



# HELŚIŃSKA FUNDACJA PRAW CZŁOWIEKA HELSINKI FOUNDATION for HUMAN RIGHTS

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**Secretariat of the Committee of Ministers  
Council of Europe  
67075 Strasbourg Cedex  
France**

*Dear Madame / Sir,*

The Helsinki Foundation for Human Rights (hereinafter: HFHR) would like to draw the attention of the Committee of Ministers to the question of execution of judgements concerning criminal defamation in Poland. It has caught our attention that these cases are not foreseen for examination at the next Committee of Ministers' Human Rights meeting on 7-9 March 2017 (1280th CM-DH meeting). We would like to ask you to include to the Committee of Ministers' agenda a number of cases concerning criminal defamation in Poland. Particularly, Koniuszewski v. Poland, Maciejewski v. Poland, Jucha and Żak v. Poland, Lewandowska-Malec v. Poland, Kurłowicz v. Poland, Długolecki v. Poland, Dąbrowski v. Poland, Malisiewicz-Gąsior v. Poland, Sokołowski v. Poland, Galus v. Poland, Szczerbiak v. Poland and Marek v. Poland cases.

While Poland made a significant progress in the implementation of judgments in the recent years, criminal defamation remains an unsolved question. This issue has been raised during the Intergovernmental Committee for Implementation of the European Court of Human Rights judgments organized by the Government's Agent on 15 December 2016. Despite the Agent information on the need to implement those judgments, the Ministry of Justice informed that there would be no action in that respect in the near future.

Defamation remains a criminal offence in Poland. Under the article 212 of the Criminal Code defamation consists of 'accusing someone of a conduct that may degrade him in public opinion or expose him to the loss of confidence necessary for a given position, occupation or type of activity'.

Article 212 § 2 of the Criminal Code still previews the sanction up to one year of imprisonment for a defamation via media. The European Court of Human Rights has continuously hold that the imposition of a prison sentence for a press offence or a statement

expressed in connection with a public debate will be compatible with freedom of expression as guaranteed by the article 10 of the European Convention of Human Rights only in exceptional circumstances, notably where other fundamental rights have been impaired, as for example, in the case of hate speech or incitement to violence<sup>1</sup>. The Polish legal order includes provisions specifically intended to counter hate speech and incitement to violence which preview the sanction of imprisonment<sup>2</sup> – thus leaving the imprisonment sanction for defamation is by no means necessary. In this context it is important to notice that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 already in 2007 urged those member States which still provide for prison sentences for defamation to abolish them without delay<sup>3</sup>.

It needs to be underlined that less severe sanctions, such as criminal fines or limitation of liberty, even when suspended for probationary period, may also cause 'chilling effect' on the public debate, as they constitute sentences under criminal law and, in consequence, are registered in the criminal record of the convicted. The registration has important consequences for the convicted, as it precludes employment in certain jobs. Furthermore there are also severe nuisances associated with a sole criminal proceedings in defamation cases, such as the obligation of personal attendance at the trial or the possibility of imposing the preventive measures such as temporal custody or psychiatric observation warrant.

In the practice of the HFHR we observe that 'chilling effect' is more likely to affect the local press and local activists which in case of facing the defamation charges, cannot afford the professional legal aid. Moreover the criminal defamation proceedings are perceived as one of the main reasons of investigatory journalism deterioration in Poland and the shift of occupation of many journalists, which often choose a 'safer' form of 'light' journalism, which in a lesser extent may affect them with criminal responsibility. It should be also noted, that although traditionally article 212 § 2 used to be applied mostly to journalists who had access to the off-line media, nowadays all the Internet users are exposed to bearing the more severe responsibility for the so called “qualified type of defamation”.

It should be underlined that the Polish legal order provides means of protecting reputation other than criminal defamation, such as civil protection of personal rights<sup>4</sup> or request for rectification (correction of information in the press)<sup>5</sup>.

The number of defamation cases in Poland remains high and generally increasing. According to the statistics provided by the Ministry of Justice, in 2012 there were 60 people sentenced for defamation committed through media. In 2013 and 2014 this number slightly decreased to 58 convictions each year, but it increased again in 2015 up to 70 convictions. Just in the first

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<sup>1</sup> *Cumpana and Mazare v. Romania* [Grand Chamber], No. 33348/96, 17 December.2004; *Otegi Mondragon v. Spain*, No. 2034/07, 15 March 201.

<sup>2</sup> Article 196 and articles 255 - 257 of the Criminal Code.

<sup>3</sup> Parliamentary Assembly, Resolution 1577 (2007) *Towards decriminalisation of defamation*, adopted on 4 October 2007.

<sup>4</sup> Articles 23 - 24 of the Civil Code.

<sup>5</sup> Articles 31a - 33 of the Press Act.

six months of the 2016, there were 51 convictions on the basis of article 212 § 2 of the Criminal Code. Among these, since 2012, 21 people were sentenced for imprisonment (vast majority in suspension)<sup>6</sup>. In many cases concerning criminal defamation, the ECtHR ruled that Poland had violated article 10 of the Convention, there was also a number of cases in which Poland made a unilateral declaration. Based on HUDOC database, these are: Koniuszewski v. Poland, Maciejewski v. Poland, Jucha and Żak v. Poland, Lewandowska-Malec v. Poland, Kurlowicz v. Poland, Długolecki v. Poland, Dąbrowski v. Poland, Malisiewicz-Gąsior v. Poland, Sokołowski v. Poland, Galus v. Poland, Szczerbiak v. Poland and Marek v. Poland.

Although the Court does not require in its jurisprudence the abolition of criminal defamation in the domestic legal systems, years of observing defamation trials in Poland brought us to the conclusion that the only solution that may guarantee this institution is not overused is actually the decriminalisation and turning to the civil remedies as an appropriate measure to protect other people's reputation. Even though as a new democracy, we should be particularly sensitive to the importance of pluralistic debate, the HFHR's monitoring experience show that defamation is often used to block the debate on matters of the public interest rather than to genuinely protect the legitimate aims.

It should be noted that on 1 September 2016 the Ombudsman called on the authorities to abolish the institution of criminal defamation. The Ombudsman particularly stressed that the decriminalisation should be followed by the introduction of a new offence in the criminal code (serious slander – spreading intentionally false information about someone) and by amendments into the civil regime, in order to facilitate the recourse to civil defamation<sup>7</sup>.

We would like to kindly ask the Committee of Ministers to take into consideration all of the arguments presented above and to include the cases against Poland concerning criminal defamation on the agenda of the next Committee of Ministers' Human Rights meeting scheduled on 7-9 March 2017.

On behalf of Helsinki Foundation for Human Rights



*Sincerely*  
Helsinki Fundacja Praw Człowieka  
**PREZES ZARZĄDU**  
*Danuta Przywara*  
**Danuta Przywara**

<sup>6</sup> The statistics were provided by the representative of the Ministry of Justice on the meeting of the Intergovernmental Committee for Implementation of the European Court of Human Rights judgments on 15 December 2016, see the minutes of the Committee for Matters of the European Court of Human Rights: <https://www.msz.gov.pl/resource/a92225bc-4842-4c16-a7de-9f1d8bdc3c4a:JCR>

<sup>7</sup> The Ombudsman proposals are available on: <https://www.rpo.gov.pl/pl/content/art-212-rzecznik-proponuje-zmiany-w-przepisach-o-znieslawieniu>