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Backlash Against Rights Advocacy

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Summary. Movements targeting fundamental rights increasingly resort to instruments and remedies designed to protect such rights (in this chapter we refer to these as the "rights-based" instruments): strategic lawsuits, freedom of expression, non-governmental organisations, citizens' initiative *etc.* They abuse democratic (rights-based) mechanisms for anti-democratic purposes. In responding to this challenge democratic actors and institutions must carefully balance, on one hand, the need to actively ("militantly") protect human rights and the instruments which can be employed for that purpose, and, on the other hand, the necessity of avoiding abuses and shortcomings which may occur. Such a balancing can take different forms in various social, cultural, and religious contexts. These issues, with particular attention paid to freedom of expression, are addressed in this chapter.

Blacklash wobec działań na rzecz obrony praw

Słowa kluczowe: wolność słowa, Pierwsza Poprawka, mowa nienawiści, słowa o charakterze wrogim, SLAPP

Streszczenie. Ruchy walczące o prawa podstawowe coraz częściej uciekają się do instrumentów i środków zaradczych mających na celu ochronę tych praw (w tym rozdziale nazywamy je instrumentami „opartymi na prawach"): strategicznych pozwów sądowych, wolności słowa, organizacji pozarządowych, inicjatyw obywatelskich itp. Nadużywają mechanizmów demokratycznych (opartych na prawach) w celach antydemokratycznych. Aby sprostać temu wyzwaniu, demokratyczni aktorzy i instytucje muszą starannie wyważyć, z jednej strony, potrzebę aktywnej („wojowniczej") ochrony praw człowieka i instrumentów, które można w tym celu wykorzystać, a z drugiej strony, konieczność unikania nadużyć i niedociągnięć, które mogą wystąpić. Takie wyważenie może przybierać różne formy w różnych kontekstach społecznych, kulturowych i religijnych. Kwestie te, ze szczególnym uwzględnieniem wolności słowa, omówiono w tym rozdziale.

Interestingly enough, movements targeting fundamental rights increasingly resort to instruments and remedies designed to protect such right (we shall refer to these as the "rights-based" instruments). Thus, they institute strategic lawsuits (*i.e.*, an instrument developed in the US tradition in order to change or modify controlling constitutional interpretations and consequently improve protection of civic rights) aimed at overturning long-developed constitutional standards protecting basic rights, or they manipulate societies (through spreading fake news or campaigning

against "degenerate elites" and their "rotten morals") in order to change existing legislations, or they infiltrate international human rights bodies, institutions and organisations[1]. To cut the long story short, anti-rights movements and institutions abuse democratic (rights-based) mechanisms for anti-democratic purposes: they wear costumes of rights' defenders in order to destroy fundamental rights.

In responding to this challenge democratic actors and institutions must carefully balance, on one hand, the need to actively ("militantly") protect human rights and the instruments which can be employed for that purpose, and, on the other hand, the necessity of avoiding abuses and shortcomings which may occur.

One must take into account that such a balancing can take different forms in various social and cultural (as well as religious) contexts: what can be seen appropriate in the US, does not have to fit European constitutional space, or what can be viewed as accurate in the Northern Hemisphere, does not necessarily have to be perfectly tailored for the global South.

These issues, with particular attention paid to freedom of expression, will be addressed in this chapter.

1. Rights-based Instruments as Weapons Against Democracy

Antidemocratic movements are present in different States, adversely affecting the rule of law and fundamental rights. In South Africa populist parties gained substantial representation standing in general elections while at the same time threatening the social balance between ethnic groups existing to-date by resorting to the argument of purported discrimination of one ethic group when compared to another[2]. In the United States the GOP's presidential candidate Mr. Donald Trump urges imposing severe restrictions on migrations and migrant families living in the US and exploits a racist but still, on the face, right-based argument of the right of American people to personal security[3], and the US Supreme Court was confronted in one of its symptomatically "June decisions"[4] with the challenge of

[1] N. Shameem, *Chapter 5: Anti-Rights Tactics, Strategies, and Impacts*, [in:] The Observatory on the Universality of Human Rights, *Rights at Risk: Time for Action. Observatory on the Universality of Rights Trends Report 2021*, https://www.awid.org/sites/default/files/2022-01/Ch5_RightsAtRisk_TimeForAction_2021.pdf, uploaded July 4, 2024.

[2] D. van Zyl-Hermann, *Make Afrikaners great again! National populism, democracy and the new white minority politics in post-apartheid South Africa*, "Ethnic and Racial Studies" 2018, 41(15), pp. 2673-2692.

[3] ACLU, *Trump on migrations,* June 6, 2024, https://www.aclu.org/publications/trump-on-immigration, pp. 1-17.

[4] „June decisions" are rulings delivered by the Supreme Court at the end of its term, *i.e.* in June (or July) which normally marks the split among judges on the direction of their decision and low ability to create majority.

authorisation of marketing for a medicine used for medical abortions based on the plea pertaining to unlawfulness of administrative act (FDA's approval of the disputed pill called Mifeprex)[5]. In Narendra Modi's India the Supreme Court, although still delivering decisions enhancing protection of some human rights[6], is seen by some as a protector of Hindu nationalist policy of the populist government and the forum for promoting the majoritarian agenda[7]. In Europe, the 2020 verdict of the Constitutional Court banning (almost totally) abortions can serve illustration of the trend to employ "juridical" and "rights-based" guns fired at human rights[8].

One of these rights-based strategies is the use of SLAPPs. SLAPPs (strategic lawsuits against public participation), first defined by Penelope Canan and George W. Pring in their 1988 paper as "attempts to use civil tort action to stifle political expression"[9] have been increasingly resorted to by those who do not feel defamed but rather seek to silence critics and control public opinion about a particular issue[10]. Their contemporary versions in quasi-authoritarian regimes extend beyond civil actions initiated by genuinely private actors (companies) and reach out to civil lawsuits pursued by ruling political parties, for example a lawsuit of the Law and Justice party against its critic and renowned law professor Wojciech Sadurski (who described that political party as an "organised criminal group")[11], or civil actions pursued by state-owned and state-controlled companies, such as the Polish public television broadcaster against the same W. Sadurski (for labelling the state-owned television broadcaster as the "Goebbelsian media company")[12], or finally also criminal proceedings conducted either by means of private indictments or by politically-controlled public prosecution, for example numerous criminal

[5] SCOTUS, June 13, 2024, *Food and Drug Administration et al. v. Alliance for Hippocratic Medicine*, *et al.*, 23-235.

[6] See *e.g.*, The Supreme Court of India, August 16, 2022, *Deepika Singh versus Central Administrative Tribunal*, concerning the constitutional recognition of same-sex couples as families.

[7] N. Sundar, *The Supreme Court in Modi's India*, "Journal of Right-Wing Studies" 2023, Vol. 1, No. 1, pp. 106-144, see pp. 107-108.

[8] Constitutional Court of Poland, October 22, 2020, case K 1/20. The judgment found a partial legality of abortion violating human dignity (Article 30 of the Constitution).

[9] Penelope Canan, George W. Pring, *Strategic Lawsuits Against Public Participation*, [1998] 35 Social Problems, 506, pp. 506-507.

[10] R.L. Moore, M.D. Murray, K.H. Youm, *Media Law and Ethics* (Routledge 2021), p. 152.

[11] See Article 19, *Poland: Court of Appeal dismisses SLAPP lawsuit against Professor Wojciech Sadurski*, https://www.article19.org/resources/appeal-court-slapp-sadurski/, uploaded July 4, 2024.

[12] See European Centre for Press and Media Freedom, *Poland: Ruling Law and Justice party and public broadcaster TVP must drop SLAPP defamation lawsuits against Law Professor Sadurski*, https://www.ecpmf.eu/open-letter-urging-tvp-to-drop-slapp-lawsuit-against-polish-professor/, uploaded July 4, 2024.

actions against the main opposition newspaper *Gazeta Wyborcza* in Poland under the *ancien régime* of the far right[13].

Another example of a "rights-based" instrument employed in a battle against fundamental rights is the use of NGOs as vehicles for promoting anti-rights agenda. Many such examples are known from the history of American constitutionalism. Anita Bryant, a homophobic vampirine, led the campaign "Save our children" against the Floridian local ordinance prohibiting discrimination based on sexual orientation and her main "argument" was that gay people were supposed to pose a threat to her own and other children enrolled in Christian schools whereas the ordinance protected against discrimination at any school. Generally, when discriminated minorities are given equal rights, it is seen by privileged xenophobes as a sudden suppression of their "rights" (namely: a "right" to discriminate others). A worldwide far-right network "Agenda Europe" (based on American-European-Russian cooperation) pushes for anti-right changes in European legislation and provides a channel for sponsoring extremist organisations in particular States[14], including *e.g.*, Poland where its local "branch" is the catholic extremist lawyers' foundation "Ordo Iuris"[15]. Extremist non-governmental organisations target, among others, the freedom of speech. For instance, in 2021 the Court of Appeal in Warsaw ultimately dismissed the defamation lawsuit instituted by some F.L. against two historians and professors, Barbara Engelking and Jan Grabowski, who allegedly defamed the claimant's grandfather as a Nazi-collaborator and antisemite[16]. What the court missed, though, was a chance to properly deal with a SLAPP sponsored by an extremist NGO, "Fundacja Reduta Dobrego Imienia" (The Redoubt of Reputation Foundation) headed by the person who had been nominated by the far-right ruling party the president of the Polish Radio and Television Council (the constitutional organ in charge of regulating the radio and television sector).

Another democratic instrument employed to combat fundamental rights is the citizens' legislative initiative. In the EU such an initiative can be brought by at least

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[13] See *passim* P. Milewska, *Countering SLAPPs in Hungary, Poland, and the Rest of the EU*, GMF Policy Paper, May 2023, https://www.gmfus.org/sites/default/files/2023-05/Milewsa%20-%20SLAPPs%20-%20paper.pdf, uploaded July 4, 2024.

[14] See European Parliamentary Forum on Population and Development, *Ristabilire naturale l'ordine. La visione degli estremisti religiosi per mobilitare le società europee contro i diritti umani in materia di sessualità e riproduzione*, https://www.epfweb.org/sites/default/files/2020-05/online_epf_italiano_definitivo_compressed.pdf, uploaded June 15, 2024.

[15] See, *passim*, K. Suchanow, *To jest wojna. Kobiety, fundamentaliści i nowe średniowiecze*, Warszawa 2020.

[16] See A. Gliszczyńska-Grabias, M. Górski, *Badacze historii w sali sądowej. Glosa do wyroku SA w Warszawie z 16.08.2021 r., I ACa 300/21*, PiP 2022, vol. 11, pp. 161-169.

1 million EU citizens from at least ¼ of the Member States[17]. This instrument, in its assumptions, democratic and serving universal participation, was also used occasionally to suppress fundamental rights and freedoms. For instance, one of the very early initiatives called "One of Us" proposed that "the EU should establish a ban and end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health" because of the need to protect human (*i.e.* foetus) dignity[18]. In its apt negative response to that initiative (the initiative is not binding upon it), the Commission managed to avoid falling into the trap set by the authors of the initiative, namely instead of pointing out at the limited (actually: non-existent) EU powers in the field of defining the beginning of human life, it argued that the level (intensity) of protecting human dignity is sufficient in EU law.

In times of democratic backsliding, rights-based institutional frameworks may be transformed into dangerous anti-rights mutants. Poland serves a very good example of such a process. For instance, after the political colonisation of large parts of the *largo sensu* administration of justice by the extremist right-wing politicians in 2015-2023, the public prosecution structures were used by the government to suppress fundamental rights and freedoms. For instance, in recent years prosecutors systematically participated in the court trials pertaining to the legal correction of sex of transgender persons, the aim of this practice being obviously to make the – already inhumanly ill-treating – procedures more complicated, lengthy and more intimidating to the claimants[19]. In 2020, when the lockdown regulations were imposed because of the COVID-19 pandemic, the National Prosecutor (in fact, a politician appointed to safeguard the interests of the ruling party, in charge of the whole public prosecution service in Poland) issued an instruction to all subordinate prosecutors ordering them to qualify the participation in mass demonstrations against the limitation of the access to legal abortion as a crime stipulated in Article 165 § 1 of the Penal Code (*i.e.* the crime of causing danger to the life or health of many people)[20].

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[17] See Article 11(4) TEU and Regulation (EU) 2019/788 of the European Parliament and the Council of April 17, 2019, on the European citizens' initiative.

[18] See European Citizens' Initiative No. ECI(2012)000005, https://citizens-initiative.europa.eu/initiatives/details/2012/000005_en, downloaded June 15, 2024.

[19] M. Adamczewska-Stachura, P. Plich, *Postępowania w sprawach o ustalenie płci. Przewodnik dla sędziów i prokuratorów,* Warszawa 2020, p. 38.

[20] See, *passim*: A. Liszewska, A. Rakowska-Trela, I. Skomerska-Muchowska, M. Górski, *Stanowisko w sprawie prawnych uwarunkowań dopuszczalności stosowania art. 165 Kodeksu karnego wobec protestujących biorących udział w zgromadzeniach o charakterze politycznym w czasie pandemii wirusa SARS-CoV-2*, Monitor Konstytucyjny, November 1, 2020, https://monitorkonstytucyjny.eu/archiwa/15942, uploaded June 24, 2024.

2. Responses to Abusive Use of Rights-based Instruments

The approach to abusive instrumentalization of rights-based instruments largely depends on the type of democracy existing in a given jurisdiction, which – in turn – is predetermined by historical experience of the society (namely, whether the underpinning experience was authoritarian in which case the post-authoritarian constitution is equipped with certain anti-backlash and pro-democratic precautionary measures[21]).

The predominant approach of European States can be characterised by the notion of "militant democracy" (or "fighting democracy"), the concept popularised in the 1930s by Karl Loewenstein in the wake of fascist pandemonium in Europe[22]. Loewenstein argued that:

> If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles[23].

Militant democracy is thus understood "as the legal restriction of certain democratic freedoms for the purpose of protecting democratic regimes from the threat of being subverted by legal means"[24]. This notion still attracts a lot of legal-scholarly attention[25]. And although the ECtHR has never actually employed the term "militant democracy", nonetheless it implicitly applies this concept by repeatedly holding in Article 10 cases that the applicant (emphasis added):

> [a]ttempted to deflect Article 10 from its real purpose by seeking to use his right to freedom of expression for ends which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention[26].

In the United States, the underlying idea of the Free Speech doctrine seems long to have been that "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied

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[21] K. Samuels, *Post-Conflict Peace-Building and Constitution-Making*, "Chicago Journal of International Law" 2006, Vol. 26, No. 2, p. 2.

[22] K. Loewenstein, *Militant Democracy and Fundamental Rights, I*, "The American Political Science Review" 1937, vol. XXXI, No. 3, pp. 417-432; and K. Loewenstein, *Militant Democracy and Fundamental Rights, II*, "The American Political Science Review" 1937, vol. XXXI, No. 4, pp. 638-658.

[23] K. Loewenstein, *Militant Democracy and Fundamental Rights, I*, *op. cit.*, p. 432.

[24] C. Invernizzi Accetti, I. Zuckerman, *What's Wrong with Militant Democracy?*, "Political Studies" 2017, vol. 65, pp. 182-199, at p. 183.

[25] A. Sajó (ed.), *Militant Democracy*, Utrecht, 2004.

[26] ECtHR, October 20, 2015, *M'Bala M'Bala v. France,* dec. (inadmissibility), appl. no. 25239/13, at 41.

is more speech, not enforced silence"[27]. Gradually, the Supreme Court outlawed what is called "fighting words" while retaining the Free Speech protection of "non-fighting" hateful expressions[28]. Thus, it held repeatedly that laws combating "fighting words" (*i.e.* speech inciting imminent lawless action) are compatible with the First Amendment. For instance, in *Chaplinsky v. New Hampshire* it held that:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the […] "fighting" words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace[29].

In *Brandenburg v. Ohio* the Supreme Court deduced from its previous rulings (emphasis added) that:

> [t]he principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action[30].

Thus, the present interpretation of the First Amendment is the hateful content of speech is insufficient to exclude it from the Free Speech protection so long as it does not amount to fighting words[31].

Legislations or case-law outlawing hate speech are known to many jurisdictions worldwide. For example, Indian Penal Code prohibits hate speech – a growingly paramount problem in the multicultural society – in Section 153A[32]. The Supreme

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[27] SCOTUS, *Whitney v. California*, 274 U.S. 357 (1927), May 15, 1927, at 377.

[28] Which is actually a very broad concept, as illustrated by the case of burning the Ku Klux Klan cross in front of the coloured family's house in St. Paul, Minnesota – see: SCOTUS, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), June 22, 1992.

[29] SCOTUS, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), March 8, 1942, at 571-572.

[30] SCOTUS, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), June 9, 1969, at 447.

[31] See e.g. SCOTUS, *Mahanoy Area School District v. B.L., a minor, by and through her father, Levy, at al.*, 594 U. S. (2021), 23 June 2021, at 8; also SCOTUS, *Matal, Interim Director, United States Patent and Trademark Office v. Tam*, 582 U. S. (2017), 19 June 2017, at 25.

[32] Sections 153A of the Penal Code of India: "Whoever— (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or illwill between different religious, racials, language or regional groups or castes or communities, or (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, [or] [(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that

Court of India, even though criticised for insufficient judicial steps taken against the growing tension adversely affecting the situation of the Muslim minority[33], has been ruling rather consistently against hate speech occurrences. For example, it ordered the State of Uttarakhand to take investigative steps targeting grave incidents of hate speech that included calling for genocide against Muslims[34]. Earlier, in *Tehseen S Poonawalla vs Union of India and Others* it held that:

[i]t is axiomatic that it is the duty of the State to ensure that the machinery of law and order functions efficiently and effectively in maintaining peace so as to preserve our quintessentially secular ethos and pluralistic social fabric in a democratic set-up governed by rule of law[35].

In South Africa, the Constitutional Court essentially confirmed the compatibility of the prohibition of hate speech with the constitution in a judgment concerning an abhorrent homophobic hate speech of a certain columnist. At the same time, the Constitutional Court managed to strike a delicate balance between the need to protect public order in this extremely diverse society and the value of fundamental freedom to speak freely, namely it outlawed as overbreadth the term "hurtful" from the definition of what constitutes prohibited hate speech. This judgment is, by the way, an art of speech of itself – let us quote the introductory phrase of the Court's reasoning:

It is a truth universally acknowledged that "[t]o be hated, despised, and alone is the ultimate fear of all human beings". Speech is powerful – it has the ability to build, promote and nurture, but it can also denigrate, humiliate and destroy. Hate speech is one of the most devastating modes of subverting the dignity and self-worth of human beings[36].

The 2010 Constitution of Kenya explicitly prohibits in its Section 33(2) (b) and (c) any expressions inciting to violence or constituting hate speech or advocacy of

the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,] shall be punished with imprisonment which may extend to three years, or with fine, or with both".

[33] N. Sundar, *The Supreme Court in Modi's India*, *op. cit.*

[34] Supreme Court of India, January 13, 2023, CPC 41/2022.

[35] Supreme Court of India, July 17, 2018, *Tehseen S Poonawalla vs Union of India and Others* [(2018) 9 SCC 501].

[36] Constitutional Court of South Africa, July 30, 2021, *Jonathan Dubula Qwelane versus South African Human Rights Commission and Another*, 2021 (6) SA 579 (CC), in item (1) of the Introduction. See also the commentary in M.E. Marais, *Hate Speech in the Equality Act Following the Constitutional Court Judgment in Qwelane v SAHRC*, PER / PELJ 2023(26), pp. 1-33.

hatred as laying outside of the scope of the free speech protection[37]. The lesson of the riots following the 2007 general election[38] was learned[39].

In Poland, the landscape of application of the laws against hate speech, a typical abuse of the freedom of expression, is blurred. On one hand, Poland should be treated as a "particularly militant" democracy. This is because its historical experience included confrontation with two totalitarian regimes: Nazism, since Poland had been occupied by the Nazi Germany in 1939-1945, and communism, as the country had been controlled, to an extent varying over time, by the communist Soviet Union (1944-1989). The 1997 Constitution invokes this experience in its preambular part ("We, the Polish Nation, […] mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland") which should play significant role in the interpretation of constitutional provisions as well as laws adopted on their basis[40]. On the other hand, the same experience dictates a particularly cautious scrutiny of interferences impacting freedom of expression. Also, strong influence of the catholic clergy in Poland and a prominent representation of (to say the least) conservative views in the society stops the political class from advancing the contemporary European human rights agenda encompassing, among others, stronger protection of minority groups (such as LGBT+ persons or people of immigrant origin) against hate speech[41].

When it comes to SLAPP litigations, the responses also vary throughout the world. The European Union has recently adopted anti-SLAPP Directive[42] aimed at providing "safeguards against manifestly unfounded claims or abusive court

[37] The Constitution of Kenya, Article 33(2): "The right to freedom of expression does not extend to— (a) propaganda for war; (b) incitement to violence; (c) hate speech; or (d) advocacy of hatred that— (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) is based on any ground of discrimination specified or contemplated in Article 27(4)".

[38] After the 2007 general elections some 1,500 persons were killed after Raila Odinga the leader of the opposition raised accusations that the the election was rigged and that he was the lawfully elected head of state. See: A. Scheffler, *The Inherent Danger of Hate Speech Legislation A Case Study from Rwanda and Kenya on the Failure of a Preventative Measure*, Windhoek 2015, https://library.fes.de/pdf-files/bueros/africa-media/12462.pdf, uploaded June 20, 2024.

[39] National Cohesion and Integration Commission, *Kenya's National Action Plan Against Hate Speech*, 2024, https://cohesion.go.ke/images/docs/downloads/Kenyas_National_Action_Plan_Against_Hate_Speech.pdf, uploaded June 21, 2024.

[40] As the Constitutional Court of Poland held in the judgment of May 11, 2005, case K 18/04 (item III.6.5.), "Legal norms in the strict sense cannot be derived from the text of the preamble to the Constitution. Nevertheless, it provides guidelines based on the Constitution maker's authentic statement as to the directions of interpretation of the provisions of the normative part of the Constitution consistent with his intentions".

[41] See *e.g.*, the European Parliament resolution of 18 January 2024 on extending the list of EU crimes to hate speech and hate crime (2023/2068(INI)).

[42] Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), OJ L, 2024/1069, 16.4.2024.

proceedings in civil matters with cross-border implications brought against natural and legal persons on account of their engagement in public participation". The Directive imposes the obligation on the Member States to provide for early dismissal of abusive claims, as well as for full reimbursement of costs. Interestingly, not a single reference to SLAPP has been made in the ECtHR case-law so far. Probably, the developments within the European Union will prompt the evolution of the interpretation of the European Convention and such a reference may start occurring over time. No anti-SLAPP law has been adopted so far in the United States at the federal level, but a majority of 34 states adopted anti-SLAPP regulations of different quality[43]. While there is a substantial record of federal case law on SLAPP litigations, generally favourable to the litigants invoking free speech guarantees[44], there seems to be no uniform anti-SLAPP strategy at the federal level. According to Laura Lee Prather, in view of the emerging SLAPPing trend in the United States fuelled by exorbitant legal fees and an absence of caps on damages pointed out at by the United Nations Human Rights Office of the High Commissioner[45], several lessons can be learned by the US legislation and legal practice from (in particular) European colleagues, such as mapping the SLAPP threats, "naming and shaming" (*i.e.* imposing professional ostracism on lawyers engaged in SLAPPs), promoting standards among lawyers and assuring proper training for judges[46]. SLAPP instances are also identifiable in the Global South. For instance, the Mzalendo Trust's report provides for an in-depth look at both SLAPPs and their countermeasures in Kenya, including some promising decisions[47] such as *Jacqueline Okuta & Anor vs. AG & others* of the High Court of Kenya annulling Section 194 of the Penal Code that criminalised defamation[48]. Nikhil Dutta

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[43] D. Greenberg, D. Keating, H. Knowles-Gardner, *Institute for Free Speech. Anti-SLAPP Statutes: 2023 Report Card*, Washington 2023, https://www.ifs.org/anti-slapp-report/, uploaded June 22, 2024.

[44] See *e.g.*, SCOTUS, *New York Times v. Sullivan,* 76 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, March 9, 1964; *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L.Ed.2d 626, 85 S.Ct. 1585, June 7, 1965; *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 30 L.Ed.2d 642, 92 S.Ct. 609, January 13, 1972; *Bill Johnson's Restaurants v. National Labor Relations Board,* 461 U.S. 731, 76 L.Ed.2d 277, 103 S.Ct. 2161, May 31, 1983; *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 117 S.Ct. 855, February 19, 1997; *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, June 30, 1994.

[45] A. Ciampi, *SLAPPs and FoAA Rights*, UNHR (Info Note), https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx, uploaded June 22, 2024.

[46] L. Lee Prather, *SLAPP Suits: An Encroachment on Human Rights of a Global Proportion and What Can Be Done About It*, 22 NW. J. HUM. RTS. 49 (2023), pp. 49-100, at pp. 70-87.

[47] Mzalendo Trust, *The Use of Strategic Litigation Against Public Participation (SLAPP) as a Concept in Kenya and Its Impact on the Freedom of Expression*, date unknown, https://mzalendo.com/media/resources/The_Use_of_Strategic_Litigation_Against_Public_Participation_SLAPP.pdf, uploaded June 22, 2024.

[48] High Court of Kenya, *Jacqueline Okuta & Anor vs. AG & others*, February 6, 2017, Petition 397 of 2016.

described a number of SLAPPs in states like Thailand, India, Philippines, South Africa, Indonesia, Malaysia, Armenia, Sierra Leone, and Honduras[49].

In Poland, the statistics of judicial identifications of SLAPPs are rather disappointing. Available databases[50] show just 4 (four) records. Only one of them (where, by the way, the judge rapporteur was simultaneously an associate professor at the University of Łódź) contained a detailed analysis of the nature of SLAPP litigations and their characteristics and a thorough analysis of reasons why the litigation in question could not have been qualified as a SLAPP[51]. The reasoning contained in other relevant rulings[52] were rather superficial (they have, what can be called, a "slapstick" form).

The EU legal framework on the European Citizens' Initiative ("ECI"), encompassing primary law (Articles 11(4) of TEU and 24 TFEU) and secondary law (Regulation 2019/788)[53] provides for safeguards against abusive employment of this instrument, namely, Article 6(3)(e) of the Regulation provides that "The Commission shall register the initiative if […] the initiative is not manifestly contrary to the values of the Union as set out in Article 2 TEU and rights enshrined in the Charter of Fundamental Rights of the European Union". So far, out of 114 initiatives, the registrations of 23 were refused, all of them considered "manifestly outside the framework of the Commission's powers" (Article 6(3)(c) of the Regulation)[54]. Among the latter, even the ECI postulating the "abolition of the European Parliament and its structures" was considered "manifestly outside the framework

[49] N. Dutta, *Protecting Activists from Abusive Litigations. SLAPPs in the Global South and How to Respond,* International Center For Non-For-Profit Law, Washington 2020, pp. 4-14, https://www.icnl.org/wp-content/uploads/SLAPPs-in-the-Global-South-vf.pdf, uploaded June 23, 2024.

[50] The query concerned the most popular legal database provided by Wolters Kluwer Publishing and the official database of Polish common courts, *Portal orzeczeń sądów powszechnych.*

[51] See Regional Court in Warsaw, July 12, 2022, *T. v. A.,* case XXII GW 155/22. The Regional Court noted, among other things, that "SLAPPs are strategic lawsuits against public participation in public debate (Strategic Lawsuit Against Public Participation). They are routinely used against public watchdog organizations that play an active role in protecting democracy and the rule of law also in the European Union. The targets of these lawsuits are journalists, independent media, scientists, and non-governmental organizations dealing with civil society and human rights. The plaintiffs include corporations, wealthy individuals and, in some cases, even government bodies. Strategic lawsuits are not limited to specific categories of claims and can take many forms. One of the features of SLAPP is their tendency to shift the debate from the political to the legal sphere. SLAPP lawsuits are essentially retaliatory lawsuits. Their goal is to suppress freedom of expression on matters of public interest" (see §§ 43-44).

[52] See: the Court of Appeal in Cracow, November 3, 2022, case I ACa 1508/21, and the Supreme Court, October 13, 2022, case II CSKP 121/22, and November 25, 2022, case II CSKP 246/22.

[53] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative (Text with EEA relevance.), OJ L 130, 17.5.2019, p. 55-81.

[54] See: https://citizens-initiative.europa.eu/find-refused-requests-for-registration_en, uploaded June 24, 2024.

of the Commission's powers"[55] whereas the main and primary problem in this case seems to have been that such an abolition would run contrary to the democratic principles of the European Union (Article 10 TEU) and the EU citizens' electoral rights as reflected in Article 39 of the EU Charter of Fundamental Rights.

The instrumentalization of citizens' legislative initiative for abusive, anti-rights purposes, is a routine practice of extremist movements in Poland. For instance, within the last yeas years (*i.e.* 2019-2024) five out of twelve citizens' initiatives aimed at restricting fundamental right[56]. No equivalent of the ECI Regulation's Article 6(3)(e) is included in the legal framework pertinent to the citizens' legislative initiative in Poland[57]; therefore, the legislative proceedings cannot be discontinued because a given bill manifestly violates fundamental rights. Interestingly enough, bodies responsible for opinion-making related to the citizens' bills present rather surprising (if not revolting) views when it comes to the protection of fundamental rights and freedoms. For example, the "Yes to the Family, No to Gender" bill aiming at the renunciation of the Istanbul Convention, proposed by right-wing extremists including some lawyers from the already mentioned "Ordo Iuris" Foundation, was opined by the President of the Supreme Court (*notabene* a professor of law) as having "no influence on matters falling within the jurisdiction of the Supreme

[55] See the information of the European Commission on the request for registration of a proposed citizens' initiative entitled "A new EU legal norm, self-abolition of the European Parliament and its structures, must be immediately adopted", January 23, 2014, C(2014)437 final.

[56] Since 2019 there were twelve bills proposed in the Parliament by way of citizens' legislative initiatives (see the list in https://orka.sejm.gov.pl/proc9.nsf/0/7510F178D30F38AAC12584B-7003F9693?Open, uploaded June 24, 2024, and apart from that list encompassing the bills proposed till the end of the Parliament of 8th term, also one more bill proposed in 2024 concerning extension of financial aid to electricity consumers related to the growth of prices for electric energy). Nearly half of these twelve bills aimed at restricting fundamental rights, including e.g.: the right to peaceful enjoyment of property (a citizen's bill on the protection of property in the Republic of Poland against claims regarding heirless property aimed at restricting property rights of heirs of pre-war property of Polish citizens of Jewish decent), the right to privacy and the prohibition of tortures and inhuman or degrading treatment (a citizen's bill "Yes to the Family, No to Gender" aimed at expressing consent for the President of the Republic of Poland to denounce the Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in Istanbul on May 11, 2011, and establishing a Team for developing the assumptions of the international convention on the rights of the family), right to freedom of peaceful assembly (a citizen's bill amending the Act of July 24, 2015 – Law on Assemblies and certain other acts, regarding – in accordance with its written motives – "opposing activities that question family values in the eyes of society, in particular by groups associating active homosexuals, the so-called LGBT groups"), and the freedom of expression (a citizen's bill amending the Act – Penal Code, regarding the introduction of a regulation in Polish criminal law that will protect the right to express views and opinions related to one's religion).

[57] This legal framework consists of Article 118 of the Constitution and the Law of June 24, 1999 on the implementation of the legislative initiative by citizens (*ustawa o wykonywaniu inicjatywy ustawodawczej przez obywateli*), O.J. 2018 item 2120 (consolidated version).

Court"[58] (therefore apparently domestic violence is not a matter of interest to the Supreme Court). Opinion in the same wording, with an additional indication that the proposed bill allegedly did not concern a normative act on the basis of which decisions are made by common courts and the Supreme Court, was presented in relation to the bill aimed at restricting the right to a peaceful assembly by prohibiting e.g. the promotion of the extension of the institution of marriage to persons of the same sex[59]. To make it clear the proposed bill, let alone its statement of reasons, could not be described as anything else than a Nazi, homophobic gibberish that violated basic democratic principles[60]. Needless to say, the aforementioned President of the Supreme Court was actively participating in the devastation of the rule of law in Poland – one should add that even her appointment to the Supreme Court is actually invalid as having been pursued with the gross violation of law[61].

3. No Single Pattern. Variousness of Responses in Different Social Contexts

There is no single pattern or best practice that can be followed universally without consideration to the social contexts in a given jurisdiction. Some practices can be named, though, which seem to be quite useful.

First and foremost, protecting fundamental rights is a process – an endless battle where no achievement can be taken for granted. Incidents of democratic backsliding are and have been known for decades – to name but a few: the collapse of the Weimar Republic, the emergence of populist regimes in Poland (2015-2023) and in Hungary (since 2010 onwards), or the de-democratization of Benin under the rule of president Patrice Talon.

This assumption of endless continuity of fighting for human rights has multiple consequences for legal education and legal practice: efforts aimed at enhancing human rights protection should be an indispensable element of the formation of lawyers as well as of the day-to-day practice in courts. In other words, democracy needs to be constantly fought for.

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[58] See the opinion of the First President of the Supreme Court Mme Małgorzata Manowska of February 15, 2021, BSA 111-021-44/21, https://orka.sejm.gov.pl/Druki9ka.nsf/0/412FADF194FCE6D7C1258680004361A5/%24File/915-001.pdf, uploaded June 24, 2024.

[59] See the opinion of the First President of the Supreme Court Mme Małgorzata Manowska of September 27, 2021, https://orka.sejm.gov.pl/Druki9ka.nsf/0/77E5A49657665DD5C1258761004D5EA8/%24File/1607-001.pdf, uploaded June 24, 2024.

[60] For the text of the bill consult https://orka.sejm.gov.pl/Druki9ka.nsf/0/EC8F58B32AAF4E15C125875F003656D8/%24File/1607.pdf, uploaded June 24, 2024.

[61] See ECtHR, February 3, 2022, *Advance Pharma sp. z o.o. v. Poland,* appl. no. 1469/20, at 294-351. See also L. Pech, J. Jaraczewski, *Systemic Threat to the Rule of Law in Poland: updated and new Article 7(1) Recommendations*, Democracy Institute Working Papers 2023/02, pp. 30, 59 and 80.

Secondly, any attempts to curtail freedom of expression are always risky to the very existence of democracy as such and particularly strict scrutiny must be applied where the freedom of expression is interfered. This is by no accident that courts in different jurisdictions see free speech as a cornerstone of democracy. As the ECtHR noted in *Handyside v. the United Kingdom,* "freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man"[62]. Similarly, the United States Supreme Court described freedom of speech as the "fundamental principle of the constitutional system"[63]. The Constitutional Court of South Africa, in a case concerning the freedom of speech of parliamentarians, held that:

> [b]y its very nature, Parliament is a body that functions through a deliberative process. Its decisions are the result of that process. Axiomatically, that process can only be meaningful if all members of Parliament are given room freely to make their points and express their opinions[64].

The apparent tension between these two postulates, namely to perceive democracy as a never-ending endeavour and to see and restriction on free speech as *a limine* threat to democracy is, in fact, a false juxtaposition. Rights-based instruments in the hands of anti-democratic movements become their own negation. Like in the case of the freedom of speech, exploited by extremists to incite to hatred and social disorder, also other rights-based instruments and institutions can be abused in order to curtail rights and freedoms of individuals: judicial remedies can be used for SLAPPing unfavourably seen public activism or scientific research, and citizens' initiatives can be manipulated by influential extremist movements or companies to suppress human rights.

When it comes to SLAPP practices, at least two methods of combating them seem particularly purposeful. One is "naming and shaming", namely the right of the public to learn the identifying data of lawyers and law firms engaged in advancing SLAPP litigations. The other one is providing education to judges and prosecutor in order to build their awareness of SLAPPs and their debilitating role in reference to free public discourse, as well as ethical (deontological) education to lawyers (barristers and advocates) making them cautious of how they perform

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[62] ECtHR, December 7, 1976, *Handyside v. the United Kingdom,* appl. no. 5493/72, at 49. See also ECtHR, December 5, 2019, *Tagiyev and Huseynov v. Azerbaijan*, appl. no. 13274/08, at 36; ECtHR (GC), May 25, 2021, *Big Brother Watch and others v. the United Kingdom*, appl. nos. 58170/13, 62322 /14 and 24960/15, at 442; ECtHR, June 20, 2024, *Friedrich and others v. Poland*, appl. no. 25344/20 and 17 others, at 245.

[63] SCOTUS, *Stromberg v. California*, 283 U.S. 359 (1931), May 18, 1932, at 369.

[64] Constitutional Court of South Africa, March 18, 2016, *Democratic Alliance v Speaker of National Assembly and Others* [2016] ZACC 8, case CCT 86/15, at 1.

their role in the administration of justice. As the CJEU rightly held in joined cases C-422/11 P and C-423/11 P (emphasis added),

> [t]he conception of the lawyer's role in the legal order of the European Union, which is derived from the legal traditions common to the Member States, and on which Article 19 of the Statute of the Court of Justice is based, is that of *collaborating in the administration of justice* and of being required to provide, *in full independence and in the overriding interests of that cause*, such legal assistance as the client needs[65].

Citizens' initiative, yet another frequently abused instrument, should be subjected to thorough preventive constitutionality review pursued by opining bodies, and in case where the latter unreservedly and unanimously opine the bills as manifestly violating fundamental rights and freedoms, the initiators should be, *e.g.,* obliged to present an independent expert legal opinion drafted by academic lawyers of recognized professional qualities proving to the contrary. Otherwise, as exemplified by the Polish experience, the citizens' initiative itself is an instrument that, even when unsuccessful, may resonate in the society threatening minority groups and voicing hatred and discrimination.

Apart from the above, the role of multilevel and multisectoral social deliberation must not be underestimated in the context of citizens' legislative initiatives. Public consultation allowing for the expression of views and interests of different social actors provides for a better quality of law. For example, in the Netherlands, all governmental bills (*i.e.* a vast majority of all bills proceeded by the Parliament) are subject to online consultations lasting normally 4 – 6 weeks and attracting sometimes a substantial attention of the public opinion[66], and the citizens' initiatives are subject to preventive constitutionality review which, in case of negative outcome, leads to discontinuation of the legislative procedure[67].

4. Conclusions

Rights-based instruments have been increasingly used for anti-rights purposes over time. With the passage of time, the humankind invented such novelties as

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[65] CJ(EU), Joined Cases C-422/11 P and C-423/11 P, *Prezes Urzędu Komunikacji Elektronicznej v. European Commission*, September 6, 2012, at 23.

[66] H. Heida, "The case of the Netherlands: Internet consultation and rules concerning lobbyists in the House of Representatives", communication of the Association of Secretaries General of Parliaments, https://www.google.pl/url?sa=i&url=https%3A%2F%2Fasgp.co%2Fwp-content%2Fuploads%2F2023%2F07%2FHeida-Netherlands.docx&psig=AOvVaw3t96LrWIhZvdf4XsulDyUf&ust=1719333015941000&source=images&cd=vfe&opi=89978449&ved=0CAQQn5wMahcKEwiQxMfM1vSGAxUAAAAAHQAAAAAQBA, uploaded June 24, 2024.

[67] See Regulations of the Committee for Petitions and Citizens' Initiatives (Regeling van de commissie voor de Verzoekschriften en de Burgerinitiatieven), Article 2.2.B. and 4.3.E; https://wetten.overheid.nl/BWBR0044981/2021-03-31, uploaded June 24, 2024.

SLAPPs or destructive employment of citizens' initiative. Some other abusive forms of employment of rights-based instruments have been present probably since the beginning of humanity, *e.g.*, lobbying or hate speech. *Proxenoi* were consular agents in ancient Greece in charge of, among others, lobbying[68], and although they could be seen as an element of deliberative democracy, to the extent which was possible in ancient times, it is hard to believe that they never acted against individuals' rights.

When Karl Loewenstein was seeking the common features of different European political movements of the fascist genre, he identified the following characteristics thereof, intriguingly all related to hate speech of different species:

> [a]ntisemitism, with the notable exception of Italy, although even here, evidently under the influence of the "Berlin-Rome axis", a change in attitude is noticeable; hostility to freemasons, pacifists, and similar international organizations; the "leadership" principle and abolition of liberal democracy and its institutions; a hazy sort of corporativism; general house-cleaning under the slogans of "regeneration" and "renovation"; rampant nationalism[69].

There is nothing surprising about that: if free speech is the building block of democracy, it may equally be a weapon destroying it. In the epoch of participatory democracy, we are flooded with speech and, consequently, attacked by the hyperpresence of hate speech.

Democracies around the globe invented different methods and instruments aimed at limiting the adverse or even devastating impact of abused rights-based instruments: deliberative democracy providing for more in-depth public discourse, dependable opinion-making provided by professional lawyers, instruments of professional deontology and expressing professional ostracism (be it through disciplinary sanctions or simply "naming and shaming"), continuing education for actors of the judicial *theatrum* allowing for identification of abusive practices in courts *etc*.

The basic and most profound prerequisite of effective preventing of democracy and human rights against abusive, anti-democratic practices, is deliberation making in the general public, and in particular lawyers, aware of the risks posed by such actions. Democracy must never be taken for granted, as once aptly noted by Yves Leterme[70].

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[68] J. Kurbalija, *Ancient Greek diplomacy: Politics, new tools and negotiation*, "Diplomacy and Technology: A historical journey', 2021, DiploFoundation, https://www.diplomacy.edu/histories/ancient-greek-diplomacy-politics-new-tools-and-negotiation/, uploaded June 21, 2024.

[69] K. Loewenstein, *Militant Democracy and Fundamental Rights, I*, *op. cit.*, p. 421.

[70] See https://www.idea.int/news/democracy-cannot-be-taken-granted-says-secretary-general-yves-leterme, uploaded June 24, 2024.

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