

POLAND

List of questions for CDMSI members on the implementation of Council of Europe standards related to safety of journalists and other media actors

1. Which are the existing mechanisms to ensure investigation and prosecution of attacks against journalists and other media actors?

Pursuant to Article 14 of the Constitution (official journal "Dz.U." 1997, No. 78, item 483, as amended), the Republic of Poland ensures the freedom of the press and other means of social communication. This provision is partially expounded in the Act – the Press Law (official journal "Dz.U." 1984, No. 5, item 24, as amended; hereinafter referred to as the 'Press Law'), which prohibits obstructing the process of collecting critical materials by the press or suppressing criticism in any other way. Furthermore, the Press Law regulates typical offences tantamount to attacks against journalists. Article 43 of the Press Law prohibits the use of violence or unlawful threats to compel a journalist to publish or abstain from the publication of a press material or to perform or abstain from a press intervention. A perpetrator of this offence is liable to a penalty of deprivation of liberty for up to 3 years. According to the interpretative practice, said violence or threat need not be applied directly against the journalist, but can also be addressed against, for example, the journalist's closest relatives. Notably, an effect in the form of the journalist's behaviour submissive to the will of the perpetrator is not required for this offence to be committed; the mere application of violence or threat against the journalist is sufficient. The Press Law also penalizes the second type of offence aimed at limiting the freedom of the press. Article 44 of this Act prohibits obstructing or suppression of press criticism under the penalty of a fine or restriction of liberty. Such general description of the constituent elements of the offence leads to the conclusion that it can be targeted against the journalist and the informant.

Apart from the above-mentioned offences, where the purpose of the attack is to restrain the freedom of the press, journalists may also press charges in the event of being victims of common crimes typified in the Act – the Penal Code (official journal "Dz.U." 1997, No. 88, item 553, as amended), such as causing grievous bodily harm, bodily injury or battery.

2. Are there any non-judicial mechanisms, such as parliamentary or other public inquiries, ombudspersons, independent commissions, as useful complementary procedures to the domestic judicial remedies guaranteed under the ECHR, specifically dealing with threats and crimes targeting journalists and other media actors?

Pursuant to Article 213 of the Constitution of the Republic of Poland, the National Broadcasting Council (KRRiT) is the authority that safeguards the freedom of speech. The tasks of the National Broadcasting Council enumerated in Article 6 of the Broadcasting Act (official journal "Dz.U." 1993, No. 7, item 34, as amended) include, amongst others, drawing up, in agreement with the Prime Minister, the directions of the State policy in respect of radio and television broadcasting, acting as a consultative body in drafting legal instruments related to radio and television broadcasting and cooperating with international organisations and authorities in this field. Based on these

prerogatives, the Chairman of the National Broadcasting Council conducted, in May 2015, consultations of the Council of Europe document under the title 'Draft Recommendation of the Committee of Ministers to member states on the protection of journalism and safety of journalists and other media actors'. Moreover, the Council monitors the ongoing developments in the country and intervenes whenever necessary. The exercise of these powers may be illustrated by an example whereby a representative of the National Broadcasting Council monitored court proceedings related to the detention, on 20 November 2014, of two journalists in the headquarters of the National Electoral Commission.

Pursuant to Article 208 of the Constitution of the Republic of Poland, the constitutional rights and freedoms are safeguarded by the Ombudsman. His task is to examine whether acts or omissions by authorities, organizations or institutions do not cause violation of the rights and freedoms enshrined in the Constitution. The Ombudsman may take action based both on received requests as well as *ex officio*. Numerous powers of the Ombudsman include right to address inquiries or requests to state authorities. The Ombudsman exercised these powers and approached the Commissioner of the Warsaw Police Headquarters with a request for explanations in the case of the above-mentioned detention of journalists in the headquarters of the National Electoral Commission.

In the Polish Parliament, Culture and Media Committees have been founded to operate both in the Lower House (the Sejm) and in the Senate. According to the regulations of the houses of the Parliament, these Committees are bodies appointed to handle and examine matters dealt with by the Parliament in its legislative work. With the scope of their control functions, the Committees may address inquiries to state bodies and mandate representatives of those bodies to participate in the Committee's meetings. Acting upon this prerogative, the Committee of Culture and Media in the Sejm convened a meeting on 19 December 2014 devoted to the detention of journalists in the headquarters of the National Electoral Commission and summoned the Chief Police Commissioner to provide explanations. He was then obliged by the Committee to take action to hold liable those responsible for this action.

3. Is the confidentiality of journalists' sources of information protected in both law and practice?

Poland's legislation protects the confidentiality of journalistic sources of information. Moreover, Article 15.2 of the Press Law imposes a legal obligation upon journalists to keep secret the data that might identify the author of a press material, a letter to the editor or other similar materials as well as persons providing the information, if such persons requested confidentiality. According to a resolution of the Supreme Court dated 22 November 2002 (Ref. No. I KZP 26/02), 'a press material is any text or image published or submitted for publication in the press, regardless of the type of the media, its kind, form, purpose or author'. Article 15.3 extends this obligation to all persons employed in newspaper offices or newsrooms, publishing houses or other press organizational units. In its judgment of 8 April 2010 (Ref. No. II SA/Wa 1488/09), the Voivodship Administrative Court in Warsaw emphasized that 'granting to the author of a press material the right to keep his name confidential creates an obligation on the part of journalists, particularly editors and editors-in-chief, to protect the anonymity of such person and not to disclose his name'. In Article 16 of the Press Law, the legislator did, however, itemise exceptions to the general principle of journalistic confidentiality, namely: the circumstances when the information obtained by a journalist constitutes

a credible information on punishable preparation, attempt or commitment of prohibited acts, regulated in Article 240 of the Penal Code (including participation in mass assassination, participation in activities of foreign intelligence services, terrorist attack, murder) or where the person providing the material or its author agree for the disclosure of that person's name.

Article 15.2 of the Press Law is further expounded by Article 180 § 3 of the Code of Penal Procedure (official journal "Dz.U." 1997, No. 89, item 555, as amended), which prohibits waiver of the journalistic obligation to maintain confidentiality of the data that permits identifying the persons described above. This means that protection of journalistic sources of information is more extensive than the scope of confidentiality protection by legal advocates, legal counsels or medical doctors, because they can be entirely exempt from their non-disclosure obligation.

4. Does the domestic legislation in your country regarding defamation/libel include criminal law provisions?

Yes, the offence of defamation/libel has been regulated in Article 212 of the Penal Code. It involves imputing to a person or an entity (an institution, a legal person or an organisational unit without a legal personality) such conduct or attributes that may discredit them in the face of public opinion or expose them to a loss of confidence necessary for a given position, occupation or activity. Such an interpretation of the component elements of the offence leads to the conclusion expressed by the Regional Court in Kielce in its ruling of 6 December 2013 (Ref. No. IX Ka 908/13) to the effect that defamation 'is a crime of effect, but the effect itself involves the mere exposure to discrediting in the face of public opinion or loss of confidence needed for the occupied position rather than this effect actually taking place in the form of discrediting or loss of position or other negative consequences associated with it'. Furthermore, in its ruling dated 14 October 2010 (II KK 105/10), the Supreme Court highlighted that 'Article 212 of the Penal Code refers not to discrediting in general, but to "discrediting in the face of public opinion", which means it is not so much offending the personal feelings of the victim that is at stake here, but how the defamed person will be perceived by a wide, indefinite circle of persons'. The reference in the wording of this Article to perception by the public opinion leads to the conclusion that 'the grounds for penal liability under this provision can be deemed existing only when the perpetrator communicated to at least one person, or in the presence of at least one person, the conduct or attributes of another person that might be discrediting to such a person [...]', which has also been emphasized in the above-mentioned ruling. The judgment of the Regional Court in Kielce dated 13 June 2013 (Ref. No. IX Ka 418/13) is also worth noting. The Court emphasized that no particular sharpness or clearness of expression is required for the offence of defamation to be committed, 'but only that this statement exposed the defamed person to the threat of loss of confidence necessary for his activity'.

The offence referred to above can only be committed intentionally, which was confirmed in the judgment of the Regional Court in Kielce dated 11 December 2013 (Ref. No. IX Ka 1530/13): 'in his conduct, the perpetrator aims at defaming the other person'.

The person committing the offence of defamation is liable to a penalty of a fine or restriction of liberty. In § 2, the legislator has also envisaged a qualified type of defamation, i.e. libel, where the perpetrator commits defamation via means of mass communication, which no doubt include the

press, radio and television. In such case, this act carries an additional penalty of deprivation of liberty for up to a year. In both these cases, the court may order punitive damages for the benefit of the victim or for a designated social cause.

According to statistical data for the period from 2010 to 2014, 288 adults were tried for the offence under Article 212 § 2 of the Penal Code, of whom 170 have been sentenced. The penalty of deprivation of liberty was pronounced against 16 persons, including two persons with imprisonment sentences without the right to conditional suspension of the penalty (which represents 5.3% of all the tried persons and 9.4% of all the sentenced persons). It is worth noting that there is a downward trend in the number of trials and sentences from 2013 for the act in question - respectively 11 trials and 11 sentences in 2013 and 3 trials and 3 sentences in 2014. Moreover, no person was sentenced to a penalty of deprivation of liberty in 2014. According to the above-mentioned statistical data, Article 212 § 2 of the Penal Code is very cautiously applied by courts, and the envisaged penalty of deprivation of liberty is adjudicated in rare cases. This leads to the conclusion that criminalization of the act of defamation by the mass media (i.e. libel) does not threaten the freedom of expression by journalists or expression of opinion in a public discourse.

Article 212 of the Penal Code was examined by the Constitutional Court which in a judgment of 30 October 2006 (Ref. No. P 10/06) ruled that it is compliant with the Constitution of the Republic of Poland: 'it can therefore be concluded that the objective underlying the regulation contained in Article 212 § 1 of the Penal Code has been constitutionally legitimate. Furthermore, in the light of instruments of international law, protection of reputation against 'arbitrary' attacks against the reputation and honour it is duty of public authorities, including the legislature. And Article 212 § 1 and § 2 of the Penal Code should be viewed above all through the prism of this duty'. Referring to the issue of criminalization of defamation, to justify the penal sanctions, the Court pointed to 'the desire to emphasize that also the state (as a commonwealth of people), and indirectly the nation as the sovereign, negatively assess violation of reputation and honour and condemn such conduct'.

5. What are the procedural guarantees (the right to defence, the periods of limitation applicable to defamation suits, *exceptio veritatis* (defence of truth) and the burden of proof, presumption of good faith etc.) included in the civil and/or criminal legislation related to defamation?

Defamation is a private prosecution offence, which means that its prosecution is instigated upon initiative of an authorized person, i.e. in this case, the victim. The initiation of such proceedings by the prosecutor or joining the already pending proceedings is possible only when the social interest so requires. Then, in accordance with Article 60 of the Code of Penal Procedure, the proceedings are pending *ex officio*, and the victim exercises the rights of an auxiliary prosecutor.

The period of limitation of the penalty for defamation is the consequence of it being a private prosecution offence. According to Article 101 § 2 of the Penal Code, the amenability to a penalty for an offence prosecuted by way of a private charge ceases after the expiry of one year from the date on which the victim learnt of the identity of the perpetrator of the offence but no later, however, than after the expiry of 3 years from the time of it being committed.

Article 213 of the Penal Code defines a counter-type to the offence of defamation, revoking the unlawfulness of action by enumerating conditions which, if met, release the perpetrator from penal liability. The offence is not committed, if the allegation is true and was not made in public. The judgment of the Regional Court in Kielce dated 9 July 2013 (Ref. No. IX Ka 651/13) makes it clear that 'the perpetrator does not act in public, when his message containing the information is not available to an unspecified number of people'. On the contrary, when the allegations were true, yet raised or made in public, the perpetrator will avoid liability, if such allegations concerned actions by a person holding a public office. Otherwise, in addition to the veracity of the allegation, the perpetrator must prove that he acted in defence of a socially legitimate interest. In its ruling of 30 September 2003 (Ref. No. III KK 176/02), the Supreme Court underlined, however, that 'establishment that the perpetrator acted in defence of a socially legitimate interest requires finding that the perpetrator was guided by such an intention only, and that he was not motivated by other considerations'. The premise of the veracity of allegation leads to the conclusion expressed by the Supreme Court in its ruling of 2 August 2005 (Ref. No. IV KK 95/05) that 'the counter-type contained in Article 213 § 2 of the Penal Code does not cover such statements, with regard to which it is not possible to apply the criterion of truth and falsehood'.

The supreme principle of penal proceedings expressed in Article 5 of the Code of Penal Proceedings in the presumption of innocence, whereby an accused person cannot be found guilty of the alleged offence until his guilt has been proven and confirmed by a final and binding judgment. Furthermore, the accused must be given the benefit of all the doubts that have not been eliminated in the course of the proceedings. A complementary principle is that the burden of proof lies on the accuser who must prove the accused's guilt. In the case of defamation, the accuser must prove that the statement containing defamatory allegations did take place. On the other hand, with regard to the proof of the truth, the burden of proof (*onus probandi*) will be shifted to the accused who must prove that the allegations were true. Such a structure stems from the belief that if the accused is not able to prove the veracity of the critical allegations, then he should not speak them out in public.

During the defamation proceedings, the accused may be assisted by a defence attorney. In the event he is unable to cover the costs of the defence attorney, he may request an appointed defence attorney. Pursuant to Article 78 of the Code of Penal Procedure, the accused must then provide evidence that he is unable to cover the costs of defence attorney without detriment to the maintenance of himself and his family.

A procedural guarantee that permits control over the ruling issued in the case is the principle of two-instance proceedings. This means that a judgment issued by a court of the first instance is not final and binding and the parties have the right to appeal before the court of second instance within 14 days of receipt of the judgment with the statement of reasons.

6. In the domestic legal framework, are state officials protected against criticism and insult at a higher level than ordinary people, for instance through penal laws that carry a higher penalty?

Yes, Article 226 of the Penal Code penalizes the act of insulting a public official or person designated to assist a public official. The condition here is that the insult must be made in the course of and in connection with the performance of that person's official duties. In its judgment of 29 November 2013, the Regional Court in Siedlce (Ref. No. II Ka 536/13) ruled that 'this ["in the course of and in connection with the performance of official duties" – annotated] means a coincidence as regards time and place of the perpetrator's conduct and the performance of official duties by a public official'. The correlation described above comprises an element of the perpetrator's motivation. This offence is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. Furthermore, Article 226 § 3 of the Penal Code contains provisions on qualified type of such an offence, where the addressee of the insult or humiliation is a constitutional body of the Republic of Poland. Then, the prescribed term of deprivation of liberty may be more severe, i.e. up to two years.

In contrast to the offence of defamation, to insult a public official, the perpetrator need not act in public.

In the judgement of 6 December 2012 (Ref. No. II AKa 218/12) the Appellate Court in Białystok highlights that 'Article 226 § 1 of the Penal Code protects the authority of persons pursuing, through the performance of their duties, the activity of state institutions, as well as their dignity. It is an offence which need not cause an effect, i.e. the target person need not experience a sense of humiliation. The protected dignity is understood in an objectivised sense, defined by the generally applicable cultural and social norms'.

7. Do laws on the protection of public order, national security or anti-terrorism have safeguards for the right to freedom of expression? What are these safeguards?

Freedom of expression is enshrined in Article 54 of the Constitution of the Republic of Poland, which guarantees the freedom to express opinions, to acquire and to disseminate information.

This freedom is protected under the Polish Constitution against excessive government interference by way of an exhaustive enumeration, in Article 31.3 thereof, of circumstances that constitute the grounds for restricting such freedom. According to this provision, said restriction may be imposed only by statute and only when required by the reasons of security or public order, protection of the natural environment, public health or morals or freedoms and rights of other persons. Furthermore, said limitations may not violate the substance of a given freedom or right. In its ruling of 30 October 2006 (Ref. No. P 10/06), the Constitutional Court explained that 'the principle of proportionality, expressed in Article 31.3 of the Constitution, requires to choose measures that are the least burdensome for an individual amongst the effective measures that restrain the exercise of rights and freedoms. A provision introducing such restriction is inconsistent with the Constitution, if the same effects can be achieved through measures which to a lesser degree restrict the exercise of freedom'. Specifying these requirements to a greater detail, in its ruling of 30 September 2008 (Ref. No. K 44/07), the Constitutional Court put forward three questions that need to be examined when imposing the limitations: 'Can the introduced regulation lead to the intended effects? Is this regulation necessary to protect the public interest it is associated with? Do the effects of the introduced regulation remain in due proportion to the burdens imposed by it upon citizens?'.

8. Are the following instruments translated into the national language and disseminated widely, in particular brought to the attention of judicial authorities and police services? Are these made available to representative organisations of lawyers and media professionals?

- Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media, 21 September 2011

The document has been translated into Polish language. It is available on the website of the National Broadcasting Council of Poland (KRRiT) („Zalecenie CM/Rec(2011)7 Komitetu Ministrów Rady Europy dla państw członkowskich w sprawie nowego pojęcia mediów”) - <http://www.krrit.gov.pl/regulacje-prawne/rada-europy/> .

- Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (2011)

The document has been translated into Polish language. It is available on the website of the Ministry of Justice and on the website of the National Broadcasting Council of Poland (KRRiT) („Zalecenia Komitetu Ministrów Rady Europy w sprawie wykorzenienia bezkarności sprawców poważnych naruszeń praw człowieka”) - <http://www.krrit.gov.pl/regulacje-prawne/rada-europy/> .

- Recommendation 1876 (2009) of the Parliamentary Assembly on the state of human rights in Europe: the need to eradicate impunity

The document has been translated into Polish language. It is available on the National Broadcasting Council of Poland (KRRiT) („Zalecenie 1876 (2009) Zgromadzenia Parlamentarnego - Stan praw człowieka w Europie – potrzeba wykorzenienia bezkarności”) - <http://www.krrit.gov.pl/regulacje-prawne/rada-europy/> .

- Guideline of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, adopted on 26 September 2007

The document has been translated into Polish language. It is available on the website of the National Broadcasting Council of Poland (KRRiT) („Zalecenie Komitetu Ministrów Rady Europy w sprawie ochrony wolności wyrażania poglądów i przekazywania informacji w czasach kryzysu przyjęte dnia 26 września 2007 r.”) - <http://www.krrit.gov.pl/regulacje-prawne/rada-europy/> .

- Recommendation CM/Rec(2004)16 of the Committee of Ministers to member States on the right to reply in the new media environment

The document has been translated into Polish language. It is available on the website of the National Broadcasting Council of Poland (KRRiT) („Zalecenie Rec(2004)16 Komitetu Ministrów dla państw

członkowskich w sprawie prawa do odpowiedzi w nowym środowisku mediów”) - <http://www.krrit.gov.pl/regulacje-prawne/rada-europy/> .

- Recommendation CM/Rec(2000)7 of the Committee of Ministers to member States on the right of journalists not to disclose their sources of information

The document has been translated into Polish language. It is available on the website of the National Broadcasting Council of Poland (KRRiT) („Zalecenie R(2000)7 Komitetu Ministrów Rady Europy do państw członkowskich na temat prawa dziennikarzy do nieujawniania źródeł informacji” - <http://www.krrit.gov.pl/regulacje-prawne/rada-europy/>

- Recommendation CM/Rec(2007)15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns

The document has been translated into Polish language. It is available on the website of the National Broadcasting Council of Poland (KRRiT) („Zalecenie R(07)15 Komitetu Ministrów Rady Europy dla państw członkowskich w sprawie działań dotyczących prezentacji kampanii wyborczych w środkach przekazu”)

- Recommendation CM/Rec(2007)2 of the Committee of Ministers to member States on media pluralism and diversity of media content

The document has been translated into Polish language. It is available on the website of the National Broadcasting Council of Poland (KRRiT) („Zalecenie Rec(2007)2 Komitetu Ministrów Rady Europy dla państw członkowskich w sprawie pluralizmu w mediach i zróżnicowania zawartości programowej”) - <http://www.krrit.gov.pl/regulacje-prawne/rada-europy/>

- Recommendation No. R (2003) 13 on the provision of information through the media in relation to criminal proceedings

The document has not been translated.

- Belgrade Conference of Ministers Resolution no 3 Safety of Journalists.

The document has not been translated.