51/6/A/2011

JUDGMENT
of 6 July 2011
Ref. No. P 12/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Stanisław Biernat – Presiding Judge
Zbigniew Cieślak – Judge Rapporteur
Maria Gintowt-Jankowicz
Mirosław Granat
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Piotr Tuleja
Sławomira Wronkowska-Jaśkiewicz
Andrzej Wróbel
Marek Zubik,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 6 July 2011, in the presence of the Sejm and the Public Prosecutor-General, a question of law referred by the Circuit Court in Gdańsk as to whether:

> Article 135(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, as amended) is consistent with Article 54(1) in conjunction with Article 31(3) of the Constitution, as well as with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended)

adjudicates as follows:

Article 135(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, as amended) **is consistent with Article 54(1) in conjunction with Article 31(3) of the Constitution of the Republic of Poland, as well as with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by Protocols Nos 3, 5 and 8 as well as supplemented by Protocol No. 2** (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended).

STATEMENT OF REASONS

* The operative part of the judgment was published on 15 July 2011 in the Journal of Laws - Dz. U. No. 146, item 879.

[…]

III

The Constitutional Tribunal has considered as follows:

1. Pursuant to Article 193 of the Constitution: "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court". The said rule is repeated in Article 3 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act). Moreover, Article 32(3) of the Constitutional Tribunal Act stipulates that a question of law should indicate "the scope within which an answer to the question may influence settlement of the case in relation to which the question has been asked (...)". The Constitutional Tribunal has on numerous occasions considered requirements which must be met by questions of law. It has stated, *inter alia* in the decision of 29 March 2000 (Ref. No. P 13/99, OTK ZU No. 2/2000, item 68), that "the admissibility of referring a question of law has (...) been determined by three premisses: a premiss concerning the scope ratione personae, a premiss concerning the scope ratione materiae as well as a functional premiss". The first two - the premiss concerning the scope ratione personae and the premiss concerning the scope ratione materiae – raise no doubts in the present case, as the Circuit Court in Gdańsk is authorised to adjudicate in the case which gave rise to the question of law, and the challenged Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, as amended; hereinafter: the Penal Code) is normative in character. What requires consideration, however, is whether the functional premiss has also been fulfilled, since establishing that will determine whether it is admissible to substantively adjudicate in the present case.

In the opinion of the Constitutional Tribunal, there is no doubt that the wording in Article 193 of the Constitution is broader in scope than the one in Article 79 of the Constitution. When juxtaposing the said regulations, one arrives at the following conclusion: a constitutional complaint may only concern a provision that constitutes the basis of a final decision on rights and freedoms, but the subject of a question of law may comprise all those provisions whose conformity (or non-conformity) to a particular higher-level norm for review affects the court's adjudication in a given case (see the judgment of the Constitutional Tribunal of 12 March 2002, Ref. No. P 9/01, OTK ZU No. 2/A/2002, item 14). "In other words, the correlation between a case pending before a given court and a question of law should consist in the fact that an adjudication by the court referring the question will vary depending on whether the Constitutional Tribunal rules the provision in question to be unconstitutional or constitutional" (J. Trzciński, M. Wiącek, commentary on Article 193 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 5, L. Garlicki, Warszawa 2007, p. 11).

1.1. In the present case, doubts arose as to the conformity of the challenged provision to Article 54(1) in conjunction with Article 31(3) of the Constitution, as well as to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by Protocols Nos 3, 5 and 8 as well as supplemented by Protocol No. 2 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention), during the consideration of an appeal against a decision in which a public prosecutor discontinued an investigation in the case

concerning a public insult to the President of the Republic of Poland, Lech Kaczyński. Thus, the case which has been pending before the court referring the question of law concerns the issue whether it was admissible to discontinue preliminary proceedings due to the public prosecutor's assumption that the act in question displayed no characteristics of a prohibited act specified in Article 135(2) of the Penal Code (cf. Article 17(1)(2) of the Act of 6 June 1997 – the Code of Criminal Procedure, Journal of Laws - Dz. U. No. 89, item 555, as amended; hereinafter: the Code of Criminal Procedure). Therefore, the direct legal basis of adjudication by the court comprises provisions concerning appeal proceedings in a criminal lawsuit. Nevertheless, assessing the aptness of the prosecutor's decision requires that the court should carry out the legal classification of the act in the context of Article 135(2) of the Penal Code, i.e. should specify (apply) the said provision with regard to the facts of the case. Possible derogation of Article 135(2) of the Penal Code, on the basis of a judgment by the Constitutional Tribunal, would make it necessary to revoke the decision on the discontinuation of the investigation and refer the case to the public prosecutor for reconsideration (see Article 330(1) of the Code of Criminal Procedure), in particular as regards the classification of the act in the context of other provisions of the Penal Code. The said circumstances confirm the existence of a functional correlation between a reply to the question of law concerning the conformity of the challenged provision to the Constitution and the Convention on the one hand and the determination of the case in appeal proceedings on the other (cf. Article 193 of the Constitution and Article 3 of the Constitutional Tribunal Act).

1.2. In the context of the functional premiss, the Constitutional Tribunal has also noted that the court which considers the appeal against the prosecutor's decision, and which has referred the question, applies Article 135(2) of the Penal Code, but merely as regards the classification of the act, and not with regard to the severity of a penalty for the offence specified in that provision. By contrast, the doubts raised in the question of law do not concern the fact of penalising an insult to the President of the Republic of Poland as such, but the severity of the penalty provided for in Article 135(2) of the Penal Code. This could suggest the lack of a correlation between the ruling of the Tribunal and the determination of the case pending before the court referring the question of law. However, it should be noted that the severity of the penalty set by the legislator may potentially be of significance for the classification of an act in some situations. It is not difficult to imagine cases where the severity of a penalty, being commonly regarded as excessive, leads to the quantitative restriction of the scope of the application of the provision by means of a very restrictive, narrowed-down interpretation of characteristics concerning the scope ratione personae and ratione materiae of the offence.

Additionally, the Constitutional Tribunal has deduced that since a question of law serves the purpose of commencing review proceedings aimed at dispelling doubts concerning constitutionality which arise in the course of the application of law by courts and, potentially, at eliminating unconstitutional norms, then it should be assumed that it would be undesirable to formulate the functional premiss, which determines the substantive consideration of the issue of constitutionality, in an excessively stringent way. Therefore, the Constitutional Tribunal has concluded that this question of law fulfils the formal premiss of conducting the substantive review of constitutionality.

2. The Constitutional Tribunal has pointed out that the Constitutional Tribunal Act has established the principle that review proceedings on the constitutionality of a normative act are commenced solely by way of application, question of law or constitutional complaint (cf. the decision of the Constitutional Tribunal of

18 November 1998, Ref. No. SK 1/98, OTK ZU No. 7/1998, item 120). In the said context, at the same time, the requirement of Article 32 of the Constitutional Tribunal Act should be taken into account, pursuant to which a question of law should, in particular, include a precise identification of the normative act, or a part thereof; formulation of an allegation of the non-conformity of the challenged normative act to the Constitution, ratified international agreement or statutes; and reasons for the claim containing indication of supporting evidence.

"The formulation of an allegation" in proceedings before the Constitutional Tribunal entails formulating a critique (negative assessment, a reservation) by the applicant, assigning certain verbal form to the statement that a lower-level norm is inconsistent with a higher-level norm (see Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, p. 113). Therefore, the essence of an allegation consists in individualising a relation between a challenged normative act (or part thereof) and the basis of a review, i.e. substantiating the statement that a given normative act (part thereof) remains in a certain relation to a higher-level norm for review – is inconsistent with (contrary to) the higher-level norm (see *ibidem*, pp. 113-114).

In its jurisprudence, the Constitutional Tribunal also emphasises the significance of proper substantiation for the allegation of the non-conformity of a challenged normative act to the Constitution, a ratified international agreement or a statute (cf. e.g. the decision of the Constitutional Tribunal of 6 October 1998, Ref. No. Ts 43/98, OTK ZU No. 5/1998, item 75). It is vital because the starting point of the assessment of any normative act should be the presumption of its constitutionality, the presumption of the rationality and freedom of the legislator, as well as consideration for the constitutional role of the legislative branch (see the dissenting opinion by Judge M. Gintowt-Jankowicz to the judgment of the Constitutional Tribunal of 11 May 2007, Ref. No. K 2/07, OTK ZU No. 5/A/2007, item 48 and the rulings cited therein). Therefore, it should be stressed that, in review proceedings before the Constitutional Tribunal, the burden of proving the allegation of unconstitutionality lies with a court referring a question, an applicant or a complainant (see the judgment of the Constitutional Tribunal of 16 September 2008, U 5/08, OTK ZU No. 7/A/2008, item 122). The failure of the said subjects to present appropriate arguments which would make it possible to overturn the presumption of constitutionality of the challenged provisions results in the Tribunal's obligation to rule the conformity of those provisions to the indicated higher-level norms for review (cf. e.g. the judgments of the Constitutional Tribunal of 13 March 2001, Ref. No. K 21/00, OTK ZU No. 3/2001, item 49 as well as of 31 May 2005, Ref. No. K 27/04, OTK ZU No. 5/A/2005, item 54).

3. The Constitutional Tribunal has stated that, in fact, Article 54(1) of the Constitution, indicated as a higher-level norm for the review, regulates three separate, though interrelated, freedoms of the individual, i.e. the freedom to express opinions, the freedom to acquire information and the freedom to disseminate information. In the present case, the first one is of fundamental significance; it is rendered in the jurisprudence of the Constitutional Tribunal, and in the doctrine of law, in a relatively broad way. The word "opinions" used in Article 54(1) of the Constitution should be interpreted in the broadest possible way: not only as the expression of personal assessment of facts and phenomena in all aspect of life, but also as presenting views, suppositions, forecasts, passing judgment on controversial matters, and also informing about actual and presumed facts (see the judgments of the Constitutional Tribunal of 5 May 2004, Ref. No. P 2/03, OTK ZU No. 5/A/2004, item 39, and of 20 February 2007, Ref. No. P 1/06, OTK ZU No. 2/A/2007, item 11, as well as P. Sarnecki, commentary on Article 54 of the Constitution, [in:]

Konstytucja Rzeczypospolitej Polskiej. Komentarz, Vol. 3, Warszawa 2003, pp. 1-2). At the same time, it is irrelevant what form the opinions will take; thus, they may be expressed orally or in writing, or by means of an image or sound, as well as by a publicly manifested attitude (e.g. wearing particular clothes in a given situation) (see the judgment of 12 May 2008, Ref. No. SK 43/05, OTK ZU No. 4/A/2008, item 57). Article 54(1) of the Constitution protects all legal forms of expression which make it possible for the individual to externalise and present his/her viewpoint (see *ibidem*). At the same time, the freedom of speech may not be limited to information and views which are received favourably, or are perceived as harmless, or are regarded as a matter of indifference (see the judgment of the Constitutional Tribunal of 23 March 2006, Ref. No. K 4/06, OTK ZU No. 3/A/2006, item 32).

As the Constitutional Tribunal stated in the judgment in the case SK 43/05, placing Article 54(1) of the Constitution in Chapter II concerning the rights and freedoms of the persons and citizens indicates that the purpose of granting constitutional protection was to provide the individual with a possibility of self-fulfilment in the personal realm. "Therefore, the significance of Article 54(1) of the Constitution consists in securing the possibility of proper development of the individual in a democratic state ruled by law. The content of that provision comprises all realms of activity, in which a given person has decided to express her/his view. Indeed, the freedom of speech may not be subordinated to only one of the types of discourse which are possible in society (e.g. a political discourse). What weighs in favour of the above is the broadest protection of the autonomy of the individual, which arises from the inherent dignity of the person (Article 30 of the Constitution), and which makes it possible for the individual to fully develop his/her personality in the surrounding culture and civilisation" (Ref. No. SK 43/05).

3.1. By contrast, Article 10(1) of the Convention stipulates, in its first and second sentences, that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". As the Constitutional Tribunal adopted in the judgment of 20 February 2007 (Ref. No. P 1/06), "a comparison of the normative content of Article 54 of the Constitution to Article 10 of the Convention indicates that the semantic scope of Article 54 of the Constitution is narrower than that which arises from Article 10 of the Convention. Article 10 of the Convention mentions the freedom of expression (i.e. the freedom of any expression), which encompasses the expression of views not only in speech, but also in writing, print or art. (...) In the Constitution, «the freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone» - are included in Article 73; whereas Article 54 of the Constitution comprises «the freedom to express opinions, to acquire and to disseminate information» in an oral form, in writing and in print, and also via any means of social communication. Moreover, as it has been mentioned before, the freedom to acquire information and the freedom to disseminate information, which are referred to in Article 54 of the Constitution, comprise not only the freedom to acquire and disseminate facts, but also the views and opinions of others. This means that the normative content of Article 54 of the Constitution is contained in the contemporary democratic standard of «freedom of expression», and in particular in Article 10 of the Convention, which is generally formulated and, at the same time, broader in scope; the said Article *expressis verbis* distinguishes between «information» and «ideas»".

3.2. The freedom to express opinions, which is enshrined in Article 54 of the Constitution, is not absolute in character and may be subject to restrictions, upholding the principle of proportionality. Pursuant to Article 31(3) of the Constitution, "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". When assessing the constitutionality of a regulation imposing a restriction on a constitutional right or freedom, it should be considered whether it meets formal criteria – i.e. whether it fulfils a premiss that a restriction may only be introduced by statute; in the case of a reply in the affirmative to that basic question, the so-called test of proportionality should be carried out (see the judgment of the Constitutional Tribunal of 13 March 2007, Ref. No. K 8/07, OTK ZU No. 3/A/2007, item 26). In accordance with the well-established jurisprudence of the Constitutional Tribunal in the context of Article 31(3) of the Constitution, while assessing the allegation of the lack of proportionality it is required to provide answers to three questions concerning the analysed norm, namely: 1) can it bring the effects intended by the legislator (the usefulness of a norm); 2) is it indispensable (necessary) for the protection of a public interest to which it is related (necessity to take action by the legislator); 3) are its effects appropriately proportionate to the burdens or restrictions imposed on citizens (proportionality in the strict sense) (see the judgment of the Constitutional Tribunal of 23 April 2008, Ref. No. SK 16/07, OTK ZU No. 3/A/2008, item 45). The indicated requirements of usefulness, indispensability and proportionality in the strict sense together constitute the content of "necessity", expressed in Article 31(3) of the Constitution (see *ibidem*).

3.3. In accordance with the standards of the Convention, the freedom of expression is not absolute in character either. As it is stipulated in Article 10(2) of the Convention, the exercise of the said freedom may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. In other words, a restriction on the freedom of expression is admissible only when the following three requirements are met: formal legality (the statutory form of a restriction), substantive legality (achieving one of the "legitimate aims" indicated in Article 10(2) of the Convention) and the necessity of restrictions in a democratic society (an "pressing social need" to impose them, proportionality to a protected "legitimate aim" as well as justification with "relevant and sufficient" reasons) (see L. Garlicki, [in:] *Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz do artykułów 1-18*, L. Garlicki (ed.), Vol. 1, Warszawa 2011, p. 599 and the subsequent pages).

3.4. The issue of the scope ratione materiae of the freedom of expression and admissible restrictions thereon occupies a significant place in the jurisprudence of the European Court of Human Rights (hereinafter: the ECHR). Above all, the ECHR emphasises that the freedom of expression constitutes one of the fundamental bases of a democratic society, one of prerequisites for its development and for the self-fulfilment of every person. Subject to Article 10(2) of the Convention, the freedom of expression is applicable not only to "information" and "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

Indeed, such are the requirements of pluralism, tolerance and broad horizons. Pursuant to Article 10 of the Convention, the freedom of expression may be subject to exceptions which must, however, be interpreted in a strict way, and a need for any restrictions must be justified convincingly. In particular, this entails the obligation to recognise the necessity of (i.e. the existence of "pressing social need" for) the introduction of that kind of restrictions, as well as the determination as to whether they are "proportionate to the legitimate aim pursued" as well as whether reasons justifying the interference, mentioned by state authorities, were "relevant and sufficient" (see the ECHR judgment of 21 January 1999 r. in the case *Janowski v. Poland*, Application No. 25716/94 and the rulings cited therein).

In the judgment in the case *Janowski v. Poland*, where the subject of adjudication by domestic courts was an insult to municipal guards (by calling them "oafs" and "dumb"), the ECHR noted that the applicant was not convicted on the basis of expressing critical opinions on municipal guards or accusing them of unjustified actions. This rules out the contention that this was an attempt at restoring censorship and constituted discouragement of the expression of criticism in future. Moreover, as the ECHR stated, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty. "In the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context".

A similar view was expressed in the judgment of 11 March 2003 in the case *Lešnik v. Slovakia* (Application No. 35640/97), in which the ECHR concluded that: "civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks (...). There is no doubt that, in a democratic society, individuals are entitled to comment on and criticise the administration of justice and the officials involved in it. However, such criticism must not overstep certain limits. The Court has held that the national authorities are in principle better placed to ensure, within the margin of appreciation reserved to them, a fair balance between the various interests at stake in similar cases" (I. C. Kamiński, *Swoboda wypowiedzi w orzeczeniach Europejskiego Trybunału Praw Człowieka w Strasburgu*, Kraków 2006, p. 405).

In the judgment of 1 July 1997, in the case *Oberschlick v. Austria* (Application No. 20834/92), which was issued with regard to a politician having been called "an idiot" by a journalist in his comment on the politician's speech. As the ECHR indicated, Article 10 of the Convention protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see I. C. Kamiński, *op. cit.*, p. 120). In the view of the ECHR, in certain circumstances, even the use of an offensive expression such as "an idiot" falls within the scope of acceptable freedom of expression, as politicians' actions or words that are radical or shocking may evoke a harsh response (see *ibidem*). Thus, state authorities should refrain from interference which is to guarantee a civilised and well-mannered public debate, due to the fact that in a democratic society a political discussion should be held in a broad and open way (see *ibidem*, pp. 120-121). However, two dissenting opinions were submitted to that judgment. In one of them, Judge Franz Matscher argued that an insult was never subject to protection under the Convention. The purpose of Article 10 of the Convention was to allow: "a real exchange of ideas, not to protect primitive, fourth-rate journalism which, not having the qualities required to present serious arguments, has recourse to provocation and gratuitous insults to attract potential readers" (I. C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, Warszawa 2010, pp. 149-150).

In its jurisprudence (see the judgment of 6 February 2001 in the case *Tammer v. Estonia*, Application No. 41205/98), the ECHR additionally stressed that if the used words were not "justified by considerations of public concern" nor did they bear "on a matter of general importance", then it would accept the stance of domestic courts in accordance with which resorting to insulting language was not necessary to express a negative opinion (see I. C. Kamiński, *Ograniczenia …*, p. 151). Since the criticism could have been formulated in another, toned-down way (see *ibidem*).

Numerous interesting views were presented by the ECHR with regard to the infringement of Article 10 of the Convention in cases related to actions aimed against the head of state. However, in the context of the present case, the significance of that jurisprudence is limited, due to the fact that, to a large extent, it concerns defamation, and not an insult to the head of state (cf. the judgments of: 23 April 1992 in the case *Castells v. Spain*, Application No. 11798/85; 25 June 2002 in the case *Colombani and Others v. France*, Application No. 51279/99; 26 June 2007 in the case *Artun and Güvener v. Turkey*, Application No. 75510/01). Nor is the offence of insulting the President of the Republic of Poland within the meaning of Article 135(2) of the Penal Code discussed in the judgment of 15 March 2011 in the case *Otegi Mondragon v. Spain*, Application No. 2034/07, which has also been confirmed by the representative of the Public Prosecutor-General in the course of the proceedings before the Constitutional Tribunal. The said ECHR judgment was issued with relation to the public statement made by Otegi Mondragon, the spokesperson for Sozialista Abertzaleak, a left-wing Basque separatist parliamentary group in the Parliament of the Autonomous Community of the Basque Country, in which he referred to the King of Spain Juan Carlos as the one who protected torture and imposed his monarchical regime on his people through torture and violence. In this context, the ECHR assumed that the applicant had undoubtedly made the remarks in his capacity as elected member of and spokesperson for a parliamentary group, and they were political in character. On the other hand, an utterance made by the applicant concerned a matter of public interest in the Basque Country. Thus, the statements of the applicant fell within the scope of the debate on public matters. In that respect, the Court held the view that, in the said case, the remarks in question did not constitute a threat to the private life of the king or to his honour, as well as they did not contain a personal attack on the person of the King, carried out with impunity. Also, the ECHR noted that the Basque Country Higher Court of Justice had found that the comments in question had been made in a public and political context that had been beyond the core of the person's dignity. The ECHR noted that they did not challenge the manner in which the King had carried out his official functions or accuse him in a tangible way of a criminal offence. The phrases used by the applicant concerned solely the King's institutional responsibility as the head and symbol of the state apparatus and of the forces which, according to the applicant, had tortured the editors of the Egunkaria newspaper.

In the context of the ECHR jurisprudence, only the statement related to the judgment of 22 February 2005 in the case *Pakdemirli v. Turkey* (Application No. 35839/97) - in which the President of Turkey was referred to *inter alia* as "a liar", "a slanderer", "a political invalid", "a narrow-minded person" and "a person who corrupts clean consciences" – may be regarded as an example of an insult to the head of state. At the same time, it should be noted that in that case – as stated by the author of the expert opinion submitted to the Tribunal in the present case – the stronger protection of the reputation of the President, which constituted the infringement of Article 10 of the Convention, resulted not so much from legislation as from jurisprudence (p. 11 of the expert opinion). Moreover, in the said case, the ECHR adjudicated on the severity of civil-law compensatory sanctions (financial compensation) for undermining good reputation,

and not as regards the severity of a criminal sanction. Nor may one overlook the fact that the ECHR, by its nature, resolves whether a ruling issued by a domestic court with regard to specific circumstances of a given case (the result of the application of a provision in a particular situation) complies with a standard of the Convention, and does not adjudicate on the conformity of a provision of the national law to the Convention. Therefore, views formulated by the ECHR directly refer only to the circumstances of a particular case and the ruling related thereto which has been issued by a domestic court.

4. Pursuant to Article 135(2) of the Penal Code, challenged in the present case: "Whoever insults the President of the Republic of Poland in public shall be subject to the penalty of the deprivation of liberty for up to 3 years". The essence of the allegation formulated with regard to that provision is the claim that Article 135(2) of the Penal Code – due to the lack of justification for a more severe penalty than the one indicated in Article 216 of the Penal Code for the basic type of the offence of insult – constitutes a threat to the freedom of speech, by the fact that it provides a basis for the disproportionate restriction of the right to criticise the head of state, and thus the right to a free public debate in a democratic state. In the opinion of the court referring the question, the excessiveness of the legislator's interference stems not only from the introduction of solely a penalty involving the deprivation of liberty in Article 135(2) of the Penal Code, but also from the lack of possibility of refraining from imposing such a penalty, if a given insult was provoked by the behaviour of the injured party (cf. Article 216(3) of the Penal Code), and also from the *ex officio* procedure for prosecuting a public insult to the President of the Republic of Poland.

4.1. Making reference to the arguments put forward by the court referring the question, the Constitutional Tribunal cited a view, presented in the judgment of 11 October 2006 in the case P 3/06 (OTK ZU No. 9/A/2006, item 121), that the state, in principle, has the right to aggravate criminal liability in the case of acts aimed against public officials (who also include the President of the Republic of Poland – cf. Article 115(13)(1) of the Penal Code). Consequently, unlike with regard to individuals, the subject of protection is different here; thus, an individual and a public official do not belong to the same group of subjects sharing the same relevant characteristic, the occurrence of which guarantees the analysis of the challenged provision in the context of the principle of equal treatment (see *ibidem*).

In the above context, it is unconvincing when the court referring the question alleges that Article 135(2) of the Penal Code, in an unjustified way, introduces more severe – with regard to Article 216 of the Penal Code – liability for a public insult to the President of the Republic of Poland. The insult referred to in Article 216 of the Penal Code is an offence against the dignity of the person (internal part) (see A. Marek, *Kodeks karny. Komentarz*, Warszawa 2007, p. 414), whereas in Article 135(2) of the Penal Code - the subject of protection comprises not only the dignity and good reputation of the President, but also the authority of the President and the undisturbed performance of his/her duties, public order, and in some situations also the security of the Republic of Poland (cf. J. Wojciechowska, [in:] *Kodeks karny. Część szczególna. Komentarz do artykułów 117-221*, A. Wąsek (ed.), Vol. 1, Warszawa 2006, p. 89 as well as M. Budyn-Kulik, [in:] *Kodeks karny. Praktyczny komentarz*, M. Mozgawa (ed.), Kraków 2006, p. 273). This way, making the penalty provided for in Article 135(2) of the Penal Code more severe is justified by a broader catalogue of values protected under that provision than under Article 216 of the Penal Code. Therefore, the state's interference with the freedom of speech in the light of Article 135(2) of the Penal Code occurred at least due to a need to

protect such significant values enshrined in Article 31(3) of the Constitution as state security and public order (cf. Ref. No. P 3/06).

The premiss of state security means "the state of affairs where there is no threat to the security of the state as a whole and to its democratic development" (K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 184). At the same time, due to that determinant, restrictions on constitutional rights and freedoms may be justified not only by external threats (arising from hostile actions or intentions of other states), but also by internal threats, provided that they become so serious that they could affect the basis of the existence of the state, the integrity of its territory, the fate of its citizens or the essence of the system of government (see L. Garlicki, "Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)", *Państwo i Prawo* Issue No. 10/2001, p. 14). By contrast, the threats of lower significance should be referred to the premiss of public order (see *ibidem*), understood as "the requirement that conditions inside the state should make it possible to have the proper co-existence of individuals within the organisation of the state" (the judgment of the Constitutional Tribunal of 12 January 1999, Ref. No. P 2/98, OTK ZU No. 1/1999, item 2). This is, in particular, the consequence of the lack of threats to the functioning of the systemic institutions of the state (cf. the judgment of the Constitutional Tribunal of 10 April 2002, Ref. No. K 26/00, OTK ZU No. 2/A/2002, item 18).

With reference to the above determinants of interference with the exercise of constitutional rights and freedoms, the Constitutional Tribunal has pointed out that one of the basic factors integrating society is social order and peace, which ensure harmonious existence and development of community in conditions which are free from internal unrest. A public insult to the President of the Republic of Poland undoubtedly disturbs the said order and peace, which constitute the constitutional premiss of public order, mentioned in Article 31(3) of the Constitution. Moreover, sufficiently large accumulation of conduct bearing the characteristics of the act specified in Article 135(2) of the Penal Code may, in extreme cases, also constitute a threat to the security of the state, understood as the weakening of the position of the Republic of Poland in an international arena, in the event of possible hostile activity or intentions of other states.

The Constitutional Tribunal has noted that the purpose of singling out the offence of public insult to the President of the Republic of Poland is the protection of the dignity and authority of the President (cf. Ref. No. P 3/06), and consequently – the protection of the Polish state, which is embodied by the President. What deserves particular emphasis is the fact that the sense of dignity and authority are among prerequisites for the effective performance of constitutional duties assigned to the head of state. At the same time, all these duties are related to the implementation of values that comprise a broader concept of state security and public order. In that context, what is of particular significance is Article 126(1) and (2) of the Constitution, pursuant to which: "The President of the Republic of Poland shall be the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority. The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory". In other words, the constitution-maker assigned the President with exquisitely solemn duties, among which one should mention the President's role as the supreme representative of the state "in foreign affairs" (i.e. relations with other states, entities that do not belong to the Polish state, as well as supra-national and international organisations and institutions of which Poland is a member), as well as "in domestic relations", i.e. relations with entities belonging to the Polish state (see M. Grzybowski, P. Mikuli, "Realizacja konstytucyjnych kompetencji Prezydenta RP w

sferze stosunków międzynarodowych", [in:] *System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa*, M. Grzybowski (ed.), Warszawa 2006, p. 51). The double dimension of the presidential representative duties was also stressed by the Constitutional Tribunal in its decision of 20 May 2009, Ref. No. Kpt 2/08, where the Tribunal stated that: "Article 126(1) of the Constitution has assigned a universal character to the role of the President as «the supreme representative of the Republic of Poland», in the sense that this role is fulfilled by the President both in the context of external relations and internal affairs, as well as – regardless of the circumstances, place and time. (...) Since the Constitution designates only the President as «the supreme representative of the Republic of Poland», the President – within the scope of and in accordance with the principles specified in the Constitution and statutes – independently decides about the place and the form of fulfilling this role set forth in Article 126(1) of the Constitution. The systemic position of «the supreme representative» entails that the scope of the self-contained role of the President primarily regards «the embodiment of the majesty of the Republic of Poland»" (OTK ZU No. 5/A/2009, item 78).

Moreover, the Constitutional Tribunal has drawn attention to the fact that the President is "the guarantor of the continuity of State authority", and therefore s/he is to prevent any distortions from occurring in the constitutional mechanism of the functioning of all authorities, organs and services of the state, as well as to eliminate the already existing distortions (see P. Sarnecki, comments on Article 126 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 1, L. Garlicki (ed.), Warszawa 1999, p. 6). In addition, the President is to "ensure observance of the Constitution" by means of interference with the actions of various organs of the state which are contrary to constitutional requirements, as well as in the cases of the non-implementation of the Constitution by relevant organs of the state (see *ibidem*, p. 10). Also, the President of the Republic of Poland safeguards the following basic values of the Polish state: a) sovereignty, understood as circumstances where all actions of the state are determined solely by decisions of its constitutional authorities; b) security, which implies that state institutions do not face serious impediment and perturbations in their functioning, as well as that society (a nation) enjoys an undisturbed existence and enhances its identity, and there are favourable conditions for its living standards to improve and its culture to flourish; c) the inviolability of the territory of the state, i.e. preventing any cession of the territory to other entities of international law and the renunciation of sovereign rights; d) the integrity of the territory, i.e. prevention of any division and partition of the territory, the introduction of partial territorial autonomy and any other decentralist tendencies (see *ibidem*, pp. 11-14). With regard to the above duties of the President, in the decision in the case Kpt 2/08, the Constitutional Tribunal stated that the duty to safeguard the inviolability and integrity of the territory of the Polish state comprises the obligation to counteract any attempts at cession of even the smallest part of the territory of Poland, including also the territorial waters. This also entails preventing the political disintegration of the territory of Poland, and the emergence of diversified public orders going beyond the scope of constitutionally permitted decentralisation of powers. This also regards counteracting any attempts at introducing territorial autonomy and any aspirations to federalise Poland. By contrast, the basic scope of carrying out the duty "to safeguard" the security of the state is related to the exercise of the President's power as the Supreme Commander of the Armed Forces of the Republic of Poland. Moreover, the President is vested with powers to take decisions in the situations of particular danger, involving the introduction of the martial law, a state of emergency or the order of (general or partial) mobilisation. Therefore, the President has at his/her disposal vital instruments to safeguard the sovereignty, security and territorial integrity of the Republic of Poland.

The solemn character of presidential duties arising from the Constitution entails that the President of the Republic of Poland is entitled to be treated with particular respect. This also follows from the fact that committing the act set out in Article 135(2) of the Penal Code is tantamount to showing disrespect for the Republic itself, which is suggested by the very title of Chapter XVII of the Penal Code, where the provision challenged in the present case has been included ("Offences against the Republic of Poland"). As it has been aptly indicated by R. Mojak, „as the head of state, the President is the embodiment of the state – its dignity, majesty, sovereignty and independence" (R. Mojak, "Model prezydentury w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (regulacja konstytucyjna roli ustrojowej Prezydenta RP a praktyka politycznoustrojowa realizacji modelu ustrojowego prezydentury)", [in:] *System rządów…*, p. 40). Also, in our constitutional tradition, the head of state has been granted a deserved status, indicating a close relation between an insult to the President and the ensuing assault on the Republic of Poland; the said status was particularly manifested in the Constitution of 23 April 1935 (Journal of Laws - Dz. U. No. 30, item 227). Therefore, also historical determinants justify singling out a public insult to the Republic of Poland in the chapter of the Penal Code entitled "Offences against the Republic of Poland".

In accordance with the legislator's choice, the aptness of which should not be challenged, the protection of the Polish state occupies the primary position in the specific part of the Penal Code (see T. Bojarski, [in:] *Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok*, Katowice 1996, p. 33). The protection of that value is the protection of a community in the form of a state as the organisation of a nation and society, and is logically *prius* with regard to the guarantees of the implementation of all the other values (see *ibidem*). The subject of protection in the provisions contained in Chapter XVII of the Penal Code is the Republic of Poland which guarantees the existence and security of the population living within its territory and the basis of its political and economic system specified in the Constitution (see S. Hoc, [in:] O. Górniok, S. Hoc, M. Kalitowski, S. M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. 2, Gdańsk 2005, p. 33). Including acts which differ in character in the above chapter of the Penal Code as prohibited acts is justified by the fact that they are regarded as direct or indirect assault on the Republic of Poland. In particular, penalising an active assault on the President or an insult to the President (Article 135 of the Penal Code) is related to respect given to the highest office in the state, but also the state itself which is the common good of all citizens (see S. Hoc, p. 139). Indeed, the President in office does not act in his/her own name, but in the name of the State, as the "head" thereof; s/he embodies the majesty of the Republic of Poland, and for that reason he is entitled to respect (see *ibidem*). "The common good", referred to in Article 1 of the Constitution is not only and primarily the organisation of the state (the organs of the state). This term also comprises a certain mental aspect, as in this context, pursuant to the content of the Preamble to the Constitution, the common good, in particular, comprises history, culture, tradition or a sense of community with all compatriots. The embodiment of those values, in accordance with the legislator's will, manifested in Chapter XVII of the Penal Code, is particularly the nation, the Polish state, the national emblem, the banner, flag or any other symbol of the state, as well as the President of the Republic of Poland. Committing the act specified in Article 135(2) of the Penal Code, and thus insulting an authority that constitutes the systemic embodiment of "the common good", undermines the Republic of Poland as the common good of all citizens, *inter alia* by the fact that it undermines the prestige of the organs of the state, weakens citizens' trust in the Republic, and may diminish the degree to which citizens identify with the state.

The differentiation of the subject of protection in Article 135(2) of the Penal Code as well as in Article 216 and Article 226(1) and (3) of the Penal Code also stems from the comparison of statutory characteristics of particular forms of insults. Pursuant to Article 216 of the Penal Code: "Whoever insults another person in his presence, or though in his absence but in public, or with the intention that the insult shall reach such a person, shall be subject to a fine or the penalty of restriction of liberty" (para 1); "Whoever insults another person using the mass media, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year" (para 2). In the light of Article 216 of the Penal Code, the protected interest is (solely) the dignity of the person, understood as the inner aspect of respect that the person deserves. By contrast, Article 226(1) of the Penal Code, imposing a penalty for insulting a public official or a person called upon to assist him, in the course of and in connection with the performance of official duties, is a guarantee of respecting the dignity of such persons, and thus is to ensure that they could carry out their duties in an undisturbed way. Article 226(3) of the Penal Code, which penalises insulting or humiliating a constitutional authority of the Republic of Poland in public, protects respect given to such authorities, and thus guarantees the proper functioning of the above institutions. A wider catalogue of protected goods arises from Article 135(2) of the Penal Code, which has been challenged in the present case, as it comprises not only the dignity of the head of state and the guarantees of the proper performance of assigned duties, but also public order and state security. The protection of those last mentioned values constitutes the consequence of constitutional and statutory duties of the President of the Republic of Poland, who among other constitutional authorities plays a special role in the above scope.

4.2. The Constitutional Tribunal has expressed the view that the allegations concerning the disproportionate sanctions set out in Article 135(2) of the Penal Code, raised by the court referring the question, stemmed from complete disregard for the provisions of the general part of the Penal Code which regulate the principles of administering penalties and criminal measures, in particular Article 58(3) and Article 59 of the Penal Code. The court presented the allegations in such a way as if imposing the penalty of deprivation of liberty in proceedings concerning an insult to the President of the Republic of Poland was inevitable. Such a stance, in an obvious way, does not correspond to the law, as it overlooks the possibilities of choosing sanctions which are – on the basis of the cited provisions – at the disposal of the court adjudicating in the case. Only by taking them into account it is possible to interpret Article 135(2) of the Penal Code. And so, pursuant to Article 58(3) of the Penal Code, in the event of committing an offence of publicly insulting the President of the Republic of Poland, the court may levy a fine or impose the penalty of restriction of liberty, instead of the penalty of deprivation of liberty, as long as the misdemeanour was not an act of hooliganism (see J. Wojciechowska, *op. cit.*, p. 91). Additionally, with regard to a perpetrator who has committed the act specified in Article 135(2) of the Penal Code, it is admissible to refrain from administering the penalty provided for in Article 59 of the Penal Code, and levying the payment of a contribution for a social cause, provided that the detrimental social consequences of the act are insignificant, the misdemeanour was not an act of hooliganism, and the indicated criminal measure will be a sufficient penalty (see *ibidem*). Hence, when determining the scope of criminal liability for a public insult to the President of the Republic of Poland, the court is obliged to take into account *inter alia* a requirement to opt for non-custodial penalties, which are preferred in that context in Polish legislation (see A. Marek, *op. cit.*, p. 154). If the premisses specified in Article 58(3) and Article 59 of the Penal Code are fulfilled, the court has a choice, for which some guidance has been provided; first of all,

the court should consider the usefulness of levying a fine, imposing the penalty of restriction of liberty or administering a criminal measure (cf. *ibidem*). What indicates the groundlessness of the argument that the penalty specified in Article 135(2) of the Penal Code is disproportionate is also the way of applying the challenged provision in practice. Courts deal with the issue of determining criminal liability and the severity of a penalty for a public insult to the President of the Republic with due caution (cf. S. Hoc, *Przestępstwa przeciwko Rzeczypospolitej Polskiej*, Opole 2002, pp. 135-139; S. Hoc, "Glosa do wyroku Sądu Apelacyjnego w Gdańsku z dnia 30 stycznia 2002 r., Ref. No. II Aka 577/01", *Prokuratura i Prawo* Issue No. 9/2006, p. 156). The said tendency is illustrated by the statistics presented by the Public Prosecutor-General at the hearing in the present case, as well as by a passage from the statement of reasons for the judgment of the Court of Appeal in Gdańsk of 30 January 2002 (Ref. No. II Aka 577/01), issued in a case concerning *inter alia* a public insult to the President of the Republic, which states that: "However, the above does not mean (...) that it is impossible to levy only a fine on the accused. In the view of the Appellate Court, such a penalty is the most appropriate in the case of commission of offences such as those ascribed to the accused. At the same time, imposing the penalty of deprivation of liberty, in particular for acts involving the use of words (which insult other persons), should be limited to only those cases where this is absolutely indispensable, as there is no possibility of imposing any other penalty. This does not occur in the present case. When adjudicating on the penalty, the Court of Appeal also took into account the regulations explicitly stated in Article 9(2) and Article 10(2) of the European Convention, which provide for limiting a penalty (sanction) in such situations to the extent it is necessary for the functioning of a democratic society. (...) At the same time, considering the significance of the interests violated by the accused, and above all the lack of remorse and the repeated breach of binding legal provisions, the levied fine had to be appropriately high so that it could manifest clear disapproval of that sort of conduct, expressed by judicial authorities. The Court of Appeal holds the view that individual penalties play that role. At the same time, taking into account the accused person's property, the levied fines do not exceed the financial capacity of the accused" (OSA No. 3/2005, item 21).

The way of applying Article 135(2) of the Penal Code, which has been illustrated above, rules out the allegation that the challenged provision has "a chilling effect" on the freedom of expression within the scope of the public debate. General prevention as the function of the provisions of the Penal Code is closely related to the way of applying the provisions by judicial authorities, thus - in the context of challenged Article 135(2) of the Penal Code – there is no risk that the said provision will have negative effects within the scope of restrictions on the freedom of expression in the public debate. Participants in the debate are undoubtedly familiar with the jurisprudence of judicial authorities as regards Article 135(2) of the Penal Code.

4.3. In the opinion of the Constitutional Tribunal, although the provision challenged in the present case should be regarded as interference with the freedom of expression (Article 54(1) of the Constitution) (cf. Ref. No. P 3/06), it is difficult to defend the view that Article 135(2) of the Penal Code constitutes a restriction on the right to criticise persons exercising supreme power, and thus a restriction on the right to a free public debate. The formulation of this inapt conclusion, by the court referring the question, probably stems from the fact that the court did not properly differentiate between two offences, namely between the offence of insulting the President of the Republic of Poland (Article 135(2) of the Penal Code) and the offence of defaming him/her (Article 212 of the Penal Code) (cf. A. Marek, *op. cit.*, p. 297). In the view of the Constitutional Tribunal,

only the penalisation of the latter act may affect the scope of the right to criticise persons exercising supreme power in the state.

The essence of defamation (imputation) amounts to imputing to another person or an entity, such conduct or characteristics that may discredit them in the public eye or result in a loss of confidence necessary for a given position, occupation or type of activity (J. Raglewski, [in:] *Kodeks karny. Część szczególna. Komentarz do art. 117-277 k.k.*, A. Zoll (ed.), Vol. 2, Kraków 2006, p. 768). "The subject of protection here is fame and honour, understood as good reputation, other people's positive opinion on a given individual's value" (M. Surkont, "Cześć i godność osobista jako przedmiot ochrony prawnokarnej", *Nowe Prawo* Issue No. 4/1980, p. 53). By contrast, in the judgment in the case P 3/06, the Constitutional Tribunal stated that: "in the literature on the subject, there is neither unanimity nor clarity as to how the term «insult» should be construed" (cf. the review of opinions which is included in the judgment). It appears that its meaning is aptly conveyed by the definition presented by W. Kulesza. In accordance with that definition, "the essence of an insult is to show contempt, which manifests a negative attitude to the value represented by a given person more forcefully than disrespect" (W. Kulesza, *Zniesławienie i zniewaga (ochrona czci i godności osobistej człowieka w polskim prawie karnym – zagadnienia podstawowe)*, Warszawa 1984, p. 174). In that case, what is meant here is an infringement which, according to culturally determined and generally accepted evaluation, is an expression of contempt for the person, regardless of the feelings of the injured party (see *ibidem*, p. 169). Thus, the view presented by the Constitutional Tribunal in its judgment in the case P 3/06 should be maintained; in accordance with that view, liability for an insult is to protect against any infringements of the dignity of the person (the so-called inner dignity), and not against conduct which undermines the good name of a given person, expresses the criticism of his/her professional or public activity, reveals private life or involves the presentation of false information and circumstances (the so-called external dignity).

The fundamental difference between defamation and an insult consists in rationalising a given accusation (see B. Michalski, *Działalność zawodowa dziennikarza a ochrona czci obywatela w prawie karnym PRL*, Toruń 1966, p. 59). In the case of defamation, we deal with "a rationalised accusation" which can be proved and "which concerns such conduct or characteristics of the injured party that may discredit the party in the public eye or result in a loss of confidence necessary for a given position, occupation or type of activity", whereas in the case of an insult we deal with "an offensive or ridiculing accusation made in an irrational way" (B. Kunicka-Michalska, [in:] B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa przeciwko wolności, wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej*, Warszawa 2001, pp. 246-247). The penalisation of defamation is aimed at providing the criminal-law protection of honour - regarded not as a subjective feeling of the injured party, but as the attitude of the public to the said party, which is a considerably objective factor (see M. Surkont, "Zniesławienie a znieważenie", *Nowe Prawo* Issue No. 6/1979, p. 48). In that sense, honour is referred to as "good reputation"; having such reputation entails that all citizens trust and respect a given person, a group of persons or institutions (see *ibidem*). By contrast, an insult is an affront to the dignity of the injured party, affecting the party's consciousness, but not affecting its good reputation (see *ibidem*, pp. 48-49). The consequences of defamation may affect the psyche of an unlimited number of persons and cause a process in the minds of those persons which would be detrimental to the injured party; whereas in the case of an insult, the perpetrator affects solely the psyche of the insulted person, treating him/her with contempt and hurting

his/her feelings (see A. Banach, *Ochrona czci i godności osobistej w kodeksie karnym polskim*, Kraków 1950, pp. 31-32).

The Constitutional Tribunal has also stressed that an insult is an act which may involve the expression of a thought not only in speech or writing, but also by means of gestures which convey contempt, by distorting someone's last name in an offensive way or by some other behaviour, e.g. turning one's back on another person or declining a handshake (see M. Surkont, *Zniesławienie i znieważenie w polskim prawie karnym*, Gdańsk 1982, pp. 149-150). By contrast, imputation consists in raising even a very general accusation, whether in speech or writing, with regard to the conduct or characteristics of the injured party; without that accusation, imputation practically does not take place (see *ibidem*).

An essential difference between the above-mentioned prohibited acts may also be the fact that, unlike regulations concerning the offence of defamation (Article 212 and Article 213 of the Penal Code), the offence of insult rules out the possibility of effective protection of the perpetrator, by means of the so-called proof of truth (see J. Raglewski [in:] *Kodeks karny. Część szczególna. Komentarz*, A. Zoll (ed.), Vol. 2, Warszawa 2008, p. 837). Therefore, the perpetrator may not rely on the circumstance that although the utterance made by him/her was insulting in character, it was true; this is because the perpetrator's utterance is not usually subject to verification in terms of its truth or falsity (see *ibidem*). Thus, the criterion for differentiating between defamation and an insult comprises *inter alia* "verifiability" of an accusation or utterance; if it is verifiable (e.g. "X committed theft" or "X is a thief"), then we deal with imputation; however, if it is unverifiable (e.g. "X is a scoundrel"), then we deal with an insult (see M. Filar, "Odpowiedzialność karna za nieuzasadnione zarzuty wobec lekarza lub zakładu opieki zdrowotnej", *Prawo i Medycyna* Issue No. 2/2006, p. 107). The above characteristic of defamation was also pointed out by the Constitutional Tribunal in its judgment of 30 October 2006, in the case P 10/06, where it pointed out that what conditions the elimination of criminal liability for imputation is the truth of an accusation (cf. Article 213 of the Penal Code). In other words, in the case of utterances which are subject to assessment in the context of the criteria of truth and falsity, the legislator protects the freedom to tell the truth (OTK ZU No. 9/A/2006, item 128).

In the context of the above, the Constitutional Tribunal has drawn the conclusion that the penalisation of a public insult to the President of the Republic of Poland in no way restricts the right to criticise the activity of the organs of the state. The said right is the basic element of a free public debate, which by its nature focuses on matters related to the functioning of public institutions, which comprises within its scope the actions of persons who hold public offices and whose decisions affect wider social groups. Therefore, what constitutes the subject of the public debate is primarily the actual functioning of the state apparatus, which may be subject to assessment by the participants of that debate. Showing contempt by means of offensive or humiliating utterances (or gestures) which are not subject to verification in terms of their truth or falsity is not conducive to presenting the said evaluation of the functioning of public institutions. Indeed, as the Tribunal established in the judgment in the case P 3/06, the essence of an insult is not a substantive utterance that evaluates the attributes and conduct of a given person, which is based on facts or suppositions, but an utterance that is an affront to the dignity of the person, due to its form and not the content. "The insulting form of an utterance may not clearly be categorised as one remaining in a substantive relation to performing the duties of a public official by a given person, or duties that fall within the scope of political activity" (*ibidem*). Thus, in the opinion of the Constitutional Tribunal, despite the arguments presented by the court referring the question of law, one

may not regard an insult as an element of admissible criticism of the President of the Republic of Poland (cf. the view of the Public Prosecutor-General in the case P 3/06), as the right to criticise that authority comprises free speech only in respect of its content and not form (in particular where it is offensive or humiliating). The criminal liability for the act specified in Article 135(2) of the Penal Code is not related to the content of an utterance, but to its form which is insulting in character. Therefore, the challenged provision is aimed at preventing such "criticism", which consists in replacing substantive arguments, recalling the freedom of speech, with insults that may not constitute a standard acceptable in a democratic state (cf. the case P 3/06). Hence, Article 135(2) of the Penal Code does not fall within the category of restrictions on the right to criticise public officials, and thus it does not constitute interference with the freedom of the public debate. An insult is not intended as the criticism of the activity or attributes of a given official, but is aimed at harming the dignity of the person. A similar view was presented by the Court of Appeal in Gdańsk in the judgment of 30 January 2002 (Ref. No. II Aka 577/01), in which it was established that the ECHR jurisprudence very aptly presents the criterion for differentiating between the right to criticism and an insult displaying the characteristics of a criminal offence (see S. Hoc, "Glosa…, p. 152). In the said jurisprudence, it is stated that the scope of admissible criticism does not encompass "a malicious attack on a person" (see *ibidem*).

In other words, in the opinion of the Constitutional Tribunal, the penalisation of a public insult to the President of the Republic of Poland does not hinder possible criticism of the activity of the said authority and the course of the public debate in that regard. In a democratic state which is the common good of all citizens, the said debate may be held in a civilised and well-mannered way, without any detriment to the rights and freedoms of persons and citizens as well as to the proper functioning of public institutions.

5. Taking everything into account, in the present case the Constitutional Tribunal has not found any arguments which are sufficient to overrule the presumption of constitutionality of Article 135(2) of the Penal Code. A similar conclusion has been drawn by the Constitutional Tribunal with regard to the higher-level norm for the review arising from Article 10(1) of the Convention. As it follows from the analysis carried out so far, the interests identified as those subject to protection under Article 135(2) of the Penal Code fall within the catalogue of "legitimate aims" mentioned in Article 10(2) of the Convention. The significance of those interests and the possibility of controlling the severity of a penalty for an insult to the President of the Republic of Poland (cf. Article 58(3) and Article 59 of the Penal Code), additionally confirmed by the way these provisions have been applied in the jurisprudence of Polish criminal courts, prove the fulfilment of the Convention requirements for the admissibility of restrictions on the freedom of expression. Due to all the above points, the Tribunal rules the provision challenged in the present case to be consistent with the indicated higher-level norms for the review.

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Stanisław Biernat
to the Statement of Reasons for the Judgment of the Constitutional Tribunal
of 6 July 2011, Ref. No. P 12/09

Pursuant to Article 68(3), second sentence, of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the statement of reasons for the above judgment.

1. I agree with the operative part of the Tribunal's judgment of 6 July 2011, issued in the case P 12/09. But I have reservations as regards certain statements contained in the statement of reasons for the judgment.

In my view, it was apt to adjudicate that Article 135(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, as amended; hereinafter: the Penal Code) conformed to the Constitution. As it appears, the Circuit Court in Gdańk, as well as the participants in the public debate preceding the issuance of the judgment, had wrongly presented the role of the Tribunal. Indeed, it is not the Tribunal's task to decide whether, for the sake of the freedom of expression, it would be more beneficial that the provision penalising an insult to the President would or would not be included in the Penal Code. Considering such issues is the task of the Parliament, which is responsible for drafting and amending statutes.

By contrast, the Tribunal's task is to determine the conformity of a challenged provision (challenged provisions) to the Constitution. This may seem to be a banal statement, but it is worth emphasising it here. Thus, the point is to examine whether the challenged provision of a given statute restricts a constitutional right or freedom to the extent and in a way that this is unacceptable in the light of the Constitution. The court which referred the question of law did not manage to overturn the presumption of conformity of Article 135(2) of the Penal Code to the Constitution. This results, *inter alia*, from the fact that the assumptions which were the grounds for the doubts of the court referring the question turned out to be inapt. I am going to focus on only a few issues here.

Firstly, for unknown reasons, the court did not take into account - in its argumentation - the existence of Article 226(3) of the Penal Code. Hence, it incorrectly assumed that the result of the elimination of Article 135(2) of the Penal Code from the legal system would be classifying an insult to the President as a prohibited act specified in Article 216(1) of the Penal Code, i.e. in the basic provision penalising an insult to another person. The said offence is not prosecuted *ex officio*, which the court referring the question of law considered to be a beneficial solution from the point of view of the freedom of speech. But, in reality, in the event of the Tribunal's ruling on the unconstitutionality of Article 135(2) of the Penal Code, an insult to the President would constitute a prohibited act set out in Article 226(3) of the Penal Code, i.e. an offence which, by analogy with Article 135(2) of the Penal Code, is also prosecuted *ex officio.*

Secondly, the court referring the question emphasised the repressive character of Article 135(2) of the Penal Code, pointing out that an insult to the President is subject only to a custodial penalty i.e. the deprivation of liberty. However, the court overlooked other possible determinations by courts or public prosecutors' offices, which follow from the provisions of the Penal Code or the Code of Criminal Procedure. What is meant here is imposing non-custodial penalties (a fine or the penalty of restriction of liberty), criminal

measures, the discontinuation of proceedings, conditional discontinuation of proceedings or refusal to institute criminal proceedings.

Thirdly, the assumption that applying the challenged provision, in order to penalise any insults to the President, would stifle the exercise of the right to criticism and the freedom of expression was not confirmed. The statistical data presented at the hearing by the Deputy Public Prosecutor-General and cited in the statement of reasons for the judgment of the Constitutional Tribunal suggest considerable caution as regards imposing criminal-law penalties for insulting the President or in the case of notifying law enforcement authorities about the commission of such an act. During the years 1998-2011, the penalty of the deprivation of liberty was imposed only once, and still its execution was conditionally suspended.

Therefore, in my view, despite systemic and political changes, there are no constitutional obstacles to have – apart from provisions on penalties for insulting another person, as well as penalties for insulting a public official or his/her assistant, or for insulting a constitutional authority of the Republic of Poland – a provision in the Penal Code which sets out a penalty for insulting the President. The substantiation for preserving such a provision, which already appeared in the Penal Code of 1932, is a special position of that authority in the system of the Republic of Poland, specified in Chapter V of the Constitution. At the same time, I do not hold the view that such a provision was prescribed by the Constitution; in my opinion, its applicability falls within the scope of the legislative freedom of the Parliament.

2. My basic reservation about the statement of reasons for the judgment concerns the statements about the subject of protection in Article 135(2) of the Penal Code. I do not consider an insult to the President to be tantamount to contempt for the Republic of Poland. It is fallacious to draw such a conclusion from the systemic interpretation, i.e. from the fact that the challenged provision has been placed in Chapter XVII – "Offences Against the Republic of Poland". However, this does not change the fact that the President should be held in reverence, and insulting the President may undermine the authority of the Republic. I share the Tribunal's opinion that what justifies imposing a restriction on the freedom of expression (Article 54(1) of the Constitution) in the event of an insult to the President is – among the values enumerated in Article 31(3) of the Constitution – the public order. However, I have doubts as to the aptness of the extensive discussion concerning the security of the state and the President's role in that respect – in the context of substantiating the constitutionality of Article 135(2) of the Penal Code. No connection was shown between an insult to the President, which deserves condemnation, and the President's duty to safeguard the sovereignty of the state as well as the inviolability and integrity of its territory. Citing here the view presented by the Constitutional Tribunal, for instance, in its decision of 20 May 2009, Ref. No. Kpt 2/08 (OTK ZU No. 5/A/2009, item 78), and the views of the doctrine formulated in other contexts seem inapt.

3. The Tribunal devotes a great deal of attention in the statement of reasons for the judgment to the distinction between two offences: an insult and defamation. Obviously, this is vital for the classification of acts in criminal proceedings. However, from the point of view of the Tribunal, whose task in the present case was to determine the constitutionality of the provision on a penalty for an insult to the President, it would only be important to acknowledge a need to take into account differences between the two offences. It is not clear what conclusions the Tribunal drew from its analysis. It would be hard to assume that committing an act consisting in punishable defamation of the President, in contrast to an insult, would – in the Tribunal's opinion – be an act assessed

completely differently in the context of exercising the constitutional freedom of expression.

At the same time, it should be noted that the criteria for distinguishing between defamation and an insult are not as clear as it might seem from the statement of reasons for the judgment. For example, calling the President 'the biggest layabout' could be classified, first of all, as an insult (if one regards the word 'layabout' as undermining the dignity of the person, used for the purpose of humiliating the person) and, secondly, as defamation (imputation of laziness, which is a vice that may discredit the person in the public eye or result in a loss of confidence necessary for a given position), or – thirdly – as voicing a critical opinion in the public debate with regard to the activity of the President, which is not punishable due to the assumption that politicians should have "thick skin" and should be immune to unpleasant, or even hurtful, epithets.

The criterion cited by the Tribunal, which is aimed at distinguishing whether an utterance contains offensive and evaluative elements which defy verification (an insult), or whether the utterance makes it possible to provide the "proof of truth", is in many situations unreliable. What is more, even if providing such proof of truth would be possible, then the sole act of proving that a given person does not behave in the way s/he is accused of, e.g. that the President is not lazy or that his/her rule is not based on torture, may be offensive to persons whom this concerns.

4. For similar reasons, one may have reservations about the analysis of the jurisprudence of the European Court of Human Rights (hereinafter: the ECHR), concerning the infringement of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention). In the statement of reasons for the judgment, excessive attention is drawn to the distinction between defamation and an insult in the light of the ECHR jurisprudence. However, the jurisprudence of the ECHR indicates that the infringement of the freedom of expression in the light of the Convention may be caused by a penalty for either imputation or an insult. A distinction between evaluative statements and statements pertaining to facts is recognised in the ECHR jurisprudence; yet, in both cases, the subject of examination by the ECHR is the question whether a restriction on the freedom of expression introduced by the states, being the High Contracting Parties to the Convention, is consistent with Article 10 of the Convention.

In the statement of reasons, the Constitutional Tribunal made extensive reference to the ECHR judgment of 15 March 2011 in the case *Otegi Mondragon v. Spain*, Application No. 2034/07. In that case, which originated with one politician referring to the King of Spain Juan Carlos as the one who protects torture and imposes his monarchical regime on his people through torture and violence, I think it was an insult and not the case of defamation of the King of Spain. It would be hard to imagine the possibility of providing "the proof of truth", in the case of the cited statement. Still, the ECHR itself concluded in the substantiation for its judgment that the impugned comments were value judgments and not statements of fact.

Overlooking even that issue, which may be disputable, above all, I still do not see a connection between the precise classification of the ECHR rulings, depending on whether they deal with defamation or an insult, and the issue of conformity of Article 135(2) of the Penal Code to the Convention.

Another issue is the fact that, despite my reservations about the argumentation, I agree with the Tribunal's conclusion that Article 135(2) of the Penal Code is consistent with Article 10 of the Convention. In my view, the justification is a balanced and mild

reaction of the organs of the judiciary to alleged or actual cases of insults to the President. The situation could, however, change in the event of a change in the punishment policy and the imposition of the penalties of deprivation of liberty for the offences set out in Article 135(2) of the Penal Code. Then one might expect the ECHR to issue rulings on the infringement of the Convention by Poland.

5. The above is related to the last issue I would like to touch upon, which is of more general relevance and exceeds the scope of the present case. The Constitutional Tribunal has concluded in the statement of reasons (at the end of point 3.4.) that: "Nor may one overlook the fact that the ECHR, by its nature, resolves whether a ruling issued by a domestic court with regard to specific circumstances of a given case (the result of the application of a provision in a particular situation) complies with a standard of the Convention, and does not adjudicate on the conformity of a provision of the national law to the Convention. Therefore, views formulated by the ECHR directly refer only to the circumstances of a particular case and the ruling related thereto which has been issued by a domestic court".

One may only partially agree with that statement. In its more recent jurisprudence, the ECHR requires the states, being the High Contracting Parties to the Convention, to take action in order to adjust the domestic law and the practice of the application thereof to the requirements of the Convention. This is the notion of "positive obligations of the state" (cf. I. Kamiński, in the opinion prepared for the Constitutional Tribunal, points 44-45; A. Paprocka, "Glosa do uchwały SN z 30 listopada 2010 r., III CZP 16/10", *Państwo i Prawo* Issue No. 7-8/2011, p. 158). I do not think that the said kind of obligation could apply to Poland in the context of Article 135(2) of the Penal Code, taking into account the present practice of applying the provision. My point is that the above-cited statement about the case-specific character of the ECHR rulings, voiced by the Constitutional Tribunal (full bench) in this particular context, would not be absolutised.

Dissenting Opinion
of Judge Piotr Tuleja
to the Statement of Reasons for the Judgment of the Constitutional Tribunal
of 6 July 2011, Ref. No. P 12/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the statement of reasons for the judgment of the Constitutional Tribunal of 6 July 2011, in the case P 12/09.

I submit my dissenting opinion to the statement of reasons for the judgment of 6 July 2011, in the case P 12/09, with regard to the interpretation of Article 54(1) of the Constitution presented by the Constitutional Tribunal, the way in which the Constitutional Tribunal resolved the conflict between the freedom of speech and the protection of the systemic status of the President as well as the view adopted by the Constitutional Tribunal that Article 135(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, as amended; hereinafter: the Penal Code) does not restrict the right to criticism.

The Constitutional Tribunal aptly indicated that the doubts of the court referring the question of law as to the constitutionality of Article 135(2) of the Penal Code were based on the erroneous interpretation of the provisions of the Penal Code. What was, in particular, inapt was the allegation of excessive penalisation raised with regard to Article 135(2) of the Penal Code. When comparing the characteristics of the types of prohibited acts set out in Article 216 and Article 135(2) of the Penal Code, the court referring the question did not, at all, take into account Article 226 of the Penal Code, and when analysing the penalty of deprivation of liberty, it did not take into consideration the proviso set out in Article 59 of the Penal Code. As a result, the court referring the question formulated allegations which are not justified in the normative content of the Penal Code. Therefore, I share the view of the Constitutional Tribunal that there are no grounds to declare the unconstitutionality of the challenged provision. Indeed, no norm arises from the Constitution, within the meaning of which there would be a prohibition against a separate penalty for an insult to the President.

I do not agree with the interpretation of Article 54(1) of the Constitution which was presented by the Constitutional Tribunal. Making reference to the judgment of 12 May 2008 in the case SK 43/05 (OTK ZU No. 4/A/2008, item 57), the Tribunal stressed the significance of the freedom of speech, as a personal freedom, by stating *inter alia* that: "The significance of Article 54(1) of the Constitution consists in securing the possibility of proper development of the individual in a democratic state ruled by law. The content of that provision comprises all realms of activity, in which a given person has decided to express her/his view. Indeed, the freedom of speech may not be subordinated to only one of the types of discourse which are possible in society (e.g. a political discourse). What weighs in favour of the above is the broadest protection of the autonomy of the individual, which arises from the inherent dignity of the person (Article 30 of the Constitution), and which makes it possible for the individual to fully develop his/her personality in the surrounding culture and civilisation". I hold the view that one should not juxtapose the freedom of speech as the guarantee of the personal status of the individual with the freedom of speech as the guarantee of the political status of the individual. Such a description of the freedom of speech is flawed. Both statuses are complementary, and the creation of proper guarantees for the exercise of the freedom of speech in the public debate is necessary due to both a personal aspect and a political one. The description of the

freedom of speech presented in the statement of reasons for the judgment overlooks the fact that the freedom stems from the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution, and the freedom of the press and other means of social communication, arising from Article 14 of the Constitution. Taking into account the facts which were the basis of the said question of law, it should be stated that the political aspect of freedom is in the present case particularly vital. The aspect has already been analysed in the jurisprudence of the Constitutional Tribunal. In the judgment of 11 October 2006 in the case P 3/06 (OTK ZU No. 9/A/2006, item 121), the Constitutional Tribunal stressed that, in a democratic state, the debate is primarily focused on matters pertaining to the functioning of public institutions, and the activity of public officials which involve taking decisions that are vital for larger social groups. What is necessary for the freedom of the debate understood in this way is to shift the borderlines of freedom of speech further and further away in the context of public officials. The extent of the freedom of speech with regard to those persons is broader that in the case of individuals. In the indicated judgment, the Constitutional Tribunal stated *inter alia* that: "the admissible level of criticism in the public debate addressed to politicians is not identical with (as it is broader than) the level of criticism of public officials. In the latter case, apart from values related to the freedom of speech and the protection of personal interests of particular individuals, one should also take into account another value, namely the effective and undisturbed activity of the organs of public authority in the interest of society at large. A separate issue is whether both realms of the public activity of a given person as a politician and a public official can be precisely distinguished. Difficulties related thereto that which appear in the realm of the application of law may not be regarded as irrelevant from the point of view of the assessment of criminal-law regulations which shape the limits of expression. (...) The excessive restrictiveness of criminal liability which at least indirectly imposes barriers on the freedom of expression – in particular when it is linked with the considerable freedom of assessment of the indicated characteristics of the offence – may lead to inadmissible interference with the realm of the guaranteed constitutional freedom".

It is such freedom of assessment of characteristics that we deal with in the present case. Contrary to the view expressed in the statement of reasons for the judgment, a distinction between an utterance which is insulting and an utterance which does not constitute an insult is not based on clear-cut criteria. As the Constitutional Tribunal aptly indicated in the case P 3/06: "the term 'insult' which is crucial for the description of the prohibited act is based on criteria that are evaluative, variable, dependent on numerous additional premisses arising from the sensitivity of the public opinion, the level of social acceptance for a certain type of evaluative and critical expressions in the public debate, as well as circumstances in which certain views and opinions are formulated". The said criteria do not make it possible, in many cases, to identify insulting utterances. Neither do they constitute a clear basis for distinguishing insulting utterances from defamation. The said lack of clarity primarily occurs in the public debate, the subject of which is the assessment of public institutions and persons that represent them, including politicians. This does not merely stem from the above-indicated broader margin of freedom as regards the assessment of public figures. It should be remembered that the subject of assessment often comprises complex socio-political phenomena and the activities of public figures involved. By contrast, evaluative utterances are, by nature, succinct in character. Persons that formulate such utterances are frequently unable to provide the proof of truth to support their evaluation. And finally, achieving the intended aim of the utterance sometimes entails resorting to harsh or shocking forms. The admissibility of formulating such evaluation in a democratic state is justified by the necessity to achieve aims in relation to which the public debate is held in the democratic state (cf. the ECHR judgment of 1 July 1997 in the case

Oberschlick v. Austria (II), Application No. 20834/92, "ECHR Reports" 1997, vol. IV, item 42). However, this makes it difficult to indicate a borderline between utterances which fall within the scope of the freedom of expression and utterances which go beyond that scope.

The above context should be taken into account by the legislator when he intends to restrict the freedom of expression by means of criminal law. Due to the character of criminal law as the *ultima ratio* in restricting the freedom of expression, the legislator - when applying the test of proportionality - should pay special attention to the principle of usefulness and the principle of the mildest measure. These principles constitute the basis of determining to what extent it is admissible to restrict the freedom of expression by means of criminal law in order to protect the President.

The answer to the above question is difficult primarily due to the complex characteristics of the systemic status of the President. The President of the Republic of Poland is a state authority by virtue of the Constitution, a public official as well as an individual. Despite being the subject of the insult, the dignity of the President as a person does not constitute the main subject of protection within the scope of the regulation adopted in the context of Article 135(2) of the Penal Code. Primarily, the subject of protection here is the constitutional authority, and only then the good reputation of the individual holding the office of the President. In the statement of reasons for the judgment, the Constitutional Tribunal aptly indicates Article 126 of the Constitution as a provision which justifies the introduction of separate criminal-law protection of the President against an insult. Also, the Constitutional Tribunal aptly points out a relation between Article 126 of the Constitution and the principle of the common good, as grounds for penalising utterances which insult the President. However, the said relation is presented in a one-sided way. The Constitutional Tribunal stresses only the aspects justifying separate criminal-law protection of the President against an insult. However, it does not notice that Article 126 of the Constitution also justifies the necessity to guarantee the possibility of providing a wide range of opinions concerning the activity of the President. The proper performance of the duties by the President requires that his/her activity be subject to the public opinion. The President as an executive authority carries out a number of state duties, makes public-law decisions, and takes a stance on strictly political matters. In such cases, the actions of the President should be assessed in the same way as the actions of other public figures. In other words, Article 126 of the Constitution justifies the possibility of having a separate penalty for an insult to the President, and at the same time it justifies the possibility of criticising and negatively evaluating the President's actions. The relation between Article 126 and Article 1 of the Constitution looks different than it is presented in the statement of reasons by the Constitutional Tribunal. For the implementation of the principle of the common good, it is necessary that the person and activity of the President are assessed in the same way as the actions of other public officials and politicians. The infringement of the principle of the common good would be a situation where the evaluation of the President would be excluded or limited; the scope of the evaluation would be narrower only due to the fact that the President is the supreme representative of the Republic of Poland. This is aptly pointed out by L. Gardocki, who argues that the excessive protection of the President, by imposing restrictions on the freedom of expression, "may lead to the somewhat artificial preservation of the authority of the office, rightly and justifiably subjected to critical evaluation by the public, and – as a consequence – may be conducive to suppressing public criticism. However, the effectiveness of the activity of a public institution, i.e. the possibility of performing duties effectively by a public authority, is not weakened by the fact that there occur highly critical, or even insulting, utterances formulated within the public realm. Obviously, this does not denote

that, in such situations, the legal system should not implement certain measures for legal protection. Still, in such a case, it is sufficient to rely on measures provided for in other legal regulations (...). Indeed, naturally, in a democratic society, there is less emphasis on the protection of values which are prestigious in character, and more attention is paid to the need for criticism and social control. By contrast, in authoritarian or totalitarian systems, authorities – being unsure of their legitimacy - readily resort, in a way, to tabooing itself, the organs of public authority, institutions and symbols (L. Gardocki, "Europejskie standardy wolności wypowiedzi a polskie prawo karne", *Państwo i Prawo* Issue No. 3/1993, p. 26). The principle within the meaning of which public figures, particularly those holding the highest state offices, enjoy a lower degree of the criminal-law protection of good reputation than individuals also applies to the President. With regard to the President, a particular difficulty in applying the said principle consists in the fact that it is impossible to separate the President's public activity from his/her private one. Neither is it possible to clearly distinguish between the President's role as a public official and a politician. The circumstances indicated above lead to a conclusion that the basic issue in the context of the reviewed provision is to detect a difference between permitted public discourse and a penalised insult. To detect that difference, it is vital to look at the situational context where utterances concerning the President are formulated. It is the context that determines whether something is or is not an insult, whether it falls within the scope of criticism and public discourse as well as whether it serves the purpose of the public debate. Adopting as a starting point the above-indicated broad scope of the freedom of expression, it should be stated that Article 135(2) of the Penal Code should not exclude the formulation of evaluation of the President, which is in the form of harsh or shocking utterances, as long as they serve the purpose of the public debate. Therefore, the constitutionality of Article 135(2) of the Penal Code may be accepted only under the condition that its application is limited to an exceptionally serious, unprovoked and unjustified insult, which may cause direct and actual harm (i.e. not merely hypothetical, nor "symbolic" harm) to a vital public interest (see I.C. Kamiński, "Ochrona dobrego imienia głów państw obcych a swoboda wypowiedzi. Orzeczenie Trybunału w Strasburgu w sprawie Colombani i inni przeciwko Francji", *Przegląd Prawa Europejskiego* Issue No. 2/2003, p. 27).

The contemporary constitutional standards result in the change of the *ratio legis* of the traditionally understood criminal-law protection of the head of state against an insult. The reason for such protection is no longer *crimen laesae maiestatis*, but the effective performance of duties assigned to the President by the Constitution. The legal protection of the head of state was different in the times when the head of state was a sovereign ruler, and it differs at present when the head of state is the supreme representative of the state, carrying out public duties assigned by the Constitution. It is possible to assume that Article 135(2) of the Penal Code constitutes an admissible restriction on the freedom of expression only on condition that the result of its interpretation leads to the above-mentioned scope of penalisation. Such an interpretation primarily assumes that specifying the scope of the said insult, referred to in Article 135(2) of the Penal Code, must take into account the varied scope of protection of public figures, including the President, and individuals. The scope ratione materiae of the insult referred to in the challenged provision is therefore narrower than the scope of the insult mentioned in Article 216 of the Penal Code. Moreover, even if we deal with utterances that fall within the scope ratione materiae of Article 135(2) of the Penal Code, detrimental social consequences which they bring about ought to be assessed in the light of Article 54(1) of the Constitution. An insult to the President does not automatically mean a threat to state security or public order. Assuming such an automatic correlation and using it as justification for the degree of the detrimental

social consequences of the act constitutes excessive interference with the freedom of expression. The sole protection of the good reputation of the President does not suffice to hold someone criminally liable, also when an insulting utterance goes beyond the scope of the accepted standards of the public debate, but the purpose of this utterance is the evaluation of the performance of public duties by the President. And finally, damage caused by an insulting utterance may only be assumed when the insulting utterance undermines the effective and undisturbed activity of the President in the interest of society at large. Taking the above elements into account should constitute the basis of assessing the degree of detrimental social consequences, with the application of Article 1 and Article 59 of the Penal Code as well as Article 17(1)(3) of the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws - Dz. U. No. 89, item 555, as amended; hereinafter: the Code of Criminal Procedure). When interpreting the provisions of the Penal Code, a given court should take into consideration the above-indicated situational context as well as the fact that, relying its adjudication on Article 135(2) of the Penal Code, it resolves a conflict between the necessity to provide legal protection to the President and the freedom of expression. The court should arrive at an interpretation of Article 135(2) of the Penal Code which would be consistent with the Constitution.

The statement of reasons for the judgment, presented by the Constitutional Tribunal, does not provide a basis for an interpretation of Article 135(2) of the Penal Code which would be consistent with the Constitution. When interpreting Article 54(1) of the Constitution and Article 10 of the Convention, the Constitutional Tribunal does not share the view that the President is entitled to a lower degree of protection of his/her good name, due to the need to protect the freedom of expression. Although the statement of reasons mentions the ECHR ruling in the case *Oberschlick v. Austria*, which points out the need for the introduction of such differentiation within the scope of protection, but at the same time the Tribunal draws attention to the dissenting opinion to that ruling. When reading the statement of reasons for the judgment, one may have an impression that the degree of criminal-law protection of the President's good reputation is very high. Given the values emphasised by the Constitutional Tribunal, the said degree seems to be even higher than in the case of the protection of the good reputation of individuals. The Constitutional Tribunal stresses that insulting the President disturbs social order and peace, the accumulation of insults may weaken the international position of the President, protection against insults is a prerequisite for the effective performance of duties, and "insulting an authority that constitutes the systemic embodiment of «the common good», undermines the Republic of Poland as the common good of all citizens, *inter alia* by the fact that it undermines the prestige of the organs of the state, weakens citizens' trust in the Republic, and may diminish the degree to which citizens identify with the state". In my view, the last-mentioned argument leads to the sacralisation of the systemic status of the President and entails that s/he has a particularly privileged position in the public debate, including the situation where the subject of the debate is the activity of the President as a politician. The Constitutional Tribunal overlooks the fact that the excessive degree of criminal-law protection of the President may result in the infringement of the freedom of expression as well as the disturbance of the proper functioning of the state office, and thus the breach of the principle of the common good. To adopt the assumption that an insult to the President undermines the values indicated by the Tribunal as a principle, rather than as an exception, narrows down the possibility of assessing the detrimental social consequences of the act. If an insult to the President, in principle, violates such crucial values, the organs of public authority which are responsible for applying the law should usually recognise the seriousness of the detrimental social consequences of the act when instituting criminal proceedings, when assessing the prohibited act and, finally, when imposing a penalty. As a

result, the court should impose the penalty of deprivation of liberty, referred to in Article 135(2) of the Penal Code. From that point of view, the argumentation of the Constitutional Tribunal is inconsistent; on the one hand, the Tribunal stresses the possibility of applying Article 59 of the Penal Code and refraining from imposing the penalty of deprivation of liberty; on the other hand, it argues that an insult to the President leads to the infringement of highly significant constitutional values. The arguments presented by the Constitutional Tribunal justify extending, rather than narrowing down, the scope of penalisation. The provisions of the Constitution do not support the view presented by the Constitutional Tribunal that the penalisation of insults to the President does not restrict the right to criticism. The said view is based on the assumption adopted by the Constitutional Tribunal that there are clear criteria for distinguishing insulting utterances from defamation. As I have indicated above, the said criteria are not clear. The lack of clarity in practice results in a difficulty in classifying particular utterances as insults or instances of defamation. The said lack of clarity is even more problematic when a person expressing an opinion on the President's activity is unable to provide the proof of truth. The impossibility of providing such proof may lead to classifying such an utterance as an insult and not as defamation. In my view, such an utterance should, even when regarded as insulting, be assessed as an utterance falling beyond the scope of the freedom of expression. Assuming that such an utterance does not at all fall within the scope ratione materiae of Article 54(1) of the Constitution, in an inadmissible way, weakens the guarantee function of the said provision. Therefore, I find it unjustified to claim in the statement of reasons that "the penalisation of a public insult to the President of the Republic of Poland does not hinder the potential criticism of the activity of that authority and the public debate within that regard".

One should agree with the Constitutional Tribunal that "in a democratic state which is the common good of all citizens, the said debate may be held in a civilised and well-mannered way, without any detriment to the rights and freedoms of persons and citizens as well as to the proper functioning of public institutions". The said proposal does not, however, justify the scope of penalisation. Criminal law only to a small extent constitutes a useful instrument for guaranteeing a civilised and well-mannered debate. Penalisation should only concern situations in which participants in the said debate, in a way that is extreme and justified by no objectives of the public debate, violate constitutionally protected values. The broader scope of penalisation makes it an inadequate instrument for guaranteeing the civilised and well-mannered way of conducting the debate. More importantly, the said scope poses a risk that issues which are vital, from the point of view of the public debate, either will not be raised or will be raised only in a way accepted by the organs of the state.

For the above reasons, I hold the view that the Constitutional Tribunal has derived excessive protection of the President from the provisions of the Constitution, as it failed to weigh the conflicting constitutional principles properly. The statement of reasons for the judgment does not indicate how the conflict of the principles should be resolved. In particular, the statement of reasons does not indicate in what way the systemic status of the President could be ensured by the criminal-law protection against an insult, while at the same time guaranteeing the freedom of expression. Consequently, the statement of reasons does not provide the proper interpretation of Article 135(2) of the Penal Code that is consistent with the Constitution. In my opinion, providing such an interpretation is necessary for ruling the said provision to be constitutional and for guaranteeing the proper application thereof.