Preface

Freedom of Speech and Religion in the United States Constitution

Preface

There is no time to read good books. There is only time for very good ones. Why reach, then, for this book, which, after all, is not short? Because it is about happiness, and the pursuit of happiness is a natural desire of every person. But is it possible to talk about this matter in the language of law, and not just in poetry? Law is a part of culture, helping to organize and protect our lives. But will one find in legal language the justification to claim that man has a right to happiness? The American Declaration of Independence of 1776 left no doubt in this regard, speaking in one breath of "unalienable rights, that among these are Life, Liberty and the pursuit of Happiness." Freedom in the pursuit of happiness is certainly provided for by the freedom of religion and the freedom of speech, as stated in the First Amendment to the U.S. Constitution. These very first freedoms promote the creation of an environment in which each person has the opportunity to take responsibility for his or her own life. Freedom of religion protects the human conscience and that which redeems us and corresponds to our highest aspirations, remaining important with regard to our daily work and rest, but also significantly exceeding the dimension of everyday life.[1] And freedom of speech serves not only the political process—so important for human organizations and communities—and as a social safety valve—a valve which allows conflicts arising between people to be more productively channeled, making it better to express them in words than in violent action (*plus ratio quam vis*). Freedom of speech also enables the free exchange of ideas and above all allows for each person's self-expression and his or her self-fulfillment. Both freedoms reveal anthropological constants and make it possible for the individual to take action and for one to realize oneself in a way that will not be in opposition to the rights of others.[2] Freedom of religion and of speech thus together create a social environment where the individual is not opposed to the collective, nor the collective to the individual. Such an environment is sometimes referred to as the common good, as stated by Art. 1 of the 1997 Polish Constitution.

Eleven years ago, in an earlier work of mine I reminded the reader of the important point that "freedom always comes with a price. This applies to freedom of speech and freedom of religion. The crucial point is who has to pay the price. Freedom cannot defend itself. It needs witnesses, martyrs and, above all, guardians and protectors."[3] We need to be aware that attacks on each of these freedoms are not diminishing, and that the mere fact of judicial

[1] Franciszek Longchamps de Bérier, "Law and collective identity: Religious freedom in the public sphere," *Krakowskie Studia z Historii Państwa i Prawa* 2017, no 1, pp. 169–180.

[2] Grzegorz Blicharz, "Freedom of speech," in *Elgar Encyclopedia of Comparative Law. Vol. 2*, eds. Jan Smits, Catherine Valcke, Jaakko Husa, and Magdalena Narciso (Cheltenham: E. Elgar, 2023), pp. 139–150.

[3] Franciszek Longchamps de Bérier, *Textbook on the First Amendment: Freedom of Speech and Freedom of Religion* (Kraków: Od.Nowa, 2012), p. 9.

protection is not enough. What is needed is the awakening of consciousness, we need a constant formation of awareness of and sensitivity to religion and free expression, we need sensitivity to other people—to the neighbor in what is an individualizing, globalizing, but also politically polarizing world. In such a world, completely new and previously undreamt of problems can arise. That is why the number of cases involving both freedoms that go on the docket and are decided by the Supreme Court of United States does not decrease over the years. Sometimes the issues discussed in these rulings are indeed novel, but more than once, however, it is simply a matter of old disputes resurfacing, only this time with intensified force.

The issues of freedom of speech, freedom of conscience and freedom of religion in a comparative context in Europe have already been fairly well and comprehensively covered in recent years.[4] But this is by no means the only reason for reaching beyond Europe—to the jurisprudential experience of the United States. The general European tendency seems to be to reduce freedom of religion to freedom of expression,[5] a tendency which turns out to be deceptive and indeed completely misguided. The reasons for this assessment are best seen when we look in detail at how each of these first freedoms is protected. Their fields can, of course, cross (a fact which seems quite obvious), but even when this crossover does not occur, these fields often require taking a new look[6] since the clash between freedom and equality is characteristic of our changing times.[7] All the same, it is even more apparent that each of these freedoms needs to be protected differently, which consequently results in the fact that the work of the legislator, the interpreter, the lawyer and the judge is different in each of them. This should come as no surprise as the nature of each of these two freedoms is itself different. In many situations, protection will be needed for both of them, requiring a fresh, but also principled, understanding. Sometimes it is enough to establish that religious freedom is protected and it is not necessary even to consider issues related to freedom of speech, and likewise vice versa. Sometimes activities that had been protected only by freedom of religion are now in addition protected by freedom of expression, so protection thereby gains an extra dimension, one which, however, should have been recognized from the beginning. It should be noted, importantly, that everything is worked out in terms of individual cases which concern individual people or their associations or corporations. That is why it is especially instructive to study the opinions which courts arrive at, particularly those of the supreme courts, standing at the apex of the process of legal interpretation. In Anglo-American law, court sentences and decisions have the force of precedent and declare what the law in force is, actualizing and developing an understanding of the protection the law affords to any and every person. Equal justice for all. In our case, this means, in essence, simply the exercise of the individual's right to freedom of religion and freedom of speech.

[4] Grzegorz Blicharz, ed., *Freedom of Conscience. A Comparative Law Perspective* (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019); Grzegorz Blicharz, ed., *Freedom of Religion. A Comparative Law Perspective* (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019); Grzegorz Blicharz, ed., *Freedom of Speech. A Comparative Law Perspective* (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019).

[5] Franciszek Longchamps de Bérier, "Religious freedom and legal education," *Forum Prawnicze* 2021, no 6, p. 24.

[6] Piotr Roszak, Sasa Horvat, and Weronika Kudła, "The right to life and cybersecurity in Poland: A challenging field for state-religion relations," in *Human Rights and the Separation of State and Religion. International Case Studies*, eds. Francis-Vincent Anthony, and Hans-Georg Ziebertz (Berlin: Springer, 2023), pp. 249–251.

[7] Grzegorz Blicharz, "Conclusion: A historical and comparative perspective," in *The Battle for Religious Freedom. Jurisprudence and Axiology*, eds. Grzegorz Blicharz, Alejandra Vanney, and Piotr Roszak (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2020), p. 413.

This work on the freedom of religion and the freedom of speech which I am handing over to the reader is the result of 20 years of teaching and research on American law, i.e. the work I conduct at the Jagiellonian University and the University of Warsaw. However, the aim of this book is not to present the research that has been done but rather to show these freedoms in a way that is most relevant to the understanding of them in the United States. That is why the structure of the book is based on the presentation of a selection of key passages from the decisions of the US Supreme Court. It is well known that foreign court cases—like those decided by the US Supreme Court or others known from comparative report-studies—are the 'parables' that allow us to see as in a fable our own local issues and guide us as to the measures to be taken. Parables come to each listener at his or her own level of intelligence and awareness. If those who hear are sufficiently acute, they will understand more than is given by the literal, explicit meaning and may possibly add something from their own experience. If the hearers are very sharp-witted or sagacious, the speaker might be required to explain the parable in plain, explicit terms.[8] And as with parables, when reading of American cases from our standpoint in Europe, we stand vis-à-vis these cases on our own, neutral ground. We talk about matters from across the ocean,[9] from a distance, even though their nature is similar or even identical to the problems that arise on home soil.[10] In the jurisprudence of the US Supreme Court, we are enabled to see ourselves 'out there', objectively, as if in a mirror.

Reading the court decisions included in this book enable us to come face to face with the opinions and points of view presented in the high legal culture of a large and stable democratic state, but also with the official behavior of outstanding and carefully-selected judges, and with the way they carry out their public mission. The intention is that their communal voice should resound fully in the following pages, since the book, constructed using a copy and paste technique, contains a selection of the best and most interesting cases. They deal with freedom of speech and religious freedom, but are also meant to introduce the European reader to the intellectual work of a lawyer specializing in the Anglo-American legal systems on these issues. The work is intended to let the judges speak. Their opinions have been stated and put on record, and these opinions are authoritative and used as source texts. We know, of course, that they have been and will continue to be subject to interpretation. Nevertheless, familiarity with the court decisions collected in this book should be useful for any reader interested in this field: if he chooses to read even just a few pages of this book, I trust he will not be wasting his time.

Franciszek Longchamps de Bérier

[8] Longchamps de Bérier, "Religious freedom," p. 32.

[9] Sebastian Kubas, *Warta na obrzeżach Konstytucji. Dekonstrukcja mitu założycielskiego amerykańskiej sądowej kontroli konstytucyjności prawa* [A Sentry on the Fringes of the Constitution. Deconstructing the Founding Myth of American Judicial Review], (Kraków: Księgarnia Akademicka, 2019), pp. 603–610.

[10] Weronika Kudła, *Wrogość wobec religii. Ostrzeżenia ze strony Sądu Najwyższego USA* [Hostility Towards Religion. Warnings from the US Supreme Court], (Kraków: Księgarnia Akademicka, 2018), pp. 7–8 and 339–349.