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Equal Treatment of the Insured in Pension Law. Selected Issues

Social security law (social insurance law) is a policy instrument used by the state to pursue, through law, the idea of social solidarity by ensuring a fair and dignified existence for all its citizens. Spreading the risk to which a person is exposed and extending it to the maximum number of persons exposed to the same risk (social solidarity) has a long tradition[1].

Generally, social insurance law is defined as a set of standards governing mandatory legal relations established for the purpose of providing the insured citizens with benefits from a dedicated public fund to satisfy their needs resulting from risks such as *force majeure* (acts of God)[2]. Thus, social insurance forms a specialized legal system aimed at the protection of social interest of citizens recognized as important from the social point of view. The constitutional legal framework of the right to social security has been set forth in Art. 67 of the Constitution under which any citizen shall have the right to social security if incapacitated for work by reason of sickness or impairment and upon having attained the retirement age. The scope and forms of social security to be specified by statute[3].

Due to the social and economic importance, passing laws concerning social insurance should take due account of constitutional principles. The social insurance system consistent with constitutional principles cannot be based on the idea of "absolute" equality of rights; yet, it must take into

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[1] J. Piotrowski, *Zabezpieczenie społeczne. Problematyka i metody*, KiW, Warsaw 1966, pp. 38 et seq.; A. Wąsiewicz, Z.K. Nowakowski, *Prawo ubezpieczeń gospodarczych*, PWN, Warsaw–Poznań 1980, pp. 20 et seq.; W. Szubert, *Ubezpieczenie społeczne. Zarys systemu*, Warsaw 1987, pp. 10–11.

[2] See in particular: T. Zieliński, *Ubezpieczenia społeczne pracowników. Zarys systemu prawnego – część ogólna*, PWN, Warsaw–Cracow 1994.

[3] This moves authorization to regulate the social security system and methods of pursuing its objectives to a sub-constitutional level. A statutory social rights protection should reflect the rights defined in the Constitution. K. Działocha, L. Garlicki (eds.), *Konstytucja Rzeczpospolitej Polskiej. Komentarz*, Vol. III, Wydawnictwo Sejmowe, Warsaw 2001, commentary to art. 67.

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account the universal character of insurance coverage and the relative uniformity of the criteria for granting social insurance benefits.

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Equality under the law is a fundamental principle of a democratic state[4], and, in consequence, a basic commandment of the civil rights and obligations. Its timeliness is undisputable considering the on-going reforms, particularly in the old-age pension law.

Art. 32 of the Constitution of the Republic of Poland[5] provides that all persons shall be equal before the law and no one shall be discriminated against in any aspect of life, for any reason whatsoever. According to this provision, all persons have the right to equal treatment by public authorities. It follows from this general principle that no one shall be discriminated against in political, social and economic life. There are no exceptions from equal treatment under the Constitution.

The message of Art. 32 has been extended to gender issues in Art. 33, according to which men and women shall have equal rights in family, political, social and economic life[6]. Sec. 2 of this article defines the principle in detail providing that men and women shall have equal rights, in particular, regarding education, employment and promotion, and the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honors and decorations. This articles provides an important ground for equality in social security.

Equality under the law as one of the fundamental principles of a democratic state of law is connected with the principles of justice and fairness. According to Perelman, abstract justice "is the principle of action under which persons belonging to the same category should receive equal treatment'[7]. Thus, in its broadest sense, equality means that all persons endowed with rights, sharing the same important characteristic should be treated equally, with the use of the same criteria. No persons can be discriminated against provided they share a specific characteristic with

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[4] See: J. Oniszczuk, *Równość– najpierwsza z zasad i orzecznictwo Trybunału Konstytucyjnego*, Leon Kozminski University, Warsaw 2004, p. 73.

[5] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

[6] A. Łabno, *Zasada równości i zakaz dyskryminacji*, in: L. Wiśniewski (ed.), Wolności i prawa jednostki oraz ich gwarancje w praktyce, Wydawnictwo Sejmowe, Warsaw 2006, pp. 45 et seq.

[7] Ch. Perelman, *O sprawiedliwości*, Warsaw 1959, PWN, pp. 36 et seq.

the rest of the sample. Thus, this "important characteristic" is decisive in making comparisons[8]. Situations don't have to be identical to deserve equal treatment. "The law may, and even should, provide for different treatment of citizens on the grounds of certain characteristics defined as relevant – in the sphere of equality of men and women this will certainly involve pregnancy and maternity..."[9]. The equal treatment principle is not an obstacle to differentiating between legal situation of the insured on a justified and fair basis, resulting from protection of their just interests. In social insurance law such stratification involves differences in regulating the rights of citizens within the same legal framework[10]. Differentiation in social insurance is admissible under the principle of fairness and justice, constituting the legal form of its implementation as regards distributive justice. Here, persons in the same formal category should receive equal treatment in the distribution of benefits[11]. Thus, the insured do not always receive equal treatment, e.g. when it results from their biological differences. The law may, or even has to, make adjustments to compensate for the actual gender inequality, in particular, unquestionably weaker constitution of women resulting from their social and biological differences[12].

In the constitutional assessment of regulations concerning social insurance rights the principles of fairness and justice are of particular importance[13]. Decisions of the Constitutional Tribunal allowing for differentiating between legal situation of persons belonging to the same relevant category, provided arguments in favor of departing from the general rule of equal treatment if such departure is reasonable, proportional to the significance of the infringed interest and are related to the constitutional

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8 K. Działocha et al., op.cit, commentary to art. 32; M. Chmaj (ed.), *Wolność i prawa człowieka w konstytucji RP*, Wolters Kluwer Polska, Warsaw 2008, pp. 56 et seq.

9 M. Matey-Tyrowicz, *Zasada równości traktowania kobiet i mężczyzn w świetle Konstytucji Rzeczpospolitej Polskiej i prawa europejskiego*, in: Równość kobiet i mężczyzn w europejskich systemach emerytalnych, Ośrodek Informacji Rady Europy, Centrum Europejskie UW, Biuletyn nr 2, Warsaw 2000, pp. 92 et seq.

10 T. Zieliński, op. cit., pp. 76–83.

11 Ibidem, p. 78; B. Wagner, *Równość w ubezpieczeniach społecznych*, in: Prawo pracy u progu XXI wieku, Stare problemy i wyzwania współczesności, Materiały z XIII Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Pracy, Białystok 2001, pp. 66–67.

12 Justification of the judgment of the Supreme Court of 3 December 1999, II UKN 233/99, OSNP 2001/7/235.

13 See judgments of the Constitutional Tribunal of 8 May 2000, files reference number SK 22/99; of 29 June 2001, K 23/00; of 24 April 2001, U. 9/00.

values, principles or standards[14]. It is inadmissible to differentiate between citizens due to criteria creating closed categories of different legal status. The principle of equality in the jurisprudence of the Constitutional Tribunal is clear. It means, in the first place, that persons within a particular class (category) have to receive equal treatment. All persons endowed with a specific relevant characteristic to the same extent, should be treated equally, thus using the same benchmark, without positive or negative discrimination[15].

The Tribunal holds that departure from equality does not mean that regulations are unconstitutional[16]. What we need is the assessment of the differentiation criterion being the basis for such departure. The reasons for differentiation have to: "1) be relevant, directly related to the purpose and essence of the regulations containing the standards in question, and be used for that purpose. Differentiation must be reasonably justified and without reference to discretionary powers; 2) be proportional. Differentiation must be proportional to the significance of interest which will be infringed upon as a result of unequal treatment; 3) be related to other constitutional values, principles or standards, justifying different treatment of similar persons"[17].

Thus, differentiation between legal situation of similar persons is more likely to be deemed constitutional if it is consistent with the principles of social justice or if it is aimed to implement those principles. Yet, it shall be unconstitutional a privilege if not supported by the principle of social justice. In this sense, the principles of equality before the law and social justice largely overlap[18].

What should be stressed is the significance of the principle of justice for the protection of acquired rights, especially with respect to entitlements acquired over a longer period of time, namely old-age pension entitlements. Legal literature takes the position that violation of the equality principle has to be stated before violation of acquired rights. Yet, the acquired rights theory does not presuppose an obligation to establish identical entitlements[19]. The doctrine of acquired rights is neither a constitutional nor

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[14] K. Antonów, *Prawo do emerytury*, Kantor Wydawniczy Zakamycze, Cracow 2003, pp. 73–74.

[15] For example judgment of the Constitutional Tribunal of 5 November 1997, K. 22/97, OTK ZU No. 3-4/1997, item 41.

[16] Judgment of the Constitutional Tribunal of 18 January 2000, K 17/99.

[17] See the judgment of the Constitutional Tribunal of 23 October 1995, K. 4/95, OTK ZU no. 2/1995, item 11; J. Oniszczuk, *Wolności i prawa socjalne oraz orzecznictwo konstytucyjne*, Oficyna Wydawnicza SGH, Warsaw 2005, pp. 89–90.

[18] Judgment of the Constitutional Tribunal of 3 September 1996, K. 10/96.

[19] K. Ślebzak, *Ochrona emerytalnych praw nabytych*, Wolters Kluwer Polska, Warsaw 2009, pp. 172 et seq.

statutory rule. Nevertheless, the Tribunal made, on numerous occasions, a reference to the acquired rights as the basis for control of enforcement of social rights[20]. Acquired rights protection in social insurance law is derived from the rule of law[21]. This doctrine should be analyzed in conjunction with the principle of a democratic state ruled by law (implementing the principles of social justice) expressed in Article 2 of the Constitution[22].

The principle in question is not an absolute value. It is admissible to change or limit those rights provided this is justified on the grounds of important legal, social or economic factors. The principle of equality may thus indicate a violation of the principle of acquired rights protection[23]. In the opinion of the Constitutional Tribunal, this principle applies to the rights justly acquired under the social insurance system[24]. In this context, an interesting decision is on the way, concerning reduction of old-age pension benefits paid to officers of uniformed services. In the lawsuit the applicants made reference to the constitutional principles of acquired rights protection and equality before the law[25].

It has been rightly noted in the doctrine[26] that the principle of the acquired old-age benefits requires to make it possible to indentify a comparable group of persons whose entitlements have been infringed upon. Thus, it is important to examine the violation of the principle of equality in the light of an abuse of a constitutional substantive right, which in the context of the old-age benefits requires a reference to be made to article 67 sec. 1 of the Constitution. It means that the right to social security after the attainment of the pensionable age requires to take into account other

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[20] T. Zieliński, *Ochrona praw nabytych – zasada państwa prawnego*, Państwo i Prawo, 1992, No. 3, pp. 3 et seq.; J. Oniszczuk, *Zasada ochrony praw nabytych w orzecznictwie Trybunału Konstytucyjnego – w sprawach z zakresu prawa pracy i ubezpieczeń społecznych*, Praca i Zabezpieczenie Społeczne 1999, No. 4, pp. 2 et seq.

[21] K. Działocha, *Państwo prawne w warunkach zmian zasadniczych systemu prawa* RP, Państwo i Prawo 1992, No. 1, p. 13.

[22] W. Sanetra, *Konstytucja wobec reformy ubezpieczeń społecznych*, Przegląd Ubezpieczeń Społecznych i Gospodarczych 1998, No. 3, p. 2; J. Oniszczuk, *Reforma świadczeń emerytalno-rentowych w świetle wyroku Trybunału Konstytucyjnego*, Praca i Zabezpieczenie Społeczne 1999, No. 10, pp. 32–34.

[23] See the judgment of the Constitutional Tribunal of 30 November 1988, K 1/88; Glosa do orzeczenia z 30 listopada 1988 r., K. 1/88, Państwo i Prawo 1989, No. 8; judgment of the Constitutional Tribunal of 28 June 1994, K6/93; judgment of the Constitutional Tribunal of 11 February 1992 , K. 14/91; see also: J. Oniszczuk, *Wolności...*, Warsaw 2005, pp. 241 et seq.

[24] See judgment of the Constitutional Tribunal of 22 August 1990, K. 7/90, OTK 1990, No. 5., and K. Kolasiński, *Prawa socjalne w orzecznictwie Trybunału Konstytucyjnego*, in: B. Von Maydell, T. Zieliński (eds.), Ład społeczny w Polsce i Niemczech na tle jednoczącej się Europy, Księga pamiątkowa poświęcona Czesławowi Jackowiakowi, Wydawnictwo Polsko-Niemieckie, Warsaw 1999, pp. 277 et seq.

[25] Motion submitted by a group of *Sejm* deputies concerning the consistence of the Act of 23 January 2009 on amendment of the statute on pension benefits provision to professional soldiers and their families and the statute on pension benefits provision to officers of the Police, National Security Agency, Intelligence Service Agency, Military Counter-Intelligence Service Agency, Military Intelligence Service Agency, Central Anti-Corruption Service, Border Protection Services, Government Protection Office, State Fire Services and Prison Services and their families with art. 2, art. 10, art. 31 sec. 3 and art. 32 of the Constitution of the Republic of Poland; K 6/09.

[26] K. Ślebzak, op. cit.

constitutional principles and values, including the principle of equality. In this context, the equality principle undoubtedly limits legislative discretion.

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On the grounds of the social insurance law the equal treatment principle was provided for in Art. 2a of the Social Insurance System Act of 1998[27]. The basis for implementing this principle were also international acts, where their numerous regulations have outlined a broadly understood equality before the law and prohibition of discrimination. The guarantees of equal treatment result from Art. 9 of the International Covenant on Economic, Social and Cultural Rights[28], from Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[29], and from item 12 Part I of the European Social Charter of the Council of Europe[30]. The principle of equality before the law is provided for in Art. 20 of the EU Charter of Fundamental Rights. It is defined as one of the fundamental principles of the Community law by the European Court of Justice[31]. Yet, on the grounds of social security law, the equal treatment principle was provided for in the Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security[32] and in the Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes[33] concerning supplementary social insurance schemes. Of considerable importance is also the Directive 2006/54/

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[27] I.e. Dz.U. Journal of Laws of 2007, No.11, item 74, as amended (hereinafter referred to as the Insurance System Act).

[28] Dz.U. Journal of Laws of 1977, No. 38, item. 169.

[29] Dz.U. Journal of Laws of 1993, No. 61, item 284.

[30] Dz.U. Journal of Laws of 1999, No. 8, item 67.

[31] J. Barcz (ed.), *Ochrona praw podstawowych w Unii Europejskiej*, Wydawnictwo C.H. Beck, Warsaw 2008, pp. 128 et seq.

[32] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ No. L. 6, 11.01.1979. Under art. 4 of the Directive 7/79 the principle of equal treatment means that there should be no discrimination on the grounds of sex either directly or indirectly by reference, in particular, to family status, in particular as concerns: the scope of the schemes and the conditions of access thereto, the obligation to contribute and the calculation of contributions, the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlements to benefits. It should also be noted that art. 7 of the Directive no. 7/79 provides for exceptions where member states may examine certain matters to the exclusion of the Directive. They concern, inter alia, benefits under old-age pension schemes granted to persons who brought up children; the acquisition of benefits entitlements following periods of interruption of employment due to the bringing up of children; the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife, and the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife.

[33] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ UE.L.86.225.40.

EC of the European Parliament and the Council of Europe of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[34].

The provisions of the social insurance law fail to provide a catalogue of explicitly defined principles of this branch of law[35]. On the other hand, the equal treatment principle was provided for *explicite* in Art. 2a of the Insurance System Act. The Parliament defined the criteria of the principle of equal treatment of all the insured, which are gender and family status[36]. The enumeration suggests limitation of the principle of equal treatment. The legislator failed, for example, to determine the age criterion and the basis for mandatory social insurance coverage. Such non-exhaustive enumeration of criteria[37] means that in these cases there are no legal grounds for differentiation between the insured on the grounds of gender and family status. As rightly indicated by B. Wagner[38], enumeration does not limit rights to protection against discriminatory measures of the insured. The Constitution prohibits discrimination without indicating, at least through examples, of the criteria, using general terms "for any reason whatsoever" which would allow the insured to enforce constitutional protection.

Art. 2a section 2 of the Insurance System Act provides a non-exhaustive criteria of the equal treatment principle: being covered by social insurance scheme, obligation of payment of and amounts of social insurance contributions, calculation of benefits, period of payment of benefits and retention of the right to benefits. Such exemplification of the equal treatment criteria of the insured indicates the direction for the interpretation of law[39]. As a general rule, the social insurance system does not exclude differences in the conditions of acquiring benefits and does not provide obstacles to differentiating between the legal situation of the insured having the insured employee status and conducting non-agricultural business activity.

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[34] Directive 2006/54/UE of the European Parliament and the Council of Europe of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (reedited), OJ. UE L 26.07. 2006, No. 2004, item 23.

[35] Social insurance law is characterized with strict and detailed provisions, which makes it difficult to construct catalogues of general principles in this area. On the notion of principles in social insurance, see: T. Zieliński, *„Zasady" w teorii i prawie ubezpieczeń społecznych*, in: Problemy ubezpieczenia społecznego, Wrocław 1988; T. Zieliński, *Ubezpieczenia*..., op. cit., pp. 119 et seq.; J. Jończyk, op. cit., pp. 25 et seq.; R. Pacud, *Zasady prawa emerytalnego*, Państwo i Prawo 2003, z. 3.

[36] These criteria are discussed by B. Wagner, *Równość*..., pp. 66–67.

[37] See justification of the judgment of the Supreme Court of 22.01. 2002, II UKN 58/01, OSNP 2003, No. 21, item 523.

[38] B. Wagner, op.cit., pp. 67 et seq.

[39] J. Jończyk, *Prawo zabezpieczenia społecznego*, Kantor Wydawniczy Zakamycze, Cracow 2006, p. 90.

The Supreme Court ruled that the prohibition to introduce different social insurance schemes for employees and persons conducting business activity could not be inferred from Art. 2a of the Insurance System Act[40]. In its justification, the Supreme Court held that Art. 2a of the Act contains a non-exhaustive list of areas subject to the equality principle. Yet, this does not mean that the differences in the types of benefits in particular insurance areas are excluded. Thus, the prohibition to introduce different social insurance scheme for employees and for persons conducting business activity, and, in consequence, to differentiate between benefits payable to the insured belonging to various insurance schemes cannot be inferred from this provision. The Supreme Court recognized a broad (however, not unlimited) discretion of the legislator to establish social insurance systems, including to define benefits payable under particular insurance schemes.

In another judgment, the Supreme Court examining the different treatment of old-age pension entitlements (set forth in Art. 29 of the Disability and Old-Age Pension Benefits From the Social Insurance Fund Act[41]) ruled[42], that equal treatment of the insured does not mean identical social insurance of all the insured. The rules for granting benefits by ensured employees may be different than of the insured under different titles, including home-based work. The Supreme Court examined granting early retirement rights to employees only in the context of discrimination of other insured categories. The basis for insurance is one of justified criteria of differentiation between the situation of the insured, accepted by legal doctrine and courts[43].

Differentiation between the entitlements to pension benefits set forth in Art. 32 of the Pension Act, depending on the type of employer, private or public, was declared inadmissible. The Supreme Court rightly ruled[44], that differentiation based on such criteria was inconsistent with the equality principle provided for in Art. 32 of the Constitution and in breach of Art. 2a of the Insurance System Act as regards non-justified differentiation in social insurance law based on the ownership status of

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40 Judgment of the Supreme Court of 22 January 2002, II UKN 58/01, OSNP 2003, No. 21, item 523.

41 Act of 17 December 1998 on Disability and Old-Age Pension Benefits from the Social Insurance Fund, i.e of 2009, Journal of Laws No. 153, item 1227.

42 Decision of the Supreme Court of 8 February 2006, III UZP 3/05, OSNP 2007, No. 5–6, item 84.

43 See also the decision of the Constitutional Tribunal of 12 September 2000, K 1/00, OTK 2000 No. 6, item. 185, which ruled that the provision of art. 29 of the Pension Act is consistent with Art. 32 sec. 1 of the Constitution.

44 Decision of the Supreme Court (7) of 13 February 2002, III ZP 30/01, OSNAPiUS 2002, No. 10, item 243.

employer[45]. Yet, after sec. 4a had been added to Art. 32 there emerged new doubts about applying this provision to persons performing work in special conditions with a private employer due to reduction of the circle of persons entitled to old-age pension benefits before the attainment of the pensionable age only to those insured who had been employed with a state-owned enterprise or a company transformed from a state-owned enterprise. This issue was finally resolved by the Constitutional Tribunal in its judgment of 14 June 2004[46], where is ruled that Art. 32 sec. 2 in part including the expression "in entities in which apply the lists of job titles determined under the existing regulations" and Art. 32 sec. 4a were inconsistent with Art. 2 and 32 of the Constitution. It emphasized that the possibility to provide for different benefit entitlements referred to in Art. 32 of the Pension Act on grounds of ownership status of the employer would constitute an unjustified discrimination against persons employed with non-public employers, and prejudice the principle of equality before the law. Performance of work in special conditions rather than the employer's status constitutes a criterion for entitlement differentiation.

The equal treatment principle applies to the insured within the meaning of Art. 4 item 1 of the Insurance System Act: every natural person covered by any type of social insurance scheme: old-age pension insurance, disability insurance, sickness insurance or accident insurance. There may be doubts about persons excluded from insurance under the Insurance System Act like public prosecutors subject to a separate pension benefit provision system. Their different legal situation may be qualified as violating the principle of universal social insurance coverage and the constitutional principles of equality (Art. 32), social justice (Art. 2) and the right to social security (Art. 67)[47].

According to J. Jończyk, the principle of equal treatment of all insured makes it possible to provide different social risk coverage under the social insurance system without the need to exclude any persons from it. Due to the universality of social insurance, social insurance schemes cannot be uniform; on the contrary, they must be different, subject only to the

[45] Z. Myszka, *Zaliczanie do stażu pracy terminowego zatrudnienia w prywatnym zakładzie pracy*, Przegląd Ubezpieczeń Społecznych i Gospodarczych 2001, pp. 20–22.

[46] P 17/03, OTK-A 2004, No. 6, item 57.

[47] J. Jończyk, op. cit., p. 90.

equal treatment principle on the grounds of sex, marital and family status. Therefore, there is a justified need to introduce separate legal regulations, especially in the area of new forms of employment[48].

An important right enjoyed by the insured is to claim damages for a breach of the equal treatment principle. Under Art. 2a sec. 3 the insured alleging not treated equally may claim damages from social insurance in court. The wording of this provision suggests that the conviction of the insured that a decision was discriminatory is of key importance. Then, Art. 83 of the Insurance System Act applies accordingly. Under its provisions, the social insurance institution issues decisions in individual cases concerning registration for membership in social insurance, history of insurance coverage, determination of insurance contributions and their collection, as well as annulment of contribution due, determination of rights to social insurance benefits and the amount of social insurance benefits. The *verbatim* interpretation of Art. 83 of the Insurance System Act leads to the conclusion that an authority competent in examining and resolving social insurence matters is the Social Insurance Institutions (ZUS) as the public authority of the first instance. Appeals go to the District Court – Labor and Social Insurance Court, to be filed through the authority which issued the decision, within the time limit and on terms and conditions set forth in the Code of Civil Procedure[49].

Art. 2a of the Insurance System Act constitutes a separate legal basis for filing for social insurance damages resulting from the provisions of substantial law. The literature righty has it[50] that the provision of 2a of the Insurance System Act is a procedural provision.

If follows from the inclusion of the equal treatment principle in the Insurance System Act that it applies to the whole insurance system. The Parliament decided, however, to highlight the equal treatment principle in the recently introduced Capital-Based Old-Age Pension Benefits Act[51],

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[48] J. Jończyk, *O szczególnych formach zatrudnienia i formach ubezpieczeń społecznych*, in: Z. Kubot (ed.), Szczególne formy zatrudnienia, Uniwersytet Wrocławski, Wrocław 2000, pp. 39 et seq.

[49] See in more detail: B. Wagner, *Postępowanie w sprawach emerytalno-rentowych*, in: U. Jackowiak (ed.), Wybrane zagadnienia prawa pracy i ubezpieczeń społecznych, GSP 2000, Vol. VI.

[50] B. Wagner, op. cit, p. 88.

[51] Journal of Laws No. 228, item 1507.

concerning the payment of old-pension benefits from funds gathered in open-pension funds (OFE). Art. 2 of the Act defines the principle of equal treatment as regards the determination of the amount of capital-based old-age pension benefits, listing, in particular, the following criteria: gender, health condition, marital or family status. It means that its is prohibited, in fixing the amount of capital-based old-age pension benefits, to provide for different benefit amounts, especially on the grounds of the above mentioned criteria. Pursuant to Art. 6 of the Capital-Based Old-Age Pension Benefits Act, in non-regulated matters apply the provisions of Art. 2a of the Insurance System Act. This reference shows the excessive zeal of the lawmakers, as the equal treatment principle included in the Insurance System Act is of superior character. On the other hand, its inclusion in the Act is aimed to reinforce the coverage of the insured in the procedure of vindication of claims before court.

Health condition may be an important criterion of differentiating between the situation in view of the right of choice between different paying entities granted by the reform to the insured. As those institutions are supposed to compete for the customer, they must not discriminate between persons due to parameters such as gender to avoid financial losses.

The introduction of the gender criterion is justified by the conditions affecting the level of old-age pension benefit[52], such as life expectancy assessed on the basis of life expectancy tables, uniform for men and women, published by the President of the Central Statistical Office (GUS). Capital-based old-age pensions are benefits paid from funds gathered by the insured under the obligatory capital accrual, part of the insurance system (II pillar)[53]. The old-age pension system consisting of two obligatory segments, uses a common principle of calculating the amount of benefits based on contributions to the system. In the II pillar, a member of a fund owns an old-age pension capital expressed in participation units originating from insurance contributions gathered on individual accounts with an open pension fund (OFE), increased by investment profits. This capital should finance the old-age pension benefit of the insured members of open pension funds (OFE) from accumulated capital. The pension is paid together with the old-age pension from the pension

[52] The Act has introduced two types of old-age pension benefits: periodical old-age pension paid to persons who applied for it before 1 January 2010 and life-long benefit capita-based old-age pension which may be paid only starting from 2014.

[53] The 1997 Organization and Functioning of Old-Age Pension Funds Act, Journal of Laws of 2004, No. 159, item 1667 as amended.

fund being part of the Social Insurance Fund; yet, is different from the legal point of view.

The right to receive capital-based old-age pension lasts for the maximum period of 5 years, between the ages of 60 and 65 of the insured. This benefit is financed with the capital gathered in an open pension fund (OFE) which, in consequence, reduces the pool of funds intended to be paid as the future life-long pension benefit[54]. The legislator, while determining the pensionable age entitling to receive the life-long old-age pension benefit, decided to make this age uniform for both sexes and fix it at 65 years of age. Such arrangements are consistent with the equal treatment principle. Yet, since the right to use the periodical old-age benefit is exercised usually by women, it might have a negative impact by reducing the amount of their life-long pension benefits. This raises questions about further functioning of different pensionable age on the grounds of gender. It has been rightly said in legal literature[55] that different principles concerning periodical capital-based old-age pension benefit and life-long capital-based pension may be objectionable as regards equal treatment of the insured on the grounds of sex (within the meaning of Art. 2 of the Act on capital-based old-age pension benefits and Art. 2a of the Insurance System Act in conjunction with z Art. 6 point 1 the Capital-Based Old-Age Pension Benefits Act). This is suggested by the conditions of determination and payment of periodical pension benefits – as compared with life-long pension benefits – established on more favorable principles (e.g. common average life expectancy, indexation, unlimited time of distribution of funds in the case of death of a woman in receipt of a periodical capital-based pension, different types of fees), which means that during a 5-year period of receipt (between 60 to 65 years of age) women are given a more favorable treatment than men who due to a higher pensionable age (65 years) are not entitled to acquire this benefit entitlement. Thus, if differentiation of pensionable age on the grounds of gender is itself admissible, there should not be too far reaching differences in regulating particular elements (e.g. method of benefit calculation) in the legal status of the insured woman and man. Moreover, it does not seem that the ac-

[54] *Emerytury kapitałowe*, in: A. Wypych-Żywicka (ed.), Leksykon prawa ubezpieczeń społecznych. 100 podstawowych pojęć, Wydawnictwo C.H. Beck, Warsaw 2009, p. 56.

[55] K. Antonów, *Cel i zakres rozwiązań przejściowych prawa emerytalnego*, in: Dziesięć lat reformy emerytalnej w Polsce, PSUS, Kudowa-Zdrój 2009, pp. 97 et seq.

tual situation of women is a justified argument in favor of retaining (after the year 2013) differentiation as regards the use of two different types of capital-based pension benefits. This lower pensionable age, by comparison to men who retire at the age of 65, entails shorter insurance seniority and less funds gathered in the second pillar of the pension insurance. These are the arguments speaking in favor of discontinuance of the difference in pensionable age on the grounds of gender.

6

Pensionable age is a legal category defined in accordance with the principle of universality of law, applying to all persons covered by social insurance. It sets the limit which when exceeded, gives the right to cease work and to receive financing from public funds. Pensionable age is determined at a similar, yet, different level for different classes of citizens[56]. Differentiation between men and women, also as regards their age, in the social insurance system is an instrument used to ensure the overall equality situation of women with respect to men. This takes the form of a compensatory privilege (positive discrimination) aimed to reduce, with the use of legal measures, the actual inequalities between sexes in the social life[57]. Differentiation in entitlements is admissible and justified provided it meets certain criteria such as relevance, proportionality, relation to other constitutional values and principles justifying different treatment of similar persons. Differences in pensionable age related with the right to receive benefits result from the broadly understood civilizational circumstances such as economic development, social relations, historical experience, cultural factors, demographic factors and the ensuing objectives of social and economic policy of particular countries[58]. Differentiation in pensionable age of women and men is a sign of unquestionable biological differences and different roles played by women and men in the family life.

Under the applicable regulations the pensionable age of woman is 60 years and of 65 of men. Special treatment is accorded to two professional

[56] Differentiation in pensionable age is based on the criteria of sex and type of work. Retaining differentiation in pensionable age due to gender or type of work is justified, *inter alia*, by tradition, procreativity, educational and social roles and the weaker physical and psychological construction of women as well as personal preferences, see: A. Wiktorow, *Zróżnicowany wiek emerytalny - korzyści czy dyskryminacja kobiet*, in: Równość kobiet i mężczyzn w europejskich systemach emerytalnych, Ośrodek Informacji Rady Europy, Warsaw University, Centre for Europe, Biuletyn, Warsaw 2000, No. 2, pp. 51 et seq.

[57] U. Jackowiak, *Wcześniejsze emerytury dla kobiet*, Praca i Zabezpiecznie Społeczne 2005, No. 11, p. 12.

[58] In more detail see: B. Wagner, op. cit., p. 34.

groups, miners and teachers who have retained the right to retire at a lower age[59], as a result of performing work in special conditions or in a special character. Such preferential treatment violates the constitutional principles of equality, fairness and justice[60].

The experience of the pension reform clearly the need to make pensionable age uniform. The legal doctrine[61] emphasizes that the retention of a different pensionable age on the grounds of sex, in the light of the established methods of calculating old-age pensions may have negative consequences for the financial situation of retired women. It should be noted that the issue was addressed by the Ombudsman who in 2007 submitted a motion to the Constitutional Tribunal to ascertain consistence of Art. 24 of the Pension Act providing for pensionable age of women to be 5 years lower than of men with Art. 32 and Art. 33 of the Constitution of the Republic of Poland (K 63/07). Differentiation on the grounds of sex may constitute women's discrimination in social security system and deprive them of the right to receive the same pension benefits as men (an estimated 66% of the benefit amount received by men). In the opinion of the Ombudsman, if in the new pension model the attainment of the pensionable age is the only criterion, and such age is different for women and men, then, because capital gathered affects future pension benefits, the final factor differentiating men and women will be the pensionable age. This proves that the law in question is discriminatory on the grounds of gender, and as such is in breach of Art. 32 and 33 of the Constitution[62].

Reference should also be made to the rulings of the Constitutional Tribunal concerning termination of employment contract with female employees due to their attainment of the pensionable age, lower than for men[63]. The attainment of a specific age as the reason for terminating the employment contract was deemed a violation of the principles of equality (Art. 32 and

[59] Act of 27 July 2005 on amendment the act of old-age and disability pensions paid from the Social Insurance fund and the Teacher Charter Act, Journal of Laws No.167, item 1397.

[60] Such an opinion is expressed by J. Jończyk, *Ubezpieczenie emerytalne – stan obecny i widoki na przyszłość*, Praca i Zabezpieczenie Społeczne 2005, No. 9. According to the author, the Act is inconsistent with art. 67 sec. 1 of the Constitution. Coverage of persons working in special conditions or in a special character should be limited to the risk of work incapacity before the attainment of the pensionable age under disability pension insurance scheme. See also critical remarks by B. Wagner, op. cit., pp. 51 et seq.

[61] A. Klimkiewicz, *Problemy kształtowania wieku emerytalnego kobiet i mężczyzn w Polsce*, in: E. Kucka (ed.), Ubezpieczenia w gospodarce rynkowej, UWM, Olsztyn 2008, pp. 331–341.

[62] See in more detail: H. Pławucka, *Ubezpieczenie emerytalne w orzecznictwie Trybunału Konstytucyjnego*, in: Dziesięć lat..., p. 104.

[63] See decisions 24.9.1991, Kw. 5/91, OTK item 5/1991; 29.9.1997, K 15/97, OTK No. 3–4/1997, item 37; 5.12.2000, K 35/99, OTK No. 8/2000, item 295; of 13.6.2002, K 15/99, OTK No. 5/2000, item 137.

Art. 33 of the Constitution) and anti-discriminatory provisions of the Labor Code (Art. 113 of the Labor Code, Art. 183a of the Labor Code and Art. 183b of the Labor Code)[64].

7

In its decision of 23 October 2007 (P 10/07) 2007 the Constitutional Tribunal of ruled on the legal situation of persons born before 1 January 1949, a group not as yet covered by the pension reform. The Tribunal found that Art. 29 sec. 1 of the Pension Actis is inconsistent with 32 and Art. 33 of the Constitution[65], to the extent to which it does not give the right to early retirement to a man, who – unlike a woman (acquiring this right after the attainment of the age of 55 years and having at least 30-year contributory and non-contributory period) should attain the age of 60 years and have at least 30-year contributory and non-contributory period.

The Tribunal ruled that the feature proving similarity of insured persons is an insurance seniority, 30 years for women and 35 years for men. At the same time, under this provision men have to meet another condition: a complete work disability. Such differentiation had to take into account the constitutional principle of equality and prohibition of discrimination on the grounds of gender. The Tribunal held that the law in question, by excluding the use of the same criteria of early retirement for women and men born before 1 January 1949, denied equal treatment to persons sharing the same important characteristics. Its justification said that the right to social security is guaranteed by the Constitution (Art. 67). The Parliment defines the contents and the form of this right, yet possible discretion is limited by the Constitution. Compensatory discrimination is aimed to ensure real equality of persons who would otherwise be underprivileged. The actual inequalities between women and men observed in real life (biological and social differences) justify the introduction of different pensionable age and insurance seniority for both sexes: lower for women, higher for men (by 5 years as regards women's insurance seniority period). The questioned provisions gave excessive preferences to women, discriminating against men,

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[64] Z. Hajn, *Dopuszczalność wypowiedzenia stosunku pracy ze względu na osiągniecie wieku emerytalnego lub nabycie prawa do emerytury*, in: Z. Góral (ed.), Z zagadnień współczesnego prawa pracy. Księga jubileuszowa Profesora Henryka Lewandowskiego, Warsaw 2009, pp. 277 et seq.

[65] The ruling is analyzed by J. Sobczak, *Koniec z dyskryminacją mężczyzn w prawie emerytalnym – wpływ wyroku Trybunału Konstytucyjnego z 23 października 2007 r. na orzeczenia sądowe*, Praca i Zabezpieczenie Społeczne 2008, No. 2, pp. 25–31.

through setting the requirement of total work disability in order to acquire the right to early retirement.

Abolishing the availability of early retirement before the attainment of the pensionable age is one of the basic assumptions of the new pension system which is based on uniform principles of acquiring pension rights by all insured, thus according coherence and fairness. In this context, attention should be paid to the solutions adopted in the area of early retirement rights in connection with the performance of work in special conditions or in a special character. The Temporary Pension Act[66], concerning pension of the insured born after 31 December 1948 – employees performing work in special conditions or in a particular character, introduced important modifications to such rights[67]. It considerably limits the scope of persons entitled to early retirement benefits, and, what is the most important, leads to a gradual elimination of early retirement in connection with performing work in special conditions. This means that differentiation in the pensionable age on the grounds of the type of work will be finally abolished.

In a case brought by the Polish Labor Union the applicants[68] argued that the constitutional principles have been violated, especially as regards ending the temporary pension scheme. Definitions such as "work performed in special conditions or in a special character" limiting the scope of a temporary pension scheme are unclear. Such measures are a sign that the Act aimed to limit and finally abolish early retirements rights enjoyed on the grounds of work performed in difficult and risky professions.

It seems that the reformers modifying the scope of persons entitled to benefit from the temporary pension scheme acted in accordance with the law. It may be assumed that the end of an early retirement on the grounds of performing work in special conditions or in a special character is aimed to ensure implementation of the principle of equality and justice in the social insurance system. The temporary pension scheme is a fair

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66 Journal of Laws of 2008 no. 237, item 1656.

67 See Decree of the Council of Ministers of 7 February 1983 concerning pensionable age of employees working in special conditions or in a special character, Journal of Laws No. 8 item 43 as amended.

68 K27/09.

compromise between the protection of acquired rights and their justified modification[69].

9

In sum, special emphasis should be placed on the fundamental role of the constitutional provisions and of pension law. Under the equality principle the law must give the equal treatment to beneficiaries sharing the same relevant characteristic. It may be assumed that the equality principle is a barrier against unfair differentiation between the insured on the basis of such criteria as age, sex, basis for insurance, family situation. Compliance with this principle does not necessarily lead to identical treatment which may put certain groups at a disadvantage contrary to the social justice principle.

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[69] Expert opinion prepared by M. Szczepańska, *Opinion concerning the government draft version of the Bridging Pension Schme Act* (paper1070), Biuro Analiz Sejmowych, www.sejm.gov.pl.