

IN THE CONSTITUTIONAL TRIBUNAL OF POLAND

Case SK 54/13

**Constitutional review of Article 196 of the Polish Criminal Code
Concerning “offence to religious feelings”**

AMICUS BRIEF BY

ARTICLE 19

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INTRODUCTION

1. Pursuant to § 29. 2 of the Rules of the Constitutional Tribunal, ARTICLE 19 files this *amicus curiae* brief in Case SK 54/13; which addresses the compatibility of Article 196 of the Polish Criminal Code (Criminal Code) penalizing “offence to religious feelings”.
2. The present case is an opportunity for the Constitutional Tribunal to clarify the compatibility of Article 196 with Poland’s international and European human rights obligations. In particular, it focuses on its compatibility with international standards on the rights to freedom of expression, freedom of religion or belief, and equality and non-discrimination which Poland has a duty to implement into its domestic law and policy. These rights are protected by the Universal Declaration of Human Rights (UDHR) and treaty law at the international and regional levels. They are considered universal, indivisible, interdependent and interrelated as emphasised by the Vienna Declaration and Programme of Action of 1993.¹
3. These principles are especially relevant to the rights to freedom of expression and freedom of thought, conscience and religion. After all, freedom of expression constitutes an essential aspect of the right to freedom of thought, conscience and religion and is essential to creating an environment in which open discussion of ideas, including about religion, can be held. Freedom of expression and freedom of religion or belief are two essential fundamental human rights that should be equally respected and protected.²
4. This amicus brief draws upon provisions of international and regional human rights treaties and their authoritative interpretation by international and regional human rights courts, bodies and mechanisms, including UN thematic mandate-holders appointed to examine, monitor, advise and publicly report on relevant rights.

ABOUT ARTICLE 19

5. ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. With an international focus since its foundation in 1987, ARTICLE 19 currently has offices in Bangladesh, Brazil, Kenya, Mexico, Myanmar, Senegal, and Tunisia. It takes its name from Article 19 of the Universal Declaration on Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends and develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally.
6. ARTICLE 19 has extensive expertise on and experience of advocating for the protection of the right to freedom of expression in accordance with international human rights standards, including in issues that are being reviewed in the present case. At the domestic level, we have intervened in the *Judicial Review of Law Number 1/PNPS/1965 concerning the prevention of religious abuse and/or defamation* before the Constitutional Court of Indonesia. We have also intervened in several relevant cases before the European Court of Human Rights, including *S.A.S. v. France*,³ *Bayev and Others v. Russia*,⁴ *KAOS GL v. Turkey*,⁵ *Samodurov v Russia*,⁶ *Incal v. Turkey*,⁷ *Goodwin v. the United Kingdom*⁸ and *Wingrove v. the United Kingdom*.⁹
7. At the international level, ARTICLE 19 has participated in the multi-stakeholder process that led to the presentation of the “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”¹⁰ and has also contributed to the consultation towards the development of Human Rights Committee’s

General Comment No 34.¹¹ Both these international instruments address, *inter alia*, whether provisions on blasphemy, religious insult are compatible with international law.

8. The remainder of this brief is structured as follows. First, it summarises the relevant constitutional and legal framework concerning offence to religious feelings. It then sets out the relevant international and regional human rights-law based arguments concerning laws criminalising disrespect to a religion or belief system, including laws on blasphemy, defamation of religions and religious insult.

POLAND'S INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

General legal obligation to implement Poland's international obligations domestically

9. The Polish state authorities, including the courts, are legally obliged to implement the state's international and regional human rights obligations - including on freedom of expression, freedom of religion or belief and the right to equality and non-discrimination - into Poland's domestic law and policy.
10. The *International Covenant on Civil and Political Rights* (ICCPR) provides the key international treaty framework for Poland's international legal obligations relevant to this case: on freedom of opinion and expression (Article 19), on freedom of thought, conscience and religion (Article 18), and equality and the prohibition of discrimination (Articles 2, 26 and 27).¹² As signatory to the ICCPR, Poland is bound by its terms and required to enact legislation to give domestic effect to its provisions and to bring domestic laws into line with the ICCPR.¹³ Poland has made no reservations or declarations in relation to the ICCPR's provisions on the rights at issue in this case and therefore must fully meet the obligations which flow from them. Moreover, under Article 27 of the Vienna Convention on the Law of Treaties, Poland "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The Human Rights Committee, the UN treaty body charged under the ICCPR with supervising its implementation, has explained that:

[A]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level... are in a position to engage the responsibility of the State Party.

11. The Committee further clarifies that states parties are required to:

Take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article... domestic law or practice [must] be changed to meet the standards imposed by the Covenant's substantive guarantees.¹⁴

12. The European Convention on Human Rights (ECHR) provides the regional framework for the rights engaged in this case: on freedom of opinion and expression (Article 10 ECHR), freedom of thought, conscience and religion (Article 9) and on equality and the prohibition of discrimination (Article 14).¹⁵ Poland is bound by its terms to implement its provisions in domestic law, as it is the ICCPR.

Freedom of expression under international law

13. The right to freedom of expression is protected by Article 19 of the ICCPR which provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: for respect of the rights or reputations of others; for the protection of national security or of public order (ordre public), or of public health or morals.

14. Article 20 para 2 of the ICCPR then states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

15. The UN Human Rights Committee (HR Committee), treaty body in charge of interpreting the ICCPR, gave its authoritative interpretation of the meaning of Article 19 in *General Comment No 34* in 2011, that covers a broad range of modes and kinds of expression, including artistic expression and expression which may be insulting. More specifically, the HR Committee stated:

This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and *artistic expression*, teaching, and *religious discourse*. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as *deeply offensive*, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20 (emphasis added, some footnotes omitted).¹⁶

16. General Comment No 34 is significant to the current case since it gives the clearest and most authoritative statement that laws criminalising disrespect to a religion or belief system – including laws on blasphemy, defamation of religions and religious insult and religious offence – are incompatible with international human rights law unless

- they genuinely constitute prohibitions on incitement to discrimination, hostility or violence *and*
- also meet the standards of Article 19 para 3 of the ICCPR and other provisions of the ICCPR, including those on non-discrimination. This is an extremely high standard and it would be impossible for any blasphemy law to meet it.

Specifically, General Comment No 34 states:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.¹⁷

17. Even if a prohibition on expression did qualify as incitement under Article 20 para 2 of the ICCPR, it would still have to meet the criteria of Article 19 para 3 of the ICCPR. Under that provision, restrictions on freedom of expression:

- must be provided by law;¹⁸

- must only be imposed based on one of the legitimate aims set out in Article 19 para 3 of the ICCPR; restrictions are not allowed on other grounds, “even if such grounds would justify restrictions to other rights protected in the Covenant”,¹⁹ and
- must conform to the strict tests of necessity and proportionality, in the sense they should not be overbroad. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.²⁰ In applying the principle of proportionality, states should consider “the form of expression at issue as well as the means of its dissemination”, meaning that political speech, particular concerning political or public figures is accorded a higher level protection.²¹ Thus, paragraph 3 “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights”.²² Furthermore, it is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression. In this regard, the Committee has stated:

[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.²³

18. Laws restricting freedom of expression must also “be compatible with the provisions, aims and objectives of the Covenant” as well as its provisions on non-discrimination.²⁴ Significantly, the Committee has indicated that the term “others” in Article 19 para 3 relates to other persons individually or as members of a community,²⁵ including individual members of a community defined by its religious faith²⁶ or ethnicity,²⁷ but the term cannot be said to apply for the respect of religions per se.²⁸
19. Any law criminalising offence to religious feelings would also not meet the standard of Article 20 para 2 of the ICCPR which requires states to prohibit by law only “incitement to discrimination, hostility or violence”. The Rabat Plan of Action (Rabat Plan), which was adopted in October 2012, elaborates on the nature of states international human rights obligations on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.²⁹ Noting the “negative impact of anti-blasphemy laws”, the Rabat Plan indicates that such laws are incompatible with states’ international human rights obligations by stating that:

States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.³⁰

The Rabat Plan also draws from the policy documents developed by ARTICLE 19, in particular the *Camden Principles on Freedom of Expression and Equality*³¹ and *Prohibiting Incitement to discrimination, hostility and violence*.³² The Camden Principles highlight the principle that “states should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions”, unless such expression constitutes incitement to discrimination hostility or violence.³³

20. The international legal position on religious insult, including blasphemy, laws set forth in General Comment No 34 and then by Rabat Plan of Action has been supported by other UN human rights bodies. Even before these two instruments were adopted in 2011 and 2012 respectively, successive UN Special Rapporteurs on the promotion and protection of the right to freedom of expression and opinion (Special Rapporteur on FOE) indicated that limitations on the right to freedom of expression were “designed in order to protect individuals against direct violations of their rights” and “are not designed to protect belief systems from external or internal criticism.”³⁴ The 2008 Joint Statement of the UN Special Rapporteur on Freedom of Opinion and Expression together with other international experts on freedom of expression,

namely, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information stated:

The concept of defamation of religions does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have reputations of their own.

Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.³⁵

21. The UN Working Group on Arbitrary Detention also held that

International law does not permit restrictions on the expression of opinions or beliefs which diverge from the religious beliefs of the majority of the population or from the State prescribed one.³⁶

22. Significantly, since 2011, UN Charter-based human rights bodies have refrained from adopting highly contentious resolutions urging states “combating defamation of religions”. By deliberately omitting any reference to “defamation of religions”, Resolution 16/18 of 24 March 2011 of the Human Rights Council on “combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief” embodied a *de facto* rejection of the term and denial of its legitimacy in the UN human rights system. Resolution 16/18 has since been consolidated through similar resolutions adopted by the Human Rights Council and General Assembly, specifically: Human Rights Council resolutions 16/18 of 24 March 2011, 19/25 of 23 March 2012, 22/31 of 22 March 2013, 25/34 of 28 March 2014, 28/29 of 27 March 2015 as well as General Assembly resolutions 66/167 of 19 December 2011, 67/178 of 20 December 2012, 68/169 of 18 December 2013 and 69/174 of 18 December 2014.

Freedom of expression under European human rights law

23. Article 10 of the ECHR states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

24. The European Court of Human Rights has repeatedly asserted that Article 10 of the ECHR protects speech that “offends, shocks or disturbs.”³⁷

25. Although Article 10 of the ECHR does not expressly protect artistic expression as such, it nonetheless protects the arts as a form of expression. As the European Court of Human Rights (European Court) noted:

Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society.³⁸

26. In a number of cases the European Court has found a violation of freedom of expression under Article 10 of the ECHR in cases concerning religious insult. In particular:

- In *Giniewski v France*, it held that a conviction for “publicly defaming” the Christian community did not meet a pressing social need, was not necessary and hence violated freedom of expression. The Court considered that the article in question was not “gratuitously offensive”, nor “insulting” and did “not incite disrespect or hatred.” Furthermore, it considered that the article had contributed to a debate on the various causes of the Holocaust, “a question of indisputable public interest in a democratic society.”³⁹
- In *Klein v Slovakia*, it held that a conviction of “defamation of nation, race and belief”, which the state had sought to justify on the grounds that the speech concerned offended religious believers, was in violation of Article 10 of the ECHR given that it neither corresponded to a pressing social need, nor was proportionate to the aim pursued, namely, the rights of those whose religious feelings had been offended.⁴⁰

27. Other bodies of the Council of Europe have commented on the compatibility of blasphemy and religious insult laws with the European human rights standards on freedom of expression. Notably, in its Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, the Parliamentary Assembly of the Council of Europe considered that “national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence”. It recommended that:

In view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by the governments and parliaments of the member states.⁴¹

28. The Council of Europe’s Venice Commission subsequently recommended *inter alia* that:

- a) incitement to hatred, including religious hatred, should be the object of criminal sanctions as is the case in almost all European States ...
- b) That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component [and]
- c) That the offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced.⁴²

Freedom of religion or belief under international law

29. Article 18 of the ICCPR provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public and private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

30. The HR Committee stated in General Comment No 22, Article 18 of the ICCPR should be interpreted broadly to “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.” It is “not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.” The scope of the right includes “freedom to choose a religion or belief, including, inter alia, the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief.”⁴³
31. General Comment No 22 indicates that Article 18 of the ICCPR protects rights of individuals or communities to freedom of religion or belief, including the right to manifest their religion or belief in worship, practice and teaching.⁴⁴ It does not protect religions or beliefs, religious ideas, symbols or personalities, as such. As the UN Special Rapporteurs on freedom of religion or belief (Special Rapporteur on ROB) and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance have asserted, the right to freedom of religion or belief “protects primarily the individual and, to some extent, the collective rights of the community concerned, but it does not protect the religions or beliefs per se”.⁴⁵
32. The scope of protection of Article 18 of the ICCPR does not insulate any religion or belief from criticism or ridicule, as the Special Rapporteur on ROB has emphasised.⁴⁶ Indeed, this provision *necessarily* covers the protection of individuals and groups who hold interpretations of religions which depart from or may be insulting or offensive to the feelings of many other followers. Such individuals and groups may include religious minorities and artists. Moreover, imposing criminal sanctions on insult or offence to religious feelings can “limit scholarship on religious issues and may asphyxiate honest debate or research”, as UN Special Rapporteurs on freedom of religion or belief and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance have pointed out.⁴⁷
33. Thus, while religious insult, religious offence, defamation of religions or blasphemy may “offend people and hurt their feelings [they do] not directly result in a violation of ... rights to freedom of religion,” as the UN Working Group on Arbitrary Detention stated.⁴⁸ Moreover, states have positive obligations to “create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their ... religion.”⁴⁹
34. In recent years, the Special Rapporteur on ROB has repeatedly called on states to repeal their blasphemy provisions.⁵⁰ In doing so, he has expressly endorsed the Rabat Plan of Action “[confirming] that, according to his experiences, blasphemy laws typically have intimidating effects on members of religious minorities as well as on critics or dissenters.”⁵¹ He has also noted that “[o]ften the mere existence of such legislation has a chilling effect on communicative outreach activities.”⁵²

Freedom of religion or belief under European human rights law

35. Article 9 of the ECHR states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall 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.

36. The jurisprudence of the European Court supports the interpretation of freedom of religion or belief of the above-mentioned UN sources in certain key respects.
37. According to the European Court's jurisprudence, freedom of religion and belief entails freedom to hold or *not* to hold religious beliefs and to practise or not to practise a religion. The Court held that freedom of religion or belief is:

[A] precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.⁵³

The European Court also recognised that:

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.⁵⁴

38. The European Commission (under the earlier two tier proceedings at the European Court) addressed the balance between the freedom of expression and freedom of religion in several cases:
- In *Choudhury v the UK*, the Muslim applicant complained about the UK's decision not to ban *The Satanic Verses*, which he considered blasphemous, relying on Article 9 of the ECHR. The European Commission on Human Rights rejected the application on the grounds that the rights contained Article 9 could not "extend to guarantee a right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals."⁵⁵
 - In a Polish case, *Dubroska and Skup v Poland*, a similar complaint was also rejected. The European Commission of Human Rights ruled that "members of a religious community must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith".⁵⁶

The right to equality under international human rights law

39. The right to equality before the law and the protection of all persons against discrimination including on the basis of religion, is at the heart of human rights. It is expressly provided for in the UN Charter which repeatedly calls for "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."⁵⁷ This principle runs through international human right law and is reiterated, in one form or another, in all human rights treaties, including those to which Poland is a state party, as detailed below.
40. The equality principle is protected by, *inter alia*, Articles 2, 26 and 27 of the ICCPR which provide:

Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess their own religion, or to use their own language.

41. The Human Rights Committee has indicated that it “views with concern any *tendency* to discriminate against any religion or belief for any reason” (emphasis added).⁵⁸ This means that even if the law prohibiting blasphemy or defamation of religion was neutral on its face and did not distinguish between various religions, it still must not be discriminatory in terms of effect and impact. Even such neutral laws tend to have a detrimental impact upon the equal enjoyment of rights by minorities and non-believers and may exacerbate societal discrimination against them, and a problematic from an international legal perspective.
42. The discriminatory impact of blasphemy laws have been highlighted by international authorities over the years. Notably, the Rabat Plan of Action’s recommendation for repeal of blasphemy laws is also based on the compelling argument that such laws are counter-productive and discriminatory in their effects.

At the national level, blasphemy laws are counterproductive, since they may result in de facto censure of all inter-religious or belief and intra-religious or belief dialogue, debate and criticism, most of which could be constructive, healthy and needed. In addition, many blasphemy laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on what constitutes religious offences or overzealous application of laws containing neutral language. Moreover, the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.⁵⁹

43. This statement echoes the very similarly phrased joint statement of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on freedom of expression at the Durban Review Conference in 2009.⁶⁰

The right to equality under European human rights law

44. Article 14 of the ECHR states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

45. The European Court has tended to decide relevant cases concerning religious insult and artistic expression without reference to Article 14 of the ECHR. It is noted that Poland has not yet signed Protocol No 12 to the ECHR which prohibits discrimination irrespective of the enjoyment of rights guaranteed by the ECHR. Nonetheless, the rights protected by Article 10 on freedom of expression and Article 9 on freedom of religion or belief must be guaranteed with respect to the principle of non-discrimination, including on the grounds of religion.

COMPARATIVE APPROACHES

46. ARTICLE 19 finally notes that although some EU Member States maintain criminal or administrative laws punishing blasphemy and/or religious insult,⁶¹ there is arguably emerging movement towards the abolition of blasphemy prohibitions in Europe. Norway has formally repealed its blasphemy law in May 2015 and there is mounting pressure for a referendum for the repeal of the blasphemy law in Ireland. Iceland abolished blasphemy law in July 2015. This movement towards the decriminalisation is strongly supported by the international human rights sources – especially General Comment No 34 and the Rabat Plan of Action – referenced in this brief.

CONCLUSION

47. For all the above reasons, it is respectfully submitted that Article 196 of the Criminal Code of Poland is incompatible with Poland's international legal obligations. It violates a number of legally binding provisions on freedom of opinion and expression, freedom of thought, conscience and religion, equality and freedom from discrimination. ARTICLE 19 respectfully submits that the provisions should be repealed.

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ARTICLE 19

¹ UN Vienna Declaration and Programme of Action, 25 June 1993, UN Doc A/CONF. 157/23.

² Report of the Special Rapporteur on freedom of religion or belief, 20 December 2004, UNDoc E/CN.4/2005/61 para 72.

³ European Court, *S.A.S. v. France*, App. No 31955/11, 1 July 2014.

⁴ European Court, *Bayev & Others v. Russia*, App.No 67667/09, pending.

⁵ European Court, *KAOS GL v. Turkey*, App. No 4982/07, pending.

⁶ European Court, *Samodurov v Russia*, App. No 3007/06.

⁷ European Court, *Goodwin v. the UK Incal v. Turkey*, App. No. 22678/93. 9 June 1998.

⁸ European Court, *Goodwin v. the UK Goodwin v. the UK*, App. No 28957/95. 11 July 2002.

⁹ European Court, *Wingrove v. the UK*, App. No. 17419/90, 25 November 1996.

¹⁰ Appendix in the Annual Report of the UN High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013.

¹¹ HR Committee, General Comment No. 34, CCPR/C/GC/34, 11 September 2011.

¹² UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976.

¹³ Article 2(2) of the ICCPR; Articles 2(1)(b) and 15 Vienna Convention on the Law of Treaties 1969.

¹⁴ HR Committee, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras 4 and 13.

¹⁵ Adopted 4 November 1950.

¹⁶ General Comment No. 34, *op.cit.*, para 11; Comm. No. 926/2000, *Shin v. Republic of Korea*, 16 March 2004.

¹⁷ HR Committee, Concluding observations on the UK (CCPR/C/79/Add.119) and on Kuwait (CCPR/CO/69/KWT).

¹⁸ General Comment No. 34, *op.cit.*, para 25.

¹⁹ *Ibid*, para 22.

²⁰ HR Committee, General Comment No 22, CCPR/C/21/Rev.1/Add.4.

²¹ General Comment No. 34, *op.cit.*, para 34.

²² *Ibid*, para 23.

²³ *Ibid* para 35.

²⁴ *Ibid*. Also HR Committee, Comm. No. 488/1992, *Toonen v. Australia*, 30 March 1994.

²⁵ HR Committee, Comm. No 736/97, *Ross v. Canada*, 18 October 2000.

²⁶ HR Committee, Comm. No 550/93, *Faurisson v. France*; Concluding observations on Austria (CCPR/C/AUT/CO/4).

²⁷ HRs Committee, Concluding observations on Slovakia (CCPR/CO/78/SVK); Concluding observations on Israel (CCPR/CO/78/ISR).

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- ²⁸ General Comment No. 34, *op.cit.*, para 28.
- ²⁹ Appendix in the Annual Report of the UN High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013. The credibility and legitimacy of the Rabat Plan derives from its substantive content (as the “state of the art” explanation of states duties and responsibilities vis-à-vis incitement) and the multi-stakeholder process that led to its adoption, see Sejal Parmar, “The Rabat Plan of Action: A Global Blueprint for Combating ‘Hate Speech’” (2014) 1 European Human Rights Law Review 21 – 31.
- ³⁰ *Ibid.*, para 25.
- ³¹ ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality*, April 2009.
- ³² ARTICLE 19, Prohibiting Incitement to discrimination, hostility and violence, December 2012.
- ³³ *Ibid.*, para 12.3.
- ³⁴ E.g. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 28 February 2008 A/HRC/7/14, para 85.
- ³⁵ Joint statement from 10 December 2008.
- ³⁶ UN Working Group on Arbitrary Detention, Opinion No 35/2008 (Egypt), 6 December 2008, para 38.
- ³⁷ European Court, *Handyside v the UK*, App. No 5493/72, 7 December 1976.
- ³⁸ European Court, *Müller v Switzerland*, App. No 10737/84, 24 May 1988, para 33.
- ³⁹ European Court, *Giniewski v France*, App. No 64016/00, 31 April 2006, para 51-53.
- ⁴⁰ European Court, *Klein v Slovakia*, App. No 72208/01, 31 October 2006.
- ⁴¹ Council of Europe Recommendation 1805 (2007), Blasphemy, religious insults and hate speech against persons on grounds of their religion, 29 June 2007, para 15.
- ⁴² Venice Commission, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, 23 October 2008, para 89.
- ⁴³ General Comment No 22, *op.cit.*, paras 2, 5.
- ⁴⁴ *Ibid.*, para 4.
- ⁴⁵ Report to the Second Session of the Human Rights Council A/HRC/2/3, 20 September 2006, para 38.
- ⁴⁶ Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, 21 December 2009, A/HRC/13/40 para 39.
- ⁴⁷ Report of the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, UN Doc A/HRC/2/3 20 September 2006, para 42.
- ⁴⁸ Opinion No.35/2008 (Egypt), 6 December 2008, para.38.
- ⁴⁹ Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, *op.cit.*, para 30.
- ⁵⁰ Reports of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 29 December 2014, A/HRC/28/66 para 94; 24 December 2012 A/HRC/25/58 para 59; 24 December 2012 A/HRC/22/5 para 66; and to the General Assembly of 13 August 2012 A/67/303 para 69.
- ⁵¹ *Ibid.*, A/HRC/25/58, para 70.
- ⁵² A/67/303, *op.cit.*, para 44.
- ⁵³ European Court, *Kokkanikis v Greece*, App. No 14307/88, 25 May 1993.
- ⁵⁴ European Court, *Otto-Preminger v Austria*, App. No 13470/88, 20 September 1994, para 47; *IA v Turkey*, App.No 42571/98, 13 September 2005, para 47.
- ⁵⁵ European Commission of Human Rights, *Choudhury v UK*, App. No 17439/90, 5 March 1991.
- ⁵⁶ European Commission, *Dubowska v Skup v Poland*, Apps. Nos 33490/96 and 34055/96, 18 April 1997.
- ⁵⁷ UN Charter, 26 June 1945, Article 1(3). See similarly Articles 13(1)(b), 55(c) and 76(c).
- ⁵⁸ General Comment No. 22, *op.cit.*, para 2.
- ⁵⁹ The Rabat Plan of Action, *op.cit.*, para. 25.
- ⁶⁰ Joint Statement by the Special Rapporteur on contemporary forms of racism, the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on freedom of expression, 22 April 2009; the Joint declaration on the subject of defamation of religions as well as anti-terrorism legislation; International Mechanisms for Promoting Freedom of Expression, Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 9 December 2008.
- ⁶¹ Those are Austria, Cyprus, Denmark, Finland, France (Alsace-Moselle only), Germany, Greece, Ireland, Italy, Malta, Poland, Portugal, Spain and the UK Northern Ireland only. See International Press Institute, *Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policy Makers*, January 2015.