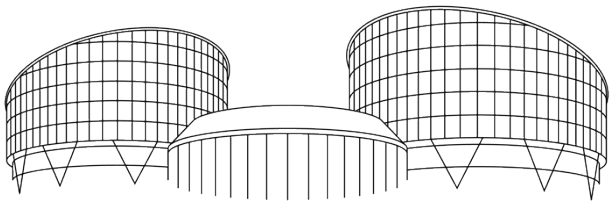

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KAPERZYŃSKI v. POLAND

(Application no. 43206/07)

JUDGMENT

STRASBOURG

3 April 2012

FINAL

03/07/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kaperzyński v. Poland,

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

David Thór Björgvinsson, *President,*
Lech Garlicki,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 13 March 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 43206/07) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Przemysław Kaperzynski ("the applicant"), on 28 September 2007.

2. The applicant was represented by Mr A. Bodnar, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged a breach of his right to freedom of expression guaranteed by Article 10 of the Convention.

4. On 15 December 2010 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1964 and lives in Olsztyn.

6. At the material time the applicant was editor-in-chief of the local weekly newspaper "Iławski Tydzień".

7. On 17 October 2005 the newspaper published an article co-authored by the applicant, entitled "Municipality in danger; authorities fail to see problem". It described in detail the situation concerning the sewage system

in the Iława municipality. The thrust of the article was that the sanitary situation in the municipality was a matter of concern and posed significant public health risks; extensive investments were necessary to improve it; there was a serious shortage of available funds; the municipal authorities were dealing with the problems in a slow and incompetent manner; it was more important for them to save money than to prevent serious health risks and to avert a danger to the population; the quality of water was unsatisfactory; and the mayor, despite the fact that he had been in office for two terms, had failed to deal with the problems properly.

8. In a letter to the newspaper of the same date the mayor of Iława complained about the article. The first paragraph of that letter was couched in ironic terms. The mayor expressed doubts about the applicant's intentions and suggested that the applicant had been acting in his own personal interest. He maintained that the general tone of the article was inappropriate. He also voiced doubts as to whether the newspaper had any readers at all and whether it was therefore worth his while to react to the article.

9. He further requested, referring to section 31 § 1 read together with section 32 of the Press Act 1984, that the applicant publish a rectification (see paragraph 22 below). He stated that the development of the sewage network was a priority for the municipal authorities and listed a number of projects undertaken by the municipality during the preceding five years. Further, three projects planned for the years 2007-2013 were listed. The mayor stated that the quality of the water was monitored by the appropriate services and referred to several projects for modernising and overhauling the existing sewage and sanitary systems.

10. The applicant did not reply to this letter and did not publish it.

11. On an unspecified later date the municipality of Iława brought a private bill of indictment against the applicant before the Elbląg District Court for the offence of failure to publish a rectification or reply as prescribed by section 46 § 1 of the Press Act (see paragraph 24 below).

12. In his written pleadings of 4 December 2005 the applicant argued that the mayor's letter could not reasonably be regarded as a request for rectification within the meaning of section 31 of the Press Act, because its content lacked the essential characteristics of a "rectification". It was not related to the facts and it was not couched in objective terms, as stipulated by that provision. In fact, its first part, in particular, was very critical of the applicant and contained innuendos about his character, motives and about the newspaper and its journalists. This alone made it impossible to regard the letter as a request for rectification. Furthermore, the style of the letter lacked the objectivity which could be expected of a rectification. It could therefore not be reasonably seen as such. It resembled rather a "reply", within the meaning of the same provision of the Press Act, expressing the value judgments and views of its author vis-à-vis the impugned article. Even assuming that the letter could be seen as a rectification, it did not

comply with the relevant requirements laid down by section 33 of the Press Act as it was more than twice the length of the contested article.

13. The applicant further submitted that the letter could not be seen as a rectification request because it breached his personal rights and the rights of other journalists working for the "*Tydzień Iławski*", by calling into doubt their professionalism and personal integrity. The applicant referred to section 33 of the Press Act, which obliged an editor-in-chief to refuse the publication of a rectification or a reply if its form or content were incompatible with the principles of co-existence with others ("*zasady współżycia społecznego*").

14. On 13 December 2006 the Elbląg District Court found the applicant guilty of an offence punishable by section 46 § 1 of the Press Act in conjunction with its section 31 § 1. The court sentenced the applicant to four months' restriction of liberty in the form of twenty hours' community service per month and suspended the sentence for a period of two years. It further deprived him of the right to exercise the profession of journalist for a period of two years and ordered that the judgment be made public by being displayed at the Iława Municipal Office.

15. The court noted that the facts of the case, for the most part, were not disputed by the parties. It found that the applicant had not replied to the mayor's letter and had not published that letter or excerpts thereof, either as a rectification or reply. It noted that he was clearly obliged to do so under the provisions of the Press Act. He was aware of his obligation as he had previously published rectifications in the newspaper. No objective grounds existed which could be said to have legitimately prevented the applicant from complying with that obligation and, in any event, he had not invoked any such grounds. It was the applicant's own decision to refuse to publish the rectification requested. Similarly, he had failed to reply to the mayor, explaining to him the reasons for his refusal to publish. His failure corresponded to the offence specified in section 46 of the Press Act read together with section 31 of that Act.

16. The judgment further read:

> "The above assessment of the [applicant's conduct] is additionally supported by the fact that in the impugned article he had discussed a question of significant importance for the municipality of Iława, namely the condition of its sewage system, by saying that the mayor had failed to take effective steps in order to have the sewage system installed. Assuming that the accused took into consideration the significance of his article, he should have, as a diligent journalist and editor-in-chief, either published the rectification demanded by the municipality, which directly concerned the questions raised in the article and outlined the steps which the municipality had already taken, or informed the municipality of the grounds for his refusal to publish a rectification."

17. The court further held that the applicant's failure to publish the mayor's letter had been to the serious detriment of the Iława municipality as by making it impossible for a fair and public debate to develop it had

undermined the confidence which a democratically elected municipal executive authority should enjoy.

18. The applicant appealed, essentially reiterating his arguments as submitted to the first-instance court.

19. On 29 March 2007 the Elbląg Regional Court upheld the contested judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. Article 54 of the Constitution provides:

> "1. Freedom to express opinions, and to acquire and disseminate information shall be ensured to everyone.
>
> 2. Preventive censorship of means of social communication and licensing of the press shall be prohibited."

Article 31 of the Constitution reads:

> "1. Freedom of the person shall receive legal protection.
>
> 2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
>
> 3. 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."

Article 190 of the Constitution, regarding the effects of judgments of the Constitutional Court, provides, in so far as relevant:

> "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 a time-limit may not exceed eighteen months in relation to a statute or twelve months in relation to any other normative act. ...
>
> 4. A judgment of the Constitutional Court on 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 ... is given, shall be a basis for reopening the proceedings or for quashing the decision ... in a manner and on principles specified in provisions applicable to the given proceedings."

21. The relevant provisions concerning the correction of information in the press and other media are contained in the Press Act (*Prawo prasowe)* of 26 January 1984.

Section 31 provides, in so far as relevant, as follows:

> "At the request of a natural or legal person or other organisational entity, the editor-in-chief of the relevant daily or magazine is under an obligation to publish, free of charge:
>
> 1. a factually based *(rzeczowe i odnoszące się do faktów)* rectification of untrue or inaccurate statements,
>
> 2. a factually based *(rzeczową)* reply to any statement which might infringe someone's personal rights"

22. Section 32 provides, in so far as relevant, as follows:

> "...Without the consent of the claimant, it is forbidden to shorten or make any other amendments to the correction or reply which would weaken its significance or alter the intentions of the author. The correction may not be commented upon in the same edition or broadcast ..."

23. Section 33 provides, in so far as relevant, as follows:

> "1. The editor-in-chief is under an obligation to refuse publication of the rectification or reply if:
>
> 1) it does not fulfil the requirements laid down in section 31 (...)
>
> 3. The editor-in-chief, when refusing to publish a rectification or reply, shall, without undue delay, send the claimant written notification of the refusal and the reasons for it. If the refusal is based on reasons referred to in sub-section (1), the editor-in-chief shall indicate those parts which cannot be published; the seven-day time-limit for producing an amended correction or reply starts running again from the day on which the refusal and its justification were delivered. The editor cannot refuse to publish a rectification or reply which has been amended in accordance with his or her indications."

24. Section 46 provides for the following penal provision:

> **"**Whosoever, in breach of the statutory obligation, refuses to publish a rectification or reply, as referred to in section 31, or who publishes such a rectification or reply contrary to the conditions laid down in this Act, shall be subject to a fine or a restriction of liberty."

25. In a judgment of 5 May 2004 the Constitutional Court (P 2/03) examined the constitutionality of the prohibition on making editorial comments on a request for rectification in the same issue of a newspaper in which the rectification was published, which was at that time provided for by section 32 § 6 of the Press Act 1984 and backed up by a criminal sanction provided for by section 46 § 1 of that Act.

26. In the light of section 32 § 6 of the 1984 Act, the prohibition on publishing comments on requests for rectifications was not absolute, since it was permissible to include such comments in the next issue or broadcast. That prohibition was necessary to protect the freedom of expression of the person having submitted the request for rectification. The challenged provisions of the Press Act made it possible to maintain a balance of power between the media and persons submitting requests for rectifications to be published, with the latter generally having more limited opportunity to publicly express their views.

27. The court further noted that the practical application of section 46 had given rise to serious difficulties in judicial practice; the Press Act did not formulate any conditions concerning either the form or the substance that would allow for a clear categorisation of a given request submitted to an editor-in-chief as a "rectification" or a "reply". Hence, editors could have – and in practice did have – serious problems in classifying such submissions. Since it was impossible to provide an unambiguous interpretation of the relevant criminal law norm and no uniform interpretation had been developed in practice, the challenged provision (that is, section 32 § 6 of the Press Act) failed to respect the principle *nullum crimen sine lege*, enshrined in Article 46 of the Constitution.

As a result, the prohibition on commenting on a rectification in the same issue, hitherto based on that provision, was deprived of its criminal sanction. The remaining elements of the criminal law provision contained in section 46 § 1 of the Press Act retained their binding force.

28. The court further observed that the prohibition expressed in section 32 § 6 of the Press Act should be secured by an adequately effective sanction, independently of civil liability. It should take into account the principle of proportionality and assume, on the one hand, the protection of the interests of those harmed by press publications and, on the other hand, values linked to the freedom of expression.

29. On 1 December 2010 the Constitutional Court held that section 46 § 1, sections 31 and 32 § 1 of the Press Act were incompatible with Article 46 of the Constitution. It reiterated its findings concerning the lack of precision in the manner in which criminal offences punishable under those provisions were defined. It further held that as a result of the judgment those provisions were to lose their binding force no later than eighteen months after the judgment was officially published. Until that time, they should be applied by the courts.

30. Article 23 of the Civil Code contains a non-exhaustive list of rights known as "personal rights" (*dobra osobiste*). This provision states:

> "The personal rights of an individual, such as, in particular, health, liberty, reputation (*cześć*), freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as]

inventions and improvements shall be protected by the civil law regardless of the protection laid down in other legal provisions."

31. Article 24 of the Civil Code provides for ways of redressing infringements of personal rights. In accordance with that provision, a person facing the threat of an infringement may demand that the prospective perpetrator refrain from the wrongful activity, unless it is not unlawful. Where an infringement has taken place, the person affected may, *inter alia*, request that the wrongdoer make a relevant statement in an appropriate form, or claim just satisfaction from him or her. If an infringement of a personal right causes financial loss, the person concerned may seek damages.

32. Under Article 448 of the Civil Code, a person whose personal rights have been infringed may seek compensation. That provision, in its relevant part, reads:

"The court may grant an adequate sum as pecuniary compensation for non-material damage (*krzywda*) caused to anyone whose personal rights have been infringed. Alternatively, the person concerned, regardless of seeking any other relief that may be necessary for removing the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific public interest ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant complained that his criminal conviction amounted to a breach of Article 10 of the Convention. This provision reads as follows:

"1. 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.

2. The exercise of these freedoms, since it 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."

A. Admissibility

34. The Government submitted that the applicant had not exhausted all the remedies afforded by Polish law in that he had failed to lodge a constitutional complaint under Article 79 § 1 of the Constitution questioning the compatibility with the Constitution of the provisions on which the decisions in his case were based. They referred to the judgments of the Constitutional Court given on 5 May 2004 and 1 December 2010 (see paragraphs 25 and 29 above). The Constitutional Court had held that certain terms of the Press Act used in connection with the rectification procedure were imprecise and therefore failed the test which a statutory determination of a criminal offence had to meet. In their view the applicant should have availed himself of that remedy and challenged the compatibility of the Press Act with the right to freedom of expression guaranteed by the Constitution. Such a complaint offered reasonable prospects of success. Moreover, when the applicant had brought his case to the Court, the case in which the Ombudsman had challenged the constitutional character of the provisions of the Press Act concerned in the applicant's case, ultimately determined by the judgment of 1 December 2010 (see paragraph 27 above), was already pending before the Constitutional Court. The applicant should have availed himself of that remedy.

35. They further argued that the applicant should have lodged a cassation appeal with the Supreme Court against the second-instance judgment.

36. The applicant argued that when his case had ended, the proceedings referred to by the Government had already been pending since 2007. It would therefore not have served any useful purpose to submit a constitutional complaint challenging the same provisions.

The applicant averred that the problem arising in his case under Article 10 of the Convention was not related to the provisions of a law as such but originated in the incorrect application of the provisions of the Press Act.

37. The applicant submitted that a cassation appeal to the Supreme Court did not lie against the second-instance judgment.

38. The Court observes that the Polish model for applications to the Constitutional Court is characterised by a significant limitation as to the form of redress it provides. By virtue of Article 190 of the Constitution, the principal direct effect of a judgment of the Constitutional Court is the abrogation of the statutory provision which has been found to be unconstitutional. In the case terminated by the Constitutional Court's judgment of 1 December 2010 (see paragraph 29 above) the Constitutional Court ruled that the unconstitutional provisions of the Press Act should temporarily remain in force and lose their binding force no later than eighteen months from the date of the judgment. Moreover, the Constitutional Court did not order any individual measure with regard to the

author of the constitutional complaint. The Court further observes that the practice of the Constitutional Court in that regard, conferring on successful authors of constitutional complaints the so-called "right of privilege", which aims at rewarding the individual who brought the first constitutional complaint concerning a particular matter for his or her proactive attitude, is not yet well-established. Consequently, it is not certain that it would be applied in a similar way with regard to each constitutional complaint (see *Orchowski v. Poland*, no. 17885/04, § 110, ECHR 2009-... (extracts).

39. The Court is further of the opinion that the applicant's conviction was not based on a direct application of section 46 § 1, sections 31 and 32 § 1 of the Press Act. Rather, his conviction was the result of a judicial interpretation which applied these provisions to the particular circumstances of the applicant's case. In that connection the Court points to the established case-law of the Constitutional Court, according to which constitutional complaints based solely on the allegedly wrongful interpretation of a legal provision are excluded from its jurisdiction.

It follows that an individual complaint to the Constitutional Court cannot be recognised as an effective remedy, within the meaning of the Convention, in the circumstances of the applicant's case.

40. In so far as the Government argued that the applicant should have filed a cassation appeal with the Supreme Court, the Court observes that such an appeal is available only in cases in which a prison sentence has been imposed on a defendant. No such sentence was pronounced in the present case.

41. It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

42. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

43. The applicant argued that the importance of a free press in a democratic society dictated that the duties and responsibilities of journalists should not be enforced by means of the criminal law. The Press Act had been adopted in 1984, in a pre-democratic political context. Its provisions, applied in a democratic system, were capable of hindering the exercise of the freedom of expression, in particular as they imposed on journalists legal obligations which should normally be reserved for professional codes of conduct.

44. The applicant further argued that he had failed to respond to the mayor's letter because section 33 § 1 of the Press Act lacked clarity as to the circumstances in which such a refusal was permissible. This lack of clarity, albeit in the context of the *nullum crimen sine lege* principle, had later been confirmed by the Constitutional Court's judgment of 1 December 2010 (see paragraph 29 above).

45. The applicant further submitted that, for a newspaper, a refusal to publish a rectification was a matter of editorial policy and an aspect of the freedom to provide information. The freedom to choose and pursue editorial policy fell within the scope of the freedom of expression. The order to publish the rectification requested by the mayor and the applicant's criminal conviction had violated that freedom.

46. The applicant further argued that the mayor's letter had not in fact related to information contained in the original article published in the applicant's newspaper and could not therefore be regarded as a proper request for rectification. That letter contained comments violating the applicant's personal rights. The national courts had failed to examine whether that letter could be regarded as a "rectification" within the meaning of domestic law. In particular, they failed to establish whether the impugned article had distorted information about the sanitary and sewage situation in the municipality. The applicant had alleged mismanagement on the mayor's part. Hence, the article concerned a matter of public interest and the criticism published in the article was directed against a public figure, an elected head of the local government.

47. The applicant argued that the interference had in fact been aimed at protecting the rights and reputation of the municipality as it had been the municipality which had brought the criminal case against the applicant (see paragraph 11 above).

48. Finally, the applicant submitted that the interference complained of had not been dictated by any pressing social need. It had been disproportionate, given in particular that he had been divested of his right to work as a journalist. In addition, the courts had imposed on him a four-month restriction of liberty in the form of twenty hours' community service per month. They had also ordered the judgment be made public. This had forced the applicant to leave his job. Moreover, the fact that the applicant had a criminal record had caused serious and ongoing difficulties in finding new employment.

49. The Government argued that the restrictions on the applicant's freedom of expression had been prescribed by section 46 § 1 of the Press Act. They had therefore complied with the lawfulness requirement stipulated by Article 10 § 2 of the Convention.

50. They further argued that the interference with the applicant's freedom of expression served the legitimate purpose of the protection of the freedom of the press. The applicant's failure to publish the mayor's

rectification had made impossible an objective debate about his role and the performance of his mandate in the development of the local sewage system and prevented the mayor from disseminating relevant factual information to the local public. Thus the applicant had prevented other persons from having their voices heard. This, in turn, was to the detriment of the local community. The domestic courts, bearing in mind the applicant's unlawful and unprofessional conduct, had acted in the interests of the protection of the freedom of the press, which should be equally accessible to all.

51. The Government averred that the interference complained of was necessary in a democratic society in order to ensure an appropriate reaction to the applicant's intention to prevent the mayor from challenging certain allegations about the conduct of the latter's official duties.

52. They were further of the view that the grounds relied on by the domestic authorities were relevant and sufficient. In any event, it was for the national authorities to decide whether no there existed a pressing social need for the impugned interference. The domestic courts enjoyed a certain margin of appreciation in this respect.

53. The Government submitted that the penalty imposed on the applicant, namely four months' restriction on the exercise of his freedom, suspended for two years, had been lenient. The prohibition on the applicant exercising the profession of journalist was not too severe because when the first-instance court had given its judgment, the applicant had no longer been working as a journalist.

2. The Court's assessment

(a) General principles

54. According to the Court's well-established case-law, freedom of expression 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. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10 § 2, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among many other authorities, *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII; and *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103).

55. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner

consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many authorities, Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; and Bladet Tromsø and *Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III).

56. In this context, the safeguards to be afforded to the press are of particular importance (*Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I). Not only does the press have the task of imparting information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" in imparting information of serious public concern (see, among other authorities, Observer *and* Guardian, cited above, § 59, and *Gawęda v. Poland*, no. 26229/95, § 34, ECHR 2002-II).

57. However, Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. By reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports of Judgments and Decisions* 1996-II ; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; and *Wołek, Kasprów and Łęski v. Poland* (dec.), no. 20953/06, 21 October 2008).

(b) Application of the principles to the circumstances of the present case

58. In the present case the prosecuting authorities instituted proceedings against the applicant for breach of his obligation to publish, by way of a "rectification" within the meaning of section 31 of the Press Act, the mayor's letter. Ultimately, the courts found him guilty of an offence and imposed a criminal sanction on him. It is not in dispute that this sanction amounted to an interference with his right to freedom of expression.

(i) Whether the interference was prescribed by law

59. The interference complained of was based on section 46 § 1 of the Press Act in conjunction with its section 31 § 1.

60. The Court observes that on 1 December 2010 the Constitutional Court found that these provisions were incompatible with the Constitution in so far as it provided for the principle *nullum crimen sine lege.* That court further held that the provisions should lose their binding force no later than eighteen months from the date of the judgment (see paragraph 29 above).

However, at the time when the final judgment in the applicant's case was given and for a long time afterwards, these provisions were binding on the courts. The Court therefore concludes that the interference with the applicant's right to freedom of expression was at the material time prescribed by domestic law. However, in the Court's view it is relevant for the assessment of the case that subsequent to the facts of the case the legal basis for the interference concerned was affected by the judgment given by the Constitutional Court on 1 December 2010 (see paragraph 29 above).

(ii) Whether the interference served a legitimate purpose

61. The Court must now examine whether the interference served a legitimate purpose.

It notes the Government's argument that it was aimed at protecting the freedom of the press. The Court does not find this argument persuasive. It fails to see how a criminal sanction imposed on a journalist can be regarded as aimed at the protection of press freedom.

The Court is prepared to accept that the interference served the purpose of protecting the reputation of the mayor and therefore the legitimate aim of the protection of the reputation or rights of others within the meaning of paragraph 2 of Article 10 of the Convention.

(iii) Whether the interference was necessary in a democratic society

62. The Court must now examine whether this interference was "necessary in a democratic society". The Court reiterates that this depends on whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient (see Bladet Tromsø *and Stensaas,* cited above, § 58). The Court's task is not to take the place of the national courts but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid., § 60, and see also *Fressoz and Roire,* cited above, § 45). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Veraart v. the Netherlands*, no. 10807/04, § 61, 30 November 2006).

63. The Contracting States have a certain margin of appreciation in assessing whether in the circumstances of a concrete case a pressing social need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy*

[GC], no. 48898/99, § 39, ECHR 2003-V, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, ECHR 2004-XI).

64. In the present case, the Court notes that the article published by the applicant concerned the development and functioning of the sewage system in the municipality. He expressed the view that the sanitary situation posed significant public health risks and that the municipal authorities had failed to deal with the matter in a competent manner. He alleged, in particular, that they had not attached sufficient weight to prevent serious health risks and that the mayor had failed to manage the situation properly. Hence, the subject-matter of that article was indisputably a matter of general interest for the local community which the applicant was entitled to bring to the public's attention. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Bączkowski and Others v. Poland*, no. 1543/06, § 98, ECHR 2007-VI; and *Wojtas-Kaleta v. Poland*, no. 20436/02, § 46, 16 July 2009). In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion (see *Lombardo and Others v. Malta*, no. 7333/06, § 54, 24 April 2007).

The Court further observes that the article did not amount to a gratuitous personal attack and was neither insulting nor frivolous in any way. It was a critical assessment of the performance of the local authorities and the mayor. It was based on a solid factual basis, referred to throughout the text. This aspect of the case was not taken into account by the domestic court. On the contrary, the Elbląg District Court was of the view that the importance of the subject-matter of the article and its public character justified the sentence imposed on the applicant (see paragraph 16 above).

65. The Court observes that the 1984 Press Act imposed on the applicant, as the editor-in-chief of a newspaper, the obligation to publish a rectification or reply to an article submitted by a person aggrieved. Section 31 of the Press Act formulated requirements that a rectification or a reply had to comply with. Section 33 of that Act allowed the editor-in-chief to refuse publication of a rectification or a reply if they failed to meet certain requirements, essentially of an editorial character. However, it also made it obligatory for the editor to inform the persons concerned in writing about that refusal and to explain why the editor had decided that the text submitted would not be published.

66. The Court is of the view that a legal obligation to publish a rectification or a reply may be seen as a normal element of the legal framework governing the exercise of the freedom of expression by the print media. It cannot, as such, be regarded as excessive or unreasonable. Indeed, the Court has already held that the right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the Convention. This flows from the need not only to be able to contest

untruthful information, but also to ensure a plurality of opinions, especially on matters of general interest such as literary and political debate (see, *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX). Likewise, an obligation to inform the party concerned in writing about the reasons for a refusal to publish a reply or rectification is not, in the Court's opinion, of itself open to criticism. Such an obligation makes it possible, for example, for the person who feels aggrieved by a press article to present his reply in a manner compatible with the editorial practice of the newspaper concerned.

67. In the present case the Elbląg District Court found that the applicant had failed in his duty to inform the mayor that he would not publish his reply. Likewise, the court found that he had failed to provide any reasons for his refusal, an obligation specified by section 33 § 3 of the Press Act. Furthermore, the domestic courts found that the applicant had not published the mayor's letter, either in its entirety or in a form which could be deemed compatible with the profile and format of the newspaper. The Court endorses the finding of the first-instance court that the applicant had failed to respect his professional obligations in this respect.

68. However, in the circumstances of the case it is not merely the obligation imposed under section 31 of the Press Act alone which constituted the legal background to the case, but also the imposition of the criminal sanction stipulated by section 46 § 1 of that Act.

69. In this connection, the Court reiterates that, in view of the margin of appreciation left to Contracting States, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], cited above, § 59; *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II; *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 68, 14 February 2008; *Reinboth and Others v. Finland*, no. 30865/08, § 90, 25 January 2011).

70. Nevertheless, the Court must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in a discussion of matters of legitimate public concern (see *Standard Verlags GmbH v. Austria*, no. 13071/03, § 49, 2 November 2006; *Kuliś and Różycki v. Poland*, no. 27209/03, § 37, ECHR 2009-...). The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident (see, *mutatis mutandis*, *Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; *Goodwin*, cited above, p. 500, § 39; *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003; *Lombardo v. Malta*, cited above, § 61). This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals. The same considerations apply in the circumstances of the present case.

71. The Court has already had an opportunity to examine the manner in which the criminal provisions of the 1984 Press Act were applied in the case *Wizerkaniuk v. Poland*, no. 18990/05, 5 July 2011. The Court observed that it had normally been called upon to examine whether interferences with freedom of expression were "necessary in a democratic society" with reference to the substance and content of statements of fact or value judgments for which the applicants had been penalised. However, in that case the courts had imposed a criminal penalty on the applicant on grounds which were unrelated to the substance of the impugned article.

72. Similarly, in the present case a criminal sentence was imposed on the applicant on the basis of the provisions of the same Press Act for an offence of an essentially procedural nature, that is for his failure to publish the mayor's letter and to inform the mayor about his refusal and the reasons for it. The Court observes that under these provisions the courts were prevented from taking into account considerations based on freedom of expression. Likewise, the applicant was denied the possibility of submitting legally relevant arguments in his favour referring to that freedom.

73. Furthermore, in assessing the proportionality of the interference, the nature and severity of the sanction imposed are also factors to be taken into account (see, for example, *Keller v. Hungary* (dec.), no. 33352/02, 4 April 2006; *Skałka v. Poland*, no. 43425/98, §§ 41-42, 27 May 2003 and *Kwiecień v. Poland*, no. 51744/99, § 56, ECHR 2007-I). In this connection, the Court observes that the applicant was sentenced to four months' restriction of liberty in the form of twenty hours' community service per month. The courts suspended that sentence for a period of two years. Furthermore, the courts deprived him of the right to exercise the profession of journalist for a period of two years.

74. The Court is of the view that a criminal sentence depriving a media professional of the right to exercise his or her profession must be seen as very harsh. Moreover, it heightens the above mentioned danger of creating a chilling effect on the exercise of public debate. Such a conviction imposed on a journalist can only be said to have, potentially, an enormous dissuasive effect for an open and unhindered public debate on matters of public interest (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 118, ECHR 2004-XI).

75. Moreover, the Court notes that the Constitutional Court found that the terms of the Press Act made it difficult for persons in the applicant's situation to decide whether a request to publish a reply or rectification amounted to a bona fide exercise of that right or not. The Court has already found that the right of reply was compatible with the freedom of expression (see paragraph 66 above). However, the Constitutional Court held that the scope and modalities of the exercise of that right under the applicable provisions of the Press Act were deficient. That finding of the

Constitutional Court is also of relevance for the Court in the assessment of the circumstances of the present case.

76. Accordingly, the Court is of the view that the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

77. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

79. The applicant claimed 6,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

80. The Government were of the view that that amount was too high.

81. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

82. The applicant also claimed EUR 500 for the costs and expenses incurred before the domestic courts and EUR 500 for those incurred before the Court.

83. The Government submitted that in the circumstances of the case a finding of a violation of the Convention would have constituted sufficient just satisfaction.

84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 750 covering costs under all heads.

C. Default interest

85. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zlotys at the rate applicable at the date of settlement:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 750 (seven hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

David Thór Björgvinsson
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge David Thór Björgvinsson is annexed to this judgment.

D.T.B.
T.L.E.

CONCURRING OPINION OF JUDGE DAVID THÓR BJÖRGVINSSON

I have voted in favour of finding a violation of Article 10 of the Convention, but would like to add a few remarks.

On 13 December 2006 the Ebląg District Court found the applicant, Mr Kaperzyński, guilty of an offence punishable by section 46 § 1 of the Press Act in conjunction with its section 31 § 1. The court sentenced him to four months' restriction of liberty in the form of twenty hours' community service per month and suspended the sentence for a period of two years. It further deprived him of the right to exercise the profession of journalist for a period of two years and ordered that its judgment be made public by displaying it at the Iława Municipal Office. The judgment was upheld by the Ebląg Regional Court on 27 March 2007. This sentence, not least the suspension of the applicant's right to exercise his profession as a journalist, has not been justified. It was clearly grossly disproportionate in the circumstances of the present case and as such is a sufficient ground for finding a violation of Article 10 of the Convention.

While I agree with the finding of a violation, I have some reservations as regards the relevance of some of the points raised in the reasoning of the majority, in particular in paragraphs 61 and 66. In this regard it should be noted that the domestic court proceedings were born out of a private bill of indictment brought by the municipality of Iława. It is therefore reasonable to consider that the letter dated 17 October 2005 was sent to the applicant's newspaper on behalf of the municipality of Iława, and not by the mayor himself in his personal capacity. This understanding is not altered by the fact that the mayor obviously was, given the polemical content of the letter, somewhat irritated by the newspaper article and, rightly or wrongly, took personally the criticism made in it. I consider that the right to reply and the duty to publish the reply under Article 10 of the Convention must first and foremost be assessed in light of the fact that the municipality is a public authority, not in the light of the personal right of the mayor to defend his allegedly damaged reputation. In my view, this is a very important consideration in the context of the present case when viewing the compatibility of the right to reply and the duty to publish such a reply against the background of the right to freedom of expression under Article 10 of the Convention.

It is for this reason that I have reservations as to the relevance of the principles set out in paragraph 66 of the judgment, where the right to reply is accepted as a normal element of the legal framework governing the freedom of expression and as such falls within the scope of Article 10 of the Convention. By using this approach the majority implies that the municipality's right to reply and the applicant's duty to publish it has some basis in Article 10 of the Convention. I disagree. Clearly a public authority,

like the municipality of Iława, cannot invoke rights under Article 10 of the Convention to impose on private parties a duty to publish a reply to criticism of its activities. It follows that recourse to national law for this purpose is contrary to Article 10 of the Convention and is another ground for finding a violation in the present case.