24/3/A/2007

JUDGEMENT

of 7th March 2007

File Reference No. K 28/05*

In the name of the Republic of Poland

The Constitutional Tribunal composed of the following bench:

Jerzy Stępień – as Chairman
Jerzy Ciemniewski
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Marian Grzybowski
Wojciech Hermeliński – as Judge Rapporteur
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Marek Mazurkiewicz
Janusz Niemcewicz
Mirosław Wyrzykowski,

Recording Clerk: Grażyna Szałygo,

having reviewed the case, with the participation of the Applicant as well as the Sejm and the Public Prosecutor General, at the hearing on 7th March 2007, concerning the application of the Commissioner for Citizens' Rights requesting to consider the conformity of:

Article 559, read in conjunction with Article 545 § 1 and 2 of the Act of 17th November 1964 – the Code of Civil Procedure (Journal of Laws – Dz. U. No. 43,

* The sentencing part of the Judgement was published on 16th March 2007 in the Journal of Laws – Dz. U. No. 47, item 319.

item 296, with amendments) insofar as it excludes the legally incapacitated person from the circle of persons entitled to put forward a motion to revoke the declaration of, or change the scope of legal incapacitation, to Article 30 and Article 31 of the Constitution.

has adjudicated as follows:

Article 559, read in conjunction with Article 545 § 1 and 2 of the Act of 17th November 1964 – the Code of Civil Procedure (Journal of Laws – Dz. U. Nr 43, item 296, with amendments), **insofar as it does not grant the legally incapacitated person the right to put forward a motion to initiate proceedings to revoke the declaration of, or change the scope of legal incapacitation, does not conform to Article 30 and Article 31 of the Constitution of the Republic of Poland.**

REASONS FOR THE RULING:

I

1. A person who, due to mental illness, mental deficiency or any other mental disorder is not able to control their conduct, may be declared completely legally incapacitated (Article 13 of the Act of 23rd April 1964 – the Civil Code, Journal of Laws – Dz. U. No. 16, item 93, with amendments; hereinafter referred to as the CC). Analogically, pursuant to Article 16 of the CC a person whose condition does not justify the declaration of complete incapacitation, but who needs assistance to manage their affairs, may be declared partially legally incapacitated.

2. Pursuant to Article 559 of the Act of 17th November 1964 – the Code of Civil Procedure (Journal of Laws – Dz. U. No. 43, item 296, with amendments; hereinafter referred to as: the CCP) "The court shall revoke the declaration of legal incapacitation when reasons for such incapacitation cease to exist; such revocation may also be issued *ex officio*" (§ 1), „In the event of an improvement of the mental condition of the legally incapacitated person, the court may change the scope of legal incapacitation from complete to partial, and in the event of deterioration of the person's mental condition – change the legal incapacitation from partial to complete" (§ 2). The following subjects shall be entitled to put forward a motion to revoke

the declaration of, or change the scope of legal incapacitation: a prosecutor, the Commissioner for Citizens' Rights, as well as other persons listed in Article 545 § 1 of the CCP (a spouse of the legally incapacitated person, relatives in the direct line and siblings of the person, as well as their statutory representative, yet relatives may not put forward such a motion where the legally incapacitated person has a statutory representative – Article 545 § 2 of the CCP). The *locus standi* to request the initiation of proceedings to revoke the declaration of, or change the scope of legal incapacitation has not been granted to the legally incapacitated person, who shall only retain the right to appeal against a decision issued in the course of such proceedings (Article 560 of the CCP). The view on lack of capacity to individually bring court actions by the legally incapacitated person in this respect has been reinforced by the Resolution of the Supreme Court of 10th November 1969, which had been put down to the rules of law register (file Ref. No. III CZP 56/69, Official Collection of the Supreme Court's Decisions – OSNC No. 7-8/1970, item 118; hereinafter referred to as: the 1969 Resolution). The content thereof was upheld on 14th October 2004 by the Supreme Court's Civil Chamber sitting in a full bench (file Ref. No. III CZP 37/04, Official Collection of the Supreme Court's Decisions – OSNC No. 3/2005, item 42; hereinafter referred to as: the 2004 Resolution).

3. The Commissioner for Citizens' Rights (hereinafter referred to as: the Commissioner, or the Applicant) submitted an application to the Constitutional Tribunal to determine the nonconformity of Article 559, read in conjunction with Article 545 § 1 and 2 of the CCP, insofar as it excludes the legally incapacitated person from the circle of subjects entitled to put forward a motion to revoke the declaration of, or change the scope of legal incapacitation, to Article 30 and Article 31 of the Constitution.

In the reasoning for his application, the Commissioner pointed out that even though the above-mentioned limitation of the capacity to individually bring court actions of the legally incapacitated person is indeed deemed "appropriate and consistent" from the perspective of constructions characteristic of civil law, yet it gives rise to serious constitutional legal doubts.

In the opinion of the Commissioner, the position of the legally incapacitated persons in court proceedings should be considered from the perspective of human dignity understood as the inherent subjective right. The right to dignity, in the most general sense, consists in the creation of (guaranteeing) such conditions to any individual which make it possible for the persons to independently develop their personality but, above all, which do not allow for a situation in which the individual becomes an object of activities taken by other subjects

(especially public authority) or becomes an instrument in realising their objectives. Dignity understood in this way shall be inherent and inalienable, and shall constitute the source of all freedoms and rights of persons (Article 30 of the Constitution). It must, therefore, also be respected as regards the shaping of the right to court by way of statutes, as stemming from Article 45 paragraph 1 of the Constitution. The limitation of the capacity to individually bring court actions by the legally incapacitated person remains in conflict with the above obligation, since the legally incapacitated person becomes an object of activities taken by other persons or subjects who are entitled to put forward a motion to change their legal status. In the opinion of the Commissioner such situation constitutes a violation of dignity of the legally incapacitated person.

The Commissioner points out that the consequences of legal incapacitation influence various spheres of both social life and law (e.g. contractual law, tax law or electoral law). Thus, the object of proceedings concerning legal incapacitation, in fact, encompasses not only the consideration of the case concerning legal incapacitation, but also the determination of the scope of the constitutional "right to freedom" of the person concerned. This right stems from Article 31 of the Constitution and consists in a prohibition of any interference by any external factors with the sphere of independent decision-making of the individual. Based on the current shape of the civil procedure the legally incapacitated person may not independently apply for a change of the scope of, or revocation of the declaration of legal incapacitation. In the opinion of the Commissioner, this infringes the person's "right to freedom".

In the Commissioner's opinion, it is doubtful whether the objective of the challenged limitation of the *locus standi* of the legally incapacitated person is constitutionally legitimate, since, pursuant to Article 31 paragraph 3 of the Constitution, any limitations upon rights and freedoms may be imposed only when necessary for State security, public order, the protection of the natural environment or freedoms and rights of other persons. The prerequisite for the limitation of rights of the legally incapacitated person within the above-mentioned scope encompassed, as was clearly expressed by the Supreme Court in the 1969 Resolution, the elimination of "the necessity to initiate proceedings upon evidently groundless motions". Consequently, for the sake of efficiency of the administration of justice, the right to dignity and freedom of the incapacitated persons in proceedings concerning them has been violated, which is inadmissible.

Furthermore, the Commissioner pointed to the necessity of considering the issues concerning the capacity to individually bring court actions by the legally incapacitated persons against a historical and comparative background. Article 19 § 1 of the Decree of 29th

August 1945 on proceedings concerning legal incapacitation (Journal of Laws – Dz. U. No. 40, item 225, with amendments), effective before coming into force of the Code of Civil Procedure, stated that the legally incapacitated person was one of the persons entitled to put forward a motion to revoke the declaration of, or change to scope of legal incapacitation. By way of the Act of 19th August 1994 on the protection of mental health (Journal of Laws – Dz. U. No. 111, item 535, with amendments) the legislator decided to grant persons deprived of the capacity to perform acts in law the entitlement to initiate some actions before courts (cf. Article 25 paragraph 2, Article 36 paragraph 3, Article 41 paragraph l, Article 47 of the Act). Accordingly, it seems that in light of the meaning of Article 31 paragraph 3 of the Constitution there is no constitutional necessity to exclude the right of the legally incapacitated person to put forward a motion to initiate proceedings to revoke the declaration of, or change the scope of their legal incapacitation.

[…]

III

The Constitutional Tribunal took the following into consideration:

1. Constitutional significance of the institution of legal incapacitation.

In the Polish legal system, legal incapacitation is predominantly a civil-law institution: both forms, prerequisites and procedure concerning the declaration of legal incapacitation have been defined in the Civil Code and the Code of Civil Procedure, while the most serious consequences of legal incapacitation consist in the loss or limitation of the capacity to perform acts in law by the legally incapacitated person (cf. K. Lubiński, *Postępowanie o ubezwłasnowolnienie [Proceedings concerning legal incapacitation]*, Warszawa 1979, pp. 11-42).

Since constitutional notions shall be of independent character, and the meaning of individual terms, as defined in statutes, shall not be decisive as regards the interpretation of constitutional provisions (cf., *inter alia,* Judgements of: 14th March 2000, file Ref. No. P. 5/99, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 2/2000, item 60; 10th May 2000 r., file Ref. No. K. 21/99, OTK ZU No. 4/2000, item 109; 7th February 2001, file Ref. No. K 27/00, OTK ZU No. 2/2001, item 29; 23rd September 2003, file Ref. No. K 20/02, OTK ZU No. 7/A/2003, item 76), a necessity arises to undertake a reconstruction of the constitutional significance of legal incapacitation. The reconstruction is

only partial in its nature and predominantly refers to the well-established civil law solutions that had existed prior to the adoption of the Constitution. It manifests itself in two major spheres.

First, legal incapacitation and the limitation of public rights associated therewith, exert significant consequences in the sphere of constitutional political rights of the legally incapacitated persons. For example, such persons shall not have the right to vote or participate in a referendum (Article 62 paragraph 2 of the Constitution), shall not have the right to stand as a candidate in presidential elections (Article 127 paragraph 3 of the Constitution), shall not have the right of access to public service (Article 60 of the Constitution) or shall not share the right of the public to introduce legislation (Article 118 paragraph 2 of the Constitution). Depriving the legally incapacitated persons of the above-mentioned political rights arises from the assumption that persons who, who due to a mental illness, mental deficiency or any other mental disorder, are not capable to individually and rationally control their conduct and decide upon their personal matters (prerequisites for legal incapacitation, as derived from Article 13 and Article 16 of the Act of 23rd April 1964 – The Civil Code, Journal of Laws – Dz. U. No. 16, item 93, with amendments; hereinafter referred to as: the CC), should neither have influence on decisions on public matters concerning the common good or on the management of State affairs or self-governing communities. This shall neither constitute an inadmissible discrimination of legally incapacitated persons (Article 32 of the Constitution), nor contradict the general principle of universality of access to political rights by Polish citizens (cf. e.g. Article 96 paragraph 2, Article 97 paragraph 2, Article 127 paragraph 1, Article 169 paragraph 2 of the Constitution).

Second, the legally incapacitated persons should basically be treated as disabled persons who shall be entitled to receive assistance in ensuring their subsistence, adaptation to work and social communication (Article 69 of the Constitution). Care, both on the part of other persons and public authorities, of persons whose mental disorders make it impossible to control their conduct shall constitute a specific aspect of the obligation of human solidarity, as laid down in the Preamble to the Constitution, as well as respect and protection of human dignity (Article 30 of the Constitution).

2. The subject of the challenge.

The subject of the challenge, as stated in the application by the Commissioner, is Article 559, read in conjunction with Article 545 § 1 and 2 of the Act of 17th November 1964

– the Code of Civil Procedure (Journal of Laws – Dz. U. No. 43, item 296, with amendments; hereinafter referred to as: the CCP), insofar as it excludes the legally incapacitated person from the circle of persons entitled to put forward a motion to initiate proceedings to revoke the declaration of, or change the scope of legal incapacitation. Of significance here is the fact that the challenged legal provision does not contain *expressis verbis* such limitation of rights of the legally incapacitated person. Yet, such limitation may be inferred from both the systematic and language interpretation based on the entirety of provisions of the Code of Civil Procedure concerning proceedings on legal incapacitation, and found by the Supreme Court in 1969 to be a legal rule (The Resolution of 10th November 1969, file Ref. No. III CZP 56/69, Official Collection of the Supreme Court's Decisions – OSNC No. 7-8/1970, item 118; hereinafter referred to as: the 1969 Resolution).

When assessing this fact one should take the following circumstances into consideration. Firstly, resolutions of the Supreme Court are issued in situations where it is necessary to clarify a legal issue or to remove ambiguities arising from the interpretation of a provision (Article 61 of the Act of 23rd November 2002 on the Supreme Court, Journal of Laws – Dz. U. No. 240, item 2052, with amendments; hereinafter referred to as: the SC Act). This signifies that for at least the first few years following the adoption of the Code of Civil Procedure there was no uniform practice in this respect. These inconsistencies were also seen in the jurisprudence of the Supreme Court. For example, in its Decision of 5th December 1968 (file Ref. No. II CR 334/68, The Supreme Court Bulletin – BSN No 4/1969, item 57) the Supreme Court clearly stated that proceedings to revoke the declaration of, or change the scope of legal incapacitation may also be initiated upon a motion put forward by the legally incapacitated person. Secondly, the matter once more became the object of Supreme Court's adjudication in 2004 (The Resolution of 14th October 2004, file Ref. No. III CZP 37/04, Official Collection of the Supreme Court's Decisions – OSNC No. 3/2005, item 42; hereinafter referred to as: the 2004 Resolution), yielding a suggestion that the 1969 Resolution had not completely solved the problem of ambiguities concerning the interpretation of this provision. Finally, the capacity of the legally incapacitated person to individually bring court actions within the scope discussed herein has triggered an intense debate in the doctrine (cf. K. Lubiński, *op.cit.*, pp. 198-203, B. Czech, [in:] *Kodeks postępowania cywilnego. Komentarz. [The Code of Civil Procedure. A Commentary]*, K. Piasecki [ed.], Vol. II, Warszawa 2006, pp. 134-142). In particular, it has to be pointed out that opinions against the stance of the Supreme Court concerning the *locus standi* of the legally incapacitated persons are still being expressed (e.g. K. Lubiński, *op.cit.*, p. 203; E.

Wengerek, [in:] J. Policzkiewicz, W. Siedlecki, E. Wengerek, *Postępowanie nieprocesowe [Non-contentious proceedings]*, Warszawa 1973, pp. 116-117; K. Korzan, *Postępowanie nieprocesowe [Non-contentious proceedings]*, Warszawa 2004, pp. 372-374).

In light of the above facts there is a necessity to determine whether the subject of the challenge indeed concerns the unconstitutionality of the provision of the Code of Civil Procedure or rather an inappropriate application thereof by courts. Examination of the case on its merits undertaken by the Constitutional Tribunal would be admissible only in the former instance, since – as the Tribunal pointed out in its Decision of 26th October 2005, file Ref. No. SK 11/03 – "There is no doubt that in the present constitutional legal order the Constitutional Tribunal is a "court of law", and not a "court of facts". Generally speaking, the Tribunal shall be competent to assess the conformity of legal acts to the Constitution (competencies of the Constitutional Tribunal have been laid down in Article 188 of the Constitution), however, under no circumstances may the Tribunal adjudicate upon matters concerning the application of law or assess, in a legally significant manner, activities of State organs, not even courts" (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No. 9/A/2005, item 110).

It is beyond any doubt that in the present case there are no prerequisites to discontinue proceedings given the inadmissibility of adjudication. The Supreme Court's decisions shall not possess the status of a universally binding source of law, within the meaning of Article 87 of the Constitution (formally, its decisions are binding upon all adjudicating benches of the Supreme Court – Article 62 of the SC Act), yet given the Court's authority and position in the system, its decisions are (should be) taken into consideration in judgements delivered by other courts. It may, therefore, be acknowledged that in relation to Article 559, read in conjunction with Article 545 § 1 and 2 of the CCP, there exists a "consistent, fixed and universal" practice of the application thereof, determining the content of the reviewed provision (cf. The Decision of the Constitutional Tribunal of 21st September 2005, file Ref. No. SK 32/04, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 8/A/2005, item 95), while dissenting views in the doctrine on the content thereof constitute only the *de lege ferenda* postulates. An additional argument supporting this assumption is the fact that it has become a point of departure for the intended amendment of the CCP (cf. Print-Out of the Sejm of 19th No. 715/V Term of Office of 19th June 2006, point 23 of the justification). Taking into consideration the above circumstances, lack of *locus standi* of the legally incapacitated persons regarding the putting forward of a motion to revoke the declaration of, or change the scope of legal incapacitation, stemming from Article 559, read in conjunction

with Article 545 § 1 and 2 of the CCP, shall be deemed a legal provision subject to review by the Constitutional Tribunal.

3. Constitutional bases of review.

In the *petitum* of the application to review the constitutionality of Article 559, read in conjunction with Article 545 § 1 and 2 of the CCP, the Commissioner for Citizens' Rights enumerated Article 30 and Article 31 of the Constitution as bases of review. Concomitantly, the justification thereof discusses flaws of the reviewed provision from the perspective of the right to court, provided for in Article 45 paragraph 1 of the Constitution ("Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court"). This prompted the Public Prosecutor General to recognise the above-mentioned constitutional provision as a separate basis of review in the present case.

Proceeding to consider a solution to this issue, it needs to be stressed that the Constitutional Tribunal shall be bound by the limits of an application, question of law or a complaint (Article 66 of the Act of 1st August 1997 on the Constitutional Tribunal, Journal of Laws – Dz. U. No. 102, item 643, with amendments; hereinafter referred to as: the CT Act). According to its jurisprudence, the Tribunal shall be obliged to take into consideration not only the *petitum* of the application initiating proceedings, but also the "normative contents that the Initiator of proceedings associates therewith" (Judgement of 14th March 2006, file Ref. No. SK 4/05, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 3/A/2006, item 29). It does not, however, mean that the *falsa demonstratio non nocet* principle constitutes an alternative to the principle stating the Tribunal shall be bound by the limits of a procedural letter. In light of the CT Act, one may not assume that, in each case, the Tribunal shall be obliged to automatically "seek" additional bases of constitutional review and "supplement" procedural letters of applicants with bases that had not been enumerated therein, but which, in the opinion of the Tribunal, are more appropriate. Such practice would contradict not only the clear wording of Article 66 of the CT Act, but also the general principle of parties' free exercise of their rights in proceedings before the Tribunal, according to which proceedings are initiated upon the application of an entitled party and within the scope identified by it (see Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym [A Commentary to the Constitutional Tribunal Act]*, Warszawa 1999, pp. 75 and 203).

The present case provides no prerequisites for the Constitutional Tribunal to specify **t**he application by the Commissioner for Citizens' Rights in greater detail. Admittedly, Article 45 paragraph 1 of the Constitution has been referred to in the application twice (pp. 7 and 10), yet the argumentation contained therein focuses on supporting the view of the nonconformity of the challenged provision of the Code of Civil Procedure to Article 30 and Article 31 of the Constitution. Therefore, there are no grounds to think that a mistake was made while defining constitutional bases of review, requiring an *ex officio* correction by the Constitutional Tribunal. An additional argument supporting the view that the application by the Commissioner be treated – in this respect – in a precise manner is the fact that the Commissioner has been the most active and most experienced initiator of proceedings before the Tribunal (till 2005, the Commissioner put forward 120 applications to the Constitutional Tribunal, *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego [Information on significant issues arising from the activity and the jurisprudence of the Constitutional Tribunal]*, Warszawa 2006, p. 110).

These arguments prompt the acknowledgement that, contrary to claims made by the Public Prosecutor General, only Article 30 and Article 31 of the Constitution may be treated as constitutional bases of review in the present case. It needs, however, to be emphasised that it results from the above-discussed formal prerequisites, and not from the lack of material relation between Article 45 paragraph 1 of the Constitution and the challenged provision. It is beyond any doubt that the right to put forward motions in court proceedings to revoke the declaration of, or change the scope of legal incapacitation constitutes one of the elements of the right to court, as laid down in Article 45 paragraph 1 of the Constitution. Both in the doctrine and in jurisprudence it is known as "the right of access to a court", "the right to initiate court proceedings" or – in civil cases – "active" aspect of the right to court, or, directly, "the right to sue" (cf. e.g. M. Wyrzykowski, *Komentarz do art. 1 przepisów utrzymanych w mocy [A Commentary to Article 1 of provisions maintained in force]*, [in:] *Komentarz do Konstytucji Rzeczypospolitej Polskiej [A Commentary to the Constitution of the Republic of Poland]*, L. Garlicki [ed.], Warszawa 1995, p. 31; P. Hofmański, *Prawo do sądu w ujęciu Konstytucji i ustaw oraz standardów prawa międzynarodowego [The right to court from the perspective of the Constitution and statutes, as well as standards of international law]*, [in:] *Wolności i prawa jednostki oraz ich gwarancje w praktyce [Freedoms and rights of the individual and their guarantees in practice]*, L. Wiśniewski [ed.], Warszawa 2006, p. 270, as well as numerous decisions by the Constitutional Tribunal, e.g. the Judgement of 9th June 1998, file Ref. No. K. 28/97, Official Collection of the Constitutional Tribunal's

Decisions – OTK ZU No. 4/1998, item 50). Recognising the fundamental nature of the challenged regulation, the Constitutional Tribunal does not share the view expressed by the Applicant stating that given its "primary" nature in relation to other rights and freedoms, the regulation is not encompassed within the scope of the general right to court. Yet, Article 45 paragraph 1 has not been indicated in the application by the Commissioner as an independent basis of review, and, therefore, the Tribunal shall not be authorised to examine the challenged provision from this perspective.

4. Assessment of conformity of the challenged provision to Article 30 of the Constitution.

According to the jurisprudence, Article 30 of the Constitution ("The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities") may constitute an independent basis of constitutional review (cf. e.g. Judgement of 15th October 2002, file Ref. No. SK 6/02, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 5/A/2002, item 65). Since the jurisprudence of the Constitutional Tribunal regarding Article 30 of the Constitution will not be summarised in its entirety herein (cf. e.g. F. Rymarz, *Zasada ochrony przyrodzonej i niezbywalnej godności człowieka w orzecznictwie Trybunału Konstytucyjnego [The principle of protection of the inherent and inviolable dignity of the person in the jurisprudence of the Constitutional Tribunal]*, "Przegląd Sądowy" ["Court Review"] 2003, No. 6, pp. 3-22), one needs to indicate at least these findings that remain significant for the case under review.

It needs to be reminded that "the dignity of the person shall be subject to absolute protection. According to a universally shared view, this shall be the only right towards which it shall be inadmissible to apply the principle of proportionality" (Judgment of 5th March 2003, file Ref. No. K 7/01, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 3/A/2003, item 19). Accordingly, in the event of finding the non-conformity of the challenged provision of the Code of Civil Procedure to Article 30 of the Constitution, it would not be necessary to undertake review of whether it may be deemed justified in light of Article 31 paragraph 3 of the Constitution.

Based on the jurisprudence of the Constitutional Tribunal, it is possible and expedient to differentiate between two aspects of dignity of the person: dignity as an inherent and inalienable value, and dignity understood as "the right of personality" "encompassing values

of mental life of every person as well as all other values determining the subjective position of the individual in society, and which, according to a shared view, make up the respect due to each person". A human being shall always retain their dignity in the former sense, whereas dignity in the guise of "the right of personality" may, in practice, be subject to violation – it "may be «violated» by actions of other persons as well as by legal regulations (Judgement of the Constitutional Tribunal in the above-mentioned case, Ref. No. K 7/01). Yet, such phenomena should always be assessed negatively and such that fail to conform to constitutional standards. Under no circumstances shall it be admissible to justify, or undermine on the basis thereof the inviolability of dignity as the inherent and inalienable value. Hence, in the present case it shall only be admissible to examine the allegation concerning the violation of dignity in its latter sense by the challenged provision.

In the opinion of the Constitutional Tribunal, dignity understood in this manner shall be associated with the existence of a certain "minimum level of subsistence guaranteeing the individual a possibility of self-reliant functioning in society, and giving every individual an opportunity for a full personal development in the surrounding cultural environment and civilisation" (Judgement of 4th April 2001, file Ref. No. K 11/00, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 3/2001, item 54). According to the view expressed by the Constitutional Tribunal in the case numbered SK 6/02, "Against the background of Article 30 of the Constitution both the situation, whereby a person would merely become an object of activities undertaken by the authority, or a "replaceable quantity", where their role would amount to a purely instrumental one or where one could talk about the allegation of «statutory deprivation of the status of a subject, which instead would be substituted by the status of an object»" – shall, as a matter of principle, be recognised as violation of dignity. Undoubtedly, the assessment of whether such an arbitrary violation of the dignity of the person has actually occurred, must take into account circumstances of a given case". Such violation would "have to degrade the person, treat them in an unfair manner, affect their civil, social or professional status, creating an intersubjective conviction justified by circumstances that in consequence of such legal regulations the individual has suffered an unfair and unjustified injustice" (Judgement of 14th July 2003, file Ref. No. SK 42/01, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 6/A/2003, item 63).

Referring the above presented understanding of the notion of "the right of personality" to the present case, it is first of all necessary to indicate that not every limitation of the *locus standi* may be recognised as one that "renders the person deprived thereof – an object", hence violating their dignity. Both in light of provisions of the Constitution in force (particularly

Article 45 paragraph 1 thereof), and from the perspective of international and European Union law (cf. Article 14 of the International Covenant on Civil and Political Rights, Journal of Laws of 1977, Dz. U. No. 38, item 167, with amendments; Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Journal of Laws of 1993, Dz. U. No. 61, item 284, with amendments; Article 47 of The Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, No. C 364 of 18th December 2000, pp. 1-22) the right of access to court should be as broad as possible. It shall not, however, be an absolute right since – in light of Article 31 paragraph 3 it may be subject to subjective (narrowing the circle of persons authorised), objective (narrowing the scope of matters considered by courts) and procedural limitations (e.g. narrowing the principles that govern the access to extraordinary appellate measures) (cf. a review of the Constitutional Tribunal's decisions concerning the right to court [in:] A. Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego [The constitutional guarantee of the right to court in light of the Constitutional Tribunal's jurisprudence]*, Łódź 2006). Such limitations shall not be connected with the violation of "right of personality"; on the contrary, they very often aim at the protection of dignity of the person. For example, the limitation of the capacity to individually bring court actions by children must be assessed in this manner, as these are parents or guardians who act on behalf of, and for the benefit of the children. Such solution shall be justified, among other things, by the insufficient insight due to the level of children's psychophysical development, hence, by objective factors that are taken into account irrespective of the stage of proceedings and which, as a matter of principle**,** are temporary in nature, since once of legal age such persons shall be granted full *locus standi*.

In the context of proceedings concerning legal incapacitation regarded in their entirety doubts may arise as to whether the limitation of rights of the incapacitated person within the scope discussed herein may be justified in a similar manner, i.e. by the necessity of protection of dignity of such person, or by the necessity to protect the person from negative consequences resulting from procedural actions undertaken by them individually. This arises, above all, from the fact that, contrary to the above-mentioned situation of children, the procedural rights of the legally incapacitated persons have been different at various stages of proceedings, and, paradoxically, are greater the more advanced the proceedings are. The legally incapacitated person shall not have the right to initiate proceedings to revoke the declaration of, or change the scope of legal incapacitation, whereas the same person shall be deemed competent enough to individually act in subsequent stages of proceedings – i.e. to

appeal against decisions made in such proceedings. In other words, at first, in the name of the protection of the dignity and interests of the person they are deprived of the right to act individually in proceedings, and later one reaches just the opposite conclusion. If the same logic were to be applied to the example of children's capacity to individually bring court actions, as discussed above, this would mean that irrespective of lack of right to initiate proceedings at first instance, children would have to have the right to individually lodge appellate measures, for example appeals or complaints.

From the perspective of the principle of dignity of the person, three kinds of arguments may be put forward against such approach. First, a legally incapacitated person shall retain the same material-legal status: till the validation of the decision to revoke the declaration of, or change the scope of legal incapacitation the person shall be declared unable to control their conduct or one that requires assistance in deciding upon their matters, which finds its confirmation in the limitation or exclusion of the person's capacity to perform acts in law. Second, assuming that the *ratio legis* of the challenged provision shall be the protection of dignity of the legally incapacitated person, then this objective should be realised equally throughout proceedings, since a decision subjectively unfavourable for the legally incapacitated person (e.g. the change of the scope of legal incapacitation from partial to complete) may be issued as a result of both the person's action and inaction, and both upon a motion to revoke the declaration of, or change the scope of legal incapacitation, and upon a complaint against a decision issued in the course of proceedings. Third, even if the scope of the capacity to individually bring court actions of the legally incapacitated person were to be diversified, it may not be attained in the manner described above. Assuming that the prerequisite that entitles the legally incapacitated person to act autonomously before courts shall be their actual psychological or mental condition, then the interested person should, in the first place, be granted access to "simpler" actions in court proceedings – i.e. initiation of proceedings, rather than "more difficult" ones – i.e. lodging appeals (being part of a highly formalised appellate procedure) against decisions issued in the course of such proceedings. This would also remain in agreement with the logic of legal proceedings in civil cases, in which, e.g. the so-called "compulsory assistance of an advocate or legal counsellor", i.e. the obligation to act through a professional lawyer exists, due to the degree of complexity of proceedings, only in hearings before the Supreme Court, as opposed to cases decided in first or second instance court proceedings (Article 87^1 § 1 of the CCP).

In light of the above presented reasoning, it is necessary to assess the challenged provision as one that infringes at least some of the above discussed prerequisites pointing at

the violation of “dignity understood as the right of personality”. A legally incapacitated person is not treated as a “subject” until the appellate stage of proceedings, in which the person appeals against the decision to the change the scope of, or revoke the declaration of legal incapacitation. Prior to this stage, the legally incapacitated person is merely a passive “object” of a motion and decision to initiate proceedings, notwithstanding the fact that the material legal status of the person is identical in both cases, and such may also be the person’s degree of perception and awareness. Undoubtedly, the legally incapacitated person treated in this manner has every right to experience an “intersubjective conviction justified by circumstances” that in consequence of the identified procedural provisions they suffered an “unfair and unjustified injustice” (cf. the above quoted case: Ref. No. SK 42/01).

Since, as has been indicated above, the violation of dignity shall not be gradable and shall not be justified by the need to protect other interests, it is necessary to acknowledge that Article 559, read in conjunction with Article 545 § 1 and 2 of the Code of Civil Procedure, does not conform to Article 30 of the Constitution.

5. Assessment of conformity of the challenged provision to Article 31 of the Constitution.

Article 31 of the Constitution reads as follows:

“1. Freedom of the person shall receive legal protection.

2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.

3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedom and rights”.

This provision constitutes an evaluation criterion for the assessment of constitutionality of Article 559, read in conjunction with Article 545 § 1 and 2 of the Code of Civil Procedure in two interconnected aspects: the subjective right to freedom (Article 31 paragraph 1 and 2 of the Constitution), and the admissible limitations upon the exercise of constitutional rights and freedoms (Article 31 paragraph 3 of the Constitution).

In light of the hitherto jurisprudence and doctrine, Article 31 paragraph 1 and 2 of the Constitution fulfils two basic functions. On the one hand, it is a "supplement of provisions that determine individual constitutional freedoms" (Judgement of 20th December 1999, file Ref. No. K. 4/99, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 7/1999, item 165; cf. L. Garlicki, *Komentarz do art. 31 [A Commentary to Article 31]*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz [The Constitution of the Republic of Poland. A Commentary]*, L. Garlicki [ed.], Warszawa 2003, pp. 11-12; K. Wojtyczek, *Ochrona godności człowieka, wolności i równości przy pomocy skargi konstytucyjnej w polskim systemie prawnym [Protection of human dignity, freedom and equality by means of the constitutional complaint in the Polish legal system]*, [in:] *Godność człowieka jako kategoria prawa [Human dignity as a legal category]*, K. Complak [ed.], Wrocław 2001, pp. 207-208). On the other hand, it constitutes a basis of intrinsic, subjective right to freedom, which is of fundamental importance to the present case. The essence of this right consists in the "freedom to make acts of will and choices" (L. Wiśniewski, *Prawo a wolność człowieka. Pojęcie i konstrukcja prawna [Law and the freedom of the individual. The notion and its legal construction]*, [in:] *Podstawowe prawa jednostki i ich sądowa ochrona [Fundamental rights of the individual and their protection by courts]*, L. Wiśniewski [ed.], Warszawa 1997, p. 54). The doctrine notes that, "on the one hand, the freedom relates to the external sphere of individual's activity (everyone may decide on their own conduct or behaviour, thus determining their own manner of influencing the outside world), and, on the other hand, to the sphere of personal safety and integrity (that sets the limits of the influence from the outside world on the individual)" (L. Garlicki, *Komentarz do art. 31 [A Commentary to Article 31]*, *op.cit.*, p. 8). As the Constitutional Tribunal found in the Judgement of 18th February 2004, file Ref. No. P 21/02, „The positive aspect of «the freedom of the individual» consists in the fact that the individual may independently shape their behaviour in a give sphere, choosing between such forms of activity that suit them best, or may refrain from any activity whatsoever. The negative aspect of «the freedom of the individual» consists in the legal obligation to refrain – by anyone – from any interference in the sphere reserved for the individual" (Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 2/A/2004, item 9).

Article 559, read in conjunction with Article 545 § 1 and 2 of the CCP has several consequences for the right to freedom understood in this manner.

Its most immediate effect is the deprivation of the legally incapacitated person of the right to individually initiate proceedings concerning the change of the scope of, or revocation

of the declaration of their legal incapacitation. Obviously, the challenged provision of the Code of Civil Procedure shall not constitute the actual obstacle for filing by the interested person a letter to court requesting to change the scope of, or revoke the declaration of their legal incapacitation. Such right shall be vested in any individual, irrespective of their capacity to perform acts in law or their psychological or mental condition, on the grounds of the freedom of communication (Article 49 of the Constitution), freedom to express opinions (Article 54 of the Constitution), as well as – in it broadest sense – the freedom to submit petitions (Article 63 of the Constitution). In this sense, the reviewed regulation shall in no way limit the "freedom" of the legally incapacitated person to make decisions in this respect. Yet, their letter shall not be treated as a motion to initiate proceedings (Article 506 of the CCP) that would give rise to a claim to "obtain a legally binding decision", even though, as the Supreme Court points out in its Resolutions of 1969 and 2004, it does bring about certain procedural effects. At the very least is obliges the court and the statutory representative notified by it to consider the initiation of proceedings to change the status of the legally incapacitated person. In this way the interested person may bring about a desired effect i.e. the initiation of proceedings to change the scope of, or revoke the declaration of legal incapacitation. Yet, these are other subjects, rather than the interested person him/herself, that have the monopoly to make a decision in this matter – the interested person's "freedom" in this respect may only be an incentive to "enjoy the freedom" by subjects entitled to initiate such proceedings. From the perspective of the right to freedom there exists a significant qualitative difference between inspiring somebody to make a decision and making the decision individually. The former shall merely be an "imitative" reflection of the right, while the latter shall constitute the essence thereof. In the case discussed herein one may not acknowledge that the right to freedom of the legally incapacitated person has been guaranteed to a sufficient degree, even if indeed, as the Supreme Court emphasises, courts treat letters from the legally incapacitated persons "with all due seriousness and thoroughness", and conduct proceedings "with particular care of the interests of the legally incapacitated person".

An indirect consequence of lack of right to put forward a motion by the legally incapacitated person to change the scope of, or revoke the declaration of legal incapacitation shall be the limitation of their freedom in other spheres as well. As the Commissioner aptly points out, the effects of a declaration of legal incapacitation are much wider than merely preventing the person from applying for a change of the scope of, or revocation of the declaration of legal incapacitation. This finds its confirmation in the name of the institution: according to a colloquial understanding of the word, 'to legally incapacitate' means to

"deprive somebody, completely or partially, of the legal possibility to decide upon oneself" (*Słownik języka polskiego [A dictionary of the Polish language]*, PWN, On-line version, available at: http://sjp.pwn.pl). Even passing over both social and psychological consequences that very often lead to exclusion from the circle of "normal people" and labelling such people as "mad", the very legal effects of the institution shall be of particular significance. They arise mainly from the fact that in the Polish legal system the institution of legal incapacitation results, as a necessary condition, in the automatic limitation of (partial legal incapacitation – Article 15 of the CC), or deprivation of (complete legal incapacitation – Article 12 of the CC) the capacity to perform acts in law by the legally incapacitated person. Yet, it is impossible, for example, to appoint a carer or guardian that would assist a person who is mentally handicapped, mentally ill or dependent in conducting their matters, without, at least, limiting the capacity to perform acts in law of the charge.

Since the possession of full capacity to perform acts in law constitutes a constitutional or statutory condition of the decision-making autonomy in various spheres of life, this consequence of legal incapacitation is of great practical consequences. In the realm of civil law it shall result in the limitation or exclusion of the possibility to independently enter into civil-legal transactions (Article 14 of the CC), to become a proxy (Article 109^2 § 2 of the CC), to draft a will (Article 944 of the CC) or enter into marriage (Article 11 § 1 of the Act of 25th February 1964 – the Family and Guardianship Code, Journal of Laws – Dz. U. No. 9, item 59, with amendments; hereinafter referred to as: the FGC). In the sphere of labour law it shall make it impossible for the completely legally incapacitated persons to take up a job, and limits the autonomy of the partially legally incapacitated persons in this respect (cf. Article 22 § 3 of the Act of 26th June 1974 – the Labour Code, Journal of Laws of 1998 – Dz. U. No. 21, item 94, with amendments). It shall also deny such persons access to some professions or functions, for example a judge of a common court (Article 61 § 1 of the Act of 27th July 2001 – Law on the Organisation of Common Courts, Journal of Laws – Dz. U. No. 98, item 1070, with amendments), a physician (Article 5 paragraph 1 of the Act of 5th December 1996 on the profession of a physician and a dentist, Journal of Laws of 2005– Dz. U. No. 226, item 1943, with amendments), a civil servant (Article 3 of the Act of 16th September 1982 on State Office Employees, Journal of Laws of 2001 – Dz. U. No. 86, item 953, with amendments), a broker or an investment consultant (Article 127 of the Act of 29th July 2005 on the circulation of financial instruments, Journal of Laws – Dz. U. No. 183, item 1538, with amendments) or an editor-in-chief of a newspaper or a magazine (Article 25 of the Act of 26th January 1984 – the Press Law, Journal of Laws – Dz. U. No. 5, item 24, with amendments). Moreover, legal

incapacitation shall result in the limitation of the capacity to perform acts in law in the sphere of administrative procedure (Article 30 § 1 of the Code of Administrative Procedure) and tax proceedings (Article 135 of the Act of 29th August 1997 – the Tax Ordinance Act, Journal of Laws of 2005 – Dz. U. No. 8, item 60, with amendments). The legally incapacitated person shall not, for example, individually register their place of residence (Article 9a of the Act of 10th April 1974 on population registers and identity cards, Journal of Laws of 2006 – Dz. U. No. 139, item 993, with amendments) or be a blood donor (Article 15 of the Act of 22th August 1997 on the public blood service, Journal of Laws – Dz. U. No. 106, item 681, with amendments). Additionally, the person's political rights shall be limited: the legally incapacitated persons shall have no electoral rights (Article 62 paragraph 2 of the Constitution), shall not set up associations (Article 3 of the Act of 7th April 1989 – The Law on Associations, Journal of Laws of 2001 – Dz. U. No. 79, item 855, with amendments), political parties (Article 11 paragraph 3 of the Act of 27th June 1997 on political parties, Journal of Laws of 2001 – Dz. U. No. 79, item 857, with amendments) or organise assemblies (Article 3 of the Act of 5th July 1990 – The Law on Assemblies, Journal of Laws – Dz. U. No. 51, item 297, with amendments).

The above-presented enumeration of legal effects resulting from legal incapacitation, even though far from being complete, definitely confirms the aptness of argumentation presented by the Commissioner for Citizens' Rights pointing at the profound implications of legal incapacitation for the legally incapacitated person's decision-making autonomy. This assessment will not be different even in light of the fact that some property rights of the legally incapacitated person may be exercised by their carer (guardian), who shall be obliged to act in the interest of the charge, hear the person out, and take into account the person's sensible wishes in "more important matters" (Article 158, read in conjunction with Article 175 and Article 178 § 2 of the FGC), and who shall be subject to supervision exercised by a court. Yet, activities of statutory representatives are not identical (from the perspective of either the law, or psychology) to activities performed individually by the person concerned. Based on the doctrine of the civil procedure one can differentiate, besides the general capacity to be a party in proceedings (i.e. the capacity specified in the civil law to take action in both contentious and non-contentious proceedings), also the right to undertake such activities individually by the subjects themselves without the need to appoint an attorney *ad litem* (the so-called capacity to individually bring court actions) (cf. M. Sychowicz [in:] *Kodeks postępowania cywilnego. Komentarz [The Code of Civil Procedure. A Commentary]*, K. Piasecki [ed.], Vol. I, Warszawa 2006, p. 283).

From this point of view, deprivation the legally incapacitated person of the right to individually petition for a change of the scope of, or revocation of the declaration of legal incapacitation must be deemed an approach that not only limits the freedom to make such a decision, but also one that deprives the person of the freedom in other spheres. It should be assessed as negative, especially when one takes into account the fact that the persons concerned (possessing full capacity to perform acts in law) may put forward a motion to declare them legally incapacitated (this view is shared by the majority scholars in the doctrine – cf. W. Siedlecki, Z. Świeboda, *Postępowanie nieprocesowe [Non-contentious proceedings]*, Warszawa 2001, pp. 116-117, yet it is not generally accepted in the jurisprudence of the Supreme Court, cf. e.g. The Resolution of 2004, point 3), but shall not be entitled to individually initiate proceedings to change their legal status, once regaining their full mental powers and wishing to remove limitations they had imposed on themselves on their own initiative.

Before declaring that the challenged provision violates the right to freedom, as laid down in Article 31 paragraph 1 and 2 of the Constitution, one needs to establish whether the limitation of the right to freedom of the legally incapacitated person within the reviewed scope may be deemed justifiable, necessary and proportional in light of Article 31 paragraph 3 of the Constitution. To support this view, the following arguments are presented both in the jurisprudence of the Supreme Court and in the literature:

First, it is pointed out that it shall not be in the least admissible to refer the notion of freedom to the legally incapacitated persons who, by definition, are not capable to control their own conduct or who need assistance to manage their affairs (cf. Article 13 and Article 16 of the CC). The doctrine emphasises that "since «freedom» is connected with the independence in decision-making, then the manner and scope of relating thereof to natural persons may not disregard the level of their development" (L. Garlicki, *Komentarz do art. 31 [A Commentary to Article 31]*, *op.cit.*, p. 10). In other words, freedom consists in conscious undertaking of activity or refraining from any activity, and thus it requires a certain degree of intellectual and emotional maturity, knowledge of the world as well as understanding of causal relationships existing therein. Acknowledging the legitimacy of this finding, one needs to, in the context of the present case, observe that the legally incapacitated person may fulfil such conditions for enjoying their freedom. In the first place such will be the case when the person regains their full mental and psychological powers and attempts to obtain a recognition of the fact in a court decision. Obviously, the opposite situation may occur as well, where disturbances underlying legal incapacitation will result in writing absurd motions to a court,

yet such situations would not be too frequent. Since the civil procedure does not envisage any "preliminary" review of the procedural capacity of the legally incapacitated person, and since it may only turn out in the course of the proceedings whether potential procedural actions taken by the person are justifiable, hence any doubts relating to this issue should be resolved in favour of the person. This is due to the fact that one may not rule out the possibility that while putting forward a motion to change the scope of, or revoke the declaration of legal incapacitation the person concerned would act with full insight and understanding, and for this reason they should be deprived the right to freedom.

Second, it is sometimes emphasised that lack of capacity of the legally incapacitated person to individually bring court actions within the reviewed scope arises from the person's lack of full legal capacity (cf. P. Kaczmarek, *Prawo do sądu a zdolność sądowa [The right to court and the capacity to be a party in a given case]*, Przegląd Prawa i Administracji Uniwersytetu Wrocławskiego 2005 [Law and Administration. A Review. University of Wrocław: 2005] , Vol. LXXIII, pp. 93-104, and by the same author: *Wokół rozumienia zdolności sądowej w procedurze cywilnej [Understanding of the capacity to be a party in a given case in light of civil procedure]*, Przegląd Prawa i Administracji Uniwersytetu Wrocławskiego 2003 [Law and Administration. A Review. University of Wrocław: 2003], Vol. LVII, pp. 107-123, as well as the above indicated Supreme Court's Resolutions of 1969 and 2004). Such approach is based on Article 65 § 1 of the CCP („Capacity to be a party in proceedings shall be vested in natural persons possessing full capacity to perform acts in law […]"), which – pursuant to Article 13 § 2 of the CCP – shall apply respectively to non-contentious proceedings. Yet, as the doctrine aptly points out (see e.g. J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, *Postępowanie cywilne [Civil Procedure]*, Warszawa 2003, p. 192), it is possible to indicate a few exceptions to this principle. The most important one has been contained in Article 573 § 1 of the CCP, which makes it possible for persons with limited capacity to perform acts in law, remaining under parental authority, custody or guardianship to individually take action in family and guardianship proceedings that concern them. As far as the procedure for incapacitation is concerned, lack of full capacity to perform acts in law had not been deemed an impediment to individually initiate proceedings by the legally incapacitated person before entering into force of the Code of Civil Procedure (cf. Article 19 § 1 of the Decree of 29th August 1945 on proceedings concerning legal incapacitation; Journal of Laws – Dz. U. No. 40, item 225, with amendments). Also in the present legal environment it does not collide with the right to appeal by the legally incapacitated person against a decision issued in the course of proceedings to revoke the

declaration of, or change the scope of legal incapacitation. Additionally, the doctrine emphasises that the capacity to individually undertake actions in court proceedings concerning their legal incapacitation shall also be retained in persons whose capacity to perform acts in law has been limited in connection with the appointment of a temporary advisor in accordance with the procedure provided for in Article 548 of the CCP (see e.g. M. Sychowicz, [in:] *Kodeks postępowania cywilnego. Komentarz [The Code of Civil Procedure. A Commentary]*, K. Piasecki [ed.], Vol. I, Warszawa 2001, p. 325). Lack of direct relation between the capacity to perform acts in law and the capacity to take action in proceedings may also be observed in court procedures regulated in acts other than the Code of Civil Procedure. For example, pursuant to Article 25 paragraph 2 of the Act of 19th August 1994 on the protection of mental health (Journal of Laws – Dz. U. No. 111, item 535, with amendments), a guardianship court may initiate proceedings concerning the admittance to a mental hospital, *inter alia*, upon the motion of the patient being admitted, irrespective of his/her degree of capacity to perform acts in law. Admittedly, the competence of the Constitutional Tribunal shall not encompass the possibility to perform the "horizontal review" of conformity of provisions of the Code of Civil Procedure to other statutory norms, it must, however, take into consideration the demand of axiological coherence of the legal system, stemming directly from the principle of the democratic State ruled by law (Article 2 of the Constitution). In light of these arguments there exists no impediment for the legally incapacitated person, lacking full capacity to perform acts in law, to possess the capacity to individually bring court actions as regards the putting forward of a motion to revoke the declaration of, or change the scope of legal incapacitation.

Third, it is emphasised that the fundamental prerequisite for the introduction of the challenged provision was the necessity to relieve courts of considering evidently groundless motions concerning the revocation of, or changing the scope of legal incapacitation put forward by the legally incapacitated persons, i.e. persons who are either mentally handicapped, mentally ill or suffering from other mental disorders. In light of the admissible limitations of rights and freedoms, enumerated in Article 31 paragraph 3 of the Constitution, the above justification has to be definitely rejected. The reviewed limitation of procedural rights of the legally incapacitated person was admittedly introduced by way of a statute, and one may find connections arising therefrom with the protection of public security (as has been done in the stance of the Sejm), yet, concomitantly, it violates – as has been shown above – the essence of the right to freedom and is flagrantly disproportionate to the protected value. The increase in the efficiency of the

administration of justice resulting from the approach may not be deemed a greater value than the right to freedom of the legally incapacitated person. What is more, doubts also arise as regards the practical significance of the enhancement of economy of proceedings, since already in the existing legal environment courts are obliged to analyse the correspondence received from the legally incapacitated persons regarding the potential *ex officio* initiation of proceedings (cf. the quoted Resolutions of the Supreme Court). Accordingly, granting their correspondence the validity of a formal motion to initiate proceedings would make little difference in this respect.

Fourth, it is pointed out that following the adoption of the Code of Civil Procedure the legally incapacitated persons received the *ex officio* action of the court "in exchange" for their hitherto right to individually initiate proceedings concerning the revocation of the declaration of, or change of the scope of legal incapacitation. The essential counter-argument against this view is lack of certainty as to whether the present legal environment also allows a court to act *ex officio* in cases concerning the change of the scope of legal incapacitation. On the one hand, such a possibility would have to be excluded on the basis of language interpretation of Article 559 § 1 of the CCP, compared to § 2 of the Article (this opinion is presented in the majority of the doctrine; c.f. among others: B. Czech, *op.cit.*, p. 134; K. Lubiński, *op.cit.*, p. 196-198; K. Korzan, *op.cit.*, p. 374). Concomitantly, the systematic interpretation of the provision in its entirety, the teleological interpretation as well as the *a maiori ad minus* argumentation could result in the adoption of an opposite view (thus e.g. W. Siedlecki, Z. Świeboda, *Postępowanie nieprocesowe [Non-contentious proceedings]*, Warszawa 2001, p. 122, as well as the above cited Resolutions of the Supreme Court of 1969 and 2004). Meanwhile, the change of the scope of legal incapacitation from complete to a partial one results in a significant qualitative change for the person concerned. It shall enable the person to autonomously make decisions concerning the taking up of a job and making dispositions concerning their earnings obtained from their work (Article 21 of the CC). It shall also allow for a conclusion of a marriage (Article 11 of the FGC) and acknowledgement, with a consent of their statutory representative, of the paternity of an illegitimate child (Article 74 of the FGC). In the event that a priority be given to the language interpretation (the court may not *ex officio* initiate proceedings to change the scope of legal incapacitation), the mechanism created by the challenged provision would be comparable to a solution stemming from the Act of 26th October 1982 on upbringing in sobriety and counteracting alcoholism (Journal of Laws – Dz. U. No. 35, item 230, with amendments; hereinafter

referred to as: the Act on upbringing in sobriety), reviewed by the Constitutional Tribunal in case numbered P 6/01. Pursuant to Article 34 paragraph 2 thereof, a person obliged to treat their alcohol addiction was deprived of the right to put forward a motion concerning the change by a court of the type of detoxification institution; such right was vested in the probation officer (provided that they were appointed), and in the detoxification institution. Among other things, lack of capacity to act *ex officio* in this respect by a court was one of the factors that prompted the Constitutional Tribunal to acknowledge in its Judgement of 8th November 2001 that the deprivation of the addicted person of the right to individually initiate proceedings concerning the change of a detoxification institution did not conform to Article 45 paragraph 1 and Article 77 paragraph 2, read in conjunction with Article 2 and Article 30 of the Constitution (Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 8/2001, item 248). Convincing arguments contained in the reasoning of the judgement should also be taken into consideration in relation to the challenged provision of the Code of Civil Procedure, reviewed in the present case.

Further doubts arise in respect of the effectiveness of the protection of the legally incapacitated person. Undoubtedly, the expression "may", contained in Article 559 § 1 of the CCP *de facto* implies an obligation incumbent upon a guardianship court to initiate proceedings if, to best of its knowledge, it is probable that the prerequisites for the revocation of the declaration of legal incapacitation have been fulfilled. However, from a formal point of view, such obligation shall also incumbent upon other subjects (especially upon a guardian or a carer), which – instead of potentially being beneficial for the legally incapacitated persons – may in practice lead to a "positive powers dispute", resulting in a situation where entities entitled to initiate proceedings await each other's actions. Also against the activity of a guardianship court is the fact that in non-contentious proceedings the *ex officio* action of a court is rather an exception and, as a matter of principle, proceedings are initiated upon a motion (Article 506 of the CCP). Accordingly, this does not guarantee that the change of the legal status of the legally incapacitated person will occur as swiftly as possible.

Besides the above-presented legal reservations, the Constitutional Tribunal may not ignore the extent of actual problems connected with guaranteeing the legally incapacitated persons their rights in court proceedings. Results of a survey, undertaken by the Department of Common Courts of the Ministry of Justice in the first quarter of 2003 and repeated in the first quarter of 2004, concerning court files relating to proceedings regarding legal incapacitation conducted between 2001-2002, show that irregularities in

this respect were still rather a rule than an exception (document Ref. No. DSP-II-5000-49/07). To illustrate the scale of the phenomenon one may, for example, cite that in proceedings concerning legal incapacitation courts only occasionally hear the interested persons (16% of the cases under examination), summon witnesses (only 2% of cases), generally appoint only one expert (98% of cases), and appoint court employees, who are often not prepared to fulfil the duty, as guardians (99% of all cases under examination) (see I. Kleniewska, *Postępowanie w sprawie o ubezwłasnowolnienie w praktyce sądowej [Proceedings concerning legal incapacitation in court practice]*, [in:] *Prawo w działaniu [Law in action]*, E. Holewińska-Łapińska [ed.], Warszawa 2006, pp. 118-134; the survey was carried out on sample of 385 cases selected at random). Similar findings were obtained in other surveys concerning court practice regarding legal incapacitation, *inter alia*, relating to the intellectually handicapped persons. An analysis of 393 court cases concerning such persons, carried out in 2001 by students of the Warsaw Law Clinic under the supervision of A. Firkowska-Mankiewicz, M. Szeroczyńska and J. Parczewski proved that on average only half of the legally incapacitated persons take active part in proceedings, while a similar percentage have an attorney *ad litem*, and decisions concerning legal incapacitation are rarely changed or appealed against (see A. Firkowska-Mankiewicz, M. Szeroczyńska, J. Parczewski, *Praktyka ubezwłasnowolniania osób z niepełnosprawnością intelektualną w polskich sądach. Raport z badań [The practice of legal incapacitation of intellectually handicapped persons in Polish courts. A survey report]*, Polskie Stowarzyszenie na Rzecz Osób z Upośledzeniem Umysłowym [Polish Association for Persons with Mental Handicap], Warszawa 2002; A. Firkowska-Mankiewicz, M. Szeroczyńska, *Praktyka ubezwłasnowolniania osób z niepełnosprawnością intelektualną w polskich sądach. Raport z badań [The practice of legal incapacitation of intellectually handicapped persons in Polish courts. A survey report]*, Człowiek – Niepełnosprawność – Społeczeństwo [The Individual – The Handicap – The Society] 2005, No. 2, pp. 87-117). What is more, legal incapacitation is often abused by families of the legally incapacitated persons in order to obtain material profits or even "extorted" by state institutions, such as the Social Insurance Institution or social welfare institutions, which treat the obtaining of the declaration of legal incapacitation as a condition to grant an allowance, e.g. disability benefit or a place in a nursing home (cf. J. Kamiński, *Sytuacja osób niepełnosprawnych intelektualnie w postępowaniu z jednostkami organizacyjnymi Zakładu Ubezpieczeń Społecznych – raport z badań [The situation of the intellectually handicapped persons in proceedings before organisational*

units of the Social Insurance Institution – A survey report], Warszawa 2005; the survey was carried out on a sample of 2453 intellectually handicapped persons living throughout Poland; Open Society Institute, *Rights of People with Intellectual Disabilities. Access to Education and Employment – Poland*, 2005). Irregularities with regard to proceedings concerning legal incapacitation have been recognised by both the Commissioner for Citizens' Rights and the Minister of Justice (Public Prosecutor General), yet, despite actions undertaken by various public institutions, the extent thereof remains considerable. Therefore, one can all the more expect that the "substitute" guarantees of the right to put forward a motion to revoke the declaration of, or change the scope of legal incapacitation will prove ineffective, while the refusal to grant the interested persons such right considerably limits their access to court and their right to decide by themselves on their own lives.

Having regard to the above-presented reservations, one has to acknowledge that the limitation of the right to freedom of the legally incapacitated person within the reviewed scope is neither justifiable, necessary nor proportional. Accordingly, Article 559, read in conjunction with Article 545 § 1 and 2 of the Code of Civil Procedure does not conform to Article 31 of the Constitution.

6. Conclusion and effects of the ruling.

In light of the above analyses, the deprivation of the legally incapacitated person of the right to put forward a motion to initiate proceedings to revoke the declaration of, or change the scope of legal incapacitation does not conform to Article 30 and Article 31 of the Constitution. Accordingly, in the opinion of the Constitutional Tribunal, it is necessary to share doubts that arose for the Supreme Court and which were expressed in the already-mentioned Resolution of 2004 on the compatibility of the existing legal environment with the highest standards of the protection of human rights. With the adoption of the Constitution of 1997, and following Poland's adoption of standards of the Council of Europe and the European Union, rights of the legally incapacitated persons should be respected to a greater extent than before. Detailed and stringent requirements have been contained, *inter alia*, in the Convention on the International Protection of Adults of 13th January 2000, drafted by the Hague Conference of Private International Law (to date, Poland has not ratified the Convention), as well as in the Recommendation of the

Committee of Ministers of the Council of Europe No. R(99)4 of 23rd February 1999 on principles concerning the legal protection of incapable adults.

Since the decision in the present case has the nature of the so-called scope judgement, the Constitutional Tribunal considers it expedient to point out the practical consequences arising therefrom. Above all, the characteristic feature of such judgments, finding the unconstitutionality of provisions lacking certain essential elements, which are necessary from the perspective of the Constitution, is that they shall not effect in the loss of binding force of such provisions. Such judgements shall result in the "confirmation – stemming from the Constitution – of the obligation to adopt legal regulations indispensable for the realisation of constitutional norms" (Judgement of 25th June 2002, file Ref. No. K 45/01, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 4/A/2002, item 46). The responsibility to adjust proceedings concerning legal incapacitation to the content of this judgement shall lie both with the subjects equipped with the right to introduce legislation, and with subjects that take part in further stages of the legislative procedure. In this context, the drafted amendment of the Code of Civil Procedure deserves approval as it grants the legally incapacitated persons the right to individually put forward a motion to revoke the declaration of, or change the scope of legal incapacitation (see the above-mentioned Print-out of the Sejm No. 715; cf. also approving opinions: H. Pietrzykowski of 3rd November 2006, commissioned by the Bureau of Research of the Sejm, as well as opinions of J. Jankowski and S. Cieślak, published in the journal "Palestra" No. 7-8/2006, pp. 130-136 and "Palestra" No. 11-12/2006, pp. 92-96).

Since judgements of the Constitutional Tribunal shall be of universally binding application (Article 190 paragraph 1 of the Constitution), their effects shall not be limited to only law-making bodies. They shall also be of significance to organs applying the law, hence, in the present case, first of all to courts deciding upon matters connected with legal incapacitation. As of the date of the publication of this Judgement in the Journal of Laws (Dziennik Ustaw) (Article 190 paragraph 3 of the Constitution) the hitherto presumption of constitutionality of Article 559, read in conjunction with Article 545 § 1 and 2 of the CCP shall cease to exist, insofar as the provisions prevent the legally incapacitated person to put forward a motion to initiate proceedings concerning the revocation of the declaration of, or a change of the scope of legal incapacitation. What needs to be strongly emphasised is the fact that it takes effect in consequence of the Constitutional Tribunal's adjudication alone, irrespective of whether any legislative amendments will be introduced

(cf. Judgement of 18th May 2004, file Ref. No. SK 38/03, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 5/A/2004, item 45). As a result, it should be acknowledged that the judgement of the Constitutional Tribunal declaring the unconstitutionality of the limitation of procedural rights of the legally incapacitated persons makes it possible for courts to apply the interpretation of the Code of Civil Procedure in a manner that conforms to the Constitution. In the context of the present judgement, the view, expressed in the already-cited Resolution of the Supreme Court of 2004, that it is impossible to achieve a significant improvement of the position of the legally incapacitated persons in court proceedings "by means of the interpretation of the existing legal provisions, as such interpretation would go beyond the powers of the judiciary" – shall lose its validity. Judges, within the exercise of their office, shall be subject not only to statutes, but also to the Constitution (Article 178 paragraph 1 of the Constitution), which shall be the supreme law of the Republic of Poland, and which may– and in the event of non-conformity of statutory provisions confirmed by way of a decision by the Constitutional Tribunal should – be applied directly (cf. Article 8 of the Constitution). The judgement of the Constitutional Tribunal may constitute a prerequisite for courts to drop the hitherto practice, based on the challenged provision and found unconstitutional, concerning the manner of proceeding with motions to revoke the declaration of, or change the scope of legal incapacitation received from the legally incapacitated persons. Exercising this right depends each time on decisions made by courts in particular cases and in accordance with the principle of separateness and independence of the judicial power from other powers (Article 173 of the Constitution), and shall not be ordered or prohibited by any other organs. Concomitantly, it needs to be strongly pointed out that the possibility of judges' making use of – within the autonomy vested in them – interpretations of statutes in a manner that conforms to the Constitution shall not release other State organs from the already-discussed obligation to make appropriate amendments to the legal system.

Besides the obligation to ensure the effectiveness of the present judgement of the Constitutional Tribunal, one may also consider making more complex changes to the institution of legal incapacitation in the Polish legal system. Most countries are currently departing from the rigid limitation of rights and freedoms of mentally ill, mentally handicapped or addicted persons in favour of more flexible solutions that can match a particular situation, which the court adjudicating in a particular case deems more appropriate. Reforms of this kind have taken place for the last 20 years, *inter alia*, in

Germany and Austria, where the then-existing institution of legal incapacitation (de: *Entmündigung*) were substituted by more flexible forms of guardianship (in Germany – *Betreuung*, introduced in 1992, and in Austria – *Sachwalterschaft*, introduced in 1984). Some countries allowed for a court to autonomously determine activities that the person subject to guardianship may undertake individually, without a consent from the statutory representative; such situation exists in, for example, France in the course of establishing the tutelage (fr: *la tutelle*) and a curatorship (fr: *la curatelle*) or in Germany in proceedings establishing care for adult persons (*Betreuung)*. Elsewhere, *inter alia*, in Holland such persons have been granted the right to oppose the activities undertaken by the guardian (nl: *mentorschap ten behoeve van meerderjarigen,* a mentor of an adult person) in the sphere of non-property matters; in the sphere of decisions concerning their property – a requirement exists that a trustee obtain the person's consent. In Germany, following an amendment of 2005, it is not possible to appoint, against the will of the person concerned, a guardian for an adult person (de: *Betreuer*) who owing to their physical, psychological or mental deficiencies is not capable of shaping their civil-legal relations. In Switzerland the appointment of a representative (de: *Beistandschaft*) to assist the person in undertaking certain legal actions or managing their property has no effect whatsoever on the person's capacity to perform acts in law. Perhaps a new form of care of persons who need assistance in conducting their own matters could – transitionally or ultimately – function along with the present approach. Changes of this kind were successfully introduced in Italy in 2004, where a more flexible care (it: *amministrazione de sonstegno*) exists parallel to legal incapacitation (it: *interdizione*).

For the reasons presented above the Constitutional Tribunal has adjudicated as in the sentence of this Judgement.

[Translated by: Marek Łukasik]