



# ORDO IURIS

INSTITUTE FOR LEGAL CULTURE

Warsaw, 25 June 2020



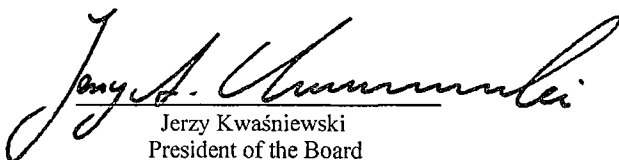
**Mr Paul Lemmens**  
**The European Court of Human Rights**  
**President of the Third Section**  
Council of Europe  
67075 Strasbourg-Cedex, France

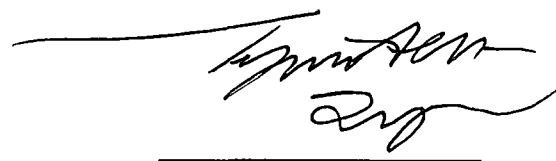
**Re: *Asociación Española de Abogados Cristianos v. Spain***  
**Application n° 22604/18**

In regard to the letter from the Section Registrar of 15 April 2020 n° CEDH-LF14.8bP3 MMI/cbo announcing that the President of the Third Section of the ECtHR has granted leave for third party intervention under Rule 44 §3 of the Rules of the Court by 30 June 2020, the Institute for Legal Culture *Ordo Iuris* respectfully submits its written observations concerning application n° 22604/18 (*Asociación Española de Abogados Cristianos v. Spain*).

These comments are limited only to points of law, including European and international standards regarding positive obligation of the state to protect religious feelings against gratuitously offensive speech and actions. The observations presented herein do not include any comments on facts of the case of *Asociación Española de Abogados Cristianos v. Spain*.

Yours sincerely,

  
Jerzy Kwaśniewski  
President of the Board

  
Tymoteusz Zych  
Vice President of the Board

Attachment: Written observations of the *Ordo Iuris* Institute for Legal Culture concerning application n° 22604/18, *Asociación Española de Abogados Cristianos v. Spain*

European Court of Human Rights

(Application n° 22604/18)

*Asociación Española de Abogados Cristianos v. Spain*

WRITTEN OBSERVATIONS

by

the *Ordo Iuris* Institute for Legal Culture

30 June 2020

**Introduction**

The *Ordo Iuris* Institute is a Polish non-governmental legal association founded in 2013, with its registered office in Warsaw, Poland at 39 Zielna St., Warsaw, Poland. Bringing together academics and legal practitioners to work on various projects, our organisation is dedicated to protection and defence of a legal culture based on the respect for human dignity, rights and freedoms.

In *Asociación Española de Abogados Cristianos v. Spain* the applicant organisation claims that its right to private life (Article 8 of the ECHR) and freedom of religion (Article 9 of the ECHR) have been violated, because the state refused to prosecute an exhibition disparaging religious feelings of Catholics. The exhibition showed pictures of a man lying naked next to the word “pederasty”, formed with consecrated hosts that he had himself even obtained by attending Eucharistic celebrations. The exhibition was presented in a public place – a municipal hall under authorisation of the city council. The authorities dismissed the case, declaring that it did not constitute a crime of disparaging religious feelings nor crime of desecration.

At present the Court's jurisprudence resolves only the question of whether the state **is entitled** to prosecute and punish offenses against religious feelings of believers. However, it does not unambiguously resolve the question of whether in some cases the state **is obliged** to take positive action to protect religious feelings. Judgment in *Abogados Cristianos* case will therefore set a precedent, importance of which cannot be overstated. The *Ordo Iuris* Institute hopes that this information and observations will prove themselves useful to the Court when considering this complex and delicate problem.

The observations presented below have been divided into five parts. The first part presents the current jurisprudence of the ECHR, which in the opinion of the *Ordo Iuris* Institute provides grounds for recognition of the right to protection of religious feelings as an element of religious freedom guaranteed in Article 9 of the Convention. The second part presents the concept of a negative obligation of the state to protect religious freedom, consisting in the national authorities refraining from engaging in activities that offend religious feelings of believers. The third part presents the concept of a positive obligation of the state to protect religious freedom in horizontal relations, consisting in counteracting the offense of religious feelings in particularly justified cases. The fourth part defines the notion of gratuitously offensive expressions in light of ECHR case-law. The fifth part summarises European countries standards on protection of religious feelings, with particular reference to Spanish and Polish regulation.

**1. Right to protection of religious feelings as an inherent element of freedom of religion**

1. Hitherto ECHR case-law has treated religious feelings as legitimate aim justifying limitation of the freedom of expression (Article 10 of ECHR), rather than as an autonomous right.

### 1.1. Religious feelings as legitimate aim justifying limitation of the freedom of expression

2. On numerous occasions the Court has found that the protection of religious feelings may be considered a legitimate aim justifying a limitation of the freedom of expression. In light of the ECHR's case law, the "rights of others" clause within the meaning of Art. 10(2) of the Convention includes:

- *the right of citizens not to be insulted in their religious feelings*<sup>1</sup>;
- *protection against the treatment of a religious subject in a contemptuous, reviling, insulting, scurrilous or ludicrous manner*<sup>2</sup>;
- *the right of other persons to proper respect for their freedom of thought, conscience and religion*<sup>3</sup>;
- *the right to respect for the religious doctrines and beliefs of others*<sup>4</sup>;
- *the right to respect for the religious feelings of believers*<sup>5</sup>;
- *rights of other persons whose religious feelings are offended*<sup>6</sup>;
- *right to protection of a group of persons from defamation on account of their membership in a specific religion*.<sup>7</sup>

3. Moreover, "the prevention of disorder" clause, within the meaning of Art. 10(2) of the ECHR, also includes *safeguarding religious peace, as well as protecting religious feelings*.<sup>8</sup>

### 1.2. When interference with freedom of expression is necessary for protection of religious feelings

4. Determining whether the interference with freedom of expression was "necessary in a democratic society" requires the Court to determine whether:

- 1) it corresponded to a "pressing social need",
- 2) it was proportionate to the legitimate aim pursued (the potential impact of the medium of expression concerned is an important factor while considering if the interference was proportional), and
- 3) the reasons given by the national authorities to justify it are relevant and sufficient.

In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are given a certain margin of appreciation.<sup>9</sup>

### 1.3. Everyone's duty to avoid gratuitously offensive expressions towards religion

5. In assessing the "necessity" of interference in the freedom of expression, the Court takes into account the obligations incumbent on individuals enjoying the rights guaranteed in Art. 10 of the Convention. In accordance with the settled case-law of the ECHR, Art. 10 of the Convention includes an obligation to possibly avoid expressions that are **gratuitously offensive** to others and have profane character and thus cause an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>10</sup>

<sup>1</sup> Judgment of 20 September 1994, *Otto-Preminger-Institut v. Austria*, §48.

<sup>2</sup> Judgment of 25 November 1996, *Wingrove v. United Kingdom*, §48.

<sup>3</sup> Judgment of 13 September 2005, *I.A. v. Turkey*, §27; *Otto-Preminger-Institut*, cited above, §55; judgment of 2 May 2006, *Aydın Tatlav v. Turkey*, §26; judgment of 25 October 2018, *E. S. v. Austria*, §46.

<sup>4</sup> Judgment of 10 July 2003, *Murphy v. Ireland*, §§63-64.

<sup>5</sup> Commission's decision of 18 April 1997, *Dubowska and Skap v. Poland*.

<sup>6</sup> Judgment of 31 October 2006, *Klein v. Slovakia*, §45.

<sup>7</sup> Judgment of 31 January 2006, *Giniewski v. France*, §§40-42.

<sup>8</sup> *E. S. v. Austria*, cited above, §41.

<sup>9</sup> Judgment of 7 December 1976, *Handyside v. United Kingdom*, §48; *The Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979; *Giniewski v. France*, cited above, §§43-54; *Aydın Tatlav v. Turkey*, cited above §§ 22-27; judgment of 4 December 2003, *Gündüz v. Turkey*, §38; *Murphy v. Ireland*, cited above, §§65-69; *Wingrove*, cited above, §53.

<sup>10</sup> Judgment of 30 January 2018, *Sekmadienis ltd. v. Lithuania*, §74; *E. S. v. Austria*, cited above, §43; judgment of 29 April 2008, *Kutlular v. Turkey*, §47; *Otto Preminger Institut*, cited above, §49; *Wingrove*, cited above, §52; *Murphy*, cited above, §65 and 67; *I.A. v. Turkey*, cited above, §24; *Gündüz v. Turkey*, cited above, §37; *Giniewski*, cited above, §43; *Aydın Tatlav v. Turkey*, cited above, §23; *Klein v. Slovakia*, cited above, §45.

6. Due to the above, a state **may legitimately consider** it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with respect for the freedom of thought, conscience and religion of others.<sup>11</sup>

7. Article 10 of the ECHR may also involve an obligation to avoid expressions which are not on their face offensive, but 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, the Court found that a total ban on the broadcast of religious advertisement may be justified in a society which is particularly sensitive towards religion and potential proselytizing.<sup>12</sup>

#### **1.4. Right to protection of religious feelings as self-dependent right**

8. The European Convention on Human Rights does not in any part refer explicitly to the protection of religious feelings. So far, the Court still has not acknowledged it as a self-dependent right, on which many applicants would be able to rely, but rather has granted 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.<sup>13</sup> However, as the Court itself has repeatedly emphasized, the Convention is a living instrument that must be interpreted in light of present-day conditions.<sup>14</sup> Interpreting Art. 9 of the Convention, it is necessary to take into account the contemporary growth of hate crimes against Christians e.g. by public desecration of religious objects such as cemeteries, churches, crosses, Bible or Holy Communion.<sup>15</sup>

9. Therefore, consideration of the case-law of the ECtHR, Article 9, interpreted systematically in conjunction with Article 10 paragraph 2 of the Convention and in light of growing anti-Christian hate speech, allows presumption that freedom of religion includes the right to the protection of religious feelings. This issue will be addressed more thoroughly in paragraph 21.

#### **2. Negative obligations of the state under Article 9 of the ECHR**

10. The negative obligations of the state under Article 9 of the ECHR primarily comprise two elements. Firstly, the state should avoid interfering with the autonomy of citizens choosing their beliefs, particularly it should refrain from interfering in decisions regarding change or abandonment of religion and manifestation of religion or non-religious belief. Secondly, the state should refrain from favouring a particular religion or non-religious worldview.

11. In the case-law of the ECHR as well as in legal academic literature it is emphasised that Article 9 of the ECHR requires the state to remain neutral in religious and philosophical issues; which means that national authorities should not favour any particular religion or non-religious beliefs.<sup>16</sup>

12. The state should therefore avoid supporting either side of the public debate, but rather try to act as a guardian of peaceful and respectful exchange of views. It is particularly important for the state to avoid supporting actions (verbal and symbolic expression) of vulgar and primitive nature. Even if such activities are not banned and are within the limits of

<sup>11</sup> See, in the context of Article 9, *Kokkinakis v. Greece*, judgment of 25 May 1993; *Otto-Preminger-Institut*, cited above, §47; *I.A. v. Turkey*, §26; *Aydin Tatlav v. Turkey*, §25; *E. S. v. Austria*, §45.

<sup>12</sup> *Murphy v. Ireland*, §§63-64, 72-74, 77.

<sup>13</sup> C. Evans, *Freedom of Religion. Under the European Convention on Human Rights*, Oxford University Press 2001, p. 69-71.

<sup>14</sup> Judgment of 25 April 1978, *Tyrer v. United Kingdom*, §31. See also judgments of: 8 July 2004, *Vo v. France* (Grand Chamber), §82; 10 February 2009, *Sergey Zolotukhin v. Russia* (Grand Chamber), §80.

<sup>15</sup> Organization for Security and Co-operation in Europe report, *Hate crime against Christians*, 31 July 2018, [https://www.osce.org/files/f/documents/4/a/389468\\_2.pdf](https://www.osce.org/files/f/documents/4/a/389468_2.pdf) (access: 22 June 2020).

<sup>16</sup> B. Vermeulen, M. van Roosmalen, *Freedom of Thought, Conscience and Religion*, in: P. van Dijk, A. van Rijn, L. Zwaak (ed.), *Theory and Practice of the European Convention on Human Rights*, Cambridge-Antwerp-Portland 2018, p.753-755.

freedom of expression, the state should promote high culture of discussion based on merits, rather than inflame the dispute by encouraging offensive behaviours.

13. When it comes to religion, the state should at least refrain from supporting offensive expressions against beliefs of any of its religious or non-religious citizens.

### 3. Positive obligations of the State under Article 9 of the ECHR

14. As a rule, the state bears responsibility only for acts and omissions of its agents and authorities that directly led to violation of the rights and freedoms guaranteed by the Convention. Actually, the Convention is generally recognized as not working in horizontal relations, i.e. between private entities. However, the Court created the concept of so-called **indirect horizontal effect of the Convention**. In certain situations the state may be obliged to secure rights and freedoms in relations between individuals by:

- i) setting up adequate legislative framework (criminal or other types of legislation),
- ii) effective law enforcement,
- iii) operational measures,
- iv) effective legal remedies.<sup>17</sup>

15. The Court has already acknowledged the indirect horizontal effect of the right to respect for family and private life (Article 8 of the Convention).<sup>18</sup> The question whether Article 9 of the Convention implies a positive obligation of the state to protect religious freedom remains disputable. The obligation of the state regarding protection of religious freedom was mostly limited to its negative aspect, i.e. abstaining from interference.<sup>19</sup> However, in the opinion of the *Ordo Juris* Institute, it is not only possible, but also desirable, to at least consider use of indirect horizontal effect concept in interpretation of Article 9 of the ECHR.

16. First of all, as Parliamentary Assembly truthfully states, *in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs – but – provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion. Public debate, dialogue and improved communication skills of religious groups and the media should be used in order to lower sensitivity when it exceeds reasonable levels.*<sup>20</sup> In turn, according to OSCE, *governments have a central role to play in ensuring access to justice for victims of anti-Christian hate crimes. This includes identification and recording of hate crimes as such; assessment of a victim's needs; or robust support mechanisms for victims, through governmental or non-governmental institutions.*<sup>21</sup>

17. Secondly, even the ECHR acknowledges that, in certain circumstances, Member States are not only entitled, but also obliged to take positive actions in order to guarantee peaceful co-existence of believers of all religions and persons not belonging to a religious group by ensuring mutual tolerance.<sup>22</sup>

<sup>17</sup> J. Gerards, *General Principles of the European Convention on Human Rights*, Cambridge 2019, p. 144-147.

<sup>18</sup> Judgment of the Grand Chamber of 5 September 2017, *Bărbulescu v. Romania*, §114-115 and 120; judgment of 4 December 2003, *M.C. v. Bulgaria*, §150,153 and 166. Cf. judgment of 26 March 1986, *X and Y v. the Netherlands*, §27.

<sup>19</sup> C. Evans, *Freedom of Religion. Under the European Convention on Human Rights*, Oxford University Press 2001, p. 69.

<sup>20</sup> §5 of PACE recommendation no. 1805 (2007) of 29 June 2007 on blasphemy, religious insults and hate speech against persons on grounds of their religion.

<sup>21</sup> Organization for Security and Co-operation in Europe report, *Hate crime against Christians*, 31 July 2018, [https://www.osce.org/files/f/documents/4/a/389468\\_2.pdf](https://www.osce.org/files/f/documents/4/a/389468_2.pdf) (access: 22 June 2020).

<sup>22</sup> Judgments of: 10 November 2005 (Grand Chamber), *Leyla Şahin v. Turkey*, §§107-108; 1 July 2014 (Grand Chamber), *S.A.S. v. France*, §123-128; *E.S. v. Austria*, §44.

18. It can certainly be said that, in accordance with the *communis opinio* on case-law and the academic literature, states have the positive obligation under Article 9 of the Convention to protect religious peace.<sup>23</sup>

19. Religious peace means the conflict-free coexistence of all religions and non-denominational persons by safeguarding mutual tolerance. Its main aim is to prevent statements and behaviour that could provoke the adherents of a particular religion to act aggressively and lead to the outbreak of conflict between different social groups. As is rightly pointed out in the literature: no people can reasonably expect their religious and philosophical beliefs to be excluded from all criticism. However, **criticism can turn into a sequence of insults devoid of merits**, or someone may take 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.<sup>24</sup> Religious peace may also be endangered by particularly intensified verbal aggression against believers e.g. from persons who knowingly and publicly unhallow objects of religious worship such as Quran, Bible or Holy Communion.

20. Thirdly, the use of a primitive and hurtful language, which does not add any merit to public debate, can in some cases be considered an abuse of the right to freedom of expression. As is well-known, the abuse clause was provided for in Art. 17 of the European Convention on Human Rights and constitutes a basis for rejecting an application by the European Court of Human Rights as inadmissible, without conducting a detailed test of proportionality of interference with rights or freedoms that have been abused. In practice to date, however, the application of this provision has been limited to four narrowly defined categories of expression: 1) promoting totalitarian ideologies; 2) expressing support for historical revisionism regarding the Holocaust and other German crimes committed during World War II; 3) of a racist, anti-Semitic, Islamophobic nature, etc.; 4) inciting to violence<sup>25</sup>. In the opinion of the *Ordo Iuris* Institute, anti-Christian hate speech falls within third category, because obviously Christians should be protected from aggressive verbal attacks any less than Muslims and Jews. Moreover, due to the concern for the quality of public debate, it is worth extending this catalogue to vulgar, primitive and hurtful statements, devoid of any substantive value, aimed only at humiliation of certain group of people such as believers. The purpose of Article 10 of the Convention is to allow a real exchange of ideas, not to protect primitive, fourth rate expressions which, not having the qualities required to present serious arguments, has resorted to provocation and gratuitous insults to attract attention of the society, without making any contribution to the exchange of ideas worthy of the name.<sup>26</sup>

21. Fourthly, religious feelings constitute an integral part of the believer's *forum internum* of religious freedom. Faith in the Divine Being, worshipping a sacred object, figure, image or book, is based on the **feelings** of the believer such as respect, awe and sometimes even love. Religious feelings are also closely related to the believer's *forum externum* of freedom of religion, 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 is reasonable to claim 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).<sup>27</sup> Consequently, the greater the acquiescence in primitive and hurtful expressions towards believers in the public space, the less people are going to exercise their positive freedom of religion. It is well

<sup>23</sup> Judgements of the Grand Chamber of the ECHR of: 10 November 2005, *Leyla Şahin v. Turkey*, §§ 107-108; 1 July 2014, *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; C. Evans, *Freedom of Religion. Under the European Convention on Human Rights*, Oxford University Press 2001, p. 71-72; R. Uitz, *Freedom of religion in European constitutional and international case law*, Strasburg 2007, p. 149 and p. 153-154.

<sup>24</sup> W. Brzozowski, in: W. Brzozowski, A. Krzywoń, M. Wiącek, *Prawa człowieka*, Warsaw 2019, p. 217.

<sup>25</sup> A. Buyse, *Prohibition of the Abuse of Rights*, in: P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (ed.), *Theory and Practice of the European Convention on Human Rights*, Cambridge-Antwerp-Portland 2018, p. 1090-1092.

<sup>26</sup> Cf. separate opinion of the judges Franz Matscher and Thór Vilhjálmsson to judgement of the ECtHR of 1 July 1997 in case: *Oberschlick v. Austria* (no. 2).

<sup>27</sup> 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.

known that verbal aggression may cause great psychological damage: lower self-concept, frustration, anxiety, anger, resentment, embarrassment. Most believers would rather abandon their religious convictions than endure constant humiliation because of their beliefs, especially when they are in minority. In other words, particular methods of opposing or criticising religion may inhibit those who hold religious beliefs from exercising freedom to express them. **That is a kind of chilling effect in horizontal relations, which can possibly transform freedom of religion into illusion.** In such cases state is not only allowed, but also obliged to intervene – take preventive and, if necessary, repressive measures in order to guarantee rights of believers under Article 9.

#### 4. Criteria of assessment of gratuitously offensive expressions

22. Obviously freedom of religion does not imply the right to be protected against any criticism. As is known, freedom of expression encompasses not only information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population.<sup>28</sup> For this reason the state is allowed to restrict only such expressions that are offensive in a gratuitous manner.

23. In the light of the ECHR's position in the *Otto-Preminger*, *Wingrove*, *I.A.* and *E.S.* cases cited above, as gratuitously offensive should be treated expressions which humiliate believers and disallow them to engage in any kind of polemics. 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 are merely aimed to humiliate believers. Pornographic or erotic expressions in regard of religion cannot be subject to any debate based on merits, because there is no room for polemics or exchange of arguments.

24. In the light of the ECHR's position in the cases *Handyside*, *Prager*, *Standard Verlagsgesellschaft*, *Klein*, *Giniowski* cited above, even controversial 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.

#### 5. European countries perspective with particular reference to Spain and Poland

25. Protection of religious feelings and beliefs by means of criminal law instruments is widespread in Europe - such provisions exist in many European countries, such as: Andorra<sup>29</sup>, Belgium<sup>30</sup>, Luxembourg<sup>31</sup>, Liechtenstein<sup>32</sup>, Bulgaria<sup>33</sup>, Moldova<sup>34</sup>, Russia<sup>35</sup>, Ukraine<sup>36</sup>, Turkey<sup>37</sup>, Greece<sup>38</sup>, Cyprus<sup>39</sup>, Finland<sup>40</sup>, Germany<sup>41</sup>, Austria<sup>42</sup>, Switzerland<sup>43</sup>, United Kingdom<sup>44</sup>, Spain<sup>45</sup>, Portugal<sup>46</sup>, Italy<sup>47</sup> and Poland<sup>48</sup>. Criminalization of anti-religion expressions (which includes not only disparagement of religious feelings as in e.g. Spain or Poland, but also stirring religious hatred as in e.g. UK) serves to

<sup>28</sup> Judgment of 7 December 1976, *Handyside v. United Kingdom*, §49. Quoted ever since in numerous cases e.g. judgments of 20 May 1999, *Bladet Tromsø and Stensaa v. Norway*, §62; 22 April 2010, *Fatullayev v. Azerbaijan*, §86; 8 November 2016, *Szanyi v. Hungary*, §38; 7 March 2017, *Döner and Others v. Turkey*, §98; 27 February 2018, *Sinkova v. Ukraine*, §104.

<sup>29</sup> Art. 339 of Andorran Criminal Code of 2005.

<sup>30</sup> Art. 144-145 of Belgian Criminal Code of 1867.

<sup>31</sup> Art. 144-145 of Luxembourg's Criminal Code of 1879.

<sup>32</sup> Section 188 of Liechtenstein's Criminal Code of 1987.

<sup>33</sup> Art. 164 (2) and Art. 165 of Bulgarian Criminal Code of 1968.

<sup>34</sup> Art. 54 (5) of Moldova's Code on Misdemeanours of 2008.

<sup>35</sup> Article 148 of Russian Criminal Code of 1996.

<sup>36</sup> Art. 161 and 179 of the Criminal Code of Ukraine of 2001.

<sup>37</sup> Articles 125 and 216(3) of Turkish Criminal Code of 2004.

<sup>38</sup> Art. 198-199 of Greek Criminal Code of 1951.

<sup>39</sup> Art. 141-142 of Cyprian Criminal Code of 1959.

<sup>40</sup> Chapter 10, Sections 1-4 of Finland's Criminal Code of 1894.

<sup>41</sup> §166 of German Criminal Code of 1871.

<sup>42</sup> § 188 of Austrian Criminal Code of 1974.

<sup>43</sup> Article 261 of Swiss Criminal Code of 1937.

<sup>44</sup> Section 29B of the Public Order Act 1986.

<sup>45</sup> Article 525 (1) of Spanish Criminal Code of 1995.

<sup>46</sup> Art. 251-252 of Portuguese Criminal Code of 1982.

<sup>47</sup> Articles 403 and 723 of Italian Criminal Code of 1930.

<sup>48</sup> Art. 196 of Polish Criminal Code of 1997.

protect values that are significant to public interest: social peace, freedom of religion, prevention of anti-religious hate speech, promotion of public debate on religion in a civilized manner. It must be highlighted that penal law prohibits only **insults**, not **criticism** against religion – the main difference lies in nature of particular expression: whether it is primitive, vulgar and aimed only at humiliating of believers or in any way productive (even if it is controversial) i.e. it contributes to public debate.

26. Due to the limited framework of these observations, the *Ordo Iuris* Institute will focus on discussing only selected jurisdictions - Spain (which is of particular importance in the present case) and Poland (about which the intervener has the widest knowledge).

### 5.1. Spanish regulation

27. In the Spanish Penal Code the offense of religious feelings is penalized in Article 525 (1), which provides:

"1. A fine of [equivalent to the salary for a period of] eight to twelve months will be incurred by those who, in offending the feelings of members of a religious denomination in public, verbally, in writing or by any type of document, mock their dogmas, beliefs, rituals or ceremonies, as well as maliciously disturbs, also in public, those who profess or practice [their religion].

2. The same penalty shall be imposed on those who publicly mock the word or in writing of persons not practicing any religion or non-believers at all. "<sup>49</sup>

Therefore, the provision introduces two independent offenses: offence of religious feelings and public mockery of non-practitioners and non-believers.

28. In Spanish legal academic literature it is explained that «mocking» means mockery, ridicule or insults<sup>50</sup>, which should be characterized by some persistence<sup>51</sup>. It is also pointed out that it should take place in public, i.e. be perceptible for a specific group of people who are passive.<sup>52</sup> The wording "who, for offending the feelings of members of a religious religion" (*para ofender los sentimientos de los miembros de una confesión religiosa*) clearly indicates that this crime is of a formal nature – to establish whether a crime has been committed it is not necessary to prove that a specific believer actually felt offended.<sup>53</sup> This is a significant difference from the separate offense of insult.<sup>54</sup>

29. In Spanish legal academic literature is also unanimously pointed out that the perpetrator's *animus inuivandi* is necessary for the existence of the crime<sup>55</sup> - acting directly to offend the religious feelings of members of a community of followers of a given religion.<sup>56</sup> It is not important, however, whether anyone has been offended - if the perpetrator acted directly to offend religious feelings and his/her actions were objectively offensive, then the crime arises even despite the apparent "lack of victims".<sup>57</sup>

### 5.2. Polish regulation

<sup>49</sup> 1. *Incurrirán en la pena de multa de ocho a doce meses los que, para ofender los sentimientos de los miembros de una confesión religiosa, hagan públicamente, de palabra, por escrito o mediante cualquier tipo de documento, escarnio de sus dogmas, creencias, ritos o ceremonias, o vejen, también públicamente, a quienes los profesan o practican.* 2. *En las mismas penas incurrirán los que hagan públicamente escarnio, de palabra o por escrito, de quienes no profesan religión o creencia alguna.*

<sup>50</sup> A. Liñán García, *La protección del factor religioso en el nuevo Código Penal español (Ley Orgánica 10/1995, de 23 de noviembre)*, REDC 58 (2001), p. 827; Colina Oquendo, commentary to Art. 525, [in:] L. Rodríguez Ramos (ed.), *Código Penal Comentado y con Jurisprudencia*, Madrid 2009, p. 1383.

<sup>51</sup> O. Pérez de la Fuente, *Libertad de expresión y escarnio de los sentimientos religiosos. Enfoques sobre la ponderación en algunos casos judiciales españoles*, „Revista Telemática de Filosofía del Derecho” 18 (2015), p. 133.

<sup>52</sup> O. Pérez de la Fuente, *op. cit.*, p. 133; A. Liñán García, *op. cit.*, p. 827.

<sup>53</sup> O. Pérez de la Fuente, *op. cit.*, p. 133; D. González Uriel, *La religión y su juridificación (Especial consideración de la colisión entre la libertad religiosa y la libertad de expresión)*, „Boletín del Ministerio de Justicia” 2/209/LXXII (2018), p. 12.

<sup>54</sup> D. González Uriel, *op. cit.*, p. 12-13.

<sup>55</sup> A. Liñán García, *op. cit.*, p. 827; P. Colina Oquendo, *op. cit.*, p. 1383; O. Pérez de la Fuente, *op. cit.*, p. 133.

<sup>56</sup> A. Liñán García, *op. cit.*, p. 827.

<sup>57</sup> O. Pérez de la Fuente, *op. cit.*, p. 133.



30. 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). The right to the protection of religious feelings is understood in Poland as a fully-developed right and indispensable element of freedom of religion.<sup>58</sup> That was done for the first time by the full panel ruling of the Constitutional Tribunal in its resolution of 2 March 1993, W 3/93, which stated that freedom of conscience and religion includes "the right to the protection of religious feelings"<sup>59</sup>. 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.

31. That view was confirmed in the full panel ruling of 7 June 1994, K 17/93 and in the relatively recent judgment of 6 October 2015, SK 54/13. In its judgment K 17/93, 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 admissible.

32. In the academic constitutional literature the freedom of religion is associated not only with negative obligations (duty not to interfere with this freedom), but also with positive obligations, such as the obligation to ensure the conditions for exercising this freedom in a manner chosen by authorized persons and within the limits set by law.<sup>60</sup>

#### **Subject of protection in Art. 196 of Penal Code**

33. According to Art. 196 of Penal Code, "Anyone who disparages other people's religious feelings by publicly abusing an object of religious worship or a place intended for the public performance of religious rites shall be subject to a fine, restriction of liberty or imprisonment of up to 2 years." In the Polish criminal law doctrine, it is generally uniformly accepted that the subject of protection of Art. 196 of the Penal Code is the right to protection (freedom) of religious feelings.<sup>61</sup> Some authors argue that the object of the protection is not mainly related to the religious feelings, but religious freedom in the internal aspect, namely, the freedom to choose a particular religion and freedom from behaviours that insult objects or places with which the content of a given religion is closely related.<sup>62</sup> The protection extends to feelings concerning all religions: Christianity (Catholicism, Protestantism, Orthodox), Islam, Judaism, Buddhism, etc.

34. The jurisprudence of the Polish Constitutional Tribunal assumes that the right to respect for religious feelings is an element of freedom of conscience and religion, which may justify the restriction of freedom of speech, consisting, for example, of prohibiting public statements aimed at mocking or humiliating believers of a particular religion.<sup>63</sup>

#### **Features of a criminal offence**

35. In light of the Polish jurisprudence regarding criminal law, Art. 196 of the Penal Code specifies criminal liability only for offensive, vulgar and mocking opinions about a particular religion. The disparagement of religious feelings means

<sup>58</sup> M. Olszówka, comment no. 55 to Art. 53, in: M. Safjan, L. Bosek (ed.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warsaw 2016, e-version available at [Legalis.pl](http://legalis.pl).

<sup>59</sup> 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.

<sup>60</sup> M. Florczak-Wątor, comment no. 4 to rt. 53, in: P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2019, e-version available at [LEX.pl](http://lex.pl).

<sup>61</sup> J. Wojciechowska, *Obraza uczuć religijnych*, in: *System Prawa Karnego*, vol. 10, (ed. J. Wąrylewski), p. 559; J. Sobczak, remark no. 12 to Art. 196, in: R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warsaw 2018, e-version available at [Legalis](http://legalis.pl); W. Wróbel, remark no. 1 to Art. 196, in: W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, Warsaw 2017, e-version available at [LEX.pl](http://lex.pl); J. Piórkowska-Flieger, remark no. 2 to Art. 196, in: T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, e-version available at [LEX.pl](http://lex.pl); N. Kłaczyńska, remark no. 2 to Art. 196, in: J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warsaw 2014, e-version available at [LEX.pl](http://lex.pl); S. Hypś, remark no. 1 to Art. 196, in: A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2019, e-version available at [Legalis.pl](http://legalis.pl).

<sup>62</sup> W. Janyga remark no. 4 to Art. 196, in: M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część szczególna. Komentarz do artykułów 117–221. Tom I*, Warsaw 2017, e-version available at [Legalis.pl](http://legalis.pl).

<sup>63</sup> Resolution of the Constitutional Tribunal (full bench) of 2 March 1994, W 3/93; judgment of the Constitutional Tribunal (full bench) of 7 June 1994, K 17/93.

behaviours that are at the same time offensive to the followers of a given religion (in the subjective sense) and offensive from the point of view of the average recipient's sensitivity in a given cultural context (in the objective sense). It should be emphasised that subjective feelings of believers do not provide a sufficient basis for the commission of a crime. The actions of the perpetrator must also be proven to be potentially objectively insulting and offensive.<sup>64</sup>

36. The case law of the Supreme Court draws attention to the need to take account of social, cultural and moral norms and generally accepted assessment criteria. Disparagement occurs when a person's behaviour turns out to be disrespectful to another party and degrades another person's dignity by using "invectives, insults, epithets, abusive words or gestures."<sup>65</sup>

37. Religious feelings can be insulted through verbal or written statements, as well as by a gesture or picture.<sup>66</sup>

#### **Possible intention**

38. To be subject to criminal liability under Art. 196 of the Penal Code, a person must directly intend to offend religious feelings (acting with so-called direct intention) or a person must publicly perform such actions with no direct intention to disparage anyone's feelings, but the offending party knows that the actions might be offensive and might cause disparagement (acting with so-called possible intention). Thus, either he or she wants to offend other people with such behaviour, or at least admits that the behaviour may be offensive to some people.<sup>67</sup> This position is also taken by the Polish Supreme Court.<sup>68</sup>

#### **Public requirement**

39. As already mentioned above, the criminal liability for insulting religious feelings applies only to acts committed in public, i.e., in public places or by means of social media (press, television, radio, social networks, online forums, etc.). In the Polish case law and criminal law doctrine, it is assumed that the public character of the offense under Art. 196 of the Criminal Code means that insulting an object of religious worship can be noticed by a large or an undefined number of people.<sup>69</sup> Speaking insulting words during a social meeting in a private apartment would not therefore fall under Art. 196.<sup>70</sup>

#### **Object of religious worship**

40. Under Art. 196 of the Penal Code, objects of religious worship include: God, understood personally or in a different way, as well as a thing, symbol, image, specific words or names which, according to the doctrine of a given religious community, are worshipped and sacred, worthy of the highest respect and adoration.<sup>71</sup> Some religions (such as Christianity, Judaism and Islam) also treat so-called holy books as objects of worship (the Bible, the Koran).<sup>72</sup> The notion of "the holy books" should be understood narrowly – they should not be identified with other books with religious content (theological

<sup>64</sup> J. Sobczak, remark no. 13 to Art. 196, in: R.A. Stefański (ed.), *Kodeks karny. Komentarz*. Warsaw 2018, e-version available at Legalis.pl; S. Hyps, remark no. 4 to Art. 196, in: A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2019, e-version available at Legalis.pl; W. Wróbel, remark no. 5 to Art. 196, in: W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a*, Warsaw 2017, e-version available at LEX.pl; M. Filar, M. Berent, remark no. 8 to Art. 196, in: M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, e-version available at LEX.pl; W. Janyga, remark no. 13 to Art. 196, in: M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część szczególna. Komentarz do artykułów 117-221. Tom I*, Warsaw 2017, e-version available at Legalis.pl; N. Kłaczyńska, remark no. 6 to Art. 196, in: J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warsaw 2014, e-version available at LEX.pl; P. Kozłowska-Kalisz, remark no. 3 to Art. 196, in: M. Mozgawa (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX 2018, e-version available at LEX.pl.

<sup>65</sup> Cf. judgment of the Supreme Court of 17 February 1993, III KRN 24/92.

<sup>66</sup> W. Wróbel, remark no. 4 to Art. 196, in: W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a*, Warsaw 2017, e-version available at LEX.pl.

<sup>67</sup> I. Zgoliński, remark no. 4 to Art. 196, in: V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, Warsaw 2018, e-version available at LEX.pl.

<sup>68</sup> Resolution of the Supreme Court of 29 October 2012, I KZP 12/12.

<sup>69</sup> Decision of the Supreme Court of 5 March 2015, III KK 274/14; I. Zgoliński, remark no. 2 to Art. 196, in: V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, Warsaw 2018, e-version available at LEX.pl; M. Filar, M. Berent, remark no. 9 to Art. 196, in: M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, e-version available at LEX.pl; A. Marek, remark no. 2 to Art. 196, in: A. Marek, *Kodeks karny. Komentarz*, Warsaw 2010, e-version available at LEX.pl.

<sup>70</sup> N. Kłaczyńska, remark no. 6 to Art. 196, in: J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warsaw 2014, e-version available at LEX.pl.

<sup>71</sup> W. Wróbel, remark no. 6 to Art. 196, in: W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a*, Warsaw 2017, e-version available at LEX.pl.

<sup>72</sup> W. Wróbel, remark no. 7 to Art. 196, in: W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a*, Warsaw 2017, e-version available at LEX.pl; N. Kłaczyńska, remark no. 8 to Art. 196, in: J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warsaw 2014, e-version available at LEX.pl; S. Hyps, remark no. 8 to Art. 196, in: A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2019, e-version available at Legalis.pl.

treatises, religious journalism, interviews with clergy). The main difference is that only the holy books are considered by believers to come from God.

## Conclusions

41. In view of the above, the following conclusions should be made:

a) The Article 9 must be interpreted in light of present-day conditions, including growing anti-Christ hate crimes, and in conjunction with the Article 10 paragraph 2 of the Convention. It gives therefore the entitlement to presume that freedom of religion includes the right to the protection of religious feelings, which are inherently connected with *forum internum* of the freedom of religion.

b) The state as a neutral arbiter should avoid participation in the public debate on religious matters on either side, but rather try to act as a guardian of peaceful and respectful exchange of views. It is particularly important for the state to avoid supporting actions (verbal and symbolic expression) of a vulgar and primitive nature. Even if such activities are not banned and are within the limits of freedom of expression, the state should promote a high culture of discussion, rather than inflame the dispute.

c) According to the *communis opinio* of jurisprudence and the academic literature of European law, states have a positive obligation under Article 9 of the Convention to protect religious peace. 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. Religious peace may also be endangered by particularly intensified verbal aggression against believers e.g. unhallowing of objects of religious worship such as Quran, Bible or Holy Communion.

d) Hate speech against religion, i.e. primitive and hurtful language, which does not add any merit to public debate, should be considered as an abuse of the right to freedom of expression (Article 17 of ECHR).

e) Most believers would rather abandon their religious convictions than endure constant humiliation because of their beliefs, especially when they are in minority. In other words, particular methods of opposing or criticising religion may inhibit those who hold religious beliefs from exercising freedom to express them. That is a kind of chilling effect in horizontal relations, which can possibly transform freedom of religion into illusion. In such cases the state is not only allowed, but also obliged to intervene – take preventive and, if necessary, repressive measures in order to protect believers from religiophobic hate speech i.e. gratuitously offensive expressions aimed only to humiliate a certain group of citizens.

f) Criminal legislation protecting religious beliefs is not aimed at criticism against religion, but at religious hatred: obviously vulgar, primitive and hurtful expressions which do not contribute to public debate in any positive way.

g) As gratuitously offensive should be treated expressions which humiliate believers and disallow them to engage in any kind of polemics. 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 are merely aimed at humiliating believers. Pornographic or erotic expressions in regard of religion cannot be subject to any debate based on merits, because there is no room for polemics or exchange of arguments. The purpose of Article 10 of the Convention is to allow a real exchange of ideas, not to protect primitive, fourth rate expressions which, not having the qualities required to present serious arguments, has resorted to provocation and gratuitous insults to attract attention of the society, without making any contribution to an exchange of ideas worthy of the name.