

Decision

dated 29 September 1997 (K. 15/97)

The Constitution Tribunal's sitting with the bench composed of the Chairman Zdzisław Czeszejko-Sochacki, Lech Garlicki (Reporting Judge), Stefan J. Jaworski, Krzysztof Kolasiński and Ferdynand Rymarz.

(...)

held

article 44, section 2, sub-section 1 of the Civil Service Act dated 5 July 1996 (Journal of Laws, Number 89, Item 402), to the extent it provides a basis for an earlier termination of employment for a female civil servant without her consent than the termination of employment for a male civil servant contravenes article 67, section 2 and article 78, sections 1 and 2 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government (Journal of Laws, Number 84, Item 426; amendments in 1995, Number 38, Item 148, Number 150, Item 729; 1996, Number 106, Item 488), because this provision contemplating different legal treatment of women and men amounts to discrimination on the grounds of gender.

Reasoning

(...)

IV

(...)

1. For this case it is central to determine the consequences of equality and a very special aspect thereof, namely the equal treatment of women and men. The principle of equality is generally formulated in article 67, section 2 of the constitutional provisions and has already been developed in decisions of the Constitutional Tribunal and other segments of the judiciary. Its essence is that „everybody recognized as a person before the law with comparable relevant features should receive equal treatment. Therefore, equal measures should be applied to them, without differentiation, either discriminatory or in the form of favoritism” (Decision U. 7/87 of the Constitutional Tribunal dated 9 March 1988, Constitutional Tribunal's Collection of Decisions 1988, p. 14). Hence there is no basis for inferring equality of different persons or situations from the Constitution since, in certain cases, equal treatment may even violate the principle of equality since it could mean either discrimination or favoritism of some persons over others.

Article 67, section 2 of the constitutional provisions saying that the residents of the Republic of Poland „have equal rights” not only endows formal and procedural meaning (equality understood as an order to treat all addressees equally) to the principle of equality but also the substantive meaning (what is referred to as equality), i.e. an the order to develop legal rules so as to provide for all consequences of the principle of equal treatment (*inter alia*, the Decision dated 24 October 1989, K. 6/89, Constitutional Tribunal's Collection of Decisions 1989, pp. 107-108). The crucial problem in the evaluation of regulations covering the principle of equality is to identify the feature that has been assumed by the lawmaker as the basis (criterion) for laying down specific differentiation. If the differentiation of legal status

applies to persons having an identical material feature then it would mean a deviation from equality in the abstract sense thereof; however it would not always amount to discrimination or favoritism in the above meaning. At this point, equal treatment becomes inseparably bound together with social justice (article 1 of the constitutional provisions, in fact, its literal meaning has been repeated in article 2 of the Constitution dated 2 April 1997). „Equality also entails the justifiability of selecting a given criterion for differentiating the holders of rights. The Constitutional Tribunal has many times underlined the connection between equal treatment and justice, allowing for differentiation by law, provided, however, that it can be justified” (Decision dated 28 November 1995, K. 17/95, Constitutional Tribunal’s Collection of Decisions 1995, part II, p. 183). It is a well-established element of the Constitutional Tribunal’s decisions (in particular, see the Decision dated 3 September 1996, K. 10/96, Constitutional Tribunal’s OTK ZU Number 5/1996, p. 281) that deviations from equal treatment of similar situations are permissible, subject, however, to the satisfaction of certain conditions, namely relevancy (direct connection between the purpose and essential contents of provisions including the norm in question), proportionality (the importance of the interest that should be furthered by the different treatment of addressees of that norm must be proportional to the importance of interests violated by reason of unequal treatment of similar persons) and relationship to other constitutional norms, principles or values that can justify the different treatment of similar persons (among them, social justice). When the above conditions are met, different legal treatment cannot be considered as discrimination which is prohibited under the Constitution.

2. The equal treatment of women and men is a special aspect of the general principle of equality. The prohibition of discrimination on the grounds of gender has been expressly laid down in article 67, section 2 of the constitutional provisions and, in addition, the situation of women has been defined in a separate provision (article 78) providing in general that „a woman ... shall have rights in all areas of life equal to the rights of a man” and providing for more specific guarantees for the equal treatment of women (including „the right to work and to pay equal to a man’s ...”), and obligating the State „to strengthen the position of women in society, especially working women.” Therefore, opportunities in a situation where the biological or social differences are of no material importance for the efficient continuation of profession... comes into violent conflict with equal treatment and the equal rights of women and men” (ibid.).

3. The Decisions of the Constitutional Tribunal, as referred to above, should be treated as the expression of two leading ideas:

- First, the evaluation of compliance between social regulations differentiating the legal status of women and men and the Constitution may and should be performed on the basis of equal treatment; in other words it is not possible to treat women and men as so different as to exclude the applicability of the general rule whereby similar holders of rights must received equal treatment under the law. Therefore, a different legal treatment is only permitted when furthered by other material Constitution-related arguments. The principle of social justice (article 1 of the constitutional provisions) is such a Constitution-related argument because, as regards the relations discussed herein, it is expressed as an order (article 78 of the constitutional provisions) to provide for the equal status of women when compared to men. Since, in social reality, the status of women is usually inferior (it is, *inter alia*, a result of the special role played by women in the area of motherhood and raising children), there are grounds, justifiable by the Constitution, for the enactment of regulations bestowing on women certain privileges in relation to men, being an instrument to ensure the actual equality of rights for women. In other words, the Constitution allows for what are referred to as leveling

privileges, i.e., privileges by law whose purpose is to even out the actual inequalities existing between women and men in social reality. The regulations laying down that kind of leveling privileges cannot be treated as discrimination or favoritism which are prohibited on the grounds of equal treatment. The lawmaker may lay down such regulations relying on its general freedom „to proclaim law corresponding to targeted social and economic goals” (Decision dated 7 December 1993, K. 7/93, Constitutional Tribunal’s Collection of Decisions 1993, vol. II, p. 410). However, in certain situations, where the biological and social differences between women and men are particularly prominent (for example, working in a mine), the provision for such leveling privileges becomes a constitutional obligation of the lawmaker. It should also be noted that this type of privilege has long been present in numerous Polish regulations in the area of labor and social security. Hence the lawmaker’s interference, if any, with the law in force would have to be assessed also from the point of view of protecting equitably acquired rights. The idea of leveling privileges is related to social rights here, however, the Constitutional Tribunal refrains from expressing its opinion whether and to what extent it could be deemed applicable to other types of rights, for instance, political rights.

- Secondly, the evaluation of the regulations discussed herein relies on a separate treatment of the rights and obligations ensuing therefrom. Therefore, putting women under any obligations or limitations that are not applicable to men, must always be assessed in the light of equal treatment. One of the crucial evaluation criteria will be the role of a given regulation to eliminate the actual inequalities between women and men that are present in society today. It is not the sole criterion, though (the analysis of biological and social differences between genders and the resulting necessity to protect women, e.g., by banning them from being employed in certain professions or certain positions, can also be very important), but it must always be analyzed in detail.

4. Similar leading ideas can be found in international law. The equal rights of women are discussed in the Charter of the United Nations (article 55, sub-section c) and the prohibition against discrimination against women also ensues from the general definition of equality as expressed in article 7 of the International Covenant of Economic, Social and Cultural Rights. Women are covered by the guarantees in article 78 and the whole article expresses the belief of the constitutional lawmaker that there is a special need to provide additional guarantees for women’s equal rights in our social order.

The Constitutional Tribunal has repeatedly ventured to interpret equal treatment against a background of regulations that differentiate the legal status of women and men; however, the alleged discrimination against women has always been the subject matter of its deliberations. In its Decision dated 3 March 1987, P 2/87, the Tribunal challenged the constitutionality of a regulation providing for identical limits of recruitment for medical studies (since there were more female candidates, the regulation provided for a more severe selection of female than male candidates). The Tribunal adjudicated that that the regulation provided for discrimination based on the criterion of gender and hence violated both article 67, section 2, and article 78 of the then Constitution. It has stressed that „the principle of equal treatment is of a fundamental nature... Any limitations in that respect, which do not spring from the effort to further the attainment of actual social equality, are not permitted” (p. 31). The Tribunal pointed out that „the lawmaker has been consistently striving, in the positive law, to ensure equal treatment of the genders and, to that effect, has endowed women with additional, when compared to men, rights... Such rights take into account biological and family considerations... They are a way to extend and strengthen a woman’s status and hence

express a tendency to secure equal treatment in practice - by applying equal rights.” (ibid., p. 29).

The Tribunal has taken a similar position in its Decision dated 24 October 1989, K. 6/89, whereby it adjudicated that the establishment of identical rules of eligibility for a miner’s pension was a violation of equality as „the equal treatment of persons who are not equal in fact” (p.110). The Tribunal held (p.108) that „the biological and social differences between women and men” are of material importance from the point of view of the process of ‘depletion’ at work and hence constitute a criterion calling for differentiation in the eligibility for pensions in favor of women. It has been emphasized there that the purpose of bestowing additional, when compared to men, rights on women in certain areas of life is to guarantee the actual equality of rights” (p. 107).

In its decision dated 24 September 1991 (Kw. 5/91), the Tribunal held that partial nonconformity between a provision of the Higher Education Act and the Constitution whereby the employment of an university instructor expires at the end of the academic year during which the instructor concerned reaches the age of retirement. Since that statute left the determination of that age to the general pension regulations, consequently, female university instructors had to retire after their 60th birthday, whereas male university instructors - only after their 65th birthday. Different rules have only applied to professors. where the retirement age was the same, i.e., 70 years. The Constitutional Tribunal has based its argument on the distribution of rights and obligations among the addressees of retirement regulations. As regards the right to retire, the provisions laying down a period five years shorter, both with regard to age and length of service, for women „were consistent with the essential orientation of Polish social security legislation...” (ibid., p.102), whereas the provision of a different retirement age in favor of women was „an additional, proper and fair regulation to the benefit of women” (ibid.). However, as far as the obligation to retire is concerned, imposing it on a woman five years earlier than on a man means that female university instructors „were put in a situation of inequality when compared to men ... [since) the equal treatment of women and men which is guaranteed by the Constitution also means occupational equality and equal opportunities (p.103). Therefore, in respect to female university instructors „the earlier [compulsory] retirement age becomes a factor of discrimination against women when compared to men whose occupational status is the same. The curtailment of women’s occupational opportunities in a situation where the biological or social differences are of no material importance for the efficient continuation of profession ... comes into violent conflict with equal treatment and the equal rights of women and men” (ibid.).

3. The Decisions of the Constitutional Tribunal, as referred to above, should be treated as the expression of two leading ideas:

- First, the evaluation of compliance between social regulations differentiating the legal status of women and men and the Constitution may and should be performed on the basis of equal treatment; in other words it is not possible to treat women and men as so different as to exclude the applicability of the general rule whereby similar holders of rights must received equal treatment under the law. Therefore, a different legal treatment is only permitted when furthered by other material Constitution-related arguments. The principle of social justice (article 1 of the constitutional provisions) is such a Constitution-related argument because, as regards the relations discussed herein, it is expressed as an order (article 78 of the constitutional provisions) to provide for the equal status of women when compared to men. Since, in social reality, the status of women is usually inferior (it is, *inter alia*, a result of the special role played by women in the area of motherhood and raising children), there are grounds, justifiable by the Constitution, for the enactment of regulations bestowing on women

certain privileges in relation to men, being an instrument to ensure the actual equality of rights for women. In other words, the Constitution allows for what are referred to as leveling privileges, i.e., privileges by law whose purpose is to even out the actual inequalities existing between women and men in social reality. The regulations laying down that kind of leveling privileges cannot be treated as discrimination or favoritism which are prohibited on the grounds of equal treatment. The lawmaker may lay down such regulations relying on its general freedom „to proclaim law corresponding to targeted social and economic goals” (Decision dated 7 December 1993, K. 7/93, Constitutional Tribunal’s Collection of Decisions 1993, vol. II, p. 410). However, in certain situations, where the biological and social differences between women and men are particularly prominent (for example, working in a mine), the provision for such leveling privileges becomes a constitutional obligation of the lawmaker. It should also be noted that this type of privilege has long been present in numerous Polish regulations in the area of labor and social security. Hence the lawmaker’s interference, if any, with the law in force would have to be assessed also from the point of view of protecting equitably acquired rights. The idea of leveling privileges is related to social rights here, however, the Constitutional Tribunal refrains from expressing its opinion whether and to what extent it could be deemed applicable to other types of rights, for instance, political rights.

- Secondly, the evaluation of the regulations discussed herein relies on a separate treatment of the rights and obligations ensuing therefrom. Therefore, putting women under any obligations or limitations that are not applicable to men, must always be assessed in the light of equal treatment. One of the crucial evaluation criteria will be the role of a given regulation to eliminate the actual inequalities between women and men that are present in society today. It is not the sole criterion, though (the analysis of biological and social differences between genders and the resulting necessity to protect women, e.g., by banning them from being employed in certain professions or certain positions, can also be very important), but it must always be analyzed in detail.

4. Similar leading ideas can be found in international law. The equal rights of women are discussed in the Charter of the United Nations (article 55, sub-section c) and the prohibition against discrimination against women also ensues from the general definition of equality as expressed in article 7 of the International Covenant of Economic, Social and Cultural Rights dated 19 December 1966 (Journal of Laws, 1977, Number 38, Item 169) or article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950 (Journal of Laws, 1993, Number 61, Item 784), as well as the European Social Charter of the Council of Europe which was recently ratified by Poland. The provisions of the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (Journal of Laws, 1982, Number 10, Item 71) are also of importance. This Convention, prohibiting discrimination against women (article 1) also includes the idea of „leveling privileges” by stating in article 4 that the adoption by a state of temporary special measures aimed at accelerating *de facto* equality between men and women... shall not be considered discrimination.

5. (...) The Constitutional Tribunal has evaluated the conformity between the rule laid down in article 44, section 2, sub-section 1 of the Civil Service Act and the Constitution. In the Constitutional Tribunal’s opinion such evaluation should be effected in relation to the aforesaid guiding ideas concerning social and employee regulations that differentiate the legal status of women and men.

The starting point shall be a statement that, as regards the evaluation of these regulations, the Constitution provides no basis for establishing such a close interrelation

between the rights and responsibilities of both male and female employees so that their general „balance” total was the same. In other words, there is no constitutional basis for adopting the hypothesis that if the legal status of a female employee contains a privilege when compared to the status of a male employee, then it is allowed (or may be even necessary), on the basis of equality, to balance that privilege by imposing on a female employee responsibilities that do not apply to any male employee. Therefore, it is not possible to justify the existence or imposition of such responsibilities with the argument that they are a consequence of the privileged position enjoyed by women. Naturally, the rights of female employees (their privileges in relation to men) can also violate equality and there are no obstacles to evaluate them from this point of view. However, the starting point for evaluating these rights must be the constitutional order to give equal rights to women (article 78 of the constitutional provisions) providing the background for consideration whether the differentiation in the legal status of men when compared to women amounts to discrimination against men under the general rule laid down in article 67, section 2. Where such differentiation stays within the limits of the „leveling privilege”, that is where it is backed by sufficient social arguments, in particular in view of giving to women *de facto* equality in the field of employment, then the differentiation in question may be deemed justified under such constitutional values as the general principle of social justice and, in particular, the principle of equal rights.

However, another method of evaluation should be applied to regulations contemplating the rights (privileges) of male employees in relation to female employees. In the circumstances of today’s Poland there are still no grounds for treating men as a weaker social group. Therefore, any such regulations should be immediately assessed in the context of the general criteria laid down in article 67, section 2 of the constitutional provisions; there are no grounds, however, for seeking their justification in article 78 of these provisions.

Therefore, it is the opinion of the Constitutional Tribunal that for the purpose of evaluating the adherence to the Constitution of the regulation contained in article 44, section 2, subsection 1 of the Civil Service Act, separate treatment of the rights and duties arising from that law in relation to female civil servants is warranted. Any other approach would collide with the consequences of article 78 of the constitutional provisions and would lead to the multiplication of inequalities, which is dubious both in logical and social terms, i.e., attempts to „even out” an inequality in one field by creating another inequality in a different field. The differentiation of citizens with the aim of arriving *at de facto* equality between men and women in the field of employment cannot serve as any basis or grounds for attempts to „even out” an inequality in one field by creating another inequality in a different field.

On one hand, article 44, section 2, sub-section 1 gives a privilege to female civil servants as they receive the right to terminate employment and retire earlier than men. This aspect of the provision under review is not the subject of complaint and we may only mention that the situation in that respect conforms with the principal orientation of Polish social security legislation (Kw. 5/91) and can be examined in light of the idea of a leveling privilege anchored in article 78 of the constitutional provisions.

However, on the other hand, the provisions contained in article 44, section 2, subsection 1, put female civil servants in a legal situation inferior to that of men because they also allow for earlier termination of employment against the will of the woman concerned. From this point of view, it is a clear differentiation in the legal status of men and women on the grounds of gender. A decision whether or not this differentiation is discriminatory (that is prohibited under the Constitution) shall depend on whether it is possible to present arguments for the differentiation. However, such arguments cannot be derived from the idea of leveling

or balancing inequalities since, as pointed out earlier, there are no grounds therefor in the Constitution.

Neither can such an argument be produced by relying on the quite obvious biological and social differences between men and women. The lawful classification may only be justified with the existence of different material characteristics in the addressees of those regulations when such characteristics are relevant, i.e., have a direct necessary connection to the differentiation made. This kind of relevancy exists in numerous professions and jobs where the biological differences between genders directly affect the possibility of having a given job performed by women and the rate of their „wear and tear” in such a job. It applies, for instance, to the job of a miner; the relevant consequences are embodied in Decision K. 6/89, however one should bear in mind that the Decision applied to a completely different situation. It referred to a provision granting a right to an employee and not a provision whereby an employee is put under an obligation. The situation examined herein is closer to the regulation challenged in Decision Kw. 5/91 where the provision concerned obligations and caused an earlier termination of employment of a female university instructor. In that case, the Tribunal noted the lack of relevancy in the feature of biological and social differences between genders as, in the case of academic work, „they are of no material importance for the efficient continuation of a professional career and subsequent promotion.” Once more, we should emphasize that it concerned a situation when a woman does not want to exercise the right to terminate employment after her 60th birthday.

It is also the opinion of the Constitutional Tribunal that in the case of civil servants, it is not possible to attach material importance to the biological and social differences between genders so that it would constitute sufficient justification for imposing different, more extensive obligations on women. The fact is that numerous other labor regulations applicable to a profession (Act on the Structure of Courts, Act on the Prosecutor’s Office, the amended Higher Education Act) provide for the same age when the opportunity or obligation to retire occurs, even without the interested party’s consent.

The Constitutional Tribunal also points out that the case under review applies to a very special occupational group, namely the civil service, where civil servants enjoy enhanced guarantees of permanent employment. The evaluation laid down in decision Tw. 7/94 with respect to women employed in state agencies, i.e., that by reason of the said permanent employment, they lose more than other female employees once they reach retirement age (p. 3), also applies to female civil servants. There were justifiable grounds for stating in the critical gloss to the Supreme Court’s judgment of 14 May 1996 that „the differentiation of the retirement age contributed to the belief that far more problems are connected with the employment of women and the increased costs of their employment. This belief is a source of discrimination against women at work” (I. Boruta, OSP 1997, Number 6, p. 335). Earlier termination may also have commensurable adverse material consequences. On one hand, the opportunity to obtain certain benefits .is lost (the Commissioner for Citizens’ Rights pointed out the example of the anniversary bonus referred to in article 57, section 1, sub-section 5 of the Civil Service Act) and, on the other hand (as pointed out in decision Tw. 7/94), considering the adverse relation between the amount of a retirement pension and a civil servant’s salary, retirement necessarily entails a deterioration in financial standing. These are certain „costs” that may be accepted by a women who selects the option of earlier retirement, however, if they are imposed on her against her will, it may be treated as discrimination.

Neither is it possible to produce any argument whereby the regulation in question could be considered as justified on the grounds of public interest prorated to the limitations imposed on the legal status of female civil servants. What is more, it is not necessary to indicate the

existence of such grounds when a decision is made to terminate employment. The standpoint of the Supreme Court is crucial here, namely that „the acquisition of the right to a retirement pension... constitutes sufficient grounds for termination of employment with an appointed state official by a notice of termination. The decision in this respect is left to the employer (under article 13, section 1, subsection 5 of the State Officials Act), however no additional restrictions or duties are imposed on it” (judgment dated 14 May 1996, *ibid.*, p. 717). There are no logical objections for relating the above argument to the interpretation of article 44, section 2, sub-section 1 of the Civil Service Act, since the essential contents of both provisions are identical. Nor are there any grounds to challenge the rectitude of the above interpretation as the Supreme Court’s authority to express its opinion on issues of labor law and social security regulations is indisputable. Hence, we must acknowledge that article 44, section 2, sub-section 1, when the grounds have contemplated what is therein materialized, give the basis for terminating employment at the employer’s discretion and does not put the employer under an obligation to provide any other arguments justifying the termination of employment. Therefore, should such an interpretation of article 44, section 2, sub-section 1 be deemed the only correct one and the effects of the application of this provision understood as above may become discriminatory, we should conclude that the provision as such is defective and not its practical application. Hence, it is necessary to recognize that the provision as such amounts to discrimination on the grounds of gender.

The above statement moves the entire matter of dispute to the realm of the Constitution and in that realm, under both present and future constitutional provisions, the Constitutional Tribunal has the exclusive power to adjudicate on the constitutionality of statutes.

6. It is the opinion of the Constitutional Tribunal that the conclusions expressed in Decision Kw. 5/91 concerning article 95, section 2, sub-section 1 of the Higher Schools Act, should be referred to the evaluation of article 44, section 2, sub-section 1 of the Civil Service Act. It is true that the Supreme Court, when expressing its opinion on the adherence to the Constitution of article 13, section 1, sub-section 4 of the State Officials Act, held that the Constitutional Tribunal’s decision cannot be directly related to the regulations examined there. On one hand the Higher Schools Act provided for the termination of employment by law, whereas under the State Officials Act the decision to dismiss an employee was left to the employer’s discretion. On the other hand, however, since the Sejm, which amended the Higher Schools Act, failed to remove similar provisions from other laws it indirectly expressed its belief that other such laws do not contain any discriminatory contents (judgment of 14 May 1996, *ibid.*, p. 716).

However, the above argumentation does not seem acceptable in this case. Article 44, section 2, sub-section 1 of the Civil Service Act does not provide for termination of employment by law but, likewise article 13, section 1, sub-section 5 of the State Officials Act, leaves it to the employer’s discretion. It does not change much from the point of view of a female civil servant, since it is still possible to arrange her retirement earlier than a man’s retirement without her consent. From the point of view of the operation of the civil service, the consequences of such discretion might even be more harmful than the automatic cessation of employment after a given age limit. The existing possibility of termination of employment for a woman who was allowed to stay on in the service after her 60th birthday could make her completely subordinate to her superiors, thus eliminating the degree of impartiality and neutrality required from a civil servant under articles 1 and 47, sub-section 4 of the Civil Service Act.

The following argument is also irrelevant, namely that if the Sejm had been familiar with Decision Kw. 5/91, it would have quashed or failed to adopt analogous solutions in other

laws. Nevertheless, the legislative decisions of the Sejm cannot be treated in terms of judicial precedents. Any and all amendments to a binding statute or the enactment of a new law is a process of compromise between various aspirations and interests and the abstract extraction of all constitutional consequences of a new regulation is not always possible. The actual contents of a provision surface only in the course of its application; the fact is that the ultimate meaning and legal effects of article 13, section 1, sub-section 5 of the State Officials Act have only been discovered through the decisions of the Chief Administrative Court and the Supreme Court. Therefore, if the Civil Service Act of 5 July 1996 contains a provision with a discriminatory effect, the duty of the Constitutional Tribunal is to recognize its nonconformity with the Constitution.

Therefore, we shall repeat the opinion expressed in the decision dated 24 September 1991 (Kw. 5/91, p.103): the equality of women and men which is guaranteed under the Constitution, also signifies equality in the field of employment and equal opportunities. The Civil Service Act allows one to deprive a female civil servant from the opportunity to continue her professional activity on equal terms with men. This provision becomes a factor of discrimination against women when compared to men with the same professional status and hence it contravenes both article 67, section 2 and article 78, sections I and 2 of the constitutional provisions.