

COMPARATIVE LAW ASPECTS OF CRIMINALISATION OF ACTS AGAINST FREEDOM OF RELIGION IN POLISH AND GERMAN CRIMINAL LAW

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ABSTRACT

The criminal law protection of freedom of belief, understood here also as freedom of religion or freedom of conscience, is not only safeguarded by acts of international law but is also enshrined in the constitutions of most European states. Consequently, national authorities are obliged to ensure the peaceful coexistence of different faiths and religions. This article aims to provide an overview of the provisions of the Polish and German Criminal Codes concerning religious freedom and to compare the scope of their protection in light of the basic laws of these countries.

Keywords: freedom, religion, belief, Polish criminal law, German criminal law

Freedom of religion¹ is one of the fundamental human rights. It is an objective and primary value, i.e. independent of the legislator. The state cannot grant it to anyone nor take it away. The fundamental scope of this freedom is subject to international and constitutional protection, as well as to protection under domestic law, including criminal law.

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¹ For the purposes of this article, the terms ‘freedom of faith’, ‘freedom of religion’, and ‘freedom of conscience’ are regarded as semantically equivalent.



INTERNATIONAL REGULATIONS

Along with freedom of thought and freedom of conscience, freedom of faith is one of the three freedoms protected under Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms,² according to which everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change one's faith or belief, and the freedom, either alone or in community with others, in public or private, to manifest one's religion or faith in worship, teaching, practice and observance. Paragraph 2 of this provision establishes that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Freedom of faith is rightly identified with freedom of religion,³ and there is no basis for differentiating between the normative meanings of these two concepts.

The cited provision of the Convention encompasses a broad spectrum of religious, philosophical, ideological and ethical beliefs.⁴ Freedom of thought, conscience and faith forms the foundation of a 'democratic society', protecting both the identity and way of life of believers, atheists, agnostics, sceptics and those who are religiously indifferent.⁵ This freedom is exercised not only by individuals but also by institutional entities, i.e. religious communities.⁶

Freedom of faith includes the right to manifest one's religion privately and publicly, including through worship, teaching, practice and ritual acts.⁷ It further follows from the case law of the European Court of Human Rights that Article 9(1) ECHR ensures the possibility of preaching and converting to one's religion and imposes an obligation on the state to respect and secure the autonomous existence of religious communities, i.e. the coexistence of individuals and groups characterised by different identities and

² Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos 3, 5 and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284), hereinafter referred to as 'the Convention' or 'the ECHR'.

³ M. Olszówka, in: Bosek L., Safjan M. (eds), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa, 2016, margin number 43; M. Rozner, 'Prawo do wolności religijnej w Europejskiej Konwencji Praw Człowieka z 1950 r.', *Studia z Prawa Wyznaniowego*, 2002, No. 5, pp. 111 et seq.; K. Kacka, 'Geneza i źródła wolności religii w europejskiej przestrzeni politycznej i prawnej', *Seminare. Poszukiwania naukowe*, 2013, No. 34, p. 164.

⁴ J. Szymanek, 'Konstytucjonalizacja prawa do wolności myśli, sumienia, religii i przekonań', *Studia z Prawa Wyznaniowego*, 2007, No. 10, pp. 90–94.

⁵ Judgment of the European Court of Human Rights (ECtHR) of 25 May 1993, *Kokkinakis v Greece*, Application No. 14307/88, para. 31.

⁶ M.A. Nowicki (ed.), *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa, 2021, p. 877.

⁷ Judgment of the ECtHR of 31 July 2009, *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, Application No. 40825/98, para. 61; judgment of the ECtHR, *Kokkinakis v Greece*, para. 31; judgment of the ECtHR of 1 July 2014, *S.A.S. v France*, Application No. 43835/11, para. 125; judgment of the ECtHR of 27 June 2000, *Cha'are Shalom Ve Tsedek v France*, Application No. 27417/95, para. 73.

adherence to different beliefs.⁸ This means that the state is obliged to guarantee the peaceful coexistence of all religions, as well as of those who do not identify with any religion.⁹ To ensure the effective possibility of manifesting religious beliefs, the state must provide judicial protection for religious communities, their members and their property.¹⁰ The fulfilment of this obligation may involve taking measures against certain forms of conduct, including conduct involving the dissemination of information and ideas deemed incompatible with respect for the freedom of thought, conscience and religion of others.¹¹ In this context, it is further emphasised in the literature that Article 9(1) ECHR protects acts of worship and devotion through which religion or belief is practised in generally recognised forms. Therefore, the state is obliged to provide legal instruments guaranteeing that prayers and other religious practices can be conducted without disturbance.¹²

Under Article 9(2) of the Convention, the freedom to manifest one's religion or faith may be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. It therefore follows from the wording of this provision that freedom of religion itself cannot be restricted, but only the manner in which it is manifested. State interference should thus occur when, in a multi-faith society, there is a need to guarantee undisturbed religious practice for all.¹³ Such restrictions must therefore have statutory status and be necessary in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.

It is important to note that, in practice, freedom of religion frequently comes into conflict with freedom of expression. According to Article 10 ECHR, everyone has the right to freedom of expression. This right includes the freedom to hold opinions as well as to receive and impart information and ideas without interference by public authorities and regardless of national frontiers (paragraph 1). The exercise of these freedoms, which entails duties and responsibilities, may be subject to such formalities, conditions, restrictions and penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of confidential information, or for maintaining the authority and impartiality of the judiciary (paragraph 2). In this context, the question arises as to

⁸ Judgment of the ECtHR, *Kokkinakis v Greece*, para. 31; judgment of the ECtHR of 9 July 2013, *Sindicatul 'Păstorul cel Bun' v Romania*, Application No. 2330/09, paras. 136 and 165; judgment of the ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, para. 79; M.A. Nowicki (ed.), *Wokół Konwencji...*, op. cit., pp. 877–878.

⁹ Judgment of the ECtHR of 21 February 2008, *Alexandridis v Greece*, Application No. 19516/06, paras. 31–32; judgment of the ECtHR of 18 February 1999, *Buscarini and Others v San Marino*, Application No. 24645/94, para. 34.

¹⁰ M.A. Nowicki (ed.), *Wokół Konwencji...*, op. cit., p. 886.

¹¹ Judgment of the ECtHR of 25 October 2018, *E.S. v Austria*, Application No. 38450/12, para. 45.

¹² M.A. Nowicki (ed.), *Wokół Konwencji...*, op. cit., pp. 877, 881, 886.

¹³ Judgment of the ECtHR, *Kokkinakis v Greece*, para. 33.

which right, in the event of a conflict, should prevail. This issue has been addressed by the European Court of Human Rights, which has held that in such situations it is necessary to determine, firstly, whether the interference with freedom of expression is prescribed by law, i.e. whether the limiting provisions have at least statutory or equivalent status; secondly, whether there is a legitimate aim for the interference with freedom of expression, namely the protection of the rights of others, including those safeguarded under Article 9 ECHR; and thirdly, whether the restriction is necessary in a democratic society. The third criterion is closely linked to the concept of the so-called margin of appreciation, that is, the state's discretion to determine what is 'necessary in a democratic society'.¹⁴ In the absence of a uniform European standard for the protection of religious belief, national authorities enjoy a wide margin of appreciation as to which legal measures may be deemed necessary in a democratic society.¹⁵ The concept of the margin of appreciation makes it possible to take into account the specific features of a given society and the cultural context in which a particular legal solution operates.¹⁶ This does not, however, imply that the state may arbitrarily refrain from protecting religious belief. In addition to enjoying a wide margin of appreciation, the state has a positive obligation to ensure the peaceful coexistence of individuals from diverse religious backgrounds, as well as of those who profess no religion.¹⁷

According to P. Sarnecki, all modern constitutions of democratic states (even if only formally) take into account the individual freedom discussed here.¹⁸

POLISH CONSTITUTIONAL REGULATIONS

The Polish Constitution,¹⁹ as stated in its solemn preamble, recognises that the Polish Nation comprises citizens who both believe in God and those who do not share this faith. The right to freedom of conscience and religion, on the other hand, is directly regulated in Article 53 of the Constitution. According to its wording, everyone is guaranteed freedom of conscience and religion (paragraph 1). Freedom of religion encompasses the right to profess or adopt a religion through personal choice, as well as to express that religion – individually or collectively, publicly or privately – through worship, prayer, participation in ceremonies, performance

¹⁴ Judgment of the ECtHR of 20 September 1994, *Otto-Preminger-Institut v Austria*, Application No. 13470/87, paras. 42–50; judgment of the ECtHR of 25 November 1996, *Wingrove v the United Kingdom*, Application No. 17419/90, paras. 36 et seq.; K. Król, 'Granice wolności artystycznej – zarys problematyki', *Santander Art and Culture Law Review*, 2018, Vol. 4, No. 1, p. 175.

¹⁵ Judgment of the ECtHR, *E.S. v Austria*, para. 44; judgment of the ECtHR, *Otto-Preminger-Institut v Austria*, paras. 50 and 55; judgment of the ECtHR, *Wingrove v the United Kingdom*, para. 58.

¹⁶ L. Garlicki (ed.), in: *Konwencja o ochronie praw człowieka i podstawowych wolności. Tom I. Komentarz do artykułów 1–18*, Warszawa, 2010, p. 552.

¹⁷ Judgment of the ECtHR, *E.S. v Austria*, para. 44.

¹⁸ P. Sarnecki, in: Garlicki L., Zubik M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2016.

¹⁹ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended), hereinafter referred to as 'the Constitution'.

of rites and teaching. Freedom of religion also includes the possession of temples and other places of worship according to the needs of believers, and the right of individuals to receive religious assistance wherever they may be (paragraph 2). Parents have the right to provide their children with moral and religious upbringing and teaching in accordance with their faith (paragraph 3). The religion of a legally recognised church or other religious association may be taught in schools without infringing the freedom of conscience and religion of others (paragraph 4). The freedom to manifest one's religion may be restricted only by law and only when necessary to protect state security, public order, health, morals, or the freedoms and rights of others (paragraph 5). No one may be compelled to participate, or not to participate, in religious practices (paragraph 6). No one may be required by public authorities to disclose his or her worldview, religious beliefs or faith (paragraph 7).

The protection of freedom of conscience and religion is a constitutional principle, which derives not only from the content of Article 53 but also from Article 25 of the Constitution. The latter is a constitutional principle governing the relationship between the state and religious structures, ensuring the equality of churches and other religious associations. These freedoms are exercised primarily in the private sphere, but may also be externalised in public spaces.²⁰

In the light of Article 53 of the Constitution, the state is the obliged entity, which must guarantee individuals the possibility of freely exercising their freedom of conscience and religion. The duties of the state have not only a negative dimension (the prohibition of interference with freedom) but also a positive one (the obligation to protect this freedom when it is infringed by other individuals). By contrast, other private entities are required to respect freedom of conscience and religion.

The essence of freedom lies in the individual's ability to act within certain boundaries set by the state. The necessity of such boundaries stems from the fact that freedom is generally not absolute and may be restricted, *inter alia*, to enable other individuals to exercise the same freedom simultaneously and independently.²¹

Freedom of conscience and religion is, above all, freedom from interference by the state and its bodies, which, in turn, have positive duties corresponding to this freedom, consisting primarily in ensuring freedom of expression in public life.

Freedom of belief gives rise not only to negative duties on the part of public authorities, such as the duty not to infringe this freedom, but also to positive duties consisting in ensuring conditions that allow this freedom to be exercised freely, in a manner chosen by the authorised person, yet within the limits prescribed by law. According to the Polish Constitution, freedom of conscience and freedom to profess a religion are absolute; only the freedom to manifest them may be restricted.²²

²⁰ P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el., 2021; P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa, 2000, p. 73; P. Sarnecki, in: Garlicki L., Zubik M. (eds), *Konstytucja...*, op. cit., pp. 277–278.

²¹ P. Tuleja (ed.), *Konstytucja...*, op. cit.; P. Sarnecki, in: Garlicki L., Zubik M. (eds), *Konstytucja...*, op. cit., pp. 278–279.

²² P. Tuleja (ed.), *Konstytucja...*, op. cit.

POLISH CRIMINAL LAW REGULATIONS

In order to ensure the fulfilment of the state's obligations regarding the free exercise of freedom of religion, the Polish legislator introduced into the Penal Code²³ provisions criminalising offences against freedom of conscience and religion. Chapter XXIV of the Penal Code includes three types of acts, namely religious discrimination (Article 194 PC), malicious obstruction of religious acts (Article 195 PC) and insult to religious feelings (Article 196 PC).

According to Article 194 PC, any individual who restricts another person's rights on the grounds of their religious affiliation or lack thereof may be subject to a fine, restriction of liberty, or imprisonment for up to two years.

Adopting a particular worldview, which includes adherence to or rejection of a particular religion, as well as participation in activities manifesting this choice, is of great importance not only for each person's sense of identity but also for the sense of coherence between the values they profess and those to which their behaviour corresponds.²⁴

This provision concerns discrimination based on belonging to a particular religion or, conversely, on not belonging to any religion. It protects the right to hold one's own beliefs as well as the right to remain irreligious, i.e. to maintain a particular religious worldview. In this context, the content of the provision corresponds closely to the constitutional regulations, defining as the protected good the freedom to hold opinions in the internal sphere of human life and to externalise them in accordance with one's conscience within the limits of the law. It also expresses the principle of equality, as set out in Article 32(2) of the Constitution, according to which everyone has the same right to participate in social life, regardless of whether they belong to a particular religious group or not.²⁵ The causative act of this offence will therefore be any act – whether action or omission – that results in obstructing or preventing the exercise of the injured party's rights on account of his or her religious affiliation or irreligiosity. A crucial aspect of religious discrimination is the specific intention and motivation of the perpetrator, manifested in the fact that the reason for actions detrimental to the injured party, which restrict their rights, is based on their religious affiliation or lack thereof.²⁶ 'Restricting a person's rights' involves imposing limitations on the broadest possible range of subjective rights.²⁷ Thus, criminalised discrimination may occur in both private and public relations, in the process of enacting and applying the law.²⁸

At this point, it is worth recalling the well-established view that the presence of culturally rooted religious symbols in public life (for example, their display in public

²³ Act of 6 June 1997, Penal Code (Journal of Laws of 2025, item 383), hereinafter referred to as 'PC'.

²⁴ Judgment of the Supreme Court of 3 March 2022, II CSK 1/13, LEX No. 1388592.

²⁵ S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 1034.

²⁶ Ibidem, p. 1035.

²⁷ A. Marek, *Kodeks karny. Komentarz*, Warszawa, 2010, pp. 445–446.

²⁸ N. Kłaczynska, *Dyskryminacja religijna a prawnokarna ochrona wolności sumienia i wyznania*, Wrocław, 2005, pp. 208–219.

authority buildings) cannot be regarded as a manifestation of the discrimination in question.²⁹

The offence set out in Article 194 PC is classified as a consequential crime and will be deemed to have been committed only if the restriction of rights has actually occurred. If, on the other hand, there is merely an attempt to restrict these rights, where the perpetrator acted with the intention of committing a criminal act and directed his or her conduct towards committing it, but the act did not occur, this constitutes an attempt.³⁰

Article 195 PC criminalises conduct consisting of maliciously obstructing the public performance of a religious act of a legally recognised church or other religious association and provides for a penalty of a fine, restriction of liberty or imprisonment for up to two years. The same penalty applies to anyone who maliciously obstructs a funeral, ceremony or funeral rites.

This provision aims to ensure protection of the right to the public performance of religious worship, as well as protection of the honour of the deceased and the feelings of participants in funeral ceremonies and rites. It is therefore concerned with guaranteeing the freedom to publicly perform acts of religious worship, i.e. to externalise one's faith through worship, participation in rites, prayer, practice and teaching, while at the same time safeguarding the significance of funeral rites, irrespective of their nature. The conduct of the perpetrator in this case consists in disturbing the solemnity or the atmosphere of reflection, or in obstructing or preventing the performance of, disrupting, or participating in religious activities. However, the provision requires that such conduct be motivated by a specific intention on the part of the perpetrator, namely a malicious character. This means acting with the purpose of annoying the victims, showing contempt or disregard for the religious act being performed, and behaving with intransigence and persistence.³¹ The same applies to interference with the performance of funeral rites.

The meaning of 'malice' as set out in Article 195 PC raises the greatest interpretative doubts and, at the same time, poses considerable evidentiary difficulties in criminal proceedings.

This 'malice' represents a specific motivation of the perpetrator, which, as the doctrine rightly indicates, may manifest itself in a desire to irritate the participants of the act or funeral, to humiliate them, distress them, offend them, insult them, or expose them to ridicule. It may also stem from a wish to profane or detract from a religious act, motivated by the conviction that the religion being obstructed contradicts the perpetrator's value system, resulting in a lack of respect and contempt for its rituals.³²

In any case, it is necessary to ask whether, in the light of the aforementioned constitutional provisions, the absence of a 'malicious' motivation on the part of the

²⁹ W. Janyga, in: Królikowski M., Zawłocki R., *Kodeks karny. Część szczególna. Tom I. Komentarz do art. 117–221*, Warszawa, 2023, p. 584; judgment of the Court of Appeal in Łódź of 28 October 1998, I ACa 612/98, *OSP*, 1999, No. 10, item 177.

³⁰ J. Sobczak, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, Legalis.

³¹ S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks karny...*, op. cit., p. 1038.

³² J. Sobczak, in: Stefański R.A. (ed.), *Kodeks karny...*, op. cit.

perpetrator justifies interference during the public performance of a religious act. Other motives for such conduct may be equally reprehensible, yet under the current legal framework, they do not give rise to criminal liability, despite violating the guarantee of the unhindered manifestation of religious beliefs. Following this line of reasoning, can the absence of a specific malicious motivation in a perpetrator who nonetheless acts intentionally shield him or her from criminal liability? It seems that, *de lege ferenda*, legislative intervention is needed in order to extend the criminalisation under this provision to include conduct other than malicious behaviour by perpetrators who violate constitutional freedoms and rights.

According to the wording of Article 196 PC, whoever offends the religious feelings of others by publicly insulting 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 for up to two years.

'Religious feelings, by their very nature, are subject to special protection under the law, as they are directly connected to freedom of conscience and religion, which is a constitutional value.'³³ There is no doubt that the good protected by the cited provision is the religious feelings of believers as an emotional element, reflecting the worldview tolerance of a state maintaining neutrality in matters of religion and belief.³⁴ The objective aspect of the act consists in publicly insulting an object of religious worship or a place designated for the public performance of religious rites.

The concept of an object of religious worship is defined as an object esteemed by a particular religious community, church or religious association, deserving of the utmost respect and adoration. The term 'object of religious worship' is generally specified within a given cultural context, in relation to the religions commonly practised in a particular place and time. However, it should be noted that this clarity of meaning may not always extend to religions or cults that are not widespread within a given society. This may have a negative impact on guaranteeing equal protection of religious freedoms, particularly in terms of safeguarding individuals from offence to religious feelings, which may depend on the degree to which a particular religion is present in society and, consequently, on public awareness of the existence of its objects of worship.³⁵

A place intended for the public performance of religious rites, on the other hand, refers to buildings or grounds recognised by the relevant religious community as sites for worship or for the performance of religious acts in the presence of others, such as churches, as well as places where such acts are performed occasionally, with the consent of and after notification to the competent authorities. Thus, a place 'intended for the public performance of religious rites' is not any place chosen by the participants in that rite for that purpose, but must be 'intended' for that purpose through an appropriate decision by the public authorities.³⁶

³³ Ruling of the Supreme Court of 7 June 1994, K 17/93, OTK, 1994, No. 1, item 11.

³⁴ Ibidem; resolution of the Supreme Court of 29 October 2012, I KZP 12/12, OSP, 2013, No. 2, item 19.

³⁵ J. Sobczak, in: Stefański R.A. (ed.), *Kodeks karny...*, op. cit.

³⁶ Ibidem.

The perpetrator's conduct is intended to offend the victim's religious feelings, which are shaped by the beliefs of a particular religion or by reverence for an object imbued with specific significance in that religion, i.e. an object of worship deserving of the utmost respect. The degrading or abusive nature of certain conduct must be assessed objectively, 'taking into account the beliefs prevailing in the cultural circle from which the victim originates'.³⁷ The perpetrator's behaviour may take the form of verbal expression but can also be manifested through gestures, writing or images. It is also possible for the elements of this offence to be fulfilled through omission.

The elements of the offence criminalised under Article 196 PC are only met when an insult to an object of religious reverence occurs publicly, meaning that the insult must be perceivable by a broader, indeterminate group of persons.

Similarly to Article 195 PC, Article 196 also gives rise to significant interpretative difficulties. These stem from the problem of defining the subjective element of the offence due to the way it is drafted. This results from the legislator's use in the text of the provision of two terms that may be treated as equivalent verbal elements of the *actus reus*: 'insulting' and 'offending'. Some representatives of the doctrine are of the view that this offence may be committed with direct or possible intent.³⁸ Others, however, limit the possibility of qualifying the perpetrator's conduct as fulfilling the elements of the act only when committed with direct intent.³⁹ An intermediate position between these two views should also be noted.⁴⁰

As A. Marek aptly observes, interpretation of this provision is far from straightforward, particularly because it is difficult to make a categorical assessment of what constitutes an insult and what merely represents the exercise of freedom of speech in the form of discussion or criticism of symbols or dogmas that are objects of worship for their adherents, within the framework of so-called acceptable criticism.⁴¹ It should be recalled that 'human freedoms', whether in the form of freedom of expression, including artistic freedom, or in the form of religious freedom, are not unlimited, since other freedoms always constitute their boundaries. It cannot be assumed that freedom of speech or freedom of artistic expression should take precedence over the right to respect for religious feelings, or *vice versa*.⁴²

³⁷ R. Paprzycki, *Prawnokarna analiza zjawiska satanizmu w Polsce*, Kraków, 2002, p. 43; judgment of the Supreme Court of 17 February 1993, file ref. III KRN 24/92, Wokanda, 1993, No. 10, pp. 8 et seq.

³⁸ M. Filar, 'Przestępstwa przeciwko wolności sumienia i wyznania', *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, Issue 18, Warszawa, 1998, p. 105; I. Zgoliński, 'Komentarz do art. 196 k.k.', in: Konarska-Wrzošek V. (ed.), Lach A., Lachowski J., Oczkowski T., Zgoliński I., Ziółkowska A., *Kodeks karny. Komentarz*, LEX/el., 2023; S. Czepita, Ł. Pohl, 'Strona podmiotowa przestępstwa obrazy uczuć religijnych i jego formalny charakter', *Prokuratura i Prawo*, 2012, No. 12, pp. 72–82.

³⁹ J. Wojciechowska, in: Wąsek A., Zawłocki R. (eds), *Kodeks karny. Część szczególna. Tom 1*, Warszawa, 2010, p. 901.

⁴⁰ W. Wróbel, in: Zoll A. (ed.), *Kodeks karny. Część szczególna. Tom 2. Komentarz do art. 117–277 k.k.*, Kraków, 2006, p. 587.

⁴¹ A. Marek, *Kodeks...*, op. cit., pp. 446–447.

⁴² Judgment of the Regional Court in Gdańsk of 22 December 2015, I C 279/12, LEX No. 1973724; cf. judgment of the ECtHR of 15 September 2022, *Rabczewska v Poland*, Application No. 8257/13.

GERMAN CONSTITUTIONAL REGULATIONS

In order to analyse the provisions criminalising acts against religious freedom in German criminal law, it is first worth recalling the relevant constitutional regulations. The Basic Law of the Federal Republic of Germany of 23 May 1949⁴³ guarantees freedom of conscience and faith in several articles.

At the outset, it is worth emphasising the expressly articulated prohibition of discrimination and favouritism on the grounds of gender, social origin, race, language, country or national origin, religion, and religious or political beliefs (Article 3(3) of the GG).⁴⁴ According to Article 4 (1) and (2) GG,⁴⁵ freedom of religion, conscience, and freedom of religious and philosophical conviction are inviolable, and freedom of religious practice is guaranteed, provided that the rights of others, the principles of morality, or the constitutional order are not violated (Article 2 GG). Furthermore, under Article 33(3) GG,⁴⁶ the exercise of civil and civic rights, access to public office, and rights acquired through the performance of civil service are independent of religion. In addition, no person may be treated less favourably because of their adherence or lack of adherence to any religious or ideological denomination. Article 7(3) GG provides for religious instruction in public schools, with the state bearing the costs of its organisation. The constitutional principle of freedom of conscience and religion as fundamental individual rights is upheld by the Federal Constitutional Court, as expressed in Article 93(1)(4a).⁴⁷

With regard to the protection of religious freedom, the Polish Constitution and the German Basic Law provide analogous solutions. Certainly, the Polish Constitution addresses this issue in greater detail, comprehensively regulating matters relating to religious freedom within a single provision, but the subjective and objective scope of regulation remains comparable.

⁴³ Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Artikel 1 und 2 Satz 2 des Gesetzes vom 29. September 2020 (BGBl. I S. 2048), hereinafter referred to as 'the GG'.

⁴⁴ *Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden.*

⁴⁵ 1. *Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich.* 2. *Die ungestörte Religionsausübung wird gewährleistet.*

⁴⁶ *Der Genuß bürgerlicher und staatsbürgerlicher Rechte, die Zulassung zu öffentlichen Ämtern sowie die im öffentlichen Dienste erworbenen Rechte sind unabhängig von dem religiösen Bekenntnis. Niemandem darf aus seiner Zugehörigkeit oder Nichtzugehörigkeit zu einem Bekenntnisse oder einer Weltanschauung ein Nachteil erwachsen.*

⁴⁷ *Das Bundesverfassungsgericht entscheidet über Verfassungsbeschwerden, die von jedermann mit der Behauptung erhoben werden können, durch die öffentliche Gewalt in einem seiner Grundrechte oder in einem seiner in Artikel 20 Abs. 4, 33, 38, 101, 103 und 104 enthaltenen Rechte verletzt zu sein.*

GERMAN CRIMINAL LAW REGULATIONS

To give effect to the protection of freedom of belief guaranteed by the constitution, the German legislator has introduced relevant provisions in Chapter 11 'Offences against religion and belief' of the German Criminal Code.⁴⁸

Article 166 StGB⁴⁹ concerns insults to beliefs, religious communities and ideological associations. According to its wording, whoever publicly or by disseminating content reviles the religion or ideology of others in a manner suited to causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding three years or a fine. The same punishment applies to anyone who publicly or by disseminating content reviles a church or other religious or ideological community or its institutions or customs in a manner suited to causing a disturbance of the public peace.

This provision encompasses the premise of insulting religious beliefs or other ideologies, a church or religious association, or even customs, insofar as such conduct may lead to a disturbance of public order. There is some overlap here with Article 130 StGB,⁵⁰ which protects public peace in general. The protected legal interest in this case is therefore public order, not religion itself or the religious feelings of believers.⁵¹ The offence of blasphemy will be subject to penalisation not because of its mere occurrence, but only when it provokes opposition within society. A necessary condition, therefore, is its public character. The perpetrator, in turn, may be punished only for causing a disturbance of public peace through his or her behaviour, and not for the mere fact of offending religious feelings. The provision of Article 166 StGB is classified as an offence of abstract endangerment of a legal good. It will therefore be sufficient that there are reasonable grounds to fear that public order may be disturbed. According to Polish legal terminology, it may thus be described as a formal offence. German legal doctrine emphasises that this provision should serve as an objective measure of values, indicating clear and inviolable boundaries when social disputes arise, particularly those of a religious or ideological nature.⁵²

In the context of the above, it should be emphasised that the protection guaranteed by Article 196 PC is incomparably broader than the one provided by Article 166 StGB. The main difference concerns the protected legal interest: in Poland,

⁴⁸ Strafgesetzbuch vom 15. Mai 1871 (BGBl 1998, ch. I, p. 3322), hereinafter referred to as 'the StGB'.

⁴⁹ § 166. 1. Wer öffentlich oder durch Verbreiten eines Inhalts (§ 11 Absatz 3) den Inhalt des religiösen oder weltanschaulichen Bekenntnisses anderer in einer Weise beschimpft, die geeignet ist, den öffentlichen Frieden zu stören, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. 2. Ebenso wird bestraft, wer öffentlich oder durch Verbreiten eines Inhalts (§ 11 Absatz 3) eine im Inland bestehende Kirche oder andere Religionsgesellschaft oder Weltanschauungsvereinigung, ihre Einrichtungen oder Gebräuche in einer Weise beschimpft, die geeignet ist, den öffentlichen Frieden zu stören.

⁵⁰ § 130. 1. Wer in einer Weise, die geeignet ist, den öffentlichen Frieden zu stören...

⁵¹ B. Valerius, in: von Heintschel-Heinegg B. (ed.), *Strafgesetzbuch. Kommentar*, München, 2010, p. 1110.

⁵² G. Czermak, E. Hilgendorf, *Religions- und Weltanschauungsrecht: Eine Einführung*, Berlin, 2018, p. 278.

it is religious feelings, whereas in Germany, it is public order. The interpretation of Article 196 PC does not allow public order to be identified even as a secondary object of protection.⁵³

Article 167 StGB⁵⁴ provides that whoever intentionally and seriously disrupts a religious service or an act of religious worship of a church or other religious community in Germany, or commits defamatory mischief in a place which is dedicated to the religious worship of such a religious community, incurs a penalty of imprisonment for a term not exceeding three years or a fine. The ceremonies of a national ideological community are treated as equivalent to a religious service.

The provision of Article 167 StGB corresponds in substance to Article 195 § 1 PC. Its purpose is to ensure the protection of the right to perform a service, religious act, or celebration of a worldview association registered in the country, and to criminalise behaviour that undermines the freedom to manifest one's beliefs.

The same applies to interference with the performance of the burial rites of the deceased. Indeed, according to Article 167a StGB,⁵⁵ a prison sentence of up to three years or a fine shall be imposed on anyone who intentionally or knowingly disrupts a funeral. However, under Polish law, such a disturbance must be of a malicious nature, meaning it must involve consciously insulting, ridiculing, or showing disrespect. In contrast, under German law, it is sufficient that the perpetrator acts intentionally (where he or she seeks to achieve the purpose of the act, namely disruption of the ritual) or knowingly (where he or she foresees the occurrence of the disruption). It follows from the above that disruption of a burial rite will also be punishable in Germany even if the perpetrator's aim is not to cause distress, typically motivated by a desire to humiliate, mock, or insult the feelings of those participating in the religious act.

The final article in the chapter addressing crimes against freedom of religion establishes criminal liability for disturbing the peace of the deceased. Under Article 168(1) and (2) StGB,⁵⁶ whoever, without being authorised to do so, takes the body or parts of the body of a deceased person, of a dead foetus or parts thereof, or the ashes of a deceased person from the custody of the person entitled thereto, or commits defamatory mischief on them, incurs a penalty of imprisonment for a term not exceeding three years or a fine. The same penalty applies to anyone who destroys

⁵³ J. Kulesza, 'Kryminalizacja obrazy uczuć religijnych. Glosa do wyroku TK z dnia 6 października 2015 r., SK 54/13', *Państwo i Prawo*, 2016, No. 9, pp. 136–142.

⁵⁴ § 167. 1. Wer (1.) den Gottesdienst oder eine gottesdienstliche Handlung einer im Inland bestehenden Kirche oder anderen Religionsgesellschaft absichtlich und in grober Weise stört oder (2.) an einem Ort, der dem Gottesdienst einer solchen Religionsgesellschaft gewidmet ist, beschimpfenden Unfug verübt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. 2. Dem Gottesdienst stehen entsprechende Feiern einer im Inland bestehenden Weltanschauungsvereinigung gleich.

⁵⁵ § 167a. Wer eine Bestattungsfeier absichtlich oder wissentlich stört, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.

⁵⁶ § 168. 1. Wer unbefugt aus dem Gewahrsam des Berechtigten den Körper oder Teile des Körpers eines verstorbenen Menschen, eine tote Leibesfrucht, Teile einer solchen oder die Asche eines verstorbenen Menschen wegnimmt oder wer daran beschimpfenden Unfug verübt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. 2. Ebenso wird bestraft, wer eine Aufbahrungsstätte, Beisetzungsstätte oder öffentliche Totengedenkstätte zerstört oder beschädigt oder wer dort beschimpfenden Unfug verübt. 3. Der Versuch ist strafbar.

or damages a place where a body is laid out, a burial site or a public memorial for the dead, or who commits defamatory mischief on them.

This standard primarily protects the sense of respect and decency owed to the relatives of the deceased. Undoubtedly, the dignity of the deceased also forms part of this protection.⁵⁷

This regulation corresponds to Article 262 of the Polish Penal Code. According to its wording, whoever insults a corpse, human ashes or the resting place of the deceased shall be subject to a fine, restriction of liberty or imprisonment for up to two years (§ 1). Whoever robs a corpse, grave or other resting place of the deceased shall be punished with imprisonment from six months to eight years (§ 2). In the Polish Penal Code, however, this provision is included among offences against public order.

CONCLUSION

The aim of this publication was not to provide an analytical commentary on the criminal provisions in force in Poland or Germany, taking into account the broadest possible perspectives of doctrine and case law, including an attempt to address any interpretative doubts. Rather, the author's objective was to present a comparative legal analysis of the constitutional and statutory aspects of the criminal and material protection of religion in both legal systems.

In conclusion, it is worth noting that the criminal law protection of religious freedom is safeguarded by international instruments, including the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as by the provisions of most constitutions currently in force in Europe. It is incumbent upon national authorities to ensure the peaceful coexistence of different faiths and religions, and such legislation serves precisely this purpose. In this context, the first conclusion is that offences against religious freedom, although of a different nature, are prosecuted *ex officio* in both Poland and Germany and must be committed intentionally. These are also classified as common offences.

The key provision concerning offences against religious feelings protects a fundamentally different legal good. While the Polish legislator defines such offences in reference to the infringement of the freedom and rights of religious believers, and even their feelings, the German system guarantees protection to public peace. This means that punishable offences are those behaviours by perpetrators that threaten public order. Naturally, the aim of any legislator should be to secure a certain degree of religious order within the state, which is equally necessary in pluralistic societies and in confessionally homogeneous ones. Nonetheless, it is the protection of freedom of religion, conscience and belief that should constitute the primary legal good in this context.

When comparing these provisions on the obstruction of religious acts, it is important to note that the Polish legislator criminalises only conduct motivated

⁵⁷ M. Heuchemer, in: von Heintschel-Heinegg B. (ed.), *Strafgesetzbuch...*, op. cit., p. 1119.

by a specific intent, i.e. malice, which consists in a desire to annoy or ridicule, without any other reasons justifying such behaviour. This certainly presents an evidentiary difficulty in criminal proceedings, while simultaneously precluding the punishment of perpetrators acting from other, equally reprehensible motives. Moreover, this applies exclusively to public religious acts. The German legislator, by contrast, requires that interference with religious acts must be flagrant, i.e. clearly ascertainable, unequivocal and sufficiently significant. Consequently, not every infringement will be subject to criminal liability. Furthermore, for reprehensible conduct in places of worship to be punishable, it must be insulting in nature, meaning offensive and degrading.

As regards funeral ceremonies, the German legislator adopts a more lenient approach to the elements of the offence, requiring the perpetrator to act intentionally or knowingly. The Polish legislator, by contrast again requires that the element of malice must be present, thereby avoiding weaker protection of these particular interests.

The offence concerning protection of corpses is regulated in a similar manner in both legal systems. In each case, the legislators based it on the premise of insult. In Germany, however, this provision is included in the chapter on offences committed against freedom of religion and belief, whereas the Polish legislator classifies such an act as one committed against public order, making respect and reverence for the deceased the protected interest. Thus, it may appear that the significance of these goods extends beyond faith or religion and has been generalised, that is, given a broader character. Under this interpretation, such acts would be deemed to infringe the principles of social coexistence. It is worth noting, however – contrary to the above thesis – that the legislator itself points out⁵⁸ that Chapter XXXII of the Penal Code contains offences which, due to their object of protection, are difficult to assign to other chapters.

An analysis of the solutions adopted in selected national criminal law systems leads to the conclusion that neither the Polish nor the German legislator has avoided solutions that may cause difficulties in prosecuting perpetrators of acts infringing freedom of religion or freedom of belief. Nevertheless, it does not appear that their respective provisions are so ambiguous as to make it impossible to determine whether an infringement has occurred in a given situation. However, interpretative difficulties make it challenging to predict whether the courts will recognise an offence in similar factual circumstances. The greatest issue arises from the complexity and diversity of religious phenomena and from socio-cultural changes. It therefore seems that the sources of the recurring public debates on the understanding of the limits of religious freedom should be sought not so much in 'imprecise' legislation as in the sphere of worldviews. Regardless of the foregoing, it is always necessary to advocate changes in both systems aimed at adopting solutions that ensure the highest standard of protection for freedom of religion.

⁵⁸ Explanatory memorandum to the Penal Code, Warszawa, 1997, p. 202.

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