Piotr Potoczny

The principle of freedom of speech and the freedom of historical opinion in selected European Union countries

Doctrinal source of the freedom of speech in Europe

The doctrine of freedom of speech was created by liberal thinkers, especially in Great Britain and France, during the 17th and 18th centuries. It was born in particularly unfavourable circumstances, during the times of monarchy and absolutism, when the freedom of opinion about the Court was strictly banned and punished.[1] The British philosophers: John Milton and John Locke, called for the freedom of press, speech and opinion. However, it was not unlimited right. For example, some restrictions concerned Catholics (as a part of society ignoring the state and directly submitted to the pope). Similarly restricted were seditious and revolutionary libels, as well as those spreading atheism (Locke). Subsequently the thoughts of Milton and Locke were developed by sir William Blackstone and John

1 In England, for example, so called *seditious libel* was a crime punished as the crime of betrayal. Nevertheless, England was the first country to guarantee the freedom of press. In 1689 the Toleration Act was adopted, and in the system of license and press control was abolished; see M. Urbańczyk, *Liberalna doktryna wolności słowa a swoboda wypowiedzi historycznej*, Poznań 2009, pp. 29–31.

Stuart Mill. The latter enlarged the area of freedom, excluding any limitation, arguing for the pluralism and free debate leading people to the truth.

France was the continental cradle of freedom of speech. Besides the expanded press control system the absolute monarchy did not manage to stop the diffusion of republican material.[2] The first to claim the liberty of speech was Charles Montesquieu, in the 18th century Chrétien Guillaume de Lamoignon de Malherbes[3] was the mouthpiece of limited freedom of press, then the unlimited right was proposed by marquis de Condorcet and comte de Mirabeau.[4] After the Great Revolution the principle became official in the article no. 11 of the Declaration of the Rights of Man and of the Citizen. The problem of freedom of speech and press was remarkably sharp in France due to the terror of the Revolution. Soon, in 1797 the press was once again under control which remained till the time of Napoleon. The 19th century was the time of the alternately liberation and censorship of press and speech, according to the raise of revolutionary fervors. The most important liberal thinkers of that period were Benjamin Constant and Alexis de Tocqueville. Generally, they claimed that "unlimited freedom of speech and press allows everyone to form true and fair opinions and that the truth emerges from free debate".[5] What is more, the utter freedom of speech prevents radicalization of society. The only restriction could result from press law.

To sum up, we can point out some common components of every liberal free-speech thought as: elimination of any preliminary censorship, recognition to this freedom as a government-control mechanism and the belief that everyone's right to truth research is a positive value. In the matter of limitations, we can observe a progressive evolution widening the freedom of speech. In the context of historical opinion, it is worth to say that the liberals did not forbid proclaiming false statements–the judgment of those belongs to every individual.[6]

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2 J. Baszkiewicz, *Wolność druku i rewolucja 1789 roku*, in: A. Korobowicz, H. Olszewski (eds.), *Studia z historii państwa, prawa i idei. Prace dedykowane profesorowi Janowi Malarczykowi*, Lublin 1997; M. Urbańczyk, *op. cit.*

3 *Mémoire sur la libraire et sur la liberté de la presse* from 1759.

4 Marie Jean Antoine Nicolas de Caritat, Marquis de Condorcet, *Fragments sur la liberté de la presse*; Honoré Gabriel Riqueti, comte de Mirabeau, *Sur la liberté de la presse.*

5 M. Urbańczyk, *op. cit.*, p. 84.

6 *Ibidem,* pp. 109–115.

The historical opinion

My paper will not consider all historical statement. In the light of freedom of expression the most important are some controversial opinions, which became the object of civil or criminal legal r egulation. These statements concern the most sensitive historical facts, often connected to national martyrdom and linked with radical ideologies. F requently they are based on unpr ofessional scientific work and par tial attitude. Often they result from planned ideological action. The most common example of the historical statement of this type is the negationism or historical revisionism. They may constitute a danger to the liberal democracy that is why the reasonable legislation in the matter is so significant.

The principle of freedom of speech and the freedom of historical opinion in selected European democracies

Apart from the universal regulations of the United Nations, the basement of European freedom of speech is determinate by European Convention of Human Rights from 1950. The point 17. of the document provides that no one may use the rights guaranteed by the Convention to seek the abolition or limitation of rights guaranteed in the Convention. It has a significant meaning for any contr oversial historical statement. The jurisprudence of the European Court of Human Rights consistently denies the right to spread the negationist opinions by virtue of this r ule.[7] On the level of E uropean law the Council Framework Decision on combating cer tain forms and expr essions of racism and xenophobia by means of criminal law has been adopted.[8]

7 Garaudy vs. France (65831/01), Although the European Court of Human Rights is quite liberal judging free historical debate [Giniewski vs. France (64016/00), Monnat vs. Switzerland (73604/01), Lehideux and Isorni vs. France (24662/94)].

8 Council Framework Decision 2008/913/JHA of the 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law – *OJ L 328, 6.12.2008*.

United Kingdom

I would like to raise a case of British citizen, controversial historian David Irving. He is one of the main person being accused of Holocaust denial propaganda. "Revisionists", as they call themselves, maintain that the historical fact as Holocaust did not took place or its course was different than the mainstream historiography claims.[9] Irving gained the fame in 1963 by his book entitled *The Destruction of Dresden*, which begun a series of following publications. In his books Irving presented personal sympathy to the 3rd Reich regime and expressed some racist and anti-Semitic convictions. There was no public accusation based on British criminal law. Nevertheless, Irving lost a notorious trial with famous American historian Deborah Lipstad as a plaintiff.[10]

The former British law was not clear and strict enough to make the Irving's public accusation possible. The wording of section 18, part III of the Public Order Act from 1986, provided that any penalization of racial-based hate speech requires an aggressive attitude. This condition eliminated the possibility to prosecute a speech pronounced in an academic or pseudoscientific way.[11] Furthermore, the rule concerns stimulation of racial-based hatred, which is not necessary to academic lecture.

Austria

The David Irving case is famous also because of the intervention of another EU country's law–Austria. In the Republic of Austria the crime of Holocaust denial was introduced in 1992 through the amendment to anti-Nazi act from 1945. The crime is punished by imprisonment from 1 to 20 years. It is defined as public, directed to wide audience denial, gross playing down, approval or justification of genocide com-

9 On the definition of Holocaust denial, see also: M. Urbańczyk, *op. cit.,* pp. 118–138.

10 The judgement of High Court in London (11.04.2000), http://www.guardian.co.uk, [20.05.2010].

11 "(…) threatening, abusive or insulting material (…)", http://www.jpr.org.uk, [20.05.2010].

mitted by NSDAP or other National Socialist crime against humanity.[12] The trial provides the participation of jury.

David Irving was arrested in 2005 for his lectures containing the negationist statements expounded before in Austria. The British historian was sentenced to the three years of imprisonment. He has effectively purged the imprisonment for 10 months. What is interesting, one of the greatest enemies of Irving, Deborah Lipstadt, registered her disapproval of using a criminal repression to fight with Holocaust denial.

The Austrian law was less rigorous to the late politician Jörg Haider. The Governor of Carinthia and leader of the national-conservative party FPÖ was famous for his disputable opinions on the 3rd Reich, Austrian veterans and concentration camps.[13] He won a notable popularity in some regions of Austria. The case of Haider transgressed the domestic scale and grown to the European level. In 2000, after the election success of Haider's party, obtention of 27% of votes to *Nationalrat* FPÖ enters to conservative government of Chancellor Wolfgang Schuessel. In reaction, 14 members of the European Union suspended their relations with Republic of Austria for eight months. It is an example of international diplomatic intervention aiming at alienation of radical political movements.

France

As I mentioned before, France is the European cradle of freedom of speech. However, actual French legislation is highly disputable in the light of liberal doctrine. Generally, the French law follows a European anti-negationist tendency, but two of the French acts are exceptional. I mean the act on positive role of the colonialism and the act on recognition of massacre of Armenians as genocide.

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12 *Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP (Verbotsgesetz 1947) in der Fassung der Verbotsgesetznovelle 1992.*

13 In 1991 r. Haider said the Nazi government had produced a "proper employment policy" as compared to the SPÖ government; he also called the concentration camps the "punishment camps" (19.02.2000) – http://www.quebecoislibre.org, [20.05.2010]. In 1995, in a speech to Austrian war veterans, he acknowledged his happiness to see that honest and faithful to their convictions people are still alive (11.10.2008) – http://www.rp.pl, [20.05.2010].

French regulations tending to counteract the Holocaust denial were adopted by the Gayssot act (*loi Gayssot*) from 1990 directed against any activity of racist, anti-Semitic and xenophobic kind.[14] The law forbids any discrimination based on affiliation or non-affiliation to an ethnic group, nation and race or on worshipped religion. The point no. 9 of the act introduced an amendment to the Penal Code treating as a crime any denial of crimes against humanity–such as they were defined during the Nuremberg trial–which were carried out either by the members of an organization declared criminal or by a person found guilty such crimes by a French or international jurisdiction. The sanction is a fine or imprisonment up to 1 year.[15]

There were several trials against negationists examined by the French courts, famous case called *affaire Faurisson* among others. Robert Faurisson, the University of Lyon scholar, published an article in „Le Monde", where he contested the use of gas chambers to the massive extermination of Jews.[16] The publication raised an ardent dispute on the larger scale of the frontiers of freedom of speech. Faurisson was supported by professor Noam Chomsky. On the opposite side stood reputable French historians as Pierre Vidal-Naquet or Nadine Fresco. Finally, the prosecutor took legal action against Faurisson for his earlier public speech accused of defamation and hatred incitement.

The French laws on positive role of the colonialism[17] and on the recognition of massacre of Armenians as genocide[18] are very particular. Both started a discussion about imposition the only true version of history. Here we deal with a unique method of limitation of freedom of speech. The state not only prohibits some opinions but impose an interpretation of certain facts in a determinate way. It becomes more worrying in case

14 *Loi n°90–615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe*, http://www.legifrance.gouv.fr, [20.05.2010].

15 *Loi du 29 juillet 1881 sur la liberté de la presse*, http://www.legifrance.gouv.fr, [20.05.2010].

16 R. Faurisson, *Le problème des chambres à gaz, ou la rumeur d'Auschwitz*, Le Monde, 29.12.1978.

17 *Loi n°2005–158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés*, http://www.legifrance.gouv.fr, [20.05.2010].

18 *Loi n°2001–70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915*, http://www.legifrance.gouv.fr, [20.05.2010].

of the very delicate topics, difficult to judge as the effects of colonialism. Thus, the rule no. 4. of the act provides the necessity of acknowledge and recognize in particular the positive role of the French presence abroad, especially in North Africa. The law aroused reaction of Algerian authorities which adopted a resolution condemning the crimes of colonialism. Further international consequence was a suspension of signing the bilateral neighborliness convention. The act on positive role of colonialism was criticized mostly by academic environment, blamed of anti-democracy and will to influence the scientific historical research.

Not less disputable was the project of act on recognition of Armenian Massacre as genocide. The official Turkish stand is that there was no genocide of Armenian people during the First World War, the deaths of Armenians resulted from standard warfare.[19] Before the act the French law had already intervened into Turkish-Armenian question. For instance, there was a public accusation trial against historian Bernard Lewis, who denied the legal qualification of the massacre as genocide. The trial was ruled on the grounds of French Holocaust denial law. The fact that in France live almost 500 thousands Armenian origin people does also matter. In 1986 the United Nations Commission on Human Rights adopted a special report on this question, and one year later was followed by the European Parliament. On October the 12th 2006 the National Assembly of France adopted the project of an act submitting the denial of Armenian genocide to the punishment of imprisonment to 1 year and fine up to 45 000 Euro. The bill was voted in large absence of the MPs, and so far did not obtain the Senate's approval. Many accusations appeared, stating among others that the project aimed rather to gain the popularity in the French-Armenian environments than to care about the historical truth.

Poland

The regulation of Polish Penal Code, establishing the crime of Polish Nation libel, was equally controversial. It was introduced because of fre-

19 On the Armenian Massacre, see: M. Zakrzewska-Dubasowa, *Historia Armenii*, Wrocław–Warszawa–Kraków– Gdańsk, 1977; J. Reychman, *Historia Turcji*, Wrocław–Warszawa–Kraków–Gdańsk 1973; M. Urbańczyk, *op. cit.*, pp. 138–148.

quent use of the term "Polish death camps" mostly by foreign press. This term refers to Nazi concentration camps formed on the territory of the Republic of Poland during the Second World War. The regulation (art.132a), effective as from March the 15th 2007, stipulated that everyone who publicly libels the Polish Nation to be responsible, have organized or participated in communist or nazi crimes is subjected to three years of imprisonment. Moreover, the responsibility was extended on Polish people and foreigners independently of the place of crime, even abroad. The amendment raised a heated discussion especially in connection with the existence of another regulation which had already established the crime of public slander of Nation or the Republic of Poland. The new rule was accused to be inconsistent with the Constitution, and to threaten freedom of expression, publishing information and any scientific activity. Besides, the rule was not as exact as criminal rules should be especially in determination of meaning of terms "Polish Nation" and "communist crimes".[20]

Contrary to the expectations of its authors, the new rule did not eliminate the use of shameful term "Polish death camps". Instead, it could seriously influence the freedom of historical research, particularly that able to reveal some inconvenient facts, present in history of every nation. Thus, it seems that the initiatives of Foreign Ministry, authorities and non-governmental organizations should be more effective than a new criminal rule.

The application of the regulation took place in the notorious case of Jan Tomasz Gross' book entitled *Fear*, which was considered a non-scientific description of Polish anti-Semitism after the Second World War. The Public Prosecutor, after investigating proceedings, refused to set up an investigation. The Prosecutor did not find any expression contrary to the nation libel regulation.[21]

The crime of Polish Nation libel has been rescinded by Polish Constitutional Court on the October the 19th 2008,[22] on the demand of Polish

20 Opinia Biura Legislacyjnego Kancelarii Senatu, 31.07.2006; see M. Urbańczyk, *op. cit.*.; definition of "communistic crime" see below.

21 The Prosecutor's examination of the content of the book was also based on point 133 and 256 of Polish Penal Code.

22 The sentence of the Constitutional Tribunal from October the 19th 2008 (5/07, Dz.U. 2008, no. 173, position: 1080). The Tribunal considered the rule as unconstitutional on formal reasons, also indicating its inexactitude.

Ombudsman. The prosecution of crimes against Polish Nation (communist, Nazi or others) is one of the competencies of the Institute of National Remembrance–Commission for the Prosecution of Crimes against the Polish Nation. The act from 1998 founding the Institute contains the definitions of communist crime and crime against humanity. A communist crime is an action of a functionary of a communist state carried out between September the 17th 1939 and December the 31st 1989; that action being either repressing or otherwise directly violating human rights of an individual or a group, or involving other crimes as defined by Polish criminal law of that time.[23] A crime against humanity is based on the Convention on the Protection and Punishment of the Crime of Genocide from December the 9th 1948 and concerns also other serious persecution because of affiliation to a nation, political, social, racial or religious group if led, inspired or tolerated by public official. The most important part of the act is its point 55. providing penalization of any public and contrary to historical facts denying of the crimes defined above.

The point 13. of the Constitution of Poland is indirectly connected with the freedom of historical opinion. The rule is to prohibit any political party or other organization whose programmes are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership. The problem of freedom of speech appears when such organizations refer to the history of fascist or communistic states, denying some of their historical facts and action or even supporting them. Obviously the explicit historical denying opinions issued by these organizations are infrequent, because usually their activity is not public. These groups often function on the border of law and are rather of minor importance.[24]

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23 Ustawa o Istytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu (Dz.U. 1998, no. 155 position: 1016).

24 However, despite the new geopolitical order in 21st century Europe, there still exists some-kind of popularity of 20th century totalitarian ideologies in certain regions of Europe. For instance, we could recall the 2004 and 2006 success of the National Democratic Party of Germany in regional election to the Saxony and Mecklenburg parliaments. Another example could be the recent growth of communistic tendency in connection with the Greek economic crisis.

The art. 13 was criticized by some Polish constitutional experts.[25] The reasons of negative opinion were: terminological inexactitude (ex. does fascism includes also Francoist Spain or Estado Novo of Salazar?; does social class hatred constitute also a violation?), ideological nature (Polish remembrance of Nazi and communist totalitarianism) or the scope of subjects able to engage the control procedure based on art. 13. (the control is led by the Constitutional Court on demand of the large number of subjects including the political institutions or group of MPs).

The Polish Penal Code contains a clause (art. 256) providing even the imprisonment up to 2 years for public propagation of fascist or other totalitarian political system that may make the functioning of ultra right organizations difficult. On the other hand, the ultra left groups seem to have a larger liberty of action. The existence of Communistic Party of Poland is not contrary to the Constitution only in condition that the party does not employ totalitarian methods and modes of activity to spread their ideology.

This situation may be changed by the project of law prohibiting communistic symbols. The project was accepted by the Sejm of the Republic of Poland in September 2009. It may introduce a prohibition of possession, production in the aim of spreading totalitarian and fascist materials, as well as any communistic material. The rule in this shape may reduce the law to absurdity when applied to collectors or youth wearing the t-shirts with Che Guevera, which is rather a sign of pop-culture and global capitalism than an expression of communistic opinions.[26]

Another post communistic country possessing similar criminal is the Czech Republic. Apart from Nazi-based crimes the Czech Criminal Code punish "the denial, approval, justification" and even „expressing the doubt of existence" of the communistic crimes and genocide. It is worth to underline that such regulation, directed to both Nazism and communism, is uncommon in West European countries, where the social perception of communism is different than in the former Eastern Bloc.

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25 L. Garlicki (ed.), K. Działocha (et al.), *Konstytucja Rzeczpospolitej Polskiej: komentarz*, tom 5, Warszawa 1999; see also: M. Bartoszewicz, *Wokół problematyki art. 13 Konstytucji RP,* Państwo i Prawo, 2005, z. 4.

26 http://www.polityka.pl, 20.10.2009, [20.05.2010].

Contemporary liberal doctrine of freedom of speech

Finally, I would like to present the modern theory concerning the limits of freedom of speech. Especially, the idea of justice as fairness of John Rawls. The theory includes the integrity of legal and social relations in liberal society. So that it determine also the rules of freedom of expression. Rawls has clearly stated that the democratic state citizens are deeply divided morally, religiously and philosophically, despite the existence of toleration and pluralism[27]. That is why we deal with political splits. John Rawls demands the widest freedom for the expression–as a basic citizen right. Especially, the freedom of speech should not be restricted in respect for common good neither for any perfectionist values as efficiency, utility, usefulness, etc. The only possible limitation may result from protection of other basic freedom. Moreover, Rawls claimed, that the rules prohibiting seditious libel and revolutionary doctrines are needles. The law should rather guarantee a protection to them. In his opinion, the revolutionary expression becomes illegal when presents "explicit intention to provoke a direct illegal action" in the circumstances "which make this effect possible"[28]. Rawls pointed out the freedom of speech is a constitutive element of democratic system. In consequence, its limitation means that we deal with a constitutional crisis. In every case, judge should study if the state is effectively affected by constitutional crisis; if not, judge should not decide to disfavor of the freedom of speech. If it turns out that the judge is forced to limit the freedom of speech to prevent possible prejudice, it means that the state definitely suffers a constitutional crisis.

The idea of justice as fairness was created by American John Rawls and fits to United States social and political circumstances. Similarly wide freedom of speech was defended by American linguist and philosopher Naom Chomsky. However, it is doubtful that the idea could be transplanted to the European ground, which is much more sensitive for any speech abuse. It seems that "the American procedural democracy creates merely some procedures to so-called free market of ideas. The European republican democracy (also known as axiological) em-

27 J. Rawls, *Liberalizm polityczny*, Warszawa 1998, pp. 32–33.

28 The rule is called *clear and present danger*. Contrary rule is named *bad tendency test*. See: M. Urbańczyk, *op. cit.*, p. 102, 105.

phasis more the republican education and values and is more restrictive to non-democratic ideas".

Streszczenie

Piotr Potoczny

Zasada wolności słowa a swoboda wypowiedzi historycznej w wybranych państwach Unii Europejskiej. Streszczenie

Artykuł opisuje problem granic wolności słowa w kontekście tzw. wypowiedzi historycznych we współczesnych demokracjach wybranych państw Unii Europejskiej. Na wstępie przedstawiam genezę europejskiej doktryny wolności słowa, która rozwinęła się najpierw we Wielkiej Brytanii i w Francji. Wskazuję na ograniczenia tej ważnej swobody w poprzednich stuleciach. Do rozważania problemu potrzebna jest także definicja pojęcia wypowiedzi historycznej. Nie chodzi bowiem o każdą opinię historyczną, ale jedynie o taką, która w swojej treści dotyczy pewnych delikatnych faktów historycznych – stanowiących niekiedy elementy mar tyrologii narodowej – i której głoszenie może być objęte sankcją prawną. N ajbardziej znanym współczesnym przykładem są podejmowane próby negowania Holocaustu, określane terminami negacjonizm lub r ewizjonizm. Przystępując do analizy prawa państw europejskich w tym zakresie, wskazałem na międzynarodowe regulacje Europejskiej Konwencji Praw Człowieka oraz linię orzeczniczą Europejskiego Trybunału Praw Człowieka. Przykładu dostarczyła tutaj głośna sprawa brytyjskiego historyka, uważanego za jednego z głównych negacjonistów, Davida Irvinga. W Wielkiej Brytanii nie został on nigdy skazany z publicznoprawnego oskarżenia. Do takiego skazania doszło już jednak w Austrii, która dysponuje jasnym i bardzo surowym ustawodawstwem w zakresie negacjonizmu. David Irving został jako jeden z nielicznych w Europie skazany za poglądy. Przytoczyłem także kontrowersyjne wypowiedzi zmarłego już lidera austriackiej partii FPÖ Jörga Haidera.

Ciekawy w świetle rozważanego problemu jest przypadek legislacji francuskiej dotyczącej konkretnych wydarzeń historycznych. Chodzi tu o ustawy o pozytywnej roli kolonializmu oraz o uznaniu masakry Ormian za ludobójstwo. W zakresie przestępstwa negacjonizmu przytoczyłem jego definicję z francuskiej ustawy *Gayssot* z 1990 roku oraz aferę Roberta Faurissona (czołowego negacjonisty francuskiego), która uruchomiła praktyczną realizację zapisów tego aktu. Więcej miejsca poświęciłem generalnej krytyce ze stanowiska liberalnej doktryny wolności słowa wspomnianych wyżej ustaw interpretujących historię.

W zakresie rodzimego ustawodawstwa w artykule zanalizowano nieobowiązujący już art. 132a Kodeksu karnego – zniewaga Narodu Polskiego. Ustawa o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu (Dz.U. z 1998 r., nr 155, poz. 1016) określa definicje zbrodni komunistycznych oraz zbrodni przeciwko ludzkości, a ponadto w art. 55 przewidujący sankcję karną w przypadku zaprzeczania tym zbrodniom. Oceniono także wolność funkcjonowania skrajnych partii politycznych w świetle zapisów art. 13 Konstytucji RP, art. 256 Kodeksu karnego oraz projektu ustawy o zakazie propagowania symboli komunistycznych.

Na koniec przedstawiona została współczesną koncepcję wolności słowa wynikającą z teorii sprawiedliwości jako bezstronności Johna Rawlsa. Amerykański filozof opowiada się za jak najszerszą wolnością wypowiedzi, rozciągającą się także na wystąpienia antydemokratyczne. W tym celu wyznaczył sędziemu pewne reguły orzekania, które miały spowodować opóźnienie ewentualnej decyzji zabraniającej aż do ostatniego możliwego momentu przed wystąpieniem realnej groźby dla ustroju.