

POLAND: THE CASE OF RELIGIOUS FREEDOM

National case studies: concentrating on the status quo and current developments

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I. Evolution of religious freedom after 1989

Religious freedom occupies a prominent place in the Polish Constitution of 1997. One should note, however, that the foundations shaping the constitutional scope of religious freedom had been introduced by laws adopted by the last communist parliament in May 1989.¹ That was several weeks before the June election which resulted in representatives of the hitherto underground opposition entering parliament. Paradoxically, a broad catalogue of guaranteed religious freedoms was introduced into Poland's legal system by the outgoing communist authorities. That was the result of roundtable agreements in which the Church and extra-parliamentary opposition had played a significant role.

The introduction of that legislation created a basic framework for religious freedom in the state. The new Polish constitution was not adopted until 1997, or rather late, hence, before it was adopted, the regulations of the 1952 constitution remained in force. But it was laws passed in 1989 introducing a broad catalogue of freedoms of conscience and religion that formed the basis for their interpretation.

The promulgation of a full constitution was preceded by long years of debate. One of its essential points were disputes relating to natural law and codified (positive) law, whose legal aspect boiled down to specifying the interdependence of *ius* and *lex*. Following the changes of 1989, there existed a clear need to refer to a more durable foundation than just positive law, to something that could constitute a pattern of axiological references to codified laws.

The experience of the recent communist past, the fragility of the foundations, on which the constitutions of authoritarian systems were based, necessitated such points of reference and quests.

¹ Law of 17th May 1989 r. on the relation of the State to the Catholic Church in the People's Republic of Poland (*Journal of Laws*, 1989 No. 29, item 154), Law of 17th May 1989 r. on guarantees of freedom of conscience and religion. (*Journal of Laws*, 1989 No. 29, item 155).

Natural law had become a reference point of order, whilst codified law had become its antithesis. Natural law was perceived as just, meaning that a conflict of norms could lead to the rejection of codified law. As one author, a judge of the Constitutional Tribunal, had written: 'It is true that the doctrine of natural law encounters great applicative difficulties within codified law, [...] nevertheless the experience provided by two massive totalitarian systems has shown that invoking it is not only possible but even necessary. After all, there already exists a point of reference acknowledged by the international community in the form of human-rights pacts. [...] They contain a major share of the catalogue of norms of human rights'.

A rather prevailing conviction at that time was that the new system should be a kind of reversal of the previous one, also, or perhaps above all, in the realm of values. In light of the huge role played by the Catholic Church in preparing the transformation and its assistance to the opposition community, at least amongst a portion of former opposition circles the dominant view was that it was only natural for the new system to directly invoke Christian values. But although such thinking was close to the heart of many Christians, some however voiced misgivings over whether one official ideology would not be replaced by 'another', thereby closing the road to pluralism.

It was characteristic that every debate evoking or even touching upon the problem of Christian values as well as freedom of conscience and religion, particularly the place of religion in public life, generated a great deal of controversy and social repercussions. One can risk stating that probably in no other country undergoing transformation did the debate on values and the place of religion in public life produce more emotions and misunderstandings. (Maybe it was the effect of a very strong position of the Church in Poland).

Mutual accusations were hurled which, depending on their source, either accused opponents of attempting to create a confessional state or, conversely, an ultra-secular one.

Although the pursuit of compromise solutions in the regulation and guarantee of religious freedom and church-state relations was one of the thorniest problems in the work of the constitutional commission, a compromise was ultimately found. The final legal regulations of the 1997 Constitution, approved in a referendum, were the result of a nationwide debate on the place of religion in life and on a Concordat signed in 1993, four years before the adoption of the Constitution.

The experience of that frequently quite aggressive debate made it possible to find formulations which were effective responses to the charges levelled against the Church and the place of religion in the state. Hence, the

constitutional provisions in that area are rather detailed. They are not limited to simply declaring freedom of conscience and religion, but in many cases indicate highly detailed ways in which that freedom is to be implemented.

II. Constitutional guarantees of religious freedom

Relevant regulations may be found in the chapter devoted to the State's general principles (art. 25 regulating the state's relations with churches and religious associations) and in that devoted to an individual's rights and freedoms (art. 53 dealing with freedom of conscience and religion). In light of the Polish Constitution, freedom of conscience and religion is not only an individual's personal freedom but, in view of the regulations of art. 25, also a principle of polity.

What principles can be extracted from those regulations?

1. In art. 53 of the Polish Constitution, freedom of religion is expressed in the category of a classic personal freedom. It is a sphere free of state interference. A person does not benefit from religious freedom by the will of the state. Instead, it is conceived as a natural freedom which the state guarantees. 'Everyone is assured of freedom of conscience and religion'. It is not linked to citizenship, but is guaranteed to everyone. Recognition of religious freedom is therefore tantamount to the recognition of religious pluralism (art. 53, passage 1).
2. The Constitution guarantees 'the freedom to profess or accept the religion of one's own choice'. It regards that freedom (free will) as an immanent feature of religious freedom. The Constitution therefore not only permits the freedom to profess a religion as well as the unrestricted freedom to change one's religion. Changing one's religion is solely a matter of a person's free will and human liberty. The state has no right to interfere therein, nor can it place any restrictions on the individual in that area (art. 53.ust. 2).
3. In various places, the Constitution refers to churches and religious associations. That formulation had engendered disputes as to which associations and churches it was to apply. The Constitutional Tribunal ruled in the matter stating that 'freedom of religion is very broadly treated as constitutional norm in that it encompasses all religions and membership of all religious associations, hence it is not restricted to participations in religious communities constituting a formal, separate organisational structure and duly registered in registers conducted by the public authority' (ruling of 15th February 1999 [SK.11/98]).
4. The Constitution enumerates ways in which religious freedom is to be implemented. Although it contains an extensive catalogue of behaviour,

it should be perceived as an exemplification. The constitution speaks about worship, prayer, participation in rituals, practice and teaching and the possession of churches and other places of worship depending on the needs of believers. However, one should not conclude that this excludes forms of religious freedom other than those enumerated here.² For example, the Constitution does not mention spreading or disseminating religion. But can spreading religion be eliminated from the ways religious freedom is realised? I am convinced it cannot. This is indeed a delicate issue, because it may intrude on other rights of the individual. But it does not violate the freedom of others as long as it is limited to persuasion and does not involve forcing someone to change his/her religion. One may also refer to the ETHC ruling (of 24th February 1998, Larissis *et al.* v. Greece) where the Tribunal ruled that, without the right of dissemination ‘freedom to change religion or conviction (...) would remain a dead letter’.³

5. The constitutional scope of religious freedom encompasses its externalisation, both individually and with others. Whilst acknowledging religious freedom as an individual liberty of a personal nature, the Constitution also creates guarantees for its collective externalisation. The Constitution therefore does not impose silence on religious matters. At the same time, it clearly states that no one can be obliged by organs of the public authority to reveal their worldview, religious convictions or denomination (art. 53, passage 7). It is therefore up to the individual whether he/she wishes to externalise his/her freedom with others or prefers to maintain silence. The Constitution has created a framework for the public externalisation of religion. That is a basic difference compared to the previous communist system which had emphasised silence in matters pertaining to religion. Guarantees of such silence and to non-revelation of religious convictions were often regarded as the very essence of freedom of conscience and religion.
6. The Constitution also guarantees diverse forms of externalising religion. It clearly states that such externalisation may be private or public. In the light of constitutional regulations, religious freedom is not reduced to the private sphere. The externalisation of religion may be restricted only by legislation and only when that is necessary to protect state security,

² *Constitution of the Republic of Poland, Commentary*, edited by L. Garlicki, Parliamentary Publishers, Warsaw 1999, chapter II, p. 4.

³ *Ibid.*, p. 6.

public order, health, morality or the liberties and rights of others (art. 53, passage 5). Simultaneously, the Constitution contains a direct regulation safeguarding the individual's right to externalise religion by directly stating that 'no one may be forced to participate or not participate in religious practices' (art. 53, passage 6).

Within the framework of religious freedom the Constitution also expresses certain categories in terms of rights, using the term 'right' in its texts, namely:

- People's right to avail themselves of religious assistance wherever they may be. The separate mention of that right obviously does not pertain to the behaviour described in point 4 above. That pertains to special situations when individuals are subject to some form of confinement and cannot make use of their freedom, as might be the case in a hospital, prison, pre-trial lock-up or the armed forces. But, according to the Constitution, also in those circumstances, individuals should have the right to avail themselves of religious freedom. The duty to organise it rests upon the state.
- The right of parents to rear their children and provide them with moral and religious teaching in accordance with their convictions (art. 53, passage 3).

III. The role of rulings by the Constitutional Tribunal

The right of religious instruction quite unexpectedly turned out to be one of the thorniest problems in Polish reality. The dispute was waged, and essentially continues to be waged, round three basic issues: 1. Where religious instruction is to be held; 2. The option of choosing between religion class and some other subject; and 3. The inclusion of religion grades in school reports together with other subjects. All three issues were the subject of rulings by courts, the Constitutional Tribunal and the European Court of Human Rights (point 2).

The right to teach religion arises from art. 53, passage 3. In point 4 of article 53, the Constitution states that 'religion (...) may be a subject of school instruction, but the freedom of conscience and religion of other individuals may not be violated'. That formulation is found in the 1997 Constitution, but the fact that religious instruction was to take place in schools, also public ones, on a voluntary basis was essentially already decided in 1990.

The dispute over religious instruction in schools was set within a broader historical context.

Poland was among those countries where religious instruction in schools had been associated with the existence of a democratic state. Religion had always been eliminated as a school subject in times of terror and radical re-

striction of human rights. There existed therefore the symbolic thinking that one of the elements of restoring democracy following the 1989/1990 breakthrough should be ‘the return of religious instruction to school’. It was significant, however, that in 1990 that decision did not meet with the enthusiastic acceptance of society. On the contrary, there erupted a stormy debate exaggerating the alleged threat connected to the reintroduction of school religious instruction, accompanied by the first wave of public criticism of the Church’s public presence.

The atmosphere surrounding the reintroduction of religious instruction to schools prompted the ombudsman to direct a complaint to the Constitutional Tribunal (K 11/90). Formally, he criticised the measures by which religious instruction had been introduced to public schools, namely two 1990 directives of the Ministry of National Education. He referred to them as legal acts of too low an order to introduce changes countermanding legislated regulations. But the ombudsman did not limit himself to formal issues. By invoking the then binding art. 67 (principle of equality) as well as art. 82 (the principle of freedom of conscience and religion) of the 1952 Constitution, he questioned the very principle of such instruction which the Tribunal emphasised in its ruling. Among other things, the ombudsman questioned the presence of crosses in classrooms. In his final presentation, the ombudsman stated that ‘the introduction of religious instruction to school is contrary to the principle of the state’s religious neutrality and not in accordance with the idea of a democratic state of law in its liberal version’. That statement went beyond purely legal argumentation.⁴

The Tribunal addressed both the formal issue, i.e. the measures whereby religion was introduced to schools, as well as the merits of the case. The Tribunal acknowledged the legality of the directive introducing religious instruction, stating that the voluntary teaching of religion in public schools in accordance with the will of interested parties had been possible on the basis of the 1989 laws on freedom of conscience and religion and the relation of the state to the Catholic Church and not on the basis of the Ministry of National Education’s directives contested by the ombudsman.⁵ Moreover, the Tribunal stated that previously existing legal and actual state, shaped on the basis of the 1961 education law, which had removed religious instruction from schools, had significantly restricted constitutional guarantees of a

⁴ W. Łączkowski, ‘Ethical and worldview dilemmas as the object of constitutional control’ in *Twenty Years of the Constitutional Tribunal’s Rulings*, Constitutional Tribunal Publishers, Warsaw 2006, p. 391.

⁵ Constitutional Tribunal’s ruling of 30th January 1991 (*CT Rulings of 1991*, item 2).

citizen's freedom of conscience and religion. The Constitutional Tribunal stated that that 'whereas voluntary religious instruction as the internal matter of churches is conducted by catechism teachers delegated by church authorities according to programmes established by said churches, and state educational programmes are not permeated with religious content, one cannot claim that the principle of a secular school and the neutrality of the state have been violated. Moreover, said secularism and neutrality not only cannot serve as the basis for introducing the obligation of religious instruction in state schools, nor can it mean banning such instruction if it is demanded by interested citizens. (...) Any other understanding of those concepts would amount not to neutrality but to state interference in the conscience and confession of citizens' (K 13/02).

In 1992, the minister's directives were replaced by an order of the Minister of National Education which, however, did not prevent the ombudsman again submitting the matter to the Tribunal (U 12/28'9). The formal objection was repeated, but this time not only the order was contested but most of the substantive complaints were also repeated. One got the impression that the purely legal objections constituted a pretext for the presentation of substantive objections of an ideological nature. The Tribunal once again did not acknowledge objections alleging that the order had been unconstitutional (ruling of 20th April 1993, CT Rulings, part I, item 9).

Conducting religious instruction in public schools also entailed the obligation of parents who did not want their children to attend catechism classes to submit negative declarations. In that regard, the Constitutional Tribunal found the relevant regulation to be unconstitutional, arguing that it may provide a basis for discrimination within the school community. The European Court of Human Rights received a complaint from parents over the lack of an opportunity to elect a replacement subject such as ethics for their son who did not attend religious instruction.

The right to choose between religion and ethics, mandated by law, had yet to be implemented. The European Court of Human Rights ruled that article 14 (banning discrimination) had been violated in conjunction with article 9 (protecting freedom of thought, conscience and religion of the *Convention on Protection of Human Rights and Basic Freedoms*, stating that there must be a choice between ethics and religion in Polish schools, as its lack constitutes a violation of human rights. Leaving a dash instead of a grade next to religion on a school report constitutes discrimination.⁶ (The ruling

⁶ Ruling of 15th June 2010 r. in the case of *Grzelak v Poland*, complaint No. 7710/02.

is not final). The reason for the acknowledged violation was found to be the poor practices prevailing in the school attended by the contesting pupil rather than the legal measures regulating the teaching of religion and ethics in Polish schools.

In Polish reality, the problem however is the lack of an ethics programme, the lack of a clear conception as to what ethics teaching should be and the fear that ethics might become an 'anti-religion'. There is a lack of qualified ethics teachers. It turned out in many cases that the priests were the best prepared ethicists. Nevertheless, that that situation does not exempt the public authorities from enforcing law and introducing in practice the alternative ethics option.

Religious freedom is also safeguarded by the Constitution's general principles defining the place of churches in the State as well as the mutual relations between the state and churches and other confessional associations.

Art. 25 introduces the following principles: 1. Churches and other religious organisations shall have equal rights; 2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to worldviews and shall ensure their freedom of expression within public life; 3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.⁷

Within the scope of those principles, one of the most controversial elements has been the concept of 'state neutrality'. That discussion is exceptionally vigorous at present. One may observe a tendency to equate the concept of a neutral state with that of an active state, contrary to the very definition of neutrality or impartiality. A neutral state, according to some rather widespread views, is one which has the obligation to negate and eliminate any religious presence from the public sphere. It should be acknowledged that such an interpretation runs counter to the essence of the constitutional norm regulating freedom of religion. The State is neutral in the sense that it cannot organise the religious life of any faith community,

⁷ Art. 25 also contains the following points: 4. The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaties concluded with the Holy See, and by statute 5. The relations between the Republic of Poland and other churches and religious organisations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

but neither can it shirk certain obligations imposed upon it, whose essence is to ensure the implementation of religious freedom.

One example is the constitutional norm stating the admissibility of access to religious assistance wherever an individual happens to be. One may regard that formulation as extremely broad and imprecise, but it is a constitutional norm which must be implemented. No one has got the right to deny access to religious assistance in any place nor with respect to any religion. In institutions belonging to the State, the State is obliged to ensure such assistance and is not exempted from it by the principle of state neutrality.

IV. Evaluation of the status quo and issues pertaining to future threats of religious freedom

Also of great significance to interpreting the scope of religious freedom is the article defining relations between internal law and international law.

In view of the experience with a communist state, which arbitrarily regulated the question of individual liberties and in extreme cases introduced restrictions that actually liquidated the essence of freedom, it was felt that a safeguard against that in the new reality should be a clear definition of the role of an international treaty in relation to national law. The relevant constitutional regulation states that in art. 91.2 'An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes and pass. 3 If an agreement ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws'.

Undoubtedly, Poland's existing legal regulations clearly warrant the conclusion that, within their particular classification of the category of religious freedom, Poland's solutions fall within what is commonly referred to as the *right to religious freedom*. Up till now, such a stand could be noted in the rulings of the Constitutional Court.

Beyond any doubt, there has emerged a clearly visible tendency to revise that formula and endow religious freedom with a form that might be called the right to freedom of religion.

That tendency has so far not been reflected in any legal norms or rulings, but there exists such a clear tendency seeking reinforcement in the rulings of European Tribunals.

The legal shape of religious freedom in Poland creates guarantees of its proper implementation. That applies not only to the majority religion but to minority denominations as well.

The Constitutional Tribunal has spoken out on that subject in its ruling on a motion of the Autocephalous Eastern Orthodox Church (ruling of 2nd April 2003, K 13/02).

A new development not taken into account during the constitutional debate was the role of international human-rights courts. They were justifiably regarded as important guarantors of human rights. There appeared to be an accepted agreement that we are all functioning in an area in which we share the same system of values, based on a foundation of Christianity, Roman law and Greek culture. At least in Central Europe, and perhaps too idealistically, Western Europe was regarded as a repository of traditional Christian values which could not be protected in the Europe under Soviet domination. Hence 'threats' from international institutions in the area of protected values were not foreseen. A tilt in the development of human rights in the direction of unrestricted liberalism initially went largely unnoticed. It entailed an extremely broad ban on discrimination transcending the traditional bounds of what we had regarded as our common values, particularly in the realm of personal liberties and the guarantees stemming from the freedom of religious conviction.

The Polish Constitution contains clear regulations pertaining to moral issues and moral foundations including, for example, its definition of marriage. Regulations such as art. 18 in the section devoted to polity principles defines 'marriage as the union of a woman and man'. Art. 48, passage 1 states that 'parents have the right to rear their children in accordance with their own convictions'. Those issues may not directly fall into the concept of religious freedom, but they fall into what are known as religious convictions. Are they sufficiently protected in light of art. 53 of the Constitution? I am convinced that the Constitution provides a good basis for that. Such was the position of the Supreme Court in its ruling of 6th April 2004⁸ in which it stated that 'protecting freedom of religion means protecting the sphere of a given individual's religious concepts, imagination, convictions and sentiments. Religious sentiments may therefore be defined as a legally protected personal value'. The question thus arises what can be the consequences of the European Human Rights Court's ruling equating the statement that marriage, in the light of non-discrimination, cannot be exclusively a union between woman and man. That issue has yet to be reviewed by any Polish court, but it appears to be a very distinct possibility in future.

⁸ ICK 484/03, OSNC 2005, No. 4, item. 69.

A clear example of that construction could be observed in the case of *Lautsi v. the Italian Government*.

We therefore find ourselves in a very sensitive place, when a particular type of decision may be posed by a (European) court of law going against the provisions of the constitution and being a kind of 'threat' to the values guaranteed by the national constitution. This doubt prevailed in the thinking of the Polish government when in 2007 it decided to ratify an opt-out protocol to the European Charter of Fundamental Rights. It was the idea that in the light of an opt out Protocol the Charter will not extend the powers of any court to strike down Polish legislation and not create any new justifiable rights.

There is, however, considerable debate concerning what effect the protocol will actually have. One view is that the protocol is an opt-out that excludes the application of the Charter to Poland and another is that that protocol is an interpretative protocol which will either have limited or no legal consequence.

But is the principle of an independent judiciary and an independent court not a cornerstone of democracy which should not be undermined?

It seems that the principle of subsidiarity should have an important role to play in this area, but that is only one of the principles courts take into account when interpreting the law. It is the court that decides the hierarchy of principles.

The debate is not yet over.