



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 10613/07
Jurgen HÖSL-DAUM and Others
against Poland

The European Court of Human Rights (Fourth Section), sitting on 7 October 2014 as a Chamber composed of:

Ineta Ziemele, *President*,

George Nicolaou,

Ledi Bianku,

Nona Tsotsoria,

Zdravka Kalaydjieva,

Paul Mahoney,

Krzysztof Wojtyczek, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above application lodged on 24 February 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Jürgen Hösl-Daum, Mr Stephan Roth and Mr Robert Göpfert, are German nationals who were born in 1978, 1980 and 1982 respectively and live in Brüggén, Oybin and Zittau. They were represented before the Court by Mr S. Böhmer, a lawyer practising in Erlangen. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołaszewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows. The applicants arrived in Poland on 20 July 2004. During the night of 20 to 21 July 2004 they put up posters, described below, at bus stops and poster pillars in Bolesławiec, a town near the border between Poland and Germany. On 22 July 2004 the applicants were arrested by the police when taking photographs of the places where they had put up the posters.

1. Posters

3. There were two posters of A3 format with text in German and a number of graphic photographs of unknown origin depicting, *inter alia*, mass graves, massacred bodies and a group of people in an open train carriage.

4. The first poster read, *inter alia*, as follows:

“The Poles and the Czechs – a heartfelt welcome to the EU!

Our justice system is working diligently, because murder is not subject to statutory limitation.

Documents [concerning] Polish and Czech atrocities on the Germans

“From the land of the dead”

A Jewish émigré and a native Berliner – Robert Jungk – later a famous author and a critic of technologies (“Brighter than a Thousand Suns”), even before the so-called “regular” expulsion had begun, published in the Zurich “Weltwoche” a report about the conditions prevailing in the eastern regions of Germany occupied by the Poles based on his own experience. His report was entitled “From the land of the dead”.

We quote some passages:

“Whoever leaves the Polish zone and reaches the territory occupied by the Russians can immediately breathe again. He leaves behind totally looted towns, plague-stricken villages, concentration camps, barren fields, streets full of corpses, in which thieves lurk, and rob the expellees of their last belongings ... It is true that on a public square in town G. girls, women and old women were raped by relatives of the Polish militia. It is true that at the railway station in S. all trains transporting refugees were systematically looted to such an extent that the people in them had to travel west naked. It is true that in the heart of Silesia not one child under one year of age is still alive, because all of them have died of hunger or been killed. It is true that in Upper Silesia women suffering from syphilis (who were earlier raped – editor) received as a “therapy” a shot in the head. It is true that there has been a wave of suicides in the country, in some towns one-twelfth and in some even one-tenth of the population have taken their lives. It is true that in the so-called labour camps in C. and S. prisoners are made to spend the whole night up to their necks in icy water and that they are beaten until they lose consciousness.”

Was the year 1945 a liberation?

Mass deaths in the foreign extermination camps

After the end of the war 7 million Germans were robbed, expelled, raped, attacked and murdered

[...]

More Germans died in Poland and on the territories occupied by the Poles in 1,255 camps than those who died in transit following expulsion. In the Lamsdorf camp in Upper Silesia, of the 8,000 [people] held there 6,048 died. In the other labour camps in Upper Silesia unspeakable cruelty reigned too. It was common practice in the different camps to shoot, as planned in advance, those who were too old, unable to work or ill.

[...]

The forced labour and suffering in a camp cannot be compensated with money, regardless of the amount. What is necessary is awareness of those crimes in the countries where the atrocities occurred. What is also necessary is that the surviving responsible parties be judged. As for that, there is total silence surrounding the issue of the German victims.”

5. The second poster contained, *inter alia*, the following passages:

“Documents on Polish and Czech atrocities ... Are our EU-friends avoiding a new evaluation of their history?? 15,000,000 Germans were robbed and expropriated, hundreds of thousands were sent to concentration camps and to forced labour ... 3,500,000 Germans were killed ... Where there is no accuser, there is no judge ... there were only Germans ... Second-class people??

[...]

Overall 11 million Germans died, including 7 million after the end of the war.

A peaceful Europe may exist only on the foundation of law and truth. The restitution of houses and plots of land expropriated against the law of nations should be a given in the now democratic Poland and Czech Republic.”

2. *Prosecution and initial court decisions*

6. On 28 December 2004 the prosecution filed a bill of indictment against the applicants with the Jelenia Góra Regional Court. They were charged with the commission of two offences: publicly insulting the Polish nation (Article 133 of the Criminal Code) and incitement to hatred based on national differences (Article 256 of the Criminal Code). It was alleged that between May and July 2004 the applicants had put up no less than thirty-two posters at bus stops and on poster pillars in towns close to the Polish-German border. According to the prosecution, the posters contained untrue statements about alleged mass crimes committed by Poles against the German civilian population during and after the Second World War and graphic photographs of unknown origin. Furthermore, the applicants had created tension between the Polish and German nations on account of their demand for land and property left by the German population on Polish territory to be returned.

7. On 7 February 2005 the Jelenia Góra Regional Court decided that it did not have jurisdiction to examine the applicants’ case and transferred it to

the Jelenia Góra District Court. It found that the acts imputed to the applicants were to be considered administrative offences against public order. The prosecution appealed against that decision. On 25 February 2005 the Wrocław Court of Appeal quashed the decision and remitted the case to the Regional Court. It held that the Regional Court could not review the soundness of the prosecution's legal classification of the alleged offences at the preliminary stage of the proceedings to determine jurisdiction.

8. On 12 May 2005 the Regional Court gave judgment. It held that the applicants had committed the impugned offences and decided to suspend the criminal proceedings against them for a two-year probation period. Each applicant was ordered to pay 2,000 Polish zlotys (PLN) to a children's home.

9. The Regional Prosecutor appealed against the judgment. She argued, *inter alia*, that the Regional Court had erred in finding that the degree of guilt and social danger of the acts imputed to the applicants had been negligible. On 14 September 2005 the Wrocław Court of Appeal quashed the Regional Court's judgment and remitted the case.

3. Trial court's judgment

10. On 7 April 2006 the Regional Court gave judgment. The applicants were convicted of insulting the Polish nation and inciting hatred between the Polish and the German nations in that on 20 July and on the night of 20 to 21 July 2004 in Bolesławiec they had put up in public places posters containing untrue statements about alleged mass crimes committed by the Poles against the German civilian population during and after the Second World War and containing graphic photographs of unknown origin; they had further created tension between the two nations by demanding the return of land and property left by the German population on Polish territory. They were also convicted of attempting to put up other similar posters.

11. The Regional Court sentenced the first applicant to ten months' imprisonment and the two remaining applicants to eight months' imprisonment. It conditionally suspended the prison sentences for a three-year probationary period.

12. The court based its findings on an opinion prepared by three professors from the law, history and sociology departments of Wrocław University. Two of the experts were also members of the Commission for the Examination of Nazi Crimes in Poland.

13. The Regional Court, having regard to the collected evidence, found the applicants guilty of publicly insulting the Polish nation and of inciting national hatred. It found, in so far as relevant:

“The offence specified in Article 133 of the Criminal Code is committed, *inter alia*, by a person who publicly insults the Polish nation. The interpretation of the term “insult” can be made on the basis of the system of values existing in a given society,

whereas the meaning of this word should reflect the meaning attributed to it in ordinary language. To insult is to offend somebody or something by word or act. ... It is an act which consists of showing contempt, damaging respect or reputation.

The term “insult” belongs to the category of value judgments and can have various meanings. It is accepted that the interpretation of this term should be made on the basis of criteria which are as objective as possible and of commonly accepted values. An insult amounts to an expression of contempt, humiliation and affront. (...)

The offence specified in Article 256 of the Criminal Code is committed, *inter alia*, by a person who publicly incites hatred on the basis of national differences. Such act consists in sowing the seeds of dislike and hostility”

14. With regard to the applicants’ motives, the court noted that they claimed to have put up posters in Bolesławiec with a view to informing the Polish public about the massacres of the German population during the period of its expulsion. It did not accept that claim as credible and held as follows:

“The posters contain many untruths concerning the Poles. It transpires from the expert opinion that the information with regard to the death rate among the Germans and to the deportations were deliberately presented in a chaotic manner – without making a distinction as to whether they took place under the Polish or Russian administration, or on the territory of Czechoslovakia – and were presented in such a way as to give grounds for accusation mainly against the Poles.

The numbers cited on the posters were taken from some biased anti-Polish political pamphlets. The information quoted from the article by R. Jungk about the situation prevailing on the territories transferred to Polish administration following the undertakings of the Potsdam Conference is untrue – information about the real perpetrators of, *inter alia*, the ordinary criminal acts was deliberately omitted. The information about Germans held in concentration camps in Poland after the end of the war is also untrue, since such camps did not exist, and the photographs on the posters have no documentary value and it is impossible to identify them.

The experts clearly affirmed in their opinion that the contents of the posters are untrue and are not supported by the research of Polish and German historians.

It is of particular importance that the accused were previously sentenced in Poland for the commission of an administrative offence under Article 63a § 1 of the Code of Administrative Offences, which consisted of putting up about one hundred crosses with the inscription ‘The Germans 1945-46’. This act of the accused had significant social repercussions, and the fact that they were sentenced indicates that they had to be aware of the legal and social consequences of putting up the posters.

The accused insulted the Polish nation by putting up the posters. The untruths included in the posters insult the Polish nation, since imputing to the Poles the alleged crimes – which are not scientifically proved – is an affront to the Polish nation. This interpretation of the posters is based, among other things, on the assessment of their contents by third persons and on the reactions of the people who saw the posters.”

15. The trial court further held:

“The contents of the posters may obviously arouse feelings of unrest, dislike or antagonism between the Polish and German nations. The emphasis in the posters on the alleged Polish crimes, and the inclusion of groundless demands for the return of houses and land left by the German population on Polish territory, may presently

revive or arouse antagonism on the part of the Germans towards the Poles. In accordance with the expert opinion the inclusion in one of the posters of a photograph of a skull was solely aimed at stirring up hatred. ...

16. With regard to the sentence, the court had regard to the applicants' previous conviction by a judgment of the Wrocław-Śródmieście District Court of 9 May 2003 for an administrative offence specified in Article 63a § 1 of the Code of Administrative Offences.

4. The applicants' appeal

17. The applicants filed an appeal. Firstly, they alleged that the court had committed a number of procedural errors. They claimed, *inter alia*, that when considering whether the offence of insulting the Polish nation had been committed, the trial court had blindly followed the expert opinion prepared by historians and failed to properly consider the matter itself and to examine the contents of the posters. Furthermore, the court had wrongly assumed that inclusion in the poster of inaccurate data related to historical events had implied that the content was insulting and incited hatred.

18. The applicants contested the trial court's refusal to admit certain evidence and alleged that it had arbitrarily assessed the evidence. In particular, they challenged its refusal to admit a second expert opinion alleging that the first one had been contradictory. In their view, the trial court had erred in considering that the contents of the posters was capable of stirring up unrest, dislike and antagonism and that they had acted with the intention of insulting the Polish nation and inciting hatred.

19. They averred that the exaggerated manner of their expression concerning the relations between the Poles and the Germans had been exclusively aimed at prompting a discussion about their relations with a view to reconciliation, and could not be considered in any way as an insult. In this connection, they claimed that the posters contained some true historical information and some which was the subject of historical dispute.

20. With regard to the alleged insult to the Polish nation, they argued that the trial court had failed to distinguish between statements which were unfavourable to the Polish nation and those which were insulting. Furthermore, Article 133 of the Criminal Code should have been construed narrowly in a modern State based on the rule of law and could not be used as a tool to protect one interpretation of history.

5. The Court of Appeal's judgment

21. On 30 August 2006 the Wrocław Court of Appeal dismissed the applicants' appeal and upheld the first-instance judgment.

22. The Court of Appeal found that the trial court had committed no errors of procedure. The evidence collected in the case had been

comprehensive and sufficient to examine the case and there was no need to admit the evidence proposed by the applicants.

23. The Court of Appeal noted that it had been necessary to examine the applicants' actions in the historical context of the Second World War and the period following it. To this end the court had ordered the preparation of an opinion by professors from Wrocław University. They had been asked to consider the content of the posters and had stated that:

“the contents of the posters were entirely untrue and contained false information about the situation prevailing on the territories transferred to Polish administration following the undertakings of the Potsdam Conference. The posters also contained untrue information about German losses which did not correspond to the results of research carried out by Polish and German historians”.

24. The Court of Appeal dismissed the applicants' arguments that the opinion had been incomplete and contradictory. It also rejected their view that the experts had not been in a position to assess whether the contents of the posters had been insulting to the Polish nation or had incited national hatred. The Court of Appeal noted that in historical studies there could be certain differences of opinion as regards, for example, the extent of German losses after the end of the war. The experts had, however, considered this issue, referring to the results of Polish-German research. Furthermore, it observed that although the human tragedies experienced by the Germans, occasioned by their expulsion in particular, could not be disregarded, those events could not be detached from the historical context, namely, the reasons for and the consequences of the Second World War, including the undertakings of the Potsdam Conference.

B. Relevant domestic law and practice

1. Relevant constitutional provisions

(a) Provisions concerning freedom of expression

25. Article 14 provides as follows:

“The Republic of Poland shall ensure freedom of the press and other means of social communication.”

26. Article 31 § 3 of the Constitution, which lays down a general prohibition on disproportionate limitations on constitutional rights and freedoms (the principle of proportionality), provides:

“Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”

27. Article 54 § 1 of the Constitution guarantees freedom of expression. It states, in so far as relevant:

“The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.”

(b) *Nullum crimen sine lege*

28. Article 42 § 1 of the Constitution reads:

“Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.”

(c) Provisions relating to the constitutional complaint

29. Article 79 § 1 of the Constitution provides as follows:

“In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution.”

30. Article 190 of the Constitution, insofar as relevant provides as follows:

1. Judgments of the Constitutional Court shall be universally binding and final.

2. Judgments of the Constitutional Court, ... shall be published without delay.

3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for the end of the binding force of a normative act. Such time-limit may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. ...

4. A judgment of the Constitutional Court on the non-conformity with the Constitution, an international agreement or statute, of a normative act on the basis of which a final and enforceable judicial decision or a final administrative decision ... was given, shall be a basis for re-opening of the proceedings, or for quashing the decision ... in a manner and on principles specified in provisions applicable to the given proceedings.”

2. *Relevant provisions of the Criminal Code*

31. Article 133 of the Criminal Code provides as follows:

“Anyone who insults the Nation or the Republic of Poland in public shall be subject to deprivation of liberty for up to three years.”

32. Article 256 of the Criminal Code read, at the material time, as follows:

“Anyone who publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, racial or religious differences or for reason of

lack of any religious denomination shall be subject to a fine, restriction of liberty or deprivation of liberty for up to two years.”

3. Relevant provisions of the Code of Criminal Procedure

33. Article 540 § 2 of the Code of Criminal Procedure provides for reopening of the proceedings following a judgment of the Constitutional Court. It reads as follows:

“The proceedings shall be reopened to the benefit of the accused when as a result of the Constitutional Court’s judgment a provision of law which served as the basis for conviction or conditional discontinuation [of the proceedings] was abolished or amended.”

COMPLAINT

34. The applicants complained that their conviction for insulting the Polish nation and incitement to hatred had violated Article 10 of the Convention. They argued that Articles 133 and 256 of the Criminal Code should be narrowly construed in order not to stifle historical debate for political reasons. They could not be punished for the dissemination of facts, even if those facts were damaging to the honour of a nation. Even if some figures quoted in the posters were not accurate, it was beyond dispute that the Poles had committed terrible crimes against German civilians during the period of the latter expulsion. There were well-documented sources confirming those and other events, such as the existence of camps for Germans in post-war Poland. They draw parallels between Article 133 of the Polish Criminal Code and Article 301 of the Turkish Criminal Code, which criminalised statements denigrating the Turkish State.

THE LAW

35. The applicants alleged that the circumstances of their case had disclosed a breach of Article 10 of the Convention.

A. The parties’ submissions

36. The Government’s submissions were initially limited to the issue of admissibility of the application. Subsequently, the Government contended that the application was inadmissible due to its manifestly ill-founded character.

37. The Government argued that in the light of the factual circumstances of the case the applicants had not exhausted all the available remedies

provided for by the Polish law. In this connection, they underlined the importance of the principle of subsidiarity. In the Government's view, the applicants did not avail themselves of the possibility of lodging a constitutional complaint contesting the constitutionality of Article 133 of the Criminal Code which served as a basis for their conviction. The Government maintained that the applicants' case satisfied the requirements concerning the effectiveness of a constitutional complaint in Poland as set out in the Court's case-law.

38. The applicants argued that the procedure of constitutional complaint concerned only the abstract review of the conformity of legal norms with the Constitution and not of their application in a given case. Such a complaint would obviously not have had any prospects of success in their case. In the applicants' view, Article 133 of the Criminal Code was compatible with the Constitution, even if the protection of the national honour by means of criminal law was uncommon in Europe. Similarly, Article 256 of the Criminal Code which protected the peaceful coexistence of different ethnic groups in a state by the means of criminal law did not raise concern under the international law standards or the Polish Constitution. Consequently, the applicants argued that they were not required to lodge a constitutional complaint as this procedure enabled them to challenge solely the impugned provisions themselves.

B. The Court's assessment

39. The Court reiterates that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system. The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV; and *Demopoulos*

and Others v. Turkey (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, ECHR 2010).

40. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. The mere doubts regarding the effectiveness of the relevant remedy, if not supported by material evidence, in particular examples from the established domestic practice, are not sufficient to absolve an applicant from his duty under Article 35 § 1 (*ibid.*; see also *Pikielny and Others v. Poland* (dec.), no. 3524/05, 18 September 2012, § 57).

41. The Government pleaded non-exhaustion of domestic remedies, claiming that the applicants should have lodged a constitutional complaint against Article 133 of the Criminal Code. The Court recalls that it has already dealt with the question of the effectiveness of the procedure of a constitutional complaint in Poland (see *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005; *Wiącek v. Poland* (dec.), no. 19795/02, 17 January 2006 and *Tereba v. Poland* (dec.), no. 30263/04, 21 November 2006; *Łaszkiewicz v. Poland*, no. 28481/03, § 68, 15 January 2008; *Liss v. Poland* (dec.), no. 14337/02, 16 March 2010; and *Urban v. Poland* (dec.), no. 29690/06, 7 September 2010). In the *Szott-Medyńska* decision the Court considered in particular two important limitations of the Polish model of constitutional complaint, namely its scope and the form of redress it provides.

42. Having analysed the above-mentioned limitations of the Polish procedure of constitutional complaint, the Court observed that the constitutional complaint could be recognised as an effective remedy, within the meaning of the Convention, only where: 1) the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; and 2) procedural regulations applicable to the revision of such type of individual decisions provided for the reopening of the case or the quashing of the final decision in consequence of the judgment of the Constitutional Court in which unconstitutionality had been found. Consequently, the Court found that the exhaustion of the procedure of the constitutional complaint

should be required under Article 35 § 1 of the Convention in situations in which both above-mentioned requirements had been met.

43. The Court observes that in the instant case the applicants were convicted of the offence of insulting the Polish nation under Article 133 of the Criminal Code and of the offence of inciting national hatred under Article 256 of the Criminal Code. The said provisions of the Criminal Code constituted the direct legal basis of the individual decision in respect of which the violation is alleged.

44. The Court has dealt with a comparable case concerning the offence of insulting a foreign Head of State under Article 136 §§ 1 and 3 of the Criminal Code. In that case the Court allowed the Government's objection that the applicant convicted on the basis of this provision was required to first lodge a constitutional complaint with the Constitutional Court (see, *Urban v. Poland*, cited above). In the earlier case of *Pachla v. Poland* (cited above) the Court adopted the same position in respect of the applicant convicted under Article 212 § 2 of the Criminal Code which criminalised defamation committed through the mass media.

45. With regard to Article 256 of the Criminal Code, the Court notes that the Constitutional Court ruled recently on a constitutional complaint challenging part of this provision. In its judgment of 25 February 2014 (case no. SK 65/12), the Constitutional Court held that the formulation "inciting hatred" used in Article 256 of the Criminal Code was compatible, *inter alia*, with Article 54 § 1 taken in conjunction with Article 31 § 3 of the Constitution and Article 42 § 1 of the Constitution. The Constitutional Court noted in passing that the constitutional complaint did not challenge the actual criminalisation of incitement to hatred based on national and other differences or the severity of the penalties that could be imposed under Article 256 of the Criminal Code. It should also be noted that the Constitutional Court was seized with a legal question on the constitutionality and compatibility with Article 10 of the Convention of Article 135 § 2 of the Criminal Code which criminalised the offence of insulting in public the President of the Republic of Poland. The Constitutional Court examined the constitutionality of the contested provision and rendered its judgment on 6 July 2011 (case no. P 12/09). In another judgment of 19 July 2011 (case no. K 11/10), the Constitutional Court reviewed the constitutionality of new provisions of the Criminal Code (Article 256 §§ 2-4) which criminalized the dissemination of information inciting to hatred and found them partially unconstitutional.

46. Having regard to the foregoing, the Court finds that the applicants in the present case were required to lodge a constitutional complaint before having seized the Court. It was open for them to question the constitutionality of Articles 133 and 256 of the Criminal Code and to argue that these provisions were in breach of Article 54 § 1 (freedom of expression), Article 31 § 3 (the principle of proportionality) and

Article 42 § 1 of the Constitution (*nullum crimen, nulla poena sine lege poenali anteriori*).

47. Had the applicants brought a constitutional complaint, and had they been successful, they could have requested a competent court, pursuant to Article 540 § 2 of the Code of Criminal Procedure, to reopen the criminal proceedings against them. In the renewed examination of the case the courts would have to disregard the legal provisions which were declared unconstitutional. Thus, as a result of the reopening of the criminal proceedings the alleged violation of Article 10 of the Convention could have been suitably redressed.

48. In conclusion, the Court finds that in the present case, by failing to lodge a constitutional complaint against Articles 133 and 256 of the Criminal Code, the applicants failed to exhaust the remedy provided for by Polish law. Thus, the Government's objection that the constitutional complaint was not employed by the applicants in the instant case is well-founded.

49. It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Fatoş Aracı
Deputy Registrar

Ineta Ziemele
President