

Religious freedom in Polish legislation

PAULINA JABŁOŃSKA

Polish law, especially constitutional law, contains a comprehensive catalogue of rights to freedoms, among which the right to religious freedom plays an important role. This right is one of the fundamental human rights, constituting the centre of his rights to freedoms. Religious freedom is a personal right of all human beings, protecting both the social spheres of existence of these individuals and the functioning of churches and religious associations as communities of believers. The state must therefore provide every human being with the protection of his individual religious freedom within the limits set by law and eliminate all forms of intolerance towards any entity. Guarantees of religious freedom are the foundation of a democratic state governed by the rule of law. Its protection is primarily ensured by international agreements adopted to protect humanity from repeating the genocide of the Second World War, which was caused by the lack of due respect for the inherent dignity of human beings and their inalienable rights. One important mechanism for combating behaviours that undermine this freedom is criminal law, which contains provisions defining crimes against religious freedom. Respect for this freedom is also governed by civil law provisions. In the course of considerations presented in this article, I will try to answer the following question: Are the guarantees of religious freedom adequately safeguarded under international and national law? Peace in the world is undoubtedly dependent on the guarantee of religious freedom, because the persecution of human beings on the basis of their religion leads to armed conflicts and the suffering of millions of people.

1. The concept of religious freedom

Freedom of religion - *the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion also includes possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services*¹.

Meanings of religious freedom:

- physical (freedom to pursue a specific activity or to refrain from such an activity),
- moral (freedom to commit good or morally evil acts),
- legal (freedom provided by legal norms)².

In the study of religious law the concept of religious freedom is understood in the following senses:

- positive - *the right of the human being's will, not limited by any coercion, to self-*

¹ Journal of Laws of 1997 no. 78, item 483 - Constitution of the Republic of Poland of 2 April 1997.

² H. MISZTAL, *Wolność religijna*, in *Prawo wyznaniowe*, edited by ID., Lublin 2000, p. 206.

*determination in religious matters, within the framework of religious goals and according to legal and religious norms*³,

- negative – *freedom from any coercion on the part of other individuals, social groups or any authority*⁴.

Taking into account the material subject matter, religious freedom is most often regulated in the following dimensions in various legal systems:

- individual – as a human right,

- communal – as a right of the Church and other religious associations.

In addition, in its doctrine the Catholic Church speaks of the religious freedom of the family, which is the basic unit of society⁵.

2. Religious freedom in the acts of the universal system of human rights protection

As one of the most important human rights religious freedom has been reflected in many international and supranational legal acts⁶.

The Charter of the United Nations, adopted on 26 June 1945 in San Francisco, includes religious freedom among the human rights and fundamental freedoms of all people⁷. One of the most important legal acts is the Universal Declaration of Human Rights adopted on 10 December 1948 in Paris, which states in Article 1 that *all human beings are born free and equal in dignity and rights. Every person has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance*⁸. For the present considerations, the most important provision of the Declaration is Article 18, which grants everyone the right to freedom of thought, conscience and religion, including the freedom to manifest their religion both in private and public life (alone or together with others), as well as to change their religion or beliefs. This article also defines the forms of manifesting one's religious belief or faith, such as teaching, practising religious worship, and observing customs prescribed by one's faith or religion. On the other hand, Article 16 grants both men and women (after reaching the age of majority) the right to marry freely and to create a family regardless of race, nationality or religion⁹.

The International Covenant on Civil and Political Rights of 16 December 1966, adopted in New York, and ratified by Poland on 3 March 1977, contains a similar provision on religious freedom¹⁰. This covenant regulates freedom of conscience and religion in Article

³ P. DE LUCA, *Il diritto di libertà religiosa nel pensiero costituzionalistico ed ecclesiastico contemporaneo*, Padova, Cedam, 1969, p. 36.

⁴ H. MISZTAL, *Wolność...*, cit., p. 206.

⁵ ID., *Wolność religijna i jej gwarancje prawne*, in *Prawo wyznaniowe III Rzeczypospolitej*, edited by ID., Lublin-Sandomierz 1999, p. 17.

⁶ E. MILCZAREK, *Symbole i stroje religijne w przestrzeni publicznej – uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka*, in «Kościół i Prawo», 11, 24, 1, 2022, p. 67.

⁷ Journal of Laws of 1947, No. 23, item 90, and of 1966 no. 7, item 41.

⁸ Universal Declaration of Human Rights adopted on 10 December 1948, <http://libr.sejm.gov.pl/tek01/txt/onz/1948.html> [22.09.2022].

⁹ M. ZUBIK, *60 Years of The Universal Declaration of Human Rights: Anniversary book*, vol. II: *Collection of International Documents on Human Right*, Warszawa, 2008, pp. 15-20.

¹⁰ International Covenant on Civil and Political Rights, Journal of Laws of 1977, No. 38, item

18 by extending the provisions of the Universal Declaration of Human Rights to include the right to have, change, and freely manifest religion or belief through teaching, worship, observance, and practice. In Article 18 (2), the Covenant extends the provisions of the Declaration by prohibiting coercion against anyone which would impair his freedom to have or to adopt a religion or belief of his choice. Additionally, in Article 18 (4) the Covenant protects the liberty of parents (legal guardians) to ensure the religious and moral education of their children in conformity with their own convictions. The provisions of the declaration are further extended in Article 18 (3) which regulates the possibility of introducing limitations on the manifestation of religion or beliefs. In addition, the covenant contains other provisions concerning religious freedom, such as Article 27, which imposes on the States Parties to the Covenant, inter alia, the obligation to ensure that religious minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language. The covenant also supplements these provisions with general provisions concerning equality (Article 26) and the prohibition of discrimination, i.a. on the grounds of religion (Articles 2 and 24 – with regard to children). One provision emphasising the importance of freedom of conscience and religion is Article 4 of the Covenant, which provides that States Parties may derogate from their obligations under the Covenant in the event of an officially proclaimed public emergency which threatens the life of the nation, provided that this is not inconsistent with their other obligations under international law and does not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin¹¹.

Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (ratified by Poland on 3 March 1977) provides for a general prohibition of discrimination on grounds of religion, and Article 13, devoted to the right to education, provides for the promotion of understanding, tolerance and friendship between all nations and all racial, ethnic or religious groups. Furthermore, Article 13(3) of the Covenant affirms the right of parents or legal guardians to choose a school other than those established by public authorities and to ensure religious and moral education consistent with the convictions of those parents and guardians. However, the implementation of this provision was made conditional on the material capacity of the country concerned (Article 13(2)). According to interpretations of this provision, the state cannot prohibit the creation of private schools with the study of religion and should ensure the possibility of receiving religious instruction in schools that are founded by public authorities¹².

In addition to the above-mentioned legal acts, there are also a number of other conventions with a narrower subjective scope, regulating issues related to religious freedom. This includes the Convention on the Rights of the Child of 20 November 1989 (ratified by Poland in 1991)¹³. In addition to the generally expressed prohibition of discrimination (including on the basis of religion) contained in the preamble as well as Article 2, the convention contains provisions directly addressing the religious freedom of children. The most important from the point of view of the present considerations is Article 14 of the Convention, which states that States Parties shall respect the religious freedom of children and secures the right of parents (legal guardians) to *direct the child*

167.

¹¹ M. ZUBIK, *60 Years...*, cit., pp. 21-39.

¹² J. KRUKOWSKI, *Ochrona wolności religijnej w umowach międzynarodowych*, in «RNPr», 3, 1993, p. 51.

¹³ Convention on the Rights of the Child, Journal of Laws of 1991, No. 120, item 526.

*in the exercise of their right in a manner consistent with the child's evolving abilities*¹⁴. This article also regulates the possibility of imposing restrictions on religious freedom, which may be subject only to such limitations as are prescribed by law and only for the protection of values such as public safety, order, health or morals, or the fundamental rights and freedoms of others¹⁵. Meanwhile, Article 30 states as follows:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Another international convention, which also guaranteed religious freedom, is the Convention Relating to the Status of Refugees, done at Geneva on 28 July 1951¹⁶. Article 4 of the Convention provides that *'the Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.'* The right to religious freedom is also guaranteed in Article 5(d)(VII) of the International Convention on the Elimination of All forms of Racial discrimination of 7 March 1966. This article imposes on States Parties to the Convention the obligation to guarantee equality before the law and, above all, the unrestricted exercise of a number of rights, including the right to religious freedom¹⁷. Issues related to religious freedom can also be found in the Geneva Conventions, which together form the core of the so-called humanitarian law. In the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), adopted in Geneva on 12 August 1949,¹⁸ Chapter V deals with religion as well as intellectual and physical activities. Article 34 of the Convention in question guarantees prisoners of war full freedom to practise their religion, including participation in religious services in accordance with the set out disciplinary routines. Furthermore, this article requires that prisoners of war be provided with suitable premises designated for such services. Under the provisions of the Convention, the protection of religious freedom is also accorded to chaplains who fall into the hands of an enemy power. They will be able to exercise their religious functions among co-religionists in accordance with Article 35 of the Convention. In addition, they will be provided with such allocation within prisoner of war camps and labour detachments that they can stay together with prisoners who belong to the same armed forces, speak the same language or follow the same religion. An important provision of this article is the possibility of correspondence between chaplains and the ecclesiastical authorities of the country of detention as well as international religious organisations. Article 36 extends the rights of chaplains to other clergy of religious denominations who are not officiated as chaplains in their own forces. According to Article 37, lay persons appointed to exercise pastoral functions must comply with all the orders of the authorities of the detaining power. Contents similar to the above-described provisions of the Third Geneva Convention are found in Article 93 of the Geneva Convention relative to the

¹⁴ Ivi, Article 14 (2).

¹⁵ M. ZUBIK, *60 Years...*, cit., pp. 721-739.

¹⁶ Journal of Laws of 1991, No. 119, item 515.

¹⁷ M. ZUBIK, *60 Years...*, cit., p. 243.

¹⁸ Journal of Laws of 1956, No. 38, item 175, annex.

Protection of Civilian Persons in Time of War (i.e. the Fourth Geneva Convention, adopted in Geneva on 12 August 1949), dealing with internees¹⁹. Article 58 (Part III, Section III), relating to the situation of clergy, provides that the occupying power will allow them to provide spiritual assistance to the members of their religious communities. An important provision is the obligation of States Parties to care for children under the age of 15 who are orphaned or separated from their families. These children should be provided with the maintenance, education and exercise of religious practices, as set out in Article 24 of the Convention (Part II). Article 27 (Title III, Section I) guarantees that, inter alia, the religious convictions and practices of persons covered by the Convention shall be respected. Provisions on the special protection of religious personnel (Article 15) as well as places of worship (Article 53) are also included in the so-called Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977)²⁰. Since they do not directly concern the issue of religious freedom, they will not be discussed in more detail.

The implementation of the provisions on religious freedom in Poland is guaranteed, among others, by the Concordat, which is a specific type of an international agreement. The nature of this agreement, signed on 28 July 1993 and ratified on 25 March 1998, is special, as such an agreement may only be concluded with the Holy See²¹.

An analysis of the content of the concordat preamble allows us to learn about the intentions and views of the parties leading to the conclusion of the given act. One of the important motives was the desire to safeguard religious freedom and to remove the threat of religious intolerance²².

According to Article 5 of the Concordat, *the Republic of Poland guarantees the Catholic Church the freedom to conduct religious services*²³, in compliance with canon law and the relevant provisions of Polish law. Article 11 states that the Parties *declare their will to cooperate for the protection and respect the institution of marriage and the family*, and emphasise the dignity and indissolubility of marriage and the value of the family.

An important issue regulated by the Concordat is the issue of teaching religion. Article 12 (1) states the following:

Recognising parental rights with regard to the religious education of their children, as well as the principles of tolerance, the State shall guarantee that public elementary and secondary schools, and also preschools, managed by state and local government administration bodies, shall arrange, in conformity with the will of interested parties, the teaching of religion within the framework of an appropriate school or preschool curriculum.

The issue raised by the above article is extremely important, considering the fact that the document has the rank of an international agreement and through its rank guarantees the presence of religious instruction from kindergarten to secondary schools²⁴. In this regard,

¹⁹ Journal of Laws of 1956, No. 38, item 171, annex.

²⁰ Journal of Laws of 1992, No. 41, item 175, annex.

²¹ Journal of Laws of 1998, No. 51, item 318.

²² P. JABŁOŃSKA, *Wolność sumienia i wyznania osoby małoletniej w Polsce w latach 1918-2015 [Freedom of conscience and confession of minors in Poland from 1918 to 2015]*, Bernardinum, Pelplin, 2022, p. 342.

²³ Article 8 (1) and (2) of the Concordat.

²⁴ P. MAKOSA, *Nauczanie religii w szkole publicznej w świetle prawa międzynarodowego i*

the state recognises the right of parents to religious upbringing of children as well as the principle of tolerance²⁵. Article 13 guarantees the possibility of religious practice and, in particular, participating in Holy Mass on Sundays and other holy days for Catholic children and young people who take part in summer holiday camps, young people's camps and other forms of collective vacationing. The Concordat also provides pastoral care to soldiers of the Catholic faith, people staying in penitentiary, rehabilitation, educational institutions, health care and social care institutions, as well as members of national minorities²⁶. Article 19 also recognises the right of the faithful to associate in accordance with canon law and for the purposes set out in that law. In Article 21 (1), the Concordat guarantees the Church the right to build, expand and maintain sacral and ecclesiastical buildings as well as cemeteries, in accordance with the provisions of Polish law.

3. Religious freedom in legal acts of the Council of Europe and the European Union

The foundational legal act for the regional system of protection of human rights established within the Council of Europe is the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950, which was ratified by Poland on 15 December 1992. Article 9(1) of the convention reads as follows: *1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.* Article 9(2) of the Convention states that the freedom to manifest one's religion or belief may only be subject to such restrictions *as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.* Article 14 of the Convention prohibits discrimination on all grounds, including religious grounds.

It is worth noting that the said Convention was supplemented by Protocol No. 1, adopted in Paris on 20 March 1952. In Article 2 (the provision concerns the right to education) the Protocol extends the provisions of Article 9 of the Convention, granting parents the right to educate and teach children, according to their own religious and philosophical beliefs.

The provisions of the European Convention on the Adoption of Children, drawn up in Strasbourg on 24 April 1967²⁷, and above all Article 9(2)(g) thereof, also seem to be important from the point of view of religious freedom. This article obliges state authorities to conduct an enquiry, among others, concerning the religious beliefs (or lack thereof) of the child and their future adoptive parents (legal guardians). The enquiry in question determines the decision on adoption.

Provisions related to religious freedom can be found in another international act, i.e. the European Convention on Extradition, done at Paris on 13 December 1957²⁸. In its contents we can find a provision concerning refusal to grant consent to extradition in the case of an offence considered to be political or an offence connected with such an offence

polskiego, in Rada Naukowa Konferencji Episkopatu Polski. Kościół w życiu publicznym, Teologia polska i europejska wobec nowych wyznań, vol. 3, Lublin, 2005, pp. 451-467.

²⁵ *Ibidem.*

²⁶ Articles 16-18 of the Concordat.

²⁷ Journal of Laws of 1999, No. 99, item 1157.

²⁸ Journal of Laws of 1944, No. 70, item 307.

(Article 3(1)) and also when the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of their race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons (Article 3(2))²⁹.

One other branch of legislation that is relevant to these considerations is the law established within the framework of the European Communities and, subsequently, the European Union, established by the Treaty on European Union of 7 February 1992. Provisions relating to human rights or the status of individuals were not initially included in the law of the original Communities. Changes in this regard only took place in 1977, when the most important bodies of the Communities (the European Parliament, the European Council and the Commission of the European Communities/European Commission) noticed the importance of fundamental rights, a catalogue of which is contained in the constitutions of individual Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Another important act was the Treaty of Amsterdam of 2 October 1997, along with an accompanying document known as Declaration No. 11 – the so-called clause on churches, adopted on 18 June 1999 by the European Council during the conference in Amsterdam. This clause confirms the institutional nature of churches and religious communities and constitutes a declaration of respect for their status in the individual Member States³⁰. This clause states as follows:

1. The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. 2 The European Union equally respects the status of philosophical and non-confessional organisations³¹.

One international act that is extremely important for these considerations is the Charter of Fundamental Rights of the European Union of 7 December 2000³². Article 10 of the Charter contains the following guarantees: Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. The Charter also recognises the right to conscientious objection in accordance with the national laws governing the exercise of that right³³. In accordance with national laws in this area, the Charter also guarantees parents the right to teach and educate their children in accordance with their own convictions (Article 14), and in Article 22 it guarantees respect for cultural,

²⁹ I. RESZTAK, *Konwencje Rady Europy o przeciwdziałaniu zjawisku terroryzmu*, in «Prokuratura i Prawo», 10, 2012, in <https://pk.gov.pl/wp-content/uploads/2013/2012/8d9a1d8e9f26dfe1e0db7de18325a186.doc> [23.09.2022].

³⁰ K. WARCHAŁOWSKI, *Ochrona prawa do wolności religijnej w prawie traktatowym Unii Europejskiej*, in «Studia z Prawa Wyznaniowego», 7, 2004, pp. 10-11.

³¹ J. KRUKOWSKI, *Stosunek Unii Europejskiej do religii i kościołów*, in «Biuletyn Stowarzyszenia Kanonistów Polskich», 17, 20, 2007, pp. 49-70.

³² O. NAWROT, *Karta Praw podstawowych UE*, in M. BALCERZAK, S. SYKUNA, edited by, *Leksykon ochrony praw człowieka. 100 podstawowych pojęć*, Wydawnictwo C.H. Beck, Warszawa, 2010, p. 184.

³³ *Ibidem*.

religious and linguistic diversity on the part of the European Union.

4. Jurisprudence of the European Court of Human Rights and its influence on legal regulations concerning religious freedom in Poland

The European Court of Human Rights (ECtHR) issued its first ruling on religious freedom in 1993. Previously cases related to this freedom were considered by the European Commission of Human Rights. In 2000 the ECtHR issued more than fifteen judgements³⁴. The judgements that were issued became the basis for the interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950³⁵, which was also referred to by the Polish Constitutional Tribunal.

The case-law of the ECtHR provides an image of religious freedom, which can be divided into the following elements: the subjective and objective scope of the freedom in question, the possibility of its limitation, as well as the role of the state and its permissible impact on the protection and guarantee of freedom established in Article 9 of the Convention. In the subjective scope, religious freedom concerns both believers and atheists, agnostics, sceptics, as well as religiously indifferent people³⁶. It follows from the above that in this case protection is awarded to every person and their internal attitude to the issues of religion, confession or lack thereof, as well as matters of conscience. Protection is also extended to religious communities, which enjoy the same rights under Article 9 of the Convention as their individual members³⁷. With regard to the objective scope, religious freedom consists in the ability to freely choose a religion or faith and to freely engage in religious practice, teaching, and worship, either privately and together with others. The discussed freedom can also be understood in a negative aspect, which consists in the ability not to profess any faith, not to participate in religious practices, as well as to remain silent on this matter, which leads to not disclosing one's religion or beliefs³⁸. In addition, the content of the discussed article gives rise to the right to try to persuade other people to accept one's faith³⁹. The European Court of Human Rights has also emphasised in its case-law that not all acts whose motive or inspiration is based on considerations concerning religion or beliefs are protected under Article 9 of the Convention⁴⁰.

Regarding the possibility of limiting the right to religious freedom, the ECtHR

³⁴ E. PALM, *Case – law of the European Court of Human Rights on the Freedom of religion guaranteed by the European Convention on Human Right*, in *Constitutional jurisprudence in the area of freedom of religion and beliefs, XIth Conference of the European Constitutional Courts*, vol. II, Warszawa 2000, p. 869.

³⁵ Journal of Laws of 1993, No. 61, item 284.

³⁶ Judgement in the case of *Kokkinakis v. Greece* of 25 May 1993, application no. 14307/88, § 31.

³⁷ M. A. NOWICKI, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, 5th edition, Warszawa, Wolters Kluwer, 2010, p. 568.

³⁸ Judgement in the case of *Sinan Isik v. Turkey* of 2 February 2010, application no. 21924/05, § 38 and 41.

³⁹ Judgement in the case of *Ivanov v. Bulgaria* of 12 April 2007, application no. 52435/99, § 78, cfr. P. JABŁOŃSKA, *Wolność sumienia i wyznania osoby małoletniej...*, cit., p. 338.

⁴⁰ Judgement in the case of *Jewish Liturgical Association Cha'are Shalom ve Tsedek v. France* of 27 June 2000, application No. 27417/95, § 73.

emphasised that religious communities cannot exercise control over the internal sphere of an individual's beliefs, but only the ways of externalising them⁴¹. The ECtHR also pointed out that, in accordance with Article 9(2) of the Convention, the conditions for the imposition of restrictions⁴², which, according to the Court, are sometimes necessary in a democratic state in order to respect the beliefs of other persons, as well as the interests of various social groups, are strictly defined in its provisions⁴³. In some of the judgements concerning Article 9 of the Convention, the Court also drew attention to the role of the State in the implementation of the religious freedom guaranteed by that provision. The state should primarily ensure neutrality and impartiality in the relationship between itself and individual religions. It follows from the above that it should refrain from imposing any specific religious beliefs⁴⁴. Moreover, it should promote public order and tolerance in a democratic society⁴⁵.

Changes in law in Poland were to the greatest extent affected by complaints concerning Article 9 of the Convention, which were submitted against Poland and examined by the ECtHR. The first such case heard by the Court was the case of *Grzelak v. Poland*⁴⁶. In the case cited, the applicants were Urszula and Czesław Grzelak and their son Mateusz, who was not able to attend alternative ethics classes, although he had resigned from attending religion classes at school. Additionally, on their son's school certificates, in the box provided for entering the grade in religion or ethics, there was only a crossed out line, which in their opinion also constituted a violation of Article 9 of the Convention, and which was also raised in the application. The applicants pointed out that Mateusz Grzelak was discriminated against and physically and mentally harassed by other students in connection with this situation at school.

The ECtHR declared the complaint admissible in respect of the above charge only with respect to the applicant Mateusz Grzelak. The Court also found that there was a violation of Article 9 of the Convention (religious freedom) and Article 14 of the Convention (prohibition of discrimination in the exercise of rights guaranteed by the Convention). According to the Court, the inability to attend classes as well as the lack of an ethics or religion grade on the school certificate is harmful, stigmatising and also puts the child in a less favourable situation compared to other students who have a grade from religion included in the grade average. The ECtHR also emphasised that interference with freedom of religion may also occur when public authorities create a situation in which persons are obliged to disclose their religious views. In addition, it stated that the freedom to manifest religious beliefs also includes the right not to disclose them and the right not to take a position that allows such beliefs to be presumed. It is worth noting that apart from the information published on 22 June 2012 on the website of the Ministry of National Education, no changes were made in the generally applicable law in Poland regarding the issues raised in the above-described judgement. The Ministry of National Education explained that the religion/ethics grade, without any indication which of these subjects it

⁴¹ Judgement in the case of *Ivanov v. Bulgaria...*, § 79.

⁴² Judgement in the case of the *Metropolitan Church of Bessarabia and Others v. Moldova* of 13 December 2001, complaint no. 45701/99.

⁴³ *Ivi* § 115.

⁴⁴ Judgement in the case of *Lautsi and Others v. Italy* of 18 March 2011, application no. 30814/06, § 31, cfr. P. JABŁOŃSKA, *Wolność sumienia i wyznania osoby małoletniej...*, cit., p. 365.

⁴⁵ Judgement in the case of *Leyla Sahin v. Turkey* of 10 November 2005, application no. 44774/98, § 107.

⁴⁶ Judgement in the case of *Grzelak v. Poland* of 15 June 2010, application no. 7710/02.

concerns, as well without deleting one of these subjects in a situation where a student did not attend such classes, should be placed on school certificates under the grade for student conduct. However, certificates issued in grades 1-3 should not include descriptive grading for both subjects⁴⁷.

Another case that concerned the violation of religious freedom was the case of *Jakóbski v. Poland*⁴⁸. The complainant alleged that Poland had violated Article 9 of the Convention, guaranteeing religious freedom, by failing to provide meatless meals to a Buddhist serving a prison sentence, which constituted a violation of the principles of the religion professed by the prisoner, also depriving him of the right to manifest his religion and beliefs. When presenting its position in the discussed case to the Court, the Polish Government stated that vegetarianism is not an essential element of the religion to which the imprisoned person adheres, and, moreover, that it would be too expensive and too complicated to provide each convicted person with a diet consistent with their religious beliefs. Referring to the above complaint, the ECtHR pointed out that compliance with dietary rules may be considered as a direct way of expressing one's religion in practice within the meaning of Article 9, and, as follows from the prisoner's religious beliefs, he should eat meat-free meals⁴⁹. Moreover, the Court pointed out that the meals requested by the applicant did not have to be prepared in any particular way or subjected to a special process, so that it would not interfere with the management of the prison or the diet of other prisoners. For the reasons described above, the Court found a violation of Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁰.

The obligation for the case-law of the ECtHR to be taken into account by state authorities, including the Constitutional Tribunal, is necessary in order to guarantee the *consistency of the protection of the rights and freedoms of the individual provided by both courts. The obligation of such consistency arises both from the norms of the Convention and from Article 9 of the Constitution of the Republic of Poland*⁵¹.

5. Constitutional regulation of religious freedom

On the grounds of the current Constitution of the Republic of Poland of 2 April 1997,⁵² the legislator included the most important guarantee of religious freedom in Article 25(2). This article reads as follows:

Public authorities in the Republic of Poland shall be impartial in matters of personal

⁴⁷<https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/warunki-i-sposob-organizowania-nauki-religii-w-publicznych-16794677> [24.09.2022]

⁴⁸ Judgement in the case of *Jakóbski v. Poland* of 7 December 2010, application no. 18429/06, cf. P. Jabłońska, *Wolność sumienia i wyznania osoby małoletniej...*, cit., p. 338.

⁴⁹ *Ivi*, § 45.

⁵⁰ <https://trybunal.gov.pl/polskieakcenty-w-orzecznictwie-miedzynarodowym/rada-europy-europejski-trybunal-praw-czlowieka/w-sprawach-polskich/art8266-sprawa-jakobski-przeciwko-polsce-skarga-nr18429-06-wyrok-z-7-grudnia-2010-r/> [24.09.2022]

⁵¹ A. PAPROCKA, *Wpływ orzecznictwa ETPCz na rozumienie konstytucyjnych praw i wolności w Polsce – kilka uwag na marginesie orzecznictwa Trybunału Konstytucyjnego*, in M. ZUBIK, edited by, *XV lat obowiązywania Konstytucji z 1997 r. księga jubileuszowa dedykowana Zdzisławowi Jaroszowi*, Warszawa, 2012, p. 88.

⁵² Journal of Laws of 1997, No. 78, item 483.

conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life⁵³.

Pursuant to Article 25(1), *Churches and other religious organisations shall have equal rights*, which means that no church or religious association has a privileged position in the state⁵⁴. According to Article 25(3),

the relationship between the State and churches and other religious organisations 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.

In accordance with Article 25(4) and (5), relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute, while 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.

The content of Article 53 is of fundamental importance for determining the scope of rights and freedoms in religious matters under the current constitution. In accordance with its provision (paragraph 1), freedom of conscience and religion shall be guaranteed to every individual. The above provision is further detailed in the subsequent provisions of this article. Namely, paragraph 2 reads as follows:

Freedom of religion includes the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion also includes possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.

According to Article 53 (3) and Article 48(1), parents have the right to provide their children with moral and religious education and instruction in accordance with their convictions. Furthermore, in accordance with Article 70(3), «parents are free to choose non-public schools for their children». Meanwhile, Article 53(4) states that «the religion of the Church or of another religious association with a regulated legal situation may be the subject of education at school, without prejudice to the freedom of conscience and religion of other persons». The regulation contained in Article 53(5) is a limitation clause and according to its wording, the freedom to manifest religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others. Religious freedom is also protected by the provisions of Article 53(6) and (7), which contain a rule protecting against coercion to participate or not to participate in the exercise of worship and a standard guaranteeing a “right to remain silent” in matters of confession or beliefs. Freedom of religion in the negative aspect consists in freedom from coercion in

⁵³ Ivi, Article 25(2).

⁵⁴ L. GARLICKI, *Polskie prawo konstytucyjne*, Warszawa, Liber, 2015, p. 67.

manifesting or not manifesting one's religious beliefs. This freedom includes a prohibition against forcing anyone (and by anyone) to participate or not to participate in religious practices⁵⁵. An important guarantee is also a constitutionally introduced prohibition on a requirement for citizens to disclose their worldview, religious beliefs or confession (paragraph 7).

It is worth adding that a certain group of freedoms and rights, e.g. religious freedom, cannot be restricted even in times of martial law and states of emergency, as specified in Article 233(1) of the Constitution of the Republic of Poland.

As indicated in Article 208(1), the observance of religious freedom as a right assigned to every person is also protected by the Commissioner for Citizens' Rights, who «protects the freedom of human rights and citizens' rights as defined in the Constitution and other normative acts».

6. Ordinary legislation on religious freedom

In Article 1(1) the Act of 17 May 1989 on guarantees of Freedom of Conscience and Confession⁵⁶ provides every citizen with religious freedom. This provision is applied to foreigners and stateless persons (Article 7) on an equal footing with Polish citizens. According to Article 2(11), citizens may associate in secular organisations in order to carry out tasks resulting from the professed religion or belief in matters of religion.

The principle of religious freedom provided the foundation for the prohibition of discriminating or privileging anyone on the grounds of religion or beliefs in matters of religion. For this reason, in Article 6, the Act established a prohibition on forcing citizens to take part in religious activities or rituals and on preventing such participation.

Article 3(1) of the Act provides that the manifestation (individually or collectively) of one's religion or belief may only be subject to statutory restrictions. Furthermore, there is a principle that statutory restrictions should apply equally to all people and religious organisations. The exercise of religious freedom must not lead to evasion of public obligations imposed by law (Article 3(2)). However, the Act allows for one exception to this principle (Article 3 (3)):

due to religious beliefs or moral principles, citizens may apply for assignment to substitute service on the terms and in the manner specified in the Act of 11 March 2022 on the Defence of the Homeland.

The exercise of this right requires the submission of an appropriate statement regarding religious beliefs or professed moral principles.

The Act on guarantees of Freedom of Conscience and Confession also specifies the category of persons to whom freedom of confession (i.e. right to manifest their religion or beliefs) only applies to a limited extent. Article 4 of the Act grants this right to the following persons:

1) those performing military service or basic service in civil defence; 2) those staying in health care and social care institutions as well as children and young people

⁵⁵ J. KRUKOWSKI, *Polskie prawo wyznaniowe*, Warszawa, Wydawnictwo Lexis Nexis, 2006 p. 77.

⁵⁶ Journal of Laws of 2022, item 1435 - Law on guarantees of Freedom of Conscience and Confession of 17 May 1989.

staying at summer camps organised by state institutions; 3) those staying in penal, correctional and educational institutions, district educational centres, youth educational centres, detention centres and shelters for minors.

Persons falling into these categories may, in accordance with the principles of their confession, participate in religious activities and rites and fulfil religious duties and celebrate religious holidays. They also have the right to possess and use items necessary for worship and religious practice.

7. Legal protection of religious freedom

The first means of legal protection of religious freedom in the domestic legal order is a constitutional complaint. It has been guaranteed in the Constitution of the Republic of Poland and may be brought by churches and other religious associations as well as by a natural person. This complaint supports the protection of the rights of churches and other religious associations in terms of examination of the conformity of laws with the Constitution and with ratified international agreements. Every person whose constitutional right to religious freedom has been violated has the right to lodge a complaint with the Constitutional Tribunal. The complaint concerns the examination of conformity with the Constitution of the Republic of Poland, and whether a given law or other legal act that concerns religious freedom has been violated⁵⁷. The observance of religious freedom is also protected by the Commissioner for Citizens' Rights, who «protects the freedom of human rights and citizens' rights as defined in the Constitution and other normative acts»⁵⁸.

In Poland religious freedom is protected in criminal law as well as in civil law. The protection of religious freedom *de lege lata* (i.e. in the law as it exists) was included in the 1997 Criminal Code⁵⁹. In Article 194 of the Criminal Code, the legislator introduced the crime of religious discrimination, according to which

anyone who restricts a person in their rights on the grounds of their religious affiliation or non-religious affiliation shall be subject to a fine, restriction of personal liberty, or imprisonment up to 2 years.

Another criminal act related to the protection of religious freedom is described in Article 195 of the Criminal Code. In it, the legislator established punishment for malicious interference with the public performance of a religious act of the Church or other religious association with a regulated legal status. Malicious interference is so-called *dolus directus coloratus*, namely, a special case of direct intent. Thus, it should be proved that the perpetrator not only wanted to commit a crime and was aware of committing a punishable act, but also that their actions were dictated by base motives, i.e. malice.

The protection of religious feelings is provided for, *expressis verbis*, in Article 196 of the Criminal Code, according to which

anyone who insults the religious feelings of others by publicly insulting an object of

⁵⁷ E. Strzembosz, *Sądy a skarga konstytucyjna*, in «Państwo i Prawo», 3, 1997, pp. 3-7.

⁵⁸ Journal of Laws of 1997, No. 78, item 483, Article 208 (1).

⁵⁹ Journal of Laws of 1997, No. 88, item 553.

religious veneration or worship or a place intended for the public performance of religious rites is subject to a fine, restriction of liberty or imprisonment for up to 2 years.

At this point, it would be advisable to refer to statistics, as the prosecutor's office receives more and more reports concerning the offence of insulting religious feelings. In 2017 and 2018, respectively, 99 and 95 such cases were reported. There were 134 notifications of a crime under Article 196 of the Criminal Code in 2019; meanwhile 156 such notifications were received in 2020. In 2019, 75 proceedings were discontinued and 20 indictments were filed in cases relating to acts falling under Article 196 of the Criminal Code, and in 2020 as many as 118 proceedings were discontinued and 30 indictments were filed in such cases⁶⁰. It should be noted that all of the offences discussed are punishable only if committed intentionally⁶¹.

Religious freedom is also protected by Article 257 of the Criminal Code:

anyone who publicly defames a group of people or an individual due to their national, ethnic, racial or religious affiliation or because of their irreligiousness, or violates the physical integrity of another person for such reasons is subject to imprisonment for up to 3 years.

It is worth mentioning that the number of offences under Article 257 reached 504 in 2019 and 356 in 2020. In contrast, the number of proceedings initiated in relation to public insult or violation of physical integrity due to national affiliation (Article 257) was 308 in 2019, and 312 in 2020⁶².

In Article 10(1) of the Code of Criminal Procedure the legislator allowed everyone (i.e. natural persons, legal persons) to submit reports on the commission of a crime, including crimes against the freedom of conscience and religion. Moreover, in the event it is determined a crime prosecuted *ex officio* has been committed, the legislator ordered the public prosecutor to bring such cases to court and support their prosecution⁶³.

In the legislator's opinion, religious freedom is a personal right of every person, which is why it is also protected under the provisions of the Civil Code. If this right is threatened by someone else's action, one can demand that the other side refrains from their behaviour. In the event of an infringement, it is possible for the court to oblige the infringer to remove the effects of their behaviour, in particular by submitting a declaration of will with appropriate content and in an appropriate form, as well as to compensate the claimant or to pay an appropriate sum of money for a social purpose indicated by the aggrieved party⁶⁴.

Articles 23 and 24 of the Civil Code are of fundamental importance for the protection of religious feelings. Article 23 contains an exemplary enumeration of personal rights, the catalogue of which is further extended by other laws, jurisprudence and doctrine. It is

⁶⁰ <https://www.prawo.pl/praw/zaostrenie-odpowiedzialnosci-za-obraze-uczuc-religijnych-196-kk,514616.html> [26.09.2022]

⁶¹ <https://www.prawodlakazdego.pl/content/ochrona-wolnosci-sumienia-i-wyznaia-w-polsce> [27.09.2022]

⁶² <https://statystyka.policja.pl/download/20/361915/Publicznezniewazeniellubnaruszenienietykalnoscizpowodownarodowosciowych-art257.xlsx> [26.09.2022]

⁶³ Code of Criminal Procedure - Article 10 §1 (Journal of Laws No. 89, item 555, as amended).

⁶⁴ Act of 23 April 1964 - Civil Code (Journal of Laws No. 16, item 93, as amended).

clear from the content of Article 23 that there are a number of personal rights, protected by subjective rights, which are intangible in nature, effective *erga omnes* (i.e. towards everyone), inalienable, and non-inheritable⁶⁵.

The protection of personal rights is also regulated by Article 24 § 1. The liability based on this article is independent of the fault of the person violating the personal rights. The prerequisite for the application of this provision is the illegality of the violation or threat to the personal right. The article in question implies a presumption of illegality, which means that the infringer of the right must prove that their act or omission would not be unlawful⁶⁶.

In the event of an unlawful infringement or threat to the personal good, the entitled party has three courses of action: a motion for determination of infringement, a motion for cessation of infringement, and a motion for removal of the effects of the infringement. However, the protection provided for by the above provision is not sufficient, because the violation of personal rights results in non-material damage, i.e. harm. The injured person may apply for a special type of damages, i.e. compensation⁶⁷. Liability for damages for the infringement of personal rights is provided for in Article 448, according to which

in the event of an infringement of personal rights, the court may award to the person whose personal rights have been infringed an appropriate amount as monetary compensation for the harm suffered or may, at their request, award an appropriate amount of money for a social purpose indicated by them, regardless of other measures needed to remedy the effects of the infringement.

The compensation provided for in this Article may be applied in addition to the protection provided for in Article 24. The fulfilment of the condition of liability for the infringement of personal rights, which under Article 24 is unlawful, is not the same as the fulfilment of conditions provided for in Article 448⁶⁸.

The right to religious freedom in the institutional dimension imposes on the state the obligation to ensure the free exercise of this freedom by every citizen. This right should be exercised in court or with administrative proceedings. In connection with a violation of material guarantees, means of legal protection can be used to claim remedy of the damage, compensation for the harm suffered, as well as punishment of the perpetrator. Human dignity, as a constitutionally protected value, determines the obligation of the state to create a system of measures for the protection of freedoms and rights. This obligation should be implemented by both national and international law⁶⁹.

Religious freedom in the institutional dimension is also guaranteed in international law. This protection is implemented through a complaint to the United Nations Human Rights Committee as well as a complaint to the European Court of Human Rights. After 14 November 1950, when Poland ratified the European Convention for the Protection of

⁶⁵ *Ibidem*.

⁶⁶ Z. RADWAŃSKI, *Prawo cywilne – część ogólna*, Warszawa, Wydawnictwo C.H.Beck, 2017, pp. 123 et seq.

⁶⁷ A. SINKIEWICZ, *Pojęcie i rodzaje szkody w polskim prawie cywilnym*, in «Rejent», 2, 1998, p. 71.

⁶⁸ B. LEWASZKIEWICZ-PETRYKOWSKA, *W sprawie wykładni art. 448 k.c.*, in «Przeгляд Sądowy», 1, 1997, pp. 6 et seq.

⁶⁹ L. WIŚNIEWSKI, *Wolność sumienia i wyznania w Europejskiej Konwencji Praw Człowieka i prawie polskim*, in «Państwo i Prawo», 8, 1991, p. 18.

Human Rights and Fundamental Freedoms, it was possible to lodge a complaint with the ECtHR in Strasbourg. Such complaints can be lodged by any Polish citizen, legal person, non-governmental organisation or a group of persons who believe that their rights and freedoms enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms have been violated. The judgement of the ECtHR is final both for the complainant and for the State (*res iudicata*)⁷⁰.

After exhausting domestic remedies, Polish citizens may submit a complaint to the Human Rights Council in Geneva. Since 2004, when Poland joined the European Union, Polish citizens living or residing in the EU may submit a petition to the European Parliament on matters related to the situation of natural and legal persons⁷¹.

It can be stated that the jurisprudence of the ECtHR and the Constitutional Tribunal affects the protection of religious freedom both in Poland and in Europe, which is why all states are obliged to respect religious freedom at the level of international law⁷².

Conclusion

The scope of religious freedom is undoubtedly difficult to determine, hence the essential role of the state in ensuring tolerance and religious harmony. Individual religious freedom has been codified in acts of international law as well as in Polish legislation. A number of rights resulting from this freedom were articulated in the Constitution of the Republic of Poland. When analysing the current form and level of guarantees of religious freedom, it should be recognised that from a formal point of view the provisions of law safeguard this sphere of human freedom to a sufficient extent. However, as indicated by the examples cited in the article, there are problems related to the practical application of the principle of religious freedom. Institutions that directly and indirectly guarantee the implementation of religious freedom do not always perform their role effectively enough.

There are many reasons for the ineffectiveness of these mechanisms. A big role is played by people's limited awareness of such violations as well as the possibility of addressing them. Additionally, as it seems, there is a sense of limited harmfulness and severity of possible violations of this freedom. On the other hand, factors of a political nature often negatively impact the possibility of applying formally binding protective instruments. As far as the issues of religious freedom of minors are concerned, it should be assumed that in the Polish reality the significance of these issues is primarily scientific and theoretical. Factors conducive to this state of affairs seem to include a certain passivity of the beneficiaries of freedom or their legal guardians, resulting from reasons such as the impact of social control, a low degree of impact in the case of violations of freedom or, finally, the low positioning of issues related to religion in the hierarchy of importance in everyday life. Unfortunately, in light of the number of complaints, and in particular the increase in crimes against religious freedom in recent times, it would be advisable to introduce regulations effectively combating the phenomenon of religious vandalism. It is not about making the penalties more strict, but introducing changes to existing provisions that would enable their effective enforcement.

⁷⁰ S. WALTOŚ, *Proces karny. Zarys systemu*, Warszawa, Wolters Kluwer, 2001, pp. 565-569.

⁷¹ <https://www.gov.pl/web/sprawiedliwosc/podstawowe-informacje-dotyczace-skladania-skargi-do-europejskiego-trybunalu-praw-czlowieka> [28.09.2022].

⁷² https://repozytorium.uni.wroc.pl/Content/89593/02_03_L_Mirocha_Wolnosc_a_rownosc_w_o_rzeczniach_Europejskiego_Trybunalu_Praw_Czlowieka.pdf [28.09.2022].

The amendment to the Criminal Code should also apply to the provisions on the offence of insulting religious feelings, which are overly vague at present. It should be pointed out that formal guarantees mean very little without proper practical application. One model example worth citing is the law in force during the period of the Polish People's Republic, when, at least formally, the norms regarding religious freedom were at first glance extremely modern and progressive. However, the practice of their application was subordinated to the overriding goals of the totalitarian (communist) state, i.e. the elimination of religion not only from public space but also from social life.

Therefore, the interpretation of the norms was consistent with this strategic objective, and attempts to seek protection of the violated freedom were unrealistic. According to Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to religious freedom derived from human dignity, therefore this fundamental right must be better protected so that Poland can once again become an oasis of religious freedom on the map of Europe.

The shape of religious freedom is an interdisciplinary issue. It is not possible to present all aspects of this sphere solely on the basis of the wording of legal provisions and jurisprudence. It is equally important to examine, among others, the sociological, demographic, and cultural aspects. Here I am only signalling this research problem, which would require extensive sociological research in order to be solved.

