



EFFECTIVE LAW IN AN EFFECTIVE STATE

*Local conditions in the global context in the face
of 21st century challenges of fighting crime.*

RELIGIOUS FREEDOM AND THE LIMITS TO FREEDOM OF EXPRESSION

Author of the analysis: Dr Zuzanna Gądzik

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Translated by: Marta Cechowicz

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Introduction

Democratic state under the rule of law ensures its citizens a range of constitutionally guaranteed rights and freedoms, which they can enjoy freely and the violation of which is punishable with appropriate legal sanctions. In addition to the right to life, right to bodily integrity and personal freedom, right to a trial without undue delay, *etc.*, these include: freedom of conscience and religion, and freedom of expression.

Despite the positive nature of these rights and freedoms, it may happen that an individual exercising his rights will violate the rights of others. The collision of freedom of expression and freedom of religion is a good case in point here. The free exercise of these two freedoms is not unlimited. That is why, it was necessary to implement appropriate provisions that would protect individual rights and ensure that they were not violated.

Penal provisions are of special importance in this respect. One of the functions of criminal law is to provide protection to values which are important to society and which are related to the human being and the state as a common good (A. Grześkowiak, K. Wiak, *Prawo karne*, Warsaw 2020, p. 12). Furthermore, criminal law has a preventive function. Statutory penalties for committing a prohibited act are intended to deter a potential perpetrator from violating legally protected interests (*Ibid.*, pp. 16-17).

Freedom of religion

Religious freedom is one of the fundamental personal rights protected in the Constitution. Pursuant to Art. 53(1) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, No. 78, item 483 as amended), everyone is granted the right to freedom of conscience and religion. Freedom of religion is to be understood as the freedom to profess or to adopt a religion by personal choice as well as to manifest that religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites, or teaching. Freedom of religion also includes the right to own sanctuaries and other places of worship depending on the needs of the faithful, and the right of individuals, wherever they may be, to benefit from religious services – Art.53(2). The religion of a Church or other legally recognised religious organisation may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby – Art.53(4). Importantly, the freedom to manifest one's religion may be limited only in special circumstances – only by way of a statute and only when it is necessary for the protection of state security, public order, health, morals or the freedom and rights of others – Art 53(5). No one may be compelled to participate or not to participate in religious practices – Art 53(6).

The Law of 17 May 1989 on Guarantees of Freedom of Conscience and Religion (consolidated text, Journal of Laws of 2017, item 1153) enumerates in detail the rights that fall within the scope of freedom of conscience and religion. Pursuant to Art. 2 of this Law, when exercising freedom of conscience and religion, citizens may, in particular: establish religious communities with their own system, doctrine and worship rituals, in order to profess and spread faith, in accordance with the principles of their faith; belong or not belong to Churches or other religious associations; profess their religion or beliefs; bring up children in accordance with their convictions in matters of religion; remain silent in matters of their religion or beliefs; maintain contact with fellow believers, including participation in the work of international religious organisations; use sources of information on religion; produce, acquire and use items needed for religious worship; produce, acquire and possess objects needed for religious observance; choose priesthood or a religious order; join in secular organisations to carry out tasks arising from their religion or religious beliefs; and have a burial in accordance with religious principles or beliefs. The above catalogue is open, which means that the exercise of freedom of conscience and religion may also take some other forms.

Taking this into account, it should be emphasised that, apart from the right to practice one's religion, freedom of conscience and religion will also involve the right to respect for one's religious feelings. Behaviours that violate any of the forms of exercising freedom of conscience and religion

(including statements made by a person) will constitute a violation of this freedom, which may result in criminal liability or liability for damages.

Freedom of expression

The freedom to express one's views and obtain and disseminate information is guaranteed under Art. 54(1) of the Constitution of the Republic of Poland. For the purposes of this article, the focus is put on the first element of this freedom, namely expressing one's views. This term should be understood as the freedom to engage in all kinds of behaviour (actions and omissions to act) which constitute the expression of one's thoughts (cf., J. Sadowski, *Komentarz do art. 54 Konstytucji Rzeczypospolitej Polskiej*, [in:] M. Safjan, L. Bosek (eds.), *Konstytucja Rzeczypospolitej Polskiej*, Warsaw 2016, Legalis/el.). In accordance with the Supreme Court's decision of 28 September 2000, V KKN 171/98 (LEX No. 45463), "[f]reedom of thought and freedom of belief can be externalised only if there is freedom of expression. Freedom of expression refers to the freedom to present views and convictions in various forms, in a way that is visible to others (with words, gestures, sounds, or images). Freedom of speech, which is a derivative of freedom of expression, is the right to freely express opinions in a spoken form, as well as the right to record and publish them as a handwritten text, in print, as an audio recording, or as an audio and video recording."

Liability for abusing freedom of expression in the context of religious freedom

Freedom of expression can essentially relate to any aspect of an individual's life. It also concerns issues connected with broadly understood faith and religion. Everyone has the right to express their opinions on the dogmas of a given faith, on Churches and religious associations, on followers of a given religion, *etc.* However, the enjoyment of this right does not mean that the freedom to express one's views and opinions is completely unlimited. It should be remembered that freedom of religion is protected under the Polish law and may not be violated at the expense of freedom of expression. This may result in a collision of two autonomous rights, which in the scope of their protection may contradict one another to some extent. The solution to the above situation is provided in Art. 31 of the Constitution of the Republic of Poland. Art. 31(2)(1) of the Polish Constitution states that everyone is obliged to respect the freedoms and rights of others. On the other hand, pursuant to Art. 31(3) of the Polish Constitution, limitations upon the exercise of constitutional freedoms and rights may be imposed only by a 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 must not violate the essence of the said freedoms and rights.

To place limitations on those expressions that could interfere with religious freedom of others, the legislator defined a catalogue of prohibited acts that constitute a violation of religious freedom. At the same time, it should be noted that in accordance with the principle *Nullum crimen, nulla poeana sine lege*, only the behaviours specified in this catalogue constitute restrictions on freedom of expression. In this was, the essence of this right remains intact.

Chapter XXIV of the Act of 6 June 1997 – Penal Code (consolidated text: Journal of Laws of 2020, item 1444; referred to in this article as: the Polish Penal Code) provides for criminal liability specifically for acts against freedom of conscience and religion. A perpetrator who commits them violates the constitutionally guaranteed freedom of conscience and religion. Taking into account that the catalogue of behaviours protected under freedom of religion is open, the scope of acts that are prohibited in order to protect the said freedom is also defined broadly. These prohibited acts include: discrimination on the grounds of religious affiliation or lack of religious affiliation (Art. 194 of the Polish Penal Code); malicious interfering with the public performance of a religious ceremony of a Church or other religious association with regulated legal status (Art. 195(1) of the Polish Penal Code); malicious interfering with a funeral, mourning ceremonies or funeral rites (Art. 195(2) of the Polish Penal Code); offending

religious feelings by publicly blaspheming an object of religious worship or a place dedicated to the public celebration of religious rites (Art. 196 of the Polish Penal Code).

In addition, the legislator criminalised behaviours that involve: homicide or causing grievous bodily harm to a person belonging to a specific religious group (among others), if the perpetrator has committed this act in order to partially or completely annihilate this group (Art. 118(1) of the Polish Penal Code); creating living conditions threatening the annihilation of the members of such a group, or using means to prevent births within this group, or forcibly removing children from the people constituting it (Art. 118(2) of the Polish Penal Code); taking part in a mass attack or one of repeated attacks against a group of people, taken to implement or support the policy of a state or organisation and severely prosecuting a group of people for reasons recognised as inadmissible under international law, including, *inter alia*, reasons of religious belief or lack of religious affiliation (Art. 118a(3)(2) of the Polish Penal Code); using violence or making an unlawful threat towards a person or a group of people on religious grounds (among others) or because of lack of religious affiliation (Art. 119 of the Polish Penal Code); inciting hatred based on religious differences (among others) or for not being religious (Art. 256(1) of the Polish Penal Code); publicly insulting a population group or an individual because of specific religious affiliation (among others) or lack of it, or for these reasons, breaching the personal inviolability of another individual (Art. 257 of the Polish Penal Code). This breach of personal inviolability refers also to an act that is defined in Art. 262(1) of the Polish Penal Code and consists in profaning a corpse, human ashes or a burial site.

It is worth noting that the legislator did not give priority or exclusivity of protection to any denomination, though granting this protection only to Churches and religious associations with regulated legal status (i.e., statutorily defined – e.g., in the Act of 17 May 1989 on the Relationship between the State and the Catholic Church in the Republic of Poland, consolidated text in Journal of Laws of 2019, item 1347, or entered into the register of Churches and other religious associations) may be regarded as some kind of limitation.

A behaviour that is of particular importance in the context of a conflict of legal rights involving freedom of expression and freedom of religion is defined in Art. 196 of the Polish Penal Code, which reads: “Anyone who offends the religious feelings of others by publicly blaspheming an object of religious worship or a place dedicated to the public celebration of religious rites, is liable to a fine, the restriction of liberty or imprisonment for up to 2 years.” Religious feelings should be understood as some attitude (mainly emotional) held by a group of people towards the faith they profess. This attitude is manifested, among others, in the right to respect for the values of a given religion and for places and objects of reverence (Judgment of the Constitutional Tribunal of 7 June 1994, K 17/93, LEX

No. 25099). A causative act in this case does not apply to any behaviour that might offend religious feelings of other people, but it is narrowed down to refer to a behaviour that involves publicly blaspheming an object of religious worship or a place dedicated to the public celebration of religious rites.

Objects of religious worship may include material objects which are the subject and symbol of worship and which are used for religious rites (e.g., a cross, crescent moon, consecrated bread, the Holy Bible, relics, pictures of saints, *etc.*), and non-material objects (e.g., God, Mother of God, saints), rites or ritual formulae used when celebrating sacraments, *etc.* (W. Wróbel, [in:] W. Wróbel, A. Zoll (eds.) *Kodeks karny. Część szczególna. Vol. II. Part I. Komentarz do art. 117-211a*, p. 645). A place for celebrating religious rites may be a place dedicated to the public performance of such rites (e.g., a church, mosque, synagogue), as well as a place temporarily adapted to serve such purpose. As accepted in the doctrine, this may be basically any place chosen by a religious community for such purposes and adapted to worship with other people (W. Janyga, *Komentarz do art. 196 k.k.* [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna. Vol. I. Komentarz do artykułów 117-221*, Legalis 2017). On the other hand, insulting a clergyman (e.g., a Catholic or Orthodox priest, the Pope, a rabbi, *etc.*) does not meet the legal definition of this crime, as such a person is not an “object” of religious worship. This, however, does not exclude potential liability for an offence of insult as defined in Art. 216 of the Polish Penal Code (cf., M. Małeckki, *Kontratyp sztuki de lege lata* [in:] F. Ciepły (ed.), *Odpowiedzialność karna artysty za obrazę uczuć religijnych*, Warsaw 2014, p. 141).

To fulfil the criteria of a crime stipulated in Art. 196 of the Polish Penal Code, a perpetrator’s act must be public, which means that it must be committed in such a place or in such a way that its recipients constitute some group of people. This can, for example, be a public place where a perpetrator offends other people’s religious feelings with his behaviour, or a perpetrator can use the mass media (e.g., post a text in a public profile on the social media, blog or online forum, publish an article, make a statement on TV or YouTube channel). Accordingly, offending someone’s religious feelings during a non-public event (e.g., in a private conversation or during a closed meeting) does not constitute a crime. At the same time, as the judicial decisions emphasise, “the attribute of publicity is not met if an insulting behaviour was recorded and then made available to a wider group of people by means of the press or the Internet. A person who makes an offensive message available to the public may, however, satisfy the criteria of an offence under Art. 196 of the Polish Penal Code. Consequently, behaviour addressed to a person or a group of people who wilfully and voluntarily come into contact with the content that may insult their religious feelings does not fulfil the criteria of an offence under

Art. 196 of the Penal Code”(Decision of the Supreme Court of 5 March 2015, III KK 274/14, LEX No. 1734689).

The perpetrator’s behaviour must be insulting and abusive. This means that it does not involve every critical and disapproving form of expression, but the one that violates certain social, cultural and moral norms and the accepted criteria of what is right and what is wrong (Judgment of the Supreme Court of 17 February 1993, III KRN 24/92, LEX No. 22114). The term ‘insult’ is understood here as a behaviour that involves offending, abusing, defiling, desecrating and disgracing (<https://sjp.pwn.pl/doroszewski/zniewazac;5531128.html>). Hence, criticising religious views held by a certain group, questioning the existence of an object of religious worship, or expressing disapproval of a religious community and the way it functions, do not constitute a crime under Art. 196 of the Polish Penal Code, if they lack degrading or offensive elements (S. Hypś, [in:] A. Grześkowiak, K. Wiak (eds.), *Kodeks karny. Komentarz*, Warsaw 2018, p. 1005). It should also be noted that the offence under Art. 196 of the Penal Code must be perpetrated intentionally. This means that a perpetrator, when engaging in a given behaviour, must wish to offend religious feelings of others, or at least must approve of this. In its Judgement of 29 October 2012 (I KZP 12/12), the Supreme Court stressed that “[an] offence specified in Art. 196 is committed by a person who, with his direct or conceivable intent, meets all of its the attributes” (Legalis no. 538443).

Taking into account that the above offence is classified as an offence with criminal consequences, the perpetrator’s behaviour must result in a specific consequence; i.e., offending other people’s religious feelings (e.g., P. Kozłowska-Kalisz, *Komentarz do art.196 k.k.*, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el. 2021). It is still disputable whether offending religious feelings of one person (and not at least two) will constitute an offence under Art. 196 of the Penal Code. It seems right to assume that the plural form used in Art. 196 is merely stylistic and thus, offending religious feelings of one person may be subject to criminal liability (W. Wróbel, *Komentarz...*, p. 643. A different stance on this issue is taken by M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 1204).

It is also important to remember that a given act must be objectively insulting. Thus, the subjective feelings of a person who has witnessed or experienced it, are not sufficient to qualify it as insulting. The assessment on whether someone’s behaviour was insulting or not should be made based on the average sense of sensitivity in this respect. On the other hand, the subjective feelings of a person whose religious feelings have been offended, may be important when a penalty is imposed (S. Dziwisz, *Ochrona uczuć religijnych w polskim prawie karnym*, Lublin 2019, p. 136).

An act of offending religious feelings is not limited to verbal offences only. It may also take the form of writing, drawing, or involve taking some actions and making specific gestures. Moreover, it is pointed out that destroying objects of worship and creating audiovisual materials that have offensive content and involve objects of worship, or parody specific rites, may also fall under Art. 196 of the Penal Code (M. Budyn-Kulik, *Znieważenie uczuć religijnych – analiza dogmatyczna i praktyka ścigania*, Prawo w Działaniu 2014, No. 19, p. 102).

Recently, there have been some controversies regarding different forms of artistic expression, which are often considered insulting. Those who are accused of offending religious feelings usually claim that they should not be held criminally liable by virtue of the justification based on art. It is worth noting here that this justification is one of the so-called non-statutory (non-codified) justifications; i.e., not defined in a statute, but rather derived from judicial decisions or legal doctrine (cf.e.g., A. Grześkowiak, K. Wiak (eds.), *Prawo karne*, Warsaw 2015, p. 122). For this reason, non-statutory justifications are frequently disputed and criticised – primarily because accepting their validity would violate the principle of separation of powers.

No matter whether the latter is true or not, it should also be remembered that the mere fact that a given content is presented as an artistic expression (e.g., in a film, drawing or a piece of music) will not automatically eliminate the social harmfulness of its message. As the Supreme Court rightly declared, “[t]he artistic form or scientific purpose of an insulting act do not by themselves exclude criminal liability for offending religious feelings or publicly blaspheming an object of religious worship” (Decision of the Supreme Court of 5 March 2015, III KK 274/14, LEX No. 1734689). Although art frequently aims at shocking its recipients, the view that artists enjoy an absolute freedom and do not have to respect other people’s rights which may be infringed on by their artistic expressions, cannot be accepted. It seems right to state that the boundary between protecting religious feelings and the right to freedom of speech is a way in which divergent opinions are expressed; this should be done in a mutual respect for differences and not lead to insulting behaviour (S.Hypś, [in:] A. Grześkowiak, K. Wiak (eds.), *Kodeks...*, pp. 1005-1006).

Regardless of the above considerations, it must be noted that religious freedom in the context of the limits to freedom of expression, is also protected under the civil law. The catalogue defined in Art. 23 of the Act of 23 April 1964 – Civil Code (consolidated text Journal of Laws of 2020, item 1740) includes examples of personal rights which are protected. One of them is freedom of conscience. It is also worth noting that this catalogue is not exhaustive, which means that other personal rights related to, for example, various aspects of religious freedom may fall under protection. The protection of personal interests was codified in Art. 24 of the Polish Civil Code, which reads: “any person whose

personal interests are threatened by another person's actions may demand that the actions be ceased unless they are not unlawful. In the case of infringement, he may also demand that the person committing the infringement perform the actions necessary to remove its effects, in particular that the person make a declaration of the appropriate form and substance. On the terms provided for in the Civil Code, he may also demand monetary compensation or that an appropriate amount of money be paid to a specific public cause" (§ 1). Protection under civil law is independent of protection under criminal law.

It is also noteworthy that the right to freedom of religion does not entail unlimited freedom to express one's religious views. It is forbidden to express opinions (even when they are based on religious beliefs) that would incite hatred based on religious differences – among others (Art. 256(1) of the Polish Penal Code). Thus, it is prohibited to publicly present content that is intended to evoke hostility, aversion or other negative emotions based on religious differences (see Judgment of the Court of Appeal in Katowice of 24 September 2013, II AKa 301/13, LEX No. 1422288). A person who, in order to distribute, produces, records or imports, acquires, stores, possesses, presents or sends any print, recording or other object containing such content (Art. 256(2) of the Polish Penal Code) is subject to criminal liability. However, if such activity is conducted for artistic, educational, collecting or scientific reasons, criminal liability is excluded (Art. 256(3) of the Polish Penal Code). This means, for example, that an actor who plays a certain character in a historical film will not be held criminally liable for making anti-Semitic statements (see more in F. Cieply, *O kontratybie sztuki*, Prokuratura i Prawo 2015, No. 10, p. 37). The justification based on art attracts much criticism. It has been pointed out that the cited provision is redundant, as the acts defined in Art. 256(3) are not accompanied by a criminal intent, which is necessary for an act to be classified as an offence (Z. Cwiakalski, [in:] W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część szczególna. Vol. II. Part II. Komentarz do art. 212-277d*, Warsaw 2017, pp. 527-528).

Another example of restricting freedom of expression which may be related to religious freedom, can be found in Art. 257 of the Polish Penal Code. Pursuant to it, anyone who publicly insults a group of people or an individual because of national, ethnic, racial or religious affiliation or because of not being religious, or for these reasons breaches the personal inviolability of another individual, is criminally liable.

It is also worth noting that, in addition to criminal liability under the above provisions, a person who publicly incites others to commit an offence (e.g., to exterminate a religious group or to desecrate a place of worship) or publicly praises such an offence, perpetrates an act that meets the legal definition of an offence stipulated in Art. 255 of the Polish Penal Code, which states that public

incitement to commit a misdemeanour (§ 1) or serious crime (felony) (§ 2), and praising publicly an offence (§ 3) is punishable. Religious motivation that the perpetrator may invoke will not exclude unlawfulness of an act.

Summary

Taking into account the scope of criminalisation of the acts described above, it should be noted that by placing some limits on freedom of expression, the legislator ensured that the expressed views do not violate personal rights of other people and the public order – as it is broadly understood. Criminal liability is provided not only for behaviours that are insulting and offend religious feelings of others, but also for expressing views that may lead to further violations. This is in line with Art. 31(3) of the Constitution of the Republic of Poland. For these reasons, limitations placed on freedom of expression by the legislator remain in force. The *ratio legis* for imposing them was to protect other rights that are enshrined in the Constitution of the Republic of Poland and in different legal acts. Therefore, one cannot accept a view that it is permissible to violate these limitations only on the basis of vague premises that are not grounded in law.