

LEGITIMACY OF THE LIMITATION ON FREEDOM OF RELIGION DURING IMPRISONMENT (IN THE LIGHT OF POLISH AND INTERNATIONAL REGULATIONS)¹

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Abstract: This article is devoted to consider the legitimacy of restrictions on religious freedom during imprisonment, taking into account the nature of the sentence, the importance of religion in human life and in the life of the convict, as well as international and national regulations. The subject of the analysis is the Polish legal system, starting with the Constitution, which guarantees freedom of conscience and religion to everyone, and in particular Polish executive law, which declares respect for religious freedom in prison. It

does not mean the guaranteeing unlimited access to religious practices and services, because imprisonment limits many human freedoms, also in such a sensitive area as religious freedom. In the course of the analysis, we considered the legitimacy of restrictions provided by criminal law, taking into account international standards for the protection of human rights and Polish regulations, which guarantee human rights and freedoms.

Keywords: Human Rights, Prison, Religion, Religious Freedom, Rights of Convicts

1. Objectives and methodology

This article aims to investigate the legitimacy of the limitations on freedom of religion during imprisonment, taking into account the nature of that penalty, significance of religion in human life and in the life of the convicted person, as well as the international and national regulations in this regard. The research problem is not a justification for the need to ensure freedom of religion, but its limitation in a crisis situation, such as being placed in penitentiary isolation.

¹ The article is the result of research undertaken as part of a research project financed by the National Science Center granted on the basis of Decision No. 2018/31 / B / HS5 / 02233.

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This study is conducted on the basis of psychological and legal literature in the area of constitutional law and penitentiary law. A derivative interpretation of the standards relating to the identified problems will also be carried out. The findings of a research conducted by us in selected prisons will also be used partially.

2. Preliminary assumptions

Psychological research shows that prison is a foreign environment for the individual who experiences a cultural shock in response to it. The common causes of stress a prisoner encounters are the loss of liberty, violence, conflicts with fellow prisoners or prison staff, lack of privacy and overcrowding. In similar fashion, Polish studies refer to the following stress factors: the presence of a tendency to violence and aggression, depressed mood, the need to find one's place in the prison hierarchy with prisoners assimilated into prison subculture and serving long sentences at its top, life of constant uncertainty, inability to anticipate the situation, and unfulfilled need for security.⁴

Contrary to the arguments on the secularization of the world,⁵ religion and the possibility to profess it are still one of the most important elements of human functioning. Human dignity finds expression, inter alia, in the innate (immanent) search and experiencing of certain transcendental values by the human person; this search must therefore be recognized, appreciated and protected.⁶ Studies carried out in penitentiary establishments show that the number of practicing believers is very high and varies depending on the religious practice. Our studies indicate that all Catholic believers placed in pre-trial detention declared participation in the weekly Holy Mass – 50% in closed prisons, opposed to 43% in semi-open prisons. Further, our studies reveal that all Catholics placed in pre-trial detention, 74% of prisoners of closed prisons and 67.5% of prisoners of semi-open prisons go to confession at least once a year. Among the believers placed in penitentiary facilities subject to our survey, all prisoners in pre-trial detention, 86% in closed prisons and 84% in semi-open prisons declared participation in a prayer.⁷

Religion allows many prisoners to keep hope in difficult times, helps them overcome life's failures and gives meaning to human life in the moments of downfall. A stay in prison is surely a difficult situation in which a person may feel unsafe and anxious. Religious practices can restore inner balance to the believer.⁸ One of the most important functions of religion is to give meaning and importance to human life. It is of utmost significance in extraordinary situations when, for

⁴ Skowroński, B. L., Talik, E. (2018). Radzenie sobie ze stresem a jakość życia osób osadzonych w placówkach penitencjarnych. *Psychiatria Polska*, 52(3), p. 526.

⁵ See for example: Bochenek, K. (2019). Zjawisko laicyzacji w społeczeństwie ponowoczesnym (konteksty filozoficzne). *Wschodni Rocznik Humanistyczny*, Vol. XVI, No. 1, 77–86, but also: Czarnecki, R. S. (2009). Meandry współczesnej laicyzacji. *Res Humana*, No. 3, 46–50.

⁶ Sarnecki, P. In: Garlicki, L. (ed.) (2016). *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. II. Warszawa: LEX.

⁷ Sitarz, O., Jaworska-Wieloch, A. (2017). Prawo do praktyk religijnych osób osadzonych w areszcie śledczym i odbywających karę pozbawienia wolności w teorii i praktyce penitencjarnej. *Archiwum Kryminologii*, XXXIX, 28–31. Slightly different results were obtained by Urbanek, A. (2007). Miejsce aktywności religijnej więźniów w teleologii pedagogiki resocjalizacyjnej na podstawie badań prowadzonych w wybranych zakładach karnych. *Zeszyty Naukowe Państwowej Wyższej Szkoły Zawodowej im. Witelona w Legnicy* 2, No. 2, 173–185.

⁸ John Paul II, Jubilee in Prisons. Homily of His Holiness John Paul II of 9 July 2000. *Opoka* [online] [viewed 20 January 2021]. Available from: http://www.opoka.org.pl/biblioteka/W/WP/jan_pawel_ii/przemowienia/wiezienia_09072000.html

instance, an individual is limited in his or her functioning in society. Further, convicted persons serving a sentence of imprisonment focus their identity around religious matters.⁹

The findings of psychological studies show that the turn to religion was one of the ways of coping with stress in prison isolation (although it was not the most common one).¹⁰ It seems legitimate to claim that prisoners increasingly pursue different religious strategies in the difficult situation of serving a penalty of imprisonment.¹¹

Further, there have been views in the literature that penitentiary ministry properly models the religious life of persons deprived of liberty and other internal relations prevailing in the prisoner community. At the same time, it perpetuates objectively proven values and does not glorify evil and violence or anti-social attitudes. Prisoners' religious life is thus part of the traditional behavior and attitudes towards God firmly established or acquired by prisoners during or before imprisonment that they pursue in prison conditions.¹² Others hold the view that prisoners' religious activity is part of a wider canon of social rehabilitation actions, and the religious practices and goals of pastoral actions performed in relation to prisoners are an important aspect determining the quality of social rehabilitation.¹³

It is important to bear in mind that despite the strong link between the freedom of conscience and religion and the psyche and in general human personality, as well as the great intensity with which they are often experienced, they cannot be classified solely as the sphere of privacy, and thus covered by the constitutional right to the protection of private life, without the need to construct separate freedoms in the constitution. First, belief and the professed religion determine, in general to a significant extent, the individual's behavior not only towards himself or herself (only this aspect falls within the right to privacy), but also towards others and the whole community. Second, the belief adhered to and the professed religion often require people to take some public action (e.g. the obligation to conduct charity work mandatory in some religions). Third, one cannot overlook the specific "historical pressure": religious matters have played such an important role throughout the long periods of the functioning of all societies (which still persists in collective memory) that it is impossible to view and regulate them only as one of the aspects of "the right to be let alone," as the content of the right to privacy is often defined.¹⁴

It is not an exaggeration to claim that in modern times freedom of religion may be seen as a benchmark of the state of democracy and respect for the rights of convicted persons. It was a widely held belief for many years that since a prisoner breached the law by committing a crime, he was therefore not entitled to any protection under that law. For instance, the view common in the USA in the 19th century was that a prisoner was a slave of the state and lost his liberty and all his rights apart from those that the law in its humanitarianism granted him. This view prevailed well into the first half of the 20th century when it took the shape of a modified *hands-off* doctrine based on the prohibition of the excessive interference by courts in the activities of the penitenti-

⁹ Romanowicz, W., Tomczyszyn, D. (2015). Stosunek do religii osób odbywających karę pozbawienia wolności a miejsce religii we współczesnym świecie. *Rozprawy Społeczne*, Vol. IX, No. 3, p. 94.

¹⁰ Skowroński, B. Ł., Talik, E. (2018). Radzenie sobie ze stresem a jakość życia osób osadzonych w placówkach penitencjarnych..., p. 533.

¹¹ Skowroński, B. Ł., Talik, E. (2018). The Sense of Quality of Life and Religious Strategies of Coping with Stress in Prison Inmates. *Journal of Religion and Health*, Vol. 57, 915–937.

¹² Nikołąjew, J. (2009). Specyfika duszpasterstwa więziennego w Polsce. Prezentacja badań własnych. *Teologia w Polsce*, Vol. 3(1), 153–154.

¹³ Urbanek, A. Op. cit., 175–176, similarly: Romanowicz, W., Tomczyszyn, D. (2015). Stosunek do religii osób odbywających karę pozbawienia wolności a miejsce religii we współczesnym świecie. *Rozprawy Społeczne*, Vol. IX, No. 3, p. 95.

¹⁴ Sarnecki, P. Op. cit.

ry administration.¹⁵ Currently, there is probably no constitution of a democratic state (even if only formally) that would not take into account freedom of religion of the individual. It is embedded in § 16 of the Virginia Declaration of Rights, approved on 12 June 1776 in the first amendment to the US Constitution, Art. X of the French Declaration of the Rights of Man and the Citizen, and the recent Constitutions include, inter alia, Art. 15 of the Swiss Constitution, § 1 of Chapter 2 of the Swedish Instrument of Government (in its 1998 wording), Art. 31 of the Constitution of Belarus, or Art. 35 of the Constitution of Ukraine.¹⁶ The protection of freedom of conscience and religion has become a systemic principle in most countries in the world. This freedom has also been made “available” to convicted persons and prisoners.

3. Confirmation of freedom of religion in the Polish legal order

Pursuant to Art. 53 of the Polish Constitution, everyone shall be ensured freedom of conscience and religion. The Constitution prescribes that freedom of religion shall include the freedom to profess or accept a religion by personal choice, as well as to manifest such religion, either individually or collectively, publicly or privately, by worship, prayer, participation in rites, practice and teaching. Freedom of religion shall also include possession of temples and other sites of worship depending on the needs of believers, as well as the right of individuals, wherever they may be, to benefit from religious assistance.

The above provision envisages two closely related freedoms of a personal nature, i.e. freedom of conscience and religion. Freedom of religion is underpinned by the belief in the existence of God or some other supreme being. It encompasses the freedom to accept and profess religion as well as the freedom to manifest it. In turn, there are various definitions of freedom of conscience, which determines different perceptions of the relationship between that freedom and freedom of religion. Some consider freedom of religion as a manifestation of freedom of conscience or as a subcategory of the latter. In this meaning, freedom of conscience means freedom to choose any belief. Others differentiate clearly between the two freedoms, recognizing freedom of conscience as the freedom to choose a belief other than a religious one. Finally, there are those who view freedom of conscience and freedom of religion jointly as one freedom of a diverse nature.¹⁷

The constitutional regulation in the sphere of human belief and professed religion involves not only the basic construction of “freedom”, but in two cases it refers to the construction of “right”. First, it relates to the right “to benefit from religious assistance wherever the individual may be.” It appears that the term “religious assistance” has a much broader scope than religious “comfort”, although the latter also implies the possibility to contact other persons, in particular clergymen who can provide such assistance. It surely includes the possibility of religious “teaching”, as well as the access to relevant literature. The question is what obligations (in keeping with the nature of every right) arise from the provision under investigation for public authorities, given that such obligations should naturally be subject to statutory regulation. In a situation where an individual makes full use of personal freedom and freedom of movement, the right under investigation is in essence his or her “freedom”. Freedom of religion has inherent relevance in situations where an individual becomes dependent on a specific legal regime in force in a place in which he or she is staying. Typical situations of this kind include hospitals, prisons and detention centers or garrisons. This right available to individuals entails corresponding duties to be per-

¹⁵ Dąbkiewicz, K. (2020). *Komentarz do art. 102 k.k.w.*, LEX.

¹⁶ Sarnecki, P. Op. cit.

¹⁷ Florczak-Wątor, M. (2019). In: Tuleja, P. (ed.). *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa: Lex.

formed by those who are in charge of such establishments to enable the provision of “religious assistance”.¹⁸ In the light of the so-called concept of absolute human rights, it should be emphasized that although the state does not create or grant human rights, it is obliged to respect and protect them and, with regard to a large part of them, including freedom of religion, to safeguard them.¹⁹

Pursuant to Art. 53 of the Polish Constitution, the state is the entity obliged to guarantee each individual the possibility of free exercise of his or her freedom of conscience and religion. The obligations of the state have a negative aspect (prohibition on a violation of freedom), as well as a positive one (protection order of that freedom where it is breached by other individuals). “Everyone” is the subject of freedom of conscience and religion. This concept should be understood as meaning any natural person, regardless of his or her nationality. It is one of the basic personal freedoms closely related to the personality of the individual and his or her need to pursue and experience transcendental values.

The essence of freedom is the freedom of the individual to act within the framework set by the state. The need to provide such framework arises from the fact that freedom is not in essence of an absolute nature and may be subject to limitations, inter alia, so that other individuals may exercise the same freedom concurrently and independently of each other. Within the established boundaries, the state should not indicate to the individual the possible forms of behavior because it may be assumed that everything that is not forbidden is allowed.

Freedom of religion in the area of serving a penalty of imprisonment is confirmed in Polish law by the Executive Penal Code (EPC). Pursuant to Art. 102 (3) EPC, a convicted person shall have the right, in particular, to exercise freedom of religion. This provision is of a general nature and it does not contain tangible rights of prisoners. It is rather a general principle that does not give the convicted person any specific rights, but it is significant inasmuch as it embeds in the Executive Penal Code the directives included in other legal acts.

Prisoners’ rights in the area of freedom of religion are specified in Art. 106 EPC. This provision sets out in § 1 that a convicted person shall have the right to perform religious practices and benefit from religious services, directly participate in services held in the prison on public holidays and listen to services broadcast by the mass media, as well as to have books, writings and objects necessary for this purpose. Apart from the general declaration of the above elements that are provided to prisoners, the lawmaker did not choose to enumerate in detail prisoners’ rights relating to the pursuit of their religious beliefs. This would in turn allow prisoners to make specific demands to their penitentiary establishment in addition to the right to participate directly in services held in the prison on public holidays. Consequently, it can be concluded that the issue of other practices and religious services has not been regulated at the statutory level, in particular their minimal availability to prisoners. Given the above, it seems appropriate to review the individual practices available to prisoners and the possibility of benefiting from services and other forms of expression of one’s faith.

4. General principle of limiting freedom of religion in penitentiary establishments

Regardless of the significance of freedom of religion, it is clear that it is not an absolute right – it is and must be limited in numerous situations. It is precisely the execution of a penalty of imprisonment, one of the most difficult areas, where the lawmaker rigorously sets a demarcation line for

¹⁸ Sarnecki, P. Op. cit.

¹⁹ Walczuk, K. (2016). Ograniczenia wolności sumienia i religii osób pozbawionych wolności. In: Nikołajew, J., Walczuk, K. (eds.) (2016). *Wolność sumienia i religii osób pozbawionych wolności. Aspekty prawne i praktyczne*. Warszawa: Unitas, p. 149.

freedom of religion. The performance of religious practices and the use of religious services by prisoners are important areas of imprisonment. It must be underlined that freedom of conscience and the freedom to accept and profess religion have an absolute dimension, whereas the freedom to manifest religion may be subject to limitations.

The Polish constitutional order specifies that the freedom to manifest religion may be subject to limitations only by way of statute and only where this is necessary for the defense of State security, public order, health, morals and the freedoms and rights of others (Art. 53 (5) of the Constitution).²⁰ One should not lose sight of the fact the provisions of Art. 53 (6) and (7) of the Constitution prohibit the legislator from introducing two types of limitations on freedom of religion, i.e. the freedom from being forced to participate or not to participate in religious practices and the freedom from being forced by public authorities to disclose one's belief, religious convictions or religion.

The general rules for limiting freedom of religion applicable to persons serving a penalty of imprisonment are governed by two provisions of the Executive Penal Code. Pursuant to Art. 104 EPC, the exercise by a convicted person of his or her rights should take place in a manner that does not violate the rights of other persons and does not interfere with the order established in the prison. Moreover, the exercise of freedom of religion may not violate the principles of tolerance or disturb the established order in the prison (Art. 106 § 3 EPC). The latter provision is an expression of the principle of religious tolerance that forms the basis for the non-conflicting exercise of freedom of religion in the prison.

5. Detailed limitations on freedom of religion arising from Polish regulations on the execution of a penalty of imprisonment and their justification

The declaration of the right to manifest freedom of religion in the course of serving a penalty of imprisonment is not equivalent to guaranteeing unlimited access to religious practices and services. The penalty of imprisonment limits many human freedoms, in such a sensitive area as freedom of religion as well. The question thus arises whether all the limitations in this area are justified.

Art. 106 § 1 EPC lays down that a convicted person shall have the right to perform religious practices and benefit from religious services, to directly participate in services held in the prison on public holidays and listen to services broadcast by the mass media, as well as to have books, writings and objects necessary for this purpose. By making reference to participation in the Holy Mass, this provision recognizes direct participation in Mass held in the prison on public holidays, yet it does not guarantee persons placed in penitentiary isolation the possibility to participate in such Mass, making that right dependent on whether the service is held in the prison at all. Polish regulations do not provide for a minimal number of Masses held in penitentiary institutions (nor do they regulate this issue in any other way by, for instance, indicating religious holidays). Consequently, prisoners declaring membership of a less popular denomination have no legal basis to demand that such a service is held.

In similar fashion, pursuant to Art. 106 § 2 EPC, a convicted person shall have the right to participate in religious teaching in the prison, to take part in charitable and social activities of the church or other religious association, as well as to have individual meetings with a clergyman of the church or other religious association to which he or she belongs; such clergyman may visit convicted persons in the premises where they are placed. However, in this case the provisions do

²⁰ On the defective manner of limiting freedom of religion in the time of pandemic see: Maroń, G. (2021). Polskie prawodawstwo ograniczające wolność religijną w okresie pandemii koronawirusa SARS-CoV-2 a standardy państwa prawa – wybrane zagadnienia. *Przegląd Prawa Publicznego*, No. 1, 33–49.

not guarantee participation in such religious practices, making the right of the prisoner to participate in them conditional on whether they are conducted in the prison at all. While the Executive Penal Code prescribes for the possibility of participating in a personal meeting with a clergyman in the cell, it does not set out the minimal number of such meetings with a specific clergyman. The right to such meetings raises doubts in the doctrine due to possible violations of the principle of tolerance resulting from the necessity of other prisoners occupying the same cell, who may in fact not feel a similar need and may not even belong to the same denomination, to participate in such a meeting.²¹

Pursuant to Art. 109 § 1 EPC, the diet provided to a convicted person in prison or detention center should, as far as possible, be adapted to his religious requirements. This means that there is no absolute requirement to adapt dietary conditions to the recommendations of specific denominations. It may thus be that a convicted person whose religion imposes specific dietary requirements, for instance, excluding pork, has no possibility of complying with such conditions. It appears that this norm unduly limits a convicted person's freedom of religion, fails to guarantee the adjustment of the diet provided to a convicted person to his or her religious beliefs and does not foresee the possibility of organizing an appropriate diet by a prisoner on his or her own.

Another limitation is introduced by the provision of Art. 110a § 1 EPC, pursuant to which a convicted person shall have the right to possess objects of religious worship in the cell. This provision is not clear as the Act does not specify what is meant by objects of religious worship, whereas others regulations (Art. 106 §1 EPC) link this formulation with the right to possess books, writings and objects necessary for religious practice. Further, the implementing provisions²² limit the number of such objects only to 10 with dimensions not more than 250 x 150 mm. It appears that freedom of religion of convicted persons would be preserved to a much greater degree if the number of objects that a convicted person may keep in the cell were limited in terms of their overall dimensions and it was up to a convicted person to choose how many of them were objects of religious worship. Moreover, the legislator should forgo the requirement that objects of religious worship should serve a specific purpose, since it entails an unnecessary element of evaluation of which object meets that requirement.

Much more far-reaching limitations are imposed on dangerous convicted persons who, pursuant to Art. 88b (3) EPC, may directly participate in services, religious meetings and religious education only in the prison ward in which they are placed. The model of dealing with this group of prisoners is clearly dominated by the isolation and protection function,²³ yet it must be recalled that the number of dangerous prisoners has been on the decline in Poland.²⁴ The above creates a risk of participating in a service or a religious meeting alone, without the sense of community in the experience of faith. Where only some prisoners show interest in participation in religious practices, placement in a small unit for dangerous offenders, which is under strict supervision, may mean that no one, except a specific prisoner, is interested in the public manifestation of faith, given that the remaining prisoners may in fact practice a different religion. There is also a risk that the small wards meant for dangerous offenders may have no places for religious practice and services.

²¹ Szczygieł, G. B. (2002). *Spoleczna readaptacja skazanych w polskim systemie penitencjarnym*. Białystok, p. 147.

²² Regulation of the Minister of Justice of 21 December 2016 on the rules and regulations of serving a penalty of deprivation of liberty. *Journal of Laws of 2016*, pos. 2231.

²³ Agree Kalisz, T. (2017). Osadzeni niebezpieczni, Procedura kwalifikacji, jej weryfikacja oraz zakres ograniczeń. *Nowa Kodyfikacja Prawa Karnego*. Wrocław, Vol. XLIII, p. 177; Szczygieł, G. B. Op. cit., p. 117.

²⁴ Niebezpiecznych więźniów coraz mniej. Available from: https://www.ebos.pl/artykul/1741_niebezpiecznych_wiezniow_coraz_mniej.html [viewed 4 April 2021].

Significant limitations are envisaged in Art. 247 EPC, pursuant to which, in cases justified by special sanitary or health reasons or a serious threat to safety, the governor of a prison or detention center may suspend or limit for a fixed term, inter alia, holding Masses and rendering religious services. The limitation of the above rights may therefore relate solely to holding Masses and rendering religious services, with other forms of expressing one's freedom of religion unaffected by such limitation. Where the above limitation or prohibition lasts up to seven days, the governor of a prison or detention center shall immediately inform the penitentiary judge thereof. The extension of the duration of the limitations or prohibitions requires the consent of that judge, and the lack of such consent shall not stay the enforcement of the decision of the governor of the prison or detention center. The governor of a prison or detention center shall have the right to contest the judge's decision before the penitentiary court, applying accordingly Art. 7 § 5 EPC (Art. 247 § 1 EPC). The literature rightly refers to the exceptional nature of that norm and the possibility of applying the limitations set out in it only where the situations listed therein cannot be prevented by other measures provided for in EPC and other legal acts governing the execution of a penalty of imprisonment.²⁵ The current epidemiological situation resulting from the COVID-19 pandemic led to the application of this provision and radical limitations on the possibility of third persons entering the prison premises were put in place.²⁶ This in turn creates a particularly difficult situation for prisoners who are deprived of the possibility of meeting their loved ones at such a family time as Christmas or Easter and maintaining the long-established Polish traditions of sharing a holy wafer or an Easter egg.

The scope of freedom of religion may also be subject to limitations in a penitentiary establishment in connection with an imposed disciplinary penalty of being placed in solitary confinement (Art. 143 § 3 (3) EPC). Such a penalty may be imposed on a convicted person who has committed an offense that seriously violates the existing discipline and order, and it consists in placing the convicted person in a single cell and preventing him or her from contacts with other prisoners. While in solitary confinement, the convicted person is deprived of the possibility of, inter alia, direct participation, in company with other prisoners, in services, religious meetings and teaching. However, upon request from such convicted person, he or she should be allowed to participate directly in the service in conditions that prevent him or her from contacting other prisoners. The question is whether such a far-reaching limitation on performing religious practices is justified. While it is clear that in the course of solitary confinement, a prisoner is denied contacts with other prisoners for leisure purposes, for instance by being refused access to sport, cultural and educational activities, or even personal conversations and activities in the cell, the application of such rules to the possibility of participation in religious services seems to be an excessive limitation. Religious services do not consist in an interaction with other prisoners that involves a selection of activity at one's own choice, but they are a joint celebration of a service in a strictly defined order without a possibility of free talk with other prisoners or engaging in voluntarily chosen leisure activities.

6. International regulations relating to the issues under investigation

Numerous international documents guarantee freedom of thought, conscience and religion, including the Convention for the Protection of Human Rights and Fundamental Freedoms signed

²⁵ Kwieciński, A. (2015). Podstawy prawne realizacji prawa do wolności religijnej w warunkach izolacji penitencjarnej. Rozważania na marginesie dyskusji o zjawisku multikulturowości populacji więziennej. *Przegląd Prawa i Administracji*, No. 100, p. 251, et seq.

²⁶ See <https://wiadomosci.onet.pl/tylko-w-onecie/koronawirus-w-polsce-sluzba-wiezienna-przygotowuje-sie-na-radykalne-dzialania/qe8sb8t> [viewed 10 April 2020]; <https://www.sw.gov.pl/aktualnosc/centralny-zarzadz-sluzby-wieziennej-ograniczenie-odwiedz-in-we-wszystkich-zakladach-karnych> [viewed 15 April 2020].

in Rome on 4 November 1950²⁷ whose Art. 9 recognizes, among other things, the right to manifest one's religion which may be subject only to such limitations 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. This provision does not define the material indispensability of certain religious practices for a given denomination and religion and does not introduce any gradation (hierarchy) of the manifestation of religious beliefs.²⁸ At the same time, this norm is so general that it should not be deemed to be equivalent to the absolute right to participate in all religious practices and services, in particular in conditions of penitentiary isolation. The state is thus not obliged to fulfil all the expectations of the prisoner in the area of religious practices, since the Convention "does not protect every act motivated or inspired by a religion or belief."²⁹

At the level of international law, prisoners' religious rights are regulated in the widest scope in the European Prison Rules (EPR) of 2006, which are an almost complete set of provisions on the enforcement of penalties and isolation measures. It is highlighted in the literature³⁰ that the significance of the EPR lies in the fact that they recommend that the penitentiary systems of states in our part of the world comply with the principles and values that are important in the European circle of civilization and which were proclaimed in the Universal Declaration of Human Rights of 1948, and subsequently defined in the European Convention on Human Rights, as well as in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. They are not hard law, yet a failure to comply with them has specific consequences for the state, ranging from negative opinions of other states, non-governmental organizations to a CPT³¹ report or a ECHR³² judgement which often refers to the EPR. The Committee of Ministers of the Council of Europe advises that the recommendations of the EPR are disseminated as widely as possible, especially among judicial authorities, prison staff and prisoners. Their goal is to minimize the negative effects of imprisonment by bringing the conditions of imprisonment as close as possible to those in which a human person is at liberty.³³ Rule 29.1 prescribes that prisoners' freedom of thought, conscience and religion shall be respected. In turn, Rule 29.2 sets out that the prison regime shall be organized as far as is practicable to allow prisoners to practice their religion and follow their beliefs, to attend services or meetings led by approved representatives of such religion or beliefs, to receive visits in private from such representatives of their religion or beliefs and to have in their possession books or literature relating to their religion or beliefs. The importance of respect for imprisoned persons as regards their religious rights was so clearly emphasized for the first time in the recommendations.³⁴

²⁷ *Journal of Laws* of 1993, No. 61, pos. 284.

²⁸ Hucał, M. (2016). Wolność sumienia i wyznania osób pozbawionych wolności w orzecznictwie ETPCz. In: Nikolajew, J., Walczuk, K. (eds.). *Wolność sumienia i religii osób pozbawionych wolności. Aspekty prawne i praktyczne*. Warszawa: Unitas, p. 192.

²⁹ *X v. the United Kingdom*, No. 5442/72, as cited in: Hucał, M. *Ibid.*, p. 194.

³⁰ Szymanowski, T., Migdał, J. (2014). *Prawo karne wykonawcze i polityka penitencjarna*. Warszawa: Wolters Kluwer, 58–65.

³¹ The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of Punishment.

³² Art. 46 of the Convention provides: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

³³ Płatek, M. (2009). Wybrane zasady kodeksu karnego wykonawczego z 1997 r. w świetle Europejskich Reguł Więziennych z 11 stycznia 2006 r. In: Lelental, S., Szczygieł, G. B. *X lat obowiązywania kodeksu karnego wykonawczego*, Temida 2. Białystok, p. 105.

³⁴ Nikolajew, J. (2013). Reguły minimalne i europejskie reguły więzienne a prawo więźniów do wolności sumienia i religii w Polsce. *Studia z Prawa Wyznaniowego*, Vol. 16, p. 123.

7. Assessment of the compliance of the Polish regulations with the international regulations

As it is often the case, international law guarantees rights at a rather general level, often without making reference to specific limitations of rights and freedoms of prisoners in the area of freedom of religion in the Polish legal order, as outlined above.

There is a notable lack in the current Polish legal order of a provision that would precisely define the moment when the administration of a given prison should make endeavors to provide convicted persons of a specific denomination with permanent pastoral care. The question is whether the lack of such regulations runs counter to Rule 29.2 of the EPR prescribing that the prison regime shall be organized as far as is practicable to allow prisoners to practice their religion and follow their beliefs, to attend services or meetings led by approved representatives of such religion or beliefs, to receive visits in private from such representatives of their religion or beliefs and to have in their possession books or literature relating to their religion or beliefs. This lack is surely in conflict with the 65 Mandela Rule which lays down that if the prison contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit so, the arrangement should be on a full-time basis. A qualified representative appointed or approved according to the above rule shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his or her religion at proper times. Access to a qualified representative of any religion shall not be refused to any prisoner. At the same time, if any prisoner should object to a visit of any religious representative, his or her attitude shall be fully respected. This problem became noticeable particularly after 1989 when Polish prisons saw an increase in the number of detained foreigners belonging to diverse churches and religious associations, including those that practically do not operate in Poland.³⁵

The failure to provide pastoral care for the denominations declared by prisoners also means that the Polish penitentiary regulations do not guarantee a minimal number of services, at least from the point of view of a given denomination, during the most important religious holidays. They do not provide for a minimal number of believers of a given denomination for which the prison should seek cooperation with a given clergyman. It is non-compliant with the 66 Mandela rule, pursuant to which, as far as practicable, every prisoner shall be allowed to satisfy the needs of his or her religious life by, among other things, attending the services provided in the prison.

Doubts have also been raised about the Polish regulations on the right to possess in the cell objects of religious worship and the limitations related to it. Rule 29.1 of the EPR guarantees convicted persons the right to possess books and literature in that field. In turn, 66 Mandela Rule foresees that as far as practicable, every prisoner shall be allowed to satisfy the needs of his or her religious life by, among other things, having in his or her possession the books of religious observance and instruction of his or her denomination. J. Nikołajew pointed to the significance of respect for the convicted person in the area of his or her religious rights and underlined in that manner the determination of religious practices consisting in, inter alia, the possession of books and literature in that field.³⁶ It is thus apparent that international law does not connect the books and literature kept by prisoners with the purposefulness of their possession, referring only to their subject matter.

³⁵ Kwieciński, A. (2015). Podstawy prawne realizacji prawa do wolności religijnej w warunkach izolacji penitencjaryjnej. Rozważania na marginesie dyskusji o zjawisku multikulturowości populacji więziennej. *Przegląd Prawa i Administracji* C/2, Wrocław, No. 3661, p. 263.

³⁶ Nikołajew, J. (2013). Op. cit., p. 123.

The regulation on taking into account religious requirements in case of diets provided to convicted persons may be deemed to be somewhat insufficient with regard to international standards. In this respect, the expression used in Rule 22.1 of the EPR that a diet provided to prisoners shall take into account the criteria set by their religion gives a far greater guarantee than the recommendation used in the Polish Code (Art. 109 § 1 EPC) that such criteria should be taken into account where practicable. Although it has been pointed out in the literature that actually there are no complaints of convicted persons on this account,³⁷ in the case of *Jakóbski vs. Poland*, the European Court of Human Rights held that the refusal to provide a meat-free diet to a prisoner in a penitentiary establishment that would comply with the requirements of his denomination violated his right to manifest his religion by observing the rules of Buddhism, even though Mahayana Buddhism, to which by declaration the applicant belonged, only encourages vegetarianism and does not require that diet.³⁸ The Court underlined in its judgement that adherence to dietary rules may be regarded as a direct expression of beliefs in practice within the meaning of Art. 9 of the Convention, and the request to provide the prisoner with meat-free meals does not require a special method of preparation, special products. In addition, the establishment did not offer an alternative diet and did not consult it with a Buddhist mission, which led the Court to the conclusion that there was a breach of Art. 9 of the European Convention of Rights.³⁹

International regulations, due to the degree of their general nature, do not refer to all limitations on freedom of religion of convicted persons provided for by Polish penitentiary law. However, the guarantees of the rights and freedoms of convicted persons declared there indicate that a great deal of caution is recommended with regard to all limitations on the right to religious practices and services and their necessity, indispensability and usefulness should be examined. It appears that not all the limitations introduced into Polish law meet these requirements.

8. Conclusions

It is hard to share the views expressed by some authors⁴⁰ who call the regulation of the rights of convicted persons to freedom of religion in the Constitution, the Code and the implementing provisions “excessive”. On the contrary, it seems that the criticism should go in the opposite direction – the regulations are too general and imprecise, allowing too much arbitrariness for the authorities applying them.

While the actual exercise of these rights may be subject to limitations, such limitation must always be legal, proportionate and justified by objective reasons, e.g. the need to protect the safety of the prison, fellow prisoners or penitentiary officers.⁴¹

It should be reiterated that internal regulations should serve only to implement the rights and obligations of convicted persons included in generally applicable regulations. Where the provisions contained therein are in conflict with the content of legislation or implementing provisions, or they impose on prisoners burdens not ensuing from such legal acts, it is necessary to verify the established order by legal means. An internal regulation that is inconsistent with the generally ap-

³⁷ Kwieciński, A. (2015). Podstawy prawne realizacji prawa do wolności religijnej w warunkach izolacji penitencjarnej. Rozważania na marginesie dyskusji o zjawisku multikulturowości populacji więziennej. *Przegląd Prawa i Administracji C/2*, ..., No. 3661, p. 263.

³⁸ Judgment of the European Court of Human Rights of 7 December 2010, 18429/06, Lex, No. 738025.

³⁹ See Bartosiewicz, J. (2014). *Glosa do wyroku ETPC z dnia 17 grudnia 2013, 14150/08*, Lex, No. 194585/4.

⁴⁰ Lelental, S. (2010). *Kodeks karny wykonawczy. Komentarz*. Warszawa, p. 447.

⁴¹ Gajdus, D., Gronowska, B. (2006). Więźniowie długoterminowi a europejskie standardy ochrony praw człowieka. In: Gardocka, T. (ed). *Kary długoterminowe. Polityka karna. Wykonywanie. Warunkowe zwolnienia*. Warszawa, 232–233.

plicable law may not be considered binding on the convicted person and as such does not bind him or her.⁴²

It is hard to disagree with the view put forward by Z. Lasocik that regardless of whether the penitentiary system is secular or not and whether it pursues educational aims or not, it should take into account, among other things, the prisoner's spiritual needs to be rational.⁴³ This means that the access to the possibility of practicing a selected confession should be independent of any possible positive impacts on the social rehabilitation process (as claimed by J. Nikołajew cited above) and the lack of such impact should not form a justification for limitations. Whilst it is hard to share the view that "religion within the walls of prisons should safeguard human natural rights and human dignity, because otherwise the prison becomes an institution of social revenge,"⁴⁴ it is certain that religions, or to be precise, the right to practice them, must be included in the penitentiary system because it is a substantive human right. It should also be recalled that the standard of the exercise of freedom of religion by the convicted person should be uniform, regardless of the kind and type of a penitentiary establishment and, in a broader perspective, regardless of the act for which the offender is serving a penalty of imprisonment.

Given that many limitations are dependent on the organizational and economic possibilities of particular states, a significant challenge is to limit the number of persons deprived of liberty in favor of alternative penal forms, which will make it possible to implement to a greater extent the rights (including religious rights) of those who must be placed in the prison.

A call for the ban on proselytism has been formulated in the Polish literature.⁴⁵ Were this view to be endorsed, it should refer to all denominations (not only selected, as is indicated by J. Nikołajew). This remark is connected with another reservation quite strongly related to the Polish reality. The issue of limitations on freedom of religion should not be viewed only from the perspective of one (dominant) denomination in the state. It should be borne in mind that prisoners of Polish penitentiary establishments include not only believers of the Catholic Church, but also of the Orthodox Church in connection with a large number of prisoners coming from the countries of the former Soviet Union, as well as Jehovah's Witnesses, Pentecostals, Seventh-day Adventists, Baptists, members of Gideons International and the Evangelical Church of the Augsburg Confession, or followers of Hare-Krishna.⁴⁶

The reasons for the limitations are certainly multifaceted, which may make it difficult to assess whether these limitations are justified. However, the basic laws (including Polish ones) impose on public authorities the obligation to treat each person deprived of liberty in a humane manner. Freedom from inhumane treatment has an absolute dimension. The Polish Constitutional Tribunal highlights that "the «humane» treatment covers more than merely the non-use of torture and prohibition on cruel, inhuman and degrading treatment, as set out in Art. 40 of the Constitution. The humane treatment must take into account the minimal needs of each person, having regard to the average standard of living in a given society, and requires positive action from public authorities in order to meet these needs" (TK – SK 25/07).⁴⁷ The practice of a chosen religion is certainly such a need.

⁴² Sitarz, O., Jaworska-Wieloch, A. Op. cit., p. 34.

⁴³ Lasocik, Z. (1989). *Praktyki religijne więźniów w prawie polskim*. Lublin: Fundacja Jana Pawła II, p. 167.

⁴⁴ Urbanek, A. Op. cit., p. 184.

⁴⁵ Nikołajew, J. (2009). Op. cit., p. 163.

⁴⁶ Szczygieł, G. B. Op. cit., p. 148.

⁴⁷ Florczak-Wątor, M. (2019). In: Tuleja, P. (ed.). *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa: Lex.

Finally, it is appropriate to share the view expressed by Grażyna B. Szczygieł that the declaration of rights and even their most precise definition is just one step on the way to recognizing the subjectivity of the convicted person. The significance of the system of rights and freedoms is primarily determined by the mechanism of monitoring respect for the guaranteed rights and freedoms, that is by placing at the disposal of prisoners proper legal instruments that they can use to enforce their rights. Studies on the practical exercise of penitentiary supervision show that penitentiary judges devote most attention to religious practices (over 90% of the minutes), and to a lesser extent to the issues of employment (81%), classification of convicted persons (64%), living conditions (from 25% do 70%), rewards and penalties (35%) and teaching and cultural and educational activities.⁴⁸

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⁴⁸ Szczygieł, G. B. Op. cit., p. 65.

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ЛЕГИТИМНОСТ НА ОГРАНИЧАВАНЕТО НА СВОБОДАТА НА РЕЛИГИЯТА ПО ВРЕМЕ НА ЛИШАВАНЕ ОТ СВОБОДА (В СВЕТЛИНАТА НА ПОЛСКИ И МЕЖДУНАРОДНИ АКТОВЕ)⁴⁹

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Резюме: Статията е посветена на легитимността на ограниченията на свободата на религията по време на изтърпяване на наказанието лишаване от свобода, като се вземат предвид естеството на присъдата, значението на религията в човешкия живот и в живота на осъдения, както и международните и национални разпоредби. Предмет на анализа е полската правна система, като се започне от Конституцията, която гарантира свобода на съвестта и религията на всеки, и по-специално полското право относно изпълнение на наказанията, което декларира зачитане на религиозната свобода в затвора. Това не

означава гарантиране на неограничен достъп до религиозни практики и служби, защото лишаването от свобода ограничава много човешки свободи, включително такава чувствителна област, каквато е религиозната свобода. В хода на анализа разгледахме легитимността на ограниченията, предвидени от наказателното право, като взехме предвид международните стандарти за защита на правата на човека и полските разпоредби, които гарантират човешките права и свободи.

Ключови думи: права на човека, затвор, религия, свобода на религия, права на осъдените лица

⁴⁹ Статията е резултат от изследване, предприето като част от изследователски проект, финансиран със средства от Националния научен център, отпуснати с Решение No. 2018/31 / В / HS5 / 02233.

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