Right-Wing Constitutionalism in Poland

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09 November 2020

Divine Decision-Making

The most recent abortion decision of 22 October 2020 of Poland's Constitutional Court ("the Court") did not come as a surprise. It is not, as some commentators would like to see, an aberration, a departure from previous liberal and human rights-based standards by a group of judges linked to the Law and Justice party. Rather, it is a consequence of the right-wing constitutionalism that has dominated the Court for years. This discourse that introduced religious dogma as the basis for legal reasoning is undemocratic and exclusionary. It presents religious worldviews as textual consequences of the constitution without taking into account the voice of citizens. The persistence of this type of constitutionalism can be demonstrated on example of a number of cases important for the public sphere in Poland.

Religion in Schools

The Catholic Church's involvement in supporting the democratic opposition during the socialist era in Poland has given this organization a large amount of moral capital and gratitude from the post-Solidarity elite after 1989. This initial, privileged position has translated over the past several decades into a constitutional infrastructure that is adapted to it.

The first important ruling, in which Catholic, right-wing constitutionalism has emerged, was the ruling of 30 January 1991 (K 11/90) concerning the introduction of religion into schools. Then Prime Minister Tadeusz Mazowiecki admitted that he was receiving calls from bishops who expected religion to enter schools as soon as possible. Not wanting to have an opponent in the Church (as it could affect the election results), religion was introduced to schools by instruction of the Minister of Education, not by act. It was done without deliberation in the Parliament. The instruction was challenged to the Court by the then Ombudsman Prof. Ewa Łętowska.

The Court found the instruction to be in accordance with the Constitution. In its justification, it stated that the principle of secularism and neutrality of the state was not violated because the state curriculum is not saturated with religious content and the teaching of religion is voluntary and it constitutes an internal matter of the churches. The Court also stated that, for reasons of secularism, religion classes in state schools could not be made compulsory but could not be prohibited either. The judges also saw no violation of the principle of separation between church and state and of the principle of secularism and neutrality of the state, as well as of the related principle of the non-

subsidiarity of churches. The Court argued that the instruction only makes the rooms of the schools available, and that “the payment of remuneration to religion teachers cannot be equated with subsidizing churches”.

The Court also disagreed that the declaration of willingness to participate in religious lessons is tantamount to a declaration revealing one’s religion and violates the right to remain silent in matters of one’s religion because “it is possible, after all, for a non-believer to send a child to religion classes”.

This ruling introduced an abstract argumentation, referring to an unspecified concept of “religion”, the consequences of which favor one particular religious institution (the Catholic Church). Moreover, it introduced the conviction that, as far as “religion” is concerned, legal requirements do not have to be strictly observed. Religion classes were introduced to schools authoritatively by the Minister of Education, without debate and voting in parliament. It was established then that the question of the presence of religion in a public space is a legal question, concerning the content of the constitution, and not a democratic question, concerning politics or the will of citizens.

The Unconstitutional Nature of Abortion Due to the Social Situation

Another important decision is an abortion judgment from 1997 (K 26/96) – also quoted in the justification of the recent ruling prohibiting abortion due to defects of the fetus. The Court ruled that the abortion for social reasons, i.e. because of the difficult living conditions of a woman, is unconstitutional. This premise was added to the law by the democratically elected parliament in 1996. It had been in force since 1956 until it was removed in 1993 by the so-called “abortion compromise”, i.e. the Family Planning Act, which allows abortion in three cases (rape, a threat to a woman’s life/health, damage to the fetus). The “compromise”, or de facto limitation of abortion, was made due to pressure from the Catholic Church, without the acceptance of all political forces, and caused considerable social protests.

In the 1997 judgment, the Court stated that, although women have a constitutional right not to impair their material situation, this protection should not as far far as to violate the fundamental good that is human life. The rights and freedoms of pregnant women do not justify depriving the life of the “conceived child”. The Court only once used the word “embryo”, the word “fetus” 47 times, and 150 times the word “child”. More than the word “woman” (8 times) or “pregnant woman” (29 times) the Court used the word “mother” (42 times). Furthermore, the Court derived the protection of “conceived life” from the principle of the democratic state ruled by law. In a rather unconventional way – to put it mildly – the issue of the rule of law was then linked to the beginning of human life at conception. The Court found that the rule of law:

> "(…) is realized only as a community of people, and only people can be proper subjects of the rights and duties established in such a state. The basic attribute of the human being is his life. Deprivation of life therefore simultaneously annihilates man as the subject of rights and duties. (…) The value of the constitutionally protected legal good that is human life, including life developing in the prenatal phase, cannot be differentiated. (…). From the moment of its creation, therefore, human life becomes a constitutionally protected value. This also applies to the prenatal phase."

This decision linked the concept of the rule of law to the fundamentally Catholic principle of protecting life from conception. At the same time, this ruling defined that the fetus already has a full, constitutionally protected legal subjectivity that is equal and independent of the will of a woman. It also consolidated the perception of the social role of women through the prism of being mothers.

Conscience Clause for Doctors

The Court also contributed to limiting access to legal abortion in its judgment of 7 October 2015 (K 12/14) concerning the conscientious objection clause, i.e. a legal regulation allowing a doctor to refuse to perform a service if it would not be in accordance with his or her conscience. The Court once again invoked the principle of the democratic rule of law, as evidenced by freedom of conscience and religion. It further stated that the conscientious objection was based on the Hippocratic Oath. The Court did not consider what the consequences of such a clause would be and that in some regions of Poland women would not be able to have a legal abortion, as in several provinces in eastern Poland most doctors refer to the conscience clause. As many as ¼ of the bench submitted separate opinions. These judges argued that the freedom of conscience was not in conflict with other freedoms and constitutional rights. For example, patients' rights were completely ignored, especially the limitation of women's medical care, despite their health insurance contributions.

Catholic and Legal Constitutionalism

All of those pointed judgments were made before the Law and Justice party took power and "hijacked" the Court. In each of the above-mentioned adjudicating benches, the majority were men. All of those judgments had separate opinions. At the same time, these rulings did not meet with any significant criticism in the legal literature (except for individual exceptions). The judges in the panels had a great deal of symbolic and cultural capital − it is an accepted practice that the judges of the Court are appointed among professors and combine their work as judges with university positions.

The quoted judgments form a coherent picture of the discourse on the Polish constitution, which we can call right-wing constitutionalism, which is at the same time Catholic and legal. Catholic because it accepts the religious dogmas of the Catholic Church as an ideological background for the interpretation of regulations. Legal because it presents the ideological and political decisions as a logical consequence of objective legal doctrine.

It accepts a broadening interpretation of freedom of conscience and religion and the assumption that full human subjectivity arises at conception. The first view leads to a privileged position of the Catholic Church in the public sphere. Since freedom of conscience and religion are so important, the State should actively support the institutions that allow the exercise of these rights. The Catholic Church is the largest religious institution in Poland, thus it has the greatest social resources allowing, for example, to pursue crimes of so-called “offending religious feelings” or to demand money transfers from the state. The second view allows for a gradual reduction of women’s rights due to the subjectivity of the fetus. By linking the moment of creation of human subjectivity with a metaphysical solution, it makes constitutionalism independent of the physical conditions of the body and medical knowledge. This view also contains several assumptions about the social role of a woman − a woman is perceived mainly by the possibility of giving birth to children and her relations with the fetus.

This discourse treats the Constitution as an objective text and not a changing set of social practices and values over time. It assumes that only specially trained legal technicians have access to this text and a monopoly on its interpretation. Access to the clarity of this text ensures knowledge of objective interpretation techniques. As expressed by the Court in its resolution of 07 March 1995 (W 9/94), its interpretation of the Constitution “does not include or add anything to the system of applicable legal norms, but only states what the content of these norms is”. Such a decision petrifies the meaning of the Constitution and at the same time takes away any responsibility from the interpreter. It also avoids any political considerations.

Right-wing legal constitutionalism is undemocratic and exclusionary. By presenting religious metaphysical decisions as obvious from the content of the constitution, it depoliticizes it. Citizens are deprived of the possibility to define and argue about values that are important for the community and this role is taken over by the judges of the Court, who support themselves with religious dogmas. At the same time, this process excludes all those who do not share Catholic metaphysics. The Constitution, out of the vulnerable social and historical arena of conflict between different world views, becomes a dogmatic declaration of one acceptable way of thinking. And the Constitutional Judge with his or her arbiter, who tries to harmonize and include other views in the process of interpretation, becomes the guardian of power and domination of one religion.

Tackling the ideological foundations

The development of Catholic and legal constitutionalism as a default form of constitutional discourse in the Court was accompanied by a progressive secularization of Poles. This seems understandable – the fading authority of the Church to decide about the lives of Polish women is replaced by the legal apparatus of repression.

The ruling of 22 October 2020 has a chance to go down as the worst judgment in the history of Polish constitutionalism. Poorly justified, politically motivated, based on a sense of moral superiority, reducing complicated matter to shining slogans without taking into account and considering other, rational perspectives and social moods. At the same time,

it must not be forgotten that this ruling is a consequence and culmination of many years. The struggle for women's rights is, therefore, not only an objection to one or another composition or decision of the Court, but it requires going beyond the ideological foundations present in this institution from the beginning. Right-wing constitutionalism is the "default setting" of most potential candidates for the position of judge of the Court. The development of such a new, more inclusive, and democratic constitutionalism is an urgent task for legal theory and jurisprudence. As Thomas Jefferson argued, each generation is entitled to its own version of constitutionalism.

The Polish version of this text was published in "Kultura Liberalna".

References

References

SUGGESTED CITATION Kocemba, Karolina; Stambulski, Michał: *Divine Decision-Making: Right-Wing Constitutionalism in Poland, VerfBlog,* 2020/11/09, https://verfassungsblog.de/divine-decision-making/, DOI: 10.17176/20201109-235704-0.

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