

Controlling the Entry of Male and Female Students in Medical and Dental Colleges

Asma Javaid v Government of Punjab
2015 CLC 907

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Introduction

In *Asma Javaid v Government of Punjab*, the Honorable Lahore High Court ('LHC') was approached in its writ jurisdiction to determine the constitutionality of a notification issued by the Pakistan Medical and Dental Council ('PMDC'), which fixed the number of seats for both male and female students at 50 percent each in medical and dental colleges across the province of Punjab. The LHC found the notification *ultra vires* Article 25 of the Constitution of the Islamic Republic of Pakistan 1973 ('Constitution'), which guarantees equality of citizens before law, and consequently declared it unconstitutional and thus of no legal effect.

This case note expounds upon the judgment rendered by the LHC, its holding and the reasoning it employed. Further, it sheds light on the impugned notification through the lens of feminist jurisprudence to analyze both the notification and the consequent judgment. This would in turn lend credence to the central theme propounded herein, which is that while the judgment's progressive nature precludes the pigeonholing of women into stereotypical roles and professions, it does little to alter the course of the established jurisprudence on the matter.

Facts and Ruling

The petitioners filed a writ petition under Article 199 of the Constitution, assailing the constitutionality of a notification issued by the PMDC, dated 18-09-2014. The impugned notification fixed a quota of 50 percent each for both male and female students applying to medical and dental colleges for the academic year 2014-2015. The edifice of the petitioners' contentions rested upon Article 25 of the Constitution, which guarantees equality before law, irrespective of sex.

The petitioners drew the court's attention to the fact that women constitute 68 percent of all students in medical colleges, thereby highlighting the likelihood of their success in a system of open merit. The impugned notification, it was submitted, was therefore not only discriminatory, but it also precluded the entry of qualified female doctors in a bid to promote their relatively lesser qualified male counterparts. Moreover, the petitioners argued that while the decision to institute the said quota was taken in February, the decision was made public in October, merely five days before the commencement of the admissions process, which allegedly reflected the *mala fide* intent of the respondents.

The respondents, refuting the arguments advanced by the petitioners, submitted that the policy was instituted while taking into account the sensitivities and idiosyncrasies of the medical profession. The respondents contended that while recent years had witnessed a penchant amongst females to enter medical schools, very few women entered medical practice, which resulted in a dearth of qualified doctors in the country. The policy was

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therefore instituted to ensure that a greater percentage of medical students entered the medical profession. The respondents, endeavoring to legitimize their policy, submitted an obscure report, written by a female doctor, depicting the gap between females successfully completing degrees in medicine and those who enter the profession.

Justice Ayesha. A. Malik dismissed the contentions of the respondents and held that the notification fell short of the requirements enshrined in Article 25 of the Constitution. Further, it was held, that notwithstanding the gender equality as enshrined in the Constitution, the State could take affirmative action for women and children in view of their history of subjugation. The heart of affirmative action, however, lies in reserving a minimum number of seats for women, as opposed to placing an upper limit on their entry. With regard to the study cited by the PMDC, the Court held that the study highlighted the plight of women in the medical profession. Therefore, the PMDC, being the regulator of the medical profession in the country, was obliged to remove obstacles impeding women's entry into the medical profession rather than restricting their entry into the medical colleges. Having held that the PMDC failed to show a relation between the purported objective of increasing the number of doctors in the country and the policy pursued, the Court accepted the petition and invalidated the notification.

Prior Case Law

A perusal of judicial precedents in Pakistan reveals that the judiciary has settled the perennial question of affirmative action through numerous judgments. The courts, while recognizing gender equality as the rule, permit the State to take affirmative action for the advancement of women in view of their historically marginalized status. Affirmative action or Temporary Special Measures ('TSMs') for the advancement of women, therefore, do not fall within the ambit of discrimination as envisaged under Article 25 of the Constitution. The same was affirmed by the LHC in *Nazar Elahi v Government of Punjab*,¹ wherein the petitioner challenged some provisions of the Punjab Women Empowerment Package 2012. The impugned package relaxed the upper limit for fresh female inductees in the public sector, taking into account the years missed due to marriage and child bearing.

In *Syeda Sadia v Bahauddin Zakariya University through Vice Chancellor*,² the LHC held that universities must apply the same yardstick while dealing with the students who are 'similarly placed'. The Court observed that the different treatment meted out to the petitioners, all of whom were females, established a *prima facie* case of discrimination. The same has been acknowledged by the Sindh High Court in *Miss Rabia Khan v Government of Sindh*,³ wherein the petitioners, *inter alia*, challenged the admissions policy of medical colleges in the province on the grounds of gender equality. The Sindh High Court held that Article 25(3) of the Constitution permitted 'positive discrimination' for the welfare of women.

It is, however, pertinent to note that the Court in the present case delved deeper into the idiosyncrasies of the medical profession. The notification, while reserving an equal number of seats for both male and female students, discriminated only against female

¹ 2013 CLC 1457.

² 2011 YLR 2867.

³ 2012 YLR 1801.

students given their overwhelming success in entrance examinations as compared to their male counterparts. The Court, therefore, while upholding established precedents, set another precedent, whereby courts may not only look at the *prima facie* nature of the impugned notification but may also delve deeper in order to discern the substance of the assailed instrument.

Analysis

This section of the case note highlights the contribution of the judgment in the *Asma Javaid* case to the country's jurisprudence. While acknowledging the judgment's liberal character, a perusal thereof reveals a myriad of noteworthy omissions, obviating the judgment from significantly contributing to the development of jurisprudence on the matter. This section, with great deference to the LHC, then provides an alternative route to achieve the same end.

The judgment in this case, while referring to the prohibition of discrimination on the basis of sex, does not take into cognizance a plethora of judicial precedents on 'reasonable classification'. The Court should have first established that the differential treatment in this instance fell short of the 'reasonable classification' test and then proceeded to address the issue.

In *Khalid Khan v The State*,⁴ the Peshawar High Court held that while the equality of citizens was a cherished goal of the Constitution, a rule of classification, based on the principle of intelligible differentia, found support in both the law of the land as well as Islamic jurisprudence. In *Abdul Khalique v Federation of Pakistan*,⁵ wherein the petitioner was aggrieved due to his different treatment as compared to employees in other government departments, the Court held that Equality of Citizens does not envisage equal treatment of all citizens in all situations, but merely provides that persons similarly placed should be treated alike. In *PWD Employees Union v Secretary Communication and Works Department*,⁶ the Balochistan High Court held that the Constitution prohibited discrimination but not classification. It stated that a classification that is not arbitrary, capricious, or in violation of the doctrine of equality, does not constitute discrimination as envisaged by the Constitution. Besides, the Court held that there must be a nexus between the classification and the purported objectives because mere reasonableness of the classification does not suffice.

The respondents, while seeking the Court's approval for the impugned notification, argued that the demand for medical practitioners necessitated an increase in male students in the medical colleges, given their penchant to enter the profession. While the policy may increase the number of medical practitioners in the country, it threatens to have profound ramifications on the quality of medical practitioners graduating from the medical colleges. The policy, therefore, does little beyond maintaining the hegemony of males in the medical profession and falls short of the purported objectives. Keeping in view the 'reasonable classification' test outlined by the superior judiciary, the policy instituted by the PMDC is conspicuously capricious and without any basis, thereby fulfilling the required threshold to constitute discrimination.

⁴ PLD 2016 Peshawar 35.

⁵ 2016 PLC (Service) 530.

⁶ 2015 PLC (Service) 1182.

Another disconcerting facet of the assailed notification was the passivity of the respondents with regard to the challenges faced by female doctors in the country. The onus of creating an enabling environment for female doctors falls upon the PMDC as it is the primary regulator of the medical profession in the country. By expressing its indifference at the plight of female doctors, the PMDC strengthens the barriers to their entry as opposed to addressing issues such as glass-ceilings, sexual harassment, and maternity leaves. The impugned notification, therefore, provides a glimpse into the prevalent patriarchal structures that function to inhibit women's activity in the public sphere. The respondents merely reinforce the pigeonholing of women into stereotypical roles, whereby women are portrayed as inferior beings, unable to thrive in a challenging professional environment. While the regulatory body relies on an obscure study conducted by a female doctor in a bid to legitimize its policy, the gender composition of the council remains equivocal. Liberal feminism has persistently advocated the incorporation of women into the public sphere, allowing them to contribute towards policies and initiatives that emanate from these fora. In recent years, liberal feminists have made concerted efforts to advocate the nomination of women to the judiciary, precluding a gendered construction of legislative instruments.⁷ The fact that the assailed notification was invalidated in a judgment rendered by a female judge should thus be seen as vindication of the liberal feminist position. This is not to suggest, however, that the judgment was swayed by the preferences of an individual judge.

A perusal of the impugned notification, and its purported justification, also brings into question the efficacy of affirmative action as a policy directive, thereby questioning the validity of the precedents set by courts. As stated earlier, courts recognize gender equality as a constitutionally enshrined principle. This does not, however, preclude the State from pursuing policies for the welfare of women, keeping in view their marginalization. The judiciary has, therefore, validated quotas in educational institutions under the pretext of the advancement of women. The status of female doctors in the country, however, reflects the shortsightedness associated with such policies. Juxtaposed with this case, medical colleges have historically reserved a minimum number of seats for female students, accommodating women who may otherwise be unable to gain admission into these colleges. Above all, various courts have validated such quotas in the past. These policies increase the number of female medical graduates in the country but contribute little towards female emancipation due to the fact that the conditions which necessitated affirmative action in the first place continue to exist. The State therefore needs to reform the patriarchal structures that continue to impede the advancement of women, seriously interfering with a woman's right to enter a profession of her choice, as guaranteed under the Constitution. It is, therefore, pertinent to delve deeper into the supposedly gender sensitive judgments previously rendered by courts, and discern the impact that they have had on the women in the country. As has been depicted, affirmative action, disregarding the discrimination that underlies the lack of female representation in the public realm, moves little beyond measures of window dressing.

The State, therefore, must take concerted steps to remove the obstacles that impede a woman's entry into numerous fora, giving effect to its obligations under both municipal as well as International Law. The Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') to which Pakistan is a signatory provides that states must undertake measures to promote substantive equality. It therefore does not suffice

⁷ Margaret Davies and Vanessa Munro, *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2013).

to simply afford male and female doctors identical treatment. The essence of equality lies in policies that take into account the biological, social as well as cultural differences between men and women.⁸ This would entail the state parties to create an environment that enables women to fully enjoy the fruits of their fundamental rights, including the right to equality and the right to profession.

Conclusion

It is interesting that the LHC did not take into account the judgment of the Supreme Court of Pakistan ('SC') in *Muhammad Aslam Khaki v Federation of Pakistan*,⁹ wherein the SC proposed special measures for the transgender community. By restricting its discussion to the males and females, the LHC overlooked the fact that the government was in violation of the SC's orders by not proposing reserved seats for the transgender community in the same order.

Nevertheless, the ruling of the LHC in *Asma Javaid v Government of Pakistan* is a welcome one insofar as it attempts to discern the gendered innuendos of ostensibly innocuous policies. An alternative route towards women empowerment, however, lies in liberally construing the fundamental human rights, and holding the State accountable for the enforcement of these core fundamental rights as well as the rights in penumbra. This would ensure that the State positively transforms the patriarchal structures that restrain women from the full enjoyment of their rights, without actively discriminating against them.

⁸ The Convention on the Elimination of All Forms of Discrimination against Women, General Recommendation 25.

⁹ PLD 2013 SC 188.