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DENIAL OF SERVICE IN THE LIGHT OF THE CONSTITUTIONAL PRINCIPLE OF EQUAL TREATMENT AND PROHIBITION OF DISCRIMINATION. SOME REMARKS AGAINST THE BACKGROUND OF LEGAL DOCTRINE AND CONSTITUTIONAL JURISPRUDENCE IN POLAND AND THE FEDERAL REPUBLIC OF GERMANY[3]

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Summary. The subject of this article is the question of the impact of the constitutional principle of equal treatment and the prohibition of discrimination on relationships of a contractual nature. Contracts are the basic tool regulating the rights and obligations of individuals in the sphere of their social and economic life. The title issue is therefore an aspect of a broader issue related to the impact of constitutional freedoms and rights on private law relations. As is well known, the model feature characterising the formation of relations between private subjects is the principle of will autonomy. One of its manifestations is freedom of contract, according to which the parties may - within the limits set by the law - arrange the legal relationship according to their own will. Among the specific elements shaping the content of contractual freedom, the freedom as to the conclusion of the contract, the choice of the counterparty, the shaping of the content of the contract and the choice of form are traditionally mentioned. In the following remarks, we will be primarily interested in that aspect of contractual freedom which relates to the choice of counterparty. We will try to determine what restrictions on the refusal to conclude a contract with a particular entity result for participants in civil law transactions from the constitutional principle of equal treatment and prohibition of discrimination. This issue will be presented in a comparative legal context showing the experience of the Polish and German constitutional courts. The aim of the article will be an attempt to reconstruct - on the basis of the jurisprudential theses developed within the framework of the interpretation of Article 32 of the Polish Constitution and Article 3 of the Basic Law of the Federal Republic of Germany - a model for resolving cases in which it is necessary to resolve a conflict between the freedom to choose a party and the right to equal treatment and the prohibition of discrimination.

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Odmowa świadczenia w świetle konstytucyjnej zasady równego traktowania i zakazu dyskryminacji. Kilka uwag na tle doktryny prawa i orzecznictwa konstytucyjnego w Polsce i Republice Federalnej Niemiec. Przedmiotem niniejszego artykułu jest kwestia wpływu konstytucyjnej zasady równego traktowania i zakazu dyskryminacji na stosunki o charakterze umownym. Umowy są podstawowym narzędziem regulującym prawa i obowiązki jednostek w sferze ich życia społecznego i gospodarczego. Tytułowe zagadnienie jest zatem aspektem szerszej problematyki związanej z wpływem konstytucyjnych wolności i praw na stosunki prywatnoprawne. Jak wiadomo, modelową cechą charakteryzującą kształtowanie stosunków między podmiotami prywatnymi jest zasada autonomii woli. Jednym z jej przejawów jest swoboda umów, zgodnie z którą strony mogą - w granicach określonych przez prawo - ułożyć stosunek prawny zgodnie z własną wolą. Wśród konkretnych elementów kształtujących treść swobody umów tradycyjnie wymienia się swobodę co do zawarcia umowy, wyboru kontrahenta, kształtowania treści umowy oraz wyboru formy. W poniższych uwagach interesować nas będzie przede wszystkim ten aspekt swobody umów, który odnosi się do wyboru kontrahenta. Spróbujemy ustalić, jakie ograniczenia w zakresie odmowy zawarcia umowy z określonym podmiotem wynikają dla uczestników obrotu cywilnoprawnego z konstytucyjnej zasady równego traktowania i zakazu dyskryminacji. Zagadnienie to zostanie przedstawione w kontekście prawnoporównawczym ukazującym doświadczenia polskiego i niemieckiego sądownictwa konstytucyjnego. Celem artykułu będzie próba zrekonstruowania - na podstawie tez orzeczniczych wypracowanych w ramach wykładni art. 32 Konstytucji RP oraz art. 3 Ustawy Zasadniczej Republiki Federalnej Niemiec - modelu rozstrzygania spraw, w których konieczne jest rozstrzygnięcie kolizji pomiędzy swobodą wyboru strony a prawem do równego traktowania i zakazem dyskryminacji.

Słowa kluczowe: horyzontalna interakcja konstytucyjnych wolności i praw, prawo do równego traktowania, Konstytucja RP, niemiecka ustawa zasadnicza, zakaz dyskryminacji, swoboda umów.

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According to the legal tradition of continental Europe, private law is a distinct component of the legal system, but private law norms do not operate in a constitutional vacuum[4]. It is not disputed in modern legal science that private law, like the other components of the legal system, is influenced by the influence of fundamental rights norms. The thesis of the so-called radiation of the constitution on private law, also referred to as indirect *Drittwirkung*, originates from the famous judgment of the Federal Constitutional Court in the *Lüth* case of 1958 (ref.)[5]. In it, the FSK stated that no provision of civil law may be interpreted in a manner contrary to the objective order of values embodied by the fundamental rights contained in the constitution. The impact of fundamental rights on private law takes place in particular through general civil law clauses and other open-ended phrases, which require recourse to extra-civil criteria in determining meaning. The indirect horizontal impact of the constitution, framed in this way, is accepted in principle in the doctrine and judicial decisions of the individual states[6].

The way in which the issue of equal treatment and discrimination is regulated in the Polish and German constitutions is similar, and the interpretation of the relevant provisions is carried out with reference to the case law of the European Court of Human Rights. Both constitutions separately recognise the right to equal treatment (32(1) of the Polish Constitution: "All are equal before the law. Everyone has the right to equal treatment by public authorities";

[4] On the blurring of the boundaries between public law and privatelaw, see J. Helios (2013).

[5] Judgment of 15 January 1958, 1 BvR 400/51, BVerfGE 7, 198 *Lüth*.

[6] On the various models of horizontal influence, see Florczak-Wątor (2014, p. 63 et seq.). For an extensive discussion of the German *Drittwirkung* model, see Wróblewska (2022).

Article 3(1) of the German UZ "All people are equal before the law") and the right not to be discriminated against (Article 32(2) of the Polish Constitution: "No one may be discriminated against in political, social or economic life for any reason whatsoever"; Article 3(3) UZ RFN: "No one may be discriminated against or favoured on grounds of sex, birth, race, language, homeland and origin, religion, religious or political opinion. No one shall be discriminated against on the grounds of his or her disability"). In the legal doctrine and judicial decisions, one can find different interpretations of the interrelationship between these two categories. It seems that while in the Polish legal doctrine, following the pronouncements of the Constitutional Tribunal, a view has been formed according to which the prohibition of discrimination is a correlate of compliance with the principle of equality and a qualified manifestation of unequal treatment (Podkowik, 2016, p. 258), thus para. 2 of Art. 32 of the Polish Constitution has a separate normative content, there has been no consistent separation of the two categories in German constitutionalism, and the provision stipulating the prohibition of discrimination is standardly captured as an expression of 'specific equality rights' reinforcing the general principle of equality[7]. In the Polish legal sciences it is assumed that the criterion distinguishing discrimination from 'ordinary' unequal treatment may be the arbitrariness of behaviour, which is done with reference to the interpretation of Article 14 ECHR formed in the Strasbourg jurisprudence[8], or the basing of the differentiating behaviour on personal characteristics, essentially independent of individuals, such as gender, age, social origin[9].

As regards the subjective scope of the right to equal treatment in the provisions under analysis, it is generally assumed that it creates a direct obligation only on the part of public entities. In the case of the Polish Constitution, this follows directly from the second sentence of Article 32(1) of the Polish Constitution, according to which everyone has the right to equal treatment by public authorities, which term should be understood as including both law-making and law-applying bodies. The German UZ, on the other hand, formulates in Article 1(3) the principle of being bound by fundamental rights, including equality rights, only in relation to state authorities (Münch, Kunig, 2010, p. 202: Jarass, Pieroth, 2004, p. 112: Epping, 2014, p. 377). In light of the above-mentioned regulations, it is only reasonable to speak of the indirect horizontal effectiveness of the right to equal treatment, which, as part of the constitutional order of values, affects the relationship between individuals through an appropriate interpretation of private law.

As far as the prohibition of discrimination is concerned, on the other hand, the regulation of Article 32(2) of the Polish Basic Law provides grounds for an interpretation according to which it may find direct application in relations between individuals. This provision, firstly, does not decide who is the addressee of the prohibition of discrimination and, secondly, the areas listed therein within which discrimination is prohibited, i.e. political, social and economic life, include the relations of the individual with other individuals (Podkowik, 2016, pp. 262-263). As far as German legal science is concerned, following the aforementioned lack of a consistent distinction within Article 3 UZ of the prohibition of discrimination as a separate

[7] Cf. e.g. the order of the FSK of 27 August 2019, 1 BvR 879/12, as well as in the literature of Epping (2014, pp. 398-399). and Münch, Kunig (2010, p. 198), where it is stated that the content of Article 3(1) UZ is similar to the prohibition of discrimination in Article 14 ECHR. The concept of 'discrimination' in the context of Article 3(3) UZ, on the other hand, appears in Michael, Morlok (2008, p. 381). In Polish literature, specific equality rights are referred to as rights expressed in constitutional provisions other than Article 32 of the Constitution of the Republic of Poland, detailing the state's obligations in the field of equal treatment, such as e.g. 33, 64(2), 68(2), 70(4). Cf. e.g. Zubik (2020), pp. 109-110.

[8] Arbitrary conduct is that which has no objective and rational justification, i.e. it does not pursue a legitimate aim or there is no rational relationship of proportionality between the means employed and the aim they are intended to achieve. See Grand Chamber Judgment of 22 December 2009 in Sejdić and Finci v. Bosnia and Herzegovina, Application nos. 27996/06 and 34836/06, § 42. For more on this see Paprocka (2015, p. 212).

[9] Podkowik (2016), p. 258 with reference to the CT ruling of 5 July 2011, P 14/10.

normative category, an assessment of the extent to which horizontal application of the prohibition of discrimination is possible is made with reference to Article 3 UZ as a normative whole. This largely determines the approach that the provision under consideration does not directly protect against private discrimination (Michael, Morlok, 2008, p. 367).

The issue of the impact of the constitutional principle of equal treatment and the prohibition of discrimination on economic relations between individuals, as this is the subject of the title issue, has been - to a varying extent - the subject of consideration by the Polish and German constitutional courts. While the position of the former court on the horizontal effectiveness of Article 32 of the Polish Constitution can be constructed primarily on the basis of statements *in* which it addressed this issue in the more general context of constitutional rights and freedoms *in genere*, there have been a number of important rulings in German constitutional jurisprudence in recent years in which the FSK has explicitly defined its attitude to the applicability of Article 3 of the UZ to relations between private entities.

The Constitutional Tribunal of the Republic of Poland acknowledged in one of its judgements that the constitutional legislator emphasises above all the protection of the individual vis-à-vis the public authorities, however, human rights apply both in the vertical dimension and the horizontal dimension. If the Constitution does not unambiguously specify the entity obliged to realise the right guaranteed therein, it should be considered that the constitutional provision obliges the legislator to protect against interference from public entities as well as other individuals and private entities[10]. In another judgment, however, he noted that the Constitution regulates the relations between the state and individuals, without entering directly into the regulation of relations between persons subject to its authority, so it cannot, however, be treated as a basis for claims against private persons[11]. The above statements should be interpreted as approval of the essentially only indirect effectiveness of constitutional norms expressing rights and freedoms.

The issue of the admissibility of a refusal to provide a service in the light of the constitutional principle of equal treatment and the prohibition of discrimination has gained currency in Polish academia with the famous case of the printer from Łódź, already widely discussed in the literature[12]. Although it was decided on the basis of the Misdemeanours Code (Kw), specifically the provision that prohibited refusal to provide a service without a justifiable reason under the threat of a fine, its significance went beyond the sphere of misdemeanours law, directing attention to the interpretation of the Constitution's norms and demonstrating the need to pay attention to the content of Article 32 of the Constitution as a determinant for the interpretation of the scope of the principle of equal treatment or non-discrimination in the sphere of economic relations. The facts of the case were as follows: a printer refused to produce a roll-up for an LGBT foundation on the grounds that the printer does not contribute to the promotion of LGBT movements with his work. The foundation aggrieved by the refusal of the service and the Ombudsman considered that there had been discrimination on the basis of sexual orientation. The court of first instance found the printer guilty of a misdemeanour - but waived his punishment due to his family situation. The case eventually reached the Supreme Court, which upheld the judgment of the lower courts, stating that "an individual worldview and subjective understanding of one's religion cannot constitute a legitimate reason for refusing a service" and at the same time indicated that the accused printer in this particular case had no legitimate reason to refuse the service[13]. The TK took a different view, ruling in its judgment of 26 June 2019 that Article 138 Kw was unconstitutional on the grounds that it was impermissible to punish someone for refusing to provide a service if it was due to a legitimate

[10] See the judgment of the TK of 19 February 2002, U. 3/01.
[11] Judgment of 27 May 2002, K. 20/01.
[12] By way of example only, see Ciszewski (2017) and Jablonska (2020).
[13] Order of the Supreme Court of 14 June 2018, *II KK 333/17.*

reason. As the Constitutional Court held, the challenged provision is incompatible with the principle of proportionality arising from Article 2 of the Constitution of the Republic of Poland, as it is not necessary to ensure the achievement of the objectives of the Act, as civil law measures are sufficient for this purpose[14]. Both the judgment itself and the reasoning used in it have met with a critical response in the Polish scientific community[15]. Contrary to the claims of the Constitutional Tribunal, the norm contained in Article 138 Kw realised well the disposition of Article 32(2) of the Constitution and had a significant anti-discrimination value. This was emphasised by many organisations dealing with the problem of discrimination and also by the RPO, who in his position paper to the judgment - referring to the jurisprudence of common courts in the Republic of Poland - stated explicitly that the provision eliminated by the TK was "the only effective means of protection against unlawful discrimination in access to services consisting in the refusal to provide a service on the basis of a personal characteristic of the client"[16]. This provision protected the discriminated against on a more favourable basis than the available civil law remedies[17]. The consequence of the judgment is a lowering of the standard of protection against discrimination in the sphere of services, as it means that any service provider can refuse to provide a service because of, for example, the views, colour, age, disability of another person and this behaviour will not be punishable.

The issue of the limits of freedom of contract in the context of the constitutional right to equal treatment and the prohibition of discrimination has been developed in several FSK rulings in recent years. As part of a line of jurisprudence initiated by the high-profile 2018 decision in the *Stadionverbot* case[18], the FSK referred to the formula according to which the determination of the effectiveness of the right to equal treatment in a private-law relationship depends on the existence of certain circumstances, which it described by reference to the figure of a 'special constellation' (German: *spezifische Konstellation*). In the circumstances of the cited case, the FCC was assessing the validity of a constitutional complaint brought by a football fan in relation to the imposition of a stadium ban subsequently upheld by the civil courts and the Federal Court. According to the complainant, such a sanction violated his "general right of personality" under Article 2(1) in conjunction with Article 1(1) of the Basic Law of the Federal Republic of Germany by depriving him of the possibility to participate in a socially important area of life, stigmatising him as a hooligan, and the contested rulings failed to take due account of the radiating effect of the aforementioned constitutional norm on the relationship between the complainant and the stadium operator. Although the FSK rejected the complaint, holding that the contested decisions satisfied the requirements of the indirect *Drittwirkung of the* 'general right of personality', it at the same time made extensive statements on the problem of the horizontal effectiveness of the right to equal treatment. He stated, firstly, that the stadium operator, as a private person, is free to choose the contractor and the conditions under which it wishes to conclude contracts. The constitutional right to property (Article 14(1) of the UZ) guarantees him the possibility to decide for himself who he allows access to the stadium and

[14] The CT pointed, inter alia, to the Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union on Equal Treatment or the claim for compensation under the provisions on the protection of personal rights of the Civil Code.

[15] The fact that the judges of the Constitutional Tribunal fully acceded to the arguments presented in the politically motivated motion to declare Article 138 Kw unconstitutional submitted by the Prosecutor General and supported by the position of the Sejm is questionable. This motion was a manifestation of legal populism expressed by the **discriminatory phenomena against LGBT communities that have been deepening in recent years and supported by those in power. See, for example, Falenta (2020), p. 223.**

[16] Ombudsman' s position of 29 March 2018 in case K 16/17, para 17.

[17] For a more extensive discussion, see the Ombudsman's position of 29 March 2018 in case K 16/17, paragraph 18.

[18] Order of 11 April 2018, 1 BvR 3080/09 - *Stadionverbot*. For an extensive discussion of this ruling, see Wróblewska (2019).

who he denies it to. This is because, insofar as this is not prevented by the law, private entities have the right to treat other private entities unequally. The FSK emphasised that no objective constitutional principle follows from Article 3(1) of the GG 'according to which private-law relations must be subject to an order for equal treatment', as this would conflict with private autonomy. The indirect horizontal effectiveness of this provision should, however, be taken into account in situations which the FSK has described as 'special constellations'. These consist of one party to a formally private-law relationship having the power to decide on access to a socially important event, which is in principle open to the general public. This kind of supremacy of one of the parties makes illusory the equivalence of the parties characteristic of a horizontal relationship and makes it in fact resemble a vertical relationship linking the state and the individual. Thus, the exclusion of certain individuals from participating in such events cannot be arbitrary, and civil courts have a duty to examine whether such exercise of the property right violates the principle of equal treatment.

The findings of the FSK on the impact of Article 3 of the UZ on private relationships made in the *Stadionverbot* ruling have subsequently been applied in other rulings, including in particular the order of 27 August 2019, 1 BvR 879/12, which was based on the refusal of a hotel service due to the political views of a would-be customer, so its circumstances can be considered similar to those of the printer case discussed earlier. The order in question arose from a constitutional complaint brought by a member of a nationalist party who, having booked a stay for himself and his spouse at a hotel offering *wellness* services, was informed that the stay would not be possible due to the incompatibility of the complainant's political beliefs with the hotel's aim of offering every guest as perfect comfort as possible. In compensation, he was presented with alternative accommodation and offered a free cancellation of the booking costs. The complainant considered that the ban on entering the hotel was discriminatory and, in proceedings before the civil courts and the Federal Court, unsuccessfully sought to have it lifted. In a constitutional complaint to the FSK, he alleged that the decisions of the aforementioned courts violated his fundamental right under Article 3(1) of the UZ, but the FSK rejected the complaint. The ruling reiterated earlier findings on the effectiveness of Article 3(1) UZ in relations between private entities: this provision does not contain an objective constitutional principle prescribing the formation of such relations on an equal basis, and therefore private entities autonomously decide with whom and under what conditions they want to conclude contracts concerning their property. Moreover, the FSK considered that in the circumstances of the case at hand, there is no 'special constellation' justifying even an indirect *Drittwirkung of* Article 3 UZ: the visit to the *wellness hotel* does not significantly affect participation in social life, and the hotel owner does not have a monopolistic position or structural advantage, as it only operates one of several hotels in the city, and it has made every effort to minimise the discomfort of the complainant resulting from the entry ban. In the context of the case at hand, the FSK also addressed the problem of the horizontal effectiveness of the prohibition of discrimination on the basis of political opinion regulated in Article 3(3), first sentence, of the UZ. It ruled out its direct effectiveness in relations between private parties, but did not further clarify the extent of its indirect effectiveness in such relations. He merely pointed out that even if more far-reaching and stricter obligations could be derived from the prohibition of discrimination by way of indirect *Drittwirkung* than from the general principle of equal treatment, this could by no means amount to an absolute prohibition of differentiation on the basis of a given criterion. The granting of constitutional protection to a given private entity always needs to be balanced against the rights and freedoms of other entities, in the case under consideration the right to property (Art. 14(1) UZ) and the freedom to conduct business (Art. 12(1) UZ).

Irrespective of the differences between the positions of the Polish and German constitutional courts as outlined above on the question of how private actors are bound by the

constitutional prohibition of discrimination, both courts in principle favour a formal interpretation of the principle of equality and the prohibition of discrimination. It does not derive from them an obligation for the state to introduce a state of actual (material) equality of market participants referring to their factual situation[19] or to realise a certain level of equality among members of the state community[20]. The implementation of Article 32 of the Constitution of the Republic of Poland and Article 3 of the UZ of the Federal Republic of Germany in private relations is not absolute and requires harmonisation with other constitutional rights and freedoms. The judicial model of resolving conflicts between the freedom to choose a party and the right to equal treatment and the prohibition of discrimination presupposes the need to balance conflicting interests and to determine whether and to what extent each party to a private-law relationship is obliged to respect the fundamental rights of the other. As noted**,** subjecting private transactions to the rigours of the Constitution's standards on fundamental rights would lead to depriving private autonomy of its essence, eliminating the distinctiveness and meaning of these transactions and making any free trade or disposal of one's rights impossible[21]. After all, the risk of violating the private autonomy of a given private entity by subjecting it to constitutional obligations varies depending on the nature of the relationship it has with the other entity. In the case of relationships of a contractual nature, in which the entity concerned provides certain services on a professional and profit-making basis, its private autonomy is necessarily limited. In this type of relationship, there is undoubtedly a 'special constellation' that *de facto* makes the horizontal relationship similar to the vertical one. The refusal of such an entity to provide a service cannot be arbitrary and must be supported by constitutional rights and freedoms. Furthermore, as is rightly pointed out[22], if one accepts an interpretation that regards the prohibition of discrimination as a rule independently defining the framework of constitutionally protected freedom of contract, one must *eo ipso* at the same time consider that discriminatory behaviour does not fall within it.

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[19] Podkowik (2016, p. 247) points to the judgments of 4 September 2007, P 19/07 and 2 December 2009, U 10/07.

[20] FSK judgment of 18 July 1972, 1 BvL 32/70 and 25/71, BVerfGE 33, 303 - numerus clausus I.

[21] See, for example, Erichsen (1996, p. 530).

[22] Horseshoe (2016, pp. 266, 269)

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