UNIWERSYTET ZIELONOGÓRSKI

DYSKURS PRAWNICZY I ADMINISTRACYJNY 1/2024 ISSN 2657-926X

Adam Jakuszewicz
Kazimierz Wielki University in Bydgoszcz
ORCID 0000-0002-7094-5822
jakuszewicz@ukw.edu.pl

Change of religion by a spouse as a culpable cause of the breakdown of marital life. A constitutional-law perspective

Keywords: change of religion, fault for the breakdown of marital life, duty of marital fidelity, religious upbringing of children, limitations of freedom to manifest one's religious beliefs

Summary. According to the jurisprudence of Polish courts, including the Supreme Court, a spouse who, as a result of their changing of religious affiliation, changes some of the rules of family life, as well as takes educational measures aimed at instilling the principles of their newly adopted religion into joint minor children, commits a breach of the duty of marital fidelity, which in turn justifies the attribution to him or her the guilt for the breakdown of the marriage. The above position raises serious constitutional doubts. First of all, the courts made the possibility for a spouse to exercise his or her freedom of religion dependent on the reaction (consent or indifference) of the other spouse, thus disregarding its inalienable nature. Indeed, the conclusion of marriage entails only such limitations on the rights and freedoms of the individual as are necessary for the realisation of the functions of marriage arising from its essence. It does not therefore have the effect of relinquishing by the spouses of the exercise of their freedom of religion. Furthermore, the courts failed to strike a proper balance between the constitutional right of both parents to raise their children in accordance with their respective beliefs. They also failed to examine the position of the children themselves on their religious upbringing in a situation of conflict between the parents, thus failing to take into account their degree of maturity and their freedom of conscience and religion. The adoption of a constitutional perspective by the courts in this type of cases would not only result in a ruling that is in line with the provisions and axiology of the Constitution, but would also contribute to the fuller realisation of substantive justice.

Zmiana wyznania przez małżonka jako zawiniona przyczyna rozkładu pożycia małżeńskiego. Perspektywa konstytucyjnoprawna

Słowa kluczowe: zmiana wyznania, wina rozkładu pożycia małżeńskiego, obowiązek wierności małżeńskiej, religijne wychowanie dzieci, ograniczenia swobody uzewnętrzniania przekonań religijnych

Streszczenie. Zgodnie z orzecznictwem polskich sądów, w tym Sądu Najwyższego, małżonek, który w związku ze zmianą przynależności wyznaniowej dokonuje zmian niektórych zasad funkcjonowania rodziny, a także podejmuje działania wychowawcze mające na celu wpojenie zasad nowo przyjętej religii wspólnym małoletnim dzieciom, dopuszcza się naruszenia obowiązku wierności małżeńskiej, co uzasadnia przypisanie mu winy rozpadu pożycia. Powyższe stanowisko budzi poważne wątpliwości prawno-konstytucyjne. Przede wszystkim sądy uzależniły możliwość korzystania przez małżonka z wolności religii od reakcji (zgody lub obojętności) drugiego małżonka, przez co zanegowały jej niezbywalny charakter. Zawarcie małżeństwa pociąga bowiem za sobą jedynie takie ograniczenia praw

i wolności jednostki, jakie są konieczne do realizacji funkcji małżeństwa wynikających z jego istoty, nie skutkuje więc zrzeczeniem się przez małżonków korzystania z wolności religii. Ponadto sądy nie dokonały należytego wyważenia konstytucyjnego prawa obojga rodziców do wychowywania dzieci zgodnie z przekonaniami każdego z nich. Nie zbadały też stanowiska samych dzieci w sprawie ich religijnego wychowania w sytuacji konfliktu pomiędzy rodzicami, przez co nie uwzględniły stopnia ich dojrzałości oraz przysługującej im wolności sumienia i wyznania. Przyjęcie przez sądy w tego rodzaju sprawach perspektywy konstytucyjnoprawnej skutkowałoby nie tylko wydaniem orzeczenia zgodnego z postanowieniami i aksjologią ustawy zasadniczej, lecz przyczyniłoby do pełniejszego urzeczywistnienia sprawiedliwości materialnej.

1. Introduction

"True marital union is, or at least should be, a union of thoughts, feelings and convictions, a community of experiences, worries and joys, a togetherness based on three feelings: love, respect and trust"[1]. Among factors that undoubtedly contribute to strengthening such a union are common religious or philosophical beliefs, as well as related practices, rites or traditions. Where there are religious differences between the spouses, preserving their spiritual communion requires that they cultivate an attitude of tolerance, mutual acceptance and readiness to compromise[2]. Lack of acceptance of one's spouse's different religious or philosophical beliefs can become the cause of a serious marital and family crisis, which, if unresolved, can lead even to the irretrievable breakdown of the marital life and consequently to the divorce. A particularly tough challenge for the maintenance of the spiritual community of spouses may be a change of religion or beliefs of one of them that occurs after concluding the marriage. This is because such a change may entail a whole range of consequences in the sphere of family life that the other spouse is unwilling or unable to accept.

To the knowledge of the author of this paper situations of this kind were examined by Polish courts in two cases with similar facts. In both of them the cause

[1] M. Jadczak-Żebrowska, *Prawa i obowiązki małżonków*, Białystok 2014, p. 122, https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/3125/1/prawa%20i%20obowi%C4%85zki%20ma%C5%82%C5%BConk%C3%B3w%20%20marta%20jadczak%20zebrowska.pdf [access: 11.08.2023]. The doctrine of Polish family law traditionally distinguishes three elements constituting marital life: spiritual, physical and economic bonds. According to this approach, conjugal life is perceived as a set of ties between spouses of a personal and economic nature. It is worth noting, however, that according to some authors, the essence of matrimonial life lies in the existence of deep spiritual and emotional ties between the spouses. Under this approach physical and economic ties of the spouses are only a manifestation or result of their spiritual community (see *idem*, p. 122 et seq.).

[2] Cf. the similar statement of the Supreme Court that "religion, and perceiving in its light the genesis of the world and the purpose of human life, or the rituals connected with its observance, is one of the planes that can significantly cement the marital and family relationship if they are common to both spouses or are different but mutually acceptable" (Judgment the Supreme Court of 29 December 1951, C 1083/51, OSN 1953, Nr 2, poz. 40, Legalis).

of the dispute between the spouses was that the wife, and subsequently also the children, converted to Jehovah's Witnesses, which brought about changes in their family life (In particular, the wife and children stopped celebrating Christmas.). The wife's decision to change her religion was met with fierce opposition from her husband, which in turn led to the breakdown of their marital life and in the end to dissolution of their marriage by divorce. The courts that heard the cases, including the Supreme Court, held unanimously that a change of religion by an individual and the resulting conduct motivated by their newly adopted beliefs should be deemed as an culpable act where it is strongly opposed by their spouse. This is because adopting by the wife of the new religion implied departure from family traditions against the husband's wishes and triggered a deep conflict over the religious upbringing of their children. When making a decision to abandon the previous lifestyle, the wife should have been aware of the fact that this would have a negative effect on the family life[3].

Considering the change of religion by one of the spouses and their subsequent conduct that results of such a decision in terms of a fault in the breakdown of marital life raises serious doubts as to the compatibility of such an approach with the freedom of conscience and religion and the right of each parent to raise children in accordance with their beliefs, as laid down in Article 53 (1) and 48(1) of the Constitution of the Republic of Poland[4] (hereinafter: the Constitution). The parents' right "to communicate and promote their religious convictions in the bringing up of their children" has also been confirmed by the European Court of Human Rights. The Court noted that this right may be exercised "even in an insistent or overbearing manner" as long as this does not expose the child to dangerous practices or to physical or psychological harm. At the same time the Court added that the exercise of this right cannot be confined to cases where a married couple shares the same religion or worldview, as it sees "no reason why the position of a separated or divorced parent who does not have custody of his or her child should be different *per se*"[5].

[3] Judgment of the Supreme Court of 25 August 2004 (IV CK 609/03); Judgment of the Court of Appeal in Katowice of 25 February 1998 (I ACa 729/97). In this context it is worth quoting the statement of the court of first instance that heard the case subsequently referred to the Court of Appeal in Katowice: "The fault of the claimant was that she changed her religion against the wishes of the respondent and also involved in it her daughters. This gave rise to marital misunderstandings and even to physical violence. With the change of religion, the complainant changed the family traditions by not celebrating holidays. In doing so, she breached her marital obligations and contributed to the enhancing of the breakdown" (quoted in: Judgment of the Court of Appeal in Katowice of 25 February 1998, *op. cit.*).

[4] Konstytucja Rzeczypospolitej Polskiej, the Act of 2 April 1997 (Dz.U. 1997, No. 78, item. 483) with further amendments.

[5] Vojnity v. Hungary, Judgment of 12 February 2013, app. no. 29617/07 § 37. In the cited case the Court derived the parents' right to bring up their children in conformity with their convictions

As a matter of principle, the exercise by the person of constitutional (and Convention) rights and freedoms should not qualify as an unlawful act that could justify attributing to them the fault for the breakdown of their marriage, unless it results or may result in the breach of the rights and interests of their spouse or children whose protection constitutes the *ratio legis* of the so-called matrimonial obligations regulated by the provisions of the Family and Guardianship Code[6] (hereinafter: the Family Code). The objective of this study is to identify these rights and interests and to determine whether the need to protect them can justify restrictions of religious freedom and educational rights of a spouse who decided to change his or her religious affiliation. In the discussed cases the consistency of such restrictions with the Constitution should have been examined by family courts as a preliminary question as it is a condition *sine qua non* for finding that the exercise of these rights by the spouse is an abuse and as such constitutes a culpable cause of the breakdown of marital life in the sense of the provisions of the Family Code.

2. Conditions for qualifying the manifestations by a spouse of newly adopted religious or philosophical beliefs as a culpable cause of the breakdown of marital life

At the outset, it should be noted that the right to have or adopt a religion or worldview pertains to the innermost sphere of an individual, which is traditionally re-

from the right to respect for family life in conjunction with religious freedom as enshrined, respectively, in Articles 8 and 9 of the Convention, together with the right to respect for parents' philosophical and religious convictions in education, as provided in Article 2 of Protocol No. 1 to the Convention. Nevertheless, in most cases relating to a dispute between parents about the upbringing of their children that were caused by their divergent religious or philosophical beliefs, examined by the European Court of Human Rights, the main issue to be resolved was the award of custody. For this reason they were decided on the basis of Article 8 (right to respect for private and family life) in conjunction with Article 14 (prohibition of discrimination). The question of an alleged violation of freedom of religion of a parent was not examined even when such an allegation was raised by the applicant. (e.g. Deschomets v. France, decision of 16 May 2006, app. no. 31956/02; Ismailova v. Russia, judgment of 2 June 2008, app. no 37614/02, § 64 et seq.; Palau-Martinez v. France, judgment of 16 December 2003, app. no.64927/01, § 45). This approach is undoubtedly in line with the principle of *iura novit curia*, according to which the Court is not bound by the legal grounds indicated by the applicant and can therefore decide for itself on the legal characterisation of the facts of the case. (M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2021, ed. 8., p. 61). On the other hand, to adjudicate such cases solely in terms of an alleged breach of the right to respect for private and family life has the effect that the very heart of dispute, that is the freedom of religion of at least one of the parents and children or of the whole family, is completely disregarded. R. Uitz, *Rethinking Desshomets v. France: reinforcing the protection of religious liberty through personal autonomy in custody disputes*, [w:] E. Brems (red.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, Cambridge University Press 2013, p. 178).

[6] Kodeks rodzinny i opiekuńczy, the Act of 25 February 1964 (Dz.U. 1964, No. 9 item. 59), with further amendments.

ferred to as the *forum internum*. As the exercise of this aspect of freedom of religion and belief does not have immediate effects in the outer world, its exercise is not subject to any legal limitations. The mere change of religion by the spouse cannot thus be examined as a potential cause of the breakdown of marital life. Moreover, categorising the change of religion by an individual without the consent of their spouse in terms of unlawfulness would have a negative impact on the missionary activity of religious communities, which is protected under Article 53(2) of the Constitution as one of the forms of manifestation of religious beliefs[7].

Unlike the freedom to choose, hold and change religious and philosophical beliefs, the freedom to manifest them is subject to limitations under the conditions set out in Article 53(5) in conjunction with Article 31(3) of the Constitution. First of all, the limitations in question have to be provided by a statute. For the purpose of this study this requirement implies the need to determine whether upon concluding a marriage the individual undertakes a statutory obligation to refrain from manifesting their religious or philosophical beliefs adopted thereafter, if this meets with the opposition of their spouse. In addition to this formal requirement it must be shown that such an obligation is necessary for the protection of at least one of the values listed in Article 53(5) of the Constitution. In the context of marital relationships, this values primarily include the rights and freedoms of the other spouse and, as appropriate, the rights and freedoms of their minor children. In the jurisprudence and scholarly literature it has been pointed out that manifestations by the spouse of his or her newly adopted religion may, in specific circumstances, result in the breach of the following matrimonial obligations laid down in the Family Code:

– the duty of marital fidelity, understood *inter alia* as the obligation to respect the legitimate expectations of one's spouse with regard to the model of marriage and family life agreed by the spouses (even implicitly) upon the conclusion of the marriage;
– the duty to respect an individual's right to choose a spouse of a particular religion, regarded as an element of the right to respect for their private life;
– the duty to cooperate for the good of the family implying the care of its economic interests.

In addition, attempts of a spouse to involve children in the religion he or she adopted after the conclusion of marriage may interfere with the analogous right of the spouse to bring up the children in conformity with his or her own beliefs (Article 48(1) of the Constitution), especially in keeping with the principles of the previous religion of both spouses.

[7] G. Jędrejek, *Uczucia religijne a regulacja stosunków między małżonkami oraz między rodzicami i dziećmi*, Ius Matrimoniale 2008, No. 13, p. 169.

2.1 Manifestation by the spouse of newly adopted religious beliefs vs. their obligation of marital fidelity

The duty of marital fidelity as laid down in Article 23 of the Family Code is primarily understood as a set of prohibitions concerning "the sexual, erotic-emotional and reproductive sphere"[8]. However, it is sometimes interpreted more broadly as a duty of mutual respect[9] or loyalty and readiness to provide to the spouse reliable assistance in difficult situations[10]. The letter view has been endorsed by the Supreme Court that held that the scope of the duty of fidelity "cannot, after all, be understood solely in terms of the narrow field of sexual contacts, but should also encompass the duty to be loyal to each other and to respect each other's dignity"[11].

This interpretation of the duty of marital fidelity underlies the Supreme Court's justification for attributing the fault for the breakdown of marital life to the spouse in the case under discussion. The Supreme Court held in this respect that the duty of fidelity includes, *inter alia*, the obligation to "abide by the common principles of life and the ways of pursuing them", and a culpable breach of this obligation occurs when the change of religion by the wife resulted in "the destruction of the spiritual community between the spouses and significant changes in the organisation of life in the family and the upbringing of the children"[12].

The ruling has received some approval in the scholarly literature. B. Czech noted that by changing his or her religious beliefs or worldview, a spouse commits an abuse of the trust that he or she has inspired in the other spouse by declaring – even implicitly - certain values at the time of the marriage. Consequently, the subsequent deviation from these values constitutes a breach of the principles of social morality to which Polish legal system refers and thus an abuse of the right to freedom of conscience[13]. A similar view has been expressed by A Sylwestrzak who claims that the manifestations by the spouses of the newly adopted religion can be examined in terms of fault for the breakdown of the marriage if they signifi-

[8] E.g. M. Fras, commentary on Article 23, in: M. Habdas (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2021 (Lex); T. Sokołowski, commentary on Article 23, in: H. Dolecki (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz,* Warszawa 2013, 2nd edition (Lex). (Lex is a Polish online platform containing jurisprudence and legal literature, run by the publishing house Wolters Kluwers Polska.)

[9] K. Gromek, commentary on Article 23, in: K. Gromek (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz,* Warszawa 2020, 7th edition (Legalis) and the case law cited therein. (Legalis is a Polish online platform containing jurisprudence and legal literature, run by the publishing house C.H. Beck).

[10] J. Pawliczak, commentary on Article 23, in: K. Osajda (ed. of the series), M. Domański, J. Słyk (eds. of the volume), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2023, 10th edition (Legalis).

[11] Judgment of the Supreme Court of 8 December 2000, I CKN 1129/99 (Legalis).

[12] Judgment of the Supreme Court of 25 August 2004, *op. cit.*

[13] B. Czech, *Wierność małżeńska a kwestia winy rozkładu pożycia*, Przegląd Sądowy 2007, No. 5, p. 19 et seq.

cantly violate the legitimate interest of the other spouse and deviate from the previously adopted model of marriage and family life[14]. This position can be seen as the concretisation of a more general directive, formulated in the doctrine of family law, according to which, when examining the fault for marital breakdown, account should be taken of the rules of conduct established by the spouses in their mutual relations ('common model of marriage') within the legal framework set out by the provisions of the Family Code that regulate the rights and duties of the spouses[15].

Nevertheless, the cited view can hardly be considered correct. Above all, it should be noted that conclusion of a marriage results in only such limitations on the exercise of constitutional rights and freedoms of the spouses that is incompatible with the essence, functions and objectives of marriage and the related legitimate (legally protected) expectations of the other spouse[16]. An obvious example of limitations on the constitutional rights and freedoms self-imposed by the spouses on entering into marriage are restrictions on the right to privacy that arise from the duty to maintain marital fidelity. Another example of such limitations is the statutory restriction of the spouse's right to property as under article 28^1 of the Family Code the spouse is obliged to allow the other spouse to use the dwelling in respect of which he or she has a legal title, including in particular the right to property, in order to satisfy the housing needs of the family.

Considering the above observation, one cannot assume that, by concluding the marriage, an individual *ipso facto* pledges not to deviate from the principles of the religion or worldview he or she professed on the day of the marriage (even though he or she has lost faith in their truthfulness), unless he or she is released from this obligation by his or her spouse. Arguing to the contrary would imply that by getting married the individual waives their right to freedom of conscience or at least makes its exercise dependent on the will or consent of their spouse. Indeed, requiring a spouse to adhere to the religious or philosophical convictions held by him or her at the time of concluding the marriage would be incompatible with the inalienable character of individual rights in general and with the utmost personal character of the freedom of conscience and religion, in particular. Neither can it be justified with the reference to the essence and purposes of the marriage. Although the sharing of religious or philosophical beliefs by the spouses is highly

[14] A. Sylwestrzak, *Zmiana religii przez małżonka a wina w rozkładzie pożycia małżeńskiego*, Gdańskie Studia Prawnicze 2006, No. 1, p. 51.

[15] See e.g. J. Pawliczak, commentary on Article 23, in: K. Osajda (ed. of the series), M. Domański, J. Słyk (eds. of the volume), *op. cit.* (Legalis); T. Skokołowski, in: T. Smyczyński (ed.), *System prawa prywatnego. Prawo rodzinne i opiekuńcze*, vol. 11, Warszawa 2014, p. 715.

[16] Cf. the statement of the Supreme Court according to which "the obligations arising from marital and family relations should not restrict the personal life of each spouse to a greater extent than the good of the family requires"(judgment of the Supreme Court of 18 March 1999, I CKN 1050/97 (Lex)).

desirable in terms of the matrimonial unity and harmony of family life, it cannot be perceived as a necessary condition for the achieving of the objective functions of marriage. Furthermore, requiring a spouse to not abandon religious or philosophical beliefs that she or he professed when concluding the marriage is incompatible with the constitutional obligation to respect and protect the dignity of the individual (Article 30 of the Constitution), especially when one takes into account that in modern discourse of human rights human dignity is increasingly perceived to be synonymous with the autonomy of will of a person or even reduced to the right to individual self-determination[17].

It should also be noted that the duty of marital fidelity can be derived not only from the provisions of positive law, but also from the principles of social coexistence, i.e. the principles of public morals to which the Polish legal system refers as one of the grounds for limitations of constitutional rights. Nevertheless, when assessing the conduct of a spouse resulting from his or her change of religion in the light of the principles of social coexistence, it is necessary to consider the evolution of moral beliefs of the modern society with regard to marital and family life. In particular, it should be considered that the model of the modern family is increasingly determined by the individualistic vision of a human being that emphasises the value of self-determination and personal happiness[18]. This trend is reflected in the view adopted by some scholars that although living together in the conjugal relationship presupposes a duty of the spouses to take their partner's opinions, wishes, needs and interests into account, the obligation to be considerate of their partner does not require either spouse to renounce their academic, artistic, political, spiritual or religious development[19]. Some scholars are even of the opinion that intolerance of the spouse's different religious, political or social views can qualify as a culpable cause of the breakdown of conjugal life[20]. For this reasons, the view that a change of religion by a person against the will of their spouse and the resulting manifestations of their newly adopted beliefs constitute a breach of the duty of marital fidelity must be regarded as untenable.

---

[17] On the increasing tendency to understand the notion of human dignity as self-realisation of an individual in accordance with his or her subjective conception of a good life or even whith his or her sheer desires, and on consequences of this tendency for the interpretation of human rights, see: G. Puppinck, *Degeneracja praw człowieka*, Kraków 2021, in particular p. 104 et seq.

[18] A. Tomczyk, *Skutki cywilnoprawne naruszenia norm moralnych między osobami bliskimi*, Warszawa 2020 (Legalis).

[19] M. Jadczak-Żebrowska, *op. cit.*, p. 85.

[20] H. Haak, A. Haak-Trzuskawska, commentary on Article 57, in: *Rozwód i separacja. Komentarz do art. 55–61⁶ KRO oraz związanych z nimi regulacji KPC*, Warszawa 2020 (Legalis).

2.2. The duty to respect the individual's right to choose a spouse of a particular religion

The Court of Appeal in Katowice framed the manifesting the newly adopted religion against the wishes of one's spouse in terms of a conflict between the right to choose a religion or belief and the right to choose a spouse with certain characteristics. According to the Court, although the right of an individual to decide on his or her religious affiliation falls within the scope of "absolute personal rights, it is also beyond doubt that everyone has the right to choose a person of a particular religion to be his or her spouse and the right to raise children in such a religion"[21].

Whereas the right of each parent to bring up children in conformity with their beliefs is enshrined in Article 48(1) of the Constitution, the legal basis for the right to 'choose the person of the spouse of a particular religion' should be sought in the right to privacy laid down in Article 47 that includes the right "to decide on one's personal life". Nevertheless, when balancing the mentioned rights the Court failed to take into account the obvious fact that some actions of an individual that pertain to their private sphere, such as the decision to marry, by its very nature require the consent or at least cooperation of another person. Article 47 of the Constitution cannot therefore be interpreted as providing a legal basis for imposing on a person a duty to take actions contrary to their conscience in order to enforce a decision of the other that affects his or her privacy. For example, as a matter of principle, a patient cannot rely on their right to private life as a legal basis for an alleged obligation of a health care worker to participate in a medical procedure that would violate the conscience of the latter. Similarly, a spouse cannot be obliged to celebrate certain holidays, observe certain traditions or participate in religious practices in order to meet the expectations of the other spouse or protect the existing model of family life, if this entailed a violation of a prohibition based on religious norms binding on them. The limit of the individual's right to self-determination is the freedom of conscience of third parties, including the spouse[22]

2.3 Manifestation of religious beliefs by the spouse vs. their duty to cooperate for the good of the family

In the judgement that gave rise to the case before the Supreme Court discussed in this study the Court of Appeal held that making donations of certain amounts by one spouse to a religious organisation against the will of the other spouse should be examined in terms of factors contributing to the breakdown of the marriage. In

[21] Judgment of the Court of Appeal in Katowice of 25 February 1998, *op. cit.*

[22] M. Wild, commentary on Article 47, in: M. Safjan, L. Bosek (eds.), *Konstytucja RP, t. 1: Komentarz do art. 1–86,* Warszawa 2016 (Legalis).

particular, the Court found that the husband continued to support the family, but restricted the wife's expenses, as he wanted to control that the money he earned (The wife was a homemaker raising three daughters.) was not used for purposes carried out by the religious community, which the wife joined despite his opposition. This measure was held by the Court of Appeal to be justified by the husband's disagreement with the change of religious affiliation by his wife and children. The position of the Court of Appeal in this respect was implicitly endorsed by the Supreme Court.

The problem with this approach is that the Court of Appeal did not examine the implications of the wife's conduct in terms of religious freedom. Specifically, it did not take into account that providing financial suport to a religious organisation is a form of manifesting one's religious beliefs under Article 53 (2) of the Constitution. Indeed, from the perspective of many religions, contributing to the maintenance of the religious organisation and to achieving of its aims, as well as supporting charitable activities, is not mere supererogation, but – at least in some instances – an obligation regulated by the internal law of the religious community in question[23]. Irrespective of the (optional or mandatory) character for the believer, providing financial contributions to their religious community should be viewed as a manifestation of their beliefs. Like other forms of exercise of religious freedom, it can be subject to limitations if they are provided by law and are necessary for the protection of, *inter alia*, the rights and freedoms of others. The legal basis for the limitation of the right to finance religious purposes can be Article 23 the of the Family Code under which spouses have a duty to cooperate for the good of the family. This means that they should "do everything that serves the legitimate interests of the family as a whole and of its individual members and refrain from any act that would harm these interests"[24]. The notion of the good of the family obviously includes economic interests so that each spouse should not only contribute – within his or her abilities - to the growth of family's assets, but also to refrain from unjustified depletion of the joint property.

[23] For example, one of the five ecclesiastical commandments binding on Catholics is to provide for the material needs of the Church. (*Catechism of the Catholic Church*, Citta del Vaticano 1993, point 2043, https://www.vatican.va/archive/ENG00015/_P85.HTM, (accessed on: 10.08.2023)). In contrast, the financing of the activities of the organisation of Jehovah's Witnesses is based on the principles of voluntariness and discretion, stemming from the personal responsibility of its members for the proper fulfilment of the tasks of the community. See: *Jehovah's Witnesses*, *Proclaimers of the Kingdom*, New York 1993, p. 340 et seq., https://www.jw.org/en/library/books/Jehovahs-Witnesses-Proclaimers-of-Gods-Kingdom/An-Association-of-Brothers/How-Is-It-All-Financed/, (accessed on: 10.08.2023).

[24] J. Gajda, commentary on Article 23, in: K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2023, 8th edition, (Legalis).

The account of facts in the case under comment (at least as stated in the reasoning of the discussed judgment) does not contain information allowing to establish that the wife donated amounts for religious purposes which, in the light of the circumstances of the case, could be considered unreasonably excessive, with the result that she could be accused of causing substantial depletion of the spouses' property and consequently of breaching her duty to cooperate for the good of the family. Nevertheless, the reasoning the Court leads to the conclusion that a spouse that remains in the statutory regime of joint marital property may prevent the other spouse's donations to a religious organisation relying on their disapproval of that spouse's conversion. This outcome is undoubtedly supported by Article 37(1)(4) of the Family Code, under which making donations from joint property requires the consent of the other spouse except in the case of 'minor customary donations'. When determining whether a donation can be regarded as 'minor' one should consider the financial situation of the particular family. In turn, the notion of 'customary' refers to the customs and practices prevailing in the family in question. The most commonly customary donations are gifts made on the occasion of personal or family celebrations such as weddings or birthdays[25]. It is argued that this category also includes contributions for religious purposes, if they are made by the family on a regular basis, such as the offerings made on the occasion of the annual pastoral visit of Catholic priests to believers' homes in accordance with Polish tradition or the regular payments of the so-called church contribution for the maintenance of a religious community made by members of Protestant churches. In contrast, this cannot be said about donations made by one spouse to a religious organisation she joined during the marriage against the wishes of the other spouse. Consequently, in the absence of the spouse's consent to such a donation, it must be deemed null and void under Article 37(1)(4) of the Family Code. This outcome, however, does not seem satisfactory from the perspective of the protection of the freedom to manifest one's religion, especially in cases where providing financial support to some purposes is perceived as a religious duty of the believer and the compliance with this duty does not have significant implications for family's assets.

3. The right of a spouse to bring up their children in accordance with their beliefs in the case of the objections of the other spouse

In the discussed judgment the Supreme Court assumed that in the case where in a marriage the tasks are divided in such a way that the husband provides for the family and the wife is a homemaker the upbringing of the children inevitably falls

[25] E.g. J. Styk, commentary on Article 37, in: K. Osajda (ed. of the series), M. Domański, J. Słyk (eds. of the volume), *op. cit.* (Legalis); K. Gromek, commentary on Article 37, *op. cit.* (Legalis).

to the latter. Consequently, the "intellectual and emotional processes and choices of the daughters of the parties" with regard to the identification with a particular religion were determined mainly by "patterns of behaviour preferred by her", and the husband had practically no real influence in this sphere so that in the event of a dispute on the issue he was in a losing position from the outset. Based on this assumption, the Supreme Court held that the husband had a legitimate expectation to have the children brought up in the religion professed by the spouses upon concluding their marriage. For this reason, when the wife after several years of marital life abandoned the principles of this religion, "he had every right to feel disappointed, excluded from the joint upbringing of the children and unfulfilled in his expectations of a husband and father". Consequently, the Supreme Court ruled that the wife's actions aimed at causing the children to change their religion amounts to a breach of the spouses' previous agreement on this issue and must therefore be considered a culpable cause of the breakdown of their marriage[26].

The judgment under comment implies a principle that when a spouse changes religion in the absence of the other spouse's acceptance of such a decision, he or she should respect the previous arrangements and practices with regard to the religious upbringing of the children. In practice, this means that the spouse who has changed religion should exercise the utmost restraint in exercising his or her right to religious upbringing of the children, or perhaps even refrain from its exercise altogether. This outcome, however, is incompatible with Article 53(2) (right to adopt a religion of one's choice) in conjunction with Article 48(1) of the Constitution (right of parents to bring up their children in accordance with their beliefs). In the light of these provision one should rather assume that the change of religion by one spouse may entail restrictions on his or her right to the religious upbringing of children only to the extent that the exercise of this right is irreconcilable with the analogous right of the other parent. Such an "accommodating" approach has been adopted in the jurisprudence of the European Court of Human Rights in cases concerning similar conflicts between parents. In the Court's view reconciling each parent's educational choices, and attempting to strike a satisfactory balance between the parents' individual conceptions, precluding any value judgments on the part of national authorities and, where necessary, laying down minimum rules on personal religious practices, lies in the best interest of the child[27]. For these reasons, it is both surprising and disturbing that the right of a parent to bring up their children in conformity with the newly adopted religious beliefs has been completely disregarded by the Polish courts. Instead of striking a fair balance and – as far

[26] Judgment of the Supreme Court of 25 August 2004, *op. cit.*

[27] T.C. v. Italy, Judgment of 19 May 2022, app. no. 54032/18; F.L. v France, decision of 3 November 2005, app. no. 61162/00.

as possible – reconciling the interests of both parties, the courts ruled unilaterally in favour of the husband who wished to ensure that the children continued to be raised in accordance with the beliefs he professed, while at the same time completely ignoring the same right of the other parent. Such an approach undoubtedly constitutes a glaring breach of the principle of proportionality.

In this connection it is noteworthy that, apart from failing to meet the husband's expectations with regard to religious upbringing of the children, the Supreme Court and other courts did not find any other abuse by the wife in the exercise of her parental rights. In the context of a conflict between spouses over the religious upbringing of their children, a parent would abuse their right if he or she made important decisions in this respect (e.g. the decision for a child to join a religious community or to enrol them in classes of religious instruction) one-sidedly, that is without taking into account the opinion of the other parent and – when appropriate – of the children themselves. Such unilateral shaping of the child's religious views could be assessed as a culpable breach of conjugal obligations and become grounds for the imputation of fault for marital breakdown, particularly when it comes to younger children who are under considerable parental influence[28].

Furthermore, it is difficult to agree with the position of the Supreme Court's that, due to the division of duties adopted by the spouses, the husband was practically excluded from the religious upbringing of the children. Above all, such an assertion is not supported by the account of the facts of the case as summarised in the reasoning of the judgment. For this reason, assuming, as a matter of a general principle, that a parent is completely excluded from participating in transmitting values to their children for the sole reason that he or she performs professional work is by no means convincing. The real impact of parenting measures on a child's attitudes is certainly determined by a number of factors, including the amount of time each parent spends with the child. Nevertheless, in the process of transmission of values to the child the most important factor seems to be the consistency of parents' conduct with their declared beliefs. In the reasons for the judgment there is no information about the husband's religious commitment and the 'positive' measures he was taking in order to pass on to the children his religious beliefs, It may well be that the husband's actions in this respect were confined to measures of a 'negative' nature, i.e. to expressing opposition to his wife's involvement of the children in the religious life of the community she had joined. Whatever the exact facts of the case and motivation of the husband may have been, a spouse, as a matter of principle, should not be attributed the fault for the breakdown of marital life only because he or she seriously tries to live in accordance with a religion that is not accepted by the other spouse.

[28] A. Sylwestrzak, *op. cit.*, p. 53.

Last, but not least, it is problematic that the courts, including the Supreme Court, did not examine the position of children with regard to the newly adopted religion of their mother as if they were not holders of the right to freedom of conscience and religion at all and did not or could not have an opinion on the matter. In particular, the courts failed to establish the following issues: Did the children feel aggrieved by their mother's change of religion? Would they like to celebrate Catholic holidays? Which faith is closer to them? In which faith would they prefer to be brought up - his father's or his mother's, or perhaps both? The duly consideration of the opinions of children is a factor that undoubtedly should have been taken into account when striking the balance between conflicting rights of the parents. It also should be noted that according to Article 48(1) of the Constitution, when exercising the right to bring up their children in conformity with their convictions, the parents should take into consideration the level of the child's maturity, as well as their own right to freedom of conscience, religion and belief. Moreover, under Article 72 (3) of the Constitution, public authorities and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. For these reasons, the failure of the courts to take into account the attitude of the children towards the changes in their family life resulting from their mother's adoption of a new religion should be deemed to amount to the breach of the aforementioned provisions, especially when one considers that at the time of the change of religion by their mothers some children had already reached the age of adolescence[29].

4. Conclusion

Despite their primarily family law character, cases concerning parental disagreement about religious upbringing of children as a cause of the irretrievable breakdown of marital life are also of constitutional relevance. Unfortunately, when ruling on this kind of cases Polish courts tend not to take the adequate account of the constitutional rights of the persons involved. Although the courts acknowledge that the spouse has a right to change their religion, they make the possibility of their manifesting of their newly adopted beliefs conditional on the reaction on the part of the other spouse. As a result, freedom of religion loses its inalienable character and becomes conditional on the attitude of other person. It should, however, be noted that as a matter of principle upon concluding the marriage a person undertakes the duty to refrain from exercise of their constitutional rights only so far as it is required by the essence and functions of the marital union. Consequently,

[29] J. de Pree, *Wolność myśli, sumienia i wyznania dziecka jako fundamentalne prawo człowieka*, Warszawa 2019 (Legalis).

the manifestations by the spouse of their newly adopted religious or philosophical beliefs can be deemed as a culpable cause of the breakdown of marriage only if it amounts to a breach of the marital obligations provided for in the Family Code and designed to protect rights and interests of others of the constitutional rank. Contrary to the position of Polish courts, on should assume that the more expectations on the part of the spouse that the other spouse will not change their religious or philosophical beliefs, and consequently their conduct, throughout the marriage are not legally protected. The statutory obligation of marital fidelity, even assuming that it includes the obligation of heightened loyalty of one's spouse to the other one, cannot be interpreted as to include a duty to refrain from abiding by imperative mandate of one's conscience. Where a change of religion by an individual meets the strong opposition of their spouse that in turn results in the breakdown of marital life, the court should dissolve the marriage by divorce without adjudicating of fault.

Furthermore, a spouse who changes their religious or philosophical beliefs during their marriage does not waive or lose their constitutional right to raise their children in accordance with their newly adopted beliefs. After all, the lawful exercise of the constitutional right to change one's religion cannot entail negative legal consequences in the sphere of other rights. Consequently, in the case of a conflict between parents over the religious upbringing of their children, the courts should attempt to reconcile the interests of both parents, taking into account the best interest of the child. The Polish courts, however, tend to rule in favour of continuing the upbringing of children in conformity with the faith professed by the spouses upon conclusion of their marriage relying only on expectations of one spouse and without considering the rights a parent who changed religion and – according to the circumstances of the case – the standpoint of the child themselves. The consideration by the courts of the constitutional perspective would not only bring their jurisprudence in line with provisions and axiology of the Constitution; it also would lead to broadening the examination of facts by properly including the perspective of all the persons involved, which would considerably contribute to enhancing substantive justice.

References

Catechism of the Catholic Church, Citta del Vaticano 1993, https://www.vatican.va/archive/ENG0015/__P85.HTM, (accessed on: 10.08.2023).

Czech B., *Wierność małżeńska a kwestia winy rozkładu pożycia*, „Przegląd Sądowy" 2007, No. 5.

Fras, M., commentary on art. 23, in: M. Habdas (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2021 (Lex).

Gajda J., commentary on Article 23, in: K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2020, 8th edition, (Legalis).

Gromek K., commentary on Article 23, in: K. Gromek (ed.) *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2020, 7th edition (Legalis).
Gromek K., commentary on Article 37, in: K. Gromek (ed.) *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2020, 7th edition (Legalis).
Haak H., Haak-Trzuskawska A., commentary on Article 57, in: *Rozwód i separacja. Komentarz do art. 55–61[6] KRO oraz związanych z nimi regulacji KPC*, Warszawa 2020 (Legalis).
Jadczak-Żebrowska M., *Prawa i obowiązki małżonków*, Białystok 2014, https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/3125/1/prawa%20i%20obowi%C4%85zki%20ma%C5%82%C5%BConk%C3%B3w%20%20marta%20jadczak%20zebrowska.pdf: (accessed on: 11.08.2023).
Jehovah's Witnesses: Proclaimers of the Kingdom, New York 1993,
https://www.jw.org/en/library/books/Jehovahs-Witnesses-Proclaimers-of-Gods-Kingdom/An-Association-of-Brothers/How-Is-It-All-Financed/, (accessed on: 10.08.2023).
Jędrejek G., *Uczucia religijne a regulacja stosunków między małżonkami oraz między rodzicami i dziećmi*, „Ius Matrimoniale" 2008, No 13.
Nowicki M.A., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2021, ed. 8
Pawliczak J., commentary on Article 23, in: K. Osajda, (ed. of the series), M. Domański, J. Słyk (eds. of the volume), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2023, 10th edition (Legalis).
de Pree, J., *Wolność myśli, sumienia i wyznania dziecka jako fundamentalne prawo człowieka*, Warszawa 2019 (Legalis).
Puppinck P., *Degeneracja praw człowieka*, Kraków 2021.
Skokołowski T., in: T. Smyczyński, (ed.), *System prawa prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 11, Warszawa 2014.
Styk J., commentary on Article 37, in: Osajda K. (ed. of the series), M. Domański, J. Słyk, (eds. of the volume), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2023, 10th edition (Legalis).
Sylwestrzak A., *Zmiana religii przez małżonka a wina w rozkładzie pożycia małżeńskiego*, „Gdańskie Studia Prawnicze" 2006, No. 1.
Tomczyk A., *Skutki cywilnoprawne naruszenia norm moralnych między osobami bliskimi*, Warszawa 2020 (Legalis).
Uitz R., *Rethinking Desshomets v. France: reinforcing the protection of religious liberty through personal autonomy in custody disputes*, in: E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, Cambridge University Press 2013.
Wild, M., commentary on Article 47, in: M. Safjan, L. Bosek, (eds), *Konstytucja RP, t. 1: Komentarz do art. 1-86*, Warszawa 2016 (Legalis).

Jurisprudence

Deschomets v. France, decision of the European Court of Human Rights of 16 May 2006, app. no. 31956/02.
F.L. v. France, decision of the European Court of Human Righs of 3 November 2005, app. no. 61162/00.
Ismailova v. Russia, judgment of the European Court of Human Rights of 2 June 2008, app. no. 37614/02.
Judgment of the Supreme Court of 29 December 1951, C 1083/51, OSN 1953, Nr 2, poz. 40, (Legalis).
Judgment of the Supreme Court of 5 December 1997, I CKN 597/97, OSNC 1998, Nr 6, poz. 99 (Legalis).
Judgment of the Supreme Court of 18 March 1999, I CKN 1050/97 (Lex).
Judgment of the Supreme Court of 8 December 2000, I CKN 1129/99, (Legalis).
Judgment of the Supreme Court of 25 August 2004, IV CK 609/03, (Legalis).
Judgment of the Court of Appeal in Katowice of 25 February 1998, I ACa 729/97, OSA 1998, Nr 11-12, poz. 49, (Lex).

Palau-Martinez v. France, judgment of the European Court of Human Rights of 16 December 2003, app. no.64927/01.
T.C. v. Italy, Judgment the European Court of Human Rights of 19 May 2022, app. no. 54032/18.
Vojnity v. Hungary, Judgment of the European Court of Human Rights of 12 February 2013, app. no. 29617/07.