

**Dr Marta Mozgawa-Saj,**  
Faculty of Law and Administration,  
Maria Curie-Skłodowska University in Lublin, Poland

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

1. The liability for the offence of insulting another individual is governed by Article 216 of the Polish Penal Code. Article 216 § 1 defines the basic type of the offence, involving an insult of another person in his or her presence, or even in his or her absence, but in public, or with the intention of having the insult reach them. Article 2 provides for an aggravated type of the offence of insult, consisting in the commission of the act described in § 1 by means of mass media. It should be noted that insult was also criminalised in the earlier Polish criminal legislation (Article 256 of the Penal Code of 1932, Article 181 of the Penal Code of 1969), although only the basic type of this offence was regulated until the entry into force of the current Penal Code.

2. The individual object of protection is internal (subjective) human dignity. In criminal law, we also distinguish dignity in the external (objective) sense, which means the value attached to a person by other people (human social significance), while internal dignity is the sense of personal dignity by an individual. Human dignity and its protection are inalienable rights attributable to every person regardless of their personal characteristics and their reputation among others. This points directly to its innate and inalienable nature, and this is the sense in which it should be considered as regards the offence of insult.

3. The provision of Article 216 § 1 lists three forms of insult: a) in the presence of the insulted (so-called direct insult); b) in the absence of the insulted, but publicly; c) not publicly and in the absence of the insulted, but with the intention of having the insult reach the insulted. In items b) and c) we are dealing with the so-called insult *in absentia*.

4. Article 216 does not contain a detailed specification of the executive activity as part of insult. It must therefore be assumed that it may be verbal or otherwise, insofar as the conduct expressed in it is to insult or ridicule another person. Thus, it must involve an oral or written statement, an exclamation, a gesture, a drawing (such as a caricature), or another medium, e.g. in the form of a film or photograph. The literature on the subject states that, unlike defamation, an insult does not necessarily contain a specific information message (allegation) against another person. An insult can be made by violating another person's bodily integrity (slapping or throwing something in the face), which implies a need for cumulative qualification (Article 216 § 1 concurrently with Article 217 § 1 in conjunction with Article 11 § 2 of the Penal Code). As some scholars of law aptly argue, sexual harassment can also be considered an

insult, expressing in such behaviours as indecent proposals, gestures, signs and any expressions of disregard and contempt for the humanity of the victim treated as a sexual object and offensive to the victim. Most scholars share the view that an insult can only be committed by action.

6. The criterion for considering a particular conduct an insult is that it is abusive, as assessed by the general public, and expresses contempt for another person, and is therefore more than merely a declaration of disrespect or a lack of good manners, faux-pas or deprecation of another person. As reasonably argued by the Supreme Court in its decree of 7 May 2008, III KK 234/07 "certain phrases may be considered 'insulting' first and foremost under generally accepted customary norms", according to which they must be recognised as insulting. Therefore, the provision of Article 216 does not cover any conduct which is customarily accepted, though not necessarily accepted by everyone or polite (e.g. shouting at the referee during a football game, e.g. "this referee sucks!", or offensive slogans chanted during political demonstrations or rallies). Thus, as rightly pointed out by certain scholars, the subjective perception of a person that his or her dignity has been violated is of secondary importance when the act is not perceived by the public as offensive. However, the Court of Appeal in Gdańsk in its judgement of 30 January 2002, II AKa 577/01, stated that the opposite situation (when the victim does not feel affected by the behaviour commonly considered to be abusive) alone does not preclude considering it an offence.

7. Any natural person may be the target of the offence of insult (regardless of his or her status and physical, personal or intellectual properties). It is not necessary for the insulted to be able to understand the content of the insult (which means that an insult may also apply to a child, a mentally handicapped person who is unable to understand a specific content, as well as a person who does not know the language in which the insulting words were formulated). Only a living person can be insulted; abusive statements about a deceased person may, however, aim at insulting the dignity of a living person (e.g. a relative of the deceased). Profanation of a corpse, human ashes or a place of repose of the dead is an offence under Article 262 § 1 of the Penal Code.

8. For the aggravated type of insult (Article 216 § 2 of the Penal Code), it is necessary for the insult to occur by means of mass communication. As stated by the Constitutional Tribunal in its judgement of 30 October 2006, P 10/06, the mass media should include "all measures that cumulatively meet the following criteria: the need for a mass recipient, topicality and short-lived nature of information, public access to it and quick getting out of date (condition of content of a mass nature), transfer of information in a certain package, institutionalization of the broadcaster and the existence of so-called gate-keeper (a controller of the content being broadcast, e.g. editor-in-chief), such as e.g. the press in the strict sense, radio and television."

9. In both the basic and the aggravated types, insult has the character of an

offence that may be perpetrated by any offender. Polish scholars of law differ in their opinions as to the subjective element of the offence of insult. However, the view prevails that both forms of intent (*dolus directus* and *dolus eventualis*) are valid, and such view was also expressed by the District Court in Białystok in the judgement of 5 March 2015, VIII Ka 938/14.

10. Most Polish scholars of law accept that insult is a conduct offence (i.e. a formal offence). It is being emphasized that no particular effect is necessary for the offence to occur, and in particular there is no need that the addressee of an abusive statement should be affected or that the abusive letter should be received by him or her.

11. The prosecution of the offence of insult (both the basic and aggravated types) is initiated upon private accusation. Pursuant to the provisions of the Code on Criminal Proceedings, in cases related to offences prosecuted on private accusation, the prosecutor commences proceedings or joins proceedings already commenced if the public interest requires it (Article 60 § 1 of the Code on Criminal Proceedings). The proceedings then take place *ex officio*, and the injured person who had initiated private prosecution exercises the rights of an auxiliary prosecutor; to an injured person who had not previously filed a private accusation, Articles 54, 55 § 3 and Article 58 of the Code on Criminal Proceedings apply (Article 60 § 2 of that Code). If the prosecutor who had joined the proceedings renounced the indictment, the injured person must be given back the rights of private prosecutor in further proceedings (Article 60 § 3 of the Code of on Criminal Proceedings)

12. Article 216 § 3 of the Penal Code provides for the institutions of so-called provocation and retaliation. Under the Penal Code, provocation appears in two meanings: as inciting another person to commit a criminal act in order to direct criminal proceedings against such a person (Article 24), and as provocative behaviour of the injured person (Article 216 § 3, Article 217 § 2). Pursuant to Article 216, provocation is a defiant conduct of the injured person, while retaliation takes place when the injured person has responded to the insult with a breach of the personal inviolability or with a reciprocal insult. In the event of provocation and retaliation, the court may (but does not have to) refrain from imposing punishment. There must occur a reasonable commensurability between the provocation and the reciprocal act provoked.

13. Insult, for its basic type, is punishable with a fine (from 10 to 540 daily rates) or the punishment of restriction of liberty (from 1 month to 2 years); while for the aggravated type: a fine (from 10 to 540 rates), punishment of restriction of liberty (from 1 month to 2 years) or punishment of deprivation of liberty (from 1 month to a year). It is possible to conditionally suspend the execution of the punishment of deprivation of liberty imposed. An option of conditional discontinuance of criminal proceedings (Article 66 of the Penal Code) is also available. In the event of a conviction for the offence referred to in Article 216 § 2 of the Penal Code, the court may decide to impose a

compensatory payment to the benefit of the injured person, the Polish Red Cross or towards another social cause indicated by the injured person (Article 216 § 4 of the Penal Code).

14. It is also worth noting that the Polish Penal Code (apart from Article 216) contains a number of other provisions governing insult of specific people, objects or places (Article 133 – public insult of the Polish nation or the Republic of Poland; Article 135 § 2 – public insult of the President of Poland; Article 136 § 3 and 4 – public insult of the head of a foreign country and other persons; Article 137 – public insult of national insignia; Article 196 – Public insult of places of worship; Article 226 § 1 and 3 – public insult of a public official or a person assisting him, or of a constitutional body of the Republic of Poland; Article 257 – insult of a group of population or a person because of their nationality, ethnicity, etc.; Article 261 – insult of a monument; Article 262 – profanation of a corpse; Article 347 – insult of a superior by a soldier; Article 350 – insult of a subordinate by a soldier).

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**Seitz Elena**, Program Director,  
International Cultural-Educational Association (ICEA), USA

## **THE EUROPEAN UNION DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET**

The European Union Directive on Copyright in the Digital Single Market [1] is a proposed European Union directive that is designed to limit how copyrighted content is shared on online platforms. EU directives are a form of legislation that set an objective for member states to achieve, so if the Directive on Copyright passes, all EU member states will be expected to eventually pass their own domestic legislation in line with the terms of the directive.

The Directive on Copyright is sometimes referred to as 'Article 13' after its most controversial component – the article that would require online platforms to filter or remove copyrighted material from their websites.

The Directive on Copyright would make online platforms and aggregator sites liable for copyright infringements, and supposedly direct more revenue from tech giants towards artists and journalists. Under current legislation, platforms such as YouTube aren't responsible for copyright violations, although they must remove that content when directed to do so by the rights holders. Proponents of the Directive on Copyright argue that this means that people are listening to, watching and reading copyrighted material without the creators being properly paid for it.

While the amended version of the Directive on Copyright is made up of 17 individual articles, the most substantial and controversial points are Article 13