



**WYDZIAŁ PRAWA
i ADMINISTRACJI**

Uniwersytet Łódzki

Patryk Kowalski

Freedom of expression in election campaigns

(Wolność wypowiedzi w kampaniach wyborczych)

SUMMARY

A doctoral dissertation prepared at the
Department of Constitutional Law
under the supervision of
Prof. zw. dr hab. Krzysztof Skotnicki

Łódź 2018

This doctoral dissertation investigates the problem of freedom of expression in election campaigns.

The two major objectives of the dissertation are: to discuss the freedom of expression in election campaigns as a human right enshrined in the Constitution and to identify limits to the freedom of expression in election campaigns. Research hypothesis boils down to the statement that the freedom of expression in election campaigns is strongly restricted by the constitutional legal framework of the Republic of Poland while it should be granted a higher level of protection than other constitutional freedoms.

In this dissertation four research methods in the field of law have been employed. These methods are: legal-dogmatic, comparative, practical, and legal-historical method. All of them were used to examine the normative material, in particular the norms of positive Polish and international law, as well as the jurisprudence of the Constitutional Tribunal, the European Court of Human Rights, courts of general jurisdiction at all levels, the Supreme Court of the United States, and the views of the Polish and United States doctrine of constitutional law and election law.

The dissertation consists of five chapters; each of them covers an extensive internal systematic structure.

The first chapter discusses terminology connected with the freedom of speech and the freedom of expression in election campaigns, as well as the idea of election campaign as such. These issues are explained in philosophical-legal and historical-legal context, and the analysis of election campaign touches also upon aspects pertaining to political sciences. Studies on the notion of the freedom of expression and its positivisation have demonstrated that we can investigate the substance of the freedom of expression in election campaigns.

Firstly, the freedom of expression in election campaigns is deeply rooted in natural law and historical natural law (it emerged through the evolution of the election campaign and positivisation of the freedom of expression in general sense, the principle of free elections, and mass media). Secondly, the freedom of expression in election campaigns features *implicit* in most constitutions and in documents of the international system of the protection of human rights starting from the second half of the 18th century. Thirdly, the freedom of speech in election campaigns has got a special status compared to the freedom of speech in general sense. Fourthly, the freedom of speech in election periods can be broken down by the form, subject and object of the expression.

Fifthly, the freedom of expression in election campaigns is not absolute and it is subject to limitations.

Looking from the viewpoint of legal and political sciences, the examination of the components of an election campaign, such as its statutory duration, participants involved in the campaign, forms and contents of their contributions have helped us propose two definitions of this freedom. According to the first one (legal) the freedom of expression „has been granted to every private individual to be able to express her/his views in the period between the date when a competent body announces the elections until 24 hours before the day of the vote.” The second definition (based on legal and political sciences) defines the freedom of expression in election campaigns as „a freedom available to every private individual to express her/his thoughts, in particular to make statements relating to the elections, in any form whatsoever, including, in particular, gatherings, posters, leaflets, social media within the period between the date when a competent body announces the elections until 24 hours before the day of the vote.”

Chapter II presents the freedom of expression against a multi-centric legal framework of the Republic of Poland. Examination of legal norms granting the freedom of expression that are contained in the Constitution of the Republic of Poland¹ and in selected international acts that protect human rights (universal: Declaration of Human and Civil Rights², International Covenant on Civil and Political Rights³ and regional: European Convention of Human Rights,⁴ and the EU Charter of Fundamental Rights⁵) has brought me to the conclusion that the freedom of expression in election campaigns can be deduced from legal norms concerning the freedom of speech in general sense. Subject and object-related aspects of these norms are defined so widely that all regulations concerning the freedom of speech can be referred to the freedom of expression in election periods. There are also minor differences in the positivisation of the freedom of expression. The Constitution of the

¹ Constitution of the Republic of Poland of 2 April 1997, Dz.U. [Journal of Laws] of 1997, no. 78, item 483 as amended.

² Universal Declaration of Human Rights adopted on 10 December 1948 in Paris, http://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf.

³ International Covenant on Civil and Political Rights opened for signature in New York on 16 December 1966, Dz.U. of 1977, No. 38, item 167.

⁴ Convention on the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950, amended with Protocols No. 3, 5, and 8 annexed with Protocol 2, Dz.U. of 1993, No. 61, item 284.

⁵ Charter of Fundamental Rights of the European Union 2007/C 303/01, OJEU 2007, no. 303, item 1 with further amendments.

Republic of Poland, the European Convention of Human Rights, and the EU Charter of Fundamental Rights stipulate that the freedom of expression in election campaigns is conferred upon private individuals and collective entities, who, however, must be covered by the jurisdiction of a particular State. On the other hand, the Universal Convention of Human Rights and the International Covenant on Civil and Political Rights state that the freedom of expression in election campaigns is granted to private individuals and to the groups thereof. The second of the above two acts also requires the jurisdiction criterion to be met. However, the scope of the freedom is practically identical and potential differences are, in principle, negligible.

Considerations concerning the freedom of expression in election campaigns carried out at the constitutional level have brought us to the conclusion that we are dealing with a personal but also political freedom despite the fact that in the Constitution of the Republic of Poland Art. 54 is included in sub-chapter "Personal Freedoms and Rights" rather than in the sub-chapter "Political Freedoms and Rights". The assertion about the freedom of expression in election campaigns being a political freedom results from an extensive analysis of selected constitutional principles: the principle of sovereignty of the nation understood as a reflection of the right to appoint some state bodies and the right to express opinions about political power; the principle of democratic rule of law and its components (elections, election campaigns, the freedom of expression); the principle of social pluralism understood as a possibility to get involved in election campaigns and reap political benefits from various forms of civil engagement in political life, in particular the principle of free elections that ensures the freedom of expression in electoral campaigns and helps them win the elections, which drives the evolution of state power. Close links between these values, election campaign and the freedom of expression provide grounds for seeing the freedom of expression in election campaigns as a political freedom.

Chapter III investigates how the Constitution of the Republic of Poland restricts the freedom of expression in election campaigns. The process is based, firstly, on constitutional norms that award the bodies of the State with the competence to restrict the freedom of expression in election campaigns. Secondly, it is founded on norms that lay down the criteria, which trigger the restriction of the freedom of expression in election campaigns.

With regard to the first one, the Constitution of the Republic of Poland contains a number of norms, which authorise the State to restrict the freedom of expression in

election campaigns. These provisions can be divided into two groups. The first one includes the following constitutional provisions, which unconditionally authorise State authorities to restrict the freedom of expression in election campaigns: Art. 2 of the Constitution (democratic rule of law), Art. 31 para. 3 of the Constitution (the clause limiting personal freedoms and rights), and Art. 54 para. 1 of the Constitution (the freedom of expression). The second group consists of provisions that authorise State bodies to impose such limitations only in specific circumstances listed in: Art. 54 para. 2 of the Constitution (special clause that authorises the State to impose limitations only upon radio or TV stations), Art. 14 of the Constitution (freedom of the press and means of social communication which authorises the State to adopt limitations to protect this freedom), Art. 178 para. 3, Art. 195 para. 3, Art. 199 para. 3, Art. 205 para. 3, Art. 209 para. 3, Art. 214 para. 2, and Art. 227 para. 4 of the Constitution (some State representatives listed in the Constitution are required to be politically neutral in exercising their duties, which means the State is authorised to impose limitations upon their freedom of expression when they make political statements).

In the second case, the freedom of expression can be limited in election campaigns under specific circumstances laid down in the Constitution of the Republic of Poland and in the instruments of the international system of the protection of human rights. These circumstances can be found in the Constitution primarily in its Art. 31 para. 3 and in Art. 54 para. 2; by making this choice I have rejected the provisions of the Constitution, which only indirectly address the issue (Arts. 2, 14, 42 para. 1, 45 para. 1, and 54 para. 1 of the Constitution of the Republic of Poland). In international law we can draw a distinction between general clauses in Art. 29 para. 2 and 3 of the Universal Declaration of Human Rights and in Art. 52 of the EU Charter of Fundamental Rights and specific clauses laid down in Art. 19 para. 3 of the International Covenant on Civil and Political Rights, and in Art. 10 para. 2 of the European Convention on Human Rights.

Considering the above, Art. 31 para. 3 of the Constitution should be regarded as the key determinant that triggers the limitation of the right of expression in election campaigns. Firstly, it can be viewed as a non-standalone, fundamental norm that explicitly (unlike, e.g., Art. 2 of the Constitution) entrusts the State with the competence to restrict the freedom of expression in election campaigns as a part of law enforcement exercise because it authorises the State to impose limitations under any legal circumstances (unlike, e.g., Art. 54 para. 2 of the Constitution). Secondly, it can also be

seen as the main norm that specifies circumstances when the limitation of the freedom of expression in election campaigns is admissible. The reason is that the Constitution of the Republic of Poland, with the exception laid down in Art. 54 para. 2 that covers only electronic media, does not contain any specific clause that would limit the freedom of expression in election campaigns. Moreover, it is the most important limiting clause compared to clauses featuring in other instruments of the international system of the protection of human rights because of the primacy of the Constitution of the Republic of Poland over international law. This hierarchy has been confirmed by the judgements of the Constitutional Tribunal.

By examining the conditions of admissibility contained in Art. 31 para. 3 of the Constitution of the Republic of Poland (limitation in the form of a statute, functional relationship between the limitation and the enforcement of any freedom, the necessity to impose limitation in a democratic state, ban on infringing the substance of freedoms and rights), this chapter provides a catalogue of the majority of limits to the freedom of expression during the election period binding in the constitutional order of the Republic of Poland.

These limits can be divided into:

1) general limits to the freedom of expression:

- A. especially relevant for election campaigns;
- B. marginal for election campaigns;
- C. that may not limit the freedom of speech in election campaigns;

2) limits to the freedom of expression in election campaigns.

It means that we can identify general limits to the freedom of expression that are binding at any time and apply, more or less, also to the periods of election campaigns as well as limits inherently linked with election campaigns.

The scope of the protection of the freedom of expression in election campaigns depends predominantly on limits specified in point 1A (called general limits to the freedom of expression in election campaigns) and in point 2 (called specific limits to the freedom of expression in election campaigns).

Chapter IV investigates general limits to the freedom of expression in election campaigns. Their list includes: the integrity of human dignity; the necessity to protect state security and public order (effective and undisturbed functioning of public authorities understood as: the necessity to protect the authority of State bodies engaged in elections and the necessity to maintain political neutrality of State representatives in

their statements); the duty of media to provide reliable information to society; ban on hate speech; and freedoms and rights of others that conflict with the freedom of expression in election campaigns.

Having investigated these limits, also at the statutory level, we may conclude that vast majority thereof - despite being linked specifically with the period of elections - do not award higher level of protection to the freedom of expression in election campaigns compared to the protection of the freedom of expression in general. The limit of the constitutional right to the protection of dignity is a principal exception here, in cases when this right clashes with the freedom of expression in election campaigns. The decision-making mechanism, which harmonises and strikes a fair balance between the freedom of expression in election campaigns and the above subjective right, has demonstrated that – in principle – the freedom in question should receive higher level of protection, meaning the right to dignity should give way to the freedom of expression in election campaigns. That is the effect of constitutional values, such as the principle of a democratic state ruled by law and the principle of free elections (with stress put on the second principle).

Studies have also revealed that Polish general courts not always apply this harmonisation mechanism and – acting against the standard set out by the European Court of Human Rights – they limit the protection of the freedom of expression in election campaigns.

Finally, chapter V discusses the following specific limits to the freedom of expression in election campaigns: subjective limits, local limits, limits with respect to the form and content.

For these limits we need to additionally stress that they depend on cumulative presence of additional conditions, since they do not relate to any single statement articulated during an election campaign. These conditions are linked with the definition of electioneering and the period when they are in place. Firstly, specific limits to the freedom of expression in election campaigns are restricted only by outright political electioneering in the meaning of Art. 105 § 1 of the Electoral Code.⁶ Electioneering is in fact any statement, which actively encourages voting in a particular way - in particular, voting for the candidate of a specific election committee - that has been made in public (limitation with respect to its content and form). Secondly, specific limits to the

⁶ Act of 5 January 2011 Electoral Code, Dz.U. of 2017, item 15 with further amendments.

freedom of expression in election campaigns restrict only these statements, which have been formulated within a period shorter than the election campaign (from the day when a competent body announces the elections until 24 hours before the date of the vote), that is within the period that starts on the day when the notification about the setting up of an election committee has been received until 24 hours before the election day. Statements which do not meet at least one of the above conditions will not be restricted by specific limits to the freedom of expression in election campaigns but only by general ones discussed in Chapter IV of the dissertation.

Besides the above, considerations contained in Chapter V of the dissertation focus on assessing binding regulations and formulating the postulates of *de lege lata* and *de lege ferenda*.

Research hypothesis has been positively verified to a significant extent. The freedom of expression in election campaigns is intensely limited by the constitutional legal system of the Republic of Poland. In the first place, we can see it from the number of limits included in most sources of binding legislation as well as in legal acts in many fields of law. Secondly, it is also confirmed by qualitative differences between these limits, which relate to the subject, content, form, place or are mixed. Thirdly, some of these limits are in force only during the election campaigns, which reflects specific wish of the legislator to limit the freedom of expression just in this period. Fourthly, the intensity, with which the freedom of expression is limited in election campaigns can be evidenced by the subjectivity and case-based approach of the State body, who applies law to examine if limits of the freedom have been exceeded.

On the other hand, one may not unambiguously decide that the freedom of expression in election campaigns should be granted higher level of protection at the cost of other constitutional values. Despite some exceptions, most limitations binding in the constitutional legal order have turned out to comply with the limiting clause set out in Art. 31 para. 3 of the Constitution of the Republic of Poland and does not infringe other norms of the fundamental law. The freedom of expression in election campaigns is not absolute and it often gives way to other values.

Patryk Kowalski

01.05.2018 Patryk Kowalski