

ARTICLE19

A stylized map of Europe is shown in a light yellow color against a darker yellow background. A black location pin is placed over the country of Poland. The text 'Poland: Responding to 'hate speech'' is overlaid on the map in white.

# Poland: Responding to 'hate speech'

2018

Country Report

## ARTICLE 19

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This report was produced with financial support from the Rights, Equality and Citizenship (REC) Programme of the European Union. The European Commission does not necessarily share the opinions expressed within the report. ARTICLE 19 bears the sole responsibility for the content.

The report was produced as part of “Media Against Hate”, a Europe-wide campaign initiated by the European Federation of Journalists and a coalition of civil society organisations, including the Media Diversity Institute (MDI), ARTICLE 19, the Croatian Journalists Association (CJA), Community Media Forum Europe (CMFE), Community Medien Institut (COMMIT) and Cooperazione per lo Sviluppo dei Paesi Emergenti (COSPE). For more information about the campaign see: <http://europeanjournalists.org/mediaagainsthate/>

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# Executive summary

This report examines both legislation and practices related to ‘hate speech’ in Poland, with a particular focus on the media. It examines the compliance of the respective legislation with international freedom of expression standards and offers recommendations for its improvement.

Since 2015, instances of ‘hate speech’ against migrants, racial and ethnic minorities, and LGBTQI people have been on the increase in Poland, often promoted by Polish politicians in the mainstream media and on social media. According to public surveys, public opinion has decisively shifted on the issue of migration and the movement of refugees: the pervasive anti-immigrant rhetoric of the Polish government has contributed to entrenching xenophobic attitudes in the country.

Despite the significance of this problem, Polish public authorities have strongly resisted addressing the issue in full compliance with international human rights law. Although Polish legislation guarantees both the right to freedom of expression and the right to equality, it does not fully comply with international freedom of expression standards applicable in this area. The primary shortfalls include the limited scope of protection against incitement in the criminal law, in particular the failure to include sexual orientation, gender identity, and disability among the protected grounds; as well as the continued existence of provisions prohibiting blasphemy/defamation of religion and a problematic application of these provisions.

Besides seeking protection from ‘hate speech’ through provisions of the criminal law, victims of ‘hate speech’ can alternatively pursue civil or administrative remedies. Available civil remedies offer targets of ‘hate speech’ the opportunity of seeking compensation for the violation of their personal rights; however, available civil and administrative provisions seem to be ineffective, and are rarely used. Further, the Law on Equal Treatment, which, amongst other things addresses the issue of harassment and could be used by victims of ‘hate speech’, is one of the least effective and poorly implemented laws in Poland.

On a positive side, under the Law on Equal Treatment, two national equality bodies are responsible for actively seeking to combat discrimination, including ‘hate speech’: the Commissioner for Human Rights (Ombudsperson) and the Government Plenipotentiary for Equal Treatment (the Government Plenipotentiary). The Ombudsperson is one of the most active actors in this area in Poland. At the same time, the current office holder is under constant attack for both his strong commitment to human rights and for the independent exercise of his mandate. Conversely, the Government Plenipotentiary, in spite of the potential influence over shaping the government’s anti-discrimination policies, is largely silent, avoiding involvement in public debates related to ‘hate speech’.

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With regards to the efforts of the media in combating ‘hate speech’, the only responsible body is the National Broadcasting Council (the Broadcasting Council), which is mandated to apply sanctions against broadcasters who have disseminated discriminatory expression. However, the Broadcasting Council’s effectiveness is undermined by the political influence exercised over the composition of its members. As for the print press, the Press Law does not address directly the issue of ‘hate speech’; however, its provisions are sometimes relied upon by victims of ‘hate speech’ in conjunction with civil law provisions.

Media self-regulation concerning ‘hate speech’ is largely ineffectual in Poland. The relevant Codes of Ethics are rarely applied in media organisations. As such, the public do not consider media self-regulatory bodies to be capable of remedying rights violations. One potentially positive example of self-regulation can, however, be found in the Committee of Advertising Ethics. The committee issues decisions on a regular basis, and these are usually followed by advertising companies found in breach of the Ethics Code.

### **Summary of recommendations:**

- All relevant Polish legislation – in particular the criminal law provisions – should be revised for their compliance with international human rights standards applicable to ‘hate speech’;
- The provisions of the criminal law that could be indirectly applied to ‘hate speech’, in particular defamation, insult, insult of the Polish nation and state, insult of religious beliefs or offending religious feelings, and the crimes against the Polish nation should be decriminalised as they fail to meet international freedom of expression standards;
- The advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights (ICCPR), establishing a high threshold for limitations on free expression as set out in the Rabat Plan of Action, as well as prohibitions on direct and public incitement to genocide and incitement to crimes against humanity;
- The protective scope of any measures to address ‘hate speech’ should encompass all protected characteristics recognised under international human rights law and not be limited to the present protected characteristics of race, ethnic origin, national, or religion. In particular, the list of protected characteristics should be revised in light of the right to non-discrimination as provided under Article 2(1) and Article 26 of the ICCPR. The protected characteristics should explicitly include sexual orientation, gender identity, and disability;
- The government should develop a comprehensive plan on the implementation of the Rabat Plan of Action. In particular, it should adopt and implement a

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comprehensive plan for training law enforcement authorities, the judiciary, and those involved in the administration of justice on issues concerning the prohibition of incitement to hatred and ‘hate speech’;

- The government should improve the existing system for collecting data and producing statistics in order to provide a coherent, integrated view of cases of incitement to hatred reported to law enforcement authorities and processed through the courts, as well as ‘hate speech’ in civil and administrative law proceedings. Such a system should also include indicators for monitoring the effectiveness of the judicial system in dealing with ‘hate speech’ cases;
- The Law on Equal Treatment should be strengthened to provide stronger remedies for victims of ‘hate speech’. In particular, the compensation claims under the Law should be widened to include non-material damages. The government should also remove practical obstacles in the implementation of the Law on Equal Treatment to ensure that victims of ‘hate speech’ and discrimination can rely on this law to seek protection of their rights;
- The institutional equality framework should be enhanced and equipped with effective instruments towards ‘hate speech’. The government and public authorities should strengthen the role of the equality institutions, and, in general, make equality a priority agenda;
- Provisions of media legislation should be brought to full compliance with international freedom of expression standards. In particular, the government should repeal the 2016 law on the National Media Council, which allows undue political interference with public service media, and should implement the December 2016 Constitutional Tribunal ruling by adopting necessary legislative changes to restore the competences of the National Broadcasting Council to oversee public service media;
- The National Broadcasting Council should improve its activities aimed at promoting good practices and standards in broadcast media and improve cooperation with media outlets to respond to ‘hate speech’;
- Public officials, including politicians, should realise that they play a leading role in recognising and promptly speaking out against intolerance and discrimination, including instances of ‘hate speech’. This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is symptomatic, expressing sympathy and support to the targeted individuals or groups, and framing such incidents as harmful to the whole of society. These interventions are particularly important when inter-communal tensions are high, or are susceptible to being escalated, and when political stakes are also high, e.g. in the run-up to elections; and
- Media organisations should recognise that they play an important role in this area and intensify their efforts to provide adequate responses. They should

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ensure that their ethical codes address 'hate speech' as well as equality and tolerance, and that these codes are effectively implemented. The codes should be widely publicised and internalised by journalists and media organisations in order to ensure full compliance with them. Effective measures should be taken to address violation of the codes. Media organisations should also organise regular training courses and updates for professional and trainee journalists on the internationally binding human rights standards on 'hate speech' and freedom of expression and on relevant ethical codes of conduct.

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# Introduction

Until relatively recently, Poland was a fairly homogenous and mono-religious (Catholic) country with a small population of national and ethnic minorities, where instances of ‘hate speech’ were not regularly documented. Relevant legislation focused primarily on combating anti-Semitism, in light of the long history of Polish–Jewish tensions.<sup>1</sup> Only after the fall of communism did the Polish government begin to introduce initiatives to combat ‘hate speech’ motivated by racism, intolerance, sexism, and homophobia, as part of their wider efforts to advance human rights’ protections in the country.

However, protection of human rights, including the right to freedom of expression, has been significantly constrained since political changes in 2015 when the Law and Justice Party (PiS) won the overall majority in the parliament election. This victory has enabled the government to increase control of various national institutions, including the public service media and the judiciary.<sup>2</sup> The government has also used legislative, political, and economic means to stifle media freedom and limit dissent and debate within the country.<sup>3</sup> At the same time, PiS has never had equality issues on its agenda and has not undertaken sufficient efforts to foster equality in the society.

In 2015, the reaction of several Polish politicians and radical groups to the so-called European ‘migration crisis’ brought about a significant shift in public discourse, with instances of both ‘hate crimes’ and ‘hate speech’ increasing. Public debate became fuelled by intolerance and prejudice and the boundaries of publicly ‘acceptable’ rhetoric were crossed almost daily. The media have played a key role in encouraging this intolerant discourse; while social media became a key platform for the exchange and transmission of ‘hateful’ views. Anti-migrant rhetoric has been mobilised by leading Polish politicians, including members of the government, and has become inextricably linked to the Eurosceptic agenda of PiS. State-funded media (largely public TV and radio broadcasters) and private media outlets sympathetic to the government, or sponsored by them, similarly reflect this anti-migrant prejudice, and focus on the purported threats they pose to public safety, including through terrorism.

‘Hate speech’ and prejudice against LGBTQI<sup>4</sup> people has also been an issue of long-standing concern in the country. According to numerous reports, LGBTQI people are amongst the most vulnerable minorities in Poland.<sup>5</sup> Homophobia and transphobia are frequently instrumentalised in political debates in order to stir up political conflict. When physical attacks against LGBTI organisations happen, the government remains silent, not criticising the attacks.<sup>6</sup>

Successive Polish governments have undertaken steps to improve protection of equality and non-discrimination since the fall of communism; most notably, the Law on Equal Treatment was adopted in 2010. However, the Law still fails to



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provide effective protection to victims of discrimination on various grounds and, as such, has been repeatedly criticised by European and international human rights bodies.<sup>7</sup> The current government has further undermined the limited equality and non-discrimination framework in the country through a number of efforts, such as efforts to limit the activities of the equality bodies.<sup>8</sup> Rising intolerance towards minorities has also been accompanied by an increasing reluctance by law enforcement authorities to respond to ‘hate speech’, rendering the existing, limited protections even more ineffectual.<sup>9</sup> Polish courts have also struggled to apply existing ‘hate speech’ legislation in accordance with international freedom of expression standards. Self-regulatory media organisations have proven similarly ill-equipped to deal with ‘hate speech’ in the media.

There are, however, some positive initiatives. These include a number of local and national ‘anti-hate speech’ campaigns organised by human rights organisations and the Polish Ombudsperson (the national equality body), interesting and innovative research conducted by Polish academics, and some initiatives by individual media outlets to address the issue internally.

This report responds to these issues and challenges in Poland. It examines both legislation and practices<sup>10</sup> related to combating ‘hate speech’ in Poland, with a particular focus on the media, and their compliance with international freedom of expression standards as well as the broader framework on ‘hate speech’ in the country, and offers recommendations for improvement.

The report is a part of a broader ARTICLE 19 project carried out in six European Union countries (Austria, Germany, Hungary, Italy, Poland, and the United Kingdom) to identify commonalities and differences in national approaches to ‘hate speech’, specifically in the media, and recommend ‘good practices’ for replication, and identify concerns which should be addressed.

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# International human rights standards

In this report, the review of the Polish framework on ‘hate speech’ is informed by international human rights law and standards, in particular regarding the mutually interdependent and reinforcing rights to freedom of expression and equality.

## The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR)<sup>11</sup> and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).<sup>12</sup>

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person’s choice. The United Nations (UN) Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States’ compliance with the ICCPR, has affirmed the scope extends to the expression of opinions and ideas that others may find deeply offensive,<sup>13</sup> and this may encompass discriminatory expression.

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is:

- **Provided for by law**, so any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- **In pursuit of a legitimate aim**, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals; or
- **Necessary in a democratic society**, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>14</sup>

Thus, any limitation imposed by the State on the right to freedom of expression, including limiting ‘hate speech’, must conform to the strict requirements of this three-part test. Further, Article 20(2) of the ICCPR provides that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence must be prohibited by law (see below).

At the European level, Article 10 of the European Convention on Human Rights

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(European Convention)<sup>15</sup> protects the right to freedom of expression in similar terms to Article 19 of the ICCPR, with permissible limitations set out in Article 10(2).<sup>16</sup> Within the EU, the right to freedom of expression and information is guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union.

## **The right to equality**

The right to equality and non-discrimination is provided in Articles 1, 2, and 7 of the UDHR.<sup>17</sup> These guarantees are given legal force in Articles 2(1) and 26 of the ICCPR, obliging States to guarantee equality in the enjoyment of human rights, including the right to freedom of expression and equal protection of the law.

At the European level, the European Convention prohibits discrimination in Article 14 and, more broadly, in Protocol No. 12.

## **Limitations on ‘hate speech’**

While ‘hate speech’ has no definition under international human rights law, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States:<sup>18</sup>

Severe forms of ‘hate speech’ that international law *requires* States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;

Other forms of ‘hate speech’ that States *may* prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment; or

‘Hate speech’ that is lawful and should therefore be protected from restriction under Article 19(3) of the ICCPR, but which nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State.

### *Obligation to prohibit*

Article 20(2) of the ICCPR obliges States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. In General Comment No. 34, the HR Committee stressed that while States are *required* to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19(3).<sup>19</sup>

The Rabat Plan of Action,<sup>20</sup> adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR),

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advances authoritative conclusions and recommendations for the implementation of Article 20(2) of the ICCPR.<sup>21</sup>

- **Incitement.** Prohibitions should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence, rather than the advocacy of hatred without regard to its tendency to incite action by the audience against a protected group.
- **Six-part threshold test.** To assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:
  - **Context:** the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework, and the media landscape;
  - **Identity of the speaker:** the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader;
  - **Intent** of the speaker to engage in advocacy to hatred; intent to target a protected group on the basis of a protected characteristic, and knowledge that their conduct will likely incite the audience to discrimination, hostility, or violence;
  - **Content of the expression:** what was said, including the form and the style of the expression, and what the audience understood by this;
  - **Extent and magnitude of the expression:** the public nature of the expression, the means of the expression, and the intensity or magnitude of the expression in terms of its frequency or volume; and
  - **Likelihood of harm occurring, including its imminence:** there must be a reasonable probability of discrimination, hostility, or violence occurring as a direct consequence of the incitement.
- **Protected characteristics.** States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted for discrimination or violence on the basis of other recognised protected characteristics.
- **Proportionate sanctions.** The term "prohibit by law" does not mean criminalisation; the HR Committee has said it only requires States to "provide appropriate sanctions" in cases of incitement.<sup>22</sup> Civil and administrative

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penalties will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) on this test.<sup>23</sup>

At the European level, the European Convention does not contain any *obligation* on States to prohibit any form of expression, as under Article 20(2) of the ICCPR. However, the European Court of Human Rights (European Court) has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the European Convention as a whole.<sup>24</sup> The European Court has also exercised particularly strict supervision in cases where criminal sanctions have been imposed by the State, and in many instances it has found that the imposition of a criminal conviction violated the proportionality principle.<sup>25</sup> Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression if less severe sanctions would achieve the same effect.

At the EU level, the Council's framework decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law"<sup>26</sup> requires States to sanction racism and xenophobia through "effective, proportionate and dissuasive criminal penalties". It establishes four categories of incitement to violence or hatred offences that States are required to criminalise with penalties of up to three years. States are afforded the discretion of choosing to punish only conduct which is carried out in "a manner likely to disturb public order" or "which is threatening, abusive, or insulting", implying that limitations on expression not likely to have these negative impacts can legitimately be restricted. These obligations are broader and more severe in the penalties prescribed than the prohibitions in Article 20(2) of the ICCPR, and do not comply with the requirements of Article 19(3) of the ICCPR.<sup>27</sup>

### *Permissible limitations*

There are forms of 'hate speech' that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility, or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR.

### *Lawful expression*

Expression may be inflammatory or offensive, but not meet any of the thresholds described above. This expression may be characterised by prejudice and raise concerns over intolerance, but does not meet the threshold of severity at which restrictions on expression are justified. This also includes expression related to the

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denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of ‘hate speech’ is symptomatic, or from maximising opportunities for all people, including public officials and institutions, to engage in counter-speech.

## **Freedom of expression online**

### *International law*

At the international level, the UN Human Rights Council (HRC) recognised in 2012 that the “same rights that people have offline must also be protected online”.<sup>28</sup> The HR Committee has also made clear that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or ‘offline’ communications, as set out above.<sup>29</sup>

While international human rights law places obligations on States to protect, promote, and respect human rights, it is widely recognised that business enterprises also have a responsibility to respect human rights.<sup>30</sup> Importantly, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE) has long held that censorship measures should never be delegated to private entities.<sup>31</sup> In his June 2016 report to the HRC,<sup>32</sup> the Special Rapporteur on FOE enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extra-legal means. He further recognised that “private intermediaries are typically ill-equipped to make determinations of content illegality”,<sup>33</sup> and reiterated criticism of notice and take-down frameworks for “incentivising questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation”, i.e. the danger of “self- or over-removal”.<sup>34</sup>

The Special Rapporteur on FOE recommended that any demands, requests, and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19(3) of the ICCPR.<sup>35</sup>

In their 2017 Joint Declaration on “freedom of expression, ‘fake news’, disinformation and propaganda”, the four international mandates on freedom of expression expressed concern at “attempts by some governments to suppress dissent and to control public communications through [...] efforts to ‘privatise’ control measures by pressuring intermediaries to take action to restrict content”.<sup>36</sup> The Joint Declaration emphasises that intermediaries should never be liable for any third party content relating to those services unless they specifically intervene

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in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it, and they have the technical capacity to do so. They also outlined the responsibilities of intermediaries regarding the transparency of and need for due process in their content-removal processes.

### *European law*

At the EU level, the E-Commerce Directive requires that Member States shield intermediaries from liability for illegal third party content where the intermediary does not have actual knowledge of illegal activity or information and, upon obtaining that knowledge, acts expeditiously to remove or disable access to the content at issue.<sup>37</sup> The E-Commerce Directive prohibits Member States from imposing general obligations on intermediaries to monitor activity on their services.<sup>38</sup> The regulatory scheme under the E-Commerce Directive has given rise to so-called ‘notice-and-takedown’ procedures, which have been sharply criticised by the special mandates on freedom of expression for their lack of clear legal basis and basic procedural fairness.

The limited shield from liability for intermediaries provided by the E-Commerce Directive has been further undermined by the approach of the European Court. In *Delfi AS v. Estonia*, the Grand Chamber of the European Court found no violation of Article 10 of the European Convention where a national court imposed civil liability on an online news portal for failure to remove “clearly unlawful” comments posted to the website by an anonymous third party, even without notice being provided.<sup>39</sup> A joint dissenting opinion highlighted that this “constructive notice” standard contradicts the requirement of actual notice in Article 14 para 1 of the E-Commerce Directive, necessitating intermediaries to actively monitor all content to avoid liability in relation to specific forms of content, thus additionally contradicting Article 5 of the E-Commerce Directive.<sup>40</sup>

Decisions subsequent to *Delfi AS* appear to confine the reasoning to cases concerning ‘hate speech’.<sup>41</sup> More recently, the European Court rejected as inadmissible a complaint that the domestic courts had failed to protect the applicant’s right to privacy by refusing to hold a non-profit association liable for defamatory comments posted to their website by a third party. The Court noted that the comments were not ‘hate speech’ or direct threats and were removed upon notice (though a formal notice-and-takedown procedure was not in place).<sup>42</sup> The position and resources of the intermediary were also relevant factors.<sup>43</sup>

Lastly, the 2016 European Commission’s Code of Conduct on Countering Illegal Hate Speech,<sup>44</sup> developed in collaboration with some of the major information technology companies, constitutes a (non-legally binding) commitment to remove “illegal hate speech”, defined on the basis of the Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law,<sup>45</sup> within 24 hours. While the Code of Conduct is ostensibly voluntary, it is part of a concerning trend whereby States (including through intergovernmental organisations) are increasing pressure on private actors to

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engage in censorship of content without any independent adjudication on the legality of the content at issue.<sup>46</sup>

In short, the law on intermediary liability remains legally uncertain in Europe, with tensions between the European Court's jurisprudence and the protections of the E-Commerce Directive, as well as the guidance of the international freedom of expression mandates.



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# Basic legal guarantees

## **An enabling environment for freedom of expression and the right to equality**

Poland has signed and ratified a majority of core international human rights instruments, and is therefore bound by international standards on freedom of expression and the protection of equality set out in them. Poland did not enter any reservations to either the International Covenant on Civil and Political Rights (ICCPR) or the International Convention on Elimination of All Forms of Racial Discrimination (ICERD) relevant to ‘hate speech’.

### *Legal protection of the right to freedom of expression*

The Polish Constitution<sup>47</sup> provides for an expansive protection of the right to freedom of expression. It guarantees freedom of the press and other means of social communication (Article 14) and freedom to express opinions and to acquire and to disseminate information (Article 54). Importantly, the Constitution further prohibits preventive censorship of the means of social communication and the licensing of the press; while permitting a statute to introduce the requirement to obtain a permit for the operation of a radio or television station (Article 54). It also provides for the protection of artistic creation and scientific research freedom as well as dissemination of the results of that work – and freedom to teach and to enjoy the products of culture (Article 73). The right to information is protected in a dedicated law.<sup>48</sup>

According to the Constitution, within a democratic society the exercise of constitutionally protected rights and freedoms can only be restricted by means of a statute and only when deemed necessary for the protection of: national security or public order; the natural environment; public health or public morals; or the rights of others. Limitations must not violate the essence of freedoms and rights.<sup>49</sup> In practice, however, although these constitutional provisions are directly applicable, the courts rarely make reference to them in their judgments.

The Constitution provides that political parties and other organisations whose programmes are based upon totalitarian methods and Nazi, fascist, and communist modes of activity – as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or influencing state policy, or provide for the secrecy of their own structure or membership – shall be prohibited.<sup>50</sup> However, the Constitution does not contain explicit provisions prohibiting the advocacy of hatred that constitutes incitement to discrimination, hostility, or violence, or any equivalent provisions to Article 20(2) of the ICCPR.

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The Polish Constitutional Tribunal (the Constitutional Tribunal) has had few opportunities to address the above-mentioned provisions in the context of incitement and/or 'hate speech' cases. In a 2014 decision, the Constitutional Tribunal stated that criminal law provisions on 'incitement to hatred' (under Article 256(1) of the Polish Penal Code) comply with constitutional guarantees for the right to freedom of expression and underlined that these provisions implement international obligations established by Article 20(2) of the ICCPR.<sup>51</sup>

*Legal protection of the right to equality*

The Constitution also guarantees the right to equal treatment and non-discrimination.<sup>52</sup> The list of protected characteristics is non-exhaustive.<sup>53</sup> The Constitution additionally provides for the special protection of national and ethnic minorities.<sup>54</sup>

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# Prohibitions of ‘hate speech’ in the criminal law

## Criminal provisions directly restricting ‘hate speech’

The Polish Penal Code<sup>55</sup> contains several provisions directly restricting some forms of ‘hate speech’, including:

- Article 119(1) prohibits the use of violence against, or of **unlawful threats** directed towards, a group of persons or a particular individual on the grounds of **nationality, ethnicity, race, political opinion, religion, or belief**.<sup>56</sup> It should be noted that in cases where threats and actual violence occur simultaneously, Polish courts tend to rule only on the use of physical violence motivated by hate and do not address themselves to threats made with the same motivation;
- Article 256(1) prohibits **publicly promoting a fascist or other totalitarian regime or inciting to hatred on the grounds of nationality, ethnicity, race, or religion or belief** (“religious affiliation” or “lack of any religious denomination”).<sup>57</sup> Article 256 further sanctions producing, preserving, importing, acquiring, storing, possessing, presenting, transporting, or transferring a print, recording, or other object which contains content which incites hatred on the same grounds, or which contains fascist, communist, or other totalitarian symbols, for the purpose of its distribution.<sup>58</sup> The provision provides an exception for cases in which the offending act is undertaken as part of an artistic, educational, collector’s, or scientific project;<sup>59</sup> and
- Article 257 prohibits **public insult of either a group of people or an individual on the grounds of their nationality, ethnicity, race, religion, or belief**, and the violation of personal inviolability of another individual for these reasons.<sup>60</sup>

Only individuals (natural persons) and not legal entities, such as associations, companies, or media outlets, can be held liable under these provisions.<sup>61</sup>

There are several problems with these provisions in terms of their compliance with international human rights standards, in particular:

- The list of **protected grounds** is exhaustive, extending only to nationality, ethnicity, race, religion, or belief (namely, “religious affiliation or lack of any religious denomination”). Other grounds excluded from protection are age, sexual orientation, gender identity, and disability, among others;
- The provisions prohibit types of conduct other than those specified in Article 20(2) of the ICCPR (for example, there is no reference to **incitement to discrimination, hostility, and violence**);

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- The provisions do not explicitly require consideration of **the intent**. Intent is, however, an essential characteristic of crime, according to the common and indisputable understanding and interpretation of the provisions. Furthermore, general provisions of the Penal Code are relevant to the interpretation of the provisions:
    - Article 115(2) of the Penal Code stipulates that the courts should take into account, *inter alia*, the form of intention and the offender's motivation when assessing the social harm caused by their offence; and
    - Article 53(2) further stipulates that the offender's motivation, as well as the negative consequences of the offence committed, should be taken into account during sentencing.

### *Interpretation of criminal provisions directly restricting 'hate speech'*

According to available statistics, since 2015, the number of cases related to Article 119(1), Article 256, and Article 257 reported to the police has significantly increased. This increase corresponds with the rise of xenophobic and racist incidents in Poland, which has itself been reflected in media coverage in the country. Reported cases of 'hate speech' online have also significantly increased, with almost half of reported 'hate speech' concerning expression on the Internet.<sup>62</sup>

Although some efforts have been made to increase police capacity to respond to these phenomena,<sup>63</sup> the number of prosecutions and convictions under the respective provisions remains relatively low.<sup>64</sup> In the limited number of cases resulting in successful criminal convictions, it has been reported that the prosecution has appealed the decision in order to seek a lower punishment.<sup>65</sup> Polish human rights organisations argue that this approach is detrimental to the culture of tolerance and co-existence of different ethnic and racial minorities: not only does this discourage reporting of incitement cases but it also sends the message that such acts are tolerated or even condoned by the state.<sup>66</sup>

Various aspects of the existing criminal provisions have been clarified by the jurisprudence of the Polish courts (see below). Although Poland has a civil law system, the lower courts typically follow the standards established by the jurisprudence of the Supreme Court. Only rarely do the courts refer to international standards for freedom of expression and non-discrimination in their decisions under these provisions. Typically, they would not refer to the three-part test on restrictions on the right to freedom of expression, or consider the six-part test suggested in the Rabat Plan of Action. Only occasionally do the courts explicitly state in their decisions that limitations of freedom of speech must be necessary in a democratic society.

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It should be noted that in cases which relate to racist threats, prosecuted under these provisions, the Polish courts typically rule that the expression “cannot be justified by any rational and universally accepted arguments”. As such, it can be concluded that race and ethnicity are considered protected grounds requiring heightened protection in Poland. In certain cases the courts have underscored that there is no need for specific and in-depth analysis of the motivation in these crimes, since it is so clearly apparent. Further, the courts sometimes refer to the need to respond to public pressure, or to raise awareness among the public, or to the existence of a pressing social need when justifying such restrictions on freedom of expression.<sup>67</sup>

From the available jurisprudence, the following issues should be highlighted:

- **Constitutionality of the provisions on “incitement to hatred”:** A constitutional challenge alleging that the provision on “incitement to hatred” (in Article 256.1 of the Penal Code) is vague and imprecise was unsuccessful.<sup>68</sup> The Constitutional Tribunal found that the courts should take into account the principle of freedom of speech, as protected by the Constitution and international and regional standards, when interpreting Article 256.1. The Tribunal underlined that whilst the criminalisation of incitement to hatred on the grounds of nationality, ethnicity, race, religion, or belief undoubtedly restricts freedom of expression, this limitation complies with statutory regulations and is necessary in a democratic society to guarantee public order as well as the protection of the rights of others;<sup>69</sup>
- The courts do not refer to any specific **incitement test** when applying the abovementioned provisions. However, in most cases the courts apply a more nuanced definition of what constitutes “incitement to hatred” and refer to the following issues:
  - *Definition of incitement:* In 2007, the Supreme Court clarified that incitement to hatred under Article 256.1 of the Penal Code addresses expression which arouses “strong aversion, anger, lack of acceptance, or even hostility against individual persons or entire social or religious groups or which, by means of their form, maintain and enforce such negative attitudes and thus emphasise the privileged position, or superiority of a specific nationality, ethnic group, race or religion or belief group.”<sup>70</sup> Further, the courts also stated that incitement that encompasses: urging, inciting, or spreading hatred, strong aversion, or hostility to one or more persons; persuading, encouraging, inducing, stirring up, or evoking anger, a lack of acceptance, and even rage against individuals or entire social groups; or preserving and enforcing such attitudes – regardless of whether they are effective – against a larger, indefinite number of people;<sup>71</sup>
  - *Public aspect of the expressive conduct:* As noted above, the expressive conduct needs to be aimed against a larger, indefinite number of people.<sup>72</sup> The courts have held that incitement to hatred on the grounds of race or

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ethnicity, under Article 256.1, ought to be interpreted as “publicly appealing (inciting) other people to feel and to preserve negative emotions, aversion and hostility towards persons of a different race”;<sup>73</sup>

- *Result of the expressive conduct:* It is not required that offenders convince others to share their viewpoint, “albeit that should be the motivation of the offender’s actions at the incriminating time and place”.<sup>74</sup> Therefore, the criteria of what constitutes expression that “incites to hatred” are fulfilled when the offender endeavours to evoke feelings of hostility against an individual or group protected by the provision;
- *Exceptions:* The courts also recognise the difference between having “a critical point of view” about certain groups (e.g. the Roma, Muslims, Jews) and incitement; and stated that merely having such critical views does not necessarily meet the requirements under Article 256 of the Penal Code;<sup>75</sup>
- **Scope of protected grounds:** The courts struggle to effectively apply the limited protections available in the criminal law. In a 2016 case, for example, a man of Polish origin was insulted and beaten subsequent to talking to his friend in German. The court did not accept the argument that the insults and physical assault, prosecuted under Article 119 of the Penal Code, were connected to the victims’ perceived German nationality or ethnic origin. Instead, it applied a very restrictive interpretation to the meaning of the protected characteristics, rejecting the possibility of extending protection to a victim whose nationality was incorrectly imputed as foreign, when he was in fact Polish;<sup>76</sup> and
- **Intent:** As for the question of intent, the National Council of the Judiciary<sup>77</sup> stated that general provisions (including intent) found in Article 115.2 of the Penal Code should be applied in ‘hate speech’ cases.<sup>78</sup> However, there is no evidence in the available case law that this principle is being followed in the decision-making of law enforcement authorities.

## **Criminal provisions indirectly restricting ‘hate speech’**

Certain other criminal law provisions could theoretically be applied in cases of ‘hate speech’: Article 207 of the Penal Code, which penalises physical and psychological abuse of an intimate partner or relative; Article 190 of the Penal Code, which pertains to the crime of unlawful threats; and Article 216 of the Penal Code, which concerns insult. However, there is no evidence in the available case law that these provisions are being applied in this manner in ‘hate speech’ cases.

Additionally, a number of criminal offences in the Polish Penal Code can theoretically be applied in response to expressive conduct that may wrongfully be classified as ‘hate speech’. By themselves, these provisions raise concerns with regards to their compliance with international human rights standards:

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- **Insult of the Polish nation or state:**<sup>79</sup> Recent political and social changes in Poland have seen the term ‘hate speech’ adopted and instrumentalised by politicians and far-right activists promoting so-called ‘patriotic values’. There is, therefore, a risk that those expressing critical opinions about the Polish nation, or the Polish people, will be accused of ‘hate speech’;
  - **Insult of religious beliefs or offending religious feelings (Article 196):**<sup>80</sup> The continued existence of these provisions has been the subject of lengthy public debate in Poland. The Constitutional Tribunal has, however, previously ruled them to be constitutional.<sup>81</sup> It found that the right to freedom of expression (under Article 54(1) of the Constitution) was not absolute and could be subject to proportionate restrictions. The Constitutional Tribunal held that restricting expression which insults or offends religious feelings or traditions was necessary in a democratic society, to ensure the protection of the rights of others, and of public order.

Polish human rights experts have repeatedly emphasised that the *de facto* purpose of these provisions is to protect the religious feelings of the Catholic majority; no cases have been brought under these provisions to protect religious minorities. Criticism of the Catholic church, Catholic doctrines, or the influence of the church on politics can therefore be labelled ‘hate speech’ on the grounds of religion or belief. Despite the relatively low number of cases and successful prosecutions under these provisions, they create a ‘chilling effect’ on freedom of expression. This is particularly relevant to artistic expression; artistic events or projects which some deem controversial have been abandoned on occasion, following the initiation of proceedings under Article 196;<sup>82</sup>

- **Criminal defamation:**<sup>83</sup> In criminal defamation cases proceedings can be initiated only through a private prosecution. According to available information, this provision has only been used in relation to ‘hate speech’ when, in 2003, Polish LGBTI organisations unsuccessfully tried to launch criminal defamation proceedings against a Catholic activist who espoused anti-LGBTQI ideology;<sup>84</sup>
- **Criminal insult:**<sup>85</sup> The same as in criminal defamation cases, criminal insult proceedings can only be initiated through a private prosecution. The term ‘insult’ is not defined in the Penal Code, which renders the offence vague by definition.<sup>86</sup> According to available case law, this provision has not yet been applied to a ‘hate speech’ case;
- **Crimes against the Polish Nation** under the Act on the Institute of National Remembrance – **Commission for the Prosecution of Crimes against the Polish Nation:**<sup>87</sup> This prohibits the denial of certain crimes committed before 31 July 1990. In 2018, the Polish Parliament adopted an amendment to this Law which expands the scope of this law.<sup>88</sup> The amendment
  - Includes a new chapter on “protection of the reputation of the Republic of Poland and the Polish People” and will allow the civil law instruments

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to protect the reputation of the Republic of Poland and the Polish People (protection of personal interests). Action to protect the reputation of the Republic of Poland and the Polish People could be brought by a non-governmental organisation if that lies within the scope of its statutory objectives. The State Treasury would be entitled to damages or redress. Action to protect the reputation of the Republic of Poland or the Polish People could also be brought by the Institute of National Remembrance;

- Criminalises attributing “publicly and against facts... to the Polish People or the Polish State responsibility or joint responsibility for Nazi crimes committed by the Third Reich or for other offences constituting crimes against peace, genocides or war crimes, or otherwise grossly diminishes the responsibility of the true offenders”;<sup>89</sup>
- Includes the exception from liability providing only for cases when a person commits this offence as a “part of their artistic, educational, collector’s or scientific activity”; and
- States that the provisions would apply to both Poles and foreigners.

The Law has caused considerable controversy in Poland and abroad.<sup>90</sup> Critics have argued that the amendment can lead to unjustifiably restrict freedom of expression and limit public debate on issues of public interest, such as historical events.<sup>91</sup> In the context of historical tension between ethnic minorities and the Polish majority, it is possible that it may have a disproportionate impact on minorities, in particular in light of the current political and public discourse, which has seen any criticism of Polish history framed as an unsubstantiated attack. The amendment may, if enforced, be used as a tool to limit expression under the auspices of combating ‘hate speech’ directed at the Polish peoples and the Polish nation.

## **Efforts to amend existing criminal legislation on ‘hate speech’**

There are currently no legislative initiatives underway to amend the existing provisions related to ‘hate speech’ under the Penal Code.

Attempts have previously been made to amend the Penal Code in order to expand the list of characteristics protected against ‘hate speech’. Human rights non-governmental organisations (NGOs) have over the last decade continuously advocated in support of such an amendment, and their call has been echoed in similar recommendations raised by international human rights bodies such as the Human Rights Committee<sup>92</sup> and the United Nations Committee against Torture.<sup>93</sup> So far these attempts have been unsuccessful. Most recently in 2016, a group of Deputies of the Sejm (the lower chamber of the Polish Parliament)<sup>94</sup> initiated an amendment proposing to extend the list of protected characteristics under Article



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119, Article 256, and Article 257 of the Penal Code to include sex, gender identity, age, disability, and sexual orientation. In November 2016, however, the Sejm rejected the draft amendment, and the legislative work was discontinued.

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# Measures against ‘hate speech’ in administrative law

Polish administrative law does not contain any provisions which either define the term ‘hate speech’ or attempt to directly restrict it. The only exception is the media law (part of administrative law), which is analysed in a subsequent section of this report.

Indirectly, two pieces of administrative law can be used to respond to some forms of ‘hate speech’. Namely:

- **The Construction Law<sup>95</sup>** requires the owner or administrator of a building to maintain and use the facility in accordance with the principles specified in the Construction Law, ensuring it meets certain technical and aesthetic standards. If it is determined that the exterior appearance of a building negatively impacts the surrounding area, the construction supervisory authority can order the owner or administrator to remedy the violation.

According to the Polish Commissioner for Citizens’ Rights (the Ombudsperson), placing ‘hateful’ inscriptions on the exterior of a building can infringe these standards and negatively impact the surroundings to such extent that the competent authority has grounds to intervene and order their removal. The Ombudsperson has previously requested that the General Construction Supervision Inspector keep his office informed of measures taken in this regard, in order to ensure a consistent approach by the various supervisory authorities in applying the provisions.<sup>96</sup> The Ombudsperson emphasised that such orders ought only to be issued as a last resort, because the owners or administrators of buildings are themselves usually harmed by such actions by third parties (that place such inscriptions on their buildings). In response, the General Construction Supervision Inspector clarified that the assessment as to whether a building’s external appearance does negatively impact the surrounding area always lies with the local authority responsible for carrying out the relevant proceedings. If the Construction Supervision Authority finds hateful inscriptions have been adorned on the exterior of a building, it should notify the relevant law enforcement force.<sup>97</sup>

- **The Law on National and Ethnic Minorities and Regional Languages<sup>98</sup>** guarantees the equal protection of national and ethnic minorities. It addresses issues relevant to the preservation and development of the cultural identity of national and ethnic minorities and the preservation and development of regional languages. It further defines the responsibilities and powers of government administrative agencies and local government in this regard. The Law obliges public bodies to take appropriate measures to promote the full and effective equality of minority groups and individual persons belonging to minorities in economic, social, political, and cultural life. It also obliges the public bodies

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to protect people who are subject to discrimination, hostility, or violence because they belong to national or ethnic minorities; to strengthen intercultural dialogue; and to promote a culture of respect of national and ethnic minorities in Poland. One of the means of implementing the Law's objectives is to support television and radio programmes made by minorities. The Law primarily deals with positive measures that can prevent 'hate speech'. It does not include any punitive measures, and therefore cannot be used to sanction instances of 'hate speech' targeting minorities.

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# Civil actions against ‘hate speech’

Under Polish law, it is possible to initiate civil causes of action in response to instances of ‘hate speech’ under the provisions of the Civil Code<sup>99</sup> and the Law on Equal Treatment.<sup>100</sup>

## *Protection under the Civil Code*

- Article 23 provides protection to “the personal interests of a human being”, including, *inter alia*, ‘freedom’ and ‘dignity’;
- Under Article 24(1), in such cases, aggrieved individuals can “demand that the action at issue ceases unless it is not unlawful”; or “demand that the person responsible for the infringement performs the necessary actions to negate its effects”, in particular, to make “a declaration of the appropriate form and substance”. They are also entitled to claim “monetary compensation or the payment of an appropriate amount of money to a specific public cause” or “to demand that the damage be remedied in accordance with general principles”;<sup>101</sup> and
- The claimants can benefit from statutory legal aid in relevant cases; however, this does not exempt them from the obligation to reimburse defendants for the costs of court proceedings if their case is unsuccessful.

The available jurisprudence further clarifies that:

- Personal interests are “non-material goods related to a person’s personality that are commonly acknowledged in society”.<sup>102</sup> The primary personal interest includes ‘reputation’;
- The determination as to whether a personal interest is infringed does not depend on the aggrieved party’s individual sensitivity, but on an objective assessment of the reaction in society;<sup>103</sup>
- Although the provisions do not address discrimination directly, offending an individual’s dignity can extend to conduct aimed at humiliating a person or at depriving her/him of an equal position (discrimination), including on the grounds of their protected characteristics, covering disability, nationality, gender, race, or sexual orientation.<sup>104</sup> The vague definition of ‘dignity’ allows for its broad interpretation and frequent application to cases of discrimination; and
- An infringement of one’s personal interests can be claimed if the following conditions are cumulatively met: (i) the personal interest exists (e.g. dignity, reputation); (ii) the interest is threatened or infringed; and (iii) the threat or infringement is unlawful. The first two conditions must be evidenced by the

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claimant seeking the protection of her/his personal interest; the defendant may defend themselves by proving that they did not act unlawfully.

Non-governmental organisations (NGOs) may initiate civil proceedings under these provisions and also seek and obtain remedies.<sup>105</sup> In particular, the anti-discrimination NGOs<sup>106</sup> can initiate cases on behalf of individuals, subject to having sought their consent,<sup>107</sup> or join pending proceedings.<sup>108</sup> If the NGOs are not a part of the proceedings, they can also submit third party interventions (*amicus curiae*). Although there are no known cases where equality NGOs have been denied permission to participate in civil proceedings, only a limited number of specialised human rights NGOs take advantage of the provision and specialise in pursuing such actions.

Under the provisions of the Civil Code, civil action can be brought either by, or on behalf of, an individual directly targeted or impacted by the action; a civil claim cannot be brought by individuals referring solely to their membership of a targeted 'social group'. This distinction can be demonstrated in the divergent response to the following two cases:

- In the first case, a civil action was initiated by a women's rights NGO on behalf of an individual in response to an allegedly sexist advertisement. The Warsaw Appellate Court found that there was no direct connection between the content of the relevant advertisement and the claimant;<sup>109</sup> such a connection could be established only if the advertisement was explicitly directed against the claimant or had referred to her personally. As a result, although the advertisement could be perceived as sexist, the Court considered that her personal interest could not have been infringed by its content; and
- In the second case, a transgender member of the Polish Parliament, who had been the victim of numerous transphobic remarks by a leading Catholic features writer, initiated a civil action. The Warsaw Appellate Court, referring to the necessity of protecting the 'dignity' of the parliamentarian, banned the journalist from addressing the deputy with transphobic remarks. However, the Court dismissed the plaintiff's request for damages.<sup>110</sup>

The Civil Code provisions therefore do not provide an effective tool to challenge instances of 'hate speech' where it is directed at whole social groups of a specific religion, race, ethnicity, sexual orientation, or gender identity. The requirement that the individualisation of personal loss is demonstrated precludes the possibility of effectively responding to speech acts targeting unidentified individuals. This lack of protection is particularly noticeable when it comes to generalised homophobic or transphobic 'hate speech', which cannot be challenged under the criminal law.

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## *Protection under the Law on Equal Treatment*

The Law on Equal Treatment provides protection from discrimination in the spheres of employment, access to goods and services, education, housing, social assistance, and health care. It includes an exhaustive list of protected characteristics, namely gender, ethnic origin, nationality, religion and religious denomination, political view, disability, age, and sexual orientation.

The Law on Equal Treatment prohibits, *inter alia*, discrimination in the form of harassment, which is defined as “any unwanted conduct whose aim or effect is violating the dignity of a natural person and creating around them an intimidating, hostile, degrading, humiliating or offensive atmosphere”.<sup>111</sup> This definition facilitates the protections being applied to certain cases of ‘hate speech’; sexual harassment is also prohibited.<sup>112</sup>

Aggrieved persons can bring civil law claims and seek damages and/or compensation.<sup>113</sup> However, the Law on Equal Treatment in Article 13 only refers to compensation for material damage (*odszkodowanie*); non-material damage is not covered.

Although the Law on Equal Treatment has been in force for several years, it is only extremely rarely applied; none of the initiated cases has addressed harassment so far.<sup>114</sup> The Ministry of Justice, which is responsible for keeping statistics on court proceedings, does not keep detailed records of proceedings under this legislation, and it is not clear if any of the cases brought were in response to ‘hate speech’.

In 2016, there was one case pending at the Constitutional Tribunal, initiated by the Ombudsperson. The case challenged the constitutionality of the Equal Treatment Act’s limited application to only the exhaustively listed social groups, and the limitation in the application in the case of some of those groups.<sup>115</sup> According to the Polish Constitution, the Ombudsperson is one of the public bodies empowered to file motions to the Constitutional Court, requesting the Court to decide whether legislation is in line with constitutional standards. However, in 2017 the Ombudsperson withdrew the motion from the Court.

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# Role of equality institutions in relation to public discourse and ‘hate speech’

## Equality institutions

Two equality institutions are mandated to combat ‘hate speech’ in Poland: the **Commissioner for Citizens’ Rights** (the Ombudsperson) and the **Government Plenipotentiary for Equal Treatment** (the Plenipotentiary).<sup>116</sup> The Ombudsperson is an independent authority subject solely to parliamentary scrutiny. The Plenipotentiary is appointed and dismissed by the Prime Minister; he/she is a deputy minister in the Chancellery of the Prime Minister and is a direct subordinate to the Prime Minister.

### *The Ombudsperson*

The mandate of the Ombudsperson<sup>117</sup> includes: monitoring, supporting, and promoting equal treatment; carrying out independent research on the topic of discrimination; preparing and publishing reports; and making recommendations on discrimination related-issues. The Ombudsperson is required to present information on her/his activities related to equal treatment, including proposals and recommendations in this area to both chambers of parliament on an annual basis. The Ombudsperson is further able to act *ex officio* or in response to applications or complaints received from concerned individuals.

The Ombudsperson does not have any powers to impose sanctions in individual cases or to offer mediation services. However, he/she can carry out investigations and request that the competent authorities (in particular state, professional, or social supervisory bodies, or prosecution services) investigate a matter or certain aspects of it. The Ombudsperson can require initiating preparatory proceedings and can participate in all ongoing civil or administrative proceedings with the rights enjoyed by the prosecutor. He/she can also move for punishment and for reversal of a valid decision in proceedings involving misdemeanour or appeal to the court of cassation or lodge an extraordinary appeal against a final judgment. As previously mentioned, the Ombudsperson is further empowered to request that the Constitutional Tribunal examines the constitutionality of specific pieces of legislation, and their conformity with international instruments to which the state is party.

Since 2015, the Ombudsperson has kept dedicated records on complaints related to ‘hate speech’, including in the media and in advertising. Importantly, the current Ombudsperson and his office additionally undertake various positive measures aimed at tackling ‘hate speech’ in Poland. For example:

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- The Ombudsperson maintains contact with the National Broadcasting Council, the editorial boards of the Polish media, the Council of Media Ethics, and representatives of social media platforms, and frequently raises his concerns in relation to their activities. For example, the Ombudsperson was prompted to raise concerns with the National Broadcasting Council in December 2016 in response to an anti-immigration piece broadcast on public television; in December 2013 to programming for the Kashubian minority; and in January 2012 to advertising materials broadcast on television that discriminated against women. Of his 2016 reports to the Council of Media Ethics, the Ombudsperson addressed practices prevalent in the media, including the tendency to include information on the nationality and ethnic origin of offenders (Romani) in news reports, and unreliable media information on Islam, Muslims, and events related to that religion and its followers;
  - The Ombudsperson proactively initiates dialogue on the need to combat ‘hate speech’ in public discourse. In February 2017 the Ombudsperson’s Office organised a debate with editorial boards focusing on the image of the Muslim community as portrayed in the press, at which a report that had been ordered by the Ombudsperson, entitled ‘The Negative Image of Muslims in the Polish Press’, was launched.<sup>118</sup> In addition, he actively cooperates with social media, especially with Facebook, in order to develop standards of protection against ‘hate speech’ on their platforms, including implementation of the European Code of Conduct on countering illegal ‘hate speech’ online, drafted by the European Commission in 2016;<sup>119</sup> and
  - The Office of the Ombudsperson is very active in promoting space for debate among various stakeholders in the media environment, including social media, human rights organisations, politicians, and public authorities. For example, he set up Anti-Hate Platforms to operate at national and local levels.

Unfortunately, despite the positive efforts of the current Ombudsperson, including in cases of ‘hate speech’, he is often criticised and undermined by politicians of the ruling party, who have made statements suggesting that the Ombudsperson will soon be dismissed from his position, and that his Office will face a budgetary reduction.<sup>120</sup> The Ombudsperson is also sometimes undermined by the law enforcement authorities. It has been reported that prosecutors interfere in court cases concerning LGBTQI persons that are dealt with by the Ombudsperson. Prosecutors can join the proceedings, and they allegedly do so, but not to support the victims but “as a way to control what is happening or to represent the opposing party”.<sup>121</sup>



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### *Government Plenipotentiary for Equal Treatment*

The Government Plenipotentiary is a government appointee placed in the Prime Minister's Office at the rank of a secretary of state.<sup>122</sup>

The mandate of the Plenipotentiary primarily extends to the coordination of governmental policies in the area of equal treatment, and to the implementation of the National Action Plan for Equal Treatment. According to the law, the Plenipotentiary should collaborate with equality NGOs and other civil society actors.

The Plenipotentiary is not an independent function and, in practice, is dependent on her/his political mandate and on whether equality and non-discrimination issues are on the agenda of the incumbent government. The past two years have seen the Office of the Plenipotentiary substantially dismantled, with a resulting diminishment in its effectiveness. The current Plenipotentiary is Adam Lipinski who has yet to take a strong public position on the current problems facing the country in relation to 'hate speech', and has not undertaken any activities or social awareness campaigns in this regard.

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# Media regulation and ‘hate speech’

## Government frameworks on media policy

Provisions related to media regulation in Poland are contained in several pieces of legislation; these deal separately with broadcast media, the print press, and electronic media.

The current media framework in Poland has to be, however, viewed in the context of the current political situation in the country. As outlined earlier, PiS and its government have undertaken a number of steps to control the media. This includes replacing the heads of the public television and radio broadcasters and limiting the independence of the public service broadcaster, which has become its “ideological mouthpiece”.<sup>123</sup> So far the government has failed to control private media, but continues efforts to ‘re-Polonise’ the media through restrictions on foreign ownership and broader efforts to suppress ‘unpatriotic’ views.<sup>124</sup>

At the same time, the Polish government does not have a comprehensive policy on the media and ‘hate speech’. Specific policies focused on particular minority groups have, however, been developed in these areas, such as the National Action Plan for Equal Treatment and the Programme for the Integration of the Roma Community in Poland.

### *Broadcast media*

Broadcast media are regulated by the Broadcasting Law, which also establishes the National Broadcasting Council (the Council), the state regulatory body for the broadcast media.<sup>125</sup>

The Broadcasting Law contains several provisions that can be applied to instances of ‘hate speech’ in the broadcast media. In particular, it states that programmes and other broadcasts should not encourage actions contrary to either the law or Poland’s *raison d’état*, and should not propagate attitudes or beliefs contrary to the moral values and social interest of the country.<sup>126</sup> Specifically, they cannot broadcast content which incites hatred or discrimination on the grounds of race, disability, sex, religion, or nationality.<sup>127</sup>

The Council has the authority to issue regulatory decisions (of an administrative nature) to broadcasters, including for the violation of the abovementioned provisions. It can impose sanctions in the form of fines; the maximum fine is 50% of the annual fee paid by the broadcaster for the right to use the frequency allocated to provide their programme service. In the event that a broadcaster does not pay for the right to use a frequency, the fine may amount up to 10% of the revenue generated by the broadcaster in the preceding tax year.<sup>128</sup> The decisions of the Council can be appealed to the Regional Court in Warsaw.<sup>129</sup>

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The Council does not maintain statistics of the number of complaints received from the public regarding the broadcasting of discriminatory content by radio and television programme services.<sup>130</sup> It only records statistics of the number of proceedings that have been initiated for the violation of the prohibition on discriminatory radio and television content. So far only a limited number of proceedings have been initiated under the provisions of the Broadcasting Law: two cases each in 2011 and 2012, four cases in 2013, six in 2015, and two cases in 2016.

Unfortunately, the Council does not provide detailed reasoning in its final decisions or provide a clear outline of the criteria used to assess such cases. The decisions typically:

- Only refer to constitutional standards of freedom of expression or international human rights standards in broad terms, without explaining the thought or assessment process in detail;
- The Council is not explicitly referring to the three-part test for restrictions of freedom of expression in its decision-making. However, it appears that the Council is following the test. For example, it refers to the limitations on freedom of expression that are necessary in a democratic society, and will usually additionally make reference to the legality of the content at issue. The proportionality test is generally invoked at the point of determining the fine to be levied. On occasion, the Council has referred to “social needs and pressure”, as well as a case’s potential importance in sending an educational message to society;
- It also seems that the Council is assessing the ‘harmfulness’ of the content; and
- In making their decisions, the Council sometimes seeks the opinion of external expert scholars specialising in the relevant discipline.
- The majority of the Council’s decisions in cases related to ‘hate speech’ concern speeches and remarks made by TV or radio show guests.
- In 2011 the Council undertook proceedings in two ‘hate speech’ cases. The first case concerned two programmes by Radio Marya. In March, it broadcast a programme in which the participants uttered statements such as “the Poles must rule in Poland”; it also published a column of a similar nature, from the series ‘Thinking the Fatherland’. In the decision, the Council demanded that the broadcaster cease broadcasting the programming as it could discriminate on the grounds of nationality.<sup>131</sup> The second case concerned the Morning WF programme on Eska Rock radio, in which the hosts made mocking and discriminatory statements against the spokesperson for the Road Transport Inspection. The Council imposed an administrative penalty, a fine of 50,000 PLN (approx 12,030 EUR).<sup>132</sup>

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- In 2012, two ‘hate speech’ cases were subject to proceedings by the Council, in which the Council imposed fines. One addressed the Morning WF programme on Eska Rock radio in June 2012, in which offensive statements about women of Ukrainian nationality were made. The Council found this to be discriminatory on the basis of gender and nationality and imposed a fine of 75,000 PLN (approx 18,015 EUR).<sup>133</sup> In the second case, the broadcaster was found to discriminate on the basis of race.<sup>134</sup>
  - In 2013, the Council undertook four proceedings. The first concerned a programme called ‘Only for adults’ in March 2013 by TV Poland SA. This was found to be in violation of “morality and social good, discriminatory against the elderly and offensive to the Catholics”. The Council imposed a fine of 5,000 PLN (approx 1,200 EUR).<sup>135</sup> The remaining three cases resulted in written notification being issued by the Council to the broadcasters in question, requesting that in the future they refrain from broadcasting content that discriminates on the grounds of sexual orientation (in two cases) and nationality (in one case).<sup>136</sup>
  - In 2014, the Council received more than 70,000 complaints following a social media campaign broadcast on the rights of LGBTQI persons on Polish Public Television. Some of these complaints referred to the alleged violation of the provisions in the Broadcasting Law which stipulates that Christian values professed by the public must be respected. However, the Council found that the broadcast content did not disrespect Christian values, and that the provision obliging the broadcaster to respect those values did not extend to an obligation to promote the belief system.<sup>137</sup>
  - In 2015, six proceedings were initiated by the Council; however, it was determined that the broadcasters were not in violation of their obligations.<sup>138</sup>
  - In 2016, the Council carried out two proceedings in ‘hate speech’ cases. One resulted in the Council issuing a written request to the broadcaster to refrain from broadcasting content which constitutes discrimination on the grounds of nationality in the future. The other procedure is pending. Several fines have also been imposed on the basis of violations of the broadcasting rules for people with disabilities.<sup>139</sup>

The Council’s decisions in discrimination cases are usually widely covered by media and attract public attention. However, the practice shows that the significant increase of, in particular, anti-migrant and racist speech in the media, mostly in state owned or pro-governmental outlets, has not prompted a sufficient response from the Council. As such, the Council’s effectiveness as a means of containing and reducing ‘hate speech’ is questionable.

It must be also noted that the interpretation of ‘hate speech’ provisions is substantially dependent on the stance of the Council at that time, and the views

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represented by its members. In this context, a broad representation of political and ideological views among the members of the Council can assist in balancing out divergent viewpoints and opinions on a particular subject, and thereby lead to sound decisions being issued. However, if members of one political camp increasingly dominate the Council, its decisions on potential violations and contingent determination of the appropriate penalties may be less balanced. This may result in a troubling scenario, whereby public debate on certain subjects is unjustifiably restricted.<sup>140</sup>

### *Positive measures*

Under the provisions on protection of minorities, the Council is obliged to undertake appropriate measures (including allocating and specifically earmarking subsidies) to support activities aimed at protecting, preserving, and developing the cultural identity of minorities, which includes supporting television and radio programme services made by minorities.<sup>141</sup> The Broadcasting Law further stipulates that public television and radio programme services must pay “due regard to the needs of national and ethnic minorities and communities speaking regional languages, including broadcasting news programmes in the languages of national and ethnic minorities and in regional languages.”<sup>142</sup> When appointing directors of sections that broadcast programmes in languages of national and ethnic minorities and the regional languages, the candidates put forward by minority organisations should be considered.<sup>143</sup>

To comply with these positive obligations, the Council has developed two key regulatory strategies – one of which addresses broadcast media regulation generally (the Regulatory Strategy) and one of which addresses electronic media specifically (the Electronic Media Strategy).<sup>144</sup> In the Regulatory Strategy, the Council explicitly refers to certain international standards related to minorities<sup>145</sup> and the National Action Plan for Equal Treatment for 2013–2016<sup>146</sup> as the primary documents which should guide the interpretation of the Council’s strategy. Although the Regulatory Strategy does not explicitly aim to address the phenomenon of ‘hate speech’ in the media, it nevertheless includes positive measures to promote freedom of expression and enhance the quality of public debate in the media, which may counteract ‘hate speech’, including:

- Ensuring diversity of programming and supporting social, community, and local media; providing all social groups access to media; protecting elderly people; promoting a positive image of old age in public media; and taking into consideration the needs of people with disabilities in programme services;
- With reference to the key activities set out in the National Action Plan, altering discriminatory portrayals by the broadcast media of members of groups at risk of unequal treatment, including by initiating and undertaking a comprehensive public debate on the manner in which at risk groups are represented in broadcast media (featuring well-known public figures, representatives of

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academia, and media experts); establishing a broad coalition called the Media of Equal Opportunities for the purpose of promoting equal treatment by the mass media; and organising competitions for the best media initiatives related to the principle of equal treatment; and

- Cooperating with equality bodies and women's rights groups to promote equality of the sexes in broadcast media; increasing the representation of women in media companies and related bodies; and counteracting stereotypical representations of women's social roles in the media.

Similarly, the Electronic Media Strategy<sup>147</sup> lists amongst its fundamental objectives the protection of national and ethnic minorities' access to electronic media. It sets out how the social communication decisions and tasks, defined in the National Programme for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance, will be driven forward and effectively implemented. These tasks include the periodic consultation of the Minority Media Council by representatives of public media, and the implementation of a series of trainings for journalists who are members of national and ethnic minorities and who make programme services in minority languages. One of the objectives of the Electronic Media Strategy is to support local and regional communities, and national and ethnic minorities and groups who use a regional language, in their aspirations to establish their own stations.

It is difficult to assess how effectively these objectives have been met. It is notable that since 2015, there has been a shift in the Council's involvement in equality and non-discrimination issues. According to available information, the Council does not regularly cooperate with either the Ombudsperson, the Plenipotentiary, or NGOs working in the sphere of 'hate speech' and discrimination. It undertakes only certain *ad hoc* activities in this area (such as participation in conferences and other events) in cooperation with some institutions. From the perspective of civil society organisations working on equality and human rights, the Council is increasingly seen as an ineffective institution in terms of combating 'hate speech', racism, or homophobia in Poland.

### *Civil society engagement*

NGOs that have been granted the status of public benefit organisations by the courts are able to make use of airtime allocated specifically for such organisations on public radio and television broadcasting.<sup>148</sup> The Polish National Radio station, for example, has broadcast the social campaigns of NGOs working on women's rights, the rights of people with disabilities, children's rights, and LGBTIQ rights, free of charge. Similarly, Polish Public Television has broadcast the social campaigns of human rights organisations, including those who focus on LGBTIQ rights and violence against women.

However, this opportunity is rarely used by organisations working in the field of equality and non-discrimination; where organisations have taken advantage, the

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substance of their campaigns has sometimes provoked controversy and backlash, including, for example, a social campaign on LGBTQI rights.<sup>149</sup>

### *Print media*

The primary piece of legislation regulating the print press is the Press Law.<sup>150</sup> It contains a number of provisions that guarantee press freedom,<sup>151</sup> and defines the work of journalists as a service to both society and the state, which entails the obligation to act in accordance with professional ethics and the principles of social co-existence, within the limits specified by law.<sup>152</sup>

The Press Law mandates the establishment of a Press Council – a consultative body that would serve the Prime Minister – that deals with complaints concerning the press, and its role in the country’s social and political life.<sup>153</sup> The Press Council has not yet been established, however, and there are no signs that its membership will be appointed in the near future.

### *Remedies for ‘hate speech’ under the Press Law*

There is overlap between the provisions of the Press Law and the Civil Code, and aggrieved individuals can simultaneously seek protection under both pieces of legislation.<sup>154</sup>

The Press Law provides for only one remedy that could be applied in some cases of ‘hate speech’ appearing in the media: the right to corrections.<sup>155</sup> This is an elaboration on the constitutional right to demand the correction or deletion of untrue or incomplete information, or of information acquired through unlawful means.<sup>156</sup> The request for correction can be filed either by a concerned natural or legal person or an organisation; upon which the editor-in-chief of the relevant daily paper or magazine is obliged to publish a matter-of-fact correction in a press release, free of charge.

This remedy does not provide particularly effective protection in the case of ‘hate speech’, however, due to its limited application to ‘facts’ and “imprecise or untrue information included in the press release”. Formulating a request to correct ‘hate speech’ directed against a particular person or group of people, which may be more likely to be based on value judgements or opinion, would make using this remedy more challenging.

Prior to 2012, the Press Law had granted a right to request that an editor-in-chief publish a ‘response’ (a matter-of-fact statement) in cases where ‘unjustified criticism’ had been published. This provision was abolished in 2012. Whilst this may have theoretically offered greater access to a remedy for victims of ‘hate speech’ appearing in the print media, it had not been used by victims for this purpose.

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Overall, victims of ‘hate speech’ tend not to make use of the Press Law to seek redress for ‘hate speech’ in the Polish print media, as the available remedies are not considered effective. Moreover, the Press Law itself, adopted in the communist era, is widely criticised as being out of step with present times and the changes in the print media landscape.

## Media self-regulation

Polish journalists and the media community more broadly are sharply divided along political and ideological lines. This division is the principal reason why a nationwide code of ethics for journalists and media workers has not been adopted. Various journalists’ associations and media outlets have, however, adopted their own ethical codes. Although none of these codes explicitly address ‘hate speech’, some refer to the principles of non-discrimination, respect, and tolerance. For example:

- The 1995 **Charter of Media Ethics of the Association of Polish Journalists**<sup>157</sup> includes, *inter alia*, the principle of respect and tolerance, human dignity, and other rights;<sup>158</sup>
- The **Association of Journalists of the Republic of Poland**<sup>159</sup> refers to the Charter of Media Ethics (above); none of their own internal documents refer to ‘hate speech’ explicitly;
- The **Code of Good Practices of Press Publishers**<sup>160</sup> of the Chamber of Press Publishers (one of the largest national association’s of publishing companies) does not regulate ‘hate speech’ in any way;
- The 2004 **Code of Professional Ethics of the Polish Radio Company** prohibits discrimination based on sex, age, disability, race, religion, nationality, political views, trade union membership, ethnic origin, religious beliefs, sexual orientation, or cultural or moral identity;<sup>161</sup> and
- **Polish Public Television broadcaster, TVP SA**, requires all journalists associated with TVP SA to adhere to its **Rules of Journalist Ethics**. It requires all journalists to respect all peoples, regardless of their attitude towards any religion or ideological, cultural, or moral identity.<sup>162</sup> Members must not discriminate against anyone on the grounds of their sex, age, disability, race, nationality or ethnicity, religion or denomination, political views, membership in organisations, cultural or moral identity, or sexual orientation.<sup>163</sup> They should also demonstrate particular sensitivity in their interaction with people with disabilities, people suffering from other illnesses, and people who are experiencing poverty. The Rules provide that journalists’ language ought to be free of vulgar or biased expressions.<sup>164</sup>



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The National Broadcasting Council has not developed an ethical code or code of professional standards for the broadcast media. Instead it promotes self-regulation in the media, and the development of such codes is the responsibility of media and journalists associations. The Regulatory Strategy emphasises that responsibility for raising the quality of journalism and public debate, eliminating the language of conflict, and improving professionalism among journalists lies with media representatives.<sup>165</sup>

Individual media and journalistic associations and outlets have included provisions in their codes that set out sanctions for their violation. For example:

- **The Association of Polish Journalists** can impose penalties on their members for violations of the Charter. These range from admonition, reprimand, temporary suspension of membership of the Association, to permanent expulsion from the Association. The Highest Journalist Court, an internal court within the structure of the Association, can order that the verdict in a particular case be published in the media.<sup>166</sup> However, it is unclear whether the Charter is truly effective in terms of its influence on general journalistic practices and the media environment, as information on the implementation of its provisions is not readily available.
- In the **Polish Radio Company**, complaints regarding violations of its ethical standards are examined by its Programme and Corporate Development Office. The Company additionally consults linguists or lawyers employed by the company; in some cases, it also asks for comments from external experts to adjudicate complaints.

In practice, it is extremely rare for disciplinary action to be taken against members of the various journalists' associations and media outlets. According to available information, many have yet to receive complaints relating to 'hate speech' published or broadcast by their members.<sup>167</sup> The only reported case concerned a complaint lodged by the Association of Polish Journalists to the Broadcasting Council, regarding a radio programme that contained racist content in 2011. This indicates that in cases of violations, aggrieved individuals prefer to lodge complaints with public authorities rather than with media associations. Limited public awareness about the existence of journalistic associations, and their ethical codes of conduct and related sanctions regimes, even among journalists themselves, is a further significant barrier to effective self-regulation.

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## Approaches to media convergence

Digital media in Poland is regulated by the Law on the Provision of Electronic Services. The Law provides immunity to Internet intermediaries, provided that they comply with certain requirements, and establishes a general notice and take down system for intermediaries to implement. The Law does not refer directly to the issue of 'hate speech', or refer to specific measures which might be taken to prevent and address the phenomenon of 'hate speech' appearing in digital media.

Social media and the majority of online content are not subject to existing legislation related to media regulation. However, recent but now established court practice has determined that online press of any type (including blogs) are to be considered part of the 'electronic press'. This means that the Press Law is applicable to a website and, as such, they are required to register the website in the special press registry, with the site administrator function fulfilled by recognised editors for the purposes of the law. The ineffectiveness of the Press Law in addressing 'hate speech' translates to the online sphere, and no relevant court cases involving digital media and 'hate speech' have so far been reported.

### *Intermediary liability*

Criminal procedures can be initiated for the 'hate speech' content online. However, under the principle of individual liability under the criminal law, only the individual perpetrator (not legal entities) can be accused of violating relevant criminal provisions. There are no reported 'hate speech' cases where individuals were criminally prosecuted for the failure to remove the third party content.

The civil courts have applied the provisions of the Civil Code on infringement of legitimate personal rights to online content and held that a website administrator may be liable for the content. This was in the case of defamatory statements only,<sup>168</sup> and no 'hate speech' cases have been reported under these provisions.

In 2015, the Polish Supreme Court clarified the extent of liability in the case of online publications. The case involved a protest action, 'Nazism never again on Allegro', against a Polish auction website, Allegro.pl, which permitted the sale of various Nazi memorabilia. The NGOs, The Never Again Association and Green Light Foundation, altered Allegro's logo to contain the SS symbol, and in March 2010 handled the materials with this symbol to people during the street action. Allegro filed a cease and desist action, requesting the removal of the material with the altered logo from all publications and destruction of the materials. After they refused to comply, the company sued them for infringement of personal rights. The courts rejected Allegro's claims.<sup>169</sup> In its decision, the Supreme Court concluded that although the good name of Allegro was violated, defendants acted in the public interest. It also stated that although under the applicable legislation, Internet service providers were not obliged to monitor, filter, or verify data; this did

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not mean that they could or should not respond to information received about a website they host and take appropriate action.<sup>170</sup>

### *Blocking*

Under the Polish Anti-terrorism Law,<sup>171</sup> the Polish intelligence agency, the ABW (Agencja Bezpieczeństwa Wewnętrznego) can “order the blocking or demand that the electronic open source service administrator block access to information data”. Websites can be blocked for up to five days prior to obtaining permission from higher prosecution authorities, and up to 30 days if permission is granted, with the option to renew it for up to three months. Authorisation for a temporary access ban can also now be granted by the minister of justice. The legislation does not grant power to the source administrator to appeal against such a decision.

It is not clear if these provisions have been applied in ‘hate speech’ cases. However, the law has been criticised as being extremely problematic from the human rights perspective, including the right to freedom of expression standards.<sup>172</sup>

### **Advertising self-regulation**

The primary advertising self-regulatory body in Poland is the Advertising Council;<sup>173</sup> its membership is mainly composed of Polish commercial advertisers. Members of the Advertising Council are required to comply with the Code of Ethics in Advertising,<sup>174</sup> which also provides the framework for the handling of complaints about the content of advertisements. It applies to all types of media, irrespective of where the advertisement is placed. The Code does not currently include any explicit reference to ‘hate speech’; but it includes detailed provisions prohibiting, *inter alia*, discrimination on the basis of sex, religion or denomination, and nationality, and the inclusion of anything which encourages acts of violence.

Compliance with the Code is enforced by the Committee of Advertising Ethics, which also accepts complaints directly from the public. The Committee consists of representatives of Polish commercial companies and individual experts in the field of business, management, and communication. The Committee has on numerous occasions dealt with complaints concerning sexist commercial advertising; in its decisions, it refers to the standard of ‘good manners’. The Committee often examines whether the advertisement promotes harmful prejudices and stereotypes, especially against women. For example, in 2014, the Committee ruled against Orangina Schweppes Polska, a drinks producer, which used in its advert an image of a scantily dressed woman and the slogan ‘This woman’s place is in the home’. The Committee found that the company breached the Code of Conduct by promoting negative social stereotypes and discriminating against women.<sup>175</sup>

There is no record of such decisions against ‘hate speech’ on other protected grounds.

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# Conclusions and recommendations

As highlighted in this report, the legal and policy framework is not sufficient to comprehensively respond to instances of ‘hate speech’ in Polish society. Moreover, the failure of the government to lead by example and foster an enabling environment for both the right to freedom of expression and the right to equality has led to the situation where those targeted by ‘hate speech’ are left without an effective remedy. The legal framework on freedom of expression and ‘hate speech’ does not fully comply with international freedom of expression standards.

It is also clear that some public bodies – in particular, the Polish Ombudsperson – and civil society have undertaken a series of programmes to promote tolerance and multi-cultural understanding in society. Unfortunately, the broadcast regulator only rarely addresses ‘hate speech’ in the broadcast media. The Polish media self-regulatory bodies have not adopted dedicated provisions that could be applied against ‘hate speech’ in the press by their members in their ethical codes.

As such, more concerted effort is needed at the government level – in law, policy, and practice – to ensure that adopted measures are effective and in line with international obligations, which strike a balance between the protection of freedom of expression and the prohibition of incitement to discrimination, hostility, and violence.

This report proposes that, at a minimum, the following measures should be undertaken to improve the current situation:

- All relevant Polish legislation – in particular the criminal law provisions – should be revised for their compliance with international human rights standards applicable to ‘hate speech’;
- The provisions of criminal law that could be indirectly applied to ‘hate speech’, in particular defamation, insult of the Polish nation and state, insult of religious beliefs or offending religious feelings, and the crimes against the Polish nation, should be decriminalised as they fail to meet international freedom of expression standards;
- The advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights (ICCPR), establishing a high threshold for limitations on free expression as set out in the Rabat Plan of Action, as well as prohibitions on direct and public incitement to genocide and incitement to crimes against humanity;
- The protective scope of any measures to address ‘hate speech’ should encompass all protected characteristics recognised under international human rights law, and not be limited to the present protected characteristics of

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race, ethnic origin, nationality, or religion. In particular, the list of protected characteristics should be revised in light of the right to non-discrimination as provided under Article 2(1) and Article 26 of the ICCPR. The protected characteristics should explicitly include sexual orientation, gender identity, and disability;

- The government should develop a comprehensive plan on the implementation of the Rabat Plan of Action. In particular, it should adopt and implement a comprehensive plan for training law enforcement authorities, the judiciary, and those involved in the administration of justice on issues concerning the prohibition of incitement to hatred and ‘hate speech’;
- The government should improve the existing system for collecting data and producing statistics in order to provide a coherent, integrated view of cases of incitement to hatred reported to the law enforcement authorities and processed through the courts, as well as ‘hate speech’ in civil and administrative law proceedings. Such a system should also include indicators for monitoring the effectiveness of the judicial system in dealing with ‘hate speech’ cases;
- The Law on Equal Treatment should be strengthened to provide stronger remedies for victims of ‘hate speech’. In particular, the compensation claims under the Law should be widened to include non-material damages. The government should also remove practical obstacles in the implementation of the Law on Equal Treatment to ensure that victims of ‘hate speech’ and discrimination can rely on this law to seek protection of their rights;
- The institutional equality framework should be enhanced and equipped with effective instruments of reactions towards ‘hate speech’. The government and public authorities should strengthen the role of the equality institutions and, in general, make equality a priority agenda;
- Provisions of media legislation should be brought to full compliance with international freedom of expression standards. In particular, the government should repeal the 2016 law on the National Media Council which allows undue political interference with public service media and should implement the December 2016 Constitutional Tribunal ruling by adopting necessary legislative changes to restore the competences of the National Broadcasting Council to oversee public service media;
- The National Broadcasting Council should improve its activities aimed at promoting good practices and standards in broadcast media and improve cooperation with media outlets, to respond to ‘hate speech’;
- Public officials, including politicians, should realise that they play a leading role in recognising and promptly speaking out against intolerance and discrimination, including instances of ‘hate speech’. This requires recognising and rejecting the conduct itself, as well as the prejudices of which it is

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symptomatic, expressing sympathy and support to the targeted individuals or groups, and framing such incidents as harmful to the whole of society. These interventions are particularly important when inter-communal tensions are high, or are susceptible to being escalated, and when political stakes are also high, e.g. in the run-up to elections; and

- Media organisations should recognise that they play an important role in this area and intensify their efforts to provide adequate responses. They should ensure that their ethics address ‘hate speech’, as well as equality and tolerance, and that these codes are effectively implemented. The codes should be widely publicised and internalised by journalists and media organisations in order to ensure full compliance with them. Effective measures should be taken to address violation of the codes. Media organisations should also organise regular training courses and updates for professional and trainee journalists on the internationally binding human rights standards on ‘hate speech’ and freedom of expression and on relevant ethical codes of conduct.

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# Annexes

## Positive initiatives

The key initiatives led by government, civil society, and media to identify, counter, and prevent 'hate speech' and its effects include the following **positive initiatives**:

- The Ombudsperson organised a series of 'Round tables against hate speech', which were attended by representatives of the prosecution service, the Ministry of the Interior, the police, the Commissioner for Children's Rights, the Ministry of Justice, the Ministry of Administration and Digitisation, and the Ministry of National Education, as well as representatives of online portals, social media platforms, and NGOs with an interest in online 'hate speech'. The attendees focused on developing good practices;<sup>176</sup>
- 'Project HejtStop',<sup>177</sup> an initiative by the NGO Projekt: Polska, set up a user-friendly website for reporting online 'hate speech' and incitement to hatred cases. The requirements for reporting incidents is very simple. The NGO then carries legal analysis of the content/incident and files a notification of unlawful action to the relevant law enforcement authorities. The project has achieved great popularity in Poland thanks to very successful information campaigns in major Polish media; and
- The organisation Projekt: Polska signed an agreement with Facebook through which it was assigned the status of 'trusted partner'. It is one of the few Polish organisations that has been assigned this status.

## Statistics on incitement

Statistics on the number of proceedings under the relevant provisions of the Penal Code Article 119.1 of the Penal Code

Year	Number of proceedings instituted by the Polish police	Number of proceedings which concluded with the Polish police establishing that an offence had been committed	The number of convictions by a final judgement
<i>Article 119.1 of the Penal Code</i>			
2011	17	23	4
2012	24	22	10
2013	44	61	8
2014	58	74	56
2015	64	65	66
2016	124	111	
<i>Article 256.1 of the Penal Code</i>			
2011	86	81	9
2012	117	86	19
2013	378	258	24
2014	373	398	34
2015	503	402	21
2016	349	373	
<i>Article 256.2 of the Penal Code</i>			
2011	86	81	N/A
2012	117	86	2
2013	12	9	1
2014	24	12	1
2015	18	25	2
2016	17	11	N/A
<i>Article 257 of the Penal Code</i>			
2011	66	82	14
2012	98	104	22
2013	196	146	26
2014	260	243	49
2015	254	299	75
2016	242	270	N/A



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# Endnotes

<sup>1</sup> See, e.g., Association of Jewish Religious Communities, Anti-Semitism in the Polish lands, available from: <http://bit.ly/2wzAhV4>.

<sup>2</sup> See, e.g., ARTICLE 19, Poland: independence of public service media, 31 January 2017, available from: <http://bit.ly/2BB5llw>.

<sup>3</sup> See, e.g., Freedom House, Pluralism Under Attack: The Assault on Press Freedom in Poland, 2017, available from: <http://bit.ly/2EPoyrW>.

<sup>4</sup> LGBTQI stands for “Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Intersex”.

<sup>5</sup> See, e.g., Campaign Against Homophobia, Report on Poland: Homophobic and transphobic crimes, from hatred and justice, Warsaw 2016, available from: <http://bit.ly/2qa0Yy1>

<sup>6</sup> See, e.g., P. Szewczyk, Under the PiS, homophobia is intensifying. Is the LGBT environment safe in Poland?, The Newsweek, 4 March 2016, available at: <http://bit.ly/2Cud33S>. The attacks were made on the offices of LGBTI organisations, such as the CSOs Campaign Against Homophobia and Lambda.

<sup>7</sup> See, e.g., the Concluding Observations of the UN Human Rights Committee on Poland, 23 November 2016.

<sup>8</sup> For example, the budget of the Commissioner for Human Rights was lowered several times; for more information, see: <http://bit.ly/2gvoIGN>.

<sup>9</sup> There have been several legislative attempts in the last decade to amend the criminal provisions in order to enhance the protection for LGBTQI community. The last rejection took place in November 2016; for more information, see: <http://bit.ly/2gvfY3t>.

<sup>10</sup> The report is based on a review of existing legislation and its application by relevant authorities, analysis of information provided by public bodies at the author’s request, as well as on interviews with key stakeholders (in particular, human rights activists and experts). All the analysis in the report is made on basis of the Polish version of the respective laws; all translations of respective laws in this report are unofficial translations. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.

<sup>11</sup> Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> circuit).

<sup>12</sup> The ICCPR has 167 States parties, including Poland.

<sup>13</sup> See HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.

<sup>14</sup> *Op cit.*, para 22.

<sup>15</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.

<sup>16</sup> Article 10 (1) of the European Convention reads: “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; Article 10 (2), The exercise of these freedoms, since it

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carries with it duties and responsibilities, may be subject to such formalities, conditions, 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.”

<sup>17</sup> Article 1 of the UDHR states: “All human beings are born free and equal in dignity and rights”; Article 2 provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind”; and Article 7 requires protection from discrimination.

<sup>18</sup> For a full explanation of ARTICLE 19’s policy on ‘hate speech’, see Hate Speech Explained: A Toolkit; available from: <http://bit.ly/1UvUQ9t>.

<sup>19</sup> General Comment 34, *op.cit.*, para 52.

<sup>20</sup> The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012; available from: <http://bit.ly/2fTNMG6>.

<sup>21</sup> The Rabat Plan of Action has been endorsed by a wide range of special procedures of the UN Human Rights Council; see, e.g. the Report of the Special Rapporteur on FOE on hate speech and incitement to hatred, A/67/357, 7 September 2012; Report of the Special Rapporteur on freedom of religion or belief on the need to tackle manifestations of collective religious hatred, A/HRC/25/58, 26 December 2013; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism on

the Internet and social media, A/HRC/26/49, 6 May 2014; and the contribution of the UN Special Advisor on the Prevention of Genocide to the expert seminar on ways to curb incitement to violence on ethnic, religious, or racial grounds in situations with imminent risk of atrocity crimes, Geneva, 22 February 2013.

<sup>22</sup> HR Committee, General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para 2.

<sup>23</sup> UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating racist hate speech, 26 September 2013, paras 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

<sup>24</sup> European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para 56; or *Gündüz v. Turkey*, App.No. 35071/97 (2004), para 22.

<sup>25</sup> European Court, *Jersild v. Denmark*, App. No 15890/89 (1992), para 35.

<sup>26</sup> Council Framework Decision [2008/913/JHA](http://bit.ly/2nTmRAi) of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law; available from: <http://bit.ly/2nTmRAi>.

<sup>27</sup> For a full analysis, see ARTICLE 19, Submission to the Consultations on the EU Justice Policy, December 2013; available from: <http://bit.ly/2APKRZ9>.

<sup>28</sup> HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.

<sup>29</sup> General Comment No. 34, *op cit.*, para 43.

<sup>30</sup> Guiding Principles on Business and Human

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Rights: Implementing the UN “Protect, Respect and Remedy” Framework (The Ruggie Principles), A/HRC/17/31, 21 March 2011, Annex. The HRC endorsed the guiding principles in HRC resolution 17/4, A/HRC/RES/17/14, 16 June 2011.

<sup>31</sup> Report of the Special Rapporteur on FOE, 16 May 2011, A/HRC/17/27, paras 75-76.

<sup>32</sup> Report of the Special Rapporteur on FOE, 11 May 2016, A/HRC/32/38; para 40 – 44,

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, para 43.

<sup>35</sup> *Ibid.*

<sup>36</sup> Joint Declaration on Freedom of Expression and “Fake News,” Disinformation and Propaganda, adopted by the UN Special Rapporteur on FOE, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017; available from: <http://bit.ly/2meFQ6g>.

<sup>37</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14(1).

<sup>38</sup> *Ibid.*, Article 5.

<sup>39</sup> Grand Chamber of the European Court, *Delfi AS v. Estonia*, No. 64569/09, 16 June 2015.

<sup>40</sup> *Ibid.*, Judges Sajó and Tsotsoria’s Joint Dissent Opinion. See also ARTICLE 19, *Delfi AS v Estonia* Case Comment: Strasbourg Undermines Freedom of Expression, 1 October 2015; available from: <http://bit.ly/2zQTEur>.

<sup>41</sup> For example, in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, No.

22947/13, 2 February 2016, the European Court found a violation of Article 10 of the European Convention where a self-regulatory body of Internet content providers and an owner of an online news portal were held liable for defamatory comments posted by a third party, which the parties removed on receipt of notice.

<sup>42</sup> European Court, *Pihl v. Sweden*, No. 74742/13, 9 March 2017.

<sup>43</sup> For further analysis, see: Dirk Voorhoof, *Pihl v. Sweden*: non-profit blog operator is not liable for defamatory users’ comments in case of prompt removal upon notice, Strasbourg Observers, 20 March 2017; available from: <http://bit.ly/2zMUQB8>.

<sup>44</sup> European Commission, Code of Conduct on Countering Illegal Hate Speech, signed on 31 May 2016; available from: <http://bit.ly/1XLcJVo>.

<sup>45</sup> Council Framework, Decision *op.cit.*

<sup>46</sup> For the criticism of the Code of Conduct, see ARTICLE 19, EU Commission Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision, June 2016; available at <http://bit.ly/29BVUJh>.

<sup>47</sup> The Constitution of the Republic of Poland of 2 April 1997, Official Journal of 1997 No. 78 position 483.

<sup>48</sup> Law on Access to Public Information. 6 September 2001. *Journal of Laws* No 112, item 1198.

<sup>49</sup> The Constitution, *op.cit.*, Article 31 para 3.

<sup>50</sup> *Ibid.*, Article 13.

<sup>51</sup> The judgment of the Constitutional Tribunal of 25 February 2014, ref. no SK 65/12.

<sup>52</sup> The Constitution, *op.cit.*, Article 32 states: “(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by the public authorities. (2) No-one shall be discriminated against in political, social or economic life for any

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reason whatsoever.” Further, Article 25 of the Constitution contains the principle of equal rights of religious associations; and Article 33 para 1 and 2 state that both women and men have equal rights in family, political, social, and economic life, and, in particular, both have equal rights to education, employment and promotion, equal pay for equal work, social benefits, holding posts, etc.

<sup>53</sup> *Ibid.* The Constitution refers to all forms of distinction which may arise in political, social, or economic life, regardless of the characteristic (criterion) according to which a distinction may occur. The provision may be cited by various groups characterised by a particular feature, e.g. race and ethnicity, age, disability, sexual orientation, and sexual identity, religion and other grounds. *C.f.* Judgement of the Constitutional Tribunal of 16 December 1997, ref. no. K. 8/97.

<sup>54</sup> *Ibid.* Article 35 para 1 guarantees people the freedom to preserve and develop their own language, preserve customs and traditions and develop their own culture; Article 35.2 provides that national and ethnic minorities have the right to establish their own educational, cultural, and religious institutions; and Articles 53, 54 para 1, 58 para 1, and 60 provide that freedom of conscience and religion, freedom of expression, freedom of association, and the right of access to public services are equally safeguarded for all Polish citizens, including members of national and ethnic minorities; *c.f.* L. Bojarski, Country report 2016 on the non-discrimination directives. Reporting period 1 January 2015 – 31 December 2015, available from: <http://bit.ly/2sUNmJU>.

<sup>55</sup> Act of 6 June 1997 Penal Code, Official Journal of 2016 No. 1137.

<sup>56</sup> *Ibid.*, Article 119 para 1. The penalty is imprisonment between three months and five years.

<sup>57</sup> *Ibid.*, Article 256 para 1. The penalty is a fine, restriction of personal liberty, or a term of imprisonment of up to two years.

<sup>58</sup> *Ibid.*, Article 256 para 2, which carries the same penalty.

<sup>59</sup> *Ibid.*, Article 256 para 3.

<sup>60</sup> *Ibid.* The penalty is a term of imprisonment of up to 3 years.

<sup>61</sup> General rules of the Polish Criminal Code.

<sup>62</sup> See the annual reports of the Prosecutor General, available from: <http://bit.ly/2wykhVi>. For example, in 2015, there were 1548 proceedings on hate crimes and ‘hate speech’ pending before prosecutor offices all over Poland, and approximately half of them concerned online content (discriminatory threats, insults, incitement).

<sup>63</sup> On the initiative of the Crime Intelligence Office of the National Police Headquarters, persons who would support combating crime motivated by racial hatred and xenophobia were appointed in all units in Poland. The term ‘crime’ means all the discriminatory motivated acts, including both physical violence as well as ‘speech acts’. The National Headquarters receive monthly reports on hate crimes registered in their areas submitted by coordinators from the province police headquarters/Warsaw Police Headquarters. The data is subject to analysis based on which new solutions aiming at greater effectiveness in combating crimes motivated by racism or xenophobia are implemented. In addition, these analyses are used in training officers who deal with this issue. Furthermore, the Cybercrime Department of the National Police Headquarters’ Crime Intelligence Office monitors the Internet on an ongoing basis with regard to displays of ‘hate speech’ on discussion forums and websites, where displays might be classified as offences regulated in Articles 256, 257 and 119 of the Penal Code. From 1 October 2014, cybercrime units have been established in all province police headquarters starting on 1 October 2014 to monitor ‘hate speech’ online. For more information, see: <http://bit.ly/2gDa2cA>.

<sup>64</sup> Regarding the police cases statistics,

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see Communication 9 February 2017 ref. no. L. dz. Gip-701/562/MP. The statistical data collected by the police do not take into account the number of offences in investigations carried out by the prosecution on its own. Regarding the statistics on court cases, see Communication of the Ministry of Justice of 14 February 2017, ref. no. DSF-II-082/33/17/2, unique document number UNP: 170214-01550.

<sup>65</sup> For example, in one case brought under Article 256 of the Criminal Code, the District Court in Wrocław issued a 10-month imprisonment sentence against a man who took part in an anti-immigration demonstration and burnt an effigy of an ultra-Orthodox Jew holding the EU flag. The prosecutors in the case appealed the verdict asking the court to lower the punishment. See more at: <http://bit.ly/2wzagsVR>.

<sup>66</sup> See, e.g. Equality Law Network, Poland, country reports, available from: <http://bit.ly/2sCvx2z>.

<sup>67</sup> E.g. the reasoning to the judgment of the Regional Court in Wrocław of 3 April 2017, ref. no. IV Ka 222/17.

<sup>68</sup> Judgement of the Constitutional Tribunal of 25 February 2014, ref. no. SK 65/12.

<sup>69</sup> *Ibid.*

<sup>70</sup> Decision of the Supreme Court of 5 February 2007, ref. no. IV KK 406/06.

<sup>71</sup> Judgment of the Regional Court in Białystok of 30 June 2016, ref. no. VIII Ka 157/16.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Cf.* e.g. the judgment of the Appeals Court in Katowice of 24 September 2013, ref. no. II AKa 301/13.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> For more information, see *TVN Warszawa*, Because he spoke German: Judgment for

beating the professor on the tram, 13 March 2017, available from: <http://bit.ly/2vD9Wlm>.

<sup>77</sup> Communication of the National Council of the Judiciary of 16 October 2016, ref. no. GMS-WP- 173-213/16. Available from: <http://bit.ly/2xgCa8c>. The National Council is a constitutional body which safeguards the independence of courts and judges and which gives its opinion on draft laws.

<sup>78</sup> *Ibid.*

<sup>79</sup> Article 133 of the Penal Code states, “Whoever publicly insults the Nation or the Republic of Poland shall be punishable by a term of imprisonment of up to three years”.

<sup>80</sup> Article 196 of the Penal Code states, “Whoever offends religious feelings of other persons, publicly insulting the object of religious worship or a place designed for public practice of religious rites shall be punishable by restriction of personal liberty or imprisonment of up to 2 years”.

<sup>81</sup> Judgement of the Constitutional Tribunal of 6 October 2015, ref. no. SK 54/13, OTK-A 2015/9/142.

<sup>82</sup> *C.f.* the case of a theatre production ‘Klątwa’, in which criminal proceedings were instituted *ex officio* by the Regional Prosecutor’s Office Warsaw–Praga on 22 February 2017, available from: <http://bit.ly/2vQsCmv>.

<sup>83</sup> Article 212.1 of the Penal Code states: “Whoever accuses another person, a group of persons, an institution, a legal person or an organisational unit having no legal personality of conduct or features which may humiliate them in public opinion or expose them to a loss of trust required in a given position, profession or type of activity, shall be punishable by a fine or restriction of personal freedom.” Article 212.2 states: “Whoever commits the offence specified in Article 212.1 by means of mass communication, shall be punishable by a fine, restriction of personal of liberty or term of imprisonment of up to one year”.

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<sup>84</sup> See Women to Women, Report of KPH on the case against Dorothy Ekes for reconsideration, 18 March 2005, available from: <http://bit.ly/2wmhKhx>.

<sup>85</sup> Article 216.1 states: “Whoever insults another person in their presence or even in their absence, yet does so publicly or with the intention of the person becoming aware of the insult, shall be punishable by a fine or restriction of personal liberty.” Article 216.2 states: “Whoever insults another person by means of mass communication shall be punishable by a fine, restriction of personal liberty or term of imprisonment of up to one year.”

<sup>86</sup> I. Zgoliński, The limits of the assertion of the insult of Art. 216 of the Penal Code, *Ius Novum*, 2013, No. 2, pp. 48–49. Generally speaking, an insult entails demonstrating contempt for another person, causing an affront to their dignity, offending them or otherwise acting in an insulting manner. Whether particular conduct is insulting depends on the standards, opinions and norms which prevail in society; *c.f.* Decision of the Supreme Court of 7 May 2008, ref. no. II KK 234/07, OSNKW 2008, No. 9, item 69.

<sup>87</sup> Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Official Journal of 2016 No. 1575). Article 55 states “Whoever publicly and against facts denies crimes (committed on persons of Polish nationality or on Polish citizens of a different nationality within the period from 8 November 1917 to 31 July 1990: Nazi crimes, communist crimes or other offences constituting crimes against peace, genocides or war crimes) shall be punishable by a fine or a term of imprisonment of up to 3 years. The judgement shall be made public.”

<sup>88</sup> See the Law of January 26, 2018 on the amendment to the Act on the Institute of National Remembrance - the Commission for the Prosecution of Crimes against the Polish Nation, the Act on Graves and War

Cemeteries, the Act on Museums and the Act on the Liability of Collective Entities for Acts Prohibited under Penalty, available (in Polish) from: <http://bit.ly/2CtX1Hi>. For more information is also in Sejm paper No. 806, available from: <http://bit.ly/2vQ2cRH>.

<sup>89</sup> The penalty is a fine or a term of imprisonment of up to 3 years.

<sup>90</sup> See, e.g. OSCE, New law on World War II crimes in Poland can threaten freedom of expression, says OSCE Representative Désir, 1 February 2018, available from: <http://bit.ly/2sBqsaF>.

<sup>91</sup> *C.f.* e.g. opinion of the Helsinki Foundation for Human Rights of 16 November 2016, available from: <http://bit.ly/2vf90tH>.

<sup>92</sup> Concluding observations of the Human Rights Committee on the seventh periodic report of Poland, available from: <http://bit.ly/2tDT6Ff>

<sup>93</sup> Concluding observations of the UN Committee on Torture with regard to the combined fifth and sixth periodic reports of Poland, available from: <http://bit.ly/1wLKWZb>.

<sup>94</sup> Draft law, Sejm paper no. 878, available from: <http://bit.ly/2t33C6W>.

<sup>95</sup> Act of 7 July 1994 Construction Law (Official Journal of 2016 No. 290).

<sup>96</sup> Annual information of the Commissioner for Citizens’ Rights on equal treatment in 2015, available from: <http://bit.ly/2wmkSKz>.

<sup>97</sup> The motion of the Commissioner of Human Rights to the General Construction Supervision of 16 October 2015, available from: <http://bit.ly/2vCtPzb>

<sup>98</sup> Act of 6 January 2005 on national and ethnic minorities and regional language (Official Journal of 2015 No. 573).

<sup>99</sup> Act of 23 April 1964 Civil Code (Official Journal of 2016 No. 380).

<sup>100</sup> Act of 3 December 2010 on the

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implementation of some provisions of the European Union on equal treatment (Official Journal of 2016 No. 1219). The Law was adopted to implement equality and non-discrimination provisions as laid down in the number of EU Directives.

<sup>101</sup> *Ibid.*, Article 24(2).

<sup>102</sup> See, e.g., the judgment of the Supreme Court of 29 September 2010, ref. no V CSK 19/10.

<sup>103</sup> Judgement of the Supreme Court of 16 January 1976, ref. no. II CR 692/75, OSNC 1976, No. 11, item 251.

<sup>104</sup> *C.f.* Judgement of the Court of Appeals in Poznań of 29 February 2012, ref. no. I ACa 1162/11, LEX No. 1133337.

<sup>105</sup> The Code of Civil Procedure, Act of 17 November 1964 Code of Civil Procedure (Official Journal 2016 No. 1822), Article 8.

<sup>106</sup> *Ibid.* Article 62.1. These are defined as NGOs whose statutory objective is to “protect equality and non-discrimination by groundless, direct or indirect differentiation of the rights and duties of citizens”. NGOs must simply prove that they are active in the field of equality, and can subsequently enjoy the statutory right to legal aid – and therefore do not incur legal costs.

<sup>107</sup> *Ibid.*, Article 61.1.5.

<sup>108</sup> *Ibid.*, Article 61.2.

<sup>109</sup> Judgement of the Appeal Court in Warsaw of 12 March 2013, ref. no. I ACa 1034/12

<sup>110</sup> The Polish Radio, Tomasz Terlikowski lost the trial with Anna Grodzka for the infringement of personal rights, 23 June 2016, available from: <http://bit.ly/1e3k040>.

<sup>111</sup> The Equal Treatment Law, *op.cit.*, Article 3.3.

<sup>112</sup> *Ibid.* Article 3.4. Sexual harassment is defined as “any unwanted conduct of a sexual nature or referring to the sex of

a natural person whose aim or effect is violating a person’s dignity, and in particular creating around them an intimidating, hostile, degrading, humiliating or offensive atmosphere; the conduct in question can involve physical, verbal or non-verbal elements”.

<sup>113</sup> *Ibid.*, Article 13.

<sup>114</sup> G. Kukowka & A. Siekiera, Monitoring report on the effectiveness of the Act of 3 December 2010 on the implementation of some provisions of the European Union on equal treatment (Official Journal 2010 No. 254 item 1700), the so called Equal Treatment Act, in the fourth year since its entering into force, available from: <http://bit.ly/2fXp78u>. Also, a 2015 study surveying 287 Polish common courts revealed that between 1 January 2011 and March 2014 only five proceedings under the legislation took place; see European Equality Law Network, Poland - Country report non-discrimination, 2015, available from: <http://bit.ly/2o84V4Z>.

<sup>115</sup> Application of 31 March 2016, ref. no. XI.510.2.2016.AM, available from: <http://bit.ly/2fX78if>.

<sup>116</sup> The Equal Treatment Law, *op.cit.*, Article 18.

<sup>117</sup> Equality mandate issued to the Commissioner for Citizens’ Rights, 1 January 2011.

<sup>118</sup> Public Observatory of Public Debate “Culture liberal,” Negative Image of Muslims in the Polish Press, January 2017, available from: <http://bit.ly/2v0JOQM>.

<sup>119</sup> For example, see the debate, “Facebook – Hate Speech – Freedom of Speech. Challenges for the Civilisation and the Law or a Crisis of Values?”, November 2016.

<sup>120</sup> See the Ombudsperson, Statement: reducing the Ombudsman’s budget will affect citizens, 28 January 2016, available from: <http://bit.ly/2gvoIGN>

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<sup>121</sup> Equality Law Network, Poland - Country report non-discrimination, 2017, available from: <http://bit.ly/2oe4buc>.

<sup>122</sup> For more information on the office, see, <http://www.spoleczenstwoobywatelskie.gov.pl>.

<sup>123</sup> Pluralism Under Attack, *op.cit.*

<sup>124</sup> *Ibid.*

<sup>125</sup> Act of 29 December 1992 on Broadcasting (Official Journal of 2016 No. 639).

<sup>126</sup> *Ibid.*, Article 18.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.* Under Article 53 of the Act, the fine for violation of the content provisions may amount up to 50% of the annual fee for the right to use the frequency allocated for providing the programme service. In the event that a broadcaster fails to pay for the right to use the frequency, the fine may amount up to 10% of the revenues generated by the broadcaster in the preceding tax year.

<sup>129</sup> *Ibid.*, Article 56.

<sup>130</sup> Communication of the National Broadcasting Council of 14 February 2017, ref. no. DPz-WSW.051.211.1.2017.

<sup>131</sup> See The Report of the National Broadcasting Council on activities in 2011, 2011, available (in Polish) at: <http://bit.ly/2syNiju>. The statements were uttered by Jan Kobylański, president of the Union of Latin American Associations and Organizations of Latin America (USOPAL); the statement was written by Stanisław Michalkiewicz.

<sup>132</sup> *Ibid.* The statements were made against Alvin Gajadhur who is of an Indian origin, but has lived in Poland since his childhood.

<sup>133</sup> See Council decision No. 7/2012 of 30 July 2012.

<sup>134</sup> See the Report of the Council in 2012, March 2013, available from: <http://bit.ly/2FbzrlA>.

<http://bit.ly/2FbzrlA>.

<sup>135</sup> See the decision of the Council No. 6 of 9 August 2013.

<sup>136</sup> See the Report of the Council on Activities in 2013, March 2013, available from: <http://bit.ly/2Gr4nxx>.

<sup>137</sup> The Decision of the Council on the broadcast of the spot 'Najbliżsi obcy', 12 March 2014, available from: <http://bit.ly/2xHVHQ9>.

<sup>138</sup> See the Report of the Council on the Activities in 2015, 31 March 2016, available from: <http://bit.ly/2GkZu9p>.

<sup>139</sup> See the Report of the Council on the Activities in 2016, 31 March 2016, available from: <http://bit.ly/2EMXBVN>.

<sup>140</sup> For more information, see A. Bodnar & D. Bychawska-Siniarska, The Council: Terror of broadcasters – defective regulation or overburdened institution?, Warsaw, 201, available from <http://bit.ly/2iJ4Gu>.

<sup>141</sup> *C.f.* the Law on national and ethnic minorities and regional language, *op.cit.*, Article 18 and Article 21.

<sup>142</sup> *Ibid.*, Article 21.

<sup>143</sup> *Ibid.*, Article 30.

<sup>144</sup> See the Regulatory Strategy for the years 2014–2016 and the Polish State Strategy on electronic media for the years 2005–2020, available from: <http://bit.ly/2whs5Ly>. The Regulatory Strategy was designed in coordination with the Prime Minister. It sets the state's policy orientations in the field of broadcasting media (pursuant to the requirements of the Broadcasting Act). The idea of the Strategy is to initiate public debate on vital issues concerning media services in Poland. The information and conclusions included in the Strategy are supposed to be a central reference point in taking strategic political, economic, and social decisions on the future of this area.



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<sup>145</sup> These include the European Charter for Regional or Minority Languages of 5 November 1992, the UN Convention on the Rights of Persons with Disabilities of 13 December 2006, the Recommendation CM/Rec(2013)1 of the Committee of Ministers to member States on gender equality and media of 10 July 2013, and the Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue of 11 February 2009.

<sup>146</sup> The Plan was adopted by the Council of Ministers on 10 December 2013.

<sup>147</sup> The strategy of the Polish state for electronic media for 2005–2020 (2005).

<sup>148</sup> Article 26 of the Law of 24 April 2003 on Public Benefit and Volunteerism (official Journal of 2016, no 1817).

<sup>149</sup> See, e.g., Human Rights Defenders in Poland, Information on the recent challenges faced by human rights defenders and civil society in Poland, November 2016.

<sup>150</sup> Act of 26 January 1984 Press Law (Official Journal No. 5 item 24, as amended)

<sup>151</sup> *Ibid.* The Law, *inter alia*, specifies the obligations of state bodies with regard to the press: to create conditions necessary to perform its functions and tasks, e.g. ensuring the activity of editorial boards of daily papers and magazines presenting various programmes, thematic scopes, and stances (Article 2); guarantees journalists access to public information (Article 3a); the right to provide press with information; as well as prohibits punitive actions for the provision of such information (Article 5).

<sup>152</sup> *Ibid.*, Article 10.

<sup>153</sup> *Ibid.*, Article 17.

<sup>154</sup> *C.f.* Judgement of the Supreme Court of 10 September 1999, ref. no. III CKN 939/98, OSNC 2000, No. 3.

<sup>155</sup> *Ibid.*, Article 31a. The correction ought

to be made in writing and sent via a post office of the postal operator or submitted at the office of the relevant paper within no more than 21 days of the day when the press release was published. The text of the correction may not exceed twice the length of the excerpt of the press release which it concerns or twice the time of the broadcast time of the relevant part of the programme service.

<sup>156</sup> The Constitution, *op.cit.*, Article 51.4.

<sup>157</sup> See <http://bit.ly/29IBpJT>.

<sup>158</sup> The Charter of Media Ethics, 2004, available from <http://bit.ly/2v8de23>.

<sup>159</sup> The Charter of Media Ethics, available from: <http://bit.ly/2v8de23>.

<sup>160</sup> The Code of Good Practices of Press Publishers, available from: <http://bit.ly/2wxsOGO>.

<sup>161</sup> Part III.a.6 of the Rules of professional ethics in Polish Radio. Based on communication from the Director of Management's Office at Polskie Radio SA of 9 February 2017.

<sup>162</sup> The Rules of journalist ethics in TVP SA – information, opinion journalism, reportage, documentary, education, Article XI/1, available from: <http://bit.ly/2wyfxiq>.

<sup>163</sup> *Ibid.*, Article XI/2.

<sup>164</sup> *Ibid.*, Article XI/4.

<sup>165</sup> Regulatory Strategy for the Years 2014–2016, available from: <http://bit.ly/2wzBtb6>.

<sup>166</sup> Article 27 of the Code.

<sup>167</sup> Interview with media expert A. Krajewski, on file.

<sup>168</sup> See, e.g., European Court, *Jeziór vs Poland*, App. no. 31955/11, communicated case.

<sup>169</sup> See The Appellate Court in Warsaw,

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Decision of 9 January 2014, case file I ACa 841/2013.

<sup>170</sup> See the Decision of the Supreme Court, Ref. Act I CSK 549/14, 23 July 2015, available from: <http://bit.ly/2Cv4c1P>.

<sup>171</sup> Law of 10 June 2016 on anti-terrorist activities and on the amendments to other acts, available from: <http://bit.ly/2C3u9dr>.

<sup>172</sup> See, e.g., Human Rights First, Poland's Anti-Terror Law Recommendations for U.S. officials attending Warsaw NATO Summit 2016, available from: <http://bit.ly/2HtpvEP>.

<sup>173</sup> The Advertising Council, information available from: <https://www.radareklamy.pl>.

<sup>174</sup> Advertising Council, the Code of Ethics in Advertising, <http://bit.ly/2wvKlup>.

<sup>175</sup> Advertising Ethics Commission, 'The place of this lady is in the kitchen? "It's discrimination"', available from: <http://bit.ly/2gBEuUe>.

<sup>176</sup> See, e.g. Ombudsperson, The second 'round table' about hate speech, 25 January 2016, available from: <http://bit.ly/2EN4W7U>.

<sup>177</sup> <http://hejtstop.pl/>.

