

Decision

dated 15 January 1991 (U. 8/90)

The Constitutional Tribunal sitting with the bench composed of Chairman Andrzej Zoll, and Judges: Czesław Bakalarski (Reporting Judge), Tomasz Dybowski.

(...)

held

that paragraph 14 of the Regulation of the Minister of Health and Social Care dated 30 April 1990 concerning the professional qualifications that are required of physicians performing abortions and the manner of issuing medical reports on the admissibility of performing such procedures (Journal of Laws; Number 29, Item 178) does not contravene article 2, sections 1 and 2 of the Act dated 27 April 1956 on the Conditions of Admissibility of Abortion (Journal of Laws, Number 12, Item 61 amended 1969, Number 13, Item 95) (hereinafter referred to as „the Act”) and articles 1, 3 and 41, sub-section 8 of the Constitution of the Republic of Poland.

Reasoning

(...) article 2, section 2 of the Act authorized the Minister of Health and Social Care to determine by regulation the professional qualifications required of physicians performing abortions and the manner of issuing medical reports on the admissibility of performing such procedures. Section 14 of the Regulation of the Minister of Health and Social Care dated 30 April 1990 concerns neither professional qualifications nor the manner of issuing medical reports. Consequently, its contents do not find support in a statutory delegation. The Constitutional Tribunal has pointed out in its t decisions on many an occasion that it is necessary for legal regulations contained in lower-ranking enactments to stay within the purview of a statutory delegation. This position is still believed to be right and valid.

The presented assumptions do not bear out, however, the assertion that in the case at hand the statutory delegation has been exceeded. To examine the case it is necessary to determine the nature of a statutory delegation. A statutory delegation is an authorization by the lawmaker to pass a rule of law, concerning a question defined in the delegation, given to an organ named in the delegation. A delegation is always an authorization to regulate by law a specific segment of social life where there has been no such regulation or where a different regulation is to supercede a current one.

To judge the validity of the petition by the Commissioner for Citizens' Rights it is thus of crucial importance whether § 14 of the Regulation of the Minister of Health and Social Care is a legal regulation of a specific question that until then had not been legally regulated or whether it is a different regulation from that which was in force previously. It is necessary to establish whether in the law as it is now (except for §14 of the Regulation of the Minister of Health and Social Care dated 30 April 1990) there is a rule of law of a constitutional or statutory rank that permits a physician to avoid making a medical report on the admissibility of abortion and performing an abortion, except, of course, for situations where failure to perform an abortion directly endangers a woman's life.

It has to be made clear in the first place that in our legal system there is no provision imposing a duty to make a report on the admissibility of abortion, from which exceptions could be provided to excuse the „shirking” of this duty. No such duty is imposed, specifically, by the Act. From the fact that the Act's article 2, section 1 does not provide for the possibility for a physician to avoid making a report on the admissibility of the procedure the duty does not follow – as the Commissioner for Citizens' Rights suggests in the petition – to make such

a report. The Act defines the conditions of admissibility of abortion, which means that by its very premises the Act concerns situations which should be an extraordinary legalization of conduct that is, in principle, unlawful. It is for this reason that these provisions are treated in the doctrine of criminal law as defining a type of justification or a circumstance excluding the illegality of a statute. The imposition of a duty to behave in a justifiable way is highly exceptional and usually concerns specific services acting to restore public order or carry out a decision of the authorities. One may not accept as valid the position taken by the Commissioner for Citizens' Rights who claims that a woman has the freedom to have an abortion and that this freedom is restricted by the Act. The law is actually the reverse. It is the ban on abortions that is primary, whereas the Act specifies only the conditions when it is admissible to disobey the ban.

Neither does the duty to make a medical report on the admissibility of abortion follow from article 1 of the Act dated 28 October 1950 on the Medical Profession (Journal of Laws, Number 50, Item 458). The provision asserts only an authority to make such reports. The range of activities that a physician is obliged to perform is set out in article 12 of the said Act.

It is impossible to accept as valid a claim made in the petition submitted by the Commissioner for Citizens' Rights that a report on the admissibility of abortion is supposed to assert the existence of objective circumstances arguing for an abortion, i.e. medical indications or difficult circumstances in which the pregnant woman finds herself. It was rightly claimed by the Minister of Health and Social Care in the reply to the petition that such a report contains elements of medical knowledge and social judgement as well as an ethical declaration. Furthermore, deciding upon the admissibility of the procedure, the report must be treated, in terms of ethics, in the same manner as the performance of an abortion. This makes a medical report radically different from a certificate issued by a public prosecutor pursuant to article 2, section 1 of the Act. Such a certificate is indeed only an assertion of fact (suspicion that the pregnancy is the result of a crime).

Similarly, no provision can be found in our legal system that would impose a duty on a physician to perform an abortion. Specifically, such a duty (except for cases of necessity) does not follow from article 1 of the Act, which the Commissioner for Citizens' Rights admits. Under the Act, the procedure may be at best admissible, provided that the conditions set forth in the Act are met. It is not, however, an event which is desired by the lawmaker in light of the Act.

By way of contrast, in the law as it is now, one can find rules of law permitting a physician to „shirk” this by making a report on admissibility of abortion or performing the procedure. The right of a physician to such „shirking” derived from article 82, section 1 of the Constitution guaranteeing freedom of conscience. Freedom of conscience does not only mean the right to have a specific view or belief, but, first and foremost, to act in accordance with one's conscience and to be free from coercion to act against one's conscience. This understanding of freedom of conscience is supported by the International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966 and ratified by Poland on 3 March 1977 (Journal of Laws, Number 38, Items 167 and 168). Article 18, section 2 of the Covenant reads as follows: „No one shall be subject to coercion which would impair his/her freedom to have or to adopt a religion or belief of his/her choice.”

The physician's right to „shirk” the report on the admissibility of abortion or the performance of the procedure follows directly from Principle 7 of the Deontological and Ethical Principles of the Polish Physician saying that: „A physician shall refuse to perform such acts that in his/her belief and according to his/her conscience may be harmful or unethical.” The Principles, by virtue of article 4, section 1, sub-section 2, article 41 and, in

particular, article 63, section 2 of the Act dated 17 May 1989 on Medical Chambers (Journal of Laws, Number 30, Item 158), have been incorporated into the system of law thus becoming rules of conduct binding on physicians.

The above quoted sources of law justify the conclusion that – regardless of § 14 of the Regulation of the Minister of Health and Social Care dated 30 April 1990 – there is a rule of law in the Polish legal system permitting a physician to shirk the report on the admissibility of abortion and the performance of an abortion with the exception of a situation when the failure to perform an abortion directly endangers a woman's life. In light of this, § 14 of the said Regulation does not introduce a new rule into the current system of law, nor a rule regulating a matter that has not been regulated yet or a rule regulating the same matter in a different manner. Therefore, what we face here is clear *superfluum* on the part of the lawmaker. While it is a clear defect of the legislative technique, it cannot be judged as a contravention of the statutory delegation. Not regulating anything, § 14 cannot contravene the delegation giving an authorization to regulate a segment of social life. A repetition of a rule of law of a statutory rank in a lower-ranking enactment cannot be taken to be a creation of a new rule, which constitutes a current problem of exceeding the delegation. Such a repetition may be treated only as information on already existing rules of law.

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