

Decision

dated 3 March 1987 (P. 2/87)

The Constitutional Tribunal sitting with the bench composed of the Chairman, Judge Natalia Gajl and Judges Henryk Groszyk (Reporting Judge) and Stanisław Paweła.

(...)

held

1) That § 1, section 2 of the Ordinance of the Minister of Health and Social Care dated 31 December 1985 in the matter of Specifying Matriculation Limits and the Scope of the Entrance Examination for the First Year of Studies and the Principles for Awarding Medical Points in the 1986/1987 Academic Year (Official Journal of the Ministry of Health and Social Care, 1986, Number 2, Item 6) and § 1, sections 2 and 3 of the Ordinance of the Minister of Health and Social Care dated 30 December 1986 on Setting Admission Quotas and Entrance Examination Requirements to the First Year of Study and Granting Extra Points in Medical Academies in the 1987/88 Academic Year (Monitor Polski – Official Gazette of the Republic of Poland -1986, Number 35, Item 274) contravene article 84, sections 2 and 5 of the Higher Education Act dated 4 May 1982 (consolidated text in Journal of Laws 1985, Number 42, Item 201) and article 67, section 2 and article 78 of the Constitution of the People's Republic of Poland;

2) A three-month time limit is set from the service hereof in which the following provisions should be abrogated: § 1, section 2 of the Ordinance of the Minister of Health and Social Care dated 31 December 1985 in the matter of Specifying Matriculation Limits and the Scope of the Entrance Examination for the First Year of Study and the Principles for Awarding Medical Points in the 1986/1987 Academic Year (Official Journal of the Ministry of Health and Social Care, 1986, Number 2, Item 6) and § 1, sections 2 and 3 of the Ordinance of the Minister of Health and Social Care dated 30 December 1986 on Setting Admission Quotas and Entrance Examination Requirements to the First Year of Study and Granting Extra Points in Medical Academies in the 1987/88 Academic Year (Monitor Polski 1986, Number 35, Item 274); if the said provisions are not abrogated, the same shall become null and void after the lapse of the said time limit.

Reasoning

(...)

IV

(...) In order to answer the question on a point of law posed by the President of the Chief Administrative Court (NSA), one should begin deliberations by ascertaining how equality been provided for in the statutes and the regulations issued in pursuance thereof, specifically women's right to be taught referred to in the question from the President of the Chief Administrative Court.

Of crucial importance for this issue is the Higher Education Act dated 4 May 1982, (consolidated text in Journal of Laws, 1985, Number 42, Item 201). Article 84, section 2 of the Act says that „the overruling criterion for being admitted to an institution of higher learning is the assessment of a candidate's knowledge, artistic talent and skills or his physical fitness inasmuch as it is required by the type of studies.” In short, admissions to institutions of higher learning are made on the basis of entrance examinations whose scope, i.e. contents and requirements, is set by the appropriate Minister in consultation with the Central Council for Science and Higher Education (article 84, section 3).

The Higher Education Act specified in article 87, section 7, that the Ministers of Science and Higher Education and of Schooling and Education, in consultation with the appropriate Ministers and youth organizations may lay down special rules of admission including a full exemption from entrance examinations for prize-winners and finalists of national curriculum subject competitions. This provision does not raise any doubts because it is unequivocally addressed to all gifted students, both men and women.

The cited Act also contains another delegation for competent Ministers (article 84, section 5), according to which „a competent Minister, having requested an opinion of the Central Council and in consultation with national boards of nation-wide youth organizations, may stipulate other conditions which, aside from examination results, and taking into account the different levels of scholastic aptitude of students with different backgrounds and life experience; may have an impact on admission. to higher studies”. This provisions, too, applies both to men and women. (...)

When analyzing the cited provisions; a conclusion has to be drawn that the Minister has overstepped his norm of competence granting him the right to define other conditions – next to examinations results – that have an impact on admission to higher studies. The linguistic interpretation of article 84, section 5 of the Act clearly shows that such conditions are supposed to take into account „different levels of scholastic aptitude of candidates with different backgrounds and life experience.” However, it is unacceptable to subsume the, differentiation based on gender under „different backgrounds and life experience.” It is only for this reason that the cited provisions of both ordinances issued by the Minister of Health and Social Care are inconsistent with a rule of law of statutory rank, i.e. article 84, section 2 and 5 of the Higher Education Act. Furthermore, it has to be noted that what is meant here is the assessment of the scholastic aptitude of all candidates and not the criterion of gender that is supposed to be an extra condition for admission to higher studies.

Pursuant to article 84, section 5 of the Higher Education Act dated 4 May 1982 and article 3, section 4, sub-section 1, letter ‘a’ of the Act on the Office of the Minister of Science and Higher Education of 25 July 1985, the Minister of Science and Higher Education also issued an enactment concerning the manner and conditions of admissions to the first year of full-time studies in the 1986/87 academic year at institutions of higher learning supervised by the said Minister (Official Journal of the Ministry of Science and Higher Education I 985, Number 9, Item 40). In the enactment, the Minister set general admission quotas and indicated that admission was to be granted to successful candidates after a screening procedure (paragraphs 1 and 2 of the enactment).

Regardless of the methods of screening used, which is not an object of the question on the point of law, it has to be observed that women’s equal rights to be taught are not violated in any part of the screening procedure. In the cited regulations, there is no mention of dividing admission quotas between men and women. Other Ministers, save the Minister of Health and Social Welfare, have not introduced any such restrictions, either.

The ordinances issued by the Minister of Health and Social Care dated 31 December 1985 and 30 December 1986 go much further in this respect. It is provided in paragraph 1, sub-section 2, of both ordinances, that within the admission quotas to medical faculties 50% of those admitted are to be women and 50% men. Consequently, a situation may arise that a female student with better examination results than a male one will not be admitted to a medical faculty because of the division of quotas on account of gender. A similar situation may arise at faculties of dentistry where admission quotas were divided between men and women at 30% to 70% a denial of admission due to such a division of quotas may concern either men or women.

It follows from the statutory delegation included in article 4, section 2, sub-section 6 of the Higher Education Act that all Ministers are clearly entitled to set admission quotas to individual fields of study according to the principles laid down in the Act.

In accordance with the prevalent views in the doctrine of constitutional law, it is impermissible to restrict the legal position of a citizen, in particular to restrict his or her rights by enactments ranking below a statute. Any restrictions of civil rights provided for in the Constitution must be made only by act.

The setting of admission quotas to institutions of higher learning directly affects the position of a citizen. In the view of the Constitutional Tribunal, a regulation restricting the position of a citizen may not be introduced by a Minister's ordinance.

The previous decisions of the Constitutional Tribunal have staunchly supported the view that with respect to the regulation of civil rights and duties and other subjects of law, the Constitution of the People's Republic of Poland does not provide for any other course besides a statute (decree). In turn, pursuant to a statutory delegation and in order to enforce a statute no other form is allowed besides a regulation (Constitutional Tribunal decisions in cases numbered U.1/86, U. 5/86, P. 2/86 and U 2/86).

As S. Rozmaryn has already asserted (*Ustawa w PRL* [Law in the Polish People's Republic], Warsaw 1964, p. 256) „any exceptions from the fundamental rights and freedoms may be enacted only, directly by act; no referrals to executive provisions authorizing such exceptions are permissible.”

Exceptions from the fundamental civil rights and liberties can be made only when the Constitution itself and a statute enforcing the Constitution permit such exceptions. In this very case, such an interpretation cannot be applied because the Constitution does not provide for any exceptions to equality. The Tribunal, speaking earlier on the question of statutory delegation (Constitutional Tribunal Decision dated 28 May 1986, reference number U 1/86), said: „A different rule of law in an executive enactment than in a statute would be permissible only if it were of absolutely exceptional nature and were permitted *expressis verbis* in the delegation and not only implied.” While fully concurring with the foregoing reasoning, the absence of such a provision in the quoted enactments must be mentioned.

While considering the question on the point of law, it is necessary, however, to take the premises of the Constitution as the point of departure. Article 67, section 2 of the Constitution says, „all the citizens of the People's Republic of Poland shall have equal rights irrespective of gender, birth, education, profession, nationality, race, religion, social status and origin.” In this context, the rights of women and men are equal in Poland. This principle as far as it relates to women is stressed and developed in other constitutional provisions. Article 78 of the Constitution provides that a woman has the same rights as a man in all fields of public, political, economic, social and cultural life.

The cited provision of the Constitution continues to indicate *expressis verbis* (article 78, section 2, sub-section 1) that a guarantee of equal rights for women is provided by equal rights with men to work and for equal pay, to rest and recreation, to social security and to be taught as well as to respect one's honor and reputation and decorations and to hold public office.

The cited provisions of the Constitution leave no doubt about the equal rights of women and men. In light of the quoted provisions, one has to accept that under the Constitution of the People's Republic of Poland equality is a fundamental principle of the system of government. The principle of dividing the overall quota used by the Minister of Health and Social Care raises a number of doubts regarding the interpretation and enforcement of constitutional

equality. In the field of law, equality is observed when every citizen may become the addressee of any rule of law granting a specific civil right. Hence, from the point of view of equality, it is impermissible to differentiate between citizens on account of such criteria that result in the rise of closed categories of citizens with a different legal status. An example of such criteria is gender.

The position taken in the ordinances at issue by the Minister of Health and Social Care gives expression to a different concept of equality because in the name of equality it differentiates and divides people, which contradicts the very principle of equal treatment of citizens. The Minister of Health and Social Care encroaches upon the sphere of fundamental civil rights; in particular, he interferes with constitutional rank concerning all civil rights and duties.

Equality enjoys a special rank among all civil rights and duties. In this connection it may be pointed out that in constitutional doctrine the rank of equality is emphasized by treating it as a fundamental one, i.e. general enough to refer to all civil liberties, rights and duties (cf. e.g. R. Wieruszewski, *Równość kobiet i mężczyzn w Polsce Ludowej* [Equality of Women and Men in the People's Republic Poland], Poznań 1975, p. 97ff, F. Siemiński, *Podstawowe wolności, prawa i obowiązki obywateli PRL* [Fundamental Freedoms, Rights and Duties of Citizens in the People's Republic of Poland], Warsaw 1979, pp. 71, 73ff., L. Wiśniewski, *Gwarancje podstawowych praw i wolności obywateli PRL* [Guarantees of Fundamental Rights and Freedoms in the People's Republic of Poland], Warsaw 1981, p: 57ff). B. Dobkowski, *Konstytucyjne prawa i obowiązki obywateli PRL* [Constitutional Rights and Duties of Citizens of the People's Republic of Poland], Warsaw 1979, p.128ff) (...).

The above position is strengthened by interpretation itself, including the *ratio legis* followed by our lawmaker in a number of enactments of fundamental importance for our legal system. Systematic interpretation brings us to the conclusion that the lawmaker consistently aimed, in the whole positive law, at ensuring the equality of gender. Having this in mind, he granted extra privileges to women in order to implement equality (e.g. in labor law – maternity leave; in family law – maintenance for single women).

Such privileges recognize certain biological and family factors and are aimed at overcoming traditional views prevailing in society. Being a certain expansion and strengthening of the status and role of a woman, they mark a tendency to guarantee equality in practice by ensuring equal rights.

It is the intention of the lawmaker, therefore, not to restrict, but, on the contrary, to extend the guarantees that equality will be implemented. In view of this – taking into account the legislation to date and analyzing the *ratio legis* consistently followed by the lawmaker – it has to be asserted that any actions resulting in restricting gender equality are unacceptable.

This fundamental constitutional principle must be observed by the whole legislative and legal system of the People's Republic of Poland, which practically implement the fundamental civil rights and duties defined in the Constitution.

Even if one assumes that the enforcement of equality is in conflict with the enforcement of any other right guaranteed by the Constitution, the fact of actual existence of such a conflict would not justify any restrictions imposed on the use of one right in favor of another.

The above comment concerns situations where the Constitution does not provide any rules for resolving conflicts between the fundamental civil rights it guarantees. The current constitution does not provide any such rules.

The only way out is a proper interpretation of the constitutional provisions concerning these fundamental rights, in this case, specifically, equality. In this connection, however, it must be observed that – following accepted interpretation rules and directives – when the text of a law is clear, obvious and does not raise any linguistic objections it should be interpreted in a straightforward manner, i.e. in accordance with the rules of language.

The analyzed provisions of the Constitution are formulated in an unequivocal manner and therefore, one may not take recourse to extralinguistic interpretation directives suggesting the adoption of a convenient ad hoc *ratio legis* favorable to the interpreter in a given situation.

Furthermore, notice should be taken of the fact mentioned by the President of the Chief Administrative Court that Poland has ratified a number of international treaties providing for women's equal rights. The three most important ratified international treaties are the International Covenant on Civil and Political Rights (Journal of Laws of 1977, Number 39, Item 167), the International Covenant on Economic, Social and Cultural Rights (Journal of Laws of 1977, Number 38, Item 167) and the Convention on the Elimination of All Forms of Discrimination against Women (Journal of Laws of 1982, Number 10, Item 71).

In this respect, Poland, accepting and ratifying both Covenants and the Convention, lent support to the premises and principles of women's equality, which is in full agreement with earlier provisions of the Constitution of the People's Republic of Poland and women's rights guaranteed there. The rules of law included in Polish legislation grant citizens equal rights regardless of gender. In particular, women are guaranteed by constitutional rules equal rights with men in all spheres of life, including the right to be taught.

Formulated in a general manner in article 67, section 2, the constitutional principle of equality of citizens means, *inter alia*, that it is impermissible to enact statutes and other legislation introducing privileges for or discriminating against citizens on account of gender, nationality, race and religion as well as birth, education, occupation, social status and origin. It is a breach of this principle to set limits on freedom, to grant rights to or impose duties on citizens making them different on account of gender

The principle of equality emerging from the aforementioned constitutional rules is of fundamental importance, as it has already been stressed, for our Constitution. It has the rank of a general principle underlying all civil rights, liberties and duties. Any restrictions on it not following from an effort to attain real social equality are inadmissible.

Moving finally to the broad arguments of the Minister of Health and Social Care used to justify the introduction of quotas – whose expediency is not to be assessed by the Constitutional Tribunal as its domain is to adjudicate on the constitutionality and legality of law – the Tribunal wishes to observe that the Minister's arguments seem to be only partially plausible. The first argument related to the specialization in surgery claims that it calls for special psychophysical characteristics. This is a valid argument. However, it should not be overestimated. First, surgery is only one, and not the most numerous, division among many different specializations. Second, as it is well known, there are many excellent female surgeons. Surgery itself has different specializations, among which only some, e.g. bone surgery, may pose certain difficulties to women of a frail frame. This argument can be applied in part to men as well. What is even more important, when applying for admission to Academies of Medicine, students do not know which specialization they are going to choose in the future and what they will focus on. This was confirmed by the testimony of witnesses heard at the hearing. Moreover, the 1st and 2nd degree specialization takes place only after six years of medical studies. Thus, persons taking up medical studies cannot decide in advance on their future specialization. The Minister of Health and Social Care admits this.

Inasmuch as it is necessary to make professional selection and pre-orientation, it should be done at the stage of choosing a specialization and not by making admission to medical schools more difficult. If, however, one wanted to influence the choice of specialization, one should try to create all kinds of enticements and economic stimuli making the medical profession, having a unique rank among all other professions; more attractive and raising its moral values. The need to make the surgical profession more attractive was mentioned by Professor Wojciech Noszczyk in his testimony at the hearing.

The next arguments of the representative of the Minister of Health and Social Care seem to rely on the need to protect women, in particular, during pregnancy and childbirth (contraindications against employment in such specializations as radiology, nuclear medicine or hardships related to round-the-clock emergency duties).

It must be observed, however, that during pregnancy and childbirth women of all professions enjoy certain privileges awarded to them by our legislation in order to make up for physiological differences and assist women who are mothers. This point of view is broadly adopted by social and welfare legislation.

As far as the need to work emergency duty at night is concerned, it should be noted that this applies not only to the medical profession. Night duties are discharged by nurses, orderlies, pharmacists, etc. Night shifts are worked by weavers and female workers in other trades. Women are employed in Poland, as in many other countries, part or full time, on different shifts, including night ones. It is not banned by law. However, for social reasons labor legislation tries to ensure the best possible working conditions both with respect to health and remuneration to all those who have to work at night.

The final argument put forward by the Minister of Health and Social Care concerns the country's defense ability. In this respect it is necessary to note that military training objectives are primarily served by special military academies, where admission and quotas are quite naturally subject to the needs of the country's defense. The analysis of the needs of the Armed Forces is not at issue in this case. Nevertheless, it is worth mentioning that women in general, including female doctors, may be drafted into the military service if a need arises pursuant, for instance, to article 47, article 92, section 3, article 118, section 1, sub-section 2 of the Act dated 21 November 1967 on the Universal Duty to Defend the People's Republic of Poland (consolidated text In Journal of Laws dated 1984, Number 7, Item 31; see also_ § 1, sub-section 2 of the Ordinance of the Minister of National Defense of 12 March 1984 on assigning women to military service, Monitor Polski, Number 10, Item 71).

Finally, it must be concluded that the Minister of Health and Social Care adopted, in fact, a functional and relatively free interpretation of equality using teleological (extralinguistic, functional) directives. Hence, he breached the interpretation directives of the second degree. Namely, the Minister gave priority to a functional interpretation of his choice instead of following a linguistic interpretation since the provisions were clear.

Notwithstanding the substance of the premises followed by the Minister when dividing the overall admission quotas, it is inadmissible under the Constitution to divide candidates to institutions of higher learning according to gender if this results in setting different requirements for admission to higher education institutions. (...)