

International Association of Judges (IAJ/UIM)
3rd Study Commission – 2022
Topic: Restrictions by the Criminal Law on the Freedom of Speech
POLAND

1. *Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.*

Freedom of speech in Poland is protected by several legal acts, the most important of which is the Constitution of the Republic of Poland.

It states in Article 54:

1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.
2. Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station.

Moreover, the Constitution also provides for the freedom of the press:

Article 14

The Republic of Poland shall ensure freedom of the press and other means of social communication.

Apart from the above, Poland is bound to protect the freedom of speech by various international agreements, such as:

Article 11 of the European Charter of Fundamental Rights

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

or Article 10 of the European Convention on Human Rights

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It should be emphasized that there are two sides of the freedom of speech – the right of expression and the right to impartial information.

The right of expression in Poland is subject to some limits that will be described below.

The right to impartial information has been seriously hindered in the last years, starting from 2015, due to the role of the public television and radio.

The public media in Poland (Polish Television/Telewizja Polska – TVP and the Polish Radio/Polskie Radio) are controlled by the ruling party and they spread constant governmental propaganda instead of objective news. These media attack the opposition, the European Union and its institutions, other Member States, in particular Germany, the refugees, etc. On the other hand, they praise all the actions of the ruling party and its politicians. During the election campaigns the public media give priority to the ruling party candidates.

It should be noted that there are regions, especially in the east of Poland, where the public media are the main source of information.

This tremendous lack of impartiality of the public media has huge impact on many aspects of life, including the results of the elections.

It should also be noted that last year the ruling party (Prawo i Sprawiedliwość/Law and Justice) tried to deprive the main independent TV station of the right to broadcast in Poland, under the pretext that it is owned by an American company – Discovery. This resulted in a wave of protests all over the country. Despite that the discriminatory law went through the legislation process and it was only stopped by a presidential veto.

The above situation shows the importance of impartial media for enforcement of the free speech principle.

2. Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.

Article 256 Paragraph 1 of the Polish Criminal Code states:

Whoever publicly popularizes fascist or other totalitarian regime or calls for hatred derived from national, ethnic, racial or religious differences or because of irreligiousness, can be punished with a fine, limitation of freedom or imprisonment for up to 2 years.

This regulation is very insufficient, as many hate speech cases concern the LGBTQ persons who are not at all protected by the criminal law. This matter should be resolved as soon as possible.

Unfortunately, the Minister of Justice of Poland Zbigniew Ziobro and his associates, and even the President of Poland and the leader of the ruling party Jarosław Kaczyński, promote the anti-LGBTQ moods and actions, so it is not likely that this regulation will be amended soon.

Another problem is that the public prosecutors in Poland are not independent, they are subordinated to the political power. The Minister of Justice is at the same time the Prosecutor General and basically no investigation concerning the wrongdoings of the ruling party politicians or their allies has been conducted for the past 7 years.

For example, there is a famous case of a nationalist assembly in Katowice in November 2017, during which the organizers hang on gallows the portraits of Polish members of the European Parliament who voted for a resolution concerning the rule of law in Poland. The prosecutor's office decided to dismiss the case several times. Finally it was the victims who placed the case in court. Another example is a case of "political death certificates" that were sent to several politicians by the nationalists. Also in this case the prosecutor refused to indict the perpetrators. It should be noted, that one of the persons who received this "death certificate", Mayor of Gdańsk Paweł Adamowicz, was killed by an assassin in January 2018.

To sum up, there are regulations in the criminal code against the hate speech, but they are insufficient and the prosecutor's office is reluctant to apply them, especially in cases of hate speech against politicians from opposition parties.

3. Does your country have restrictions by the criminal law of the freedom of speech?

And if yes, could you give an overall picture of what the legislation is like?

Including

o Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions

o Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics

There are three types of regulations concerning limits of free speech in the Polish criminal code.

The first one concerns offending the state impersonations: the emblem, the nation, the constitutional organs or public officials (a very wide range of crimes, punishable also by imprisonment), the second one – libel and and insult and the third one – offence of religious feelings.

A. There are several provisions in the Criminal Code that apply to the first group of cases:

Article 133 provides for public insult of the Nation or the Republic, that can result in up to 3 years imprisonment.

Article 135 Paragraph 2 states that publicly insulting the President of Poland can result in up to 3 years imprisonment.

Article 137 provides for a crime of insult to the flag, emblem or other state symbol, that can be punished by fine, limitation of freedom but also by imprisonment for up to one year.

Finally, Article 226 of the Criminal Code states that public insult of a state official during performance of his/her duties is punishable by up to a year's imprisonment (Paragraph 1) and public insult or humiliation of a constitutional organ of the Republic of Poland is punishable by imprisonment of up to 2 years.

B. There are two types of crimes provided for in the Criminal Code related to the protection of individuals against abuse of free speech.

The first one is Article 216 of the Code that provides for liability for insult.

The second one is Article 212 that provides for liability for libel. It should be noted that journalists are not excluded from the scope of this regulation.

The details of these provisions will be described in answers to question 4.

C.

As for the crime of the offence of religious feelings, Article 196 of the Criminal Code provides:

Who offends the religious feelings of other persons by publicly insulting an object of religious worship or a place destined for public performance of religious practices, will be subject to a fine, limitation of freedom or imprisonment of up to 2 years.

This regulation has been used to investigate artists and activists for their interpretation of religious symbols, for example a picture of Virgin Mary with the baby Jesus and a rainbow halo was considered by the prosecutor's office as an offence against religious feelings and the LGBT activist Elżbieta Podleśna who used this symbol was prosecuted (and acquitted).

A description of several cases concerning the investigations of alleged abuse of free speech using the above provisions of the Criminal Code can be found under this link:

<https://notesfrompoland.com/2018/08/21/polands-insult-laws-and-the-threat-to-free-speech/>

4. If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?

• Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category

• In cases where the freedom of speech and the restrictions are to weighed against each other – o Are there then guidelines on how the balancing should be done?

o If Yes, which of the two parameters weighs heaviest, a) the protection of free speech or b) the category that is protected by the legislation? And does this differ from category to category?

o And how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?

There are provisions in the Criminal Code that moderate the limitations to the freedom of speech. Article 213 of the Criminal Code states that the crime of libel provided for in Article 212 is not committed if a non-public accusation is true. Also, the public persons are less protected than ordinary citizens. Accordingly, public true statement concerning the conduct of a person performing a public function or made in order to defend a socially legitimate interest will not be considered as a crime.

The burden of proof lies on the defendant.

However, if the statement concerns the private or family life, the proof of truth can be performed only when the statement is aimed to prevent a danger for life or health of humans or demoralization of a minor.

Even if the conditions of Article 213 are fulfilled, the culprit can be found responsible for insult. As for liability for an insult, the court can choose not to punish the perpetrator if the insult was a result of defiant behaviour of the victim or if the victim responded with an insult or physical assault. It should be noted that both of these crimes are private-prosecution offences. However, the public prosecutor can choose to prosecute these crimes as well, having in view the public interest.

5. Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?

o If it gives cause for doubt, how is it expressed? Does it deter the citizen from making statements?

Or does it deter citizens from suing?

These regulations are quite complicated and can be abused. It should be noted that speaking the truth in public may lead to conviction for libel, which seems quite ridiculous in a democratic society. This unusual construction transfers the burden of proof to the defendant which is quite unusual and can cause a freezing effect among the society and, in particular, the press.

Criticism of politicians who perform constitutional functions, like the President, can be criminally prosecuted.

The protection of personal dignity and good name should be mainly ensured by means of civil proceedings and it definitely should not be punishable by prison as stated in Article 212.

6. Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and

comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases?

The regulations are unclear and insufficient. On the one hand they forbid the citizens to some extent to criticize the authorities, on the other hand they leave entire minorities unprotected (no hate speech criminalization if it is aimed against the LGBTQ people).

The developments in the law should lead to liberalization of regulations concerning the limitation of the freedom of speech, especially in the criminal code and at the same time to raising the level of protection of citizens against hate speech.