IN THE HIGH COURT OF WARSAW

CASE II C 21/19

Law and Justice

Plaintiff

vs.

Prof. Wojciech Sadurski

Defendant

EXPERT OPINION

of ARTICLE 19: Global Campaign For Free Expression

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I. Introduction

1. The expert opinion is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that protects and promotes freedom of expression and information worldwide, including in Poland. Its aim is to inform the High Court of Warsaw about international and regional standards on freedom of expression that can be applied in the present case. These include, in particular, standards under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights (European Convention), both of which Poland signed and ratified. As a result, Poland is not only bound by the respective provisions of as a matter of international law, but is also obliged to give effect to them through national legislation and practice. The Expert Opinion also includes review of comparative jurisprudence and best practices around the world in the respective issues.

II. Interest of ARTICLE 19

2. ARTICLE 19 is well-recognized international human rights organization, with international office in London and several regional offices. It takes its name and mandate from Article 19 of the Universal Declaration of Human Rights which guarantees the right to freedom of opinion and expression and campaigns against censorship in all its forms around the world. ARTICLE 19 frequently submits written comments/amicus curiae to international and regional courts as well as to courts in national jurisdictions in cases that raise issues touching on the international guarantee of freedom of expression. Over the years, ARTICLE 19 has produced a number of standard-setting documents and policy briefs based on international and comparative law and best practice on freedom of expression issues, including on protection of reputation.[1]

3. ARTICLE 19 welcomes the opportunity to provide the expert opinion in this case under Article 63 in connection with Article 61 § 1 in connection with art. 13 § 2 Act of 17 November 1964 of Civil Procedure (Journal of law [Dz. U.] 2019.1460 from 2019.08.05).

III. Issues addressed

4. This case concerns the scope of the right to freedom of expression and the limits on political speech and protection of reputation of political parties. We understand that the defendant in the case, Professor Sadurski is a highly respected professor of law at the universities of Sydney and Warsaw who frequently publishes political opinions on his personal blog and Twitter account. He is known as a vocal commentator of the Law and Justice political party (*Prawo i Sprawiedliwość* – PiS), as well as the political and human rights situation in Poland. The case was initiated as a result of his tweet of 10 November 2018, in which he characterized the PiS as "an organized criminal group" and called upon citizens to boycott a so-called "Independence March" to be held in Warsaw. However, the Expert Opinion does not address the facts or merits of the case.

5. ARTICLE 19 recalls that under international and regional human rights law, the right to freedom of expression is not an absolute right and may be legitimately restricted by the State in certain circumstances. A three-part test sets out the conditions against which any proposed restriction must be scrutinised and these requirements also apply to online

[1] ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2017, available at https://bit.ly/333fXKk.

content:[2]

- **The restriction must be provided by law**: thus, it must have a basis in law, which is publicly available and accessible, and formulated with sufficient precision to enable citizens to regulate that conduct accordingly.[3]

- **The restriction must pursue a legitimate aim**, of those that are exhaustively enumerated in Article 10 para 2 of the European Convention and Article 19 para 3 of the ICCPR, namely: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, and/or the protection of the reputation or rights of others. Article 10 para 2 of the European Convention also provides that preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary, is a legitimate aim.

- **The restriction must be necessary in a democratic society**, meaning that it must be necessary and proportionate. This requires an assessment of whether the proposed limitation responds to a "pressing social need" and whether the measure is the least restriction method of achieving the objective.

6. As a party to the ICCPR and the European Convention, the courts in Poland must subject any interference to freedom of information to this test. Further, given the legal issues involved in the case, ARTICLE 19 submits that the High Court of Warsaw should consider international and comparative standards on:
   - Protection of political speech under international and regional human rights standards;

   - The extent to which statements on politicians and political parties (especially governing political parties) are entitled to special protection and an appropriate standard to be applied in defamation cases involving politicians and political parties;

   - The extent in which opinions and exaggerated language, including those on social media, are protected under international and regional standards on freedom of expression;

IV. Arguments

Protection of political speech

7. ARTICLE 19 recalls that critical importance of freedom of expression with respect to political speech is well-established by the European Court of Human Rights (European Court). The European Court repeatedly stated that political speech "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment."[4] It stressed that "the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech."[5] It further affirmed that "there is little scope under Article 10(2) of the Convention for restrictions on political speech

[2] *C.f.* e.g. UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 43.
[3] *Ibid.,* paras 24-25. See also European Court of Human Rights (European Court), *The Sunday Times v United Kingdom*, App. No. 6538/74, 26 April 1979, para 49.
[4] European Court, *Janowski v Poland*, App. No. 25716/94, 21 January 1999, para 30.
[5] European Court, *Feldek v Slovakia*, App. No 29032/95, 12 July 2001, para 83.

or on debate on matters of public interest."[6]

8. Similarly, the Human Rights Committee also stated that "communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."[7]

9. In sum, international and European freedom of expression standards have clearly asserted that any restriction imposed upon the exercise of free expression in a political debate is subject to review on the grounds that it inhibits the right to free expression. Additionally, any restriction upon free expression in this context requires a compelling justification, because the right of free expression has significant weight in any assessment of the proportionality of a restriction. This is true due to the public interest in political discourse, and how integral the free exchange of ideas is for public participation in democratic politics.

Statements with respect to politicians and political parties

10. Jurisprudence of international and European human rights bodies recognise that politicians and public officials are required to tolerate a greater degree of criticism than ordinary citizens. This principle has been also stress by courts in a number of national jurisdictions.[8] This is for three key reasons.
    - First, democracy depends on the possibility of open public debate about matters of public interest. Without this, democracy is a formality rather than a reality. Hence, those who hold office in government and who are responsible for public administration must always be open to criticism. This applies as much to ideas and information that offends, shocks or disturbs as it does to that which is perceived as inoffensive. A democratic society demands pluralism, tolerance and broadmindedness.[9]

    - Second, politicians have willingly and knowingly exposed themselves to examination by assuming public functions. For example, the European Court emphasised that any political actor "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance" than a private individual.[10] An even greater degree of tolerance applies to criticism of governments than in relation to a politician.[11]

    - Third, political actors nearly always have greater access to means of public communication and can therefore respond to any allegations with a speed and ease that is unavailable to ordinary citizens.

11. Additionally, in the 2000 Joint Declaration of the three special international mandates for

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[6] European Court*, Sürek and Özdemir v Turkey*, App. No. 23927/94, App. No. 24277/94, 8 July 1999, para 60.

[7] UN Human Rights Committee, General Comment 25, UN Doc CCPR/C/21/Rev.1/Add/7 (1996) para 25.

[8] See, e.g. the Hungarian Constitutional Court, Decision 36/1994. (VI.24) AB; the Netherlands Supreme Court, *Herrenberg/Het Parool case*, 6 March 1985, Nederlandse Jurisprudentie 1985, 437; or the House of Lords of the UK, *Derbyshire County Council v. Times Newspapers Ltd. and Ors* [1993] 1 All ER 1011, p. 1017.

[9] C.f. The Judicial Committee of the Privy Council, Hector v. Attorney-General of Antigua and Barbuda, [1990] 2 AC 312 (PC), p. 318; and decisions of the European Court in *Mathieu-Mohin and Clerfayt v Belgium A*, App. 9267/81, 2 March 1987, para 47; *Lingens v Austria*, App. No. 9815/82, 8 July 1986, paras 41-42; and *Bowman v UK,* App. No. 24839/94 19 February 1998, para 42.

[10] *Lingens v Austria, op.cit.*, para. 41.

[11] See, e.g., the European Court, *Castells v Spain*, App. No. 11798/85, 23 April 1992, para 46; or *Stomakhin v Russia,* App. No. 52273/07, 9 May 2018, para 89.

promoting freedom of expression, they stated that "at a minimum... defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures... should be repealed."[12]

12. Although politicians have to tolerate a greater degree of criticism, as noted above, they clearly have some right to protection for their reputations. Accordingly, there are some limits on what may be said about them. The international bodies have not established a clear standard in such cases, however, the review of regional and domestic jurisdictions shows that courts have indicated a number of factors to be taken into consideration. Many jurisdictions require only that speaker did not act with malice – by publishing a false statement either knowingly or with reckless disregard for the truth – or that the responsible journalist acted reasonably or exercised some measure of professional diligence. Even in the latter case, courts have recognized that publication may be warranted in the public interest even though little or no verification of the facts is possible. As for the European Court, factors to be taken into account in determining whether a statement is defamatory include the goal of the speaker in making the statements: if the goal is to promote reform or to inform the public, rather than to undermine reputations, there will be a presumption that the statements are protected by the guarantee of freedom of expression.[13] The European Court has also held that good faith is relevant in determining whether certain statements are defamatory.[14]

13. ARTICLE 19 submits that these standards should be considered by the Court in the present case where the defendant's statement considered the governing party of the country. A full exercise of the freedom to impart information and ideas allows for free criticism of the government, which is the main indicator of a free and democratic society.

Defense of an opinion

14. It is well established under European and international law that opinions are entitled to enhanced protection under the guarantee of the right to freedom of expression. Courts around the world, international and national, regularly distinguish between opinions and statements of fact, allowing far greater latitude in relation to the former. ARTICLE 19 takes the view that statements of opinion should never attract liability under defamation law;[15] at a minimum, such statements should benefit from enhanced defamation protection.

15. For example, in *Lingens v. Austria*, the European Court held that value-judgments must be carefully distinguished from assertions of fact. In that case, the Court noted that the journalist was covering political issues that were of immense public interest to Austrians and that censuring the articles would deter other journalists from contributing to public discussion. The Court emphasised that

> [A] careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of

[12] Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression, 30 November 2000.

[13] See, e.g. European Court decisions in *Thorgeirson v. Iceland*, App. No. 13778/88, 25 June 1992, paras 64-66.

[14] See, e.g. the European Court, *Schwabe v. Austria*, Series A. No. 242-B, 28 August 1992; *Oberschlick v. Austria (No. 1)*, App. No. 11662/85, 23 May 1991; *Oberschlick v. Austria (No. 2),* App. No. 20834/92, 1 July 1997.

[15] ARTICLE 19, Defining Defamation, *op.cit.,* Principle 10.

> proof... As regards value-judgments, this requirement [to prove truth] is impossible of fulfilment and it infringes freedom of opinion itself.[16]

16. ARTICLE 19 also notes that when criticising public officials and expressing opinions about them, strong words and harsh criticism are perhaps even to be expected, especially in matters of public controversy or public interest. The European Court recognised this in a number of cases; for instance:
    - In *Lingens v. Austria*, the European Court overturned a defamation case against a journalist who criticised the Austrian Chancellor for agreeing to collaborate with a political party headed by former Nazis. The journalist used expressions such as "basest opportunism," "immoral" and "undignified."[17]

    - In *Renaud v. France*, a chairman of the local association of residents opposing the construction project and the webmaster of the Internet site of the association criticised public officials and politicians. The European Court found that when a debate relates to an emotive subject, such as the daily life of the local residents and their housing facilities, politicians must show a special tolerance towards criticism and they have to accept oral or written outbursts.[18]

    - Similarly, in *Thorgeirson v Iceland*, police officers were characterised as "beasts in uniform," "individuals reduced to a mental age of a new-born child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity" and the police was criticised for "bullying, forgery, unlawful actions, superstitions, rashness and ineptitude." The European Court found that such language was permissible given that it was situated in a broader debate about police reform.[19]

17. The European Court has not gone quite so far as to accord opinions absolute latitude, holding that freedom to express value judgements is not entirely unfettered. In practice, however, the European Court allows a considerable degree of leeway to statements of opinion. For example, in *Dichand and others v. Austria*, the European Court stressed that the discussion was on a matter of important public concern and recalled:

> It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.[20]

18. ARTICLE 19 submits that the short and informal style of criticism is particularly relevant to expression on social media. As the European Court emphasised in *Tamiz v. the United Kingdom*

> [An] attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life … This threshold test is important: as...the reality is that millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another

[16] *Lingens v. Austria*, *op.cit.*, para 46.
[17] *Lingens v. Austria*, *op.cit.*, para 21.
[18] European Court, *Renaud v. France,* App. No. 13290/07, 25 February 2010, para 40.
[19] *Thorgeirson v. Iceland*, *op.cit.*, paras 14-15.
[20] European Court, *Dichand and Others v. Austria*, App. No. 29271/95, 26 February 2002, paras 51-52.

person's reputation.[21]

In this case, the European Court found that although the applicant's statements were "undoubtedly offensive, for the large part they were little more than "vulgar abuse" of a kind – albeit belonging to a low register of style – which is common in communication on many Internet portals" and allegations levied "would, in the context in which they were written, likely be understood by readers as conjecture which should not be taken seriously."[22]

V. Conclusions

19. Freedom of expression has been recognised as a basic precondition for a functional democracy, and indeed human progress and development. The free flow of information and ideas is essential and there is little scope under Article 19 para 3 of the ICCPR and Article 10 para 2 of the European Convention for restrictions on political speech or on debate on questions of public interest.

20. It has been widely accepted that politicians and political parties must tolerate a greater degree of criticism and scrutiny than ordinary citizens and criticism against them might be provocative, controversial or offensive. When assessing the validity of any claims brought against these individuals, it is essential to consider that the majority of comments made by private individuals online are likely to be too trivial in character, and/or the extent of their publication too limited, for them to cause any significant damage to another's reputation. Furthermore, the opinions expressed are not truth-statements and are therefore impervious to being proven or disproven.

21. This is the opinion of ARTICLE 19, prepared by the undersigned, and is subject to the decision of this Court.

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ARTICLE 19

[21] European Court, *Tamiz v the United Kingdom*, App. No. 3877/14, 19 September 2017, para 80.
[22] *Ibid.,* para 81.