

STANISŁAW DZIWIŚ

## CRIMINAL LIABILITY OF ARTISTS FOR OFFENCES AGAINST RELIGIOUS FEELINGS

### PRELIMINARY REMARKS

The Polish Criminal Code<sup>1</sup> penalizes behaviours which insult other people's religious feelings if an object of religious worship or a place intended for public performance of religious rituals is publicly offended. The way religious feelings are protected under criminal law raises doubts mainly due to the fact that a behaviour which constitutes an offence under Article 196 of the Polish Criminal Code is often deemed to reflect the perpetrator's freedom of expression. From the perspective of the doctrine, it is sometimes claimed by some jurists that if an offender's conduct is a manifestation of his or her artistic creation, they should not be held criminally liable by virtue of the so-called non-legal justification based on art.

There is no agreement as to the existence of justifications whose attributes are not defined in the statute but rather derived from legal practice or penal jurisprudence (the so-called non-legal justifications). Opponents of their admissibility point out, among others, unauthorised interference of the judiciary in the competences of the legislative power,<sup>2</sup> difficulty finding the legal basis for a refusal to institute or

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<sup>1</sup> Act of 6 June 1997 (Polish Penal Code), Journal of Laws of 2016, item 1137 as amended. [hereafter PC].

<sup>2</sup> A. ZOLL, „Uwagi wprowadzające do rozdziału III Wyłączenie odpowiedzialności karnej,” in *Kodeks Karny. Część ogólna. Komentarz*, ed. A. Zoll (Warsaw: Wolters Kluwer, 2007), 396.

discontinue criminal proceedings<sup>3</sup> and the court having to determine the attributes of a non-legal justification, which may yield divergent opinions issued by different judicial panels.<sup>4</sup> This article is not intended to contribute to the discussion of the possibility of using non-legal justifications *in abstracto*, but rather to consider the possibility of using them for offences against religious feelings. It addresses the question whether it is possible to utilise a non-legal justification based on art and a justification using a wronged party's consent in the case of religious feelings being harmed.

## 1. JUSTIFICATION BASED ON ART

Justifications are circumstances which preclude criminal unlawfulness. Their occurrence render an act satisfying the nominal criteria for a crime not unlawful.<sup>5</sup> The need to recognize the existence of such criteria stems from the impossibility of drafting legal regulations in such a manner that the generic description of an offence may cover only unlawful behaviours.<sup>6</sup> Some of these circumstance are envisaged by the legislator and reflected in PC (self-defence, necessity, permissible risk, permissible criticism or ultimate need) or another act which is equivalent to a law passed by the Parliament (e.g. acting within one's powers and duties,<sup>7</sup> or permissible abortion<sup>8</sup>).

PC provides for exclusion of criminal unlawfulness of an act undertaken as part of one's artistic activity. Pursuant to art. 256 §3 of PC, no offence is committed if for the purposes of distribution the perpetrator of an act that is proscribed by the law "produces, preserves or imports, acquires, stores, possesses, presents, transports or transfers printed matter, a recording or another object with the content specified in § 1" (i.e. promoting a fascist or another totalitarian system or inciting hatred based on national, ethnic, racial or religious differences or for reason of lack of any religious denomination) or "carrying fascist, communist or other totalitarian symbols". This

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<sup>3</sup> P. BRZOZOWSKI, „Podstawa prawna odmowy wszczęcia (umorzenia) postępowania karnego w sytuacji wystąpienia pozaustawowego kontraktu,” *Zeszyty Naukowe Uniwersytetu Szczecińskiego* 835 (2014): 201.

<sup>4</sup> *Ibid.*, 197; R. KUBIAK, „Czy istnieje «kontrakt zwyczajny»,” *Prokuratura i Prawo* 7–8 (2015): 88.

<sup>5</sup> R. HAŁAS, „Pojęcie kontraktu i rodzaje kontraktów (Rozdział III § 25), in *Prawo karne*, ed. A. Grześkowiak and K. Wiak (Warsaw: C.H. Beck, 2015), 121.

<sup>6</sup> J. MAJEWSKI, *Okoliczności wyłączające bezprawność czynu a znamiona subiektywne* (Warsaw: Wolters Kluwer, 2013), 19.

<sup>7</sup> Art. 244 §1 of Code of Criminal Procedure, Journal of Laws of 2016, item 1749 as amended.

<sup>8</sup> Art. 4a of the Act on family planning, protection of human foetuses and the conditions under which pregnancy termination is permissible of 7 January 1993, Journal of Laws No. 16, item 78 as amended.

art-oriented justification, however, does not include artistic acts which are intended to insult an object of religious worship or a place for public performance of religious rituals. Incidentally, it should be noted that the inclusion of the justification in art. 256 §3 is by some jurists rightly deemed to be superfluous for lack of a criminal intention on the part of an artist or a scientist since the goal of their activity is by no means to promote a totalitarian system.<sup>9</sup> Yet, the legislator does not provide a justification which would exclude the unlawfulness of a proscribed act committed by an artist in connection with his or her artistic activity.

When seeking grounds for the presence of an art-related non-legal justification we need to determine the basis and grounds (social need) for its existence. Drawing on A. Zoll and W. Wróbel, it should be noted that the basis for all justifications is a conflict of goods.<sup>10</sup> The good under protection as defined by art. 196 of PC is religious feelings, that is to say, an attitude to a specific denomination<sup>11</sup> or, more specifically, the right to have them protected under the Constitution of the Republic of Poland<sup>12</sup> which ensures the freedom of conscience and belief.<sup>13</sup> In the case of an act proscribed by law but resulting from artistic expression, the freedom of artistic creation, invoked by the Constitution, will be at conflict with the good protected by art. 196 PC. Yet neither of these freedoms constitutes an absolute liberty, therefore it is subject to limitation under art. 31 para. 3 of the Polish Constitution. It is in art. 196 PC that artistic expression is limited. Adoption of a non-legal justification by law is tantamount to a cancellation of the unlawfulness of an artistic act due to its considerable social value. This would result from weighing up the goods and an observation that the infringed good is, at the very most, equal to the artistic value<sup>14</sup> whereas

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<sup>9</sup> W. KULESZA, „Pochwalanie faszyzmu i komunizmu w świetle prawa karnego (uwagi «de lege praevia, lata et ferenda»),” in *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Materiały z konferencji naukowej, Lublin, 26–27 września 2011 roku*, ed. A. Michalska-Warias, I. Nowikowski, and J. Piórkowska-Fliieger (Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2011), 114; K. WIĄK, „Komentarz do art. 256 k.k.,” in *Kodeks karny. Komentarz*, ed. A. Grześkowiak and K. Wiak (Warsaw: C.H. Beck, 2017), 1173; Z. ĆWIAKAŁSKI, „Komentarz do art. 256 k.k.,” in *Kodeks karny. Część szczególna. Komentarz*, ed. A. Zoll (Warsaw: Wolters Kluwer, 2013), 1386.

<sup>10</sup> ZOLL, *Uwagi wprowadzające do rozdziału III*, 398.

<sup>11</sup> N. KŁĄCZYŃSKA, „Komentarz do art. 196 k.k.,” in *Kodeks Karny, Część Szczególna, Komentarz*, ed. J. Giezek (Warsaw: Wolters Kluwer, 2014), 509. See also P. KOZŁOWSKA-KALISZ, „Komentarz do art. 196 k.k.,” in *Kodeks karny komentarz*, ed. M. Mozgawa (Warsaw: Wolters Kluwer, 2014), 497; J. WOJCIECHOWSKA, „Komentarz do art. 196 k.k.,” in *Kodeks karny. Część szczególna. Komentarz do art. 117-221*, vol. I, ed. A. Wąsek (Warsaw: C.H. Beck, 2004), 733.

<sup>12</sup> Constitution of the Republic of Poland, promulgated on 2 April 1997, Journal of Laws No. 78, item 483 as amended. [hereafter CRP]

<sup>13</sup> Resolution of the Supreme Court of 29 October 2012, file ref. no. I KZP 12/12.

<sup>14</sup> T. GARDOCKA, „Czy w polskim prawie potrzebny jest kontratyp sztuki?” *Palestra* 1–2 (2015): 26.

the artistic purpose could not have been achieved in a different manner, i.e. without infringing upon the goods of others that have legal protection. At this early stage, it should be noted that this task is extremely difficult, and determination of objective criteria to provide the judgements offered above seems virtually impossible.

Although most jurists advocate the existence of the so-called non-legal justification by art,<sup>15</sup> a comprehensive and clear definition has not been offered yet. One of the more popular definitions was created by J.J. Nalewajko and R. Kubiak,<sup>16</sup> based on identification of three attributes: an artistic goal, the character of a work and the creator. In accordance with the definition above, an artistic goal involves a presentation of the ideas and feelings of the creator. The presentation should satisfy the intellectual, cultural or aesthetic requirements of society. Artists strive to express themselves and their artistic vision for the public good. The effect of his work should be characterised by beauty and good taste, so the proposed evaluation criterion would be an aesthetic criterion. Such a work, according to the authors, can be created only by an exceptionally gifted master and professional.<sup>17</sup> Analysing the presented definitions, we need to note that their highly generic character infringes the principle of attribute determination regarding justifications,<sup>18</sup> and as a result renders their proper application impossible. Moreover, the proposed manner of artistic identification constitutes an unreasonable limitation of the freedom of artistic creation that is inherent in every person as stipulated by art. 73 CRP. J. Warylewski rightly notes that the acknowledgement that only a person who is both a professional and a master can be an artist excludes beginning artists whose works – using the proposed criteria – would be judged with less tolerance than those of a recognized artist.<sup>19</sup> Likewise, any gradation of artistic freedom based on artistic education would be groundless. It also should be emphasised that many eminent and the most highly regarded artists were not artistically educated.<sup>20</sup>

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<sup>15</sup> The legitimacy of a non-legal justification by art is supported, among others, by J. Warylewski, M. Filar, and J. Majewski as well as J. Nalewajko and R. Kubiak.

<sup>16</sup> J.J. NALEWAJKO and R. KUBIAK, „Sztuka jako okoliczność wyłączająca bezprawność,” *Palestra* 9–10 (2000): 31.

<sup>17</sup> *Ibid.*, 31ff.

<sup>18</sup> W. WOLTER, „O kontratypach i braku społecznej szkodliwości czynu,” *Państwo i Prawo* 10 (1963): 505.

<sup>19</sup> J. WARYLEWSKI, „Pasja czy obraza uczuć religijnych? Spór wokół art. 196 Kodeksu karnego.” In *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, ed. L. Leszczyński, E. Skrętowicz, and Z. Hołda, 425–38 (Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2005), 367–83. See also GARDOCKA, *Czy w polskim prawie karnym*, 24.

<sup>20</sup> R. PAPRZYCKI, „Kazus «Nergala». Kilka uwag na temat przestępstwa obrazu uczuć religijnych w związku z procesem oskarżonego muzyka Adama Darskiego,” *Themis Polska Nova* 2 (5) (2013): 229.

Another problem associated with the definition presented by J.J. Nalewajko and R. Kubiak is the proper definition of a work of art. J. Warylewski claims it can be practically anything.<sup>21</sup> However, this notion is crucial for the concept of justification by art, hence we need to consider who could identify it and how this could be done. According to J.J. Nalewajko and R. Kubiak, such an assessment could be made only by “an authority who enjoys some reputation in a given field, who in a unique way imposes the treatment of a given idea as a means of artistic expression and establishes evaluation criteria for similar ideas by communicating that verbally or through publications.”<sup>22</sup> In practice, it is practically impossible to find a critic whose opinions never provoke debate. Additionally, opinions of renowned critics regarding the value of a particular work can vary considerably. D. Kuspit, an outstanding art critic, has expressed a view that “it has become standard to defend every novelty in the world of art, music and architecture, be it completely shallow or offensive, always accompanied by a cliché mentioning resistance that all eminent artists face in every age [...]; all of this is praised as original experiments commanding the highest regard. No critic would dare suggest that these works of art are as senseless as they seem.”<sup>23</sup> It will be useful to invoke an opinion issued by the Supreme Court which concluded that entrusting a person who is not a member of a judicial panel with the task of evaluating the artistic merit of a work “dangerously precludes the judiciary from making judgements about events.”<sup>24</sup> However, it should be noted that whether the character of a particular work is to be appraised by a renowned authority or the judiciary, this assessment will always be subjective due to the lack of clear-cut identification criteria.

Looking at the possibility of defining a work of art, T. Gardocka claimed that the only permissible criterion determining whether a particular work can be regarded as artistic is the artistic goal of its creation.<sup>25</sup> It should be emphasised that artistic creation is not always intended to satisfy intellectual, cultural or aesthetic needs of society. Many artists, if not all, are driven by inner feelings and the necessity to manifest them in an artistic manner. Their goal, then, is to express themselves and

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<sup>21</sup> WARYLEWSKI, „Pasja czy obrazu uczuć religijnych,” 367–83.

<sup>22</sup> NALEWAJKO and KUBIAK, „Sztuka,” 31 ff.

<sup>23</sup> D. KUSPIT, *Koniec sztuki*, transl. J. Borowski (Gdańsk: Muzeum Narodowe, 2006), 55, quoted after: C. MORYC, „Odpowiedzialność artysty za przekaz twórczy,” in *Odpowiedzialność karna artysty za obrazę uczuć religijnych*, ed. F. Cieply (Warsaw: Instytut na Rzecz Kultury Prawnej Ordo Iuris, 2014), 66.

<sup>24</sup> Resolution of the Supreme Court of 5 March 2015, file ref. no. III KK 274/14, OSNKW 2015/9/72.

<sup>25</sup> GARDOCKA, *Czy w polskim prawie karnym*, 28.

provide their own interpretation of the world. On the other hand, a graffiti artist damages someone's property by spraying a wall can have an artistic goal on mind. At present, art and beauty are open notions, contentious and non-definable, hence the character of a work cannot be determined using the aesthetic criterion.<sup>26</sup>

The analysis provided above suggests that the attributes of a non-legal justification by art, proposed by Nalewajko and Kubiak, have not been specified precisely enough to assume their correct applicability. The authors do not offer a sufficient indication which criteria should be adopted when artistic impact is evaluated to make certain that the appraisal is not a subjective judgement of the evaluator. This conception became a foundation for concepts formulated by other representatives of the doctrine.

For example, J. Warylewski claims that the possibility of using a non-legal justification by art requires one to decide whether the perpetrator is an artist, the work has an artistic nature, and the creator pursued an artistic goal.<sup>27</sup> In contrast, M. Budyń-Kulik and M. Kulik point out the artistic goal of artistic creation and social profitability of using an art-oriented justification, profitability emerging when the artistic goal of a presented work has a greater value than that of the infringed good. Under this conception the possibility of using a non-legal, art-oriented justification is dependent on the statement that the weighing up of conflicting goods and their evaluation show that the value of a work is equal or greater than that of the infringed good. Both M. Budyń-Kulik and T. Gardocka believe that the very artistic goal and aesthetic feelings do not justify an exclusion of unlawfulness, and an art-oriented justification can be invoked only in a situation when the envisaged artistic goal could not have been achieved without infringing a specific good which is under legal protection.<sup>28</sup> Similarly, given these conceptions the proposed lists of attributes of an art-oriented justification do not permit their proper use.

In all of the presented conceptions of an art-related justification, all of their authors unanimously indicate that it can only be used only in relation to an artist's activity. W. Cieślak presents a different view, claiming that greater freedom of speech should be granted also to scientists and journalists.<sup>29</sup> However, this postulate is markedly

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<sup>26</sup> H. KIEREŚ, „Spór o sztukę. Pomiedzy moralnością a prawem,” in *Odpowiedzialność karna artysty*, 20.

<sup>27</sup> J. WARYLEWSKI, „Prawnkarne uwarunkowania wolności w zakresie ekspresji seksualnej oraz twórczości (m.in. artystycznej, naukowej i dziennikarskiej),” in *Prawnkarne aspekty wolności: materiały z konferencji, Arłamów 16–18 maja 2005 r.*, ed. M. Mozgawa (Kraków: Kantor Wydawniczy Zakamycze, 2006), 104.

<sup>28</sup> M. BUDYŃ-KULIK and M. KULIK, „Wolność działalności artystycznej jako okoliczność wyłączająca odpowiedzialność karną,” in *Prawnkarne aspekty*, 234ff; GARDOCKA, „Czy w polskim prawie karnym,” 24.

<sup>29</sup> W. CIEŚLAK, „Kontratyp swobody artystycznej w oczach praktyka,” in *Odpowiedzialność karna artysty*, 186.

different from the reasons provided by the doctrine with respect to the existence of an art-oriented justification, and it is not about its name losing relevance only, since it is hard to pinpoint a goal (even hypothetical one) that would justify the behaviour of a journalist or scientist which insults an object of religious worship or a venue for public performance of a ritual. Such individuals are obviously entitled to voice their criticism, for example regarding the currently existing denominations and the sense of belief in God, but this entitlement is enjoyed by all people – regardless of their role in society. The freedom of speech is enshrined in the Constitution of the Polish Republic.<sup>30</sup> It was also included in the Press Law of 26 January 1984.<sup>31</sup> This freedom, similarly to other freedoms, has no absolute character. When exercising it, journalists must not forget about their work ethic and rules of social coexistence. The scope of their work must lie within the limits imposed by provisions of the law (art. 10 para. 1 of Press Law Act) and may not infringe upon personal rights of others (art. 12 para. 1 point 2 of Press Law Act). By virtue of art. 12 para. 1 point 1 of Press Law, journalists are to exercise due diligence and accuracy when collecting and using press materials, and in particular verify the truthfulness of news items or credit their sources.<sup>32</sup> There are also restrictions with regard to public statements since pursuant to art. 18 para. 2 of the Act on radio and TV broadcasting of 29 December 1992 “programmes or other kinds of broadcast should respect religious convictions of the recipients, especially the Christian system of values.”<sup>33</sup>

The right granted to journalists under art. 41 of Press Law Act to publish negative but reliable assessments of artistic, professional or public activity is intended to realize tasks specified in art. 1, i.e. to ensure that citizens are reliably informed, that public life is transparent and that social issues are monitored and subject to criticism. This, however, does not mean that statements which offend religious feelings are subject to legal protection. The journalist right to criticize “is not unlimited and is not to be construed as a right to put forward groundless or poorly researched accusations,”<sup>34</sup> and “the satirical nature of a work does not always exclude the unlawfulness of the author’s activity.”<sup>35</sup> Therefore a satirical or caricatured representation

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<sup>30</sup> In accordance with art. 14 CRP, Poland is obliged to ensure the freedom of the press and other means of social communication, whereas under art. 54 para. 1 CRP everyone shall be free to express their opinions and acquire and disseminate information.

<sup>31</sup> Journal of Laws of 1984, No. 5, item 24 as amended.

<sup>32</sup> Resolution of the Court of Appeal in Katowice dated 4 November 1999, file ref. no. IACa 536/99.

<sup>33</sup> Journal of Laws of 2016, item 639 as amended.

<sup>34</sup> Resolution of the Supreme Court dated October 17, 2001, file ref. no. IV KKN 165/97, OSNKW 2002/3–4/28.

<sup>35</sup> Resolution of the Supreme Court dated June 20, 2001, file ref. no. I CKN 1135/98, OSP 2001/12/181.

of the clergy or their work can be deemed permissible. That statement cannot be offensive. It must not “go beyond certain limits which originate in customs, principles of decency and good taste.”<sup>36</sup> Incidentally, it must be stressed that the areas referred to in art. 41 of the Act which are subject to reasonable criticism (artistic, professional or public activity) do not concern the domain of *sacrum*.

The doubts presented in this article as to the effectiveness of the non-legal, art-related justification are borne out through analysis of court judgements. To exemplify the diversity of opinions concerning artistic activities that insult religious feelings, a reference can be made to the case of A. Darski, who tore up and scattered pieces of the Bible, uttering offensive remarks concerning the contents. The District Court in Gdynia (Poland) ruled that the act remained within the limits of an art-related justification.<sup>37</sup> The Regional Court in Gdańsk revoked the ruling of the court of the first instance, indicating that justification by art was not sufficiently motivated.<sup>38</sup> In contrast, the Supreme Court indicated that “the liability concerns also artists.”<sup>39</sup> When providing the grounds for the decision, the court made reference to the opinion of L. Garlicki, who claims that art cannot be “offensive to others for no reason.”<sup>40</sup> The case mentioned above demonstrates a variety of interpretations of the perpetrator’s behaviour and the possibility of excluding unlawfulness using the art-oriented criterion. Although it is hard to find any artistic content in the conduct of the perpetrator, i.e. the tearing up of the Bible and likening it to faeces, the court of the first instance concluded that this act falls within the scope of an art-oriented justification, and thereby sharing the view presented by some that an artist is allowed to do anything. Yet, this assumption is inconsistent with the idea of justifications which essentially render specific behaviours legitimate only if a set of precisely defined circumstances co-occur but not with respect to any act manifested by a person deemed (probably not by everybody) to be an artist.

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<sup>36</sup> Resolution of the Supreme Court of dated February 2, 2011, file ref. no. II CSK 431/10.

<sup>37</sup> Resolution of the District Court in Gdynia dated August 18, 2011, file ref. no. II K 589/10.

<sup>38</sup> Resolution of the Regional Court in Gdańsk dated May 29, 2012, file ref. no. V Ka 798/11.

<sup>39</sup> Resolution of the Supreme Court dated October 29, 2012, file ref. no. I KZP 12/12.

<sup>40</sup> L. GARLICKI, „Komentarz do art. 10 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności,” in *Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz do art. 1–18*, vol. I, ed. L. Garlicki (Warsaw: C.H. Beck, 2010), 638.



## 2. JUSTIFICATION BASED ON VICTIM'S CONSENT

Another important matter is how to decide in the case of an offence against religious feelings whether it is possible to invoke the so-called justification on account of the victim's consent. It would apply to situations in which a victim wilfully and voluntarily comes into contact with content that insults his or her religious feelings. Importantly, not everybody regards the consent of an interest holder as a non-legal justification. For example, A. Zoll believes that an express consent of a victim renders the offender's conduct inherently lawful since it does not infringe upon any good that enjoys legal protection.<sup>41</sup> In contrast, A. Spotowski,<sup>42</sup> Ł. Pohl,<sup>43</sup> T. Bojarski<sup>44</sup> and M. Mozgawa<sup>45</sup> are of the opinion that such consent, depending on circumstances, can give rise to primary lawfulness or constitute a non-legal justification. Acknowledgement of an interest holder's consent as a circumstance that excludes the unlawfulness of an act which insults religious feelings is manifested by J. Warylewski<sup>46</sup> and W. Wróbel.<sup>47</sup>

An examination of court rulings issued in connection with offences against religious feelings with respect to which the victims themselves would willingly become acquainted with the offensive content demonstrates discrepancies among judicial decisions in this respect. For instance, the court of the first instance in the Nieznalska case ruled that in the case of an offence against religious feelings, the wronged party will always – to some extent – contribute to it.<sup>48</sup> In a case heard in connection with the publication of a website that would parody the sacrament of confession, the District Court in Biała Podlaska expressed an opinion that “the fact that the witnesses had to search for an on-line confession website prior

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<sup>41</sup> A. ZOLL, „«Pozaustawowe» okoliczności wyłączające odpowiedzialność karną w świetle konstytucyjnej zasady podziału władzy,” in *W kręgu teorii i praktyki prawa karnego*, 434.

<sup>42</sup> A. SPOTOWSKI, „Zezwolenie uprawnionego i zgoda pokrzywdzonego a odpowiedzialność karna,” *Państwo i Prawo* 3 (1972): 82.

<sup>43</sup> Ł. POHL, *Prawo karne. Wykład części ogólnej* (Warsaw: Wolters Kluwer, 2012), 279.

<sup>44</sup> T. BOJARSKI, *Polskie prawo karne. Zarys części ogólnej* (Warsaw: LexisNexis, 2008), 180.

<sup>45</sup> M. MOZGAWA, „Rozdział III Okoliczności wyłączające bezprawność,” in *Prawo karne materialne – część ogólna*, ed. M. Mozgawa. (Warsaw: Wolters Kluwer, 2011), 256.

<sup>46</sup> WARYLEWSKI, „Pasja czy obraza uczuć religijnych,” 367–383; similarly in M.M. BIECZYŃSKI, *Prawne granice wolności i twórczości artystycznej w zakresie sztuk wizualnych* (Warsaw: Wolters Kluwer, 2011), 317; M. ZIÓLKOWSKI, *Komentarz do wyroku Sądu Rejonowego w Białej Podlaskiej z 12 czerwca 2007 r.*, accessed 5 January 2017, <http://www.prawaczlowieka.edu.pl/index.php?dzial=komentarze&komentarz=c8306ae139ac98f432932286151dc0ec55580eca-c0>.

<sup>47</sup> W. WRÓBEL, „Komentarz do art. 196 k.k.,” in *Kodeks karny. Część szczegółowa. Komentarz*, ed. A. Zoll (Warsaw: Wolters Kluwer, 2013), 661.

<sup>48</sup> Resolution of the District Court in Gdańsk dated July 18, 2003, file ref. no. IV K 638/02.

to using its content was irrelevant to the offender's liability."<sup>49</sup> In the case of Dar-  
ski, who had torn up and scattered the fragments of the Bible during a concert, the  
Supreme Court decided that the participants had expressed their willingness to take  
part in the scheduled performance by buying tickets for it, therefore the defendant's  
conduct did not constitute a crime under art. 196 PC.<sup>50</sup>

Significantly, in its statement of reasons, the Supreme Court indicated that the  
consent of an interest holder must precede the act of the perpetrator, and the time  
when it is expressed is instrumental in invoking a justification based on victim's  
consent. The time when consent is expressed is also noted by J. Piskorski.<sup>51</sup> When  
an offence against religious feelings is committed, consent is typically expressed by  
those who intend to find out about some artistic activities before filing an offence  
notification. It should be noted that in such cases religious feelings are insulted  
before voluntary acquaintance with the content in question takes place. A public  
insult of an object of religious worship may offend not only its witnesses but also  
those who do not participate but are going to find out about it afterwards. The  
sheer thought that someone dared to abuse an object of religious worship or a place  
intended for the public performance of religious rituals can evoke the feelings of  
indignation and resentment in the worshippers. Those who express their voluntary  
and informed consent before getting acquainted with a work of art must not claim to  
be wronged in accordance with the *volenti non fit iniuria* principle. It should be re-  
membered, though, that an offence against religious feelings is a criminal act subject  
to public prosecution. Therefore, in the case of a reasonable suspicion that a crime  
has been committed, the law enforcement authority initiates *ex officio* proceedings.  
A public presentation of artistic expression constitutes a real threat to religious feel-  
ings of some persons. Even if concert organisers informed the participants about  
the possibility that their religious feelings might be insulted by the artist's conduct  
before they bought their tickets, the artist's behaviour could constitute a crime un-  
der art. 196 PC. We should remember that concerts are organised by a number of  
individuals who have not expressed such consent. Moreover, concert footages are  
often posted on the Internet<sup>52</sup> and become accessible to anybody. At any rate, the

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<sup>49</sup> Resolution of the District Court in Biała Podlaska dated June 12, 2007, file ref. no. VII K 2159/06.

<sup>50</sup> Resolution of the Supreme Court of March 5, 2015, file ref. no. III KK 274/14, OSNKW 2015/9/72.

<sup>51</sup> J. PISKORSKI, „Kontratyp sztuki?” in *Wokół problematyki prawnej zabytków i dzieł sztuki*, vol. I, ed. W. Szafranski (Poznań: Wydawnictwo Poznańskie, 2007), 168. IDEM, „Volenti non fit iniuria – niedoceniana czy przeceniana zasada prawa karnego?” in *Zgoda pokrzywdzonego*, ed. R. Zawłocki (Warsaw: C.H. Beck, 2011), 19.

<sup>52</sup> Responsibility of the person who publishes such a concert video on the Web is a different matter. Such conduct satisfies the criteria of a crime under art. 196 PC, and the person can be held liable

wronged person can find out about the artist's performance from a participant. As mentioned before, the very awareness of the artist's behaviour can harm one's religious feelings. It is obvious that only public behaviours are punishable under art. 196 PC, yet the obligation to buy a ticket does not affect the public perception of the offender's performance.<sup>53</sup> If we were to accept that the perpetrator's conduct did not have a public character, not all criteria of a crime against religious feelings would be satisfied, and thereby it would be pointless to create a non-legal justification. Here, it would be instructive to mention an opinion issued by the European Court of Human Rights in the case *Otto-Preminger Institut v. Austria*. The Court adjudicated that the interference of state authorities involving confiscation of a film which might insult religious feelings was valid.<sup>54</sup> The film was to have been screened in a cinema owned by Otto-Preminger Institut. It would have been available only to those who knew what to expect and would decide to buy a ticket. The Court stressed that despite certain restrictions related to the availability of the film, it had been widely advertised,<sup>55</sup> so the scheduled showing became, say, a public statement. The consent expressed by persons who are witnesses to an artist's act does not relieve law enforcement authorities of the duty to institute proceedings.

#### FINAL REMARKS

The underpinnings of the attempted establishment of a non-legal justification based on art are rooted in the conviction that artists must be guaranteed greater freedom since artistic freedom "would lose its social mission and sense without a right to ambiguity, without provocation or strong impact on the recipient."<sup>56</sup> In this case, similarly to other conceptions of non-legal justifications, the lack of statutory

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for insulting religious feelings. Simultaneously, pursuant to art. 116 of Act on copyrights and related rights dated February 4, 1994 (Journal of Laws of 2016, item 666 as amended), the person is subject to criminal liability for unauthorised distribution of the recording.

<sup>53</sup> W. JANYGA, *Przestępstwo obrazy uczuć religijnych w polskim prawie karnym w świetle współczesnego pojmowania wolności sumienia i wyznania* (Warsaw: Wydawnictwo Sejmowe, 2010), 212; see also WARYLEWSKI, „Pasja czy obraza uczuć religijnych,” 367–383.

<sup>54</sup> Judgement of the European Court of Human Rights dated September 20, 1994 in the case *Otto-Preminger Institut v. Austria* (complaint no. 13470/87), series A, no. 295-A.

<sup>55</sup> The film was announced as: "A satirical tragedy by Oscar Panizza, set in Heavens, filmed by Schroeter and based on the play, showing a reconstruction of the writer's trial and conviction."

<sup>56</sup> R. PAPRZYCKI, „Jak znieważać przedmiot czci religijnej. Rozważania na temat znamienia «znieważenia» przedmiotu czci religijnej przestępstwa obrazy uczuć religijnych – art. 196 k.k.” *Themis Polska Nova* 2 (3) (2012): 99ff.

normalization results in lack of unanimity in respect of their attributes. When hearing a particular case, the court is forced to determine the attributes of that specific justification and assess their applicability. This assessment, given the biased attitude of the judicial panel, may give rise to divergent opinions, and as a result weaken the safeguarding and protective functions of criminal law. Following A. Zoll, it must be said that this also constitutes interference of the judiciary in the competences of the legislative power, violating the principle of legality specified in art. 10 of the Constitution.<sup>57</sup> Definitions which are adopted for the conceptions of a non-legal, art-based justification are vague and have a very broad scope, which on the one hand narrows down their practical application, but on the other poses a risk of unjustified exclusion of unlawfulness and thereby prevents a victim from asserting his or her rights. Given the arguments presented above, we would be tempted to reject the concept of a non-legal justification based on art. In this case, when religious feelings are insulted, there is no reason for using a non-legal justification based on victim's consent because this consent is typically not expressed before the artistic act takes place. At the same time, there is a risk that persons who do not participate in the performance directly will get to know about it and their religious feelings will be insulted by the artist's conduct, and because of that the act will constitute an offence against religious feelings.

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<sup>57</sup> ZOLL, "«Pozastawowe» okoliczności," 433–434.

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## CRIMINAL LIABILITY OF ARTISTS FOR OFFENCES AGAINST RELIGIOUS FEELINGS

### Summary

The article focuses on the possibility of excluding criminal liability of artists for their conduct which bears the attributes of an offence against religious feelings and which is a manifestation of their artistic expression. The existing conceptions of a non-legal justification based on art are analysed. The article also deals with the importance of the right enjoyed by journalists to publish negative appraisals of creative, professional and public acts, and its impact on the assessment of the punishability of a conduct that insults religious feelings. Also, reference is made to the possibility of evoking a justification by the injured party's consent in the case of an offence against religious feelings, especially in a situation when the victim comes into contact with the offensive content deliberately and voluntarily. The dogmatic considerations are supplemented with a presentation of court rulings that are relevant to the study.

**Key words:** offence against religious feelings; freedom of artistic expression; crimes against the freedom of conscience and religion; non-legal justification based on art.

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