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JANUSZ ROSZKIEWICZ DOKTORANT W KATEDRZE PRAWA KONSTYTUCYJNEGO W INSTYTUCIE NAUK O PAŃSTWIE I PRAWIE WYDZIAŁU PRAWA I ADMINISTRACJI UNIWERSYTETU WARSZAWSKIEGO. ASYSTENT RADCY PROKURATORII GENERALNEJ RZECZYPOSPOLITEJ POLSKIEJ.

The right to the protection of religious feelings versus freedom of expression in the light of the Constitution of the Republic of Poland and the European Convention on Human Rights

INTRODUCTION

In the Polish legal system religious feelings are protected in three spheres:

1) the civil law system – religious feelings constitute a personal good, the protection of which may be sought by way of an action before a common court (Article 23-24 of the Civil Code[1]);
2) the criminal justice – an offence against religious feelings is an offence prosecuted by public indictment (Article 196 of the Penal Code[2]);
3) administrative regulations – lack of respect for audiences' religious beliefs on the part of the media in their broadcasts and programmes (cf. Article 18 paragraph 2 of the Broadcasting Act[3]), as well as on the part of advertisers in the commercial broadcasts emitted by them (cf. Article 16b paragraph 3 point 3 of the Act) may result in the imposition of a financial penalty on the broadcaster by the Chairman of the National Broadcasting Committee (Article 53 paragraph 1 of the Act).

1 The Act of 23.4.1964 - Civil Code (Dz.U. of 2018 item 1025 as amended).

2 The Act of 6.6.1997 - Penal Code (Dz.U. of 2018 item 1600 as amended).

3 The Act of 29.12.1992 on radio and television broadcasting (Dz.U. of 2017 item 1414 as amended).

That state of affairs results directly from the provisions of those acts, and as such remains undisputed. However, doubts arise as to the compatibility of those provisions with the freedom of speech, understood also as the right to make statements that "offend, outrage or cause disturbances in the State or in a part of the society"[4].

The present article deals with three questions:

- can the right of believers to the protection of their religious feelings be derived from the freedom of religion, and if so, to what extent can the protection of that right justify a restriction of the freedom of expression?
- are the mechanisms of protection of religious feelings, which are applied in Polish law, compliant with the constitutional and European standards of freedom of expression?
- how should competent public authorities protect religious feelings in order to avoid undue interference with freedom of expression?

4 Famous judgement of the ETHR of 7.12.1976, Handyside v. t9he United Kingdom, §49. In cases concerning freedom of the press, the Court also pointed out that provocative, exaggerated and biased statements are also covered by the Convention - verdict of the ETHR of 26.4.1995 in case: Prager and Obershlick v. Austria, §38;verdict of the ETHR of 22.2.2007 in case: Standard Verlagsgesellschaft mbH (no. 2) v. Austria, §40.

1. FREEDOM OF EXPRESSION VERSUS FREEDOM OF INSULT

In the discussion on the protection of religious feelings, the question is whether in modern times, in the era of pluralism, there exists at all the "right to have one's religious beliefs not insulted"[5]. In my opinion, the question should be reversed – is there a right to insult anyone, for any reason whatsoever? "Insult" (affront, offend) means "to violate someone's personal dignity by word or deed"[6], "to address or treat someone with disrespect, contempt"[7], "to say or do something primitive and repulsive"[8].

Therefore the 'right to insult' in the linguistic sense means the right to be rude, including the right to use invectives and vulgarisms, and to humiliate and show contempt for other people. Certainly, no

5 G. Letsas, *Is There a Right not to be Offended in One's Religious Beliefs?,* in: L. Zucca (ed.), *Law, State and Religion in the New Europe Debates and Dilemmas*, Cambridge 2012, p. 239-260.

6 The PWN Dictionary, https://sjp.pwn.pl/szukaj/obrazić.html (10.3.2019).

7 The PWN Dictionary, https://sjp.pwn.pl/szukaj/obrazić.html (10.3.2019).

8 The PWN Dictionary, https://sjp.pwn.pl/szukaj/obrazić.html (10.3.2019).

legal act speaks directly of such a right. Many legal acts, however, speak of freedom of expression, freedom of uttering one's opinions or simply freedom of speech, and it is from that freedom that the so-called *right to insult* (*right to offend*) is usually derived[9].

It wasn't always like that. Initially, freedom of speech was manifested in freedom of scientific research, then it was associated with the right to criticize abuses of power, and subsequently it was extended to the right to criticize private individuals, and in contemporary times it has been recognized that everyone has the right to insult others. In my opinion, the 'right' to insult is so distant from the original idea of freedom of expression, that it should not be treated as a resulting from human dignity, inherent and inalienable human right .

Contrary to popular belief, freedom of expression is not a product of the French Revolution, but its ideological roots go back to the Middle Ages. It was in the Middle Ages that the idea of university appeared: a community of people from all fields of science (theological, legal and natural) who – for the common good – seek knowledge and pass it on to the next generations. To ensure, however, that scientific research is not hampered by any prejudice or political pressure, kings, princes and popes agreed together to provide universities with strong guarantees of independence. In every European country a medieval university was therefore guaranteed full autonomy, manifested by its total exclusion from the jurisdiction of royal and ecclesiastical courts.

Neither royal nor inquisition officials could enter a university without its rector's consent. As a result, university professors and students could conduct unrestricted scientific research and enjoy the freedom of public debate – including even the toleration of teachings deemed heretic by the Catholic Church, although that was possible exclusively within the university territory. Although at that time it was not called "freedom of speech", from today's point of view we can say with certainty that the medieval university was an oasis of freedom of scientific research and freedom of publicizing its results.

For the first time freedom of speech was recognized as a common (universally applicable), inherent and inalienable human right during the French Revolution. In the Article XI of the Universal Declaration of the Rights of Man and of the Citizen it is stated that "[t]he free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law". In that document the use of the terms 'ideas' and 'opinions' is crucial, because it is narrower than 'words' – not every 'word' is under protection, but only those 'words' which are the fruit of 'thinking' and express fairly consistent 'views'. Such an understanding of the freedom of ideas and convictions is indicated by the historical context in which the Declaration was created – during

9 More on this topic – A. Clooney, P. Webb, *The Right to Insult in International Law,* in: "Columbia Human Rights Law Review" no. 48.2/2017, p. 1-55.

the French Revolution, which broke out because of the political aspirations of the so-called third state, consisting of "bourgeoisie" (i.e. merchants), representatives of liberal professions and peasantry, who wanted to increase their influence on the governance of the state. It was at that time that freedom of speech began to be associated with everyone's right – regardless of their origin – to speak out on public matters, to criticize the moves of power and to influence them. The "speech" had a useful purpose: it was to remind the rulers that, contrary to the abstract assumptions of the legal system at that time, they were not infallible. The freedom of speech understood in that way was useful for making the subjects (who – thanks to their participation in the public debate – were over time becoming citizens) aware of the importance of the state system, which was progressing from the model of an absolute monarchy to a republican monarchy, and over time to a sheer republic and democracy.

Only in modern times, thanks to the Supreme Court of the United States and the European Court of Human Rights (probably the most influential constitutional courts in Western civilization) an assumption appeared that it is allowed not only to criticize, but also to insult. The "speech" does not have to be valuable – it has become a value in itself.

That, obviously, does not mean that freedom of expression is an absolute value today – it is subject to proportionate restrictions; nevertheless it has a much broader scope than in the initial idea of human rights. However, in practice it is recognized that only the most radical statements are the "speech", which is excluded from the protection of the law: hate speech and obvious slander. That is why human rights in the modern sense of the notion do not stand in the way of civil or even criminal sanctions for hate speech and slander. Meanwhile, all other "speech" – even most primitive and vulgar – can, as a rule, count on legal protection.

I do not agree with such a trend in the evolution of the standard of freedom of speech. The law should not protect statements that are intended **solely** to humiliate another human being – I stress the word 'solely' here in order to point out that controversial, shocking and offensive statements should certainly be protected if there is a substantive argument behind them, if they make at least a minimal contribution to the public debate. By statements that serve exclusively to humiliate another human being, I mean statements that offend religious feelings, as well as statements that offend the human being as such. It is difficult to consider "a fundamental condition for the development of society and of every human being". (judgment *Handyside*) to tolerate statements that name others "boors"[10] and "idiots"[11] or primitive exhibitions portraying public figures against the background of male or female genitals. [12]

11 Cf. the statement by Janusz Palikot, who said that he "considers the President [Lech Kaczyński] to be a "cham" [pl. boor, yokel]" was not considered an insult to the head of state. The prosecution was persuaded by the insignificant explanations by Janusz Palikot himself, who testified that he had used the term "cham" to refer to the President in the meaning of the Biblical parable of Ham [in pl. "Cham"], Noah's son, to emphasize that the President's conduct had been disgraceful and inappropriate - Decision The District Court in Warsaw of 9 February 2009, XVIII Kp 841/08.

10 Cf. the statement by Janusz Palikot, who said that he "considers the President [Lech Kaczyński] to be a "cham" [pl. boor, yokel]" was not considered an insult to the head of state. The prosecution was persuaded by the insignificant explanations by Janusz Palikot himself, who testified that he had used the term "cham" to refer to the President in the meaning of the Biblical parable of Ham [in pl. "Cham"], Noah's son, to emphasize that the President's conduct had been disgraceful and inappropriate - Decision The District Court in Warsaw of 9 February 2009, XVIII Kp 841/08.

12 In the verdict of 15 January 2019 in case: Mătăsaru v. Moldavia it was considered a violation of freedom of speech to sentence to 2 years in prison suspended for 3 years a man who had displayed two "sculptures" in the street in front of the seat of the General Prosecutor's Office in the shape of a penis and a clitoris, on which he hanged photographs of high-ranking civil servants.

I share the view expressed by the judges of the Strasbourg Court, Franz Matscher and Thór Vilhjálmsson, that the aim of Article 10 of the Convention 'is to enable a real exchange of ideas and not to protect primitive, poor quality journalism which, without being qualified to formulate serious arguments, resorts to provocation and unnecessary insults in order to attract potential readers without making any contribution to the exchange of ideas that deserve such a nomination."[13] That view can also be relevant in case of statements made by people who are not journalists. There is no basis for protecting that type of behaviour, which obviously does not mean that it should be sanctioned in an arbitrary way. In the rule of law, any action by a public authority must be proportionate to the gravity of the infringement. Therefore, I believe that the most appropriate form of sanction for such type of expressions should be sought in civil law, while limiting criminal and administrative sanctions to expressions that cause serious social unrest that threaten public order, incite violence or are hate speech.

13 Separate opinion of the judges Franz Matscher and Thór Vilhjálmsson to Judgement of the ETHR of 1 July 1997 in case: Oberschlick v. Austria (no. 2).

2. THE RIGHT TO THE PROTECTION OF RELIGIOUS FEELINGS IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

Although no provision of the Constitution of the Republic of Poland explicitly mentions the "right to the protection of religious feelings", the jurisprudence and literature have accepted to derive it from the freedom of religion (Article 53). That was done for the first time by the full panel ruling of the Constitutional Tribunal in its resolution of 2.3.1993, W 3/93, which stated on the basis of the Constitution of 1952 that freedom of conscience and religion includes "the right to the protection of religious feelings"[14]. In the same judgment, the Constitutional Tribunal acknowledged that the law may restrict freedom of expression in order to protect the rights of believers to respect their religious feelings. That view was confirmed several years later in the full panel ruling of 7.6.1994, K 17/13 and in the relatively recent judgment of 6.10.2015, SK 54/13. In its judgment K 17/13, the Constitutional Tribunal recognized compatible with the Constitution a provision requiring television and radio broadcasters to respect the religious feelings of the public. And in its judgment SK 54/13, the Constitutional Tribunal found that a provision of criminal law, stipulating a fine for insulting religious feelings, was constitutionally compatible. Both judgements will be discussed in more detail later in this article.

Following the Polish Constitutional and Strasbourg's jurisprudences, our literature also recognizes the right to the protection of religious feelings as an element of religious freedom.[15]

14 By the way, it is worth noting that the quoted ruling of the Constitutional Tribunal took place almost two years before the famous verdict of the European Court of Human Rights in case: Otto-Preminger-Institut v. Austria, which is considered to be the first decision of a European court recognising the right to respect for religious feelings as a human right.

15 M. Olszówka, comments no. 10 and 55 to art. 53, in: M. Safjan, L. Bosek (ed.) *Konstytucja RP. Tom I. Komentarz to art. 1–86,* Warszawa 2016 (Legalis); B. Banaszak, comment no. 6 to art. 53, in: ibid., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012 (Legalis); K. Wojciechowski, comment no. 10 to art. 18, in: S. Piątek (ed.), *Ustawa o radiofonii i telewizji. Komentarz*. Warszawa 2014 (Legalis). See also W. Brzozowski, in: W. Brzozowski, A. Krzywoń, M. Wiącek, *Prawa człowieka,* Warszawa 2018, p. 211 – although the author speaks rather of a positive obligation by the state to ensure the protection of religious feelings against unjustified insults or malicious interference with religious ceremonies.

3. THE RIGHT TO THE PROTECTION OF RELIGIOUS FEELINGS IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Similarly as in the case of the Constitution of the Republic of Poland, the European Convention on Human Rights does not refer anywhere explicitly to the protection of religious feelings. Nevertheless, a cautious argument can be assumed, that in the light of the case-law of the European Court of Human Rights in Strasbourg, the Article 9, interpreted systematically in conjunction with the Article 10 paragraph 2 of the Convention, gives the entitlement to presume that freedom of religion includes the right to the protection of religious feelings. The Article 10 paragraph 2 of the Convention says that *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.*

Since the 1990s the ECtHR's settled case-law has accepted that the concept of 'rights of others' includes the right to the protection of religious feelings, which the Court itself defines as:

- the right of citizens not to be insulted in their religious feelings[16];
- protection against the treatment of a religious subject in contemptuous, reviling, insulting, scurrilous or ludicrous manner[17];
- the right of other persons to proper respect for their freedom of thought, conscience and religion[18];
- the right to respect for the religious doctrines and beliefs of others[19];
- the right to respect for the believers' religious feelings[20];
- the rights of other persons whose religious feelings were offended[21];
- the right to protection of a group of persons from defamation on account of their belonging to a specific religion[22].

The notion of 'the prevention of disorder', referred to in Article 10 paragraph 2 of the Convention, also includes the safeguarding religious peace.[23]

In the light of that case-law, the right to the protection of religious feelings is seen rather as a value, to which the national legislator can resort when restricting freedom of expression, than as an autonomous

16 Judgement of the ETHR of 20.9.1994 in case: Otto-Preminger-Institut v. Austria, §48, which, incidentally, is counted among the 'great Strasbourg precedents' which have had a significant impact on the development of the standard of freedom of expression - L. Garlicki, comment no. 7 to art. 10, in: L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18. Tom I. Komentarz*, Warszawa 2010 (Legalis).

17 Judgement of the ETHR of 25.11.1996 in case: Wingrove v. United Kingdom, §48 – also one of the great precedents, as the verdict on Otto-Preminger.

18 Judgements of the ETHR z: 13.9.2005 in case: I.A. v. Turkey, §27; 20.9.1994 in case: Otto-Preminger-Institut v. Austria, §55; 2.5.2006 in case: Aydin Tatlav v. Turkey, §26; 25.10.2018 in case: E. S. v. Austria, §46.

19 Judgement of the ETHR of 10.7.2003 in case: Murphy v. Ireland, §§63-64.

20 Decision of the European Commission on Human Rights of 18.4.1997 in case: Dubowska and Skup v. Poland.

21 Judgement of the ETHR of 31.10.2006 in case: Klein v. Slovakia, §45.

23 E. S. v. Austria, *op. cit.*, §41.

22 Judgement of the ETHR of 31.1.2006 in case: Giniewski v. France, §§40-42.

subjective right. In that context, one can at most talk about a "developing right" to protect religious feelings, limited to situations when they are attacked in a conscious and unproductively offensive manner. So far, the Court still has "not created positive law, on which many complainants would be able to rely, but rather has granted the States a wide margin of discretion to take actions to protect their population members' religious feelings, even if that would restrict such rights as freedom of expression"[24].

24 C. Evans, *Freedom of Religion. Under the European Convention on Human Rights,* Oxford University Press, 2001, p. 69-71.

3.1 ASSESSMENT OF THE INDISPENSABILITY OF THE INTERVENTION INTO FREEDOM OF EXPRESSION

The Strasbourg jurisprudence has assumed that assessing whether an interference with freedom of expression was 'necessary in a democratic society' in accordance with Article 10 paragraph 2 ECHR requires finding whether:

1) it responded to a pressing social need;
2) it was proportionate to the desired purpose (at that stage the potential impact of the medium through which the expression was made public is relevant);
3) the reasons given by the State's authorities to justify the action are relevant and sufficient.

States have a certain margin of discretion in assessing whether there occurs an 'urgent need', which will be discussed further.[25]

25 Judgements of the ETHR of: 7.12.1976 in case: Handyside v. United Kingdom, §48; 26.4.1979 in case: The Sunday Times v. United Kingdom (nr 1), § 62; 4.12.2003 in case: Gündüz v. Turkey,§ 38. Also cited judgements of the ETHR in cases: Giniewski v. France, *op. cit.,* §§ 43-54, Aydın Tatlav v. Turkey, *op. cit.*, §§ 22-27; *Murphy v. Ireland*, *op. cit.*, §§ 65-69, Wingrove, *op. cit.*, § 53.

3.2 OBLIGATION TO AVOID GRATUITOUSLY OFFENSIVE STATEMENTS

In assessing the 'necessity' of interference with freedom of expression, the Court takes account of the obligations incumbent on individuals who exercise the rights guaranteed by Article 10 of the Convention. According to settled case-law of the ECtHR, Article 10 of the Convention expresses the obligation to avoid, as far as possible, statements which are gratuitously offensive or profane and do not contribute to public debate in any way[26]. In view of the above, a State may deem it necessary to introduce repressive measures against certain forms of behaviour, including the dissemination of information or ideas, which are considered contrary to respect for freedom of thought, conscience and religion[27].

26 Otto Preminger Institut, *op. cit.,* §49; Wingrove, *op. cit.,* §52; Murphy, , *op. cit.,* §§65 and 67; I.A. v. Turkey, *op. cit.,* §24; Gündüz v. Turkey, *op. cit.,* § 37; Giniewski v. France, , *op. cit.,* §43; Aydın Tatlav, *op. cit.,* §23; Klein, , *op. cit.,* §45; Gündüz, *op. cit.,* §37; E. S. v. Austria, §43. Also judgements of the ETHR of 29.4.2008 Kutlular v. Turkey, §47 and 30.1.2018 in case: Sekmadienis Ltd. v. Lithuania, §74.

27 See in the contexts of art. 9 EKPC – Judgement of 25.5.1993 in case: Kokkinakis v. Greece. See also Otto-Preminger-Institut, *op. cit.,* § 47; I.A. v. Turkey, *op. cit.,* §26 ;Aydin Tatlav , *op. cit.,* §25; E. S. v. Austria, , *op. cit.,* §45.

Article 10 of the Convention may also require to avoid expressions of a religious nature which, although not offensive by themselves, in specific circumstances may produce an offensive effect (*an expression, which is not on its face offensive, could have an offensive impact in certain circumstances*). Public authorities may then be entitled to

interfere with freedom of expression in order to avoid offending religious feelings. For example, in one case the Court found that a total ban on broadcasting religious recordings in an advertising band may be justified by the protection of respect for religious feelings in a society which is particularly sensitive to religion and to potential fear of proselytism[28].

28 Murphy, , *op. cit.,* §§63-64, 72-74, 77.

3.3 POSITIVE OBLIGATION TO PROTECT RELIGIOUS FEELINGS

The question whether Article 9 of the Convention implies a positive obligation of the state to protect religious freedom is currently disputable. The obligation of the state was limited to its negative aspect, i.e. abstaining from interference with religious freedom, but not extended to the obligation to create "conditions for its flourishing"[29].

29 C. Evans, *op. cit., p.* 69.

It can certainly be said that, according to the *communis opinio* on case law and the doctrine of European law, states have a positive obligation under Article 9 of the Convention to protect religious peace[30].

Religious peace means the conflict-free coexistence of all religions and non-confessional persons by safeguarding mutual tolerance. Its main aim is to prevent statements and behaviour that could provoke the adherents of a particular religion to acts of aggression and lead to the outbreak of conflict between different social groups. As is rightly pointed out in the literature: " Obviously, no people can reasonably expect their religious and philosophical beliefs to be excluded from all criticism." (…)"However, one can imagine situations, in which criticism turns into a strand of insults devoid of content, or in which someone takes steps to make it difficult or impossible for another person to exercise his or her freedom, e.g. by disturbing religious ceremonies. (…) The attacked person may then expect the state to intervene in his or her case." [31]

30 Judgements of the Grand Chamber of the ETHR of 10.11.2005 in case: Leyla Şahin v. Turkey, §§ 107-108 and of 1.7.2014 in case: S.A.S. v. France, § 123-128. See also E.S. v. Austria, *op. cit.,* §44. For literature see J. Meyer-Ladewig, S. Schuster, comment no. 8 to art. 9, in: J. Meyer-Ladewig, M. Nettesheim,Sp. von Raumer (ed.), *EMRK – Europäische Menschenrechtskonvention. Handkommentar,* Baden-Baden 2017, p. 377; J. Frowein, comment no. 8 to art. 9, in: J. Frowein, W. Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar,* Kehl 1996; p. 371-372; L. Garlicki, comment no. 21 to art. 9, in: L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18. Tom I. Komentarz*. Warszawa 2010 (Legalis); C. Evans, *op. cit.* p. 71-72; Uitz, *op. cit., p.* 149 and p. 153-154.

However, there is no universal consensus as to whether the state should also interfere in the freedom of expression in order to protect religious believers from offending their feelings, even in the absence of a threat to social peace: while the Strasbourg Court itself seems to consider it acceptable, many of the doctrine's representatives remain critical toward that position[32].

31 W. Brzozowski, *op. cit., p.* 211.

Personally, I do not share the fairly common criticism of the doctrine for the Strasbourg concept of gratuitous offensiveness.

As it was mentioned in the introduction, I believe that there are no values in a democratic society that would argue in favour of granting protection to expressions aimed solely at humiliating another person. Therefore, the state should protect not only religious peace, but also – in right proportions – the religious feelings of believers from gratuitously offensive expressions.

32 See e.g. Uitz, *Freedom of religion in European constitutional and international case law,* Strasburg 2007, p. 151-164.

3.4 THE MARGIN OF FREEDOM

The ECtHR's view, that it is impossible to establish a uniform concept of the importance of morality and religion in society, expressed in the 1980s and 1990s, remains valid in present times[33]. Consequently, the lack of one universal approach of states to the need to protect the rights of believers against attacks on their religious feelings broadens the margin of discretion of national legislators in regulating freedom of expression in areas where it may lead to an offence against intimate personal moral or religious beliefs[34]. That position was recently confirmed by the Court in 2018 in its judgment E. S. v. Austria [35].

The evaluation of the activities of national public administrations and national courts adjudicating on matters concerning religious feelings by the Court is guided by the principle of subsidiarity, confirmed in the Protocol No 15, which is not in force but has been ratified by 45 of the 47 States, and which supplemented the Convention with the clarification that the Member States are primarily responsible for safeguarding rights and freedoms within the ECHR and they enjoy a margin of discretion in that respect, while being subject to the supervisory jurisdiction of the European Court of Human Rights.

Consequently it is understood that national authorities – by virtue of their direct and continuous contact with social elements within their territories – are principally in a better position than an international judge when it comes to formulate an opinion about the requirements concerning the limitations on the exercise of freedom of expression as well as the 'necessity' of restricting that freedom in order to ensure protection against materials which may seriously offend deepest feelings and beliefs[36].

In assessing the legitimacy of interference with freedom of expression in order to protect the religious freedom of other persons, the Court took into account, inter alia, the number of believers in the area where freedom of expression was restricted. For example, when assessing whether it was permissible to prohibit the broadcasting of a film which infringed religious feelings in the Otto-Preminger-Institut case v. Austria, the Court took account of the fact that the Roman Catholic religion was the religion of an overwhelming majority of the population[37]. In the Murphy v. Ireland case, the Court, when assessing the admissibility of a ban on broadcasting a radio advertisement about a planned lecture on the resurrection of Christ, took into account the particular sensitivity of Irish society to religious matters and to potential proselytism[38].

33 Judgement of the ETHR z 24.5.1988 Müller et al. against Switzerland, §35; Otto-Preminger-Institut, *op. cit.,* §50.

34 Aydin Tatlav, *op. cit.,* §24; Otto-Preminger-Institut, *op. cit.*,, § 50; Wingrove, *op. cit.*,, §§53 and 58; Murphy, *op. cit.,* §67; I.A. v. Turkey, *op. cit.,* §25. See also the judgement of the ETHR of 22.12.2005, in case: Paturel v. France, §28.

35 §44.

36 Wingrove, *op. cit.,* § 58, Murphy, *op. cit.,* §67; Handyside, *op. cit.,* §48; Sunday Times, *op. cit.,* §59.

37 §56.

38 Murphy *op. cit.,* §73.

On the basis of the cited case law, it can be concluded that the socio-cultural context, and in particular the attitude of the concerned society towards religion, has an important role to play in assessing the need for interference with freedom of expression in order to protect religious feelings.

3.5 EXAMPLES OF ACCEPTABLE INTERFERENCE WITH FREEDOM OF EXPRESSION TO PROTECT RELIGIOUS FEELINGS

By way of example, the Court in Strasbourg considered the following interference with freedom of expression to be indispensable for the protection of religious feelings and peace:

- confiscation of the film depicting in a provocative way the figures of God the Father, the Mother of God and Jesus Christ [39];

- a total ban on the distribution of a film depicting erotic fantasies of St. Teresa of Avila [40];

- a ban on the radio broadcasting of an announcement of a film about the proofs for Christ's resurrection [41];

- a fine of 3 291 000 Turkish lira (then equivalent to 16 US dollars) for the publication of a book which contained a passage depicting an erotic scene involving an Islamic prophet and a comment stating that 'Muhammad did not prohibit sexual intercourse with dead persons or with live animals'[42];

- imposing a fine of EUR 480 for speaking at an open discussion seminar on Islam, during which the speaker said that Mohammed 'had many women' and 'liked to do it with children'[43].

The last of the above mentioned issues deserves additional comment, because it was lively criticized by representatives of the science of international and European law.[44] First, attention should be drawn to the very circumstances of that case. During a seminar in autumn 2009, E. S. said that the prophet Muhammad "was a warlord, he had many women and, as it were, he liked to do it with children". Then she continued by quoting a fragment of her private conversation with her sister, in which E. S. said: "A 56 years old and a 6 years old? How would you call it? Give me an example? What would we call it if it wasn't paedophilia?" In saying that, she referred to Ṣaḥīḥ *al-Bukhārī*, a collection of traditions devoted to the life and teaching of the Prophet by Al-Buchari, a medieval Persian scholar, who mentioned the relationship between Muhammad and minor Aisha. The seminar was attended by 30 persons, including a journalist who recorded the entire presentation. Shortly afterwards, the journalist's superior reported to the prosecutor's office that E.S. was suspected of committing a crime. The conviction of E.S. for offending the Muslims' religious feelings was therefore carried out on the initiative of a journalist who took part in the seminar she

39 Otto-Preminger-Institut, *op. cit.*

40 Wingrove, *op. cit.*

41 Murphy, *op. cit.*

42 I. A. v. Turkey, *op. cit.*

43 E. S. v. Austria, *op. cit.*

44 See e.g. S. Smet, *E.S. v. Austria: Freedom of Expression versus Religious Feelings, the Sequel,* "Strasbourg Observers", 7.11.2018, https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/ (19.12.2018); M. Milanovic, *Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment in E.S. v. Austria,* Blog of the European Journal of International Law, 29.10.2018, https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/ (19.12.2018); S. Peers, *Freedom to insult? Balancing freedom of expression with religious tolerance in ECHR case law,* EU Law Analysis Blog, 19.12.2018, http://eulawanalysis.blogspot.com/2018/10/freedom-to-insult-balancing-freedom-of.html (19.12.2018); M. Scott, *The ECtHR has not created a European blasphemy law but it has produced a lamentable judgment,* http://barristerblogger.com/2018/10/27/the-ecthr-has-not-created-a-european-blasphemy-law-but-it-has-produced-a-lamentable-judgment/ (19.12.2018); E. Bougiakiotis, *E.S. v Austria: Blasphemy Laws and the Double Standards of the European Court of Human Rights*, UK Constitutional Law Association Blog, 22.11.2018, https://ukconstitutionallaw.org/2018/11/22/emmanouil-bougiakiotis-e-s-v-austria-blasphemy-laws-and-the-double-standards-of-the-european-court-of-human-rights/ (19.12.2018); Interview with Grégor Puppinck (director of the European Center for Law and Justice), *Délit de blasphème : «La CEDH n'est pas Charlie !»,* "Le Figaro" z 26.10.2018, http://www.lefigaro.fr/vox/religion/2018/10/26/31004-20181026ARTFIG00232-delit-de-blaspheme-la-cedh-n-est-pas-charlie.php (19.12.2018).

conducted. At no stage of the proceedings before national courts has it been established whether or not any Islamic believer had actually felt offended by the plaintiff's statements. In other words, E.S. was sentenced to a fine for offending Muslims' feelings, despite the fact that no Muslim (!) complained or publicly expressed dissatisfaction concerning her statement. The Court completely ignored that element in its considerations, even though it was of fundamental importance for the assessment of the need for the prosecution and courts to interfere with the plaintiff's freedom of expression, since if her speech was delivered in a small group of 30 people, without a single Muslim, it is hard in such a situation to speak of a threat to religious peace or even of an offence of religious feelings. To put it simply, no one can be offended by a statement they have not heard. Paradoxically, the initiation of criminal proceedings against E. S. and her conviction led to making her speech public and, as a result, could have disturbed the peace or hurt someone's religious feelings.

The very fact that the Court has undertaken an assessment of the factual basis of the speech concerning the events of 1 400 years ago raises doubts. Thus, the judges directly joined the long-standing historical dispute over the nature of Mohammed's relationship with Aisha, which in itself is highly questionable[45]. Also, it is puzzling that the Court categorically holds that the allegation of Mohammed's paedophilia is devoid of 'sufficient factual basis' and constitutes a 'false fact' (sic)[46]. It is worth to recall that in the case of *value-judgment* – a subjective opinion, that the plaintiff's statement on Mahomet was considered to be, the criteria of evidence are less rigorous than in the case of *statement of fact*. While a person who presents certain information as facts has to prove their authenticity in order to benefit from the protection of the right to freedom of expression, a person who presents his or her personal views is not required to prove them (which is obvious). In the case of value judgements, at most it may be required to show that there is a 'sufficient factual basis' for the formulation of a particular view. It is at the very least incomprehensible why the Court did not consider the medieval historical source Ṣaḥīḥ al-Bukhārī, cited by the plaintiff, which mentioned Muhammad's sexual life with the minor Aisha as a 'sufficient factual basis', and the question arises as to what other evidence the Court expected to be provided[47].

It is also questionable whether Article 9 of the Convention entails the obligation to avoid expressions 'which present objects of religious worship in a provocative manner which may offend the feelings of believers of a given religion'. Such an approach goes beyond the standard established in the Otto-Preminger-Institute and Wingrove cases, where the Court allowed the possibility of prohibiting 'gratuitously offensive' rather than merely 'provocative' expressions"[48].

45 A similar question was posed by S. Smet, quoted above.

46 By the way, it is worth noting the surprise that the text of the judgment uses such an awkward term. After all, facts, as we know, are by definition true, a 'false fact' (untrue fact) is a typical oxymoron.

47 Also indicated by E. Bougiakiotis, quoted above.

48 Likewise, M. Milanovic, quoted above.

It is also difficult to accept that the Court blamed the plaintiff for not formulating her expression concerning Mahomet in an 'objective' manner. Expecting value judgements to have a neutral tone is not only unrealistic (because every person has his or her own views which affect his or her expressions), but also controversial from the point of view of the right to freedom of speech, the essence of which includes the possibility to manifest one's beliefs, even if only in a controversial or objectionable way[49].

49 Likewise, E. Bougiakiotis, quoted above.

3.6 EXAMPLES OF UNACCEPTABLE INTERFERENCE WITH FREEDOM OF EXPRESSION EMPLOYED TO PROTECT RELIGIOUS FEELINGS

On the other hand, the Strasbourg Court found that freedom of expression had been violated by:

- condemning the journalist, who in his press article criticized a Catholic Archbishop for his protest against a blasphemous poster announcing the release of a new film in cinemas, to pay a fine of CZK 15 000 (approximately EUR 375); the journalist reproached the Archbishop for collaboration with security services in the communist era and expressed his surprise as to why Catholics would not leave the organization headed by such an "ogre"[50];

- condemning a publicist to pay a compensation of 1 franc and 10 000 francs by way of reimbursement of costs to a Christian association, which has lodged a complaint against his critical article against John Paul II's encyclical *'Veritatis Splendor'*; in the publicist's opinion, the thesis contained in the encyclical, that the Old Testament had been fulfilled in the New Testament, has been repeated by the Catholic Church for many years, thus becoming a source of antisemitism and "it prepared the ground" for the Holocaust.[51];

- imposing a fine of EUR 580 on a company, which ran an advertising campaign with an actor who played Jesus wearing jeans, with one of its slogans: "Jesus, what pants!"[52].

50 Judgement of the ETHR of 31.10.2006 in case: Klein v. Slovakia.

51 Judgement of the ETHR of 31.1.2006 in case: Giniewski v. France.

52 Sekmadienis, *op. cit.*

Having established the above observations, we can proceed to the presentation of Polish mechanisms for the protection of religious feelings and their evaluation from the point of view of standards stemming from the Constitution and from conventions.

4. THE PROTECTION OF RELIGIOUS FEELINGS IN THE CIVIL CODE

4.1 CHARACTERISTICS OF THE PROTECTION OF PERSONAL RIGHTS

The personal interests of a human being are non-economic values closely linked to an individual, which are important for his physical and mental integrity and which are protected by civil law[53]. The catalogue of personal rights is defined in Article 23 of the Civil Code, including, among others, health, freedom, honour and freedom of

53 Cf. S. Grzybowski, *Ochrona dóbr osobistych*, Warszawa 1957, p. 19; Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 1993, p. 121; M. Hałgas, P. Kostański, *Prawo cywilne – część ogólna*, Warszawa 2006, p. 58. See also ruling of the Supreme Court of 19.11.2010, III CZP 79/10.

conscience. However, personal rights not expressly mentioned in that provision, but derived by way of interpretation by a judicature, are also protected. According to the dominant position, recognising a value as a personal interest is determined by objective criteria, i.e. social acceptance for the protection of a particular value and a negative assessment of behaviour that infringes that value, while only the opinion of persons, who think reasonably and honestly, should be taken into account[54]. Instruments for the protection of personal rights are specified in Articles 24 and 448 of the Civil Code - the injured party may lodge a claim by way of an action before a common court to demand that:

1) the perpetrator ceases to act infringing the claimant's interests,
2) the perpetrator completes activities necessary to remove consequences of the infringement (e.g. publish an apology),
3) the perpetrator pays the claimant a pecuniary compensation for the endured non-material damage,
4) the perpetrator pays a specified sum of money for social purposes [55].

4.2 RELIGIOUS FEELINGS AS A PERSONAL INTEREST

In the doctrine of civil law, religious feelings are considered to be a personal interest[56]. The decisive factor in recognizing religious feelings as a personal interest was, in fact, the judgment of the Supreme Court of 6 April 2004, I CK 484/03, in which it linked them to religious freedom[57]. In the opinion of the Supreme Court, the protection of religious freedom (which, similarly to the freedom of conscience explicitly mentioned in Article 23 of the Civil Code, is subject to civil law protection) also includes "the sphere of concepts, ideas and religious beliefs of a given person", which "also includes that person's religious feelings".

The Supreme Court defined religious feelings as "a mental state, the essence of which is the internal attitude to past, present and future events, directly or indirectly related to religion as a form of social consciousness, including beliefs concerning the sense and purpose of the existence of man, mankind and the world". As regards religious feelings, it is worth to note the increased importance of the subjective criterion when assessing infringements, although certainly the objective criterion also continues to be applicable[58]. Infringement of personal rights in its form of religious feelings may consist in insulting a religious object (e.g. a cross, a relic, the Most Holy Sacrament, a figure or image of a saint) or a place of worship[59].

To claim an infringement of personal interests it is necessary that a minimum level of discomfort[60] is exceeded; thus an insignificant experience of annoyance does not justify demanding protection of

54 P. Sobolewski, Comment no. 3 to art. 23, in: *Kodeks cywilny. Komentarz*, Warszawa 2018 (Legalis); J. Panowicz-Lipska, comment no. 5 to art. 23, in: M. Gutowski (ed.), *Kodeks cywilny. Tom I. Komentarz to art. 1–352*, Warszawa 2018 (Legalis); M. Pazdan, comment no. 4 to art. 23, in: K. Pietrzykowski (ed.), *Kodeks cywilny. T. I. Komentarz. Art. 1–44910*, Warszawa 2018 (Legalis); S. Dmowski, Trzaskowski, comments no. 9-10 to art. 23, in: J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Księga pierwsza. Część Ogólna*, Warszawa 2014 (LEX).

55 Of the material protection measures indicated in points 3-4, the plaintiff may demand only on condition that the perpetrator is proven guilty, unlike in the case of non-material protection measures, where it is only sufficient that the perpetrator's action meets the condition of illegality.

56 S. Kalus, Comment no. 26 to art. 23, in: M. Fras, M. Habdas (ed.), *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1-125)*, Warszawa 2018 (LEX); P. Księżak, Comment no. 52 to art. 23, in: P. Księżak, M. Pyziak-Szafnicka (ed.), *Kodeks cywilny. Komentarz. Część ogólna*, Warszawa 2014 (LEX).

57 Incidentally, it is worth noting that the adjudicating panel in this case consisted of two senior civil law experts well-known in the Polish legal circles: prof. Elżbieta Skowrońska-Bociak (as chairwoman) and prof. Gerard Bieniek (as rapporteur). The third member was the no less honourable Teresa Bielska-Sobkowicz.

58 More: G. Jędrejek, T. Szymański, *Prawna ochrona uczuć religijnych w Polsce (Próba oceny dotychczasowych rozwiązań, czyli o rozdźwięku pomiędzy literą prawa a jego aplikacją)*, in: „Studia Prawa Wyznaniowego" t. V/2002, p. 171-202.

59 Cf. P. Księżak, Comment no. 52 to art. 23, *op. cit.*, LEX.

60 M. Pazdan, comment no. 4 to art. 23, in: K. Pietrzykowski (ed.), *op. cit.* , Legalis.

religious feelings, like – for example – a malicious remark made by a minor pupil during a catechesis lesson or a vulgar statement directed at a clergyman by a homeless person intoxicated with alcohol.

Protection of religious feelings in civil mode, unlike in criminal mode, may be claimed only by the person directly injured, which means the person to whom the statement or conduct was addressed. [61]

61 M. Pazdan, comment no. 4 to art. 23, in: K. Pietrzykowski (ed.), *op. cit.* , Legalis.

4.2 ASSESSMENT OF THE CONFORMITY OF ARTICLES 23-24 OF THE CIVIL CODE WITH THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE ECHR

The provisions of Articles 23-24 of the Civil Code were not the subject of assessment by the Constitutional Tribunal from the point of view of their conformity with Article 54 paragraph 1 of the Constitution.

As far as the European Court of Human Rights is concerned, it spoke about the Polish regime of the protection of personal interests only in terms of a journalist's expression infringing the good name of a public person[62].

62 Judgement of the ETHR z 3.11.2015 in case: Stankiewicz et al. v. Poland (no.2 2).

4.3 EXAMPLES OF CIVIL LAW INTERFERENCES IN FREEDOM OF EXPRESSION

So far, the only more publicly known example of interference by a civil court in freedom of expression to protect religious feelings is the case of a Catholic priest with the honorary title of Prelate of His Holiness, who felt offended by a harsh article on John Paul II. The court ruled to publish in a daily newspaper an apology for the priest (plaintiff in the case), because John Paul II's statement that "Darwin's theory of evolution is not only a scientific hypothesis, but something more" was censured as follows: "How gloomily and roughly the sloppy and gibberish words of J.P. II sound against Ratzinger's elegant yet accessible essay! How that man, who in fact has never ceased to be a vulgar curate from Niegowić, is not ashamed to bring into disrepute himself (the least significant), the religious union he heads, and the nation he once belonged to!"[63] However, that judgment is debatable because the article insulting the Pope had no connection with the possibility of expressing religious feelings and did not ridicule the religious feelings of a particular person, so it is difficult to speak here of a "personal" nature of the infringement that is necessary under a civil law regime. [64]

63 Judgement of the Supreme Court of 6.4.2004, I CK 484/03.

64 Judgement of the Supreme Court z 6.4.2004, I CK 484/03.

5. PROTECTION OF RELIGIOUS FEELINGS IN THE CRIMINAL CODE . 5.1 CHARACTERISTICS OF THE CRIME OF OFFENDING RELIGIOUS FEELINGS

Since 1997 until now, Polish law has been providing for the protection of religious feelings in Article 196 of the Penal Code: *Whoever offends religious feelings of other persons by insulting publicly an object of religious worship or a place designated for public performance of religious rites, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.*

That provision is the fruit of many years of evolution, which indicates the gradual attenuation of criminal sanctions for offending religious feelings in the Polish legal system. Article 196 of the 1997 Penal Code is essentially a repetition of Article 198 of the 1969 Penal Code[65]: *Whoever offends religious feelings of other persons by insulting publicly an object of religious worship or a place designated for public performance of religious rites shall be subject to the penalty of deprivation of liberty for up to 2 years, restriction of liberty or a fine.* In turn, Article 198 of the Penal Code of 1969 was modelled on Article 5 of the 1949 Decree on the Protection of Freedom of Conscience and Religion[66], which provided for a **much severer** penal sanction: *Whoever offends religious feelings by publicly insulting a religious object or a place of worship intended for the performance of religious rites shall be subject to the penalty of imprisonment for up to five years.*

Before 1949, Article 172 of the Criminal Code of 1932 was in force[67]: *Whoever blasphemies God in public is subject to the penalty of imprisonment for up to 5 years.* As we can see, the original object of protection was the sanctity of the subject of worship, which was God, and not the religious feelings of believers. As a consequence the perpetrator was subject to criminal liability also when his act did not offend a particular religious believer. At that time, the jurisprudence of the Supreme Court assumed that the mere possibility of outrage or offence of religious feelings, included in the direct intention or possible intention of the perpetrator, was sufficient[68].

The historical analysis leads to the conclusion that Article 196 of the Penal Code does not provide for a penalty for blasphemy (insulting the value considered sacred by the legislator), but for the effect of inducing people of a particular religion to feel offended.

The aim of that provision is not to protect the sacred but to protect the right of believers to have their freedom of conscience and religion respected, and to protect religious peace. In order for such an act to be punishable, it must be committed in public, so that the information about it reaches at least one person of a given religion. Both issues will be discussed in more detail below.

65 The Act of 19.4.1969 - Penal Code (Dz. U. no. 13 item 94 as amended), repealed.

66 Decree of 5.8.1949 on Protection of the Freedom of Conscience and Religion (Dz.U. no. 45, item 334).

67 Regulation by the President of the Republic of Poland of 11.7.1932 - Penal Code (Dz. U. no. 60 item 571).

68 Judgement of 25.3.1938, 3 K 2547/37; OSN(K) 1938, no. 10, item 250.

OBJECT OF PROTECTION

In the Polish doctrine of criminal law, as a rule, it is unanimously assumed that the subject of protection of Article 196 of the Penal Code is the right to protection (freedom) of religious feelings[69]. Some authors hold the view that the object of protection are not so much religious feelings as religious freedom in its internal aspect, namely the freedom to accept and profess a religion in freedom from acts, which insult objects or places with which the content of the religion in question is closely connected[70]. Thus, the object of protection of Article 196 of the Code of Criminal Procedure "is not what is divine, but what is human"[71], "it is not the protection of the deity – God."[72].

THE CONSTITUENT ELEMENTS OF AN OFFENCE,

In the light of the representatives' of the Polish doctrine of criminal law position, Article 196 of the Penal Code provides for criminal liability only for offensive, vulgar and scoffing statements against a specific religion.

The term 'the offence of religious feelings' is understood as "behaviour which is simultaneously offensive to the believers of a given religion (in the subjective sense) and offensive to the sensitivity of an average recipient in a given cultural circle (in the objective sense)". It should therefore be stressed that in order to recognize that a criminal offence of insulting other persons' religious feelings has been committed, their merely subjective sensations are not sufficient, but that the perpetrator' acts must also be objectively insulting and offensive[73].

The jurisprudence of the Supreme Court draws attention to the necessity of taking into account social, cultural and moral norms and generally accepted evaluation criteria. Insulting occurs when the perpetrator shows contempt for the other party by his behaviour, when he demeans the other party's dignity by using "invectives, insults, epithets, abusive words or gestures" against that party".[74] Religious feelings may be offended by verbal or written statements, as well as by gestures or images[75].

POSSIBLE INTENTION

Criminal liability for a crime specified in Article 196 of the Penal Code applies both to a person who directly aims at offending religious feelings (acting in the so-called direct intent) and to a person who publicly undertakes such causal actions, **to which he or she agrees**, that – due to their form – they are of an offensive nature. As a result, the perpetrator either wants to offend the religious feelings of other

69 J. Wojciechowska, *Obraza uczuć religijnych* [in:] *System Prawa Karnego*, t. 10, ed. J. Warylewski, p. 559; J. Sobczak, Comment no. 12 to art. 196, in:A. Stefański (ed.), *Penal Code. Komentarz*. Warszawa 2018 (Legalis); W. Wróbel, Comment no. 1 to art. 196, in: W. Wróbel, A. Zoll (ed.), *Penal Code. Część szczególna. Tom II. Część I. Komentarz to art. 117-211a*, Warszawa 2017 (LEX); J. Piórkowska-Flieger, Comment no. 2 to art. 196, in: T. Bojarski (ed.), *Penal Code. Komentarz,* Warszawa 2016 (LEX); N. Kłączyńska, Comment no. 2 to art. 196, in: J. Giezek (ed.), *Penal Code. Część szczególna. Komentarz,* Warszawa 2014 (LEX); S. Hypś, comment no. 1 to art. 196, in: A. Grześkowiak, K. Wiak (ed.), *Penal Code. Komentarz*, Warszawa 2019 (Legalis).

70 W. Janyga, comment no. 4 to art. 196, in: M. Królikowski, Zawłocki (ed.), *Penal Code. Część szczególna. Komentarz do artykułów 117–221. Tom I,* Warszawa 2017 (Legalis).

71 J. Warylewski, *Pasja czy obraza uczuć religijnych? Spór wokół art. 196 k.k.*, in: L. Leszczyński, E. Skrętowicz, Z. Hołda, (ed.), W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska, Lublin 2005, p. 370.

72 R. Paprzycki, *Czy bluźnierca jest przestępcą? Rozważania na temat znamienia "przedmiotu czci religijnej" przestępstwa obrazy uczuć religijnej - art. 196 k.k.*, "Palestra" no. 5-6/2008, p. 87.

73 P. Kozłowska-Kalisz, Comment no. 3 to art. 196, in: M. Mozgawa (ed.), *Penal Code. Komentarz aktualizowany,* LEX 2018; M. Filar, M. Berent, Comment no. 8 to art. 196, in: M. Filar (ed.), *Penal Code. Komentarz,* Warszawa 2016, LEX; J. Sobczak, Comment no. 13 to art. 196, in:A. Stefański (ed.), *op. cit.,* Legalis; S. Hypś, comment no. 4 to art. 196, in: A. Grześkowiak, K. Wiak (ed.), *op. cit.,* Legalis; W. Wróbel, Comment no. 5 to art. 196, in: W. Wróbel, A. Zoll (ed.), *op. cit.,* LEX; W. Janyga, comment no. 13 to art. 196, in: M. Królikowski, Zawłocki (ed.), *op. cit.,* Legalis; N. Kłączyńska, Comment no. 6 to art. 196, in: J. Giezek (ed.), *op. cit.,* LEX.

74 Cf. wyr. of the Supreme Court z 17.2.1993, III KRN 24/92.

75 W. Wróbel, Comment no. 4 to art. 196, in: W. Wróbel, A. Zoll (ed.), *op. cit.,* LEX.

people with such behaviour or, anticipating such an outcome of his behaviour, agrees to that outcome [76]. That position is also adopted by the Supreme Court [77].

PUBLIC CHARACTER

As it was already mentioned, the criminal responsibility for offending religious feelings applies exclusively to acts committed in public, i.e. in public places or with the use of social media (press, television, radio, social networking sites, internet forums, etc.).

It is assumed in the jurisprudence and doctrine of criminal law that the public nature of the crime under Article 196 of the Code of Criminal Procedure means that profanation of an object of religious worship may be perceived by a greater or more unspecified number of persons[78]. It is sufficient here to somehow get acquainted with the perpetrator's behaviour, provided that in its original form it had a public character [79]. Uttering offensive words during a social meeting in a private apartment does not exhaust constituent features stipulated by the commented provision[80].

OFFENCE WITH CRIMINAL CONSEQUENCES

The offence referred to in Article 196 of the Penal Code has an effective character, which means that specific persons must feel affected by the perpetrator's behaviour. [81]. The effect in the form of "an offence of religious feelings " should be understood as "a person's emotional reaction to the demeaning behaviour towards an object, sign, symbol, person being a bearer of religious values, which may be accompanied by a sense of infringement of dignity, shame, embarrassment, sadness.

The victim does not have to be a direct witness of behaviour that offends religious feelings. A sufficiently thorough account of an offensive event can also lead to an effect in the form of an offence of religious feelings. The decisive factor is that the offensive content has reached a particular person, triggering a strong reaction from that person in the form of an offence of religious feelings.[82] To exhaust constituent features, it is sufficient to hurt religious feelings of one particular person[83].

As a matter of fact there exists the opposite view, according to which the concept of insult refers to the perpetrator's behaviour as such and is independent of the effects of that behaviour on other people, but – as the author himself admits – it is a view of minority[84].

76 I. Zgoliński, Comment no. 4 to art. 196, in: V. Konarska-Wrzosek (ed.), *Penal Code. Komentarz*, Warszawa 2018 (LEX).

77 Ruling of the Supreme Court z 29.10.2012, I KZP 12/12.

78 Decision of the Supreme Court z 5.3.2015, III KK 274/14; A. Marek, Comment no. 2 to art. 196, in: A. Marek, *Penal Code. Komentarz,* Warszawa 2010 (LEX); I. Zgoliński, Comment no. 2 to art. 196, in: V. Konarska-Wrzosek (ed.), *op. cit.,* LEX; M. Filar, M. Berent, Comment no. 9 to art. 196, in: M. Filar (ed.), *op.cit.,* LEX;

79 W. Janyga, comment no. 21 to art. 196, in: M. Królikowski, Zawłocki (ed.), *op. cit.,* Legalis.

80 N. Kłączyńska, Comment no. 6 to art. 196, in: J. Giezek (ed.), *op. cit.,* LEX.

81 P. Kozłowska-Kalisz, Comment no. 5 to art. 196, in: M. Mozgawa (ed.), *op.cit.* LEX; J. Wojciechowska, comment no. 4 to art. 196, in: A. Wąsek, Zawłocki (ed.), *op. cit.,* Legalis; W. Wróbel, Comment no. 5a to art. 196, in: W. Wróbel, A. Zoll (ed.), *op. cit.,* LEX.

82 W. Wróbel, Comment no. 5a-5b to art. 196, *op. cit.,* LEX.

83 I. Zgoliński, Comment no. 2 to art. 196, in: V. Konarska-Wrzosek (ed.), *op. cit.,* LEX.

84 W. Janyga, comment no. 22 to art. 196, in: M. Królikowski, Zawłocki (ed.), *op. cit.,* Legalis.

OBJECTS OF RELIGIOUS VENERATION

Objects of religious worship within the meaning of Article 196 of the Penal Code are deemed to be: God understood as a person or otherwise, and also objects, symbols, images, specific words or names which – according to the doctrine of a given religious community – are worshipped and regarded as sacred, worthy of the highest respect, esteem and praise because of their relationship with transcendence[85]. In some religious communities, the Bible itself or the Koran may also be an object of religious worship (that is possible to a greater extent, especially in the latter case).[86].

5.2 ASSESSMENT OF THE COMPLIANCE OF ART. 196 OF THE CODE OF CRIMINAL PROCEDURE WITH THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE ECHR

In the light of the described above standpoint of the criminal law science on the understanding of the function and scope of Article 196 of the Penal Code, it does not seem that its provision could be considered an excessive interference with freedom of expression. As a matter of fact, that provision is interpreted narrowly and applies to extreme cases where the expressions were aimed solely at insulting the religious feelings of others.

The Constitutional Tribunal ruled on the compliance of the Article 196 of the Code of Criminal Procedure with the Constitution in its judgment of 6 October 2015, SK 54/13, in which it examined Dorota "Doda" Rabczewska's constitutional complaint for being sentenced to a fine of PLN 5,000 for insulting religious feelings. The Constitutional Tribunal stated that Article 196 of the Penal Code, in so far as it penalizes the insult to religious feelings of other persons by publicly insulting an object of religious worship, which is punishable by a fine, is consistent with the principle of *nullum crimen sine lege certa* (Article 42 of the Constitution) and with freedom of speech (Article 54 of the Constitution). In its recitals, the Court stressed that the right to the protection of religious feelings is an element of religious freedom both internally (freedom from acts that insult an object of religious worship) and externally (freedom to manifest an individual's religion). In the opinion of the Constitutional Tribunal, the expressions used in the provision, such as "insulting religious feelings" and "object of religious worship" from Article 196 of the Code of Criminal Procedure, have in fact understandable and unambiguous content in the jurisprudence and doctrine of criminal law. In the further part of its recital the Constitutional Tribunal, referring to the ECtHR rulings in cases Handyside, Otto-Preminger-Institut, Murphy and Dubowska i Skup, stated that Article 54 of the Constitution does not preclude the

85 W. Wróbel, Comment no. 6 to art. 196, in: W. Wróbel, A. Zoll (ed.), *op. cit.*, LEX.

86 W. Wróbel, Comment no. 7 to art. 196, in: W. Wróbel, A. Zoll (ed.), *op. cit.*, LEX; N. Kłączyńska, Comment no. 8 to art. 196, in: J. Giezek (ed.), *op. cit.*, LEX; S. Hypś, comment no. 8 to art. 196, in: A. Grześkowiak, K. Wiak (ed.), *op. cit.*, Legalis.

introduction of a fine for insulting religious feelings – the restriction of freedom of speech is justified by the protection of the rights and freedoms of others (religious freedom) and public order.

However, the Constitutional Tribunal did not resolve all doubts related to the constitutionality of Article 196 of the Penal Code, for it refused to rule on the action in so far as it concerned the assessment of the constitutionality of the sentence of imprisonment for insulting religious feelings. In that part, the proceedings were closed on the ground that there was no connection with the plaintiff 's specific case. In that aspect the question of the proportionality of sanctions for insulting religious feelings remains open.

Currently, the European Court of Human Rights is hearing the case of Dorota 'Doda' Rabczewska's complaint against Poland, in which she claims that punishing her with a fine for offending religious feelings is a violation of her right to freedom of expression. The plaintiff challenges not only the imposition of a penalty of that amount, but also the very Article 196 of the Penal Code, arguing that the criminalisation of an offence against religious feelings is incompatible with modern standards of human rights protection. As of February 1, 2019, the case has not yet been adjudicated. The Court will have to assess whether a statement in a press interview describing the authors of the Bible as "drunk with wine and smoking herbs" is a gratuitously offending expression which has no legal protection, or whether it falls within the limits of freedom of expression and is protected under Article 10 of the Convention.

At this point it is worth noting that the Polish regulation is similar to Article 188 of the Austrian Penal Code, which was reviewed by the Court in the Otto-Preminger Institut v. Austria and E. S. v. Austria: *Whoever, in circumstances in which his conduct may give rise to reasonable outrage, publicly discredits or insults a person who, or an object which is the object of worship of a church or a religious order established in the country, or a dogma, lawful customs or a lawful institution of such a church or community, is subject to a penalty of imprisonment of up to six months or daily penalties of up to 360 days.*

Article 196 of the Polish Penal Code is related with Article 188 of the Austrian Penal Code by the following:

1) the subject of protection is the right to respect for one's religious freedom from third parties;

2) the criminal liability refers to actions which offend values that are important to the believer: a religious object or a place of ritual;

3) the criminal liability encompasses actions which are offensive in the subjective sense (from the point of view of believers) as well as in the objective sense (from the point of view of an average member of a given society);

4) insulting religious feelings must take place in public – actions in private space, even if extremely blasphemous, are not subject to criminal liability;

5) the penalty for insulting religious feelings is a fine or imprisonment.

Looking at Article 196 of the Penal Code from the perspective of the judgments of Otto-Preminger and E.S. cases, it is not possible – in my opinion – to see its contradiction *per se* with Article 9 of the Convention. A contradiction could possibly arise only in the event of an absolute imprisonment sentence for insulting religious feelings, but that issue has not yet been adjudicated by the Tribunal.

6. PROTECTION OF RELIGIOUS FEELINGS IN THE BROADCASTING ACT

6.1 CHARACTERISTICS OF THE MECHANISM FOR THE PROTECTION OF RELIGIOUS FEELINGS IN BROADCASTING

The Broadcasting Act protects religious feelings against offensive content from advertising (Article 16b paragraph 3 point 3) and from programmes and other broadcasts (Article 18 paragraph 2). In the case of advertising, the Act states that it must not "hurt religious or political beliefs", while with regard to programmes and other communications, it states that they "should respect the religious beliefs of the public, and in particular the Christian system of values". For violation of any of those provisions, the liability is borne by the broadcaster, on whom the Chairman of the National Broadcasting Council may impose a fine of up to 50% of the annual fee for the right to dispose of the frequency designated for broadcasting its programme or up to 10% of the broadcaster's income earned in the previous tax year (Article 53 paragraph 1).

In the wording in force until 2000, Article 16b paragraph 3 point 3 and Article 18 paragraph 2 of the aforementioned Act spoke about "religious feelings".

On 19.5.2000, "religious feelings" were deleted from both provisions and replaced by "religious beliefs"[87]. In the literature, that measure was interpreted as the will to "use a term with less emotional tint ", which "was not linked with the intention to change the provision in a significant way".[88]. In the light of a generally uniform position of the doctrine, it can be assumed that the validity of TK's current view, expressed in the resolution of 2.3.1994, W 3/93, according to which Article 18 paragraph 2 of the Broadcasting Act expresses the prohibition of violation and obligation to respect religious feelings by radio and television media, remains in force.[89]. The same can be said of Article 16b paragraph 3 point 3 of the Broadcasting Act, which has the same function, but with regard to advertising.

87 The Act of 31.3.2000 on amendment to the Act on Radio and Television broadcasting and the Act on the Polish Language (Dz. U. no. 29 item 358).

88 K. Wojciechowski, comment no. 10 to art. 18, in: S. Piątek (ed.), *Ustawa o radiofonii i telewizji. Komentarz*. Warszawa 2014 (Legalis).

89 Cf. E. Czarny-Drożdżejko, Comment no. 8 to art. 18, in: taż, *Ustawa o radiofonii i telewizji. Komentarz,* Warszawa 2014 (LEX); J. Sobczak, Comment no. 6 to art. 18, in: ibid., *Radiofonia i telewizja. Komentarz,* Zakamycze 2001 (LEX).

The criterion for assessing whether a programme or a broadcast respects religious feelings is the average sensitivity of the recipient[90]. As in the civil and criminal regimes, the subjective perceptions of the public are not decisive in that regard.

90 E. Czarny-Drożdżejko, Comment no. 8 to art. 18,

6.2. EXAMPLES OF OFFENSIVE PROGRAMMES AND BROADCASTS

The President of the National Broadcasting Committee decided to interfere with the freedom of expression in the case of, among others, the following instances:

- cabaret Limo performance, in which, for example, Christ's birth was presented as a drunken party, and the Pope as a person engaged in inappropriate entertainment and in addition vulgar. A fine of 5000 PLN was imposed on the broadcaster for the cabaret performance[91];

- a programme in which the hosts, among other things, were comparing Our Lady to the queen of ants and saying that she was a Jew and the "most holy ant", describing her as a "black ant-onna" – the broadcaster was imposed a fine of PLN 70 000, which, however, was revoked after appeal to the court[92];

- a talk-show programme in which a Catholic radio journalist's voice was parodied while repeating words of the **prayer** recited by members of rosary circles, accompanied by a scornful comment – the broadcaster was fined with PLN 500,000 [93].

91 Decision by the Chairman of the NBC no.6/2013 of 9 August 2013

92 Decision by the Chairman of the NBC no.1/2013 of 21 January 2013, repealed by the verdict of the District Court in Warsaw of 29.4.2014, XX GC 374/13, which was upheld by the Court of Appeals in the verdict of 2.9.2015, VI ACa 1312/14.

93 Decision by the Chairman of the NBC z 22 March 2006 no. 2/2006, upheld in the verdict of of the Supreme Court of 14 January 2010, III SK 15/09

6.3. ASSESSMENT OF THE COMPLIANCE OF ARTICLE 18 PARAGRAPH 2 AND ARTICLE 16B PARAGRAPH 3 POINT 3 OF THE BROADCASTING ACT WITH THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE ECHR

Article 18 paragraph 2 of the Broadcasting Act was unanimously recognized by the Constitutional Tribunal as **complying with freedom of expression** in the full Tribunal's ruling of 7.6.1994, K 17/93. In the recitals of its judgment, the Tribunal explained that "the provision in question 'is based on the protection of freedom of conscience and religion, which also includes the prohibition of infringement of religious feelings". It also pointed out that by virtue of "an unrestricted audience, the content transmitted by radio and television may infringe the rights and freedoms of others to a greater extent". In that context, it may be added that the extent of the 'field of destruction' of statements publicized by mass media is not only a threat to the religious feelings of countless people, but also to social peace, which can be undermined if a large number of people feel provoked by acts of aggression. Similarly, Article 16b paragraph 3 point 3 of the Broadcasting Act serves the same

purpose as Article 18 paragraph 2, and an identical sanction is provided for its violation, which leads to the conclusion that it also complies with the constitutional freedom of speech.

The cited provisions of Polish law were never the subject of assessment by the ECtHR. However, in the light of the to-date case-law, it can be assumed that the establishment of a ban on violating religious feelings under the threat of an administrative financial penalty falls within the margin of freedom enjoyed by states when deciding how to guarantee the protection of religious feelings of individuals, e.g. against potentially offensive content resulting from advertisements and announcements.[94]

94 Likewise in the judgement concerning Sekmadienis, *op. cit.*, §73.

7. CONCLUSIONS

In view of the above discussion of the Polish and European standard of relations between freedom of speech and the protection of religious feelings, the following conclusions can be drawn:

Freedom of religion implies the right to respect (protect) the religious feelings of believers. Religious feelings form an integral part of the believer's *forum internum* of religious freedom. Faith in the Divine Being, worshipping a sacred sign, figure, image or book, is based on the feeling of the believer – respect, awe and sometimes even love. Religious feelings are also closely related to the believer's *forum externum* of freedom of religio, because at the moment of loss of religious feelings towards the object of worship, the will to practice a particular religion (its "manifestation") weakens and sometimes even ceases. Therefore, it can be said that having religious feelings in relation to the broadly understood objects of worship is a *sine qua non* condition for professing the vast majority of religions (Christianity, Islam, Judaism).[95]. In other words, the greater the consent to offend religious feelings in the public space, the less willing people will be to use freedom of religion – that is a kind of " freeze- effect" in horizontal relations.

95 However, it does not necessarily have to be so in case of Buddhism, which as a religion without a personal God differs from the above mentioned.

2. In this context, statements that are insulting to religion are not only a form of exercising freedom of expression, but may also interfere with the personal emotional relationship between the believer and the object of worship. Assessing the admissibility of such interference requires a balance between two values: freedom of expression, which also includes the right to criticize religion, and freedom of religion, which also includes the right to respect for religious feelings.

Freedom of expression as understood by the Constitution of the Republic of Poland and the European Convention on Human Rights does not impede to create mechanisms for the protection of individuals' religious feelings. States have a margin of discretion in that sphere as to the choice of the form of protection, which may be of civil,

administrative or even penal character. The extent of the margin of discretion is largely determined by the socio-cultural context in the given state, including in particular the religiosity of the society concerned. The more people in a particular country are sensitive to religious issues, the deeper the state can interfere with freedom of expression in order to ensure respect for religious feelings and to guarantee religious peace.

4. In the light of the ECtHR's position in the cited Otto-Preminger, Wingrove, I.A. and E.S. cases, particularly the expressions which humiliate believers and disallow them to engage in any kind of polemics should be considered gratuitously offensive. More specifically, it can be presumed in principle that statements depicting religious objects in a sexual context do not contribute in any way to public debate, but merely serve to humiliate believers. Pornographic or erotic expressions are impossible to debate contentwise, there is no room for polemics or exchange of arguments.

5. In the light of the ECtHR's position in the cited cases Handyside, Prager and Obershlick, Standard Verlagsgesellschaft, Klein and Giniowski, even controversial, shocking, biased and injurious statements on religion are admissible, provided that they make at least a minimal contribution to public debate and can be the subject of substantive polemics. Therefore, one cannot agree with the position formulated by some representatives of the Polish doctrine that expressions which "mock or ridicule religious dogmas, contest the authenticity of the apparitions, raise doubts about the truth of creeds and the sense of religious directives" are against legal regulations"[96] Such a standpoint would *de facto* make it impossible for atheists and agnostics – who by their very nature question the existence of God, cast doubt on the truth of faith and the sense of religious commandments – to speak out on religious matters. One can neither agree with the position that "critical remarks [on religion] should be balanced, free from aggression, factual"[97], which is in stark contrast to the established Strasbourg line that freedom of expression also protects expressions that offend, outrage and cause disturbance in society. Notwithstanding that, I am of the opinion that freedom of speech is interpreted too broadly today (I share the view expressed in the above mentioned Mr Matscher's and Mr Vilhjálmsson's dissenting opinions on the judgment Oberschlick v. Austria No. 2).

6. In the light of the ECtHR's position in the cited Sekmadienis case, it can be firmly stated that the use of a religious symbol for commercial purposes cannot *per se* justify the imposition of a penalty for offending religious feelings, either in an administrative or all the less in a penal procedure.

7. In the light of the ECtHR's position in the Sekmadienis case, before imposing a penalty for violation of religious feelings by a public authority (e.g. the President of the National Broadcasting Committee)

96 J. Sobczak, Comment no. 6 to art. 18, *op. cit*.

97 J. Sobczak, Comment no. 6 to art. 18, *op. cit*.

an in-depth investigation should be carried out into whether interference with freedom of expression is necessary in specific circumstances. Therefore:

- judgments and decisions imposing financial penalties for offending religious feelings should be justified in detail, indicating the serious and precise reasons for which it was considered that in specific circumstances a particular statement was offensive and had to be punished; the responsibility for proving that an expression objectively offended religious feelings rests with the authority;

- If the reviewed expression is likely to offend believers of different religions, it is important to consult representatives of all those religions. For example, in the case of an expression that hurts Christian feelings, it is not enough to get acquainted with the position of the Catholic Church in order to fully evaluate the offensive character of the expression.

8. The question of imprisonment for insulting religious feelings remains unsettled. Neither the Polish Constitutional Tribunal nor the Strasbourg Court have so far had the opportunity to comment on that matter.

ABSTRAKT/ABSTRACT

Niniejszy artykuł dotyczy prawa do ochrony uczuć religijnych jako wartości usprawiedliwiającej ograniczenie wolności słowa. Prawo do ochrony uczuć religijnych może być chronione za pomocą trzech metod: cywilnej, karnej i administracyjnej. Zagadnienie jest omawiane z punktu widzenia Konstytucji RP oraz Europejskiej Konwencji Praw Człowieka, ze szczegółowym uwzględnieniem orzecznictwa Trybunału Konstytucyjnego oraz Europejskiego Trybunału Praw Człowieka w Strasburgu.

This article concerns the right to the protection of religious feelings as a value which justifies a restriction of freedom of expression. The right to the protection of religious feelings can be protected by three methods: civil, penal and administrative. The issue is discussed from the point of view of the Constitution of the Republic of Poland and the European Convention on Human Rights, with particular emphasis on the case-law of the Polish Constitutional Court and the European Court of Human Rights in Strasbourg.

SŁOWA KLUCZOWE/KEYWORDS

Constitution of the Republic of Poland, European Convention on Human Rights, freedom of expression, Protection of religious feelings, right to offend

Europejska Konwencja Praw Człowieka, Konstytucja RP, Ochrona uczuć religijnych, prawo do obrażania, wolność słowa