

Between

Dorota
RABCZEWSKA

Applicant

v.

Poland

Respondent Government

Third-party intervention submissions by ARTICLE 19

Introduction

1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and right to freedom of information. ARTICLE 19 welcomes the opportunity to intervene in this case, by the leave of the President of First Section of the Court of 12 March 2018, under Rule 44(3) of the Rules of the Court.
2. The present case concerns the imposition of criminal sanctions for personal opinions expressed in the context of a live television broadcast that were deemed offensive to the (long deceased) authors of the Bible, and therefore insulting to Christians, who demographically constitute by far the majority faith group in Poland. It raises key issues regarding the compatibility of “religious insult” laws with the European Convention.
3. In this intervention, ARTICLE 19 draws on its expertise as an organisation working on freedom of expression issues and advocating consistently against prohibitions on blasphemy, “religious defamation”, and “religious insult” in various countries around the world, beginning with our campaign in defence of Salman Rushdie; and advocating against various “defamation of religion” resolutions at the UN. Our submissions to the Court are that:
 - **“Religious insults” fall within the scope of the right to freedom of expression;**
 - **Protecting the “feelings” of religious believers through the criminal law, where there is no incitement to discrimination or violence, does not pursue a legitimate aim, and is not necessary in a democratic society; and,**
 - **“Religious insult” laws are inconsistent with international and European human rights law, because of the discriminatory impact they have on the freedom of expression rights of atheists, believers of minority religions or beliefs, and dissenters within religion or beliefs.**
4. Our submissions take a mostly comparative perspective, assessing how UN human rights mechanisms have addressed relevant points of principle to these three questions under international human rights instruments analogous to the European Convention.

A. “Religious insults” fall under the protection of the right to freedom of expression

5. The European Court has repeatedly asserted that speech that “offends, shocks or disturbs” is protected.¹ Similarly, the UN Human Rights Committee (HR Committee), the treaty body constituted by independent experts tasked with monitoring implementation of the International Covenant on Civil and Political Rights (ICCPR), has determined in its General Comment No. 34 that the scope of protection afforded to the right to freedom of expression by Article 19(2) of the ICCPR is similarly broad.² It covers “the expression and receipt of communications of every form of idea and opinion capable of transmission to others”, and includes “artistic expression” as well as “religious discourse.”³ Importantly, the HR Committee has stated authoritatively that “the scope of [Article 19 paragraph 2 of the ICCPR] embraces 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.”⁴
6. The HR Committee’s approach is therefore consistent with that of the European Court’s in several cases:⁵ any expression, including artistic expression, that pertains to religious discourse, even when it may be deeply offensive, falls within the protective scope of Article 10 of the European Convention, subject to the permissible limitations set out in Article 10(2) of the Convention.

B. The protection of the feelings of religious believers through the criminal law, in the absence of an incitement to discrimination or violence, does not pursue a “legitimate aim” and is not “necessary in a democratic society”

7. Article 10(2) of the European Convention – as with Article 19(3) of the ICCPR - permits States to limit the right to freedom of expression, provided three strict conditions are met, also known as “the three-part test”; any limitations has to be: (a) provided by law; (b) in pursuit of a legitimate aim, including “the protection of the reputation or rights of others”; and, (c) be necessary and proportionate to the legitimate aim. ARTICLE 19 notes that additionally, Article 20(2) of the ICCPR obliges States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence”, though such limitations must also meet the three-part test.⁶
8. ARTICLE 19 submits that under this three-part test, “religious insult” laws, as a subset of prohibitions on “blasphemy”, raise two connected concerns: i) they do not pursue a legitimate aim, and ii) they are not necessary in a democratic society. An analysis of international human rights standards shows that to resolve these concerns, it would be necessary to assume the legitimate aim of such laws is to protect individuals from the advocacy of religious hatred constituting incitement to hostility, discrimination, or violence (per Article 20(2) of the ICCPR), and also read into the law the essential elements of the offence of “incitement.” Where Article 20(2) of the ICCPR is properly implemented in national laws in more generic “incitement” offences, however, specific “religious insult” laws would be duplicative and therefore redundant.
 - i. Legitimate aim
9. Under Article 10(2) of the European Convention, and under Article 19(3) of the ICCPR, any restriction of the right to freedom of expression must pursue one of a series of exhaustively listed “legitimate aims”. “The protection of the reputation or rights of others”, within this listing in both instruments, has a narrow meaning.
10. The HR Committee has clarified that, for Article 19(3) of the ICCPR, “rights of others” means *the rights of persons*, either individually or as members of a community. While this may apply to individuals as defined by their religion or belief, the right does not attach to religions or beliefs as such.⁷ It follows from this that there is no human right to be free from exposure to ideas or opinions that are offensive, even if they are offensive to a person’s religion or belief.⁸ It is, therefore, not a

legitimate aim to impose limitations on the right to freedom of expression to protect individuals' feelings from offense, including in relation to ideas or opinions that offend their religion or belief.

11. The HR Committee has been quite unambiguous, in General Comment No. 34, in making clear that "religious insult" laws do not comply with the ICCPR:

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.**⁹ [emphasis added]

12. The UN Special Rapporteur on the right to freedom of opinion and expression has stated that limitations on the right to freedom of expression are "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."¹⁰ In relation to prohibitions on "religious insult", the Special Rapporteur specified to the UN General Assembly in 2016 that "while 'wounding religious feelings' may involve real emotional costs, such charges have no basis under international human rights law and limit without justification the sharing of information and ideas pertaining to religion and belief."¹¹ In 2008, regional freedom of expression mandates joined the UN Special Rapporteur in stating:

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.¹²

13. This has been reinforced by the UN Special Rapporteur on freedom of religion or belief, who has stated repeatedly that it is a misunderstanding of the right to freedom of thought, conscience and religion, as protected under Article 18 of the ICCPR ("the right to freedom of religion or belief"), to consider that the right protects religions or beliefs in the abstract: the right to freedom of religion or belief does not encompass a right for one's religion or belief to be free from ridicule or insult.¹³
14. At the European level, the Court has recognised in relation to Article 9 of the Convention that:

[T]hose 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 of their faith.¹⁴

15. In the view of ARTICLE 19, this approach requires recognising that an individual is not constrained in their enjoyment or exercise of the right to freedom of religion or belief when the content of their religion or belief is criticised, or insulted, even where that criticism is unreasonable or offensive. To have any meaning, a *necessary feature* of the right to freedom of religion or belief must be that it requires the State to protect conflicting and contrary viewpoints, even if they are offensive or insulting. Indeed, since the right pertains to a person's most deeply held beliefs, those convictions should be capable of withstanding external challenge. As the UN Working Group on Arbitrary Detention has stated, while religious insult "may offend people and hurt their feelings [they do] not directly result in a violation of ... rights to freedom of religion."¹⁵

16. The European Commission earlier dismissed numerous cases on the basis that 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.*”¹⁶
17. This approach finds also support in the broad reading the HR Committee has given in Article 18 of the ICCPR in placing significant value in respect for pluralism and diversity.¹⁷ This has led the Special Rapporteur on freedom of religion or belief to argue, convincingly, that “taking religious and philosophical pluralism seriously” means recognizing a right for a diversity of people to hold beliefs that are “irreconcilable.”¹⁸ To equate feelings of offense regarding one’s religion or belief as an infringement of one’s right to freedom of religion or belief would, in the view of ARTICLE 19, go too far. As the Special Rapporteur argues:

Obviously, satirical comments on religious issues or depictions of religious figures may sometimes offend the feelings of believers. Those who feel offended are free to voice their anger publicly and call for a change in attitudes. This can also become an issue for interreligious communication and public debates. **Subjective feelings of offensiveness, however, should never guide legislative action, court decisions or other State activities.** The threshold for imposing legal restrictions on freedom of expression must remain very high, in compliance with the criteria provided in international human rights law.¹⁹ (Emphasis added)

18. ARTICLE 19 therefore submits that prohibitions on “religious insult” are indistinct from more broadly framed prohibitions on blasphemy. That the former seek to protect the subjective feelings of persons, while the latter protect religions or beliefs in the abstract, has no distinction in practice: proving insult to the individual in these circumstances rests on an evidential finding of insult to the religion itself. In both instances, the State finds itself in the position of using the criminal law to determine the acceptable boundaries of religious discourse. Since “religious insult” laws in effect privilege the content of religious or philosophical beliefs, they should be viewed as incompatible with the right to freedom of religion or belief. With this being the case, it would not be possible to justify limitations on the right to freedom of expression on the basis that punishing “religious insult” pursues the “legitimate aim” of advancing the right to freedom of religion or belief, and as such these laws also violate the right to freedom of expression.
19. We also note that “religious insult” laws are sometimes justified as pursuing the legitimate aim of protecting collective interests, such as “public order”, under Article 10(2) of the Convention and Article 19(3) of the ICCPR. For reasons outlined below, ARTICLE 19 considers that “insult” to persons’ religious feelings does not automatically create a risk to public order, and that the framework of Article 20(2) of the ICCPR provides an appropriate model for ensuring that harmful acts, for example of violence, are avoided.
 - ii. Necessary in a democratic society
20. To the extent that States may seek to justify “religious insult” prohibitions as pursuing the legitimate aim of “protecting or other legitimate aims (e.g. “protecting public order”), the experience of international human rights mechanisms is that they are counter-productive to that end, and therefore do not meet the requirement of being “necessary in a democratic society”.
21. ARTICLE 19 is aware of the sensitivities surrounding matters of religion or belief, and the realities of seeking to protect rights of others and preserve public order in environments that are hostile. Nevertheless, we consider that it is precisely in these circumstances when international human rights law must give heightened protection to freedom of expression, since it is at such moments when the right is most at risk, and also when the value of protecting open and robust debate is most important to preserving the values of democracy.
22. As the Venice Commission observed in its study on this issue, almost a decade ago:

A democracy should not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion through open public debate, as opposed to ban or repression, is the most democratic means of preserving fundamental values.

[...] in a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. Ensuring and protecting open public debate, should be the primary means of protecting inalienable fundamental values such freedom of expression and religion at the same time as protecting society and individuals against discrimination. It is only the publication or utterance of those ideas which are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited.

[...] The right to freedom of expression implies that it should be allowed to scrutinise, openly debate, and criticise, **even harshly and unreasonably**, belief systems, opinions, and institutions, as long as this does not amount to advocating hatred against an individual or groups.²⁰

23. Though intolerance on the grounds of religion or belief is a challenge to any democratic society, especially a pluralistic one, it does not follow that to counter this and promote tolerance, it is necessary to resort to restrictions on *all* intolerant speech. There is increasing support for the proposition that the most effective way to counter hatred, including on the basis of religion or belief, which may be expressed through religious insult, is by creating spaces for inclusive dialogue. In particular, the use of restrictive measures in these circumstances may
24. ARTICLE 19 also notes that in line with these reasons, since 2011, States at the UN Human Rights Council (HRC) have refrained from adopting resolutions on the contentious matter of “combating defamation of religions”, dispensing with prior calls for prohibitions on such speech. Rather, in HRC Resolution 16/18, States adopted a consensus-based approach to “combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief.”²¹ The resolution contains an eight-point action plan that calls on States to address religious intolerance through a series of predominantly positive actions that do not constrain human rights, such as through education and awareness raising, and speaking out against acts of intolerance. Of the eight points, only one foresees limitations on freedom of expression, on States to “criminalize incitement to imminent violence based on religion or belief”, notably avoiding language that would foresee prohibitions on “religious insults” as such.²² This approach has been sustained through follow-up resolutions reaffirming the action plan at the HRC,²³ and UN General Assembly.²⁴
25. This significant shift in the position of States was influenced by other human rights mechanisms. As outlined above, the UN Special Rapporteur on freedom of religion or belief has argued that respect for diversity and pluralism it is inherent to the right to freedom of religion or belief, and exemplifies its mutually reinforcing relationship with the right to freedom of expression. The Special Rapporteur has further explained how this has a practical, as well as normative, significance:

Intolerance, stereotyping, stigmatization, discrimination and incitement against persons based on their religion or belief do not only affect members of religious communities, but also have an impact on society as a whole [...] What is also needed is the development of frank public discourse, facilitated by free and independent broadcast, print and online media, a broad range of civil society organizations and other stakeholders. The best antidote to intolerant propaganda is a culture of critical public discourse with broad participation. Governments have the responsibility to create a safe and enabling environment in law and practice for media practitioners and civil society activists, based on respect for everyone’s freedom of expression and all other human rights.²⁵

26. Importantly, the Special Rapporteur stresses that what is *not* needed is prohibitions on “religious insult”, underscoring that they are counter-productive to the aims States most often cite in seeking to justify them, and are harmful to democracies:

Abundant experience in a number of countries demonstrates that blasphemy laws do not contribute to a climate of religious openness, tolerance, non-discrimination and respect. To the contrary, they often fuel stereotyping, stigmatization, discrimination and incitement to violence.²⁶

27. Indeed, the Special Rapporteur has noted that even the existence of such laws, without their enforcement, can have a chilling effect on discussions around religion or belief in society.²⁷ In evaluating the important contribution of artists to rights respecting and inclusive societies, the Special Rapporteur in the field of cultural rights has cautioned States to respect the rights of artists broadly, rather than limit protections to what might narrowly be considered their artistic output:

In particular, decision makers, including lawmakers and judges, when resorting to possible limitations to artistic freedoms should take into consideration the nature of artistic creativity (as opposed to its value or merit) as well as the right of artists to dissent, to use political, religious and economic symbols as a counter-discourse to dominant powers and to express their own belief and world vision.

[...] This entails accepting that some of these artistic and cultural works will inevitably be critical of the Government and of society, and sometimes of aspects of cultural and religious practices, and requires that Government refrain from trying to control, censor or orient these works. **States must also respect and ensure the human rights of the artists and cultural practitioners working in these areas.**²⁸

28. Moreover, the Rabat Plan of Action,²⁹ the outcome document of a series of expert meetings convened by the Office of the UN High Commissioner for Human Rights (OHCHR), which elaborates on the nature of States’ obligations under Article 20(2) of the ICCPR, criticises blasphemy laws in the following terms:

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

29. The Rabat Plan of Action, and specifically its call for the repeal of blasphemy laws, has subsequently been endorsed by numerous special procedures of the HRC.³¹

30. In relation to the necessity of limitations on “religious insult” laws to pursue public order objectives, ARTICLE 19 submits that this carries the risk of creating an “assassin’s veto”, and is inherently anti-democratic. It incentivises people with religious sensitivities to react disproportionately or violently to expression they do not like, in order to pressure authorities to censor adverse expression. It is important to distinguish expression which intentionally incites violence *against a targeted minority (or otherwise protected) group* (which “religious insult” rarely does), from provocative expression that may cause persons to retaliate *against the speaker* (which is more common). In the latter circumstance, the State should focus on those who engage in criminal acts of retaliation, or the incitement of those acts, rather than limiting the expressive provocation. Additional methods should also be considered, as outlined in HRC Resolution 16/18, to reduce tensions through community outreach, for example.

31. As the Special Rapporteur on freedom of religion has warned, “[a]nti-blasphemy, anti-apostasy and anti-conversion laws, some of which are falsely presented as “anti-incitement” legislation, often serve as platforms for enabling incitement to discrimination, hostility or violence against persons based on religion or belief.”³² This further underscores the danger in democracies of “religious insult” laws, particularly when they are enforced in favour of majority religions or beliefs.

iii. A standard of incitement to hostility, discrimination or violence

32. In light of the international human rights standards pertaining to freedom of expression and freedom of religion or belief, ARTICLE 19 submits that “offensiveness” of expression, including its “gratuitousness”, should not be considered as determinative factors in assessing either the legitimate aim of restrictions, or their necessity in a democratic society. Instead, the focus should be on whether the expression intentionally advocated religious hatred constituting incitement to hostility, discrimination or violence, and was likely to be successful in doing so.³³
33. This position is also increasingly supported in jurisprudence of the European Court. The Court has held the absence of “incitement” to be a determining factor in finding that the enforcement of “religious insult” violated Article 10 of the Convention,³⁴ with the Grand Chamber similarly treating the absence of “incitement” as determinative in more recent and analogous decisions concerning “historical memory” laws (which States often seek to justify on similar grounds to “religious insult” laws).³⁵
34. Also at the European level, the Parliamentary Assembly of the Council of Europe (PACE) has reached this same conclusion. In Recommendation 1805 (2007) “on blasphemy, religious insults and hate speech against persons on grounds of their religion”, PACE considered that “national law should only penalise expressions about religious matters which *intentionally* and severely *disturb public order and call for public violence*.”³⁶
35. Analysing “religious insult” laws a year later, the Venice Commission added further weight to this recommendation, observing that:

The Commission does not consider it necessary or 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. Neither does the Commission consider it essential to impose criminal sanctions for an insult based on belonging to a particular religion. If a statement or work of art does not qualify as incitement to hatred, then it should not be the object of criminal sanctions [...]

It is true that the boundaries between insult to religious feelings (and even blasphemy) and hate speech are easily blurred, so that the dividing line, in an insulting speech, between the expression of ideas and the incitement to hatred is often difficult to identify. This problem however should be solved through an appropriate interpretation of the notion of incitement to hatred rather than through the sanctioning of insult to religious feelings.³⁷ (Emphasis added)

36. Notably, Council of Europe Member States Denmark, the United Kingdom, Iceland, Norway, and Malta, have all repealed criminal prohibitions on blasphemy since the PACE recommendation and Venice Commission’s 2008 study.
37. In relation to the ICCPR, the HR Committee has stated that “religious insult” laws do not comply with the covenant “except in the specific circumstances envisaged in article 20, paragraph 2”, i.e. where the expression amounts to advocacy of religious hatred that constitutes incitement to hostility, discrimination or violence.³⁸ Thus, the HR Committee views preventing against these particular harms as both a legitimate aim and necessary in a democratic society, though such limitations must still comply with Article 19(3) of the ICCPR.³⁹
38. ARTICLE 19 recommends the Rabat Plan of Action for the guidance it gives courts in clarifying what the Venice Commission identifies as a “blurred line” between expression which incites harmful acts (and may be restricted), and expression that is insulting towards religions (which may not be restricted). It builds upon HR Committee General Comment No.34, and draws upon much of the European Court jurisprudence on “hate speech”, to make the following points of principle worth noting:⁴⁰

- Key elements of the offence: “Incitement” under Article 20(2) of the ICCPR supposes a focus on the *specific intent* of the speaker to cause *acts of discrimination or violence* against individuals targeted because of their religion or belief, as well as the *likelihood and imminence of those harms occurring in the particular context*. The subjective feelings of persons offended or insulted by that speech is therefore not pertinent to the key elements of this offence, since the focus is instead on preventing specific harmful actions that may be incited by speech, and the culpability of the speaker for those outcomes. Thus, the intent and position of the speaker and, in particular, their ability to influence their audience to take harmful action, is what is most relevant.
- A high threshold for limitations on expression: The Rabat Plan of Action draws upon a range of jurisprudential sources, including the European Court, to propose a six-part “threshold” test, for determining when limitations on “incitement” are necessary under the requirements of the ICCPR. Those factors are: (i) the social and political context; (ii) the speaker, e.g. his or her status and influence over their audience; (iii) the intent of the speaker; (iv) the content and form of the expression; (v) the extent of the expression; (vi) the likelihood and imminence of discrimination, hostility or violence occurring as a direct consequence of the expression.
- Proportionality: That even where this high threshold is reached, criminal sanctions should only be used as a last resort measure, considering the principles of necessity and proportionality. Moreover, the availability of numerous non-coercive measures outside of the criminal law should be considered, in particular as less restrictive means may indeed be more effective in countering intolerance and discrimination. The crux of the Rabat Plan of Action is that violence and discrimination, as well as the advocacy of hatred constituting incitement to these acts, is best prevented through open dialogue rather than through censorship.

39. ARTICLE 19 therefore submits that a State’s positive obligation to create favourable conditions for the exercise of the right to freedom of religion or belief should not suppose that limitations to freedom of expression are an effective course of action, yet alone necessary or proportionate. Rather, the UN Special Rapporteur on freedom of religion or belief has specified that Articles 18 and 19 of the ICCPR provide “positive preconditions for combating intolerance by facilitating the creation of communicative counter-strategies in the broadest sense, such as public condemnation of incitement to hatred and public demonstrations in support of targeted individuals or groups.”⁴¹

40. HRC Resolution 16/18 and the Rabat Plan of Action similarly set out a series of positive policy measures States should take to create an enabling environment for both the rights to freedom of expression and freedom of religion or belief. Several of these actions, for example in the field of education, are preventative. Others are more reactive, for example, that public officials should avoid engaging in advocacy of hatred, and speak out against incidents of intolerance, as the European Court has also urged.⁴² This demonstrates that international human rights law does view religious intolerance as a potential human rights concern, and the obligation of the State is not to do nothing in response to incidents of religious intolerance: certain interventions into public discourse may be necessary, though they do not need to limit the right to freedom of expression, and indeed it may be counter-productive to resort to censorship.

C. “Religious insult” laws have a discriminatory impact on the freedom of expression of atheists and believers of minority religions or beliefs.

41. As PACE has recognised, “national law and practice concerning blasphemy and other religious offences often reflected the dominant position of particular religions in individual states. 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.”⁴³

42. Equality before the law and the protection of all persons against discrimination, including on the basis of religion or belief, is at the heart of international and European human rights law.⁴⁴
43. In General Comment No. 34, the Human Rights Committee states that it would be “impermissible” for any prohibitions on “religious insult” “to discriminate in favour of or against one or certain religions or belief systems, of their adherents over another, or religious believers over non-believers.”
44. In the Rabat Plan of Action, a connection is drawn between the potential for prohibitions on “religious insult” to be discriminatory in their effects, and therefore also counter-productive to aims of promoting public order:

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 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.⁴⁵

45. These concerns are shared by special procedures of the HRC. In his most recent report to the UN General Assembly, the UN Special Rapporteur on freedom of religion or belief observed:

Anti-blasphemy laws often give States licence to determine which conversations on religion are admissible and which ones are too controversial to be voiced. The Special Rapporteur notes that when governments restrict freedom of expression on the grounds of “insult to religion”, any peaceful expression of political or religious views is subject to potential prohibition. In practice, those laws can be used for the suppression of any dissenting view in violation of international human rights standards protecting freedom of opinion and expression and freedom of religion or belief.

[...] Legislation on religious offences is thus often used to facilitate the persecution of members of religious minority groups, dissenters, atheists and non-theists. In many States, individuals whose beliefs constitute dissent from religious doctrine or beliefs held by the State have been subjected to criminal sanctions, including life imprisonment or capital punishment, under the auspices of ‘fighting religious intolerance’ or ‘upholding social harmony’.

46. ARTICLE 19 shares these concerns and submits that, in its experience, “religious insult” laws are rarely applied to protect persons with minority or dissenting religions or beliefs from attacks, in particular by persons belonging to a majority religion or belief group. As such, these prohibitions violate the right to freedom of expression as well as guarantees against discrimination.

Conclusion

47. For all of the above reasons, ARTICLE 19 respectfully submit that, as a matter of principle, prohibitions on “religious insult” to protect the “feelings” of religious believers through the criminal law, where there is no incitement to discrimination, hostility or violence, violate Article 10 of the European Convention.

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- ¹ European Court, *Handyside v. the UK*, App. No. 5493/72, 7 December 1976.
- ² HR Committee, General Comment No. 34, CCPR/C/GC/34, 11 September 2011, at para. 11.
- ³ *Ibid.*
- ⁴ *Ibid.*
- ⁵ See, for example: European Court, *Giniewski v. France*, App. No. 64016/00, 31 April 2006; European Court, *Klein v. Slovakia*, App. No. 72208/01, 31 October 2006.
- ⁶ General Comment No. 34, *op. cit.*, at paras. 50 - 52.
- ⁷ *Ibid.*, at para. 28.
- ⁸ *Ibid.*, at para. 11.
- ⁹ *Ibid.*, at para. 48.
- ¹⁰ 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, at para 85.
- ¹¹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 September 2016, A/71/373, at para. 43.
- ¹² Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, The UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 9 December 2008.
- ¹³ Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, 20 September 2006, A/HRC/2/3, at para. 37. See also: Report of the Special Rapporteur on freedom of religion or belief, “two closely related rights: freedom of religion or belief and freedom of opinion and expression”, 23 December 2015, A/HRC31/18, at para 13.
- ¹⁴ European Court, *Otto-Preminger v. Austria*, App. No. 13470/88, 20 September 1994, at para. 47; European Court, *Dubowska and Skup v. Poland*, Apps. Nos. 33490/96 and 34055/96, 18 April 1997.
- ¹⁵ Opinion No. 35/2008 (Egypt), 6 December 2008, at para. 38.
- ¹⁶ European Commission, *Choudhury v. UK*, App. No. 17439/90, 5 March 1991; see also European Commission, *Dubowska and Skup v. Poland*, Apps. Nos. 33490/96 and 34055/96, 18 April 1997.
- ¹⁷ HR Committee, General Comment No. 22, 27 September 1993, CCPR/C/21/Rev.1/Add.4, at paras 2 and 5. The HR Committee stated that Article 18 of the ICCPR covers “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief” and 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.”
- ¹⁸ Report of the Special Rapporteur on freedom of religion or belief, “two closely related rights: freedom of religion or belief and freedom of opinion and expression”, 23 December 2015, A/HRC31/18, at para. 14.
- ¹⁹ *Ibid.*, at para 61.
- ²⁰ *Op. Cit.* at paras. 44, 46, and 49.
- ²¹ HRC Resolution 16/18 on Combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence and violence against, persons based on religion or belief, adopted by consensus on 24 March 2011.
- ²² *Ibid.*, at para. 5(f).
- ²³ See, for example. HRC Resolution 34/32, adopted on 24 March 2017.
- ²⁴ Most recently GA resolution 72/176, adopted by consensus on 19 December 2017.
- ²⁵ The 2015 Report of the Special Rapporteur on freedom of religion or belief, *op.cit.*, at para 45.
- ²⁶ *Ibid.*, at paras 60 and 84. See also, Special Rapporteur on freedom of religion or belief, A/72/365, 28 August 2017, at paras 27 - 29.
- ²⁷ A/67/303, *op. cit.*, at para. 44.
- ²⁸ Report of the Special Rapporteur in the field of cultural, rights, 4 January 2018, A/HRC37/55, at para. 21 and 32.
- ²⁹ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC22/17/Add.4, 5 October 2012.
- ³⁰ *Ibid.* at para 25.
- ³¹ 2017 UNGA Report of the Special Rapporteur on freedom of religion or belief, *op.cit.*; Report of the Special Rapporteur on freedom of expression, A/71/33, 6 September 2016; Report of the Special Rapporteur on minority issues, A/HRC/28/64, 2 January 2015; UN Working Group on Arbitrary Detention, Opinion No. 35/2008 (Egypt), 6 December 2008, para. 38.
- ³² 2017 UNGA Report of the Special Rapporteur on freedom of religion or belief, *op.cit.*, at para. 27;
- ³³ General Comment No. 34, *op. cit.*, at para. 48.
- ³⁴ See, respectively: European Court, *Sekmadienis Ltd. v. Lithuania*, App. No. 69317/14, 30 January 2018.
- ³⁵ European Court [GC], *Perinçek v. Switzerland*, App. No. 27510/08, 15 October 2015.
- ³⁶ Council of Europe Recommendation 1805 (2007), “Blasphemy, religious insults and hate speech against persons on grounds of their religion”, 29 June 2017, at para. 15.
- ³⁷ The European Commission for Democracy through Law (the Venice Commission), “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”, October 2008, at paras. 64, 68; see also: para. 89.
- ³⁸ General Comment No. 34, *op. cit.*, at para 48.
- ³⁹ *Ibid.*, at paras. 50 - 52.
- ⁴⁰ Rabat Plan of Action, *op. cit.*
- ⁴¹ The 2015 Report of the Special Rapporteur on freedom of religion or belief, *op.cit.*, at paras 9 and 55.

⁴² European Court, *Erbakan v. Turkey*, App. No. 59405/00, 6 July 2006, at para. 64.

⁴³ Council of Europe Recommendation 1805 (2007), *op. cit.*, at para 10.

⁴⁴ Article 14 of the European Convention, and Articles 2(1), 26 and 27 of the ICCPR. We note that Poland is not a signatory to Protocol No. 12 of the European Convention (general prohibition on discrimination).

⁴⁵ The Rabat Plan of Action, *op. cit.*, at para 25.