

FREEDOM OF CONSCIENCE AND RELIGION IN PRIVATE SCHOOLS

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ABSTRACT

This study examines freedom of conscience and religion in private schools, which seems to lie outside the mainstream of discussions on the presence of religious symbols or, more broadly, religious acts in public spaces. First, the study explores the parallel historical formation of freedom of conscience/religion and the right to education. Then, the study sketches an outline of the sources of law guaranteeing these freedoms, focusing on the aspects common to European legal culture. Then, the subject and object of this freedom are discussed in the context of private schools. Selected case law is then examined to provide illustration. Finally, the study offers key general and de lege ferenda conclusions.

KEYWORDS

*religious freedom
freedom of conscience
private school
curriculum
worldview
pluralism*

1. Introduction

Freedom of conscience and religion is a fundamental human right. It can be enjoyed in various ways and at different stages of life. Education, in both public and private schools, is also basic in nature. The presence of religious symbols in public schools was an issue in the well-known case *S. Lautsi vs. Italy* tried before the European Court of Human Rights (ECHR); private schools were left on the margins of this dispute.² However, can this issue be limited to public schools? Are private schools *extraterritorial*? Compelling and practical

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2 | At the same time, the Italian government indicated that, when a person refuses to accept crosses in a public school, he or she may send the child to a private school; cf. *Lautsi v. Italy*, 3 November 2009, no 30814/06, § 37. In the context of ECHR jurisprudence, the doctrine is focused on public schools; cf. Abramowicz, 2015, p.11 and passim; Romanko, 2013, p.207 and passim; Stanisiz, 2016, p. 155 and passim; Szubtarski, 2016, p. 185 and passim; Torfs, 2016, p. 11 and passim.



issues arise concerning the freedom of conscience and religion in private schools in the broad sense. What are the limits of restrictions on this freedom in private schools? This issue can also be approached from the institutional side, by considering what a restriction on the freedom of private education looks like when freedom of conscience and religion is being abridged.

We are concerned with individual rights and their possible gradation: on the one hand, freedom of conscience and religion at the individual and institutional levels; on the other, the right to education. In European legal culture, freedom of conscience and religion and the right to education are both highly valued and protected.³ One can hypothesise that, although freedom of conscience and religion is not absolute and can be properly limited,⁴ any limitation thereof in private schools should be interpreted narrowly because of the gradation of values within the axiology recognised in European legal culture.

This study seeks to contribute to discussions concerning possible restrictions on freedom of conscience and religion in private schools. The analysis is confined to the European legal context (using the Polish legal order as an illustrative example) because of the limited framework of the article.

2. Historical outline of education and freedom of conscience and religion in Europe

The issue of freedom of conscience and religion in private schools is not new. Freedom of conscience and religion and the right to education are issues that have been shaped for centuries, and with very similar subjective and objective scopes. Thus, discussing them from a historical perspective is important.

Education is inseparable from the history of humans, who, as rational beings, pass knowledge on to others in order to survive and develop. The first organised form of education appeared in antiquity; interestingly, it was usually private (e.g. Plato's Academy).⁵ The idea of religious freedom, legally sanctioned via the Edict of Milan (313 CE), developed thereafter. After the fall of the Roman Empire, Christians created an organised system of education in Europe, which became unified (the requirement to use Latin and teach specific subjects facilitated scientific exchange and progress).

The first universities appeared in the Middle Ages, within the framework of functioning denominational states. They were the most highly organised educational element of a system subordinate to the Catholic Church. Over the years, lower-level schools were founded that were accessible to the wider public (e.g. parish schools). Education developed

3 | It must be remembered that their basis is the dignity which is the source of human rights, widely recognized in international and constitutional law, particularly in Europe; cf. Introduction to the Universal Declaration of Human Rights adopted in New York on December 10, 1948; introduction to the International Covenant on Civil and Political Rights opened for signature in New York on December 19, 1966; Introduction to the International Covenant on Economic, Social and Cultural Rights opened for signature in New York on December 19, 1966; preamble to the Convention on the Rights of the Child, adopted in New York on November 20, 1989.

4 | Schanda, 2015, p. 207.

5 | Cf. Orczyk, 2008.

not only in Europe but also on other continents, such as Asia (e.g. China). However, what is characteristic of Europe is the organised nature of education since the Middle Ages and the significant contribution made by religious communities to its development and functioning.⁶ The freedom of conscience and religion of believers attending schools run by their religious community was generally unlimited. Many of the schools founded by religious associations in centuries past were open to persons of other faiths (e.g. *Gymnasium Bonarum Artium* founded in Raków, Poland, by the Arians in 1602). The notion of a universal education system developed during the Enlightenment. The school system created by the Church was being abolished at that time; for example, many Catholic orders that had provided education were being dissolved. The secular school was part of the new model of a secular state, as was limited freedom of conscience and religion, at least institutionally. The desire to reduce, or even eliminate, private education appeared at a later stage in history. During the communist period, the functioning of private schools in Central and Eastern Europe was contrary to the political assumptions of the time. Communist states were secular and were hostile to religion.⁷

After communist regimes fell, a general process of legal normalisation took place in the countries of Central and Eastern Europe (as they adopted the standards of states with the rule of law), during which freedom of conscience and religion was restored and guaranteed in a broad sense, including the right to establish and run schools. The centuries-old achievements of religious communities in shaping Europe's education system were newly appreciated. The Catholic Church concluded many concordats guaranteeing the right to run schools (including universities).⁸ Interestingly, the Holy See

6 | As judge Bonello pointed out in a dissenting opinion to the judgment of the ECHR of March 18, 2011, no. 30814/06. in the famous case of *S. Lautsi*, the debate on the cross in public schools should begin by seeing its presence in Italian schools in its righteous perspective, since the Church provided the only education in Italy for many centuries. According to this judge's opinion, many, if not most, schools, colleges, universities, and other educational institutes in that country were founded, financed, or run by the Church or its members or branches; dissenting opinion of the judge G. Bonello to the judgment of the European Court of Human Rights *Lautsi [Grand Chamber] v. Italy* of 18 March 2011, no. 30814/06.

7 | Interestingly, there were a few exceptions, such as the Catholic University of Lublin in Poland; cf. Příbyl, Kříž, 2015, p. 139.

8 | For example, in accordance with Art. 14 sec. 1-2 of the concordat with Poland of July 28, 1993:

1. The Catholic Church has the right to establish and run educational and upbringing institutions, including kindergartens and schools of all kinds, in accordance with the provisions of canon law and in accordance with the principles specified by relevant laws. 2. These schools are governed by Polish law in carrying out the minimum curriculum for compulsory subjects and in issuing official forms. In carrying out the curriculum of other subjects, these schools follow the Church regulations. The public nature of these schools and institutions is determined by Polish law.

However, according to Art. 15 sec. 1-2 of the concordat:

1. The Republic of Poland guarantees the Catholic Church the right to freely establish and run higher education institutions, including universities, separate faculties and higher seminaries, as well as research institutes. 2. The legal status of the universities referred to in paragraph 1, as well as the procedure and scope of recognition by the State of ecclesiastical degrees and titles, and the legal status of Catholic theology faculties at state universities are regulated by agreements between the Government of the Republic of Poland and the Polish Episcopal Conference authorized by the Holy See.

Cf. also art. 10 of the concordat with Slovenia of May 24, 2004. AAS 98 (2006) p. 142 and *passim*. As noted by Warchałowski, contemporary concordats recognize the Church's right to establish and run schools at various levels (from kindergarten to university); cf. Warchałowski, 1998, p. 216.

even concluded a partial concordat with China on education and the right to run schools autonomously.⁹

Thus, the provenance of education is clearly private, and private education should be given space in a pluralistic education system, with due respect for the autonomy and independence of religious communities running such institutions, and for the freedom of conscience and religion of individuals. Religious associations have had a significant influence on the development of the education system. Freedom of conscience and religion and the right to education have very similar histories.¹⁰ The constitutions of modern European countries often refer in their preambles to their Christian heritage and tradition, which is important, *inter alia*, for the historical and functional interpretation of their regulations.¹¹

3. Outline of the sources of law protecting freedom of conscience and religion in the context of private schools

Freedom of conscience and religion is recognised in many normative acts.¹² The right to education is guaranteed at similar levels in the hierarchy of sources. In states with the rule of law, however, the law is preceded by an axiology recognised by society,¹³ consisting of values that are related and have an observable gradation. The value of freedom of conscience and religion ranks high in the hierarchy of values. For believers, eternal life is often more important than mortal life.¹⁴

9 | Pursuant to Art. 2 (A) of the concordat with China of December 2, 2011:

The Parties agree that both authorities, responsible for their own Higher Education System and for the Higher Education Institutions established or approved by the same authorities or otherwise considered as belonging to their systems, shall be independent and autonomous each within their field and adhering to the said principles shall closely cooperate among them. (AAS 105 (2013) 93-104)

This confirms the view emerging in the literature about the universal nature of the concordat, which can be considered when quantitative factors are of lesser importance (e.g. the number of followers in a given country); cf. Medina, 2020, p. 33.

10 | For example, according to judge Bonello, education and Christianity have almost become interchangeable concepts in Italy, and it is the absence of a crucifix in school that should be surprising, not its presence; cf. Dissenting opinion of the judge G. Bonello to the judgment of the European Court of Human Rights *Lautsi [Grand Chamber] v. Italy* of 18 March 2011, no. 30814/06.

11 | Cf. preamble to the Slovak constitution of September 1, 1992, preamble to the Polish constitution of April 2, 1997.

12 | Cf. Moravčíková, 2015, p. 37 and *passim*.

13 | As the Polish Constitutional Tribunal rightly noted in its judgment of 16 November 2011

[The] protection of fundamental rights has a high rank in the law of the European Union. [...] The consequence of the axiology of legal systems common to all Member States is that the EU law does not arise in a European space, that is abstract and free from the influence of the Member States and their communities. It is not created arbitrarily by the European institutions but is the result of joint actions by the Member States. (Judgment of the Polish Constitutional Tribunal of November 16, 2011, file ref. no. SK 45/09, Journal of Laws No. of 2011, No. 254, item 1530, OTK ZU 9A/2011/97)

14 | As pointed out by the ECHR in the judgment of May 25, 1993, *Kokkinakis v. Greece*, no. 14307/88, according to which freedom of religion is, in its religious dimension, one of the most important elements forming the identity of believers and their concept of life. According to the ECHR, pluralism, an inherent feature of a democratic society that has been fought for over centuries, depends on it.

As confirmed by the ECHR, freedom of thought, conscience, and religion is also a value for atheists, agnostics, sceptics, and people indifferent to faith.¹⁵ Education is also highly valued in Europe. It is quite typical for parents to strive to provide the best possible education for their children, while respecting the freedom of conscience and religion of other parents and their children. The constitution-maker should take this into account when creating a framework for public education, but also enable the proper functioning of private schools, giving parents and other adults the right to determine their educational path.¹⁶

It should therefore not be surprising that constitutional law includes universal guarantees of freedom of conscience and religion. There is also a guarantee of the right to education, which includes the right to run private schools and to study at such institutions.¹⁷ The right to education is universal in Europe. However, certain differences may appear when this law is compared with the freedom of conscience and religion and the specific model of the state–church relationship adopted in a country. For example,

15 | Kokkinakis v. Greece, May 25, 1993, no. 14307/88.

16 | Cf. Misztal, 2000.

17 | Interestingly, such guarantees can be found in various systems of church–state relations. For example, in Poland, pursuant to Art. 53 of the Constitution of April 2, 1997, religious freedom is protected on an individual basis; cf. also art. 6.1 of the Constitution of Holand of March 28, 1814; art. 19 of the Constitution of Belgium of February 7, 1831; art. 99 of the Constitution of Latvia of February 15, 1922; art. 44.2 1° of the Constitution of Ireland of July 1, 1937; art. 19 of the Constitution of Italy of December 27, 1947; art. 4 (1) of the Constitution of Germany of May 23, 1949; art. 18 of the Constitution of Cyprus of August 16, 1960; art. 40.1 of the Constitution of Malta of September 21, 1964; art. 41.1 of the Constitution of Portugal of April 2, 1976; art. 16.1 of the Constitution of Spain of December 27, 1978; art. 37 (1) of the Constitution of Bulgaria of July 12, 1991; art. 29 (1) of the Constitution of Romania of November 21, 1991; art. 41 of the Constitution of Slovenia of December 23, 1991; § 40 of the Constitution of Estonia of June 28, 1992; art. 24.1 of the Constitution of Slovakia of September 1, 1992; art. 26 of the Constitution of Lithuania of October 25, 1992; art. VII of the Constitution of Hungary of April 25, 2011. Moreover, in a religious state such as Greece, religious freedom is protected in accordance with Art. 13 of the Constitution of June 9, 1975. At the same time, with regard to establishing and running private schools, it is worth pointing out that, pursuant to Art. 70 paragraph. 3 of the Polish Constitution of April 2, 1997:

Parents have the freedom to choose schools other than public ones for their children. Citizens and institutions have the right to establish primary, secondary and tertiary schools as well as educational establishments. The conditions for the establishment and operation of non-public schools and the participation of public authorities in their financing, as well as the principles of pedagogical supervision over schools and educational establishments, are set out in the Act.

A state in which cooperation with religious communities is undertaken for the common good can be classified as secular; cf. also art. 24 § 1 of the Constitution of Belgium of February 7, 1831; art. 42.3 1° of the Constitution of Ireland July 1, 1937; art. 7 (5) of the Constitution of Germany of May 23, 1949; art. 20.1 of the Constitution of Cyprus of August 16, 1960; art. 27.3 of the Constitution of Spain of December 27, 1978; art. 26 of the Constitution of Lithuania of October 25, 1992. For comparison, in accordance with Art. 16 sec. 1 of the Greek Constitution:

Parents are free to choose schools other than public ones for their children. Citizens and institutions have the right to establish primary, secondary and tertiary schools as well as educational establishments. The conditions for the establishment and operation of non-public schools and the participation of public authorities in their financing, as well as the principles of pedagogical supervision over schools and educational establishments, are set out in the Act.

The above list shows that religious freedom and the right to education in Europe are so universal that they are guaranteed in selected secular and religious states. The dissimilarity between states manifests in Europe in terms of the pluralism of relations between states and churches.

placing religious symbols on the facade of a private school building is not prohibited in Croatia, Poland, or Hungary, unlike in France (the rule for school interiors is different).¹⁸

Freedom of conscience and religion is also widely protected by international law, both universal and European. International law includes the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Beliefs; and the Convention on the Rights of the Child. Among European laws, the European Convention for the Protection of Human Rights and Fundamental Freedoms has gained particular significance for European legal culture, as the ECHR relies on it to resolve specific cases and ensure the effectiveness of its judgments. Moreover, the Convention is an element of universal binding law in European countries.¹⁹ The right to education is also protected under international law, including the abovementioned acts. Thus, there is a clear relationship between these rights. The ECHR referred to the relation between Article 9 of the Convention guaranteeing freedom of conscience and religion and Article 2 of Protocol No. 1 to the Convention guaranteeing the right to education, implying that a systemic interpretation of both standards is necessary.²⁰ The starting point is Article 9 of the Convention. In the jurisprudence of the Court, guaranteeing educational pluralism is important; pluralism is guaranteed in terms of beliefs. This includes a pluralism of models of church–state relations in individual states.

Regarding international agreements, freedom of conscience and religion is expressly guaranteed in contemporary concordats concluded by the Holy See with many countries with different models of church–state relations. The same international agreements often explicitly guarantee the right to establish schools, including universities.²¹

Individual states also determine issues related to religious freedom from sub-constitutional legal sources. Poland initiated the systemic transformation of post-communist countries and therefore seems to be a good example of the fight not only for religious freedom but also for educational pluralism. In Poland, churches and other religious

18 | Cf. Tawil, 2015, p. 66; Valutyte, Gailiute, 2013, p. 58.

19 | As the Polish Constitutional Tribunal rightly pointed out in its judgment of December 2, 2009 (file ref. no. U 10/07; Journal of Laws 2009 No. 210, item 1629):

The judgements of the European Tribunal establish common normative content of fundamental rights and freedoms, the legal regulations of which (including constitutional ones) sometimes differ significantly in individual states. This also applies to the freedom of conscience and religion, one of the fundamental freedoms enshrined in the Convention. The legal regulation of the freedom of conscience and religion in individual European countries differs, but the European Court established the normative content of the principle of freedom of conscience and religion common to European democratic states, interpreting the provisions of the Convention, in particular its Art. 9, defining the freedom of conscience and religion.

20 | Cf. Lautsi, § 47; cf. also Folgerø, § 84.

21 | Cf. Art. 14-15 of the concordat with Poland of July 28, 1993. It is worth mentioning that, under Community law (which no longer has a pan-European scope), the European Union respects the solutions of individual Member States in the field of relations between state and church. In the field of education, the free movement of people and capital is an important factor. Therefore, the general principles of the fundamental rights guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms and rights resulting from the constitutional traditions common to the Member States acquire particular importance for the assessment of the relationship between freedom of conscience and religion and the right to education; Art. 6 sec. 3 of the Treaty on European Union.

associations have the general right to establish and run schools in accordance with the Act of May 17, 1989, on the guarantees of freedom of conscience and religion.²² This act is of a general nature and protects religious freedom.²³ Acts that individually relate to a dozen or so religious associations are also characteristic of the Polish legal system. These laws guarantee religious freedom as well as the right to establish schools and universities, regardless of whether a given religious community is Christian.²⁴ Thus, the rights of religious associations in conducting educational activities are generally recognised.

It can thus be concluded that freedom of conscience and religion on individual and institutional levels is broadly guaranteed by normative acts in European legal culture, starting from the constitution and proceeding through multilateral and bilateral international agreements and sub-constitutional acts. This freedom may be limited by strictly defined conditions. The right to education is protected by similar normative acts. There is a parallelism here similar to that observed in the historical discussion in the previous chapter, which proves that freedom of conscience and religion and of the right to education enjoy similar levels of importance in European legal systems. Moreover, this freedom is included as part of basic human rights, which is important for its interpretation in relation to the right to education. Therefore, the relationship between freedom of conscience and religion and the right to education appears simultaneously at a different level of the hierarchy of sources of universally binding law. Thus, they must be construed using systemic and functional interpretations.

4. Subjects of freedom of conscience and religion in the context of private school activities

The subjective aspect of freedom of conscience and religion in the context of private schools can be considered at various levels by considering the sources of the law guaranteeing this freedom. First, this freedom is granted to individuals, since humans have a conscience and are capable of religious acts. This freedom can thus be compared with the rights of an entity running a private school and of its students. The believer can exercise his or her freedom of conscience and religion at a school (individual aspects). Moreover, people have the right to organise themselves into groups and to express their faith collectively and to create religious communities. Thus, this freedom is granted essentially to

22 | Cf. Art. 21, 22. Consolidated text: Journal of Laws of 2017, item 1153, as amended.

23 | Cf. Art. 1.

24 | For example, cf. Art. 33 of the Act of April 21, 1936 on the State's relationship to the Muslim Religious Union in the Republic of Poland (Journal of Laws No. 30, item 240); Art. 12, 20, 23; Act of May 17, 1989 on the State's Relationship to the Catholic Church in the Republic of Poland (consolidated text: Journal of Laws of 2019, item 1347); Art. 9, 16-19 of the Act of 4 July 1991 on the State's Relationship to the Polish Autocephalous Orthodox Church (consolidated text: Journal of Laws of 2014, item 1726); Art. 11, 16-19 of the Act of May 13, 1994 on the relationship of the State to the Evangelical-Augsburg Church in the Republic of Poland (uniform text: Journal of Laws of 2015, item 43); Art. 9, 14-16 of the Act of June 30, 1995 on the relationship of the State to the Evangelical-Methodist Church in the Republic of Poland (uniform text: Journal of Laws of 2014, item 1712); Art. 13 of the Act of February 20, 1997 on the State's Relationship to Jewish Religious Communities in the Republic of Poland (consolidated text: Journal of Laws of 2014, item 1798).

individuals but also to institutions. Freedom is then concerned with, *inter alia*, a religious community's right to establish a private school and run it. Moreover, this freedom is enjoyed by non-believers and legal persons, who also have the right to establish private schools.

It can thus be concluded that religious freedom, which is vested in many subjective entities, may on both individual and institutional levels refer to the activities of private schools.

5. Objects of freedom of conscience and religion in the context of private school activities

The objective aspect of freedom of conscience and religion in the context of private schools seems to be more complex than the subjective aspect. This freedom may have different configurations. There may be *secular* and *denominational* private schools depending on the entity running them and on the profile of the establishment (e.g. foreign-language schools, high schools, higher seminaries). In the first case, exercising freedom of conscience and religion may consist of manifesting religious beliefs – for example, by praying before and after classes, wearing religious symbols or religious clothing,²⁵ and expressing a position consistent with your beliefs. A *secular* private school could take the position that such behaviour violates its internal norms and try to implement the worldview adopted in its internal acts. Moreover, it could be argued, that, since the choice of school is voluntary and other schools are available, any person in violation of the rules should change schools or adapt to the school's norms.

At this point, it is necessary to refer to the jurisprudence of the ECHR on the use of religious symbols in the workplace, which initially accepted such an argument by analogy (regarding employee relations).²⁶ However, current jurisprudence differs.²⁷ Other students or teachers could also invoke their individual freedom of conscience and religion. The matter is complicated by the possible conscientious objections of the pupils, issues related to discrimination, and the relevant model of church–state relations. Specific matters should be approached individually and examined in terms of whether the restriction of religious freedom was justified – for example, in light of another protected value.

25 | The growing ECHR case law on the wearing of religious clothes in public spaces is important in this regard; cf. *Dahlab v. Switzerland*, 15 February 2001, no 42393/98; *Şahin v. Turkey* [Grand Chamber], 10 November 2005, no 44774/98; *Phull v. France* [decision], 11 January 2005, no 35753/03; *Köse and the Others v. Turkey* [decision] 24 January 2006, no 26625/02; *Kurtulmuş v. Turkey* [decision] 24 January 2006, no 65500/01; *El Morsli v. France* [decision], 4 March 2008, no15585/06; *Dogru v. France and Kervanci v. France*, 4 December 2008 – no 27058/05 and no 31645/04; *Ahmet Arslan and Others v. Turkey*, 23 February 2010, no 41135/98; *Belcacemi and Oussar v. Belgium*, 11 July 2017, no 37798/13; *Dakir v. Belgium*, 11 July 2017, no 4619/12; *Hamidovic v. Bosnia and Herzegovina*, 5 December 2017, no 57792/15; *Lachiri v. Belgium*, 18 September 2018, no 3413/09. Regarding public schools, one important consideration in the ECHR decision is the functioning model of the state–church relationship. However, the question of private schools remains open.

26 | *Eweida and Others v. the United Kingdom*, January 15, no. 48420/10, § 59.

27 | Cf. *ibid.*, § 83.

In the case of *denominational* private schools, additional issues of an institutional nature may arise, such as whether the curriculum is imposed by the state, how the school is financed, how learning outcomes are determined in the general education system, how religious symbols are handled, or whether admission depends on certain criteria (e.g. religious ones for a seminary). Therefore, a number of questions arise, such as how far the state can interfere in the curriculum by pointing to certain minimum criteria.

The state has the right to interfere in the education system in the context of freedom of conscience and religion, but it should do so only exceptionally as part of the framework limiting that freedom and while taking the autonomy of *denominational* private schools properly into account. State funding should not imply a refusal to recognise the autonomy of these schools.

The two groups of private schools have common features. For example, their funding is based to varying degrees on fees paid by pupils (i.e. parents). Therefore, it is important to consider the opinions of the parents and strive for compromise. Another common feature is that attendance is voluntary. This voluntariness would become illusory if no other schools were available.²⁸ Moreover, private schools generally enjoy more freedom in designing their curricula than public schools do.

Therefore, the subject of freedom of conscience and religion in the context of private schools is complex. The exercise of this freedom in full or even in part may be confronted by other rights, including the freedom of conscience and belief/religion of others. Therefore, one cannot formulate a single 'pan-European' answer in the form of a general prohibition against the expression of religious beliefs (e.g. wearing a traditional religious symbol) or the granting of unlimited religious freedom (e.g. engaging in frequent public prayers instead of attending class) at such schools. In European legal culture, issues related to religious freedom must often be settled by the judiciary on a case-by-case basis. The key to resolving such disputes is to, first, try to assess the gradation of individual values in a specific case (the principle of weighing the protected values) and then, following this order, to examine whether any potential restriction of freedom of conscience and religion would be proportionate (principle of proportionality of restrictions).

6. Selected case law

The judgments of the ECHR have the greatest range of impact given the number of states that have ratified the convention. The ECHR has issued many judgments within the scope of Article 9 of the Convention²⁹ guaranteeing freedom of conscience and

28 | Pursuant to Art. 2 letter c of the Convention to Combat Discrimination in the Field of Education, drawn up in Paris on December 15, 1960, the setting up or operation of private teaching establishments is not deemed to be discriminatory as long as they are not intended to exclude any group. Their aim should be to supplement the educational opportunities provided by the state.

29 | Cf. *Kokkinakis v. Greece*, 25 May 1993, no 14307/88, § 31; *Otto-Preminger-Institut v. Austria*, 20 September 1994, no 13470/87, §47; *Şahin v. Turkey* [Grand Chamber], 10 November 2005, no 44774/98, §104; cf. also Valutyte, Gailiūtė, 2013.

religion as well as Article 2 of Protocol No. 1 to the Convention, which guarantees the right to education while respecting the rights of parents to raise their children as they see fit. Several judgments also refer to the relation between these articles. Article 2 of Protocol No. 1 does not distinguish between public and private education, although the educational pluralism necessary to protect democracy is safeguarded primarily by state education.³⁰ Thus, the ECHR has ruled that, to an appropriate extent, this objective should also be pursued in private schools. Although the protocol constitutes a *lex specialis* in relation to Art. 9, these provisions should be interpreted jointly, and one cannot rely solely on a simple 'conflict of laws' rule, as in the field of hermeneutics.³¹ The interpretative burden concerning the relation of Article 9 of the Convention and Article 2 of Protocol No. 1 focuses on public schools run by a public authority. This is evidenced by the indication that ensuring pluralism requires the state to define curricula that convey information or knowledge in an objective, critical, and pluralistic manner.³² However, such norms cannot be directly applied to private schools, such as seminaries. Moreover, the possibility that indoctrination will be alleged, for example, due to the placement of a cross in the classroom seems lower in a private school than in a public school, as private school is voluntary.

As has been mentioned, the decisions of the ECHR and general jurisprudence are often referred to by constitutional tribunals.³³ It can be concluded that such judgments are an example of the complex nature of issues concerning the relationship between freedom of conscience and religion and the right to education in private schools.³⁴ This issue requires multifaceted interpretations, an appropriate and individual hierarchy of recognised values and the rights protecting them, assessments of their mutual relationship, and a determination of the possibility of restricting freedom of conscience and religion. There are no definite answers for every case. However, the starting point should be a

30 | Lautsi, § 47.

31 | Cf. Lautsi [Grand Chamber] v. Italy, 18 March 2011, no 30814/06, § 60.

32 | Cf. *ibid.*, § 62.

33 | Cf. Poniatowski, 2018. A judgment of the Polish Constitutional Tribunal can be mentioned as an example of the pursuit of pluralism and the resolution of the relationship between freedom of conscience and religion and the right to education. It dealt, *inter alia*, with the issue of financing Catholic private schools from the state budget. Three acts were at issue: 1) an act on financing the Pontifical Faculty of Theology in Warsaw from the state budget (Journal of Laws of 2006, No. 94, item 648); 2) an act on financing the Pontifical Faculty of Theology in Wrocław from the state budget (Journal of Laws of 2006, No. 94, item 649); 3) an act on financing the Higher Jesuit School of Philosophy and Education ('Ignatianum') in Krakow from the state budget (Journal of Laws of 2006, No. 94, item 650). According to the applicants, the authorities supported a given religious doctrine and the education of clergymen, as in a denominational state. However, in the opinion of the Tribunal, such funding is not contrary to the constitution and fulfills the constitutional right to education, which is of universal nature; cf. the judgment of the Polish Constitutional Tribunal of December 14, 2009 (file reference number K 55/07, published in Journal of Laws of 2009, No. 218, item 1702). As indicated by the Constitutional Tribunal, this is precisely how the state fulfils its obligation to ensure educational pluralism:

From the perspective of a democratic, pluralist and open society, the existence – next to other universities – of religious universities is a value because it significantly extends the educational offer addressed to citizens, enriches public debate and is an important element of worldview pluralism.

Cf. *ibid.*

34 | This issue is universal; cf. also Chetty, Govindjee, 2014 (the article concerns the legal order of South Africa); Donlevy, 2008.

consideration of freedom of conscience and religion in light of the gradation of values. The jurisprudence of the ECHR emphasises the need to maintain a proper balance between individual rights.

7. Conclusions

National legal orders may differ, implicitly or explicitly, in how they approach freedom of conscience and religion in private schools. Nations should respect their constitutional law, based largely on European legal culture but also on international law, including the jurisprudence of the ECHR, which has competent jurisdiction in this regard and analyses specific cases in a way that often seeks a European consensus; in its absence, the court analyses the relationship between the law of a given state and the Convention.

Freedom of conscience and religion in private schools can be approached from the perspective of both the individual (the student's rights) and the institution (the rights of the entity running the school). There is no simple answer as to which is paramount in every case. Therefore, dispute resolution should be approached on an individual basis, and the values protected by law should be weighed in the context of the given dispute. The starting point is that freedom of conscience and religion should be understood broadly and applied to the entire operation of private schools (including the pupils and also those who establish and run the schools). Any restriction must be justified based on appropriate legal grounds resulting from constitutional and international standards.

In view of the gradation of values within the axiology recognised in European legal culture, the possibility of limiting the freedom of conscience and religion in private schools should be interpreted narrowly. The catalogue of possible restrictions on freedom of conscience and religion should follow the typical premises of such restrictions indicated in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is often referred to in constitutional law. Therefore, the task of the state is to regulate the law in such a way as to maintain the correct balance between freedom of conscience and religion and the pursuit of educational pluralism.

Europe has few laws or judgments relating to the use of religious symbols or religious instruction in public schools, as shown in the case of *S. Lautsi* before the ECHR. There are even fewer laws relevant to private schools. On a *de lege ferenda* basis, then, it might be advisable to include a specific norm in relevant statutes or even acts of a higher rank that would explicitly determine a generally formulated freedom of conscience and religion by guaranteeing it to everyone and every type of school, with limitations thereof possible only in cases specified in the act and requiring compliance with constitutional and international standards.

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