RELIGON-BASED REFUSAL TO PERFORM SERVICES FOR HOMOSEXUALS IN POLAND

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Abstract

The article concerns the problem of religiously motivated refusal to provide services for homosexuals. The study is dedicated to the Polish approach to the problem, it comments on views of Polish scholars as well as recent case-law of Polish courts. Nevertheless, broader international legal context is also outlined. The author put forward the thesis that because of low probability of achieving legal changes of the status of homosexuals in Poland, LGBT society` activists have moved their attempts to judicial sphere and adopt so called strategic litigation as a tool of legal change. The Polish experiences reveal that the application of such measures could bring results contrary to theirs` authors intentions. Strong social backlash towards judgements that foster LGBT society` demands was eventually accompanied by the judgement of the Constitutional Tribunal, that has reversed previous decisions of common courts and Polish Supreme Court.

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1. Introduction

The Polish legal discourse regarding the issue of homosexuality has been for years dominated by the problem of the institutionalization of same-sex partnerships and marriages. One might assume that the key milestone in this tendency was the article published by Ewa Łętowska and Jan Woleński in 2013 in response to the legal opinion provided by the Office of Studies and Analyses of the Supreme Court, according to which the introduction of same-sex partnerships or marriages in Polish legal system would be contrary to article 18 of the Polish Constitution[1]. The discussion presented two rival interpretations. First, still prevailing in the Polish legal discourse[2], states that the content of article 18 should be understood as a legal definition of the marriage as a relationship between the man and the woman, which is deemed to be a legal obstacle to the institutionalisation of same-sex relationships. The proponents of this position hold that any attempt to establish an institution analogical to marriage, but applicable to same-sex couples, should be seen as a circumvention of article 18 of the Constitution[3]. In one of its judgements, the Polish Constitutional Tribunal reminded that "in the Polish domestic law, the marriage (as a relationship of the man and the woman) has acquired the independent constitutional status by virtue of article 18 of the Constitution. The change of this status would be possible solely with observance of the provisions concerning the change of Constitutions specified in article 235"[4]. The judgement is portrayed as a serious argument against the institutionalisation of same-sex relationships in Poland. The second stance is based on the assumption that article 18 of the Constitution does not provide the legal definition of the marriage; instead, it rather states that marriages composed of the man and the woman should be ac-

[1] A. Jezusek, *Możliwość instytucjonalizacji związku osób tej samej płci w świetle art. 18 Konstytucji RP*, 4(129) rok XXIII Przegląd Sejmowy Dwumiesięcznik 67 (2015).

[2] P. Sut, *Relacje prawo–intymność "ukryte" w Konstytucji Rzeczypospolitej Polskiej (problem instytucjonalizacji małżeństw homoseksualnych w Polsce wobec nieokreśloności prawa)*, 7/1 Filozofia Publiczna i Edukacja Demokratyczna 235 (2018).

[3] P. Mostowik, *Kilka uwag o ochronie małżeństwa na tle Konstytucji i prawa międzynarodowego*, in J.M. Łukasiewicz, A.M. Arkuszewska, A. Kościółek (eds.), *Wokół problematyki małżeństwa w aspekcie materialnym i procesowym*, 45, 59 (2017).

[4] Case no. K 18/2004.

corded special protection by the state. According to this interpretation, the Polish Constitution does not ascertain any restriction in this respect; hence, it is not necessary to amend the Constitution in order to establish legally binding same-sex partnerships[5].

Regardless of the question of constitutionality of same-sex partnerships in Poland, its institutionalisation would require that an action be undertaken by legislator, which is rather improbable in the current political context. Therefore, we may put forward a thesis that the course of actions undertaken by LGBT activists has shifted towards the problems that could be resolved without any involvement of the law-maker, i.e. demanding only judicial decisions. One of such problems is the question of mostly religion-based refusal of services to LGBT society members[6]. Unlike in the United States or United Kingdom, where legal disputes concerning refusal of services for homosexuals, in overwhelming majority of cases, followed or accompanied the legalisation of same-sex marriages[7], in Poland this problem outpaces the institutionalisation of same-sex partnerships or marriages.

To date, Polish courts have examined two widely commented cases concerning the refusal of providing services for homosexuals, in which the accused party attempted to defend them-

[5] Comprehensive defence of this stance in: A. Jezusek, *Możliwość instytucjonalizacji związku osób tej samej płci*, cit. at 1. It is worth to underline that in the western legal culture the concept of marriage as a different-sex relationship used to be rooted so strongly that even when a constitution did not provide definition similar to the Polish one, constitutional courts defended the different-sex interpretation, see German discussion on the subject described by P. Łącki, *Zmiana znaczenia pojęcia małżeństwa w niemieckiej ustawie zasadniczej. O meandrach dynamicznej wykładni postanowień konstytucyjnych*, 2(46) Forum Prawnicze (2018).

[6] What is interesting, the leading Polish organisation representing demands of LGBT society – *Kampania Przeciw Homofobii* (Campaign against Homophobia) – qualifies such a phenomenon as a form of violence (see M. Świder, M. Winiewski eds., *Sytuacja społeczna osób LGBTA w Polsce. Raport za lata 2015–2016*, 76 2017, accessible: https://kph.org.pl/wp-content/uploads/2017/11/Sytuacja-spoleczna-osob-LGBTA-w-Polsce.pdf, last accessed: 28.6.2019).

[7] For information on history of institutionalisation of same-sex relationships see P. Pogodzińska, *Status prawny małżeństwa i związków partnerskich w Unii Europejskiej*, in C. Mik (ed.) *Prawa człowieka w XXI w. – wyzwania dla ochrony prawnej* (2004); G.J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25/2 The Future of Children (2015); E.D. Rothblum, *Same-Sex Marriage and Legalized Relationships: I Do, or Do I?*, 1 Journal of GLBT Family Studies" (2005).

selves by relying on their religious beliefs. Both cases were decided in favour of LGBT organisations pleading as victims. However, most recently the Polish Constitutional Tribunal has issued the judgement pursuant to which the provision, on the basis of which the accused were found guilty, is unconstitutional[8]. It creates the possibility of overturning previous judgements of Polish common courts.

The article intends to present the Polish perspective of the problem of religion-based refusal to perform services to LGBT society members or their representatives. The second part of the text aims at presenting the broad legal context of the problem. It indicated also the cases similar to the Polish ones, examined particularly by the courts in the Anglo-Saxon countries. Furthermore, the European legal background is analysed in this respect, yet contrary to the paragraph devoted to Anglo-Saxon case-law, predominantly the legal provisions are analysed; however, certain relevant ECHR case-law is also presented. Part three of the article quotes the Polish provisions that could be applied to the problem, particularly constitutional principles and statutory law. These two parts of the paper contribute to outlining all problematic legal spheres influencing the problem, i.e.: the freedom of economic activity (and the freedom of contract), freedom of religion (with reference to the conscientious objection), prohibition of discrimination[9], and also the consumer law. Fourth part of the article comments on the recent Polish case-law regarding the religion-based refusal of services. It presents the facts and justifications delivered by the courts, introduces certain doubts raised by law scholars towards the decisions and puts forward some remarks of more theoretical nature. In Conclusions I will demonstrate how the actions of LGBT groups in Poland, pursuing to fulfil their demands, has almost entirely shifted towards the judicial sphere, which allows to enforce legal changes without the need to reach the democratic consent – the support of the majority of society.

[8] Case no. K 16/17.

[9] It seems that these three issues play the crucial role in similar disputes (at least in the Polish context and when it comes to the substantive law). Theoretical arguments concerning these three issues are analysed by W. Ciszewski, *Czy wolność uprawnia do dyskryminowania? Rozważania teoretycznoprawne na kanwie sprawy drukarza z Łodzi*, 5(43) Forum Prawnicze (2017).

II. International and European legal context

1. Anglo-Saxon contribution to the problem

The United States were the country where the disputes around the issue of refusal to perform services for homosexuals due to one`s beliefs emerged for the first time and were quite common. The circumstances of such cases were rather similar: owners of small, private business used to refuse performing services requested by gay or lesbian couples, which led to certain legal consequences: generally, defendants were either fined, or, optionally, obliged to reimburse costs of proceedings at law[10]. Significantly, great majority of the cases concerned wedding services, such as providing wedding cakes, photo sessions or preparing bunches of flowers for a same-sex couple. Some of the cases took place in states which did not formally recognised same-sex partnerships or marriages at the moment of events under consideration.

To outline background of the dispute in a proper way it is worth to notice that by virtue of *Obergefell v. Hodges*[11] judgement of the US Supreme Court same-sex marriages were eventually legalised in the entire United States. On the other hand, in its previous ruling to the case *Burwell v. Hobby Lobby*[12], the Supreme Court accepted a kind of consciousness objection for those running commercial enterprises. Accusations raised against business-owners refusing to perform services were formally anchored in the so-called SOGI laws (abbreviation from: Sexual Orientation Gender Identity), which were aimed at combating discrimination

[10] About American cases see in Polish: Ł. Mirocha, *Odmowa wykonania usług weselnych dla par jednopłciowych w Stanach Zjednoczonych*, 4 Państwo i Prawo (2019), in English: J. Bauers, *The Price of Citizenship: an Analysis of Anti-Discrimination Laws and Religious Freedoms in Elane Photography, LLC v. Willock*, 15 Rutgers Journal of Law and Religion (2014); B. Knox, *A Fundamental Standoff Post-Obergefell: Which Fundamental Right Should Prevail When Claims of Free Exercise Clash With Claims of Discrimination in the Private Marketplace?*, 68 Alabama Law Review (2016); C. Schube, *A New Era in the Battle Between Religious Liberty and Smith: SOGI Laws, Their Threat to Religious Liberty, and How To Combat Their Trend*, 64 Drake Law Review (2016); A. Riley, *Religious Liberty vs. Discrimination: Striking a Balance When Business Owner Refuse Service to Same-Sex Couples Due to Religious Beliefs*, 40 Southern Illinois University Law Journal (2016).

[11] Case no. 576 U.S. (2015).

[12] Case no. 573 U.S. (2014).

in every field of social life, including market sphere. Few of such statutes expressed religious exemptions in direct way (e.g. the so-called Utah Compromise[13]), however most of them had absolute character.

Two main arguments were raised by defendants in favour of refusal, both of them grounded in the First Amendment of the US Constitution. Firstly, defendants claimed that providing wedding services for homosexuals remains in opposition to their religious beliefs. They referred to *free exercise clause*. Secondly, they maintained that their creative work is a kind of art, so forcing them to ensure same-sex couples with effects of their work should be considered as a sort of "compelled speech" (*freedom of speech* argument). In contrary to caveats claiming that refusal was based on the features or *identity* of potential contractors (homosexuality), defendants argued that it was expressed due to *actions* of potential contractors (or just the intent to conclude same-sex marriage). One of the defendants explained the difference, claiming that they have always been performing services for their friends – a homosexual couple, but they denied to do so when it came to wedding services[14]. Similar arguments occur regularly in disputes related to the conflict of religious liberty and equality demands. In comparison to alike disputes in other countries, the lack of arguments derived from economic freedom is characteristic in American conditions.

The overwhelming majority of the cases taking place in the United States was resolved in favour of homosexuals. However, most recent judgement of the US Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[15] has brought alteration. The judgement was favourable to defendant; still, it was too profoundly connected to the facts of specific case to be deemed as any plausible sign of a new tendency in the US case-law regarding the problem of religion-based refusal. Relying on the justification of *Masterpiece Cakeshop* verdict we can cautiously predict that arguments referring to the freedom of expression (or speech) might

[13] SB 296 Utah Antidiscrimination Act.
[14] Case *Washington v. Arlene's Flowers, Inc.*
[15] Case no. 584 U.S. (2018).

be more convincing for American judges than these recalling the freedom of religion[16].

The United States were not the only country where similar disputes occurred. As Wojciech Ciszewski[17] points out, the case most similar to the Polish one took place in Canada. The judgement in *Ontario Human Rights Commission v. Brockie*[18] was decided in favour of an LGBT association, which had met with refusal when ordered a kind of printing service. The defendant – Scott Brockie – proclaimed himself as a new-born Christian and explained his behaviour as motivated by his beliefs. This elucidation was not considered as convincing for the Ontario Supreme Court, which decided that defendant violated relevant counter-discrimination laws. The case-law of European countries also provides us with decisions concerning tensions between religion beliefs and antidiscrimination. In 2018 the Supreme Court of the United Kingdom overruled judgements of lower instance courts in case regarding the refusal to prepare cake for homosexuals. *Lee v. Ashers Baking Company Ltd. and Others*[19] seems to deliver quite similar conclusion to the verdict in *Masterpiece Cakeshop* case. Just as the American judgement, it is also deeply anchored in the facts of the specific case. It could be difficult to derive any general clues from this judgement, except the obvious one stating that antidiscrimination tendencies do not always have to prevail in market sphere.

2. European system of the protection of human rights

Judgements quoted above do not have any direct impact on the Polish legal system; however, the most famous verdict in this field – the one delivered by the US Supreme Court in the case *Masterpiece Cakeshop* – was mentioned by the Polish Supreme Court in

[16] The judgement have not finished legal struggles of the *Masterpiece Cakeshop* owner; he is burdened by clearly provocative requests accompanied by complaints to the state`s Civil Rights Commission. See D. Laycock, *The Broader Implications of Masterpiece Cakeshop*, 1 Birgham Young University Law Review issue 196-202 (2019).

[17] W. Ciszewski, *Czy wolność uprawnia do dyskryminowania?*, 38, cit. at 9.

[18] Case no. O.J. No. 2375 [2002].

[19] Case no. [2018] UKSC 49. Gareth Lee decided to issue motion to European Court of Human Rights, the case is pending (application no. 18860/19).

the justification of the judgement commented in part IV of the article. On the contrary, the provisions contained in the European system of human rights` protection have binding character for both the Polish legislator and Polish courts. Because of that it is necessary to at least outline provisions that may affect the analysed problem. The following considerations shall be limited to conclusions developed by the European Court of Human Rights on the basis of the Conventions on Human Rights and Basic Freedoms and stipulations provided by the Charter of Fundamental Rights of the European Union.

When it comes to the ECHR case-law it should be noticed that until now no case underpinned by the facts exactly related to the aforementioned ones was decided by this body. However, there were few cases somehow similar or delivering useful clues for the presented equality v. religious freedom conflict[20]. Firstly, the judgement to the case of *Eweida and others v. United Kingdom*[21] is worth mentioning. The judgement concerned *inter alia* situations in which claimants refused to perform services for homosexuals, to which they were obliged by a kind of codes of good practice. Mr McFarlane was associated as a counsellor in private organisation providing confidential sex therapy and relationship counselling service and described himself as a practicing Christian. He refused to lead therapies for same-sex couples. Ms Ladele – also a Christian – denied to assist in the ceremonies of concluding same-sex civil partnerships. They met with severe consequences of such behaviour, which was considered as misconduct by their employers. As a result, they were made redundant. Before the ECHR both claimants recalled article 9 of the Convention (*freedom of thought, conscience and religion*); nevertheless, their applications were unsuccessful. The judgement is usually presented as an argument against effectiveness of using conscience reasons in confrontation with equality demands[22]. In spite of this, it should be underlined

[20] For comprehensive analysis of so-called "Łódź printer" case from the point of view of ECHR see Ł. Mirocha, *Prywatna dyskryminacja ze względu na orientację seksualną w relacjach cywilnoprawnych. Perspektywa Europejskiego Trybunału Praw Człowieka*, 2(70) Studia Prawnicze KUL, 85-105 (2017).

[21] Applications no. 48420/10, 59842/10, 51671/10 and 36516/10.

[22] M. Hara, *Refleksje nad odpowiedzialnością za wykroczenie z tytułu odmowy świadczenia usługi (art. 138 k.w.) w kontekście unormowań cywilnoprawnych*, 1(13) Ius Novum 122 (2019).

that the ECHR has treated both religious reasons and provisions securing equal access to some services regardless of sexual orientation as interests at risk, which – in effect – requires fair balancing. It implies that in different context the result of the case could be altered[23].

Leaving aside the commented case, it should be noticed that earlier the Court was faced with cases whose main question referred to the problem of equal treatment of homosexuals in civil-law relations. Despite the fact that the Convention does not provide any provisions directly concerning this sphere, the cases were always decided in favour of a homosexual claimant[24]. While considering circumstances in which homosexuality is under discussion, one should remember that article 8 of the Convention could be regarded as a quite universal basis for demands that otherwise had no legal ground in the document. The *right to respect private and family life* in conjunction with article 14 (*prohibition of discrimination*)[25], could be deemed as a legal measure for combating discrimination in market sphere. Some doubts concerning this interpretation may result from the problem of horizontal effect of the Convention (do human rights take effect between individuals, or only in state-individual relation?). However, the ECHR more and more often acknowledges horizontal effect of the Convention referring to positive duties of a state[26].

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[23] Comprehensive study of the cases: I. Leigh, A. Hambler, *Religious Symbols, Conscience, and the Rights of Others*, 3/1 Oxford Journal of Law and Religion (2014).

[24] See *Karner v. Austria*, application no. 40016/98; *Kozak v. Poland*, application no. 13102/02; *P.B. and J.S. v. Austria*, application no. 18984/02.

[25] It should be noticed that the Protocol no. 12 to the Convention establishes general prohibition of discrimination, what significantly broadens equality guarantees in the system of Convention.

[26] See J.-F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights. A Guide to the Implementation of the European Convention on Human Rights, 7* Human Rights Handbooks (2007); J. Czepek, *Szczególny charakter ar. 8 EKPC w teorii zobowiązań pozytywnych państw-stron*, in C. Mik, K. Gałka (eds.) *Między wykładnią a tworzeniem prawa. Refleksje na tle orzecznictwa Europejskiego Trybunału Praw Człowieka i międzynarodowych trybunałów karnych*, 192, 202 (2011); D. Chorąś, *Prawo do poszanowania życia prywatnego i rodzinnego w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka – granice ingerencji w sferę praw jednostki*, in M. Cezarego, G. Katarzyny (eds.), *Między wykładnią a tworzeniem prawa* (2011).

On the other hand, the ECHR` case-law also delivers examples of application of conscientious objection, establishing a kind of conscience clause[27], to date limited to medical professions[28] and people refusing military service[29]. Judgements issued in such cases convince that one`s beliefs could be considered as the basis for refusal; however, the right to refuse is not absolute. The Polish Supreme Court in the justification of the judgement commented below as an example recalls the case *Pichon and Sajous v. France*[30] concerning the co-owner of the pharmacy who, basing on religious beliefs, refused to sell contraceptives to patients having validly issued prescriptions. The case was not decided by the ECHR in compliance with the pharmacist`s demands.

It should be emphasised that article 9 of the Convention does not directly mention the right to conscientious objection, which distinguishes it from the Charter of Fundamental Rights of the European Union. The article 10.2 of the main EU document on human rights acknowledges that "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right". In my opinion, the provision should be interpreted is such a way that although the EU law gives independent, sufficient basis for religion-based refusal, the specific conditions of such refusal should be clarified by the domestic law. The application of the right to conscientious objection is not limited to predetermined situations, nor is the catalogue of entitled subjects restricted to medical professions and people refusing military service[31].

Except the abovementioned ones, there are at least three more aspects of the problem which are affected by the Charter. Articles 16 and 17 concern respectively *the freedom to conduct a business* and *the right to property*. Both rights were indicated – in Polish discussion over the problem – as arguments in favour of business-

[27] On the distinction of the two: W. Ciszewski, *Wyłączenia światopoglądowe jako przedmiot dyskusji teoretycznoprawnej – próba systematyzacji*, 2(34) Forum Prawnicze (2016).
[28] See O. Nawrot, *Conscientious objection and European vision of human rights*, 6.1 Progress in Health Sciences 150-157 (2016).
[29] Famous case *Bayatyan v. Armenia*, application no. 23459/03.
[30] Application no. 49853/99.
[31] I.C. Kamiński, *Komentarz do art. 10*, in A. Wróbel (ed.) *Karta Praw Podstawowych Unii Europejskiej. Komentarz* 14-15 (2013).

owners refusing to meet demands of the potential customers. This dimension of the problem (particularly *the freedom of contract*), although raised by defendants, was neglected by Polish common courts and the Supreme Court. Nevertheless, it was taken into consideration by the Polish Constitutional Tribunal[32].

There are also two further provisions of the Charter that should be outlined here: the article regarding consumer rights protection and – last but not least – principles concerning equality protection. Pursuant to article 38 of the document: "Union policies shall ensure a high level of consumer protection". The stipulation is meaningful in the context under study, especially when we take into consideration that the concept of "consumer" was relevant in settling Polish court cases. According to certain interpretation, discussed below in more detail, the misdemeanour of which the defendants in Polish court cases were accused, was designed to provide protection for natural persons. In spite of that, Polish courts decided that these provisions apply to legal persons as well. Nevertheless, it should be reckoned that the European Court of Justice did not derive independent normative content from article 38 of the Charter, but used it as an interpretative clue fostering consumer interests[33].

When it comes to equality issues, it is worth to stress that one of the Charter`s chapters is entitled "Equality". This value is mentioned as third one in the Charter, after "Dignity" and "Freedom", leaving behind chapters referring to "Solidarity", "Citizens` rights" and "Justice". Article 20 establishes a kind of formal equality principle stating that "Everyone is equal before the law.", whereas the latter provision is closer to the substantive ideal of equality: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". In contrast to article 14 of the Convention on Human Rights and Basic Freedoms, the Charter explicitly

[32] Polish Constitutional Tribunal recognises the freedom of contract as stemming from the freedom of economic activity, see judgement in case no. SK 24/02.

[33] See B. Stępień-Załucka, *Ochrona konsumentów, użytkowników i najemców*, in H. Zięba-Załucka (ed.) *Wolności i prawa ekonomiczne, socjalne i kulturalne w Konstytucji RP z 1997 r.*, 272 (2018).

forbids to use sexual orientation as the reason for different treatment[34]. What is even more significant is that provision under study states the following: "Any discrimination (…) shall be prohibited". This wording allows to avoid interpretative doubts arose in the context of the Convention regarding the horizontal effect of the protected right. On the grounds of the Charter it is obvious that a state is not the only addressee of the prohibition of discrimination, or it is at least the subject obliged to prevent discrimination in each sphere and each sort of social relations – therefore, it has positive duties in preventing discrimination. The horizontal effect of the prohibition of discrimination was acknowledged by the ECJ *inter alia* in its judgement of 10 July 2008[35]. High status of equality principle in horizontal relations is confirmed by EU directives, e.g. the Council Directive 2004/113/EC implementing the principle of equal treatment of men and women in the access to and supply of goods and services[36]. The way the EU directives are implemented into the Polish legal system shall be illustrated in the following part, but firstly we should focus on Polish constitutional provisions affecting the problem.

III. Polish legal background of the problem

Despite the fact that cases under study, settled by Polish common courts, directly concerned only one provision of the Code of Petty Offences, both the Polish Supreme Court and Constitutional Tribunal attempted to analyse broader legal context of the problem. Doing so, they needed to take into account at least three groups of rights: religious freedom with its consequences, equality and counter-discrimination provisions, and, finally, principles governing the market activity, from both sides: business-owners

[34] The Convention provides open catalogue of such reasons, and after previous disputes whether discrimination of homosexuals fits into premise "sex" or "other status", the ECHR have decided that it is forbidden as fitting into "other status".

[35] Case no. C-54/07; the case concerned racial discrimination. See W. Brzozowski, A. Krzywoń, M. Wiązek, *Prawa człowieka*, 274 (2018); A. Bierć, *Freedom of Contract against the Constitutional Non-discrimination Principle*, 3(215) Studia Prawnicze 47-49 (2018).

[36] On horizontal effect of the Charter: E. Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the European Union: Rediscovering the Reasons for Horizontality*, 21/5 European Law Journal (2015).

and customers. Their content shall be outlined here, whereas the analysis of the Petty Offences provision is delivered in part IV of the article alongside with the study of the Polish judgements.

The Constitution of the Republic of Poland of 1997[37] provides comprehensive regulation of freedom of thought, conscience and religion. Article 53 warranting this rights encompasses *inter alia* "the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching". Section 6 of the article states that "No one shall be compelled to participate or not participate in religious practices", while section 7 assures: "No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief". The right to conscientious objection is not expressly mentioned in this part of the Polish Constitution; however, the conscience clause is warranted by the article 85.3 for citizens refusing military service. What is more, Polish statutory law ensures persons practicing medical professions with the right to conscience clause. There is no legal act that directly provides business owners with any form of the right to the conscientious objection, whereas the Polish Constitutional Tribunal, in the widely commented judgement concerning the conscience clause in medical professions[38], admitted that the Constitution is the independent, sufficient source of such a right. In the academic disputes arose around this statement two contradictory stances could be identified: one defending the thesis that conscience clause should be anchored in the statutory law to be applicable in practice[39], and second, compliant with the Tribunal`s view[40], which seems to open door for all sorts of applications of the right to the conscientious objection in the market square.

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[37] Dz.U.1997.78.483. Hereinafter I use official translation accessible on webpage: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (last accessed: 29.6.2019).

[38] Case no. K 12/14.

[39] E.g. W. Ciszewski, *Kazus łódzkiego drukarza (uwagi do artykułu Mikołaja Iwańskiego z perspektywy teorii prawa)*, 7/2018-6/2019 Czasopismo Prawa Karnego i Nauk Penalnych 13 (2018-2019).

[40] E.g. M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi (art. 138 Kodeksu wykroczeń) na tle kolizji zasad konstytucyjnych. Rozważania na kanwie kazusu łódzkiego drukarza o styku prawa karnego sensu largo oraz prawa*

When it comes to equality protection, the article 32 needs to be indicated. It states that: "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities" (sec. 1) but also that "No one shall be discriminated against in political, social or economic life for any reason whatsoever" (sec. 2). The second section is particularly problematic. It is – in conjunction with article 8.2 of the Constitution[41] – perceived as a legal basis for the horizontal effect of constitutional provisions, as it indicates "social or economic life"[42]. However, it could be convincingly claimed that the identification of the sphere of the prohibited discrimination is not equal with the outlining of the scope of actors being addressees of the provision. The Constitutional Tribunal still does not present a consequent stance towards this problem[43].

When looking for legal arguments in favour of the thesis that equality principle is binding in the market sphere and, as a result, potential parties of civil-law contract should treat each other equally, it is worth to investigate the EU law's influence on the Polish legal system. Firstly, it should be noticed that the result of conforming the Polish legal system in order to access the EU is that the premise of "sexual orientation" was directly prohibited as a basis of different treatment, for example in the Polish Labour Code[44] (prohibition of any form of discrimination at work). Secondly, it has to be stressed that by establishing the Act on the implementation of certain European Union provisions concerning equal treatment[45] (so-called "Equal treatment act" or "Non-discrimination act") Poland has made the relevant EU directives enforceable. The act was pointed out by the proponents of the erasing of provision establishing misdemeanour committed by defendants in Polish cases as an example of non-criminal law measure employed in prevention of discrimination. As such it was portrayed by the Attorney General in his motion issued to the Consti-

konstytucyjnego, 7 Czasopismo Prawa Karnego i Nauk Penalnych 43 (2018 preprint).

[41] "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise".

[42] See A. Bierć, *Freedom of Contract* 41, cit. at 35.

[43] M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi* 40, cit. at 40.

[44] Dz.U.2019.1040.

[45] Dz.U.2016.1219.

tutional Tribunal concerning the question whether the controversial petty crime is in compliance with the Polish Constitution[46]. In fact, in case of the refusal to perform services for homosexuals, the Equal treatment act is rather useless. The exemptions from its application are formulated in such a way that it does not provide protection for homosexuals on the market. According to article 5.3, the act is not to be applied in the choosing of the contractor provided that the choice is not based on sex, race, ethnic origin or nationality. It means that the refusal to perform services for homosexuals surpasses the scope of application of the act. This fact was recognised by the Polish Commissioner for Human Rights in his official response to the Attorney`s General motion, it is also confirmed by legal scholars[47]. Moreover, the act limits its application to natural persons in many places. Additionally, it could be noticed that the Polish civil law could be used as a counter-discrimination measure, the protection of personal rights is an example of such a function.

To sum up, it could be difficult to find an unquestionable legal basis for equal treatment in business-customer relations in the Polish legal system. Both proponents and opponents of this thesis can put forward equally strong arguments.

There are at least two – mention worthy – provisions in the Polish Constitution regarding rights of business owners operating on the market. Article 20 of the Constitution states that "A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland". The principle of economic freedom is acknowledged in the stipulation, and – as mentioned above – it is the freedom of contract that was derived from it by the Constitutional Tribunal. It is claimed that the "social" aspect of market economy means that state is entitled to correct negative effects of free market mechanisms, e.g. in order to protect consumers as the disadvantaged party of a potential contract[48]. Such actions are not to be considered as state`s preference towards consumers, but

[46] See further part of the article.
[47] M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi*, 20, 38, cit. at 40.
[48] W. Brzozowski, A. Krzywoń, M. Wiązek, *Prawa człowieka*, 282, cit. at 35.

rather as an attempt to compensate for their weaker position[49]. The consumer`s status is strengthened by the content of article 76 of the Constitution, pursuant to which: "Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute". The concept of the "consumer" has autonomous meaning in the Polish Constitution, therefore it should not be identified with its definitions contained in the Polish Civil Code (restricting the definition of consumers to natural persons concluding legal acts not connected with their business activity) or the concept present in the Polish criminal law. Article 22 of the Constitution is also meaningful in the problem under study as it states: "Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons". In accordance with the provision penalising refusal to perform commercial service ought to be underpinned by an important public reason. Opponents of the right to refuse convince that what embodies such a reason are equality demands. Significantly, articles 20 and 22 are contained in chapter entitled "The Republic", which includes basic principles of Polish political and social order, while article 76 is included in the chapter devoted to rights and freedoms, as the last one of them.

Strong connections between the constitutional rights outlined above and the civil law relations that may be affected by them, demonstrate that the thesis about publicization of private law must be taken as serious one[50]. However still controversial, the recognition of horizontal effect of human rights should be perceived as an increasing tendency in the contemporary Polish legal discourse. The following part of the article aims at presenting how abovementioned principles were applied in real cases concerning the analysed problem.

[49] B. Stępień-Załucka, *Ochrona konsumentów, użytkowników i najemców*, 277-278, cit at 33.

[50] See A. Bierć, *Freedom of Contract*, 38, 49, cit. at 35.

IV. Recent Polish case-law

1. The facts and justifications of the judgements

The facts behind the two cases regarding the problem under study were very close. The first case concerned the situation in which an employee of the private company based in Łódź and specialised in commercial printing refused to prepare a so-called roll-up for *LGBT Business Forum* – the foundation (legal person) aimed at promoting advantages of hiring LGBT society members. Once a volunteer, acting on behalf of the foundation, revealed the design of the roll-up, the order was met with refusal (the technical details were already settled). The refusal took the form of an email stating the following: "Hello, I refuse to create the roll-up using received graphics, We don`t contribute to promoting LGBT movements by our work" ["Witam, Odmawiam wykonania roll-up, uz otrzymanej grafiki, Nie przyczyniamy się do promocji ruchów L. nasza pracą"]. It became the subject of a heated debate whether at the moment of the abovementioned events the printer`s webpage contained the statement that the company does not provide ideologically-oriented services[51]. The events underlying the second case under study took place in Poznań. A *Krav maga* trainer having expressed his consent to provide the self-defence lessons to members of *Stonewall Poznań* (association of people supporting LGBT postulates), eventually refused to render the service. Although initially he motivated his refusal with the lack of time, ultimately, he referred to his convictions. His explanations were not consistent[52]. Moreover, the defence of both accused parties tried to justify their decisions by bringing up the issue of freedom of economic activity, particularly the principle of freedom of contract.

In both cases, the applications were issued by the Police after the intervention of the Polish Commissioner for Human Rights[53]. In both cases the defendants were found guilty of com-

[51] Polish Supreme Court case no. II KK 333/17.

[52] I rely on media information, especially: P. Żytnicki, *Instruktor, który odmówił zajęć z osobami LGBT, prawomocnie skazany. To drugi taki wyrok w Polsce* (2018) accessible: http://poznan.wyborcza.pl/poznan/7,36001,23998805,instruktor-ktory-odmowil-zajec-z-osobami-lgbt-prawomocnie.html (last accessed: 29.6.2019).

[53] P. Walczak, *Glosa do wyroku Sądu Okręgowego w Łodzi z dnia 26 maja 2017 roku, V Ka 557/17*, 1 Internetowy Przegląd Prawniczy TBSP UJ 22 (2018).

mitting misdemeanour described in article 138 of the Code of Petty Offences, which states the following: "Whoever, when dealing professionally with the provision of services, requests and charges a higher payment than the one in force, or intentionally, without a justified reason, refuses to provide a service to which he is obliged, is subject to a fine"[54]. Nonetheless, no penalties were imposed on the defendants. The courts decided that founding them guilty is a sufficient measure.

In both cases appeals were issued by the barristers of the defendants and also by the public prosecutor (in favour of the accused); however, the second instance courts upheld first instance decisions. It is worth to emphasise that the second instance court in the case of the Łódź printer adopted the clearly hostile approach towards religious convictions of the accused. Its reasoning refers for example to "subjective understanding of confessed religion" and, basing on purely anecdotal evidence, states that "[g]ranting individual people the right to be guided with their subjective understanding of religion in public sphere or in the market could not be accepted or justified by the state. It could lead to extremely dangerous precedents, and, in extreme cases, to the complete chaos"[55]. The court pointed out the examples of the Islamic terrorism and "*Gott mit uns*" statements present on uniform belts of the Third Reich soldiers; it failed to see the insulting character of such comparisons. What is crucial, according to lower instances' interpretation, is that religious beliefs may not be considered as a "justified reason" in the understanding of article 138 of the Code of Petty Offences. Referring to pronouncements of law scholars, the courts supported the view that only objective reasons fulfil this premise[56].

It is the judgement by the Supreme Court dated 14th June 2018 that brought about a change in this state of affairs[57]. In the reasoning, the Court acknowledged that religious beliefs could be considered as "a justified reason" when the character of provided service clearly stands in opposition to religious convictions, even

[54] Dz.U.2019.821.

[55] Łódź District Court judgement, case co. V Ka 557/17.

[56] For the comprehensive overview of the literature concerning the problem of "justified reason" see M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi,* 7-9, cit. at 40.

[57] Case no. II KK 333/17.

if there are other values, such as the constitutional prohibition of discrimination, which indicate the reverse procedure as appropriate. The Court emphasised that no refusal shall be based on features of the contractor, but on the nature of service[58], which makes the *ratio decidendi* similar to the concurring opinion worded by Justice Thomas to the US Supreme Court ruling in the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, delivered few days earlier[59]. This remarkable alteration (in comparison to the rulings of the lower instances) does not, however, change the result of the case – the Supreme Court upheld the previous decisions, claiming that the character of service (preparing a roll-up) could not be perceived as standing at odds with religious beliefs of the accused who referred to his Catholic faith. The Court, relying on the official teaching of the Catholic church, assumed that it proclaims empathy and tolerance for people of different sexual orientation.

The analysed disputes received extensive media coverage and were widely commented by officials, i.a. the Polish Commissioner for Human Rights and also the current Minister of Justice, who simultaneously performs the function of the Attorney General. The latter, using his powers, in order to investigate the constitutionality of the provision in question, addressed the motion to the Constitutional Tribunal ordering it to investigate whether article 138 of the Code of Petty Offences is compliant with article 2 of the Constitution[60], article 53 section 1[61] (protecting freedom of religion and freedom of conscience) – with article 31 section 3[62] (concerning conditions to be met in order to limit the constitutional rights and freedoms), and article 20 (the principle of social market

[58] Compare consideration contained in part II.1 of the article.

[59] Quoted above in part II.1 of the article. See also Ł. Mirocha, *Polskie orzecznictwo w perspektywie wyroku w sprawie Masterpiece Cakeshop*, 2(46) Forum Prawnicze (2018).

[60] "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".

[61] "Freedom of conscience and religion shall be ensured to everyone".

[62] "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

economy) – with article 22 (concerning conditions to be met in order to limit the business freedom) and article 31 section 2[63] and 3.

The Constitutional Tribunal in its ruling of 26th June 2019 has decided that article 138 is partially contrary to article 2 of the Constitution and chose to discontinue the proceeding in further matters[64]. It can be assumed that the reason for making the decision on purely formal, instead of substantive, basis, was to avoid potential worldview controversies concerning the problem. The judgement implies that the sentenced perpetrators have the right to resume the proceedings by virtue of article 113 of the Code of Proceeding in Petty Offences Cases[65]. When it comes to the LGBT activists, the judgement, on the one hand, is perceived as invalid due to the procedural reasons concerning the problem of election of one of the judges hearing the case; on the second hand, it is seen as a means of depriving homosexuals of the last effective defence instrument against discrimination in the market sphere[66].

2. Doubts concerning judgements

Many allegations against the decisions of the common courts were raised during the course of the proceedings and later. There were two most controversial problems regarding the interpretation of article 138. The first problem deals with the issue of obligation to provide services, in particular with possible reasons for such an obligation; the second one concerns the interpretation of "a justified reason for refusal of service". Below I would like to focus on these doubts. Likewise, a number of other dilemmas that

[63] "Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law".

[64] Information from the Constitutional Tribunal webpage: http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/10678-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/ (last accessed: 29.6.2019).

[65] Dz.U.2019.1120. The right was already exercised – relevant motions have been successfully issued.

[66] A. Ambroziak, *LGBT, osoby z niepełnosprawnością i osoby starsze bez ochrony przed dyskryminacją – adw. Knut o wyroku TK* (2019), accessible: https://oko.press/lgbt-osoby-z-niepelnosprawnoscia-i-osoby-starsze-bez-ochrony-przed-dyskryminacja-adw-knut-o-wyroku-tk/ (last accessed: 29.6.2019).

appeared in the legal discourse will be commented on later in this part.

In their decisions, the Polish common courts interpreted the premise of duty or obligation in close conjunction with the premise of "dealing professionally with the provision of services". The Supreme Court states that it accepts the view that the source of obligation indicated in article 138 of the Code arises already from the fact of professional manner of providing services. Contrary to the stance of the District Court in Łódź, which pointed out that it is the agreement that can be the source of obligation as interpreted in the commented provision, the Supreme Court eventually combined these – in my opinion independent – premises, thus violating the basic principles of legal interpretation[67]. The interpretation adopted by the Supreme Court was firmly anchored in historical context in which the analysed provision was established, and also grounded in law scholars' writings published in the past[68]. The provision in question was previously introduced into the Polish legal system in 1957 in the conditions of socialist economy in which, due to the shortages of goods on the market, it was crucial to ensure that traders would not select their customers[69]. The obligation to provide services was self-evident in the case of state-owned service-providers. To counter possible doubts based on the claim that article 138 has lost its legitimacy, the Supreme Court decided to give it a brand-new anti-discrimination character[70],

[67] Identifying "obligation" with the premise of professional character of providing services makes "obligation" superfluous, which, i.a., violates the prohibition of *per non est* interpretation, see L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, 150-152 (2002).

[68] Commentaries edited by Tadeusz Bojarski, Tomasz Grzegorczyk or Marek Mozgawa agreeably point out that the obligation of provision of service should be identified with the fact that a trader remains on disposal of everyone who demand and pay for the service he/she provides, so there is no right to select customers. The quoted commentaries are based in this matter on the work edited by Jerzy Bafia, which was first released in 1974, when the presented definition could have its legitimacy.

[69] P. Walczak, *Glosa do wyroku Sądu Okręgowego w Łodzi*, 27, cit. at 53. Current Polish Code of Petty Offences was enacted in 1971; the provision in question have never been amended.

[70] It should be noticed that such interpretation does not necessarily lead to the conclusion that the defendant violated article 138 of the Code of Petty Offences. Mikołaj Iwański, however, supporting the view that the commented provision remains in close connection with counter-discrimination statutory provisions,

which however does not change the fact that the adopted interpretation of abovementioned premises is doubtful. The premise of "professional provision of services" should be distinguished from the premise of "being obliged to provide services", which refers the interpreter to purely civil law ascertains which were omitted by the Supreme Court. The doubts are even stronger when we take into consideration serious problems with finding in the Polish legal system a convincing constitutional or even statutory basis for equal treatment in horizontal relations.

Before the Supreme Court has released its interpretation, law scholars, referring to the opinion of the Łódź District Court, regardless of the fact that the conclusion of contract between parties was doubtful, wondered whether entering into an agreement automatically entails the obligation within the meaning of article 138 of the Code of Petty Offences. This strand of argumentation is based on the supposition that civil law obligations have no peremptory character, whereas criminal law should be applied solely to obligations of this nature. In conclusion, the character of the "obligation" indicated in the discussed provision should be stronger than civilian[71]. To some extent, the motion directed to the Constitutional Tribunal by the Attorney General follows this line of argumentation, when it recalls the content of article 31 paragraph 2, according to which: "Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law"[72].

The second crucial interpretative problem concerned the premise of "a justified reason for refusal". As mentioned above,

expressly admits that the defendant in this specific case was not obliged to service (M. Iwański, *Odpowiedzialność za odmowę świadczenia* usługi, 45, cit. at 40).

[71] P. Walczak, *Glosa do wyroku Sądu Okręgowego w* Łodzi, 23-26, cit. at 53.

[72] In the discussion about the legal character of the duty to perform services at least three positions are presented: 1) proponents of the civilian character of the duty recall the content of article 138, as using civil law terms and not referring to other legal standards (e.g. M. Hara, *Refleksje nad odpowiedzialnością za wykroczenie*, cit. at 22); 2) supporters of the public law character of the duty build their stance on various dignitarian or egalitarian provisions (eg. M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi*, 37-38, cit. at 40); 3) defenders of the thesis that "the professional provision of services" could be perceived as sole basis of the duty (following the majority of legal doctrine and commented judgements).

according to the stance of lower instance courts, such a "justified reason" should be of exclusively objective or technical nature. Hence, a craftsman who is not physically able to render an ordered service is entitled to refuse; so is a trader who does not have the ordered goods at his disposal. The lower instance courts considered religious beliefs as an insufficient basis to deny services. This interpretation was altered by the Supreme Court. However, despite the fact that the interpretation of the "justified reason" premise was broadened by an addition of a religious conviction, the Court upheld the position that religious convictions must be understood in compliance with the official teaching of the denomination to which a person belongs. Even cursory analysis of this stance shows that it is hardly restricting from the perspective of religious liberty; it also could be deemed as contrary to the contemporary trends of legal interpretation of "convictions", e.g. the concept of "sincere religious beliefs" present in the US Supreme Court judgement in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case, previously developed by the Canadian Supreme Court in the judgement of 30 June 2004, [2004] 2 SCR 551, 2004 SCC 47[73]. What is more, the standpoint presented by the Polish Supreme Court begs to the question whether the state is entitled to evaluate someone's beliefs – a question that is frequently raised before the European Court of Human Rights.

To conclude the considerations above, it should be noticed that the Polish Supreme Court, having issued its creative interpretation, has remarkably broadened the scope of application of analysed provision; however, alongside this change it is the range of possible exemptions that is also broadened[74].

The last allegation which is worth considering – and which has been already pointed out in the previous parts of the article – regards the question of eligible scope of the subjects protected by virtue of article 138. The title of the chapter in which the provision

[73] The presented judgements are examples of the so-called subjective interpretation of religion, whereas Polish Supreme Court seems to apply objective concept; on the distinction: W. Ciszewski, *Kazus łódzkiego* drukarza, 9, cit. at 39.

[74] See Ł. Mirocha, *Polskie orzecznictwo w perspektywie wyroku w sprawie Masterpiece Cakeshop*, 76-77, cit. at 59.

is placed states "Offences against consumer interests"[75]. Article 138 considered separately from others does not restrict the scope of potential victims, albeit according to the principle of systematic interpretation, the interpretation of the provision should take the chapters title into account[76]. It could be claimed that other provisions of the discussed chapter directly refer to consumers; thus, *a contrario*, if the article 138 does not specify the concept of a consumer, it should be deemed as more general in its scope of application. However, the provisions directly referring to consumers in the analysed chapter were added to the Code of Petty Offences during its recent amendments. Hereby they should not affect the result of the systematic interpretation based on the chapter`s title. In both cases which have been examined by the Polish court so far the legal persons appeared as victims of committed misdemeanours. This raises a question whether indeed it was them who were the subjects entitled to protection[77], particularly when it is crucial to compare the bargaining power of "perpetrators" and "victim", in the context of the horizontal effect of human rights. Finally, one should raise the issue of association of a legal person with a feature which – for obvious reasons – it could not have, i.e. sexual orientation[78].

[75] Evaluation of this arguments must reckon that Polish criminal law provides us with other examples of the situation in which the chapter`s title suggest a narrower interpretation of subjects under protection, while court`s practice have broadened the circle of entitled actors, see article 300 of the Criminal Code which is equally applied in the cases of persons conducting business and others, despite the fact that is contained in the chapter entitled "Offences against business transactions and property interests in civil law transactions".

[76] L. Morawski, *Wykładnia w orzecznictwie sądów*, 198-199, cit. at 67.

[77] Wojciech Ciszewski convinces that this distinction is not legally meaningful, because – shortly speaking – the message issued by the refusal eventually reaches the natural person, even if previously the refusal was directed to the legal one (W. Ciszewsk, *Kazus łódzkiego drukarza*, 7, cit. at 39).

[78] Adam Bodnar, Polish Commisioner for Human Rights, rejects the allegation that discrimination took place because of associating legal person with the sexual orientation of its members, see A. Bodnar, *Posądza łódzkiego drukarza o czyn niedozwolony, którego nie zna polskie prawo* (2017), accessible: https://ordoiuris.pl/wolnosci-obywatelskie/adam-bodnar-posadza-lodzkiego-drukarza-o-czyn-niedozwolony-ktorego-nie-zna (last accessed: 30.6.2019).

3. Some theoretical remarks

The judgements under study could be perceived as handbook examples of a hard case, which seems to be obvious considering how many contrary and often unclear principles are involved in their resolution. A more interesting question arises when it is the distinction between the judicial activism and the doctrine of judicial restraint (passivism)[79] that is applied as the interpretative key to the analysis.

The fact that decisions of the common courts and the Polish Supreme Court illustrate the doctrine of judicial activism leave no space for doubts. By establishing the meaning of the applied norms, the courts went beyond their literal meaning and were inclined to "repair" some (real or alleged) defects of the applied provisions to achieve the predetermined end. At least when it comes to the justification of the Supreme Court decision, the legal reasoning took the form of argumentation rather than syllogistic manner of law application. The justifications did not only refer to legal arguments, but also reckoned with possible – in judges' eyes – consequences of the decisions. It could be difficult to resist the impression that (in spite of their assertions) the courts were politically engaged – this phenomenon seems to be particularly evident in the case of the Łódź District Court.

It is clear that the way the cases were decided by the common courts and the Supreme Court is rather liberal than conservative. It is not surprising. The doctrine of judicial activism is traditionally connected with the liberal approach, according to which one of the main functions of the courts is to protect minorities[80]. In contrast, conservatives are usually seen as proponents of the judicial restraint, and *vice versa* – the supporters of the idea of judicial restraint are perceived as conservatives[81].

The analysis of the Polish Constitutional Tribunal judgement brings more unexpected result. The judgement overturned the effects of the decisions of the common courts; as a result, it could be seen as an expression of the conservative approach.

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[79] See L. Morawski, *Legal policy and courts*, in T. Biernat, M. Zirk-Sadowski (eds.), *Politics of Law and Legal Policy. Between Modern and Post-Modern Jurisprudence*, 186-189, (2008).

[80] See F. Ciepły, *Oryginalizm interpretacyjny czy żyjące źródła prawa? Polityczny wymiar aktywizmu sędziowskiego*, 2(46) Forum Prawnicze, 43-44 (2018).

[81] See F. Ciepły, *Oryginalizm interpretacyjny czy żyjące źródła* prawa, 43, cit. at 80.

However, the way it was achieved resembles the approach associated with the judicial activism rather than the application of the doctrine of judicial restraint. If the Constitutional Tribunal's decision was based on the fact that provision in question was not sufficiently clear (not compliant to the rules of good legislation)[82], it would be easy to recall numerous counter-examples of criminal law provisions based on premises that are even more open-texted than article 138 of the Code of Petty Offences. However, doubts about meaning of the analysed provision were not the reason of acknowledging that article 138 is not pursuant to the Constitution. The Tribunal provides us with a rather unusual reasoning in which conjunction of the two factual premises is considered as the sufficient basis of stating that the principle of proportionality (stemming from the rule of *Rechtsstaat* grounded in article 2 of the Polish Constitution) was violated when it comes to article 138 of the Code of Petty Offences. Firstly, the Tribunal admits that offenders committing a deed penalised by the provision are generally granted lenient or not very severe legal consequences. Furthermore, the justification of the judgement recognises the fact of poor effectiveness of the provision as a counter-discrimination measure[83]. Secondly, the Tribunal recognises the problem of ineffectiveness of other counter-discrimination provisions contained in the Polish legal system. The conclusion derived from linking these two facts should be – in my opinion – contrary to the one reached by the Tribunal. Accurate conclusion is closely related to the arguments raised by the Commissioner for Human Rights and it states that when we are faced with the ineffectiveness of legal regulations in a given area, we should not deprive ourselves of any potentially useful instrument. Unfortunately, the result of the Tribunal`s reasoning was opposite.

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[82] The justification of the commented judgement supports this intuition by claiming that "[t]he Tribunal has noticed that the content of concepts included in article 138 is ambiguous. Already when lingual interpretation is applied the provision might raise doubts, especially when the expression «justified reason» of refusal is taken into consideration" (quoted judgement, 9).

[83] To cite: "Article 138 does not fulfil counter-discrimination aims. The analysis of its application confirms that in cases recalling article 138 penalties applied are low, or courts refrain from imposing punishment. As a result, it is hard to consider that the norm has any preventive or educational meaning. It does not realise repressive function as well" (16).

The thesis that the Constitutional Tribunal has overstepped the margin of necessary intervention can be defended. It demonstrates that there is no direct link between the judicial activism and the liberal engagement of the courts (seen in political terms). Albeit the "conservative activism" would rather take the form of counter-measures, it would be aimed at combating legal or social changes supported by liberals[84].

This notion is connected to another remark that should be inferred from the analysed legal dispute. Activity of NGOs appearing as victims in both cases could be perceived as an example of the so-called strategic litigation. (Adam Bodnar, the Commissioner on Human Rights supporting their initiatives, formerly – as human rights activist – applied the strategic litigation in course of his conduct.) The proceedings were directed to publicly expose certain problems of the sexual minority, and this aim was indeed achieved. Moreover, as the cases were won by their initiators, they should be deemed as successful (at least until the Constitutional Tribunal's judgement). However, the strong backlash against the results of the judgements – regardless if genuinely social or supported by the current government – has led to the situation which is – at least from the perspective of the initiators of the proceedings – even worse than before. The thesis that, as a result of the decision of the Constitutional Tribunal, the Polish legal system does not provide minorities with effective measures against discrimination is too severe. However, it is the distant side effect of the strategic litigation conducted by NGOs that actually weakens the potential protection of many groups (not only defined by sexual orientation of the members). It reveals how remarkably disadvantageous is the judicial activism of the courts when driven by strategic litigators. It leads to the conclusion that it is the democratic process that should remain the main tool of social change.

[84] Paradoxically the Tribunal almost directly recalls the doctrine of judicial restraint by saying that: "The character of the raised allegation of inconsistency with the Constitution (lack of proportionality due to aim of the statute) *favours the far-reaching restraint of the Constitutional Tribunal* in its evaluation of the legislator`s actions from the perspective of purposefulness and effectiveness" (11).

V. Conclusions

The judicial branch remains the main area of legal changes as far as the demands of sexual minorities in Poland are concerned. The presented problem is not the only question in which significant changes were achieved. Other examples of such phenomenon include the recognizing of the same-sex partner as the closest person within the meaning of relevant provisions of the Civil Code and Penal Code, which, i.a. had an impact on the issue of the right to continue rent agreements[85] or the right not to testify against a partner. The rulings of courts confirm changes occurring in the sensitive sphere of nomenclature applied to sexual minorities, consequently acknowledging that some ways of naming them are offensive and can be considered a criminal offence[86].

The problem commented in the article distinguishes somehow from abovementioned issues. It unavoidably involves rights and interests of the various parties, which makes it particularly difficult to resolve. In my opinion the Polish Supreme Court coped with such a hard task of balancing interests better than the Constitutional Tribunal; however, we should assume that both judgements are only an introduction to the real discussion over demands of sexual minorities in Poland.

[85] See the ECHR judgement in the case *Kozak v. Poland*, 2 March 2010, application no. 13102/02.

[86] See P. Knut, A. Kwaśniewska, J. Lendzion, K. Michalski, *Prawa osób LGBT w Polsce – orzecznictwo* (2015), accessible: https://kph.org.pl/wp-content/uploads/2016/05/Broszura_KPH_2015_v9_DRUK_bezznacznikow.pdf (last accessed: 2.7.2019).