[PL] Constitutional Tribunal on the Amendment of the Broadcasting Act

IRIS 2006-7:1/31

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In its decision of 23 March 2006, the Polish Constitutional Tribunal has found certain regulations of the Polish Broadcasting Act to be unconstitutional. The subjects of the constitutional complaint were the amendments of 29 December 2005 to the Broadcasting Act and other Acts (see IRIS 2006-2: 18) which included some important changes concerning the composition and functioning of the National Broadcasting Council (NBC), the protection of ethics of journalism as a new task of the NBC and the privileged treatment of so-called “social broadcasters”.

NBC is one of the constitutional organs of State Control and for the Defence of Rights. It has fundamental regulatory power in the area of electronic media, safeguarding the freedom of speech, public interest and the right to information; it is authorised to issue regulations and, in individual cases, to adopt resolutions. The revisions concerning the above-mentioned issues, including the procedure applied for adopting the amendments, have triggered legal disputes (see IRIS 2006-6: 18) concerning which the Commissioner for Citizens' Rights and two groups of deputies have complained before the Constitutional Tribunal.

1. According to the new provisions, the NBC consists of 5 members while the terms of all the former members have immediately expired. This has raised the question about the fundamental principle of the continuity of functioning of constitutional organs. First, the Tribunal has confirmed that this principle fully applies to the NBC and has stipulated that new provisions have caused an interruption in the functioning and exercising of the tasks of the NBC as a constitutional organ without any "sufficient constitutionally-permissible reasons". Thus, it found non-conformity with the constitutional principles, e.g. a democratic State governed by the rule of law. However, the Tribunal has noticed that it might not constitute the grounds for challenging the expiry of the mandates, because the right to hold an office, a position, or a mandate in organs of public authority does not constitute an "acquired right" in the meaning of the principle of protecting acquired rights.

2. Concerning the competence of the NBC to initiate and undertake activities within the scope of journalists’ ethical rules, the Constitutional Tribunal has indicated that: “In the Polish legal system there is no generally binding or uniform

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catalogue of principles of journalistic ethics, which would serve as the source of legal norms addressed to journalists. Therefore, the notion of journalistic ethics used in ... the challenged Act, refers to non-legal criteria of assessing events in the sphere of the freedom ofexpression". The Tribunal argues that: “The lack of sufficient precision in defining the terms used in legal provisions may justify the allegation of infringing the requirements stemming from ... the principle of a democratic State governed by the rule of law”. Applying ambiguous terms is not prohibited only if it is possible to determine them in a non-arbitrarily manner; special procedural guarantees of transparency and of control bodies (applying the law) are also required.

The Tribunal stipulates that: “Concomitantly, vesting the NBC with this task ... reaches beyond the scope corresponding to the role and position of that organ in the system of government” which may infringe the principle of the organs of public authority functioning on the basis and within the limit of law.

The Tribunal indicated that journalistic rights, such as freedom of expression, may be subject to limitations, but only if they are introduced in the form of a statute. They should be formulated in a precise manner and finally their practical exercising ought to be strictly controlled.

3. The privileged treatment of “social broadcasters” in the procedure of so-called renewed licence, which may be denied only in cases explicitly prescribed in the Broadcasting Act, distinguishes the legal situation of social broadcasters from that of all others. The Tribunal stipulates that: “Different treatment by a legal norm of its addressees having a specific common feature does not automatically violate ...the principle of equality and prohibition of discrimination, provided that it is based upon a justified criterion of differentiation”. In the present case, the Tribunal remarks that: “The differentiation criterion adopted by the legislator - i.e. the fact that a social broadcaster does not pursue an economic activity and, in particular, does not display any advertisements or sponsored communications - may not be recognised as relevant when determining the conditions for licence renewal”. Since the statutory tasks of all audiovisual broadcasters are the same and as the conducting of activities in this field is connected with substantial financial and organisational expenses, “less favourable treatment - concerning the conditions for obtaining the renewed licence ... - infringes” the principal of equal and non discriminating treatment by public authorities. Moreover, the Tribunal is of the opinion that such unequal treatment of broadcasters also implies unequal treatment within the scope of the freedom of expression, and obtaining and disseminating information.

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Decision of the Constitutional Tribunal (K 4/06)

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