

Judgement of 23rd April 2008, [SK 16/07](#)

FREEDOM OF EXPRESSION AND MEDICAL ETHICS

(OTK ZU 2008, No. 3A, item 45)

Type of proceedings: constitutional complaint Initiator: A natural person	Composition of Tribunal: 5 judges	Dissenting opinions: 0
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Legal provisions under review	Basis of review
<p>The obligation of a physician to express an opinion on professional activities of other physicians with particular caution as well as the prohibition on public discredit of another physician.</p> <p>[Code of Medical Ethics: Article 52 paragraph 2]</p> <p>in conjunction with :</p> <p>the obligation to observe the principles of ethics, deontology, and other regulations connected with the practice of a profession as well as principles of imposing sanctions for the failure to do so</p> <p>[Act of 17th May 1989 on Chambers of Physicians: Article 15 point 1, Article 41 as well as Article 42]</p>	<p>Freedom of expression [Constitution: Article 54 paragraph 1]</p> <p>Principle of proportionality [Constitution: Article 31 paragraph 3]</p> <p>Professional self-governments – creation, status and functions [Constitution: Article 17 paragraph 1]</p> <p>Right to submit petitions [Constitution: Article 63]</p>

The challenged provisions of the Act on Chambers of Physicians bind physicians to abide by the principles of professional ethics and impose sanctions for the failure to do so, simultaneously authorising medical courts to adjudicate on penalties of warning, reprimand, suspension or deprivation of the right to practice a profession. The principles of deontology and professional ethics are adopted by self-governments of physicians acting by virtue of statutory authorisation. The principles have been contained in the Code of Medical Ethics (hereinafter referred to as: the CME), amended in 2003, envisaging, *inter alia*, the procedure in the event of finding another physician's failure to follow the principles of medical profession. The challenged provision of Article 52 of the CME expresses the so-called principle of loyalty, prescribing an obligation to express opinions on the activity of another physician with particular caution, as well as a prohibition on discrediting the person in public. Furthermore, in accordance with the content of the Physician's Oath adopted by the General Medical Assembly, a physician should not undermine trust in other physicians. Medical courts, unlike the Supreme Medical Council and the doctrine, interpret the

prohibition on public discredit as a prohibition on any public criticism, irrespective of the motives underlying its expression or the veracity of allegations.

The complainant, employed as an assistant professor at the Department and the Teaching Hospital of Infectious Diseases of Children at Medical University in Wrocław, engaged in polemics with the head of the same department as regards the legitimacy of some surgery performed on a group of patients. Besides informing an organ of a self-government of physicians about the case, the complainant expressed her protest against performing such surgeries in a press publication. As a result of the publication, the Regional Medical Court found the complainant guilty of a professional misconduct on the grounds of infringement of Article 52 paragraph 2 of the CME, and imposed a penalty of a reprimand. The complainant's appeal was partially upheld by the Supreme Medical Court. The challenged decision was amended in terms of the penalty (the Court imposed a lighter penalty of a warning), yet the allegations concerning the violation of personal interests consequent upon an incorrect interpretation of Article 52 paragraph 2 of the CME were dismissed. Medical courts of both instances based their decisions on the finding that Article 52 paragraph 2 of the CME imposes sanctions for a mere fact of public expression of a view discrediting another physician, irrespective of their veracity.

The complainant alleged an infringement of the freedom of expression by the adopted interpretation of the CME, and pointed out that the imposed limitation of the right is not justified in light of the principle of proportionality. The complainant also emphasised that the challenged provisions failed to conform to the constitutional principles envisaging that professional self-governments shall act for the purpose of and within the limits of the public interest.

The challenged provision of the CME was identified in conjunction with a fragment of the Physician's Oath, as adopted by the General Medical Assembly. Yet, the Constitutional Tribunal decided to discontinue proceedings within this scope, having found that the Physician's Oath did not constitute an integral part of the CME and had not been the basis of any decision at any stage of proceedings in the complainant's case.

RULING

Article 52 paragraph 2 of the Code of Medical Ethics, read in conjunction with Article 15 point 1, Article 41 and Article 42 paragraph 1 of the Act of 17th May 1989 on Chambers of Physicians, insofar as it prohibits the expression of public statements on professional activities of another physician, where the statements are veracious and justified by the protection of the public interest, does not conform to Article 54 paragraph 1, read in conjunction with Article 31 paragraph 3 and Article 17 paragraph 1 of the Constitution, and is not inconsistent with Article 63 of the Constitution.

The Tribunal discontinued proceedings within the remaining scope, pursuant to Article 39 paragraph 1 point 1 of the Act of 1st August 1997 on the Constitutional Tribunal, given the inadmissibility of pronouncing judgement.

PRINCIPAL REASONS FOR THE RULING

1. The subject of review within the procedure of a constitutional complaint is a normative act in its substantive meaning. Of decisive significance in the assessment of a particular act is whether the content thereof is general (i.e. the provision is addressed to a particular category of persons non-identifiable by name) and abstract in its nature (i.e. the content of the provision does not exhaust itself in a one-off obligation to behave in a particular manner). The assessment is undertaken for each and every act separately, applying the presumption of normative nature of legal acts.
2. A complex statutory norm is a norm of universally binding law (e.g. of a statute) specified in detail by the content of a particular decision, e.g. an act adopted by an organ of a professional self-government, belonging to a separate deontological normative order. Provisions of the Code of Medical Ethics acquire legal value solely in conjunction with another act of universally binding law – appropriate provisions of the Act on Chambers of Physicians.
3. The Physician's Oath may not be the subject of a review undertaken by the Tribunal, because its wording had been adopted by way of a separate resolution by the General Medical Assembly without a clear statutory basis. The Oath does not establish any separate ethical norms for physicians, and only generalises (synthesises) the norms already included in the Code of Medical Ethics.
4. The provision of Article 54 paragraph 1 of the Constitution *de facto* provides for three separate, albeit interrelated freedoms of the individual, i.e. freedom to express opinions, freedom to acquire information, and freedom to disseminate information. The first one is of particular significance in the present case.
5. The freedom of expression may not be limited to information and opinions that are regarded as favourable or perceived harmless or neutral. The provision of Article 54 paragraph 1 of the Constitution encompasses the expression of opinions in all forms and in all circumstances.
6. An "opinion", within the meaning of Article 54 paragraph 1 of the Constitution, is understood not only as the expression of personal assessment as regards facts and occurrences of various spheres of life, but also as a presentation of opinions, conjectures, predictions and judgements regarding controversial matters, and the communication of information concerning both ascertained and conjectured facts.
7. The broadest scope of the freedom of expression and the right to voice criticism exists in the sphere of politics. Yet, the freedom of expression also encompasses other areas of public as well as private life. The jurisprudential line of the Constitutional Tribunal in this matter is compatible with the jurisprudence of the European Court of Human Rights, which emphasises the particular significance of the freedom of expression in the shaping of attitudes and opinions on matters that attract public interest or cause concern.
8. It is necessary to compare two values: the freedom of making public statements that are veracious and justified by the protection of the public interest with the

appropriateness of the protection of the public interest connected with the public image of health service and its employees.

9. Any limitations upon the freedom of expression on the grounds of the protection of the public interest have to be weighted against the patients' right to proper health care and to information. Furthermore, the limitations have to fulfil the formal criteria for the admissibility of limitations upon constitutional freedoms and rights, and pass a test of proportionality, which is composed of three elements: 1) the prerequisite of usefulness of a norm, 2) the prerequisite of the legislator's necessity to act, 3) the prerequisite of proportionality in the strict sense.
10. The Tribunal acknowledges that there is a need for certain limitations upon the freedom of expression and the right to voice criticism in relations existing between physicians, on account of the necessity to protect patients' confidence in the health care, which is indispensable for the proper functioning of medical profession as a whole, specific nature of relations between a physician and a patient, based on the trust the patient reposes in the physician, and, finally, the specific character of diagnostic and therapeutic decisions, which are, as a rule, taken in circumstances of incomplete understanding of the conditions related to a given case.
11. However, there may exist a necessity to publicly voice criticism of another physician, within the limits of the veracity of the statements expressed, and the need to protect the patient's health and life. The interpretation of the Code of Medical Ethics may not aim at an absolute prohibition on voicing public criticism by another physician.
12. The provision of Article 17 paragraph 1 of the Constitution consists of an institutional norm and does not constitute the basis for the construction of a separate constitutional right or freedom. Yet, since the provision was referred to in the application in conjunction with other provisions, it influences the interpretation of those bases of review. Each activity of a professional self-government is subject to an assessment from the perspective of the public interest and the protection thereof.
13. The provision of Article 17 paragraph 1 of the Constitution specifies in detail the goals and limits of activities of professional self-government, which shall concern themselves with the proper «practice of (...) professions». The goal in question shall be the control of the quality – both in the substantive and legal sense – of activities constituting the «practice of (...) professions». Furthermore, the provision of Article 17 paragraph 1 sets the framework and orientation of the activities at issue. Such framework shall be determined by the «public interest».
14. It is necessary to undertake a constitutional review of a provision whose content has been shaped by a fixed, consistent and common judicial interpretation. The jurisprudence of medical courts, which have failed to take into account the evaluation that is prescribed by the Constitution, strengthens the allegation of an infringement of Article 54 paragraph 1, read in conjunction with Article 17 paragraph 1 and Article 31 paragraph 3 of the Constitution.
15. Petitions, proposals and complaints, as referred to in Article 63 of the Constitution, concern the broadly understood activity of public authority, which is characterised by its political nature. It is unjustified to treat the concern for the proper practice of a

profession in which the public repose confidence as a task commissioned from within the scope of public administration.

EFFECTS OF THE JUDGEMENT

1. The decision of the Constitutional Tribunal in the present case has the nature of the so-called scope judgement. This signifies that the norm decoded from Article 52 paragraph 2 of the CME, read in conjunction with Article 15 point 1 and Article 41 of the Act on Chambers of Physicians, is unconstitutional only in part (encompassing a specific manner of interpretation).
2. The intended effect may be achieved by such alteration of the interpretation of Article 52 paragraph 2 of the CME, adopted in the jurisprudence of medical courts, that would conform to the content of the present judgement of the Constitutional Tribunal. However, a necessary amendment has to be introduced to the content of Article 52 of the CME to prevent misinterpretation of this decision in the process of its enforcement.
3. For persons who were penalised on the basis of Article 52 paragraph 2 of the CME, where medical courts had failed to undertake the assessment of either the veracity of the statements expressed or 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 Article 190 paragraph 4 of the Constitution, and in accordance with the procedure of Article 540 ff of the Code of Criminal Procedure that shall apply accordingly.

Provisions of the Constitution

Art. 17. 1. 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.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by 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. 54. 1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.

Art. 63. 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.