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Navigating Legal and Cultural Intersections: The Impact of Law on Minority Traditions and Identity

Abstract: States should establish in their legislations protective mechanisms which, on the one hand, guarantee the realisation of the rights of the majority and, on the other hand, ensure respect for the traditions, culture and customs of national and ethnic minorities. In Poland there are such guarantees that ensure that minorities can live in accordance with their own traditions and customs, also at the highest normative level. In addition to the legal sphere, one should not forget the equally important sphere of social life, which for some people is even more important. The issue of early marriage in the Roma community is an exemplification of the problem that can be caused by the interference of subject law norms with the centuries-old traditions and customs of a particular national or ethnic group.
Keywords: customs, identity, law, minorities, Roma, traditions

Introduction

It will not be revealing anything new to say that one of the distinguishing features of modern societies, including in Europe, is their multiculturalism. Living in one country, in other words living 'side by side', with people of different nationalities, from different cultures and coming from different traditions is commonplace today. Interestingly, however, multiculturalism itself is nothing new. If we assume that this phenomenon consists precisely in the coexistence of different ethnic, national and religious groups in each area, originating from different traditions and

cultures (Jaskuła, 2015; Śliz & Szczepański, 2021), then its origins can be found even in the time of the pharaohs, in the Greek world or in the Roman Empire (Szlachta, 2022, pp. 19–20). Today, however, serious threats to multiculturalism are increasingly noted. While critical voices are not new, they have recently assumed great importance again, especially due to the troubling problem of migration in Europe (Burdiak, 2021; Doliwa-Klepacka, 2021; Kużelewska & Piekutowska, 2021; pp. 153–171). However, it is worth remembering that problems within multicultural societies can affect both sides, the host society as well as the minority group. Therefore, in connection with the mixing of societies, states should establish in their legislation protection mechanisms so that, on the one hand, the rights of the majority are guaranteed and, on the other hand, national and ethnic minorities can preserve their traditions, culture and customs.

1. Normative guarantees for the protection of national and ethnic minorities

The development of multiculturalism itself 'is safeguarded by various guarantees found in almost all human rights conventions' (Sykuna & Podolska, 2022, p. 123). At the international level, certain rights for minorities are guaranteed, for example, by Article 27 of the International Covenant on Civil and Political Rights, which states: 'In States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be deprived of the right to have their own cultural life, to profess and practice their own religion and to use their own language with other members of the group' (quoted in Suchocka, 1991, p. 141 ff.). On an individual level, the protection of members of minorities will consist primarily of respect for the dignity of the individual, and thus also his or her origin, freedom of thought, conscience and religion.

> Equally important are the prohibition of discrimination and rights of a cultural nature. The emanation of this aspect is the granting of equal rights to all. In the collective dimension, multiculturalism is safeguarded by, for example, the right to national self-determination or the possibility to cultivate the identity of a given minority (Sykuna & Podolska, 2022, p. 123).

In the system of Polish law, starting with the 1997 Constitution of the Republic of Poland, which is highest in the hierarchy of sources of law, it can be assumed that national and ethnic minorities have their constitutional position guaranteed. Indeed, in Article 35(1) and (2), the Polish Constitution stipulates that '[t]he Republic of Poland guarantees Polish citizens belonging to national and ethnic minorities the freedom to maintain and develop their own language, preserve their customs and traditions and develop their own culture' and '[n]ational and ethnic minorities have the right to

establish their own educational, cultural and religious institutions and to participate in the settlement of matters concerning their cultural identity'. The norms that can be decoded from this provision should be self-evident, especially if we consider them in the context of human dignity. It is rightly argued by Czarny that:

> the special protection of the rights of persons belonging to national and ethnic minorities is very closely linked to the imperative to respect the dignity of the human person and the resulting principle of individual freedom […] an element of respect for human dignity is the recognition by the state of the right of the individual to freely define his or her identity in terms of national and ethnic affiliation, as well as its xternalisation. (Czarny, 2016, p. 890)

In the absence of protection for minority groups in the republic, it would be difficult to imagine the implementation of the rule of law. This protection is more effective because Article 35 of the Constitution has the character of a direct provision, for the application of which there is no need to refer to separate laws (Skrzydło, 2000, pp. 47–48).

In Polish literature, it is assumed that the indicated normative provision in the system of regulations on individual freedoms and rights has a threefold function. Indeed, Lech Garlicki points out that:

> Firstly, it should be treated as one of the general principles of this system. In this sense, Article 35 expresses the principle of tolerance and respect for national and ethnic minorities, thus also formulating one of the constitutional values. […] Secondly, it should be treated as a norm specifying the preceding provisions of Chapter II. This specification relates, on the one hand, to the subjective delimitation of the circle of action of freedoms and rights, because Article 35 creates a separate category of subjects and gives them a special constitutional status; and on the other, to the principle of equality, because Article 35 grants special rights to national and ethnic minorities (the persons who constitute them), and thus orders these subjects be treated differently, according to the concept of compensatory preference.
>
> Thirdly, it is to be regarded as an expression of specific subjective rights, enumerated with regard to the individual (persons belonging to a minority) in paragraph 1, and with regard to groups (minorities as such) in paragraph 2. This makes it possible to analyse these provisions in accordance with general methods of dissecting provisions on subjective rights. (Garlicki, 2003, pp. 7–8)

Apart from the above-mentioned principle of the protection of national and ethnic minorities, we can also find another principle in the Polish Constitution: the equality of all citizens before the law. This study does not aim to make a detailed analysis of both these principles on the grounds of Polish law; however, it should be

pointed out that they belong to the basic 'normative canon' of a democratic state of law. Therefore, it is worth asking whether there are situations in practice that force people to verify the principle of equality.

Leaving aside the discussion on positive discrimination, even with a cursory comparison of the two principles mentioned above, a further question arises as to whether there is a phenomenon of superiority and inferiority between these principles. Breaking away for a moment from considerations based on Polish legislation, it should be considered more generally, and in principle theoretically, whether a minority that is guided in its conduct by a time-honoured tradition should give it up due to lack of acceptance by the state in which it has settled. After all, is it possible to sacrifice a tradition that has been cultivated for centuries and to conform to the majority's standards simply because one represents a minority? Or should it be otherwise, perhaps the law of the state in which a minority group is settled should take into account the validity of specific norms shaped by customs and cultural habits, if only at the expense of the principle of equality of all before the law? In these considerations, it is also worth reflecting on the limits of minority protection. The question is: To what extent should the 'host state' ensure all the freedoms of its citizens who nevertheless belong to national and ethnic minorities? It also seems reasonable to ask whether a democratic state under the rule of law is obliged to accept and protect all customs practised by individual national and ethnic minorities. Perhaps only those customs which are accepted but not necessarily applied by the majority should be protected? How far, then, should the state protect its citizens who are concentrated in an ethnic or national minority? How, in the event of differences, should the interests of both the minority and the majority of citizens living in the state be balanced? What stance should be taken with regard to the customs of national and ethnic minorities which, although derived from centuries of tradition, are in conflict with the law? (Sykuna, 2008; Sykuna, 2009; Sykuna & Zajadło, 2007).

The legal system should protect minorities and, as we have pointed out, in Poland there are such guarantees, even at the highest normative level, which ensure that minorities can live in accordance with their own traditions and customs, also affecting the cultural identity of an individual. Indeed, it is worth emphasising that the right to cultural identity belongs to everyone, and its source can be found in human dignity (Wojciechowski, 2022, pp. 133–152). In addition to the legal sphere, one must not forget the equally important social sphere, which for some people is even more important. This is related to the issue of belonging to a certain group which enforces certain behaviours. The fact that someone belongs to a certain ethnic minority does not exclude the fact that, living in a certain country, he or she will interact with people from other groups (which is an important element of the definition of multiculturalism) or even want to belong to those groups. In this case, the problem of maintaining one's own identity may arise, because belonging to a particular or new group, even a peer group, may involve having to accept different rules than those which the per-

son in question followed in his or her previous community. It would not be an exaggeration to say that young people, especially during adolescence, have the greatest problems with their own identity; we do not just mean their sexual maturity, but any issues related to their lives. Particularly in this regard, we are interested in young people's identification with their family or, even more broadly, with their family environment of origin. However, this origin can sometimes be quite burdensome for young people, especially if the family requires them to conform to or merely accept certain behaviours that are characteristic of their environment but uncommon among the majority. Observation of young people, especially teenagers, leads to the conclusion that very often, the desire to belong to a peer group is so strong that it can even win out over their own family environment. Indeed, the main factor influencing young people's decisions is their need for acceptance by their peers; the desire to be in such a group, to belong to it and to gain its acceptance sometimes leads to great sacrifices on their part. In certain situations and environments, in order not to be excluded or even ridiculed, young people make very dramatic choices. Sometimes they even renounce their own traditions and origins, and sometimes they only try to reconcile their own tradition with the behaviour of the majority.

2. Exemplification of the problem through the case of early marriage in the Roma community

One of the minorities that has inhabited large parts of many countries for centuries are the Roma (Mirga & Mróz, 1994). This diaspora has also been quite significant in Poland for centuries due to the number of members of its community (Mróz, 2001). It will not be an exaggeration to say that the Roma minority, like other minorities, especially among its younger generation, faces certain problems of belonging or even cultural identity (Wojciechowski, 2023). Living in any of the European countries, the Roma are subject to all the norms of positive law, just like other citizens. Unlike the latter, however, their lives and conduct are also determined by norms specific to their national minority (Sykuna, 2008; Sykuna, 2009). This applies to family life, the obligations of marriage or even the marriage itself.

Importantly, in the case of the Polish Roma, their community has been facing numerous problems for years, the root of which is the conflict between their centuries-old traditions and the customary standards of most of society. Moreover, sometimes this conflict is compounded by various legal issues. In Poland, such a situation arises, for example, in the case of marriages concluded by the Roma. Directly related to this is also the problem of early sexual contact that can occur between girls and boys from the Roma community, which in certain cases even leads to a violation of the applicable norms of the Polish Criminal Code. It is therefore worth taking a closer

look at the issues mentioned in connection with the previously indicated problem of multiculturalism.

There are two equivalent forms of marriage in Polish law; the first is based on Article 1 § 1 of the Family and Guardianship Code, i.e. so-called civil marriage, and the second based on Article 1 § 2 of the Family and Guardianship Code, defined as a marriage governed by the internal law of a church or another religious association with consequences in the sphere of civil law. Hence, despite the commonly used expression 'religious marriage', we are only dealing with a form of marriage that is different from the secular version. Without going into the details of all the prerequisites for marriage, in the context of the considerations made in this article, it is nevertheless necessary to mention the minimum age of the parties to the marriage: according to the rule expressed in Article 10 § 1 of the Family and Guardianship Code, both the man and the woman should be at least 18 years old. However, for important reasons, the guardianship court may permit the marriage of a woman who has reached the age of 16 where the circumstances indicate that the marriage will be compatible with the good of the established family. The literature indicates that these important reasons should be assessed considering the good of the family, looking at each case individually and the totality of the relevant circumstances (Piasecki, 2002, p. 69. On the rules of marriage in Polish law, also see Chwyć, 1998; Haak, 1999; Piasecki, 2011; Smyczyński, 2014, p. 92 ff.).

With regard to further considerations, it is also worth recalling, albeit briefly, the basic elements of the ceremony during the celebration of a marriage, particularly, however, in the case of a marriage celebrated in the Catholic Church. Interestingly, other prerequisites for the validity of marriage can be found in some of these elements. Given that, according to the liturgical rite, the sacrament of marriage is celebrated at Mass, the main part of the joining of the future spouses takes place after the homily. A clergyman – usually the parish priest – questions the bride and groom about their wish to marry and to be faithful, and to have and bring up children. (Exceptionally, according to Canon 1116 § 2 of the Code of Canon Law, in the case of danger of death, another clergyman may intervene at the conclusion of the marriage.) Then, with their hands entwined in the priest's stole, the future spouses make a declaration of intent to marry at the same time; it is assumed that if they are mute, they may sign the marriage formula in the presence of the clergyman, or they may express their wish to enter the union by other signs. The clergyman confirms the union, takes off the stole and blesses the rings, which are a symbol of the sacrament. As they place them on each other's fingers, the spouses again speak words testifying to their love and fidelity (Balwicka-Szczyrba, 2019; Góralski, 1998; Góralski, 2011; Sobański, 2003; Szadok-Bratuń, 2013; Tunia, 2023; Zabłocki, 1999).

A certain similarity in terms of marriage ceremonies exists in the Roma community. Its members, as Polish citizens, are necessarily subject to the laws in force in Poland. However, as Roma, they feel subjectively bound by the customary impera-

tive stemming from centuries of tradition, which allows marriages to be concluded at a very early age, even before coming of age. It is difficult to pinpoint precisely when young Roma are ready to live together; the problem is that the environment, parallel to the norms resulting from their centuries-old culture, is subject to the civilisational influences of the country in which the group resides. It also happens (even quite often) that it is not the partners themselves but their parents who decide whether the young people have already reached a sufficient age for marriage. Despite various age limits cited in the literature, it is most often assumed that 13-year-old girls and 16-year-old boys are ready to get married (Ficowski, 1989, p. 80; Kowarska, 2005, p. 103).

The wedding rite is preceded by a period of preparation, during which the families of the future spouses play a significant, and sometimes the most important, role. Here too, however, there is a lack of uniformity in the ways in which young people are brought together. Often it is the parents who decide on everything, but sometimes the interested parties themselves take the initiative to get married. Although young Roma people can choose three forms of marriage in Poland, i.e. civil, church and traditional, in their community the traditional wedding, called *mangavipen* (Kowarska, 2005, pp. 116–117), is considered the most important (though it does not have any consequences from the perspective of Polish civil law). It is concluded by young people even before they reach the age of majority. What is more, the Roma quite often skip the first two forms of marriage provided for by Polish legislation altogether, which is already legally possible, remaining throughout their lives in unions based only on the traditional oath (Kowarska, 2005, p. 117). It can therefore be concluded that in this situation, from the point of view of Polish law, we are dealing with a typical cohabitation.

The wedding ceremony is attended by the parents and family of the young couple (Bartosz, 2004, p. 193). The entire course of the *mangavipen*, despite minor differences due to the distinctiveness of individual Roma groups, is determined by predominantly similar customs that flow from centuries of tradition. First, a designated member of the elders, a person of authority in the community, instructs the future spouses on the responsibilities that come with the institution of marriage. He then ties a special shawl on their hands. Sometimes it is considered sufficient for the nuptial act to tie the hands with a simple ribbon, string or even an apron, preferably in red (Kowarska, 2005, p. 118). After the public and voluntary declaration of the spouses' readiness to live together as a couple and the acceptance of the union by their parents, the young couple is doused with vodka or champagne and sometimes tossed up in the air (Kowarska, 2005, p. 118).

In some Roma clans or groupings, such as among the Kełderasz, the ceremony of the wedding itself is preceded by a rite known as *tumnimos*, or a conspiracy. In this ceremony,

> which takes place on neutral ground (not at the bride's or groom's father's house), only men take part; the bride and groom cannot be present. The bride's father arrives first, accompanied by men from his family, and awaits the arrival of the groom's father and his companions. The negotiations begin with the father of the bridegroom presenting the *daro*, i.e. the size of the payment for his wife in *galbs* (gold ducats or dollars). The size of the *daro* has already been decided in advance. The *daro* is counted by all the men present. By accepting the *daro,* the father of the bride approves the marriage. The father of the groom then shows everyone the ceremonial bottle of vodka, the so-called *ploska,* to which a red scarf, the *diklo*, is tied. To it are pinned gold earrings – a wedding gift, a *capara.* The shawl and earrings are intended for the girl. If she accepts them (the shawl is a symbol of the conjugal state), it means that she consents to the marriage; if she returns the gift through someone, it means that the wedding ceremony is broken and requires her father to return the *daro*. The two fathers then each drink a glass of vodka from the *ploska,* saving the rest for the wedding feast – the *biav. The tumnimos* ceremonies end with a feast, the *paćiv,* given by the father of the groom. (Mirga & Mróz, 1994, p. 256)

There is also information in the literature about the buying or kidnapping of future wives. Ficowski (1989, p. 78) points out that the former custom, practised by the Lowars and the Kełderasz, was basically discontinued after the Second World War. Wife kidnapping, on the other hand, still happens today, even among Polish Roma (Ficowski, 1989, p. 79). In principle, this has little to do with violence or surprise, as the young agree in advance to run away together and on their return, declare to their families that they have spent the night together. According to Roma customs, such a fact is tantamount to a marriage (Ficowski, 1989, p. 79).

Mirga and Mróz, referring to nineteenth-century authors describing the marriage customs of the Roma, aptly summarise that the essential elements of these customs are:

> the age of the spouses – 12 to 15 years – endogamy, avoidance of marriages of too close relatives (first-degree kinship), the role of the gypsy elder, the civil nature of the union, the child as a source of the permanence of the marriage, the woman's infertility as a reason for breaking the marriage contract [and] the occasional nature of the conclusion of church weddings. (1994, p. 254)

We can take as a case study the example of one of the inhabitants of Lower Silesia, Marek K., who seems to have chosen the traditional way, in the Romani sense of the word. In 2003, at the age of 18, in line with the tradition, he married his chosen one, also from a Romani family, who was not yet 15 on the wedding day. It is also worth mentioning that less than a year after this momentous event for the young couple, a child was born.

Considering the above incident according to the rules of Polish family law, it is easy to conclude that the young Roma at the time of the nuptials did not meet the prerequisites for the required age as set out in Article 10 § 1 of the Family and Guardianship Code. Moreover, since there was sexual intercourse with a person under the age of 15, it seems clear that there was also a violation of the norms of Polish criminal law. Indeed, according to Article 200 of the Penal Code, '[w]hoever has sexual intercourse with a minor under 15 years of age or engages in another sexual act towards such a person or leads such a person to submit to such an act or to perform it, shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years'. In addition, the Polish legislation for the offence in question does not allow for the erasing of a custodial sentence without conditional suspension of its execution.

The case of Marek K. came to light when, following a probation interview, a criminal complaint was filed. In the indictment, Marek K. was charged with committing an act under Article 200 § 1 of the Criminal Code. From the very beginning of the proceedings, the suspect (later the accused) did not deny the alleged circumstances in any way. It transpired that in 2003 Marek K. did indeed marry his chosen one in accordance with Roma tradition, and a year later a child was born to them. As a result of the proceedings, Marek K. was found guilty of an act that the court classified as an offence of sexual intercourse with a person under 15 years of age. On the basis of Article 200 § 1 of the Criminal Code, Marek K. was sentenced to eight months' imprisonment. At the same time, the court suspended the sentence for a probation period of three years and placed the defendant under probation supervision for that period.

From a criminal law perspective, the matter described seems clear and obvious. However, one might say it has a certain cultural 'second level'. As a citizen of the Republic of Poland, Marek K. is subject to Polish law, but certainly as a member of the Roma community, he feels bound by the moral imperative stemming from tradition, according to which it is permissible to marry at a very early age – ergo to have sexual intercourse at an equally early age.

The above case reverberated very widely throughout the Roma community. The reaction to the court verdict was the issuing of an official statement by the Roma Association in Poland, which included an appeal to respect their tradition, 'one of whose elements is the practice of very early marriage of women' (Roma Association, 2007). Referring to the content of the Polish law on national minorities, it pointed out that the specificity and cultural and moral distinctiveness of the Roma had not been considered with regard to this case. Furthermore, while making it clear that the Association in no way wished to interfere in the procedure provided for by Polish law, it was hoped that this individual case would not become an impetus for the initiation of similar lawsuits targeting members of the Roma minority in Poland (Sykuna, 2008).

The concerns of the Roma community may indeed be justified, given that the practice of early marriage of young Roma women is quite common. Therefore, the publicity surrounding the case of Marek K. may inevitably cause the Roma tradition

to be associated with one of the worst crimes. An additional problem arises in the analysis mentioned above of the construction of the offence under Article 200, especially in connection with Article 106a of the Penal Code; however, a detailed consideration of the premises of the described act would exceed the framework of this article. It suffices to point out that in a situation in which the court would sentence the offence in question to imprisonment without conditional suspension, the Penal Code does not allow for the possibility of its abolishment. The provision of Article 106a was introduced as a result of amendments to the Penal Code made in 2005; it is worth noting at this point that the addition of this article was met with numerous comments from the perspective of the doctrine of criminal law. Its controversial nature was emphasised, as it contradicts the principle of humanity and seems unreasonable in view of the principles of penal policy (Bogdan, 2007, pp. 1113–1114; Marek, 2007, p. 243; Mozgawa, 2007, p. 212).

Interestingly, this case was similar to a whole series of problems that US courts were already examining during their proceedings in the 1980s; the parties in these trials also belonged to ethnic or national minorities living in the United States. Moreover, although the acts they were accused of were contrary to the applicable law, they found justification in the customs and traditions of these minorities. For example, *People v. Moua*, which was tried in California in 1985, concerned a Lao man from the Hmong tribe who, in accordance with the custom of the ethnic group (*zij poj niam*, marriage by capture), kidnapped his chosen one in order to get married (Golding, 2002, p. 148; Gordon, 2001, p. 1813 ff.; Phillips, 2003, p. 511 ff.). Another case concerned specific behaviour among members of the Albanian minority in the USA.

In Anglo-Saxon legal culture there is a concept, or perhaps even an institution, referred to as the cultural defence (Sykuna & Zajadło, 2007). It has found application not only in the examples cited above, but also in many others, and also outside the field of criminal law (Dundes Renteln, 2004). It is most often assumed that it can be generally referred to in situations in which the authority applying the law takes (or does not take) into account the validity of specific cultural norms in a certain social group which deviate in a significant manner from the accepted general social standards (Van Broeck, 2001, p. 5). A cultural defence is taken in a narrow or a broad sense depending on the type of case to which it is applied. The former is linked only to criminal proceedings; in this sense, cultural defence refers to a certain type of legal or juridical strategy used in criminal proceedings. It consists in using the argument of the offender's membership of a specific cultural group in order to exclude or limit his/her responsibility or to mitigate the threatened punishment for the act in question (Wu, 2003, p. 981 ff.). In a broader sense, however, the concept can also be extended to entire branches of law and other types of proceedings, such as civil or administrative proceedings. For example, in *Friedman v. State*, the institution of a cultural defence emerged as an argument in favour of awarding damages to a plaintiff for personal injury (Dundes Renteln, 2004, p. 53 ff.). Cultural considerations are

also invoked by asylum seekers in the current administrative procedure in the United States. It is worth mentioning that in these cases, however, the cultural defence argument is all too often abused. Indeed, in order to strengthen the justification of their applications, emigrants refer to various cruel but fictitious customs in force in their countries (Dundes Renteln, 2004, p. 53 ff.).

Particularly in the context of a multicultural Europe, a defence through culture is likely to be increasingly used and is undoubtedly a challenge, as some authors already pointed out more than a decade ago (Sykuna & Zajadło, 2009). Although the framework of this study does not allow for a detailed analysis of the cultural defence in Poland, it is worth pointing out at the end of these considerations that this concept has already entered Polish legal language on a permanent basis, especially in the context of criminal law (Bek, 2018; Bojarski & Leciak, 2012; Kleczkowska, 2012).

Conclusion

The issue of early marriage in the Roma community is only an exemplification of the problems that can be caused by the interference of subject law norms in the centuries-old traditions and customs of a particular national or ethnic group. Objectively, the norm of Article 200 of the Polish Criminal Code is extremely important, necessary and by all means desirable in a state of law, as it safeguards the rights of minors. However, our aim is to point out that it may happen that, on the one hand, the law, understood as a whole system of norms, supports and ensures the freedom of citizens belonging to national and ethnic minorities to preserve their customs and traditions and to develop their own cultural identity, while, on the other hand, from a certain aspect, it may equally interfere with them. Consequently, this can lead to the aggravation of identity problems within minority groups.

In addition to the law, social factors, such as the peer group imperative, can also contribute to the weakening of bonds within minorities and, at the same time, lead to their members losing their own identity. Although the latter phenomenon should be further explored in detailed sociological research, it can be pointed out here, in conclusion, that especially among young members of various minorities, the social factor seems no less important than the legal one.

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