80/8/A/2011

JUDGMENT
of 11 October 2011
Ref. No. K 16/10*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Mirosław Granat – Presiding Judge
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka – Judge Rapporteur,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 11 October 2011, in the presence of the applicant and the Public Prosecutor-General, an application by the Polish Ombudsman (hereinafter: the Ombudsman) to determine the conformity of:

1) Article 22(4) of the Mental Health Protection Act of 19 August 1994 (Journal of Laws - Dz. U. No. 111, item 535, as amended) in the part containing the wording "over the age of 16" to Article 41(1) in conjunction with Article 48(1), second sentence, Article 72(3) of the Constitution and Article 12(1) of the Convention on the Rights of the Child (Journal of Laws - Dz. U. of 1991 No. 120, item 526, as amended), as well as to Article 47 in conjunction with Article 48(1), second sentence, Article 72(3) of the Constitution and Article 12(1) of the Convention on the Rights of the Child,
2) Article 32(5), Article 32(6) in the part containing the wording "who has reached the age of 16", and Article 34(4) of the Act of 5 December 1996 on the Professions of Medicine and Dentistry (Journal of Laws - Dz. U. of 2008 No. 136, item 857, as amended) to Article 41(1) in conjunction with Article 48(1), second sentence, Article 72(3) of the Constitution and Article 12(1) of the Convention on the Rights of the Child, as well as to Article 47 in conjunction with Article 48(1), second sentence, Article 72(3) of the Constitution and Article 12(1) of the Convention on the Rights of the Child,
3) Article 17(1) in the part containing the wording "including a minor who has reached the age of 16" as well as Article 17(3) in the part containing the wording "who has reached the age of 16" of the Act of 6 November 2008 on Patients' Rights and the Ombudsman for Patients' Rights (Journal of Laws - Dz. U. of 2009 No. 52, item 417, as amended) to Article 41(1) in conjunction with Article 48(1), second sentence, Article 72(3) of the Constitution and Article 12(1) of the Convention on

* The operative part of the judgment was published on 10 November 2011 in the Journal of Laws - Dz. U. No. 240, item 1436.

the Rights of the Child, as well as to Article 47 in conjunction with Article 48(1), second sentence, Article 72(3) of the Constitution and Article 12(1) of the Convention on the Rights of the Child,

adjudicates as follows:

1) Article 22(4) of the Mental Health Protection Act of 19 August 1994 (Journal of Laws - Dz. U. No. 111, item 535, of 1997 No. 88, item 554 and No. 113, item 731, of 1998 No. 106, item 668, of 1999 No. 11, item 95, of 2000 No. 120, item 1268, of 2005 No. 141, item 1183, No. 167, item 1398 and No. 175, item 1462, of 2007 No. 112, item 766 and No. 121, item 831, of 2008 No. 180, item 1108, of 2009 No. 76, item 641 and No. 98, item 817, of 2010 No. 107, item 679 and No. 182, item 1228 as well as of 2011 No. 6, item 19 and No. 112, item 654) **in the part containing the wording "over the age of 16",**

2) Article 32(5), Article 32(6) in the part containing the wording "who has reached the age of 16", and Article 34(4) of the Act of 5 December 1996 on the Professions of Medicine and Dentistry (Journal of Laws - Dz. U. of 2008 No. 136, item 857, of 2009 No. 6, item 33, No. 22, item 120, No. 40, item 323, No. 76, item 641 and No. 219, item 1706 and 1708, of 2010 No. 81, item 531, No. 107, item 679 and No. 238, item 1578 as well as of 2011 No. 84, item 455, No. 106, item 622, No. 112, item 654 and No. 113, item 658)**,**

3) Article 17(1) in the part containing the wording "including a minor who has reached the age of 16" as well as Article 17(3) in the part containing the wording "who has reached the age of 16" of the Act of 6 November 2008 on Patients' Rights and the Ombudsman for Patients' Rights (Journal of Laws - Dz. U. of 2009 No. 52, item 417 and No. 76, item 641, of 2010 No. 96, item 620 as well as of 2011 No. 112, item 654),

– are consistent with Article 41(1) in conjunction with Article 48(1), second sentence, Article 72(3) of the Constitution of the Republic of Poland and Article 12(1) of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989 (Journal of Laws - Dz. U. of 1991 No. 120, item 526, as well as of 2000 No. 2, item 11)**, as well as with Article 47 in conjunction with Article 48(1), second sentence, Article 72(3) of the Constitution and Article 12(1) of the Convention on the Rights of the Child.**

STATEMENT OF REASONS

[...]

III

1. The presentation of the challenged provisions.

The discussion of the present case should be preceded by the presentation of the legal situation subjected to the review of constitutionality. In the application lodged with the Tribunal, the Ombudsman challenged Article 22(4) of the Mental Health Protection Act of 19 August 1994 (Journal of Laws - Dz. U. No. 111, item 535, as amended; hereinafter: the Mental Health Protection Act), Article 32(5) and (6) as well as Article 34(4) of the Act of 5 December 1996 on the Professions of Medicine and Dentistry

(Journal of Laws – Dz. U. of 2008 No. 136, item 857, as amended; hereinafter: the Act on the Professions of Medicine and Dentistry) as well as Article 17(1) and (3) of the Act of 6 November 2008 on Patients' Rights and the Ombudsman for Patients' Rights (Journal of Laws – Dz. U. of 2009 No. 52, item 417, as amended; hereinafter: the Act on Patients' Rights and the Ombudsman for Patients' Rights), i.e. selected excerpts from the provisions of the three statutes. Moreover, the Ombudsman limited the scope of the allegation to the phrases contained therein: "over the age of 16" and "who has reached the age of 16"; except for Article 32(5) and Article 34(4) of the Act on the Professions of Medicine and Dentistry, which were challenged in their entirety. However, the presentation of the subject of the review may not be narrowed down solely to the scope of the allegation, without prejudice to the possibility of understanding and then assessing the regulations under review. Thus, the description below also takes into account, within the indispensable scope, their normative context.

The first one of the challenged provisions – Article 22(4) of the Mental Health Protection Act – introduces an exception to the rule set out in Article 22(3) of the said Act, within the meaning of which a minor or a person who has no legal capacity is admitted to a mental hospital solely upon written consent of his/her statutory representative. Paragraph 4 also requires that consent to admission to a mental hospital be granted by a minor over the age of 16 or an incapacitated person who has reached the age of 18, provided that s/he is capable of granting such consent. Moreover, the paragraph stipulates that in the case of contradictory statements by the said person and his/her statutory representative, the required consent is granted by a guardianship court.

Similarly to the above-cited provision, other challenged regulations – Article 32(5), Article 32(6) and Article 34(4) of the Act on the Professions of Medicine and Dentistry – constitute part of a larger whole and regulate exceptional situations in respect of the scope ratione personae.

In accordance with the principle expressed in Article 32(1) of the Act on the Professions of Medicine and Dentistry, the medical practitioner may carry out an examination or provide other health-care services upon consent granted by the patient. If the patient is a minor or is incapable of granting conscious consent, then consent granted by his/her statutory representative is required; in the case s/he has no statutory representative, or if reaching an agreement with the representative is impossible, consent is granted by the guardianship court (paragraph 2). In the case of a need for the examination of the person referred to in paragraph 2, the required consent may also be granted by a *de facto* guardian (paragraph 3). Consent by the guardianship court is also indispensable after carrying out the examination, but before further health-care services are provided by the medical practitioner, if the patient referred to in paragraph 2 has neither a statutory representative nor a *de facto* guardian, or if reaching an agreement with those persons is impossible (paragraph 8). Pursuant to challenged paragraph 5, if the patient has reached the age of 16, his/her consent is also required. By contrast, challenged paragraph 6 stipulates that, in the case of an objection raised by an underage patient who has reached the age of 16, an incapacitated patient, or a mentally ill or mentally handicapped patient who has sufficient understanding of medical activities – apart from consent granted by a statutory representative or a *de facto* guardian, or in the case where they refuse to grant consent – consent by the guardianship court is required.

Article 34 of the Act on the Professions of Medicine and Dentistry regulates surgical procedures and the application of higher-risk medical treatment or diagnostics. The said provision requires the patient's prior written consent. As regards a minor, an incapacitated person or a person who is incapable of granting such consent consciously, the medical practitioner may carry out the procedure or apply the treatment or diagnostics

referred to in paragraph 1 of the said Article, after obtaining consent from the patient's statutory representative; in the case where the patient has no representative, or if reaching an agreement with the representative is impossible, consent granted by the guardianship court is required (paragraph 3). Within the meaning of challenged paragraph 4, if the patient has reached the age of 16, his/her written consent is also required. It is worth noting that the applicant challenged Article 32(5) and Article 34(4) of the Act on the Professions of Medicine and Dentistry in their entirety, without restricting the scope of the allegation to the phrase "has reached the age of 16" contained therein. Due to the wording of the two provisions ("if the patient has reached the age of 16, his/her [written] consent is also required"), deleting the indicated wording would deprive the other parts of logical and normative content. Therefore, one may not agree with the view of the Public Prosecutor-General that the scope of the allegation has not been restricted by mistake. As it follows from the substitution of the application, it is true that the Ombudsman does not challenge the fact that underage patients have the right to decide whether they will be provided with health-care services set out in Article 32 and Article 34 of the Act on the Professions of Medicine and Dentistry or not; what the Ombudsman challenges is the restriction of that right solely to the group of patients over 16. Despite that fact, one may not challenge Article 32(5) and Article 34(4) of the Act on the Professions of Medicine and Dentistry only in the part containing the wording "has reached the age of 16", since in the case of deleting the wording, the said provisions would lose their meaning.

Pursuant to Article 34(5) of the Act on the Professions of Medicine and Dentistry, in the situation referred to in paragraph 1, Article 32(6) is also applied accordingly. If the statutory representative of the patient who is a minor, who is incapacitated, or who is incapable of granting conscious consent, does not agree to medical activities mentioned in paragraph 1 which are to be carried out by the medical practitioner, and which are indispensable to eliminate the risk of the patient's death, serious injury or serious health loss, the medical practitioner may still carry out such activities after obtaining consent from the guardianship court (paragraph 6). The medical practitioner may carry out activities referred to in paragraph 1 and Article 32(1), also without any consent of the statutory representative of the patient or consent granted by a competent guardianship court, where a delay caused by obtaining the said consent would pose a risk of death, serious injury or serious health loss to the patient. In such a case, where possible, the medical practitioner is obliged to consult another medical practitioner, preferably one who is a specialist in the same area of medicine (paragraph 7). Moreover, the medical practitioner forthwith notifies the statutory representative, the *de facto* guardian or the guardianship court about the medical activities undertaken. The medical practitioner provides information about the circumstances specified in paragraphs 3 to 7 to the patient, his/her statutory representative or *de facto* guardian, or the guardianship court, and also makes relevant notes and provides justification in medical documents (paragraph 8).

Also, Article 17(1) of the Act on Patients' Rights and the Ombudsman for Patients' Rights has been included within the scope of the allegation. The said provision stipulates that the patient, including a minor who has reached the age of 16, has the right to grant consent to an examination or other health-care services to be provided to him/her by the medical practitioner. Paragraph 2 of the said provision grants the right to give consent referred to in paragraph 1 also to the statutory representative of the patient who is a minor, who is incapacitated, or who is incapable of granting conscious consent, and in the case where there is no statutory representative – with regard to an examination – also to the patient's *de facto* guardian. Moreover, challenged Article 17(3) of the Act on Patients' Rights and the Ombudsman for Patients' Rights guarantees - to an underage patient who has reached the age of 16, an incapacitated patient, or a mentally ill or mentally

handicapped patient who has sufficient understanding of medical activities - the right to object to a health-care service, despite consent granted by the patient's statutory representative or *de facto* guardian. In such a situation, consent by the guardianship court is required.

2. The essence of the constitutional issue.

In the application by way of which these review proceedings have been commenced, the Ombudsman have questioned the regulations of statutes on the provision of health-care services which grant underage patients the right to participate in decision-making as regards the course of medical treatment after they have reached the age of 16. In the view of the Constitutional Tribunal, although the applicant negatively assesses the minimum age adopted in the statutes – considering it to be too high, the main allegation pertaining to the challenged regulations concerns their arbitrary character and their automatic application, which overlook the individual ability of a particular underage patient to decide about him/herself in a conscious and responsible way. The fact that the challenged regulations do not respect the opinion of the child to the extent this is adequate to the child's actual competence as regards decision-making, but they establish a fixed age limit for all children, which – in the opinion of the applicant – infringes the norms indicated as higher-level norms for the review.

To resolve the case, it is necessary to examine whether the formal criterion used by the legislator does actually restrict the fundamental subjective rights of underage patients, enshrined in the Constitution and indicated in the application (see points 3-5 of this part of the statement of reasons), and if it does – whether the restriction is unauthorised in character (see points 6-8 of this part of the statement of reasons). The answer to the second question depends on determining whether the Constitution of the Republic of Poland or the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989 (Journal of Laws - Dz. U. of 1991 No. 120, item 526, as amended; hereinafter: the Convention), in the provisions indicated as higher-level norms for the review in the present case, rule out any restrictions on the exercise of subjective rights by a minor, and in particular whether they rule out the application of imposed formal age limits and instead provide for flexible and individualised criteria. If they do not exclude such dividing lines in relation to age, it should be examined whether they possibly provide for minimum age limits.

Moreover, the Ombudsman mentioned that the challenged provisions aggravated the chaos that was noticeable in statutes regulating the legal situation of minors. Indeed, they do not correspond to any concepts adopted in other legal acts, introducing separate premisses of assessing rights enjoyed by underage patients. Thus, they multiply (already numerous) applicable solutions. Therefore, the Tribunal should also make reference to the allegation of the systemic inconsistence of the legislator, when it comes to the shaping of children's rights.

3. The patient's consent to medical treatment.

3.1. The significance of the consent and its legal character.

As it has been noted in the introductory part of the statement of reasons, the right to decide about oneself, including the choice of the method of medical treatment, manifests the autonomy of the individual. The institution of consent to medical treatment constitutes a reflection of that right and is one of the premisses of legality of the treatment. The said remark equally concerns the most risky medical procedures as well as routine examinations which pose no health hazard. It refers to a wide spectrum of medical activities – from

diagnostics and examinations to minor medical procedures and surgery, on an outpatient basis and in hospital. Treatment understood in a broad way, undertaken – in breach of regulations – without the patient's consent, is unlawful and may constitute grounds for civil, criminal or professional liability on the part of the medical practitioner. The lack of the patient's consent to a particular medical procedure binds the medical practitioner and renders his/her actions unlawful (performing a medical procedure without the consent of the patient constitutes an offence under Article 192 of the Penal Code). By contrast, consent renders medical interference lawful and – consequently – eliminates liability for carrying out the procedure, although it obviously does not exclude liability for possible medical malpractice (cf. the decision of the Supreme Court of 27 October 2005, III CK 155/05, OSNC 2006/7-8/137, Bulletin of the Supreme Court Issue No. 2006/2/9). The above statements are commonly accepted in the doctrine of law and jurisprudence.

However, what ignites controversy is the assessment of the legal character of the patient's consent to medical treatment. The views of scholars in that regard have been thoroughly discussed in the argumentation presented to the Tribunal. What constitutes the axis of doctrinal dispute is the question whether the said consent is a civil-law declaration of will and a category that depends on legal capacity, or whether it is of a different character. The Tribunal does not undermine the significance of that issue; nevertheless, anticipating the further discussion, the Tribunal states that the said issue is irrelevant from the point of view of reviewing the challenged provisions in the light of the higher-level norms for the review which have been indicated in the Constitution. Taking any side in the debate would only be of significance for the assessment of the conformity of the challenged legal solutions to the provisions of other statutes, including in particular the Civil Code. The review of legal acts of equivalent rank in the hierarchy of acts does not fall within the scope of the jurisprudence of the Constitutional Tribunal, which is going to be discussed below (see point 7.2).

3.2. The premisses of effectiveness of consent.

The Tribunal shares the view of the Marshal of the Sejm that considerable significance should be assigned to the premisses of legal effectiveness of the patient's consent. Valid consent may be granted only by an authorised person – a person who disposes of protected interests; given medical treatment may not breach a statute or contradict the principles of community life; a statement expressing consent must result from a decision taken freely, and thus the one who disposes of the interest must be able to grant consent at the moment of making the statement; the decision must be taken after the careful consideration of facts (the so-called informed consent) and must be expressed in an appropriate form (cf. M. Filar, "Postępowanie lecznicze (świadczenia zdrowotne) w stosunku do pacjenta niezdolnego do wyrażenia zgody", *Prawo i Medycyna* Issue No. 13/2003, p. 41; M. Safjan, "Autonomia jednostki wobec interwencji medycznej" [in:] *Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny*, Warszawa 1998, p. 62)

The first one of the enumerated premisses is of key significance. Indeed, determining whether, in the challenged provisions, the legislator has specified a group of parties that are authorised to dispose of the personal interests of an underage patient in accordance with the Constitution constitutes the core of the matter. Replying to the question which has been posed, one should also take into account those conditions of validity of consent which – generally speaking – require the patient's ability to take in and process information on planned medical treatment. The necessity to possess such an ability is almost directly confirmed by Article 3(4) of the Mental Health Protection Act, which stipulates that consent to admission to a mental hospital may only be consent which is

freely granted, even if the grantor is a mentally unstable person, but who is - regardless of his/her mental state – actually able to understand information, provided in an accessible way, about the purpose of the admission to hospital, his/her state of health, suggested diagnostic activities and medical treatment, as well as the foreseeable effects of undertaking or refraining from those actions.

3.3. Obligations to provide information on the part of the medical practitioner.

The above requirement addressed to the patient is correlated with obligations to provide information on the part of the medical practitioner. Within the meaning of Article 31(1) of the Act on the Professions of Medicine and Dentistry, the medical practitioner should provide the patient or his/her statutory representative with accessible information about the patient's state of health, a diagnosis, suggested and possible methods of diagnostics and medical treatment, the foreseeable effects of applying them or refraining from them, the results of the treatment and a prognosis (the so-called explanation for the purpose of informed self-determination). The said obligation – to some extent – also concerns underage patients who have reached the age of 16. The medical practitioner provides them with information to the extent and in a form that is necessary for the proper course of a diagnostic or therapeutic process, as well as s/he listens to their opinions (the so-called therapeutic explanation). If the patient is under 16 or is unconscious, or incapable of comprehending the meaning of the information, the medical practitioner imparts the information to a close person, as defined in Article 3(1)(2) of the Act on Patients' Rights and the Ombudsman for Patients' Rights. The said solution is adopted and repeated in Article 9 of the said Act, which also extends the obligation to provide information to the patient to include nurses and midwives.

As it follows from the cited regulations, information which determines effective consent to a medical activity must fulfil certain requirements not only as to its content but also form. It should be provided in a way which is accessible and comprehensible to the patient, enabling the patient – after absorbing the information – to make conscious choices about medical treatment (cf. A. Dudzińska, "Wymagana informacja udzielana pacjentowi", *Państwo i Prawo* Issue No. 8/2008, p. 90; the Supreme Court has on a number of occasions voiced its views on the scope of medical information – see e.g. the judgment of 28 September 1999, Ref. No. II CKN 511/96, Lex No. 453701, and of 17 December 2004, Ref. No. II CK 303/04, OSP No. 11/2005, item 131).

3.4. Persons and entities authorised to grant consent to medical treatment.

In principle, a person who disposes of the personal interests of the patient is the patient him/herself. The principle is that every person has an unrestrained possibility of assessing, for him/herself, a need for medical treatment as well as methods of such treatment. If the patient is the sole holder of the right to grant consent, then in a situation where s/he refuses to grant it, the medical practitioner should respect the patient's will, inform him/her about the consequences of refraining from or delaying the treatment, and refrain from further action (cf. the decisions of the Supreme Court of 16 April 2009, Ref. No. I CSK 402/08, Lex No. 560512 as well as of 12 February 1997, Ref. No. II CKU 72/96, OSNC No. 6-7/1997, item 84). The analysis of the presented provisions (the challenged regulations and their normative context) clearly indicates that the said principle refers only to patients who have reached the age of 18, who have full legal capacity and are able to consciously grant consent. With regard to particular cases listed in legal provisions, what is required is cumulative consent (also referred to as parallel consent) of the patient and another authorised person or entity. The law also knows the cases of the so-called substitutive consent solely granted by another person or entity.

Such situations particularly concern minors, persons who are completely or partially incapacitated, as well as mentally ill or mentally handicapped persons who have sufficient understanding of medical activities or who lack such understanding, and who are able to consciously grant consent or who are actually unable to do so.

On behalf of a minor, such consent is, in principle, expressed by his/her statutory representative (thus it is substitutive consent). Only after the patient has reached the age of 16, the medical practitioner is also required to obtain the patient's consent (cumulative consent). The patient who has reached the age of 16 may also express his/her legally effective objection. In the case of contradictory statements by a minor and his/her statutory representative, the decisive voice is given to the guardianship court. Having reached a certain age, a minor is in a similar situation as incapacitated persons who are able to consciously grant consent as well as mentally ill or mentally handicapped persons who have sufficient understanding of medical activities. The legislator relies on the assumption that only after reaching the age of 16, persons acquire an ability to develop a conscious and rational attitude to health-care services that are offered to them.

Also, the above-quoted provisions regulating the medical practitioner's obligation to provide information have confirmed the above-indicated assumption adopted by the legislator that the fact of reaching the age of 16 guarantees that the patient is intellectually and emotionally mature, which is indispensable for comprehending medical information and for granting justified and legally effective consent to medical treatment.

The said assumption, putting aside its substantive validity, is not consistently applied in the realm of medical law. Indeed, there are several binding legal acts which regulate the special aspects of medical activity and which assume different criteria for legally effective consent granted by underage patients. Nor is the assumption reflected in the way the situation of minors is shaped in the broadly understood system of law. The said problem, which has been touched upon, is going to be discussed below (see point 7 of this part of the statement of reasons).

However, the assessment of the described statutory solutions should be preceded by the presentation of the constitutional points of reference indicated in the application.

4. The characteristics of the main higher-level norms for the review – constitutional guarantees and the limits thereof.

4.1. Personal liberty and personal inviolability in the light of Article 41(1) of the Constitution.

Moving on to discuss the higher-level norms for the review indicated in the present case, it should be noted that the applicant has assigned primary importance to some of them, whereas others have been indicated as ancillary. The Ombudsman has requested that the conformity of the challenged provisions be reviewed primarily in the light of Article 41(1) and Article 47 of the Constitution, which are to be read in conjunction with Article 48(1), second sentence, and Article 72(3) of the Constitution as well as in conjunction with Article 12(1) of the Convention. In the first place, both main higher-level norms for the review will be presented, and subsequently (see point 5) ancillary ones will be discussed.

The first one of the above-mentioned higher-level norms for the review – Article 41(1) of the Constitution guarantees personal inviolability and personal liberty to everyone, with the restriction that any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute. The interpretation of the normative content of that provision should begin by discussing the term "personal liberty". It is characterised as the possibility of taking his/her own decisions

by the individual in compliance with his/her will and making his/her own choices in public and private life, which are unrestrained by other persons. In the light of binding constitutional standards, the freedom of the individual is perceived as a fundamental value in a democratic society, which is inherent, unquestionable and inalienable, as well as which constitutes the source of the individual's personal development, personal happiness and social progress (cf. the judgment of the Constitutional Tribunal of 10 March 2010, Ref. No. U 5/07, OTK ZU No. 3/A/2010, item 20, P. Sarnecki, comments on Article 41, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, L. Garlicki (ed.), Warszawa 2003, the statement of reasons for the resolution of the Supreme Court of 13 March 1990, Ref. No. V KZP 33/89, OSNKW No. 7-12/1990, item 23). Also, the Supreme Court stressed, making reference to Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR) (Journal of Laws - Dz. U. of 1977 No. 38, item 167) and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended), that in a democratic state freedom is protected in a special way, including the freedom of private life and the autonomy to make choices, as one of the fundamental principles of the contemporary doctrine of human rights, which is to be particularly protected by the state, as provided for in Article 41(1) and Article 47 of the Constitution (cf. the above-quoted decision of the Supreme Court of 27 October 2005, Ref. No. III CK 155/05).

Personal inviolability within the meaning of Article 41(1) of the Constitution is specified as "a guaranteed possibility of maintaining the individual's identity and integrity, both at the physical and mental level, as well as prohibition against any, direct and indirect, interference from the outside, which would infringe that integrity" (P. Sarnecki, *op.cit.*). In the above-mentioned judgment of 10 March 2010, the Tribunal stated that personal inviolability had a physical and mental dimension, as the identity of the person is defined by both his/her body and psyche. The said value is linked to the idea of the dignity of the person, which is referred to in Article 30 of the Constitution.

The terms under analysis are closely related, and the Tribunal has already referred to that relation in its previous rulings, distinguishing between a positive and negative aspect of the individual's freedom. The positive aspect comprises the freedom to act in any way one wishes in any realm – the right to choose such forms of activity which suit a given person best - as well as the freedom to decide to refrain from any activity. The negative aspect of the individual's freedom consists in a legal obligation to refrain – by anybody – from interference with the realm which is reserved for the individual. The said obligation lies with the state and other entities. Given such an interpretation of freedom, the term "personal liberty" overlaps with its positive aspect that protects the possibility of exercising the individual's will and the freedom of choice as regards his/her actions, in the broadest possible sense. By contrast, personal inviolability constitutes its negative aspect that guarantees "freedom from" interference with internal and external integrity of every person. In the light of the presented interpretation of Article 41(1) of the Constitution, respect for personal inviolability constitutes a guarantee of the exercise of personal liberty. Taking this into consideration, the Tribunal concluded that the legislator may impose restrictions on personal liberty, provided that he would not only meet all the requirements stated in Article 31(3) of the Constitution, concerning a restriction of every constitutional right or freedom, but also – under a particular condition arising from Article 41(1) of the Constitution – would respect personal inviolability (see the judgment of the Constitutional Tribunal of 10 March 2010 and reference contained therein).

4.2. The right to make decisions about one's personal life and the legal protection of private life, within the meaning of Article 47 of the Constitution.

One of the manifestations of the individual's freedom is the right "to make decisions about his personal life", referred to in Article 47 of the Constitution, which has been indicated as the second basic higher-level norm for the review. Moreover, the said provision guarantees that everyone has the right to legal protection of his/her private life. Privacy - understood as the right to "live one's life, in accordance with one's will and with any external interference being limited to an indispensable minimum" – *inter alia* refers to personal life (thus it also includes the individual's health) and it is sometimes called as "the right to be left alone". When mentioning the right to legal protection of one's private and family life as well as of one's honour and good reputation, and the right to make decisions about one's personal life, the Constitution establishes a prohibition against the state's interference with the private life of the individual, but it also imposes positive obligations on the state.

It should be noted that the protection of the right to privacy and of the right to make decisions about one's personal life is not absolute in character and may be subject to restrictions, provided that there is another constitutional norm, principle or value that weighs in favour of this and the extent of the restriction remains appropriately proportionate to the significance of the interest that the said restriction is to serve (see the judgment of the Constitutional Tribunal of 24 June 1997, Ref. No. K 21/96, OTK No. 2/1997, item 23, and the jurisprudence and the literature on the subject cited therein, in particular: A. Kopff, "Koncepcje prawa do intymności i do prywatności życia. Zagadnienia konstrukcyjne", *Studia Cywilistyczne*, Vol. XX/1972, W. Sokolewicz, "Prawo do prywatności", [in:] *Prawa człowieka w Stanach Zjednoczonych*, Warszawa 1985, p. 252). The scope of admissible restrictions is governed by the principle of proportionality, as set out in Article 31(3) of the Constitution. The said provision also specifies the formal terms of possible interference on the part of the legislator and the maximum scope of such interference. It seems that in the case of shaping the legal situation of the child, the general basis of restricting rights and freedoms is, in a sense, overridden by Article 48(1) and Article 72 of the Constitution, which in a clear way influence the child's position.

5. Higher-level norms for the review that are read in conjunction with other provisions.

5.1. The guarantees of personal liberty and personal inviolability of minors (children).

Pursuant to the Constitution, personal liberty, personal inviolability, the right to legal protection of one's private life as well as the right to make decisions about one's personal life are guaranteed to everyone. However, it is not accidental that the Ombudsman recognised a need to relativise the said rights and freedoms in the context of minors, indicating the following as higher-level norms for the review that are to be read in conjunction with other provisions: Article 48(1), second sentence, and Article 72(3) of the Constitution, as well as Article 12(1) of the Convention. They take into account the need to ensure that children will have the right to self-determination, with an explicit or implicit proviso that the exercise of that right is to be proportionate to the degree of maturity of the child and should take place under supervision.

At this point, it should be clearly emphasised that the borderline of majority in the Polish legal system is one and is set at the age of 18. This is stated in Article 10 of the Civil Code, with the exception that a minor attains majority on marriage. The said borderline is also respected by the Constitution, its Article 62(1), which grants the right to vote to Polish citizens who have, no later than on the day of vote, attained 18 years of age. Hence, within the meaning of the law, children are persons under 18. Such an interpretation is consistent

with Article 1 of the Convention, which stipulates that for the purposes of the Convention, "a child" means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Before interpreting the ancillary higher-level norms for the review that have been indicated in the application, which shape the situation of children, one should realise that they concern individuals from the moment they are born until they attain 18 years of age.

Pursuant to Article 48(1), second sentence, of the Constitution, upbringing shall respect the degree of maturity of the child as well as his/her freedom of conscience and belief and also his/her convictions. Within the meaning of Article 72(3) of the Constitution, in the course of establishing the rights of the child, the organs of public authority and persons responsible for the child shall consider and, insofar as possible, give priority to the views of the child. In accordance with Article 12 of the Convention, the States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The common denominator of the indicated regulations is the obligation of persons and entities that have influence on the child's life to respect his/her autonomy, individuality and convictions. What follows from that obligation is the necessity to acknowledge that the child is a subject of rights and to consider his/her opinions. The addressees of the norms are parents, guardians, the organs of public authority, persons who are responsible for the child as well as the States Parties. Therefore, the said group comprises all persons and entities who are directly and indirectly authorised to decide about the course of medical treatment of the child: apart from parents and legal or *de facto* guardians, there are also guardianship courts, medical practitioners (falling within the category of persons which are *in concreto* responsible for the child) as well as states, which grant the above powers to particular persons and organs of public authority by virtue of their legislation.

The above-mentioned higher-level norms for the review which are to be read in conjunction with other provisions may be interpreted in two ways. On the one hand, they undoubtedly establish the rights of the child. On the other hand – also undoubtedly – they are based on the assumption that the child is not self-reliant and that there is a need for supervision of his/her actions. In the provisions of the Constitution, indicated as the higher-level norms for the review, the rights of children are, in a way, formulated in opposition to persons and entities that ultimately take decisions. The said persons and authorities – parents, persons who are responsible for the child, the organs of public authority and the state – they constitute a certain buffer between the child and the external world. They assist the child in specifying his/her place in the world, bearing the child's welfare in mind, respecting his/her opinions, convictions and autonomy, but filtering them through their own experience and knowledge which the child, for obvious reasons, lacks. Thus, each of the provisions indicated as ancillary higher-level norms for the review in the present case implies the restriction of the child's rights and freedoms. Therefore, it is justified to conclude that the Ombudsman does not challenge the admissibility and legitimacy of such a state of affairs, i.e. the restriction of the child's rights as such (including the rights of underage patients).

5.2. The principle of "benefit of the child" and parental authority.

There is no doubt that the provisions indicated as higher-level norms for the constitutional review which are to be read in conjunction with other provisions aim at "the benefit of the child", considered by the Constitutional Tribunal to be a kind of constitutional general clause, which should be reconstructed by reference to the axiology

of the Constitution and general systemic assumptions. At the same time, the requirement to protect the child's benefit constitutes the basic and primary principle of the Polish system of family law, to which all regulations within the realm of relations between parents and children are subordinated. The term "the rights of the child" in the provisions of the Constitution should be understood as a requirement to protect the interests of a minor who can, in practice, seek such protection on his/her own within a very limited scope (see the judgment of the Constitutional Tribunal of 28 April 2003, Ref. No. K 18/02, OTK ZU No 4/A/2003, item 32). Therefore, parents should have the right to represent the child before third parties, in order to effectively look after the child. They are vested in that regard with a subjective right which is inherent and natural, and which has not been granted by the state, although it is exercised under the supervision of the state and society. Also, parenthood is protected by the Constitution (see Article 18). However, if parents fail to properly exercise their rights and fulfil their obligations with regard to their child, which is against the benefit of the child, they may be deprived of parental authority.

The Constitutional Tribunal points out the fact that, although Polish legislation still mentions the term "parental authority over the child", which is associated with an authoritarian model of upbringing, the evolution of the term is definitely heading towards the direction set by constitutional standards, which is best confirmed by the substantiation for a bill amending the Act of 25 February 1964 - the Family and Guardianship Code (Journal of Laws - Dz. U. No. 9, item 59, as amended; hereinafter: the Family and Guardianship Code), which has been introduced by the Act of 6 November 2008 (Journal of Laws - Dz. U. No. 220, item 1431). As a result of that amending Act, § 4 has been added to Article 95 of the Family and Guardianship Code, which outlines the scope of parental authority; in accordance with § 4, before taking a decision concerning the person or property of the child, parents should consider the child's opinion if the child's mental development, state of health and degree of maturity allow for that, as well as take into account – to the extent it is possible – the child's reasonable requests. When introducing the said provision as well as other significant amendments to the Family and Guardianship Code, the Polish Parliament kept the statutory term "parental authority" despite the proposals to replace it with a "milder" phrase. The legislator justified his decision in the following way: "parents should be vested with «authority» over the person and property of the child, who due to the state of his/her physical, psychological and intellectual development as well as the lack (or little amount) of life experience is not capable of taking decisions independently in a way which is appropriate for his/her benefit. Parental authority over the child does not exclude taking into account his/her opinions or joint decision-making with regard to the child (...). Also, in the context of relations with third parties, attention should be drawn to parents' actions which have legal effects, when they represent the child and handle his/her matters within the limits of their autonomy falling within the scope of parental authority. (...) The term «parental authority» is an adequate term as regards the role of parents in the realm of upbringing in the context of relations with other persons and entities. (...) Thanks to acquired experience, older persons are by nature predestined to guide younger persons who lack sufficient experience and, in their interest, to take decisions which have legal effects; in the realm of civil-law relations between parents and children, this is manifested by making declarations of will as well as by taking action instead of and on behalf of the child. The bill preserves the requirement of obedience on the part of the child with the emphasis on the increasing independence of adolescents when it comes to taking decisions and making the declarations of will (…). Parents' actions in the various realms of parental authority granted to them, and in particular as part of taking care of the child and representing the child, should be taken with respect for the dignity and rights of the child" (the explanatory note to the bill – the

Sejm Paper No. 888, Sejm/6thterm). It clearly follows from the quoted excerpt from the explanatory note that powers concerning decision-making in the case of persons who are subject to parental authority have been spread out in a well-thought-out way, which is far from being random and arbitrary, which is concurrent with the Convention and the constitutional guarantees of the rights of the child, and which meets the requirements thereof. It should be stressed that Article 95(4) of the Family and Guardianship Code also binds parents when they are to take decisions as to the medical treatment of the child, supplementing the normative content of the challenged provisions.

In the light of the above provisions, the remark by the Marshal of the Sejm should be regarded as apt, namely that it is unjustified to juxtapose the rights of the child with the legal institution of parental authority. Although the relation between parents and their children displays authoritative characteristics, the primary purpose of parental authority is the benefit of the child.

6. The assessment of the challenged regulations in the light of the indicated higher-level norms for the review.

6.1. The adequacy of the higher-level norms for the review.

The higher-level norms for the review indicated by the Ombudsman should be regarded as adequate for assessing the legal situation of patients under 16 which is determined by the challenged excerpts from the provisions. Although very generally formulated, the requirements in Article 41(1) and Article 47 of the Constitution, within the scope of their application, comprise the patient's right to autonomy. Indeed, there is no doubt that the health of every person, including a minor, constitutes an element of his/her personal life, which is subject to legal protection and over which the person has discretion, within the meaning of Article 47 of the Constitution. Also, Article 41(1) of the Constitution, within the above-mentioned two aspects of the individual's freedom – the positive and negative one – ensures that everyone is free to make use of health-care services, which implies both the possibility of accepting them ("freedom to") as well as the possibility of refraining from them ("freedom from") - (cf. M. Safjan*, op.cit.*, p. 34). The institution of substitutive consent (and also cumulative one) undeniably restricts the autonomy of the patient which is protected at the level of the Constitution. Therefore, a question arises whether this actual restriction, stemming from the application of the challenged regulations, is based on other provisions of the Constitution.

As it has already been mentioned above, while referring to Article 48(1), second sentence, and Article 72(3) of the Constitution as well as Article 12(1) of the Convention as higher-level norms for the review that were to be read in conjunction with other provisions, the Ombudsman expressed the view that the child's freedom – by nature of things – had to be restrained. While accepting the fact that children exercised their rights under the supervision of adults, the Ombudsman stated that the application of the formal criterion of age in the medical statutes, above which a minor's opinion on medical treatment became legally significant, was inconsistent with the indicated higher-level norms for the review. As a model, the Ombudsman adopted a criterion which is more subtle and flexible, taking into account the realities of the growing-up process of a particular subject of rights and obligations. At the same time, the applicant did not completely negate the legal admissibility of applying the minimum age, but he concluded that the said age should be lowered.

6.2. The application of higher-level norms for the review.

Article 48(1), second sentence, and Article 72(3) of the Constitution as well as Article 12(1) of the Convention require that the views of the child in all matters affecting him/her will be taken into consideration and that they will be given due weight in accordance with the maturity of the child; however, they do not require that the said views should have any direct legal effects (as regards the standard of the Convention, cf. M. Śliwka, *Prawa pacjenta w prawie polskim na tle prawnoporównawczym*, Toruń 2008, p. 191). The said provisions do not provide for a sanction for the infringement of the obligation set out therein or for a necessity to refer to a third party, when a person or entity designated to decide about the situation of a minor does not agree with his/her views. Nor do they mention anything about the minimum age at which the views and actions of the child should cause a change in his/her legal situation or should trigger any legal consequences. Moreover, they do not introduce a prohibition against setting a formal age limit or several different age limits. Besides, age limits are also mentioned in the Constitution, where the right to vote is granted at the age of 18 (Article 62(1)), where education to 18 years of age is compulsory (Article 70(1), second sentence), or the permanent employment of children under 16 years of age is prohibited (Article 65(3), first sentence).

The current legal provisions allow the child to express his/her opinion in matters concerning his/her own health, in compliance with the standards set out in the higher-level norms for the review read in conjunction with other provisions, which should be considered as minimum guarantees. As it has been suggested above, due to parental authority, what emerges is a tri-lateral legal relation: between parents and their child on the one hand, and the parents and third parties on the other (cf. T. Sokołowski, [in:] *Komentarz do art. 95 Kodeksu rodzinnego i opiekuńczego*, Lex 2010). The obligation to consider the child's opinion on his/her medical treatment and to take it into account as much as possible is primarily fulfilled in the relation between parents and their child, as well as in the relation between a guardian and the child. Indeed, taking care of the child is governed by provisions on parental authority, including the stipulation that a guardian should also obtain permission of a guardianship court with regard to all major issues that pertain to a given minor (Article 155(2) and Article 156 of the Family and Guardianship Code), and *inter alia* – as regards major issues concerning medical treatment. The guardianship court is also obliged to consider the child's opinion, before taking a decision on matters concerning his/her person, if the child's mental development, state of health and degree of maturity allow for that, as well as to take into account – to the extent it is possible – the child's reasonable requests (Article 576(2) of the Code of Civil Procedure). Subsequently, a statutory representative or the guardianship court, knowing the child's opinion on the course of medical treatment, represents the child in relations with third parties, which include entities providing health-care services (for more on the substitutive consent, cf. M. Śliwka, *op.cit*., pp. 194-203).

The challenged provisions, which assign legal significance to the opinion of a minor over 16 and provide for specific effects thereof (namely, the necessity to have an issue resolved by a competent organ of the state, in the case of disagreement or an objection), go beyond the scope of the requirement that the said persons and entities are obliged to consider and take into account the child's opinion before taking a decision concerning his/her person. The further extension of the scope of the regulations, although perceived as needed and desirable, falls within the discretion of the legislator.

In the opinion of the Tribunal, when assessing the validity of the allegation formulated by the applicant, apart from taking into account arguments arising from the analysis of constitutional norms, one may not overlook the actual possibilities of implementing the proposal that constitutes the essence of the application. It seems obvious

that correlating, in general, the requirement that consent should be granted in person by an underage patient with the level of his/her maturity would necessitate the creation of institutional supervision of that level in every individual case. In turn, this would mean a necessity for providing professional personnel in that regard in almost every health-care centre. This would also postpone providing medical assistance. In the view of the Tribunal, another possibility, i.e. leaving a decision on matters affecting the patient at the discretion of medical personnel that have been assigned with carrying out basic activities related to medical treatment (admission to hospital, a medical procedure, a medical examination), could lead to much more significant infringements of the rights of patients than those which – in the applicant's opinion – occur in the context of the current provisions.

Taking this into account, the Tribunal states that the challenged provisions are not inconsistent with Article 48(1), second sentence, and Article 72(3) of the Constitution as well as Article 12(1) of the Convention. Moreover, they go beyond the scope of the minimum outlined therein, by granting minors who have reached the age of 16 statutory guarantees of influence on the process of medical treatment. The adopted solution is consistent with the Constitution and the Convention, although it may be evaluated as dissatisfactory for various reasons (cf. M. Safjan, *op.cit*, p. 56, M. Śliwka, *op.cit*., pp. 213-214). However, such evaluation of a legal regulation goes beyond the scope of the powers of the Tribunal. The realm of the jurisdiction of the constitutional court ends where the realm of the lawmaker's legislative freedom begins. As a result, the allegations formulated by the applicant may only be regarded as *de lege ferenda* proposals.

A separate analysis should still be carried out with regard to the Ombudsman's allegation of the legislator's lack of systemic consistency as far as specifying the rights of minors is concerned.

7. The allegation that the rights of underage patients have not been specified in a uniform way in various legal acts.

7.1. The special regulations governing the situation of minors.

As an additional argument justifying the allegation of the unconstitutionality of the challenged provisions, the applicant indicated different regulations concerning underage patients in various medical statutes. All the authors of the opinions presented to the Tribunal in the present case have pointed out the existence of numerous exceptions to the assumption adopted in the challenged regulations. The said exceptions can in particular be found in the following acts of medical law:

– Article 12(3) of the Act of 1 July 2005 on the collection, storage and transplantation of cells, tissues and organs (Journal of Laws - Dz. U. No. 169, item 1411, as amended), which requires that the consent of a minor over the age of 13 should be obtained before taking a sample of his/her bone marrow,

– Article 4a(4) of the Act of 7 January 1993 on family planning, human foetus protection and conditions for the acceptability of terminating pregnancy (Journal of Laws - Dz. U. No. 17, item 78, as amended), which stipulates that the performance of an abortion on a female minor over the age of 13 is contingent upon her written consent (apart from consent granted by her statutory representative), and which grants a female minor under 13 the right to voice her own opinion before a guardianship court authorised to grant consent to the medical procedure,

– Article 306 of the Code of Civil Procedure, which provides for the possibility of taking blood samples for the purpose of providing evidence solely upon consent of the donor, and only in the case of minors under 13 – upon consent of their statutory representatives,

– Article 25(2) of the Act on the Professions of Medicine and Dentistry, which contains the requirement to obtain the written consent of a minor as regards his/her participation in a medical experiment (apart from the consent of the minor's statutory representative), if the minor has reached the age of 16 or if the minor is under the age of 16, but is capable of voicing his/her opinion as regards taking part in the experiment;
– Article 15 of the Code of Medical Ethics, which requires the medical practitioner to obtain consent to carry out a diagnosis, provide medical treatment and take prophylactic measures from any underage patient if s/he is able to grant it consciously; at the same time, the medical practitioner is obliged to respect the right of every patient to consciously take part in a decision-making process concerning his/her health and provide the patient with comprehensible information.

As it follows from the indicated regulations, at times the legislator considerably lowers the age at which the patient gains legal guarantees of exerting influence on his/her own medical treatment. In some cases, the legislator provides evaluative criteria, or completely overlooks them, granting every patient the right to express opinions on matters affecting the patient regardless of his/her age and understanding of medical activities.

It ought to be added that the situation of minors in the context of other branches of law also differs from the model presented by the Ombudsman; what is more, it is also varied. As it has already been mentioned, in accordance with the Civil Code, an adult is a person who has attained eighteen years of age or has got married before that age (Article 10). However, in compliance with the Civil Code, a person who has reached the age of 13 is already vested with some limited legal capacity (Article 15), as well as capacity as regards torts – from now on the minor shall be liable for a damage caused by him/her (Article 426). In the light of the Family and Guardianship Code, any change of last name in the case of a child who has reached the age of 13 requires the child's consent (Articles 88-90 of the said Code). Additionally, a child who has reached the age of 13 is required to grant consent to adoption (provided that s/he is capable of granting such consent and the adoption is not contrary to his/her interests) and a possible change of first name related to the adoption (Article 118(1) and 122(3) of the Family and Guardianship Code). Also, before reaching the age of 13, the adoptee should be heard by the court if s/he can comprehend the significance of adoption (Article 118(2) the Family and Guardianship Code). Moreover, the term "juvenile" is used in the law, within the meaning of the definition provided in Article 1(2)(1) of the Act of 26 October 1982 on legal cases concerning juveniles (Journal of Laws - Dz. U. of 2010 No. 33, item 178, as amended), which – in specific cases – includes persons under 21. A juvenile who commits a prohibited act after having attained the age of 17 is liable under the provisions of the Penal Code (Article 10(1) of the Code). The said age limit may be lowered when a juvenile after attaining the age of 15 years commits one of the prohibited acts enumerated in Article 10(2) of the Penal Code, if the circumstances of the case and the state of mental development of the perpetrator, his characteristics and personal situation warrant it, and especially when previously applied educational or corrective measures have proved ineffective.

7.2. The constitutional-law assessment of differentiation introduced by the legislator into the legal situations of children.

The legal evaluation of the existing state of affairs should begin with the statement that the diversity of solutions contained in the legal acts of equivalent rank (in the present case – statutes) does not, *per se*, constitute a basis for ruling any of the adopted regulations to be unconstitutional. It should be stressed that adjudication in that regard falls outside of

the scope of the jurisdiction of the Constitutional Tribunal. The Tribunal has been established to adjudicate on the conformity of the provisions of lower rank to the provisions of higher rank in the hierarchical structure of the sources of law. The Tribunal has no power to assess the "horizontal" conformity of legal acts (cf. the judgment of the Constitutional Tribunal of 23 February 2010, Ref. No. K 1/08, OTK ZU No. 2/A/2010, item 14 and the jurisprudence cited therein). Moreover, the Constitution does not contain an explicit requirement, and thus – a higher-level norm for review, that the legislator should preserve coherence between provisions contained in various normative acts of equivalent rank. Although Article 2 of the Constitution implies the legislator's obligation to enact "appropriate legislation", the said provision may not however be applied in the present case for two reasons. Firstly, it has not been indicated by the applicant as a higher-level norm for the review, and the Tribunal is bound by the scope of the application (Article 66 of the Constitutional Tribunal Act of 1 August 1997, Journal of Laws - Dz. U. No. 102, item 643, as amended). Secondly, what is primarily derived from Article 2 of the Constitution is the requirement to enact law which is lucid and rational. However, the systemic diversity of legal solutions does not rule out that each single norm may be expressed precisely and clearly as well as fall within the logic, aims and axiology of a legal act comprising the norm.

Therefore, one should draw a clear distinction between the negative evaluation of legislation that is not free from divergence and the conformity of the legislation to the Constitution. The outcome of evaluating solutions adopted in the legal system in the case of each of these two approaches (the substantive evaluation and the review of constitutionality) may be different. Also, different will be the effects of negative verification. In the first case, there will be no direct consequences for the applicability of the criticised regulations, it is however desirable to formulate *de lege ferenda* proposals. By contrast, in the case of ruling the unconstitutionality of a provision in the course of review proceedings before the Constitutional Tribunal, the provision ceases to have effect. During the process of enacting legal provisions, the legislator's crossing of boundaries set by the constitution-maker is hedged around with a sanction of invalidity. However, when the legislator stays within the boundaries set out by the Constitution, then he enjoys considerable freedom of decision and, acting within those boundaries, he may refuse to consider even the most substantively justified proposals for amendments to the law, by giving political or economic reasons. An additional guarantee of the freedoms and prerogatives of the legislator is the presumption of the constitutionality of legal provisions enacted by the legislator. In the well-established jurisprudence, the Tribunal recognises that its review is not aimed at assessing the aptness and legitimacy of solutions adopted by the legislator. A regulation adopted by the Polish Parliament may be evaluated in respect of its usefulness and as regards its forecasted social and political effects; however, such assessment does not fall within the constitutionally specified scope of the jurisdiction of the Tribunal, which is competent to adjudicate regarding only the matters provided for in Article 188 of the Constitution (cf. e.g. the above-mentioned judgment of the Constitutional Tribunal of 23 February 2010, Ref. No. K 1/08 and the judgment of 21 October 1998, Ref. No. K 24/98, OTK ZU No. 6/1998, item 97). The legislator's lack of systemic consistency is not *per se* an effective allegation concerning constitutionality.

7.3. The substantive legitimacy of the existing differentiation.

This general stance does not rule out the possibility that, in a particular case, differentiation introduced into statutory regulations has a completely arbitrary and accidental character, which virtually leads to an infringement of the principle of equality with regard to individuals who are in a similar situation. However, in the view of the

Constitutional Tribunal, this is not the case in the context of the indicated regulations, which introduce differentiation in the legal situations of minors, and in particular underage patients. The Tribunal notices rational considerations which justify the said different regulations.

Although one may expect all 13-year-olds to comply with certain norms of conduct (e.g. prohibition against causing injury to another person, or against damaging another person's property); however, it is understandable that there are differences in regulations as regards civil and criminal liability for the intentional breach of those norms. Indeed, it is hard to compare the corrective effect of substantive liability for damage with the impact of penalties provided for in criminal law. Therefore, there must be different premisses of the application thereof, taking into account the age and the psychological state of a person responsible for committing a given act. Also, a different approach is needed for specifying the rights of minors in various situations regulated by civil law. Considerations which determine the granting of legal capacity to minors (the need to protect third parties and the requirements of legal transactions) should differ from considerations that are taken into account when specifying the scope of the right to self-determination – in situations which do not pose any direct risks (such as a decision to change one's first and last name or adoption) as well as in situations which are dangerous to one's life and health (such as diseases and medical treatment).

Moving on to the assessment of legal solutions adopted in the medical statutes, it ought to be emphasised that in that case, a decision-making process is not free from strong emotions, with a typical, for young people, tendency to opt for risky behaviour. This justifies special caution with which underage patients' freedom of decision is specified; here the caution is much greater than, for instance, in the case of specifying the effectiveness of agreements concluded by minors with regard to insignificant day-to-day matters. Hence the minimum age (16) is higher in the challenged provisions as an age limit determining the acquisition of the right to grant consent to medical treatment. When justifying the different solutions adopted in the above-indicated medical statutes, it should primarily be emphasised that the provisions challenged by the Ombudsman have a general character and regulate typical situations, whereas the legal acts enumerated above which grant a wider scope of decisions to the child concern exceptional circumstances (putting aside the Code of Medical Practice, which contains a general norm that is also deontological in character, and that may acquire a legal character in the realm of the universally binding law, solely by way of exception, in conjunction with statutory provisions – see the judgment of the Constitutional Tribunal of 23 April 2008, Ref. No. SK 16/07, OTK ZU No. 3/A/2008, item 45). What distinguishes them is not, as one might think, a particular high risk related to medical interference, but the fact that a given medical procedure provided to the patient lacks the typical goal of medical treatment i.e. to treat the patient. The cases of bone marrow transplants, abortion or participation in a medical experiment in the context of minors are – as one might expect - extremely rare and do not concern emergencies. These considerations suffice to justify their separate regulation. Moreover, regardless of similarities displayed by the above-mentioned exceptions (the lack of the typical goal to treat the patient, rarity of occurrence), each of them is very different – has its own unique character that requires an individualised approach. It entails posing a risk to health and life which is difficult to predict, in exchange for potential but uncertain benefits for the patient or third parties. It causes pain and discomfort as well as involves taking a risk for the sake of another person, for example in the case of donating bone marrow. It involves considerable intensity of emotions and a psychological burden, leading to irreversible consequences, such as abortion. It requires taking into account various circumstances outside the realm of medicine, such as providing

a blood sample as evidence. In the view of the Constitutional Tribunal, the legislator has no constitutional obligation to transfer these special solutions to statutes that regulate basic health-care services which are provided on a mass scale.

8. Conclusions.

The Tribunal does not negate the existence of certain defects in the provisions of medical law which regulate the scope ratione personae and ratione materiae of obtaining consent to medical treatment by medical practitioners, such as for instance extensive lists of particular cases. Although this conclusion implies criticism, it is not tantamount to the statement that the challenged regulations are unconstitutional.

The Tribunal states that the challenged provisions do not restrict the rights of underage patients – which are enshrined in Article 41(1) and Article 47 of the Constitution, read in conjunction with Article 48(1), second sentence, and Article 72(3) of the Constitution as well as Article 12(1) of the Convention - beyond the limits arising from those provisions.

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