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THE LEGAL STATUS OF PRISON CHAPLAINS AND THE VIOLATING THE FREEDOM OF CONSCIENCE AND RELIGION OF INCARCERATED IN POLAND

Abstract. This study explores the legal regulations constituting the basis for the performance of religious services by prison chaplains in penitentiary institutions, both for a fee and free of charge. This should help to explain the double subordination resulting from the merging of a public function, i.e. employment in a penitentiary facility, and the ecclesiastical function carried out by a clergyman as a chaplain. The presented considerations show that the legal status of prison chaplains is a multi-threaded issue that raises doubts as to the desirable content of these regulations. This is because precise and transparent criteria are lacking after meeting which, an appropriate contract with a chaplain should be concluded and which would justify the choice between employment and performing the indicated service free of charge. Further research is needed to develop legal solutions that would clarify the legal status of prison chaplains and fully protect the religious freedom of prisoners, the right of churches and other religious organisations to provide religious assistance, all to eliminate the risk of violating such rights and the risk of violating the safety and order in penitentiary facilities.

Keywords: freedom of conscience and religion, religious organisation, prison chaplain, religious practices, Prison Service.

Introduction

Churches and other religious organisations have the right to conduct pastoral activities for people staying in special places due to their health con-

dition, i.e. in health care facilities, and in penitentiary facilities as a result of their law violations. The individuals detained in those places also have the right to exercise their freedom of conscience and religion. Therefore, granting them access to religious practices organized by churches and other religious organisations affirms their religious freedom, and often has significant implications for their resocialization and ability to return to a law-abiding life. However, religious organisations wishing to provide pastoral care to people placed in these special institutions must comply with their internal rules of operation (Mezglewski, 2011, p. 212).

The right to benefit from pastoral care follows from religious freedom (Krukowski, 2005, p. 175). The normative basis is Article 53 sec. 2 of the Constitution of the Republic of Poland, which states that religious freedom implies the individual right to use religious assistance in any place (Sobczyk, 2016, pp. 83–96). This right is further specified by the Act of 17 May 1989 on guarantees of freedom of conscience and religion (the Act on Guarantees). In accordance with Article 4 sec. 1 item 3 in connection with Article 2 item 2 thereof, the right to participate in religious practices of persons staying in penitentiary institutions is regulated. Therefore, regardless of religious affiliation, every person has the right to enjoy pastoral care wherever they are. It is noteworthy that this right, in accordance with Article 19 sec. 1 in connection with section 2 point 3 of the Act on Guarantees, churches and other religious organisations should operate in compliance with the principle of equal rights of these entities, which no doubt implements the principle of equal rights of churches and other religious organisations enshrined in Article 25 sec. 1 of the Polish Constitution. However, it should be noted that convicts can perform religious practices and use religious services if a chaplain is present. Therefore, the presence of a chaplain is essential for the performance of religious services in penitentiary units.

This study examines the legal provisions governing the performance of religious services by prison chaplains in penitentiary facilities in order to show the double subordination inherent in combining a public function – resulting from employment in a penitentiary institution – and an ecclesiastical function performed by a clergyman as a chaplain. In addition, it should be examined whether these provisions constitute a sufficient guarantee of prisoners' religious freedom and, importantly, whether religious assistance can be guaranteed to these persons by individual churches and other religious organisations, and whether the provisions in question properly regulate the legal status of prison chaplains.

**The right of religious organisations to organise pastoral care
in penitentiary institutions**

The organization of pastoral care by churches and other religious organisations in penitentiary institutions is a right safeguarded by acts individually regulating the legal status of religious organisations (Krukowski, 2005, p. 179). The relevant acts concern the relations between the Polish state and the following churches: the Catholic Church, the Polish Autocephalous Orthodox Church, the Evangelical Church of the Augsburg Confession, the Evangelical-Reformed Church, the Polish Catholic Church, the Seventh-day Adventist Church, the Christian Baptist Church, the Evangelical-Methodist Church, the Old Catholic Mariavite Church, the Pentecostal Church, the Catholic Mariavite Church, and Jewish Religious Communities). However, as a rule and in compliance with these provisions, the indicated right should be exercised by chaplains assigned by the competent superior of a given church or other religious organisation (e.g. the diocesan bishop). On the basis of such a referral, the heads of relevant institutions conclude appropriate contracts with chaplains. Within the Catholic Church and the Polish Autocephalous Orthodox Church, pursuant to the acts regulating their legal status, the duties of a chaplain should be carried out on the basis of contracts for the free provision of the services in question (Krukowski 2005, p. 179; Mezglewski 2011, p. 211). Such a right is not stated explicitly in the acts regulating the status of the Eastern Old-Rite Church, the Muslim Religious Association, and the Karaite Religious Association. However, these religious organisations also have the right to organise pastoral ministry in penitentiary institutions. It is guaranteed in accordance with Article 18 sec. 2 of the Act on Guarantees, according to which the right in question is granted thereunder if it is not directly guaranteed by the acts regulating the legal status of individual churches or other religious organisations. This right, however, pursuant to Article 19 sec. 1 in connection with sec. 2 point 3 of the Act on Guarantees, religious organisations should exercise in accordance with the principle of equal rights of these entities. Moreover, as already shown, pursuant to Article 4 sec. 1 point 3 in connection with Article 2 point 2 of the Act on Guarantees, inmates have the right to participate in religious practices. Therefore, representatives of all churches and other religious organisations whose status is regulated by individual acts have the right to carry out pastoral ministry in penitentiary facilities. Moreover, in accordance with the general norms arising from the Act on Guarantees, this right may also be exercised by religious associations that have acquired legal personality by obtaining an entry in the reg-

ister of churches and other religious organisations. In 2024, there were about 150 prison chaplains in prisons, of whom about 20 worked full-time (<https://www.ekai.pl/ks-adam-jablonski-naczelnny-kapelan-wieziennictwa-wszyscy-osadzeni-sa-duchowo-moimi-dziecmi>). The right to provide pastoral assistance is actually exercised by religious organisations such as the Catholic Church (including the Greek Catholic Church), the Polish Autocephalous Orthodox Church, the Evangelical Church of the Augsburg Confession, the Pentecostal Church, the Seventh-day Adventist Church, the Christian Baptist Church, the Evangelical Reformed Church, the Polish Catholic Church, the Old Catholic Mariavite Church, as well as Jehovah's Witnesses, the Church of Christ's Congregations, the Gideon Society, the Brahma Kumaris World University for Personality Development, the Sangha Kandzeon Buddhist Association, the Krishna Consciousness Society, the Christian Congregation, and the Church of God in Christ. Regular prison ministry is conducted by representatives of the following churches: the Catholic Church, the Polish Autocephalous Orthodox Church, the Evangelical Church of the Augsburg Confession, the Pentecostal Church, the Seventh-day Adventist Church, the Baptist Church, the Bible Society, and the Treaty Association of Jehovah's Witnesses (Migdał, 2008, pp. 390–391; see also Storoniak, 2009, pp. 339–344; Nowak, 2009, pp. 333–337).

The analysis of legal regulations leads us to the observation that all churches and other religious organisations with a regulated legal status have the right to organise chaplain pastoral services in penitentiary facilities. Therefore, in this respect, no evidence of violation of the constitutional principle of equal rights of religious associations can be shown (Abramowicz 2018, pp. 281–288).

Likewise, the right to organise pastoral care in broadly conceived penal institutions was regulated for the Catholic Church in Article 17 of the Concordat, whereby the Catholic Church has the right to carry out religious practices and provide religious services to persons staying in penitentiary, educational and resocialization institutions. This ministry is to be carried out by chaplains assigned to do this work by the diocesan bishop. On the basis of this referral, an appropriate contract is concluded with the respective chaplain (see Krukowski, Warchałowski 2000, p. 199; Krukowski 1999a, pp. 155–157; Krukowski 1994, pp. 48–49; Kuglarz 2010, p. 553; Krukowski 2000, p. 322; Krukowski 1999b, p. 27; Krukowski 2008, pp. 116–117; Góralski 2003, pp. 167–169; cf. Borecki 2007, p. 144). The provision does not specify, however, whether this is an unpaid contract, as regulated in the Act on relations between the State and the Roman Catholic Church. On the basis of the indicated norms and considering the hierarchy of sources of law, we

note that it is also permissible to conclude paid contracts with chaplains (Nikołajew 2012, pp. 208–209; Stanisławski 2016, p. 172). Such a restriction is stipulated only in the Act on relations between the State and the Polish Autocephalous Orthodox Church. However, no other act regulating the legal status of religious organisations or the Act on Guarantees provides for such a restriction. It should be noted, however, that the provisions of individual religious acts differ widely in terms stated above (see Różański 2016, pp. 240–243).

The principles regarding the direct implementation of the right of religious organisations to organise pastoral care in prisons are also specified in the relevant provisions of the Act of 6 June 1997 – The Executive Penal Code (hereinafter: EPC). In this regard, Article 102 EPC is pertinent by guaranteeing the convicted person, in particular, the right to exercise religious freedom. Now, there is also Article 106 EPC, which guarantees the convicted person the right to perform religious practices and avail themselves of religious services (Stanisz 2018, p. 283). Paragraph 4 of this article contains a statutory delegation to issue a regulation of the Minister of Justice of 2 September 2003 on detailed principles of performing religious practices and using religious services in prisons and detention centres. Guarantees in this respect are also included in Article 110a § 1 EPC, which assures the convicted person the right to possess, for example, objects of religious worship in their cell. Also, we should mention the regulation of the Minister of Justice of 23 December 2022 on the rules of organisation and order for the execution of imprisonment, and the regulation of the Minister of Justice of 23 December 2022 on the rules of organisation and order for the execution of temporary detention, which were issued on the basis of the statutory delegation contained in Article 249 EPC (Nikołajew 2012, pp. 137–183). A model contract for the performance of religious services in prisons has also been developed – it is concluded with a chaplain who has been granted a referral to perform these services by the appropriate representative of a specific religious organisation (Migdał 2008, p. 392; Górowska 2009, p. 277).

Religious practices performed by a chaplain in penitentiary units

The provisions of the aforementioned regulation of the Minister of Justice of 2 September 2003 on detailed principles of religious practices and the use of religious services in prisons and detention centres merit our special at-

tention. The act implies that chaplains are doubly subordinated. In order to safeguard the rights of inmates mentioned in this act, the director of a penitentiary institution, in consultation with the clergy of churches or other religious organisations providing religious services (chaplains), establishes the internal order of religious practices and the use of religious services, as well as the rules and order of use of rooms and places (chapels or other rooms or places in a prison or detention centre appropriately adapted for this purpose) by individual groups of convicts. Importantly, in accordance with § 3 of the regulation, the director of a penitentiary institution concludes a contract with a chaplain on the provision of religious services, without specifying at this point whether the contract is for paid or unpaid provision of religious services. The contract is based on a referral issued by the authorities or an authorized representative of the church or other religious organisations, designating the cleric to perform religious services in a given institution. Therefore, the director becomes the superior of the chaplain, who answers to him or her in the penitentiary institution, regardless of his subordination to the ecclesiastical authority of the religious organisation – this state of affairs is confirmed by the referral issued by the church authority to perform religious services in a given institution (Nikołajew 2022, p. 131; Nikołajew 2012, pp. 208–209).

The contract specifies in particular the scope of the chaplain's duties, the rules of his substitution by another cleric, the scope and rules of his use of other people's help when performing his ministry, the rules of cooperation with the facility's director, and the situations in which the contract will be terminated (Skrobotowicz 2022, pp. 153–154; Bielecki 2018, pp. 225–226). According to § 4, the chaplain should be informed about the regulations concerning, in particular, the execution of imprisonment sentences, the regulations concerning the rules of order and safety in force in the place, movement within the premises, and the regulations concerning state and official secrets. It should be emphasized that if a chaplain or his substitute grossly violates the indicated regulations, the facility's director is to notify the chaplain's ecclesiastical superiors or an authorized representative of the church or other religious organisations. If another person conducting pastoral ministry violates the aforementioned regulations, the director of the facility may revoke their permission to enter the facility premises. In addition, in accordance with § 5, the director takes the necessary steps to ensure appropriate conditions for the performance of religious practices and services, and the use of these services. The director also seeks the opinion of a chaplain on the organisation of religious services.

Importantly, the employment of a chaplain is also regulated by the Act of 9 April 2010 on the Prison Service (hereafter: APS), where Article 26 stipulates that Prison Service (PS) organizational units are places where officers serve and employees work. It should be emphasized that the legislation provides a closed list of PS positions in which only officers may serve (Mazuryk 2013, pp. 95–96). They are listed in the Regulation of the Minister of Justice of 12 January 2011 on the definition of Prison Service positions in which only officers may serve, but the act does not mention chaplains. Therefore, chaplains may work as employees, constituting part of the auxiliary staff of the PS.

It should be emphasized that the position of chaplain was indicated in the Regulation of the Council of Ministers of 22 July 2010 on the types and list of positions in which employees of the Prison Service organizational units are employed as specified in the provisions on employees of state offices issued on the basis of Article 31 sec. 2 APS. The annex to this act lists chief chaplains as managerial positions in the Central Board of the Prison Service, and chaplains as penitentiary positions in detention centres or prisons. PS workers, including chaplains, are employed pursuant to the Act of 16 September 1982 on employees of state offices. Chapter 3 of this act specifies the duties of state officials. Accordingly, chaplains are obliged to conscientiously fulfil the official orders of their superiors. They are not allowed to engage in additional activities without prior consent of the head of the place of their employment. They are not to perform activities conflicting with their duties or might arouse suspicions as to their impartiality or lack of self-interest. A chaplain employed on the basis of this act enjoys the same rights and is under the same obligations as other employees of the penitentiary facility, i.e. a detention centre or a prison. He is to be appropriately remunerated, he can be promoted, receive allowances and jubilee awards. He is eligible for retirement and disability benefits as specified in the regulations on the general retirement provision of employees and their families. This act also specifies the amount and distribution of working time. In addition, the provisions on disciplinary liability for violations of employee duties apply to chaplains employed in penitentiary units in accordance with the indicated act. According to their wording, the chaplain's direct disciplinary superior is the director of the penitentiary facility in which the chaplain is employed.

We also need to refer to Article 27 APS, which specifies the basic requirements not only for PS officers, but also for employees, which should also be applied to employed chaplains. They should demonstrate proper general and professional preparation and a high moral standard, systematically

improve their education and professional qualifications. In their conduct towards incarcerated persons, they are obliged, in particular, to be guided by the principles underlying the rule of law – impartiality and humanity – respect their rights and dignity, and show a good example. Furthermore, in accordance with Article 28 APS, they are prohibited from conducting activities that undermine the authority of the PS or in which official information is used for non-official purposes. It is also forbidden to maintain contacts with persons deprived of their liberty other than those resulting from official duties and to provide unauthorized persons with information concerning persons deprived of their liberty, also after their release. Furthermore, a PS employee, chaplains included, must meet the requirements specified in Article 29 APS. This provision requires the person in question to

- be at least 18 years of age,
- have full legal capacity,
- enjoy full public rights,
- be able to ensure the proper performance of tasks assigned.

Additionally, Article 29 requires that

- no final conviction has been recorded against the person for an intentional offence or an intentional fiscal offence;
- no final judgment conditionally discontinuing criminal proceedings for such an offence has been issued;
- no criminal proceedings are pending against the person for such an offence.

It also requires the person to have an education appropriate to the position held, guarantee the maintenance of secrecy in accordance with the requirements specified in the Act of 5 August 2010 on the protection of classified information, and be mentally and physically fit for a specific position, which is – determined by the occupational medicine service.

It is worth noting that chaplains working as PS employees during and in connection with the performance of their official duties enjoy legal protection under the Act of 6 June 1997 – The Penal Code for Public Officials. Further, Article 32 APS indicates that heads of PS organisational units are also superiors of the chaplains they employ. A chaplain working for the Prison Service is also entitled to benefits resulting from the employment relationship, such as other PS employees, i.e. remuneration and other financial benefits, insurance entitlements, or social benefits, e.g. the right to recreation (Nikołajew 2012, p. 213).

It should be noted that chaplains in prisons can carry out their ministry as part of their employment in accordance with the Labor Code as civilian employees of the PS, but they can also perform this service free of charge

in accordance with the provisions of the Act of 24 April 2003 on public benefit activities and voluntary work. They are referred to in Article 42, sec. 1 point 3 thereof. The act specifies the necessary qualifications of volunteers. It should be noted that the pastoral ministry of chaplains under the indicated act is carried out on the basis of an agreement concluded with the head of the penitentiary facility, which specifies the scope, method and time of service. The agreement should also contain a provision on the possibility of its termination. On the other hand, in matters not regulated by the act in question, the provisions of the Act of 23 April 1964 – The Civil Code apply. However, we should be aware that the status of a chaplain who carries out his ministry in virtue of the indicated provisions in a voluntary manner differs radically from that of a chaplain working as a prison employee. The former does not have the status of an employee and therefore does not have the above-mentioned entitlements, as opposed to regular prison employees. Therefore, there is a large discrepancy between the legal status of a chaplain as a PS worker and the legal status of a chaplain performing his service as a volunteer.

We should also turn our attention to Rule 65 of the UN Standard Minimum Rules, which recommend that if there is a sufficient number of prisoners of the same religion in a prison, a suitably qualified representative of that religion should be appointed so as to ensure that prisoners have access to pastoral care provided by an appropriate person (Stanisławski 2016, pp. 171–173). It should be noted that the regulations in question – which serve as the basis for religious ministry of chaplains in penitentiary institutions in Poland – neither specify the principles nor introduce the relevant criteria, after the meeting of which it would be mandatory to conclude an appropriate contract with a chaplain to ensure his services for prisoners of a specific denomination, for example, how many prisoners of a specific denomination should be in a given penitentiary institution. The regulations guarantee that churches and other religious organisations can apply for the religious services of a designated chaplain. There are no clear regulations indicating when the director should employ a chaplain as a PS worker, and what should determine the amount of his working time with respect to his employment, and when his ministry should be provided free of charge, on a voluntary basis. We believe this situation raises doubts regarding the sufficient protection of the right of prisoners to exercise their freedom of conscience and religion, but also the right of individual religious organisations to give religious assistance to persons staying in penitentiary institutions.

It is worth noting that all churches and other religious organisations with a regulated legal status have the right to organize pastoral services in penitentiary institutions in accordance with the constitutional principle of equal rights of these entities (Abramowicz 2016, pp. 131–141). However, the current regulations regarding the forms of worship provided by chaplains do not indicate precise criteria securing the implementation of this ministry. It is clear that the freedom to manifest one's religion is not absolute. According to Article 53 sec. 5 of the Polish Constitution, the freedom to manifest religion may be restricted by law and only when it is necessary to protect state security, public order, health, morals, or the freedoms and rights of other people. In addition, the provisions limiting the exercise of religious freedom of prisoners are regulated in the relevant provisions of the Executive Penal Code (Nikołajew 2020, pp. 245–261; also Abramowicz, Abramowicz 2023, pp. 266–267). It should be noted that the participation of inmates in religious practices is possible thanks to their freedom to manifest religion. The assurance of this possibility is no doubt a serious risk for the continuous management of a penitentiary facility. This calls for the use of necessary methods of risk management in the penitentiary system so that measures taken by PS officers towards inmates can be adjusted to allow them to exercise their indicated freedom in question (Wojtasik-Terech 2019, p. 397). The development of appropriate legal solutions to precisely define criteria of chaplains' pastoral ministry in penitentiary facilities is necessary to properly secure the religious freedom of prisoners and eliminate the risk of violations thereof. Such legal solutions would also help penitentiary authorities to maintain the right balance between the willingness of incarcerated persons to participate in religious practices and the protection of internal order in a given facility, and enable them to guarantee the safety, rights and freedoms of other persons. Moreover, this would enable authorities to maintain impartiality when deciding whether or not to conclude a contract with a prison chaplain, and when choosing whether to employ a chaplain or allow him to perform his ministry free of charge (see the judgment of the ECtHR of 10 November 2005, *Leyla Şahin v. Turkey*, no. 44774/98; Czebotar 2016, p. 213).

Conclusion

There is no doubt that the legal provisions defining the legal status of chaplains employed in penitentiary units are an embodiment of the constitutional principle of cooperation between the state and churches and other

religious organisations for the good of man and the common good specified in Article 25 sec. 3 of the Constitution of the Republic of Poland. These provisions are intended to safeguard the exercise of religious freedom by persons confined in penitentiary institutions. They are also intended to secure the autonomy of churches and other religious organisations by respecting the choices made by their authorities who will carry out pastoral ministry as a chaplain. If a chaplain performs religious practices as a PS employee, there also arises an employee-subordination relationship that ensures the autonomy of the state party in defining and implementing order regulations specifying the internal rules of functioning of penitentiary institutions and the rules on inmates serving their sentences. Therefore, by doing pastoral ministry chaplains employed in penitentiary facilities perform both a public function by carrying out the tasks of employees of a public institution and an ecclesiastical function as clerics acting as chaplains for prisoners. With regard to pastoral matters, chaplains answer to their respective superiors of the church or other religious organisation. This is confirmed by the fact that it is the authorities of individual religious organisations who refer chaplains for employment. A referral is a precondition for an employment relationship with a chaplain, whose clerical qualifications to act as a prison chaplain are confirmed in this way. On the basis of such a referral, the heads of the relevant penitentiary facilities enter into appropriate contracts with chaplains – in this way, they become employees of the Prison Service, being directly subordinated to the head of the penitentiary institution. By virtue of this subordination, chaplains are also to carry out tasks and instructions set by the employer. However, in a situation where the chaplain performs his service free of charge, doubts arise as to the scope of his subordination to the head of the penitentiary facility, which is because the chaplain does not have the status of a PS employee.

The considerations presented so far show that the legal status of prison chaplains is a multi-faceted issue, but it presents doubts as to how inmates' right of religious worship can be adequately guaranteed and how to respect the right of religious organisations to provide religious assistance to prisoners. This is due to the lack of precise and transparent criteria that need to be met if the head of a penitentiary facility is to conclude an appropriate contract with the chaplain, and which would justify the choice between employing a chaplain on a regular basis and having one to provide his services free of charge. This issue merits further research to develop *de lege ferenda* proposals, which would become the basis for regulations specifying the legal status of prison chaplains. This would fully ensure the religious freedom of imprisoned individuals by properly guaranteeing the right of churches and

other religious organisations to provide religious assistance and clarifying the legal status of prison chaplains. This would eliminate the risk of violating the above-mentioned rights and the risk of breaching the security and internal order in penitentiary institutions.

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