

**RESOLUTION**  
**of the Constitutional Tribunal**  
**dated 2 March 1994 (W. 3/93)**

Pertaining to establishing the universally binding interpretation of article 21, section 2, subsection 6 in conjunction with article 18, sections 1 and 2 and article 6, section 1, article 14, section 1 and article 22 of the Radio and Television Act dated 29 December 1992 (Journal of Laws, 1993, Number 7, Item 34).

The Constitutional Tribunal sitting with the full bench composed  
of Chairman and President of the Constitutional Tribunal, Andrzej Zoll (Reporting Judge),

and Judges: Tomasz Dybowski, Lech Garlicki, Stefan Jaworski, Wojciech Łączkowski, Ferdynand Rymarz, Wojciech Sokolewicz, Janusz Trzcíński, Błażej Wierzbowski, Janina Zakrzewska (Reporting Judge).

After reviewing, under the course prescribed by article 13, sections 1 and 2 of the Constitutional Tribunal Act dated 29 April 1985 (uniform text, Journal of Laws, 1991, Number 109, Item 470; amended: 1991, Number 47, Item 213), the First President of the Supreme Court's petition to establish the universally binding interpretation of article 21, section 2, sub-section 6 in conjunction with article 18, sections 1 and 2 and article 6, section 1, article 14, section 1 and article 22 of the Radio and Television Act dated 29 December 1992 (Journal of Laws, 1993, Number 7, Item 34) by explicating:

1) whether article 21, section 2, sub-section 6 in conjunction with article 18, sections 1 and 2 of the Radio and Television Act dated 29 December 1992 (Journal of Laws, 1993, Number 7, Item 34) introduces the opportunity for other entities besides the broadcaster to evaluate a program before it is broadcast,

2) whether article 21, section 2, sub-section 6 and article 18, sections 1 and 2 of the aforementioned Radio and Television Act contradict article 6, section 1 of this Act

held

**1) article 21, section 2, sub-section 6 in conjunction with article 18, sections 1 and 2 of the Radio and Television Act dated 29 December 1992 (Journal of Laws, 1993, Number 7, Item 34) does not introduce the opportunity for other entities besides the broadcaster to evaluate a program before it is broadcast;**

**2) article 21, section 2, sub-section 6 and article 18, sections 1 and 2 of the aforementioned Radio and Television Act and article 6, section 1 of this Act are not mutually exclusive.**

Reasoning

(...)

II

The Constitutional Tribunal took the following into account: 1. The subject of interpretation pertaining to the Applicant's first question is article 21, section 2, sub-section 6 in connection with article 18, sections 1 and 2 of the Radio and Television Act. The interpretation of these provisions is supposed to facilitate a response to the question whether the norms instituted therein constitute a competency basis for some other entity besides the

broadcaster to evaluate a radio and television program before it is broadcast. A. An analysis of the aforementioned provisions leads one to the conclusion that they entail orders and directives pertaining to the contents of radio and television programs and auditions. In particular, these auditions cannot propagate actions contradictory to the Polish reasons of state nor attitudes and views contradictory to morality and the social good (article 18, section 1 ); they should respect the religious feelings of the audience, but especially they should respect the Christian system of values (article 18, section 2). Pursuant to article 21, section 2, subsection 6 public radio and television programs should „respect the Christian system of values, assuming the universal principles of ethics as the basis.”

In the opinion of the Constitutional Tribunal the bans delineated in article 18, sections 1 and 2 should first and foremost be interpreted from the point of view of the constitutional principle of freedom of expression. Freedom of expression constitutes one of a human's basic rights vested in every human being in a natural manner. The role of constitutional regulations is to confirm the existence of this freedom, to define its basic aspects and to institute the indispensable guarantees of the necessary limitations. Polish provisions give expression to the freedom of expression in article 83 on the basis of the constitutional provisions whose power has been upheld, and – with reference to radio and television – in article 36b section 1 of the constitutional provisions. Freedom of expression also finds confirmation in international conventions on human rights, in particular, in article 10 of the Convention on the Protection of Human Rights and Basic Freedoms (known as the European Convention). Poland's ratification of this Convention signifies that all state bodies are bound by the obligations included therein.

Freedom of expression entails all forms of communicating to others opinions, views and information which, however, does not preclude differences in how they are treated individually, also when speaking about the extent to which they are protected. With reference to broadcasting radio and television programs this stems from how this issue was captured in a separate provision in article 36 b section 1 with special meaning for article 83, which situates the freedom of expression against the backdrop of a „citizen's right to information and the social interest.”

Freedom of expression, just like all of an individual's other rights and freedoms, is not absolute in nature and may be subjected to necessary limitations which is permitted *expressis verbis* by the European Convention (article 10, section 2 and article 1 I ). Instituting these limitations belongs to the lawmaker's powers; it is necessary, however, to meet three conditions.

First, the statutory curtailment of freedom may occur only if it is explicitly permitted by other constitutional provisions or if it is imperative to mutually harmonize the freedom of expression with other constitutional principles, norms and values. It is necessary to emphasize once again that article 36b section 1 of the constitutional provisions upheld in power orders *expressis verbis* that broadcasters' freedom of expression be harmonized with the audience's right to information and the requirements of social interests. Thereby the constitutional provisions permit the institution of a separate (stricter) system of restrictions with reference to the electronic mass media. This stems both from the particular intensity and extent of influence of television and radio on their audiences and from the technical concerns of having to maintain order in the air. The limited number of radio and television programs hinders the complete execution of the principle of pluralism in the opinions expressed but it justifies other forms of state intervention besides the ones employed with reference to other forms of speaking out. It is worth mentioning that even the European Convention adopted a similar approach: while article 10, section 2 defines the generally permissible limitations on the

freedom of expression, article 10, section 1 sentence 2 further permits the introduction of a system for licensing radio and television companies.

Second, statutory limitations on the freedom of expression may only be introduced to the extent necessary and should be treated in categories of exceptions. Their existence must always stem from explicitly formulated statutory provisions and it is forbidden to base them on supposition. Upon the interpretation of these constitutional provisions one must always award priority to that way of understanding which corresponds to the greatest degree to the constitutional principle of freedom of expression. Third, neither the individual statutory limitations nor the sum thereof may violate the essence of the freedom of expression. As the Constitutional Tribunal asserted „Ordinary acts may state more concretely or supplement the provisions of the Constitution pertaining to rights and freedoms... they cannot, however, violate the essence of these rights” (U. 6/92, Collection of the Constitutional Tribunal's Decisions, 1992 I, p. 204; also K 6/90, Collection of the Constitutional Tribunal's Decisions, 1991, p. 21; K. 1 /91, Collection of the Constitutional Tribunal's Decisions, 1991, p. 91).

B. The extent of the ban specified in article 18, section 1 is demarcated by referring to the contents of legal norms (the ban against propagating actions contradictory to the law) and with the assistance of general clauses: the Polish reasons of state, morality and the social good. A particular expression of these clauses is the order defined in article 18, section 2 to respect religious feelings demarcating one of the boundaries of the freedom of expression exercised via radio and television. In this sense it should be interpreted as a ban against infringing upon religious feelings. It overlaps with the ban against offending religious feelings as specified in article 198 of the Criminal Code and the extent of protection afforded to personal interests specified in article 23 of the Civil Code. According to the generally accepted interpretation, they are first and foremost the rights and freedoms defined in article 67 to 89 of the constitutional provisions which also include the right to respect religious feelings.

The provisions of the press law which are also applicable to radio and television prohibit the dissemination or distribution of an audition which infringes upon these rights. These provisions envisage a fine (article 49a) for inadvertently permitting the publication of a press material entailing the traits of a criminal offence. Moreover, pursuant to article 33, section 1, sub-section 2 of the Press Law the editor-in-chief is duty-bound to refuse to publish a correction or responses if they contain criminal contents or if they infringe upon the personal interests of third persons.

The linguistic interpretation of article 18, section 2 leads one to the conclusion that the phrase used in this provision „especially to respect the Christian system of values” constitutes an exemplary enumeration justified by the deep roots of these values in the tradition and culture of the Polish society regardless of a given person's relationship to religion. Such was the intent of the lawmaker, as the senator reporter stated when discussing the Senate's proposals put forward to the draft version of the Act at the sitting of the Senate on 29 December 1992 Article 18, sections 1 and 2 is not the only provision limiting radio and television programs on the content side. The dissemination and distribution of these auditions and programs is generally curtailed by the licensing and registration system. The dissemination and distribution of radio and television programs without a license or registration constitutes a criminal offence (article 52 of the Radio and Television Act). The terms and conditions for obtaining a license and registration therefore mark the normative boundary of freedom of expression exercised by disseminating and distributing radio and television programs.

The content of the programs broadcast is also curtailed by the regulation set forth in article 13, section 1 in conjunction with article 1, section 1 of the Radio and Television Act. The latter provision defines the general framework of a radio and television program asserting that it is supposed to „supply information, provide cultural and artistic interests, facilitate utilization of education and the body of scientific progress, supply entertainment, support domestic audio-visual creativity.” As is manifest, an important feature of this provision is that it defines from a positive standpoint the contents which a radio and television program is supposed to execute.

Moreover, the Radio and Television Act introduces other substantive bans and orders pertaining to the contents and the way in which the programs and auditions broadcast (disseminated or distributed) are broadcast. Chapter 3 of the Act is devoted to them. The orders and bans formulated in this chapter concern all broadcasters – both public and private radio and television units. One of these bans has been instituted in article 18, sections 1 and 2.

Further limitations may stem from other acts such as the Press Law, the Criminal Code or the Act on the Protection of Secrecy. Transmitting information with a specific content using the means of radio and television is subject to evaluation from the point of view of the entire legal system.

Article 21, section 2, sub-section 6 of the Act pertains exclusively to public radio and television. This provision specifies from the substantive side the duties of broadcasters of programs in public radio and television stipulating that the programs should „respect the Christian system of values accepting the universal principles of ethics as a basis.” The order to respect does not signify, however, an order to propagate the Christian system of values. The terms incorporated in article 21 are not exhaustive. Article 1 and article 13, section 1 of the Act generally demarcating the objectives of radio and television is applicable to the program contents of public radio and television. The regulation set forth in article 21 constitutes a more detailed list of the objectives of public radio and television and the program premises.

It should be noted that the postulates set forth in article 21 concern the program as an entirety and not a specific audition. The assertion whether the actions of a public radio and television unit contradict the provisions of the Act therefore necessitates the evaluation of not the individual items in a program but in its entirety. The formulations in article 21, section 2, sub-section 6 of the Radio and Television Act are of this type that they assume the evaluation of actions causing the program as an entirety not to meet the criterion envisaged in the provision. It is not sufficient for an allegation to be lodged merely against a single audition within a program.

In no instance whatsoever may the directive flowing from article 21, section 2, sub-section 6 be read in separation from the other provisions of law. For it constitutes only one of the equitable directives demarcating the activity of public radio and television. The public radio and television program is supposed *inter alia* „to foster the free shaping of the views of the citizens and the formulation of opinions” (sub-section 3), „to enable the citizens and organizations thereof to participate in public life by presenting various views and positions and to exercise the right to review and social criticism” (sub-section 4). Moreover, units of public radio and television create the opportunity for political parties to present their stance on critical public affairs (article 24).

As amended by article 60 of the Radio and Television Act, article 25, section 4 of the Act dated 17 May 1989 on the Guarantees of Freedom of Conscience and Religion (Journal of Laws, Number 29, Item 155; 1990, Number 51, Item 297; Number 55, Item 321 and Number 86, Item 504; 1991, Number 95, Item 425; 1993, Number 7, Item 34) concerns not only

Christian denominational communities; it asserts that „churches and other religious organizations have the right to broadcast religious and moral, social and cultural programs in radio and television in the manner specified in consultation with the authorities of a given church or some other religious organization and the public radio and television unit.” In the opinion of the Constitutional Tribunal attention should have also been drawn to the regulation in article 28, section 7 of the Radio and Television Act, pursuant to which the program councils operating in public radio and television units are supposed to represent parliamentary groups and the social interests and expectations linked to the program activities of an organizational unit.

The evaluation of the provision under interpretation against the backdrop of the entire legal system leads the Constitutional Tribunal to the conclusion that the execution of the directive contained therein must be in agreement and harmony with other equivalent provisions (directives). Assuming the rationality of the lawmaker who does not establish mutually exclusive norms in the same legal act, the directive set forth in section 21, section 2, sub-section 6 should be treated as a principle whose fulfillment is to be effected in agreement with the scope of other principles and rules. The Constitutional Tribunal acknowledged such a normative construction as the most appropriate for the interpretation of the provisions specifying the tasks of the defined organizational unit. To carry them out one must look to article 21, section 2, subsection 6 as to a principle linked in the concrete activities of a public radio unit with other principles weakening the categorical nature of the directive contained therein.

The norms presented above limit in a defined manner the contents of radio and television auditions and programs, to which the Radio and Television Act is applicable, thereby marking off the boundaries of the freedom of expression. The addressee of these norms is the broadcaster who pursuant to article 4, sub-section 1 of the Act is a „person who creates or composes programs and disseminates them or turns them over to other persons to be disseminated in their entirety and without any changes.”

C. The Constitutional Tribunal asserts that one of the elements of the essence of the freedom of expression is the freedom from preventive censure understood as awarding powers to state bodies to review the contents of statements before they are conveyed to the recipient, and also to make the transmission of statements to recipients dependent upon the prior approval of a state body. The state may institute mechanisms of consequential accountability for abusing freedom of expression, but prior intervention may only be permitted exceptionally, as a side effect of other constitutionally legitimate actions of the State (e.g. pursuing criminal offences or ensuring that the judiciary operates correctly).

The norms interpreted from the provisions related to the Applicant's first question do not impose upon the broadcaster the duty of presenting auditions or programs to any entity whatsoever for prior review. Nor does it contain any power for some other entity to evaluate auditions or programs. They entail orders and bans addressed to the broadcaster pertaining to the contents of the auditions or programs which are being prepared or disseminated by the said broadcaster. If the broadcaster violates the bans or orders enumerated therein, this may lead to the liability specified in the law, inclusive of the application of sanctions. This liability, however, is defined in other provisions besides the ones which constitute the subject of interpretation.

In particular, article 10 grants to the Chairman of the National Radio and Television Council and the Council itself the powers to demand that a broadcaster present materials, documents and provide explanations to the extent necessary to investigate the conformity between a broadcaster's action and the provisions of the Act and the terms and conditions of

its license; as well as to encroach authoritatively in the process of disseminating radio and television programs. This provision cannot, however, be interpreted as a competency basis to review the contents of radio and television programs before they are broadcast. When interpreting article 10, section 2 of the Radio and Television Act the Constitutional Tribunal acknowledged that this provision should be understood in a way that ensures the most far-reaching conformity with constitutional norms.

In applying this interpretation the Constitutional Tribunal asserted that deducing from article 10, section 2 of the Radio and Television Act the power to carry out an initial review of a program and audition before they are broadcast would contravene the constitutional freedom of expression. For this reason it should be assumed that the audit powers stemming from article 10, section 2 concern only radio and television programs after they are broadcast.

2. The Constitutional Tribunal in analyzing the contents of the norms set forth in article 18, sections 1 and 2 and in article 21, section 2, sub-section 6 in conjunction with the regulation incorporated in article 6, section 1 of the Act assumed the interpretation established in subsection 1 to be the starting point and acknowledged that these norms are not mutually exclusive.

Article 6, section 1 of the Radio and Television Act defines the directives by which the National Radio and Television Council is to be guided in its activities. According to this provision the „National Council stands guard over the freedom of expression in radio and television, the independence of broadcasters and the interests of the audience while ensuring that radio and television are open and pluralistic in nature.” These principles are addressed to a specific state body. Article 21, section 2, sub-section 6 and article 18, sections 1 and 2 of the Radio and Television Act are addressed in turn to the broadcasters of radio and television programs and auditions. Because the dispositions of these provisions vary, it is difficult to find a scope in which there would be a collision between the norms interpreted from the provisions referred to by the First President of the Supreme Court. The reasoning of the petition shows, however, that article 18, sections I and 2 and article 21, section 2, sub-section 6 are evaluated from the point of view „of a general principle of freedom of expression, the open and pluralistic nature of radio and television and the principle of the independence of the broadcaster.”

The principle of freedom of expression, as was stated above, is not absolute in nature, and may encounter limitation in the Constitution itself on account of other rights and freedoms which are protected in the legal system. One such value is in particular the freedom of conscience and religion which incorporates the right to protect religious feelings.

The open and pluralistic nature of radio and television is a general principle which on the very foundation of the statute is treated realistically, as demonstrated on the one hand by the assumption that there are broadcasters, confessional programs, national and cultural minorities (thus not every broadcaster must retain the „open and pluralistic nature in its auditions”), while on the other hand by the permissibility of restricting the contents of radio and television signals on account of the social or individual good.

The principle of a broadcaster's independence in shaping the program is established in article 13, section 1. This principle does not signify however complete arbitrariness in shaping these programs but only a guarantee that all curtailments in this area must be consistent with the Constitution and explicitly stem from the Act.

(...)