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Discrimination from a Criminological and Criminal-Political Perspective

Abstract: The subject here is the phenomenon of discrimination from the perspective of criminology, victimology and the tasks of criminal policy. The author first reconstructs the definition of discrimination and its causes, manifestations and negative consequences for people affected by discrimination. The issue of regulating manifestations of discrimination through criminal law regulations is then analysed. Ultimately, the belief is put forward that criminology and victimology provide material to recognize the real social harm of an act in the form of discrimination and unequal treatment in access to social goods. The findings in the area of criminal and criminalization policy make it possible to recognize that other criminalization prerequisites have been fulfilled. This finally makes it possible to call for the introduction into the petty offences law of a prohibited act in the form of unjustified refusal to provide a service that is within the scope of a given actor's offer.

Keywords: criminalization, discrimination, restriction of rights, unequal treatment, vulnerable people

Introduction

The idea of sustainable development is aptly captured in a sentence from the 1987 report of the World Commission on Environment and Development: it is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (Agenda 2030). The 2030 Agenda for Sustainable Development is a plan of action for people, planet and prosperity. The first of the five great transformative changes that are envisaged, defined as the 5 Ps of sustainable development (People, Planet, Prosperity, Peace, Partnership), state: 'Leave no one behind, i.e. reach excluded groups, create conditions and opportunities for all people to enjoy universal human rights and economic achievements' (gov.pl, n.d.).

These goals cannot be met without eradicating discrimination and lack of respect for diversity in social life. This is mentioned by the 2030 Agenda, which envisages 'a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity' (United Nations, 2015).

The problem of preventing discrimination and respecting diversity besets countries at different stages of development, with different economic statuses, cultures and socio-political models. It is vertical and horizontal in nature. The Preamble to the 2030 Agenda reads: 'As we embark on this collective journey, we pledge that no one will be left behind.' Fighting discrimination is addressed by Goal 5 of the 17 Sustainable Development Goals of the Agenda, which provides: 'Achieve gender equality and empower all women and girls.' The problem of discrimination also falls unquestionably under Goal 10, defined as '[r]educe inequality within and among countries', and within its framework under sentence 10.3, which reads, '[e] nsure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard'. Another important goal is Goal 16, which states that it is necessary to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels' (Redo, 2019, pp. 850–852).

The search for solutions to social problems such as discrimination must start with a diagnosis of the phenomenon – what is discrimination, what causes it and what social and individual effects it produces. At this stage, given the role of criminology and its relations to criminal law, penal policy and other state policies, the knowledge and experience of criminologists are essential and their findings can benefit the international community. It must be assumed that criminology involves a comprehensive study of deviant phenomena (taking the form of social pathology) and control mechanisms (Błachut et al., 2004, p. 19; Filipkowski & Guzik-Makaruk, 2019). Criminology should therefore provide an answer to the question of the aetiology and phenomenology of discrimination, and victimology an answer to the question of the negative consequences of discrimination. A criminological study should be completed with the development of a theoretical basis for combating these phenomena, including through a critical analysis *de lege lata* and the formulation of *de lege ferenda* postulates (within a so-called criminal policy).

This article aims to examine the problem of discrimination in criminological and criminal-political terms. It seeks to formulate an answer to the question of what discrimination is, what its causes are, its phenomenological image and consequences, and how penal legislation can or should respond to it. This study presents the preliminary assumptions of a criminalization policy sensitive to the problem of discrimination. These assumptions are intended to be complementary

to the algorithms for criminalization decisions already developed in Polish doctrine (Gardocki, 1990; Hryniewicz, 2011b; Kulesza, 2017). The issues of systemic discrimination related to the specific design of criminal law regulations are beyond the scope of interest of this study (for more, see Sitarz, 2024).

1. A diagnosis of the phenomenon of discrimination

It is crucial to define the phenomenon of discrimination as regards its diagnosis and prevention. It is assumed that discrimination is an unfair, harmful, selective and inappropriate treatment of a person based on their membership of a socially identifiable group, based on one or more characteristics (Jabłońska, 2017, p. 17). It is a situation where a person, because of various characteristics, is treated less favourably than another person would be in a comparable situation (Trociuk, 2013). In his socio-cognitive concept of prejudice in discourse, Teun A. van Dijk distinguishes 'the seven Ds of discrimination': 'dominance, differentiation, distance, diffusion, diversion, depersonalization or destruction and daily discrimination' (quoted in: Reisigl, 2010, p. 32).

A (new) criminological approach can therefore be proposed, under which, in essence, discrimination is an arbitrary, egoistical, unjust and unfair resolution – from the perspective of (universal and recognized) social and cultural standards – of a conflict of interest based on an irrelevant (in given circumstances) characteristic of a person (or a group of people). The conflict arises from, on the one hand, the rights and freedoms of a discriminated-against actor who lacks access to specific benefits, services and possibilities, and, on the other, a discriminating actor who has the freedom to pursue his/her own beliefs (based on prejudices and stereotypes) and to maximize his/her own material and non-material benefits. The narrowing of human autonomy in the social dimension may therefore be called discrimination. The key to the term discrimination is certainly a lack of reasonable and legitimate justification for differentiation in the legal and social situation of individuals. From this perspective, it must be concluded that discrimination is an (arbitrary) decision based on prejudices and stereotypes.

2. The aetiology and phenomenology of discrimination

To determine the aetiology of the phenomenon of discrimination is not an easy task. A review of the main criminological theories explaining discrimination was carried out by Fibbi, Midtbøen and Simon, who listed authoritarian personality theory, aversive racism theory and 'colour-blind racism'. While discrimination is often theorized as part of decision-making processes at the individual level, collective phenomena such as stereotypes and prejudices, and their diffusion or change, are also part of the dynamics between individuals and groups. In everyday life, actors inevitably classify people into social categories where new information is assigned to existing

categories. This categorization process is useful and even necessary to orient oneself in an environment rich in stimuli, information and events. However, information confirming one's own convictions tends to be stored, while information contradicting them tends to be disregarded, as it disrupts routine and requires an additional cognitive effort. Categorization assigns individuals to social groups; it often entails the division of social space into an 'in-group', which includes the categorizer, and an 'out-group'. It relies on stereotyping, an inevitable by-product of normal cognitive processes. In turn, structural discrimination shifts attention precisely towards such broader societal structures. The contextual dimension neglected in early theories provides tools to understand variations in discrimination across time and space and the way it is produced and reproduced by institutions. Compared to individual and organizational theories, the structural discrimination approach expands the analysis of discrimination, usually confined to one domain and a point in time, in the two significant directions of time and scope (Fibbi et al., 2020, pp. 21–42). According to Reskin (2000), all common social science theories on discrimination and the dominant legal approach to discrimination locate its source in intrapsychic processes, such as prejudices, ignorance, a sense of threat and a desire to maintain or improve one's position. However, they differ in whether they perceive the consequences of intrapsychic processes as motivated or automatic. The theories assuming that discrimination is motivated by dislike or fear of another group see it as an aberration within a generally fair reward system. Under social cognition theory, the basic cognitive processes through which the brain of every human sorts out data distort our perception, affect all our attributes and lead us all to favour members of our group. A laissez-faire decision-making process in worker organizations and other areas, including schools, voluntary organizations and the family, transforms these prejudices into discrimination against out-group members. If the cognitive processes leading to discrimination are universal, as the experimental evidence suggests, they cause a huge amount discrimination (for example in employment) that is neither intentional nor motivated by conscious negative feelings towards out-groups. In turn, organizational practices that define how the input of individuals contributes to personal decisions, and thereby accelerate, enable or prevent the activation of cognitive errors, are the direct causes of the greater part of employment discrimination.

Discrimination takes on various forms; its phenomenology is immensely rich and varied. In addition to restrictions based on sex, race, skin colour, religion or philosophy and age, discrimination can result from the discriminated persons' level of intelligence, skills, competencies (including language competence), economic situation (most frequently in the form of indirect or covert discrimination), name, disability and obesity. Discrimination also encompasses violence, including violence against women, domestic violence and sexual violence (Helios & Jedlecka, 2017, p. 50, 60–66; Kowalewska-Borys & Truskolaska, 2014, pp. 89–91). In addition, it is worth looking at discrimination in the future. The problem of accessibility for vaccinated individuals will raise criminal law dilemmas (for example, the question arises whether

it would be justified to limit participation in education or mass events for unvaccinated people). Microchip implants are certainly also a new challenge in anti-discrimination policy: they can on the one hand be a cause of discrimination and on the other be a tool for obtaining information leading to discrimination (Shainaz, 2018). The list is not exhaustive, because 'as a rule, any attribute which the dominant group considers undesirable in a given situation may lead to discrimination against any minority group characterised by that attribute' (Winiarska & Klaus, 2011, pp. 10–11).

It is difficult to determine the magnitude of discrimination, but it may certainly be evidenced by the number of court cases. Locally conducted studies show how huge and widespread the problem is (Blendon & Casey, 2019, p. 54; Molero et al., 2012). One in three European workers (34%) have felt discriminated against at work for some reason; in Italy, this number rose to 42% and in France, Spain and Great Britain to 37%, with the lowest number recorded in the Netherlands (21%). Another problem is highlighted by the Office of the Commissioner for Human Rights; a study carried out in 2018 showed that in the case of personal experience, only 2% of respondents replied that they had been victims of discrimination, while 3% said that their relatives had shared that experience. On the whole, over 90% of respondents declared that they had no direct experience of discrimination in the past year. As was rightly observed in the report, the findings should not give rise to optimism, since an analysis of the previous questions proved that the level of knowledge among Poles about what constitutes discrimination is very low, and a majority do not even recognize some discriminatory actions (also punishable by law) as discrimination (Domaradzka-Widła & Widła-Domaradzki, 2020, pp. 73–74).

3. A victimological perspective on discrimination

It is also necessary to make a victimological diagnosis. Most studies on prejudice have adopted a one-way orientation, exploring why members of majority groups become prejudiced against minorities, without considering the effects of prejudice and discrimination on their victims, minority members and subordinate groups. If we are to adopt a two-way approach, it is argued that understanding prejudice will also require knowledge of how members of minorities react to and defend themselves against it (Dion et al., 1978). The consequences of discrimination depend on its type; the situation of victims of gender discrimination differs from the situation of victims of disability discrimination. In any case, the effects of discrimination can be considered on an individual and a societal basis. The former encompasses mental effects, which include minority stress (Everett et al., 2016) and associated low self-esteem, anxiety and other permanent psychological damage (Stop Hate UK, 2023). Studies confirm that stigma, prejudice and discrimination create a hostile and stressful social environment, which causes mental health problems (Meyer, 2003). Writers also mention the externalization of

stereotypes. The awareness of the existence of an unfavourable social image, and suffering its social consequences by experiencing discrimination, activates a self-fulfilling prophecy (Popiołek & Januszek, 2018). Simultaneously, an increasing body of evidence suggests that racial discrimination is an emerging risk factor for disease and contributes to racial disparities in health (Williams et al., 2019). Discrimination on the societal level results in the brutalization of language, the marginalization of social groups, spatial segregation and lack of equal access to essential services and goods such as education and a health service. The loss of specific individuals (e.g. due to emigration) or the loss of their activity (demotivation) are surely a societal cost of discrimination. All these consequences are far-reaching, because research has found that even when someone does not explicitly encounter discrimination or hatred personally, seeing it happen to others can still have an effect on self-esteem due to vicarious traumatization. In addition, if someone belonging to a minority group sees another member being discriminated against, then they are more likely to assume this could happen to them too, leading them to feel more vulnerable and less confident (Stop Hate UK, 2023); perceived racial discrimination is a robust predictor of involvement in delinquency (Unnever et al., 2009).

The criminological perspective provides a new understanding of discrimination that is extremely rare in scholarly discourse, namely, that separate attention should be given to the problem of the criminogenic nature of discrimination. Studies in this field are not very well developed, though as early as 1899, Du Bois observed: 'In the case of the Negro there were special causes for the prevalence of crime […] he was the object of stinging oppression and ridicule, and paths of advancement open to many were closed to him' (quoted in Burt et al., 2012). For example, it has been established that discrimination is a common stressor among African Americans and may increase susceptibility to risk behaviour, such as early initiation of psychotropic substance use and physical aggression (Xie et al., 2020). One study has also shown the relationship between perceived racial discrimination, especially in childhood, and both arrest and incarceration reported in adulthood. The authors pointed out that the results of their study suggest that early perceived racial discrimination, especially when it involves the police (i.e. 'hassling'), increases the likelihood of African American adolescents engaging in illegal behaviour and being arrested and incarcerated. Racial pride moderates these effects: it reduces the likelihood of illegal behaviour in the absence of police 'hassling', but increases illegal behaviour and arrest when the discrimination comes from the police (Gibbons et al., 2020). The researchers argue that the harmfulness of discrimination has been conceptualized within the stress-process framework as an acute stressor causing mental and physiological suffering. In criminology, the general strain theory, which is a social-psychological extension of classic strain theory, applies a stress framework to crimes. This theory perceives crime as a way of coping with distress caused by strain, defined as negative social relations. Stress or negative emotions can put pressure on an individual so that he or she (1) attempts to achieve his or her objectives or obtain positively valued incentives through illegal channels; (2) attacks,

escapes or seeks vengeance on the source of negative emotions, or a substitute for them (frequently a more vulnerable and more readily available substitute); and (3) copes with or avoids his or her suffering by other behaviour. Thus, under the general strain theory, racial discrimination causes suffering that increases the likelihood of committing a crime (Burt et al., 2012, and the studies cited therein).

Finally, to paraphrase Harrell's (2000, p. 42) words about racism, it can be concluded that the toxin of discrimination that runs through the veins of society has yet to find an antidote. Discrimination can traumatize, hurt, humiliate, enrage, confuse and ultimately prevent the optimal growth and functioning of individuals and communities.

4. Discrimination and criminal policy

The findings of criminologists and victimologists allow the question of whether and how to regulate the prevention of discrimination in legal terms and what the role of criminal law is in this regard. The search for answers must take place at the *de lege lata* and *de lege ferenda* levels. To begin with, the history of law is, in a sense, a history of (structural) discrimination when law introduced or preserved societal inequalities (for example, the prohibition on the deprivation of life did not apply to everyone, such as slaves, peasants in a feudal state or sometimes women and children (Lang, 2012, pp. 16–19)). Simultaneously, the evolution of law is to make efforts to rise above prejudices in order to respect equality and diversity and recognize human rights. Consequently, international declarations, conventions and constitutions are cited as the first anti-discrimination instruments. Previous legislative instruments removing unjustified inequality before the law were also anti-discrimination regulations.

The Polish legal system provides a range of protection against discrimination. The vast majority of EU *acquis* which regulate the principles of equality and non-discrimination were developed in the area of labour and employment. Consequently, the most tangible changes in the Polish legal order in the process of the implementation of EU standards occurred in the provisions on employment (Kędziora et al., 2018, p. 20; Maliszewska-Nienartowicz, 2012, pp. 84–115; Pużycka & Wojnowska-Radzińska, 2011, pp. 265–266; Śledzińska-Simon, 2011). For greater certainty, the prohibition of discrimination is expressed in Article 32 of the Constitution of the Republic of Poland; in particular, the regulations on employment can be found in the Labour Code (Article 18(3)(a)–(d)). Moreover, the Law on the Implementation of Certain EU Provisions on Equal Treatment is an important legal instrument (Sejm of Poland 2023). From the perspective of the issue under analysis, allegations of incompatibility with the objectives set by EU directives have been made in relation to this law. One of its most conspicuous implementation deficiencies seems to be the question of establishing adequate sanctions for a violation of the rights guaranteed by

the provisions. EU regulations require that national legislatures design sanctions in such a way that they are effective, proportionate and dissuasive.

Two questions arise: whether these instruments are sufficient and whether criminal law measures responding to discrimination should exist in the legal system. In *de lege lata* terms, discrimination may be subjected to a criminal law assessment based on the provisions of the Criminal Code (primarily Articles 119, 194, 199, 212, 216 and 257) and the Code of Petty Offences (Article 135). The indicated regulations refer to discrimination quite clearly, but without using this wording. Notably, when making a criminal law assessment of discriminatory behaviour, other provisions of criminal law may also apply, for example, provisions on domestic violence (Article 207 of the Criminal Code) or on sexual violence (Articles 197–199 of the Criminal Code).

Article 138 of the Code of Petty Offences occupied a special place until, in a judgment delivered by the Constitutional Tribunal on 26 June 2019 (Judgment of the Constitutional Tribunal 2019), it was deemed unconstitutional in the part containing the words 'or intentionally refuses, without good reason, to provide a service to which it is obliged'; that part was repealed with effect from 4 July 2019 (Sejm of Poland 2019). A review of the analyses and positions in connection with that ruling (Jabłońska, 2017, pp. 107–116) and the glosses and discussions (Derlatka, 2018; Zarębska, 2019) of an earlier (2018) order of the Supreme Court (Judgment of the Supreme Court 2018) concerning the behaviour of a printer who refused to provide a service to an organization supporting the LGBT+ community make a list of arguments regarding the possible re-criminalization of discriminatory behaviour. Iwański was right to argue in 2019 that lending an anti-discriminatory nature to Article 138 of the Code of Petty Offences is a kind of 'prosthesis' resulting from the statutory gap in the area of introducing the penalization of discriminatory acts, 'with one's head held high', into the Polish legal system. Until this gap has been filled, the analysed regulation will remain the only measure providing a sanction for this type of behaviour; therefore, it seems that it should be used, but with caution (Iwański, 2019). Kulesza makes a valid point when he argues that:

> An interpretation in line with the Constitution of the Republic of Poland must lead to the conclusion that Article 138 of the Code of Petty Offences is applicable only to the few cases in the legal system where there is a statutory restriction of economic freedom and freedom of contract by an obligation to conclude a contract imposed explicitly by a relevant provision of law. The notion of 'reasonable cause' for refusing to conclude this type of service contract should also be understood to include considerations arising from the exercise of freedom of conscience and religion. However, the unbridgeable limit to this freedom is the commission of an act of discrimination to which an individual is not entitled, irrespective of his or her religious convictions or presented philosophy of life. Freedom of conscience and religion that manifests itself in discrimination against another person does not enjoy constitutional protection (2019, p. 127).

While Article 138 was in force in its entirety, a question also arose as to whether the penalty foreseen in the petty offences regime is not symbolic and therefore fails to meet the anti-discrimination objectives (Jabłońska, 2017, p. 197).

The cited legislative changes make it legitimate to ask whether a criminalization postulate can or should be formulated *de lege ferenda*. First, it is important whether, in the light of its international obligations, Poland must adopt criminal law measures. The practice of criminal prosecution had modest beginnings in Europe for decades, but in the past few years, due to the determination and pressure exerted by the governments assembled in the European Council, it has taken on a new shape and grown to a vast size. It is indicated that acts committed on EU territory should draw a response of adequate modernization and the Europeanization of legal measures relevant to the protection of legal goods (Pływaczewski & Guzik-Makaruk, 2014, p. 25). The 2000 European Council Directive requires the introduction of penalties but does not indicate their nature (Burek, 2007, p. 12), only that they 'must be effective, proportionate and dissuasive' (Wróblewska, 2020, p. 91). The lack of an obligation to criminalize seems all the more appropriate given that the Supreme Court held that a compensation awarded based on the Law on the Implementation of Certain EU Provisions on Equal Treatment should be dissuasive, of a general preventive nature and individual (Jabłońska, 2017, p. 198). This approach does not prevent a consideration of the validity of the criminalization of discrimination based on other arguments. Jabłońska (2021) is right to argue that the usefulness of the standardization provision cannot be understood in a way that requires a sanctioning standard encoded in it to guarantee behaviour in line with the content of that standard. Taking into account the functions of criminal (repressive) law, it cannot be expected that a sanctioning standard will eliminate a certain category of unlawful behaviour completely.

Criminal law as an instrument is not to be created spontaneously; certain rules need to be set, openly discussed, promoted and applied. Otherwise, the criminalization process will be vulnerable to the opportunistic exploitation of criminal law by politicians to put fresh ideas into effect and satisfy the temporary emotions of the public (Gardocki, 1990, p. 127). The doctrine of Polish criminal law has produced a body of important scholarly work structuring the criminalization process (Gardocki, 1990; Kulesza, 2017). Special attention should be paid to the arguments formulated by Hryniewicz; she has distinguished some dimensions of the coherence of legal goods' protection by criminal law, which must be assimilated into the theory of criminalization for an assessment of a draft sanctioning standard. It is a systemic coherence requiring the continuity of protection of goods, taking into account the axiological assumptions of the whole legal system. The second dimension is coherence understood as consistency of protection, requiring the extension of criminalization to new behaviour that infringes or endangers a legal good to a degree comparable to that of the criminalized behaviour. Then, coherence at the international

level requires the transfer of the scope of protection of a good accepted as a standard to national criminal law. Finally, coherence in the scope of penalties is imposed for attacks of a similar nature on specific legal goods (Hryniewicz, 2011b, p. 62). In the case of discrimination, assessment of the validity of criminalization is hampered by the rich picture of that phenomenon. Taking into account the criminological and victimological dimensions of discrimination, for the purposes of the criminalization process, essentially two types of behaviour can be distinguished:

1) Discrimination, in particular intolerance of diversity ('otherness') as stereotype-based dislike, taking the form of aggressive and violent behaviour (including hate speech, violence, domestic violence and sexual violence);
2) Discrimination, in particular intolerance of diversity ('otherness') as stereotype-based dislike, taking the form of denial of access to certain goods, services or employment.

The first form is generally criminalized in every legal system as a crime against life, health, property or honour. Some standardizations can indeed raise doubts as to whether they are an adequate response to cases of discrimination (for example, in respect of discrimination based on gender and age which manifests itself in domestic violence). A specific diagnosis is provided by a document prepared by the Office of the Commissioner for Human Rights, *Combating violence against women, including elderly women and women with disabilities. Analysis and recommendations* (Trociuk, 2013, pp. 91–104). It also remains to be considered whether types qualified with regard to an offender's objective should be introduced – in Europe, two-thirds of states have introduced stricter penalties for prejudice-motivated crimes (Godzisz, 2017, p. 76). They may be labelled 'hate crimes' (Brookman et al., 2022; Dudek, 2012, p. 35), and a doubt arises in connection with this type of crime: Are hate and prejudice worse than other emotional states accompanying criminal activity? Dudek recalls the arguments most frequently given in support of such a thesis, which include the argument of greater harm, the argument of the greater culpability of hatred, a (more severe) penalty as a message of condemnation of hatred and prejudice, the argument of oppression and compensation of wrongs. Dudek believes that there is no justification for such political-criminal decisions (Dudek, 2012, p. 36).

A real challenge is presented by a decision on penalizing discriminatory denial of access to certain goods, services and employment. There is no room for a broader discussion here, so only a few points can be mentioned. The starting point should be to define criminal law regulations' object of protection; the question arises of whether it is freedom and diversity on the social level or goods that are breached as a result of discrimination (in particular, the aforementioned mental and physical condition of harmed individuals). The former is an extremely vague concept that lies far beyond the classical understanding of a legal good in criminal law; one must therefore share the view expressed by Hryniewicz, who argues that 'non-discrimination is not a legal

good protected by criminal law. Instead, it constitutes a way (standard) of dealing with other legal goods where the protection of that good requires that equal access to it is ensured' (2011a, p. 106). This approach is also supported by the content of Article 31(3) of the Constitution, which indicates the substantive grounds for interference, among which the freedom and rights of others assume particular importance.

When making a decision on the criminalization of discrimination, it is necessary to remember that such a decision means taking into account two aspects: first, a conflict of interest, values and goods, and second, the subsidiarity principle of criminal law sanctions. Since every criminalization limits human freedom (meaning the freedom of choice of behaviour), every restriction of this freedom should be the last resort (the *ultima ratio* principle of criminal law) (Gardocki, 1989) and reasonably justified. Consequently, attention should be paid to goods, values and rights that are potentially restricted in connection with the creation of a (new) criminal provision to 'secure' the principle of equality and respect for diversity. These include economic freedom, freedom to manifest one's philosophy of life and to engage in behaviour compatible with it in the public space, freedom of religion, freedom of the media, freedom to organize socio-cultural events and freedom of artistic creation. In the case of the criminalization of behaviour restricting the availability of certain goods or services, what is in fact restricted under pain of penalty is, for example, freedom of contract, freedom to organize space, etc. However, these restrictions result from abandoning the absolute principle of fighting for one's own good (which is a natural impulse and ultimately forms the basis for functioning in a group or groups) in favour of supporting weaker actors. This approach is a measure of civilization and humanism.

Simultaneously, equality and diversity are not absolute values. Restrictions of the equality principle and respect for diversity can result from the need to respect the right to life and health, the right to security, and freedom in the private sphere. The following regulation is obvious: 'This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities' (European Union, 2000). Where restrictions on equality of access are reasonably justified (*verba legis*: 'it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are adequate and necessary'), unequal treatment 'loses' the status of discriminatory behaviour (in a primary manner). This principle must be fully actualized in the process of making a criminalization decision. Justified refusal of access to goods and services may not constitute a criminal act.

Remarkably, respect for or a violation of human dignity should not be a decisive criterion in the process of making a criminalization decision (for a different view, see Iwański, 2019, p. 43). It is an extremely broad concept, in which the real harm suffered by the two parties to a conflict of goods and values 'gets lost'. Moreover, this argument

can be relied on by both parties to the conflict. The conscience clause should not be used in the criminalization process because it itself leads to discrimination (for more, see Sitarz, 2023).

It is generally accepted that the subsidiarity principle assumes that the introduction of criminalization of a specific type of prohibited act requires that it is established beforehand that civil or administrative liability is not sufficient (Jaworska-Wieloch, 2018, p. 28). Such assumptions include the view formulated by Hryniewicz, who argues that 'discrimination is and should be punishable only when it expresses itself in behaviour liable to cause actual disorganization of social or economic life, which would be difficult to eliminate effectively using instruments from other, presumably less repressive, fields of law' (2011a, p. 111). One must share the view held by Kaczmarek (2008, p. 29), who argues that treating criminal law standards as secondary, sanctioning only behaviour contrary to the sanctioned standard arising from other regulations, leads to an incomprehensible and unacceptable procedure of making criminal law a mere appendix to other areas of law. Criminal law is not only a more effective tool for the eradication of undesirable acts; the (criminal) penalty condemns an act, and its evaluative nature – distinct from other repressive legal institutions – is its characteristic feature. Ultimately, an administrative sanction does not express social disapproval of an act, though it may appear to be more adequate judging by the nature of the breached duty of equal treatment in access to services. From this perspective, civil law measures appear to be insufficient too. In turn, a criminal conviction and its legal consequences do not make it possible to call for the criminalization of discriminatory behaviour in the form of denial of access to goods or services.

Conclusions

In sum, criminology and victimology provide material to recognize the real social harm of an act in the form of discrimination and unequal treatment in access to social goods. The findings in the area of criminal and criminalization policy make it possible to recognize that other criminalization prerequisites have been fulfilled. This finally makes it possible to call for the introduction into petty offences law of a prohibited act in the form of an unjustified refusal to provide a service that is within the scope of a given actor's offer.

Finding a solution to the problem of discrimination and ensuring respect for diversity is to ensure 'larger freedom' (as mentioned in the 2030 Agenda; Redo, 2019, p. 854). In view of the growing or increasingly noticeable clash of goods and freedoms, the prohibition of discrimination means to do so in an equitable manner, without undue, unreasonable or disproportionate prejudice to other actors. Much as multiculturalism (respect for diversity on the cultural level) is 'the process of widening moral boundaries, by finding compromises for mutual acceptance within a

democratic society' (Redo, 2019, p. 888), so should an inclusive society free from all discrimination, mentioned in Goal 16 of the 2030 Agenda, be the result of a common agreement on the limits of freedom in the areas of employment, education, economic freedom and one's own choice.

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