

Equality of Polish and Foreign Undertakings in Setting Up Business in Poland



INTRODUCTION

The aim of this work is to analyze the principle of equality of Polish and foreign undertakings with respect to starting up economic activity in Poland. It seems reasonable to start the discussion from Art. 32 of the Constitution of the Republic of Poland of 2 April 1997¹. The Constitution provides for the principle of equality in the light of which everyone is equal before the law and has the right to be treated equally by administrative authorities. In addition, it forbids discrimination in political, social or economic life for any reason. This principle is important for the economy, in particular from the point of view of interference by public administrative bodies². The principle of equality of Polish and foreign undertakings in taking up economic activity has been expressed in Art. 6 sec. 1 of the Economic Freedom Act of 2 July 2004³. Under the act the commencement, carrying out and termination of economic activity is free for everyone on equal terms and subject to conditions stipulated by law. The imperative of equality applies to any entity interested in the development of business in Poland⁴.

This paper comprises two parts. The first part concerns the origin and directions of development of the principle of equality, taking into account, in particular, constitutional regulations, whereas the second

¹ Journal of Laws, No. 78, item 483, as amended.

² K. Strzyczkowski, *Prawo gospodarcze publiczne*, 3rd ed., Lexis Nexis, Warsaw 2007, p. 83.

³ Consolidated text: Journal of Laws of 2007, No. 155, item 1095, as amended.

⁴ K. Stoga, R. Potrzyszcz, *Działalność gospodarcza przedsiębiorców i osób zagranicznych. Obowiązki przedsiębiorcy. Zasady udzielania koncesji i zezwoleń. Oddziały i przedstawicielstwa przedsiębiorcy zagranicznego*, Infor, Warsaw 2001, p. 4.



part covers equality of Polish and foreign undertakings in our domestic legislation. The content of the constitutional principle of equality is analyzed in the perspective of judgments of the Constitutional Tribunal and of legal doctrine. It is crucial to take into account the relationships between the following concepts: equality, social justice and prohibition of discrimination. The issue at hand is of utmost importance as the right to economic freedom is possible only under conditions of equal treatment of various business entities. Equality before the law is treated in the European legal writings as one of the main requirements of the rule of law⁵. The significance of this principle for economic turnover is further enhanced in Art. 12 of the Treaty establishing the European Community, in the light of which any discrimination on the grounds of nationality is prohibited⁶.



THE DEVELOPMENT OF THE PRINCIPLE OF EQUALITY IN THE COMMON LAW SYSTEM

The principle of equality began to resemble its present understanding in the 17th century and was affected by the philosophical concept of liberalism. Later, was reflected in the ideology of the American Revolution and of the French Revolution. In that period the first regulations providing for equality of chances were introduced. Equality manifested itself in many ways. One of them was the campaign for equal treatment of men and women started by Mary Wollstonecraft in the 18th century. Feminism had been predominantly interested in the reform of education, voting rights and economic conditions of women's life⁷. The first statutory regulations concerning equality in commencing business date back to the beginning of the 1970s⁸. For example, *The Race Relations Act* of 1965 banned discrimination in such areas as employment, supply of goods and provision of services⁹.

⁵ A. Tukaj, *Zasada równości płci w Polsce na tle regulacji prawnych Unii Europejskiej*, Prawa Człowieka, Humanistyczne Zeszyty Naukowe 2008, No. 11, p. 167.

⁶ K. Strzyczkowski, op. cit., p. 83.

⁷ H. Barnett, *Constitutional & Administrative Law*, Cavendish Publishing, London 2006, p. 545.

⁸ *Ibidem*, p. 539.

⁹ *Ibidem*, p. 540.



Foreign scholarship emphasizes the constitutional dimension of the principle of equality. In the common law system the idea of A.V. Dicey¹⁰ played a substantial role in defining the principle of equality. Dicey considered only the formal side of equality which, to him, was not absolute. In his opinion, the principle of equality refers to all citizens, both rich and poor, subject to uniform law¹¹. He allowed for a privileged treatment of certain groups such as children and the sick if dictated by equity and social justice¹². The principle was also discussed by many other scholars. J. Raz – who advanced the theory of the rule of law in his 1977 *The Rule of Law and Its Virtues* – among the commandments of rational legislation mentions as first the principle of equality, transparency and clarity of law¹³.

Scholars tie the principle of equality to the issue of non-discrimination. A ban on discrimination is to guarantee equality and is connected with the state's obligation to eliminate unequal treatment of citizens. The academics vary in their opinions on the mutual relation between the principle of non-discrimination and the principle of equality. Some treat them as separate, self-contained principles, while to others the principle of non-discrimination is supplementary to the principle of equality; still others merge the two principles into one value. The latter seems to be prevailing. R. Smith notes that discrimination concentrates on the negative aspect of the principle of equality¹⁴ and uses them interchangeably¹⁵. Similarly, N. Foster on the grounds of the Treaty on the European Union states that equality, equal treatment and the principle of non-discrimination are synonymous.¹⁶

British academics differentiate between direct and indirect discrimination. In case of direct discrimination citizens are treated differently due to their origin or race¹⁷. Indirect discrimination occurs when law imposes identical obligations on all, but indirectly affects certain groups due to

¹⁰ See more in: A.V. Dicey, *The Law of Constitution*, Oxford University Press, Oxford 1885.

¹¹ J. Jowell, D. Oliver, *The changing Constitutions*, Oxford University Press, Oxford 2007, p. 22.

¹² J. Adler, *Constitutional and Administrative Law*, Palgrave Macmillan 1994, p. 45.

¹³ A. Carroll, *Constitutional and Administrative Law*, Harlow 2009, p. 44.

¹⁴ R.K.M. Smith, *Textbook on International Human Rights*, Oxford University Press, Oxford 2007, p. 370.

¹⁵ R.K.M. Smith, *Text & Materials on International Human Rights*, London–New York 2007, p. 374.

¹⁶ N. Foster, *Foster on EU Law*, Oxford; Oxford University Press 2006, p. 396.

¹⁷ H. Barnett, *op. cit.*, p. 541.



its certain characteristic features. In *Singh v British Railway Engineers*¹⁸ the House of Lords was of the opinion that the rules that require all railway employees to wear a headgear can indirectly discriminate against employees of Indian origin who are obliged by their religion to wear only turbans, however it found the challenged requirement to be justified by the need to provide safety at work.



THE EVOLUTION OF THE PRINCIPLE OF EQUALITY IN POLISH LAW

The idea of equality emerged in the early days of Polish constitutionalism¹⁹. It was known to the first organic laws²⁰ and appeared in many court decisions. Equality had been invoked in the Constitution of 3 May of 1791. Its Art. II guaranteed all freedoms, liberties and prerogatives in private and public life²¹. The act extended the principle of equality only to the noble class, granting it equal rights to hold public offices, enjoy privileges and prerogatives. The equality of rights within the ranks of nobility gave rise to a new direction in the evolution of the said principle²². Subsequent constitutional acts were passed by the foreign powers who partitioned Poland at the end of XVIII century. The Constitution of the Duchy of Warsaw, largely limited by Napoleon on 22 July 1807 proclaimed an absolute equality of all citizens before the law. It contained solutions derived from the French constitution of 1799. Its Art. 1 stipulated that people are born and remain equal and have equal rights. Thus it broke away from the traditional class division by laying the foundation for a new model of society.

The period following the Second World War was important for the idea of equality was instrumental in setting basic rules of the political system²³. On 22 February 1947 the Sejm adopted a Declaration on the implementation

¹⁸ [1986] ICR 22.

¹⁹ A. Chorążewska, *Problematyka wykładni zasady równości na tle orzecznictwa Trybunału Konstytucyjnego*, *Prawa Człowieka. Humanistyczne Zeszyty Naukowe* 2008, No. 11, p. 66.

²⁰ A. Tukaj, *op. cit.*, p. 168.

²¹ J.B. Falski, *Zasada równości w Polskich Konstytucjach (1781–1935)*, *Państwo i Prawo*, 1997, No. 1, p. 3.

²² *Ibidem*, pp. 6–7.

²³ A. Chorążewska, *op. cit.*, p. 66.



of civil rights and freedoms. The Declaration – due to its non-binding nature – was a Parliament’s self-obligation enhancing the rights and freedoms contained therein²⁴. In the resolution the Sejm declared to continue the implementation of civil rights, including the principle of equality before the law regardless of nationality, race, religion, sex, origin, position or education²⁵. In the post-war Poland the principle of equality came up again in the Constitution of 22 July 1952²⁶. Its Art. 81 sec. 1 of the Constitution stipulated that “the citizens of the People’s Republic regardless of their nationality, race and confession shall have equal rights in all aspects of public, political, economic, social and cultural life. A breach of this principle by any direct or indirect privilege or limitation of rights on the account of nationality, race or confession shall be subject to punishment”²⁷.

The transformation of the Polish political system which took place at the turn of the 1980s and the 1990s forced adjustments in the constitutional provisions²⁸. The reform was effected by new constitutional provisions giving up the criteria of forbidden differentiation. The departure from “non-discrimination” clauses does not mean they could not be found in the legal system currently in effect. The European Convention on Human Rights²⁹ is one of the examples of an open catalogue of criteria of forbidden discrimination. Under Art. 14 of the Convention the exercise of the rights and freedoms must be secured without discrimination on any ground such as sex, race, color, language, religion, political opinion, origin, or other status³⁰. The provision of Art. 26 of the International Covenant on Civil and Political Rights, which guarantees equality before the law, contains a similar list³¹. Many national regulations also contain exemplary lists of criteria, including in particular Art. 15 of the Canadian Charter of Rights and Freedoms³², Art. 14 and 15 of the Constitution of India³³, Art. 14 of the British Human

²⁴ W. Skrzydło, *Polskie prawo konstytucyjne*, Marpol, Lublin 1997, p. 48.

²⁵ A. Chorążewska, op. cit., p. 67.

²⁶ Consolidated text: *Journal of Laws* 1976, No. 7, item 36 as amended.

²⁷ Z. Jarosz, P. Zawadzki, *Prawo konstytucyjne*, PWN, Warsaw 1988, p. 222.

²⁸ A. Chorążewska, op. cit., pp. 67–68.

²⁹ Signed in Rome on 4 November 1950, ratified by Poland on 15 December 1992, *Journal of Laws* 1993, No. 61, item 284 as amended—further referred to as the Convention.

³⁰ M. Rayan, P. Foster, *Unlocking Constitutional & Administrative Law*, Hodder Education, London 2007, p. 495.

³¹ R. Clyton, H. Tomlinson, *The Law of Human Rights*, Oxford; Oxford University Press 2000, Vol. 2, p. 149.

³² “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability”.

³³ R. Clyton, H. Tomlinson, op. cit., p. 205.



Rights Act of 1998³⁴ or Art. 2 of the African Charter on Human and People's Rights³⁵.

3.1. Equality as a constitutional rule

The principle of equality was formulated in Art. 32 sec. 1 of the Constitution in Chapter II entitled "Freedoms, Rights and Obligations of Persons and Citizens". It is viewed as most fundamental among all rights and freedoms³⁶. It is, first of all, addressed to all public authorities, including authorities that make and apply laws³⁷. They have an obligation to level out the differences between individuals in order to achieve true equality³⁸. Scholars uniformly interpret the principle of equality as an imperative to apply the same criteria to all entities sharing certain common features³⁹.

In a judgment of 9 March 1988, the Constitutional Tribunal stated that equality means that "all entities which have a given (relevant) feature should be treated equally to an equal degree, i.e. according to the same measure without discriminating against or in favor of any of them"⁴⁰. Similarly, in a judgment of 5 November 1986 the Tribunal interpreted the principle of equality stating that "the right to equal treatment arising out of the Constitution does not apply solely to a legal sphere but extends to all aspects of public, political, social and cultural life"⁴¹. Later on, in October 1989 the Tribunal stated that the said principle can be considered in two aspects: equality before the law understood as equal application of law (*sensu stricto*), and as equality in the law⁴². In the above judgment the interpretational problem regarded the function that should be assigned to the principle of equality. In the Tribunal's opinion, the equality in the application of law, called equality before the law *sensu stricto*, amounts to equal protection of

³⁴ Text of the document in English, in: R. Clyton, H. Tomlinson, op. cit., p. 17.

³⁵ J. Rehman, *Intentional Human Rights Law. A practical approach*, Harlow 2003, p. 240.

³⁶ J. Siewczyło-Chłabcz, E. Bieniek-Koronkiewicz, *Podjęmowanie i wykonywanie działalności gospodarczej*, Lexis Nexis, Warsaw 2002, p. 30.

³⁷ K. Strzyczkowski, op. cit., p. 83; P. Winczorek, *Prawo konstytucyjne Rzeczypospolitej Polskiej. Podręcznik dla studentów studiów nieprawnych*, Warsaw 2003, p. 89.

³⁸ B. Gronowska, *Wolność, prawa i obowiązki człowieka i obywatela*, in: W. Szyszowski (ed.), *Prawo konstytucyjne*, TNOiK, Toruń 2006, p. 107.

³⁹ See: C. Kosikowski, *Przedsiębiorca w prawie polskim na tle prawa europejskiego*, Lexis Nexis, Warsaw 2003, p. 171; K. Strzyczkowski, op. cit., pp. 83–84; M. Zdyb, *Działalność gospodarcza i publiczne prawo gospodarce*, Kantor Wydawniczy Zakamycze, Cracow 2001, p. 60; J. Siewczyło-Chłabcz, E. Bieniek-Koronkiewicz, op. cit., p. 30.

⁴⁰ U 7/87, OTK 1988, No. 1, item 1.

⁴¹ 5/86, OTK 1986, No. 1, item 27.

⁴² Judgment of the CT of 24 October 1989, K 6/89.





rights of each human being and the application of law in accordance with regulations. The equality in the law is understood as a demand that the law does not discriminate against or in favor of specific groups of citizens. A judgment of 26 April 1995, in which the Tribunal states that although it is prohibited to treat similar entities unequally, this does not exclude unequal treatment of entities which are not similar, is important for defining the principle of equality⁴³. This thesis was reiterated many times, among other things, in judgments of the Supreme Administrative Court (NSA). In its decision of 17 November 1992 NSA stated that observing the principle of equality before the law meant the application of the same legal criteria to persons who were in an analogous legal situation⁴⁴.

Doubts are raised over the meaning of “equality before the law”. There are two different views on issue. According to the first one, equality before the law should be understood as a demand that legal regulations do not contain provisions discriminating against or in favor of any group of citizens⁴⁵. Those who support the other stance consider that the principle of equality before the law does not concern the content of a legal regulation but the manner in which it is applied, thus it is addressed to the authorities acting in individual cases. According to this rule an authority should adopt identical positions in identical cases⁴⁶. W. Sadurski⁴⁷ and P. Tulej share this opinion. In this context one should accept the interpretation of A. Banaszak. Equality before the law should be understood as an obligation to ensure equal treatment by public authorities in the process of applying law, whereas equality in the law refers to passing laws⁴⁸. In consequence, the principle of equality has a double meaning. On the one hand, it refers to equality in the application of law, on the other, to the just content of law⁴⁹.

The citizens’ right to equal treatment is tied to the obligation of the state to counteract discrimination. Art. 32 sec. 2 forbids discrimination in political, social and economic life. Discriminatory is a conduct resulting in a denial or limitation of the right to freedom or imposing obligations inconsistent with legal norms. B. Gronowska defines discrimination as a “different

⁴³ K 11/94, OTK 1995, No. 2, item 12.

⁴⁴ SA/Wr 998/92, OSP 1994, No. 2, item 24.

⁴⁵ B. Sagan, *Zasady prowadzenia działalności gospodarczej*, in: J. Olszewski (ed.), *Publiczne prawo gospodarcze*, Wydawnictwo C.H. Beck, Warsaw 2005, p. 16.

⁴⁶ P. Tulej, *Konstytucyjny status jednostki w państwie Polskim*, in: P. Sarnecki (ed.), *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Warsaw 1999, p. 109.

⁴⁷ W. Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia*, PWN, Warsaw 1988, p. 94.

⁴⁸ A. Banaszak, *Prawo konstytucyjne*, Wydawnictwo C.H. Beck, Warsaw 2008, p. 481.

⁴⁹ A. Chorążewska, *op. cit.*, p. 72.





treatment of persons in an objectively identical situation, without an objectively justified reason”⁵⁰. To P. Winczorek “discrimination consists in a conduct denying rights and limiting freedoms vested in a person by virtue of the Constitution”⁵¹.

Scholars are of different opinions on the mutual relation between the principle of discrimination and the principle of equality. To some they are separate rules and to others the principle of non-discrimination supplements the principle of equality, still others perceive the two principles as one value. The Tribunal is of the opinion that the Constitution defines the principle of equality in detail. Firstly, Art. 32 of the Constitution emphasizes the universal nature of the principle by demanding that it be observed in all areas of life. Secondly, it points out that differentiation has its limits⁵². Discrimination can take the form of legal or factual discrimination. Legal discrimination is when law fails to confer the rights when it is obliged to, or deprives citizens of the privileges guaranteed by the Constitution. Factual discrimination is a denial to implement the rights and freedoms of a person⁵³.

In conclusion, equality should be related to the process of law-making as this implies an obligation to implement equality in the law; whereas the term “discrimination” should be referred to the implementation of law. Another argument in support of the above view relates to the different scope of addressees of the norm. The principle of equality is, above all, addressed to public authorities, in particular to the legislature. The circle of addressees of the prohibition of discrimination is relatively bigger. Apart from government’s agencies they include such groups as employers and teachers⁵⁴.

The principle of equality can be defined in a formal or substantive sense. Formally, equality means the absolute prohibition of differentiation of legal entities. The principle of equality understood this way cannot be the cornerstone of a legal system as it does not take into account the complexity of the situation at law of entities⁵⁵. Under the Constitution equality must be understood as substantive equality. In this sense it was defined by the Tribunal in

⁵⁰ B. Gronowska, *op. cit.*, p. 107.

⁵¹ P. Winczorek, *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Liber, Warsaw, p. 90.

⁵² Judgment of the CT of 23 October 2001, K 22/01, OTK 2001, No. 7, item 215.

⁵³ P. Winczorek, *op. cit.*, p. 90.

⁵⁴ See: M. Malone, *Discrimination Law. A practical guide for management*, Kogan Page, London 1993, p. 23.

⁵⁵ P. Tuleja, *op. cit.*, p. 106.

a decision of 9 March 1988 which took as equality the acceptance of a different treatment of different entities (addressees of legal regulations), since equal treatment of the certain entities in one respect entails discrimination in other respect⁵⁶. It is not the same as an obligation to treat each addressee and in each situation equally in the law. A factual situation of legal entities is usually very different, then identical treatment would lead to injustice⁵⁷.

3.1.1. The principle of social justice

The principle of social justice is not defined by law. Scholars differ in their opinions, however they can be divided into at least two distinctive groups. One group defines the principle in question while the other claims it is impossible to do (in a static sense). The following definitions are put forward in the literature. A. Pułło defines the principle of social justice as universally accepted rules of ethical order, connected with the relations between the communities and individuals. Due to its universal acceptance it does not need to be implemented by the state but only respected⁵⁸. A Chorążewska refers to the Aristotelian concept of social justice defining it as a balance between encumbrances and benefits in a situation of a relative lack of goods⁵⁹. T. Dybowski and P. Winczorek, point out to a great variety of concepts of justice depending on the time and conditions in which they are formulated⁶⁰. Similarly, W. Piwowarski takes the view that it is possible to define the principle of social justice only in a dynamic sense due to its continuous development⁶¹. In the opinion of A. Szafrąński, justice requires that the state creates an economic system in which the needs of an individual are satisfied and, even more so, individuals are able to develop their potential and pursue their goals. Social justice is, on the one hand, a reason for the state to interfere in the economic life. On the other hand, it does not allow the state to exceed certain boundaries in the implementation of statistic instruments of economic policy⁶².

⁵⁶ Case file ref. U 7/87, OTK 1988, No. 1, item 1.

⁵⁷ P. Tuleja, *op. cit.*, pp. 106–107.

⁵⁸ A. Pułło, *Sprawiedliwość społeczna w systemie zasad naczelnych Konstytucji RP*, Państwo i Prawo, 2003, No. 7, p. 8.

⁵⁹ A. Chorążewski, *op. cit.*, p. 79.

⁶⁰ Cf. T. Dybowski, *Zasady sprawiedliwości społecznej jako problem konstytucyjny w orzecznictwie polskiego Trybunału Konstytucyjnego*, Sądownictwo Konstytucyjne 1996, Vol. 1, p. 74.

⁶¹ W. Piwowarski, *ABC katolickiej nauki społecznej*, Pelplin 1993, p. 38.

⁶² A. Szafrąński, *Konstytucyjnoprawne podstawy prowadzenia działalności gospodarczej przez przedsiębiorców publicznych*, Przegląd Sejmowy 2008, No. 2, p. 54.



The Constitutional Tribunal drew far-reaching conclusions in its judgment of 23 October 1995, in which it allowed a material justification of social preferences dubbing them a “compensatory privilege”⁶³. The Tribunal stated that in some cases the differentiation of legal situation of similar entities is possible, however, it must be rationally justified. Thus an opinion crystalized that the constitutional principle of equality is not absolute. The Tribunal emphasized the relationship between the principle of equality and the principle of social justice, allowing the differentiation in the law if it was justified⁶⁴. The analysis of the above views may be summarized by saying that equality amounts to acceptance of different treatment by law of different entities as well as different treatment by law of identical entities. In this context, the academics and the courts stress the relation between the principle of equality and the principle of justice, allowing for the differentiation in the law. Its constitutionality is assessed by reference to the rationality and fairness of the adopted criteria. What raises doubts is the definition of the criterion according to which entities are being differentiated.

The judgments of the Tribunal may be helpful in making a list of conditions under which certain groups may be treated preferentially (compensatory privilege). The first condition consists of relevant arguments for differentiation. They should be directly related to the goal and the content of the provisions of the disputed norm as well as to serve the achievement of this goal and realizing the content. Any differentiation should be reasonably justified⁶⁵. In its judgment of 23 October 1995 the Tribunal demanded that these arguments be somehow related to other constitutional values, rules or norms justifying different treatment of similar entities⁶⁶. For instance, the elderly and children, the healthy and the sick, or disabled can be treated differently in various important aspects⁶⁷. In addition, these criteria must be proportional. The weight of the interest serving differentiation must be in proportion to the weight of interests that is to be infringed.

In sum, the reasons for differentiation must be directly related to the content and the goal of the provision to which they relate, convincing and rationally justified⁶⁸. Secondly, the condition of proportionality must be

⁶³ K 4/95, OTK 1995, No. 2, item 31.

⁶⁴ U 7/87, OTK 1988, No. 1, item 1.

⁶⁵ Judgment of the CT of 12 December 1994, K 3/94, OTK 1994, No. 2, item 42.

⁶⁶ K 4/95, OTK 1995, No. 2, item 31.

⁶⁷ P. Winczorek, *op. cit.* p. 89.

⁶⁸ K. Strzyczkowski, *op. cit.*, p. 84.



satisfied. The weight of the interests (values) being protected and the interests (values) being limited, must be kept in proportion. Departure from equality is conditional on the relation between the said regulation and another constitutional value or principle (for example, the principle of social justice) justifying the different nature of the regulation⁶⁹.

The way the Tribunal interprets the normative content of the principle of equality has evolved over the years. Under the Constitution, the principle of equality prohibits different treatment of entities substantially similar to each other. Therefore effective legislation should impose the same obligations and guarantee the same liberties and rights. Differentiation, as an exception, is possible only where entities themselves substantially differ⁷⁰. If they are similar, all conditions necessary for the “compensatory privilege” must be satisfied.

The above decisions were issued predominantly on the basis of provisions that are no longer in force, however, they remain relevant to the current legal order. This view was confirmed by the Constitutional Tribunal on 16 December 1997 when it stated that the judgments passed hitherto in connection with the principle of equality remain relevant in the new constitutional system⁷¹.

4

THE EVOLUTION OF LEGISLATION ON TAKING UP ECONOMIC ACTIVITY IN VIEW OF THE PRINCIPLE OF EQUALITY

The principle of equality in doing business was first introduced into Polish law by the Economic Activity Act of 28 December 1988⁷². Its Art. 1 stipulated that everyone was free and had equal rights to take up and conduct economic activity. The important elements of the principle of equality were set out in Art. 7 which guaranteed equal rights for business irrespective of ownership structure, payments, bank loans and in supply of means of

⁶⁹ *Ibidem*, p. 84.

⁷⁰ P. Winczorek, *op. cit.*, p. 89.

⁷¹ K 8/97, OTK 1997, No. 5–6, item 70.

⁷² *Journal of Laws*, No. 41, item 324, as amended.



production⁷³. It referred to the choice of legal and organizational form and of insurance.

The implementation of economic equality was based on the assumption that the state should treat equally all citizens in their economic relations. Literature noted a close relationship between the principle of equal treatment and the constitutional economic rights of citizens⁷⁴. The importance of the principle is attributed, among other factors, to the openness of its axiological basis. It had had particular meaning at a time of special protection of social ownership⁷⁵.

Starting a business is governed by many statutes. The most important include the Companies with Foreign Participation Act of 14 June 1991⁷⁶, the Acquisition of Real Estate by Foreigners Act of 24 March 1920⁷⁷, and the Ordinance of the Council of Ministers on the Conditions, Procedure and Authorities Competent to Issue Permits to Establish Representative Offices within the Territory of the People's Republic of Poland to Foreign Legal and Natural Persons, Necessary for Conducting Their Business Activity of 6 February 1976⁷⁸.

As a result of systemic transformation the principles of taking up and conducting economic activity were reformulated in the Economic Activity Law of 19 November 1999⁷⁹. Its Art. 5 providing for the principle of equality was directly connected with Art. 6 referring to foreigners. In effect foreign entrepreneurs were granted the same rights as Polish citizens provided that they obtained a residence permit in the Republic of Poland⁸⁰. The latter was regulated by the Foreigners Act of 25 June 1997⁸¹. Pursuant to its Art. 4 foreigners were eligible for a permit for permanent residency if they met all the following conditions: (1) proved stable family or economic relations with the Republic of Poland, (2) had accommodation and means of subsistence, (3) immediately prior to application they had stayed in Poland for at least three years on under a temporary residence permit.

⁷³ M. Zdyb, *Komentarz do ustawy o działalności gospodarczej*, Oficyna Wydawnicza Branta, Bydgoszcz 1997, p. 32.

⁷⁴ S. Hoc, *Prawo gospodarcze. Wybrane zagadnienia*, Dom Wydawniczy Elipsa, Warsaw 1999, p. 40.

⁷⁵ W. Kubala, *Prawo działalności gospodarczej. Komentarz*, Warsaw 2000, p. 69.

⁷⁶ Consolidated text: *Journal of Laws* of 1997, No. 26, item 143 – the Act was repealed on 1 April 2002.

⁷⁷ Consolidated text: *Journal of Laws* of 2004, No. 167, item 1758 as amended.

⁷⁸ *Journal of Laws* No. 106, item 497 as amended.

⁷⁹ *Journal of Laws* No. 101, item 1178 as amended – further referred to as the Economic Activity Law.

⁸⁰ W. Kubala, *op. cit.*, pp. 72–73.

⁸¹ Consolidated text of 2001, *Journal of Laws* No. 127, item 1400 as amended.

Art. 6 sec. 2 of the Economic Activity Law regulated the taking up of economic activity by foreign persons. It set out a general rule that foreign persons could take up and conduct economic activity under the same conditions as undertakings with permanent place of residence or a seat in Poland, provided that, under condition of reciprocity, Polish citizens could exercise the same rights in their country of origin⁸². Art. 6 sec. 3 governed the lack of reciprocity. Should this be the case foreign persons could only establish limited partnerships, limited liability companies and joint stock companies and participate in such companies. The Act covered all who, according to the definition in Art. 2 sec. 2, met the criteria of an undertaking, thus setting uniform rules for starting up and operating a business.

Significant changes were introduced by the Economic Freedom Act of 2 July 2004⁸³, a third act supporting equality in business.



EQUALITY OF UNDERTAKINGS UNDER THE ECONOMIC FREEDOM ACT

Art. 6 of the Act explicitly guarantees equality in taking up and conducting economic activity. All business entities having certain common characteristics should enjoy equal rights. The provision refers to Art. 32 of the Constitution, therefore it should be interpreted in accordance with it⁸⁴. In a judgment of 28 November 1990 the Supreme Court stated that direct application in judicial decisions of the provision of the Constitution is permissible, in particular if it ensures fuller and broader protection of citizens' rights⁸⁵.

In legal writings the principle of equality in business boils down to a choice of organizational and legal form of the activity, insurance obligations, taxation, creditworthiness, issuing promissory notes, bankruptcy and arrangement proceedings with creditors. All entities are equally obliged to observe the rules of environmental protection, fire safety, health and

⁸² C. Kosikowski, *Prawo działalności gospodarczej. Komentarz*, Lexis Nexis, Warsaw 2000, p. 28.

⁸³ Journal of Laws of 2007, No. 155, item 1095 as amended—further referred to as the Act on Freedom of Economic Activity.

⁸⁴ C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Lexis Nexis, Warsaw 2005, p. 46.

⁸⁵ III ARN 28/90, Lex No. 10895.



safety at work⁸⁶. In the opinion of C. Kosikowski, the principle of equality is a declaration forbidding discrimination between undertakings on the grounds of, e.g., the type of ownership or legal status⁸⁷. Courts also tried to define the principle of equality in the context business law. In a judgment of 26 June 1991 the Supreme Court stated that the constitutional principle of equality at the stage of commencing economic activity amounts to the prohibition of discriminatory clauses in secondary legislation in access to capital, human or material factors of economic activity⁸⁸.

The *communis opinio* is that the said principle of equality applies not only to citizens but also to other legal entities. This relates first of all to legal persons. It does not mean that all categories of undertakings must have equal rights and obligations. Equal treatment presupposes a possession of a relevant feature common for a specific class of persons⁸⁹.

The principle of equality is not absolute, therefore the same rights need not to be vested in all undertakings. Maintaining state monopolies is a departure from the principle⁹⁰ which is not breached by the requirement of obtaining a concession or a permit as long as all businesses may apply for them on equal terms if they meet statutory conditions⁹¹. The view that granting a concession for a specific area of business is in natural conflict with the constitutional principles of freedom and equality is unjustified. It is true that a concession, as one of the forms of limiting the freedom of economic activity, makes it dependent on an administrative decision. However, statutory forms of regulating economic activity play an important role in society and apply only to activities which require the fulfillment of special conditions⁹². For example, the radio and TV broadcasting can be placed under a more stringent control for its impact on the conduct and views of the society and limited frequencies⁹³.

Speaking of the national dimension of equality one should consider from two points of view: internal, in relation to Polish undertakings, and

⁸⁶ M. Zdyb, *Wspólnotowe i polskie publiczne prawo gospodarcze*, Vol. 1, *Wolność i reglamentacja działalności gospodarczej. Handel zagraniczny*, Wolters Kluwer Polska, Warsaw 2008, p. 51.

⁸⁷ C. Kosikowski, *Ustawa o swobodzie...*, p. 46.

⁸⁸ III ARN 31/92, OSNCP 1994, No. 2, item 38.

⁸⁹ M. Zdyb, *op. cit.*, p. 60.

⁹⁰ B. Sagan, *op. cit.*, pp. 16–17.

⁹¹ M. Zdyb, *op. cit.*, p. 90.

⁹² C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, Lexis Nexis, Warsaw 2007, p. 266.

⁹³ M. Romanowski, *Zasad swobody działalności gospodarczej w świetle praktyk KRRiT*, Przegląd Prawa Handlowego, 2001, No. 6, p. 36.



external – in relation to foreign undertakings⁹⁴. Poland's accession to the European Union paved the way for the removal of a number of road-blocks to foreign investment, particularly as far as the EU investors were concerned⁹⁵. Art. 12 of the Treaty on the European Community prohibited any discrimination based on nationality. Therefore foreign persons from the EU area should be treated equally with Polish undertakings. In consequence, the principle of equality in economic activity is best implemented in relation to EU enterprises.

6

COMMENCEMENT OF BUSINESS BY FOREIGN ENTITIES IN POLAND

The Economic Freedom Act distinguishes four groups of foreign entities, thus differentiating the rights to take up and conduct economic activity in Poland. They are as follows:

- a) foreign persons from member states of the European Union, member states of the European Free Trade Association (EFTA) – parties to the agreement on a European Economic Area (EEA) and foreign persons from countries that are not parties to the EEA agreement;
- b) undertakings having a seat in the EU member states, EFTA member states and in the countries which entered into agreements regulating the freedom of provision of services;
- c) foreign persons that do not have a place of residence or a seat in the EU or EEA; and
- d) foreign undertakings.

Re (a). Art. 13 of the Act made equal with Polish citizens the foreign persons from the EU member states, states – parties to the agreement on the EEA and countries respecting the freedom of establishment under international agreements. It is directly related to the principle of assimilation according to which EU undertakings should be able to act on terms no less favorable than Polish undertakings⁹⁶.

⁹⁴ J. Sieńczyło-Chlabicz, E. Bieniek-Koronkiewicz, op. cit., p. 31.

⁹⁵ M. Zdyb, op. cit., p. 76.

⁹⁶ Ibidem.



This principle also covers citizens of other countries not mentioned in sec. 1 if they meet one of the following conditions: (1) hold a residence permit, or (2) hold a long-term residence of the EC permit, (3) hold a temporary residence permit granted in connection with Art. 53 sec. 1 point 7⁹⁷, 13⁹⁸, 14⁹⁹ and 16¹⁰⁰ of the Foreigners Act of 13 June 2003¹⁰¹, (4) hold a temporary residence permit in order to reunite with the family, (5) obtained the consent for a tolerated stay, or (6) have a refugee status, and (7) enjoy temporary protection in the Republic of Poland or (8) enjoy supplementary protection, (9) hold a valid Pole's Card, (10) hold a residence permit on the grounds of being married to a Polish citizen, (11) hold a visa referred to Art. 61 sec. 3¹⁰² or 71a sec. 3¹⁰³ of the Foreigners Act (12), they reunite with family members who are citizens of the EU or EEA states. They may undertake and pursue economic activity on the same terms as Polish citizens¹⁰⁴.

The construction of the principle of equality adopted in the judgments of the Constitutional Tribunal remain fully applicable to the interpretation the Economic Freedom Act¹⁰⁵. Differentiation relies on distinctive features of specific groups of addressees of legal norms¹⁰⁶. Constitutional values are relevant, in particular if foreign undertakings benefit from the principle of equality only insofar they are subject to Polish law. Different treatment of foreign business is justified if it is in the interest of the state, for its safety or sovereignty.

⁹⁷ Art. 53 sec. 1 point 7—a family member of the foreigner entering into the territory of the Republic of Poland or staying in the said territory in order to reunite with the family.

⁹⁸ Art. 53 sec. 1 point 13—a person holding a long-term EC resident's stay permit, granted by another European Union member state, who intends to work or conduct economic activity pursuant to the applicable provisions in the Republic of Poland, undertake or continue studies or professional training, or demonstrates other circumstances justifying residence in the territory of the Republic of Poland,

⁹⁹ Art. 53 sec. 1 point 14—a family member of a foreigner, with whom he or she had stayed in the territory of another EU member state, accompanying him/her or wishing to reunite,

¹⁰⁰ Art. 53 sec. 1 point 16—a person arriving into or staying in the territory of the Republic of Poland in order to start or continue regular studies of higher education or regular doctoral studies, hereinafter referred to as "studies", also if he/she undertook studies in the territory of another EU member state, which studies he/she intends to continue or supplement in the territory of the Republic of Poland,

¹⁰¹ Consolidated text: Journal of Laws z 2006, No. 234, item 1694 as amended.

¹⁰² Art. 61 sec. 3—if the application was filed within the prescribed time limit, the *wojewoda* shall issue (...) a visa for the period of proceedings concerning a permit to reside for a specified period of time, and shall annul it after the final decision in the matter has been made.

¹⁰³ Art. 71 a sec. 3—the *wojewoda* shall issue a visa to the foreigner who filed the application during his/her lawful stay in the territory of the Republic of Poland, for the period of proceedings concerning a permit to settle or of a long-term EC resident to stay, and shall annul it after the final decision in the matter has been made.

¹⁰⁴ J. Sienczyło-Chlabicz, M. Nowikowska, *Podjęmowanie i wykonywanie działalności gospodarczej na terytorium RP przez przedsiębiorców zagranicznych*, in: C. Kosikowski (ed.), *Publiczne prawo gospodarcze. Ćwiczenia*, Lexis Nexis, Warsaw 2008, pp. 101–102; E. Wieczorek, *Zasady podejmowania działalności gospodarczej przez osoby zagraniczne na terytorium Polski*, in: A. Pawłowski (ed.), *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Wolters Kluwer Polska, Cracow 2007, p. 94.

¹⁰⁵ *Ibidem*, p. 77.

¹⁰⁶ M. Zdyb, *op. cit.*, p. 77.



Re (b). The place in which economic activity is conducted abroad is important for the second group referred to in Art. 13 sec. 1a of the Economic Freedom Act. This group was formed by the Amending Act of 10 July 2008¹⁰⁷. Undertakings having their seat in the EU member states, EFTA member states – parties to the agreement on the EEA and states that concluded with the European Community and its member states agreements regulating the freedom of provision of services, may temporarily provide services according to the rules specified in the Treaty establishing the European Community¹⁰⁸ without registration. Art. 5 item 3 defines an “undertaking” as a foreign person conducting economic activity abroad, whereas the term “foreign person” covers three categories of entities: natural persons, legal persons and units without legal personality.

Re (c). In the third group are foreign persons without a place of residence or a seat in the EU member states, EFTA member states – parties to the agreement on the EEA. They have the right to undertake economic activity in a limited scope in the form of a limited partnership, mixed joint-stock and limited company, limited liability company and joint-stock company as well as to participate in such companies, to subscribe and acquire their shares or stocks unless international agreements stipulate otherwise. The above provision are discriminatory, in particular as to the choice of a legal and organizational form of activity¹⁰⁹. In C. Kosikowski’s dissenting opinion a limited choice of forms does not affect the ability of doing business¹¹⁰. A. Banaszak argues that the principle of equality applies not only to Polish citizens but also to all natural persons subject to the jurisdiction of the Republic of Poland as well as to legal persons¹¹¹. The point of reference in the analysis should be not only the normatively described political system but also the system at work¹¹².

Re (d). The last group includes foreign undertakings. They act according to the rule of reciprocity unless ratified international agreements stipulate otherwise. They may establish branches with a seat in Poland and agencies.

¹⁰⁷ Journal of Laws No. 141, item 888.

¹⁰⁸ Journal of Laws of 2004 No. 90, item 864.

¹⁰⁹ K. Strzyczkowski, *op. cit.*, p. 84.

¹¹⁰ C. Kosikowski, *Ustawa o swobodzie...*, p. 85.

¹¹¹ A. Banaszak, *Prawo konstytucyjne*, Wydawnictwo C.H. Beck, Warsaw 2008, p. 481.

¹¹² A. Domańska, *Naruszenie praw cudzoziemców oraz mniejszości narodowych rozważania w oparciu od wybrane wystąpienia rzecznika Praw Obywatelskich, Prawa Człowieka. Humanistyczne Zeszyty Naukowe* 2003, No. 9, p. 123.



Art. 13 sec. 1 of the Act applies accordingly to branches of foreign undertakings with a seat EU member states, EEA states that are not EU member states and countries that are not parties to the agreement on the EEA, which enjoy the freedom of economic activity under agreements concluded by those countries with the EC and its member states.

Equality may be limited to protect the public interest¹¹³. The limitations may include the obligation to register a company, appointing representatives in Poland, or even to veto foreign investments posing a threat to the interests or security of the state. Examples include: (1) Banking Law of 29 August 1997¹¹⁴, (2) The Insurance Act of 22 May 2003¹¹⁵, (3) the Trading in Financial Instruments Act of 29 July 2005¹¹⁶, (6) the Games and Bets Act of 29 July 1992¹¹⁷, (7) Aviation Law of 3 July 2002¹¹⁸, (8) Radio and Television Broadcasting Act of 29 December 1992¹¹⁹. Under Art. 40 sec. 1 a branch of a foreign bank in Poland needs a permit from the Polish financial supervision authority, issued upon consultation with the Minister of Finance at the request of the interested bank. A branch must use business name of the foreign headquarters in the language of the country of origin along with a description of the bank's legal form translated into the Polish language, followed by the expression "a branch in Poland", keep accounts in the Polish language, notify the Minister of the Economy of any changes of the data subject to entry in the register.



FINAL REMARKS

The principle of equality of undertakings protects these entities from an unjustified interference of the state. Its interpretation should be maintained in the spirit of the Constitution. The Constitutional Tribunal evolved in its attitude toward equality in business. The principle of equality as seen

¹¹³ M. Zdyb, *op. cit.*, p. 82.

¹¹⁴ Consolidated text *Journal of Laws* z 2002, No. 72, item 665 as amended.

¹¹⁵ *Journal of Laws* No. 124, item 1151 as amended.

¹¹⁶ *Journal of Laws* No. 183, item 1538, as amended.

¹¹⁷ Consolidated text: *Journal of Laws* of 2004, No. 4, item 27, as amended.

¹¹⁸ Consolidated text: *Journal of Laws* of 2006, No. 100, item 696, as amended.

¹¹⁹ Consolidated text: *Journal of Laws* of 2004, No. 253, item 2531, as amended.



by scholars and the Tribunal can be characterized as an obligation to treat similar entities similarly. It allows justified differences and is related to the principle of social justice¹²⁰. Its essence is that everyone is equal before the law and has a right to equal treatment by public authorities. To assess the compliance of laws with the principle of equality a relevant common feature is needed. However, the imperative of equality is not absolute. There is always a degree of individualization of human rights and freedoms¹²¹. In the Tribunal's developed a concept of "compensatory privilege" whereby different treatment is justified if the same measure is applied to all interested in obtaining certain goods and the same attention is given to them. Differentiation, however, must be, firstly, rationally justified, secondly, proportional, and thirdly, related to other constitutional values, principles or norms.

Social justice is a manifestation of the "adjustment of the principle of equality to the benefit of citizens that are in the most difficult economic situation"¹²². In the Tribunal's opinion, in order to prove a departure from the principle of equality, it is not sufficient to assume that law is to be equal for all. Just law cannot function without differentiating. It does so by addressing norms only to some classes of citizens.

The constitutional principle of equality was specified in statutes by reference to the subject matter of activity¹²³. As such it may be defined as a level playing-field to be respected both by enterprises and lawmakers. The Constitution demonstrates significance of equality for the economy and delineates the scope of interference of public authorities¹²⁴. It is implemented to a greatest degree in relation to business from the EU states. Foreign persons from outside of the EU and EFTA are limited in their choice of organizational and legal form. The above regulation is in compliance with the widely accepted interpretation given by the Constitutional Tribunal according to which unequal treatment is prohibited, unless there is no common relevant feature.

¹²⁰ A. Chorążewska, *op. cit.*, p. 71.

¹²¹ B. Gronowska, *op. cit.*, p. 107.

¹²² Judgment of the CT of 28 May 1986, U 1/86, OTK 1986, item 2; also judgment of the CT of 10 October 2000, P 8/99, OTK 2000, No. 6, item 190.

¹²³ M.A. Waligórski, *op. cit.*, p. 220.

¹²⁴ K. Strzyczkowski, *op. cit.*, p. 81.