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DOMESTIC MECHANISM OF STATEMENT'S  
CONTROL DURING THE ELECTION CAMPAIGN  
– GUIDELINE IN THE LIGHT OF THE ECTHR'S  
JURISPRUDENCE

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**Summary:** Preventing the progressive phenomena of negative campaign, demagoguery and dissemination of false information is one of the most important challenges for a qualitative election campaign. One of the solutions may be establishing accelerated electoral proceedings, for which a pattern can be sought *inter alia*, in Polish legislation (article 111 of Polish Electoral Code). Although the European Court of Human Rights in Strasbourg has never comprehensively commented on accelerated control mechanism in the election campaign, the case-law analysis allows to identify the minimum standards. The article indicates a cross-sectional understanding of freedom of expression in regard to electoral campaign, as well as minimum requirements to be met by those mechanisms.

**Keywords:** electoral campaign, freedom of expression, electoral dispute, European Convention on Human Rights, free elections.

## 1. INTRODUCTION

Freedom of expression during the electoral campaign is of primary importance. The statement of the paramount importance is confirmed not only in the case law of national (e.g. Constitutional Courts of High Supreme Courts) and international courts (European Court on Human Rights in Strasbourg – fur-

ther: “ECHR” or “Court”), but in also in soft law. In Code of Good Practices on Electoral Matters, Venice Commission emphasized that free suffrage comprises two different aspects: free formation of the elector’s opinion, and free expression of this opinion, i.e. freedom of voting procedure and accurate assessment of the result. The Court in Strasbourg also observed that freedom of expression in one of the conditions necessary to “ensure the free expression of the opinion of the people in the choice of the legislature”<sup>1</sup>.

Despite of the importance of constitutional and conventional jurisprudence in the context of freedom of expression, there is no doubt that the almost unlimited availability of statements in the era of new technologies has already begun to constitute a specific threat to a democratic country. There is no doubt, that freedom of expression is frequently used as tool for influencing the correctness of the process of social communication, having subsequent impact on the formulation of the will of voters. Phenomenon alike populism, demagogism, falseness of statements may affect not only individual decisions of voters, but the election results in the polling station, constituency and even on a national scale. Therefore, freedom of expression should be seen not only as a freedom, but also as a kind of threat to a democratic state of law.

EHCR rightly noticed that freedom of expression may come into conflict with the right to free elections (with special emphasis on “free expression of the opinion of the people”) or personal rights of candidates. It may be considered necessary, in the period of electoral campaign to place certain restrictions, of type which would not usually be acceptable<sup>2</sup>. ECHR repeatedly notice that free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. Nevertheless, in striking the balance between rights (especially during electoral campaign), the States have a margin of appreciation, as they do generally with regard to the organization of their electoral systems<sup>3</sup>.

This easily discernible collision within the freedom of expression requires consideration, whether and in which shape mechanism for controlling expression during electoral campaign should be introduced and organized. Considering the Polish case, *Kwiecień v. Poland*, based upon the electoral proceeding (currently art. 111 of Local Electoral Act), Court has taken a view that the provision of such a summary remedy during periods of local or national electoral campaign

<sup>1</sup> See *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A, No. 113, § 54.

<sup>2</sup> See *Bowman v. the United Kingdom*, judgment of 19 February 1998, *Reports* 1998-I, § 43.

<sup>3</sup> See *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A, No. 113, § 52–54.

serves the legitimate goal of ensuring the fairness of the electoral process. Moreover, they are aimed at ensuring the proper conduct of the electoral campaign by preventing infringements of the candidates' personal rights, which are capable of affecting the result of the election. Thus, such provisions cannot be questioned from the Convention standpoint<sup>4</sup>.

Necessity of establishing electoral procedures in regard to freedom of expression may be noticed in soft law instruments: *Resolving Electoral Disputes in the OSCE Area: Towards Dispute Monitoring System*<sup>5</sup> ruled by Office for Democratic Institutions and Human Rights, as well as in Code of Good Practices in Electoral Matters. In both documents, were expressed the right to remedy for violation of campaign rights<sup>6</sup> and necessity of proper observance of election campaign rules by the appeal body<sup>7</sup>.

Exemplary, such proceedings were implemented in polish electoral code in art. 111. Therefore, if distributed electoral materials (in particular posters, leaflets and slogans, as well as statements of other forms of electoral agitation) contain false information, the candidate or electoral representative of election committee concerned, has the right to submit a motion to the regional court, to render a decision that:

1. ban on disseminating false informations,
2. order forfeiture of electoral materials that contain such information.
3. order rectification of such information,
4. order to public a response to statements infringing personal rights,
5. order to apologize to the person, whose personal rights have been violated,
6. order the participant to pay up to PLN 100,00 for a public benefit organization,

The regional court is obliged to examine the application within 24 hours in non-litigious proceedings. The substantiated judgement/orders as to merits, shall be immediately served by the court to the persons concerned and those obliged to comply with court's order. The regional court's decision may be appealed to the Court of Appeal within 24 hours, which will recognize the grievance within 24 hours. Cassation appeal is not eligible, and decision of appeal court is immediately enforceable.

<sup>4</sup> See *Kwiecień v. Poland*, No. 5174499, 9 January 2007, § 55, unreported.

<sup>5</sup> *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System*, Office for Democratic Institutions and Human Rights, Warsaw 2000.

<sup>6</sup> *Ibidem*, p. 9.

<sup>7</sup> *Ibidem*, p. 10.

## 2. FREEDOM OF EXPRESSION DURING ELECTORAL CAMPAIGN – OVERVIEW OF LINE OF JURISPRUDENCE

The ECtHR repeatedly upheld, while precious for all, freedom of expression is particularly important for political parties and their active members, as well as for election campaigns when opinions and information of all kinds should be permitted to circulate freely<sup>8</sup>. Although the limits of acceptable criticism are generally wilder where the target is a politician<sup>9</sup>, the Court expanded its assertions as general rule, specifying that opinions and information pertinent to elections, both local and national, which are disseminated during the electoral campaign should be considered as forming part of a debate on questions of public interest, unless proof to the contrary is offered<sup>10</sup>. This results in very narrowed interpretation of restrictions on freedom of expression in respect of matters of public interest. These concepts directly affect executions of evidence of truth. Since 1986, ECHR, in the light of art. 10 of ECHR, widely developed a criterion for verifying opinions and facts<sup>11</sup>. In its practice, ECHR has made the distinction between statements of fact and value judgements<sup>12</sup>. While the existence of facts can be demonstrated, the truth of value judgements is not susceptible of proof – the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10<sup>13</sup>. Where a statement amounts to a value judgement, the proportionality of an interference depends on whether there exists a sufficient factual basis for the impugned statement, since even a value judgement without any factual basis to support, failing which it will be excessive<sup>14</sup>.

The task of the national courts is to examine whether the author of the statement relied on sufficiently accurate and reliable information and whether the factual basis of statements was related to its scope. Adjudicating in this regard, domestic court are required to comply with the principles, expressed in Article 10 of the Convention<sup>15</sup>.

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<sup>8</sup> *Kita v. Poland*, No. 57659/00, 8 July 2008, § 44, unreported. See *Bowman v. the United Kingdom*, judgment of 19 February 1998, *Reports* 1998-I, § 42.

<sup>9</sup> *Feldek v. Slovakia*, No. 29032/95, judgment of 12 July 2001, ECHR 2001-VIII, § 74.

<sup>10</sup> *Lopes Gomes da Silva v. Portugal*, No. 37698/97, § 33, ECHR 2000-X, see *Kwiecień v. Poland*, No. 51744/99, 9 January 2007, § 52, unreported.

<sup>11</sup> *Lingens v. Austria*, judgment of 8 July 1986, Series A, No. 103, p. 26, § 40–42.

<sup>12</sup> *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, p. 236, § 47.

<sup>13</sup> *Feldek v. Slovakia*, No. 29032/95, ECHR 2001-VIII, § 75–76.

<sup>14</sup> *Pedersen and Baadsgaard v. Denmark* [GC], No. 49017/99, § 76, ECHR 2004-XI.

<sup>15</sup> *Braun v. Poland*, App. No. 30162/10, 4 November 2014, § XYZ unreported., *Kurski v. Poland*, App. No. 51744/99, 5 July 2016, § 48, unreported.

Nonetheless, in the Stasbourg's jurisprudence can be easily seen the tendency to decrease the significance of the distinction between statements of fact and value judgments, while the impugned statements were made in the course of a lively political debate, even where the statements may lack a clear basis in fact (in this case, Courts take this view in the light criticism of local authority at local level)<sup>16</sup>. It can be observed, that Court has well-established line of jurisprudence, which provide very narrow margin of appreciation of the national authorities, in particular the domestic courts. However, this should not be understood as an absolutization of freedom of expression in the election campaign.

At this point, I would like to draw attention to the fact that national authorities have a very narrow margin of appreciation in regard to electoral statements. From the point of electoral campaign, this has double significance. First of all, statements, disseminated during electoral campaign are considered, in principle, as a part of a debate on questions of public interest. This leads to limitation of sufficient grounds for facts statements or value judgements (distinction is becoming less relevant in that matter)<sup>17</sup>. On the other hand, any interference with the freedom of expression requires a thorough examination of statements and its relationship to other conventional rights. It is desirable that domestic courts would correctly use the principles of ECHR. Obligation of paramount importance for common courts it to make their jurisprudence fully compliant with Convention and the case-law of ECHR<sup>18</sup>.

### 3. GENERAL PRINCIPLES OF ELECTION DISPUTE RESOLUTION

Due to beforehand mentioned reasons, fully supported by ECHR jurisprudence and international soft – law instruments, the domestic legislator should make efforts to constitute a fast – track procedure, aimed at rightly reaction to violation of electoral campaign rules (e.g. freedom of expression). It remains beyond all reasonable doubts that existence of electoral procedures may be key to counteract the infringements and assess or qualify the electoral statements properly. ECHR recognizes the need to combat the dissemination of misleading information about candidates in elections to ensure the quality of public debate in the pre-election period<sup>19</sup>. Due to the dynamics of the election campaign and

<sup>16</sup> *Lombardo and Others v. Malta*, App. No. 7333/06, 24 April 2007, § 60.

<sup>17</sup> *Kita v. Poland*, No. 57659/00, 8 July 2008, § 46, unreported.

<sup>18</sup> A. Bodnar, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w Polsce – wymiar instytucjonalny*, Warszawa 2018, p. 469.

<sup>19</sup> *Kita v. Poland*, No. 57659/00, 8 July 2008, § 55, unreported.

the circulation of information, at this time difficult to contain, such proceedings should be aimed at controlling any false information as soon as possible.

The Polish Tribunal Constitutional confirms in its judiciary, that the solution of a particular electoral procedure is associated with the specificity of the election campaign - short deadlines for the examination of the case in the first and second instance are to ensure that the decision will be issued in such a time that on the one hand voters can familiarize themselves with the court's reasoning before the day of voting. Thorough pre-election debate, free from pathologies – especially dissemination of false news, should have been taking place for a sufficiently long period, enabling the formation of the will of voters<sup>20</sup>.

It is beyond all reasonable doubts that, judicial proceedings pursuant to electoral matters, alike art. 111 of Polish Electoral Act, are compatible with Convention in so far as they are fully compliant with their requirements. Examination of jurisprudence allows to identify guideline, particularly important to the adequate formation of electoral disputes. Although the European Court of Human Rights in Strasbourg has never comprehensively commented on accelerated control mechanism in the election campaign, the case-law analysis allows to identify the minimum standards.

In accordance with upon-mentioned assertions, electoral disputes, due to the subject matter and the importance of quality of public – debate should entirely under supervision of common courts (judicial review). The obligation of primary importance is to ensure the full compliance with ECHR jurisprudence. Inaccurate application or distinction the statements of fact from value judgements (or even not taking them into consideration) or incorrect understanding of public debate can lead not only to violation of provision of art. 10, but also creating the *chilling effect*, which may hamper the debate.

In accordance with the jurisprudence of Court in Strasbourg, domestic legal remedies must be effective in practice, as well as in law<sup>21</sup>, having regard to the individual circumstances of case. In assessing effectiveness, account must be taken not only of formal remedies available, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant<sup>22</sup>. In the context of electoral disputes, ECHR seems to notice two objectives of the judicial process – preventing at infringements of personal interests (rights)

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<sup>20</sup> Judgment of Constitutional Tribunal in Poland, 21 July 2009, App. No. K 7/09 (OTK ZU 2009/7/A, poz. 113).

<sup>21</sup> *El-Masri, v. „The Former Yugoslav Republic of Macedonia”*, App. No. 39630/09, 13 December 2012, § 255, *Kudła v. Poland*, App. No. 30210/96, judgment of 26 October 2000, ECHR 2000-XI, § 152.

<sup>22</sup> *Van Oosterwijk v. Belgium*, App. No. 7654/76, judgement of 6 November 1980, § 36–40.

of candidates and simultaneous influence on the electoral result. Second objective is ensuring the quality of public debate during electoral campaign, by preventing of spread false information. Therefore, the issue of primary importance is to end the litigation before the day of election. Otherwise, the proceedings will lose any relevance to the applicant's election prospects<sup>23</sup>. The Court observed that proceedings of this type are conducted within very short-time limits. Notwithstanding with the aware of the of swift access to a remedy, speed should not go so far as to constitute an obstacle or unjustified hindrance to making use of it or take priority over its practical effectiveness<sup>24</sup>. At the same time, as desirable as the expeditious examination of election-related disputes may be, it should not result in the undue curtailment of the procedural guarantees afforded to the parties to such proceedings, in particular the defendants.

Accelerated proceedings and short hearing times do not release national courts from the obligation to rigorously and thoroughly examine the parties' submissions (especially regarding the rights guaranteed by the Convention and its Protocols)<sup>25</sup>. Thereby is required clear and specified justification. Substantiation must always ensure the parties the possibility of effective exercise of any existing right of appeal<sup>26</sup> and for that reason, to familiarize themselves with the reasoning by reaching its determination.

Situation, in which the deadline for lodging an appeal (legal remedy) expires without enabling the applicant to get acquainted with the content of the judgment under appeal, may limit the effective exercise of allowed legal remedy and deprive of capability of submitting own stance<sup>27</sup>. ECHR, in the case *Brzeziński v. Poland* drew attention to this kind of situation. The court served the reasoning after the expiry of the time-limit for bringing action against decision, so that the applicant could only rely on the information provided by the employee from the court. The Court has once again emphasized that the speed of proceedings cannot deprive the parties of procedural guarantees, in particular those, against whom proceedings have been initiated.

At the very end, the issue of nature and severity of legal sanctions requires to be signalized. It should be borne in mind that not only excessively severe sanctions, but also those of mild and potential nature may hamper public debate<sup>28</sup>

<sup>23</sup> *Kwiecień v. Poland*, No. 5174499, 9 January 2007 § 55, unreported.

<sup>24</sup> *De Souza Ribeiro v. France*, App. No. 22689/07, 13 December 2012, § 95.

<sup>25</sup> *Wagner and J.M.W.L v. Luxembourg*, App. No. 76240/01, 28 June 2007, § 96.

<sup>26</sup> *Hirvisaari v. Finland*, App. No. 49684/99, 27 September 2011, § 30 *in fine*.

<sup>27</sup> *Hadjianastassiou v. Greece*, App. No. 12945/87, 16 December 1992, § 34–36.

<sup>28</sup> *Steur v. Nedherlandts*, App. No. 39657/98, 28 October 2013, Reports 2003-XI, § 44.



and simultaneously trigger so – called chilling effect<sup>29</sup>. Disproportionately high penalties are also considered dubious<sup>30</sup>. In my opinion, the sanctions provided in the Polish Electoral code may have effect in this manner. A sanction of PLN 100 000 advises on the serious risk of warning and discouraging potential authors of future statements. The margin of appreciation for national courts should be significantly smaller here, especially since the statement related to the public interest remains at stake.

#### 4. CONCLUSIONS

The progressing phenomenon of the negative campaign, consisting in discrediting political opponents, expressed by the dissemination of false information, violation of the limits of permitted criticism and formulation of assessments, which are not based on facts, contradicts the relevant constitutional values – protection of the fairness of the election and the right of voters to obtain truthful information on public matters. Due to this reason, domestic legislators should make efforts to maintain quality of election campaign and prevent for violation of freedom of expression. Therefore, domestic mechanism of statement's control during the election campaign should be implemented in the light of ECHR guidelines. Although there was no comprehensive comment of ECHR, the above – mentioned case-law allows to identify the minimum standards. Accelerated proceedings should provide immediate control of allegedly false information, as well as ensure procedural guarantees of the parties. By following ECHR jurisprudence, accelerated electoral proceedings may provide valuable solutions for ensuring a qualitative election campaign and debate on public matters.

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<sup>29</sup> *Malisiewicz Gąsior v. Poland*, App. No. 43797/98, 6 April 2006, § 68, unreported.

<sup>30</sup> *Steel and Morris v. United Kingdom*, App. No. 68416/01, 15 February 2002, Reports 2005-II, § 95.



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