

## **Symbolic speech in the jurisprudence of national and international courts**

*Summary of dissertation by Dominika Bychawska-Siniarska*

There are many types of expression. One of them is nonverbal expression, manifested with symbols, gestures or performance. Marches, pickets, wearing armbands on the forearm or showing gestures of peace are just a few of the possible forms of non-verbal communication. In recent years, with the enormous increase of information, symbolic speech becomes an effective way of communication, as it usually grasp recipients' attention, particularly if symbols are used in an unconventional manner. Therefore, there was a need for research in that area. The dissertation analysis how non-verbal communication was first granted protection by the US courts and then this protection has been increasingly transposed to the jurisprudence of the European Court of Human Rights. It also looks at how Polish law and courts perceive symbolic speech, particularly, how they assess the scope of its protection.

Symbolic speech has been first introduced in the United States law, and used to describe actions that purposefully and discernibly convey a particular message or statement to those viewing it. Symbolic speech has been recognized by the US Supreme Court as being protected under the First Amendment to the US Constitution as a form of speech, but this is not expressly written as such in the document. Anti-segregation and Vietnam War protests referring to symbolic speech generated cases before US courts. The US Supreme Court developed a number of guidelines and tests on assessing if non-verbal communication deserves constitutional protection. In *United States v. O'Brien*, the Supreme Court highlighted that guidelines must remain neutral in relation to the subject of the speech at hand. Moreover, a law introducing limitations to speech must be within the Constitutional power of the government to enact law, further an important or substantial government interest, that interest must be unrelated to the suppression of speech (or "content neutral") and prohibit no more speech than is essential to further that interest.

In recent years, the European Court of Human Rights (ECtHR) has granted symbolic speech protection in cases relating to freedom of expression, right to assembly or freedom of religion. Most of the cases concerned however freedom of expression. Assessing the scope of protection of non-verbal communication the ECtHR uses the traditional three-step test assessment (legal basis, legitimate aim and proportionality). While referring to proportionality, it relies on standards developed in cases of verbal speech. It particularly analysis if the speech is comprehensible to the recipient, if it has been expressed in public interest, whom it concerns (ex. public person), whether it is satirical in nature and what are the multiple meanings of the symbol used. While analysing the proportionality of interference, Strasbourg judges also take into consideration the severity of the sanction imposed by national authorities. At the same time, the ECtHR leaves outside the scope of protection symbolic speech which is not clearly readable to the recipient and is of pure sensational nature.

Neither Polish legislation nor the case law defines or even refers directly to symbolic speech. Protection of particular state, national, religious or historical symbols is scattered in many normative acts. Some of these regulations may interfere with the freedom of expression, both conventional and symbolic. The jurisprudence of Polish courts also insufficiently notes the construction of symbolic speech and, consequently, the ways to assess its limits. In particular, the national courts do not analyse the purpose behind symbolic speech, i.e. possible public

interest. Moreover, a number of regulations interfering with non-verbal communication provide for a criminal sanction, which raises doubts in relation to ECtHR's standards on proportionality. Therefore in order to adapt to international standards of protection, many Polish regulations impacting symbolic speech should be amended. The case law of the Polish courts should take into account the protection of symbolic speech to a greater extent, as it was done by the Polish Supreme Court in relation to the criticism of the Allegro website by the Green Light Foundation or in relation to the modification of the anthem of the Republic of Poland by Jan Kapela. In both cases, following the ECtHR's jurisprudence, the Supreme Court emphasized that freedom of expression is not limited to information and opinions that are received favourably or considered neutral, but also refers to expression that may outrage, offend or disturb a part of the society. The dissertation analysis examples of Polish jurisprudence both in cases where international protection standards have been taken into consideration and when they have been disregarded, provoking a substantial interference with symbolic speech.