



ADF INTERNATIONAL

**For attention:**

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Date:

17 January 2025

Re:

**ADF International submission – 27 November 2024 Government Bill amending the Criminal Code (No. 876) before the meeting on 22 January 2025.**

From:

*ADF International*

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## 1 Introduction

1. ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people. We act before national and international institutions and have ECOSOC consultative status with the United Nations (registered name 'Alliance Defending Freedom'), accreditation with the Organization of American States, and are registered with the EU Transparency Register. ADF International is also a participant in the FRA Fundamental Rights Platform.
2. ADF International submits that the Polish *Government Bill amending the Criminal Code* (No. 876) (hereinafter the '*Bill*') does not comply with the international right to freedom of expression (Article 19 of the International Covenant on Civil and Political Rights ('ICCPR')). For the reasons described below, it is respectfully submitted that the Polish government should abandon the *Bill*.

## 2 Freedom of expression and freedom of speech

3. Freedom of expression is undoubtedly one of the most fundamental freedoms in the constitutional structure of any democracy. It underpins, *inter alia*, the vital ability of citizens to speak out without fear of repercussion.
4. The right to speak freely features prominently in all international human rights treaties. Consequently, Article 19 of the Universal Declaration of Human Rights (UDHR) is unambiguous in its far-reaching recognition of freedom of expression:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

5. The wording was followed closely in the drafting of Article 19 of the ICCPR, Article 10 of the European Convention on Human Rights (ECHR), and Article 11 of the Charter of Fundamental Rights of the European Union (EU Charter).
6. General Comment 34 by the UN Human Rights Committee states:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.<sup>1</sup>

7. The same General Comment states that Article 19(2) of the ICCPR also protects *deeply offensive speech*.<sup>2</sup>
8. In keeping with other international human rights bodies, the European Court of Human Rights (ECtHR) has had a longstanding tradition of giving robust protection to freedom of expression.
9. The ECtHR has stated on numerous occasions that freedom of expression has a 'special importance' under the ECHR<sup>3</sup> and that States are under a positive obligation to create a favourable environment for citizens to participate in public debate, enabling them to express their opinions and ideas without fear.<sup>4</sup>
10. According to the ECtHR, Article 10 not only protects the substance of the ideas and information expressed but also their form. In the seminal case of *Handyside v. the United Kingdom*, the ECtHR explained the importance of freedom of speech to democracy itself:

Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.<sup>5</sup>

11. Therefore, international and European law protects not just inoffensive speech but also speech that disturbs, shocks, provokes, hurts, and displeases.
12. Nonetheless, freedom of expression is not absolute: it can be legitimately limited in specific situations. For an interference with freedom of expression to be justified, it must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. The ECtHR has stated that any exceptions to the right to freedom of expression must be construed strictly and the need for any restrictions must be established convincingly,<sup>6</sup> and only 'convincing and compelling reasons' can justify a restriction on freedom of expression.<sup>7</sup> Additionally, the United Nations General Comment 34 similarly states that limitations to the right to freedom of expression are to be strictly interpreted and not

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<sup>1</sup> Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, para 2.

<sup>2</sup> Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, para 11.

<sup>3</sup> See *Ezeline v. France*, App no. 11800/85, para 51.

<sup>4</sup> *Dink v. Turkey*, App nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, para 137.

<sup>5</sup> *Handyside v. the United Kingdom*, App no 5493/72, para 49.

<sup>6</sup> *Sener v. Turkey*, App no. 26680/95, para 39. See also *Thoma v. Luxembourg*, App no. 38432/97, paras 43, 48, *The Observer and The Guardian v. the United Kingdom*, App no. 13585/88, para 59.

<sup>7</sup> *Delfi As v. Estonia* [GC], App no. 645669/09, 16 June 2015, para 131.

overbroad.<sup>8</sup> The Rabat Threshold test<sup>9</sup> prefers a *direct causal link* between the speech and harm suffered before any limitation to freedom of expression can be made.

13. Therefore, limits on speech should remain an exception which is narrowly construed, well-defined, proportionate, legitimate, pursuing a clear aim, and must ensure that less restrictive means do not exist.

### 3 The Polish *Bill* is not in line with international human rights standards

#### 3.1 'Hate speech' is not strictly defined and lacks objectively determinable criteria

14. There 'is no universally accepted definition of the expression hate speech'<sup>10</sup> - largely because of underlying philosophical, historical, and constitutional differences between global states in relation to freedom of expression.<sup>11</sup> Hate speech is an elusive umbrella term usually referring to speech considered hateful by a group of persons. Similarly, hate speech laws intend to criminalise speech and expression based on subjective criteria such as 'insult' and 'offence' as is also introduced in the amendments of the draft *Bill* (amendments to Article 257 of the *Bill*).
15. In 2015 UNESCO published a manual addressing online hate speech: its authors admitted that 'the possibility of reaching a universally shared definition seems unlikely.'<sup>12</sup> Likewise, the United Nations Strategy and Plan of Action on Hate Speech clearly stated that 'there is no international legal definition of hate speech, and the characterization of what is "hateful" is controversial and disputed.'<sup>13</sup>
16. The Polish *Bill* restricts the right to freedom of expression far beyond the limitations allowed in international human rights law, as described above. It introduces subjective concepts such as 'insult' which can potentially incarcerate persons and criminalize their speech.
17. On the contrary, criminal law is predicated upon an objective and evidence-based assessment of culpability and harm relating to the offending behaviour. Criminal frameworks rely upon clear, unambiguous, and predictable statutory definitions - in the interests of citizens and law enforcers alike. Contrary to other criminal laws, hate speech laws rely heavily on subjective and unclear terms. This is evident from the *Bill* essentially lacking in a definition of 'hate speech' or 'insult'.
18. This is also contrary to international law's requirement that any limitation to freedom of expression be clearly prescribed by law, as required by Article 19 of the ICCPR.<sup>14</sup> This means that for a legal restriction to meet the requirement of 'prescribed by law' it must be drafted with sufficient precision to enable an individual to regulate his or her conduct accordingly and be made accessible to the public. It must be clear what sorts of speech 'are properly restricted and what sorts are not'.<sup>15</sup> Hate speech, as defined in the *Bill*, does

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<sup>8</sup> Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, paras 21 – 36.

<sup>9</sup> The Rabat Plan of Action, [https://www.ohchr.org/sites/default/files/Rabat\\_threshold\\_test.pdf](https://www.ohchr.org/sites/default/files/Rabat_threshold_test.pdf), accessed 16 May 2023.

<sup>10</sup> 'Factsheet – Hate Speech', Council of Europe, November 2008, p.2.

<sup>11</sup> C. Harris, J. Rowbotham, K. Stevenson, 'Truth, law and hate in the virtual marketplace of ideas: perspectives on the regulation of Internet content' *Information and Communications Technology and Law*, 18, no. 2 (2009), paras. 155-184. This research suggests that hate speech laws in different countries are rooted in historical and philosophical and constitutional traditions in relation to freedom of expression.

<sup>12</sup> Iginio Gagliardone et al., 'Countering Online Hate Speech' (2015), 8.

<sup>13</sup> United Nations Strategy and Plan of Action on Hate Speech, p2.

<sup>14</sup> Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, paras 21 – 36.

<sup>15</sup> Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, paras 25.

not provide any clarity as to what type of speech is limited and what is acceptable. Citizens will not be certain which forms of expression are within the boundaries protected by law or if they subject themselves to prosecution.

19. Additionally, the Bill fails to meet the strict proportionality tests outlined in Article 19 of the ICCPR as it does not require the State to prove a causal link between the speech and any actual incitement or 'insult' (see proposed amendments to Articles 256§1 and 257. This is contrary to the Rabat Threshold Test described above.

### *3.2 Prosecutorial and practical problems*

20. Due to the definitional complexities relating to hate speech, law enforcement agencies will face difficulties in identifying whether there is sufficient evidence to prosecute. Hate speech, which aggravates many base crimes such as assault and harassment, is often verbally communicated, and therefore, the evidence relies on the hearer or receiver being able to accurately recollect the event. The evidence base can, therefore, be very thin and anecdotal.
21. According to the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye: 'the vagueness of hate speech and harassment policies has triggered complaints of inconsistent policy enforcement that penalizes minorities while reinforcing the status of dominant or powerful groups.'<sup>16</sup>

## **4 Conclusion**

22. The above issues highlight that:
  - The proposed Polish *Bill* does not comply with the right to freedom of expression as contained within international human rights law. It is also an unjustifiable limitation of this right as it does not meet the grounds required for the proportional limitation of the right to freedom of expression.
  - The absence of a firm definition of the crimes and the lack of traditional criminal elements (i.e., criminal intent, causation, harm, state of mind) results in the fact that the policing of hate speech and hate crimes will be a difficult and unjustifiable task for law enforcers.
23. The proposed amendments would chill public and private debate amongst Polish citizens from different philosophical, historical, and religious contexts, stifling the right to freedom of expression.
24. We therefore respectfully ask for the reconsideration and eventual dismissal of the amendments to the Penal Code.

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<sup>16</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, 6 April 2018.