

# STATUTORY ATTRIBUTES OF DEFAMING BY THE INTERNET IN THE CONTEXT OF COMMITTING IT AS THE INDICATION OF THE LEGAL-CRIMINAL RESPONSIBILITY

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## Abstract

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The subject of the article touches upon the dissertations concerning the nature of defamation committed through mass media. The issues undertaken in the article aim at defining online defamation as well as indicating its nature and legal effects. It will allow to determine fundamentals of perpetrator's legal liability. The scope of this liability will be discussed through the analysis of Polish penal-legal regulations and the judicature stance in this regard.

**Key words:** defamation, Internet, mass media, Polish Penal Code

## Introduction

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Increasingly frequent cases of defaming by the Internet make the analysis of statutory attributes of this type of forbidden act gain its topicality from obvious reasons. Persons who were victims of this type of action must be aware of both a situation when defaming via media comes into existence, but also of legal measures to which they will be entitled in the fight against effects of the action of this type. The crucial objective of the conducted research aimed at defining the crime described in Art. 212 § 2 of Polish Penal Code, showing its substance, the legal nature and substantive consequences. As a result, it will allow to make an attempt to determine the time of committing the acts included in the considered provision, which in turn will be essential for the decision in what way one should estimate the limitation period for the crime of the defamation posted on the Internet.

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It is beyond doubt that legal regulation included in the contents of Art. 212 § 2 Polish Penal Code constitutes the result of noticing by the legislator the needs of normative inclusion of all forms of defamation committed via mass media. By introducing the aggravated type in § 2 Art. 212 of Polish Penal Code attests to the fact, that legislator did not remain indifferent to legal effects of this special form of the defamation, and in consequence led to the amendment of code regulations by enforcing regulations strengthening the criminal liability for the perpetrator, in comparison to the area of responsibility predicted in the basic type. However, prior to a wider elaboration on legal consequences predicted for the aggravated type of the defamation, some words must be devoted to define notions constituting building blocks of the discussed crime.

### **The nature of the notion of defamation**

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In the dictionary presentation “to defame” means: “to cause the loss somebody’s reverence, humiliating him and the loss of trust in the public opinion; to accuse, to slander”<sup>2</sup>. Above mentioned reverence, understood as someone’s good name, constitutes a protective fundament which is a basis for Art. 212 of Polish Penal Code, including its §2. Being a legally protected good, the reverence should be comprehended as “the presumption of honesty entitled to everyone, co-existing in accordance with the norms of conduct of this person towards other persons, due competence and required properties in case of performing determined function or doing the certain job, the lack of attributes deserving condemning”<sup>3</sup>. In this wording, it is a strictly normative category, being entitled to everyone, so consequently it does not require any additional conditions to be fulfilled. Thus, it is reverence in more objective meaning. L. Gardocki aptly notices: “it constitutes the unity of an inner conviction of the man of his value, giving him the right to the respect or the public trust and the social recognition and respect for the individual”<sup>4</sup>. In case of the aggravated type, violating this reverence must come into existence by the means of “mass communication” so that it meets the attributes determined in contents of Art. 212 § 2 Polish Penal Code.

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<sup>2</sup> B. Dunaj (ed.), *Słownik współczesnego języka polskiego*, t. 2, Warszawa 2000, p. 665.

<sup>3</sup> W. Kulesza, *Zniesławienie i zniewaga*, Warszawa 1984, p. 36.

<sup>4</sup> L. Gardocki, *Prawo karne*, Warszawa 2005, p. 262.

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## The means of mass communication as the condition of the aggravated type

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To be regarded as the means of mass communication such a medium must have a quantitatively significant range of recipients, and be directly used for large scale transmission of information e.g. the press, the radio, television, or the Internet. A possibility of disseminating determined contents for the broad public opinion is a fundamental trademark of the mass media.

When linking these two notions into the cohesive entirety one should state that for the defaming in the aggravated type it is essential to publicly defame somebody through the means of mass communication. M. Filar points out that: “Defamation only has public character when on account of the time, the technique and the place of defaming, its intellectual contents can (however does not have to) reach the undefined, anonymous group of people and every person who will be in such a time and a place, can read this content”<sup>5</sup>.

Taking into account the linguistic understanding of the notion “defaming through mass media” it is essential to explain the legal meaning of acts included in Art. 212 § 2 Polish Penal Code.

From the point of view of the current legal regulations, the crime of defamation, regardless of the type, comes down to: “imputing to another person (a group of persons, an institution or organizational unit not having the status of a legal person) such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity” Art. 212 § 1 Polish Penal Code. Consequently, defamation consists either in raising the allegations or making them public. Raising the allegation takes place when the perpetrator accuses in his own name, whether or not it is based on his own observations or facts he was informed by other people; making the allegation public consists in passing the heard allegation to other people<sup>6</sup>.

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## Legal nature of the defaming in the aggravated type

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The linguistic interpretation of the crime determined in Art. 212 § 2 Polish Penal Code does not cause greater interpretative problems. However, establishing the legal nature of the considered provisions turns out to be

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<sup>5</sup> M. Filar, *Odpowiedzialność karna za nieuzasadnione zarzuty wobec lekarza lub zakładu opieki zdrowotnej*, „Prawo i Medycyna” 2006, no 23, p. 99.

<sup>6</sup> A. Zoll, *Commentary to art.212 Polish Penal Code*, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Commentary to art. 117-277*, vol. II, Zakamycze 1999.

much more problematic. In the subject literature there are some discrepancies that lead to the dilemma: whether this provision should be understood as the formal constructive crime, or as the lasting offence. This dissonance is also clearly visible in the contents of the analysed decision which is supported by a legal question directed to the Supreme Court. In the face of existing problems, it is worthwhile to give some thought to the legitimacy of each of these presentations and point out which of these positions should be recognized as a suitable interpretation of the aggravated form of defamation.

In the subject writing, a view which characterizes defaming as a formal constructive crime is dominating. Supreme Court also supports the normative understanding of Art. 212 § 2 Polish Penal Code in the justification of the commented regulation. According to this presentation, we will deal with the formal offence (ineffective), when “the behaviour of the perpetrator will be imposed with a formal disciplinary ban is not conditional on the effect but exclusively on committing the act that fits the description included in the disposition”<sup>7</sup>. In case of this crime, the perpetrator creates the distress for the determined value. It means that for the existence of this crime, it will be enough to trigger negative results i.e. for someone’s good name (Art. 212 § 1 Polish Penal Code), however, it is not necessary for the actual effect of losing the trust needed for the given position, occupation or type of activity to take place. It will be sufficient that the acts of perpetrator can objectively lead to such effect<sup>8</sup>.

However, with the reference to defaming in the basic type, there is a lack of obstacles to include this crime in the category of “formal constructive crime”. In case of aggravated type of defamation, especially through the Internet, a twinge of doubt can appear legitimately. First, their understanding requires indicating what the lasting offence is. In A. Marek’s opinion the lasting offence consists in: “producing and supporting the unlawful state for some time, e.g. unlawful imprisonment (Art. 189 Polish Penal Code), desertion (Art. 339 Polish Penal Code); this state lasts long until it gets interrupted by the very perpetrator (e.g. he will free the imprisoned person) or finishes as a result of the interference of the authorities or third parties (e.g. apprehending the deserter)”<sup>9</sup>. The unlawful state must last for some time. What is more, the sole effect is not sufficient for this crime to come into existence, but a longer period of its existence is essential. The adoption of such a state of affairs in the context of the analyzed matter would have to

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<sup>7</sup> J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2004, p. 207.

<sup>8</sup> K. Dudka, *Ochrona prawa do prywatności i jej ograniczenia w polskim prawie karnym*, part II., „Czasopismo Prawa Karnego i Nauk Penalnych” 2002, no 1, p. 5 and next.

<sup>9</sup> A. Marek, *Prawo karne*, Warszawa 2006, p. 215.

mean that in case of posting the defaming contents on the Internet, Art. 212 § 2 Polish Penal Code would be applicable as long as this post is available on the Internet portal. In the context of the defamation made through the Internet, a Regional Court in S. drew attention to such an understanding. However, it (not entirely right) was criticised by the Supreme Court.

While continuing the divagation concerning the lasting offence, one should mention that it is not necessary to treat as the lasting offence so-called crime of collectively determined attributes, which in contrast to the lasting offence as such, is characterized by a repeated behaviour contradictory to the legal-penal norm. It means that the perpetrator commits many actions which by virtue of the act are treated as one crime, which takes place e.g. mistreating (Art. 207 Polish Penal Code). In this case the multitude of behaviours does not cause the multitude of crimes, but is treated as the one act. The Supreme Court noticed in decision from 29th June 2010: “by constructing the legal unity of the act in such a situation, the legislator aims at avoiding the need of making the legal-criminal evaluation of its every ontological fragment”<sup>10</sup>. Admittedly both the lasting offence and the offence of multiple action determined attributes constitute varieties of the seeming concurrence of crimes, however, they are not identical. It translates into the fact that with the reference to the lasting offence, it is justified to connect it with defaming via mass media, but it is impossible to find such connections in case of the crime of multiple-action attributes. Defaming in the aggravated type is not certainly that kind of crime. In this regard, a view of the Supreme Court is fully justified: “It is beyond doubt that the perpetrator commits defaming only once, by announcing the determined contents. To acknowledge that that all the features of the crime were demonstrated, other causative acts are not required any further; there is also no possibility to make – in the framework of the same act – a legal-criminal evaluation of any further indications of the perpetrator’s actions”<sup>11</sup>.

Bearing in mind the above mentioned remarks, one should return to the earlier question: is it possible to accept the view rejecting the possibility of including the defamation in the aggravated type as the lasting offence understood as continuing in time of some forbidden act? Does it indicate the necessity of unambiguous declaration for formal constructive crime?

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<sup>10</sup> Supreme Court decision of 29 June 2010, I KZP 7/10, Biuletyn SN, Nr 5, p. 12-13.

<sup>11</sup> Ibid.

## Defaming through the Internet against defaming through the mass media

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It seems that indicating the desired stance requires considering a few substantial matters, distinguishing the defamation made through the Internet from defamation made using the other mass media, especially press publications. The nature of the Internet makes it a peculiar medium, requiring, at the background of other media, the separate approach. What is more, using this mean of mass communication can arouse some interpretative doubts which in significant way can influence the unambiguous determination of the legal construction of actions included in Art. 212 § 2 Polish Penal Code.

Understanding the nature of these doubts requires, above all, determining in what way one should comprehend the Internet as the mass media and hence as the tool which can be used to commit actions determined in Art. 212 § 2 Polish Penal Code. The lack of the statutory definition of the mass media translates into the situation when it is discussable whether the Internet can be treated as such a mean.

However, it undoubtedly seems that dissemination of information through web pages and Usenet discussion system must be recognized as the mean of mass communication<sup>12</sup>. Using this medium by the perpetrator will undeniably cause passing definite contents to the broad public opinion, especially if this information is posted on the website, the blog, or the web forum of given Internet service and alike. It is possible to state that the huge reach of the Internet is as wide as the one of the press, the radio, or television, and thus the circle of recipients is unlimited in the same way. However, one should take into account that the Internet acts mainly as the mass media when “it is used to pass information to closely undetermined or determined, but appropriately sufficient in numbers group of subjects to which we can assign the expression <<multitude of recipients>><sup>13</sup>”.

For these reasons, it will not be possible to treat as defaming contents such slanders which were posted on the Internet but they were included e.g. in the email, messages sent through messengers or via social media, because in such a presentation there is the lack of public character of the defamation. The Internet in this dimension should be treated as the means of interpersonal communication, directed towards strictly determined people and exclusively for their information.

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<sup>12</sup> M. Sowa, *Ogólna charakterystyka przestępczości internetowej*, *Palestra* 2001, nr 5-6, p. 25 i n.

<sup>13</sup> T. Fołta, A. Mucha, *Znieważenie i zniesławienie w Internecie*, *Prokuratura i Prawo* 2006, nr 11, p. 52

It is not possible to agree with the stance of the Supreme Court expressed in the decision from 29th June 2010 that one should not treat defaming committed by the Internet as the lasting offence, because similarly to defaming printed in the press: “The act does not recognize as unlawful the state of keeping online the defaming content posted by the perpetrator; similarly as the act does not recognize unlawful the state resulting from the universal availability of newspapers, including their archival copies. If a different stance is assumed, also in the last case, it would be required to assume that the perpetrator commits the defamation until the last copy of the newspaper which had printed the defamation disappears from libraries”<sup>14</sup>. In case of Internet crimes, also with reference to defaming through the Internet, one should assume that the state of the unlawfulness continues for the entire period in which defaming contents is posted on the website. The infringement of the aggrieved party interests lasts as long as the defaming content is publicly accessible on the Internet portal. The specificity of the Internet, its popularity and availability but first of all its considerable anonymity of people posting their opinions, causes the possibility of public defaming in this very way to be incomparably higher than in case of any other medium, including press. The decisive factor is the possibility to establish the author of the defaming contents. In case of press publications indicating the author of slanders does not cause any problems (in most cases the author is known from the full name).

However, it is much more difficult to establish personal details of the person posting defaming contents on the Internet. One of the not-codified rules of the netiquette provides that the Internet user has an online nickname rather than the full name; which causes considerable trouble both for the aggrieved party (by online defamation) and for the interpreter of the law<sup>15</sup>. Moreover, one must pay attention to the fact that the publisher after releasing determined publications cannot affect the further circulation of these copies. On the other hand, the moderator or a webmaster, not to mention the user of the specific website or discussion forum, or the person writing on the blog can affect the visibility of materials posted online, even after publishing them, hence is able to delete them. There is no doubt that both the publisher and the author of defaming publications, published in the form of the press article are deprived of such a possibility. M. Sowa aptly points out “unlike press publications, the author of the online entry has a limitless possibility of changing or removing the posted content”<sup>16</sup>.

<sup>14</sup> Ibid.

<sup>15</sup> A. Bojańczyk, Ściganie zniesławienia i zniewag internetowych, *Edukacja prawnicza* 2007, nr 2 (86), p. 21.

<sup>16</sup> M. Sowa, Odpowiedzialność sprawców przestępstw internetowych, *Prokuratura i Prawo* 2002, nr 4, p. 68.

The unique nature of the Internet was already noticed in the decision from 7th March 2008, in which the Supreme Court noticed that: “One should remember that in case of the Internet we deal with the extreme inequality of websites. Regardless of the fact whether the aggrieved party was touched with the defamation or the insult, faces the anonymous perpetrator of the crime. Massive nature of the Internet, its extensive reach causes that it has an exceptional nature in relation to other means of mass communication. The circle of recipients of defaming or insulting information is unusually wide. The attempt to defend against defaming or insulting contents is practically impossible, and establishing the perpetrator seems unfeasible”<sup>17</sup>.

Having considered the arguments put forward, proving the peculiar nature of the Internet as the mass media, one must indicate that period of unlawful state lasts from the moment of posting defaming statements up to the moment of their removal. Considering the specificity of the online defamation, one must treat it as the lasting offence. In such understanding that it is justified to admit that “lasting offence is committed until the moment of ceasing punishable activity or until the moment of handing down the conviction”<sup>18</sup>, and the running time of the limitation period would be counted from the date of deletion of the entry from the information and communication network.

## **Conclusions**

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To sum up above dissertations, one must notice that the specificity of Internet as the mass media makes it impossible to treat it equally to other media, and especially to the press. One should treat the defamation committed through the Internet as the lasting offence, because it will allow not only to include the very infringement, but also its real effect as long as long it persists which will have a direct influence on counting the course of limitation from the moment of removing the entry. In this way, to a considerable extent, it will be possible to widen the possibility of claiming rights by people aggrieved by slanderous contents posted online.

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<sup>17</sup> Supreme Court decision of 7th May 2008, III KK 234/07, OSNKW 2008, nr 9, pos. 69.

<sup>18</sup> Supreme Court decision of 21st July 1938., I K 3157/37, OSN(K) 1939, nr 4, pos. 82.



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# EUROPEAN OMBUDSMAN AS AN INSTITUTION COUNTERACTING THE IMPROPER ADMINISTRATION

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## Abstract

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The article is devoted to the institution of the Ombudsman of the European Union as one of the youngest bodies of the European Union. The main task of the European Ombudsman is to ensure the quality of the Community administration. But this is not his only task. What is also important, it is its role in strengthening the relationship between EU citizens and the EU authorities, creation of standards of good administration, fixing its errors and undertaking interventions against the EU authorities. The activities for the protection of citizens' rights in the context of the institution of the European Ombudsman have two main dimensions: an individual one, or interventions on specific issues, and a general, ie. supervision of EU bodies

**Key words:** European Ombudsman, citizenship, Lisbon Treaty, complaint, European Network of Ombudsmen.

## The legal nature of the Ombudsman

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The institution of the European Ombudsman was created by the Maastricht Treaty of 1992. As a part of European citizenship it aims to: improve the protection of citizens in cases of maladministration of Community institutions and bodies, and thus, increase the openness and democratic supervision of the decision-making process and management in the Community institutions<sup>2</sup>. The legal basis of the Ombudsman are based on Articles 20, 24,

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<sup>2</sup> The first proposal to create the office of the Ombudsman within the EU was put forward in the 70s by the Britons. During the work on the Treaty on European Union Spain and Denmark fought most actively for introduction of the institution of the Ombudsman.