

Conflict between freedom of expression and freedom of religion. The ECHR case of *Rabczewska v. Poland*, 8257/13. An approving commentary

Konflikt między wolnością słowa a wolnością religijną. Sprawa *Rabczewska v. Polska*, skarga nr 8257/13. Glosa aprobująca

Конфликт между свободой слова и свободой вероисповедания. Дело *Рабчевска против Польши*, жалоба № 8257/13. Одобрительный научный комментарий

Конфлікт між свободою слова та релігійною свободою. Справа *Рабчевська проти Польщі*, заява № 8257/13. Схвалюючий коментар

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Summary: The ECHR statement that the domestic courts did not assess whether the applicant's statements had been capable of arousing legitimate indignation or whether they were of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland is of key importance considering the judgment under review. ECHR rightly ruled that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements in question do not incite to hatred or religious intolerance. In the absence of a legal definition, it is difficult to assess the social harmfulness of an act. The Court has recognised the issue that has existed for years in Polish criminal law – that the protection of religious feelings is ineffective and inadequate to the degree of the insulting nature of the criminal act. Poland violated Article 10 of the Convention, as the national courts failed to make a fair assessment of the social harmfulness of the act.

Key words: blasphemy, religious feelings, freedom of speech, religious freedom, freedom of expression

Streszczenie: Ocena dokonana przez ETPC, w myśl której sądy krajowe nie oceniły, czy wypowiedzi skarżącej mogły wzbudzić uzasadnione oburzenie lub czy miały one charakter podżegania do nienawiści albo w inny sposób zakłócania pokoju i tolerancji religijnej w Polsce, ma kluczowe znaczenie w kontekście głosowanego wyroku. ETPC słusznie orzekł, że grupa religijna musi tolerować zaprzeczanie przez innych jej przekonaniom religijnym, a nawet propagowanie przez innych doktryn wrogich ich wierze, o ile kwestionowane wypowiedzi nie nawołują do nienawiści lub nietolerancji religijnej. Wobec braku definicji prawnej trudno ocenić społeczną szkodliwość czynu. Trybunał stwierdził, że ochrona uczuć religijnych jest nieskuteczna i nieadekwatna do stopnia zniewagi czynu zabronionego, tym samym uznał istniejący od lat w polskim prawie karnym problem ze stopniowaniem społecznej szkodliwości czynu. Polska naruszyła art. 10 Konwencji, gdyż sądy krajowe nie dokonały rzetelnej oceny społecznej szkodliwości czynu.

Słowa kluczowe: bluźnierstwo, uczucia religijne, wolność słowa, wolność religijna

Резюме: Оценка Европейским судом по правам человека (ЕСПЧ) того, что национальные суды не оценили, могли ли высказывания заявителя вызвать обоснованное негодование, носили ли они характер подстрекательства к ненависти или иным образом нарушали мир и религиозную толерантность в Польше, имеет решающее значение в контексте рассматриваемого постановления. ЕСПЧ справедливо постановил, что религиозная группа должна терпимо относиться к отрицанию другими лицами ее религиозных

убеждений и даже к распространению другими лицами доктрин, враждебных ее вере, если оспариваемые высказывания не возбуждают ненависть или религиозную нетолерантность. В силу отсутствия юридического определения, трудно оценить общественную опасность деяния. Суд пришел к выводу, что защита религиозных чувств неэффективна и неадекватна степени оскорбления запрещенного деяния, тем самым признав существующую в течение многих лет в польском уголовном праве проблему с градацией общественной опасности деяния. Польша нарушила статью 10 Конвенции, поскольку национальные суды не смогли дать справедливую оценку общественной опасности деяния.

Ключевые слова: богохульство, религиозные чувства, свобода слова, свобода вероисповедания

Резюме: Оцінка ЄСПЛ, згідно якої національні суди не оцінили, чи могли заяви заявника викликати обґрунтоване обурення або чи мали вони характер підбурювання до ненависті чи іншим чином порушували мир і релігійну терпимість у Польщі, має вирішальне значення в контексті рішення, що переглядається. ЄСПЛ справедливо постановив, що релігійна група повинна терпимо ставитися до заперечення іншими її релігійних переконань і навіть до поширення іншими доктрин, ворожих їхній вірі, якщо оскаржувані висловлювання не розпалюють релігійну ненависть або брак толерантності. За відсутності легального визначення важко оцінити суспільну шкоду діяння. Суд визнав, що захист релігійних почуттів є неефективним і неадекватним ступеню правопорушення забороненого діяння, тим самим визнавши проблему, яка роками існувала в польському кримінальному праві з градацією суспільної шкідливості діяння. Польща порушила статтю 10 Конвенції, оскільки національні суди не дали справедливої оцінки суспільної шкідливості діяння.

Ключові слова: богохульство, релігійні почуття, свобода слова, релігійна свобода

The Court reiterates that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance (§ 57).

In particular, the domestic courts did not assess whether the applicant's statements had been capable of arousing justified indignation or whether they were of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland (§ 60).

Introduction

This gloss is of an approving nature and will analyse the judgment of the European Court of Human Rights (hereinafter: the Court) of 15 September 2022 (case of *Rabczewska v. Poland*, application no. 257/13).¹ The following part of the judgment under review will answer the question of whether the judgment implies the need to decriminalise the offence of insulting religious feelings.

¹ [https://hudoc.echr.coe.int/fre#{%22languageisocode%22:\[%22ENG%22\],%22ap-pno%22:\[%228257/13%22\],%22documentcollectionid%22:\[%22CHAMBER%22\],%22itemid%22:\[%22001-219102%22\]}](https://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22ENG%22],%22ap-pno%22:[%228257/13%22],%22documentcollectionid%22:[%22CHAMBER%22],%22itemid%22:[%22001-219102%22]}) [access: 10.07.2023].

1. Circumstances of the case

It was clear from the factual findings of the first-instance (Regional Court for Warsaw-Mokotów) and second-instance court (District Court in Warsaw) that the defendant (Dorota Rabczewska), through her public utterance, referred in a demeaning and insulting manner to objects of religious reverence – the figures considered to be the authors of the Holy Scriptures, and indirectly also to the content of the Book. By her unambiguously insulting statement concerning the authors of Scripture, the defendant also indirectly insulted the Book itself (in an immaterial sense), which is an object of the highest reverence not only in the Christian religions, but – as far as the Old Testament is concerned – also in Judaism. The defendant, through her controversial words, intended to hurt the religious feelings of others. The District Court held that the characterisation of biblical content as the fruit of the drug- and alcohol-induced state its creators were in – which is indisputably evident from the content of the interview – could not be regarded as an appropriate and acceptable criticism of the object of religious reverence, a presentation of one's own views, or a joke. The defendant committed this act with direct intent; she was fully aware of her criminal activity. Despite assurances that she did not intend to offend anyone, the defendant believes that such a context and manner of expression is within the scope of freedom of speech, it is an expression of her sincerity and she will act similarly in the future. As a mitigating circumstance, the Court considered the defendant's prior clean criminal record, the fact that she had reconciled with the victim, and that she had expressed remorse. An appeal against the above ruling was lodged by the defendant's attorney. In considering the above appeal, the District Court had no doubt that the defendant's conduct was of an offensive, taunting nature and fulfilled all the elements of an offence under Article 196 of the Criminal Code. The Regional Court only changed the date on which the criminal act was committed, establishing that the offence against religious feelings occurred on 24 July 2009.

Dorota Rabczewska by virtue of the rulings by the District Court in Warsaw of 16 January 2012 (III K 416/10) and by the Regional Court in Warsaw of 18 June 2012 (X Ka 496/12), was legally found guilty of committing the offence charged in the indictment under Article 196 of the Criminal Code, i.e. that in an interview with the online edition of *Dziennik.pl* she publicly insulted the religious feelings of Ryszard N. and Stanisław K. by insulting the object of religious worship in the persons of the authors of the Holy Bible. The defendant was fined a total of PLN 5000 (€ 1000).

Dorota Rabczewska then filed a constitutional complaint requesting that the Constitutional Court declare Article 196 of the Criminal Code as unconstitutional as it prevents the free expression of views on objects of religious worship; it restricts

this right in a disproportionate manner; it does not protect persons who do not profess a religion; and it does not meet the requirements of the specificity of law. The representatives of the Prosecutor General and the Sejm (Lower Chamber of the Parliament) moved to consider the provision of Article 196 of the Criminal Code as compliant with the Constitution.²

The Constitutional Tribunal, in its judgment of 6 October 2015 (SK 54/13), stated that Article 196 of the Criminal Code, in so far as it criminalises insulting the religious feelings of others by publicly insulting an object of religious worship, punishable by a fine: is consistent with Article 42 item 1 in connection with Article 2 of the Constitution of the Republic of Poland; it is not incompatible with Article 53 item 1 in connection with Article 54 item 1 of the Constitution; it is in line with Article 54 item 1 in connection with Article 31 item 3 of the Constitution.³ Consequently, Dorota Rabczewska (hereinafter: the applicant) lodged an application with the Court, registered under no. 8257/13. Polish doctrine notes the fact that the Constitutional Tribunal's judgment is compliant with current European standards.⁴

2. The enjoyment of freedom of speech

In the case in question, the Tribunal rightly noted that the context of the applicant's statements was not aimed at provoking religious hatred or intolerance. The domestic courts found that the words uttered by the applicant were offensive and caused an outrage among religious believers. From the perspective of protecting

² In the constitutional complaint, Dorota Rabczewska indicated the following constitutional review patterns: Article 53 Section 1 of the Constitution in connection with Article 54 Section 1 of the Constitution to the extent that it interferes with the freedom of conscience of people who do not profess religion by preventing them from freely expressing their views on objects of religious worship; Article 54 Section 1 of the Constitution in connection with Article 31 Section 3 of the Constitution in connection with Article 2 of the Constitution to the extent that it restricts the freedom of expression in a disproportionate way, significantly exceeding the scope necessary in a democratic state ruled by law, violating the essence of this freedom; Article 25 Section 2 of the Constitution in connection with Article 32 Section 1 of the Constitution to the extent that it protects believers against offending their religious feelings, but it does not protect people who do not profess religion and their worldview and philosophical beliefs are violated by other people; Article 42 Section 1 of the Constitution in connection with Article 2 of the Constitution to the extent that it does not meet the requirements of specificity and certainty of criminal law provisions.

³ OTK ZU 2015, no. 9A, item 142; Journal of Laws [Dziennik Ustaw] of 2015 item 1632.

⁴ M. Skwarzyński, *Orzeczenie TK w sprawie sygn. akt SK 54/13 w przedmiocie przestępstwa obrazy uczuć religijnych w świetle standardów strasburskich*, Przegląd Prawa Wyznaniowego 2016, vol. 8, pp. 115–128.

freedom of expression, it is the purpose of the utterance and its nature that is most significant, not just the specific statements, even if they are offensive. The Tribunal analysed the applicant's words in terms of their actual impact on Polish society. The Tribunal considered the type of rights infringed upon and the consequences of the singer's words.

Religious feelings are protected by Polish law. The offence under Article 196 of the Criminal Code is compliant with the Polish Constitution. However, all this does not mean that freedom of speech cannot be violated. The applicant did not use hate speech nor did she incite or even suggest that people should abandon their faith or attack believers. Her words were shocking and controversial, but simultaneously did not carry a message of religious intolerance. It is one thing to incite to hatred or religious intolerance and another to express extremely foolish views that cannot be perceived by others as an attack on religion. This subtle difference was noted by the Tribunal, while assessing the rank of the singer's words in the context of her right to freedom of speech. It is difficult to view the applicant's statement as intended to provoke a doctrinal dispute or undermine core truths of the faith. The style and nature of the applicant's speech would seem to support considering it as a typical exercise of free speech not subject to punishment.

The applicant did not intend to provoke any public debate on religious issues, nor did she wish to undermine religious doctrine. Instead, it was apparent from the context of her statements that she was driven by emotions and aimed at gaining popularity. This, of course, does not release her from responsibility for her words. The context of her statement clearly indicates that the purpose of her interview was not religious in nature. The controversial issues in the interview were incidental. The applicant has never taken part in public debates concerning religion, the role of faith in human life, etc. The few words uttered in the interview cannot obscure the fact of the interview's true intention. The Tribunal conducted a fair evaluation of the applicant's statements and found that her words did not provoke a religious fight nor were they directed at religious believers in order to provoke hatred. In fact, the interview was intended to promote herself and her artistic work rather than provoking a religious fight.

Certainly, the Tribunal has drawn attention to the existing issue in Polish law of classifying statements insulting religious feelings as hate speech. Public expression of one's negative or critical views concerning the object of religious reverence are outside the scope of the criminalisation under Article 196 of the Criminal Code, provided that it does not take the form of or contain objectively insulting content. It is accepted in doctrine that public criticism of a particular religious community, its functioning or the views it proclaims, including questioning the existence of the

object of their worship, shall not be considered an insult to religious feelings, provided that the criticism is not insulting by its nature.⁵

Freedom of expression, referred to in Article 54 Section 1 of the Constitution, enjoys full liberty with regard to behaviour that does not fulfil the elements of the offence of insulting religious feelings (Article 196 of the Criminal Code), even when we are dealing with criticism or a negative opinion, which, however, does not take the form of insult, and also when culpable guilt cannot be attributed to the perpetrator. Offence to religious feelings is a subjective category dependent on the recipient's individual sensibility. The Court rightly noted that the applicant's statement did not include "actions containing elements of violence, or elements susceptible of stirring up or justifying violence, hatred or intolerance of believers." This raises the question of when and what actions should be considered iconoclastic. The Court triggered discussions concerning the interplay between hate speech and speech offending religious feelings. The Court found that the applicant's state of mind and lack of unequivocal intent to offend the religious feelings of others and, most importantly, the fact that her public words had provoked a reaction from only two people in the country should be seen as a violation of freedom of speech.⁶

One should not lose sight of the need for the Polish courts to apply a proportionality test. The crux of the matter comes down to the question of whether offending the religious feelings of two people in the entire country is sufficient to consider the application of criminal sanctions as necessary. The circumstances of this case show that the lack of objective criteria as to when an action is an inadmissible critique, negative opinion, insult, or disparagement is of great importance here. It cannot be that the criminal law system uses Article 196 of the Criminal Code to criminalise the absurdity, stupidity and infantile behaviour of the perpetrator. Freedom of speech in the context of a democratic and pluralist state also means the freedom to express one's ignorance without inhibitions. A democratic society is entitled to protection against the insults to its values, in this case fundamental (religious) values, but this protection must relate to situations in which religious freedom is genuinely

⁵ S. Hypś, in: *Kodeks karny. Komentarz*, eds. A. Grześkowiak, K. Wiak, Warszawa 2015, p. 977.

⁶ See § 63: "[...] the Court observes that the applicant was convicted in criminal proceedings originating from a bill of indictment lodged by a public prosecutor upon a complaint by two individuals. The criminal proceedings were thus continued even after the applicant had reached a friendly settlement with one of the complainants. The applicant was sentenced to a fine equivalent to 1,160 euros, fifty times the minimum. The Court cannot, therefore, conclude that the criminal sanction imposed on the applicant was insignificant."

threatened. An insult therefore consists of behaviour which constitutes, in the light of customary and cultural norms, an expression of contempt.⁷

In practice, freedom of expression will be jeopardised whenever national courts inadequately justify the application of a criminal sanction against a person who has offended the religious feelings of others. The very fact that legislative attempts have been made to change the content of Article 196 of the Criminal Code demonstrates the need for deeper reflection on the criminal law protection of religious feelings.⁸ Any doubt in a criminal trial must be interpreted in favour of the defendant (*in dubio mitius*), including those concerning attempts at legislative amendment of the offence under Article 196 of the Criminal Code.⁹ The national courts were not up to the task.

3. The subjectivity of religious feelings

The Constitutional Tribunal, in its judgment of 6 October 2015, stated that the object of protection, referred to in Article 196 of the Criminal Code, is the right to protection of religious feelings, arising from the freedom of religion guaranteed by Article 53 of the Polish Constitution.¹⁰ In Poland, the scope of protection under Article 196 of the Criminal Code provides comprehensive protection of religious feelings, adequate to the constitutional rank of this value. In practice, the construction of the offence under Article 196 of the Criminal Code focuses only on the legal

⁷ See more: N. Kłączyńska, in: *Kodeks karny. Część szczególna. Komentarz*, ed. J. Giezek, Warszawa 2014, p. 510.

⁸ See more in: J. Strzelecki, *Kryminalizacja obrazy uczuć religijnych – analiza krytyczna*, in: *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara*, vol. 1, eds. A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Leciak, Toruń 2012, pp. 488–489.

⁹ Two draft amendments to the Criminal Code concerning the crime of offending religious feelings were submitted to the Lower Chamber of the Parliament. The solutions proposed in the draft of 24 January 2012 (Paper no. 240) aimed at removing the provision of Article 196 of the Criminal Code and, consequently, to decriminalise offences against religious feelings, and the draft of 20 April 2012 (Paper no. 383) assumed the modification of the features of this type of offence, combined with the reduction of the statutory threat and the introduction of a private prosecution procedure. The draft of 11 April 2022 provided for the introduction of two offences into the Criminal Code – publicly insulting or mocking a church or other religious association with a regulated legal situation, its dogmas or rituals, as well as publicly insulting an object of religious worship or a place intended for the public performance of religious rites.

¹⁰ Judgment of the Constitutional Tribunal of 6 October 2015, SK 54/13, OTK 2015, no. 9A, item 142.

protection of believers.¹¹ There should be no doubt that religious feelings are inseparably linked precisely to a person's faith – not to other aspects of their emotional life and inner convictions.¹² In contrast, the protection under this provision does not extend to the feelings of non-religious people arising from their non-religious affiliation.¹³

Polish courts have not sufficiently taken into account the type and nature of the rights infringed upon, the extent of the damage caused or threatened, the manner and circumstances in which the act was committed, as well as the motivation of the perpetrator, the type of precautionary rules violated and the degree of their violation. The literature rightly notes that Article 115 § 2 of the Criminal Code does not formally define the essence of social harmfulness, but merely indicates which elements are to be taken into account in its assessment.¹⁴

Criminal law doctrine indicates various criteria that can be used to assess the degree of social harm. However, the examples of negligible social harm provided in the literature indicate that the assessment of behaviour is often extra-legal in nature.¹⁵ The negligible nature of this type of offence is also evident from a comparison of the number of convictions for an offence under Article 196 of the Criminal Code in relation to the overall scale of offences and represents between 0,000002 and 0,000032% (average 0,000017%) of criminal cases per year (2005–2011). In these few cases, the courts have most often imposed a custodial sentence with probation.¹⁶

It is truly difficult to conclude that the social harmfulness of the act is greater than negligible in a situation where the justice system is involved in prosecuting the offence of insulting religious feelings after two people have filed a complaint. One of the elements to be examined by the court when analysing social harm is the extent of the harm caused. The lack of clear guidance on how to grade social harm in itself violates Article 10 of the convention, because, after all, it can be a tool to restrict freedom of expression. There is a lack of research on how the victim's own

¹¹ See W. Wróbel, in: *Kodeks karny. Część szczególna*, vol. 2, ed. A. Zoll, Kraków 2006, p. 643; in different manner M. Filar, M. Berent, in: *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2016, p. 1204.

¹² See Z. Gądzik, *Przestępstwa przeciwko wolności sumienia i wyznania. Efektywne Prawo*, 2021, <https://efektywne-prawo.org.pl/wp-content/uploads/2021/12/Z.-Gadzik-przestepstwa-wobec-wolnosci-sumienia-i-wyznania4.pdf> [access: 10.07.2023].

¹³ Z. Migros, *Z problematyki przestępstw przeciwko wolności sumienia i wyznania*, Zeszyty Naukowe ASW 1978, no. 22, p. 100.

¹⁴ R. Zawłocki, *Pojęcie i funkcje społecznej szkodliwości czynu w prawie karnym*, Warszawa 2007, pp. 156–157.

¹⁵ Ibidem, pp. 219–268, 290; W. Janyga, *Przestępstwo obrazy uczuć religijnych w polskim prawie karnym w świetle współczesnego pojmowania wolności sumienia i wyznania*, Warszawa 2010, p. 277.

¹⁶ M. Poniatowski, *Analiza art. 196 Kodeksu karnego z perspektywy 15 lat jego obowiązywania*, Roczniki Nauk Prawnych 2013, vol. 23, no. 3, pp. 30–50.

subjective belief arising from a sense of offence to their religious feelings is investigated in practice. The average member of a religious group is therefore taken as a model.¹⁷ This is an imperfect criterion.¹⁸

An important issue of the judgment under review is the recognition that the social harmfulness of an act is gradable and that assessment of its degree falls to the court. In order to speak of an offence, the social harm must be greater than negligible (*nullum crimen sine damno sociali magis quam minimo*, as expressed in Article 1 § 2 of the Criminal Code). The 1997 Polish Criminal Code adopted a comprehensive concept, all the while without defining the concept of social harm. The condition for any discontinuation of proceedings is to prove that the degree of social harm was negligible under Article 17 § 1 point 3 of the Code of Criminal Procedure. The impact of the degree of social harm is relevant not only in the case of the institution of conditional suspension of proceedings, but also when ruling on the application of a penal measure instead of a penalty (Articles 53 § 1, 59, 66 of the Criminal Code).

4. The lack of need to decriminalise the offence of insulting religious feelings in Polish criminal law

Answering the main question posed in this gloss, it must be stated that the *Rabczewska v. Poland* ruling does not imply the necessity to decriminalise the offence of insulting religious feelings. The breach of the Convention standard in this case should be seen as a necessity to make the essential legislative changes, given the considerations mentioned in this gloss.

Above all, the shaping of criminal liability without considering the criteria for assessing the degree of social harm caused by the act deprived the applicant of the right to form her own opinions. Each of the grounds of social harm is characterised by its legal significance, and therefore the omission of any of them and the arbitrary assessment of any of them must result in a breach of the Convention standard. In the case of *Rabczewska v. Poland*, the Tribunal recognised this issue by stating that “the examined under examination did not amount to an improper or abusive attack

¹⁷ R. Krajewski, *Ochrona wolności sumienia i wyznania w świetle Kodeksu karnego z 1997 r.*, Przegląd Sądowy 2008, no. 3, p. 72; E. Kruczoń, *Przestępstwo obrazy uczuć religijnych*, Prokuratura i Prawo 2011, no. 2, p. 44.

¹⁸ M. Poniatowski, *Analiza art. 196...*, pp. 30, 36, 57.

on an object of religious veneration likely to incite religious intolerance or violating the spirit of tolerance, which is one of the bases of a democratic society” (§ 64).

The complexity of understanding and interpreting elements of the offence of insulting religious feelings leads to the conclusion that the applicant’s conduct was reprehensible and insulting, but did not merit a criminal law response from the State. The Tribunal concludes that “in the instant case the domestic courts failed to comprehensively assess the wider context of the applicant’s statements and carefully balance her right to freedom of expression with the rights of others to have their religious feelings protected and religious peace preserved in the society” (§ 64).

Drawing on the well-known distinction between justification and excuse (exculpation) for the purposes of criminal law, it is worth noting that a justified action is not criminal, whereas an excused defendant has committed a criminal act but is not subject to punishment. In view of the complex circumstances of the entire incident, it must be considered that the applicant’s conduct did not substantially violate social mores. In particular, the fact that the applicant was judged as for a criminal act despite her state of mind and her lack of clear intent to offend the religious feelings of others and, most importantly, the fact that her public words caused a reaction from only two people in the country should be seen as a violation of freedom of expression.

Constitutional Tribunal Judge Andrzej Wróbel stated that “In a democratic state governed by the rule of law, belonging to a European culture marked by, among others, values such as tolerance and pluralism of worldviews, the protection of the religious feelings of others against being offended by insulting and public and intentional behaviour towards an object of religious worship need not lead to the threat of imprisonment, in particular for up to 2 years.”

In the Author’s opinion, the arguments presented by the Court should provide guidance to the Polish State in adapting the current provision of Article 196 of the Criminal Code to balance two constitutional rights. After all, the mere threat of a custodial sentence, irrespective of sentencing practice, can also be seen as an excessively harsh measure. At this point, it should be pointed out that the causal conduct described in Article 196 of the Criminal Code, in order to be socially harmful, must aim to influence society in such a way as to cause social danger. The issue in terms of the correct application of Article 196 of the Criminal Code is to grasp the moment from which it can be said that the act in question was socially harmful to a degree greater than negligible.

In finding a violation of Article 10 of the Convention, the Court in fact recognised the problem associated with the assessment of the social harmfulness of an act in Polish criminal law. In Rabczewska’s case, the Polish government failed to show that the applicant’s behaviour had a domino effect and depreciated religious

values to such an extent that state intervention would be required. First of all, Poland violated Article 10 of the Convention, as the national courts failed to make a fair assessment of the social harmfulness of the act.

According to Thomaso Virgili, one of the main problematic aspects is the subjectivity of religious feelings: “Along with ‘justified indignation,’ ‘religious feelings’ is a vague phrase that is hard to define and inevitably linked to the ethos and sensibility of the individual or of that (allegedly) prevalent in the group. Who should speak for all believers? ‘Religious peace’ is yet another indefinite concept, as the ECtHR has not anchored it to the more objective criterion of public order. And if it did so, as the concurring opinion proposes, it would de facto create an incentive for organised groups to react violently against expression they do not like, for the louder the unrest, the more solid the legal grounds for censorship.”¹⁹

Conclusions

It must be stated that the Court’s judgment does not imply the necessity to decriminalise the offence under Article 196 of the Criminal Code. Violation of Article 10 of the Convention in this case should trigger a discussion on the due protection of freedom of expression by introducing objective criteria for the gradation of the social harmfulness of the act of offending religious feelings and perhaps also its fundamental revision.

The judgment is also an important point of reference for Christians in Poland to become more resolutely involved in defending the values close to them by using the available legal tools to this end, otherwise national courts will not be able to establish the social harmfulness of the act.

In practice, the Court has recognised the issue that has existed for years in Polish criminal law – that the protection of religious feelings is ineffective and inadequate to the degree of the insulting nature of the criminal act. On the one hand, the Court’s judgment should represent a watershed moment in terms of modifying the content of the elements of this offence and, on the other hand, national courts must implement a system that would objectively assess the gradation of the social harmfulness of iconoclastic acts.

¹⁹ T. Virgili, *Rabczewska v. Poland and Blasphemy before the ECtHR: A Neverending Story of Inconsistency*, Strasbourg Observers, 2022, <https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/> [access: 10.07.2023].

A significant problem noticed by the ECHR in the *Rabczewska v Poland* case is the lack of gradation of the act's social harmfulness. Not all behaviour (even socially negative and offensive) should result in criminal liability. If the criminal law system were designed to punish stupidity and all its manifestations, it would lead to absurdity. In practice, the criminal sanction is intended to have an educative dimension and is the ultimate response of the state to a citizen's behaviour. In *Rabczewska's* case, her punishment had the opposite effect to that intended, lending credibility to her frivolous statement, which can objectively be considered ridiculous. According to the Supreme Court, "the assessment of the degree of social harmfulness of a specific conduct should be an overall assessment, taking into account the circumstances listed in Article 115 § 2 of the Criminal Code, and not the sum or derivative of partial assessments;" therefore, national courts must "assess the harmfulness of an act comprehensively, and not in terms of its individual factors."²⁰

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²⁰ Judgment of the Supreme Court of 27 July 2021, III KK 346/20, LEX no. 3305210.

Conflict between freedom of expression and freedom of religion. The ECHR case of *Rabczewska v. Poland*

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