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Constitutional Determinants of the State's Policy Towards the Church in Poland After 1989

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The problem of religious relations generally, and particularly the relations between the state and the church in their institutional dimension is traditionally a delicate constitutional matter. The question about how, one the one hand, the state should refer to religious organizations and, on the other, to a much broader problem of world outlooks (and similar issues) is – looking at it from the historical perspective – one of the most important questions to be answered by the legislator. What is more, this is the question which – at least for some time – has been answered with radically different answers, which effectively generates disputes and conflicts. The consequence is that the Parliament's decision – whatever it was – about the final shape of the religious order in the state, especially including the state-church relations, was usually burdened with exceptionally large risk of confrontationality. The plurality of ideas about how the state is to refer to the religious issue, the weight of this matter and, finally, the subjective opinions of the authors of the basic law in the field caused (and still do) that in the constitutional area this is a matter particularly exposed to polemics. The religious matter is, first of all, treated as obligatorily constitutional, which means that placing it outside the basic law makes the constitution incomplete and only fragmentary, Secondly, for obvious reasons, this is a controversial matter, which gives

rise to different, sometimes diametrically different opinions. If we add the historical and political contexts of the so-called historical moment, which means the time when the basic law was created, it becomes clear that the issue of favouring a definite, and especially a fairly clear concept of the religious order, is a real melting pot of conflicts and a clash (at times very sharp) of different opinions and views.

The fact that the religious issue is an element causing extremely large tensions and controversies in the process of establishing the constitution is confirmed by the case of Poland, both from the period when the Constitution from 17 March 1921 was created and in modern times of the constitutional debate preceding the proclamation of the Constitution from 2 April 1997[1]. The case of Poland is a very good illustration of the "constitutional religious dispute" because before 1921, and before 1997, there could be seen two alternative approaches to the way of regulating the state-church relations. The first, traditional one wanted a constitutional confirmation of the model of a confessional state where the spheres of *sacrum* and *profanum* adjoin and even – in the propositions leaning towards the orthodox – overlap and permeate each other. The other extreme attitude advocated the idea of a completely secular state, where the state and the church are fully independent and separate, and the worldview expressed in the essential act faithfully respects the principle of secularity, and hence religious non-involvement[2]. Those two extreme standpoints were supplemented with a variety of in-between projects, which were less explicit and which contained only certain solutions treated as the extremes of the model solutions[3]. In the case of the March Constitution it finally brought a completely eclectic concept which – using different mutations and peculiarities together with completely opposing viewpoints – ultimately created a vision of the state much closer to the variant of a confessional state than its secular opposite. It should be added that such a friendly vision of the state-church relations was wholly confirmed by the political practice interpreting the regulations of the basic law favourably to the idea of a religious state. It is generally known that after the war the series of political events caused that continuing the model of the corrected form of a religious

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1 More on this subject, see: P. Borecki, *Koncepcje stosunków między państwem a związkami wyznaniowymi w projektach i postulatach konstytucyjnych*, Warszawa 2002; P. Leszczyński, *Zagadnienia wyznaniowe w Konstytucji RP*, Warszawa 2001.

2 Cf. P. Borecki, *Geneza modelu stosunków państwo-kościół w Konstytucji RP*, Warszawa 2008, pp. 122 ff.

3 More on this subject, see: M. Pietrzak, *Prawo wyznaniowe*, Warszawa 2010.

state was impossible. The Constitution of the Polish People's Republic from 22 July 1952 clearly spoke for the variant of a secular state, directly declaring that the state and the church were separate entities. The principle of separation, together with the principle of individual freedom of conscience and religion *prima facie* referred to the democratic concept of a secular (lay) state. The ideal of a secular state could not be fully realized as a result of the state's ideological involvement in the atheist worldview. Thus, the principle of the ideological neutrality typical of the secular state was rejected and the Polish People's Republic (PRL), although proclaiming a clear-cult separation of the state and the church, became the state very strongly involved on the side of the atheist ideology. It was not accidentally then said that the People's Poland was actually a confessional state à *rebours*, where religion was replaced by the communist ideology and the corresponding attitude was clearly hostile towards religion[4], in a great degree referring to religious prosecutions.

Hence, it should be acknowledged that the experiment that we had to deal with on the ground of Polish constitutionalism did not favor the promotion of a true, authentic concept of a secular state. All constitutions either directly declared the ideal of a religiously engaged state (May Constitution from 1791) or a partly religious state, where the ideas typical of a religious state clearly dominated over the secular trends (March Constitution from 1921), or – finally – an à *rebours* confessional state, which means a state where the principle of separation was established but it was rejected at the starting point as a result of deviating from the rule of equal distance from all kinds religions, ideologies and worldviews. In the latter case, the principle of the ideological neutrality of the state was missing, which is basic for the authentic idea of secularity. As long as the state is not truly neutral and impartial in its worldview, the attitude of the state to the church – regardless of the set of formulas to express this attitude – becomes distorted again when it promotes clearly religious ideas or – on the contrary – those that are hostile towards the Church and the phenomenon of religiosity as such[5].

Constitutional experiences could not, therefore, provide a distinct indication about what attitude the constituting power should take

[4] Cf. A. Mezglewski, H. Misztal, P. Stanisz, *Prawo wyznaniowe*, Warszawa 2008, pp. 18–19. Cf. M. Winiarczyk-Kossakowska, *Konstytucyjna regulacja problematyki wyznaniowej w Polsce Ludowej*, [in:] J. Szymanek, J. Zaleśny (eds.), *Problemy polityki wyznaniowej*, „Studia Politologiczne" 2012, Vol. 23.

[5] More on this subject, see: P. Borecki, *Państwo neutralne światopoglądowo: ujęcie komparatystyczne*, „Studia z Prawa Wyznaniowego" 2006, vol. IX, pp. 75 ff.

in relation to the problem of state-church relations. The answer was not provided, either, by the complex political-social conditions, which constituted a relatively strong position of one of the religious organizations and, in general, the religious factor in public life. On the one hand, there was an unquestionable domination of the followers of one religion, who – additionally – belonged to one religious organization. On the other hand, however, the place of this organization in history made it exceptionally strong and gave the social authority. Finally, the political practice, later on legalized, at least partly, after 1989 clearly preferred the concept of "loose" *separationis ecclesiae et status*. One more factor should be added, which ultimately determined first, the very tone of the constitutional discussion and later the adopted shape of the constitutional regulation between the state and the church. This is a certain kind of conviction that he dominating religious organization, which in the Polish conditions is the Catholic Church, should obtain a specific compensation due to the hostile policy of the communist authorities[6]. Moreover, the policy of the People's Republic towards a broadly viewed issue of worldviews has been some kind of a negative point of reference since the beginnings of the Third Republic of Poland. That means that a lot of the existing solutions were implemented because they were treated (whether rightly or not, is another matter) as oppositional towards *ancien* régime. The paradox of the whole situation was that those solutions, which stood in opposition towards the communist ones, at the same time characterized the religious state. In consequence, when a new constitution of democratic Poland was to be created, it turned out that the constituting power faced an alternative of choosing between the promotion of an idea of a secular state, which was discredited in the times of the Polish People's Republic, and a wish to establish a religious state. The latter solution was certainly supported by the continuation of the solutions from before the war (largely viewed as authentically Polish ones), a quantitative domination of the followers of one religious organization, the historical role of the Catholic Church and its political importance, and – finally – the open wish to break with the times of PRL, which distorted the idea of a secular state by identifying it with fighting anti-clericalism[7]. Of importance was also the wish to compensate for the losses that religious organizations,

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6 This conviction was frequently expressed not only by politicians but by the hierarchs of the Catholic Church. More on this subject, see: J. Gowin, *Kościół w czasach wolności 1989–1999*, Kraków 1999, pp. 72 ff.

7 Which was one of the major arguments presented by representatives of the Church during the work on the constitution. Cf. J. Krukowski, *Państwo a kościoły i związki wyzna-*

especially the biggest one, suffered in the former epoch, which was generally estimated as an anti-church and anti-religious attitude. Hence a reconstruction of the religious order conducted after 1989 resulting in replacing the constitutional idea of division with a practical idea of combining *sacrum* and *profanum*. It should be remembered, however, that from the formal point of view the regulation of the Constitution of PRL, according to which the state and the church were separated, was in force until 1997. First, till the "Small Constitution" was passed in 1992, it was binding in its original form, as art. 82 of the Constitution of PRL, and after changing the Constitution on 29 December 1989 – as an article of the constitution of democratic Poland. Later on, when the regulations of the "Small Constitution" entered into force, art. 82 was upheld. However, as was rightly indicated, the norm according to which the state and the church were separated structures lost its axiological base, openly negated by the new system of values promoted by the "Small Constitution"[8]. As a result, nobody really treated seriously the regulation saying about the separation, which was best confirmed in practice clearly clashing with the idea of a secular state. Therefore, *desuetudo of* the constitutional rule of separation was mentioned. In the political reality that rule was replaced by the principle of cooperation between the state and the church and the interpenetration of state and religious matters[9]. It should also be mentioned that in those times, when formally the rule establishing the separation between the state and the church was in force, the most important solutions were implemented which were later on to confirm the incompatibility of the pure model of separation with the Polish conditions. Religious instruction in public schools, financing the educational activity of religious organizations from the state resources, far-reaching tax preferences for religious organizations, an institution of chaplains widely used in educational institutions and uniformed services and an obligation to respect Christian values in the public radio and TV broadcasting – all these appeared in law and in practice when the constitutional clause concerning separation between the state and the church was binding *de iure*. It turned out that the model of institutional relations between the state and religious

niowe w projekcie konstytucji RP, [in:] J. Krukowski (ed.), *Ocena projektu konstytucji RP*, Lublin 1996, pp. 141ff.

8 Cf. K. Działocha, *Trybunał Konstytucyjny wobec zmiany Konstytucji*, „Państwo i Prawo" 1990, No. 4, pp. 5 ff.

9 J. Brożyniak, *Konstytucyjne dylematy regulacji stosunków wyznaniowych we współczesnej Polsce*, Warszawa 1996, p. 48.

organizations shaped in the 1990's was an open contradiction to what was univocally settled by constitutional decisions. In practice, especially during the constitutional debate, it was a pressure to include the actual relations of state and church in the constitution. Secondly, it was an argument for the advocates of the existing religious relations that it was simply so and it should remain so since it is a "natural" and "obvious" state. Finally, the advocates of the concept of a secular state were moved to a position of defenders of the constitutional *status quo*, commonly seen as a communist re-sentiment, which *notabene* caused that it was all the more willingly negated in practice. A difficult thing for the latter group was a lack of one clear vision of the religious order. Certain radical versions appeared that suggested introducing the principle of a restrictive separation and hence a secular state according to the French scheme. There were also more conciliatory ideas, which respected the historical and socio-political conditions and spoke for a *soft* version of separation. It should be remembered that there is no one scheme of a religious state and, likewise, the model of separation includes different variants. Thus, the whole problem of settling the state-church relations is a *continuum* of solutions, where the extremes are the classical forms of a secular state, on the one hand, and a religious state, on the other, whereas most systems are found somewhere in the middle[10]. Therefore, it should not be surprising that the group of advocates of closer relations between the state and the church did not have just one idea about how to articulate it in the constitution. There were both, more traditional concepts referring to the classical model of a confessional state and the concepts breaking this model but still remaining within the frameworks of a state friendly to the church.

As it could be expected, the political debate that took place when the Constitution from 1997 was being prepared and accepted, numerous arguments appeared concerning the model of the state-church relations. Those arguments lasted alongside the polemics on such important but socially and politically delicate issues related to worldviews as abortion or ratification of the Concordat signed in 1993. The first one involved advocates and opponents of abortion, who lavished arguments referring to the model of the state-church relations. The former assumed that the separation between the state and the church also meant the state's *désintéressement* concerning the worldviews and morality; therefore, the

[10] Cf. H. Misztal, *Systemy relacji państwo – kościół*, [in:] H. Misztal (ed.), *Prawo wyznaniowe*, Lublin 2003, pp. 37 ff.

statutory prohibition of abortion would strike the very basis of secularity, where the state could not favour any side of the religious orientation. The other group took the standpoint according to which the state could definitely not present an agnostic attitude and that it should be ideologically and morally involved in the protection of the conceived life. According to that opinion, abortion made the state axiologically shallow, which stands in contrast to the tradition of a thousand years of Christianity, when human dignity was protected. A similar set of arguments caused a dispute about ratifying the Concordat[11]. For some, its ratification meant returning to the traditional relations between the state and the church and a natural state in a society dominated by Catholics. It was also pointed out that the Concordat was a certain comeback to the traditionally Polish ways of settling the relations with the church, and even more, a specific gift of the church for Poland[12]. An argument not to be ignored was the person of Pope John Paul II, who was expected to guarantee that the decisions of the Concordat would not in any way aim at the state's interests and that the negotiated agreement was the best of the possible ones. A wide array of arguments indicating the validity, or even necessity, of rarifying the Concordat included – quite wrongly – the fact of having no regulation of the state-church relations[13]. The Constitution of PRL was no longer in force and its art. 82, which was kept in the "Small Constitution", was not seriously treated by anybody. Consequently, it was believed that in the constitutional area the state-church relations were not determined in any manner and they required some kind of regulation. Additionally, for the advocates of the Concordat its ratification, preceding the adoption and implementation of the new constitution, was a guarantee that in the future the relations between the state and the church on the constitutional level would not change, which was supposed to be a certain warranty against the "fighting anticlericalists", demanding a secular state. For the other group, the Concordat was an attempt to establish "the Taliban", a sign of crawling confessionalization and, above all, an open violation of the constitutional decision, according

[11] Cf. R.M. Małajny, *Konkordat polski z 1993 r. – altera pars*, [in:] B. Górowska (ed.), *Konkordat polski 1993. Wybór materiałów źródłowych z lat 1993–1996*, Warszawa 1997, pp. 639 ff.

[12] Cf. J. Krukowski, *Realizacja konkordatu z 1993 r. w prawie polskim*, „Studia Prawnicze" 1999, No. 3, pp. 5 ff.

[13] On legal complexities connected with ratification of the concordat, see: J. Szymanek, *Tryb ratyfikacji konkordatu z 1993 roku – główne problemy*, [in:] Cz. Janik, P. Borecki (eds.), *Dziesięć lat polskiego konkordatu*, Warszawa 2009, pp. 48 ff.

to which the state and the church were two separated structures. The *stricte* constitutional arguments indicated that the existing legal situation did not provide for any contractual form of establishing the state-church relations, and only a statute was a constitutionally determined manner of the state referring to the legal situation of the church. It is in this point that the ratification of the Concordat was incompatible with the binding art. 82 of the constitution of PRL (later Republic of Poland, RP) because the only form of agreement that it allowed between the state and the church was a statute and not a concordat, which is an international agreement, which – in turn – corresponded to the existing principle of unilaterality in regulating the legal situation of religious organizations.

It was also pointed out that a concordat – as a tool in settling the relations of the state with the church – had lost its value and the relation of a modern democratic state to the church should be determined in another form, not a traditional concordat. Finally, it was claimed that ratification of the concordat had to be preceded by passing a new constitution because otherwise, it would determine the shape of constitutional regulations, and the constituting power would be forced into a corner, to use a colloquial expression. That argument was significant as it touched the crux of the matter. The constitutional debate on the postulated shape of the state-church relations was continued and, actually, nobody knew which variant would be ultimately adopted. The extreme solutions (e.g. a classical confessional state, or secularity à la *française*) were decisively rejected as absolutely inadequate in the Polish conditions, while all the others were taken into consideration and in fact it was not known which side (i.e. the more confessional or the more secular one) the final version would take. Hence, the possible ratification of the concordat before the adoption of the new constitution was considered to be a missed solution because it would determine the state-church relations and would in fact leave no choice to the constituting power. In consequence, it was argued that if this chronology was adopted, i.e. if the constitution – at least in its fragment concerning the state-church relations – was an act issued after the ratification of the concordat, then it would question the status of the constitution as the law of the highest rank. Hence, it was believed that the ratification had to wait until the new constitution was passed and whether it could be ratified at all and participate in legal transactions was to be made dependent on whether its decisions would not contradict the adopted regulations of the basic law as fundamental to determine the most important basis of the confessional order in the state. The hierarchical subordination towards

the constitution then meant refraining from implementing the concordat so that the state-church relations would not be determined too hastily. The logic of putting the legal transactions in order in all spheres of life required that first the constitutional framework be created and only then was it to be filled with the statutory content, or – more broadly – the law of sub-constitutional character (which also includes the concordat).

The constitutional debate proceeded in a tense atmosphere but it was not as heated as had been initially thought. It turned out that the issues concerning the worldviews aroused emotions but these were cooled by other, more earthly problems, or they were consciously hushed in the new of the expected constitutional compromise. Awaiting the constitution and the successful completion of the many years constitutional work was common, which caused that a number of controversial issues were minimalized – thus agreeing for far-reaching compromises, settled only partially in a way that satisfied nobody, or completely ignored in the belief that they could be definitely solved at the statutory level, which could be even more comfortable as it would not restrict the direction of future solutions. It is obvious that ideological issues, including the state-church relations, were exposed – due to their controversial nature – to compromises, in this case meaning oscillating between the extremes and a lack of definite, unambiguous choice. Other factors also contributed to this distinctly eclectic attitude, for example the atmosphere in which the constitutional discussion took place and, on the one hand, enforcing the confirmation of the *status quo*, which had already fixed a network of relations between the state and churches, especially the biggest one, and – on the other – generating no conflicts in the sphere of worldviews summed up with a catchy slogan of a "fight with the church". In addition, an extremely important matter, especially from the perspective of successful completion of constitutional work, was a friendly, or at least neutral, attitude of the Catholic Church, whose social resonance was perceived as an almost priceless value in the face of the adoption of the final text of the basic law in the national referendum.

All this tangle of historical, situational, political and – *last but not least* – legal factors caused that the issue of the character of the state-church relations (and the whole religious policy) in the new constitution was in the highest degree ambiguous. The proposed projects presented an array of solutions, with the parties of the constitutional coalition (SLD, PSL, UW and UP) aiming towards an idea of a secular state (although most frequently understood in different ways, but first of all not going towards the French solutions). On the other hand, the very atmosphere

of the debate and its political pragmatics demanded at least a favourable attitude to those ideas which softened secularity, reconciling elements of the separation with elements of religiosity.

As a result, the constitutional compromise, which is often a key to evaluate the solutions adopted in the constitution, also included – for understandable reasons – a block of religious matters. It is clear that the compromise did not go – contrary to the March constitution from 1921 – towards clearly eclectic solutions, uniting *fifty fifty* two antagonistic ideas, i.e. the idea of a secular state and – on the other end – a confessional state. Indeed, it had to reconcile two opposing ideas and two opposing tendencies marked in the constitutional work, but it could not do it as ostentatiously as it had been done in the inter-war period. On the other hand, for a number of reasons enumerated above, there was no possibility of establishing a pure idea of a secular state, openly stipulating an institution of a separation between the state and the church. The constituting power had to combine the idea eliminating the extremes in such way that the idea of secularity should not be ostentatiously promoted but, still, it should be expressed. Therefore, a general idea can be drawn from the decisions included in the Constitution of RP adopted on 2 April 1997. This idea is the state referring to a broad concept of separation. However, it should be emphasized that this idea is not established *explicite* and, secondly – which is a completely different matter – it is not always respected in practice. Hence, it is pointed out that in the area of the state-church relations, or even broad worldviews, a clear discrepancy can be seen between the letter of the constitution and its practice.

The model of the state-church relations established in the Constitution from 1997, regardless of its final shape, acquired an exceptionally high importance. This is attested by the fact that institutional rules determining the state's relation to religious organizations was included at the very beginning of the basic law, in its first chapter[14]. Entitled "The Republic", the chapter enumerates those solutions which in the opinion of the constituting power are especially important since they compose the principal rules of the constitution, thus axiologically defining the state[15]. Consequently, such fundamental rules as the common good, the

[14] J. Osuchowski, *Religia i Konstytucja*, [in:] T. Mołdawa (ed.), *Państwo. Demokracja. Samorząd. Księga pamiątkowa na sześćdziesięciopięciolecie Profesora Eugeniusza Zielińskiego*, Warszawa 1999, pp. 91 ff.

[15] Cf. S. Gebethner, *Rzeczpospolita w świetle postanowień rozdziału pierwszego Konstytucji z 1997 roku*, [in:] E. Zwierzchowski (ed.), *Podstawowe pojęcia pierwszego rozdziału Konstytucji RP*, Katowice 2000, pp. 13 ff.

nation's sovereignty, a democratic state ruled by law, division of powers or political pluralism were placed together with the rules determining the state's relation to religious organizations and other issues that, directly or indirectly, followed from the former ones. At the same time, it is emphasized that this kind of approach, independently of the model of institutional relations between the state and the church, *prima facie* testifies to a relatively big importance of the religious issue and to the fact that the problem of the ideological order is treated by the constitutional legislator with special attention. As a result, it should be indicated that including the "religious" decisions in art. 25 of the Constitution of RP (Republic of Poland) caused that he constitutional concept of the religious order had a very high rank, thus becoming one of the basis of the political system of RP[16]. It should also be added that because the religious issue was included in the first chapter of the Constitution, and considering the fact that the procedure of amending the text of the Constitution was provided in art. 235, this problem was made immune to the possible attempts to change it in the future. The regulations of the first chapter of the basic law are subject to special protection and their modification (like changing the regulations of chapters two and twelve of the Constitution) takes place according to other, more difficult, principles than the other fragments of the Constitution.

The state-church relations, finally determined in the disposition of the regulation of art. 25 of the Constitution of RP, cannot be viewed in the form of one definition or rule. Art. 25 of the constitution does not say about one concrete principle but a few, which taken *en bloc* make it possible to define the model of the state's reference to religious organizations. It should be emphasized at the same time that the way of interpreting this model also requires referring to other parts of the basic law, especially the Preamble, which contains important religious and ideological aspects, and to the decisions of the second chapter, where the issue of individual freedom of conscience and religion was regulated. For understandable reasons, the idea of the constituting power to regulate the religious order does not only establish the relations between the state and churches, but it contains a whole array of ideological issues, through the light of which the other regulations should be interpreted, including those that refer only to institutional relations.

[16] Cf. R.M. Małajny, *Państwo a Kościół w Konstytucji III RP (refleksje aksjologiczne)*, „Państwo i Prawo" 1995, No. 8, pp. 79 ff.

The rules concerning institutional relations between the state and the church include those that are enumerated in art. 25. In the sequence adopted by the constitution, these are: equality of rights of churches and other religious organizations (art. 25 item 1); the principle of impartiality of public authorities in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life (art. 25 item 2); the principle of autonomy and the mutual independence between the state and churches (art. 25 item 3); the principle of cooperation (art. 25 item 3) and, finally, the principle of bilateral relations of both entities (art. 25 items 4 and 5). It is worth pointing out that the constitution power does not make any hierarchy or any other indication – except the very place of particular rules in art. 25 – about which if these is treated as, for example, the most important and which are to perform a complementary role. However, it is clear that although all these rules together establish the relations of the state to religious organizations, the key ones include the principles of equality and impartiality. It is them which ultimately determine the secular character of the state where the spheres of *sacrum* and *profanum* are separated. The other principles are only a logical consequence, stipulating, firstly, the mutual independence between the state and the church; secondly, cooperation of both entities and, thirdly, the regulation of the relations between the state and particular religious organizations by virtue of a statute, thus protecting the latter from one-sided, and hence arbitrary, actions of the state.

Although not directly called so, those principles make the canon of the secular state, where there is a clear demarcation line between the spheres of *sacrum* and *profanum*. For this reason, in the constitutional sense, Poland meets the standards of a secular state, all the more so because the block of institutional rules (from art. 25) is complemented with one, very important principle, namely that of individual freedom of conscience and religion (art. 53 items 1 and 2), additionally protected by the so-called right of silence (art. 53 item 7). In consequence, the norms of the basic law determining the ideological character of the state, including its relation to religious organizations on the one hand, and to individual religious freedom, on the other, fully correspond to the concept of a secular state, where the state and the church are separated and an individual has a guarantee of religious freedom (both individual and collective, private and public). Nevertheless, it is interesting to note that the idea of a secular state which respects the separation between the state (public) sphere and the ecclesiastical one was not established *expressis verbis*. Because of the necessity of making a constitutional

compromise, the Polish constituting power had to give up explicit expressions, which – without any understatements or substitute decisions – would proclaim a secular state. That is why the Polish constitution is characterized by a lack of decisions which would – like in France – define the state as a secular (lay) one, or which – after the example of Russia – would clearly proclaim the separation between the state and the church, or which – referring to the German model – would prohibit the establishment of a state church, official or privileged in any other manner[17]. It can be deduced that a lack of decisive and unambiguous expressions in the Constitution and, instead, using equivalent ones is a sign of a constitutional compromise and, above all, a wish to introduce the rules corresponding to a secular state but without an ostentatiously expressed idea of *separationis ecclesiae et status*. On the other hand, although the Polish basic law includes certain expressions determining the secular character of the state, its distinguishing feature is that the text of the Constitution is full of religious or ideological formulas, which occur in a disproportionately high degree considering the needs and expectations of the constitution. As a result, the constitutional compromise in its confessional area is characterized, on the one hand, by no clear proclamation of the principle of separation or the idea of a secular state, and – one the other – by a remarkable load of religious or ideological expressions in the Constitution. This is only seemingly without any importance. The religious contents of the Preamble enforce such interpretation of the articulated part of the Constitution that would satisfy those contents (naturally, if is possible). Sometimes, the consequence is that controversial matters are interpreted, for example, in the spirit of the "Christian heritage of the nation", which weakens the secular character of the state already at the starting point. This is not a merely hypothetical matter, which is shown by the decision of the Constitutional Tribunal from 2 December 2009, where a clearly pro-confessional attitude of the Tribunal was grounded in the religious formulations of the Preamble. As a result, it turns out that what was supposed to be a kind of courtesy towards the religious constitutional postulates, without interfering into the *meritum* of the state-church relations, could be an important element of such an interpretation of the decisions of the basic law which would curb the secular status of the state. The religious elements of the Preamble are not, then, only

[17] On the possible variants in this respect, cf. J. Szymanek, *Formy prawnej instytucjonalizacji rozdziału państwa i kościoła*, „Studia z Prawa Wyznaniowego" 2008, vol. XI, pp. 47 ff.

a nice stylistic figure or a rhetorical expression having no effect on the normative layer of the constitutional decisions. Where it is possible – frequently referring to the religiously inclined expressions from the introduction to the basic law – such a train of thought is attempted which goes in the direction of making the state *softly* religious or para-religious. It appears that the constitutional compromise made in the past is not only of historical character but it still affects the way and direction of interpreting detailed decisions of the basic law[18]. It should be added that in the area of the state-church relations as well as in the sphere of more general ideological questions, such an interpretation, which means a continuous clash of opposing tendencies, does take place, which – as can be easily guessed – is transferred into practice, which clearly diverts from the state of *de lege lata*.

This practice mainly means approving certain behaviours that openly break, or at least get round the constitutional norms in the state-church relations, and trying to apply other, sometimes alternative solutions. An example is the practice of hanging religious symbols in public buildings (the Sejm of RP, central offices, schools, local government buildings); or a developed practice of maintaining (at the state's cost) an institution of different kinds of chaplains (in the army and other uniformed services); the presence of church hierarchs during different state celebrations; linking those celebrations with religious ones; or teaching religion in public schools. The examples can be multiplied but one more should be added, namely no moderation on the part of the state and its organs in getting involved in religious issues. A shameful example refers to different kinds of resolutions passed by the Sejm and the Senate. The more interesting ones include, for instance, the resolution of the Sejm of RP commemorating the 350th anniversary of the lifting of the siege of Jasna Góra monastery in Częstochowa, the resolution of the Sejm of RP commemorating the 350th anniversary of the Lviv vows taken by King Jan Kazimierz, the resolution of the Sejm of RP on the 30th anniversary of the beginning of John Paul II's pontificate; the resolution of the Sejm of RP on the 10th anniversary of the message addressed by John Paul II in the Sejm, the resolution of the Sejm of RP on cases of prosecutions of Christians in India. The second chamber of the Parliament, i.e. the Senate, is equally ready to get its authority involved in supporting clearly

[18] On the specific character of interpreting the religious issues included in the Constitution, cf. J. Szymanek, *Interpretacja przepisów wyznaniowych w konstytucji*, „Studia z Prawa Wyznaniowego" 2006, vol. IX, pp. 101 ff.

religious drafts of resolutions, thus also relativizing the constitutional order of impartiality of public authorities in matters referring to religious and ideological issues. The more interesting resolutions to be mentioned include the resolution from 2008 on honouring the person of blessed Father Honorat Koźmiński and his achievements, the resolution passed in the same year on commemorating the anniversary of Holy Father John Paul II's death, the resolution passed in 2008 on commemorating the 30th anniversary of the election of Cardinal Karol Wojtyła to the Holy See, or – finally – the resolution adopted a year later on commemorating the 70th anniversary of the death of St. Urszula Ledóchowska and recognizing her as a model patriot[19].

The aforementioned examples, selected out of many, confirm that most frequently we have to do with rather ambivalent treatment of the rule of ideological impartiality of the state[20]. The state, or – more strictly – the public authorities of RP, does not present an indifferent attitude to various convictions and different views, especially towards different religions. Usually, we have examples of a completely different approach of the public authorities, i.e. an attitude of strong involvement in promoting one religion and one worldview. This can be seen in symbols (e.g. religious symbols in public buildings, or referring to the religious ceremony on each occasion) but also in the legislative activity, where we can clearly see preference given to one religious attitude (e.g. the legislation connected with IVF, registered partnerships, abortion, Christian values, which are institutionally ordered as necessary to be respected by the mass media, establishing bank holidays, *etc.* A caricature of the lack of impartiality or just moderation in supporting one religion is also frequent promotion of a definite religion during elections and the electoral campaign. We remember the pictures of the left-wing prime minister kneeling in the chapel in Jasna Góra, prayers of the Protestant prime minister in the Roman Catholic Church or particular candidates for President participating in almost all religious ceremonies. Another example is the marriage of one of the party leaders, which had been an informal relationship for nearly 30 years, formally contracted immediately

[19] More on this subject, see: P. Borecki, *Elementy konfesjonalizacji państwa we współczesnej Polsce*, [in:] J. Szymanek (ed.), *Państwo wyznaniowe. Doktryna, prawo i praktyka*, Warszawa 2011, pp. 148 ff.

[20] More on this subject, see: R.M. Małajny, *Neutralność a bezstronność światopoglądowa państwa (uwagi na tle polskiej praktyki konstytucyjnej po 1989 r.)*, [in:] T.J. Zieliński (ed.), *Bezstronność religijna, światopoglądowa i filozoficzna władz Rzeczypospolitej Polskiej*, Warszawa 2009, pp. 71 ff.

before the elections. As a result, a statement can be ventured that a political norm is a lack of ideological impartiality of public authorities or even more, manifesting the attachment to a definite church and its religion, followed by promoting the attitudes adequate to the faith thus popularized.

In addition, another constitutional norm which is frequently overlooked is the principle of equality of churches and other religious organizations. Here, the examples are not so extreme but also striking. It is best seen if we look, for instance, at differentiated legislative guarantees for religious organizations in the sphere of the pastoral service in the military forces. As a consequence, three churches, namely Catholic Church, Orthodox Church and Evangelical Church of the Augsburg Confession, have organized structures of pastoral service operating within the military forces. Clergymen of seven churches have ensured rights to organize pastoral care in the army. They are appointed by the superior authorities of those churches in agreement with the Ministry of National Defense but they are not professional soldiers. They have the right of entry to the area of military units. They perform their service at the dates settled with the commanders of those units. The Polish Reformed Church and the Union of Jewish Religious Communities in Poland got guarantees for the organization of pastoral care for the soldiers outside the military units if a church, a chapel, a synagogue or a house of prayer is found in the place where the armed forces are stationed and if it does not interfere with important duties of the soldiers. Regarding the religious communities entered in a register of churches and other religious organizations, the legislator generally guarantees a possibility for them to perform their functions in relation to the people doing the military service. Corresponding agreements can be made with religious organizations which have a settled legal status concerning the pastoral functions performed by the clergymen of those religions[21].

Still another example of infringing, or – more delicately speaking – going round the principles in the state-church relations is the principle of bilateralism in settling the relation of the state to particular religious organizations. In reference to the largest of religious organizations, i.e. the Catholic Church, this rule is fully respected since its fulfillment is found in the Concordat. However, in the case of other religious organizations

[21] On other signs of the practice interfering with the constitutional regulations, cf. J. Szymanek, *Prawo wyznaniowe w praktyce III RP (zagadnienia wybrane)*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2006, fasc. 1, pp. 93 ff.

their legal situation has been, so far, regulated only one-sidedly, by way of a statute passed, however, without a previous agreement on the basis of which the act establishing the relations between the state and a given church would be passed. Requests of religious organizations for a corresponding agreement have been so far ignored by the Council of Ministers, which – in accordance with art. 25 item 5 of the Constitution – is obliged to negotiate agreements in the name of the state which are then transformed into the law properly regulating the situation of a given religious organization. As a result, no positive reaction of the Council of Ministers to the demands presented by the authorities of particular religious organizations concerning a corresponding agreement should be assessed as disregarding the constitutional principle of bilateralism in the relations of the state with the church[22].

Numerous cases of how the constitutional determinants of the state-church relations are ignored show that despite a relatively simple possibility of deriving the idea of a secular state from the basic law, the state becomes at least semi-religious. The next example is the Church Fund, which is still functioning but which has lost its reason to exist. It should be remembered that the Fund was established in 1950 when the state took over the church property. In its assumption the Fund was to be a *sui generic* compensation for the nationalized church property. However, since 1989 the nationalized church property has been successively returned. In the case of the Catholic Church this procedure is almost completed in whole. Nevertheless, this has not liquidated the Church Fund. It has been *de facto* transformed into an item of the state's budget or, actually, a subsidy from the budget administered by the Ministry of Interior and Administration. 80%–100% of the social and health insurance premiums for the clergy are mainly financed from the Fund. The height of the Church Fund in recent years was from about 90 million to approximately 1000 million PLN annually. Its existence can be treated as a form of the state openly financing religious organizations, which is known to be one of the features of a confessional state.

A general look at the practical signs of a disrespectful attitude to particular rules establishing the institutional relations between the state and churches allows for the conclusions that the *de iure* and *de facto* states in the sphere of the religious order do not overlap and the real model of the state-church relations resembles – at the very best – a very friendly

[22] Cf. T.J. Zieliński, *Regulacja stosunków między państwem a związkami wyznaniowymi w trybie art. 25 ust. 5 Konstytucji RP*, „Państwo i Prawo" 2003, No. 7, pp. 51 ff.

separationis ecclesiae et status. Speaking of the state-church relations more straightforwardly, the expressions that are used include a semi-religious state, a religiously involved state, an indifferent state, a *de facto* religious state, or – finally – a state oscillating around religiosity[23]. Nevertheless, it needs to be explained that all these expressions refer to the practice of religious relations. On the level of constitutional decisions, Poland corresponds to the standards of a secular state, respecting – in the area of institutional relations – equality of all religious associations, their autonomy and independence and a contractual way of settling their relations with the state, which is, additionally, impartial in the sphere of religious and ideological beliefs. In the individual dimension, on the other hand, the freedoms of conscience and religion are guaranteed, which is the *minimum minimorum* of a democratic separation identifying the secular form of the state. Of key importance for the ideological identification of the character of the state is certainly the principle proclaiming the equality of churches and other religious organizations as well as the norm defining the state as impartial. The former can be treated in the Polish conditions as a substitute form of the separation between the state and the church, while the other should be perceived as the most important (besides the principle of individual and collective religious freedom) element of a secular state. The *de lege fundamentali lata* secular form is slightly broken or – to use more delicate words – infringed by the religious expressions in the Preamble but the direction of the state-church relations, which clearly goes towards religiosity, is ultimately settled by the practice, which disturbingly deviates from the state postulated by the constituting power.

Abstract

The text is about the constitutional foundations of the State's policy towards the Church in Poland after 1989. It analyses the political and social determinants of the currently binding legal regulations indicating the State-Church relationship, their content and the way constitutional regulations referring to the issue of religion are applied. All the reflections are presented in the context of the question about the secularity of the relationship between the State and the Church.

[23] It can be noticed that besides the indicated principles, the principle of autonomy and independence of the state and churches is also infringed. Cf. M. Pietrzak, *Prawo kanoniczne w polskim systemie prawnym*, „Państwo i Prawo" 2006, No. 8, pp. 16 ff.

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