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Refusal to Provide the Service Due to the Freedom of Conscience and Religion of the Service Provider in Poland

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Słowa kluczowe: wolność sumienia i religii, wolność uzewnętrzniania religii, odmowa świadczenia usługi

Abstract

The article presents the problem of refusal to provide a service due to the service provider's freedom of conscience and religion. In practice, it raises many problems. Protection resulting from the Article 138 of the Code of Petty Offenses was aimed at preventing discrimination against people who want to use the services provided by professionals. In 2019 the content of this provision has been changed by a decision of Polish Constitutional Tribunal (case No. K 16/17). The author claims that the invocation of professed principles of faith and conscience should not automatically be regarded as discrimination. The prohibition of forcing to act contrary to the conscience or professed principles of faith is an emanation of human dignity.

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Streszczenie**Odmowa świadczenia usługi ze względu na wolność sumienia i religii usługodawcy w Polsce**

W artykule przedstawiony został problem odmowy świadczenia usługi ze względu na wolność sumienia i religii usługodawcy. W praktyce rodzi on wiele problemów. Ochrona wynikająca z art. 138 kodeksu wykroczeń miała na celu zapobiegnięcie dyskryminacji osób, które chcą skorzystać z usług świadczonych przez profesjonalistów. Treść tego przepisu została jednak zmieniona orzeczeniem Trybunału Konstytucyjnego z 2019 r. (sygn. K 16/17). Autorka twierdzi, że powołanie się na wyznawane zasady wiary i sumienie nie powinno być automatycznie uznawane za dyskryminację. Zakaz zmuszania do działań sprzecznych z sumieniem czy wyznawanymi zasadami wiary stanowi bowiem emanację niezbywalnej godności człowieka.

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I.

Freedom of conscience and religion is a fundamental principle in a democratic state and society. It is a consequence of the principle of individual freedom. Everyone can freely shape their attitude to faith and religion. Freedom of conscience and religion includes the freedom to accept and profess philosophical and ideological beliefs about a religious, anti-religious or non-religious tinge, to disclose these thoughts and beliefs, and to follow their instructions². Freedom to profess religion is a universal standard, and its importance is emphasized by many international acts³. According to the ETPC case-law, freedom of conscience and religion is one of the foundations of a pluralistic democratic

² P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warsaw 2000, p. 73.

³ W. Sobczak, *Wolność myśli, sumienia i religii – poszukiwanie standardu europejskiego*, Toruń 2013, p. 183; M. Piechowiak, *Wolność religijna i dyskryminacja religijna – uwagi w kontekście rezolucji Parlamentu Europejskiego z 20 stycznia 2011 r.*, [in:] *Urzeczywistnianie wolności przekonań religijnych i praw z niej wynikających*, eds. S. Stadniczeńko, S. Rabiej, Opole 2012, pp. 107–129.

society⁴. It is, in its religious dimension, one of the most important elements of the identity of the followers and their conception of life⁵.

Although everyone enjoys the autonomy of thought, conscience and religion, so is free to choose a system of values, some limitation may be introduced in a democratic society. Their aim is to reconcile the interests of different groups and ensure respect for each person's beliefs. At the same time, the state must remain neutral and impartial, because a democratic state is a state of pluralism⁶.

According to the ruling of the Polish Constitutional Tribunal, freedom of conscience and religion has a strong foundation in the Republic of Poland both in the acts of international law and in the provisions of the Constitution⁷. According to the preamble to the Constitution, every citizen should have a sense of responsibility before God or before his own conscience. According to the Article 25 par. 2 of the Constitution, "public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relations to outlooks on life, and shall ensure their freedom of expression in public life". According to the Article 85 par. 3 of the Constitution, there is a right to refuse military service due to religious convictions or moral principles. According to the Article 48 par. 1 of the Constitution, "parents shall have the right to rear their children according with their own convictions". However, the basic article in the Polish Constitution regarding freedom of conscience and religious beliefs is Article 53. Freedom of conscience – traditionally mentioned together with freedom of religion, is not necessarily connected with freedom of religion. It can result from various systems of values, but it always occupies a special place among human rights. It is inherent and inalienable

⁴ Judgment of European Court of Human Rights of December 13, 2001, *Metropolitan Church of Bessarabia and others v. Moldova*, application No. 45701/99, www.hudoc.echr.coe.int (15.11.2019).

⁵ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly res. 36/55 of November 25, 1981, <https://www.ohchr.org> (15.11.2019).

⁶ M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warsaw 2013, p. 740.

⁷ The Constitution of the Republic of Poland adopted on April 2, 1997 (Dz.U. No. 78, item 483).

freedom resulting from the Article 30 of the Constitution – of principle of human dignity⁸.

As the Polish Constitutional Tribunal Court noted freedom of conscience does not only mean the right to represent a particular worldview, but the right to act according with one's own conscience, to freedom from compulsion to act against one's conscience. The institution that safeguards this freedom is called a "clause of conscience". It is understood as being able not to act in a lawful and appropriate way, but at the same time contrary to the worldview (ideological or religious beliefs) of the person. In the ethical dimension, this construction can lead to the primacy of conscience over the requirements of the law. On the juridical level – it ensures the implementation of freedom of conscience and eliminates the collision of norms of law with ethical norms, enabling the individuals to behave fairly, consistent with their beliefs⁹.

II.

In practice, it happens that the freedom of conscience, understood as described, becomes the reason why the entrepreneur refuses to perform a work or service. Such an example is the case dealt with Masterpiece Cakeshop, a bakery in Lakewood led by J. Phillips, which refused to make a wedding cake for the same-sex couple on religious grounds¹⁰. The couple filed a charge under the Colorado Anti-Discrimination Act, which prohibits discrimination based on sexual orientation in a place of business engaged in any sales to the public¹¹. The Colorado Civil Rights Commission, evaluating the case under the state's anti-discrimination law, found that the bakery had discriminated against the couple. Following appeals within the state that affirmed the Commission's decision, the bakery took the case to the U.S. Supreme Court. The owner of the bakery, over his years as a cake artist, has declined to cre-

⁸ M. Olszówka, *Komentarz do art. 53*, [in:] *Konstytucja RP. Tom I, Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Warsaw 2016, pp. 10–12.

⁹ Judgment of Constitutional Tribunal of January 15, 1991, case No. U 8/90, OTK ZU 1991, item 8.

¹⁰ <https://www.supremecourt.gov/qp/16-00111qp.pdf> (15.11.2019).

¹¹ <https://supreme.justia.com/cases/federal/us/584/16-111> (15.11.2019).

ate cakes with various messages that violate his faith, including messages that promote LGBT ideology, express racism, celebrate Halloween, promote marijuana use, and celebrate or support Satan. Phillip's lawyers argued: "This situation is one where the state itself has taken a formal position that anti-discrimination rights and the rights of groups like the LGBT and transgender community are more important than the historic and founding right of religious freedom"¹².

In June 2018, the Supreme Court issued its opinion in the case: *Phillips v. Colorado Civil Rights Commission*, ruling that Phillips was wrongfully prosecuted for declining to bake the cake. The Supreme Court stated that although a baker, in his capacity as the owner of a business serving the public, "might have his right to the free exercise of his religion limited by generally applicable laws", a State decision in an adjudication "in which religious hostility on the part of the State itself" is a factor violates the "State's obligation of religious neutrality" under the Free Exercise Clause of the First Amendment to the Constitution. According to this amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"¹³. It was not the first such a judgement of Supreme Court. In its "compelled speech" rulings, the Supreme Court has protected the right not to be forced to say, do, or create anything expressing a message that one rejects. Its most famous cases were: *West Virginia v. Barnette* (1943) and *Wooley v. Maynard* (1977)¹⁴.

In Poland, there are similar problems. As an example, it can be described the case of an employee of the Łódź printing house, who refused to print posters promoting the LGBT ideas (May 2015). He indicated that he did not want to support the LGBT organization's activities and contribute to the dissemi-

¹² D. Rufino, *Religious Liberty is Still Under Attac*, <https://teainpolitics.wordpress.com/tag/colorado-anti-discrimination-act> (15.11.2019).

¹³ Judgment of Supreme Court of June 4, 2018, No. 16111, *Masterpiece Cakeshop, Ltd. et al., Petitioners v. Colorado Civil Rights Commission*, <https://supreme.justia.com/cases/federal/us/584/16-111> (15.11.2019).

¹⁴ R.P. George, S. Girgis, *A Baker's First Amendment Rights*, "New York Times", December 4, 2017, <https://www.nytimes.com/2017/12/04/opinion/first-amendment-wedding-cake.html> (15.11.2019).

nation of its content. The printer explained the refusal with his beliefs. In February 2016, the Polish Commissioner for Human Rights made a notification in this case about the possibility of committing an offense, quoting the Article 138 of the Code of Petty Offenses¹⁵. In 2017, the court finally found the printer guilty of a petty offense. According to the Article 138 of the Code of Petty Offenses, in the version applicable until July 2019, everyone who is engaged in the provision of services professionally, and who requests or collects a higher payment for a provision obliging or intentionally refuses the service to which he is obligated without a justified reason, shall be liable to a fine.

Polish Minister of Justice as a Prosecutor General undertook to defend the printer, but the Supreme Court dismissed his cassation in June 2018. Defending the printer from Łódź, the Minister emphasized that he refused to perform the service not because the people who ordered it were homosexuals but because of the content that was supposed to be on the roll-up. It was not about who, but it was about what was ordered. The fact is, that the printer refused to perform the service only after he became convinced that the content that he would promote through his work in his printing house is in clear contradiction with his values, violate his freedom of conscience and religion, which, after all, as an inviolable value guarantees the constitution. However, the Supreme Court admitted that an individual worldview and subjective understanding of a professed religion could not constitute a legitimate reason for refusing service. That court in this case pointed out that the accused printer had no legitimate reason to refuse the service.

III.

According to the Article 138 of the Code of Petty Offenses, a penalty may be imposed if the following conditions are fulfilled together: 1) the refusal to provide the service was intended, 2) the refusal to provide the service had no justified reason, 3) the person who refused was professionally involved in the provision of services, 4) the person who refused was required to provide the service. These principles were introduced into Polish law as early as 1957 in the Law of Combating Speculation and Protecting the Interests of Buyers

¹⁵ Code of Petty Offenses of May 20, 1971 (consolidated text Dz.U. 2019, item 1238).

and Agricultural Producers in Trade (Article 15)¹⁶. These rules were created during the communist period and were intended to protect against speculation in access to deficit goods and services. They also were to allow the equal access to goods and services at pre-determined prices. After the political transformation and change of the economic system of the state, Article 138, was intended to protect against discrimination in access to services. According with Article 138, the sanction shall be imposed only if the entrepreneur refused to provide the service without justified reason. The legislator has not indicated whether such a refusal may result from factual circumstances or whether it covers other causes, including intangible ones, resulting for example from the beliefs of the service provider. One cannot speak of an offense when the refusal to provide services was justified. This may be due to, for example, objective reasons, e.g. machine failure, customer behavior (e.g. being under influence of alcohol), lack of sufficient competence of the service provider (who may not undertake the implementation of a task that is too complicated and difficult for him). The service provider will not commit the offense, if due to the large number of orders he offered the client a distant deadline. This is not a refusal to provide services.

District Court in Łódź stated that refusal to provide services could not be justified if an entrepreneur refused to provide the service, even if he has not yet concluded a contract with the client. In the case of public offering of services or goods, the obligation to provide is born when this public offer is accepted by the potential buyer who wishes to pay the price. This interpretation is the consequence of these situations, in which it is common to conclude transactions in a quick, simplified, informal manner¹⁷.

The Prosecutor General had doubts about the constitutionality of the Article 138 of Code of Petty Offenses. He submitted a request to the Constitutional Tribunal for a declaration of unconstitutionality of Article 138 to the extent that it relates to the intentional unjustifiable refusal because of the beliefs of the person who is dealing with the provision of professional services¹⁸.

¹⁶ Law of July 13, 1957 of Combating Speculation and Protecting the Interests of Buyers and Agricultural Producers in Trade (Dz.U. No. 39, item 171, with later amendments).

¹⁷ Judgment of the District Court in Łódź of May 26, 2017, ref. No. V Ka 557/17.

¹⁸ Judgement of Constitutional Tribunal of June 26, 2019, case No. K 16/17, OTK ZU-A 2019, item 49.

The Constitutional Tribunal did not assess whether the Article 138 of the Code of Petty Offenses is according with the Article 53 para 1. of Polish Constitution. According to this article freedom of conscience and religion shall be ensured to everyone. Tribunal's assessment was limited to finding the inadequacy of the content of Article 138 to its goal which the legislator wanted to achieve. Tribunal stated, that this article violated the constitutional principle of a democratic state ruled by law (Article 2 of constitution). Its content also contained concepts so vague that at the stage of applying the law they could lead to various, unconstitutional interpretations that could not be prevented from being interpreted according with the Constitution.

The decision of the Constitutional Tribunal means that part of the Article 138 of the Code of Petty Offenses has been repealed and there are no more grounds to impose a fine for refusing to provide services because of beliefs. Persons offended by refusal to provide services may request compensation by the provisions of the Civil Code because of the violation of personal rights.

IV.

The problem presented in this paper raises many doubts. The purpose of the Article 138 of the Code of Petty Offenses was to prevent discrimination against people who want to use the services provided by professionals. In practice, we can observe many acts of discrimination in such situations. This was emphasized for example by the Polish Commissioner for Human Rights, when he wrote, that according to his information that among those who were found guilty of an offense under the Article 138 of the Code of Petty Offences, the courts found, among others, the owner of a shoe store who refused to serve a customer in a wheelchair; a second-hand clothing store owner who has banned people with prams entering the store; club owner who refused to enter a concert for a wheelchair user; a trainer who refused to conduct self-defense training to members of an organization initiating action against discrimination based on sexual orientation. In these cases, the courts imposed on service providers only small fines (in the amount of PLN 20–500).

However, invoking the principles of faith and conscience cannot be regarded as discrimination. From the Article 53 section 1 of the Constitution fol-

lows an obligation to ensure the freedom of a given person to adopt a set of moral, philosophical, religious and social views and rules, and forcing them to act contrary to conscience constitutes a violation of inalienable human dignity (protected for example in Article 30 of the Constitution).

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