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THE PRISONER'S RIGHT TO FREEDOM OF CONSCIENCE AND RELIGION IN THE EUROPEAN SYSTEM OF HUMAN RIGHTS PROTECTION

The implementation of standards of human rights protection in places of imprisonment is an issue of major importance for the policy of the State. The problem of individuals remanded in penitentiary centres may seem of little relevance given the generally good opinion about the high standards maintained in European prisons.

1. The prisoner as a subject of human rights

According to Art. 5, point 2 of the *American Convention on Human Rights*,¹ all persons deprived of their liberty should be treated with respect for the inherent dignity of the human person. According to the European Court of Human Rights, “prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty.”² Being a human being is the foundation of human rights, “man is man, and precisely because he is man he has rights which are proclaimed and protected by law” [Orzeszyna 2013, 17]. Even the most notorious criminal deserves human treatment because he is a human being. It should be borne in mind that everyone deserves the so-called second chance, in other words, an opportunity to improve, and the main goal of penitentiary facilities is the social reintegration of detainees.

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¹ More on the Convention see: *American Convention on Human Rights* (22.11.1969), www.refworld.org/docid/3ae6b36510.html [accessed: 3.01.2019].

² Judgement of the European Court of Human Rights of 6 October 2005, Grand Chamber, *Case of Hirst v. the United Kingdom*, Application No. 74025/01, para. 69.

2. The prisoner's right to freedom of conscience and religion

Every prisoner has the important right to be able to freely exercise his free thought, conscience and religion. The fundamental standard of this right is expressed in Art. 18 of the *Universal Declaration of Human Rights*, which says that “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”³ The *Universal Declaration of Human Rights* concerns the possibility of manifesting religious beliefs both in the public sphere and privately, which demonstrates a positive interpretation of religious freedom [Krukowski 2000, 211]. In addition, this normative act assigned a uniform name to the right: “the right to freedom of thought, conscience and religion” [Łopatka 1995, 8], later used in a majority of normative texts [Płoski 2009, 59]. The provision has a nearly identical wording in Art. 18 of the *International Covenant on Civil and Political Rights*,⁴ stating that “everyone shall have the right to freedom of thought, conscience and religion.” The Covenant emphasises that no one will be subject to coercion which would restrict his freedom of religion or acceptance of religion [Michalska 1982, 166].

Similar solutions regarding the freedom of thought, conscience and religion as well as restrictions on their exercise were adopted in the UN Declaration.⁵ In Art. 1 of the Declaration, the General Assembly regulates the elimination of all forms of intolerance and discrimination based on religion or religious convictions.

In the European system, freedoms of conscience and religion apply to everyone, including those serving a custodial sentence. Art. 9 of the

³ *Universal Declaration of Human Rights*, adopted by the UN General Assembly on 10 December 1948, doc. 217 A (III).

⁴ *International Covenant on Civil and Political Rights*, opened for signature at New York on 16 December 1966, Journal of Laws of 1977, No. 38, item 167.

⁵ *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, adopted by the UN General Assembly on 25 November 1981, www.ohchr.org/EN/ProfessionalInterest/Pages/ReligionOrBelief.aspx [accessed: 3.01.2019].

Convention for the Protection of Human Rights and Fundamental Freedoms acknowledges that “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief in worship, teaching, practice and observance. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, the protection of law and order, health and morals or the protection of the rights and freedoms of others.”⁶ The norms assume the perspective of individual internal autonomy and impart an absolute character to it, but its external relationship has the nature of a distinct law [Garlicki 2010, 556].

3. Penitentiary rules

The International Penal and Penitentiary Commission established some universal rules for the treatment of criminals. The League of Nations developed a set of rules in 1934. This project was continued after World War II under the supervision of the UN. Following a review of the 1943 draft the First UN Congress on the Prevention of Crime and the Treatment of Offenders, which was held in Geneva in 1955, it unanimously adopted new minimum rules on 30 August 1955 [Płoski 2009, 66]. The obligations of the public authorities take on a special character with regard to individuals remanded in penitentiary institutions. The State is obliged to enable detainees to attend services and communicate with a cleric.⁷ Only disciplinary and safety considerations can justify the imposition of restrictions [Garlicki 2010, 570].

3.1. Participation in religious events

A prominent example of restrictions on freedom applied on grounds of security and public order with regard to a prisoner is an application against

⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, made at Rome on 4 November 1950, Journal of Laws of 1993, No. 61, item 284 as amended.

⁷ ECHR Judgement of 29 April 2003, Chamber (Section IV), *Case of Poltoratskiy v. Ukraine*, application No. 38812/97, para. 168.

the United Kingdom. The applicant, who was serving a sentence for murder and who posed a threat to other inmates, started rows exposing himself to their hostility. He served his sentence in a separate cell and was not allowed to attend the services because the prison authorities were afraid that he might interfere with the service and cause unrest among the detainees. The Commission considered it appropriate to restrict religious freedom for reasons of security and public order. Relevant in this case was the fact that the prison authorities made it possible for the applicant to be visited regularly by a prison chaplain, in an attempt to guarantee religious freedom as far as possible.⁸

3.2. The obligation to wear penitentiary clothes

It would be interesting to examine the Convention in terms of its compatibility with the obligation to wear a prison uniform and the obligation of work. We should qualify the complaint of the detainees that the requirement to wear a prison uniform bearing the insignia of the United Kingdom⁹ violates their freedom of opinion and conscience. To justify their position they stated they were ‘political prisoners’ or ‘prisoners of war’ and as such they were not supposed to be subjected to the same treatment as other prisoners who had been convicted of ‘ordinary’ criminal offences. The Commission, however, considered that the right to a free manifestation of religion or beliefs could not be interpreted as inclusive of the right of the applicants to wear their own clothes; also the restriction imposed on prisoners in general was justified by the need to protect society from crime [Warchałowski 2004, 167]. The Polish legal system is more modern. Art. 107 of the *Executive Penal Code* provides that “those convicted of a crime committed for religious, political or ideological beliefs serve their sentences separately from those convicted for other offences and have the right to wear their own clothes, underwear and shoes, and cannot be obligated to work.”¹⁰ This case illustrates the influence of Strasbourg jurisprudence on further regulations of the Polish law [Płoski 2009, 73].

⁸ ECHR Application of 7 March 1985, *Case of Childers v. United Kingdom*, No. 9813/82.

⁹ ECHR Resolution in the *Case of McFeely and Others v. United Kingdom*.

¹⁰ Act of 6 June 1997, *the Executive Penal Code*, Journal of Laws of 2019, item 676 as amended [henceforth cited as: EPC].

3.3. Manifestation of religious beliefs

The ban on wearing a beard or the use of religious objects may under certain circumstances be considered as compatible with the provisions of the Convention. This is exemplified by the allegation that the prison authorities opposed the freedom to manifest religion by denying the applicant permission to grow a Chinese beard, preventing him from practising yoga, and denying him the right to wear a rosary. In fact, the applicant was free to exercise yoga on condition that it did not interfere with prison discipline. This allegation was found to be unjustified by the Commission. As regards the refusal to permit the applicant to grow a Chinese beard, the Commission took the view that the need for the applicant to be recognisable justified the restriction of his freedom to demonstrate his religion. In response to the objection that the right to have a rosary was denied, it was considered that, even though the rosary is an essential element of the proper profession of the Buddhist faith, such a restriction is justifiable by the necessity to protect public order, and especially the safety of the prisoner as well as the maintenance of discipline in the prison.¹¹ It is possible that in certain situations an improper use of the rosary might endanger security in the facility, but the standpoint of the Commission endorsing the refusal to allow the prisoner to have a rosary seems too oppressive [Warchałowski 2004, 173].

3.4. The right to health

Another premise justifying interference in the right to freedom of conscience and religion is health-related. Although this circumstance is the least controversial and does not give rise to doubts of an axiological nature, its definition creates particular difficulty [Płoski 2009, 74]. It is assumed that these premises may sanction the limitation of certain rights in order to obviate a serious threat to public health or that of individual people, to prevent diseases or injuries, or to ensure proper care of the sick and injured [Warchałowski 2004, 173]. This category includes a complaint filed by an Indian Sikh against the United Kingdom as he refused to clean his prison cell stating that as a person of a higher caste he could not – for religious

¹¹ Application No. 1753/63, Decision of 15 February 1965, in: Jasudowicz 2001, 178.

reasons – humble himself to do cleaning work. The Commission concluded that Art. 9 of the ECHR had not been infringed. The restriction on the manifestation of religious beliefs in this case was justified by the protection of the applicant’s health and that of other inmates.¹²

In light of the above, it becomes necessary to find a compromise. An interpretation of the Convention should take into account the recommendations of the European Prison Rules [Garlicki 2010, 570].

The Polish Constitution regulated the right to freedom of conscience and religion both for individuals and at the collective level. The Polish basic law broke with the traditional Polish terminology through the use of the notion of ‘freedom of conscience and religion’. Nor is the Constitution compatible with the nomenclature of international agreements [Pietrzak 1997, 181]. The issue is all the more important because the scope of the term ‘freedom of religion’ is narrower than the denotation of ‘freedom of religion’ [Płoski 2009, 63].

The legal system in Poland benefits greatly from the *Concordat between the Holy See and the Republic of Poland*, which normalises the area of religious ministry and worship in prisons.¹³ In Art. 17, the Concordat parties stipulate that “the Republic of Poland shall ensure conditions for the exercise of religious practices, religious ministry, and health and social care of persons remanded in penitentiary, educational and resocialization institutions, as well as other institutions and facilities of this kind.” The Concordat provides examples of entitlements available to individuals detained in prisons. These are in particular: assurance of the opportunity to attend Holy Mass on Sundays and holy days, catechesis and spiritual retreats, the use of individual religious assistance in compliance with the purpose of their stay in these institutions. To enable those deprived of their liberty to exercise their rights, a diocesan bishop sends chaplains to relevant institutions with whom they conclude appropriate agreements [Płoski 2009, 62].

¹² Application No. 8231/78, Decision of 6 March 1982, in: Jasudowicz 2001, 230.

¹³ *Concordat between the Holy See and the Republic of Poland*, signed at Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

In the Polish legislation, a convicted person has the right to exercise his or her religious freedom. This is guaranteed by Art. 102, point 3 EPC, in which this right is captured as one of the fundamental human rights [Szymanowski 1999, 250]. This general principle is elaborated by and large in Art. 106 EPC. This right is also addressed by other provisions of this code. Art. 104 EPC stipulates that “the exercise of the rights vested in a convicted person shall take place in a manner that does not infringe the rights of other persons and does not interfere with the order established in the prison.” We also read in Art. 106, para. 3 EPC that “the exercise of religious freedom shall not violate the principles of tolerance or interfere with the established order in prison.” There are also some regulations concerning the right of prisoners to possess books, written matter or objects necessary to perform religious practices, to benefit from religious assistance and to possess religious objects in their cells (Art. 106, para. 1 EPC).

Conclusion

A prisoner, by virtue of his or her humanity, enjoys human rights, just as any other human being does. However, such rights gain special significance since prisoners are individuals in special circumstances, whose liberty has been taken away. This means that not only are they forbidden to leave their place for a strictly defined period of time, but they are also subjected to special legal regimes, often disregarded by the national authorities. For this reason, the state apparatus may commit abuses in relation to persons deprived of their liberty. Individuals whose freedom has been taken away are dependent on state functionaries. Therefore, in order to counteract the negative consequences, the norms of universal, regional and national law provide for specific rights of incarcerated individuals. These are the following rights: to family life, to marry, to freely practice to practise religion, to satisfy one’s special eating habits and – most importantly – the right to be immune from torture.

State authorities are obliged to strictly observe the right associated with the sphere of beliefs and opinions. Persons deprived of their liberty should be given access to religious practices. They should be able to participate in religious services of their rite, have contact with a spiritual person, and

have the opportunity to keep objects of worship. However, the satisfaction of special eating habits can be a problem. Unfortunately, prisoners often make use of legal provisions related to the possibility of cultivating their religion. They ask to be given access to religious objects and then use them to commit proscribed acts. The frequent changes in legislation which do not keep up with the case law and doctrine of international law are not facilitating the exercise of those rights.

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The Prisoner's Right to Freedom of Conscience and Religion in the European System of Human Rights Protection

Summary

The article aims to present the prisoner's right to the freedom of conscience and religion in the European system of human rights. A detainee is a subject of special human rights because he or she is deprived of the right to liberty. Public authorities are obliged to strictly observe the law related to the sphere of convicts and their views. The right of people deprived of liberty is to exercise their free thought, conscience and religion. No one should be subjected to coercion which would limit their freedom of religion, except as stipulated by the legislator. Public authorities are obliged to provide prisoners with the opportunity to participate in religious events, to contact a priest, to manifest religious beliefs and to be administered medical care. Discipline and security issues may justify the imposition of restrictions of liberty on the grounds of security and public order. Taking advantage of religious freedom must not violate the principles of tolerance or disrupt the established order in prison.

Key words: human rights, rights of prisoners, European system of human rights, right to freedom of conscience and religion

Prawo więźnia do wolności sumienia i wyznania w europejskim systemie ochrony praw człowieka

Streszczenie

Artykuł ma na celu przedstawienie praw więźnia do wolności sumienia i wyznania w systemie europejskim praw człowieka. Osoba znajdująca się w miejscu detencji jest szczególnym podmiotem praw człowieka, ponieważ jest pozbawiona prawa do wolności. Władza publiczna ma obowiązek bezwzględnego przestrzegania prawa związanego ze sferą przekonań i poglądów więźnia. Prawem osoby pozbawionej wolności jest realizowanie jej swobodnej myśli, sumienia i wyznania. Nikt nie może podlegać przymusowi, który ograniczałby jego wolność wyznania lub przyjmowania religii, z wyjątkiem zastrzeżeń przewidzianych przez ustawodawcę. Władze publiczne zobowiązane są do zapewnienia więźniom możliwości uczestnictwa w wydarzeniach religijnych, kontaktu z osobą duchowną, uzewnętrzniania przekonań religijnych oraz zapewnienia opieki medycznej. Kwestie dyscypliny i bezpieczeństwa mogą powodować ograniczenie wolności ze względu na bezpieczeństwo i porządek publiczny. Korzystanie z wolności religijnej nie może naruszać zasad tolerancji ani zakłócać ustalonego porządku w zakładzie karnym.

Słowa kluczowe: prawa człowieka, prawa więźniów, system europejski praw człowieka, prawo do wolności sumienia i wyznania

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