Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Religious Affiliation as a Challenge to Judicial Independence: A Case Study of II KK 440/23

Question(s) at stake:

Whether a judge's axiological connection with the Catholic faith and the Catholic Church constitutes grounds for recusal from hearing a criminal case concerning offences involving the insult to the religious feelings of Roman Catholics and the insult to an object of religious worship.

Outcome of the ruling:

Circumstances indicating the judge's axiological connection with the Catholic faith and the Catholic Church – evidenced by a clerical recommendation submitted during the nomination procedure and by a volume of poetry published by the judge – may, from the perspective of an objective observer, give rise to reasonable doubts as to the judge's impartiality in a case concerning criminal liability for offending the religious feelings of Roman Catholics and insulting an object of religious worship, and may therefore constitute grounds for the judge's recusal.

Topic(s):

- Crime and Punishment under State Law

Keywords:

- Freedom of thought, conscience and religion
- Defamation of religion / blasphemy
- Monuments

Tag(s):

- Offence against religious feelings

- Public insult to an object of religious worship or a place of religious worship
- Desecration of a monument or public place commemorating a historical event or honouring a person
- Judicial religious impartiality

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Country:

Poland

Official citation:

Supreme Court, Decision of 27 March 2024, II KK 440/23 (Postanowienie Sądu Najwyższego z dnia 27 marca 2024 r., II KK 440/23)

Link to the decision:

https://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/ii%20kk%20440-23-2.docx.html

ECLI:

No ECLI number / ECLI number unknown

Date:

27 March 2024

Jurisdiction / Court / Chamber:

Supreme Court, Criminal Chamber

Remedy / Procedural stage:

Appeal in Cassation to the Supreme Court

Previous stages:

- District Court in Piaseczno, Judgment of 13 January 2023, II K 424/22 (publicly available);
- Regional Court Warsaw. Judgment of 4 July 2023, IX Ka 592/23 (publicly available);

A series of decisions on the recusal of Supreme Court judges (incidental proceedings):

- Supreme Court, Decision of 18 December 2023, II KK 440/23;
- Supreme Court, Decision of 14 February 2024, II KK 440/23.

Subsequent stages:

- Supreme Court, Decision of 23 January 2025, II KK 440/23
- Supreme Court, Decision of 6 March 2025, II KK 440/23
- Supreme Court, Decision of 9 April 2025, II KK 440/23
- Supreme Court, Decision of 14 May 2025, II KK 440/23
- Supreme Court ,Decision of 29 May 2025, II KK 440/23
- Supreme Court, Decision of 17 September 2025, II KK 440/23

Branches / Areas of law:

Criminal law, Fundamental rights

Facts:

On the evening of Saturday, 24 October 2020, in the Witold Skórzewski Spa Park in Konstancin-Jeziorna, Masovia, Magdalena B. – then twenty-three years old – spray-painted the hands and forearms of a statue of Pope John Paul II with red aerosol paint. The incident occurred merely two days after the Constitutional Tribunal’s ruling of 22 October 2020 (known as “case K 1/20”), which declared unconstitutional the statutory provision permitting abortion in cases of severe and irreversible fetal defects. The ruling provoked a wave of mass demonstrations across Poland, and the weekend of 24/25 October proved especially turbulent, with thousands of protesters taking to the streets, chanting slogans and carrying

placards opposing the Tribunal’s decision.

Magdalena B.’s act was not an isolated incident. At the time, numerous churches and other religious sites were becoming focal points for protest. On the walls of the Church of St James at Narutowicz Square in Warsaw’s Ochota district, demonstrators painted the slogans “abortion without borders” (Pol. “*aborcja bez granic*”) and “you have blood on your hands” (Pol. “*macie krew na rękach*”); on the walls of the Church of St Matthew, then still under construction, protesters wrote “women’s hell” (Pol. “*piekło kobiet*”). The defendant, however, did not act solely in response to the abortion ruling. During police questioning and in her testimony before the court, she explained that her protest was multifaceted but directed primarily against the institution of the Catholic Church and against John Paul II as a public figure. By painting the statue’s hands red, she meant to evoke the image of “blood on one’s hands” and thus signal what she saw as the shared responsibility of the late Pope and the Church hierarchy for three categories of wrongdoing: (1) the Church’s role in restricting access to abortion in Poland and limiting women’s reproductive rights; (2) the failure of the Church and state authorities to respond to the concealment of sexual violence perpetrated by priests and bishops; and (3) more broadly, the Church’s passivity in the face of the clerical sexual-abuse scandals that came to light between 2018 and 2020.

The defendant emphasized that her act was a peaceful form of protest. She had no intention of insulting the monument; her aim was to express civic dissent through her actions. Her action caused no structural damage to the statue, involved no vulgarities or offensive drawings, and was not intended to incite hatred or violence. She maintained that she had expressed her protest in a manner respectful of the memory of the deceased and in accordance with the legal order. In light of the evidence, the factual essence of the case ultimately came down to a single question: whether the defendant had acted with the intention of insulting the monument or whether her conduct was a non-verbal expression of criticism directed at the Church as an institution – in particular, its influence on legislation in Poland and its role in concealing sexual offences committed by clergy. The message she sought to convey by painting the statue’s

hands red was not equivalent to calling the figure depicted a “murderer,” “perpetrator,” or “executioner” in any literal sense; rather, it symbolized her assessment of the Pope’s shared responsibility for what she perceived as threats posed to women’s rights and the safety of children.

The District Court in Piaseczno, as the court of first instance, adopted a different interpretation. It held that painting the statue’s hands red unambiguously conveyed the notion of blood on the hands and thus implied that the person commemorated was a murderer, perpetrator, or executioner. On that basis, it convicted the defendant of insulting the monument. However, the Warsaw Regional Court, in examining the defence’s appeal, concluded that a proper analysis required consideration of the broader historical context of the years 2018–2020 – a period marked by major revelations of clerical sexual abuse both in Poland and abroad, the exposure of successive cases of sexual abuse perpetrated by clergy, the concealment of these crimes by Church authorities, and, crucially, mounting questions about the responsibility of Pope John Paul II in this regard. After the Warsaw Regional Court delivered its acquittal on 4 July 2023 (case no. IX Ka 592/23), the Warsaw District Prosecutor filed a cassation appeal against the acquittal and to the detriment of the defendant, Magdalena B. The Supreme Court received the cassation appeal on 19 September 2023. The case was registered under number II KK 440/23, and by an order of 20 September 2023, the President of the Criminal Chamber assigned it to Judge Igor Zgoliński, who was to preside over the adjudicating panel in the forthcoming cassation proceedings.

On 30 November 2023, however – before the cassation appeal could be examined on the merits – Magdalena B.’s defence counsel submitted a motion to the Supreme Court seeking the recusal of Judge Zgoliński pursuant to Article 41 § 1 of the Code of Criminal Procedure. The motion argued that the Judge’s appointment to the Supreme Court, made upon the recommendation of the National Council of the Judiciary (‘KRS’) in the composition established under the Act of 8 December 2017, gave rise to justified doubts about his impartiality. The defence relied on the Supreme Court’s plenary resolutions of 23 January 2020 and 2 June 2022, in

which the Court held that a bench is improperly constituted whenever it includes a judge appointed on the recommendation of the so-called “neo-NCJ” (Pol. “neoKRS”). The crisis surrounding the National Council of the Judiciary began in 2017–2018, when political actors assumed control of the selection of its judicial members, raising concerns about the Council’s constitutional independence and triggering far-reaching doubts as to the lawfulness of judicial appointments. As a result, the Council’s status has been challenged by both domestic and European courts (in particular, the CJEU), making the position of judges appointed with its involvement one of the central rule-of-law issues in Poland. The Council continues to exist as a formal institution, yet it operates under a cloud of contested legitimacy, while attempts at its reform remain entangled in a broader constitutional and political deadlock.

On 18 December 2023, the Supreme Court, sitting under the chairmanship of Judge Tomasz Artymiuk, granted the motion and recused Judge Zgoliński from the case. The Court justified its decision by referring to extensive Supreme Court case law and the standards of Article 6(1) of the European Convention on Human Rights, emphasizing that the appointment procedure conducted through the neo-NCJ – an organ dependent on the executive and legislative branches – renders any judicial panel on which such a judge sits not an “independent and impartial tribunal established by law.”

Following Judge Zgoliński’s recusal, the case was reassigned to a new presiding judge. On 18 January 2024, Magdalena B.’s defence counsel submitted yet another motion for recusal – this time seeking the recusal of Judge Ryszard Witkowski. The motion relied on two lines of argument. First, the judge had served in the prosecution service from 1996 until his appointment to the Supreme Court in 2018 – thus linking him institutionally to the same body that was now pursuing the cassation appeal against the defendant. Second, given the highly charged nature of the case, his prosecutorial background gave rise – from the standpoint of public perception – to a reasonable concern that he might not appear fully impartial in a cassation proceeding sought by the prosecution.

On 14 February 2024, the Supreme Court, sitting under the chairmanship of Judge Wiesław Kozielewicz, issued a decision recusing Judge Witkowski. The Court distinguished between subjective (personal) impartiality and objective (perceived) impartiality, noting that although there were no grounds to question Judge Witkowski's actual impartiality, a hypothetical, reasonably informed member of the public could nonetheless harbour legitimate doubts about whether a judge formerly linked to the prosecution service would remain impartial in a case brought before him by that same institution. The Court also noted the socially and emotionally charged nature of the case. Following the second recusal, the case was once again reassigned, and the defence filed a third motion for recusal – this time concerning a judge identified by the initials A.D. The grounds were more complex and multidimensional. First, the defence again invoked the allegedly defective appointment procedure involving the neo-NCJ. Second – and this was new – the defence argued that Judge A.D. was, from the standpoint of an impartial observer, clearly axiologically connected to the Catholic faith and the Catholic Church. The motion pointed to the fact that during her appointment process she had received a letter of recommendation ("certificate of moral standing") from Bishop Krzysztof Włodarczyk of Bydgoszcz, and that she had published a volume of religious poetry that had been publicly circulated and discussed.

Ruling:

On 27 March 2024, the Supreme Court, presided over by Judge Piotr Mirek, granted the motion and recused Judge A.D. In its reasoning, the Court held that, while those circumstances afforded no grounds to conclude that the judge was incapable of maintaining actual impartiality, in a case concerning the protection of religious symbols and religious feelings, they could, from the perspective of an external observer, give rise to justified doubts regarding her objectivity in matters connected with the religion with which she had publicly expressed an axiological affinity. **The decision marked a precedent in the history of the Polish Supreme Court: it was the first time a judge had been recused on the ground of her declared affiliation with a particular religion in**

proceedings concerning the protection of that religion's symbols.

After Judge A.D.'s recusal, the Court was confronted with two further recusal motions – this time concerning judges Stanisław Stankiewicz and Adam Roch. From the filing of the cassation appeal in September 2023 until September 2025 – almost two years – the Supreme Court did not examine the case on its merits. Instead, the proceedings focused on the successive recusal of judges assigned to the case. Four separate decisions resulted in the recusal of successive judges, with the grounds for recusal shifting from the allegedly defective appointment procedure (Zgoliński, A.D.) through professional ties and issues of public perception (Witkowski), to a judge's ideological and religious associations with the subject matter of the proceedings (A.D., Stankiewicz). Each recusal required a new assignment, and each reassignment opened the possibility of yet another motion for recusal.

Main quotations on cultural or religious diversity:

"In the circumstances of this case, it [recusal] is also justified in view of the other circumstances raised by M. B.'s defense counsel relating specifically to the person of the judge whose recusal is sought. This concerns the submission, during the nomination procedure, of a recommendation from a Catholic clergyman and the description of a volume of poetry published by the judge, which is available in the public domain. Although there are no grounds for assuming that these circumstances prevent the judge from remaining impartial, it would be difficult to deny that, given the nature of the act alleged against the defendant, they may, from the perspective of an external observer, give rise to reasonable doubts as to his objectivity."

Main legal texts quoted in the decision:

Domestic Law

- Constitution of the Republic of Poland (02.04.1997): Articles 45 (1), 187 (1)
- Criminal Code (06.06.1997): Articles 196, 261
- Code of Criminal Procedure (06.06/1997): Article 41(1)

International law

- Convention for the Protection of Human Rights and Fundamental Freedoms: Article 6(1)

Cases cited in the decision:

Relevant Polish and international case law:

- Judgment of the European Court of Human Rights of 9 January 2018, GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland (Application no. 18597/13),
- Judgment of the European Court of Human Rights of 19 July 2011, Uj v. Hungary (Application no. 23954/10),
- Judgment of the European Court of Human Rights of 4 November 2014, Braun v. Poland (Application no. 30162/10),
- Judgment of the European Court of Human Rights of 15 March 2022, Grzęda v. Poland (Application no. 43572/18),
- Decision of the European Court of Human Rights of 8 February 2001, Pitkevich v. Russia (Application no. 47936/99),
- Judgment of the Supreme Court of 2 June 2003 (case no. III KK 161/03),
- Resolution of the Joint Chambers of the Supreme Court: Civil, Criminal, and Labour and Social Security of the Supreme Court of 23 January 2020 (BSA I-4110-1/20),
- Decision of the Constitutional Tribunal of 31 January 2011 (case no. K 3/09).

Commentary

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The decision under commentary marks an unprecedented development in Polish criminal procedure: for the first time in the history of Polish jurisprudence, a Supreme Court judge was recused from hearing a case on account of their axiological ties to a particular religion, in a case concerning the protection of the symbols and religious feelings associated with that same faith. The ruling

represents an evolution in the standards of judicial impartiality in Poland and constitutes a significant contribution to constitutional, procedural, and European human-rights doctrine. Polish courts of the highest judicial authority – including the Constitutional Tribunal itself (case K 3/09) – have previously considered motions seeking the recusal of judges on grounds of an alleged lack of impartiality in cases concerning the financial affairs of the Catholic Church. Yet neither the mere declaration of religious affiliation, nor even membership in bodies appointed by the archbishop had hitherto constituted sufficient grounds for the recusal of a judge.

The particular responsibility borne by the judge deciding the recusal motion did not stem solely from the need to address issues of a strictly constitutional nature, such as the defective appointment of a judge – an issue already examined in binding decisions of international bodies and in the joint resolution of the combined chambers of the Supreme Court. The deciding judge was required to determine whether the judge's exceptionally strong personal ties to the Catholic Church could, from an objective observer's standpoint, raise doubts about impartiality. More specifically, the deciding judge was required to assess to what extent the submission, during the nomination process, of a recommendation from a Catholic cleric (specifically, a bishop), together with the public discussion of the volume of religious poetry authored by Judge A.D., could cast doubt on her ability to maintain objectivity in the case at hand. The key to understanding the Court's decision lies in the following statement: "*Although there is no basis to assume that these circumstances prevent the judge from maintaining impartiality, it would be difficult to deny that, given the nature of the act imputed to the accused, they may – when viewed from the standpoint of an external observer – give rise to reasonable doubts as to the judge's objectivity.*" Here, the Court drew a crucial distinction between two aspects of impartiality. First, subjective (or personal) impartiality – the judge's genuine ability to remain impartial in adjudication; the Court expressly found no basis to assume that the judge's religious ties impaired this ability. Second, objective (perceived) impartiality – how a judge's impartiality is viewed by a "reasonable outside observer",

conceived as a hypothetical, reasonably educated member of society. The Court held that in a case concerning the protection of religious symbols, a judge's ties to the same religion may generate reasonable doubts as to objectivity. It was this second category of impartiality that justified the judge's recusal.

The reasoning adopted in the justification for the decision permits the reconstruction of a specific test for assessing judicial impartiality, which other Supreme Court panels may apply in the future. It may be formulated as a sequence of questions. Step one: *does the judge exhibit axiological ties to a specific religion or denomination?* Evidence of such ties may include a cleric's recommendation submitted during the nomination process, public manifestations of faith (literary, artistic, or scholarly publications of a religious nature), membership in religious organizations, or charitable or social activity connected with religious institutions. Step two: *does the subject matter of the case concern the protection of symbols, religious feelings, or institutions associated with that same religion?* In the present case, the answer is yes – Article 196 of the Criminal Code (concerning the offending of religious feelings, particularly of Roman Catholics) and Article 261 (insulting a monument, in this case, the monument to John Paul II). Step three: *from the vantage point of an external observer (a hypothetical, reasonably informed member of society), could such ties generate reasonable doubts as to the judge's objectivity?* The Court answered in the affirmative: where a judge publicly identifies with the religion whose symbols are at issue, an objective observer may doubt whether the judge can remain impartial. If the answer to all three questions is "yes," the judge must be recused under Article 41 § 1 of the Code of Criminal Procedure.

The decision aligns with the case law of the European Court of Human Rights concerning judicial impartiality, particularly with respect to the objective impartiality test. Under this test, it is not enough for a judge to be actually impartial – the judge must also appear impartial ("*justice must not only be done, it must also be seen to be done*"). The ECtHR has repeatedly emphasized that the appearance of impartiality is as important as actual impartiality itself, because public confidence in the administration of justice depends on the appearance of

impartiality. The Polish Supreme Court applied that standard to the specific context of a judge's religious ties in a case concerning the protection of religion – a novel, albeit, for understandable reasons, controversial, application of the impartiality test. In the context of religious impartiality in the judiciary, the relevant international standards cannot be overlooked: the case concerning Russian judge Galina Pitkevich (application no. 47936/99), whose application challenged her removal from office, based on findings that her membership in the Living Faith Church had influenced her conduct on the bench and undermined the requirement of religious neutrality. The European Court declared the application inadmissible.

The ruling of the Polish Supreme Court also raises numerous questions and controversies. First, the decision lacks clear boundaries for the application of the axiological-ties test. It does not specify which connections are sufficient to justify recusal and which are not. This raises the question of whether a Catholic judge may adjudicate cases concerning Catholic symbols; whether a judge who previously belonged to a political party may rule in political cases; whether a judge engaged in social activism may adjudicate matters related to their advocacy; or whether a person with strong ethical views (pro-life or pro-choice) may hear abortion cases. The Court did not delineate the limits of the test. The decision may be read narrowly – as applying only where the judge has publicly manifested such ties, for example, through a clerical recommendation or publications – or broadly – as extending to any judge whose views are known, even if not publicly expressed. Second, the ruling may encourage strategic misuse of recusal motions. If it suffices to demonstrate any ideological link between the judge and the subject matter, a dissatisfied party could indefinitely prolong proceedings by filing successive motions. In case II KK 440/23, from September 2023 to March 2024 (and even further, until September 2025), the case was never examined on the merits because the defence successfully sought the recusal of successive judges. This raises the question of how to reconcile the right to an impartial tribunal with the right to a hearing within a reasonable time (Article 6 § 1 ECHR), though it must be acknowledged that this matter touches

upon the general issue of recusal motions and the procedure for their examination rather than specifically the doubts about judicial religious impartiality. Third, the decision relies on the perspective of the "external observer," but who exactly is this observer? What are the observer's values, worldview, or beliefs? Are they religious or non-religious? Pro-choice or pro-life? Depending on how one conceptualizes this observer, the assessment of impartiality may differ considerably. For a religious person, a judge's Catholic faith may enhance the perception of impartiality, whereas for a non-religious person, it may have the opposite effect. The Court did not rely on empirical research to determine how society, in fact, perceives judges' religious ties; instead, it assumed a priori that such ties may raise doubts. Fourth, the ruling may be interpreted as raising questions concerning the principle of worldview neutrality of the state. Article 25(2) of the Polish Constitution provides that public authorities shall remain impartial in matters of religious, philosophical, and ideological conviction. Is recusing a judge merely for being Catholic an expression of such impartiality – or a violation of it? The decision may be understood either as safeguarding neutrality (by ensuring that judgments are free of ideological bias) or as departing from it (by recusing judges solely because of their religious beliefs).

Despite the controversies, the decision has significant positive implications. It strengthens judicial impartiality standards by affirming that a judge's impartiality must be not only actual but also perceived as such by society at large. It reinforces public confidence in the courts by recusing judges whose connections may give rise to doubt. It acknowledges the special sensitivities involved in cases concerning religious feelings – matters that are deeply charged and ideologically contested, and that therefore require special caution in the process of judicial appointments. It also aligns with ECtHR case law, which has repeatedly underscored the importance of the objective impartiality test. At the same time, the decision's most significant drawback is the absence of clear limits on the axiological-ties test, which increases the risk of instrumental use: parties may overuse recusal motions to delay proceedings or avoid "inconvenient" judges.

This ruling may also reduce the pool of available judges in cases concerning religious feelings, given that few judges are entirely devoid of any religious ties. Furthermore, a judge's non-religiosity does not necessarily guarantee religious impartiality; on the contrary, in the eyes of a religious society, a judge (including judges) who demonstrates non-denominational beliefs may be perceived as potentially prejudiced against religion as such. The ruling may, therefore, be perceived as discriminatory on the grounds of religious belief. It may undermine the state's neutrality toward religious convictions. It raises the question of whether judicial nomination procedures should be modified to ban clerical recommendations – or perhaps to eliminate recommendations altogether. To avoid the negative consequences of the ruling, several solutions deserve consideration. First, statutory clarification of the criteria for recusing a judge due to axiological ties (a revision of Article 40 § 1 or Article 41 § 1 of the Code of Criminal Procedure). Second, the introduction of objective tools (e.g. social surveys) to assess whether certain ties genuinely raise societal doubts. Third, limiting the number or timing of recusal motions to prevent abuse.

The Supreme Court's decision of 27 March 2024 will enter the history of Polish law as the first case in which a judge was recused on account of religious ties. Whatever controversies it may provoke, it marks an important step toward a fuller understanding of judicial impartiality in a pluralistic and increasingly secular society, where traditional religious authorities are losing influence and trust in the judiciary increasingly depends on perceived neutrality. The ruling is bound to become the subject of doctrinal debate in the years to come and may serve as a starting point for redefining impartiality standards in Poland – whether in the context of religious connections or other forms of ideological, political, or social affiliation. It shows how the highest judicial authority responded to the challenge posed by the rapid political polarization at the turn of the 2020s in Poland, which spilled over into religious tensions, illustrating, in particular, the shifting public perception of the Catholic Church's social affiliation.

Literature related to the main issue(s) at stake:

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