

Judgment of 5th May 2004, P 2/03
PROHIBITION OF EDITORIAL COMMENTS ON PRESS RECTIFICATIONS

Type of proceedings: Question of law referred by a court Initiator: District Court for Łódź-Śródmieście	Composition of Tribunal: 5 judge-panel	Dissenting opinions: 0
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Legal provisions under review	Basis of review
Prohibition of editorial comments on a press rectification in the same periodical edition or broadcast – under threat of punishment [Press Act 1984: Articles 32(6) and 46(1)]	Rule of law Legal reservation (exclusivity of statutes) in relation to limiting constitutional rights and freedoms Principle of proportionality Requirement for acts prohibited under criminal law to be defined by statute Freedom of expression [Constitution: Articles 2, 31(3), 42(1) and 54(1); European Convention for the Protection of Human Rights and Fundamental Freedoms: Article 10; International Covenant on Civil and Political Rights: Article 19]

The current Press Act 1984 imposes certain obligations, enforced by both civil and criminal sanctions, on editors-in-chief as regards their dealings with third parties. Such obligations include, in particular, the duty to publish free of charge “rectifications” and “responses” submitted by concerned persons, within a specified time frame and in a stipulated manner. In accordance with the 1984 Act, a “rectification” should be pertinent and relate to facts, with the subject-matter of the rectification relating to “an untrue or inaccurate message” contained in that work. Alternatively, a “response” is required to be pertinent and to possess a subject-matter relating to a “statement constituting a threat to personal interests”. The Act does not specify the manner in which these two types of statements should be distinguished, in the event of any such doubt arising. Such differentiation has significant practical consequences, however, since the ability to comment on rectifications and responses is differentiated by statute. Article 32(6) of the Press Act 1984 prohibits the publication, or announcing, of editorial comments on a rectification in the same edition of the periodical or broadcast in which that rectification was published. The Act merely permits a periodical or broadcast to announce the inclusion of future explanations or polemics in subsequent editions or broadcasts. No equivalent prohibitions apply in respect of responses. Furthermore, the aforementioned legal classification is important from the perspective of criminal law. Article 46(1) of the 1984 Act prohibits, under threat of fine or restriction of liberty, failure to publish rectifications or responses, or publication thereof in a manner which does not conform to the Act – i.e. in particular by publishing a submitted rectification alongside a commentary thereon by the editorial board or the original author of the work to which the rectification relates.

The background of the Constitutional Tribunal judgment summarised herein took place during criminal proceedings at the District Court in Łódź-Śródmieście, at which the editor-in-chief of a local newspaper was accused of committing the offences specified in Article 46(1) of the Press Act 1984 by, inter alia, publishing rectifications accompanied by editorial comments. The District Court decided to refer a question of law to the Constitutional Tribunal concerning the conformity of the aforementioned statutory provisions with norms of supra-statutory rank governing: the principle of the rule of law (Article 2 of the Constitution); the requirements of proportionality and legal reservation (i.e. exclusivity of statutes) in relation to limiting constitutionally guaranteed rights and freedoms (Article 31(3) of the Constitution); the right to freedom of expression (Article 54(1) of the Constitution, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 19 of the International Covenant on Civil and Political Rights); and the requirement for acts prohibited under criminal law to be defined by statute (Article 42(1) of the Constitution).

RULING

1. Article 32(6) of the Press Act 1984, insofar as it prohibits commenting on the text of rectifications published in the same periodical edition or broadcast, conforms to:

- **Article 31(3), read in conjunction with Article 54(1), of the Constitution,**
- **Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,**
- **Article 19 of the International Covenant on Civil and Political Rights.**

2. Article 46(1), read in conjunction with Article 32(6), of the Press Act 1984, insofar as it prohibits, under threat of punishment, commenting on the text of rectifications published in the same periodical edition or broadcast, whilst failing to define the notions of rectification and response, does not conform to Articles 2 and 42(1) of the Constitution, since it is insufficiently precise in specifying the ingredients of the prohibited act.

PRINCIPAL REASONS FOR THE RULING

1. The requirement that any limitation imposed on constitutional rights and freedoms may only be imposed “by statute” (so-called legal reservation; Article 31(3) of the Constitution) signifies more than merely a reminder of the general principle of legal reservation in relation to regulating the legal situation of persons, which constitutes a classical element of the rule of law principle. It also introduces the requirement that such statutory provisions must be sufficiently precise. Behind the formulation stating that limitations to constitutional rights and freedoms may “only” be instituted by statute lies an order of completeness, allowing the complete extent of such restrictions to be identified on the basis of the interpretation of those statutory provisions.
2. Article 54(1) of the Constitution regulates three personal freedoms: to express one’s opinions; to acquire information; and to disseminate information. The notion of “opinions”

should, in this case, be understood as broadly as possible, encompassing personal assessments of facts and phenomena in all aspects of life, viewpoints, suppositions and speculations, as well as informing about existing and presumed facts.

3. The framework of permissible limitations on the freedom of expression, encompassing the freedom to hold one's opinions and to receive and impart information and ideas without interference from public authorities and regardless of State frontiers, is laid down in Article 10 of the European Convention in a similar formulation to Article 31(3) of the Constitution. In the light of Article 19(3) of the International Covenant on Civil and Political Rights, however, further limitations may be placed on the exercise of the right to freedom of expression, since this Covenant provision does not contain a reservation, similar to that contained in Article 31(3) of the Constitution, stating that such limitations must be "necessary in a democratic State".
4. Within Europe, it is possible to identify two different models for press rectifications: the French model (also known as the polemic model) and the German model (called the determining model). In accordance with the French model, the mere fact that a person has been mentioned in the press creates a legal right for that person to exercise a right of response (*réponse*), allowing them to dispute both the alleged facts and evaluations contained in the original publication. Such a response may instigate a further exchange of opinions. Conversely, in the German system, press corrections are limited to the publication of rectifications (*Gegendarstellung*) relating only to facts, with strict limitations applying to the ability to comment on such rectifications. The Press Act 1984 introduced into the Polish legal system a mixed model governing two distinct institutions – rectifications and responses (cf. Article 31 of the Press Act 1984).
5. In the light of Article 32(6) of the 1984 Act, the prohibition of publishing comments on submitted rectifications is not absolute, since it is permissible to include such comments in the next periodical edition or broadcast. The prohibition of commenting on rectifications alongside their publication is necessary in order to protect the freedom of expression of the person having submitted the rectification. It is permissible for the author of the original work, to which the rectification relates, to comment on the rectification; the only limitation on this right being the postponement of the moment at which the original author may take advantage of this possibility. If it were lawful to simultaneously publish a rectification, whose subject-matter is restricted by statute (i.e. the requirement of pertinence and relevance only to facts), alongside comments thereon, equivalent limitations should apply to the content of such comments. Nevertheless, the press law currently in force permits a broad discretion in relation to the content of such comments, allowing them to also include evaluative statements. The challenged provisions enable the maintenance of a balance of power between the media and persons submitting rectifications, with the latter generally having more limited possibilities of publicly expressing their views on a given issue, and do not infringe the norms indicated in point 1 of the Tribunal's ruling as the legal bases of review.
6. As regards the aforementioned provision, it is also not possible to speak of an infringement of society's right to reliable information. The challenged provisions permit, along-

side the rectification, the publication of information announcing polemics or explanations in the subsequent periodical edition or broadcast. Any recipient interested in further debate concerning a certain topic is thus provided with information as to whether such debate will take place. Such information, furthermore, safeguards the recipient against the risk of assuming that the information presented in the rectification is objectively true.

7. From the principle of the rule of law, as expressed in Article 2 of the Constitution, stems the requirement to comply with the principles of appropriate legislation. This requirement is functionally tied with the principles of legal certainty, legal security and the protection of citizens' trust in the State and its laws. These principles have particular significance in the sphere of human and civil freedoms and rights.
8. Any prohibition or order enforced by criminal sanctions ought to be formulated in a precise and unambiguous manner (*nullum delictum sine lege certa* principle). Article 42(1) of the Constitution establishes the requirement for prohibited acts to be defined and categorised by statute. When speaking of "prohibited acts", the constitutional legislator has a concrete behaviour in mind that may be attributed to a person, thus requiring precise formulation (specification).
9. The principle of specificity contained in Article 42(1) of the Constitution defines the acceptable limits for creating blanket norms of criminal law. Although a criminal law norm may be referential in nature, it is impermissible to fail to precisely specify each of the elements of such a norm that would prevent discretion in its application.
10. The current press law contains no prerequisites of a formal character (e.g. concerning the title) or of a material character (regarding the content) to allow categorical determination of whether a statement sent to the editorial board is a rectification or a response. The potential addressees, in particular the editors-in-chief of periodicals, may have – and in practice do have – serious problems in determining unambiguously which factual situations are subject to restrictions regarding the placing of comments. The Supreme Court's position is that the subject submitting the text to the editorial board for publication should decide whether that text should be published as a "rectification" or as a "response". In the opinion of the Supreme Court, it would amount to the offence specified in Article 46(1) of the Press Act (referring, inter alia, to Article 32(6)) for the editorial board to arbitrarily publish a text submitted to them as a "rectification" in the form of a "response", whilst simultaneously publishing a comment on that text. Since the failure to publish a rectification or response (in spite of the statutory obligation to do so) also amounts to an offence specified in Article 46(1) of the Press Act, it follows that each occasion on which the author incorrectly categorises a submitted response as a rectification may – given the anxiety regarding criminal liability – act as a *de facto* limitation on the editorial board's decision to take advantage of the right to comment in the same periodical edition or broadcast on a text that is, by its nature (in a material sense), a response as opposed to a rectification. Since it is not possible to provide an unambiguous interpretation of the relevant criminal law norm, the challenged provision does not conform to the principles of appropriate legislation and specificity stemming from Articles 2 and 42(1) of the Constitution.

11. As a result of the finding of unconstitutionality indicated in point 2 of the Tribunal's ruling, the prohibition of commenting on a rectification in the same periodical edition or broadcast (on the basis of Article 32(6) of the Press Act) is deprived of its criminal sanction (so-called depenalisation). The remaining elements of the criminal law provision contained in Article 46(1) of the Press Act retain their binding force.
12. The prohibition expressed in Article 32(6) of the Press Act should be secured by an adequately effective sanction, independent of the civil liability envisaged by Article 38(1). It should take into account the principle of proportionality and assume, on the one hand, the protection of interests of those harmed by press publications and, on the other hand, values linked with the freedom of expression. Any criminal sanction will be permissible only provided that the ingredients of the prohibited act are specified precisely, in accordance with the requirements of Article 42(1) of the Constitution.
13. The legislator may decide whether it is appropriate to maintain the legal distinction between rectifications and responses in the future. The solutions adopted in this field by Polish law are greatly different from those models present in other European legal systems.
14. The requirement, contained in Article 193 of the Constitution, that the Constitutional Tribunal's response to a question of law referred by a court shall be necessary for the referring court to determine an issue before it, is not as strict as the analogous requirement concerning the mechanism of constitutional complaint, as specified in Article 79(1) of the Constitution. Whereas the latter provision requires complainants to indicate, in the text of the constitutional complaint, the normative act "upon which" the final adjudication concerning their constitutional freedoms, rights or obligations was based, a court referring a question of law to the Constitutional Tribunal may indicate any provision whose implementation is the subject of doubts during the interpretation and application of law by that court.

Provisions of the Constitution, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights

Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 31. [...] 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 freedoms and rights.

Art. 42. 1. Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

Art. 54. 1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.

Art. 79. 1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

Art. 193. Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

European Convention

Art. 10. 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

International Covenant

Art. 19. 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order (ordre public), or of public health or morals.