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## Public Truths and Their Legal Protection

### 1. Introduction

In this paper I address the question whether democracies should actively protect the truth and how far this protection should go. I would like to start with a remark that the lack of such protection has contributed to the crisis we have been observing in the West for years now.

It is widely accepted in the literature on the subject that western liberal democracies are witness to a major societal change with strong repercussions for politics. The current moment in history is characterized by a lack of trust in democratic institutions, political parties and the media<sup>2</sup>. As a result we observe an unprecedented rise of populism all over the world<sup>3</sup>. It is estimated that in the last decades populist parties tripled their support in Europe and got their leaders into governments in 11 countries<sup>4</sup>. The strong presence of populist parties in Europe, often with clear nationalistic and xenophobic agenda, leads to political tensions within the whole camp of western democracies. Various factors have been brought forward as an explanation of the observed worrisome phenomena, including economic inequalities and globalization, partisan polarisation and the crisis of identity<sup>5</sup>. However, researchers and commentators agree that developments in internet communication and the rise of new media are one of the key contributing factors.

Technological advancement and the creation of social-media platforms enable dissemination of disinformation, propaganda and falsehood on an unprecedented scale. The so-called *fake news* becomes an important part of the information marketplace, competing with unbiased information and slowly reaching the level of dissemination that actually influences the political process. The cases of Brexit or the elections in Poland in 2015 demonstrate how disinformation about the real costs of the EU membership or media hysteria about the threat of illegal immigration can have a bearing on the results of voting. *Fake news* spread by social media platforms is not the only problem, though.

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<sup>2</sup> See e.g.: *2019 Edelman Trust Barometer: Executive Summary*, Chicago 2019. See also: *Who Can You Trust?: How Technology Brought Us Together and Why It Might Drive Us Apart*, London 2017, p. 41.

<sup>3</sup> For a definition of populism see: C. Mudde *The Populist Zeitgeist*, "Government and Opposition" 2004/39, pp. 541–563.

<sup>4</sup> P. Lewis, S. Clarke, C. Barr, N. Kommenda, J. Holder, *Revealed: one in four Europeans vote populist*, "The Guardian", 20 November 2018, <https://www.theguardian.com/world/ng-interactive/2018/nov/20/revealed-one-in-four-europeans-vote-populist>, accessed on: 19 August 2020.

<sup>5</sup> T. Cooper, J. Thomas, *Nature or Nurture: A Crisis of Trust and Reason in the Digital Age*, London 2019, pp. 11–39.

According to Yascha Mounk, three major factors guaranteed the stability of liberal democracies in the past, one of them being mass communications control by political and financial elites<sup>6</sup>. Other authors also underscore the role of quality of mass communication and media for the preservation and advancement of the model of liberal democracy<sup>7</sup>. That quality according to Mounk was assured by the political and financial mainstream, because liberal elites usually safeguard a respectful evidence-based discourse, which forms a part of their identity based on high education. But this identity and, even more, the standards that the liberal elites imposed on media and mass communication were also seen as a cultural or political extortion by those members of society who considered themselves marginalized and by those participants of the political discourse, who found themselves voiceless, being too far right or too far left for mainstream communication. Therefore, the harmful and untamed spread of *fake news* and disinformation was caused by the erosion of the system of mainstream media as well as by developments of new media platforms<sup>8</sup>. This has tremendous, though often underrated, political consequences, since mainstream media play an important role as a moderator of democratic debate and a tool of democratic control over the government. Furthermore, the removal of communication barriers allows various like-minded individuals, whose identity lies outside of the mainstream, to connect, share ideas and gain support. This leads to the ascent of populist movements across the globe.

Taking all of the foregoing into consideration, it is justifiable to assume that technical (social media) as well as substantive (lack of control over the public discourse) changes in mass communication and the media market are amongst the most important causes of the current crisis of democracy. The truth and factual correctness were the central ideas for the mainstream liberal media. Of course the media often lie to and manipulate public opinion, but the idea of truth has never been dispelled or even challenged by their representatives. Truth was also favoured by a narrow bandwidth of traditional communication channels. The press, TV channels and other forms of disseminating information have a finite capacity, so false information cannot dominate over public opinion as long as the majority of media creators adhere to the principle of factual correctness as opposed to disinformation. Everything changes with the internet and digitization, since tokens of information, regardless of its factual relevance, can be produced in infinite numbers. Thus, false or fake news can easily compete with and outnumber the truth.

Hence, the rise of populism in Europe is not only caused by the inability on the part of states to fulfil important societal needs (i.e. the crisis of a sense of community), solve important problems (i.e. economic inequalities) or address existential fears (i.e. uncontrolled immigration), but also by the fact that western states have remained unprotected and unprepared for the mass inflow of fakes and false information which fuelled populist movements. What's more, political authorities tend to overlook the fact that voters are susceptible to manipulation and propaganda. They don't usually actively seek true information and are highly prone to fakes, as long as these fakes uphold their

<sup>6</sup> Another two were: economic growth and low ethnic diversification in politics, see: Y. Mounk, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It*, Cambridge 2018.

<sup>7</sup> E.g.: T. Cooper, J. Thomas, *Nature*..., p. 25.

<sup>8</sup> See: *Tackling the Information Crisis: A Policy Framework for Media System Resilience*, London School of Economics and Political Science, London 2018.

preexisting views<sup>9</sup>. This and the crumbling of the mainstream media system under the pressure of modern digital technology leads to the conclusion that political authorities must reinvent the regime of truth protection, if only they want to keep liberal democracy alive<sup>10</sup>.

At this point in time we cannot stop new media from being created or new modes of communication from emerging. The revolution had happened and we cannot undo it. So, in order to combat the crisis of democracy, we can only turn to substantive requirements to apply to communication, which are of crucial importance for the existence of liberal democracy. We need mechanisms that will favour and promote accurate information in clash with incorrect one and impose restrictions on what can be expressed and disseminated. For decades such mechanisms have operated via the market of traditional media. But now this market has been disrupted by the invention of social platforms. Thus, it is the political authorities that should step up by employing various kinds of regulations. No wonder then that in response to the fake news invasion in the public discourse, the idea of legal interventions to protect the truth is presented by some authors as a reasonable expectation<sup>11</sup>.

It is expected that governments, law-makers and public institutions will be able to play a more active role in combating fake news and disinformation, especially if they have been deliberately deployed to disrupt democracy. What are the measures that can be employed to protect democratic, and thus rational, discourse? To answer this question, it is critical to look at those cases when the law already stands to protect the truth.

## 2. Legal protection of personal truths

Let us start with the observation that an idea of a logical status of certain sentences being protected by the law is neither odd nor extraordinary<sup>12</sup>. Civil law as well as criminal law are endowed with various procedures designed to guarantee such protection. For example, under the Polish law, a person whose good name or dignity is endangered by a spread of false and defamatory information may sue an entity legally responsible for spreading that information, or even launch a criminal case against a defamer. Truth is also regulated in the press law, mainly in the form of a person's or company's right to demand that a disclaimer of false or inexact (incorrect) information be published<sup>13</sup>. However, not everybody has the right to initiate those procedures. According to the Polish Criminal Code<sup>14</sup> or the Polish Civil Code<sup>15</sup>, it must be the person directly targeted

<sup>9</sup> In fact, as certain researches have demonstrated, it is in fact much worse, because voters may recognize a political candidate as insincere and inconsiderate, but support him anyway. Also, voters appreciate a candidate precisely because they recognize him as a "lying demagogue". See: O. Hahl, M. Kim, E. Zuckerman Sivan, *The Authentic Appeal of the Lying Demagogue: Proclaiming the Deeper Truth about Political Illegitimacy*, "American Sociological Review" 2018/1, pp. 1–33.

<sup>10</sup> The question of the truth playing a role of a necessary condition for liberal democracy is an important one, but is much too broad to discuss in this short essay.

<sup>11</sup> See: T. Cooper, J. Thomas, *Nature...*, p. 197: "if a government's primary role is the security and protection of its citizens, (...) it is incumbent on governments to step up to that role with regard to the digital environment".

<sup>12</sup> By the logical status of a sentence I mean the property of being true or false which is ascribed to a sentence by a certain language community.

<sup>13</sup> I assume here that incorrect information is not necessarily false, and this is also a core idea behind the Polish regulations contained in Article 31a of the Press Law (Polish title: Ustawa z 26.01.1984 r. – Prawo prasowe, tekst jedn.: Dz. U. z 2018 r. poz. 1914).

<sup>14</sup> Polish title: Ustawa z 6.06.1997 r. – Kodeks karny (tekst jedn.: Dz. U. z 2020 r. poz. 1444).

<sup>15</sup> Polish title: Ustawa z 23.04.1964 r. – Kodeks cywilny (tekst jedn.: Dz. U. z 2020 r. poz. 1740).

by false information. This means that *your* dignity or *your* good name must be damaged. In the case of the press law, you must be an entity (natural person, legal person or other organization) “interested” in disclaiming incorrect information, otherwise you are not entitled to make such a request<sup>16</sup>. Hence, truth protection in these particular cases relies on having a direct legal interest. However, this requirement is not strict. For example, according to the Polish press law, the right to disclaimer is extended also to a legal successor of a deceased person or organization. In the case of a natural person, this particular regulation seems to be aimed at the protection of a special value that western societies usually associate with an individual’s memory of a person. It is because of that value we let certain people, i.e. relatives of a deceased person, actively control the way others speak of the person<sup>17</sup>.

As we can see, the protection of a logical status of certain sentences is already embodied in the law. It is limited only to the cases of false or inexact information regarding individuals (natural persons, legal persons, organizations) and only individuals with a sufficiently close relation to the content of incorrect information are entitled to avail of this protection. Because of the personal nature of protected information I have coined the term “personal/private truth” to describe it. And because its protection is limited to individuals only, the term “personal/individual protection” will be used as the designation of the protection regime described above. Using this terminology, we can conclude that there exists at least individual protection of personal truths in the law, and it is achieved by actions of particular individuals such as litigation, charge, request.

But what about those bits of information (propositions, sentences) which transcend a merely personal truth? What about information which relates to a deceased person who has no living legal successor, or groups of persons, or facts? Is it even possible to single out any cases when the law is used to protect the truth of sentences which are not reducible to sentences about someone’s personal affairs? Let’s now turn to *memory laws*.

### 3. Memory laws

The so-called *memory laws* are regulations designed to protect history, including facts about historical figures or certain groups (e.g. victims of war crimes, nations). Many countries decided to implement specific regulations into their legal systems especially to counteract misinformation about *Shoah* or other atrocities committed by totalitarian regimes throughout the 20th century<sup>18</sup>. Some authors claim that these regulations can be fully explained in terms of protection of dignity of victims or private memories of their living relatives. According to this approach, memory laws are in fact special cases of protection of those personal truths that concern historical events. In many cases this protection is exercised solely by individual actions. In the Polish case law there is a growing number of verdicts where courts have expanded the legitimacy of individuals in cases of false sentences regarding even the history of the nation, let alone a particular individual. The judge’s motivation was the role that history plays for personal dignity or

<sup>16</sup> It is a question for judicature and the legal doctrine to determine what the term “interested” means in this particular context.

<sup>17</sup> In the case of organizations and companies, the reason is straightforward – a successor’s interests might be impaired by bad fame, so it seems *right* to let the successor protect its own business. A mere economic interest is usually everything we need to explain why the law affords certain organizations the right to protect truth in regard to their predecessors.

<sup>18</sup> See: N. Kaposou, *Memory Laws, Memory Wars. The Politics of the Past in Europe and Russia*, Cambridge 2017.

identity of the litigator, or even just affiliation of the litigator with the group defamed by historically incorrect information<sup>19</sup>. This view was later supported by some authors and seems to be an established position at least on the grounds of the Polish law<sup>20</sup>.

In general, however, memory laws are the instances of public law and their aim is to establish public protection of certain truths, not limited to individual's interventions. Some authors justify their public character by the instrumental value of public protection – defending the truth about past atrocities helps stopping the spread of hate crimes in the future<sup>21</sup>. This view seems to be in conformity with international law, especially with the interpretations of the Article 19 in conjunction with Article 20 of The International Covenant on Civil and Political Rights (ICCPR)<sup>22</sup>:

Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression (...) The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events<sup>23</sup>.

According to this, the objective of memory laws lies in the protection of rights or reputations of others, or the protection of national security, public order, public health or morals and hence it is not just the protection of truth by itself<sup>24</sup>. In that case, the historical (i.e. regarding past events) defamation is subject to legitimate regulation as long as it, for example, damages the reputation of some groups, or individuals or nations, or creates sufficient conditions for hate crimes.

However, a number of authors take a different stance, focusing rather on the notions of collective memory or history as independent reasons for intervention by the state. In their opinion, memory is not only a private construct of a personal value. Collective memory and even history are constructed by various public means, simply because they are valuable for societies as they create the collective identity of a group such as a nation<sup>25</sup>. Thus, it is in the interest of the nation or the state to protect these constructs by public means, including legal interventions<sup>26</sup>. Thus, legal interventions are not only allowed, but even required when the memory and the history are distorted by dissemination of falsehood. And these interventions are not limited only to the cases of personal truths or individual's interventions, when, for example, ex-prisoners of death camps or

<sup>19</sup> See: judgment of Białystok Appeal Court (Polish: Sąd Apelacyjny) of 30 September 2015 (I ACa 403/15), LEX No. 1820409; judgment of the Olsztyn District Court (Polish: Sąd Okręgowy) of 24 February 2015 (I C 726/13), LEX No. 1836004.

<sup>20</sup> See eg.: M. Jabczuga-Kurek, *Legitymacja czynna członka zbiorowości w nietypowych sprawach o ochronę czci i dobrego imienia* [Eng. *Entitlement of a community member in unusual cases for the protection of dignity and good name*], in: B. Jelonek-Jarco, R. Kos, J. Zawadzka (eds.), *Usus magister est Optimus. Rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi* [Eng. *Usus magister est Optimus. Legal treatises offered to Professor Andrzej Kubas*], Warszawa 2016, pp. 75–77.

<sup>21</sup> See: W. Brzozowski, *Bezstronność światopoglądowa władz publicznych w Konstytucji RP* [Eng. *Ideological impartiality of the public authorities in the Polish Constitution*], Warszawa 2011, pp. 156–167.

<sup>22</sup> See: The International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>23</sup> See: *General comment No. 34. Article 19: Freedoms of opinion and expression* (CCPR/C/GC/34), United Nations Human Rights Committee, 12 September 2011, para. 49.

<sup>24</sup> See: Article 19(3) of the ICCPR.

<sup>25</sup> See: A. Radwan, *Między negacjonizmem a dyfamacją. Ustawodawca jako moderator dyskusji o przeszłości* [Eng. *Between negationism and defamation. The legislator as a moderator of discussions about the past*], in: A. Radwan, M. Berent (eds.), *Prawda historyczna a odpowiedzialność prawna za jej negowanie lub zniekształcanie* [Eng. *Historical truth and legal responsibility for its negation or distortion*], Warszawa 2020, pp. 100–104.

<sup>26</sup> For a comprehensive analysis of literature on this matter see e.g.: A. Radwan, *Między negacjonizmem...*, pp. 81–132.

their organizations, or military combatants fighting with murderous regimes, go to court to sue those who disseminate false information about their past or about the history.

Memory and history are just an assemblage of sentences. Memory laws, thus, are an example of regulations aimed at protecting truths which are not merely private. Those truths could pertain to individuals or groups of individuals, but, more notably, also to facts. And their protection could be initiated by public institutions, not only by private persons.

As we see, the legal protection of truth is not limited to individual protection of personal truths only. In the case of memory laws, we could observe a tendency to establish a certain version of history by legislation and then to equip the state with legal means to defend it against being distorted. Notably, the protection of history is usually not justified by the necessity of protecting the rights or reputation of individuals, or public morals, or public order etc. Collective memory and history are legal values *per se*. And they contain not only sentences about particular persons or groups (i.e. victims of war), but also some general factual statements. Clearly the memory laws are examples of public protection of impersonal truths.

#### 4. Public protection of consumers

Another case of public protection of factual knowledge is the system of consumer protection. This system establishes public offices and procedures responsible for, among other things, protection of information about products and services. That information is not personal, as it does not relate to any specific person. It is rather factual: it describes how a product or service works and how costly it is, etc. Consumer protection is all about providing consumers with factual knowledge necessary for rational consumer choices.

Some procedures of this system are initiated by individuals, other by authorities. For example, the Polish Act on Counteracting Unfair Market Practices introduces the concept of unfair, misleading market practice defined (partially) as dissemination of false information<sup>27</sup>. The protection regime consists of the right of misled consumers to litigate the infringer. But litigation is not limited to individuals, since certain offices, for example the ombudsman, have the right to litigate as well. Likewise, the Polish Act on Competition and Consumer Protection introduces the notion of practices infringing collective consumer interests and refers to *a violation of the obligation to provide consumers with reliable, true and full information* as an example of such a practice<sup>28</sup>. Here the task of protection is entrusted to a special public office.

In both the cases, the subject of protection is information and correct information is protected publicly, by procedures defined by public law and initiated (also) by public authorities.

#### 5. General factual knowledge and fake news

As we can observe, there are various measures designed to protect the correctness of information in the law. Some of them only protect information of personal pertinence that can influence a person's reputation or social status. But even the protection of

<sup>27</sup> Act of 23 August 2007 on Counteracting Unfair Market Practices (Polish title: Ustawa z 23.08.2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym, tekst jedn.: Dz. U. z 2017 r. poz. 2070).

<sup>28</sup> Act of 16 February 2007 on Competition and Consumer Protection (Polish title: Ustawa z 16.02.2007 r. o ochronie konkurencji i konsumentów, tekst jedn.: Dz. U. z 2020 r. poz. 1076).

personal information could be instituted by public authorities, since the way a person is remembered may have a public significance. And by introducing the notion of collective memory (history), we can even argue that factual (impersonal) knowledge about the past must fall under public protection, too. Consumer protection is yet another example of factual knowledge protected by public law.

For the purpose of seeking remedy for the crisis referred to in the first section of this paper, it is crucial to answer the question if factual knowledge *in general* could be legally protected. The reason behind is that fake news and disinformation which are spreading through social media are often targeted at factual knowledge. For example, various conspiracy theories about big pharma, vaccines, immigration, terrorism, hidden costs of an EU membership all include false sentences about facts.

In this case, we are looking for a system of protection that is capable of coping with factual knowledge and is not limited solely to sentences of personal significance. Such a system must therefore go beyond individual interests and provide for protection initiated by public authorities, similarly to the cases of consumer protection or history laws. Moreover, such a system (or at least its description) should be comprehensive enough to incorporate consumer protection and memory laws and present them as instances of the general scheme.

At this point let me outline the notion that could be of use in laying down some details of how this general protection of factual knowledge could be structured.

## 6. *Public interest* as a general clause

The notion of public interest has been the subject of academic debates for years, mainly in the context of democracy and public administration theories. In the theory of democracy, it represents the idea of an active government which does not limit itself to satisfying the interests of particular groups, but transcending them in a way<sup>29</sup>. Since ancient Greece, it has been highly debatable how the phrase: “in a way” should be understood<sup>30</sup>. It remains quite clear, though, that in a number of legal acts the term “public interest” plays the role of a general clause, i.e. a general directive for the application and interpretation of law by public authorities<sup>31</sup>. It is worthy of note that the term seems to have a meaning similar to “social interest” or “socially justified interest”<sup>32</sup>.

In the field of political studies a slightly different definition was proposed by Walter Lippmann, who concluded that “the public interest may be presumed to be what [people] would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently”<sup>33</sup>. This seemingly adds a requirement of rationality to the idea of public interest, bringing this notion closer to Rawls’ idea of public reason.

<sup>29</sup> Readers interested in the origins of and essential introduction to various conceptions of public interest may refer to H. Elcock, *The Public Interest and Public Administration*, “Politics” 2006/2, pp. 101–109.

<sup>30</sup> See: W.J. Stankiewicz, *Aspects of Political Theory*, London 1976, pp. 27–40.

<sup>31</sup> Reportedly, the term “general clause” was used for the first time in: J.W. Hademann, *Die Fluch in die Generalklauseln. Eine Gefahr für Recht und Staat* [Eng. *The Curse of the General Clauses. A Danger to the Law and the State*], Tübingen 1933.

<sup>32</sup> It appears that the notion of public interest coincides with the notion of social interest and partly deflects from the notion of socially justified interest. For more comprehensive analysis see: A. Zurawik, *Interes publiczny, interes społeczny i interes społecznie uzasadniony* [Eng. *Public interest, social interest and socially justified interest*], “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2013/2, pp. 57–69.

<sup>33</sup> W. Lippmann, *Essays in the Public Philosophy*, New York 1956, p. 40.

Another definition, however, was proposed in journalism, where George Brock identified the interests of collective identity, an advancement of benefit or a prevention of harm and free flow of information as the three requirements of public interest<sup>34</sup>. This area of studies on public interest is particularly interesting, since the concept of public interest is assumed as being fundamental for journalism. The media often describe themselves as missionaries of public good and employ their understanding of public interest as a signpost for their conduct. It is precisely because of that the concept and its applications have been a subject to a number of empirical studies in the area of journalism with rather interesting results.

David Morrison and Michael Svennevig interviewed media professionals and regulators on their understanding of the notion of public interest and concluded that although major proportions of the public are familiar with the concept of public interest, “no rigorous definition is provided”<sup>35</sup>. In turn, other authors even claim that public interest in journalism cannot be defined at all<sup>36</sup>. These findings are of course somewhat problematic, since they render the idea of having an operational criteria or objective standards for public interest simply fruitless. If media practitioners, who often rely on public interest as a justification for their controversial choices, could not even decipher what the term “public interest” means for them, how anybody could?

This observed inability of determining the operational criteria for deployment of the concept of public interest, even in a very practical context such as journalism, is responsible for the wide range of attitudes toward the concept displayed by academics. Some authors simply underscore its resemblance to other flexible and undetermined concepts like “common good” or “general will”, which are understood as an aggregation of individual interests<sup>37</sup>. Others rank the concept as “ill-suited to empirical research conducted according to accepted scientific standards”, specifically because of its diffusion and fluidity<sup>38</sup>. There are also certain authors who believe that the public interest in democracy is in fact tantamount to the will of the political majority. For them, public interest is just another way to cover up the pursuit of one’s own political agenda<sup>39</sup>. Finally, other authors propose an approach to understanding of this concept not as operational criteria for particular decision-making, but rather as an opportunity for deliberation on decisions and conduct, which is an important part of exercising public administration<sup>40</sup>. Thus, the concept of public interest is no longer seen as *an ideal* viable for public conduct, but a *heuristic device* useful for the analysis of this conduct.

This distinction is of a great importance. Although I will argue that in the context of public truth, public interest cannot play a role of a certain ideal of conduct, one can still use the notion as a tool to analyse and justify the regimes of public truth protection. I will expand on this idea shortly.

To recapitulate, there is no shortage of authors criticizing the use of the concept of public interest on the grounds of its vagueness and lack of empirical content which

<sup>34</sup> See: G. Brock, *Out of Print. Newspapers, Journalism and the Business of News in the Digital Age*, London 2013, pp. 192.

<sup>35</sup> See: D. Morrison, M. Svennevig, *The Public Interest, the Media and Privacy*, London 2002; D. Morrison, M. Svennevig, *The Defence of Public Interest and the Intrusion of Privacy: Journalists and the Public*, “Journalism” 2007/1, pp. 44–65.

<sup>36</sup> J. Petley (ed.), *Media and Public Shaming. Drawing the Boundaries of Disclosure*, London 2013.

<sup>37</sup> See: F. Bealey (ed.), *Blackwell Dictionary of Political Science*, Oxford 1999, p. 274.

<sup>38</sup> See: D.F. Morgan, *The Public Interest*, in: T.L. Cooper (ed.), *Handbook of Administrative Ethics*, 2<sup>nd</sup> ed., New York 2001, pp. 166–167.

<sup>39</sup> See: H.G. Frederickson, *Can Public Officials Correctly Be Said to Have Obligations to Future Generations?*, “Public Administration Review” 1994/5, pp. 457–464.

<sup>40</sup> T.L. Cooper, *The Responsible Administrator*, 4<sup>th</sup> ed., San Francisco 1998, p. 77.



sometimes leads to its use as an excuse for implementing policies of the majority regardless of their actual value for the whole society. But even if no one knows what public interest actually means and even if this term may sometimes be exploited by authorities to justify arbitrary decisions, we can still defend this concept as a general clause. Suffice to say that fuzziness and a lack of precise determination of a concept are exactly what should be expected if it is used as a general clause in the law. General clauses are general, unspecific, undetermined and vague – and exactly these features make them useful.

## 8. Need for a general protection of public truths

Previously I made an assumption that we need to enrich the theory of liberal democratic state with the idea of the system of protection designed to defend factual knowledge in response to fake news and disinformation campaigns. I believe that the notion of public interest helps us to describe and justify this proposal. As we remember, I distinguished between two different types of truths. Some of them are important only for certain individuals because incorrect information could damage their reputation, rights or even the memory of their relatives which they cherish. I refer to those truths as “private” or “personal”. Certainly, however, there is also information which is significant for society as such, not necessarily for any person in particular. Contrary to “personal” information, I referred to this kind of information as “public”. Although personal truths are usually protected by individual measures, i.e. litigation, charges and applications, public truths, on the other hand, on many occasions need to be protected by actions taken by authorities. It is mainly due to the fact that often there is no personal interest that could be ascribed by the law to a particular person in order to protect the information, for example in the court.

In the case of history or consumer protection, one could rationalize that the existing measures are necessary to protect the collective memory of the nation or to protect the society against hate speech, or to protect consumers against frauds. Admittedly, there are reasons that help us see the instrumental value of protection of public truths in those cases. Nonetheless, at the same time both those specific reasons fall in the broader category of public interest. It is fully acceptable to say that the protection of consumers or history (or the collective memory) *lies in the public interest*. What this term means is yet another question, but the term seems to be a convenient category one can apply to efficiently describe both these cases. The usefulness of this category becomes even more apparent once we turn to other cases of socially valuable factual knowledge. It is because in such cases it is often difficult to characterize the underlying reason for intervention that could play a role of instrumental justification for public protection. Let's consider, for example, the case of vaccinations.

Despite the fact that vaccines contributed to eradicating or limiting a number of serious illnesses across the globe, a strong anti-vaccine movement has recently emerged in a way that somewhat resembles the other populist trends. According to the World Health Organization, vaccination is one of the most cost-effective ways to prevent diseases and it helps to avoid 2 to 3 million deaths a year<sup>41</sup>. At the same time, thanks to the changes in the media market and the proliferation of social media platforms, vaccination is highly and vigorously contested. As a result, the number of the vaccinated is

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<sup>41</sup> See: *10 facts on immunization*, World Health Organization, <https://www.who.int/mongolia/health-topics/vaccines/10-facts-on-immunization>, accessed on: 19 August 2020.

falling and illnesses which used to be considered eradicated are reappearing. Thus, the spread of the anti-vax hoax poses danger to the society and public health, lowering its herd immunity to various diseases. No wonder that the anti-vax movement (or “vaccine hesitancy” as it is sometimes called in official WHO’s documents) is considered one of the major threats to global health by WHO and threatens to reverse the progress made in tackling vaccine-preventable diseases<sup>42</sup>.

Hence, factual knowledge with no straightforward personal connotations is being widely questioned with the devastating result that threatens society and even the whole world. As highlighted above, we cannot stop the spread of the anti-vax hoax, or other similar instances of fake news and disinformation, by limiting or changing the infrastructure of the internet, mainly due to its dispersed nature. We cannot vaccinate people against conspiracy theories or fake news, because their susceptibility to misinformation is part of the human condition. As an economist would probably put it, there are structural factors that seriously limit our choices here. The only thing we can in fact do is to confront fake news and misinformation directly.

Some might propose that we should do this by education, information campaigns and so on. Yet the efficacy of these particular measures is limited because sensational information always gains greater attention, especially when competing with “boring” scientific facts. On the other hand, if such campaigns could have reversed the effects of misinformation and fake news, we would limit our interventions to them even in cases of consumer protection or memory laws. But instead of doing just that, we have implemented certain legal measures, also in criminal law, simply because other options, such as education, failed. It is reasonable to expect that in the case of the anti-vax hoax we need to do exactly the same in order to tackle the misinformation pandemic. Thus, it is reasonable to argue that it is in the public interest to protect the scientific knowledge on vaccines and the notion of public interest can play a role in justifying this protection.

As mentioned earlier, there is a growing consent among researchers as well as political leaders that states and authorities must intervene to limit the damage of spreading misinformation to societies. The notion of public interests is, hence, a convenient justification for any such intervention. If the public protection is justifiable in the cases of memory and consumers, it should be justifiable in the case of factual knowledge, scientific truths or other general statements valuable for society. In all those cases we may assume that certain actions (legal interventions) are taken by public authorities because there is no particular person entitled to protect the truth on his or her own. As soon as we recall the classic definitions of the term “public interest” as something that transcends the personal (individual) interest, we realize that the notion of public interest seems to be in the right place here. The public interest transcends personal (individual) interests just like public truths transcend personal truths.

## 9. Public protection of public truths and freedom of opinion

So far I have argued that in cases of certain impersonal, general statements, for example scientific knowledge, we might expect state authorities to proactively combat misinformation. The notion of public interest should play a role in the justification of legal

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<sup>42</sup> See: *Ten threats to global health in 2019*, World Health Organization, <https://www.who.int/news-room/feature-stories/ten-threats-to-global-health-in-2019>, accessed on: 19 August 2020.

measures implemented to achieve this goal. Let us now turn to the question what exactly such a regime of protection should look like? Although describing all possible realizations exceeds the scope of this paper, some degree of detail can definitely be provided.

The main problem which we stumble upon at the very beginning of our considerations is that any attempt to protect the logical status of certain sentences seems to be in conflict with freedom of opinion. Freedom of opinion and related freedom of expression are legal values protected at the level of domestic as well as international law<sup>43</sup>. Certainly, one can even defend the view that freedom of opinion is in fact a manifestation of public interest. Thus, any system of protection of information must take into consideration the fact that citizens are legally entitled to speak freely, and thus to say things that are not true. Then again, definitely there are cases in which certain restrictions could be imposed, especially when they are necessary in view of respect for the rights or reputations of others and for the protection of national security or public order, or public health or morals<sup>44</sup>. In Poland's domestic law, general principle introduced by the Article 31(3) of the Constitution states that any restrictions on the constitutional freedoms and rights must be necessary for the state security or public order, or for the protection of the environment, public health and morality, or freedom and rights of others. Although in the case of the so-called "vaccine hesitancy" we can hold that public health is in danger, yet it is difficult to justify in general that the state is entitled to restrict the citizens' ability to challenge public truths by employing administrative measures or other manifestations of its authority.

Seemingly, the idea that the state guided by public interest can generally protect the truth is in conflict with the law in two different ways. Firstly, freedom of opinion is, as we see, protected by the law. Secondly, public interest cannot play a role in the justification of its limitation. In the Polish Constitution as well as in the ICCPR, the term "public interest" is not amongst the reasons for the limitation of freedom of opinion (or belief). On the contrary, other terms have been listed there as general clauses to be taken into consideration. Hence, is there a way to answer these concerns? Let us take the second one first.

It is indeed the case that public interest is not the justification for restricting freedom of opinion, either under national or international law. Therefore, state authorities cannot simply rely on public interest in their actions aimed at protecting the accuracy of any claims as long as those claims are within the scope of freedom of opinion (or belief). However, terms such as "national security", "public order", "public health" etc. can be interpreted as fitting into a broader conceptual category of public interest. In other words, the state actions to protect public health or public order etc. are, after all, actions in the public interest. Therefore, we can look at these terms as constituting a certain refinement, within the sphere of international and domestic law, of the general term "public interest" which in itself is perhaps too vague to be used directly. But, even if the latter term cannot play a role of a certain ideal for any specific behaviour, as it lacks an operationalized criterion for its usage, it can still play a role of a useful analytic tool for conceptual analysis of the actual, but also called-for regulations.

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<sup>43</sup> Here I use the terms taken from the article 19(1) and 19(2) of the ICCPR. In Polish law, the freedom of conscience, and therefore beliefs, and freedom of expression fall under, respectively, the Article 53(1) and the Article 54(1) of the Constitution of the Republic of Poland of 2 April 1997 (Polish title: *Konstytucja Rzeczypospolitej Polskiej* z 2.04.1997 r., Dz. U. Nr 78, poz. 483 ze zm.).

<sup>44</sup> See: Article 19(3) of the ICCPR.

In fact, let us consider the aforementioned cases of public truth protection, i.e. consumer protection and the memory laws. While in the first case we can say that the restriction of the freedom of opinion regarding products and services is motivated by the need to protect the rights of consumers (and thus in accordance with, for example, the Article 31(3) of the Polish Constitution), in the case of memory laws the matter gets more complicated. As we may recall, different justifications are possible here. Some will refer to national identity or pride, other to the concept of public order and hate speech. However, if we need to address these cases without deep-diving into detailed considerations just to grasp their common elements and properties, the notion of public interest could turn out to be handy. The same applies should we like to formulate some proposals of future regulations.

## 10. Sketch of the system

At this point I would like to attempt an explanation what public protection of public truth could look like, taking into account the fact that public truths lie within citizens' freedom of opinion. At the outset, it is worth noting that the possibility of building a control regime based on a public body equipped with administrative powers to regulate a public debate seems to be downright out of question. The Orwellian Ministry of Truth (and anything that resembles it) simply does not fall within the legal standards currently in force. The existence of such a body would also raise concerns similar to those surrounding the concept of public interest. If, as claimed in the literature, the content of public interest mainly reflects the will and interests of the political majority, the idea that there would be an administrative body restricting the freedom of public debate in the public interest will always be somewhat troubling and suspicious.

Concerns about such a body will not be alleviated should we put forward a postulate that, instead of public interest, we will rather use the concepts of public security, public morality, public health etc. to define its operations. Yet, it can always be argued that all those concepts are, after all, also mere projections of a certain political majority. Public order is often equated simply with the current political system of the state, and the threat to public health implies a public health standard accepted by the current political majority. Hence, it is easy to imagine that state authorities are combating information provided, for example, by whistleblowers about the surveillance of citizens by secret services, or declarations of the rights and freedoms of persons whose sexual orientation or lifestyle is considered a deviation.

Thus, the Ministry of Truth model is not the available option for the public truths protection. Nonetheless, its drawbacks guide us to imagine what this protection could actually look like. Namely, in cases where legal values or standards are clashing, courts and tribunals are usually the right place to reconcile them. Therefore, also in the case of a collision between the freedom of opinion and the protection of truths, admittedly the courts should be the place where this conflict is resolved. In fact, this is exactly happening in cases of personal truths when particular individuals are going to court against other individuals or entities in order to suppress their freedom of opinions. In the case of public truths, as we remember, the problem lies in the absence of any specific entity designated by the law that could play the role of the litigator. Hence, I think that the most natural solution will be simply to expect that the existing public institutions will start to play a more active role within the limits of their statutory fields

of competence. This role could include, for example, educational activities, monitoring the press, submitting replicas or eventually going to court in cases where public interest has been violated as a result of disinformation.

It seems to be crucial importance to grant these institutions the right to appear in courts. And this could be achieved in the legal doctrine or judicature by underscoring the necessity of protection of public interest, explained in terms of public order, health, morality, reputation of persons or groups of people who require protection, and other sufficient legal reasons for restricting freedom of opinion. Also, public institutions are, after all, established for a specific purpose of fulfilling certain public interest (e.g. public health, public security, collective memory etc.). It is not at odds, therefore, to expect that they should respond to misinformation that could impair those goals. In order to acknowledge this, we need of course to employ the concept of public interest and recognize that the legal doctrine can legitimize public institutions as the court actors in cases when the public truth is in danger. As we can see, it seems, though, that the term “public interest” is necessary to establish this line of argument.

The acceptance by the legal doctrine of the view that certain public institutions are entitled to legal action in defence of the truth of sentences regarding their statutory goals is certainly not an unbelievable idea. As mentioned before, Polish courts have recently admitted that individuals have the right to protect a certain version of history and legally combat statements attributing responsibility for Nazi crimes to the Polish nation. Since public truths can be protected by appropriately extending the concept of personal interest, why not, then, employ the notion of public interest to justify protection of public truths by public institutions?

On the margin, the legal protection of history seems to be a good example here, because it is fulfilled by a specialized institution deliberately set up to actively shape public debate: the Institute of National Remembrance (IPN). The methods of its operation as defined by the law include “dissemination in the country and abroad opinions regarding the most important historical events for the Polish Nation”, or “preventing the dissemination in the country and abroad of information and publications about untrue historical content, harming or defaming the Republic of Poland or the Polish Nation”<sup>45</sup>. In the context of our considerations, however, the most interesting seems to be the chapter on the *Protection of the good name of the Republic of Poland and the Polish Nation*, where Articles 53o and 53p explicitly state that this protection could be fulfilled by civil procedures appropriate for personal goods protection and that the Institute is empowered to litigate. Thus, by a decision of law-makers, the Institute of National Remembrance is capable of protecting a certain category of public truths in a civil court. As we keep in mind, a similar situation can be observed in the case of consumer protection, where certain public institutions can file a complaint or even litigate.

But even in the absence of a direct and explicit regulation of this issue by the legislator, it may be often rational to accept that certain public institutions are entitled to take legal action when information relevant to their area of competence is endangered. For example, according to the law, the State Sanitary Inspection is established to implement public health tasks and one of the methods of its operation is to conduct educational and health activities in order to develop appropriate attitudes and health

<sup>45</sup> See: Article 53a(1) of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Polish title: Ustawa z 18.12.1998 r. o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, tekst jedn.: Dz. U. z 2019 r. poz. 1882).

behaviours among citizens<sup>46</sup>. If we assume that the concept of “educational activity in order to develop appropriate attitudes” includes defence against disinformation, which seems to be quite non-controversial assumption, it could be argued that, even in the absence of explicit authorization by the legislator, the Inspection is entitled to appear in the court and litigate, let’s say, against the claims that undermine the effectiveness of vaccination.

Therefore, the regime of protection of public truths postulated here may entail that the already existing public institutions simply take legal action to limit the spread of incorrect information (or falsehood) on subjects that lie within their statutory competences while courts and other public institutions recognize those actions as legitimate. The task of the court would be to decide to what extent the interference of certain public institutions falls within the scope of the constitutional and international standards. According to this approach, the argument that such interventions by public institutions would pose a threat to freedom of opinion seems to fade, primarily because the court is the place where conflicts of legal values or legal standards are resolved. And the notion of public interest will serve as a convenient category for describing the reasons and nature of institutional involvement, as well as help to gain acceptance for it within the legal doctrine. The latter is of course necessary only as long as the lawmaker refrains from regulating the issue in a comprehensive manner, for example by granting certain public institutions an explicit competence to stand in the court.

## 11. Are public institutions able to cope with the public protection of the truth?

If we postulate the regime of public truths protection based on existing public institutions, we must face certain problems that could be encountered in the functioning of every organization. Those problems, being the subject of organizational studies, may hinder, if not prevent, the effective protection against disinformation.

First of all, employees of any public institution tend to limit themselves to matters that they can do routinely, without going beyond the scope of their established and clearly defined duties. Yet, in order to be effective, the protection of public truth requires not only constant monitoring of the public debate and statements that are formulated within it, but also a prompt response to them and this may exceed the capabilities of the existing public institutions. The issue of disclosure of crimes on the initiative of law enforcement agencies could serve as an illustration of this problem. There is plenty of at least anecdotal evidence that law enforcement agencies, despite having broad competences to act proactively, are usually reactive and rarely take action without a notice. It is difficult to expect that, for example, the State Sanitary Inspection will act any differently, especially since its employees have competencies quite other than appearing in courts in cases concerning, after all, semantics. Suffice to say that even a simple monitoring of the public debate can cause problems for officials as it means either additional duties for those already employed or a need for new job positions. Both are always a problem because of budget and time constraints.

So, it is naïve to expect that a set of largely autonomous public institutions will be able to provide the required level of protection for public truths. They simply lack both

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<sup>46</sup> See: the Act of 14 March 1985 on the State Sanitary Inspection (Polish title: Ustawa z 14.03.1985 r. o Państwowej Inspekcji Sanitarnej, tekst jedn.: Dz. U. z 2019 r. poz. 59).

human resources and professional knowledge, but also an appropriate level of coordination that must be provided.

One can argue that the answer to this issue is to rely on the initiative of the citizens who could play the role of a watchdog. Here, again, we come across psychological or sociological limitations. It is difficult to expect that citizens will organize themselves sufficiently to guarantee a comprehensive monitoring of public space and not only initiate relevant procedures in appropriate public institutions, but also follow on their outcomes. Non-governmental organizations could perhaps be better suited to play this role, as they do in the cases of counteracting corruption or monitoring the mechanisms of democracy.

Either way, as we see, we come to the conclusion that public protection of public truths requires not only the development – by the doctrine, jurisprudence or lawmakers’ actions – of a certain concept of public interest related to such truths, but also the emergence of some kind of a “coordinating body”. The task of this body would be to identify cases of misinformation and initiate action by relevant public institutions. It would therefore play the role of “truth spokesman” of some kind. Such a coordinating body should not have the power to sanction or compel, but could still be important. And, what is more, it could also be a public institution, established by statutory law.

## 12. A spokesman for the truth

What might this coordinating body look like? Let us examine another area of the law, where we are dealing with similar circumstances, namely, with a number of independent public institutions acting to protect a specific public interest. Specialized institutions have been set up in many countries to promote and monitor the observance of human rights. These institutions have different mandates, but their common goal is to receive and investigate complaints about alleged human rights violations. As a rule, these institutions are public bodies.

Having a specialized institution with a strong democratic mandate and a broad independence to protect the truth would be of great value. Such an institution could be a place where citizens might turn to signal cases of public truth violations, and hired or elected officials working for that institution could act accordingly, relying on their professional knowledge. It is a matter of a future discussion if such an institution should only play a role of a middle man merely signalling violations to other public institutions, or should have the right to go to court directly. In the latter case, it would resemble the Speaker of the Public Interest, an institution functioning in Poland during the period of 1997–2007 that investigated cases of collaboration with the former communistic regime<sup>47</sup>.

A number of scientific papers and empirical research have been devoted to the issue of human rights institutions, so I will not elaborate this topic any further. Suffice to say that the model of operation of these institutions (*the ombudsman model*), is a part of a broader pattern of a model of dispute resolution which has recently become more

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<sup>47</sup> See: the Act of 11 April 1997 on disclosure of work or service of persons performing public functions in state security organs or cooperation with them in the years 1944–1990 (Polish title: Ustawa z 11.04.1997 r. o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944–1990 osób pełniących funkcje publiczne, tekst jedn.: Dz. U. z 1999 r. Nr 42, poz. 428).

significant in both civil and administrative justice systems<sup>48</sup>. In this broader conceptual and organizational framework, one can therefore look for inspiration for specific solutions that provide an effective level of public protection for public truths. Although, strictly speaking, the ombudsman institution has historically served the purpose of supervising the proper functioning of public administration in relation to citizens, not to protect public goods like information<sup>49</sup>.

The ombudsman for the public truth seems to be also an answer to the institutional limitations I have described above. First of all, the problem with initiating interventions disappears, because such interventions would take place at the request of the ombudsman, who, depending on the specific regulations adopted, could even go directly to court. Thus, employees of public institutions would not be required to assume a proactive role and would attend to their regular duties. Secondly, it would also be easier for officials to justify that their interventions are in the public interest, since they take place at the request of the ombudsman who, by definition, represents the public interest. This argument will, of course, largely depend on the degree of democratic legitimacy of the institution of the ombudsman and its authority. But regardless of the solutions finally adopted, the introduction of such an institution seems to be an important step on the path to building efficient mechanisms for protecting the public truth.

### 13. Final remarks

I am fully aware that many topics raised in this paper require further careful consideration. However, my intention was to signal the existence of the problem in the first place and to indicate solutions possible from the point of view of jurisprudence. The truth is a universal value in all liberal democracies. It is an essential element of a rational discourse and a prerequisite for effective political intervention<sup>50</sup>. Though, in times of unprecedented spread of disinformation, defending the truth becomes one of the most pressing problems in contemporary politics.

While in the case of certain sentences, the protection of the truth can be effectively implemented through individuals' actions in court, in the case of sentences of fundamental significance for society, public interventions seem vital. General justification of such interventions could be formulated in the language of public interest.

In practice, the regime of protection of public truths can be dispersed. Instead of having a single office in charge for public truth, which could immediately evoke fears of censorship, I propose to act through the existing public institutions operating within their statutory competences. However, the proposed system requires coordination and it seems a good idea to expand it with a special ombudsman institution that would play the role of a spokesman for the truth. Such an institution could either simply initiate action by public institutions or could also be empowered to appear in courts.

I hope these rough ideas will inspire further discussion and contribute to doctrinal development of an effective protection of truth.

<sup>48</sup> See: M. Hertogh, R. Kirkham, *The Ombudsman and Administrative Justice: From Promise to Performance*, in: M. Hertogh, R. Kirkham (eds.), *Research Handbook on the Ombudsman*, Cheltenham 2018, pp. 1–15.

<sup>49</sup> See: L. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, "Harvard Human Rights Journal" 2000/13, pp. 5–6.

<sup>50</sup> I am aware that certain prominent proponents of liberal democracy have a different opinion, but I will not elaborate on this issue here. Readers can find more on the subject in: J. Cohen, *Truth and Public Reason*, "Philosophy & Public Affairs" 2009/1, pp. 2–42.



### **Public Truths and Their Legal Protection**

**Abstract:** In this paper I deal with two key concepts of a modern political theory, i.e. truth and public interest, and examine relationships between them. This subject seems particularly important in the context of the observed crisis of the liberal democracy and the spread of misinformation and fake news. I argue that there is a need to create a public system of protection designed to defend the logical status of those statements which have a value for the society. By using the notion of public interest as a tool for analysis, I demonstrate how such a system might be structured. I suggest employing existing public institutions to construct a system of public protection of the truth, yet supplemented by a coordinating body based on the ombudsman model.

**Keywords:** post-truth, disinformation, public interest, personal truths, public truths, factual knowledge, public protection of truth, ombudsman institutions, spokesman of truth

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