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WILL POLAND BE THE MOST CONFSSIONAL STATE OF THE EUROPEAN UNION?

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Abstract. *The article offers a concise view on the problems related to the compatibility of the religious clauses in the Polish Constitution with the principles and standards of the European Union and with the constitutional regulations of other individual member states. The author particularly demonstrates to what extent Poland is different or even unable to enter this community and fully participate in the integration of the continent. In the first part of the article, the author studies the content of the Polish basic law provisions on religion, in the second—the corresponding European Union regulations and similar rules in force in the individual nations of the continent. The article concludes that the constitutional provisions on religious matters demonstrate that regulations in the Polish basic statute are not more confessional than those established in other European Union countries.*

Keywords: *constitution, religion, church, religious clauses in the constitution.*

Introduction

One of the most striking features of the Polish Constitution of 2 April 1997¹ are the religious clauses. Its Preamble states that ‘We, the Polish Nation—all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources <...>, beholden to our ancestors for <...> our culture rooted in the Christian heritage of the Nation and in universal human values, <...> recognizing our responsibility before God or our own conscience, hereby establish this Constitution of the Republic of Poland’. Articles 25 and 53—the most extensive in the whole of Poland’s basic statute—specify the details concerning the role of churches and believers in the country. Here we might also mention the subsidiarity principle found in the preamble ‘strengthening the powers of citizens and their communities’, the human dignity ‘a source of freedoms and rights of persons and citizens’ (Art. 30), and the first article of our Magna Carta saying that ‘The Republic of Poland shall be the common good of all its citizens’. These provisions are undoubtedly of Roman Catholic origin, even if now—as always is the case in political thought—many doctrines and ideological currents would claim parenthood and sole right to its original interpretation.

The aim of this article is to examine the compatibility of the religious clauses in the Polish Magna Carta with the principles and standards of the European Union and with the constitutional regulations of other member states. This should demonstrate to what extent Poland is different and whether it can enter this community and fully participate in the integration of the continent. In the first part, I will examine the meaning of the Polish basic law provisions on religion, and in the second—the corresponding European Union regulations and similar rules in force in the individual nations of the continent.

1. What Exactly Does the Preamble to the Polish Constitution Say?

The Preamble to the Polish Basic Law does not contain the classical formula of *Invocatio Dei*. It echoes *grosso modo* the wording of the German Basic Law of 1949² as it refers to the responsibility of all citizens of the Republic before God and their own conscience. Reference to the Supreme Essence is an expression of the opinion that a constituent assembly also has certain limits. Because the Basic Law does not mention a precise God by name, one cannot describe the text as strongly strongly confessional in character.³ This declaration of responsibility before God and conscience should be

1 The Constitution of the Republic of Poland. *Dziennik Ustaw*.1997, No. 78.

2 *Documents on Germany 1944-1985*. United States-Department of State. Washington: Department of State, p. 278–306.

3 Before only two of our seven constitutions have a reference to God. In the Fundamental Law of 1791, the appeal was connected with Christian truths. It began with the words: ‘In the name of God in Holy Trinity’. The invocatio dei from the Constitution of 1921 was more universal. It reads ‘In the name of Almighty God’. This could be recognized by believers of other monotheistic religions, especially Jews and Muslims.

treated rather as a bond of the state with the natural law. This feature implies a ban on state totalitarianism. Examination of the particularly rich German case law on this matter reveals that the legal content of the religious appeal is only tantamount to a pledge to not absolutize popular sovereignty and to renounce atheism as a type of established state church.

In this way, the declaration can be seen as cultural (symbolic) or as a precaution against any uncontrolled and unlimited models of state power. These elements are included in the law as reflection of positive values, especially those directed against the voluntaristic theories of popular sovereignty. The reference to God is not a general, pro-Catholic directive on the interpretation of the Polish basic statute. In particular, the appeal to God does not preclude tolerance of other religions or beliefs or the openness of the Constitution of Poland.

1.1. The Status of Churches

The relationship between public authorities and denominations in the Republic of Poland is based on several principles. The most important of these rules is contained in the Section 25 Paragraph 3 of the Constitution.⁴ It reads that the relationship between the State and religious organizations will be built upon the State's 'respect for their autonomy and the mutual independence of each in its own spheres'. This formula defining the relationship between the political organization of society and religious denominations is a statement affirming the separation of church and state. If the notion of independence does not evoke reservations—particularly since the concept used in the Basic Statute also includes other constitutional bodies like the Judiciary or the regulatory agency on the radio and television broadcasting—the notion of autonomy should be analysed as a right to the unhampered management of affairs without interference of others entities or persons in the respective sphere. Thus, decisions taken in compliance with the internal regulations of particular denominations are excluded from the competence of general courts. State agencies, in their relations with the church, are bound by the so-called connected competence. For instance, a teacher of the Roman Catholic religion or school chaplain cannot appeal to the general court of law regarding decisions taken by ecclesiastical administration on termination of his employment.

Another constitutional principle pertaining to the relationship between the State and religious organizations is the duty 'to cooperate for the individual and common good' (Section 25, Paragraph 3). This negates principle of the State's neutrality with regard to religious denominations. According to Section 25 Paragraph 2 of the Constitution, public authorities in the Republic of Poland have an obligation to be impartial in religious matters. Impartiality—as opposed to neutrality—implies an active disposition or even the possibility of taking a position in matters of contention.⁵ In religious matters, an impartial state may decide on questions related to an individual's understanding of his place in the universe. In other words, the State may take the side of a particular church

4 The Constitution of the Republic of Poland, *supra* note 1.

5 See Sadurski, W. *Bezstronność czy neutralność. Rzeczpospolita*. 1995, 14-15: 5.

if its decision is based on an objective truth, i.e. on a conviction regarding the validity of individual arguments and not on prejudices, phobias or aversions.

The rights and responsibilities of denominations may be reflected in the agreements concluded between them and the Council of Ministers. In Poland, there are currently more than 120 denominations authorized to establish their status by way of agreements. The proposal to limit the number of religions that have ‘treaty-making power’ has been attempted a number of times over the last half century but without any success. Because of this, the list of the non-Catholic churches might be longer. The concluded agreements are the basis for drawing up parliamentary acts concerning individual denominations. From this follows, that every change of any of these acts requires a modification of the respective agreements.

In the case of the Roman Catholic Church—owing to the existence of the Vatican State—the legal basis of the relationship between this religion and the Republic of Poland takes form in a separate international treaty called the concordat. Due to the superiority of international treaties over any parliamentary statutes in the Polish legal system, the concordat can only be supplemented by general binding legislative instruments. Yet, the privileged position of the Roman Catholic Church may be lesser than that of an international organization or international institution to which the Republic of Poland may, by virtue of international agreements, delegate the competence of organs of state authority in relation to certain matters (Sec. 90, Para. 1 of the Constitution).

The concordat and the agreements between the Council of Ministers and other denominations must observe at least five principles. The basis of this relationship is the recognition of the right to self-administration (autonomy) and the independence of denominations from state apparatus. Another tenet of these agreements is the duty to base the relations between denominations on the equality of their rights. Furthermore, every one of these denominations has the right to teach its own religion in the system of public education. This right is not restricted by the number of students belonging to a given denomination.

On the threshold between the examined issues and the freedom of conscience is the guarantee provided for in Sec. 53, Para. 7 of the Constitution. It forbids the institutions of public authority to compel anyone by force to disclose their religious convictions or beliefs. This right to remain silent on matters of belief is not so distinctly formulated in either the International Covenant on Civil and Political Rights of 16 December 1966⁶ nor the (European) Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950⁷.

1.2. The Freedom of Conscience

Freedom of religion, as established in the Sec. 53, Para. 2 of the Constitution includes the freedom to profess or to accept a religion by personal choice and to practice

6 International Covenant on Civil and Political Rights of 16 December 1966 [interactive]. [accessed 12-01-2010]. <<http://www.hrcr.org/docs/Civil&Political/intlcivpol.html>>.

7 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 [interactive]. [accessed 12-01-2010]. <<http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>>.

this religion either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching and in addition to it, the possession of sanctuaries appropriate to the needs of the believers as well as the right of individuals wherever they may be, to benefit from religious services. This formula is somewhat narrower if compared to the mentioned international instruments, and especially if compared to the decisions taken by Vatican II. These documents are concerned with liberty in religious matters. Therefore, they also encompass those who do not profess any religion. The Polish constitutional regulation deals only with the rights of believers in this sphere. The constitutional liberty of conscience is limited to the free choice of religion and to the free performing of rites.

On the other hand, by using the terms ‘everyone’ and ‘no one’, the constitutional text is of universal reach and is much broader with regard to minors. Contrary to the guarantees of Sec. 59, Para. 3 of the Constitution, the rights of the parents to ensure their children a religious upbringing and teaching in accordance with their convictions, the second sentence of the paragraph requires them to observe the degree of maturity in a child as well as his freedom of conscience and belief as well as his convictions. What is more, Sec. 53, Para. 6 of the Constitution forbids anyone, including parents to compel whosoever, including their children to participate or not participate in religious practices. This constitutional formula is further defined in Sec. 85, Para. 3 of the Basic Law. This provision permits a citizen to be exempt from compulsory military service if his religious convictions do not allow him to perform it.

Freedom of conscience must be understood in a positive manner. In this sense, the State must take up affirmative actions, including the financial ones, to ensure the implementation of this freedom. This particularly concerns the private education system. Pursuant to Sec. 70, Para. 3 of the Constitution, parents have the right to enroll their children in schools of their choice, public or private, and citizens have the right to establish such educational institutions. The third sentence of this paragraph provides for the duty of legislative specification of the scope of financing by public authorities of the so-called social schools and private education institutions.

Although freedom of conscience has the character of an unconditional mandatory principle, which does not allow any deviation from it, even during war or following the introduction of extraordinary measures, Sec. 53, Para. 5 of Constitution provides the possibility to restrain the open public expression of a religion under certain conditions. However, such limitations can only be imposed by a parliamentary act. Such restrictions may be necessary for ensuring national security, public order, health, morals or the freedoms and rights of others.

2. Religious Matters and the European Union

Before the Treaty of Amsterdam of 2 October 1997,⁸ the EU had barely concerned itself churches. This organization has taken stance on religious issues only through the European Convention for the Protection of Human Rights and Fundamental Freedoms

8 Amsterdam Treaty of 2nd October 1997. *Official Journal*. C 340, 10 November 1997.

of 1950. Furthermore, the omission of these questions has at times been interpreted as an attempt by the EU to establish something like a new form of ‘religiosity’.⁹

2.1. The Status of Churches

First of all, we should mention that the so-called religious clause in the Treaty of Amsterdam constitutes only a ‘Statement on the status of the churches and confessional organizations’ in its Final Act. Its English short text reads that the ‘European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. European Union equally respects the status of philosophical and non-confessional organizations’. If the formal aspect of this confessional clause was and is subject to the severe criticism, especially from religious circles, its content—though short of meeting their expectations—has generally been welcomed quite warmly. For the first time in the history of this organization, churches have been treated as a distinct entity with specific character and needs.

Significantly, this Statement confirms domestic legal regulations—in force until now—on denominational issues. From this point on, churches as holders of rights may be a party to legal relations before the institutions of the EU. At the same time, every domestic confessional law system has been legitimized by the community legal order. Until the Amsterdam Treaty, churches were treated not as such, but as employers, partners in the economic market, etc. Inside the EU legal order, the law concerning religious organizations had functioned as a confessional law without the ingredient of religion or as a constitutional-ecclesiastical legal order without churches. The case law of the EU was deprived of the conceptual tools needed to decide on denominational matters.

By signing the said Statement, the EU, in a way, abandoned its traditional neutrality, if not to say, a certain disregard of confessional issues. Especially, this means the setting up of a new value system in which spiritual questions are prominently singled out. In particular, this means that the EU is not indifferent to the fundamental common values invariably sustained by Christian communities in the civil societies of our continent. At present, one can only entertain hopes that this first statement of the EU on transcendental problems will be followed up by a more juridical pronouncement on this score.

2.2. The Freedom of Conscience

On this issue, it is important to examine Art. 9 of the European Convention on Human Rights of 3 September 1953, the case law evolved on its basis by the European Court (or the Commission prior to 1999) of Human Rights in Strasbourg, and the jurisprudence of the Court of Justice in Luxemburg.

9 See Juros, H. Kulturowe motywy “klauszuli koscielnej” w Traktacie Amsterdamskim [Cultural reasons of the “confessional clause” in the Amsterdam treaty]. *Studia Europejskie*. 1998, 1: 27. This opinion is, inter alia, of the former rector of the Polish Catholic Theology Academy and now the scientific director of its Studium Generale Europa. The existence of some hints to the confessional law within the EU legal order, one may find only in several decisions of the Court of Justice in Luxemburg, according to which the religious needs should be considered as the interests worthy of safeguarding by community law.

In the case of *Kokkinakis v. Greece*¹⁰ of 25 May 1993, the Strasbourg's Court declared that the freedom of thought, conscience and religion is one of the foundations of democratic society and is also important for the protection of the identity of believers as well as that of atheists, agnostics, skeptics and persons indifferent to any religion. The freedom of religion belongs to the internal life of every person, but also entails the freedom to follow personal convictions. Pursuant to Art. 9, it may also entail public expression of a religion together with others. In the same case, the Court underlined that the freedom in question encompasses, in principle, the freedom to convert, even through teaching. Without this, the freedom to change religion or belief would be moot. The states may introduce criminal responsibility exclusively for using improper methods of such practice. Public authorities may take repressive measures if they consider some forms of behavior contrary to the respect for freedom of thought, conscience and beliefs of others. In such cases, one may claim that religious convictions are infringed upon if an object of worship is presented in a provocative manner.

In the decision of the European Commission of Human Rights in *Iglesia Bautista 'El Salvador' and Ortega Moratilla v. Spain*¹¹ of 11 January 1992, the Court said that legal protection of movable property and real estate provided for the realization of the freedom of conscience must be guaranteed. On the other hand, this same institution recognized the possibility of punishing objectors of conscience for refusing to perform alternative military service (e.g., the report on *Grandrath v. Germany*¹² of 12 December 1968). Finally, in the case of *X. and Y. v. the Netherlands*¹³ of 26 March 1985, the Court decided that the State has the duty to ensure the effective respect for guarantees provided for in Art. 9 of the Convention, even in the relations between private persons.

The European Court of Justice in Luxemburg has also evolved extensive case law on this subject-matter. In its decision on *Prais v. Council*¹⁴ of 1976, the Court recognized that the right to religious freedom constitutes a part of the common constitutional tradition of the member states and consequently—of the community legal order. What is more, in this decision, the Court relied on secondary Union legislation that expressly mentions religious matters: the Statute of Public Officials of the EU provides that civil servants should be chosen without regard to religion.¹⁵ This question is currently very controversial in Poland, namely, that of freedom from work on Christian feast-days as decided in the case of *Torfaen Borough Council*¹⁶ in 1991. The Court held that closing times for retail shops based on member state provisions for the reservation of Sundays and holidays was in conformity with the primary legislation of the EU.

10 *Kokkinakis v. Greece*, application no. 14307/88.

11 *Iglesia Bautista 'El Salvador' and Ortega Moratilla v. Spain*, application no. 17522/90.

12 *Grandrath v. Germany*, application no. 2299/64.

13 *X. and Y. v. the Netherlands*, application no. 8978/80.

14 Case 130/75, *Prais v. Council* [1976] ECR 1589.

15 Another secondary juridical instrument of the EU dealing directly with religious needs is the so-called Television Directive (Dir. 89/552/EEC). In compliance with it, the transmissions of church services or religious programs of less than half-an-hour in scheduled duration cannot be interrupted by advertising spots. In addition, Art. 12c of this Directive says that TV ads cannot injure the religious feelings.

16 Case C-145/88, *Torfaen Borough Council v. B & Q plc.* [1989] ECR 3851.

3. Constitutional Provisions on Religion in the Member States

According to the long-standing jurisprudence of two European judicial instances on this question, the highest standard valid in a member state should be used as a basis for determining the so-called common constitutional tradition. The Union law must in its provisions observe the right to self-determination with the greatest scope existing in any member state and safeguard the freedom of action guaranteed to religious communities in the respective polities. The comparison between the constitutional provisions of the individual European nations and the Polish ones is highly instructive. Many basic laws in the countries concerned have far reaching regulations. Here we will present only the most typical ones.

The ‘most advanced’ constitutional preambles can be found in the present-day Irish and Greek fundamental laws. The two texts mention the Holy Trinity, but the first one goes further by adding that from this union of three persons ‘is all authority and to Whom, as our final end, all actions both of men and States must be referred’. On the other hand, the opening phrase of the lengthy Art. 3 of the Greek Constitution proclaims the Eastern Orthodox Christian Church as the prevailing religion in that country.

Art. 181 of the binding Belgian Constitution¹⁷ says that salaries and pensions of the ministers of faith are to be paid from the state budget. The Basic Law of Denmark¹⁸ goes further in this direction. Its Art.4 lays down that the ‘Evangelical Lutheran Church is the Danish National Church and as such is to be supported by the State in economic, legal and political relations’. Art. 140 of the German Basic Law¹⁹, along with Art. 137 Para. 6 of the Weimar Republic Constitution of 1919²⁰ allows religious communities to levy taxes.

Art. 6 of the Danish Constitution²¹ proclaims that the King (or the Queen) must belong to the Evangelical Lutheran Church. A provision of similar nature is found in the Greek Fundamental Law. Its Art. 33 provides that the President of the Republic must swear a Christian oath, which is an indirect way of forbidding the election of a non-Orthodox head of state.

The German Fundamental Statute contains a number of pertinent rules.²² According to its Art. 7 Para. 3, religious education in public schools, with the exception of non-confessional schools, is to be a standard subject. This means that it is not to be reduced into the

17 The Belgian Constitution [interactive]. [accessed 12-01-2010]. <http://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/grondwetEN.pdf>.

18 The Constitutional Act of Denmark [interactive]. [accessed 15-01-2010]. <<http://www.eu-oplysningen.dk/upload/application/pdf/0172b719/Constitution%20of%20Denmark.pdf>>.

19 Basic Law for the Federal Republic of Germany [interactive]. [accessed 15-01-2010]. <<https://www.btg-bestellservice.de/pdf/80201000.pdf>>.

20 The Constitution of the German Reich (Weimar constitution) of 11 August 1919 [interactive]. [accessed 15-01-2010]. <<http://www.lwl.org/westfaelische-geschichte/que/normal/que843.pdf>>.

21 The Constitutional Act of Denmark, *supra* note 18.

22 Basic Law for the Federal Republic of Germany, *op cit*.

position of a minor or an optional subject. Art. 23 Para. 3 of the Spanish Constitution²³ of 1978—in contrast to the Polish Fundamental Law²⁴—gives an exclusive right to the parents in the religious up-bringing of their children.

The most unusual constitutional example of the role of a religion may be found in the United Kingdom. The 24 bishops of the Anglican Church—without any formal basic law provision—are entitled to sit in the upper house of the British Parliament. To that, we should add the fact that the ecclesiastical law, including the Canon law of the Church of England is automatically incorporated into the generally binding law of that country.

Conclusions

This short overview of the constitutional provisions on religious matters demonstrates that the regulations of this issue in the Polish basic statute are no more confessional than those found in other European Union countries. The fundamental rules in force in the nations of this organization trespass upon the so-called separation of church and state principle more than all the Polish constitutional provisions. Let us mention the position of the Anglican or the Greek churches in the respective national governmental structures. The Danish and Greek constitutional rules on the beliefs of the Head of State violate even the elementary equality principle. The separation of church and state in contemporary Europe is a genuine myth.

An examination of the position of the EU on church-state relations reveals the same process of the demolishing of the dividing wall. The building into the primary body of the Union law of the so-called religious clause is a breakthrough. The churches have been elevated from a type of ordinary economic units to distinct spiritual entities. Another breakthrough is the freedom of conscience as guaranteed by Art. 9 of the European Convention on Human Rights. Both the Court and the Commission have been eager to expand religious liberties. The case law of these organs and of the highest judicial body of the EU in Luxemburg are approaching the new confessional constitutional order found in Poland. At any rate, Poland's present-day basic law arrangement do not constitute an obstacle to our integration into the EU.

23 Spanish Constitution [interactive]. [accessed 15-01-1010]. <http://www.congreso.es/portal/page/portal/Congreso/Congreso/Informacion/Normas/const_espa_texto_ingles_0.pdf>.

24 The Constitution of the Republic of Poland, *supra* note 1.

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AR LENKIJA BUS RELIGINGIAUSIA EUROPOS SAJUNGOS ŠALIS?

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Santrauka. *Trumpa konstitucinių nuostatų dėl religinių klausimų apžvalga rodo, jog šio dalyko reglamentavimas pagrindiniu Lenkijos įstatymu nėra labiau religinis negu kitose Europos Sąjungos šalyse. Šios organizacijos šalyse galiojančios pagrindinės normos pažeidi-*

džia vadinamąjį bažnyčios ir valstybės atskyrimo principą labiau nei Lenkijos konstitucinės nuostatos. Vertėtų paminėti Anglikonų ar Graikų bažnyčių padėtį šių šalių valdžios struktūrose. Danijos bei Graikijos konstitucinės normos dėl valstybės vadovo tikėjimo pažeidžia netgi pirminį lygybės principą. Šiandieninėje Europoje bažnyčios bei valstybės atskyrimas yra tik mitas.

ES pozicijos dėl bažnyčios-valstybės santykių analizė taip pat parodo vykstantį skiriamos sienos griuvimo procesą. Vis dėlto, vadinamojo religinių nuostatų įtraukimas į ES įstatymus yra laimėjimas. Bažnyčia buvo išaukštinta ir iš įprasto ekonominio vieneto tapo dvasine institucija. Kitas laimėjimas yra sąžinės laisvė užtikrinama Europos Žmogaus Teisių Konvencijos 9 straipsnyje. Ir Teismas, ir Komisija siekė išplėsti religines laisves. Šių institucijų bei aukščiausios ES teisinės institucijos Liuksemburge praktika artėja prie Lenkijos religinės konstitucinės tvarkos. Šiaip ar taip, dabartiniai Lenkijos įstatymai nėra kliūtis integracijai į ES.

Reikšminiai žodžiai: konstitucija, religija, bažnyčia, susijusios su religija konstitucinės nuostatos.

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