

Literature

1. Wiak Krzysztof [in] Kodeks karny. Komentarz, ed. K. Wiak and A. Grześkowiak, Warszawa, 2018.
2. Bolesta Stefan. Prawnoadministracyjne zagadnienia porządku publicznego, Warszawa, 1997.
3. Kalitowski Michał [in] Kodeks karny. Komentarz, ed. M. Filar, Warszawa, 2012.
4. Ćwiakalski Zbigniew [in] Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117-277 kk, ed. A. Zoll, Warszawa, 2013.
5. Michalska-Warias Aneta [in] Kodeks karny. Część szczególna. Tom II. Komentarz art. 222-316, ed. M. Królikowski and R. Zawłocki, Warszawa, 2017.
6. Judgment of the Supreme Court - Military Chamber of 16 February 1987, WR 28/87, OSNKW 1987 no 9-10, item 85.
7. Lach Arkadiusz [in] Kodeks karny. Komentarz, ed. V. Konarska-Wrzosek, Warszawa, 2018.
8. Resolution of the Supreme Court - Criminal Chamber of 20 September 1973, VI KZP 26/73, OSNKW 1973 no 11, item 132.
9. Mozgawa Marek [in] Kodeks karny. Komentarz, ed. M. Mozgawa, Warszawa, 2017.
10. Informator Statystyczny Wymiaru Sprawiedliwosci. URL: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

UDC 343.63(477+438)(043.2)

Marek Mozgawa, Prof. dr hab.,
Maria Curie-Sklodowska University in Lublin, Poland

THE OFFENCE OF INSULT IN THE POLISH PENAL CODE (ARTICLE 216)

Article 216 of the Polish Penal Code (PC) sets out criminal liability for a criminal insult of another natural person. However, all entities other than natural persons (e.g. institutions and legal persons) remain outside the scope of Article 216 PC. However, the phrase "another person" used by the legislature does not exclude considering a group of persons whose personal dignity the offender has abused by his/her conduct as the object of the causative action [1]. Article 216 § 1 PC defines the basic type of the crime the substance of which is expressed in insulting another person in his/her presence or even in his/her absence but publicly, or with the intention that the insult reaches that person (punishable by a restriction of liberty or a fine). On the other hand, Article 216 § 2 PC defines an aggravated type, consisting in insulting another person via means of mass communication (punishable by a fine, deprivation of liberty or imprisonment of up to one year). The insult was criminalised also under previous Polish criminal legislation (Article 256 PC of 1932, Article 181 PC of

1969), but only the basic type of crime was known until the entry into force of the Penal Code of 1997. All Polish penal codes regulated also the institutions of the so-called provocation and retort (Article 256 §2 of the PC of 1932, Article 181 §2 of the PC of 1969, Article 216 §3 of the PC of 1997).

The object of protection here is dignity (in Polish: *cześć*). Colloquially, the Polish word *cześć* is defined as respect, honour, appreciation, but it also has a different meaning, equivalent to worship, admiration (and in the latter sense is usually not subject to criminal law protection). There is duality within the meaning of the term "dignity": in the external (objective) and internal (subjective) sense [2]. When we speak of external dignity, we mean the value that a person has in the eyes of other people (the social significance of an individual), while in the case of inner dignity we mean the sense of personal dignity of a person (the inner value of a person). For the provisions of Article 216 PC, the object of protection is the internal (personal) dignity [3], and in the case of defamation (Article 212k.k.) – the external (objective) dignity.

The dignity of every natural person is protected, regardless of their sex, age, social status or origin [4]. Even mentally ill or impaired people are not deprived of the value that is inextricably linked to being human, and they can therefore be insulted [5]. In the event of a public insult to a group of people or an individual for reasons of their nationality, ethnicity, race, religion or lack of religious affiliation, the provision of Article 257 PC applies. The element of insult also appears in a number of other types of crime: Article 133 PC (insult to the Polish Nation or the Republic of Poland), Article 135 § 2 PC (insult to the President of the Republic of Poland), Article 136 § 3 PC (insult to the head of a foreign state), Article 136 § 4 PC (insult to a diplomatic personnel member or a consular official), Article 137 PC (insult to Polish national symbols), Article 196 PC (insult to an object of religious worship or a place intended for the public performance of religious rites), Article 226 PC (insult to a public official or a person assisting this official), Article 261 PC (insult to a monument), Article 262 § 1 PC, (insult to human corpses, human ashes or the resting place of the deceased), Article 347 PC (insult to one's superior), Article 350 PC (insult to one's subordinate) [6].

The provision of Article 216 § 1 PC clearly defines three "subtypes" of insult:

- 1) in the presence of the insulted person (the so-called direct insult);
- 2) in the absence of the insulted person, but committed publicly;
- 3) non-publicly and in the absence of the insulted person, but with the intention that the insult reach that person.

Items 2 and 3 refer to what is known as an insult *in absentia*. As argued by the Court of Appeal in Warsaw in its judgment of 26 February 2018, (VI ACa 1576/16, LEX No 2578915): "An insult consists of statements which are offensive to the dignity of a given person, insulting or ridiculing, which cannot be rationalized. Since an insult is an injury to a person's self-esteem, an insult -

unlike a defamation - may also occur if the recipient of an offensive statement is solely that person".

The legislature has not specified what insult what to be consisting in, but the broad understanding of the term is usually adopted [7]. Therefore, an insult should be understood as any behaviour of the perpetrator which demonstrably expresses contempt for another person, and in particular is intended to humiliate his or her personal dignity and make them feel hurt or offended (decision of the Supreme Court of 7.5.2008, III KK 234/07, OSNKW 2008/9/69). The prevailing view among scholars in the field is that an insult can only be committed by action. Nonetheless, it is argued that, exceptionally, it can also be committed by omission [8], for example by not shaking hands to welcome a person suspected of having committed a crime (which, however, must raise serious doubts, due to the fact that the insult offender must have the obligation to act, and the source of such an obligation in the case of shaking hands cannot be specified). An insult may be committed orally, in writing, in print, image (e.g. caricature), or even by gesture [9]. An insult may be committed by violating the physical integrity of another person (slapping, tossing an object in someone's face), which entails the need to apply the so-called cumulative qualification - Article 216 § 1 in concurrence with Article 217 § 1 in conjunction with Article 11 § 2 of the Penal Code [10].

This raises doubts as to what criteria should be used to assess whether an insult has occurred: subjective (i.e. taking into account only the assessment of one's own value and feelings by a given person), objective (which takes into account the average level of assessment and respect for a person), or mixed (subjective-and-objective). The Supreme Court, in the resolution of 05.06.2012. (SNO 26/12, LEX no. 1231618), stated that "Whether a behaviour was insulting is determined by the prevailing social assessments and moral norms, and not by the subjective conviction of the allegedly insulted person". The use of the objective criterion, however, requires the establishment of a touchstone to which the behaviour assessed as insulting would be related; such touchstone may be the value system functioning in society. As rightly noted by R.A. Stefański, "The assessment of a certain behaviour as insulting based on this criterion does not take into account the fact that it depends on the cultural standards of society, environmental conditions, worldview conditions, or the group in which the perpetrator or victim live. For this reason, it is also necessary to take into account the social background assessments in so far as they contain norms that treat behaviour as insulting, even though they are relevant to the general public [11]. However, it should be noted that the assessment of behaviour as insulting cannot disregard the feelings of the insulted person, as it is first and foremost about infringing the person's interest, which should therefore lead to the conclusion that most appropriate is the mixed (subjective-and-objective) criterion.

The aggravated form of defamation (due to using the mass media by the

perpetrator) is defined in Article 212 § 2 PC. All generally available means, with which the transmission of information currently takes place, are possible (e.g. press, radio, television, Internet). As argued by the Constitutional Tribunal in the judgment of 30.10.2006, (P 10/06, OTK-A 2006/0, item 128) the mass media should be "centres that cumulatively meet the following criteria: need for the existence of a mass audience, topicality, concise character of information, public access to information and information quickly getting out-of-date (condition of contents about mass character), transmission of information in the certain package, institutionalisation of broadcaster and existence of the so-called gate-keeper (controller of the content being broadcast, e.g. editor-in-chief), thus exemplifying, *inter alia*, press in the strict sense, radio and television". On the other hand, the Supreme Court noted in the judgement of 07.11.2014 (V KK 231/14, LEX no. 1583243) that «the term 'means of mass communication' is not about the mass availability of the medium itself, but about the mass availability of information broadcast by it» [12].

The offence in question is of a general nature. On the other hand, scholars in the field differ in views on the subjective elements of insult. The prevailing view is that both forms of intent: direct intent (*dolus directus*) and legal intent (*dolus eventualis*) are involved [13]. According to A. Marek, insulting is essentially an intentional behavior [14]. The view that insulting is a formal offence (offence not characterised by its effect) seems to prevail [15]. It is noted that no specific effect is necessary for its accomplishment, in particular that the addressee of an insulting statement does not need to feel offended or a written insult does need to reach the addressee to make the offence happen [16]. The material nature of the crime is supported by, among others, O. Górniok [17] and J. Wojciechowski [18].

Only a living person can be insulted; abusive speaking of a deceased person may, however, be intended to offend the personal dignity of a living person [19]. Insulting a human corpse, human ashes or the resting place of a deceased constitutes an offence under Article 262 § 1 PC. If the perpetrator offends several persons in a single statement, then it should be considered that he/she commits one act. The same happens where the perpetrator, at the same place and time, speaks various words of an insulting nature towards the same person, or at the same time uses offensive words and gestures to degrade the dignity of the person; there is also one action [20].

The prosecution of an insult of both the basic type (Article 216 § 1) and the aggravated type (Article 216 § 2 – where the insult took place by means of mass media) is carried out under private prosecution. Pursuant to Article 60 § 1 of the Code of Criminal Procedure, in cases prosecuted by private prosecution, the public prosecutor shall initiate the proceedings or joins the proceedings already initiated if the public interest so requires. The proceedings are then conducted *ex officio* and the victim, who has previously brought a private indictment, exercises the rights of the auxiliary prosecutor; Articles 54, 55 § 3 and 58 of the

Code of Criminal Procedure shall apply (Article 60 § 2 CCP). If the prosecutor who had joined the proceedings subsequently abandoned the prosecution, the victim returns in further proceedings to the rights of the private prosecutor (Article 60 § 3 CCP).

Article 216 § 3 PC provides for the institution of so-called provocation and retort. Under the Penal Code, provocation occurs in two meanings: as inducing another person to commit a criminal offence in order to bring criminal proceedings against that person (Article 24 PC) and as a provocative behaviour of the victim (Article 216 § 3, Article 217 § 2). Literature distinguishes conscious and unconscious provocation, intentional and objective provocation, criminal and non-criminal provocation, one-sided and mutual provocation [21]. Under Article 216 PC, provocation is a provocative conduct of the victim, while retort takes place when the victim has responded to the insult by breaching bodily integrity or mutual insult. In the event of provocation or retort, the court may (but does not have to) refrain from imposing a penalty. There must be reasonable commensurability between provocation and reaction of the provoked person (cf. judgment of the Supreme Court of 17.06.1971, Rw 612/71, OSNKW 1971/10, item 159). Writing about the nature of retort, J. Makarewicz stated: «The act of private revenge has replaced the state intervention. The retort [...] merely extinguishes the state's right of punishment as a result of self-administering justice by the victim himself/herself. The state's right of punishment, generated upon the insult, disappeared again when the offended replied with an insult. This is the point of gravity of the retort» [22].

The crime in its basic type (Article 216 § 1) is punishable by a fine (from 10 to 540 day-fine units) or a penalty of restriction of liberty (from 1 month to 2 years) or in the aggravated type is punishable, apart from a fine (from 10 to 540 day-fine units) or restriction of liberty (from 1 month to 2 years) also provides for a custodial sentence (from 1 month to 2 years) also by custodial sentence (from one month to one year). It is possible to discontinue conditionally the criminal proceedings (Article 66 PC) as well as to refrain from imposing the penalty (Article 59 PC). If a custodial sentence is imposed, its execution may be conditionally suspended for a probation period (Article 69 PC). In the event of an insult, the court may impose vindictive damages (up to PLN 100,000, unless otherwise provided by law – Article 48 PC) to be paid to the victim, the Polish Red Cross or for any other social purpose indicated by the victim (Article 216 § 4 PC). It is possible to rule that the judgment be made public, impose the obligation to rectify the damage and sometimes impose the forfeiture (e.g. forfeiture of the press material in which the insult was committed – Article 37a of the Press Law).

As regards the number of adults who have been finally convicted (under private indictment) for offences defined in Article 216 of the Polish Penal Code, according to data submitted by the Ministry of Justice [23], in 2017 the figure amounted to 390 (a total of 360 under Article 216 § 1 PC, including 247

men and 113 women, and a total of 30 under Article 216 § 2 PC, including 22 men and 8 women). The penalty of fine was most frequent: 291 convictions - 74.6% (270 under Article 216 § 1 PC, and 21 under Article 216 § 2 PC); in second place was the penalty of restriction of liberty – 97 cases - 24.9% (88 under Article 216 § 1 PC and 9 under Article 216 § 2 PC). In one case, an immediate custodial sentence was imposed, and in one case a penal measure was imposed as an independent measure. In view of the above, it may be concluded that the courts are not too severe towards the perpetrators of insults, which seems to be reasonable, considering the degree of social harmfulness of these offences.

Literature

1. Długosz J. in: Kodeks karny. Część szczególna, vol. I. Komentarz. Art. 117-221, ed. M. Królikowski, R. Zawłocki, Warszawa, 2013, p. 830.

2. Kulesza Cf.W. Zniewaga, in: System Prawa Karnego, tom 10, Przepisy przeciwko dobrom indywidualnym, ed. J. Warylewski, Warszawa, 2016, p. 1218.

3. Resolution of the Supreme Court of 29.10.2020, II DO 96/20, LEX no. 3077121).

4. Marek A., Kodeks karny. Komentarz, Warszawa, 2010, p. 486.

5. Tak W. Kulesza, Zniesławienie i zniewaga. Ochrona czci i godności osobistej w polskim prawie karnym. Zagadnienia podstawowe, Warszawa, 1984, p. 170.

6. On this topic, cf. Kozłowska-Kalisz, Typy zmodyfikowane przestępstw przeciwko czci i nietykalności cielesnej, in: Przepisy przeciwko czci i nietykalności cielesnej, ed. M. Mozgawa, Warszawa, 2013, p. 164 et seq.

7. Hypś S. in: Kodeks karny. Komentarz, ed. A. Grześkowiak, K. Wiak, Warszawa, 2019, p. 1159.

8. Śliwowski J., Prawo karne, Warszawa, 1979, p. 405; M. Lipczyńska, Oskarżenie prywatne, Warszawa, 1977, p. 144.

9. On this topic in more detail, cf.: R.A. Stefański, Zniewaga: pojęcie i kryteria, in: Przepisy przeciwko czci i nietykalności cielesnej, ed. M. Mozgawa, Warszawa, 2013, p. 159.

10. Mozgawa M., Odpowiedzialność karna za przestępstwo naruszenia nietykalności cielesnej, Lublin, 1991, p. 85.

11. Stefański R.A. Zniewaga, p. 161.

12. Zgoliński Cf. I. Zniesławienie w polskim prawie karnym, Warszawa, 2013, p. 142 et seq.

13. As proposed by J. Raglewski in: Kodeks karny. Część szczególna, vol. 2. Komentarz do art. 212 – 277d, eds. W. Wróbel, A. Zoll, Warszawa, 2017, p. 89; R. Góral, Kodeks karny. Praktyczny komentarz z orzecnictwem, Warszawa 2005, p. 292; O. Górnioł, in: O. Górnioł et al., Kodeks karny, vol. 2, Komentarz do art. 117-363, Gdańsk 2005, p. 243; S. Hypś, in: Kodeks, p. 1161. The same view has been shared by the Regional Court of Białystok in judgment of 5.03.2015, VIII Ka 938/14, LEX no. 1828749.

14. Marek A., Kodeks, p. 487.

15. As proposed by, among others, J. Waszczyński, Zniewaga, in: System Praw Karnego, vol. 4, part 2, O przestępstwach w szczególności, eds. I. Andrejew,

L. Kubicki, J. Waszczyński, Ossolineum, 1989, pp. 113–114; K. Buchała, Prawo karne materialne, Warszawa, 1989, p. 696; A. Marek, Kodeks, p. 487; L. Gardocki, Prawo karne, Warszawa, 2017, p. 292; W. Kulesza, Zniesławienie, p. 168 et seq.

16. Marek A., Kodeks, p. 487.

17. Górniok O. in: O. Górniok et al., Kodeks karny, p. 244.

18. Wojciechowski J., Przepisy przeciwko czci i nietykalności cielesnej. Rozdział XXVII Kodeksu karnego. Komentarz, Warszawa, 2000, pp. 52-53).

19. Peiper L., Komentarz do kodeksu karnego, Kraków 1936, p. 538.

20. Hyps S. in: Kodeks, s. 1162.

21. Mozgawa M., Odpowiedzialność, p. 152.

22. Makarewicz J., Kodeks karny z komentarzem, Lwów 1932, p. 337.

23. <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

UDC 343.292(043.2)

Marta Mozgawa-Saj,

Maria Curie-Skłodowska University in Lublin, Poland

PARDON IN THE POLISH CODE OF CRIMINAL PROCEDURE - ANALYSIS OF THE INSTITUTION

The discussed topic in this paper is the institution of pardon understood as an act of the executive power's interference in the justice system. The Author pays special attention to criminal law and procedural regulations of this institution, trying to present the essence and character of the act of pardon.

A pardon is a constitutionally permissible interference of the President in the area of jurisdiction exercised by independent and autonomous courts of law. The issue of the act of pardon is regulated by the Constitution of the Republic of Poland of 1997 and the Code of Criminal Procedure of 1997 (hereinafter: CCP). It should be emphasized that the act of pardon does not change the sentence and does not question the guilt of the convicted person. Therefore, it does not interfere with the material layer of the final verdict [1, p. 6]. The right of pardon may be exercised only when the ordinary measures envisaged by the law are no longer sufficient and considerations of justice and humanity demand an alteration of the legal situation of the convicted person [2].

As the Constitutional Court noted in its decision of 21 February 2007 (Ts 47/06, LEX No 277465) "*...the object of the procedure for pardon is the possibility of showing a special act of clemency to the convicted person, i.e. a person whose criminal responsibility has already been determined by a final court judgment. However, since the reason for the pardon cannot be any circumstance concerning the crime committed or contesting the determination of criminal responsibility, thus the convicted person no longer benefits from the right of defence*". The Code of Criminal Procedure regulates the pardon in Section XII devoted to proceedings after the judgment becomes final.