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On a verbal offence against religious feelings – commentary on the European Court of Human Rights' judgement of 15 September 2022 in *Rabczewska v. Poland*

O obrazie uczuć religijnych słowem – komentarz do wyroku Europejskiego Trybunału Praw Człowieka z dnia 15 września 2022 roku w sprawie *Rabczewska przeciwko Polsce*

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Abstract: In its judgement of 15 September 2022 in the case of *Rabczewska v. Poland* (App. No. 8257/13), the European Court of Human Rights (ECtHR) held that the conviction of a Polish singer for her statement made during a press interview – "It's hard to believe in the writings of someone wasted from drinking wine and smoking some weed," referring to the authors of the Bible – violated Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The findings and conclusions presented by the ECtHR in this case significantly differ from those given by the domestic courts. Despite the shortcomings identified in this study, the ECtHR's judgement deserves approval. This underscores that adjudication by the domestic courts under Article 196 of the Criminal Code, which penalises insulting religious feelings, cannot be divorced from the Convention's standards. Moreover, the ECtHR's judgement in *Rabczewska v. Poland* requires that domestic courts engage in thorough reflection on the essence of insulting religious feelings in light of the ECtHR's rulings. Accordingly, a clear standard for ECtHR adjudication in cases involving freedom of expression and the protection of religious feelings is highly desirable. Therefore, the ECtHR should eliminate all deficiencies in argumentation, gaps and substantive errors from its justifications of judgements.

Key words: freedom of expression; religious feelings; human rights; European Court of Human Rights; Polish Criminal Code; *Rabczewska v. Poland*

Streszczenie: Europejski Trybunał Praw Człowieka (ETPC) w wyroku z dnia 15 września 2022 r. w sprawie *Rabczewska przeciwko Polsce* (skarga nr 8257/13) orzekł, że skazanie w procesie karnym piosenkarki za wypowiedź, która padła w trakcie wywiadu prasowego: „Ciężko wierzyć w coś, co spisał jakiś tam napruty winem i palący jakieś zioła", odnoszącą się do autorów Biblii, stanowi naruszenie przez Polskę art. 10 Konwencji o ochronie praw człowieka i podstawowych wolności. Ustalenia i konkluzje przedstawione w tej sprawie przez ETPC są zupełnie odmienne od tych, które wskazały sądy w postępowaniu krajowym. Wyrok ETPC zasługuje na aprobatę, mimo wskazanych w opracowaniu braków w jego uzasadnieniu. Orzeczenie to przesądza również o tym, że orzekanie przez sądy krajowe na podstawie art. 196 Kodeksu karnego, który penalizuje obrazę uczuć religijnych, nie może być oderwane od standardów konwencyjnych i wymaga od sądów krajowych pogłębionego namysłu nad istotą obrazy uczuć religijnych w perspektywie orzeczeń ETPC. W związku z tym wysoce pożądany jest jasny standard orzekania przez ETPC w sprawach dotyczących wolności słowa i ochrony uczuć religijnych. Dlatego ETPC powinien wyeliminować z uzasadnień swoich orzeczeń wszelkie braki argumentacyjne, luki i błędy merytoryczne.

Słowa kluczowe: wolność wypowiedzi; uczucia religijne; prawa człowieka; Europejski Trybunał Praw Człowieka; Kodeks karny; *Rabczewska przeciwko Polsce*

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Introduction

In its judgement dated 15 September 2022, the European Court of Human Rights (ECtHR) ruled in the case of *Rabczewska v. Poland*[1] that fining Dorota Rabczewska (a Polish singer) under Article 196 of the Polish Criminal Code[2] for her statement: "It's hard to believe in the writings of someone wasted from drinking wine and smoking some weed," which referred to the authors of the Bible – constituted a violation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[3] Pursuant to Article 43 of the ECHR, the Polish government requested that the case be referred to the Grand Chamber. This request was rejected on 30 January 2023 by a panel of five judges of the Grand Chamber. The judgement thereby became final, putting an end to the dispute that had lasted for over 14 years. The merit of the ECtHR's judgement, which states that Article 10 of the ECHR had been violated, deserves to be approved. However, some arguments used in its justification are questionable. I intend to highlight these deficiencies that have not received sufficient attention in previous publications, suggesting how they may be overcome, which may be helpful in clarifying the standard of the ECtHR's ruling in this case.

1. "It is undisputable that the defendant's statement offended […] religious feelings" – proceedings before domestic courts

The ECtHR's judgement in *Rabczewska v. Poland* is based on facts that took place several years ago. In 2009, Dorota Rabczewska (a Polish singer performing under the artistic pseudonym Doda) was interviewed by a journalist of the *dziennik.pl* website[4] in response to questions mainly about her private life (the decor of her apartment, her relationship with her then partner). During the interview, she stated, among other things:

> When it comes to the Bible […] it's hard for me to believe in something that has no bearing on reality. […] where are the dinosaurs in this Bible and so on […] There are seven days of the creation of the world and there are no dinosaurs […] and that bothers me. I try to have a sensible approach to the reality. And of course, I believe in a higher power, not necessarily called God […] There are different religions, and it's nice that every person believes in something. I believe in something, too. I try to pray and I had a religious upbringing, but I have my own views on various matters that […] I talked about. […] I believe in what is. What our mother earth has brought us during excavations, and during simply everything, there is evidence of it. And you know… It's hard to believe in something written down by someone wasted from drinking wine and smoking some weed.[5]

[1] Judgment of the European Court of Human Rights of 15 September 2022 in *Rabczewska v. Poland*, App. No. 8257/13. The paragraph numbers given in brackets refer to this judgment. All judgments of the European Court of Human Rights cited in the article are available on the HUDOC website, https://hudoc.echr.coe.int [accessed: 10 September 2024].

[2] Act of 6 June 1997 – Criminal Code, consolidated text: Dziennik Ustaw [hereinafter: Journal of Laws] 2004, item 17; hereinafter: Criminal Code or Polish Criminal Code.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Rome, 4 November 1950, Journal of Laws 1993, item 284; hereinafter: ECHR.

[4] "Doda o religii." Interview. *Dziennik Online*. n.d. Audio. https://www.youtube.com/watch?v=B6oTTsC6RDg [accessed: 12 March 2024].

[5] Ibidem.

When asked by the journalist who she meant, she added, "All those guys who wrote […] those incredible stories."[6] After the interview was published, the public prosecutor received a complaint that Dorota Rabczewska had committed an offence under Article 196 of the Polish Criminal Code.[7] The complaint was filed by two individuals: Ryszard Nowak, chairperson of the National Committee for Defence against Sects, and Stanisław Kogut, then a senator of the Law and Justice Party. The proceedings taken by the prosecutor resulted in a bill of indictment against Rabczewska. It stated:

> On 3 August 2009 in Warsaw, in an interview given for the online edition of *dziennik.pl*, she publicly offended the religious feelings of Ryszard Nowak and Stanisław Kogut by insulting the object of religious worship – the authors of the Holy Bible, which is an offence under Article 196 of the Polish Criminal Code.[8]

During the investigation, Dorota Rabczewska pleaded not guilty and argued that it had not been her intention to insult an object of religious worship or to offend the religious feelings of anyone. She emphasised that she was a peaceful person and respected all religions, and her interview should not have been taken seriously because she had given it in a humorous and detached manner and had been using the language of young people, which was full of metaphors (par. 9). In court, she testified again that her intention had not been to offend or spark revolt. She had replied to the journalist's questions in a sincere, subjective and frivolous manner, and her views were based on historical and scientific television programmes, of which she was a fan (par. 9). Despite these arguments, she was convicted as charged and sentenced to a fine of PLN 5,000.[9] The judgement was upheld by a second-instance court.[10]

It is also noteworthy that, following this judgement, a constitutional complaint was filed with the Constitutional Court in Poland, alleging that Article 196 of the Criminal Code was incompatible with the Constitution of the Republic of Poland.[11] In assessing the admissibility of the constitutional complaint, the Constitutional Court emphasised that the complainant cannot challenge the constitutionality of a law or other normative act without considering the case law specific to their case.[12] The Constitutional Court held that the contested provision had not in its entirety served as the basis for the complainant's final conviction. As a result, the complaint was dismissed to the extent that

6 Ibidem.

7 Article 196 of the Criminal Code: "Whoever offends the religious feelings of other persons by publicly insulting an object of religious worship, or a place designated for public religious ceremonies, is liable to pay a fine, have his or her liberty restricted, or be deprived of his or her liberty for a period of up to two years."

8 Judgment of the Warsaw-Mokotów District Court in Warsaw of 16 January 2012, III K 416/10 (unpublished); see: *Rabczewska v. Poland*, par. 8.

9 Judgment of the Warsaw-Mokotów District Court in Warsaw of 16 January 2012, III K 416/10. In addition to the fine, the court ordered the defendant to pay court costs of PLN 500 to the State Treasury and PLN 4,244 as justified expenses of the State Treasury, totaling PLN 4,744.

10 Judgment of the Warsaw Regional Court of 18 June 2012, X Ka 496/12 (unpublished).

11 The Constitution of the Republic of Poland of 2 April June 1997, Journal of Laws 1997, item 483.

12 Judgment of the Constitutional Court of 6 October 2015, SK 54/13, LEX No. 1809388.

the contested provision did not form the basis of the singer's conviction, while clarifying that

> […] the subject of the review in this case is limited to Article 196 of the Criminal Code to the extent in which it penalises the offence to religious feelings of others by publicly insulting an object of religious worship, punishable by a fine.[13]

The Constitutional Court rendered a decision on the constitutionality of only a part of Article 196 of the Criminal Code. It concluded that, to the extent considered in the review, Article 196 was consistent with Article 42(1) in connection with Article 2 of the Constitution, it was not inconsistent with Article 53(1) in connection with Article 54(1) of the Constitution, and it was in line with Article 54(1) in connection with Article 31(3) of the Constitution. Therefore, the Constitutional Court ruled solely on the constitutionality of this part of Article 196 of the Criminal Code, which penalises an insult of religious feelings punishable by a fine.[14]

2. "There has been a violation of Article 10 of the Convention"– proceedings before the European Court of Human Rights

Following the decision of Polish courts, Dorota Rabczewska filed a complaint against Poland with the ECtHR. Her primary contention was that her criminal conviction for offending religious feelings constituted a violation of Article 10 of the ECHR (pars. 34–36). Specifically, she argued that her conviction and sentence represented an unjustified infringement of her right to freedom of expression. One of the arguments intended to demonstrate the groundlessness of the infringement was the fact that she had been prosecuted based on a bill of indictment filed by the public prosecutor, who believed that the public interest had been violated. According to the applicant, the penalty imposed on her was excessively severe, disproportionate to the legitimate aims pursued and should not have been imposed in a democratic society. Moreover, the applicant argued that criminal law should not be employed to protect subjective religious feelings and that the provision that penalised such expression with a penalty of up to two years of imprisonment fell short of the Convention standards. She also argued that her statements had not been addressed against the Catholic religion or its worshippers, had not been intended to insult or offend the religious feelings of others or violate public order. Her statements had not been a form of hate speech. Finally, she emphasised that she had expressed her private views on the topic about which she was asked and that the form of expression had been adapted to her audience – fans of her music (par. 36).

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13 Ibidem.

14 Ibidem. See: Piotr Szymaniak. 2015. "Prof. Łętowska: Trybunał Konstytucyjny kręci na siebie bat." *Dziennik Gazeta Prawna*, October 12. https://prawo.gazetaprawna.pl/artykuly/899039,prof-letowska-trybunal-konstytucyjny-kreci-na-siebie-bat.html [accessed: 10 September 2024].

The stance of the Polish government was different (see: pars. 37–41). In their submissions, the government representatives contended that there had been no violation of Article 10 of the ECHR; they argued that the interference with the applicant's rights was consistent with the standards established in the case law of the Court, that the interference had been prescribed by law and that the artist should have foreseen that her statement could lead to prosecution because 90% of the population in Poland was Catholic and religion played a key role in the identity of most Poles as part of their culture. The government argued that the purpose of the interference had been to protect the rights and religious feelings of others. The government emphasised that the freedom of expression and the right to respect for religious beliefs, as enshrined in Articles 10 and 9 of the ECHR, respectively, should be equally protected (see: par. 38). The government further asserted that the applicant's statements had been intended to shock and garner broader popularity. To support this, it was noted that the proceedings against the applicant had been initiated at the request of "[…] two individuals, and not by the authorities of their own motion" (par. 38). The domestic courts, in the opinion of the government, carried out a thorough and diligent analysis of the necessity of the impugned measure and provided relevant and sufficient reasons for it (par. 38), the sanction was the mildest possible and the amount of the fine was adjusted to the applicant's financial means. Therefore, the interference was proportionate to the legitimate aim.

While analysing the complaint and materials gathered in the case, the ECtHR did not state that there was a conflict between the freedom of expression guaranteed by Article 10 of the ECHR and freedom of thought, conscience and religion guaranteed by Article 9 of the ECHR. However, in the section dedicated to general principles, the Court reiterated two fundamental principles established by case law under Article 10 of the ECHR and seamlessly transitioned to reaffirm several principles related to freedom of thought, conscience and religion, as outlined in Article 9 of the ECHR (par. 47). Applying these general principles to the case at hand, the ECtHR concluded that there had been a violation of Article 10 of the ECHR in *Rabczewska v. Poland*.

3. Freedom of expression and religious feelings[15] – aspects not considered by the ECtHR in the justification in the *Rabczewska v. Poland*

The judgement should be approved concerning its merits; however, its justification raises certain reservations, warranting further commentary. The main objection is the inconsistency of the ECtHR in adjudicating matters related to religious freedom[16] and, consequently,

[15] For a general characterisation of the relation between freedom of conscience and religion and freedom of expression, see: Bhatia 2021; Doe 2011; Evans 2001; Gegenava 2022; Hill 2020; Kamiński 2016; Roszkiewicz 2020; Stanisz 2023.

[16] "[…] this case represents another chapter in a tale of inconsistency of the Court dealing with religion and free speech." Virgili, Tommaso. 2022. "Rabczewska v. Poland and blasphemy before the ECtHR: A neverending story of inconsistency." *Strasbourg Observers*, October 21. https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/ [accessed: 10 September 2024]; "[…] the judgments of the Court in this regard are so inconsistent that it is difficult to predict which direction

the absence of fixed criteria for predicting[17] future rulings in similar cases. In this context, the ECtHR is criticised for either inconsistency in its reasoning[18] or for the perceived weakness of the judgement.[19] When enumerating general principles relevant to a given case, as is done in this instance, the ECtHR often reiterates them almost automatically and mechanically. This leaves commentators to speculate on the implications of these principles being mentioned in a specific case.[20] As a result, the commentators sometimes attempt to deduce the reasoning behind a particular judgement for themselves, and specifically, they attempt to establish what factors determine whether there has been a violation of the Convention or not.[21] Notably, the commentators who were disappointed with the justification in *Rabczewska v. Poland* would alter various elements in it.

I would like to add a few additional comments that have not been raised yet and that I believe are important for assessing this judgement. First, in its reasoning in *Rabczewska v. Poland*, the Court overlooks two pivotal issues: freedom of expression and respect for religious beliefs. Second, the Court applies a threefold test in an automatic and cursory manner, resulting in logical gaps, omissions and even substantive errors, which should be noted. Third, the ECtHR's reasoning lacks a thorough analysis of the "prescribed by law" requirement. There is no examination of this case in the context of the "heckler's veto" criterion, nor a clear assertion that the conviction by domestic courts had an undisputed "chilling effect." If the above points had been included in the judgement, then the court's decision would be more coherent. These issues will be further explored in the following sections.

4. A conflict of two freedoms – religious feelings omitted

The ECtHR posited that the case of *Rabczewska v. Poland* involved a conflict of two freedoms: freedom of expression and freedom of thought, conscience and religion, hence focusing its reasoning on this conflict. The majority of the Court's considerations delve

the Court will take in a given case: whether it will prioritise freedom of religion, or more specifically religious feelings (Article 9 of the ECHR), or freedom of expression (Article 10 ECHR)." Kulesza, Mrowicki 2023, 46.

17 "Strasbourg's approach to blasphemy increases uncertainty about the boundaries of free speech." Hauksdóttir 2021, 75.

18 Aleksander Kappes, Jacek Skrzydło. 2022. "Sprawa Dody nie powinna trafić do Strasburga." *Rzeczpospolita*, September 29. https://www.rp.pl/opinie-prawne/art37139861-kappes-skrzydlo-sprawa-dody-nie-powinna-trafic-do-strasburga [accessed: 10 September 2024].

19 "The ECtHR's judgment issued on 15 September in the case of Dorota 'Doda' *Rabczewska v. Poland* shows the unpredictability of Strasbourg jurisprudence and, consequently, the absence of a clear legal standard for delineating the State's obligations under the European Convention on Human Rights and Fundamental Freedoms. This is also one of the weakest ECtHR's rulings in terms of argumentation." Ireneusz Cezary Kamiński. 2022. "Wyrok zwycięski, ale słaby." *Rzeczpospolita*, October 4. https://www.rp.pl/rzecz-o-prawie/art37163131-ireneusz-cezary-kaminski-wyrok-zwycieski-ale-slaby [accessed: 10 September 2024].

20 "Most often, the Court formulates its principles in a very general fashion, decontextualized, repeating them almost like mantras in every decision. They are sometimes used as a sort of wild card that makes it possible to decide on a conflict one way or the opposite – and the problem is aggravated by the fact that not all the chambers of the ECtHR apply those general criteria in the same manner." Martínez-Torrón 2020, 836–837.

21 See: Martínez-Torrón 2020, 844; Martínez-Torrón 2021, 187; Stijn Smet. 2018. "E.S. v. Austria: Freedom of expression versus religious feelings, the sequel." *Strasbourg Observers*, November 7. https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/#_ftn1 [accessed: 10 September 2024].

into the general principles related to freedom of thought, conscience and religion, as outlined in Article 9 of the ECHR. It appears that the ECtHR overlooked the fact that the complaint concerned a violation of Article 10 of the ECHR. Thus, Article 10 should be the primary point of reference for those adjudicating in this case. This thesis is supported by the ECtHR's reasoning.

When restating the general principles related to Article 10 of the ECHR, the Court emphasised that the fundamental judgements on this matter were given in *Handyside v. the United Kingdom*[22] and *Fressoz and Roire v. France*.[23] Pursuant to these judgements, freedom of expression constitutes one of the foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment; in addition, it refers not only to information or views that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock, or disturb the state or any social group. Such are the demands of pluralism, tolerance and broad-mindedness, without which there would be no democratic society.[24] The Court further noted that there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest.[25] Finally, the exercise of freedom of expression carries with it duties and responsibilities.[26] These points do not raise any doubts. However, what can be questioned is the Court's reiteration of the principle regarding the limited scope for restrictions on political speech or debate on matters of public interest. It appears that the ECtHR may have sent a misleading signal here, suggesting that, in the case of the Polish singer's statement, a broader scope for permissible restrictions might apply, given that her remarks do not fall into either the first or second category of statements. However, the Court did not explicitly draw this conclusion, leaving it to the interpretation of those analysing the judgement. Moreover, nowhere in its reasoning did the Court note that the decisions of domestic courts in this case undoubtedly had a "chilling effect."

The remaining and much more extensive considerations regarding general principles focus on Article 9 of the ECHR. Upon reading and comparing these principles in the judgement, one can conclude that they have been cited automatically and formulated in a style reminiscent of Pythian replies. As a result, the ECtHR struggled to provide precise justification for its rulings in cases related to freedom of conscience and religion. The reasoning of the ECtHR could even give the impression that it was inclined to side

[22] Judgment of the European Court of Human Rights of 7 December 1976 in *Handyside v. The United Kingdom*, App. No. 5493/72.

[23] Judgment of the European Court of Human Rights of 21 January 1999 in *Fressoz and Roire v. France,* App. No. 29183/95.

[24] See: *Handyside v. The United Kingdom*, par. 49.

[25] See: Judgment of the European Court of Human Rights of 23 June 2016 in *Baka v. Hungary*, App. No. 20261/12, par. 159; Judgment of the European Court of Human Rights of 27 June 2017 in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App. No. 931/13, par. 167.

[26] *Rabczewska v. Poland*, par. 47; Judgment of the European Court of Human Rights of 30 January 2018 in *Sekmadienis Ltd. v. Lithuania*, App. No. 69317/14, par. 74; Judgment of the European Court of Human Rights of 20 September 1994 in *OttoPreminger-Institut v. Austria*, App. No. 13470/87, par. 49; Judgment of the European Court of Human Rights of 10 July 2003 in *Murphy v. Ireland*, App. No. 44179/98, par. 65; Judgment of the European Court of Human Rights of 13 September 2005 in *İ.A. v. v. Turkey*, App. No. 42571/98, par. 24; Judgment of the European Court of Human Rights of 31 January 2006 in *Giniewski v. France*, App. No. 64016/00, par. 43; Judgment of the European Court of Human Rights of 31 October 2006 in *Klein v. Slovakia*, App. No72208/01, par. 47.

with the Polish state. The Court reiterated, among others, that "[…] in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs, including a duty to avoid as far as possible an expression that is, regarding objects of veneration, gratuitously offensive to others and profane" (par. 47)[27] and that "[…] the State's duty of neutrality and impartiality excludes any discretion on its part to determine whether religious beliefs or the means used to express such beliefs are legitimate" (par. 48).

However, these considerations do not include the key issue of religious feelings. Thus, at this early stage, it becomes evident that the ECtHR is overlooking religious feelings.

Applying the above principles to the case of *Rabczewska v. Poland*, the ECtHR stated that the criminal conviction, which gave rise to Rabczewska's complaint, amounted to an interference with the applicant's right to freedom of expression, which was also acknowledged by the Polish government; thus, this fact was uncontested. Such interference constitutes a breach of Article 10 unless it is prescribed by law (1), pursues one or more of the legitimate aims referred to in Article 10(2) of the ECHR (2) and is necessary in a democratic society to achieve the aim in question (3). For an interference to not constitute a violation of the Convention, all three conditions – legality, purposefulness and necessity – must be jointly satisfied. Failing to meet any of them results in a violation of the Convention. Although the application of this test is a standard procedure of the ECtHR, the manner in which it was carried out lacked thoroughness and contained interpretive gaps, making the Court's reasoning inconsistent and lacking precision.

5. Undisputed that the interference was "prescribed by law"?

The ECtHR noted that it was undisputed that the interference was "prescribed by law" and that the determining factor was the fact that the singer was convicted under Article 196 of the Polish Criminal Code (see: par. 55). According to the ECtHR, the first condition has been satisfied. Therefore, the formal validity of the provision and final conviction were pivotal for the ECtHR in determining that the interference was indeed prescribed by law. However, should this specific provision of the Polish Criminal Code (Article 196) and ongoing debate surrounding its content and application in Poland have prompted the ECtHR to reaffirm the principles it established regarding the "prescribed by law" condition? In particular, the expression "prescribed by law" in the Article 10(2) not only requires that the impugned measure should have a legal basis in domestic law but also refer to the quality of the law in question, which should be accessible to the person concerned and foreseeable regarding its effects. "The level of precision required of domestic legislation – which cannot provide for every eventuality – to a considerable degree depends on the content of the law in question, the field it is designed to cover and the number and

[27] See also: *Sekmadienis Ltd. v. Lithuania*, par. 74; *OttoPreminger-Institut v. Austria*, par. 49; *Murphy v. Ireland*, par. 65; *İ.A. v. v. Turkey*, par. 24; *Giniewski v. France*, par. 43; *Klein v. Slovakia*, par. 47.

status of those to whom it is addressed".[28] Taking into account the content of Article 196 of the Criminal Code, it would also be justified to quote the Court's stance on the requirement of foreseeability:

> As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a "law" within the meaning of Article 10(2) unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice.[29]

Obviously, the ECtHR added that " […] the role of adjudication vested in the national courts is precisely to dissipate such interpretational doubts as may remain. The Court's power to review compliance with domestic law is thus limited, as it is primarily for the national authorities, notably the courts, to interpret and apply domestic law."[30] However, in the case at hand, the ECtHR formulated an extensive list of objections regarding the national courts. Therefore, the "prescribed by law" requirement in this case should have been developed and thoroughly analysed. This is especially pertinent because, as indicated by the principles cited above, the fact that a specific provision is in force in a state party to the Convention and that a conviction was based on it does not necessarily mean that the interference was "prescribed by law." It should be noted that, although Rabczewska did not plead guilty before the Polish courts, she did not contest that the interference was not "prescribed by law" during the ECtHR's proceedings or that her conviction was unjust because her act did not constitute a criminal offence. However, given that Rabczewska did not admit to the alleged crime during the domestic proceedings, it is worth asking how the issue of "prescribed by law" should have been addressed if an analysis of the essence of the right to protect religious feelings under Article 196 of the Criminal Code and an examination of the content of Rabczewska's contested statement had led to the conclusion that there was no offence against religious feelings and, consequently, that her conviction was unfounded (not "prescribed by law"). This question is raised because, although a detailed argument providing an answer is beyond the scope of the present study, I believe that no crime was committed. This is because Rabczewska's act did not meet the criteria for an offence under Article 196 of the Criminal Code and, therefore, did not constitute an offence against religious feelings. It should also be remembered that committing a prohibited act does not necessarily constitute a criminal offence if the social harm caused by this act is negligible.[31] During the proceedings before the domestic courts, there was no reference to the principle

[28] Judgment of the European Court of Human Rights of 4 December 2018 in *Magyar Jeti ZRT v. Hungary*, App. No. 11257/16, par. 59.

[29] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, par. 143.

[30] Ibidem, par. 144.

[31] Article 1 § 2 of the Criminal Code, in connection with Article 115 § 2 of the Criminal Code. More extensively on this see: Zawiślak 2023, 217–229.

of criminal liability, particularly concerning the social harm of the act. The examination of the statement that gave rise to these proceedings, including its content, form and context, as well as the available reasoning in the case led to the conclusion that the factual and legal determinations made by the Polish courts were flawed. I believe that the assessment of whether the behaviour constituted an insult to religious feelings was not based on objective criteria, which are essential in such cases. Although religious feelings are inherently subjective, when someone is accused of offending them, especially in the context of criminal liability, religious feelings must be clearly and objectively defined. Notably, legal doctrine emphasises that this objective assessment should be based on prevailing social opinions. When this criterion for clarity and objectivity is adopted, the protection of religious feelings may be less stringent in secularised societies, where members might not necessarily be sensitive to religious values. Thus, it seems more reasonable to base the assessment on the opinions of those who hold such feelings, that is, religious individuals or believers, irrespective of their faith.[32] However, in the case at hand, the assertion that "[…] the court objectively assessed the nature of the defendant's behaviour, considering the prevailing religious beliefs in the cultural community from which the injured parties come, using an average member of a given religious group as an example,"[33] is unfounded. The court merely cited a well-established and accepted doctrinal position. A particularly perplexing conclusion is the assertion that the objective nature of offending religious feelings is determined by the witness's fear of the reaction from one of the political parties.[34] The analysis of the domestic court's line of reasoning also raises doubts regarding its impartiality. What may seem strange is the fact that the court uncritically accepted testimonies from victims and witnesses. These testimonies paid less attention to the facts regarding the alleged offence against religious feelings but more frequently included categorical judgements about the accused and her intentions.[35] Strange here is that the court dismissed the singer's explanations without valid justification and baselessly attributed criminal intentions to her, which not only contradicts her explanations but also, importantly, the context in which her words were spoken. In light of the accused's explanation that it was not her intention to offend anyone, the court's statement that "[…] the accused's action was undoubtedly intentional, and the accused acted with the intention of ridiculing, offending and undermining the dignity of the authors of the Holy Bible"[36] is bizarre because such allegations regarding the accused's intentions were not justified. What is also surprising is the court's statement: "Undoubtedly, the words spoken by the accused were objectively offensive. This assessment of the statement is supported by the evidence presented in the case, in particular by the opinions of two religious experts and a linguistic

32 See: Jaskuła 2010, 173–174; Jaskuła 2011, 371–372.

33 Judgment of the Warsaw-Mokotów District Court in Warsaw of 16 January 2012, III K 416/10, p. 14.

34 "The witness's testimony shows that the statement of the accused could objectively be interpreted as offensive and insulting the religious feelings of other people, since the witness was afraid of the reaction from one of the political parties." Ibidem, p. 7.

35 "The accused is a person who likes to shock and dominate others, and when she saw the journalist's surprised face, she considered it her triumph." Ibidem, p. 6.

36 Ibidem, p. 14.

expert."[37] However, this seems inconsistent because, just a few lines earlier, the court stated: "The experts unanimously confirmed that the words spoken by the accused […] may undermine the authority of the Holy Scripture,"[38] which suggests a possibility rather than certainty. The reasoning is inconsistent, chaotic and unconvincing. The case should have been dismissed during the prosecutorial proceedings; it should not have proceeded to court and should not have resulted in a criminal conviction. If no offence had been committed, it should also be assumed that the State's interference was not "prescribed by law."[39] Obviously, the ECtHR's finding that the interference had not been "prescribed by law" would imply the absence of the remaining premises. However, despite highlighting several deficiencies in the Polish judicial system, the Court failed to conduct such an analysis. It addressed the central issue of the singer's statements allegedly insulting religious feelings only when examining the third condition, that is, the necessity to interfere with freedom.

Regarding the second requirement of the threefold test, the Court found that the conviction had been intended to protect religious feelings, which followed directly from Article 196 of the Criminal Code; this purpose corresponded to the protection of the rights of other persons under Article 10(2) of the ECHR; hence, the interference had served at least one of the purposes indicated in Article 10(2) of the ECHR. This finding, in a situation where the Court assumed that the interference had been prescribed by law, does not raise any doubts or reservations.

6. "The interference was not necessary" – Article 9 instead of Article 10(2) of the ECHR

Whether the interference amounted to a violation of the ECHR was assessed through the third criterion of the threefold test, that is, whether it was necessary in a democratic society. In the case of *Rabczewska v. Poland*, the Court concluded that the matter at hand involved weighing the conflicting interests (par. 56). It reiterated the principle that "[…] statements that may shock or disturb some people do not in themselves preclude the enjoyment of freedom of expression" (par. 57) and 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" (par. 57). In this context, the ECtHR made several critical remarks regarding the domestic courts. It found, among other things, that the domestic courts had not properly assessed – based on a detailed analysis of the wording of the statements made – whether the impugned statements constituted factual statements or value judgements; moreover, they had not discussed the permissible limits of criticism of religious doctrines under the Convention. In addition, they had

37 Ibidem, p. 7.
38 Ibidem.
39 It is also worth mentioning here that, in other cases concerning a violation of the ECHR, the Court rarely determined that an interference had not been prescribed by law. See: Kamiński 2010, 44. The same did not occur in the case of *Rabczewska v. Poland*, which implied the need to apply the remaining conditions of the test.

not assessed whether the applicant's statements had been capable of arousing justified indignation or whether they were of a nature to incite hatred or otherwise disturb religious peace and tolerance in Poland. In summary, the Court found that, in the case in question, the domestic courts had failed to comprehensively assess the wider context of the applicant's statements for a correct balance between her right to freedom of expression with the rights of others to have their religious feelings protected and religious peace preserved in society (pars. 60–63).

I agree with the concerns expressed by the ECtHR – although it is evident that the necessity to analyse these elements does not follow from Article 196 of the Criminal Code and that they do not constitute the defining characteristics of the offence of insulting religious feelings, they should be considered when determining whether religious feelings were objectively insulted. This important aspect was missing during the domestic proceedings. From this perspective, the *prima facie* irrelevant allegations against the domestic courts become comprehensible, and the justification itself gains greater substance. The requirements to carefully balance the applicant's right to freedom of expression with the rights of others to preserve religious peace in society – or the category of justified indignation – are the criteria examined by the ECtHR in cases related to freedom of thought, conscience and religion. These findings should also guide Polish courts in determining whether religious feelings are objectively insulted. The potential disruptions to religious peace, such as protests by offended individuals, as indicated by the ECtHR, may also serve as a criterion for objectively determining whether someone's religious feelings have been offended. However, it should be emphasised that this alone is not sufficient to conclude that religious feelings have been offended. In other words, the fact that someone's statement results in disturbing religious peace may suggest that it is not merely a subjective feeling of offence at play. It is essential to examine whether this outrage is justified and whether it constitutes a case of the "heckler's veto."[40] This aspect was also missing from the ECtHR's reasoning, which should be considered a shortcoming. From the perspective adopted by the ECtHR, the absence of disruption to religious peace means that religious feelings are not objectively violated. When these criteria are applied to the case at hand, it can be concluded that religious feelings are not objectively insulted. This conclusion is inadvertently supported by the arguments put forward by the Government of the Republic of Poland, which claimed that "[…] 90% of the population in Poland was Catholic and religion played a crucial role in the concept of identity to the majority of Poles as part of their culture" (par. 37), rightly noting that "[…] Catholics and other religious people had the right not to be insulted on the grounds of their beliefs" (par. 30). However, this argument overlooks the fact that, out of the community of over 30 million Polish Catholics,[41] only two individuals felt that their religious feelings had been so violated by the singer's statement that it warranted notifying the prosecutor.[42] Although the ECtHR did not

[40] See: Judgment of the European Court of Human Rights of 8 July 2008 in *Vajnai v. Hungary*, App. No. 33629/06, par. 57; Judgment of the European Court of Human Rights of 24 July 2012 in *Fáber v. Hungary*, App. No. 40721/08, par. 57.

[41] Based on the data provided by the Polish Government.

[42] This was also pointed out by judges Felici and Ktistakis in their "Joint concurring opinion" (par. 5).

explicitly raise this argument when justifying the judgement, its acceptance would warrant an additional observation: Considering the facts established during the domestic proceedings and the process of determining whether religious feelings were objectively insulted, the behaviour of individuals who reported the alleged crime to the prosecutor should also have been evaluated in light of the "heckler's veto" standard, which, according to the case law of the ECtHR, cannot serve as a basis for restricting freedom of expression.[43] National judges are obligated to respect the ECHR, which is part of the Polish legal system, and to adjudicate in accordance with the standards it has established. As a result, when adjudicating offences related to religious feelings, it is necessary to assess whether these feelings have been objectively insulted.

Emphasising that it had not been argued before the domestic courts or the Court itself that the applicant's statements constituted hate speech, the ECtHR stated that, in its opinion, the applicant's statements did not amount to an improper or abusive attack on an object of religious veneration (par. 64).[44] The Court concluded that it had not been demonstrated that interference in the instant case was needed, in accordance with the State's positive obligations under Article 9 of the ECHR (par. 64). In other words, according to the ECtHR, the State's interference was not necessary to ensure that others could exercise their rights arising from freedom of conscience and religion, as safeguarded in Article 9 of the ECHR.

Although I agree with the Court's conclusion that state interference with the applicant's freedom of expression was not necessary in a democratic society, I would like to make a further critical comment. In my opinion, the ECtHR wrongly referred to Article 9 of the ECHR. The analysis of the "criterion of necessity" carried out by the Court does not apply to Article 9 but to Article 10(2) of the ECHR and the premise of "protecting the rights of other persons," which, in *Rabczewska v. Poland,* refers to the right to protect religious feelings under Article 196 of the Criminal Code. The scope and subject of protection regulated in Article 9 of the ECHR and Article 196 of the Criminal Code are not identical. Thus, reference to Article 9 of the ECHR, not Article 10(2) in connection with Article 196 of the Polish Criminal Code, constitutes a substantive error, especially because some commentators have questioned whether Article 9 of the ECHR protects religious feelings. Therefore, the ECtHR should not have determined whether interference with the applicant's freedom of expression was necessary to guarantee the protection of freedom of conscience and religion under Article 9 of the ECHR but rather whether it was necessary to guarantee the protection of the rights of other persons under Article 10(2) of the ECHR, which, in the case in question, referred to the protection of the religious feelings of other people under Article 196 of the Polish Criminal

43 See: *Vajnai v. Hungary*, par. 57; *Fáber v. Hungary*, par. 57.

44 This finding stands in contrast to the findings of the District Court in Warsaw, which stated that "[…] due to the derogatory nature of the statement, it cannot be considered as falling within the limits of freedom of speech, conscience, and the right to present different views" (Judgment of the Warsaw-Mokotów District Court in Warsaw of 16 January 2012, III K 416/10, p. 14). As a side note, it is worth noting that this sentence also contains a substantive mistake – it is a mistake to state that the statement does not fall within the limits of "freedom of conscience" as freedom of conscience in the internal dimension is not subject to limitations; it is only the externalisation of what is internal that can be limited.

Code. In this situation, the Court should have devoted its considerations to what constitutes the protection of religious feelings and should have given its arguments in this context, including the standards regarding religious feelings developed under Article 9 of the ECHR, if it asserts that religious feelings are protected under this Article. Meanwhile, in the most extensive part of the justification relating to the necessity of interfering with the applicant's freedom of expression, the Court obscured the key issue of protecting religious feelings by automatically invoking general principles regarding freedom of conscience and religion without specifically addressing religious feelings. In other words, the ECtHR once again overlooked the significance of religious feelings, this time making a substantive error in its line of reasoning.

Finally, it is worth pointing out one more aspect that was either treated superficially (by the domestic courts) or completely ignored (by the ECtHR). In her complaint, the applicant alleged that Poland had violated Article 10 of the ECHR, thus indicating the subject and scope of her complaint. However, an analysis of the statement for which Dorota Rabczewska was convicted may lead to the conclusion that the conviction also constituted a violation of her freedom of thought, conscience and religion. In the criminal statement, the applicant reveals her own religious beliefs and worldview. How else can we interpret her statements

> […] of course I believe in a higher power, not necessarily called God […]. There are different religions, and every person, it's nice that every person believes in something. I believe in something, too. I try to pray and I had a religious upbringing, but I have my own views on various matters that […] I talked about. […] I believe in what is. […] It's hard to believe in something written down by someone wasted from drinking wine and smoking some weed.[45]

The last sentence, which was taken out of context, served as the basis for reporting a crime, but it can also be viewed as an expression of one's worldview. Hypothetically, the case in question might also present a conflict solely under Article 9 of the ECHR. However, this matter will not be further explored because it falls outside the current study's scope.

Conclusion

In the case of *Rabczewska v. Poland*, the ECtHR ruled in favour of the applicant and held that her conviction for an incriminated statement violated Article 10 of the ECHR.

In my opinion, the justification provided by the domestic courts in their judgements demonstrates errors in their assessment of the evidence. This is confirmed by the ruling of the ECtHR that the impugned statement did not amount to an improper or abusive attack on the object of religious veneration. It is even more difficult to find rational and substantive arguments to justify the fact that an improvised, frivolous and even unwise statement taken out of context and reported by two individuals prompted and involved

[45] "Doda o religii." Interview. *Dziennik Online*. n.d.

law enforcement agencies and the state justice system for several years in defence of allegedly offended religious feelings.[46] The arguments put forward in domestic proceedings by the prosecutor, witnesses and courts in their justifications of both judgements as well as those presented by the Government of the Republic of Poland during proceedings before the ECtHR do not qualify as such arguments. Judging Wojtyczek's dissenting opinion also fails to offer such arguments. His assertions regarding the supposed "christianophobia" in Poland that lacked specific data, sources and context for the acts deemed christianophobic are surprising – such propositions were an official narration of the ruling party at that time.

The ECtHR's judgement in *Rabczewska v. Poland* is generally approved regarding its merits, but it is criticised for the justification it provides. I agree with those commentators who described this justification as unclear and fault the presented argumentation for its lack of clarity and precision. This renders it challenging, if not impossible, to reliably anticipate how the Court will rule in similar cases in the future. In this context, it is necessary to develop much more individualised and precise justifications, which should not merely comprise a compilation of excerpts from previous judgements because these may not always be relevant to the case at hand. The suggestions concerning how the ECtHR could better ground the merits of the case have been presented above.

Although the complaint concerned a violation of Article 10 of the ECHR, the Court paid disproportionate attention to the general principles of Article 9 of the ECHR, wrongly omitting the issue of protection of religious feelings. Instead, it should have focused on Article 10(2) of the ECHR to determine and precisely justify whether the interference was justified because it protected the rights of other persons, that is, the right to have their religious feelings protected. It seems that the key part of the judgement is the one in which the ECtHR asserted that the examined statement, in its opinion, did not amount to an improper or abusive attack on the object of religious worship. However, this conclusion can be formulated only when the last criterion of the threefold test has been examined, that is, whether interference was necessary. Nevertheless, it cannot be ignored that, because the statement did not amount to an improper or abusive attack on an object of religious worship, there could be no violation of religious feelings, and because there was no violation, no crime was committed; therefore, the interference of the Polish state was not only unnecessary but also legally groundless, and as such, it was not prescribed by law and did not serve the legitimate purpose indicated in Article 10(2) of the ECHR. It also seems that there were grounds to rule that the Polish state did not meet any of all three criteria of the threefold test used to determine whether the interference was compliant with the Convention.

The ECtHR's judgements in which the Polish state is the losing party reveal a disturbing inconsistency between the rulings of Polish courts and those of the ECtHR because

[46] "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." Zawiślak 2023, 222.

it is contrary to the case law developed based on legal provisions within Poland's legal system, to which the Polish state has willingly committed and bound itself. It is also disturbing because, regardless of whether we agree or disagree with the rulings in the cases that Poland lost, they show that the Polish state is violating human rights as safeguarded under the Strasbourg framework. It is difficult not to agree with those who criticise the sometimes apparent lack of coherence or clarity in the ECtHR's rulings concerning freedom of conscience and religion. However, it is also undeniable that it is difficult to justify adhering to legal rulings established by the Court some decade ago, taking into account contemporary social dynamics, such as the increasing pluralism of worldviews, secularisation and evolving religious sensitivities. These can be observed in Poland at an unprecedented scale.[47]

Therefore, this judgement should serve not only as inspiration but also as an imperative to explore the current perspective of the ECtHR in adjudicating human rights issues, particularly based on Article 196 of the Polish Criminal Code, also in the context of the abovementioned changes.

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[47] See: Mariański 2018, 77–106; Marcin Przeciszewski. 2020. "Spada zaufanie do Kościoła." eKAI, November 20, https://ekai.pl/spada-zaufanie-do-kosciola/ [accessed: 10 September 2024].

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