

**Council of Europe
DGI – Directorate General of Human Rights
and Rule of Law
Department for the Execution of Judgments of
the ECtHR
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FRANCE**

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The Helsinki Foundation for Human Rights (hereinafter: HFHR), the Journalistic Society (*Towarzystwo Dziennikarskie*, hereinafter: TD) and Watchdog Polska (hereinafter: WP) addresses the Committee of Ministers in its supervisory capacity, pursuant to Rule 9.2. of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of terms of friendly settlements.

1. Kurlowicz group of cases

The three organizations would like to draw the attention of the Committee of Ministers to the question of execution of European Court of Human Rights' (hereinafter: ECtHR) judgments concerning criminal defamation in Poland, grouped together under the case of *Kurlowicz v. Poland* (application no. 41029/06). The cases of this group concern violations of the right to freedom of expression (Article 10) due to the applicants' (politicians, journalists or editors) criminal conviction to fines for defamation on different instances between 2002-2010. Together with the case of *Kurlowicz* (leading case), the group consist of 5 cases.

Noting the vital role of the press in a democratic society, the Court indicated that the relevant interferences were disproportionate to the legitimate aim pursued and not “necessary in a democratic society” within the meaning of Article 10 § 2 of the Convention.

Furthermore, 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 or was strike out of the list of cases for other reasons¹. Based on the HUDOC database, a number of cases dealing with criminal defamation remain unimplemented: *Koniuszewski v. Poland* (application no. 619/12), *Maciejewski v. Poland* (application no. 23755/03), *Jucha and Żak v. Poland* (application no. 19127/06), *Lewandowska-Malec v. Poland* (application no. 39660/07), *Kurlowicz v. Poland* (application no. 41029/06), *Długołęcki v. Poland* (application no. 23608/03), *Dąbrowski v. Poland* (application no. 18235/02), *Malisiewicz-Gąsior v. Poland* (application no. 43797/98),

¹ E.g. *Cieśla v. Poland*, application no. 70345/14.

Sokołowski v. Poland (application no. 75955/01), Galus v. Poland (application no. 61673/10), Szczerbiak v. Poland (application no. 23655/09) and Marek v. Poland (application no. 34103/03). A number of new cases related to criminal defamation are pending before the ECtHR.²

2. Government Action Report

The Government Action Report from 6 June 2017 focuses on 3 aspects relating to criminal defamation: (1) nature and severity of the penalty imposed by the domestic courts; (2) too narrow definition of what is public debate applied by the domestic courts and not taking into account contexts in which impugned statements were made; (3) lack of recognition by the domestic courts between statements of fact and value judgements.

As general measure the Government has mentioned the legal changes adopted in 2009, which resulted in the elimination of the prison sentence, limiting the penalty to a fine or a community sentence. As far as the aggravated form of defamation is concerned (Article 212 par. 2 – defamation through means of mass communication), the maximum prison sentence has been decreased from two years to one year. The amendment has been in force since 8 June 2010. The Government also highlighted the activities of dissemination of the judgment and training of legal professionals. The Government shared statistical data in order to prove, that the number of prison sentences adjudicated based on art. 212 par. 2 remains low. However, it must be noted that, although the aforementioned act has amended article 212 § 1 of CC was amended by the aforementioned act and defamation is *in principio* no longer punishable by prison sentences, this kind of penalty can still be imposed in cases pertaining to defamation via media (covered by article 212 § 2 of CC).

Moreover, the Government highlighted that there is a need to provide with information and training, in order to challenge the too narrow definition of public debate adopted by national courts, as well as the lack of recognition between statement of facts and value judgments. The Government is spreading information about the ECtHR judgments in that respect. In order to demonstrate the impact of its activities, the Government gave examples of national courts judgments, where those principles were applied. Information sharing and training was also envisaged in order to cope with the lack of distinction between value judgments and statement of facts.

The Polish Government states that the existence of this legal status, which relies on both criminal and civil defamation regimes, must be sustained in order to prevent the creation of a legal lacuna in respect of the protection of a person's reputation. The HFHR, TD and WP shares the views of the Parliamentary Assembly of the Council of Europe and thus finds those claims highly debatable.

² E.g. Kasproicz v. Poland, application no. 58400/14.

3. Criminal defamation – unsolved problem

Criminal defamation remains an unsolved question. The Polish Minister of Justice admitted on February 14th, 2019 that the government is currently discussing the potential decriminalization of defamation in Poland.³ However, as of today, no substantial steps have been taken to sufficiently address this issue.

Defamation remains a criminal offence in Poland. Under art. 212 of the Criminal Code (hereinafter: the CC), 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'.

Art. 212 § 2 of the CC still foresees **sanctions up to one year of imprisonment for a defamation via media**. The ECtHR has continuously held 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 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.⁴ The Polish legal order includes specific provisions intended to counter hate speech and incitement to violence which carry a sanction of imprisonment.⁵ Therefore, penalizing defamation with imprisonment is by no means necessary in the Polish legal system. In this context it is important to notice that, already in 2007, the Parliamentary Assembly of the Council of Europe in its Resolution 1577 urged those member States which still provide for prison sentences for defamation to abolish them without delay.⁶

The only other actions, in respect of general measures, taken by the Government to implement the ECtHR's judgments were the publication and dissemination of those judgments among domestic courts. According to the Action Report, the National School of Judiciary and Public Prosecution has also organized a series of trainings for judges on the topic of 'Criminal proceedings as a form of interference with freedom of expression and the conditions of its admissibility in the light of the European Court of Human Rights' case-law concerning Article 10 of the Convention'. It should be noted, that those measures had an impact on the interpretation of public interest and distinction between value judgments and facts. However, the interpretation, in accordance with the ECtHR is not a norm and still judgments occur, where those interpretational rules are not applied⁷. It often happens still, that the courts do not take into account the rules on journalistic due diligence, forcing the accused to prove

³ The Minister of Justice's statement is available at: <https://polskieradio24.pl/5/1222/Artykul/2263491,Wazna-deklaracja-ministra-sprawiedliwosci-ws-art-212-Kodeksu-karnego>

⁴ *Cumpana and Mazare v. Romania* [Grand Chamber], No. 33348/96, 17 December 2004; *Otegi Mondragon v. Spain*, No. 2034/07, 15 March 2011.

⁵ Article 196 and articles 255 - 257 of the CC.

⁶ Parliamentary Assembly, Resolution 1577 (2007) *Towards decriminalisation of defamation*, adopted on 4 October 2007.

⁷ E.g. Case of Wojciech Biedroń describing judge Łączewski.

all the formulated statements⁸. Therefore, it should be noted, that the **measures proposed in the Action Report, are not effective.**

4. Raising number of criminal defamation cases

These measures have not proved effective in reducing the number of criminal prosecutions and convictions for defamation. Indeed, statistical data **shows an increase in the use of art. 212 of the CC by the domestic courts.** Yet, HFHR, TD and WP would like to point out that statistical data provided below shows an increase in the use of article 212 of the CC by the domestic courts, suggesting that the measures taken by the Government are insufficient and ineffective.

According to the statistics provided by the Ministry of Justice, in 2012, 60 people were sentenced for defamation committed through media. In the period from November 2012 until 2015, the number of persons convicted based on art. 212 par. 1 and 2 of the CC decreased steadily. This was particularly due to actions undertaken by the HFHR together with the Polish Association of Journalists, the Association of Local Journalists and the Chamber of Publishers, namely a campaign conducted in 2012 aimed at “deleting art. 212 of the penal code”⁹. The proposed first step was to delete the sanction of imprisonment from article 212 par. 2 (defamation via media), which has mostly affected journalists and bloggers. Despite the action, the Polish legislators (Ministry of Justice) have not brought the country’s defamation law in line with international standards. Comparing those numbers with 101 convictions on the basis of article 212 § 2 of the CC in 2016, and 137 of these convictions in 2017, clearly shows that the general measures taken by the Polish Government have failed to sufficiently implement the ECtHR’s judgments into the domestic judiciary system.¹⁰

Type of proceedings/ number of convictions ¹¹	2012	2013	2014	2015	2016	2017	2018
Art.212 §1 Criminal Code	179	165	163	157	229	201	221
Art.212 §2 Criminal Code	60	58	58	70	101	137	118

⁸ E.g. case Cieśla v. Poland, application no. 70345/14.

⁹ More information about the campaign can be found on: <http://www.hfhr.pl/kampania-wykresl-212-kk-wystapienie-do-ms/>

¹⁰ The statistics were provided by Ministry of Justice on the 20th March 2019 in response to HFHR’s motion to access this information on the basis of Freedom of Information Act.

¹¹ Data based on a request for information to the Ministry of Justice on the number of convictions based on art. 212 par. 1 and 2.

The number of instances in which defamation via media is being penalized with imprisonment has actually decreased¹². However, persons prosecuted on the basis of article 212 § 2 of the CC are still facing severe consequences and the sole threat of this punishment may endanger freedom of speech in Poland and in particular act as a deterrent for Polish independent journalism. Even less severe sanctions, such as criminal fines or limitation of liberty, even when suspended for probationary period, may also cause a **'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 a psychiatric observation warrant.

5. Greater use of penal remedies against speech

Another recent tendency could be observed in the last couple of months, namely the increased use of penal 'state machinery' for the purposes of protecting the reputations of particular officials. The most prominent example is the case of Wojciech Czuchnowski, editor of *Gazeta Wyborcza*, who was under investigation for insult of a constitutional body, after publishing a series of articles examining links between top judges of the Constitutional Tribunal and intelligence agencies.¹³ In some isolated cases, journalists are targeted with severe charges, such as espionage in the case of a *Newsweek Polska* reporter who was investigating the story behind the nomination of Mr. Woyciechowski, the Chairman of the Board of the Polish Security Printing Works and the case of mass layoffs in this company that followed.

6. Consequences of maintaining criminal defamation

In the practice of the HFHR, TD and WP we observe that this 'chilling effect' is more likely to affect the local press and local activists which in case of facing the defamation charges, often cannot afford the professional legal aid. As has been observed in our practice, often, local titles face several proceedings, criminal and civil at once. An example could be a series of cases opened by a local lawyer against *Kurier Słupecki*. Journalists face both criminal and civil proceedings for the same publications¹⁴.

Moreover, the criminal defamation proceedings are perceived as one of the main reasons of **investigative journalism deterioration in Poland** and the shift of occupation of many local journalists

¹² In 2018 6 persons were given prison sentences, of which 4 were suspended.

¹³ D. Bychawska-Siniarska, Criticizing the new President of the Polish Constitutional Court: A Crime against the State?, *Verfassungsblog*, 6 December 2017, article available at: <https://verfassungsblog.de/criticizing-the-new-president-of-the-polish-constitutional-court-a-crime-against-the-state/>

¹⁴ Criminal proceedings for defamation, case file no. IIK 156/18, civil proceedings, case file no. I C 1151/19.

(and bloggers), which often choose a 'safer' form of journalism, which in a lesser extent may affect them with criminal responsibility. It should be noted that although traditionally article 212 § 2 CC 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'. Moreover, it should be noted that the procedure impacts on the burden of proof, which according to the Polish Code of Criminal Procedure, should rely on the prosecution. Once a private bill of indictment send to the court, the **burden of proof lies with the accused**.

Additionally, it should be underlined that the Polish legal order provides means of protecting reputation other than criminal defamation, such as civil protection of personal rights¹⁵ or request for rectification (correction of information in the press).¹⁶

Another significant consequence of the use of **criminal defamation is its politicization**. Not only by the greater use by politicians, but also, because of the potential, selective use of the pardon institution by the President. In 2017 the President has issued a pardon in the case of Tomasz Wróblewski¹⁷. Currently the President considers the application of pardon in the case of activist and politician Jan Śpiewak. The HFHR, TD and WP believes that the use of pardon may be selective and protect only pro-governmental or governmental media. This in turn would lead to a situation, where the article would be effective only towards a certain group of media, persons, particularly those who are independent or in opposition to the Government.

7. Recommendations to ensure proper implementation

Having considered all of the above, the HFHR, TD and WP finds that measures taken by Polish Government, which are practically exclusively limited to implementing individual measures pursuant to article 540 § 3 of the Code of Criminal Procedure, cannot be viewed as in any way sufficient in respect to the implementation of ECtHR judgments concerning criminal defamation. We believe that the full implementation of the judgments relating criminal defamation would require:

- **Decriminalization of defamation;**
- **As the first or alternative step, the elimination of the prison sentence from art. 212 par. 2 of the CC;**
- **Including pre-service and in-service trainings on ECtHR freedom of expression case law for judges and prosecutors.**

To conclude, 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**

¹⁵ Articles 23 - 24 of the Civil Code.

¹⁶ Articles 31a - 33 of the Press Act.

¹⁷ More about the case: <https://www.rp.pl/Prawo-karne/302019938-RZECZOprawie---Dariusz-Pluta-karanie-za-znieslawienie-na-mocy-art-212-kk-to-wstyd-dla-Polski.html>

the decriminalisation and turning to the civil remedies as an appropriate measure to protect other people's reputation. The HFHR, TD and WP shares those views with the Ombudsman who on 1 September 2016 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.¹⁸

Alternatively, if a full abolition of criminal defamation were not possible in the current political climate, we kindly ask the **Committee of Ministers to encourage the Polish government to abolish the prison sentence prescribed in art. 212 par. 2 of the Criminal Code.** We believe that, though not sufficient, this could be a positive step forward, diminishing the risk for media professionals and bloggers. Even though as a new democracy, we should be particularly sensitive to the importance of pluralistic debate, the HFHR's, WP's and TD'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.

Pre-service and in-service training of judges and prosecutors relating to ECtHR case law on freedom of expression and criminal defamation should be developed in details. Such training should include questions, such as: thicker skin of politicians, distinction between statement of facts and value judgments, public interest and political debate, as well as the question of burden of proof.

Therefore, 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 March 2020. Furthermore, facing longstanding disregard of Parliamentary Assembly of the Council of Europe and ECtHR views in respect to criminal defamation on behalf of Polish Government and the continuous insufficiency of the measures taken by the Government presented in the Action Report, we would like to underline the urgency of addressing this issue as current legal status endangers freedom of speech in Poland and in particular the independent status of Polish media. Thus, we also respectfully ask the Committee of Ministers to **consider including cases against Poland concerning criminal defamation under the enhanced supervision procedure.**

Sincerely,



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¹⁸ The Ombudsman proposals are available on: <https://www.rpo.gov.pl/pl/content/art-212-rzecznik-proponuje-zmiany-w-przepisach-o-znieslawieniu>