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Freedom of Contract against the Constitutional Non-discrimination Principle

Abstract
The purpose of the theoretical considerations contained in this article is to attempt to define the ways to eliminate conflicts between the constitutional non-discrimination principle, as a reflection of the equal treatment principle, and the freedom of contract principle, as a reflection of the constitutionally protected party autonomy principle, which is a foundation of private law.

On the background of the horizontal effect (radiation) of constitutional fundamental rights on individual rights, a question arises about which criteria shall decide in practice about the resolution of conflicts between the aforementioned principles within diversified trading, including mass consumer trading. In particular, a very important issue in the context of European standards, including European model law, is the question about the legal remedies (of a property [pecuniary] and non-property [nominal] nature) which may serve to eliminate the consequences of infringement of non-discrimination rights in the process of contracting. There is also the question of how far in scope the traditional civil law remedies serving the protection of personal rights – apart from instruments established by non-discrimination regulations – may find application in this field if vivid manifestations of non-discrimination violate human dignity, which is the foundation of the protection of personal rights.

1. Jurisprudence against the horizontal effect of non-discrimination

1.1. Indirect or direct binding force of constitutional fundamental rights in contractual relations between private parties

In these times of profound societal changes, particularly the increased international and national protection of universal human rights and the axiological convergence of legal systems on a global and European scale, one can observe a long-lasting, intensifying process of the publicisation of private law as a traditional branch of the national legal system, aiming at the protection of private rights. The saturation of private law, being since Roman times 'under the care' of public law, with imperative norms (*ius cogens*), results in narrowing of private autonomy (*ius dispositivi* norms) in the name of an obligatory alignment of the 'bargaining power' private autonomy) of potentially weaker parties in legal trading. Some traditional sections of this law, serving to protect the interests of the potentially weaker party to the contract, such as labour law or consumer law, are gaining the features of public law, not to mention the process of publicisation of competition protection law or the area of public – private partnership[1].

Within the contemporary legal system, one of the essential sources of publicisation is 'the constitutionalisation of private law', named the horizontal effect (radiation) in the doctrine, or the horizontal binding force (in the direct or indirect form) of constitutional fundamental rights (*Drittwirkung*), which are objective principles of the whole legal system, and, at the same time, individual rights of a person, serving to protect the endangered sphere of human freedom. It is widely accepted that an individual (a person) as the subject of a set of personal rights (public or private) may demand from the state the protection of those rights and may decide independently whether to take advantage of these rights[2].

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1 J. Habermas, *Faktyczność i obowiązywanie*, Warszawa 2005, p. 420; B. Skwara, *Publicyzacja prawa prywatnego na tle niemieckiego orzecznictwa konstytucyjnego poświęconego mocy obowiązującej praw człowieka* [in:] *Ewolucja demokracji przedstawicielskiej w krajach Europy Środkowej i Wschodniej*, eds. M. Paździor, B. Szmulik, Lublin 2013, p. 340; A. Sobczyk, *Wolność pracy i władza*, Warszawa 2015, p. 20; A. Żurawik, *Problem publicyzacji prawa prywatnego w kontekście ustrojowym*, 'Państwo i Prawo' 2010, No. 5.

2 Cf. among others: M. Florczak-Wątor, *Horyzontalny wymiar praw konstytucyjnych*, Kraków 2014, p. 52; A. Bator, A. Kozak, *Wykładnia prawa w zgodzie z Konstytucją* [in:] *Polska kultura prawna a proces integracji europejskiej*, ed. S. Wronkowska-Jaśkiewicz, Kraków 2005, p. 43; B. Skwara, *Drittwirkung jako przejaw publicyzacji prawa prywatnego* [in:] *Państwo i prawo wobec współczesnych wyzwań. Księga jubileuszowa Profesora Jerzego Jaskierni*, ed. R.M. Czarny, K. Spryszak, Toruń 2012, p. 230; K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 50.

In these days of universal protection of human rights, constitutional axiology – including constitutional norms guaranteeing fundamental rights – is not limited to typically vertical relationships (individual – state), but it also determines the nature of relations between equivalent private individuals, influencing both legislation of private law and its application (judicial decisions).

In the doctrine, there is actually no consensus on the manner and extent of the horizontal impact (binding force) of constitutional rights and freedoms, but it seems to be accepted that the stronger the impact, the stronger the connection of a particular kind of legal relationship (section of private law) with the public sphere (the state) can be observed[3]. Generally, in national jurisprudence – as with the jurisprudence of many other countries, both of the Anglo-Saxon tradition[4] and the continental one[5], this belief is becoming more popular, not so much in terms of the direct binding force of constitutional fundamental rights, but of the indirect impact, which can be defined as the transference of constitutional fundamental rights onto horizontal relationships (between private individuals), bearing in mind the application of mechanisms of private law, in particular the general clauses connected with fairness (justice).

The view on the indirect horizontal binding force of individual rights (radiation) is getting strengthened in national doctrine, the judicature of the Constitutional Tribunal (TK), and in courts of general jurisdiction. At the base of the view on the Constitution's impact of the entirety of social – economic life, including the relationships of a private nature (horizontal relationships), was there foremost the idea of withdrawal from the concept of the Constitution as a political declaration in favour of the position of the normative nature, influencing the judicial practice[6].

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3 J. Limbach, *Promieniowanie Konstytucji na prawo prywatne*, 'Kwartalnik Prawa Prywatnego' 1999, No. 3, p. 406; E. Łętowska, *Promieniowanie orzecznictwa Trybunału Konstytucyjnego na poszczególne gałęzie prawa* [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, ed. M. Zubik, Warszawa 2006, p. 535; J. Podkowik, *Problem horyzontalnego działania praw jednostki w orzecznictwie sądów w sprawach cywilnych* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015, p. 91; B. Skwara, *Horyzontalny skutek praw i wolności jednostki w systemie Konstytucji RP* [in:] *Dylematy praw człowieka*, eds. T. Gardocka, J. Sobczak, Toruń 2008, p. 350; P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Kraków 2003.

4 For more about the doctrine of 'state action' and its critical evaluation, compare: J. Wróblewska, *Rozwój doktryny* state action *w orzecznictwie sądowym USA* [in:] *Sądy i trybunały wobec problemu …*, pp. 43–59.

5 Cf. B. Banaszak, *Koncepcje horyzontalnego działania (obowiązywania) podstawowych praw jednostki w orzecznictwie sądowym RFN* [in:] *Sądy i trybunały wobec problemu …*, pp. 31–58.

6 M. Florczak-Wątor, *Rola sądów i trybunałów w kształtowaniu koncepcji horyzontalnego działania praw jednostki* [in:] *Sądy i trybunały wobec problemu …*, p. 74; J. Podkowik, *Wolność umów i jej ograniczanie w świetle Konstytucji RP*, Warszawa 2015, p. 35.

The basic importance in the sphere of the impact of constitutional norms on private relations, however – including judicial practice – is attributed to the clause of the direct application of constitutional norms (Art. 8 (2) Constitution), as far as they have a self-executing nature (hypothesis, disposition, and sanction) and do not refer to ordinary acts (statutes). This clause confirms the belief that constitutional norms defining rights and freedoms also have a horizontal effect (indirect or direct) but in respect to the nature of the relationships between private individuals – in particular as regards the parties of a weaker bargaining position (e.g., workers' rights, consumer rights, tenants' rights) – who are also awarded direct protection in constitutional norms[7].

As a consequence of the limited – in practice – possibility of the independent application of the Constitution to the sphere of relationships between individuals, defined as the indirect horizontal effect of fundamental rights, the indirect horizontal effect of constitutional rights – known as the radiation of constitutional rights or co-application of the constitution and statutes by the courts – is becoming the main model, as it is in the practice of other European countries, not excluding the concept of what is known as the positive protective obligations of the state (guaranteed ones) in order to protect the potentially weaker party of the contract against the stronger one[8].

Along with the strengthening – in theory and in practice – of the concept of the indirect horizontal effect of constitutional rights, implemented mainly by the courts, as the combined impact of statutes (acts) and the Constitution (using the mechanisms of private law), a question has appeared regarding how conflicts between different constitutionally-protected fundamental rights should be resolved. In this regard, the constitutional proportionality principle (Art. 31 (3)) is useful – as an optimising instrument which makes it possible to define the scope of the constitutional effect on different rights and to indicate the need to balance the values (rights). On the *in abstracto* level, this is done by the Constitutional Tribunal as a court of law, and on the level of specific civil cases (*ad casum*) it is done by courts of general jurisdiction (courts of facts), following the 'recommendations' (aims) of the legislature.

There is an *opinio communis* that the constitutional proportionality principle – applicable not only in the vertical sphere, but also with regard to

7 A. Mączyński, *Bezpośrednie stosowanie Konstytucji przez sądy*, 'Państwo i Prawo' 2000, No. 5, p. 3; B. Skwara, *W obronie bezpośredniego horyzontalnego obowiązywania praw człowieka*, 'Przegląd Sądowy' 2017, No. 1; S. Wronkowska, *W sprawie bezpośredniego stosowania Konstytucji*, 'Państwo i Prawo' 2001, No. 9, p. 4.

8 For the different concepts of the horizontal effect of fundamental rights on individual rights, compare M. Florczak-Wątor, *Horyzontalny wymiar praw konstytucyjnych…*, p. 63.; M. Safjan, *O różnych metodach oddziaływania praw podstawowych na prawo prywatne*, 'Państwo i Prawo' 2014, No. 2.

horizontally balancing conflicting interests of equivalent private individuals – and, as grounds for interpreting legal regulations by courts in specific civil cases, - should not lead either to favouring or discriminating against the protection of individual rights of one party over another[9].

The *ad casum* settlement of the aforementioned conflicts of constitutional rights by applying the proportionality principle is of the utmost importance in the process of resolving difficult cases between private individuals. It refers, in particular, to situations where the conflict has at its core constitutional rights which are protected in a similar way, but, at the same time, have fundamental importance for private law as a traditional component of the legal system[10].

In the area of the horizontal effect of the constitutional, fundamental rights of an individual, it is a particularly difficult problem to eliminate the conflicts between the fundamental principle of the freedom of the party's will – including freedom of contract, which is legally reinforced by the constitutional freedom of an individual (Art. 31 (1)), as well as in the freedom of economic activity (Arts. 20 and 22) – and the scope of the similarly protected constitutional principle of equal treatment (equality before the law: Art. 32 (1)), as a formal expression of justice (fairness), whose negative reflection in accordance with the doctrine of private law is the constitutional non-discrimination principle (the prohibition of unequal treatment) in social and economic life (Art. 32 (2))[11].

In the doctrine, it a widely accepted view that the line the courts should not cross is the inadmissibility of questioning the binding force of mandatory binding legal regulations (*ius cogens*) without first using the method of legal questions to the Constitutional Tribunal, as well as an imposition on one party of the duty to perform a legal act (i.e., direct action) in order to realise the freedom of another individual or the creation of a contractual civil relationship as long as a statutory legal norm does not establish it[12].

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9 J. Podkowik, *Problem horyzontalnego działania…,* p. 91; also cf. A. Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej. Sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie*, Warszawa 2010; J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2008.

10 Cf. M. Safjan, *Autonomia woli a zasada równego traktowania* [in:] *Zaciąganie i wykonywanie zobowiązań*, eds. E. Gniewek, K. Górska, P. Machnikowski, Warszawa 2010, p. 357.

11 Ibid., p. 373, R. Trzaskowski, *Zakaz dyskryminacji w prawie umów* [in:] *Europeizacja prawa prywatnego,* vol. II, eds. M. Pazdan, W. Popiołek, M. Rott-Pietrzyk, M. Szpunar, Warszawa 2008, p. 593.

12 See J. Podkowik, *Problem horyzontalnego działania…*, pp. 112–113; cf. A. Sobczyk, *Problem horyzontalnego działania praw jednostki w orzecznictwie sądów pracy* [in:] *Sądy i trybunały wobec problemu…*, pp. 115–129.; J. Ciapała, *Horyzontalny wymiar praw konstytucyjnych na podstawie wybranego orzecznictwa w sprawach gospodarczych* [in:] *Sądy i trybunały wobec problemu…*, pp. 129–148; P. Tuleja, W. Białogłowski, *Problem horyzontalnego działania praw jednostki w orzecznictwie Trybunału Konstytucyjnego* [in:] *Sądy i trybunały wobec problemu…*, p. 79.

1.2. Constitutional principles of equal treatment and of freedom of contract as a normative expression of the principle of the freedom of the parties' will

The freedom of contract principle (Art. 353[1] Civil Code [CC] in connection with Art. 22 Constitution) as a normative expression of the principle of the freedom of the parties' will, constituting the foundation of private law, and approved by Constitution of the Republic of Poland, international conventions, and European law, does not exclude its conflict between it and other fundamental rights, including the constitutional principle of equal treatment, whose expression is the non-discrimination principle (Art. 32 (2) Constitution).

Moreover, the conflict between these principles is somehow included in their functioning because the freedom of contract, which assumes the freedom of private individuals to shape a legal relationship, allows – within the limits of legal order (statutes) and moral values (general clauses of fairness nature) – subjectivism and arbitrariness, including unequal treatment as a result of a game of interests. In particular, it is widely accepted that in the process of contracting it is permissible to differentiate the legal situation of private individuals (contractors) if an objective and rational justification of unequal treatment exists, i.e., if it is confirmed by justice (fairness) or other constitutional values. It is even argued that inequality 'negotiated freely' is the power of private law – excluding, however, inequality forced by a party who is economically and intellectually stronger[13].

This raises the question of which criteria should resolve conflicts between the freedom of contract principle, which approves of subjective choices of the parties to the contract within the limits of legal regulations and moral norms, and the equally fundamental equal treatment principle, which is an axiological foundation of the European legal system and guarantees formal justice in legal trading, but at the same time weakens the arbitrariness of those regulations. How can one exclude unequal treatment forced by the economically stronger party in the process of contracting, without infringing the freedom at the same time?

In Polish jurisprudence, there is a consistent view that in the sphere of private law – i.e., the horizontal impact of constitutional fundamental rights (individual–individual) – in which the proportionality principle is applied (Art. 31 (3) Constitution) as a limitation clause (optimising) which serves to

13 M. Safjan, *Autonomia woli a zasada równego …* [in:] *Zaciąganie i wykonywanie zobowiązań …*, p. 376; Id., *Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania*, 'Kwartalnik Prawa Prywatnego' 2009, No. 2; also cf. P. Machnikowski, *Swoboda umów według art. 353[1] kc. Konstrukcja prawna*, Warszawa 2005; R. Trzaskowski, *Granice swobody kształtowania treści i celu umów obligacyjnych. Art. 3531 kc*, Kraków 2005.

solve axiological conflicts, the equal treatment principle has a narrower application than in the vertical sphere (individual–public authority body), addressed to the lawmaker. It is influenced by the priority of the freedom of contract principle (the freedom of the parties' will) as a foundation of private law, which allows differentiation of the parties to the limits of discrimination, that means unequal treatment of the partners as regards legal relations not having the public law characteristics[14].

In case of a conflict, in a particular situation, between the equal treatment principle and the freedom of contract principle, the advantage always goes to the non-discrimination principle if the inequality of treatment refers to a relationship in the public sphere or is connected with the public sphere, *ipso facto* threatening the dignity of an individual and his/her fundamental rights, but the freedom of contract principle prevails if they are relationships of a solely private nature, not connected with the public sphere, both in the functional aspect (carrying out tasks of a public nature), as well as the individual aspect (the potential cooperation of private persons and public bodies)[15].

It is also a commonly accepted view that the equal treatment principle finds a wider application in the sphere of private law in negative terms, i.e., in the form of the non-discrimination principle understood as a qualified form of unequal treatment referring to particularly gross cases of unequal treatment. It is assumed, not without a discrepancy between the positions of theoreticians of private law and constitutionalists, that the range of manifestation of non-discrimination as a mechanism of compensating for the freedom of the weaker party's will depends on objective criteria (factors). In this respect, basic importance is brought to the public dimension of the benefits on offer (goods or services) and the constitutionally protected dignity of an individual (individual, personal features of the party), and, in particular, the deficit in the depth of consensual equality and the kind of interests being protected, chiefly those in which true freedom of the party's will may not be disclosed because of a definite advantage of one party (e.g., an entrepreneur, employer, or owner) weakening the freedom of the other party's will (e.g., an employee, consumer, or tenant)[16].

Labour law and consumer law are naturally applicable in the field of non-discrimination in contracting since they are areas of law within which the

14 M. Safjan, *Autonomia woli a zasada równego traktowania*…, p. 377; also cf. *Ustawowe ograniczenia swobody umów. Zagadnienia wybrane*, ed. B. Gnela, Warszawa 2010.

15 Cf. J. Podkowik, *Wolność umów i jej ograniczanie* …, p. 54; J. Sawiłow, *Swoboda umów – kompetencja czy prawo podmiotowe? O użyciu pojęcia kompetencji do objaśnienia problematyki swobody umów w nauce prawa cywilnego* [in:] Ibid.

16 Cf. M. Safjan, Autonomia woli a zasada równego traktowania…, p. 373; J. Podkowik, Konstytucyjna zasada równości i zakaz dyskryminacji w prawie cywilnym, 'Kwartalnik Prawa Prywatnego' 2016, No. 2, p. 263.

entrepreneur (employer) is directly obliged to observe constitutional axiology in terms of the protection of consumers or employees. The rights of consumers or employees as legal rights of a public nature result first of all from statutes (acts), not contracts, which may sometimes infringe on fundamental constitutional rights[17].

1.3. Non-discrimination as protection against a qualified form of unequal treatment in contract law

In the literature, it is rightly noted that contemporary contract law, which serves large-scale, global trading, creates many opportunities for discrimination, i.e., actions which unequally treat the equal: from an ungrounded differentiation of persons when selecting a partner (by unfavourably forming the contracts for selected partners), through engaging parties to the contract, to actions which discriminate against third parties[18].

In the doctrine of constitutional law, non-discrimination – which has an axiological foundation in the concept of equal and inalienable human dignity as the contemporary foundation of freedoms and rights – is perceived as a meta-law (a barrier clause) defining the implementation of the equal treatment principle and other freedoms and rights fairly and efficiently[19].

Enforcing the universal equal treatment principle (in the vertical and horizontal scale), non-discrimination – which originates in public law – undoubtedly weakens the practical impact of the principle of the freedom of the parties' will, and especially the freedom of contract, as a principle of private law, in accordance with which parties are allowed to choose their partners at their discretion, not excluding the possibility of eliminating from this process some specified persons according to their own beliefs as long as it is done within the legal limits of this discretion (the Constitution, statutes, and general clauses concerning justice).

Hence, this raises the question about the nature and the scope – and, in particular, the criteria – of the impact of this public prohibition on the private

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17 For more, see A. Sobczyk, *Wolność pracy i władza*, Warszawa 2015, p. 17; J. Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin 2009, p. 131.; M. Szydło, *Wolność działalności gospodarczej jako prawo podstawowe*, Bydgoszcz–Warszawa 2011, p. 76.

18 R. Trzaskowski, *Zakaz dyskryminacji w prawie umów …*, p. 595; Cf. A. Mączyński, *Konstytucyjne podstawy ochrony praw konsumentów* [in:] *Prawa człowieka, społeczeństwo obywatelskie, państwo demokratyczne. Księga jubileuszowa dedykowana prof. P. Sarneckiemu*, eds. P. Tuleja, M. Florczak-Wątor, S. Kubas, Warszawa 2010.

19 In the matter of non-discrimination as a clause-barrier, i.e., a legal norm not permitting for exception from its application and not being connected with proportionality mechanism, compare J. Podkowik, *Konstytucyjna zasada równości…*, p. 263.

law principle of the freedom of contract because non-discrimination – coming from public law – may in fact weaken the scope within which the freedom of contract may be manifested, but should not annihilate it.

Constitutional norms, which are a starting point for considerations regarding the nature of non-discrimination – connected with human dignity – do not leave any doubt about the fact that the party who is protected against discrimination is 'any private individual' who is active in society, in the political, social and, in particular, economic aspects – i.e., in the public sphere. In that sphere, no party should be exposed to discrimination, not only from other natural persons, as sole entrepreneurs, but also from legal entities (e.g., multinational corporations, banks, or other financial institutions), which, as parties with vast bargaining power – including the creators of general terms for trading purposes – are commonly the perpetrators of discrimination.

In the constitutional meaning, such a partner cannot be discriminated against 'for any reason', which means that the catalogue of those reasons is open and variable, and that, through establishing that catalogue, ratified international agreements, being a part of the national legal order, may be helpful because they contain an appropriate specification of personal characteristics which may in practice constitute a reason for discriminating against natural persons in legal trading[20].

The above means that the grounds for the legal qualification of non-discrimination for the purpose of private trade – particularly in terms of consumer trade or labour law – are not only constitutional norms (Art. 32 (2) Constitution), but also ratified 1) by Poland's international agreements on the protection of human rights and citizen's rights, which protect human rights (an individual's) rights of public nature, 2) by EU law (treaties and secondary law), which fiercely combat discrimination, as well as 3) national ordinary statutes (acts), including the national Act on Non-discrimination[21], and 4) by civil code regulations on the protection of personal rights (Arts. 23 and 24 CC), which qualify infringement on non-discrimination as a kind of civil offence. These aforementioned regulations contain extended non-discrimination regulations which prohibit discrimination in the public sphere, as well as in different aspects of this sphere, including the social and economic area, not excluding the process of contracting especially, as long as the goods and services are offered in public.

One should share the view that discrimination means a qualified (gross) manifestation of unequal treatment because of the violation of constitutionally

20 J. Podkowik, *Konstytucyjna zasada równości*…, p. 256.

21 The Act on the implementation of some regulations of the European Union within equal treatment from December 3, 2010 (Dz. U. 2010, No. 254, item 1700; i.e., Dz. U. 2016, item 1219), called the Act on non-discrimination.

protected dignity (personal characteristics), in particular of the potentially weaker party. What matters here is 'oppression' in private legal trade, if the trade is of a public nature, particularly of persons or social groups or the limitation of their rights because of individual, personal characteristics, which are generally independent of the individual – e.g., race, nationality, sex, religion, etc.). However, so called ordinary contractual inequality – as regards the selection of a contractor from the same group of people with similar characteristics or differentiation of equivalence of benefits in the contracts - may not be treated as discrimination[22].

With reference to contract law, non-discrimination is determined by personal criteria of discrimination, which are enclosed in non-discrimination regulations more broadly than in traditional personal rights because the scope of protection includes not only values already recognised as personal rights, but also legally protected values such as using the goods or services offered in public. It is, therefore, of great importance that the combination of the contracting process with the public dimension of private trading in which the freedom of the party's will may commonly not manifest in reality because of a negotiating advantage of the other party (e.g., in employment or consumer trading).

In the doctrine of constitutional law, it is a commonly accepted view that non-discrimination as a barrier clause constitutes constitutional limit on personal freedom to perform conventional legal acts of a civil nature or to make statements when purchasing goods or providing services, i.e., an individual's activity in the social and economic areas[23]. Therefore, in the theoretical sphere, recognising non-discrimination as a limitation of the freedom of contract it is not an acceptable view, because such a freedom does not include discriminatory behaviours at all[24].

The opinion that non-discrimination is a constitutional limit on personal freedom (opportunity to choose) when performing conventional legal acts deserves approval in reference to the areas of legal trading under the control of constitutional lawmakers because of their public features, such as labour law, whose predominant characteristic is its public nature; consumer relations, following the publicisation of labour law; or the legal sphere of the protection of fair competition, which has the protection of public interests at its core. In this area, the general non-discrimination principle has full constitutional reasoning and direct horizontal effect.

22 M. Safjan, *Autonomia woli a zasada równego traktowania …*, p. 357; Cf. B. Gronowska, *Porównywalność sytuacji jednostek jako przesłanka dyskryminacji – uwagi na tle orzecznictwa strasburskiego*, 'Europejski Przegląd Sądowy' 2013, No. 6, p. 4.

23 J. Podkowik, *Konstytucyjna zasada równości…*, p. 264.

24 Ibid.

There are, however, No. theoretical or semantic barriers – in the field of private law, an itemised field of the legal system – against describing the non-discrimination principle – in the meaning resulting from the Constitution and international norms, as a 'limitation of the freedom of contract principle', which emerges from 'statutes' in the meaning of Art. 353 CC because interpretation of this last concept as used in the aforementioned is included in the Constitution, international conventions, and EU law.

2. European Union law as grounds for combating discrimination in private trading

The horizontal effect of fundamental rights, and the combating of discrimination is undoubtedly confirmed as one of the tasks of treaty law (Arts. 3 and 4 TEU) by the judicature of the Court of Justice of the European Union (CJEU), which makes creative use of the German doctrine *Drittwirkung*.

EU jurisdiction treats non-discrimination as a fundamental treaty principle of European law – which applicability extends to relations between private individuals – constituting at the same time one of the guarantees of the implementation of the European principle of the free movement not only of people, but also of goods and services, as well as the free conduct of business[25].

In accordance with CJEU jurisdiction, non-discrimination because of nationality (citizenship) applies not only to actions of public authorities, but also to actions of other organisations of the state which establish rules about collective labour law and the provision of services (e.g., sports associations). The CJEU has stated in a few verdicts that non-discrimination in a gainful activity because of nationality which results from treaty law constitutes a control criterion of the legality of contracts and regulations which do not come from public authorities.

The horizontal effect of norms on non-discrimination in the area of workers' rights has been confirmed by the CJEU in cases concerning equal pay of women and men for the same work or work of the same value, as well as combating discrimination because of age – assuming that the national court is obliged

25 Cf. M. Domańska, *Zasada równości (zakaz dyskryminacji)* [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, T. 1, ed. A. Wróbel, Warszawa 2010, p. 162; J. Sozański, *Znaczenie wspólnotowego zakazu dyskryminacji…*, p. 82, M. Taborowski, *Poziom ochrony praw podstawowych wynikający z Karty praw podstawowych UE jako przeszkoda dla przystąpienia UE do Europejskiej konwencji praw człowieka*, 'Europejski Przegląd Sądowy' 2015, No. 12, pp. 28–34; A. Wróbel, *O niektórych aspektach koncepcji praw podstawowych UE jako zasad*, 'Europejski Przegląd Sądowy' 2014, No. 1, p. 106; J. Sozański, *Znaczenie wspólnotowego zakazu dyskryminacji dla Polski*, 'Przegląd Sądowy' 2004, No. 6, p. 81.

to guarantee the implementation of the non-discrimination principle in matters of age by not applying any national law regulations contrary to this principle. Moreover, the CJEU stressed the horizontal effect of treaty norms prohibiting the application of anti-competitive practices to the disadvantage of the weaker company. The CJ also derived from treaty norms the prohibition of cartel agreements and of abuse of a dominant position, both addressed to entrepreneurs[26].

The jurisdiction of the CJEU concerning the horizontal effect of European law – treaty norms and directive regulations – indicates that the view on the horizontal effect of this law has at its roots a broad interpretation of the concepts of 'state' and 'public authority' and/or a wider interpretation of the duties of stronger partner towards a potentially weaker partner[27].

However, European jurisprudence generally understands by the concept of 'discrimination' only such actions that do not have objective and rational grounds and simultaneously do not maintain a justified proportion between the measures applied and the purpose predicted to be achieved[28].

European case studies inspire the jurisprudence line of member states, including the Polish Constitutional Tribunal, which treats the constitutional non-discrimination principle as a correlate of the observation of the principle of equality and indicates the inadmissibility of introducing regulations which differentiate the legal situation of the addressees of legal norms solely because of individual characteristics of those addressees[29].

European Union *acquis* in terms of combating discrimination is generalised by model EU law – in particular, the Draft Common Frame of Reference (DCFR) – as the grounds for the unification strategy of European private law, according to which everyone has the right not to be discriminated against on the grounds of their gender, ethnicity, or race, as a consequence of a contract or another legal act whose subject is to guarantee the access or supply of goods or services available in public (Art. II–2.101 DCFR).

With reference to contract law, non-discrimination is determined by such basic criteria as the natural, personal characteristics of the contracting party (gender, ethnicity, race, etc.) or the type of contract in the context of the way the

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26 B. Skwara, *Horyzontalne obowiązywanie praw podstawowych w orzecznictwie ETS* [in:] *Sądy i trybunały wobec problemu horyzontalnego…*, pp. 59–79; Cf. J. Maliszewska-Nienartowicz, *Zakaz dyskryminacji ze względu na wiek w świetle rozstrzygnięć TS wydanych w okresie 2010–2013*, 'Europejski Przegląd Sądowy' 2014, No. 5, p. 30.

27 B. Skwara, *Horyzontalne obowiązywanie…*, p. 75.

28 M. Safjan, *Autonomia woli a zasada równego traktowania…*, p. 373; Idem, *Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania*, 'Kwartalnik Prawa Prywatnego' 2009, No. 2, p. 298.

29 Cf. verdict of Constitutional Tribunal from July 5, 2011, P14/10, OTK ZU A 2011, No. 6, Item 49 and J. Podkowik, *Konstytucyjna zasada równości i zakaz …*, p. 258.

goods and services are offered. This means that non-discrimination because of the personal characteristics of the contractor refers to goods or services available in public, i.e., any kind of trading. As a consequence, this prohibition does not generally operate outside the scope of the public offering of goods and services – that is, in private relations, of a family or social nature.

The prohibition of the unequal treatment of contracting parties has a fundamental importance in – apart from the public nature of offering the goods or services – the process of the publicisation (constitutionally protected) of the sphere of entering employment contracts and in consumer trading; it is also acquiring more and more characteristics of a public nature, in which there are potentially weaker parties (employees or consumers) who are exposed to discrimination from stronger parties (economically and intellectually)[30].

3. Act on non-discrimination and other national statutes (acts) containing regulations about combating discrimination in legal trading

In the Polish system of law, the specialised legal act directed towards combating discrimination in accordance with European standards is the Act from December 3, 2010 on the implementation of some EU regulations in terms of equal treatment[31], called the Act on Non-discrimination – which prohibits discrimination because of some criteria defined therein (personal characteristics) regarding access to benefits from the goods or services offered in public. This act includes not only a legal definition of discrimination (direct and indirect), but also regulations aimed at protecting the party being discriminated against in the process of eliminating the consequences of the infringement of personal rights as a result of discriminatory actions. The act implements sanctions of a private nature.

The aforementioned act, which also applies in private trading (concluding a contract), binds to EU secondary law, which defines discrimination very broadly. In accordance with the regulations of that act, direct discrimination shall be prohibited; this is defined as a natural person being treated less favourably because of personal characteristics (e.g., sex, race, ethnicity, nationality, religion, confession, opinion, disability, age, or sexual orientation) than another person is/was/would be treated in a comparable situation (e.g., when concluding a loan agreement).

The concept of indirect discrimination (also prohibited), however, is to be understood as a situation where – because of the aforementioned personal

30 B. Skwara, *Horyzontalne obowiązywanie praw podstawowych*..., p. 61.

31 Dz. U. 2010, No. 254, item 1700 (i.e., Dz. U. 2016, item 1219).

characteristics and, as a result of a seemingly neutral regulation, a criterion applied, or an action taken – there appear or could appear unfavourable disproportions or a particularly unfavourable situation for a natural person (e.g., commanding restaurant staff not to serve customers because of the colour of their skin), unless the regulation, criterion, or action is objectively justified in the view of a legitimate purpose which is to be achieved, and the measures undertaken are appropriate and necessary (e.g., the requirement to wear a festive outfit as a condition of entering a place).

The protection against the discrimination of natural persons – both direct and indirect – because of individual, personal characteristics is clearly defined in respect to the spheres of influence, including social and economic areas, such as undertaking and performing business and professional activities – in particular, as part of an employment relationship or providing work on the basis of civil law contracts – undertaking vocational education and joining and taking part in trade unions, employers' organisations and professional self-governments.

The Act on non-discrimination – which defines the prohibited forms of unequal treatment, particularly in socioeconomic areas – also includes procedural guarantees aimed at combating discrimination. First of all, the act states that in cases of violation of the equal treatment principle, the Civil Code and Civil Procedural Code are to be applied; additionally, the party discriminated against is granted facilitation in the sphere of evidence. The party discriminated against must only lend credence to the fact of discrimination, and the discriminating party shall prove that he/she has not committed a violation of the equal treatment principle.

Apart from the Act on non-discrimination, the Labour Code also includes extended legal regulations in the area of concluding employment contracts. Its regulations, similarly to the Act on non-discrimination, define – for the purposes of labour law – direct and indirect discrimination, and they establish appropriate sanctions in case of violation.

Prohibitions of discrimination are also included in normative acts of an economic nature, such as the acts on combating unfair competition and on the protection of competition and consumers, or the public procurement law. The regulations contained therein also establish sanctions in case of violation of that prohibition by parties in economic trading.

'Juridical support' in the process of combating discrimination as a civil wrong (unlawful act) is also provided by Civil Code regulations on the protection of personal goods when, in the process of concluding a contract, there is a violation of a value recognized by jurisprudence as 'personal goods', but also as so-called legally protected interests.

4. Legal grounds to eliminate the consequences of the violation of non-discrimination in the process of concluding contracts

In a theoretical sense, the evaluation of violating the prohibition of unequal treatment in the process of concluding contracts (non-discrimination) may be based on a constitutional norm either directly, that is, with direct reference to the Constitution along with the horizontal application of fundamental rights, or indirectly, that is, with the application of the mechanisms of private law, including general clauses of justice[32].

Jurisprudence – derives the assessment directly from a constitutional norm as a 'stronger approach' – and indicates a higher practical usefulness of referring to general clauses – as a mechanism better adjusted to the axiology of private law and to the concept of radiation of constitutional rights on private law – understood as interpretative co-application of the Constitution and regular statutes (acts)[33].

The general sanction arising from introducing discriminatory provisions of the contract (e.g., as to personal characteristics) is the invalidity of those provisions because they exceed the limits of the freedom of contract and of performing legal actions, and more precisely, they are contrary to Civil Code regulations (Art. 353^1 CC in connection with Art. 58 § 1 CC)[34].

It seems, however, that in cases when only some contract provisions have a discriminatory element, the party discriminated against may demand only those provisions be struck, not the entire contract – or that the contract be modified and so that its content excludes discriminatory clauses. The decision in such a matter is taken by the court.

Such an action is admitted by the 'pro-European' interpretation (consistent interpretation) of Art. 58 § 1 and 3 CC, which allows 'another consequence' than the absolute invalidity of a contract containing a discriminatory clause. The priority of 'another consequence' over invalidity is determined *in concreto* by the

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32 Cf. M. Safjan, *Autonomia woli a zasada równego traktowania…*, p. 379; R. Trzaskowski, *Zasada dyskryminacji w prawie umów…*, p. 614.

33 M. Safjan, *Autonomia woli a zasada…,* pp. 379–380; Cf. P. Czarny, *Trybunał Konstytucyjny a wykładnia ustaw w zgodzie z Konstytucją* [in:] *Polska kultura prawna a proces integracji europejskiej*, ed. S. Wronkowska, Warszawa 2005, p. 67.

34 In the matter of the invalidity of the contract, compare M. Gutowski, Nieważność czynności prawnej, Warszawa 2006; T. Gizbert-Studnicki, *O nieważnych czynnościach prawnych w świetle koncepcji czynności konwencjonalnych*, 'Państwo i Prawo' 1975, No. 4; M. Grochowski, *Wadliwość umów konsumenckich (w świetle przepisów o nieuczciwych praktykach rynkowych)*, 'Państwo i Prawo' 2009, No. 7; Z. Radwański, *Jeszcze w sprawie nieważności czynności prawnych*, 'Państwo i Prawo' 1986, No. 6; P. Skorupa, *Normatywne modele sankcji nieważności bezwzględnej a nieistniejąca czynność prawna*, 'Studia Prawnicze' 2010, No. 1, pp. 31–86.

interpretation of the purpose of the Act, done in the process of judicial application of the law, taking into account a proportional reaction to the defectiveness of a legal contract[35].

It is up to the court in a particular case to decide what kind of sanction (proportionate and efficient) should be recognised as 'another consequence' in order to replace contractual, discriminatory provisions (contrary to the act) with regulations resulting from acts, the principles of social co-existence, or from established habits (Art. 56 CC)[36].

In the search for the sources of sanctions of a civil nature – in case of a contradiction between the content of a contract and the non-discrimination principle – the regulations of the Act on non-discrimination may be useful because – since it definitely prohibits discriminatory actions – it establishes remedial sanctions applicable to private law[37].

In accordance with the Act on non-discrimination, everyone for whom the equal treatment principle has been violated (e.g., employee, consumer, or tenant) has an established right to compensation, taking into account the regulations of civil code, that is, first of all to fully redressed damages to property (lost benefits)[38].

Within the pro-European interpretation of national regulations (consistent interpretation) in judicial decisions, there has been noted a positive tendency to wide interpretation of compensation, including not only damage to property, but also nominal damage. The regulation concerning the possibility to

35 Cf. R. Strugała, *Prywatnoprawne skutki naruszenia zakazu nierównego traktowania – uwagi de lege lata i de lege ferenda*, 'Europejski Przegląd Sądowy' 2016, No. 4, p. 16; R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem. W poszukiwaniu sankcji skutecznych i proporcjonalnych*, Warszawa 2013, p. 547; A. Bierć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2015, p. 571.

36 In national doctrine 'another consequence' in the meaning of Art. 58 CC is generally considered to be a sanction – different from invalidity – exceeding the limits of the freedom of contract as far as it results from specific provisions (R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem*.., pp. 48). The judicature follows this direction and in the matter of interpreting of 'another consequence' – with reference to credit agreements containing currency option clauses, they allow – as an extreme solution – the replacement of an invalidity clause, as a judicial sanction, referring to the principles of social coexistence: – compare the verdict of the Supreme Court II CSK 768/14 and II CSK 750/15.

37 R Strugała, *Prywatnoprawne skutki naruszenia* …, p. 16.

38 Cf. Art. 13 of the Act on Non-discrimination and R. Strugała, *Prywatnoprawne skutki naruszania*…, p. 15; Cf. M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2011, p. 220; J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych*, Warszawa 1975, p. 5; B. Lewaszkiewicz-Petrykowska, *Zasada pełnego odszkodowania (mity i rzeczywistość)* [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, eds. W. Popiołek, L. Ogiegła, M. Szpunar, Kraków 2005.

claim damages has become grounds to award monetary compensation alone to the party being discriminated against[39].

However, even in the context of European law, which provides far-reaching protection against discrimination, it would be problematic to construct – on the side of the party being discriminated against – a general right to demand the conclusion of a contract corresponding to the content of that right. In fact, European law (Art. II.2:104 DCFR and Art. III.3:101/1 DCFR) allows a claim for the conclusion of a contract whose conclusion has been refused in the conditions of discrimination of the party entitled (or fulfilment of the performance if the contract has been concluded), but in the doctrine it is rightly stated that this may occur only in special cases, particularly if the discriminating party concludes contracts of that kind *en masse*, and the party being discriminated against does not have access to goods or services of that kind at all or their access is significantly limited. Demanding (forcing) the conclusion of a contract would be valid in the situation of adhesive contracts if the entrepreneur avoids the obligation without justified reasons (e.g., in the area of services of general interest)[40].

Apart from general provisions of the Civil Code – which establish invalidity of a contract because it contains discriminatory provisions – other sanctions (another consequence) than the invalidity of the contract (limited judicial sanction) are also allowed, as long as this results from special provisions (e.g., the Act on the Protection of Competition and Consumers, the Act on Combating Unfair Competition, or the Act on Non-discrimination) as grounds for claims of damages owing to discriminatory reasons in economic trading; Civil Code provisions may have definite meaning in combating discriminatory actions about the protection of personal goods so long as in the process of concluding a contract there is a violation of values commonly recognised as personal interests. Undoubtedly, vivid manifestations of discrimination in legal trading, leading *ad casum* to an evident violation of recognised personal interests (e.g., honour, or freedom of religion) defy human dignity as a foundation of personal goods, in particular, the right to privacy as a basic good. What is more, potential sanctions – which the legislator allows against the violation of personal goods within general tort

39 Cf. verdict of the Supreme Court from November 19, 2010, III CZP79/10, LEX No. 612168, as well as the verdict of the Supreme Court from September 15, 2015, III CZP107/14, OSNP 2016, No. 2, item 16; J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010; M. Wachowska, *Zadośćuczynienie pieniężne za doznaną krzywdę*, Toruń 2007; J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych*.., pp. 43–125.

40 Cf. M. Safjan, *Autonomia woli a zasada…*, p. 381; R. Trzaskowski, *Zakaz dyskryminacji w prawie umów*.., pp. 614–15.

protection – are directionally consistent with the standard of the protection against discrimination required by European law[41].

General Civil Code provisions about the protection of personal interests make it possible for the person harmed by a discriminatory differentiation of the parties (because of personal characteristics) to enjoy, first of all, non-pecuniary remedies. The party discriminated against by a refusal to conclude a contract may enjoy claims for the removal of the consequences of infringement. In particular, they can demand the submission of a statement of relevant content and appropriate form or can demand the withdrawal of a public offer which includes manifestations of discrimination (when, for example, a job offer for a translator in a construction company excludes women from applying). The party discriminated against whose personal interests have been infringed upon owing to discriminatory actions may demand proprietary remedies, such as damages aiming to remedy proprietary loss, as well as claims for solely monetary compensation for moral harm (mental suffering)[42].

However, in comparison with European non-discrimination law, the protection against discrimination on the grounds of general Civil Code provisions has its imperfections, limiting the scope and the likelihood of its manifestation because – according to the civil code – the scope of this protection includes only the values recognized (by the legislature and the judiciary) as personal interests, excluding legally protected values, e.g., discriminatory refusal to benefit from goods or services offered in public. Moreover, it is commonly accepted that at the root of the proprietary remedies, including claims for solely monetary compensation for harm caused by the infringement of personal interests, there should be an unlawful act (tort), which denotes culpability of the violator, as a subjective premise; such a premise is not required by non-discrimination European law[43].

Judicial protection does not exhaust institutional legal remedies of an individual against discrimination in legal trading. A private individual who has not received satisfactory protection against discriminatory actions may enjoy a constitutional complaint – aimed at protecting individual rights, freedoms, and interests. In a constitutional complaint, which is available for a final judgment court or of a public administration body, a party may take exception to the fact that a particular court judgment has been issued on the grounds of a statute or normative act which is incompatible with Constitution. The consequence of a potential declaration of non-compliance of a court judgment's normative basis

41 R. Strugała, *Prywatnoprawne skutki naruszenia…*, p. 15.

42 Cf. T. Targosz, *Roszczenia służące ochronie dóbr osobistych* [in:] *Media a dobra osobiste*, eds. J. Barta, M. Markiewicz, Warszawa 2009; J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010.

43 Cf. R. Strugała, *Prywatnoprawne skutki naruszenia …*, p. 15.

is the resumption of court proceedings, conducted without the legal act whose unconstitutionality was declared by the Constitutional Tribunal[44].

After the exhaustion of available, national remedies, the party being discriminated against has the right to submit an individual complaint against the state to international bodies of human rights protection if there was a significant violation on the part of organs of state authority of individual rights protected by international conventions on the protection of human rights which have been ratified by Poland. The protection of individual rights in proceedings before international bodies supports the national system, but strict, procedural requirements do not make it easier for an individual to quickly pursue claims because of a violation of their individual rights through discrimination[45].

The variety of legal grounds as well as the diversity of remedies serving to eliminate the consequences of infringement of non-discrimination in legal trading (in the process of contracting) raise one's hopes for efficient protection; however, previous experience in this area – both European and national – does not warrant optimism[46].

44 Cf. A. Barczak, *Skarga konstytucyjna w sprawach cywilnych i administracyjnych w orzecznictwie Trybunału Konstytucyjnego*, Part 1, 'Transformacje Prawa Prywatnego' 2000, No. 3.; Ibid. Part 2, 'Transformacje Prawa Prywatnego' 2000, No. 4.

45 Cf. H. Bajorek-Ziaja, *Skarga do Europejskiego Trybunału Praw Człowieka oraz skarga do Europejskiego Trybunału Sprawiedliwośc*i, Warszawa 2006, p. 23; P. Grzegorczyk, *Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym*, 'Przegląd Sądowy' 2006, No. 6; M.A. Nowicki, *Europejska konwencja praw człowieka. Wybór orzecznictwa*, Warszawa 1999; P. Walczak, *Warunki dopuszczalności skargi indywidualnej na podstawie Europejskiej konwencji praw człowieka*, 'Państwo i Prawo' 1993, No. 8; and A. Paprocka, *Ochrona przed dyskryminacją ze strony podmiotów prywatnych jako pozytywny obowiązek państwa – uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka* [in:] *Horyzontalne oddziaływanie Konstytucji Rzeczpospolitej Polskiej oraz Konwencji o ochronie praw człowieka i podstawowych wolności*, eds. A. Młynarska-Sobaczewska, P. Radziewicz, Warszawa 2015, p. 209.

46 Cf. M. Wieczorek, K. Bogatko, A. Szczerba, *Postawy sędziów wobec zjawiska dyskryminacji oraz ocena przepisów antydyskryminacyjnych – wyniki monitoringu* [in:] *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu*, eds. M. Wieczorek, K. Bogatko, Warszawa 2012, p. 165; Cf. P. Borecki, *Zakaz dyskryminacji ze względu na wyznanie lub światopogląd*, 'Studia Prawnicze' 2015, No. 4, pp. 90–92.

Bibliography

Bajorek-Ziaja H., *Skarga do Europejskiego Trybunału Praw Człowieka oraz skarga do Europejskiego Trybunału Sprawiedliwości*, Warszawa 2006.

Banaszak B., *Koncepcje horyzontalnego działania (obowiązywania) podstawowych praw jednostki w orzecznictwie sądowym RFN* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015.

Barczak A., *Skarga konstytucyjna w sprawach cywilnych i administracyjnych w orzecznictwie Trybunału Konstytucyjnego*, Part 1, 'Transformacje Prawa Prywatnego' 2000, No. 3.

Barczak A., *Skarga konstytucyjna w sprawach cywilnych i administracyjnych w orzecznictwie Trybunału Konstytucyjnego*, Part 2, ,Transformacje Prawa Prywatnego' 2000, No. 4.

Bator A., Kozak A., *Wykładnia prawa w zgodzie z Konstytucją* [in:] *Polska kultura prawna a proces integracji europejskiej*, ed. S. Wronkowska-Jaśkiewicz, Kraków 2005.

Bierć A., *Prawo umów wobec konstytucyjnego zakazu dyskryminacji* [in:] *Wyzwania współczesnego prawa. Księga jubileuszowa Sędziego T. Szymanka*, eds. B. Bajor, P. Saganek, Warszawa 2018.

Bierć A., *Zarys prawa prywatnego. Część ogólna*, Warszawa 2015.

Borecki P., *Zakaz dyskryminacji ze względu na wyznanie lub światopogląd*, 'Studia Prawnicze' 2015, No. 4.

Ciapała J., *Horyzontalny wymiar praw konstytucyjnych na podstawie wybranego orzecznictwa w sprawach gospodarczych* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015.

Ciapała J., *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polski*, Szczecin 2009.

Czarny P., *TK a wykładnia ustaw w zgodzie z Konstytucją* [in:] *Polska kultura prawna a proces integracji europejskiej*, ed. S. Wronkowska, Warszawa 2005.

Domańska M., *Zasada równości (zakaz dyskryminacji)* [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, part 1, ed. A. Wróbel, Warszawa 2010.

Florczak-Wątor M., *Horyzontalny wymiar praw konstytucyjnych*, Kraków 2014.

Florczak-Wątor M., *Rola sądów i trybunałów w kształtowaniu koncepcji horyzontalnego działania praw jednostki* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015.

Grochowski M., *Wadliwość umów konsumenckich (w świetle przepisów o nieuczciwych praktykach rynkowych)*, 'Państwo i Prawo' 2009, No. 7.

Gronowska B., *Porównywalność sytuacji jednostek jako przesłanka dyskryminacji – uwagi na tle orzecznictwa strasburskiego*, 'Europejski Przegląd Sądowy' 2013, No. 6.

Grzegorczyk P., *Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym*, 'Przegląd Sądowy' 2006, No. 6.

Gutowski M., *Nieważność czynności prawnej*, Warszawa 2006.

Habermas J., *Faktyczność i obowiązywanie*, Warszawa 2005.

Kaliński M., *Szkoda na mieniu i jej naprawienie*, Warszawa 2011.

Lewaszkiewicz-Petrykowska B., *Zasada pełnego odszkodowania (mity i rzeczywistość)* [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, eds. W. Popiołek, L. Ogiegła, M. Szpunar, Kraków 2005.

Limbach J., *Promieniowanie Konstytucji na prawo prywatne*, 'Kwartalnik Prawa Prywatnego'1999, No. 3.

Łętowska E., *Promieniowanie orzecznictwa Trybunału Konstytucyjnego na poszczególne gałęzie prawa* [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, ed. M. Zubik, Warszawa 2006.

Machnikowski P., *Swoboda umów według art. 353[1] kc. Konstrukcja prawna*, Warszawa 2005.

Maliszewska-Nienartowicz J., *Zakaz dyskryminacji ze względu na wiek w świetle rozstrzygnięć TS wydanych w okresie 2010–2013*, 'Europejski Przegląd Sądowy' 2014, No. 5.

Matys J., *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010.

Mączyński A., *Bezpośrednie stosowanie Konstytucji przez sądy*, 'Państwo i Prawo' 2000, No. 5.

Mączyński A., *Konstytucyjne podstawy ochrony praw konsumentów* [in:] *Prawa człowieka, społeczeństwo obywatelskie, państwo demokratyczne. Księga jubileuszowa dedykowana prof. P. Sarneckiemu*, eds. P. Tuleja, M. Florczak-Wątor, S. Kubas, Warszawa 2010.

Nowicki M.A., *Europejska konwencja praw człowieka. Wybór orzecznictwa*, Warszawa 1999.

Panowicz-Lipska J., *Majątkowa ochrona dóbr osobistych*, Warszawa 1975.

Paprocka A., *Ochrona przed dyskryminacją ze strony podmiotów prywatnych jako pozytywny obowiązek państwa – uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka* [in:] *Horyzontalne oddziaływanie Konstytucji Rzeczpospolitej Polskiej oraz Konwencji o ochronie praw człowieka i podstawowych wolności*, eds. A. Młynarska-Sobaczewska, P. Radziewicz, Warszawa 2015.

Podkowik J., *Konstytucyjna zasada równości i zakaz dyskryminacji w prawie cywilnym*, 'Kwartalnik Prawa Prywatnego' 2016, No. 2.

Podkowik J., *Problem horyzontalnego działania praw jednostki w orzecznictwie sądów w sprawach cywilnych* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015.

Podkowik J., *Wolność umów i jej ograniczanie w świetle Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2015.

Radwański Z., *Jeszcze w sprawie nieważności czynności prawnych*, 'Państwo i Prawo' 1986, No. 6.

Safjan M., *Autonomia woli a zasada równego traktowania* [in:] *Zaciąganie i wykonywanie zobowiązań*, eds. E. Gniewek, K. Górska, P. Machnikowski, Warszawa 2010.

Safjan M., *Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania*, 'Kwartalnik Prawa Prywatnego' 2009, No. 2.

Safjan M., *O różnych metodach oddziaływania praw podstawowych na prawo prywatne*, 'Państwo i Prawo' 2014, No. 2.

Sawiłow J., *Swoboda umów – kompetencja czy prawo podmiotowe? O użyciu pojęcia kompetencji do objaśnienia problematyki swobody umów w nauce prawa cywilnego* [in:] *Zagadnienia wybrane*, ed. B. Gnela, Warszawa 2010.

Skorupa P., *Normatywne modele sankcji nieważności bezwzględnej a nieistniejąca czynność prawna*, 'Studia Prawnicze' 2010, No. 1.

Skwara B., *Drittwirkung jako przejaw publicyzacji prawa prywatnego* [in:] *Państwo i prawo wobec współczesnych wyzwań. Księga jubileuszowa Profesora Jerzego Jaskierni*, eds. R.M. Czarny, K. Spryszak, Toruń 2012.

Skwara B., *Horyzontalny skutek praw i wolności jednostki w systemie Konstytucji RP* [in:] *Dylematy praw człowieka*, eds. T. Gardocka, J. Sobczak, Toruń 2008.

Skwara B., *Publicyzacja prawa prywatnego na tle niemieckiego orzecznictwa konstytucyjnego poświęconego mocy obowiązującej praw człowieka* [in:] *Ewolucja demokracji przedstawicielskiej w krajach Europy Środkowej i Wschodniej*, eds. M. Paździor, B. Szmulik, Lublin 2013.

Skwara B., *W obronie bezpośredniego horyzontalnego obowiązywania praw człowieka*, 'Przegląd Sądowy' 2017, No. 1.

Sobczyk A., *Problem horyzontalnego działania praw jednostki w orzecznictwie sądów pracy* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015.

Sobczyk A., *Wolność pracy i władza*, Warszawa 2015.

Sozański J., *Znaczenie wspólnotowego zakazu dyskryminacji dla Polski*, 'Przegląd Sądowy' 2004, No. 6.

Stępkowski A., *Zasada proporcjonalności w europejskiej kulturze prawnej. Sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie*, Warszawa 2010.

Strugała R., *Prywatnoprawne skutki naruszenia zakazu nierównego traktowania – uwagi de lege lata i de lege ferenda*, 'Europejski Przegląd Sądowy' 2016, No. 4.

Szydło M., *Wolność działalności gospodarczej jako prawo podstawowe*, Bydgoszcz–Warszawa 2011.

Taborowski M., *Poziom ochrony praw podstawowych wynikający z Karty praw podstawowych UE jako przeszkoda dla przystąpienia UE do Europejskiej konwencji praw człowieka*, 'Europejski Przegląd Sądowy' 2015, No. 12.

Targosz T., *Roszczenia służące ochronie dóbr osobistych* [in:] *Media a dobra osobiste*, eds. J. Barta, M. Markiewicz, Warszawa 2009.

Trzaskowski R., *Granice swobody kształtowania treści i celu umów obligacyjnych. Art. 353[1] kc*, Kraków 2005.

Trzaskowski R., *Skutki sprzeczności umów obligacyjnych z prawem. W poszukiwaniu sankcji skutecznych i proporcjonalnych*, Warszawa 2013.

Trzaskowski R., *Zakaz dyskryminacji w prawie umów* [in:] Europeizacja prawa prywatnego, part II, eds. M. Pazdan, W. Popiołek, M. Rott-Pietrzyk, M. Szpunar, Warszawa 2008.

Tuleja P., Białogłowski W. *Problem horyzontalnego działania praw jednostki w orzecznictwie Trybunału Konstytucyjnego* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki,* ed. M. Florczak-Wątor, Kraków 2015.

Tuleja P., *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Kraków 2003.

Ustawowe ograniczenia swobody umów. Zagadnienia wybrane, ed. B. Gnela, Warszawa 2010.

Walczak P., *Warunki dopuszczalności skargi indywidualnej na podstawie Europejskiej konwencji praw człowieka*, 'Państwo i Prawo' 1993, No. 8.

Wałachowska M., *Zadośćuczynienie pieniężne za doznaną krzywdę*, Toruń 2007.

Wieczorek M., Bogatko K., Szczerba A., *Postawy sędziów wobec zjawiska dyskryminacji oraz ocena przepisów antydyskryminacyjnych – wyniki monitoringu* [in:] *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu*, eds. M. Wieczorek, K. Bogatko, Warszawa 2012.

Wojtyczek K., *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999.

Wronkowska S., *W sprawie bezpośredniego stosowania Konstytucji*, 'Państwo i Prawo' 2001, No. 9.

Wróbel A., *O niektórych aspektach koncepcji praw podstawowych UE jako zasad*, 'Europejski Przegląd Sądowy' 2014, No. 1.

Wróblewska J., *Horyzontalny wymiar praw i wolności jednostki w USA – uwagi na tle orzecznictwa amerykańskiego SN* [in:] *Amerykański system ochrony praw człowieka: aksjologia, instytucje, efektywność*, part 2, ed. J. Jaskiernia, Toruń–Warszawa 2015.

Wróblewska J., *Rozwój doktryny* state action *w orzecznictwie sądowym USA* [in:] *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015.

Zakolska J., *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2008.

Żurawik A., *Problem publicyzacji prawa prywatnego w kontekście ustrojowym*, 'Państwo i Prawo' 2010, No. 5.

SUMMARY

The research carried out within seems to confirm the view that in the sphere of horizontal impact of constitutional rights the prohibition of unequal treatment has a narrower application than in the vertical sphere addressed to the state (public authorities), because the principle of the constitutionally protected freedom of contract (freedom of the parties' will) – which constitutes the foundation of private law – allows differentiation of the two parties of the contract to the limits of discrimination – i.e., gross, subjective, and unreasonable inequality forced by the stronger party with the violation of legally protected natural, personal characteristics of the weaker party.

In the sphere of concluding contracts, the scope of using non-discrimination as a mechanism for compensating for the freedom of will of the potentially weaker party to the contract is determined by objective criteria such as constitutionally protected human dignity (individual, personal characteristics) in connection with the public dimension of the goods or services on offer. In particular, the protection against discrimination includes those areas of contracting in which the real freedom of will may not manifest because of a definite advantage of one party (e.g., an entrepreneur, employer, or landlord) weakening the other party's autonomy (e.g., an employee, consumer, or tenant). Not without reason, non-discrimination finds a natural application in labour law and consumer law. Infringement of the non-discrimination principle exposes the violator, in particular, to civil sanctions (of a proprietary and non-proprietary nature).

A general sanction resulting from infringement of non-discrimination, i.e., from introducing discriminatory provisions to the contract, is the invalidity of those provisions, not excluding remedial sanctions, such as the right to demand proprietary damages or a claim for solely monetary compensation, without the need to determine the fault of the violator. Non-discriminatory regulations not only protect the party to the contract in case of infringement of personal interests which are well-established in the jurisprudence, but also against infringement of the legally protected interests in the process of contracting.

Keywords
constitutionalisation of private law, equal treatment principle, constitutional prohibition of discrimination, human dignity, freedom of contract principle, natural personal characteristics, goods or services offered in public, remedies for the protection of personal goods (proprietary and non-proprietary)