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Data: 18/11/2026 04:12:08

Articles

Studia Iuridica Lublinensia vol. XXX, 4, 2021
DOI: 10.17951/sil.2021.30.4.505-531

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Ratio legis of Criminalization of the Offence against Religious Feelings (and Blasphemy)

Ratio legis kryminalizacji naruszania uczuć religijnych (i bluźnierstwa)

ABSTRACT

This article deals with the criminalization of violating religious feelings is of a scientific and research nature. The scientific problem is to determine the actual ratio legis of the act described in Article 196 of the Polish Criminal Code, which will ultimately allow to assess whether the criminalization decision is right. The author does not share the commonly held views on the protection and justification of the criminality of offending religious feelings. A comparison of crimes that provide for punishment for violating other feelings, as well as violating feelings of a different nature with impunity, allows for the formulation of the thesis that in the case of Article 196 of the Criminal Code it was not religious feelings and their protection that became the reason for the criminalization decision. This reason is the fear of the social consequences of violating religious feelings. Since this behavior is criminalized in most countries around the world, the significance of these scientific findings is of international significance both theoretically and practically.

Keywords: violating religious feelings; blasphemy; criminalization; protection; Criminal Code

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Data: 18/11/2026 04:12:08

The blasphemer, like a demon, attacks God himself.
He is worse than those who crucified Jesus Christ,
because they did not know him to be God;
but he who blasphemes, knows him to be God,
and insults him face to face.

Bernardine of Sienna[1]

INTRODUCTION

On the surface it may appear that the issue of offences against religious feelings is of marginal significance – the number of offences identified in official police statistics under Article 196 of the Polish Criminal Code is indeed really small.[2] However, the gravity of the problem means that it should be given due attention, and the review of media information confirms that it arouses intense emotions. And at the same time, as L.W. Levy points out, blasphemy is a taboo subject in all places where we meet with religion and its followers.[3] Blasphemy is punished in virtually every legal system, regardless of the religion professed by the citizens of the country[4]. In other words, blasphemy is considered a criminal act in legal cultures shaped, among others, by Judaism, Islam, Christianity, Hinduism and Buddhism.

This article addresses the issue of criminalization of the offence against religious feelings. The author's intention is to step away from the classic approach to this issue and to establish what effectively determines the decision on criminalization and whether it is correct. Hence the necessity to keep clear of the well-trodden paths of analysis. Therefore, the following topics are discussed in the study: 1) the

[1] As cited in K. Kratiuk, *Czas zacząć karać za obrazę Boga*, 2017, http://docplayer.pl/61687903-Czas-zaczac-karac-za-obraze-boga.html [access: 8.04.2020].

[2] In 2016, 46 crimes were reported, 2015 – 32, 2014 – 38, 2013 – 54, 2012 – 51, 2011 – 33, 2010 – 52. Notably, 2000 was a record year in the statistics covering the last several years since 145 such crimes were reported. See *Postępowania wszczęte i przestępstwa stwierdzone z art. 196 k.k. za lata 1999–2020*, http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-5/63492,Obraza-uczuc-religijnych-art-196.html [access: 9.04.2020].

[3] L.W. Levy, *Treason Against God: A History of the Offence of Blasphemy*, New York 1981, p. 6, ac cited in D. Wąsik, *Bluźnierstwo w wybranych kulturach prawnych*, "Studia Iuridica Toruniensia" 2014, vol. 15, p. 211.

[4] On details of penalties imposed for blasphemy in selected European countries see A. Wąsek, *Przestępstwa przeciwko przekonaniom religijnym de lege lata i de lege ferenda*, "Państwo i Prawo" 1995, no. 7, pp. 33–34; idem, *Ochrona uczuć religijnych w prawie karnym*, [in:] *Prawo wyznaniowe*, eds. H. Misztal, P. Stanisz, Lublin 2003, p. 216; W. Janyga, *Przestępstwo obrazy uczuć religijnych w polskim prawie karnym w świetle współczesnego pojmowania wolności sumienia i wyznani*, Warszawa 2010, pp. 114–118.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

concept of feelings and religious feelings; 2) the essence of the crime of insult to religious feelings; 3) distinction between the concepts of insult to religious feelings and blasphemy and related formulations; 4) proposed amendments to the criminal law regarding the insult to religious feelings; 5) justification of criminalization and the subject matter of protection; 6) attempt at an answer to the issue indicated in the title – what is the *ratio legis* of the provision of Article 196 of the Criminal Code.

RELIGIOUS FEELINGS

It is extremely difficult to define the concept of religious feelings. In psychology, feelings are defined as intensified emotions processed by man and culture.[5] In its judgement of 2004, the Supreme Court held that religious feelings are "a mental state whose essence lies in an internal response to past, present and future events directly or indirectly related to religion as a form of social awareness, including beliefs about the sense and purpose of human existence, humanity and the world".[6] In the opinion of S. Hypś, religious feelings may be defined as a certain (primarily emotional) attitude of a given group to their faith, manifesting itself also in the right to protection of the respect for its professed values and revered places and objects.[7] In turn, W. Janyga claims that religious feelings are to be understood as human relations with the sacred expressed on several levels – intentional, volitional and emotional.[8] W. Wróbel is of the opinion that religious feelings are an emotional response of the individual accompanied by shame, embarrassment and sadness.[9] The Constitutional Tribunal recognized that religious feelings are a multi-faceted emotional attitude towards a professed religion.[10] Finally, in the opinion of G. Jędrejek and T. Szymański, "religious feelings are […] personal interests within the meaning of Article 23 of the Civil Code, and therefore any insult or threat to such interests gives rise to an opportunity to make use of the legal instruments envisaged in Article 24 of the Civil Code".[11]

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[5] M.J. Lubelski, J.M. Stanik, L. Tyszkiewicz, *Wybrane zagadnienia psychologii dla prawników*, Warszawa 1986, p. 82.

[6] Judgement of the Supreme Court of 6 April 2004, I CK 484/03, OSNC 2005, no. 4, item 69.

[7] S. Hypś, [in:] *Kodeks karny. Komentarz*, eds. A. Grześkowiak, K. Wiak, Warszawa 2015, p. 976.

[8] W. Janyga, [in:] *Kodeks karny. Część szczególna. Komentarz*, eds. M. Królikowski, R. Zawłocki, Warszawa 2013, p. 592.

[9] W. Wróbel, [in:] *Kodeks karny. Część szczególna*, ed. A. Zoll, vol. 2, Warszawa 2013, p. 659.

[10] Judgement of the Constitutional Tribunal of 6 October 2015, SK 54/13, Journal of Laws 2015, item 1632.

[11] G. Jędrejek, T. Szymański, *Prawna ochrona uczuć religijnych w Polsce (Próba oceny dotychczasowych rozwiązań, czyli o rozdźwięku pomiędzy literą prawa a jego aplikacją)*, "Studia z Prawa Wyznaniowego" 2002, vol. 5, p. 171.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

Religious feelings are not mentioned directly in the Polish Constitution. They are inferred from the contents of Article 53 (1) of the Polish Constitution which provides that "Freedom of conscience and religion shall be ensured to everyone". Pursuant to the judgement of the Constitutional Tribunal of 7 June 1994,[12] religious feelings, due to their nature, are subject to special protection of law. The Constitutional Tribunal found that they are directly related to the freedom of conscience and religion which is a constitutional value. The Constitutional Tribunal further held that freedom of conscience and religion is also expressed in the prohibition on offending religious feelings. Note should also be taken of the opinion of J. Sobczak stating that the protection of religious feelings is also a value provided for in Article 25 (1) to (3) of the Polish Constitution. The same author sees that the relation between religious feelings and freedom of conscience and religion is borne out by international law, e.g. by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the UN General Assembly resolution 36/55 of 21 November 1981.[13]

It is a common opinion that religious feelings are relevant for religious believers. In contrast, A. Draguła expresses a largely isolated view that non-believers with a negative relation to the sacred also have religious feelings. The author calls such feelings negative or indifferent.[14] As rightly pointed out by S. Dziwisz, the structure of the provision of Article 196 of the Criminal Code does not allow the conclusion that the protection under that provision extends also to religious feelings given that they cannot be injured by means of profaning an object of religious worship or a place dedicated to the public celebration of religious rites.[15] Further, the Constitutional Tribunal took the view that Article 196 of the Criminal Code does not protect the feelings of non-believers, since its provisions merely mention religious feelings.[16]

Z. Mikołejko raised the issue whether any feelings from the public sphere, including religious feelings, should be protected by law at all.[17] At the outset, it may be interesting to list other feelings whose impairment is criminalized under Polish criminal law or constitutes the prerequisite for criminalization. These clearly include: sense of security (in the event of punishable threat), feeling of shame (offence of pornography), self-esteem (offences of defamation and insult). It must be recalled that out of the feelings of attachment to third parties or attachment to

[12] K 17/93, OTK 1994, no. 1, item 11.

[13] J. Sobczak, *Obraza uczuć religijnych a wolność sztuki i ekspresji artystycznej*, "Themis Polska Nova" 2015, no. 1, p. 87, 101.

[14] A. Draguła, *Bluźnierstwo. Między grzechem a przestępstwem*, Warszawa 2013, p. 199.

[15] S. Dziwisz, *Ochrona uczuć religijnych w polskim prawie karnym*, Lublin 2019, p. 128.

[16] Judgement of the Constitutional Tribunal of 6 October 2015, SK 54/13, Journal of Laws 2015, item 1632.

[17] Z. Mikołejko, *Młot na Dodę i wolność słowa*, "Gazeta Wyborcza", 28.01.2012.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

an idea, criminal law protects respect for the dead as well as attachment to Poland (patriotism). The question could thus be raised what motivated the Polish legislature to include religious feelings in the list of criminally protected feelings, while at the same time disregarding other undoubtedly important feelings. It would also be interesting to establish why the legislator considered that the insult to religious feelings should lead to criminal liability and whether that was due to the influence of religion and the church on law-making, or whether there are other indications for it.

THE OFFENCE AGAINST RELIGIOUS FEELINGS IN THE CURRENT LEGAL FRAMEWORK

The subject matter of this study does not allow for a very detailed analysis of the statutory elements of the offence against religious feelings (reference can be made in this respect to the large body of literature).[18] Only the key issues directly related to the assessment of the legitimacy of criminalization of the behavior under consideration and the scope of that criminalization are intended to be presented here.

Pursuant to Article 196 of the Criminal Code, whoever offends religious feelings of other persons by profaning in public an object of religious worship or a place dedicated to the public celebration of religious rites shall be subject to a fine, a penalty of limitation of liberty, or a penalty of deprivation of liberty for a term of up to 2 years.

Notwithstanding the importance of the statutory elements of the specific act (as well as the determination whether the offence under analysis is of a formal or material nature, and leaving aside the relationship between profanation and insult), the interpretation of the term "object of religious worship" appears to be the key issue given the subject of this study. Once the scope of the term is precisely determined, an ultimate clarification of the essence of the crime under Article 196 of the Criminal Code is possible. In a similar vein, only a brief overview of the opinions in this regard reported in the Polish literature is provided here.

The very wording of the term "object of religious worship" raises doubts. First of all, it is necessary to establish whether it concerns objects of religious worship or objects used in religious worship. The main difference lies essentially in whether the said object must be material, or whether it may be understood as meaning "intangible beings". The resolution of this matter will significantly alter the scope of the criminalized behavior.

[18] See W. Janyga, *Przestępstwo obrazy uczuć religijnych…*; A. Draguła, *op. cit*.; R. Paprzycki, *Prawna ochrona wolności sumienia i wyznania*, Warszawa 2015; P. Kotas, P. Lewandowska, *Ochrona uczuć religijnych a wolność wypowiedzi*, Warszawa 2017; S. Dziwisz, *op. cit*.; M. Budyn-Kulik, *Znieważenie uczuć religijnych – analiza dogmatyczna i praktyka ścigania*, "Prawo w Działaniu. Sprawy Karne" 2014, no. 19.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

A. Wąsek is of the opinion that "an object of religious worship" referred to in the said provision cannot be understood as God, the Mother of God, or any dogmas of faith.[19] In his interpretation of the provision under analysis, J. Wojciechowski concludes that it contains a legal loophole – behavior consisting in offending God goes beyond the scope of criminalization even though it carries more weight.[20] The literature review shows that clergymen may not be the object of religious worship, although such situations may indeed occur arousing doubts in that respect.[21] Further, as stated by L. Gardocki, the term "object of religious worship" encompasses also "a cult object in a broader sense (e.g., insulting Muhammad, Buddha or Christ)".[22] J.A. Prochowski identifies within a cult, i.a., its object who is a personal God.[23] W. Wróbel draws up a list of designations of an object of religious worship that comprises God understood personally or otherwise and such things, symbols, images, specific words or names as according to the doctrine of a given religious community are considered sacred, worthy of the highest respect, veneration and worship, in particular those that express God's presence directly or are His sign. According to this author, rituals or words that are sacramental in nature may also be objects of religious worship.[24] By contrast, some scholars associate the insult to religious feelings with a "ruthless attack on the Pope". In a similar vein, G. Jędrejek and T. Szymański commented as follows: "It should also be recalled that the Polish Television broadcast statements that may be considered insulting to, among others, Cardinal Józef Glemp, Primate of Poland. And one cannot but note that in our mostly Catholic society the primate performs a crucial historically-rooted function of a spiritual leader who is particularly responsible for the fate of the nation". Another example of the offence against religious feelings indicated by those authors included gross jokes poking fun at the Catholic Radio Maryja.[25]

Another serious interpretative problem concerns the above-mentioned term "religious feelings", regardless of the dispute as to the significance of these elements of the statutory definition of the act for the existence of the crime. As given above, the Supreme Court noted in relation to this term that it is "a mental state whose essence

[19] A. Wąsek, *Przestępstwa przeciwko przekonaniom religijnym…*, p. 33. Similarly M. Filar, [in:] *Kodeks karny. Komentarz*, ed. O. Górniok, Warszawa 2004, p. 591; W. Janyga, *Przestępstwo obrazy uczuć religijnych…*, pp. 214–220.

[20] J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 2002, p. 340.

[21] M. Brzeska, *O bezzasadności postulatu dekryminalizacji obrazy uczuć religijnych oraz postulatu kryminalizacji publicznej obrazy przekonań światopoglądowych*, "Jurysta" 2015, no. 4, p. 12.

[22] L. Gardocki, *Prawo karne*, Warszawa 2001, p. 243. Similarly J. Wojciechowska, *Przestępstwa przeciwko wolności sumienia i wyznania*, [in:] *Kodeks karny – część szczególna*, ed. A. Wąsek, vol. 1, Warszawa 2004, p. 86; R. Paprzycki, *Prawna ochrona…*, pp. 116–118.

[23] J.A. Prochowski, *Wolność religijna jako jedno z podstawowych praw człowieka*, [in:] *Efektywność europejskiego systemu ochrony praw człowieka*, ed. J. Jaskiernia, Toruń 2012, p. 43.

[24] W. Wróbel, *op. cit.*, p. 501.

[25] G. Jędrejek, T. Szymański, *op. cit.*, pp. 174–177.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

lies in an internal response to past, present and future events directly or indirectly related to religion as a form of social awareness, including beliefs about the sense and purpose of human existence, humanity and the world".[26] Even the rules of the Criminal Code of 1969 state that feelings express the state of the subject, changes in the internal state of the individual and his/her relation to the surroundings. The extent to which particular individuals gain awareness of an emotional experience may therefore vary depending on the extent to which they are aware of the relation which they experience emotionally.[27] A further issue concerns the criteria for the assessment of the offence against religious feelings. The question arises as to their nature – whether they are subjective or objective. A. Wąsek proposes that "the average sensibility in that area" should be considered adequate for the purposes of such assessment.[28] This view is supported by R. Paprzycki who draws attention to the fact that sensibilities vary widely among individuals depending on their religious involvement. This author also notes that the religious feelings of persons deeply involved in religion may be hurt even when any truth of their faith is undermined or by a manifestation of atheism.[29] As regards the matter of D. Nieznalska, J. Warylewski criticizes the view that the average sensibility should be taken into account in assessing whether some artistic activity offends religious feelings. In his opinion, "reliance on assessments made by educated persons and those interested in art is in fact more appropriate than making reference to the prevailing social assessments".[30]

It appears that the criterion of "average sensibility" for the assessment of injury to religious feelings fails both as regards the area of artistic or scientific activities and in situations of everyday life. As noted by L. Gardocki, persons deeply involved in religion may perceive any attempt to call into question the truths of the faith they profess as offensive to their religious feelings. The author further points out that only such behavior should be considered a crime under Article 196 of the Criminal Code that is insulting in nature, i.e. the charge against the perpetrator must relate to the form of a statement or behavior.[31] By way of illustration, the question arises whether writing about god, paraments and other religious artefacts using lowercase letters offends religious feelings through its insulting form.[32] Another

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[26] Judgement of the Supreme Court of 6 April 2004, I CK 484/03, OSNC 2005, no. 4, item 69.

[27] J. Bafia, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1971, p. 444.

[28] A. Wąsek, *Przestępstwa przeciwko przekonaniom religijnym…*, p. 39.

[29] R. Paprzycki, *Prawna ochrona…*, p. 112.

[30] J. Warylewski, *Pasja czy obraza uczuć? Spór wokół art. 196 Kodeksu karnego*, [in:] *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, eds. L. Leszczyński, E. Skrętowicz, Z. Hołda, Lublin 2005, p. 8.

[31] L. Gardocki, *Prawo…*, p. 270.

[32] *Bóg czy bóg*, http://sjp.pwn.pl/poradnia/haslo/bog-czy-Bog;8654.html [access: 8.04.2020]. Cf. *Zasady pisowni słownictwa religijnego*, www.kul.pl/zasady-pisowni-slownictwa-religijnego,art_3460.html [access: 8.04.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

question is whether wearing jewelry in the shape of religious symbols (especially in "non-obvious places", such as the belly) solely for aesthetic purposes offends religious feelings by insulting, say, the cross. The problem of an inverted cross which led a radical Christian faction to accuse John Paul II of blasphemy may be proof of the mounting dilemmas and delicate nature of the matter.[33] One may well wonder whether a figure of Christ crucified on a sickle and hammer offends religious feelings and thus satisfies the statutory elements of the provision under analysis. The assessment of that act may be affected by the fact that such a sculpture was offered to Pope Francis by Bolivian President Evo Morales.[34] Another example could be Christ nailed to a bomber that is falling down. In the opinion of Pope Francis, such exhibit does not offend religious feelings, as "it was a criticism of Christianity allied with imperialism, represented by the bomber".[35]

Referring to the matter indicated above, two fundamental issues should be raised. First of all, it is clear that the act refers to the object of religious worship. The ban on broad interpretation in criminal law should remove any doubts in this respect. It should be added that the meaning of these words will be complemented by the teaching of a given religion. If a given denomination does not foresee the cult of objects for worship, then such meaning of the statutory wording is inadmissible. Similarly, the principles of faith of a given religion or belief will provide an answer to the question whether the concept of "the object of religious worship" is an empty concept at the level of that denomination. This remark alone shows that this provision is definitely misused as a suggested criterion for a criminal law assessment of offending feelings. It must be recalled that the law criminalizes only such offence against religious feelings that involves profaning an object of religious worship or a place dedicated to the public celebration of religious rites.

With reference to the indicated examples, it seems appropriate to refer to the issue rarely examined in academic writings, i.e. the subject of the offence under Article 196 of the Criminal Code. It is commonly pointed out that it is a general crime – anyone can perpetrate that act. The main question that arises is whether indeed everyone can offend religious feelings. There is a need to evaluate whether a bishop, cardinal or pope can offend a Catholic believer's religious feelings and thus commit a crime, or wonder whether words uttered by religious leaders in reference to their own religion can be by nature blasphemous. A case in point is

[33] *10 symboli religinjnych. Co oznaczają i skąd się wzięły?*, http://niewiarygodne.pl/gid,14414844,img,14414943,kat,1017185,page,11,title,10-symboli-religijnych-Co-oznaczaja-i-skad-sie-wziely,galeriazdjecie.html [access: 8.04.2020].

[34] K.M. Kaproń, *Chrystus, sierp i młot*, 9.07.2015, www.tygodnikpowszechny.pl/chrystus-sierp-i-mlot-29119 [access: 8.04.2020].

[35] *Sierp, młot i Chrystus? „Gdy się zastanowić, to nie obraża"*, 17.07.2015, www.fronda.pl/a/lewacki-krucyfiks-nie-to-mnie-nie-obraza,54200.html [access: 8.04.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

the aforementioned accusation of blasphemy leveled at John Paul II.[36] Elsewhere, for instance, "Fronda" asks: "The Pope invited the controversial artist to play in the Vatican. Is it blasphemy?".[37] P. Lisiecki holds the view that the display of *Pachamama* figures in the Vatican approved by Pope Francis is a blasphemy.[38] There is however no information on reporting the crime of insult to religious feelings committed by priests or ministers of other religions who criticize their own religion or make heretical theses, even if the Episcopate openly evaluates the behavior of some priests as such.[39] This means that the practice of applying the law restricts the category of the subject to those perceived as attacking a given religious denomination. "True" members of a given denomination do not offend religious feelings regardless of the words they utter.

Acknowledging the delicate and complex problem of drawing the boundaries between the protection of freedom of conscience and religion and freedom of expression, A. Wąsek postulated *de lege lata* that the provision of Article 196 of the Criminal Code be interpreted restrictively and with great caution. In his opinion, it is to be achieved by a proper interpretation of the normative elements of the term "profane", as well as by using the formal and material description of the criminal offence specified in Article 1 § 2 of the Criminal Code,[40] pursuant to which, a prohibited act of negligible social harmfulness does not constitute a crime. I am convinced that the restrictive interpretation proposed by the author is not sufficient to maintain the necessary balance between freedom of religion and freedom of expression. The question thus arises whether a balance between these values is the real issue at stake.

The law applicable to the issue under consideration may be summarized by the diagnosis prepared by G. Jędrejek and T. Szymański in the form of a 10-point statement containing their view on the reasons for deficiencies in the way the

[36] One of Christian movements – Sedevacantism – points to several other instances of blasphemy committed by John Paul II. Cf. *John Paul II and the Inverted Cross*, www.blessedquietness.com/journal/housechu/inverted.htm [access: 8.04.2020]; *John Paul II's miscellaneous apostasy, blasphemy, and sacrilege*, 9.11.2005, www.mostholyfamilymonastery.com/catholicchurch/john-paul-ii-photos-sacrilege/#.VbFVYdLtmko [access: 8.04.2020].

[37] *Papież zaprosił kontrowersyjną artystkę, aby zagrała w Watykanie. To bluźnierstwo?*, 19.11.2014, www.fronda.pl/a/papiez-zaprosil-kontrowersyjna-artystke-aby-zagrala-w-watykanie-to-bluznierstwo,44148.html [access: 8.04.2020].

[38] *Paweł Lisicki: Pachamama w Watykanie to bluźnierstwo*, 9.11.2019, www.dorzeczy.pl/nasi-w-mediach/119899/pawel-lisicki-pachamama-w-watykanie-to-bluznierstwo.html [access: 8.04.2020].

[39] The Episcopate spokesman declared that the celebration of the mass before Pride Parade by Priest S. Niemiec "satisfies the elements of blasphemy". See A. Szczęśniak, *„Jako ksiądz jestem antyklerykałem" – mówi Szymon Niemiec. To on odprawił nabożeństwo przed Paradą*, 9.06.2019, https://oko.press/jako-ksiadz-jestem-antyklerykalem-mowi-szymon-niemiec-to-on-odprawil-nabozenstwo-przez-parada [access: 8.04.2020].

[40] A. Wąsek, *Ochrona uczuć religijnych…*, p. 225.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

protection of religious feelings is currently regulated. They claim that the gap between applicable law and its application is due to: 1) the view that the protection of religious feelings, in particular under criminal law, leads to censorship; 2) the treatment of religious feelings as an interest protected by law, but being in fact "secondary" to other interests; 3) losing sight of the basic principle of the continental law system stating that where there is a subjective right, it must be possible to protect that right in all cases under procedural law; 4) the fear that a person defending religious feelings might be accused of "obscurantism", ignorance, etc.; 5) limited knowledge of applicable legal instruments that allow the protection of religious feelings; 6) the treatment of freedom of expression as an absolute interest subject to no restrictions; 7) passivity of secular Catholics; 8) habits of many judicial staff members formed in a previous era, as before 1989, the protection of religious feelings was often of a fictitious nature; 9) the placing of emphasis on the objective element in civil law protection; 10) the lack of "respect for applicable law" dating back to the times of the Polish People's Republic.[41]

INSULT TO RELIGIOUS FEELINGS AND BLASPHEMY

The offence against religious feelings is commonly known, albeit somewhat incorrectly, as "blasphemy". As E. Dąbrowska and I.C. Kamiński argue, the concept of blasphemy was not much needed for a long time, as the concept of heresy was used instead. Only Protestants who were seen by the Catholic Church as "heretics" needed a new structure, but they also thought of blasphemy as equivalent to a "false" religious doctrine. In the Middle Ages, the promotion of atheism was also considered blasphemy.[42] Nonetheless, numerous modern opinions stress that blasphemy is to be used solely to denote insult against God.[43]

The literature review shows that over time both Poland and other countries increasingly moved from the theological understanding of blasphemy.[44] The last time classic blasphemy was explicitly provided for under Polish law was in the Criminal Code of 1932.[45] As noted by W. Wasil, the crime of blasphemy against God came to

[41] G. Jędrejek, T. Szymański, *op. cit.*, pp. 201–202.

[42] E. Dąbrowska, I.C. Kamiński, *Przestępstwo bluźnierstwa religijnego w angielskim common law*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2009, vol. 7, p. 6.

[43] Cf. A. Draguła, *op. cit.*, pp. 9–10; W. Wasil, *Od bluźnierstwa do przestępstwa, czyli co tak naprawdę chroni państwo: Boga czy uczucia religijne? Studium historyczno-prawne*, "Kościół i Prawo" 2019, vol. 8(1), pp. 203–218.

[44] W. Wasil, *op. cit.*, p. 206.

[45] Article 172 had the following wording: "Whoever insults God in public shall be liable to a penalty of deprivation of liberty for a term of up to 5 years".

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

be defined in criminal codes as an insult to the religious worship of the community or as a religious insult against believers, and thus the codes of European countries changed the subject matter of protection from God to the rights of the community of believers who are citizens of a given country.[46] We cannot ignore the view that although the current Criminal Code does not penalize blasphemy against God, such acts are penalized by the structure of protection of religious feelings. Assuming that apart from material items, objects of religious worship include also God and saints within the meaning of religious doctrines,[47] then it follows that the scope of the offence against religious feelings covers onetime blasphemy too. G. Jędrejek and T. Szymański share the view stating that "it could hardly be accepted that the legislator criminalizes insult against objects while at the same time allows for the insult against the subjects of worship, which is evidently more painful for believers. *Argumentum a minori ad maius* is justified in this case".[48] This stance is not isolated. Similar views (indicated above) are expressed by W. Wróbel,[49] S. Hypś[50] and the Constitutional Tribunal.[51]

Account should also be taken in this regard of the distinction (or lack thereof) between the concepts of "blasphemy" and "heresy". History has shown that these concepts have not always been or are properly distinguished. For instance, Calvin relentlessly called for the fight against blasphemous heretics comprising in essence, according to his teachings, all those who had different religious views.[52] Moreover, the 17th century is known for hunting blasphemers. During that period, there were many reformation movements in Europe that denied the main truths of faith, so their teachings were treated as heretical blasphemy.[53] It would seem that even today persons calling for penalization do not necessarily distinguish "insult to religious feelings" from "heresy"[54] or even from "criticism".[55] Viewed in that

[46] W. Wasil, *op. cit.*, p. 207.

[47] M. Mikuła, *Granice dozwolonego dyskursu antyreligijnego w II Rzeczypospolitej. Uwagi do orzeczenia Sądu Najwyższego z 5 lipca 1938 r. i jego aktualność dzisiaj*, "Studia z Prawa Wyznaniowego" 2010, vol. 13, p. 180.

[48] G. Jędrejek, T. Szymański, *op. cit.*, pp. 182–183.

[49] W. Wróbel, *op. cit.*, pp. 659–660.

[50] S. Hypś, *op. cit.*, p. 977.

[51] Judgement of the Constitutional Tribunal of 6 October 2015, SK 54/13, Journal of Laws 2015, item 1632.

[52] A. Draguła, *op. cit.*, p. 175.

[53] W. Wasil, *op. cit.*, p. 205.

[54] As given on the website of the Catholic Piotr Skarga Association, utterances such as "God does not exist" or denying the divine justice are forms of blasphemy. See M. Kostka, *Problemy. Nie bluźnij!*, www.piotrskarga.pl/nie-bluznij-,11133,12420,p.html [access: 8.04.2020].

[55] Cf. the assessment of an observation made by L. Jażdżewski in P. Jóźwik, *Krytyka Kościoła czy obrażanie*, www.przewodnik-katolicki.pl/Archiwum/2019/Przewodnik-Katolicki-19-2019/Wiara-i-Kosciol/Krytyka-Kosciola-czy-obrazanie [access: 8.04.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

way, the words of L. Igwe are disturbingly true, "Every believer is a blasphemer because the teaching of one religion rejects the doctrines of other denominations. What in fact one religion recognizes as sacred another considers profanation. Islamic religious doctrines mock Christian faith and *vice versa*. Both Christian and Islamic preachers mock the claims of indigenous African religions when they teach their own faith. Religions are by definition mutually blasphemous".[56]

DE LEGE FERENDA DEMANDS

An analysis of *de lege ferenda* demands will make it possible to adequately demonstrate how to interpret the provision of Article 196 of the Criminal Code, as well as to highlight the social needs of at least some social groups.

One example of the proposed amendments is the new wording of the provision proposed by A. Wąsek. The provision would then bear the following wording: "Whoever publicly insults the beliefs of another person in the area of faith, in particular faith in God, or publicly insults an object directly related to religious worship or a place dedicated to the celebration of religious rites, if this act could violate social order, shall be liable to a fine, a penalty of limitation of liberty, or a penalty of deprivation of liberty for a term up to 2 years".[57] In a similar vein, J. Kędzierski calls for amendments to Article 196 of the Criminal Code proposing that it should read as follows: "§ 1. Whoever publicly insults God shall be liable to a penalty of deprivation of liberty for a term of up to 5 years. § 2. Whoever publicly reviles or derides a legally recognized denomination or religious association, its dogmas, beliefs or rites, as well as an object of religious worship or places dedicated to the celebration of religious rites shall be liable to a penalty of deprivation of liberty for a term of up to 3 years. § 3. Whoever maliciously interrupts a public, collective celebration of a religious act of a legally recognized denomination or religious association shall be liable to a fine, a penalty of limitation of liberty or a penalty of deprivation of liberty for a term of up to 2 years". The scholar holds the view that there is no protection of freedom of conscience and religion without the criminal law protection of God, religious denominations, their dogmas and acts.[58] Moreover, well-known Catholic publicist K. Kratiuk is convinced that blasphemy should be penalized for the sake of the perpetrators themselves. As he claims: "After all, a person punished for offending God has a greater chance of conversion and atonement than the one whose crime goes unpunished". Then he adds:

[56] L. Igwe, *Ściganie bluźnierstwa zasługuje na szyderstwo i pogardę*, 27.04.2017, www.listyznaszegosadu.pl/nowy-ateizm-i-krytyka-religii/sciganie-bluznierstwa-zasluguje-na-szyderstwo-i-pogarde [access: 8.04.2020].

[57] A. Wąsek, *Przestępstwa przeciwko przekonaniom religijnym…*, p. 38.

[58] J. Kędzierski, *Przestępstwa przeciwko religiom i wyznaniom w polskim prawie karnym – de lege ferenda*, "Palestra" 2007, no. 7–8, p. 82.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

"Over the years, our faith has become increasingly shallow and driven by emotions – hence the existence in the Criminal Code of a provision concerning insult to religious feelings. This wording implies that we believe in the existence of religion, but not in the existence of God. The point is that even atheists and other lefties know that religion exists (and so do feelings)".[59]

Voices have also been raised calling for a change in the procedure for prosecuting the offences against religious feelings from public prosecution to private prosecution.[60] It would seem that such a proposal makes sense, in particular in comparison with other offences subject to private prosecution (as long as the genuine aim is to protect feelings and freedom, but not public order). However, the specificity of the crime and the particular activity of persons who claim that their religious feelings are being offended mean that a change in the mode of prosecution will have a limited impact on the use and perception of the said crime.

The crux of the matter – in the light of the issue of the *ratio legis* of the provision of Article 196 of the Criminal Code raised in the title of this article – clearly lies in the calls for the decriminalization of the offence against religious feelings. It, therefore, seems necessary to compare the arguments put forward in favor of the provision in question with the arguments for its repeal.

There is no doubt that the most important argument invoked to retain the offence against religious feelings in the Polish legal order is the constitutionally guaranteed religious freedom of every individual. The importance and relevance of this form of freedom is indicated above. However, for the sake of underlining the importance of this prerequisite for criminalization, it is useful to quote the view expressed in the literature that "the freedom of conscience and religion, which safeguards the autonomy of the individual, protects the very core of their dignity".[61] Given that criminal law is assigned a role in the protection of socially significant values, the criminal law response to violations of religious freedom is part of the State's *ius puniendi*. It is worthy of note that the recognition of religious freedom imposes on the State an obligation not only to refrain from violating it, but also to protect it against violations by other people.[62] The merits of this view are further confirmed by the European Court of Human Rights rulings that "as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any 'formality', 'condition',

[59] K. Kratiuk, *op. cit*.

[60] Cf. W. Brzozowski, *Bezstronność światopoglądowa władz publicznych w Konstytucji RP*, Warszawa 2011, pp. 112–113.

[61] W. Janyga, *Przestępstwo obrazy uczuć religijnych*…, p. 87.

[62] Cf. W. Odrowąż-Sypniewski, *O zgodności z Konstytucją postulatu wykreślenia z polskiego prawodawstwa przepisów o „przestrzeganiu wartości chrześcijańskich" i „obrażaniu uczuć religijnych"*, "Zeszyty Prawnicze Biura Analiz Sejmowych" 2006, no. 3, p. 22.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

'restriction' or 'penalty' imposed be proportionate to the legitimate aim pursued".[63] The argument has therefore been advanced that the elimination of criminal law protection of religious feelings would run counter to Article 53 of the Polish Constitution.[64]

Reference should be made in this respect to the aforementioned view expressed by A. Zoll that "the possible abolition of provisions penalizing the offence against religious feelings is equivalent to giving the go-ahead for intolerance, which can in turn lead to far-reaching social tensions".[65] This view relies on a completely different argument – decriminalization of the behavior under analysis may lead to social unrest, the prevention of which also falls under the responsibility of the State.

The objections to the criminalization of the offence against religious feelings are more varied, but it is attributable, at least in part, to the fact that their proponents seek to change the *status quo*. The most official form thus far was a parliamentary draft of 2012 amending the Criminal Code by repealing Article 196 of the Criminal Code.[66] As indicated in the explanatory memorandum accompanying the draft, its aim was "to provide freedom of expression of opinion and belief in public without fear of being accused of offending religious feelings".

The literature review and the public debate conducted mainly through the mass media show that the following objections are raised to support the derogation of Article 196 of the Criminal Code.

First, serious doubts arise over the interpretation of the provision, which does not go unnoticed even by the supporters of criminalization of the offence against religious feelings.[67] The summary analysis of the contents of the provision made above shows how hard it is to set the limits of criminalization of the behavior defined in that provision. One of the scholars in fact admits that "there is generally no common agreement as to the interpretation of any of the statutory elements of the offence against religious feelings".[68] The question thus arises whether there was an infringement of the principle of the specificity of a criminal provision derived from the contents of Article 42 of the Polish Constitution. What such lack of precision in the formulation of statutory elements means for judicial practice is shown

[63] Judgement of the ECHR of 20 September 1994, *Otto-Preminger-Institut v. Austria*, application no. 13470/87, as cited in M.A. Nowicki, *Europejski Trybunał Praw Człowieka*, vol. 2, Warszawa 2002, pp. 1059–1060.

[64] W. Odrowąż-Sypniewski, *op. cit.*, p. 23. In a sense, also R. Paprzycki, *Prawna ochrona…*, p. 46.

[65] D. Jaworski, M. Müller, *Kodeks Boga nie chroni*, "Tygodnik Powszechny" 2010, no. 3, p. 6.

[66] Poselski projekt o zmianie ustawy – Kodeks karny, Sejm RP, VII kadencja, Druk nr 2677, Warszawa, 8 lipca 2014 r., http://orka.sejm.gov.pl/Druki7ka.nsf/0/6993DFE7DEB35C0CC1257D410036BBBB/$File/2677.pdf [access: 8.04.2020].

[67] Cf. L. Ozdarska, *Przestępstwo obrazy uczuć religijnych w polskim kodeksie karnym*, "Studia Prawnoustrojowe" 2013, no. 19, pp. 123–135.

[68] J. Strzelecki, *Kryminalizacja obrazy uczuć religijnych*, [in:] *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara*, eds. A. Damski, J. Bojarski, P. Chrzczanowicz, M. Leciak, vol. 1, Toruń 2012, p. 476.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

by high-profile cases in which court decisions arouse major controversies. A case in point is notification on suspicion of committing a crime of insulting St. John Paul II by the former President of Słupsk, R. Biedroń, in connection with removal by Biedroń of a photo of the Pope from his office, which in the opinion of the persons reporting the crime was an offence under Article 196 of the Criminal Code.[69]

As W. Cieślak notes, what constitutes an object of religious worship of one faith (religion) can be perceived as a blasphemy by followers of another.[70] And such situations will surely take place also in Poland given the increasingly widespread multiculturalism.

The axiological objections, also referring to the provisions of the Polish Constitution, are of an even more serious nature.

First, an infringement of the principle of proportionality must be identified (Article 32 (3) of the Polish Constitution) in the context of a proportional response to an act. A criminal penalty is fundamentally the most painful response; moreover, the status of a person convicted of an intentional crime entails many negative legal and social consequences. Such consequences of a conviction appear to be a grossly disproportionate response to an insult to someone's religious feelings. It is not simply a matter of penalty and its consequences. Questions are raised whether that criminalization is useful, necessary and adequate.[71]

Another objection concerns the unjustified protection afforded to the feelings of believers, without comparable protection of the feelings and beliefs of non-believers.[72] Assuming, as indicated by M. Brzeska, that the feelings related to the atheistic worldview can be protected by other provisions of the Criminal Code (e.g., Articles 257, 212 and 216),[73] the same regulations may equally well be used in the context of the protection of religious feelings following a potential repeal of the provision of Article 196 of the Criminal Code.

The issue of the lack of sufficient justification for the criminal law protection of religious feelings is also raised in the context of no protection of feelings in all other areas (feelings for another person, aesthetic or philosophical feelings). "There is no reason why St. Paul should be treated by the law of a democratic state differently from Georg Wilhelm Friedrich Hegel. However, this is not the case. Saying, for instance, that St. Paul was a third-rate political writer of antiquity, and his 'Epistle to the Ro-

[69] R. Nowak, *Prezydent Słupska znieważył św. Jana Pawła II*, 23.06.2015, www.fronda.pl/a/prezydent-slupska-zniewazyl-sw-jana-pawla-ii,53112.html [access: 8.04.2020]. The author argues that St. John Paul II is legally a subject of religious worship and is protected by Article 196 of the Criminal Code.

[70] W. Cieślak, *„Pasja" przed sądem*, [in:] *Fascynujące ścieżki filozofii prawa*, ed. J. Zajadło, Warszawa 2008, pp. 107–108.

[71] Cf. primarily J. Kulesza, *Kryminalizacja obrazy uczuć religijnych. Glosa do wyroku TK z dnia 6 października 2015 r., SK 54/13*, "Państwo i Prawo" 2016, no. 9.

[72] Cf. the parliamentary Draft amending the Criminal Code indicated above.

[73] M. Brzeska, *op. cit.*, p. 115.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

mans' is testimony to his intellectual shallowness, not to mention the public burning of a book in which the 'Epistle' was printed, may mean that you end up in court".[74]

A very serious objection is also based on the opinion that the provision serves to eliminate artistic phenomena not approved by specific social groups. It may be aptly illustrated by the above-mentioned case of D. Nieznalska and her installation titled *Passion*. The case of Nieznalska and her final acquittal did not send a clear and unequivocal signal to the public. Many artistic endeavors are still being subjected to criminal law evaluation.[75]

Other objections are made by J. Hartman, an ethicist and philosopher, who holds the view that Article 196 of the Criminal Code "represents a concession to the times when the State had its religion and protected it by law punishing for blasphemy. This concession was made by zealous authorities at the request of the Church, or perhaps in an attempt to curry favor with it, using the hands of a Catholic codifier, most likely a professor of law, to guarantee that mighty institution the strongest protection against more radical criticism".[76]

R. Paprzycki considers that the issue must be raised of whether the Criminal Code should provide for offences against freedom of conscience and religion at all. In his opinion, criminal law should stigmatize "only really dangerous behavior". He goes on to conclude that the reason for the criminalization of acts detrimental to the freedom of conscience and religion is "probably, above all, the great importance of religion in the social life of Poles and the position of the largest churches and religious associations". The author has concerns that the penalties may prove to be "a tool for enforcing moral principles, the violation of which does not have significantly harmful consequences for society".[77]

Further, J. Strzelecki points to a contradiction with the broadly understood principles of rational criminalization.[78] On the one hand, the determination of the subject matter of protection may still be a problem (and this primarily justifies criminalization). On the other hand, the principle of subsidiarity of criminal law

[74] J. Majmurek, *Drażliwość religijna i demokracja*, 3.09.2013, www.krytykapolityczna.pl/artykuly/opinie/20130903/majmurek-drazliwosc-religijna-i-demokracja [access: 8.04.2020].

[75] The Nationwide Committee for the Defence against Sects and Violence filed a notification on suspicion of blasphemy allegedly committed by artist Albert Załuski of Nowy Sącz, who hung in the windows of his apartment crucified figures with crossbar codes above their heads (in the shape of a globe) and with bottles in their hands. See A. Oskierko, *Komitet Obrony przed Sektami: ta praca to bluźnierstwo!*, 4.12.2013, www.gazetakrakowska.pl/artykul/1057844,komitet-obrony-przed-sektami-ta-praca-to-bluznierstwo,id,t.html?cookie=1 [access: 8.04.2020].

[76] J. Hartman, *Co łączy Polskę i Izrael? Kara za obrazę uczuć*, 31.07.2012, www.polityka.pl/tygodnikpolityka/kraj/1529157,1,co-laczy-polske-i-izrael-kara-za-obraze-uczuc.read [access: 8.04.2020].

[77] R. Paprzycki, *Graj szatanie. Prawnokarna ochrona sumienia i wyznania a działalność satanistów*, "Rzeczpospolita" 2000, no. 221, p. C-3.

[78] J. Strzelecki, *op. cit.*, p. 476 ff.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

has been breached given the fact that the measures provided for in civil law or in the Code of Petty Offences seem sufficient.[79]

Finally, the fact that there is no need for criminal law protection of religious feelings may stem (as given above) from the existence of other criminal law provisions that protect interests that are more precisely defined and in principle do not raise interpretative and axiological doubts (e.g., offence of defamation, insult, destruction of property).

To summarize this part of the analysis, it should be pointed out that in the Recommendation 1805 (2007) of the Council of Europe with regard to blasphemy, religious insults and hate speech against persons on grounds of their religion adopted on 29 June 2007, it was stated that in multicultural societies it is often necessary to reconcile freedom of expression and freedom of thought, conscience and religion. It may also be necessary to place restrictions on these freedoms, any such restrictions must be prescribed by law, necessary in a democratic society and proportionate to the aims pursued. In the opinion of the Assembly, blasphemy as an insult to a religion, should not be deemed a criminal offence.[80] In contrast, the Commission decision issued 10 years earlier stated 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. Also, the right to freedom from interference with the rights guaranteed in Article 9 (1) of the Convention does not necessarily and in all circumstances imply a right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or a group of individuals".[81]

SUBJECT MATTER OF PROTECTION IN THE PAST AND IN THE PRESENT

The subject matter of protection is the most important statutory element of each type of prohibited act, as it often constitutes the *ratio legis* of all provisions criminalizing specific behavior. It is worth emphasizing that the subject matter of protection of the crime under consideration is in fact a justification for the restriction of freedom of expression and it is therefore a significant element of the entire analysis. In the case of the crime of insult to religious feelings, the determination

[79] *Ibidem*, p. 487. Cf. M. Wąsek-Wiaderek, *Cywilnoprawna ochrona wolności sumienia i uczuć religijnych*, [in:] *Prawo wyznaniowe*…, pp. 227–228.

[80] Assembly debate of 29 June 2007. Text adopted by the Assembly on 29 June 2007. See *Rada Europy przeciwko tzw. obrazie uczuć religijnych*, transl. M. Twardowski, www.racjonalista.pl/kk.php/s,6055#_f1 [access: 8.04.2020].

[81] Commission Decision of 18 April 1997, *Dubowska and Skup v. Poland*, applications no. 33490/96, 34055/96.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

of a generic and specific subject matter of protection leads to disputes and raises doubts in the doctrine. It would be worthwhile mentioning some of them.

At the outset, seeking the grounds for the criminalization of religious crimes, one cannot ignore somewhat exotic remarks which are in fact a good example of the bygone sacral rationalization. Priest M. Kostka (Priestly Fraternity of Saint Peter) makes the following comments on the website of the Piotr Skarga Association: "Perhaps someone will ask: why did the State look into the matter of the sin that should remain a personal matter between God and the blasphemer? The reason is that blasphemy has always been considered a kind of social vice. Where a certain number of individuals adhere to something like this, it becomes a kind of public sin that brings God's harsh punishment on the whole country where such insults are thrown at God with impunity. For God cannot be mocked (Galatians 6:7)".[82]

E. Kruczoń takes the view that there is no *de lege lata* justification in J. Wojciechowska's argument that Article 196 of the Criminal Code protects the idea of freedom of beliefs of citizens in matters of faith, which stems from the constitutional principle of freedom of conscience and religion and is an expression of ideological tolerance of the State that maintains neutrality in matters of religion and beliefs. In the opinion of E. Kruczoń, J. Wojciechowska erroneously equates feelings with beliefs which, in addition to the emotional element typical of feelings, also contain an intellectual element.[83] The view that the religious feelings of believers, that is a psychological phenomenon, are the subject matter of protection is relatively common in the world of criminal law science.[84] In contrast, W. Wróbel argues that the subject matter of protection is the right to the protection of religious feelings.[85] Along the same lines, the Supreme Court stated in its resolution that the subject matter of protection to which the crime under Article 196 of the Criminal Code relates is the right to protect religious feelings that stems from freedom of conscience and religion.[86]

Nonetheless, opposing views are also put forward here and there. Even representatives of communities of deeply religious believers are not prepared

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[82] M. Kostka, *op. cit*.

[83] E. Kruczoń, *Przestępstwo obrazy uczuć religijnych*, "Prokuratura i Prawo" 2011, no. 2, p. 39 and the literature cited therein: B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa przeciwko wolności, wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej. Rozdziały XXIII, XXIV, XXV i XXVII Kodeksu karnego. Komentarz*, Warszawa 2001, p. 730.

[84] As, e.g., J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1987, p. 208; O. Górniok, [in:] *Kodeks karny. Komentarz*, ed. A. Wąsek, Gdańsk 2003, p. 989; A. Marek, *Prawo karne*, Warszawa 2003, p. 528.

[85] W. Wróbel, *op. cit.*, p. 500.

[86] Resolution of the Supreme Court of 29 October 2012, I KZP 12/12, OSNKW 2012, no. 11, item 112.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

to agree to an interpretation of the provision that would emphasize religious feelings[87] and call for its amendment towards a prohibition on offending religious symbols.[88]

The differently defined subject matter of protection of classification under Article 196 of the Criminal Code is the freedom of conscience and religion – as indicated by the title of the 24th chapter of the Criminal Code that includes that provision. The question now arises as to the aspect of that freedom. W. Janyga is of the opinion that Article 196 of the Criminal Code protects religious freedom in its internal and external aspect in the intellectual, emotional and volitional dimensions and protects religiosity as a phenomenon; it involves freedom from profane behavior in relation to objects and places connected with religious worship.[89] M. Filar argues that the direct subject matter of protection is the freedom of particular individuals from any behavior consisting of an insult to their religious feelings which generates a sense of mental discomfort associated with the perceived lack of respect for their religion.[90] Further, an important distinction is made by M. Derlatka who observes that God is the object of religious worship, and the subject matter of the protection under Article 196 of the Criminal Code is only the right to protection of religious feelings.[91] S. Dziwisz rightly notes that criminal law, as is the case with other areas of law, does not protect religiosity as a phenomenon.[92] Ultimately, however, it is right to share the pessimistic conclusion by J. Strzelecki that the clarifications on what constitutes the subject matter of protection of the provision under consideration are merely apparent and as such cannot be deemed sufficient to justify criminalization, which only gives the appearance of rationality.[93]

At the same time, there are still views referring to the aforementioned concept derived from the Criminal Code of 1932 – the protection of public order. As noted by J. Wojciechowska, the aforementioned view of J. Makarewicz that the main idea behind so-called religious offences is to prevent social disruption remains valid.[94] On a similar note, A. Zoll warns "the possible abolition of provisions penalizing

[87] Cf. a comment by T. Terlikowski in connection with the performance of a play „Golgotha Picnic" in *Kontrowersje wokół „Golgota Picnic". Stawia pytanie fundamentalne: czy chrześcijanie sprostali chrześcijaństwu?*, 6.07.2014, www.tvp.info/15944933/informacje/polska/kontrowersje-wokol-golgota-picnic-stawia-pytanie-fundamentalne-czy-chrzescijanie-sprostali-chrzescijanstwu [access: 8.04.2020].

[88] T.P. Terlikowski, *Zakazać profanacji, a nie obrazy uczuć*, 18.08.2011, www.fronda.pl/a/terlikowski-zakazac-profanacji-a-nie-obrazy-uczuc,13989.html [access: 8.04.2020].

[89] W. Janyga, *Przestępstwo obrazy uczuć religijnych…*, p. 181 ff.

[90] M. Filar, *op. cit.*, p. 591.

[91] M. Derlatka, *Bóg nie potrzebuje ochrony*, "Rzeczpospolita", 3.07.2012.

[92] S. Dziwisz, *op. cit.*, p. 124.

[93] J. Strzelecki, *op. cit.*, p. 483.

[94] J. Wojciechowska, [in:] B. Kunicka-Michalska, J. Wojciechowska, *op. cit.*, p. 72.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

the offence against religious feelings is equivalent to giving the go-ahead for intolerance, which can in turn lead to far-reaching social tensions".[95]

It appears that the European Court of Human Rights eventually takes a similar position on the issue. Even the ultra-Catholic Polish organization Ordo Iuris appears to share the view when it posts the following on its website: the provisions protecting religious feelings not only do not conflict with the jurisprudence of the European Court of Human Rights in Strasbourg, but judging by the 2018 case of *E.S. v. Austria* held before the ECHR, it is the responsibility of domestic authorities to ensure the peaceful coexistence of different denominations and religions, which is pursued by such provisions.[96] It follows from the European Court of Human Rights judgement that there is a danger that gratuitously offensive expressions going beyond the limits of a critical denial of other people's religious beliefs are likely to incite religious intolerance.[97] A similar assessment was given earlier by the Constitutional Tribunal: "In the opinion of the Constitutional Tribunal, the restriction of the freedom to express offensive or profane opinions referred to in Article 196 of the Criminal Code clearly complies with the requirement of statutory regulation and is in addition necessary in a democratic state, above all, to protect the rights and freedoms of other persons, as well as the public order, i.e. the values referred to in Article 31 (3) of the Polish Constitution".[98]

J. Kulesza expressed a critical assessment of that position. He stated: "It is not possible to accept the consideration of the Constitutional Tribunal that the interest protected by Article 196 of the Criminal Code includes not only religious feelings, but also public order. In this way, it seems to unknowingly refer to the concepts appearing in the jurisprudence of the ECHR that also relate to the protection of public order. This view cannot be accepted given that there is no basis for indicating public order as the subject matter of protection of Article 196 of the Criminal Code. The subject matter of protection is construed by decoding the scope of criminalization by means of analysis of a set of statutory elements of a generic type of the crime and a systemic interpretation that refers directly to the social undesirability of an act as decisive for criminalization and forming the background of the social harmfulness of a particular act. The analysis of Article 196 of the Criminal Code does not allow for the identification of public order even as the secondary subject matter of protection. Moreover, such indication would in fact be

[95] As in D. Jaworski, M. Müller, *op. cit.*, p. 6.

[96] *Ochrona uczuć religijnych w wybranych państwach Europy. Analiza prawnoporównawcza z uwzględnieniem orzecznictwa Europejskiego Trybunału Praw Człowieka*, https://ordoiuris.pl/wolnosc-sumienia/ochrona-uczuc-religijnych-w-wybranych-panstwach-europy-analiza-prawnoporownawcza-z [access: 4.04.2020].

[97] Judgement of the ECHR of 25 October 2018, *ES v. Austria*, application no. 38450/12.

[98] *Ibidem*.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

pointless in the light of the fact that public order is, in essence, the subject matter of protection of any generic type, which is why such acts constitute crimes in the first place".[99]

CONCLUSIONS

The reflections on the subject matter of protection completing the conducted analyses provide a good opportunity to attempt to formulate final conclusions.

The first question to be considered is why the legislator added religious feelings to the list of feelings protected by criminal law while omitting others, undoubtedly important in human life. Such feelings naturally include: pride in one's own scientific and artistic work, the insult of which does not constitute a crime; attachment to non-religious ideas such as humanism, science, atheism; attachment to non-religious authorities. Even marital infidelity is not criminalized, although it oftentimes hurts human feelings very deeply and is a life tragedy for many people leading some of them to commit suicide. Finally, the feelings of football fans (and not only football) are not protected even though they have demonstrated the intensity of their emotions on numerous occasions.

It may appear that the constitutional obligation of the State to protect the freedom of conscience and religion is the answer to the above question. However, I am not sure whether the views of many lawyers and the judicature on the relationship between the above freedoms and the protection of religious feelings is as indisputable, and almost dogmatic, as it is given in the literature. The constitutions and many international acts guarantee various aspects of freedom. Treaties and constitutions protect family, science and freedom of artistic expression. The Polish Constitution in Article 68 (5) declares that "public authorities shall support the development of physical culture". The obligations to protect the relevant feelings cannot however be deduced from such declarations. Further, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief indicated above, which, in the opinion of J. Sobczak, aims at confirming the relationship between religious feelings and the freedom of conscience and religion, does not address the protection of religious feelings. It refers to tolerance and religious freedom, which is not the same.[100] In other words, the constitutional provisions do not require the criminal law protection of religious feelings.

It seems quite legitimate to wonder whether Article 196 of the Criminal Code relates merely to the matter of religious feelings. In other words, are the said reli-

[99] J. Kulesza, *Kryminalizacja obrazy uczuć religijnych…*, p. 139.

[100] Deklaracja w sprawie eliminacji wszelkich form nietolerancji i dyskryminacji opartych na religii lub przekonaniach, http://libr.sejm.gov.pl/tek01/txt/onz/1981.html [access: 8.04.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

gious feelings, despite being *verba legis*, the primary justification for criminalization? These doubts can be illustrated through a question posed by W. Cieślak, who wonders whether we are prepared to gag people in the name of the preservation of public order (and to avoid a particular provocative "axiological dialogue").[101]

All the aforementioned doubts arising from the lack of a precise description of the prohibited behavior and, most of all, the admissibility of criminalization of blasphemy in the 21st century in a European country show that the protection applies in fact to public peace, and not to religious feelings. This argument may be confirmed by the fact that criminal law protection does not apply to other feelings that are equally important in human life, even though they are guaranteed by the Polish Constitution. Moreover, the significance of social order in the light of Article 196 of the Criminal Code is also indicated by a kind of impunity for behavior harmful to religious feelings, but committed by members of a given denomination. In such situation, there is no danger that believers of a given denomination will protest publicly against their "teacher". This means that the protection of public peace that may be disturbed by hurt believers became the premise for the criminalization of the behavior defined in the provision of Article 196 of the Criminal Code. The limited comments given above, in particular by the criminal law specialists from the interwar period, confirm this argument. The question is whether religious feelings, and more precisely, an insult to religious feelings, may give rise to negative behavior. Examples may be provided by history and, in the present day, by the attacks in response to the outrage of religious feelings associated with Islam. Can the Polish legislator be afraid of such unrest? Yes. The ongoing social, ideological and religious changes that make Polish society lose its almost religiously homogeneous nature are conducive to more violent reactions. The contemporary events, protests and marches confirm that attitudes (towards various issues) are becoming increasingly more radical. It, therefore, seems legitimate to claim that the criminalization of the insult to religious feelings is a form of penalization in the foreground of violation of the goods such as law and social order (understood as peace or harmony). And this is the reason why only those feelings are subject to criminal law protection.

These questions also raise another concern – whether the offence against religious feelings is inserted in an appropriate chapter. The question could arise as to whether the insertion of that provision among the crimes against freedom of conscience and religion is of a fictitious nature and is perhaps even an indication of the legislature's obscurantism. Its generic subject matter of protection is public order, and at the same time it constitutes its prerequisite for criminalization. It should be recalled that in this case public order is to be understood in the strict sense as order and peace on the streets, or as being free from riots and aggressive demonstrations.

So I do not agree with the opinion of W. Wasil cited above that the statutes of European countries changed the subject matter of protection from God to the rights

[101] W. Cieślak, *op. cit.*, pp. 108–109.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 04:12:08

of the community of believers who are citizens of a given state.[102] On the one hand, penalization for blasphemy may be based in Poland on the current legal state. But most of all, it is the fear of riots caused by hurt believers of any religion that forces legislators to prohibit insults to religious feelings. Let us recall an excerpt from the Supreme Court ruling of 1925: "Religious believers are particularly aware of any offences against their religious feelings, any attacks on the freedom of worship and religious interests can cause unrest and riots, therefore the State, in the name of social order and public peace, is forced to afford its criminal law protection to religion".[103] Hence the tolerance for behavior that could objectively be perceived as an insult to religious feelings, but since it is displayed by a member of a religious community, there is no fear that it will give rise to unrest or disruptions.

This is a case of simplified criminalization defined by L. Gardocki as the application of criminal law standard by substitution to behavior other than the one that is difficult to prove and remains hidden behind the criminalized behavior, or to specific behavior in order to prevent others that involve higher social undesirability.[104] It is forbidden to offend religious feelings in order to prevent more serious social unrest. This model of criminalization also explains the discrepancy between the individual subject matter of protection (which is religious feelings) and the prerequisite for criminalization (which is peace and social harmony).

The question arises whether criminalization is justified for such reasons. J. Kulesza claims that "the degree of social undesirability of the assessed behavior should constitute the limit of simplified criminalization. It is unacceptable to criminalize behavior that has a link to other behavior involving higher social undesirability, but that link with a potential breach or jeopardy of an interest appears to be too remote".[105] It should be emphasized that in the case of penalization of the insult to religious feelings, the behavior of some persons is subject to penalties in order to prevent dangerous behavior of others. Is it appropriate to protect those feelings rather than merely stigmatize disproportionate reactions triggered by an injury to such feelings? After all, there are no provisions prohibiting insult to feelings of football fans through the profanation of the symbols of football teams. Instead, the prohibition and response relate (at least in principle) to inadequate reactions of fans hurt in their love for club colors. The Polish legislature should take a similar position in this case. This is all the more so, we reiterate the point, because a decision on criminalization is not a matter of the importance of the feelings or the importance of their object or subject.

[102] W. Wasil, *op. cit.*, p. 207.

[103] Ruling of the Supreme Court, Collection of Rulings of the Supreme Court, Penal Chamber 1921, no. 146.

[104] L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa 1990, p. 66.

[105] J. Kulesza, *Zarys teorii kryminalizacji*, "Prokuratura i Prawo" 2014, no. 11–12, p. 106.

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ABSTRAKT

Niniejszy artykuł dotyczy kryminalizacji naruszania uczuć religijnych i ma charakter naukowo-badawczy. Problemem naukowym jest ustalenie rzeczywistego *ratio legis* czynu opisanego w art. 196 Kodeksu karnego, co pozwoli ocenić, czy decyzja kryminalizacyjna jest słuszna. Autorka nie podziela powszechnie prezentowanych poglądów o przedmiocie ochrony i uzasadnieniu karalności obrazy uczuć religijnych. Porównanie przestępstw, które przewidują karalność za naruszenie innych uczuć, a także bezkarne naruszanie odczuć innej natury pozwala na sformułowanie tezy, że w przypadku art. 196 Kodeksu karnego to nie uczucia religijne i ich ochrona stały się przyczyną decyzji kryminalizacyjnej. Za taką przyczynę należy uznać obawę przed społecznymi konsekwencjami naruszania uczuć religijnych. Ponieważ zachowanie to kryminalizowane jest w większości państw na świecie, znaczenie niniejszych ustaleń naukowych ma międzynarodowe znaczenie, zarówno teoretyczne, jak i praktyczne.

Słowa kluczowe: naruszanie uczuć religijnych; bluźnierstwo; kryminalizacja; ochrona; Kodeks karny