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## The State Anthem as a Subject of Review in Proceedings Before the Constitutional Tribunal in Poland?

- **ABSTRACT:** *The national anthem is regulated in Poland at the constitutional and statutory levels. The legislature has determined which song is to be the anthem and in this way has bound other legislative bodies. However, the details of the anthem were left to the legislature. This gives room to consider the possibility of assessing the compatibility of the statutory arrangements for the anthem, including its content, with the Constitution. Although the issue prima facie seems to be purely hypothetical and may be treated as a mere curiosity, the analysis of the problem shows that the findings may affect both the perception of the scope of control of the constitutionality of the law and the degree of protection of national and state symbols, including the anthem. This article thus aims to determine whether the anthem can be subject to scrutiny in proceedings before the Constitutional Tribunal, and if so, what the framework of tribunal adjudication is.*
- **KEYWORDS:** national symbols, state symbols, anthem, constitutional review, Constitutional Tribunal

### 1. Introduction

The model of constitutional review of the law in Poland is based on the Kelsen concept. This refers to centralised control carried out by a body appointed specifically for this purpose, which is the Constitutional Tribunal. It is an organ of the judiciary, although separate from the courts, as indicated by both Article 10(2) of the Constitution and Article 173 of the Constitution of the Republic of Poland.<sup>1</sup> It

<sup>1</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 482 as amended).

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is no coincidence that the Polish legislator distinguished two divisions of bodies within the judicial authority: courts and tribunals.<sup>2</sup>

The Constitutional Tribunal has jurisdiction to rule on the hierarchical compatibility of law within its specific sources—laws, international agreements, and regulations adopted by central state bodies.<sup>3</sup> A special case is a control initiated by a constitutional complaint<sup>4</sup> and the legal question;<sup>5</sup> in these two cases, a normative act may be subject to review, which means a wider range of cognition than in the case of cases initiated by applications of authorised entities.<sup>6</sup>

Article 28(4) of the Constitution of the Republic of Poland provides that ‘The emblem, colours, and anthem of the Republic of Poland shall be subject to legal protection’. Paragraph 5 of this Article clarifies that ‘The details of the emblem, colours, and anthem shall be laid down by law (statute)’. Therefore, the question arises as to whether the national anthem can be reviewed in proceedings before the Constitutional Tribunal. This is important from the point of view of the implementation of constitutional values and principles. The Constitution of the Republic of Poland sets the permissible limits of the legislator’s activity, including those concerning the regulation of the national anthem.

Therefore, this study will examine and seek to answer whether the Constitutional Tribunal can review the constitutionality of the Polish anthem and, if so, what the scope of any possible activity of the Tribunal could be in this respect.

## **2. The national anthem as an object of legal protection in the Republic of Poland**

The national anthem is undoubtedly a national symbol and at the same time a state symbol. In Polish doctrine, state symbols are understood as national symbols that have obtained legal legitimacy. Thus, they affect the manifestation of the state’s legal personality,<sup>7</sup> as they serve to distinguish the state from other states and to confirm its identity. State symbols are also an important element of patriotic education.<sup>8</sup> Therefore, they are a value which, from the perspective of public authority, is important and worthy of protection and the creation of legal regulations. This relates to the fact that the national anthem is recognised as intangible national

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2 Syryt, 2019, pp. 312–315.

3 Art. 188(1–3) of the Constitution of the Republic of Poland.

4 Art. 79(1) of the Constitution of the Republic of Poland.

5 Art. 193 of the Constitution of the Republic of Poland.

6 Art. 122(3); Art. 133(2); Art. 191 of the Constitution of the Republic of Poland.

7 Komarnicki, 2008, p. 236.

8 Wiszowaty, 2011, p. 31.

heritage<sup>9</sup> whose protection is provided in Articles 5 and 6 of the Constitution of the Republic of Poland. The first of these provisions defines the protection of national heritage as one of the objectives of the state. Article 6 of the Constitution confirms the existence of the state's obligation to make cultural goods that are a source of Polish national identity available.<sup>10</sup>

The consequence of granting the national anthem special legal protection is the possibility for an individual to implement cultural law, which is the right to cultural identity. In this sense, the anthem is a cultural element on which the individual builds his identity.<sup>11</sup> Sarnecki states that state symbols confirm Polish identity. Placing the provisions on state symbols in Chapter I of the Constitution is a reference to a fragment of the Preamble of the Constitution that the Polish people are 'grateful to our ancestors for their work, for the struggle for independence paid for by huge sacrifices, for culture rooted in the Christian heritage of the Nation' and it is also a direct reference to the national heritage.

The national anthem in Poland was covered by legal protection only recently. Hymnic songs were composed and performed regardless of their legal regulation. The lack of clear legal provisions regarding the anthem meant that there was no clarity as to which of the hymn songs was the official anthem and, therefore, which should be performed in certain circumstances of a state nature.<sup>12</sup>

Several relatively low-ranking documents contributed to the recognition of *Mazurek Dąbrowskiego* as the official anthem.<sup>13</sup> In particular, the following should be mentioned: an order of the Minister of Military Affairs of 22 March 1921 to render military honours during the performance of this work and the anthems of the Allied states, thus equating them as regards to military ceremonial;<sup>14</sup> an order of the Minister of Military Affairs on 2 November 1921 concerning the performance of the national anthem during military ceremonies;<sup>15</sup> a circular of the Ministry of Religious Denominations and Public Enlightenment of 15 October 1926 concerning the national anthem in force during school ceremonies;<sup>16</sup> and a circular of the Ministry of Internal Affairs of 26 February 1927 announcing the text of *Mazurek Dąbrowskiego* as the only binding national anthem.<sup>17</sup>

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9 K. Zeidler states that: 'The values that make up the heritage of Polish culture also include songs carrying patriotic content which, also on a legal level, do not have the same rank as the national anthem. These include, for example, Bogurodzica or Rota' (Zeidler, 2007, p. 31).

10 Banaszak, 2009, p. 55.

11 Kosińska, 2014, p. 121.

12 For more on the Polish anthem, see Rychlik, 2016, pp. 125–139.

13 For more on the history of the Polish anthem, see Syryt, 2022, pp. 202–205; Szeleszczuk, 2020, pp. 147–164.

14 Kijowski, 2004, p. 123.

15 Ibid.

16 Panek, 1996, p. 31.

17 Kijowski, 2004, p. 124.

Any issues concerning the national anthem were regulated in normative acts of higher rank in the 1970s. In this context, an important act was the resolution of the Council of State on 8 March 1973 on the principles of national and local state celebrations.<sup>18</sup>

The national anthem was given constitutional status under an amendment to the Constitution of the Polish People's Republic in 1976.<sup>19</sup> To Article 89 of the Constitution of the People's Republic of Poland paragraph 3 was added, under which *Mazurek Dąbrowskiego* became the anthem of the Polish People's Republic. After the publication of the consolidated text of the Constitution of the People's Republic of Poland, the numbering of some articles was changed, and the provision regulating the issue of the anthem is included in Article 103(3).

The constitutional provisions on the anthem are developed in Articles 12–14 of the Act of 31 January 1980 on the Emblem, Colours, and Anthem of the Polish People's Republic. Annexe 4 to the Act specified the text of the anthem and its musical notation.<sup>20</sup>

The Constitution of the Republic of Poland of 1997 regulated the issues concerning the anthem in Article 28(3–5). After entry in force of the Constitution of the Republic of Poland,<sup>21</sup> no new law was passed regarding national and state symbols, including the anthem. Therefore, the Act of 31 January 1980 on the Emblem, Colours, and Anthem of the Republic of Poland and on State Seals remains in force, although after numerous amendments and an amended title.<sup>22</sup>

Therefore, the provisions governing the Polish legal system on the national anthem before the Constitution entered into force. Importantly, the anthem itself was mentioned directly in the Constitution of the Republic of Poland,<sup>23</sup> and its text is an element of a normative act.<sup>24</sup>

If we suppose that the national anthem, including its text, is regulated by law—the annexe is an element of the law—, then it is possible to consider—ignoring the desirability of this action—a possible control of the national anthem from the point of view of its compliance with the Constitution.<sup>25</sup>

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18 The Polish Monitor of 1973 No. 13, item 78.

19 Act of 10 February 1976 on amendments to the Constitution of the Polish People's Republic, Journal of Laws 1976 No. 5, item 29.

20 Journal of Laws 1980, No. 7, item 18 (the original version of the text of the Act).

21 The amendments did not concern the matter of the national anthem.

22 Journal of Laws 2019, item 1509.

23 Art. 28(3) of the Constitution of the Republic of Poland.

24 Annexe 4 to the Act of 31 January 1980 on the Emblem, Colours, and Anthem of the Republic of Poland and on State Seals; Szeleszczuk, 2020, pp. 147–164.

25 This issue is not only of academic value, but may be considered in connection with public discussion of making changes to the text of the national anthem by amending the Act.

### **3. The jurisdiction of the Polish Constitutional Tribunal to rule on the hierarchical compatibility of the law – general remarks**

The examination of legality consists in assessing the behaviours of public authorities which, acting contrary to the standard of conduct set out in the relevant provision of competence or procedure, will lead to illegal consequences. The illegality of a law-making act of a public authority may be the basis for its annulment. In the case of law-making behaviour related to the establishment of legal acts of a certain hierarchical rank in the legal system, the reference points verifying their legality are the relevant provisions contained in higher-ranking legal acts.<sup>26</sup>

According to Article 188 points 1–3 of the Constitution of the Republic of Poland, the Tribunal adjudicates the compatibility of certain normative acts or parts thereof with the acts of a higher order indicated in that provision. The same applies to handling constitutional complaints,<sup>27</sup> legal questions,<sup>28</sup> or applications for preventive control.<sup>29</sup> Therefore, the Constitutional Tribunal decides on certain normative acts or legal provisions. Although literally the Constitution of the Republic of Poland allows the Constitutional Tribunal to rule on the compatibility of certain normative acts—laws and international agreements—, in practice the subject of the review before the Constitutional Tribunal may be presented in different ways. This means that it is not always necessary to complain about the entire act—this would be rather inadvisable from the point of view of the objectives of the inspection. Usually, the subject of the audit is a specific part of the normative act expressed in the form of a legal provision(s) and in a substantive form, including legal norms. The actual subject of control in proceedings before the Constitutional Tribunal is legal norms when the Tribunal decides on the relationship between the content of the audit subject and the constitutional model. A legal norm is reconstructed based on a specific legal provision contained in a specific normative act. It should be noted that the decisions of the Constitutional Tribunal always refer to a specific provision, and the subject of the letter-initiating proceedings before the Constitutional Tribunal are the provisions from which certain norms result. In reviewing the content of a normative act or part of it, the objection of unconstitutionality must relate to a norm related to a specific and precise provision of law.<sup>30</sup>

Law provides for the development of constitutional norms concerning the rules of procedure before the Constitutional Tribunal under Article 197 of the

26 Wronkowska and Ziemiński, 2001, pp. 243–244.

27 Art. 79(1) of the Constitution of Poland.

28 Art. 193 of the Constitution of Poland.

29 Art. 122(3) and Art. 133(2) of the Constitution of Poland.

30 Syryt, 2014, p. 63; Kustra, 2012, pp. 13–34; Federczyk and Syryt, 2017, pp. 71–72; Mączyński and Podkowiak, para. 77; the judgment of Constitutional Tribunal of 10 March 2022, ref. no. K 7/21, OTK A/2022, item 24; decision of Constitutional Tribunal of 19 November 2014, ref. no. P 15/13, OTK ZU no 10/A/2014, item 115.

Constitution of the Republic of Poland. Currently, this is governed by the Act of 30 November 2016 on the organisation and procedure before the Constitutional Tribunal.<sup>31</sup> According to Article 67(1) of the Constitutional Tribunal Act, the Tribunal is bound by the scope of the appeal indicated in the application, legal question, or constitutional complaint. The scope of the appeal includes the indication of the challenged normative act or its part—determination of the subject of the review—and the formulation of a plea of unconstitutionality, a ratified international agreement, or a law—indication of the standard of review; Article 67(2) of the Constitutional Tribunal Act. This regulation is complemented by Article 69 paragraphs 1 and 3 of the Constitutional Tribunal Act, from which it follows that in the course of the proceedings, it should examine all relevant circumstances in order to clarify the case comprehensively and is not bound by the evidentiary conclusions of the participants in the proceedings, and may also admit of its motion the evidence which it considers reasonable to clarify the case.

Binding the Constitutional Tribunal to the scope of the appeal does not preclude the possibility of its reconstruction based on the *petitum* and justification of the letter initiating the proceedings. The Constitutional Tribunal has explained in its previous case-law that regardless of whether a given editorial unit of a normative act has been challenged or the appeal is within the appropriate scope, in the case of assessing the conformity of the indicated content with the Constitution, the Tribunal reconstructs the subject of the appeal and extracts the normative content that was challenged by the initiator of the proceedings. It confirms whether the norm indicated in the application—legal question or constitutional complaint—has a specific content.<sup>32</sup>

At the same time, it can be considered whether the subject of control may be part of an act that does not contain normative content—i.e. one from which the rules of conduct do not result. This finding is important for answering the question of whether the national anthem can be subject to review by the Constitutional Tribunal.

#### **4. Normativity as a feature of an act assessed by the Constitutional Tribunal**

Article 188 of the Constitution of the Republic of Poland lists the cases which the Tribunal adjudicates. Its cognition is referred to normative acts or legal provisions derived from a specific group of state bodies. Both in case law and in the legal doctrine, the importance of normativity was emphasised as a feature determining

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31 Journal of Laws 2019, item 2393; the Constitutional Tribunal Act.

32 See the judgment of Constitutional Tribunal of 10 March 2022, ref, K 7/21 and the case law cited therein.

the admissibility of examining the act by the Constitutional Tribunal.<sup>33</sup> The Constitutional Tribunal pointed out that the features that distinguish legal norms from other social rules are, in particular, their general and, at the same time, abstract character. The feature of generality refers to the construction of a standard in which the wording of the addressee and the circumstances of application of the standard are determined by the type and not individually. The addressee should be defined as an element of a class of separate entities by virtue of a specific feature or characteristic. This abstractness refers to the object of the norm and determines the due conduct of the addressee. The subject of a legal norm should be a class of behaviour and not the specific behaviour of the addressee. The consequence of the abstractness of a norm is its repeatability.<sup>34</sup>

In the decision of 7 January 2016 ref. no. U 8/15, the Tribunal, referring to its *acquis*, indicated two criteria for qualifying specific legal acts as normative acts that will decide the possibility of their control by the Constitutional Tribunal. The first is the formal criterion, which means that a normative act is an act regardless of its content and is qualified as a source of law by the Constitution of the Republic of Poland. The second criterion allows the recognition of all acts as normative, which include legal norms—general or abstract, regardless of how they are named. In material terms, therefore, these may not only be recognised as sources of law by the constitution-maker, but also other legal acts containing legal norms, which are also legal acts. Article 188(3) of the Constitution is defined as “provisions of law.” In the opinion of the Constitutional Tribunal, it may examine an act that meets at least one of the above criteria—formal or substantive. As a rule, the Constitutional Tribunal examines acts that meet these criteria jointly.<sup>35</sup>

According to the above findings, it should be noted that they are particularly important in cases where the initiator of the proceedings challenges acts other than laws or international agreements. Article 188(1) of the Constitution of the Republic of Poland expressly confers on the Constitutional Tribunal the power to rule on the conformity of laws and international agreements with the Constitution. This means that in this case, a review of these acts cannot be refused *a priori*.

If it turned out that the law or part of it that was challenged before the Tribunal had normativity features, it would be necessary to consider the criteria for reviewing such an act.

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33 Federczyk and Syryt, 2017, pp. 75–83 and the literature and case law cited therein.

34 See e.g. decision of the Constitutional Tribunal of 6 December 1994, ref. no. U 5/94, OTK 1994, part II, item 4; decisions of 24 March 1998, ref. no. U 22/97, OTK ZU No. 2/1988, item 16; 14 December 1999, ref. no. U 7/99, OTK ZU No. 7/1999, item 70; 29 March 2000, ref. no. P 13/99, OTK ZU No 2/2000, item 68.

35 See OTK ZU A/2016, item 1. See also the explanation of P. Radziejwicz in: Radziejwicz, 2016, pp. 45–65; Federczyk and Syryt, 2017, p. 77.

## 5. The control of the anthem of the Republic of Poland by the Constitutional Tribunal

The above findings allow us to conclude that from the formal point of view, the anthem of the Republic of Poland may be subject to constitutional review by the Constitutional Tribunal. The anthem's text is one of the annexes to the Act on the Emblem, Colours, and Anthem of the Republic of Poland and State Seals. If the Constitutional Tribunal decides on the conformity of laws with the Constitution and the annexe to the Act is its element, it may be subject to tribunal review. The point of reference in this case is Article 28(3) of the Constitution of the Republic of Poland, according to which the anthem of the Republic of Poland is *Mazurek Dąbrowskiego*.

Under Article 68 of the Constitutional Tribunal Act, when ruling on the conformity of a normative act or a ratified international agreement with the Constitution, the Tribunal examines both the content of such an act or agreement and the competence and observance of the procedure required by law to issue an act or to conclude and ratify an agreement. Thus, even without analysing the content of the anthem, the Tribunal could verify the legislator's competence to adopt the anthem's text and the legislative procedure whereby the anthem became part of the law.<sup>36</sup>

Annexe 4 to the Act on the Emblem, Colours, and Anthem of the Republic of Poland and on State Seals, therefore, defines only the legally correct version of the anthem in terms of content and melody, including the key in which it should be performed. This is further confirmed by Article 13(1) of the Act on the Emblem, Colours, and Anthem of the Republic of Poland and on State Seals, which constitutes an order for the public performance or performance of the anthem in the arrangements resulting from the Annexe. Modifications in this area may be subject to legal liability. Therefore, the solutions to the Act on the Anthem contained in the Annexe are informative and constitute an element for reconstructing the legal norm.<sup>37</sup> Thus, because it is possible to attribute the value of normativity to Annexe 4, it would be possible to consider the possibility of reviewing the constitutionality of the content of the anthem.

It seems that among all the modes of initiating the hierarchical review of the constitutionality of the law—i.e. the application procedure, constitutional complaint, and legal question—, the indicated possibility would be primarily justified in the first of the modes. This gives the initiator of the proceedings a wide range of possibilities to challenge a provision, norm, or normative act, and

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<sup>36</sup> For more on the review of the mode of enactment of the law by the Constitutional Tribunal, see Syryt, 2014 and the literature cited therein.

<sup>37</sup> See a case of Jaś Kapela: Siedlecka, 2019.



indicates various control models. This also allows for a greater field of action for the Constitutional Tribunal.

In the case of an application that is a form of abstract initiation of review, the Constitutional Tribunal does not have to show that it rules on a given norm that was the basis for the final decision in the applicant's case<sup>38</sup> or that the resolution of the case pending before the questioning court depends on its decision.<sup>39</sup> Therefore, it has a wider possibility of determining the appropriate scope of appeal than in cases initiated by constitutional complaints or legal questions.<sup>40</sup>

The application to the Constitutional Tribunal provides not only greater freedom in formulating an accusation of unconstitutionality but also as regards the model of control. Of course, the nature of the allegation will result in restrictions on this model, but they are factual and not legal.

The constitution-maker limited the legislator to a song that could be an anthem. In this respect, the adjudication of constitutionality must not lead to eliminating the current anthem from the legal system. If there were a will to change the anthem because it could violate constitutional norms expressing certain principles and values, it would be necessary to change the Constitution of the Republic of Poland.

It seems that it would be hypothetically possible—although the question is to what extent it would be expedient—to subject the content of the anthem or a part of it to constitutional review. In this case, the point of reference could be the provisions concerning the principles of the state system and the status of the individual in the state—i.e. the provisions contained primarily in Chapters I<sup>41</sup> and II<sup>42</sup> of the Constitution of the Republic of Poland. By examining the content of the anthem, the Constitutional Tribunal can assess the extent to which the content contained therein corresponds to the constitutional values and principles on which the system of the Republic of Poland is based. It cannot be excluded that when assessing compliance with the Constitution, it would be necessary to consult on the genesis and interpretation of the anthem and its stanzas so that control would be as reliable as possible and achieve the objective of protecting the constitutionality of the law and the values expressed in the Constitution of the Republic of Poland.

Standards from Article 1 (the Republic as a common good), Article 2 (the principle of a democratic state ruled by law) and Article 5 of the Constitution (state

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38 As is the case with cases initiated under Art. 79(1) of the Polish Constitution by way of a constitutional complaint.

39 As is the case when a court refers a legal question to the Constitutional Tribunal under Art. 193 of the Polish Constitution.

40 Cf. the Constitutional Tribunal's reasoning in the judgement of 10 March 2022, OTK ZU A/2022, item 24.

41 Chapter I, 'The Republic', concerning the principles of the state system and definition of state symbols.

42 Chapter II 'Freedoms, rights and duties of man and citizen'.

goals) could particularly apply in this case. However, this is not a closed catalogue. Undoubtedly, the preamble to the Constitution of the Republic of Poland could also be helpful in assessing constitutionality.<sup>43</sup>

Although there is a dispute in Polish law as to whether it can be a pattern of control in the proceedings of the Constitutional Tribunal, its value is indisputable in the process of interpreting the act with the highest legal force in the state, especially in the context of indicating the values on which the state system is based—constitutional axiology.<sup>44</sup> In addition, the entities initiating the proceedings in front of the Constitutional Tribunal sometimes indicate the preamble as a pattern of control, and the Tribunal uses this when assessing constitutionality to strengthen the arguments in favour of the adopted direction of the ruling<sup>45</sup> and even makes the preamble an element of the operative part of the judgment.<sup>46</sup>

In the justification of their decisions, courts sometimes refer as well to certain elements of the preamble, in particular, to the principle of subsidiarity,<sup>47</sup> the principle of justice and strengthening of the rights of citizens,<sup>48</sup> and the duty of integrity and efficiency in the actions of public authorities.<sup>49</sup> Due to the clear reference to the values in the preamble to the Constitution of the Republic of Poland and the reference to structural experience, it seems that the possible control of the national anthem could be related to the reference to the content of the preamble to the Constitution of the Republic of Poland.

Hypothetically, it can be assumed that if the Constitutional Tribunal found that some contents of the national anthem stood in contradiction to the

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43 It should be noted, however, that as to the normative character of the preamble, opinions in the doctrine are divided, and it is normativity that is a feature that easily allows for the formulation of a reference compact for the control of the constitutionality of the law. Neither jurisprudence nor legal doctrine has indicated which parts of the preamble contain elements of legal norms and which can serve as a guideline for the interpretation of constitutional norms (Cf. Banaszak, 2018, pp. 51–52 and the author's review of the views on the nature of the preamble). However, it should be noted that since the preamble is part of the normative act and the Constitution is the pattern of control in the light of the constitutional provisions, the possibility of making the preamble or the content derived from it the pattern of control cannot be excluded.

44 On the role of the preamble and its normative significance see Banaszak, 2018, pp. 49–56. For a more extensive discussion of the preamble in the monograph, see also Strzepak, 2013.

45 Płowiec, 2010, p. 20. The Preamble is used to interpret the Constitution (see e.g. the judgment of Constitutional Tribunal in its full composition of 18 February 2003, ref. no. K 24/04, OTK ZU No 2/A/2003, item 11).

46 See e.g. the judgments of the Constitutional Tribunal in its full composition of 11 May 2005, ref. no. K 18/04, OTK ZU No. 5/A/2005, item 49; 16 December 2009, ref. no. Kp 5/08, OTK ZU No 11/A/2009, item 170.

47 See e.g. the judgment of the Voivodship Administrative Court in Poznań of 18 July 2012, ref. no. IV SA/Po 304/12, and the judgment of the Supreme Court of 5 March 2008, ref. no. III UK 93/07.

48 See e.g. the judgment of the Voivodship Administrative Court in Lublin of 19 April 2012, II SA/Lu 86/12.

49 See e.g. the judgment of the Supreme Administrative Court of 16 May 2012, I GSK 375/11.

Constitution, its verdict—after being published in the Journal of Laws—would result in the derogation of these contents from the Annexe to the Act. A new anthem text should then be considered depending on how serious the allegations seem and how broad the derogation would be. In an extreme case, it would be necessary to consider changing Article 28(3) of the Polish Constitution, which rigidly defines which song could be the national anthem.

However, a fundamental doubt arises in the discussion of the effects of the constitutional control of the national anthem. In the case of a partial derogation of the text of the anthem by the judgment of the Constitutional Tribunal, there is the question of whether it would be the same song referred to in Article 28(3) of the Constitution, which is an element of the intangible national heritage protected by both Article 5 and Article 6 of the Polish Constitution. Thus, a possible tribunal control would have to consider this context of the assessment of the constitutionality of the law containing the text of the national anthem as well.

## 6. A few comparative legal remarks

Aside from the considerations mentioned above regarding Polish law, it should be noted that the issue of the anthem as a category falling within constitutional law is not present only in Poland. First, one should mention the issue of the German anthem.

The provisions of the law and jurisprudence of a foreign country cannot be transferred directly to legislative decisions and the sphere of law application, especially since the legal systems and structures of the states of individual countries differ from each other. However, it is worth researching and analysing foreign laws for cognitive purposes. By observing the functioning of certain institutions in other countries, one can consider arguments for or against implementing certain legal structures in Poland.

As far as the German anthem is concerned, it is part of the Song of the Germans (*Das Lied der Deutschen*), also known as the Song of Germany (*Das Deutschlandlied*). The text of the German national anthem, and more precisely, the Song of Germany, was written in 1841 by A. H. Hoffmann von Fallersleben. Because the song was written during the period of fragmentation in Germany, the first stanza calls for considering the interests of the entire country and abandoning the care of only specific regions. During the German Empire, the song was very popular, but in some circles it was criticised for overemphasising the ideas of equality and democracy. The song was first recognised as an anthem in 1922 by F. Ebert, the first president of the Weimar Republic. Later, Nazi propaganda used the first stanza to spread its ideas; therefore, after World War II this stanza was discontinued in public. This stanza is also outdated because the geographical features mentioned in this part of the song are no longer located in Germany.

Later, for some time, ‘Ode to Joy’ was performed as the German anthem with a melody by L. v. Beethoven. In 1950, attempts were made to establish national anthem. However, this failed. Although ‘Song of the Germans’ was treated as an anthem, the legal status of the work has not been fully clarified. In 1952, K. Adenauer, the Chancellor of the Federal Republic of Germany, proposed in a letter to President Th. Heuss that only the third stanza of ‘Song of Germany’ should be the anthem. The second was considered too prosaic and inappropriate for a national anthem. Heuss accepted this proposal, and the letters were published in the Journal of Laws. After the reunification of Germany in 1990, other proposals for a national anthem continued to appear. The official acceptance of the anthem was confirmed in letters by Chancellor H. Kohl and President R. von Weizsacker.<sup>50</sup>

On 7 March 1990 the Federal Constitutional Tribunal ruled that the third stanza of ‘Songs of Germany’ was the anthem of Germany.<sup>51</sup> The case was settled as follows: The applicant objected to the penalty imposed on him for disregarding the national anthem of the Federal Republic of Germany.<sup>52</sup> At the end of August 1986, the text *Deutschlandlied* ’86 containing the modified text of the anthem was published in the Nuremberg municipal magazine, whose editor-in-chief was the applicant. As a result of this publication, the District Court confiscated the issue of the magazine. The applicant used this fact as an opportunity to print a “press release”—a leaflet in which he alleged a violation of artistic freedom, particularly the freedom to present artistic works. In the leaflet, he described and commented on the confiscation and the facts on which it was based. He used the words of the anthem.

The court sentenced the applicant to four months’ imprisonment for disregarding the symbols of the state. The applicant filed an appeal against this judgment which was dismissed as unfounded. The court found that in *Deutschlandlied* ’86, the words and terms had been used consciously and deliberately. The author embedded some words in the text of the anthem that the Federal Republic of Germany was a state whose basic features were the brutal use of state power, disease, and primitive sexuality. In the opinion of the Court, the aim of the modification of the anthem was to attack and slander the anthem of the Federal Republic of Germany and thus the Federal Republic of Germany itself. The court considered that the right to freedom of art did not prevent the applicant from being punished. The Court referred to the definition of art derived by the Federal Constitutional Court.

It stated that *Deutschlandlied* ’86 could qualify as art. However, artistic freedom is subject to restrictions according to the principles set out in the constitution. Among the protected values and goods are the existence of the Federal

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<sup>50</sup> See also Koch, 2021; Enders, 2022.

<sup>51</sup> BVerfGE 81, 298.

<sup>52</sup> Art. 90a section 1 point 2 of the German Criminal Code.

Republic of Germany and its free democratic order. In the case of the respective publication, the Federal Republic and its state system were deliberately slandered and ridiculed through the accumulation of negative metaphors. These efforts aimed to ridicule the sense of the state of citizens who declared loyalty to the country. Undermining the state consciousness of citizens could threaten the free democratic order of the state.

The Bavarian Higher National Court unanimously dismissed the applicant's appeal as unfounded. Accordingly, the applicant lodged a constitutional complaint with the Federal Constitutional Court. He stated that by publishing *Deutschlandlied* '86, he did not exceed the permissible limits of artistic freedom. According to the applicant, making an anthem funny cannot upset the existence of a free democratic fundamental order. The applicant's actions did not call into question the state consciousness of the citizens of the Federal Republic of Germany, and did not constitute a threat to the free democratic fundamental order.

The applicant considered that the court decisions violated Article 103 sec. of the Basic Law of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland),<sup>53</sup> as *Deutschlandlied* did not comply with the statutory reservation. There are no legal solutions as to which stanzas should be considered the national anthem, and this issue is not regulated by law.

The Federal Minister of Justice stated that the constitutional complaint was unfounded. In the minister's opinion, the national anthem became binding in the correspondence between Chancellor Adenauer and federal president Heuss on 29 April and 3 May 1952. The content of the correspondence implied that *Deutschlandlied*, consisting of three stanzas, constituted the national anthem. This circumstance must be distinguished from the limitation that only the third verse may be sung at state ceremonies. The Federal Minister of Justice also questioned whether the text *Deutschlandlied* '86 could be considered art protected within an individual's fundamental rights. In his opinion, the description of the Federal Republic of Germany expressed in the modified text of the anthem violates the general personal rights of its citizens and their sense of citizenship: The national anthem, which, like the federal flag, has an identity meaning, had been the subject of a clumsy mockery. The motif, form, and external framework of discredit are so serious that the expression of artistic freedom has been exceeded.

The Bavarian Ministry of Justice also found that there had been no violation of the applicant's constitutional rights.

Despite the participants' objections to the proceedings, the Federal Constitutional Court recognised the constitutional complaint as justified. It claimed that the impugned decisions violated the applicant's fundamental rights under Article 5 section 3 sentence 1 GG (artistic freedom).

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53 Grundgesetz für die Bundesrepublik Deutschland of 23 May 1949 (GG).

The Federal Constitutional Court recognised that the adaptation of *Deutschlandlied* is art within the meaning of this fundamental right and a form of poetry. The author used the formal language of the poem to convey his experiences and impressions of certain life processes, which can be summarised under the slogan ‘German everyday life’.

The Tribunal pointed out that the state’s intervention in this kind of freedom had to be measured against the requirements of the guarantee of artistic freedom. The penalty imposed on the applicant was not related to the entire leaflet containing the work and the opinion given therein, and was directed only against the *Deutschlandlied* ‘86 print. The court should consider that the applicant intended to use the leaflet to fight for the freedom to communicate a work of art. If in this context he uses the work of art itself to achieve this goal, the activity is also meant to make it available to the public. If the state measures in such cases are specifically and exclusively directed against the work of art disseminated in such a way, the responsible person acts as its mediator.

In connection with the examined case, the Federal Constitutional Court clarified that when it comes to the question of which song is the ‘Anthem of the Federal Republic of Germany’, these requirements are only met in the case of the third stanza of *Deutschlandlied*. The correspondence between Federal Chancellor Adenauer and Federal President Heuss in 1952 remains unclear. It is not explicitly stated that that song should only be announced as the anthem with the third stanza. However, it was clearly stated that the third verse should be sung at state ceremonies, which has been common practice for decades. The Court found that only the third stanza of *Deutschlandlied* was protected as a state symbol and by law.

The case mentioned above indicates that in the context of the execution of artistic freedom the FCC—although indirectly—considered the compliance with constitutional values of the song recognised as the anthem.

However, due to the differences in competencies and character between the Polish Constitutional Tribunal and the FCC, German solutions cannot be directly applied in Polish law. However, some interpretative guidelines regarding constitutional values may be considered when analysing the constitutionality of national and state symbols, including the national anthem. This will not constitute a formal and legal analysis, but rather will provide support to the interpretation of phenomena that go beyond the legal context.

## 7. Conclusions

The analysis of the admissibility of the control of the constitutionality of the national anthem has both cognitive value and constitutes a certain scientific puzzle. However, it may also influence a broader view of the possibility of examining the hierarchical compliance of the law, especially in those areas and in relation

to those acts that are strongly connected with systemic and social values and that build the identity of the nation.

Therefore, in the study's conclusion, it should be stated that, from a formal point of view, the text of the Polish anthem could be the subject of control before the Constitutional Tribunal. The Tribunal adjudicates the compliance of laws with the Constitution. Since the content of the anthem is contained in an annexe to the Act, the Tribunal may adjudicate on it regardless of the assessment of the normativity of this act fragment. This indicated approach is in line with the Tribunal's previous findings on the admissibility of the Tribunal's adjudication in cases of assessment of the hierarchical compliance of laws.

In performing its review, the Tribunal could verify whether the anthem's text corresponds to the values and principles expressed in constitutional norms, particularly those that relate to the principles of the political and social system of the state. In doing so, it could refer not only to the articulated part of the Constitution but also to its preamble.

However, the control of the constitutionality of the state anthem has limits that the Constitution itself sets. First, a judgment of the Constitutional Tribunal could not lead to the derogation of the entire anthem, as the anthem is mentioned by name in the provisions of the Constitution. Changing the anthem—that is, replacing it with another song (a piece of music)—would require an amendment to the Constitution, which is not easy under Article 235 of the Constitution.

Second, when considering the control of the constitutionality of the anthem, it would be necessary to consider whether the elimination of some of its fragments—stanzas or parts thereof—from the legal system would not cause the remainder of the work to lose its coherence and constitute a different work. Meanwhile, the hymn is constitutionally protected and constitutes an element of intangible national heritage. For specific reasons, the song in question was recognised as an anthem and was an element in strengthening the sense of belonging to a particular state and nation. It should be noted that in the national consciousness, the *Dabrowski Mazurka* appears as a piece that shapes Polish patriotism and expresses devotion to the homeland.<sup>54</sup>

Therefore, the possible initiation of proceedings before the Constitutional Tribunal concerning the anthem should be preceded by profound reflection.

Irrespective of the above remarks, it should be emphasised that the possibility of controlling the constitutionality of the national anthem in Poland is a tool that paradoxically constitutes additional protection of the anthem and is, therefore, an instrument protecting national symbols.

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54 See the resolution of the Sejm of the Republic of Poland of 1 March 2007 on the celebration of the 80th anniversary of the promulgation of *Mazurek Dąbrowskiego* as the Polish national anthem (*Monitor Polski* of 2007, No. 16, item 178).

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