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The Constitutional Principle of Freedom of press and its Limitations in Journalistic Practice

Keywords: Constitutional Tribunal, freedom of press, media, journalism

Słowa kluczowe: Trybunał Konstytucyjny, wolność prasy, media, dziennikarstwo

Abstract

In Poland, freedom of press is a systemic principle that protects the rule of law. Relevant regulations regarding this matter are included in the constitution in force since 1997. However, other legal regulations contain solutions that raise objections of the journalistic environment and are described as repressive towards the media. The Article 212 of the Penal Code provides for example a criminal penalty of up to one-year imprisonment for the offense of defamation using mass media. According to journalistic circles, such a provision negatively affects journalistic practice causing the so-called “chilling effect”, i.e. unwillingness to undertake controversial subjects. The discussed issue is analyzed in the light of the provisions of the Constitution, jurisprudence of the Constitutional Tribunal, the Press Law Act, as well as selected articles of the Penal Code.

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Streszczenie**Konstytucyjna zasada wolności prasy i jej ograniczenia w praktyce dziennikarskiej**

Wolność prasy jest w Polsce zasadą ustrojową, która zabezpiecza rządy prawa. Odpowiednie regulacje dotyczące tej materii są zapisane w konstytucji obowiązującej od 1997 r. Jednak w innych regulacjach prawnych są zapisane rozwiązania, które budzą opór środowiska dziennikarskiego i są określane jako represyjne w stosunku do mediów. Takim rozwiązaniem jest art. 212 kodeksu karnego, który przewiduje m.in. sankcję karną do roku pozbawienia wolności za przestępstwo zniesławienia za pomocą mediów. Według środowisk dziennikarskich taki przepis negatywnie wpływa na praktykę dziennikarską powodując tzw. „efekt mrożący”, czyli niechęć do podejmowania kontrowersyjnych tematów. Omawiane zagadnienie jest analizowane w świetle zapisów konstytucji, orzecznictwa Trybunału Konstytucyjnego, przepisów prawa prasowego, a także wybranych artykułów kodeksu karnego.

The aim of the paper is to analyze the constitutional principle of freedom of press in the context of legal solutions affecting the functioning of the media. The issue is discussed in the light of the provisions of the constitution, the jurisdiction of the Constitutional Tribunal, the Press Law Act, as well as selected articles of the Penal Code. The provisions regarding freedom of press are confronted with legal provisions that may affect journalistic practice in this area.

I. Freedom of speech and press

Freedom of speech and the right to free expression are one of the fundamental rights in a democratic system². L. Jaworski claims that freedom of speech has no primacy over other freedoms, but the situation in which it is impos-

² *Leksykon wiedzy politologicznej*, eds. J. Marszałek-Kawa, D. Plecka, Toruń 2018, pp. 544.

sible to actually exercise freedom of speech questions the real functioning of other freedoms³.

As J. Sobczak notes, freedom of press is a derivative of freedom of thought, which results in freedom of belief. The essence of freedom of speech is the right to express views, both in spoken form and words recorded in the publication. As the same author adds, freedom of press is possible when freedom of speech and freedom of expression are guaranteed. Thus, full freedom of press is possible when there is real freedom of thought, belief, expression, speech, information, publication⁴.

In this context, the rights enshrined in the constitution of 1997 are significant in Poland. Article 14, chapter I of the constitution of the Republic of Poland states that “the Republic of Poland shall ensure freedom of press and other means of social communication”. In turn, in Article 54 it is stated that the freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone. At the same time, preventive censorship of media and press licensing are prohibited in Poland (a license to operate a radio or television station may be provided by law)⁵. In this context, reference should also be made to the provisions of the Press Law Act, according to which “the press, pursuant to the Constitution of the Republic of Poland, has the right to freedom of expression and realizes the right of citizens to reliable information, transparency of public life as well as social control and criticism”⁶.

The right to freedom of expression is also mentioned in the Article 10 of the European Convention on Human Rights. According to it, “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”. At the same time, the provision shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises⁷.

³ L. Jaworski, *Wolność wyrażania poglądów a wolność środków społecznego przekazu w Konstytucji Rzeczypospolitej Polskiej*, [in:] *Prawo prasowe między wymogami prawa, nakazami etyki a oczekiwaniami rynku*, eds. J. Sobczak, K. Chałubińska-Jentkiewicz, Toruń 2016, p. 34.

⁴ J. Sobczak, *U podstaw doktrynalnych liberalnej koncepcji wolności prasy*, [in:] *Czy istnieje IV władza? Wolność prasy w teorii i praktyce*, eds. T. Gardocka, J. Sobczak, Toruń 2010, p. 36.

⁵ The Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78, item 483).

⁶ The Press Law Act of January 26, 1984 (Dz.U. 2018, item 1914).

⁷ The European Convention on Human Rights, https://www.echr.coe.int/Documents/Convention_POL.pdf (2.10.2019).

II. Legal solutions affecting journalistic practice

As emphasized in the literature, the functioning of the free press is one of the mechanisms that secures the system of the rule of law. But at the same time, such values as freedom of speech and the press are perceived as competing with the values of personal rights⁸.

In Poland, the provision that has long been criticized by the journalistic community is the Article 212 of the Penal Code. §1 states that “Whoever imputes to another person, a group of persons, an institution or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year”. According to §2 “If the perpetrator commits the act specified in § 1 through the mass media shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years”. The offenses specified in § 1 and § 2 are prosecuted by private prosecution⁹. At the same time, the Article 213 § 2 of the Penal Code states that whoever raises or publicises a true allegation concerning the behavior of a person holding a public function in defense of a justifiable public interest shall be deemed to have not committed the offence specified in Article 212 § 1 or 2¹⁰.

The Article 212 of the Criminal Code, which provides for the possibility of criminal sanction in case of the media infringing personal rights, is referred to as the most common and most severe means of repression against the media¹¹. As A. Bodnar notes, maintaining a criminal law provision that provides

⁸ M. Łoszewska-Ołowska, *Wolność słowa i prasy a ochrona dóbr osobistych w Polsce – konflikt, czy konieczny kompromis?*, [in:] *Czy istnieje IV władza? Wolność prasy w teorii i praktyce*, eds. T. Gardocka, J. Sobczak, Toruń 2010, p. 111; 39; J. Marszałek-Kawa, *Realizacja funkcji kontrolnej przez parlamenty narodowe*, „Cywilizacja i Polityka” 2003, No. 1, pp. 95–112.

⁹ Quoted from the Act of June 6, 1997, Criminal Code (Dz.U. No. 88, item 553, namely Dz.U. 2019, item 1950), <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf> (15.10.2019).

¹⁰ Ibidem.

¹¹ D. Sześciło, *Paragraf 212. Karanie dziennikarzy za zniesławienie w polskiej praktyce*, Warsaw 2009, p. 7.

for criminal liability for defamation is contrary to the guarantees of freedom of expression. Especially in a situation where journalists could be responsible for their professional activity through civil trials in cases concerning the protection of personal rights¹².

At the same time, experts note that most of defamation cases ends up not with criminal sanctions but with financial penalty as in civil cases. Important here is the very awareness of journalists that criminal liability may be applied to them, they may be accused in criminal proceedings and it is possible to apply preventive measures against them in connection with pending proceedings¹³. In addition, claim that is also made is that criminal cases conducted pursuant to the Article 212 of the Criminal Code often relate to opinions, assessments and other evaluative statements. Such statements are not subject to the criterion of truth and falsehood as in the case of facts and thus cannot be proved and are not subject to proof of truth¹⁴.

III. Jurisprudence of the Constitutional Tribunal

The Article 212 of the Criminal Code was the subject of a ruling of the Constitutional Tribunal in 2006. The subject of the Tribunal's audit were the features of defamation and defamation by means of mass communication. The initiator of the proceedings was the Gdańsk District Court, and the judgment was issued on October 30, 2006. The case was considered in the context of freedom of press and other social media, the principle of proportionality and freedom of speech¹⁵.

Referring to the Constitutional Tribunal, the District Court pointed out that criminal repression in cases concerning freedom of speech and freedom of press was unnecessary in a democratic state ruled by law, and therefore dis-

¹² Ibidem, p. 5.

¹³ Ibidem.

¹⁴ M. Domagalski, *Art. 212 Kodeksu karnego to relikty poprzedniej epoki*, rozmowa z Dariuszem Plutą, adwokatem, specjalistą i praktykiem do spraw mediów, <https://www.rp.pl/Rzecz-o-prawie/304029988-Art-212-Kodeksu-karnego-to-relikty-poprzedniej-epoki.html> (16.10.2019).

¹⁵ Judgment of October 30, 2006 r., P10/06 defamation crime, http://trybunal.gov.pl/fileadmin/content/omowienia/P_10_06_PL.pdf (17.0.2019).

proportionate. The same effects can be achieved by using the opportunities offered by the press law (possibility of rectification or reply) or by civil proceedings for the protection of personal rights¹⁶.

The Constitutional Tribunal stated that the Article 212 of the Penal Code in § 1 and § 2 is in accordance with the constitution. In the justification of the judgment, the Constitutional Tribunal stated that freedom of press, which is an element of freedom of speech, has the status of a systemic principle. This does not mean that freedom of speech is absolute and cannot be restricted. The constitution does not stipulate that freedom of speech has a supposed priority of protection against other freedoms and rights, including such as the right to protection of honor and reputation. The judges of the Tribunal also recognized that the protection of reputation in civil law proceedings is not as effective as “criminalizing defamation”. The relationship between honor and good name and human dignity speaks for the issue of honor and good name to be covered by criminal law. At the same time, the Constitutional Tribunal noted that the effects of defamation were “essentially irreversible” and could not be balanced by appeals or apologies. The more so that the defamation carried out through the media causes greater damage. At the same time, judges of the Constitutional Tribunal admitted that the possibility of a criminal conviction for defamation may hinder the shape of public debate, which is undesirable. However, the fact that defamation proceedings under the Criminal Code are initiated by private prosecution and the practice of applying the regulations contained in the Criminal Code makes it difficult to talk about the discussed provisions being a tool of excessive repression. It is also difficult to recognize that this is a manifestation of disproportionate interference with freedom of speech¹⁷.

In 2012 Ombudsman prof. Irena Lipowicz challenged the penalty of deprivation of liberty for up to one year for defamation to the Constitutional Tribunal. The basis of the conclusion was the belief that without questioning the need to punish defamation, the penalty of imprisonment due to its severity is disproportionate. As a consequence, this violates the provisions of the constitution and the Convention on Human Rights and Fundamental Free-

¹⁶ Ibidem.

¹⁷ Ibidem.

doms¹⁸. The Constitutional Tribunal dismissed the case in 2013 citing the decision of 2006¹⁹.

IV. Statistics of defamation sentences

As mentioned, the Constitutional Tribunal pointed out that the practice of applying the solutions provided in the criminal code is difficult to recognize as an instrument of excessive repression regarding freedom of expression and press. The Helsinki Foundation for Human Rights provides interesting data in this regard. According to statistics prepared on the basis of data provided by the Ministry of Justice for 2000–2011, the total number of people who have been convicted for defamation under the Article 212 of the Penal Code has increased significantly. In 2000 there were 43 such people, and in 2011 – 232. A significant increase in convicted persons can also be observed in relation to individual paragraphs of the Article 212 of the Penal Code. Pursuant to § 1, 38 final convictions were passed in 2000. In 2011 there were already 180 of them. On the basis of the Article 212 § 2 of the Penal Code (defamation by means of media), 5 people were convicted and sentenced in 2000. In 2011, 52 such sentences were made²⁰.

According to the data of the Polish Journalists Association, in 2005–2006, based on the provisions of the Article 212 of the Criminal Code, 102 cases concerning journalists were discontinued while in 23 cases journalists were sentenced²¹. Other proponents of changes to the Article 212 of the Penal Code point out that, e.g. in the years 2002–2008, 712 people were sentenced for defamation, while 1057 people were sentenced in this period for beating or par-

¹⁸ *Karanie za zniesławienie niekonstytucyjne? RPO zaskarżyła przepis*, <https://prawo.gazetaprawna.pl/artykuly/664742,karanie-za-znieslawienie-niekonstytucyjne-rpo-zaskarzyla-przepis.html> (30.10.2019).

¹⁹ A. Wójcik, *Knebel dla mediów. Zwłaszcza lokalnych. Artykuł 212 na straży interesów polityków i innych prezesów*, <https://archiwumosiatsynskiego.pl/wpis-w-debacie/knebel-dla-mediow-zwłaszcza-lokalnych-art-212-na-strazy-interesow-politykow-i-innych-prezesow> (30.10.2019).

²⁰ D. Głowacka, *Praktyczny przewodnik po artykule 212 k.k.*, Warszawa 2012, p. 21, <http://gazetylokalne.pl/wp-content/uploads/2015/10/PRZEWODNIK-WWW.pdf> (24.10.2019).

²¹ D. Sześciło, *op.cit.*, p. 7.

ticipating in a fight, which are perceived as more dangerous in consequences²². In 2016, 330 people in Poland incurred criminal liability under the Article 212 of the Criminal Code. In this group, 229 people were convicted under Article 212 § 1 and 101 people under Article 212 § 2²³.

Statistics also show that in the case of convictions for defamation, the most frequently imposed penalty is a fine. According to data for 2010, 146 people were sentenced to a fine pursuant to the Article 212 of the Penal Code (in 30 cases the sentence was conditionally suspended), 26 people were sentenced to restriction of liberty (in 4 cases the sentence was conditionally suspended) and 15 people were sentenced to imprisonment (in 11 cases the sentence was conditionally suspended)²⁴.

V. Legal provisions and journalistic practice

However, the discussed legal provisions have long been a source of controversy in the journalistic community. The provision of the Penal Code, which provides a prison sentence for the content of statements, was called “a stain on the Polish legal system” by representatives of the Chamber of Press Publishers²⁵. Critics of criminal liability for defamation claim that the consequence of such legal solutions is the so-called chilling effect, i.e. the fear of journalists and other citizens about publicly addressing certain topics. Other consequences relate to the need to participate in a long trial and, in the event of a conviction, entry in the criminal record, which may affect professional career in the future²⁶.

In 2011, a social campaign regarding the deleting a provision from the criminal code that provides criminal sanctions for defamation was carried out by the Association of Local Newspapers, the Helsinki Foundation for Human Rights and the Chamber of Press Publishers. The creators of the campaign were of the

²² D. Bychawska-Siniarska, *Wykreśl 212 kk. Czy odpowiedzialność za zniesławienie powinna zniknąć?*, http://www.tokfm.pl/Tokfm/1,103454,10205965,Wykresl_212_KK__Czy_odpowiedzialnosc_za_znieslawienie.html (21.10.2019).

²³ A. Wójcik, *op.cit.*,

²⁴ D. Głowacka, *op.cit.*, p. 21.

²⁵ D. Sześciło, *op.cit.*, p. 6.

²⁶ D. Bychawska-Siniarska, *Wykreśl...*

opinion that the entire Article 212 should be deleted from the criminal code. In their opinion, cases concerning defamation should be considered under civil law. This gives the opportunity to obtain more satisfactory compensation, without the negative consequences of a criminal penalty²⁷. It was the representatives of local editors who emphasized the consequences of criminal provisions on defamation in research carried out by the Association of Local Newspapers. Local newspaper publishers pointed out that this type of media is often “harassed in defamation cases”. Most of them are won by publishers. However, the trial itself is a nuisance for the publisher and editorial staff, which involves time spent on the trial, commuting costs and attorney’s fees²⁸.

The Ombudsman organized a discussion in 2019 in which the argument was put forward i.e. that the dispute over legal solutions under the Article 212 of the Criminal Code is in fact the settlement of the dispute over reputation and freedom. In this context, freedom is more important than reputation²⁹.

It should be noted, however, that the postulate that the cases concerning defamation should be resolved solely on the basis of civil law, also raised pragmatic doubts in the journalistic environment. In connection with the campaign regarding the deletion of the Article 212 of the Penal Code and discussion on this subject in 2011, there was an argument that settling cases concerning defamation only by means of civil proceedings may lead to an increase in the number of claims and the amount of damages awarded to journalists. This can also cause a “chilling effect” for journalists and publishers. Representatives of the legal community also drew attention to a similar aspect. The abolition of the provisions of the Article 212 of the Penal Code and transfer of defamation cases solely to civil law could result in the necessity for journalists to insure themselves against civil liability, as other professionals do, e.g. doctors³⁰.

²⁷ <http://gazetylokalne.pl/nasze-dzialania> (25.10.2019).

²⁸ K. Lisowski, *Dziennikarze lokalni najczęściej nękani sprawami o zniesławienie (raport)*, <https://www.wirtualnemedi.pl/artykul/dziennikarze-lokalni-najczesciej-nekani-sprawami-o-znieslawienie-raport> (25.10.2019).

²⁹ Art. 212 Kodeksu Karnego – jeśli chcecie go zostawić, to go zmieńmy. *Debata u Rzecznika*, <https://www.rpo.gov.pl/pl/content/debata-wolnosc-slowa-a-znieslawienie> (28.10.2019).

³⁰ K. Sobczak, „Wykreśl 212 kk” – ruszyła kampania przeciwko więzieniu za słowa, <https://www.prawo.pl/prawnicy-sady/wykresl-212-kk-ruszyla-kampania-przeciwko-wiezieniu-za-slowa,40627.html> (29.10.2019).

VI. Conclusion

Based on the analysis presented, several conclusions can be made. As noted in the paper, freedom of press and personal rights are seen as competitive values. In its jurisprudence, the European Court of Human Rights, also in cases concerning Poland, pointed out that the crime of defamation may be an element of excessive interference with the right to express opinions, as well as affect the limitation of political statements and public debate. The problem is the excessive severity of punishment, which may include imprisonment³¹.

It should be noted that from the point of view of journalistic practice, the possibility of criminal penalties for defamation may have the greatest impact on local media. They do not have such financial, organizational and legal support as large editorial offices. As a consequence, they are more susceptible to the “chilling effect” that can be caused by law.

The Constitutional Tribunal in Poland has recognized the provisions allowing criminal penalties for defamation to be in accordance with the Constitution. The decision on a possible change of criminal provisions, raising objections in journalistic circles, will therefore be of a political nature and belongs to the legislative bodies. The first step limiting the practical application of the Article 212 of the Penal Code may be the implementation of the postulate raised in the above-mentioned debate organized by the Ombudsman: journalists themselves in cases concerning defamation should consistently refrain from invoking the penal code for proceedings under civil law.

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