

Judgment of 22<sup>nd</sup> February 2005, [K 10/04](#)  
**PUBLIC PROSECUTION OF OFFENCES ARISING FROM FAILURE  
 TO PUBLISH, CONTRARY TO THE PRESS ACT,  
 A RECTIFICATION OR RESPONSE**

<b>Type of proceedings:</b> <a href="#">Abstract review</a> <b>Initiator:</b> Commissioner for Citizens' Rights	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
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Legal provisions under review	Basis of review
Public prosecution (i.e. prosecution <i>ex officio</i> ) of an offence arising from the editor-in-chief's default on the obligation to publish a rectification or a response, in the event that the injured party is not a natural person [Press Act 1984: Article 46(2)]	Principle of proportionality Principle of equality Freedom of expression [Constitution: Articles 31(3), 32, 54(1)]

In Polish criminal law, offences are principally capable of public prosecution (i.e. prosecuted *ex officio*, even in the absence of a complaint from the injured person) – the task of filing the indictment generally belongs to the public prosecutor. Some offences are, where statute explicitly stipulates, exceptionally capable of prosecution upon initiation by a private entity; in such cases the injured person may file the indictment themselves (Article 59 § 1 of the Criminal Procedure Code 1997). Nevertheless, whenever an offence is capable of prosecution upon initiation by a private entity, the prosecutor may *ex officio* institute criminal proceedings or intervene in proceedings previously initiated “where the social interest so requires” (Article 60 § 1 of the Criminal Procedure Code).

In the present case, the Commissioner for Citizens' Rights challenged a provision of the Press Act 1984 before the Constitutional Tribunal. This provision differentiates the procedure applicable for prosecution of an offence committed by an editor-in-chief of a daily newspaper or journal who, contrary to the aforementioned Act, defaults on the obligation to publish a rectification of an untrue or inaccurate message or a response to a statement constituting a threat to personal interests. This offence, subject to penalty by fine or restriction of liberty (Article 46(1) of the Press Act), is capable of prosecution upon initiation by a private entity, provided that the injured party is a natural person (Article 46(2)). In all other cases – e.g. when the injured party is a legal person or a State office – the general principle of public prosecution (i.e. prosecution *ex officio*) applies.

In the opinion of the Commissioner for Citizens' Rights, the public (i.e. *ex officio*) prosecution of offences in such cases represents interference within the sphere of freedom to express one's views and opinions (freedom of expression, cf. Article 54(1) of the Constitution) which is unjustified in the light of the principle of proportionality (Article 31(3) of the Constitution); and an infringement of the constitutional principle of equality (Article 32), since it envisages preferential treatment of an injured party being a legal person or other organisational unit vis-à-vis the treatment of an injured party being a natural person.

The applicant stressed that, as regards Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the jurisprudence of the European Court of Human Rights assumes that, in a democratic State, freedom of expression is broader as regards statements concerning public persons and institutions than where private persons are the subject of concern and evaluation. In the applicants view, the challenged provision of the Press Act functions in an opposite manner.

The Commissioner for Citizens' Rights was induced to submit the application in the present case by complaints received by him regarding actions undertaken by the public prosecutor's office against the editors-in-chief of daily newspapers and journals in cases where they were suspected of having infringed the obligation to publish a rectification or a response.

In the ruling of this judgment, the Constitutional Tribunal applied a technique whereby it ruled that part of the reviewed provision failed to conform to the Constitution (leading, *ipso facto*, to elimination of that part), thereby amending the content and scope of this provision's application. The hitherto Article 46(2) of the Press Act read: "Where the injured party is a natural person, prosecution shall take place upon initiation by a private entity". On the day of entry into force of the judgment summarised herein (following publication in the Journal of Laws) the offence specified in Article 46 of the Press Act became an offence to be prosecuted upon initiation by a private party, regardless of the status of the injured party.

## RULING

**The challenged provision, in the part containing the expression "Where the injured party is a natural person", does not conform to Article 32 of the Constitution and is not inconsistent with Article 54(1), read in conjunction with Article 31(3), of the Constitution.**

## PRINCIPAL REASONS FOR THE RULING

1. In contradistinction to the constitutional provisions operative until 1997, which referred to the principle of equality before the law only as regards "citizens", the terms contained in Article 32 of the current Constitution – "all persons" and "no one" – in no way limit the group of entities in whom the right to equal treatment by public authorities, including the legislator, is vested. Currently, the *ratione personae* of the constitutional principle of equality encompasses all entities, *ipso facto* including legal persons.
2. The principle of equality consists in treating equally all entities (the addressees of a legal norm) characterised to an equal degree by a certain significant (relevant) feature, according to the same measures and without discrimination or favouritism. The starting point for assessing the compared situations, from the perspective of the principle of equality, is to determine whether there exists a common relevant feature, i.e. whether a similarity of situations exists, so as to justify applying the principle of equality. An infringement of the principle of equality is possible only once it is found that similar situations have been treated differently by the law. Nevertheless, differential treatment of similar situations is not always constitutionally impermissible, since cases may exist where such differential treatment is justified. Justification of any departure

from the requirement to treat similar entities equally must, firstly, be relevant in nature, i.e. it must remain directly connected with the aim and principal content of the provisions containing the reviewed norm and serve the realisation thereof. In other words, the introduced differentiations must be rationally justified. Secondly, it must be proportionate in nature, i.e. the importance of the problem to be remedied by differentiating the situations of the norm's addressees must remain in appropriate proportion to the importance of interests that will be infringed as a result of unequal treatment of similar entities. Thirdly, any arguments justifying such a departure must remain in conjunction with other constitutional values, principles or norms, justifying the differential treatment of similar entities.

3. The proceedings applicable in cases initiated by a private entity constitute a type of special proceedings, introduced in the Criminal Procedure Code for criminal policy reasons. The challenged provision in question (Article 46(2) of the Press Act) is special in the sense that it determines whether certain offences are capable of public (i.e. *ex officio*) prosecution or prosecution upon initiation by a private entity, not based upon the characteristics of the offence but based merely upon the characteristics of the injured party. *Ipso facto*, it amounts to differential treatment of similar situations to apply the procedure of prosecution upon initiation by a private entity only as regards offences constituting infringements of a natural person's legally-protected interests whilst excluding this procedure where other entities are the parties injured by acts containing identically specified ingredients, since the common relevant feature is the status of the party injured by an act containing identically specified ingredients of an offence.
4. The aforementioned differentiation of similar situations is unjustified from the perspective of the constitutional principle of equality, since it does not remain in direct connection with the aim and principal content of the provision reviewed in the present case (cf. point 2 above). Besides the truthfulness and accuracy of press information, the interests protected by Article 46 of the Press Act include those of all entities whose personal interests have been infringed, or at the very least threatened, by the press publication.
5. Human dignity, referred to in Article 30 of the Constitution, as a transcendent value, being supreme vis-à-vis all human rights and freedoms (since it constitutes the source thereof), is inherent and inalienable; it is intrinsic in human beings and may not be infringed by the legislator's activities or the actions of other entities. In this sense, a human being always retains their dignity and no action may deprive them thereof, nor constitute an infringement thereof. In its second meaning, human dignity appears in the guise of "personal dignity" – which may best be expressed as a right of personality, encompassing the values of the psychological life of each human being and all the values determining the position of the individual within society, which compose, within general opinion, the respect due to each person. Only dignity within this second meaning may be infringed by the actions of other persons and legal regulations.
6. The infringement of a natural person's personal interests (or at least a threat to such interests), resulting from performing the activities specified in Article 46(1) of the Press Act, is an impermissible intervention within the sphere of personal dignity. Criminalisation of such an act is, accordingly, a form of protecting human dignity. In order to achieve this goal, the legislator bestowed upon an injured natural person the

right to file a private indictment against the perpetrator, assuming *ipso facto* that prosecution upon initiation by a private entity constitutes a sufficiently effective procedure to hold the perpetrator criminally accountable. Given this, there is no justification within the axiology of the Constitution for providing greater protection – in the form of public prosecution (i.e. prosecution *ex officio*) – for injured entities not being natural persons, whose rights may not be derived from the requirement to respect and protect the constitutional value of dignity.

7. The limits of intervention within the sphere of constitutionally protected rights and freedoms are laid down by the principle of equality and the concept of the essence of each particular right and freedom (Article 31(3)). The constitutional norm permitting limitations to be introduced only insofar as they are necessary in a democratic State demands consideration of the following issues: whether the introduced provision is capable of leading to the results envisaged thereby; whether this provision is necessary for protection of the public interest with which it is connected; whether the effects of the introduced provision are proportionate to the burdens imposed thereby upon the citizen.
8. The applicant's allegation that the principle of proportionality was infringed concerns neither the criminalisation *per se* of acts enumerated in Article 46(1) of the Press Act, nor the severity of the penalty envisaged by the legislator. The alleged failure to conform to the Constitution concerns only the procedure for prosecuting these offences, as envisaged by the legislator, where the injured party is not a natural person. In order to permit the conclusion that categorisation of an offence as one capable of public prosecution (i.e. prosecution *ex officio*) amounts to an infringement of the principle of proportionality, it would be necessary to prove that this procedure is excessively burdensome for the entity having committed the prohibited act. Likewise, given the conjunction indicated by the applicant between Article 54(1) and Article 31(3) of the Constitution, the aforementioned excessive burden would need to amount to an interference with the freedom of expression. The applicant presented no arguments capable of justifying the allegation that Article 46(2) of the Press Act does not conform to Article 54(1), read in conjunction with Article 31(3), of the Constitution, construed in such a manner. In particular, the applicant failed to indicate how altering the applicable procedure would reduce the severity of limitations placed upon an accused enjoying the freedom to disseminate information. Accordingly, the aforementioned provisions of the Constitution may not be viewed as adequate bases of review of the challenged provision of the Press Act.
9. On the day of the entry into force of the judgment summarised herein, Article 46(2) of the Press Act will be read accordingly: "Prosecution shall take place upon initiation by a private entity". In consequence, from this day, any infringement of the requirement to publish a response or rectification, in the manner specified by provisions of the Press Act, will be an offence capable of prosecution upon initiation by a private entity, regardless of the status of the injured party.
10. The ruling of this judgment was formulated by applying a technique consisting in the elimination of part of the text of a normative act. An identical result could have been achieved if the Tribunal had ruled that Article 46(2) of the Press Act was partially unconstitutional, by indicating a certain scope of unconstitutionality of the norm contained within this provision (the formula "does not conform to the Constitution, insofar

as...”). In opting for the first possibility of formulating the ruling, the Tribunal was influenced by the need to ensure a correct and unambiguous understanding of the practical legal effects of its judgment. Since it may not be excluded that organs applying the law erroneously – albeit occurring in practice – apply a Tribunal decision declaring a certain scope of a reviewed provision to be unconstitutional (without having altered the wording of the provision) as a decision of an interpretative nature, deprived of universally binding force, the Tribunal decided to apply the formula whereby it declares the non-conformity with the Constitution of a specific, expressly indicated, part of the provision’s text.

11. The present judgment does not constitute a basis for re-opening court proceedings following which persons guilty of committing acts specified in Article 46(1) of the Press Act were convicted upon initiation by a private entity. A provision specifying the procedure for prosecuting an offence may not be treated as the basis for a court’s judicial decision within the meaning of Article 190(4) of the Constitution. The challenged provision and, consequently, amendment thereof, has no influence upon the classification of an act as an offence, nor does it constitute a basis for the level of penalty imposed upon those who committed the offence.
12. Whilst the prosecution procedure is ultimately a procedural issue, many statutory provisions use the fact of conviction for an offence capable of public prosecution (i.e. prosecuted *ex officio*) as their basis for imposing detrimental legal consequences, such as the prohibition on undertaking activities concerning access to information protected by State secret or deprivation of the right to stand as a candidate as regards elections within certain organs. One of the consequences of the judgment summarised herein is that, in the future, no detrimental legal consequences associated with the statutory classification of an offence as one capable of public prosecution (i.e. prosecution *ex officio*) may be imposed upon persons convicted for offences stipulated in Article 46(1) of the Press Act (regardless of the nature of the injured party).

#### Provisions of the Polish Constitution and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms

##### Constitution

**Art. 30.** The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

**Art. 31.** [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

**Art. 32.** 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.  
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

**Art. 54.** 1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.

**Art. 190.** [...] 4. A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

##### European Convention

**Art. 10.** 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, condi-

tions, 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.