45/3/A/2008
JUDGMENT
Of 23 April 2008
Case file number SK 16/071

In the name of the Republic of Poland

Constitutional Tribunal sitting in the panel:

Janusz Niemcewicz – Presiding Judge
Adam Jamróz
Teresa Liszcz –Judge Rapporteur
Ewa Łętowska
Mirosław Wyrzykowski,

Reporting clerk: Krzysztof Zalecki

Upon hearing on 16 April 2008, with the participation of the complainant and the Sejm, Prosecutor General, Ombudsman for Citizen Rights and the Supreme Medical Council, of the constitutional complaint of Zofia Szychowska for the review of conformity of:

Art. 15(1), Art. 41 and Art. 42(1) of the Act of 17 May 1989 on Chambers of Physicians (*Dziennik Ustaw* [Journal of Laws] No. 30, item 158 as amended), further specified by the norm of Art. 52(2) of the Code of Medical Ethics read in conjunction with the content of the Physician's Oath in its part on "not undermining the trust bestowed upon them (fellow physicians)" to the extent in which these provisions limit the constitutional principle of freedom of *expression* and the right to criticize, with Art. 54(1) read in conjunction with Art. 31(3), Art. 17(1) and Art. 63 of the Constitution read in conjunction with Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

The Tribunal rules as follows:

Art. 52(2) of the Code of Medical Ethics read in conjunction with Art. 15(1), Art. 41 and Art. 42(1) of the Act of 17 May 1989 on Chambers of Physicians (*Dziennik Ustaw* No. 30, item 158 of 1990, No. 20, item 120 of 1996, No. 106, item 496 of 1997, No. 28, item 152 of 1998, No. 106, item 668 of 2001, No. 126, item 1383 of 2002, No. 153, item 1271 and No. 240, item 2052 of 2004, No. 92, item 885 and No. 176, item 1238 of 2007) **does not conform to Art. 54(1) read in conjunction with Art. 31(3) and Art. 17(1) of the Constitution of the Republic of Poland and is not inconsistent with Art. 63 of the Constitution to the extent in which it prohibits veracious statements substantiated by the protection of public interest regarding the professional activity of another physician.**

Furthermore, the Tribunal decides:

pursuant to Art. 39(1) point 1 of the Act of 1 August 1997 on the Constitutional Tribunal (*Dziennik Ustaw* No. 102, item 643 of 2000, No. 48, item 552 and No. 53 item 638 of 2001, No. 98 item 1070 of 2005, No. 169, item 1417 of 2009) **to discontinue the proceedings in its remaining scope due to the inadmissibility of passing a judgment.**

STATEMENT OF REASONS

1 The concluding part of the judgment was published on 13 May 2008 in *Monitor Polski* No. 38, item 342. By a decision of the Constitutional Court of 29 April 2008, an obvious typing mistake in *Monitor Polski* No. 38, item 341 has been rectified.

I

1. In her constitutional complaint of 10 January 2006, the complainant, Zofia Szychowska, requested that Art. 15(1), Art. 41 and Art. 42(1) of the Act of 17 May 1989 on Chambers of Physicians (*Dziennik Ustaw* No. 30, item 158 as amended, hereinafter referred to as Act on Chambers of Physicians or the ACP), further specified by the norm of Art. 52(2) of the Code of Medical Ethics (hereinafter referred to as the CME), read in conjunction with the content of the Physician's Oath in its part on "not undermining the trust bestowed upon them (fellow physicians)" to the extent in which these articles limit the constitutional principle of freedom of expression and the right to criticize, be declared contrary to Art. 54(1) read in conjunction with Art. 31(3), Art. 17(1) and Art. 63 of the Constitution read in conjunction with Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Dziennik Ustaw* of 1993, No. 61, item 284 as amended; hereinafter referred to as the European Convention or the Convention).

The constitutional complaint, drafted on the basis of a project developed under the Precedent Case Program of the Helsinki Human Rights Foundation was lodged in the following circumstances. The complainant, while employed as an assistant professor at the Chair and Teaching Hospital for Paediatric Infectious Diseases of the Medical University in Wrocław, became involved in a dispute with the Chair Holder, Irma Kacprzak-Bergman, regarding the plausibility of lumbar punctures in children who had undergone postmeasles encephalitis. Independently of informing a medical self-government authority of this issue, the claimant expressed her protest against this treatment in a press publication released in *Agora* magazine of 13 May 2001 and 13 January 2002.

In connection with these publications, the Regional Medical Court (hereinafter referred to as RMC) of the Lower Silesia Chamber of Physicians passed a judgment on 2 February 2006, case file No. S 12/04, finding the complainant guilty of professional misconduct on the ground of violation of Art. 52(2) of the Code of Medical Ethics (CME) and imposed a penalty of a reprimand. The complainant's appeal against this judgment was partially upheld by the Supreme Medical Court (SMC). In its judgment of 20 June 2006, the SMC amended the challenged judgment as to the penalty, deciding instead on a lighter penalty of a warning, dismissed the charges of violation of substantive law due to the erroneous interpretation of Art. 52(2) of the CME. The Medical Courts of both instances based their decisions on the finding that Art. 52(2) of the CME sanctions the mere fact of making a public comment discrediting another physician, irrespective of its possible veracity.

The complainant expressed her objections primarily against Art. 52(2) of the CME, in connection with the quoted fragment of the Physician's Oath. In reference to previous jurisprudential line of the Constitutional Tribunal regarding professional ethical norms, the complainant quotes the applicable provisions of the Act on Chambers of Physicians, i.e. Art. 15(1), Art. 41 and Art. 42(1) as the source of the norm further specified by Art. 52(2) of the CME. In the event of adjustment of the jurisprudential line prevailing up until now, the complainant does not rule out grounds for reviewing Art. 52(2) of the CME itself.

In the opinion of the complainant, limiting the freedom of expression in the context of Art. 52(2) of the CME in the course of practice of medical courts has been occurring with no exceptions. Examining violations of the aforementioned provision is in practice limited to ascertaining whether or not a given physician has indeed expressed a public, negative assessment of the professional activity of another physician. The medical courts, however, do not examine the veracity of such a statement, nor whether it has been made in the protection of public interest. The notion of "discrediting", used in Art. 52(2) of the CME is vague and in practice leads to a complete prohibition on any public criticism of another physician. In the opinion of the complainant it has been assumed that any criticism leads to discrediting.

Furthermore, the described limitations of the freedom of expression are not justified from the point of view of the values indicated in Art. 31(3) of the Constitution (should it be found that it

is indeed reasonable to review Art. 52(2) of the CME, the requirement of the legal reservation is also unsatisfied). This is because the *ratio* of the challenged provision is supposed to be the protection of physicians' reputations. In the opinion of the complainant, the protection of their reputations must not be absolute; a patient's interest must prevail where a conflict arises. This regards both the interests of a specific patient (i.e. the one affected by the criticised erroneous treatment) as well as those of a potential patient. Patients should have the right to seek opinion on physicians from other physicians and specialists in a given field, and such practice should be considered beneficial. One-off, fact-based criticism does not have to damage the capital of trust earned by a physician over the years and if it is proven to be unjustified, the interested physician shall be able to defend himself. The value of human dignity prevails over the interests of society and, therefore, also over the interests of a given professional group, also pursuant to the Council of Europe's Convention of 4 April 1997 on Human Rights and Biomedicine (signed by Poland, although not ratified as yet).

The solution adopted in the challenged Art. 52(2) of the CME is contrary to the standards set forth for, among others, the press law and the Penal Code (Art. 213 of the Penal Code). Analogical provisions have not been included in either the International Code of Medical Ethics, adopted by the World Medical Association, or codes of ethics binding the representatives of other professions of public confidence, such as barristers and notaries public. The European Court of Human Rights (hereinafter referred to as the ECHR), in its judgment of 17 October 2002 in the case of *Stambuk v. Germany* (No. 37928/97) has also ruled in favour of freedom of expression in cases of statements made in public interest and against corporate prohibitions.

The inconsistency of Art. 15 (1), Art. 41 and art 42(1) of the ACP, further specified by Art. 52(2) of the CME, with Art. 17(1) read in conjunction with Art. 54(1) of the Constitution lays, in the opinion of the complainant, in the fact that this provision obliges the medical self-government to act within the boundaries of public interest and in its protection. This very interest is the good of the patient and providing citizens with high-quality medical services, as well as the patient's right to choose a competent, trustworthy physician, which ensures the appropriate self-regulation of the medical services market. The rules laid out in Art. 17(1) of the Constitution are not reflected in the content of the ethical norms binding members of the medical self-government.

The provisions in question are also challenged as inconsistent with Art. 63 read in conjunction with Art. 54(1) of the Constitution, stipulating the so-called right to petition. In the opinion of the complainant, her action, constituting of public criticism of the professional activity of another physician is also simultaneously a public formulation of a petition and complaint to the authorities of a corporation.

2. The Ombudsman for Citizen Rights (hereinafter referred to as Ombudsman or OCR) has, by a written motion of 12 July 2007, declared his participation in this case. The Ombudsman's position, along with its substantiation, has been expressed in a motion of 21 December 2007 (RPO-559391-1/07/BB/AP). In the opinion of the Ombudsman, Art. 15 (1), Art. 41 and Art. 42(1) of the Act on Chambers of Physicians, further specified by Art. 52(2) of the Code of Medical Ethics, to the extent in which they prohibit the expression of fact-based criticism made in the public interest, are inconsistent with Art. 54(1) read in conjunction with Art. 31(3) of the Constitution.

In the Ombudsman's opinion, irrespectively of certain discrepancies as to the justification of the review by the Constitutional Tribunal of norms set forth in the CME, the very admissibility of such review should not raise doubts. Provisions of Art. 15 (1), Art. 41 and Art. 42(1) of the ACP impose on physicians a duty to observe ethical norms and provide a basis for applying sanctions for their violation. It is, however, impossible to determine the specific content of the indicated duties without a review of the decisions of the CME. It is then possible to reconstruct a comprehensive legal norm, based on which a judgment has been passed on the complainant's rights as construed by Art. 89(1) of the Constitution. In the opinion of the Ombudsman, the challenged norm prescribes that one refrain from discrediting another physician, both when such criticism is justified and when it is not. Therefore, Art. 52(2) of the ACP constitutes a "dam" against any public statement

containing criticism of the medical practice of another person, even if this criticism is based upon facts and made in the public interest (ex. for the good of patients).

The Ombudsman made reference to previous decisions of the Constitutional Tribunal and of the European Court of Human Rights regarding freedom of expression and indicated that the mentioned freedom allows statements concerning alleged and unconfirmed facts, as well as opinions that are controversial, unaccepted or in fact insulting. The Ombudsman also assessed the challenged regulation from the point of view of requirements formulated pursuant to Art. 31(3) of the Constitution, arriving at the conclusion that, at least potentially, two of the values indicated therein may be meaningful in light of the assessment of the introduced limitations of freedom of expression. These are the "rights and freedoms of other persons" (and, in fact, protection of honour and good reputation of a physician, mentioned in Art. 47 of the Constitution) and "public health" in connection with "public order".

Comparing the challenged regulation with the standards for protection of honour and good reputation effective in universally binding law e.g. in penal law (Art. 212 of the Penal Code) and in civil law (Art. 23 and Art. 24 of the Civil Code), the Ombudsman emphasized that defence against charges of defamation or infringement of someone's personal interests requires providing evidence of the truth of the defamatory statement and evidence of acting for public interest (in good faith). In his opinion, physicians have the right to protection of their good reputation, however, no substantial reasons exist for the protection of this value, provided for by the ACP and imposing particular obligations on other physicians, to diverge this significantly from the protection foreseen by the universally binding law. The challenged norm is also based on the erroneous assumption that it is criticism of one physician by another that may result in the infringement of personal interests, while in practice it may be a result of actions undertaken by persons from outside of medical circles.

Similar reasons indicate, in the Ombudsman's opinion, that the introduced limitation is also not necessary from the point of view of values connected with the image of health service in society, which are "public health" in connection with "public order" or the "well-functioning of the profession as a whole", mentioned in the ECHR's judgment in the case of *Stambuk v. Germany.* The Ombudsman emphasized that the social role of the health service is very important. In his opinion, however, it is not acceptable to assume that justified and material criticism of individual physicians may disorganise its proper functioning. Although professional expertise is necessary in the assessment of medical practice, it may not be assumed that the general society should not have access to this type of discussion, and that any medical disputes should be settled by physicians in their own circle. The present regulation, on the other hand, leads to a situation whereby such a debate may take place, but without the participation of physicians. Socially justified interest, in the name of which such criticism is made, regards providing the access to this information to patients themselves. In the Ombudsman's opinion, freedom of expression is of twofold nature in this case: it regards both the physician's freedom to express his or her opinions, as well as the freedom of access to information by the general society. The frameworks for debates concerning health services, which evoke general interest and are constantly present in the mass media, should be delimited universally for the entire society (physicians and others) on the basis of the requirement of truth and public interest.

3. By a writ of 2 October 2007, the Presiding Judge called upon the authorities of the Supreme Medical Chamber to take a position in the case. The position of the Supreme Medical Council (hereinafter referred to as SMC) was presented in a document of 24 October 2007 (NRL/ZRP/WI/940-1/2038/2007), in which the President of the SMC stated that the charges of the constitutional complaint are unjustified, as the provisions challenged in the complaint are not inconsistent with the principles set forth by the Constitution or the Convention.

In the opinion of the President of the SMC, the purpose of developing deontological norms set out in the CME is to ensure the best possible medical practice, which also entails the broadly understood good of patients. Similar regulations are embodied in provisions of law and codes of professional ethics of other professions of public trust. As to Art. 52 of the CME, regarded in its

entirety, it protects the interest of the patients, including their sense of security arising from the trust bestowed in both specific physicians and physicians generally, which could be undermined by wrongful, irresponsible, negative assessment of the activities of other physicians, driven by the intention to "take over" their patients or other reprehensible motives.

It is the opinion of the President of the SMC that the challenged provision does not limit freedom of expression proclaimed in Art. 54(1) of the Constitution. An analysis of the entire Art. 52 of the CME shows that a physician may criticise other physicians, as long as it is done with particular caution. It is only prohibited to discredit them publicly. This is due to, among others, the high complexity of most medical situations and the necessity to have indispensable specialised knowledge in order to be able to properly assess an employed medical treatment. This is why this assessment should be carried out primarily by the appropriate authorities of the Chambers of Physicians. The key term in this case, "discrediting", does not, according to the President of the SMC, constitute every instance of criticism (especially medical-related criticism), but only activities aiming to undermine the authority of another physician, depriving him of the trust reposed in him and marked by ill-will. The nature of the CME's standards and the relatively unambiguous significance that the term “discrediting” has in the general language render the charge of vagueness of the challenged provision unjustified.

The President of the SMC emphasizes that the right to criticize is not an absolute right, but may be subject to limitations pursuant to Art. 31(3) of the Constitution. If Art. 17 of the Constitution provides for the creation of self-governments within a profession in which the public repose confidence, then a value such as public trust, necessary for the performance of their professional duties, also becomes a constitutional value. In his opinion, it is also unjustified to compare the solution adopted in Art. 52 of the CME with the provisions of press law or penal law. Moral and ethical standards are meant to shape attitudes that are positive and desirable from the point of view of the adopted value system, while the purpose of legal norms is to regulate the life in society. President of the SMC considers it an abuse to state that the challenged provision places physicians in a situation of having to chose between the patient's good and the good of another physician. He also considers it an abuse to emphasize the rigorous sanctions faced by a physician who violates this prohibition. Penalties available to medical courts, specified in Art. 42 of the Act on Chambers of Physicians, are imposed depending on the gravity of the confirmed offence. Also, never during the 18 years of operation of these courts, has a physician been penalized with a deprivation of the right to practice the profession for an offence against Art. 52 of the CME.

The President also considers it unjustified to charge that Art. 52(2) of the CME violates the provisions of Art. 63 of the Constitution. A detailed analysis of how the complainant expressed her opinion publicly makes it impossible to attribute to it the features of a complaint, a petition or an application. The complainant had exercised her right to these measures by addressing both the Lower Silesia Chamber of Physicians and the Ethics Committee under the State Committee for Scientific Research. Her opinion expressed in a press article was a result of the fact that the aforementioned institutions did not settle the complaints in her favour and, indirectly, a result of her conflict with the scientific circles. The challenged provision also does not violate Art. 10 of the European Convention. Moreover, the reasoning of the judgment of the ECHR in the case of *Stambuk v. Germany* of 17 October 2002, to which the complaint made reference, may in fact confirm the necessity of taking into consideration a value such as the well-functioning of the medical profession.

4. The Prosecutor General, in a document dated 27 December 2007, adopted a position stating that Art. 15 (1), Art. 41 and Art. 42(1) of the Act on Chambers of Physicians, further specified by Art. 52(2) of the Code of Medical Ethics, construed as prohibiting any public criticism of the professional activities of another physician, are inconsistent with Art. 54(1) read in conjunction with Art. 31(3) and Art. 17(1) of the Constitution read in conjunction with Art. 10 of the European Convention but are not inconsistent with Art. 54(1) read in conjunction with Art. 63 of the Constitution.

In the opinion of the Prosecutor General, a linguistic analysis of Art. 52(2) of the CME indicates that this provision does not prohibit any form of criticism of one physician by another, but only such critical statements which aim to harm the reputation of a physician, to cause bad impression or attitude. Understanding the provision in this manner, the introduced limitation of freedom of expression and of the right to criticize seems consistent with the principle of proportionality. The negative results of the limitation of the right to criticise are balanced by the obligation to identify the error of a physician who is mistaken, to undertake actions to reverse the consequences of an error which are detrimental to the patient's health and to notify an authority of the Chamber of Physicians. The subject of protection is not only the honour and good reputation of the physician, but also the trust bestowed by patients in physicians, indispensable for the proper course of treatment.

A separate issue is, however, the interpretation of Art. 52 of the CME made by judicial authorities. Since the challenged provision has been in force for a short period of time and few proceedings have been carried out in connection to it, it is difficult to establish a uniform jurisprudential line. The content of judgments issued in the complainant's case do, however, justify the doubts which, in the opinion of the Prosecutor General, should authorise the Constitutional Tribunal to review the conformity of the extended interpretation of the norm expressed in Art. 52 of the CME with the Constitution, even though it is not certain whether such interpretation is a fixed one or one commonly and consistently followed by courts.

The Prosecutor General did not, however, concur with the charge that Art. 52 of the CME violates the provision of Art. 63 of the Constitution since, according to the unanimous views expressed in the legal doctrine and in jurisprudence, petitions, complaints and proposals specified therein should be applicable to the broadly understood activities of public authorities. He also considers it unwarranted to compare the decisions of the CME with other deontological codes and to transfer the consideration of acts punishable under penal proceedings onto the ground of disciplinary offences.

5. The Speaker of the Sejm of the Republic of Poland, in a document dated 2 April 2008, stated his position, requesting that Art. 15 (1), Art. 41 and Art. 42(1) of the Act on Chambers of Physicians, further specified by the norm of Art. 52(2) of the Code of Medical Ethics, be declared conform with Art. 54(1) read in conjunction with Art. 31(3), Art. 17(1) of the Constitution and read in conjunction with Art. 10 of the European Convention and conform with Art. 54(1) read in conjunction with Art. 63 of the Constitution.

In the opinion of the Speaker of the Sejm, upon a linguistic analysis of Art. 52(2) of the CME, it is possible to state that it does not introduce a prohibition of publicly criticising the professional activity of another physician. This is because the terms "criticism" and "discrediting" may not be considered synonymous; the former also encompasses negative, but not compromising opinions regarding another person, and it contains an indication of irregularities and errors of another person, but without undermining the trust this person enjoys. On the other hand, the freedom of expression guaranteed by the Constitution does not include the freedom of discrediting a person who exercises a profession of public trust. Moreover, freedom of expression is not absolute and may be subject to limitations under the conditions specified in Art. 31(3) of the Constitution. The prohibition set forth in Art. 52(2) of the CME is also connected with the good of the patient, whose relationship with his or her physician should be based on confidence and is necessary for reasons of protection of health, the good of patients and other persons (physicians). In the opinion of the Speaker, the reasons indicated weigh in favour of conformity of the challenged provisions also with Art. 17(1) of the Constitution, as solutions that protect real public trust are a prerequisite for the well-functioning of profession of public trust. The Speaker of the Sejm considers it unjustified to claim that the challenged provisions are inconsistent with Art. 63 of the Constitution.

In his summary, the Speaker of the Sejm noted that the basis of the complaint is in fact not so much the literal wording of Art. 52(2) of the CME, but rather its interpretation given by court authorities. In the case at issue the complainant failed to prove that such interpretation was fixed,

common and consistent.

6. In a motion dated 1 April 2008, the President of the Supreme Medical Council (No. : NRL/ZRP/WI/940-2/) requested that the Supreme Medical Council be granted the status of a party to the proceedings. The motion was accepted by a decision of 9 April 2008.

II

At the hearing on 16 April 2008, a representative of the Prosecutor General modified his position in case at issue by abandoning the interpretation formula referring to a specified understanding of the challenged provisions ("construed as prohibiting any public criticism of professional activities of another physician"). The representative of the Prosecutor General at the same time voiced a doubt whether, in light of the closed system of sources of law adopted under the 1997 Constitution, it is admissible to adopt norms infringing upon the constitutionally protected rights and freedoms in a legal act which is not a universally binding source of law.

The representatives of the Ombudsman for Citizen Rights requested that the jurisprudence of the European Court of Human Rights be taken into account and particularly, besides the already mentioned judgment given in the case of *Stambuk v. Germany*, the judgment given in the case of *Barthold v. Germany*.

The President of the Supreme Medical Council made precise the position of the Council, according to which it is admissible to review the provisions of the CME read in conjunction with the provisions of the Act on Chambers of Physicians, while emphasizing that applying constitutional standards to these provisions should take into account the ethical nature of these norms and the honour-related dimension of sanctions imposed by medical courts on the basis of Art. 52(2) of the CME (in the form of warning or reprimand). In the remaining scope, the parties upheld the positions declared in their written statements.

III

The Constitutional Tribunal considered what follows:

1. The challenged provisions and the essence of the constitutional problem.

The complainant challenged the following provisions in her constitutional complaint: Art. 15 (1), Art. 41 and 42(1) of the Act on Chambers of Physicians of 17 May 1989 (*Dziennik Ustaw* No. 30, item 158 as amended; hereinafter referred to as Act on Chambers of Physicians) read in conjunction with Art. 52(2) of the Code of Medical Ethics and the content of Physician's Oath in its part on "not undermining the trust bestowed on them (fellow physicians)".

The challenged provisions of the Act on Chambers of Physicians read as follows: Art. 15 (1) of the ACP: "Members of the medical self-government shall be obliged to observe: 1) principles of ethics and deontology and other provisions on practising the profession of a physician".

Art. 41 of the ACP: "Members of the medical self-government shall be subject to professional liability before medical courts for actions against the principles of ethics and professional deontology and for violation of provisions on practising the profession of a physician".

Art. 42 (1) of the ACP: "A medical court may adjudicate the following penalties: 1) warning, 2) reprimand, 3) suspension of the right to practice as a physician for a period of six months to three years, 4) deprivation of the right to practice the profession".

Art. 52(2) of the Code of Medical Ethics (hereinafter referred to as the CME) stipulates: "A physician shall express opinions on the professional activity of another physician with particular caution. Particularly, a physician shall not discredit another physician publicly in any way whatsoever".

The fragment of the Physician's Oath quoted in the constitutional complaint reads as

follows: "I solemnly pledge: (…) to guard the honour of the medical profession and not to taint it in any way whatsoever and to show my colleagues the kindness they deserve, *not to undermine the trust bestowed on them*, while acting impartially and taking into consideration the good of patients [the challenged fragment in cursive].

2. Preliminary issue: admissibility of review of corporate deontological norms and the extent of the review.

2.1 Pursuant to jurisprudence of the Constitutional Tribunal, the subject of review under the constitutional complaint pursuant to Art. 79(1) of the Constitution is a normative act in a substantive meaning. The meaning of this notion, while established under the previous Constitution and the Act on Constitutional Tribunal of 29 April 1985 (*Dziennik Ustaw* No. 22, item 98 as amended), (see the jurisprudence: of 7 June 1989, case file No. U.15/88, OTK [*Judicial Decisions of the Constitutional Tribunal*] of 1989, item 10, page 146; of 19 June 1992, case file No. U. 6/92, OTK of 1992, part 1, item.13, page 201; of 6 December 1994, case file No. U.5/94, OTK of 1994, part 2, page 119), has been, at least in what concerns the prerequisite of "normative nature" of the act subject to review, upheld by judicial decisions under the new Constitution and the Act of 1 August 1997 on the Constitutional Tribunal (*Dziennik Ustaw* No. 102, item 643 as amended, hereinafter referred to as the Act on CT), (see judgments: of 13 March 2001, case file No. K.21/00, OTK ZU [*Official Collection of Decisions on the Constitutional Tribunal*] No. 3/2001, item 49; of 15 December 1999, case file No. p. 6/99, OTK ZU No. 7/1999, item 164, page 881 and decisions: of 14 December 1999, case file No. U/7/99, OTK ZU No. 7/1999, item 170, p p. 919-920; of 29 March 2000, case file No. p. 13/99, OTK ZU No. 2/2000, item 68, p. 311). The principal criteria for the inclusion of acts in this category under the Constitution of 2 April 1997 have been indicated in judgments given in cases with file numbers SK 1/01 (of 12 July 2001, OTK ZU No. 5/2001, item 127) and U 4/06 (of 22 September 2006, OTK ZU No. 8/A/2006, item 109). In these judicial decisions, the following criteria for establishing whether a legal act is normative have been indicated: 1) the content of the act and not its form is a decisive criterion for evaluating its normativeness (substantive definition), 2) the specific nature of this type of evaluation which also takes into account the systemic connections of a given act with other acts in the legal system deemed normative beyond any doubt, 3) the assumption that doubts as to the normative nature of some legal acts appear to be an inherent feature of a legal system. Furthermore, the Constitutional Tribunal has always held the opinion that if these acts contain any normative content, then there are no grounds to exclude them from review of constitutionality or legality, particularly when the protection of human and citizen rights or freedoms is concerned. In such cases, the Constitutional Tribunal applies to legal acts a rule of presumption of normativeness. Otherwise, the majority of the numerous acts enacted by different state authorities and sometimes other entities would remain excluded from any review of their constitutionality or legality.

On the other hand, the content of Art. 79(1) of the Constitution should not be regarded in isolation from other provisions of the Constitution, especially those regulating the competence of the Tribunal. This is because the scope of cognizance of the CT is regulated primarily by Art. 188 of the Constitution, pursuant to which: "The Constitutional Tribunal shall adjudicate regarding the following matters:

1) the conformity of statutes and international agreements to the Constitution;
2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
4) the conformity to the Constitution of the purposes or activities of political parties;
5) complaints concerning constitutional infringements, as specified in Art. 79 (1).

The above means that under the 1997 Constitution, the Constitutional Tribunal, also on the basis of

a constitutional complaint, may review the hierarchic conformity of only those normative acts which are specified in Art. 188 points 1-3 of the Constitution (see also: J. Trzciński, commentary on Art. 79 in *Komentarz do Konstytucji RP* [Commentary on the Constitution of the Republic of Poland], vol. 1, Warsaw, 1999, p. 14 and L. Garlicki, commentary on Art. 188 in *Komentarz do Konstytucji RP,* vol. 5, Warsaw, 2007, p p. 30-31).

2.2 In case at issue, the complainant challenges the content of Art. 15(1), Art. 41 and Art. 42(1) of the Act on Chambers of Physicians in conjunction with the provisions of Art. 52 of the CME to the extent in which they further specify the indicated provisions of the Act. In the statement of reasons of her complaint, she claims that reasons exist to consider CME an act containing legally binding norms, not only ethical standards. Should such an opinion be accepted, the Tribunal may review Art. 52(2) of the CME as an autonomous norm.

The idiosyncrasy of the case at issue lays in the fact that the description of the prohibited and sanctioned actions of physicians are in their entirety covered by Art. 52(2) of the CME, while the provisions of the Act on Chambers of Physicians challenged in the complaint oblige physicians to observe the principles of professional ethics and sanction the failure to do so. In the normative context of the challenged provisions and provisions of the CME, it is also worthy to mention Art. 4(1)(2) of the ACP and Art. 33(1) of the ACP, which impose on the medical self-government a duty to adopt principles of medical ethics and deontology without formulating any "guidelines" as to the content of these principles. These provisions, however, have not been challenged.

The provision of Art. 52(2) of the CME, fundamental in this case, undoubtedly is of general nature (it concerns a given category of unnamed addressees) and abstract (its content is not exhausted in a single order to act in a certain way). Due to the source and legal nature of the rule of conduct contained therein, it is unclear whether it may be considered an autonomous norm. (In its judgment of February 18, 2004, the CT has ruled in favour of such interpretation in the case of acts on corporations of barristers and solicitors, judgment passed on February 18, 2004, case file No. P 21/02, OTK ZU No. 2/A/2004, item 9). In relation to prior statements, and particularly due to the content of Art. 188(1) to (3) read in conjunction with Art. 79(1) of the Constitution, it is then impossible to conclude that the Tribunal may only review the aforementioned deontological corporate provision and the appropriate part of the Physician's Oath separately, (that is, independently of the provisions of the ACP). This is because the provisions of the CME regarded in isolation from the appropriate statutory provisions belong to a different normative (deontological) order and they only acquire legal value within the universally binding law precisely through the Act on Chambers of Physicians and to the extent specified by its provisions, particularly Art. 4 of this Act, which is the legal basis for enacting the CME. Consequently, the subject of the review of the Constitutional Tribunal is the provision of Art. 52(2) of the CME read in conjunction with the appropriate provisions of the ACP and, more precisely, the legal norm decoded from the quoted provisions and decisions. In its judgment of 7 October 1992 (case file No. U.1/92, OTK of 1992, part 2, item 38), the Constitutional Tribunal has already adopted an analogical concept of a "complex statutory norm" (which is in essence a blanket rule at the legislative level), further specified by a specific provision of a statute enacted by a professional self-government authority.

2.3 Having considered both the purpose of the constitutional complaint and the charges contained therein, the Constitutional Tribunal sitting in the present panel favours the position that the subject of the review is the legal norm decoded from Art. 52(2) of the CME, read in conjunction with Art. 15 (1), Art. 41 and Art. 42(1) of the AC p. Hence, the extent of the review encompasses the mentioned provisions and decisions, with an emphasis on Art. 52(2) of the CME, fundamental in the case at issue as it contains the description of the prohibited and sanctioned actions of a physician.

2.4 However, the part of the Physician's Oath on "not undermining the trust bestowed on them (fellow physicians)" quoted in the complaint lays beyond the extent of review by the Tribunal. Such

position is substantiated by several arguments. Firstly, Physician's Oath is not an integral part of the Code of Medical Ethics. Its content has been adopted by way of a separate resolution of the National Medical Assembly without any clear statutory basis. It is also reasonable to state that this resolution does not stipulate any new deontological norms, but rather it generalizes (synthesizes) the norms contained in the CME. Swearing the Physician's Oath is a traditional way of solemnly undertaking to observe all the deontological norms resulting from separate provisions and decisions. Secondly, what seems of key importance in the analysed context, medical courts have found the complainant guilty of violation of Art. 52(2) of the CME, but the issue of whether she has violated the content of the Physician's Oath has not been deliberated at any stage of the proceedings. For this reason, the Constitutional Tribunal has decided to discontinue the proceedings in this scope.

On a side note, however, it should be emphasized that even if the remaining circumstances of the case justified the admissibility of review of the indicated part of the Physician's Oath as a *sui generis* normative provision (separately or in conjunction with appropriate provisions of the ACP), the analysis of its content would inevitably lead to the conclusion that the charge is unjustified. This is because the content of the entire part of the Physician's Oath concerning the mutual relations of physicians ("to guard the honour of the medical profession and not to taint it in any way whatsoever and to show my colleagues the kindness they deserve, *not to undermine the trust bestowed on them*, while acting impartially and taking into consideration the good of patients") do not support the thesis on its inconsistence with the provisions serving as reference for the review indicated in the constitutional complaint.

2.5. Consideration of provisions serving as reference for the review, expressed alongside the complaint, requires certain adjustment. Pursuant to Art. 79(1) of the Constitution, "any person whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution". Therefore, the jurisprudence of the Constitutional Tribunal reflects the assumption that the conformity of challenged normative acts with international agreements may not be reviewed on the basis of a constitutional complaint (see, *inter alia*, judgment of CT of 13 January 2004, case file No. SK 10/03, OTK ZU No. 1/A/2004, item 2). Hence, Art. 10 of the Convention, quoted in the complaint, may not be considered an appropriate provision serving as reference for the review in the case at issue. Therefore, the Constitutional Tribunal has decided to discontinue the proceedings in this scope. This, however, does not mean that the content of this provision and the jurisprudence of the European Court of Human Rights (hereinafter: ECHR) based on it may not be quoted in the case at issue as elements of the argumentation. Such practice is to ensure a certain level of uniformity of decisions awarded by agencies of legal protection whose judgments are based on provisions of national and international law.

3.Normative context and the interpretation of Art. 52(2) of the CME.

3.1. The challenged provision of Art. 52(2) of the CME, included in Chapter 3 of the Code entitled "Mutual relations between physicians" prescribes the so-called principle of loyalty. Currently, the entire Art. 52 of the CME reads as follows:

"1. Physicians shall show each other mutual respect. Particular respect shall be shown to senior physicians and, above all, to former teachers.
2. A physician shall express opinions on the professional activity of another physician with particular caution. *Particularly, a physician shall not in any manner discredit another physician publicly*.
3. A physician who observes an error made by another physician shall first notify the physician in question. Should such intervention prove ineffective or should the noticed error or infringement on

the principles of medical ethics result in serious damage, it shall be reported to an authority of the Chamber of Physicians.
4. Notifying an authority of the Chamber of Physicians of the revealed infringement on the principles of medical ethics and of the professional incompetence of another physician shall not constitute a violation of medical ethics.
5. Should the revealed error made by another physician have a detrimental effect on the health of a patient, actions shall be undertaken to reverse its results".
Art. 52(2) of the CME has been given its current wording as a result of amendments adopted by the 7th Extraordinary Medical Assembly on 20 September 2003. Prior to the amendment, Art. 52 of the CME was worded as follows:
"1. Physicians shall show each other mutual respect.
2. A physician shall not express a negative assessment of the professional activity of another physician or discredit him or her in any way publicly or in the presence of the patient, the patient's close ones or assisting staff.
3. A physician who observes an error of another physician shall first report them to the concerned physician. Notifying an authority of the Chamber of Physicians of the revealed infringement on the principles of medical ethics and of the professional incompetence of another physician shall not constitute a violation of the principles of professional solidarity."

3.2. Prior to the amendments introduced in 2003, Art. 52(2) of the CME was the subject of avid criticism, also within the medical circles. Particularly, it has been raised that a literal interpretation of the provision could justify the prohibition of any "discrediting" of another physician, also unrelated to his or her professional activities. Already then it has been indicated that the prohibition contained in the limitations introduced by Art. 52(2) of the CME does not only concern discrediting another physician with false information or information divulged in ill-will. Since any instance of criticism may be considered "discrediting", doubts were voiced as to whether the prohibition expressed in this provision is not of absolute nature, i.e. if it provides for any exceptions other than reporting an observed infringement of medical ethics or professional incompetence of another physician to an authority of the Chamber of Physicians stipulated in Art. 52(3) of the CME. Therefore, read literally, Art. 52(2) of the CME allowed the conclusion that a physician has no right to express any critical opinions with regards to another physician, irrespective of the subject of such criticism (professional activity or conduct in any other area or life), its veracity, motives and whether it is substantiated by the protection of some socially justified interest (see: M. Boratyńska, p. Konieczniak *Taki sobie casus. Wykonywanie zawodu lekarza a wolność słowa.* [practising as a physician and freedom of expression. A casus.], Part 1 in *Puls* monthly published by the District Chamber of Physicians, No. 9/2003).

Here it is worth to mention the appropriate regulations of medical deontological codes effective prior to World War II and directly afterwards. Principle No. 18 of the Collection of Principles of Medical Deontology adopted by the General Meeting of the Supreme Chamber of Physicians on 16 June 1935 stipulated: "A physician shall not express a negative assessment of the professional activity of his or her colleague in the presence of the patient or the patient's close ones. A physician shall not act in a manner which may discredit another physician". An almost identical regulation was adopted in the Principle No. 16 of the Deontological Code of Physicians and Dentists adopted at the meeting of the Management Board of the Chamber of Physicians and Dentists on 1 May 1948.

A more precise and broad regulation was contained in the Collection of Ethical and Deontological Principles of the Polish Physician adopted at the Extraordinary National Assembly of the Delegates of the Polish Association of Physicians in Szczecin on 22 June 1984. Pursuant to Principle No. 39 of the Collection, "Relations between physicians shall be based on mutual respect, loyalty and collegiality resulting from common objectives and respect for the labour, effort and responsibility undertaken by physicians in their daily professional activity". Pursuant to Principle No. 40, "A physician shall not assess precipitously the activity or skills of another physician,

particularly he shall not base his judgment on information from the patients and third parties, as such information is often the result of a misunderstanding or of reasons of secondary importance". Principle No. 41 stipulates "Should it be indispensable to issue an opinion on the professional activity of another physician, the opinion may only be issued at the written request of competent authorities. It may also be expressed in the course of a scientific discussion, at the request of the physician in question. Such opinion shall be impartial and shall comply with ethical and deontological principles". Finally, Principle No. 42 prescribed: "A physician requested to issue an official opinion on the activities of another physician shall become thoroughly familiar with all the materials and circumstances necessary to clarify the case. The opinion shall be formulated cautiously and objectively. Such opinions, whenever possible, shall be developed in cooperation with competent specialists".

3.3. Amendments to the Code of Medical Ethics introduced in 2003 removed a significant number of doubts expressed in literature. Art. 52 of the CME in its current wording establishes relatively unambiguous, at least *prima facie*, rules of conduct in the event of observing a violation of medical or deontological principles by another physician. These are as follows:
-notifying the physician in question of the observed transgressions,
-should such intervention prove ineffective or when there is danger of serious damage, notifying an authority of the Chamber of Physicians,
-in the event of finding that an error made by another physician has a detrimental effect on the health of a patient, undertaking steps to reverse its consequences.
Independently of the above duties, the challenged Art. 52(2) of the CME prescribes that due caution be observed while formulating opinions on the activities of another physician. The principle of cautious assessment manifests itself specifically in the prohibition on discrediting another physician publicly in any way whatsoever.

3.4. Of utmost importance in the case at issue is to ascertain the designation of the terms "to discredit" and "to criticize" and of their mutual relation. According to the dictionary definition, "to discredit" means "to undermine the confidence in, to belittle the authority, value of; to compromise the reputation of (*Mały słownik języka polskiego* [Small Dictionary of Polish], Warsaw 2005, p. 168). To criticize is "to point out errors and shortcomings, assess negatively, reproach" (ibid., p. 362). Hence, semantically, the two terms intersect, but are not synonymous. "Criticism", in its strict sense, always carries an element of analysis and assessment of the appropriateness of conduct of the criticized person which, in turn, allows for the subsequent objective evaluation of its veracity and correctness. Moreover, at least from the semantic perspective, criticism does not necessarily have to involve third parties, but may be limited to the exchange of opinions between the criticizing person and the criticized person. On the other hand, the essence of "discrediting", at least in the semantic context employed in universal language, results in the undermining of someone's authority, in the negative assessment of someone's attitude or activity by others. The indicated negative result may be brought about by the objective (justified or otherwise, but verifiable) assessment of someone's activities or by how they are treated (for example, referred to in a disrespectful or contemptuous manner). Therefore, discrediting may be of contextual nature and, what follows, significantly less discernible than criticism. Finally, an important, though not paramount, element of this term is the motive of the person formulating given opinions. In practice, however, it is difficult to assess this element in subjective and psychological categories, as well as in terms of the foreseeable balance of social consequences caused by stating such an opinion. To simplify, discrediting would be "criticism for the sake of criticism", or a reaction disproportionate to the exposed error or the intended positive social consequences (see also the differentiation between "common criticism" and accusations which "undermine the public confidence in civil servants" in the statement of reasons of the Grand Chamber of the ECHR in the case of *Pedersen and Baadsgaard v. Denmark* of 17 December 2004).

3.5. A literal interpretation of the challenged provision, supported by the historical and systemic interpretations allows for the conclusion that the sanctioned action, i.e. public discrediting of another physician, refers only to criticism which is expressed publicly and is not based on facts, or based on facts, but disproportionate in form or content to the criticized activity of another physician, or not connected with the protection of public interest. Such is its significance accepted by the Supreme Medical Council and in literature (see the statements quoted in the motion of the Prosecutor General: of R. Krajewski, *Na marginesie artykułu 52 KEL*, [Sidenotes to Art. 52 of the CME], published in "Gazeta Lekarska" [Medical Gazzette] No. 5/2004 and J.Umiastowski, *Komentarz do artykułu „Czy lekarz korzysta z wolności słowa?”* [Commentary on the article entitled "Are physicians free to express their opinions?"] published in *Pomorski Magazyn Lekarski* [Pomeranian Medical Magazine] No. 7(149)/2006, p. 3).

From the perspective of the protection of rights of the complainant and of other persons in similar situation, the most important issue is the interpretation of Art. 52(2) of the CME adopted in the jurisprudence of medical courts. Jurisprudence of the Constitutional Tribunal reflects a position that there is a requirement for the review of constitutionality of provisions which are shaped by fixed, consistent and common judicial interpretation (see: judgment of the CT of 16 October 2007, case file No. SK 13/07, OTK ZU No. 9/A/2007, item 115). Since not many cases are based on the challenged provisions, it is difficult to speak of "fixed" or "consistent" interpretation in the commonly used sense of these words. In the years 2004-2006, out of 103 examined cases based on the challenged provision, only 8 were concerned with the content of the provision (see: R. Krajewski, *Kodeks Etyki Lekarskiej jako podstawa odpowiedzialności zawodowej* [Code of Medical Ethics as the basis of professional responsibility] in *Gazeta Lekarska* No. 10/2007). Therefore, it is appropriate to adopt the understanding of the challenged provision adopted in the case of the complainant and established on the basis of copies of judgments filed by the Supreme Medical Council.

The quoted statements of the Supreme Medical Court and of medical courts of lower instances indicate, in the opinion of the Constitutional Tribunal, that the notion of "discrediting" in proceedings regarding professional duties of physicians, conducted pursuant to Art. 52(2) of the CME is employed in its simplified meaning, which diverges from the one presented hereinabove. This is because medical courts interpret "public discrediting" as to be any public criticism, without examining the underlying reasons (motives) nor, which seems fundamental in the case at issue, the veracity of the charges (particularly, Supreme Medical Court in its judgment awarded in the case of the complainant of 20 June 2006, case file No. NSL Re p. 23/06). It is not the subject of control and review in this case to weigh the opposing values of the good reputation and professional authority of a physician, on the one hand, and of the social (public) interest, for whose protection a critical statement is made on the other hand. Furthermore, in none of the presented cases the medical courts have undertaken to identify such interest or value alternative to the protection of honour and good reputation of the informed physician. This is the content of the norm decoded from Art. 52(2) of the CME accepted by the CT as reliable for the review of constitutionality (see, however, the opinion formulated in the jurisprudence of the Supreme Medical Court of: 15 November 2005, case file No. NSL Re p. 44/05; 18 October 2005, case file No. NSL Re p. 28/05 and of 29 November 2005, case file No. NSL Re p. 48/05).

4.The content of Art. 52(2) of the CME and the regulation of intra-corporate criticism in the context of other codes of professional conduct.

4.1. Irrespectively of how medical courts interpret the content of Art. 52(2) of the CME in practice, it seems justified to juxtapose the challenged provision with the regulations on intra-corporate criticism contained in codes of professional conduct of other professions of public trust. An analysis of how this issue is regulated calls for dividing them into two categories.

4.2. Ethical codes in the first category contain measures similar to or exceeding those of the

challenged Art. 52(2) of the CME. These are, among others:
-point 24, second sentence of the Code of Professional Ethics of Nurses and Midwives of the Republic of Poland, pursuant to which a nurse or a midwife "may not undermine the authority of other employees of the health service, nor impart information which impairs the practising of their profession";
- Art. 38 of the Code of Ethics of Legal Advisors (Annex to resolution No. 5 of the 8th National Assembly of Legal Advisors of 10 November 2007), pursuant to which: "1)It shall be unacceptable for a legal advisor to express to third persons a negative opinion of the professional activity of another legal advisor, without prejudice to para.2 and para.3, 2)A legal advisor who has been requested to issue an opinion on another legal advisor is obliged to hear out the legal advisor whom the opinion concerns and to base the opinion on documents and facts known to him, as well as to ensure that it is objective and factual.3) Issuing a negative opinion on another legal advisor, also as regards his professional activity, shall be acceptable provided that such opinion is based on facts and the need or duty to issue it result from professional or self-government tasks or competences".
- Art. 15(1-3) of the Code of Ethics of Tax Advisors (Annex to resolution No. 28/2006 of the 2nd National Assembly of Tax Advisors of 22 January 2006 on professional ethics of tax advisors), stipulates: "1. A tax advisor shall be obliged to observe the principles of loyalty, collegiality and fair competition towards other tax advisors. 2. A tax advisor shall not express publicly negative opinions on another tax advisor, his or her professional activities or other actions. However, it shall be acceptable to refer to arguments or opinions expressed by another tax advisor based on facts. 3. At the request of a client, a tax advisor may present his own opinion on the case previously examined by another tax advisor without questioning his skills. The assessment of the arguments presented by another tax advisor shall be substantiated, however, in a statement of reasons for his position".

4.3. In the second category of codes of professional ethics the principles of collegiality, loyalty, freedom of expression and the right to criticise are asserted in a much more reserved manner. The provisions of deontological acts in this category do not prohibit criticising or discrediting another member of the profession *per se*, but rather they prescribe caution in formulating appropriate statements. These include the following:
- Art. 27 of the Code of Ethics of Pharmacists, pursuant to which "Relations between pharmacists shall be based on mutual respect, loyalty, collegiality and solidarity. They shall exchange experiences and be of assistance to one another. The mutual assessment of pharmacists shall be fair, while criticism shall be presented impartially and relayed to the concerned person in the first place",
- §31(1) and §39(2) of Code of Ethics of Advocates stipulate that "an advocate shall observe the principles of kindness, loyalty and collegiality towards fellow advocates", but "in the event of conflict between the principle of collegiality and the justified interest of the client, the client's interest shall prevail",
- §2 point 8 of the Code of Ethics of Civil Servants, adopted by regulation 114 of the Prime Minister of 11 October 2002 on the adoption of a Code of Ethics of Civil Servants (M. p. No. 46, item 683 as amended), pursuant to which "A member of the civil service corps (…), 8)shall exercise restraint in publicly expressing his opinions on the functioning of his office, as well as other offices and state authorities".

4.4. International collections of medical deontological principles also do not contain a provision identical to the challenged Art. 52(2) of the CME. Art. 28 sentences 1 and 2 of the European Guide to Medical Ethics (hereinafter referred to as: ECME) decreed on 6 January 1987 stipulates that the principles of collegiality (*la confraternité*) that bind physicians are laid down "in the interest of patients" and "aim to prevent a situation whereby a patient could be subject to unfair competition between physicians". Art. 30 of the ECME stipulates: "A physician who notifies the appropriate professional authority of an observed violation of medical ethics or professional competences by another physician does not violate the principle of collegiality". Finally, pursuant to point B6 of the Annex to the ECME, "a physician may make statements for public coverage in the press, radio and

television to the extent in which it aims to inform the public opinion on matters of health. A physician who participates in an educative or sanitary action aiming to inform the public opinion, regardless of the means of communication, shall quote only confirmed information and exercise caution and care for the consequences of his statements for the public opinion (…)".

5. The charge of violation of freedom of expression and the right to criticise (Art. 54(1) read in conjunction with Art. 31(3) of the Constitution).

5.1. Pursuant to Art. 54(1) of the Constitution, "The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone". In literature it has been emphasized that the quoted provision of the Constitution in fact regulates three separate but interrelated freedoms of individuals, that is freedom to express one's opinions, freedom to acquire information and freedom to disseminate information. In the case at issue of particular significance is the first one, relatively broadly formulated both in the jurisprudence of the Constitutional Tribunal and in the doctrine of law.

An "opinion", within the meaning of Art. 54(1) of the Constitution, is understood not only as the expression of personal assessment concerning facts and occurrences in all aspects of life, but also as presenting opinions, conjectures, predictions and judgments regarding controversial matters, and the communication of information concerning both confirmed and alleged facts (see judgments of the CT of: 5 May 2004, case file No. P 2/03, OTK ZU No. 5/A/2004, item 39; 20 February 2007, case file No. P 1/06, OTK ZU No. 2/A/2007, item 11 and p. Sarnecki, *uwaga 5 do Art. 54*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, [remark No. 5 to Art. 54 [in:] Constitution of the Republic of Poland. Commentary], vol. 3, Warsaw, 2005.

Pursuant to the consistent jurisprudence of the CT and the ECHR, freedom of expression and the right to criticise has the broadest extent in the area of political life (see, *inter alia*, judgments of the ECHR in the cases of *Lingens v. Austria* of 8 July 1986, No. 9815/82, *Castells v. Spain* of 23 April 1992, No. 11798/85, *Incal v. Turkey* of 9 June 1998, No. 22678/93 and judgment of the CT in the case with file No. P 1/06). Especially in this area, freedom of expression is one of the foundations of a democratic society, a condition of its development and of self-realization of individuals (judgments of the CT of: 23 March 2006, case file No. K 4/06, OTK ZU No. 3/A/2006, item 32 and 11 October 2006, case file No. P 3/06, OTK ZU No. 9/A/2006, item 121).

Freedom of expression, however, applies also to other aspects of public and private life. The jurisprudential line of the CT is in this matter compatible with the jurisprudence of the ECHR, which emphasizes the particular significance of the freedom of expression in the shaping of attitudes and opinions in issues which attract public interest and concern (*serious issues affecting the public interest*, see, *inter alia*, judgment of the ECHR in the cases of *Hertel v. Switzerland* of 25 August 1998, No. 25181/94, § 47). Clearly, the problems of protection of health and the functioning of the health service, particularly to the extent in which they deal with issues significant for the safety of patients, must be considered such issues affecting public interest (same ECHR in its judgments in cases of: *Bergens Tidende v. Norway* of 2 May 2000, No. 26123/95, § 51 and *Selistö v. Finland* of 16 November 2004, No. 56767/00, § 51.

Freedom of expression may not be limited only to information and opinions which are deemed favourable or perceived as harmless or neutral (see judgments in the cases with file nos. K 4/06 and P 3/06). Provision of Art. 54(1) of the Constitution applies to the expression of opinions in any form and in any circumstances (see judgment in the case with file No. P 10/06, OTK ZU No. 9/A/2006, item 128).

5.2. Freedom of expression and the right to criticise, which constitutes an element of it, may not be understood as unlimited (absolute) values and so may be subject to limitations. It is, however, necessary that such limitations be formulated so as to satisfy the constitutional requirements. Although Art. 54 of the Constitution does not make a clear reference to Art. 31(3) of the Constitution, in light of the consistent jurisprudence of the Tribunal, the foregoing is not of decisive

importance. Art. 31(3) of the Constitution is of general nature and is applied not only when the provision which is the basis of a given freedom or right clearly foresees the admissibility of its limitation, but also when it does not. Hence, the quoted provision is a necessary supplement to the norms provided for in Art. 14 and Art. 54(1) of the Constitution (see judgment of the CT in the case with file No. P 10/06).

Pursuant to Art. 31(3) of the Constitution, "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by a statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. Art. 10(2) of the Convention specifies similarly the admissibility of limitations of freedom of expression, while a more liberal approach has been adopted in Art. 19(3) of the International Covenant of Civil and Political Rights (see the deliberations on the level of protection resulting from the abovementioned judgments in the judgment of the CT of 5 May 2004, case file No. P 2/03).

While reviewing the constitutionality of the regulation stipulating the limitation of a constitutional freedom or right, it should be considered whether it meets the formal criteria, i.e. the prerequisite of being introduced by a statute (due to the fundamental role of freedom of expression in a democratic state ruled by law, it is necessary to strictly control the precision of provisions of statutes introducing a limitation of the exercise of this freedom – see judgment of the CT of 23 March 2006, case file No. K 4/06) and should the answer to this basic question be positive, then a proportionality test should be conducted (see, instead of various, judgment of the CT of 13 March 2007, case file No. K 8/07, OTK ZU No. 3/A/2007, item 26). Pursuant to jurisprudence of the Constitutional Tribunal based on Art. 31(3) of the Constitution, the charge of lack of proportionality requires that the following be ascertained regarding the analysed norm: 1)can it achieve the objective intended by the legislator (effectiveness of the norm)?, 2)is it necessary (indispensable) for the protection of public interest with which it is connected? (the legislator's necessity to act), 3)are its effects proportionate to the burdens or limitations which it imposes on the citizen? (proportionality *sensu stricto*). The indicated postulate of effectiveness, necessity and proportionality *sensu stricto* compose the content of "necessity" expressed in Art. 31(3) of the Constitution.

5.3. While assessing the compliance with the requirement that a provision introducing a limitation of constitutional rights and freedoms may only be introduced by means of statute, reference should be made to the concept of the subject of review, formulated at the beginning. This subject is a legal norm decoded from Art. 52(2) of the CME read in conjunction with Art. 15(1) and Art. 41 of the AC p. Accepting the particular role of deontological acts of professional corporations, it is reasonable to conclude that the requirement for a limitation of constitutional rights and freedoms to be introduced by a statutory instrument, at least in its broad sense, has been met. In the opinion of the Constitutional Tribunal, transferring to professional self-governments the authority to interfere with certain constitutional freedoms of persons exercising professions of public trust may, in specified circumstances, be deemed justified or even consistent with the needs of "proper exercise" of regulated professions. This may not, however, be a blanket authorisation (judgment of the CT in the case with file No. P 21/02). At this point it should be emphasized that the nature of professions of public trust, which are regulated and require membership in professional corporations, weighs in favour of a slightly more liberal interpretation of this prerequisite. In reference to the remarks made by the CT in the case with file No. P21/02, it should be indicated that "entering into a corporation, upon fulfillment of the statutory conditions (…) is equivalent to subjecting oneself voluntarily to ‘supervision of proper exercise of the profession’ and, *ipso facto*, ‘constitutes a voluntary submission to intra-corporate regulations’".

5.4. Therefore, it is fundamental in the case at issue to ascertain whether any of the values specified in Art. 31(3) of the Constitution speak for the discussed limitation of freedom of expression. Should

the answer be positive, it must also be determined whether the challenged regulation meets the remaining criteria specified under this constitutional norm. In the opinion of the Tribunal, the protection of honour and good reputation of another (criticised) physician may not be considered sufficient reason for such a special regulation. The principle of equality, rudimentary in contemporary legal systems (Art. 32 of the Constitution) does not justify the necessity of providing for this type of special protection which exceeds the regulations set forth by positive law (discussed at length in the Ombudsman's motion) only to physicians and exclusively in professional relations (regarding other physicians).

As correctly emphasized by the Ombudsman for Citizen Rights, the necessity of protecting "public health", understood in conjunction with the prerequisite of "public order" appears to be a relevant justification for limiting the right to criticise decoded from Art. 52(2) of the CME. The trust reposed by patients in physicians, their competences and employed methods of treatment is, as stressed by the President of the SMC, an indispensable element of proper functioning of the health service in general, as well as of the success of individual therapies. The European Court of Human Rights has employed an analogical construction in the case of *Stambuk v. Germany* quoted by the parties to the case at issue (see judgment of 17 October 2002, application No. 37928/97, § 41: "well-functioning of the profession as a whole". Hence, while deliberating the admissibility of expressing critical opinions regarding the health service, particularly in the mass media, it is important to consider on the one hand the "freezing effect" of restrictive regulations limiting the right to criticise and, on the other hand, the possible effects of liberalization of the rules on criticism on the attitude of the society towards the health service, including a similar "freezing effect" in what concerns confidence and faith of potential patients in the success of treatment.

Also the element of protecting the public good connected with the social image of the health service and its employees is subject to consideration in juxtaposition to other values, protected by law under both the Constitution and statutes, such as: the right of patients to proper medical care or their right to access information. Firstly, even though a negative assessment of a specific physician may also, at least potentially, have the side effect of changing the attitude that patients have towards the profession as a whole, it is unjustified to identify criticism of one physician and the trust he or she enjoys with criticism and confidence regarding the profession as a whole. It is worth mentioning here that even though the criticism of one physician may in the short run harm the trust that the public repose in health service, in the long perspective it will strengthen this trust by assuring the patients that errors and violations committed by physicians are not covered up but exposed. Secondly, trust reposed in a specific physician must have its objective grounds and should these grounds be violated, such an occurrence may not be kept silent. The factor which is to reconcile the indicated values is, among others, the procedure of reporting the observed errors and violations of professional deontology provided under Art. 52(3) of the CME. However, if the measures stipulated by this provision prove ineffective, then public divulgation of credible information, aimed at protecting the public interest, should not result in imposing a penalty pursuant to Art. 52(2) of the CME. Therefore, the interpretation of the challenged provision, adopted in the jurisprudential practice of medical courts, based on which a court adjudicating in cases of professional offences against Art. 52(2) of the CME does not examine the veracity of statements made by the alleged offender nor the motives underlying divulging the information on defective conduct of another physician is found inconsistent with the requirement of "necessity" of the limitation mentioned in Art. 31(3) of the Constitution.

5.5. However, the Tribunal does not concur with the complainant's claim that the public interest which justifies permitting complete freedom of expression in relations between physicians, with the inclusion of statements for the mass media, is the "broadly understood right of patient to chose a competent, trustworthy physician" and that "this possibility guarantees the proper self-regulation of the health service market". The complainant's argumentation in the indicated extent is unrelated to the essential matter of proceedings in the case at issue, but rather pertains to a certain vision of the

health service market, ruled by open competition, including "negative advertising" aiming to depreciate the skills and qualifications of competitors in order to increase demand for one's own services. It should be reiterated that the area of medical services is a specific one, irrespectively of its growing marketization. Leaving other reasons aside, what speaks for the specific nature of this area is the rank of values subject to protection and the scale of disproportion between the knowledge and awareness of the "client" and of the qualified personnel who provide the services. It is the opinion of the Tribunal that, in these conditions, allowing for unlimited criticism whose legitimacy could only be verified *ex post* before courts, would be socially harmful, both on the general and individual levels.

5.6. In conclusion, the Tribunal recognizes the need for certain limitations of the freedom of expression and the right to criticism in relations between physicians due to the necessity of protecting the confidence that patients repose in the health service and which is indispensable for the proper functioning of this profession as a whole, as well as due to the nature of patient-physician relations based on confidence that a patient reposes in the physician and finally due to the specifics of diagnostic and therapeutic decisions, usually made without complete knowledge of all the circumstances of a given case. The reporting procedure provided for under Art. 52(3) of the CME aims to reconcile these competing values. This, however, does not mean that the mechanism specified therein will always be sufficient or adequately effective for the protection of the value fundamental in the examined extent, that is, the health and life of patients. *In casu*, within the limits dictated by the protection of this value and, what is obvious, the veracity of the produced statements, the necessity to publicly criticise another physician may arise. Hence, an interpretation of Art. 52(2) of the CME consistent with the constitutionally approved system of values may not head towards absolute inadmissibility of public criticism of a physician by another physician nor towards relieving the medical courts of hearing evidence of truth and of evaluating conflicting interests in a given case.

6. Charge of violation of Art. 17(1) of the Constitution

Pursuant to Art. 17(1) of the Constitution, "By means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest". The quoted provision contains an institutional norm and does not constitute a basis for constructing a separate constitutional right or freedom, whose violation could be objected against under constitutional review initiated by a constitutional complaint. It is however admissible to quote it as a union regulation affecting the interpretation of other (basic) models of constitutional review.
As the Tribunal ruled in the case with file No. P 21/02, "The regulation of Art. 17(1) of the Constitution authorises self-governments of professions of public trust to "supervise the proper functioning of the profession". This supervision, by an explicit order by the constituent assembly, is to be exercised "within the boundaries of public interest and for the purpose of its protection". Such formulation, in the first place, precisely defines the purpose and boundaries of the exercised "supervision over (…) practiced professions". This purpose is ensuring the proper quality, in both the substantial and legal sense, of all the activities which constitute "the practice of professions". (…) Secondly, the formulation of Art. 17(1) sets out the limits and direction of the exercised "supervision". These limits are delineated by the "public interest". The exercised supervision should, by virtue of constitutional provision, aim to protect this interest. Each action of a self-government regarding "the exercise of supervision" is therefore subject to constitutionally defined assessment from the standpoint of protecting public interest".
In the case at issue, the above concerns both the processes of enacting corporate deontological norms, as well as their interpretation and application by screeners for professional liability and the medical courts. Authorities of professional self-governments may not disregard the content of Art.

17 of the Constitution in the course of exercising their statutory competences. The constituent assembly, by vesting specific tasks pertaining to the area of public administration in the authorities of professional corporations and by introducing the requirement of membership in a professional corporation, gives the public interest the rank of justification and ultimate purpose of furnishing the authorities of professional self-governments with the indicated attributes. The circumstances of the case at issue also allow the consideration of this value. Therefore, jurisprudential practice of medical courts insofar as they ascribe to the provision of Art. 52(2) of the CME meaning that abstracts from the constitutionally ordered valuation is therefore unjustified and reinforces the charge of violation of Art. 54(1) read in conjunction with Art. 31(3) and Art. 17(1) of the Constitution.

7. The charge of violation of Art. 63 of the Constitution.

The charge of violation of Art. 63 of the Constitution by Art. 52(2) of the CME read in conjunction with Art. 15 (1) and Art. 41 of the ACP has been found unjustified. Pursuant to Art. 63 of the Constitution, "Everyone shall have the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person – with his consent – to organs of public authority, as well as to organizations and social institutions in connection with the performance of their prescribed duties within the field of public administration. The procedures for considering petitions, proposals and complaints shall be specified by statute". The so-called right to petition regulated by this provision covers petitions, proposals and complaints filed with public authorities, as well as social organizations and institutions in connection with the performance of their prescribed duties in the field of public administration. Regardless of the fact that authorities of the medical self-government in specific cases perform prescribed duties in the field of public administration, it would be unjustified to generally include among these duties "exercising the supervision of the proper functioning of a profession in which the public repose confidence" (Art. 17(1) of the Constitution) and controlling the observance of principles of professional deontology. The doctrine of constitutional law emphasizes that from the content of Art. 63 of the Constitution and from the fact that it has been included among provisions which guarantee political rights and freedoms results the rule that petitions, motions and complaints are to concern the broadly understood activity of public authority, and the Constitution accentuates the political aspect of this institution (see: W. Sokolewicz, Uwaga 6 do Art. 63, [w:] *Konstytucja Rzeczpospolitej Polskiej. Komentarz*, t.III [Remark No. 6 to Art. 63 in Constitution of the Republic of Poland. Commentary, vol. 3], Warsaw 2003). Hence, the thesis that a press article on defective, according to the complainant, professional practice of another physician constitutes a form of a "public" expression of a motion or complaint to the authorities of the medical self-government seems artificial and based on a misunderstanding. The effects of such reasoning for the general society require no further elaboration. However, it should be emphasized that the provisions of the Act on Chambers of Physicians and of the Code of Medical Ethics provide for an option, and in the case of observing serious violations, even the duty of reporting it to the competent authority of a professional self-government and they set out the procedure for handling such a motion. In the circumstances that shape the background of the case at issue, the complainant did, in fact, file such a report, but its effects were not satisfactory to her.

8. Effects of the judgment

The judgment of the Constitutional Tribunal in the case at issue has the nature of a so-called scope judgment. This signifies that the norm decoded from Art. 52(2) of the CME, read in conjunction with Art. 15 (1) and Art. 41 of the ACP (when understood in a specific manner) is unconstitutional only in part. Therefore, in order to fix the unconstitutionality *pro futuro*, it is not necessary for the legislator or the appropriate authorities of the medical self-government to act. The desired effect may be achieved by such alteration of the interpretation of Art. 52(2) of the CME,

adopted in the jurisprudence of the medical courts, that would conform to the content of the present judgment of the Constitutional Tribunal, i.e. that the notion of "discrediting" signifies a public statement which is false or not connected with the protection of the public interest, made exclusively or primarily in order to undermine the authority of another physician or the trust they enjoy. However, an amendment should be introduced in the content of Art. 52(2) of the CME so as to prevent misinterpretation of this provision in the process of its application.

From the point of view of the complainant and other persons who faced a similar situation, i.e. were penalised on the basis of Art. 52(2) of the CME, whereby medical courts failed to undertake the assessment of either the veracity of the statements expressed or of the importance of the interest for the protection of which the persons had acted, the present decision constitutes the basis for re-opening proceedings, pursuant to Art. 190(4) of the Constitution, and in accordance with the procedure of Art. 540 and ff. of the Code of Penal Procedure.

On these grounds, the Constitutional Tribunal ruled as in the concluding part of the judgment.