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Law and Collective Identity. Religious Freedom in the Public Sphere

Abstract

Does religion represent a threat to public life and freedom of individuals or perhaps an opportunity for integral development that stems from care for the state as the common good? Christianity does not regard faith as a private matter. It must enjoy freedom in the public sphere. Therefore, assuming that state regulations have no concealed or overtly anti-religious bias, they are certain to entail endeavours to set the barely definable boundaries of the permissible and the impermissible. Richard John Neuhaus proved that the naked square is an illusion, an imposture rather than an opportunity or a decent objective. Public life, as any other kind of existence, abhors vacuum. The calls for confining religion to the private sphere are always to be a failure for the health of the public life. The freedom of religion, as any other freedom, is a challenge that requires defense and price to be paid by nations and individuals. The specific and true cases demonstrate that the numerous antireligious metaphors are not matched by the actual experience. The US Supreme Court decision in Zubik v. Burwell is thoroughly discussed below to give a clear and the most recent example of complexity of both the issue and possible ways of resolving controversies on various aspects of religious freedom.

Key words: collective identity, religious freedom, conscientious objection, church-state relations.

Religiousness is inherent in human nature. Individual maturity in this realm involves progress from natural religiousness to faith which in turn requires being true to what one professes. A believer is the subject not only of political agreement or the social contract but also of the covenant of faith. Yet, since states are believers' habitats, it is all very well as long as the state is a legal state or *rechtsstaat*. Even if it has not always been a democratic *rechtsstaat*, the impact of legal regulations on the life of faith requires analyses and productive research work. The creation of effective and sustainable relations between the authorities and religious denominations takes a lot of practical sense. It is precisely the attitude to religion that determines the perception of neutrality, secularism, the scope of autonomy as well as the sovereignty of governments and churches along with the permitted scope of their cooperation. Does religion represent a threat to public

life and freedom of individuals or perhaps an opportunity for integral development that stems from care for the state as the common good?

When Christianity is one of religions, not necessarily dominant or traditionally best rooted in a particular national community, the presence of religion in the public sphere seems easy enough to explore as Christianity does not need to be the nucleus of day-to-day life or of a variety of public policies. Faith does not form a canon of conduct in terms of dress, diet, travel etc. It only sets moral, ergo inward requirements, and demands respect for dogmas as well as orthodoxy, not orthopraxy. However, the issue tends to be more complex as Christianity does not regard faith as a private matter. It must enjoy freedom in the public sphere. Therefore, assuming that state regulations have no concealed or overtly anti-religious bias, they are certain to entail endeavours to set the barely definable boundaries of the permissible and the impermissible. Recognition thereof involves a potential key prerequisite for the specific kind of permissibility: religious identity and tradition of faith, both of which represent an essential part of collective identity that in turn may help determine the scope of religious impact in the public sphere of rechtsstaat.

My address scheduled for delivery at the conclusion of the already famous conference held in 2016 on religion in the public sphere of legal state of the 19th through 20th centuries[1] was titled "Religious Freedom in the Public Square." The organizers had intended it to be the paper crowning the event with a summary of what was to be discussed during the entire symposium. When faced with the aforementioned procedural requirements of the conference whose very subject presupposed the adoption of juridical approach to the presence of religions in the lives of nations, I decided that being determined to hint about the key concept of the presentation which I had intended to be my contribution to the event's finale, I should refer to a classic concept: the metaphor from the title of the book "The Naked Public Square"[2] by Richard John Neuhaus. The naked square is an illusion, an imposture rather than an opportunity or a decent objective. Public life, as any other kind of existence, abhors vacuum. The calls for confining religion to the private sphere that originated also in the United States of the 20th century invite grave risks to the health of public relations. The attempts to eradicate both faith as such and whatever identifies particular citizens as religious individuals, are all bound to instantaneously entail the sneaky pervasion of secularism meaning a political doctrine and praxis that seek to eliminate religion and its inherent values from the conduct of public affairs.[3] What needs stressing here is that at issue are the values guiding and driving millions of people in their daily pursuits. The current polarisation: liberals versus conservatives or the right versus the left has assumed unprecedented proportions and has grown more emotional than it was at the time of writing the book. Hence the increased appreciation of the remark by R.J. Neuhaus that religion is not responsible for divisions. On the contrary, it teaches respect for others including non-believers, which viewed through the prism of what has emerged from the secularity of the country known for the ominous separation, causes the concept of *frater-*

[1] *Religion in the Public Space of the Legal State of the 19th through 20th Centuries*, Kraków, April 28th–29th 2016.

[2] R.J. Neuhaus, *The Naked Public Square. Religion and Democracy in America*, Grand Rapids, MI, 1984.

[3] *Cf. O wolność słowa i religii. Praktyka i teoria* [For the Freedom of Speech and Religion. Praxis and Theory], F. Longchamps de Bérier, K. Szczucki (eds.), Warszawa 2016.

nité from the motto of the French Republic to gain in unambiguity that is a blessing for public peace largely due to extension of the biblical qualities stemming from the Judeo-Christian tradition over the concept of brotherhood. It uses the phrase 'fellow man' or the word 'neighbour' as a synonym for brother. All this seems so obvious, however, given the denial on the part of a variety of secular doctrines, there is still lots to prove, plenty to substantiate, both in theoretical and practical terms. One type of argument in favour of the theories proposed above is supported by historical and comparative facts whose combination provides a diachronic approach rendered in terms of comparative jurisprudence, while the use of comparative argument alone enables synchronic comparison.

The other type of argument in favour of the social practice is aided by public response to violation or even emergence of threats to religious freedom as well as by the relevant kind of journalism. The freedom, as any other freedom, is a challenge that requires defence and price to be paid by nations and individuals. The specific and true cases demonstrate that the numerous antireligious metaphors are not matched by the actual experience, which is exemplified by the claim that a high and heavily guarded wall of separation should be built between church and state that has been repeatedly quoted as irrelevant in decisions by the US Supreme Court.[4]

As time goes by, Joseph Weiler's argument in favour of respecting the collective identity of nations appears to be increasingly convincing. Indeed, it is religion professed by the overriding majority of specific indigenous populace that forms its most essential part. To my mind, this is eloquently exemplified by the Islamic Republic of Pakistan that emerged in the wake of the secession which set the British Indies apart from the territories lying on the Indus River which are inhabited by the Muslims. Indeed, as Muslim communities are becoming more and more active in Europe J. Weiler's argument is being considered increasingly pertinent, and so is the debate on the relations between religion and political authorities. The hitherto popular problem management concepts seem to be sterile when confronted with the recurring questions regarding the status of Islam and its faithful in the European nations. In this context it is worth looking into the distinction within the concept of freedom of religion. What needs noting "In addition to the classical *individual* freedom of and from religion, in its very structure Europe represents a second *collective*, *identitarian*, freedom, conceptually stemming from self-determination, namely the freedom of nations/states to include in their self-definition, in their self-understanding and in their national and statal symbology, a more or less robust entanglement of religion and religious symbols."[5] Europe sees no evil in individual countries' perceiving their identities through religion or by referring to their respective historical religious traditions. Consequently it is not uncommon for spectators of public space in these countries to see religious symbols appearing in liaison with state symbols. Not infrequent are cases of coexistence between the principles of liberal democracy and collective identity that is rooted in religion or has historical links therewith. Secular societies tend to treat the symbols as part of their own national identity and see their use to say the least as a manifestation of tolerance for fellow citizens.

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[4] F. Longchamps de Bérier, *Church-State Relations: Separation without the Wall*, "Studia Iuridica" 1995, No. 30, pp. 61–92.

[5] J.H.H. Weiler, *Państwo i Naród, kościół, meczet, synagoga. Nieuniknione debata (State and Nation; Church, Mosque and Synagogue. The Debate that Won't Go Away)*, "Forum Prawnicze" 2011, No. 1, p. 38.

Apparently, identity found not only in people's private lives seems to steadily gain in meaning. That it should be integral part of day-to-day existence and subject to legal protection is being increasingly recognised by the nations of Europe, at least those within our region. The trend is particularly conspicuous in the context of doubts regarding intellectual status of Europe of the Carpathians.[6] The mountains by their very nature represent an eloquent metaphor. Extending across the territories of numerous countries they bring together most dissimilar entities thus offering opportunities for formation of a community. None of the nations can say that the Carpathians are their internal mountains but all of them claim that these are their own mountain, even though the mountains are not exclusively theirs. Hence opportunities for searching common heritage and acceptance thereof. The mountains with their slopes alternately imposing, jagged and gentle, descend to valleys of diverse shapes and lengths. There are people there living lives of their own, effectively isolated from each other, yet now and again nursing the sense of being unique, special, sometimes lonely. The metaphor of the mountains invites the formation of a community, at the same time fostering realization of the capacities stemming from difference. Consequently, it removes surprise that the Carpathian peoples can feel very distant and different in the individual valleys but at times of crises they may choose to seek each other's understanding and support.

A West to the East bird's-eye view shows that the further East the more numerous are scattered towns and cities. The number of universities shrinks, too.[7] Those north of the Alps were founded relatively early: 1348 in Prague, 1364 in Cracow, 1365 in Vienna, 1367 in Pecs. Yet, it was only throughout the 19th century that legal uniformity of the Continent was arrived at, and western law and doctrine were *en mass* transferred to the East. With real business doing fine or thriving between eastern peripheries and West European metropolises, local cooperation in other areas of human activity was rather disadvantaged. Where law is concerned, intraregional cooperation was scarce, except for the notable 19th century Austro-Hungarian structures that may well be deemed a concept that a hundred years later was followed by the rise of the European Union.[8] However, bulk of said cooperation was not internal but with the Western metropolis.

The awareness of negligence having occurred in the past necessitates intellectual effort aimed at intensifying contacts and cooperation as well as at stepping up regional exchange with a view to using the riches consequent on diversity whose recognition bolsters the identities of individual nations as it compels everyone to seek treasures in the valleys. Comparing Poles with their neighbour nations demonstrates how very Roman we are even though it was the partitions of Poland in the late 18th century that we owe the legal heritage of the Quirites that became part of our nation's relevant tra-

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[6] At Conference: *Europa Karpat (Europe of the Carpathians)*, Krynica-Zdrój, 7–8 September 2016.

[7] T. Giaro, *Legal Tradition of Eastern Europe. Its Rise and Demise*, "Comparative Law Review" 2011, Vol. 2, No. 1, p. 6.

[8] A. Dziadzio, *Monarchia konstytucyjna w Austrii (1867–1914). Władza – obywatel – prawo* [Constitutional Monarchy in Austria (1867–1914). Authority *v.* Citizen *v.* Law], Kraków 2001, pp. 5–6. For a remark regarding the transfer of the institution of Austrian law from the times of Franz Joseph I Monarchy into the legal systems of the successor states of the Habsburg Monarchy see: *idem*, *Die Angelegenheiten aus Galizien in der Rechsprechung der österreichischen Verwaltungsgerichtsbarkeit im 19. und 20.* [in:] *Rechtsprechung in Osteuropa. Studien zum 19. und fruhen 20. Jahrhundert. Rechtskulturen des modernen Osteuropa. Traditionen und Transfers. Herausgegeben von Zoran Pokrovac*, Band 6.1, Frankfurt am Main 2012, pp. 477–478.

dition only when Poland lost its statehood even though the inheritance had never been part of the Polish history before. While canon law dominated legal education at the Cracow Academy's faculty of law, the Roman law was treasured and respected rather than mastered and understood. It struck root in Poland alongside Napoleon's codes, Austrian ABGB and German BGB at the time when Polish identity was determined by Catholicism and republicanism. Due to the role its culture had played, Latin[9] was another determinant and thus became second language of Polish gentry. Even more essential was its frequent use for drawing up legal acts.

> As for Europe in the exact sense of the term, there is a certain feature, that could be its very exclusive property which no other land can possibly claim a right to, no other parts of the world can call it theirs, no other territory is willing to fight for. The feature is: being Roman or more exactly being written in or being inspired by Latin as well as by its culture and the other kinds of the influence it has had on the Continent. Europe differs from what is not Europe by the "Latin" or "Roman" nature of the sources it draws on.[10]

Rémi Brague wrote of the identity of the Continent *vis-à-vis* the world outside and whatever is alien to Europe. When combined with Catholicism, the Ciceronian republicanism found in the Polish reservoir of Latin culture forms a *sui generis* genome of Polish identity. The liaison of the above trinity sets us apart from the identity of the other valleys, but when examined separately each of the constituent entities: Catholicism, republicanism as well as affiliations to Latin and its culture, all have the capacity for fusion with those that regard any part of the trinity as theirs when perceived in combination with the other distinctive features of collective identity.

Identity is pivotal in the Christian eschatological vision which has it that each and every name inscribed in the apocalyptic Book of Life guarantees that after the resurrection of soul and body, those bearing the names shall stand before God as identifiable 'I's'. In terms of the worldly life this lends credence to genealogical studies seeking to discover one's ancestors and to determine where one's roots are, to be logically followed by the establishment of sources to draw on as well as potential inspirations and any other matter to avow. Next come, on the one hand a broader historical identity and on the other hand a more personal genetic identity, the overriding objective being not so much remaining who I am but first and foremost the 'I' that seeks to advance, grow and reach ever further. Thus, hardly surprising is the observation that the perceptions experienced by nations resemble those on the part of individual citizens, which consequently invites claims that law should be a tool for the pursuit and eventual accomplishment of objectives and for the protection of values and qualities. They include the pursuit of integral development as part of common good, provided that the identity is preserved. In this context the concept of the right to collective identity can hardly be disregarded.

No less essential are the conclusions in the matter of immigration. All those seeking shelter from danger must be offered optimum social conditions along with respect for their dignity and opportunities of return. Moreover, it is no less essential for the people to

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[9] D. Karłowicz, *Ta karczma Rzym się nazywa* [The Name of the Inn is Rome], "Teologia Polityczna" 2015–2016, No. 8, pp. 15–26.

[10] R. Brague, *Europa. Droga rzymska* [Europe, the Roman Road], transl. by W. Dłuski, Warszawa 2012, p. 32.

be offered conditions conducive to the preservation of their identity at the place of exile. Immigrants must not be insidiously deprived of their identity under the guise of integration and excuses quoting their poverty and sense of helplessness. The tradition and history of Polish tolerance requires openness, respect for difference but also emphasises the need for protecting the identity of those hosting the visitors. The tradition also enjoins that in the event of intensive immigration, which in the long run is bound to compel safeguarding both individual and collective dimensions of identity for whoever is concerned. Hospitality and shelter should be offered in the first place to those who in cultural terms are nearest to the host country.

Upon the collapse of the Austro-Hungarian monarchy in 1918, there was no certainty whatsoever in Europe of the Carpathians as to how the relations between state and Church should be formed, which is reminiscent of the 1791 ratification of the Bill of Rights along with the First Amendment to the US Constitution guaranteeing the freedom of religion and prohibiting the establishment of a national religion. However, the Bill applied only to the federal level. It was not until 1940 that religious freedom began to be perceived as liberty in the sense covered by the Fourteenth Amendment,[11] which was tantamount to the requirement that each state should respect the above in full. The diachronic comparative legal approach normally emphasises the growth of national consciousness reflected in the relevant provisions as well as in the dynamically ongoing rendition of the well-established legal arrangements. The experience of Hungary, Poland, Austria, Saxony, as well as Germany of the 19th and 20th centuries in the broad sense of the country's name, exemplifies the arduous development of relations between public authority and religious denominations. In Central Europe the two worlds have touched notably over legal regulations pertaining to the institutions of matrimony and family as well as education, the activity of religious associations and other organizations alongside pursuits drawing inspiration from faith. Specific facts, problems and phenomena occurring here are dealt with in the individual texts contained in the present volume. The phenomenon of collective identity is perfectly illustrated by what has been experienced by Hungary, Poland and Austria. Also, corroborated thereby is the view that "calling for tolerance for others ought not to be understood as encouraging intolerance for one's own identity."[12] Concern about religious freedom and the related and perfectly justified expectation that it should be guaranteed by the state ought to involve no requirement that the state dissociate itself from part of its cultural identity solely because it could be linked to or rooted in religion. The articles which follow seem to testify to the pertinence of J. Weiler's theory that democracy need not necessarily involve the concealment of one's religious identity.[13]

Comparative legal synchronic approach reveals the obvious: Europe of today may include countries whose constitutional provisions favour one denomination thus forming a national religion, which is the case for Greece, Norway and Great Britain. In turn, France is still being ruled by anti-religious separation expressed in the constitution by the *principe de laïcité* – the principle of secularity. However not only in Europe of the

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[11] *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586 (1940).

[12] J.H.H. Weiler, *Państwo i Naród...*, p. 43.

[13] *Ibidem.*

Carpathians the 20th century saw the ultimate emergence of the view that autonomy and independence of Church and state are beneficial for both covenants: religious and political, but most of all for the subjects: the faithful and the citizens. Most willingly accepted is the model of coordinated separation that presupposes cooperation between the authorities and denominations in the furtherance of numerous public objectives. The process is bound to invariably involve a lot of trouble hopefully much less vocal than what is found in the American model of neutral separation between Church and state. Such trouble always occurs upon encounter on the one hand of the permissible and the consistent with law as part of accommodation geared to the practical recognition and genuine acceptance of religious needs and expectations, and on the other hand with what must be considered as impermissible entanglement and a step towards favouring a particular denomination or religion in all American life, which practically paves the way for the possibly limited, yet still real establishment of national religion.[14] The challenges faced by religious freedom are often posed by legal arrangements that being basically neutral are capable of interfering with exercise thereof. At times, the controversy concerns issues that are intrinsically pre-determined in terms of moral and ethical standards, as exemplified by the ominous consequences the case *Obergefell* v. *Hodges*[15] of 2015 by the aid of which the Supreme Court of the United States attempted to alter the entire anthropology of marriage. More frequent though are provisions of general applicability adopted to pursue an objective other than interfering with freedom of conscience or confession, nevertheless arousing wide interest and causing no less dramatic divisions within the public. One example here is the 2010 pride-and-glory Affordable Care Act,[16] also called Obamacare, that was certain to stir controversy due to the projected enormous scope of its application. The Act guaranteed health insurance by levying the payment of the fees on employers. The plan also provided for refunding contraceptives and antinidatory agents. However, an exception was envisaged in the wake of the easily predictable conscience-motivated protests by employers with strong religious sentiments: churches and non-profit organizations that were required to provide qualified information, i.e. to supply insurers or federal authorities with a formal statements on religiously motivated protests at refunding contraceptives under the relevant terms of social insurance. Next, the insurers remaining in contractual relationships with the employers were obliged by the authorities to cover the costs of employees insurance policies on their own within the challenged scope, naturally without any financial contribution whatsoever on the part of the employers.

The final format and contents of the above provisions by all means deserved a fanfare as an essential and praiseworthy manifestation of concern about the need for respecting moral or religious beliefs. There was but one aspect whose *ratione materiae* scope was not broad enough as provided for by the relevant legislation, which was pointed out by the other employers who worked for-profit, as well but they too voiced their most sincere religiously motivated refusal to fund their staff's contraceptives or antinidatory agents. The proceedings in the *Burwell* v. *Hobby Lobby Stores* case at the Supreme Court in

[14] *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687, 710 (1994).

[15] *Obergefell* v. *Hodges*, 135 S.Ct. 2584 (2015).

[16] 124 Stat. 119, 42 USC § 18001.

2014 wound up with a slide down win for the protestors,[17] a success that involved a vexing question of whether the decision would be given restrictive or expanded interpretation by subsequent judicial decision-making, as it did allow conscience-motivated protests on the part of organizations and not just natural persons. The tenor of the reasoning of the judgement regarding *Hobby Lobby* inspired the non-profit organizations formerly excluded from Obamacare Plan to contradict the constitutional consistency of the requirement of notification advanced by statute due to what was pointed out as substantial burden upon the freedom of practising religion. The submission of statements to insurer or federal authorities representing declaration of conscience-motivated protest seems to be inconsistent with the rights guaranteed by the Religious Freedom Restoration Act[18] adopted by the US Congress in 1993 that bans the authorities from imposing substantial burden and allows interference with religious freedom solely in the event of compelling state interest. The interference shall be applied in a least burdensome manner, i.e. ought to be narrowly tailored with the least restrictive means of furthering. Moreover, it was implied that exceptions allowed by notification typically resulted in employers being circumvented and subject to plain juggle. Employees will be receiving the contentious funds thanks to health insurance policies paid by relevant employers. The legislators deliberately did not provide for a separate insurance scheme covering contraception or antinidation. It was undesired by either executive bodies or women's right organizations.

No fewer than eight major cases swept across the courts of five out of twelve circuits. As for all of the seven cases forming one batch and submitted to the US Supreme Court as *Zubik* v. *Burwell*, the courts of appeal upheld the stand of the Federal Government. Only the Eighth Circuit decided in favour of religious organizations.[19] Due to the rift, the Supreme Court felt obligated to look into the matter, however the sitting was held about a month or so after the death of justice Antonin Scalia, which badly impaired the proceedings that thus seemed to be doomed to lose the grip of positive and tough decision-making. The predictable 'balance' of justices who were strongly polarised over ethical and moral issues entailed odds of 4:4 votes, which resulted in upholding lower court rulings. Such arrangement though would have closed the door on the establishment of uniform case-law in the whole of the United States in the matter pursued by non-profit organizations. Having closed the hearing and a follow-up debate attended by the opposing parties the Supreme Court took all those concerned a little aback by requesting the submission of the respective supplemental briefing outlining the parties' stands on the particular proposal for a compromise. They were specifically asked to decide with regard to contraceptives whether health insurance refund should be made available to staffs by insurance companies being contractual partners of the employers but with no notification whatsoever from the employers. The Supreme Court inquired if employers found it sufficient not to be obligated to do anything else, apart from concluding a contract with the insurers concerning the scheme that did not provide for covering some or all forms of contraception with the

[17] *Burwell* v. *Hobby Lobby Stores*, 134 S.Ct. 2751 (2014). F. Longchamps de Bérier, *Polityczny podział wzdłuż linii podziału religijnego? Dwa nowe orzeczenia Sądu Najwyższego Stanów Zjednoczonych* [A Political Division along Religious Lines? Two New Rulings by the Supreme Court of the United States], "Forum Prawnicze" 2014, No. 2, pp. 9–15.

[18] 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq*.

[19] *Sharpe Holdings, Inc.* v. *HHS*, 801 F.3d 927 (2015).

rider that the employers must be aware of their employees receiving full refunds from the very same insurance organizations. The government was expected to determine if the proposed arrangement would provide continuous refunding of contraceptives or antinidatory agents without impairing the rest of their health insurance. To this end the employers were given the offer of supplying the insurers with statements declaring absence of their interest in insurance within the means in question, to be followed by insurers offering health insurance within the specific liability scope to employees providing that particular cover was not to be funded by the insurance organization. Employers would not have had to rely on the aforementioned exception while staffs would have been making unrestricted use of the scheme envisaged as part of Affordable Care Act.

Since either party to the dispute told the Court that the proposed arrangement seemed 'feasible,' an unanimous sentence was pronounced on the 16th of May 2016 reflecting the spirit of the compromise formerly devised by the Court.[20]

The ruling was collectively written by the justices *per curiam*. It suspended the sentences by Courts of Appeals and reversed and remanded the cases for development of a common position with a view to allowing for the freedom of practising religion and ensuring that women entitled to the relevant health insurance schemes available from their non-profit employers would be receiving complete and equal refund also with regard to contraceptives. Eventually the US Supreme Court decided to bluntly say that it had resolved not to take a stand toward the crux of the controversy. Nevertheless, it also voiced the recognition of the fact that by pursuing the controversy the employers had effectively made the government aware of their standpoint.[21] A dictum like this may present an impression of an understatement, yet what appears to be a real flaw of the *Zubik* v. *Burwell* ruling is that the arrangements encouraging the settlement of all of the controversies that had arisen, covered but one problem: the recognition of religiously motivated protest on the part of self-insured subjects. It appears that the justices had no knowledge whatsoever of the hurdles found in that uniquely small area.

Besides, there emerged a concurring opinion added by Sonia Sotomayor reflecting concerns that the Court's failure to refer to the crux of the controversy could trigger a variety of interpretations different from what she found appropriate. The sole supporter of Sonia Sotomayor's opinion was Ruth Bader Ginsburg. As was mentioned before, the government shared the concerns regarding the creation of a separate plan providing for insurance covering only contraceptives and antinidatory agents. However, the irony was that it was justice Samuel Alito and chief justice John Roberts who referred to the potentiality of excluding the contentious items from the main health insurance plan to be approved of by non-profit employers at the relevant sitting attended by the parties concerned.[22] In a consenting opinion the justices' female colleagues S. Sotomayor and R. Ginsburg emphasised that "separate contraceptive-only policies do not currently exist,"[23] and may prove impermissible in the federal law in the first place. They also insisted that the wording of the ruling *per curiam* indicated that lower courts ought not to allow compromise

[20] *Zubik* v. *Burwell*, 136 S.Ct. 1557 (2016).

[21] *Ibidem*, at 1560.

[22] *Zubik* v. *Burwell*, 2016 WL 1134578 (U.S.) (*Oral Argument*) 50 and 74, accessible also on https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1418_1bn2.pdf (access: 10.12.2016).

[23] *Zubik* v. *Burwell*, 136 S.Ct. 1561 (Sotomayor, J., *concurring*).

arrangements that do not guarantee seamless contraceptive coverage. In fact, the requirement of separate contraceptive refunding would leave suspended all of the women who had the continuity ensured under Affordable Care Act. In S. Sotomayor's opinion Congress sought in the Act to eliminate barrier to the delivery of "preventive services" which would be created by requiring that women affirmatively opt into the coverage. If not, the provision of special, extra funding would be required. Which interpretation of *Zubik* v. *Burwell* case is going to prevail in the years to come? depends on the opinion or opinions by the justice or justices to be appointed by the new 45th President of the United States. Aware of this was the decision-making bench in May 2016. In the wake of what took place on 8th of November 2016 there are good reasons to believe that the proposals by S. Sotomayor may not gain the upper hand in the highest judicial authority of the United States.

Regardless of what happens in the foreseeable future the ruling *per curiam* appears to be extraordinarily interesting and a kind of Judgment of Solomon as evidenced by immediate comments that followed the announcement by either party. "Concealed in the Court's oracular language is a tentative but important win for the government"[24] wrote a constitutionalist positively supporting the stand taken by religiously motivated employers. "[T]he decision was basically a quiet, face-saving, non-precedent-setting defeat for the government"[25] said a professor of law apparently hailed by some as a star of unique expertise, the present writer hardly needs add: supposedly in the course of still being minted. The professor little thought of concealing disappointment at the recognition of employers' rationale and the failure to sustain in a direct manner the rulings by the circuit courts.

The ruling appeared to be, Januslike, point in two directions and extraordinarily interesting as the US Supreme Court ordered that "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage."[26] No view was expressed on the merits of the cases, nor a binding precedent was set for the future, which demonstrates that even the presence of a well-established conceptual network, spectacular record of judicial decisions and superb judicial qualifications along with law itself and fair rendition of judgement do not guarantee due respect for the subtle realm of the freedom and the sensitivity of conscience. Action taken by the Supreme Court represents a fresh momentum aimed not only at lower courts of justice with a view to ensuring utmost care for the presence of religion in the public sphere as well as respect free of overtones of favouritism of any kind.

It would sound very banal to conclude the remarks highlighting the importance of religious freedom with a warning that the freedom has its price. After all, so does every

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[24] G. Epps, *The U.S. Supreme Court's Nonsense Ruling in* Zubik, "The Atlantic" 16.05.2016, http://www.theatlantic.com/politics/archive/2016/05/the-supreme-courts-non-sensical-ruling-in-zubik/482967/ (access: 10.12.2016).

[25] E. Volokh, *Prof. Michael McConnell on* Zubik v. Burwell *(yesterday's Supreme Court RFRA/contraceptive decision)*, "The Washington Post" 17.05.2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/prof-michael-mcconnell-on-zubik-v-burwell-yesterdays-supreme-court-rfra-contraceptive-decision/?utm_term=.6399f52e1ca5 (access: 10.12.2016).

[26] *Zubik* at 1557.

other freedom. Pursuant to constitutionally guaranteed protection it has to be ensured to everyone, not just to those who can afford it. Therefore not much faith may be placed in the assurance that the price is worth paying if it means ensuring the freedom not just to oneself but with the hope of offering it to others. The dire need for consolidating the awareness of respect for freedom of religion suggests itself here as an obvious educational requirement confronting a civic society. When rendered in terms of comparative jurisprudence respect for religious freedom appears to be a quality that needs "exporting" beyond the limits of one's national or state community. It was not until after World War II that a dispute with atheism went really nuclear thus bringing out the significance of religious freedom. The fortunate part of the aftermath involved the development of strategies promoting protection not only of freedom to but also freedom from. Today we have found ourselves on the threshold of a showdown with the expectations of Islamic believers. Conspicuous is a *sui generis* freeze of pondering on religious freedom as well as on relations between authorities and religion. The pause follows the recognition of the imperative of promoting tremendous respect for the freedom with the attendant awareness of how hard it is to hinder its use for winning consecutive footholds with a view to imposing one's beliefs, religion and culture on others. All this provides overall insight into determinants underlying the need for the promotion of safeguards of religious freedom in the world of today.

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Streszczenie

Prawo i tożsamość zbiorowa. Wolność religijna w sferze publicznej

Z natury człowieka wynika jego religijność. Osobista dojrzałość w tej sferze wymaga przechodzenia od naturalnej religijności do wiary. Ta zaś wymaga życia w zgodzie z tym, co się wyznaje. Wierny jest podmiotem porozumienia politycznego i przymierza wiary, więc religia nie jest sprawą prywatną. Jej eliminacja z życia publicznego nie pozostawia nigdy pustego miejsca. Istotnym składnikiem zbiorowej tożsamości społeczeństw bywa religia wyznawana przez zdecydowaną większość rdzennej ludności. Amerykański model neutralnego rozdziału państwa od Kościoła świetnie pokazuje problemy, jakie pojawiają się na linii między tym, co dopuszczalne i zgodne z prawem jako dostosowanie w celu uwzględnienia religijnych potrzeb lub oczekiwań, a tym, co należy uznać za niedopuszczalne otwarcie drogi do faworyzowania konkretnego wyznania bądź religii w ogóle, a więc co w istocie prowadzi do ustanowienia – przynajmniej w pewnym zakresie – Kościoła państwowego. Subtelny przykład przyniosło w związku z tzw. *Obamacare* orzeczenie *Zubik* v. *Burwell*, wydane przez Sąd Najwyższy USA w 2016 roku.

Słowa klucze: tożsamość zbiorowa, wolność religijna, sprzeciw sumienia, relacje państwo–Kościół.