

Decision

dated 30 January 1991 (K. 11/90)

The Constitutional Tribunal sitting with the bench composed of the Chairman and Vice-President of the Constitutional Tribunal, Leonard Łukaszuk and Judges: Czesław Bakalarski (Reporting Judge), Tomasz Dybowski, Kazimierz Działocha, Antoni Filcek, Henryk Groszyk, Wojciech Łączkowski (Reporting Judge), Maria Łabor-Soroka, Remigiusz Orzechowski, Mieczysław Tyczka, Janina Zakrzewska, Andrzej Zoll.

(...)

held

1) that the Instructions issued by the Minister of National Education dated 3 August 1990 concerning the reinstatement of religious instruction in schools in the 1990/91 school year and the Instructions issued by the Minister of National Education dated 24 August 1990 concerning the reinstatement of religious instruction in schools in the 1990/91 school year laying down the principles of co-operation with Churches and Religious Organizations except for the Roman Catholic Church do not contravene article 2 of the System of Education Development Act dated 15 July 1961 (Journal of Laws, Number 32, Item 160 as amended),

2) that the Instructions issued by the Minister of National Education dated 3 August 1990 conform with article 18, section 3, and article 19, section 1 of the Act dated 17 May 1989 on the Relationship of the State to the Roman Catholic Church in the Republic of Poland (Journal of Laws, Number 29, Item 154 as amended),

3) that both the above-named Instructions of the Minister of National Education conform with articles 1, 3 and 67, section 2, and article 82, section 2 of the Constitution of the Republic of Poland as well as with article 2, sub-section 4 of the Act dated 17 May 1989 on Guarantees of Freedom of Conscience and Religion (Journal of Laws, Number 29, Item 15 5 as amended),

4) that the first paragraphs of the cited Instructions of the Minister of National Education conform with article 2, sub-section 5 and article 10, section 1 of the Act dated 17 May 1989 on Guarantees of Freedom of Conscience and Religion (Journal of Laws, Number 29, Item 155 as amended) as well as articles 1, 3 and 82, section 1 of the Constitution of the Republic of Poland,

5) that paragraph 4 of the Minister of National Education's Instructions dated 3 August 1990 and sub-section 5 of the Minister of National Education's Instructions dated 24 August 1990 conform with article 10, section 2 of the Act dated 17 May 1989 on Guarantees of Freedom of Conscience and Religion and article 1 and 3 of the Constitution of the Republic of Poland,

6) that paragraph 4 of the Minister of National Education's Instructions dated 3 August 1990 and sub-section 7 of the Minister of National Education's Instructions dated 24 August 1990 do not contravene article 9, sections 1 and 2, and article 23, section 1, sub-section 4 of the Teacher's Charter Act dated 23 January 1982 (Journal of Laws, Number 3, Item 19 as amended) and conform with articles 1 and 3 of the Constitution of the Republic of Poland.

Reasoning

(...)

A. For the consideration of the petitions submitted by the Commissioner for Citizens' Rights it is of vital importance to determine whether the contested Instructions conform with article 2 of the System of Education Development Act dated 15 July 1961. The reason being that it is only with this provision that the Commissioner for Citizens' Rights interprets article 19, section 1 of the Act dated 17 May 1989 on the Relationship of the State to the Roman Catholic Church in his petition of 16 August 1990' and it is mainly with the aid of this provision that he attempts to show, in his petition of 28 August 1990, the unlawfulness of the Minister of National Education's Instruction dated 24 August 1990.

At the hearing on 29 January 1991, the Commissioner for Citizens' Rights expanded his arguments in this respect by citing additionally article 10, section 1 of the Act dated 17 May 1989 on Guarantees of Freedom of Conscience and Religion. The Constitutional Tribunal does not share this position.

The said provision, speaking of the secularity and neutrality of the State, corresponds with the first sentence of article 2 of the System of Education Development Act dated 15 July 1961 speaking of the secularity of schools. In this respect, neither provision can serve as a premise for a conclusion that in state schools no teaching of religion by representatives of particular churches or religious organizations may take place. Given the fact that voluntary religious instruction, as an internal matter of churches, is provided by catechists delegated – by the church authorities and in accordance with syllabi drawn up by the churches, while state curricula are not permeated with religious ideas, one may not speak of a violation of the secularity of schools or of the State's secularity and neutrality. What is more, secularity and neutrality may serve neither as grounds for introducing obligatory religious instruction to primary schools nor as a justification of a ban on such instruction if interested citizens wish it. This is the true meaning of the State's secularity and neutrality. A different interpretation of these concepts would not mean neutrality but interference by the State with freedom of conscience and religion of citizens. This understanding of secularity and neutrality follows from semantic premises and from a systematic interpretation which, in the contemporary Republic of Poland, obviously differs from the interpretation of secularity made in the times of the People's Republic of Poland, specifically as illustrated in the cited Act dated 15 July 1961. Finally, the interpretation adopted by the Constitutional Tribunal agrees with a similar understanding of the concepts of secularity, neutrality and separation of Church and State in many European democratic countries.

Wherefore, in order to resolve the question at hand, the second sentence of article 2 of the cited Act dated 15 July 1961 on the System of Education Development is of vital importance. This sentence says that all instruction and education in schools is to be secular.

The question should be considered separately with respect to the Instructions dated 3 August 1990 referring to the teaching of religion by the Roman Catholic Church and separately with respect to the Instructions dated 24 August 1990 concerning the teaching of religion by other Churches and Religious Organizations.

a) As far as the instructions dated 3 August 1990 are concerned, it is particularly necessary to explain the relationship between article 19, section 1 of the Act dated 17 May 1989 and article 2 of the Act dated 1961 (second sentence). It is this relationship that determines the legality or illegality of the Minister of National Education's Instructions dated 3 August 1990.

Three issues should be discussed here.

1. Article 4, section 1 of the Act dated 17 May 1989 on the Relationship of the State to the Catholic Church rules that the Joint Committee of the Government and the Conference of

the Polish Episcopate shall entertain „questions of interpretation and enforcement of this Act.” The Joint Committee interprets article 19 of the said Act literally, i.e. in a way that facilitates religious instruction not only in parish catechization facilities but also in other places upon permission from their administrators. The person authorized to make classrooms in state schools available is the Minister of National Education who „agreed in the Instructions concerning the reinstatement of religious instruction in schools in the 1990/91 school year dated 3 August 1990” (this is a quotation from a letter written by the Joint Committee of the Government and the Episcopate on 29 December 1990). The above interpretation by the Joint Committee indicates the real intention of the lawmaker who drafted the 1989 Act together with the Joint Committee and granted the Committee the right to interpret the Act (article 4, section 1).

The Constitutional Tribunal shares the view of the Joint Committee presented above.

2. Against this background, it is necessary – in the opinion of the Constitutional Tribunal – to consider whether the Minister of National Education’s Instructions contravene article 2, the second sentence of the Act dated 15 July 1961. This question is settled by article 3, section 2 of the cited Act dated 17 May 1989 which reads as follows: „In matters relating to the Church, not regulated herein, universally binding legal provisions shall be applied, provided that they do not contravene the principles following hereinafter” (...) If then, article 2, second sentence of the Act dated 15 July 1961 were not to allow – following the interpretation made by the Commissioner for Citizens' Rights – voluntary religious instruction, according to the wishes of those interested, in classrooms at the Minister of National Education’s disposal, it must be accepted that this provision does not apply to the case in hand. The reason being that it contravenes the principles defined in the cited Act dated 17 May 1989, in particular article 19, section 1, in connection with article 18, section 1.

3. In this situation, one may cite only as an auxiliary means of support the interpretation following from the principle that „a later statute derogates an earlier one „ This leads to the conclusion that the right to teach religion in classrooms at the Minister of National Education’s disposal following from the Act dated 17 May 1989 cannot be restricted by a statute dating back to 1961.

Therefore, one must observe that the ability to teach religion mentioned in the Instructions dated 3 August 1990 was first created by the Act dated 17 May 1989 on the Relationship of the State to the Roman Catholic Church and not by the Minister of National Education’s Instructions.

b) A slightly different argument should be used when dealing with the allegation that the Minister of National Education’s Instructions dated 24 August 1990 do not conform to article 2, the second sentence of the Act dated 15 July 1961. These Instructions apply to other Churches and Religious Organizations besides the Roman Catholic Church. That is why one may not cite the provisions of the above-mentioned Act dated 17 May 1989 on the Relationship of the State to the Roman Catholic Church. The problem should be dealt with in relation to the Act dated 17 May 1989 on the Guarantees of Freedom of Conscience and Religion (Journal of Laws, Number 29, Item 155).

Article 20, section 2 of the said Act includes a provision that the teaching of religion to children and adolescents „is organized, according to a syllabus drawn up by the authorities of a church or a religious organization, in catechization facilities located in churches, meeting houses and other rooms provided for that purpose by a person authorized to dispose of them” (...): This provision, together with article 20, section 1 of the said Act providing that „Churches and other religious organizations may teach religion to children and adolescents and raise them in accordance with religious principles pursuant to the wishes of their parents

or legal guardians, introduces similar solutions to those enacted by the Act on the Relationship of the State to the Roman Catholic Church: Thus, also in respect to matters covered by the Minister of National Education's Instructions dated 24 August 1990; the allegation made by the Commissioner for Citizens' Rights that the Instructions contravene article 2 of the Act dated 15 July 1961 must be deemed unfounded. Regardless of the interpretation following from the principle that a later statute derogates an earlier one, the need to treat the Instructions dated 24 August 1990 and the Instructions dated 3 August 1990 concerning the Roman Catholic Church in the same manner follows from article 67, section 2 of the Constitution of the Republic of Poland in connection with article 9, section 2, sub-section 3 of the Act dated 17 May 1989 on the Guarantees of Freedom of Conscience and Religion by virtue of which the following principle is in force: „all churches and religious organizations shall enjoy equal rights regardless of their legal status.” The principle of equality ensures that other Churches and Religious Organizations besides the Roman Catholic Church, despite the fact that there is no similar statute, as yet, to that on the Relationship of the State to the Roman Catholic Church relating to them, have the same rights also in respect to teaching religion in accordance with the parents' will: Given the fact that the opportunity to teach religion, mentioned in the Instructions dated 24 August 1990, follows from the cited Act on the Guarantees of Freedom of Conscience and Religion, an allegation that the said Instructions intrude upon matters reserved to a statute cannot stand.

B. The remaining allegations contained in both petitions submitted by the Commissioner for Citizens' Rights are not of primary importance judging by the arguments cited to substantiate them and have been put forward – in the own words of the Commissioner for Citizens' Rights „only for the sake of support.” The following two allegations are meant here:

a) the Contradiction between the two sets of Instructions issued by the Minister of National Education (dated 3 August 1990 and 24 August 1990) and article 2, sub-section 4 of the Act dated 17 May 1989 on the Guarantees of Freedom of Conscience and Religion in connection with article 67, section 2 of the Constitution,

b) the Contradiction between sub-section 1 of the two sets of Instructions and article 2, sub-section 5 of the above-named Act whereby article 82, section 1 of the Constitution is violated.

As far as the first allegation is concerned, it is hardly intelligible, all the more so since it has been substantiated in a manner making it difficult to understand. The two Instructions not only do not contravene the rules of law cited in the petition, but, on the contrary, the said rules of law are reflected in the Instructions. Both Instructions assert the right of citizens to bring up children in accordance with the parents' beliefs in relation to religion, which is mentioned in article 2, subsection 4 of the Act dated 17 May 1989 on the Guarantees of Freedom of Conscience and Religion. The Instructions, considered jointly, guarantee citizens equal rights to religious instruction, regardless of their denomination, which is mentioned in article 67, section 2 of the Constitution of the Republic of Poland.

In his second petition (dated 28 August 1990), the Commissioner for Citizens' Rights, while continuing to support the allegation discussed here, suggests that the range of persons to whom the two Instructions apply leaves out non-Christians. The Commissioner for Citizens' Rights justifies his claim by deduction *a contrario* citing sub-section 12 of the Instructions dated 24 August 1990. The said paragraph says: „In classrooms and other rooms in schools a cross may be displayed. In schools, a prayer before and after classes may be introduced. The Headmaster, knowing his or her environment, shall decide whether to touch this issue at all.” The Instructions continue: „In multi-denominational classes, individual prayer in silence may

be introduced or a common text acceptable to all denominations may be used. In any case, prayer in classrooms requires special tact and delicateness from the teachers as well attention to the situation of students belonging to other denominations and non-believers. Prayer in school cannot be allowed to become a source of conflict or a feeling of discrimination against any persons. Children adhering to other religions or having non-believing parents may not be made to say prayers” (boldface type inserted by the Constitutional Tribunal). The foregoing text, cited by the Commissioner for Citizens' Rights, as well as a list of religions submitted by the Minister of National Education do not bear out in the least the claim that only Christian religions are meant by it. Of course, when the Cross is mentioned as a symbol, Christian religions are meant. However, the text speaks only of the possibility of displaying a cross making it dependent on a number of conditions, which testifies to the demonstration of consideration for other denominations and non-believers. The text is so abundantly clear in this respect that it is hardly possible to come up with another interpretation. Additionally, it has to be noted that the opportunity of displaying a cross or saying a prayer was not introduced by the Instructions issued by the Minister of National Education. It follows unequivocally from article 15, section 2 of the Act dated 17 May 1989 on the Relationship of the State to the Roman Catholic Church (Journal of Laws, Number 29, Item 154 amended by the Journal of Laws, 1990, Number 51, Item 297). The allegation that the first paragraphs of both Instructions contradict article 2, sub-section 5 of the Act on the Guarantees of Freedom of Conscience and Religion and, consequently, violate article 82, section 1 of the Constitution is based on presumptions. The petitioner claims (identically in both petitions); „The Instructions (sub-section 1) provide for the parents (or the adolescents themselves) to make a declaration of will concerning participation in religious lessons.” It is from this claim that the Commissioner for Citizens' Rights draws the conclusion that „by this fact, *per facta concludentia*, article 2 of the Act on the Guarantees of Freedom of Conscience and Religion, providing for the privacy („imperviousness”) of the religious sphere, is circumvented.” This more precisely defines – as the Commissioner for Citizens' Rights claims – the rule of law contained in article 82, section 1 of the Constitution which has been „abridged by a non-statutory enactment.”

Besides the fact that the breadth of this rule has been derived from article 2, sub-section 5 of the cited Act, it must be said that the above assertion and conclusion reached by the Commissioner for Citizens' Rights is erroneous. First and foremost, it is inaccurate to claim out of the context of the Instructions that „it (sub-section 1) provides for the parents (or the adolescents themselves) to make a declaration of will concerning the participation in religious lessons.” What is missing from this assertion is an explanation of utmost importance for the case in hand that making such declarations of will is voluntary. The voluntary nature follows from the first sentence of subsection 1 (in both sets of Instructions) which states that religious lessons will be offered to those students „whose parents wish it.” It is obvious that only in such cases „willingness to take advantage of religious lessons may be expressed by parents or students” (secondary school students). These are the exact words of the Minister of National Education’s Instructions dated 3 August 1990. It follows, anyway, from the whole context of both Instructions and from the subsequent explanation. The author of these Instructions repeatedly and strongly stresses their voluntary nature emphasizing on many occasions the need for tact and delicateness. Hence, one can hardly find any duties imposed on citizens by any of the Instructions. With the claim of the Commissioner for Citizens' Rights being inaccurate, the conclusion drawn by the Commissioner for Citizens' Rights from that claim is wrong, too. It cannot be plausibly claimed that article 2, sub-section 5 of the Act on the Guarantees of Freedom of Conscience and Religion and, consequently, article 82, section 1 of the Constitution has been violated. A literal reading of both Instructions of the Minister of National Education does not warrant such a conclusion. The statutory right to remain silent

may not be treated as a command to remain silent, to which the interpretation made by the Commissioner for Citizens' Rights leads. Citizens (including elder students) may, according to the Instructions, freely enjoy the freedom of conscience and religion provided for in article 82, section 1 of the Constitution (which also says „Citizens shall not be prevented from participating in religious activities and rites”) and in article 2, sub-section 5 of the Act on the Guarantees of Freedom of Conscience and Religion which says that citizens may remain silent on their religion or beliefs. Furthermore, the Instructions conform with article 1, section 2; in connection with article 3, section 1 of the above-named Act dated 17 May 1989 on, the Guarantees of Freedom of Conscience and Religion. These provisions provide that the „freedom of conscience and religion includes the freedom to choose religion or beliefs and to give expression to them individually and collectively, in private and in public” (article 1, section 2). „Giving expression, individually or collectively, to one’s religion or beliefs may be subject only to those statutory restrictions which are necessary to maintain public safety and order or public health and morality or the fundamental rights and freedoms of other persons” (article 3, section 1). Both Instructions issued by the Minister of National Education rephrase only the contents of the above provisions for use by the administration subordinated to the Minister. It is also wrong to conclude that signing up for religion classes is equivalent to a declaration disclosing one’s religious convictions. It is quite imaginable for a non-believing person to send a child to religion classes and, conversely, for a believing person not to do so. The statutory right to remain silent may not be treated as a command to remain silent, to which the interpretation made by the Commissioner for Citizens' Rights leads.

To recapitulate, it must be observed that the contested Instructions issued by the Minister of National Education not only do not violate article 2, subsections 4 and 5 of the Act on the Guarantees of Freedom of Conscience and Religion in connection with article 67, section 2, and article 82; section 1 of the Constitution, but in various ways and on many occasions stress these rules of law relying also on other provisions of the above-named Act that have not been cited by the Commissioner for Citizens' Rights. Thus, also in this respect, the allegation that the Minister of National Education’s Instructions encroach on matters to be regulated solely by statute is unfounded. On the contrary, the Instructions provide an organizational framework for all interested parties to express their opinion on the opportunity for teaching religion brought about by the statute. It must also be stressed that this opportunity follows from natural and inalienable human rights and freedoms, which has already found expression in international law. It is this law that is referred to in the preambles to both of the cited Acts dated 17 May 1989.

C. Allegations submitted additionally at the hearing do not change the substance of the reasoning contained in the petitions submitted in writing. The Commissioner for Citizens' Rights quoted other provisions that – in the opinion of the Commissioner for Citizens' Rights – had been violated by both of the Minister of National Education’s Instructions. These provisions were previously analyzed in part by the Constitutional Tribunal, prior to the mention made by the Commissioner for Citizens' Rights. This applies to the allegation of violating article 23, section 1, sub-section 4 of the Teacher’s Charter. The Constitutional Tribunal states that the said provision does not apply to this case as it refers only to tenured teachers. Catechists, however, cannot be tenured because in their case statutory requirements are not met, e.g. unlimited employment. (article 10, section 2 of the Teacher’s Charter).

As far as the allegation of violating article 9, sections 1 and 2 of the Teacher’s Charter (concerning qualification requirements) is concerned, it follows from explanations supplied by the Minister of National Education that the qualifications of religion teachers are not only not lower than the average qualifications held by other teachers, but are frequently higher. In addition, as religious instruction is an internal affair of churches, the decisions concerning

catechists and their qualifications are left to the governing bodies of these churches. This allegation is incongruent with the allegation of integrating religious instruction with teaching in conformity with the state curriculum.

Neither has the Constitutional Tribunal found any evidence of violating the separation of Church and State (article 82, section 2 of the Constitution) nor the State's secularity and neutrality, nor the related principle of not subsidizing churches (article 10, sections 1 and 2 of the Act on the Guarantees of Freedom of Conscience and Religion). The Instructions issued by the Minister of National Education do not violate these principles because they only make classrooms available on specific terms, which conforms – as it has already been shown – with both Acts dated 17 May 1989. The Tribunal has not found any arguments that would justify the claim that the reinstatement of voluntary religious instruction in schools means its integration with scholastic curricula. Finally, the payment of salaries to religious teachers cannot be identified with subsidizing or funding churches or other religious organizations mentioned in both of the Acts dated 17 May 1989.

D. The Constitutional Tribunal, while entertaining the petition made by the Commissioner for Citizens' Rights concerning the manner whereby the contested Instructions were issued by the Minister of National Education, took into account the law as it had been before the enactment of both Acts dated 17 May 1989 as well as the actual situation prior to the issuance of the Instructions in relation to the constitutional rights of citizens following from article 82, section 1 of the Constitution. The Constitutional Tribunal also considered the law and relevant facts which developed or occurred after the passage of the cited Acts and Instructions.

The Constitutional Tribunal has arrived at the conclusion that the law and actual situation in the past, molded by article 2 of the Act dated 15 July 1961 on the Development of the System of Education (esp. the second sentence) and administrative acts which – justly pointed out by the Commissioner for Citizens' Rights – illegally and dishonorably eliminated religious instruction from schools, considerably abridged the freedom of conscience and religion of citizens guaranteed by the Constitution and made it more difficult for churches and other religious organizations to fulfill their functions (article 82, section 2 of the Constitution). The abridgements were manifested, for instance, by territorial and temporal separation of religious teaching from teaching in schools. This caused so many difficulties for school children (esp. in rural areas) to obtain religious instruction that in many cases they were forced to forgo studying religion – against their own will and the will of their parents. A violation of civil rights guaranteed by article 82, section 1 of the Constitution was evident. The cited Acts of 17 May 1989 and the contested Instructions, by making it possible to receive religious instruction in school classrooms, removed the above-named difficulties thus ensuring the enforcement of article 82, section 1 of the Constitution.

E. While deciding the issue in hand, one may not ignore the fact that article 2 of the Act dated 15 July 1961 on the Development of the System of Education contravenes the instruments of international law or the international declarations ratified by Poland. These instruments demand that Signatory States respect the inalienable and natural rights enjoyed by every human being including the right to freely provide children with religious and moral instruction in accordance with one's own convictions and beliefs. The Contracting Parties took on a duty to enforce these rights and respect the freedom of parents and legal guardians. Any statute that would ban or command teaching religion in schools against the will of parents does not correspond to the standards of international law. This follows for instance from:

- article 18, section 1 of the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (Number 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (ratified by Poland on 3 March 1977),

- article 13, section 3 of the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (Number 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, (ratified by Poland on 3 March 1977),

- article 18 of the Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

- Sec. VII of the Helsinki Final Act, adopted on 1 August 1975,.

- Principle 10 of the Concluding Document of the Madrid Meeting of the CSCE countries of 6 September 1983,

- Sec. 11, 13f and 16 (whole) of the Final Act of the Vienna Meeting of the CSCE countries of 19 January 1989.

The above-cited instruments impose upon the States the duty of protecting human rights and freedoms. Therefore, the State cannot shirk the duty of ensuring religious education and in such a place as the parents may wish. The State is not relieved of this duty even when, due to its negligence, religious education – for want of other possibilities – is provided as a temporary measure by a church institution on its own premises. It is enough to quote here the latest international document, adopted a year ago with Poland's participation, namely the „Vienna Document” cited above. Under it, the Republic of Poland assumed an obligation to „encourage taking up the questions of the development and protection of human rights and fundamental freedoms in schools and other educational institutions” (sec. 13f).

(...)