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Achievements and Challenges of the Contemporary Polish Electoral Law

Keywords: electoral rights; Electoral Code, the National Electoral Commission; election silence, agitation
Słowa kluczowe: prawa wyborcze, Kodeks wyborczy, Państwowa Komisja Wyborcza, cisza wyborcza, agitacja

Abstract

The aim of the article is to present recent amendments to the Electoral Code respecting constitutional right to a court and to describe some selected proposals for changes within the Polish electoral law, which – despite the fact that they were formulated by the doctrine of constitutional law and were raised in the legislative process – in certain cases have not yet been reflected in subsequent amendments to the Electoral Code. The analysis included the admissibility of bringing an appeal to the court against the decisions of the National Electoral Commission and some cyclical demands to abolish the election silence. The assessment of the indicated issues was made in the light of the science of law, the decisions of the Constitutional Court and the proposed amendment bills to the electoral law.

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Streszczenie

Osiągnięcia i wyzwania współczesnego polskiego prawa wyborczego

Celem artykułu jest przybliżenie ostatnich zmian prawa wyborczego, zmierzających do zagwarantowania konstytucyjnego prawa do sądu oraz respektowania zakazu zamykania drogi sądowej, w odniesieniu do wybranych instytucji regulowanych przepisami Kodeksu wyborczego. W omawianym zakresie analizie poddano również te spośród przepisów wyborczych, w stosunku do których postulowane przez doktrynę i podnoszone w procesie legislacyjnym propozycje zmian nie zostały dotychczas wprowadzone. Rozważania koncentrują się wokół dopuszczalności zaskarżenia decyzji Państwowej Komisji Wyborczej do sądu oraz cyklicznie zgłaszanych postulatów zniesienia ciszy wyborczej. Oceny omawianych instytucji dokonano w świetle poglądów nauki prawa, orzeczeń Trybunału Konstytucyjnego oraz wnoszonych projektów zmian ustawodawczych.

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I.

Pursuant to the provisions of the Art. 4 par. 2 of the Constitution of the Republic of Poland[2], which specifies the rules of the Nation's sovereignty, the sovereign exercises their power directly or through their representatives. Bringing the idea of the representative government to the forefront of the constitutional regulation is a deliberate endeavor of the legislator, aimed at establishing the primacy of representative democracy, while guaranteeing the sovereign instruments of direct participation in the exercise of power. Such an approach to sovereignty requires to assign a special importance to state standards of electoral law which regulate the mode of filling positions in representative bodies.

The Electoral Code,[3] which is the result of parliamentary work on a comprehensive standardization of the conduct rules in the election to the Parliament, for the office of President of the Republic of Poland, to the local au-

[2] The Constitution of the Republic of Poland of 2 April 1997 (Dz.U.No. 78, item 36 as am.).

[3] The Act of 5 January 2011 – The Electoral Code (c.t. Dz.U. 2019, item 684 as am.).

thorities and to the European Parliament, from the moment it was adopted has raised a lively discussion in the science of law on the need to modify and supplement its provisions – twenty one existing amendments to the Act, including the last reform of the electoral regulations, which came into effect on 10 August 2019 – indicates on the one hand, their rank in the functioning of the system of representative government, and on the other hand, provokes comments on the desired direction of changes in this area. Apart from the widely discussed proposals of a fundamental nature, involving the transformations within the electoral system in the strict sense, a group of current issues of a detailed nature should be noted, which lie within the scope of interest of the doctrine and practice of constitutional law.

II.

An issue worth signalling is the lack in the Polish electoral law of possibility to appeal from certain decisions of the NEC. The Electoral Code establishes a clear system of appeal based on a hierarchy of bodies, providing, depending on the nature of the elections: the possibility of challenging the decision of the Circuit or Regional Electoral Commissions before the District Electoral Commission (Art.172 § 1 point 5 of the EC)[4], the arbitration of complaints against the activities of Circuit Electoral Commissions by the Regional or Territorial Electoral Commissions (Art. 175 § 1 point 4 and Art. 180 § 1 point 4)[5]; repealing by the electoral commissioner of the resolutions by the Territorial and District Electoral Commissions undertaken in violation of the law or the NEC guidelines (Art. 167 § 2 of the EC), and it places the examination of complaints against the activities of the District Electoral Commission and electoral commissioners among the duties of the National Electoral Commission (Art. 160 § 1 point 5 of the EC)[6]. Despite the formal completeness and transparency of the mode of filing appeals, it should be indicated that the Code does not provide for the admissibility of a means of appeal to the court against

[4] B. Banaszak, *Kodeks wyborczy. Komentarz*, Warsaw 2014, p. 301.

[5] A. Kisielewicz, *Art. 175; Art. 180,* [in:] *Kodeks wyborczy. Komentarz Lex*, eds. K.W. Czaplicki, A. Kisielewicz, J.S. Jaworski, F. Rymarz, B. Dauter, Warsaw 2014, pp. 426–428, 439–440.

[6] Idem, *Art. 160; Art. 167,* [in:] *Kodeks...*, pp. 384–390, 408–414.

certain decisions of the National Electoral Commission. The discussed issue should be examined closer, the more that the present legal status also raises concerns of the OSCE, which calls for the introduction of the right to appeal against all decisions by the central electoral body to the Code provisions – the lack of such possibility is assessed in the OSCE reports as a violation of Art. 77 par. 2 of the Constitution of the Republic of Poland, guaranteeing the judicial way of claiming violated rights and freedoms, and as a situation contrary to the commitments of the OSCE, including in particular the Copenhagen Document, par. 5.10, according to which everyone should have effective means of appeal against administrative decisions, which guarantees the respect for fundamental rights of the individual and an instrument to ensure the integrity of the system of law[7]. The central question in the light of the issue is whether the means of appeal against the findings of the NEC should apply automatically against all decisions regardless of their subject matter, or whether its admissibility should be conditional on the actual exhaustion of possibilities to claim rights and freedoms of the individual.

In the first place it should be noted that in the current legal status, the judicial review of the decisions of the National Electoral Commission is limited in principle to the possibility of appeal to the Supreme Court by the financial agent of the electoral committee against a decision by the NEC to reject the financial statements (Art. 145 § 1 of the EC) and the powers of the competent entities to challenge decisions by the NEC to refuse acceptance of a notice on the establishment of an electoral committee (in relation to the elections to the Sejm Art. 205 § 1, presidential elections Art. 300 § 1 and Art. 404 § 1 of the EC in relation to the local elections), or a submission of a candidate for the office of President of the Republic of Poland (Art. 304 § 6 of the EC).

It should be noted with approval that as a result of legislative actions taken in 2018 and in 2019, four subsequent regulations of the Code concerning the

[7] *The OSCE Report 2012*, p. 22; *The OSCE Needs Assessment Mission Report* 2015, p. 9; *The OSCE Report* 2016, p. 19. One should also recall the decisions of the Code of Good Practice which provide for the need to establish an effective system of appeal in electoral matters. What is worth emphasizing in the context of the discussed problem, the creators of the Code, allowing the possibility to hear appeals by specialized electoral commissions, stipulate that "the existence of a form of judicial review is desirable, so that, in the first instance an appeal should be considered by the commission of a higher level and the competent court is the second instance" (Section II 3.3. point 93 of the Code of Good Practice).

procedure of appealing from certain electoral acts are in force in a form that assures court proceedings in relation to the decisions of the National Electoral Commission, which were final prior to the amendments. According to the content of Art. 12 § 14 of the Electoral Code, determined by the Act of 15 June 2018 amending the Act – the Electoral Code and Certain Other Acts[8], for the decision of the National Electoral Commission in relation to the decision of the electoral commissioner regarding the division of the commune into permanent voting districts, a group of at least 15 voters has the right to lodge a complaint to the Supreme Administrative Court, within 3 days from the publication of the decision of the NEC. Art. 420 § 2 of the EC, concerning the examination by the National Electoral Commission of complaints about the decisions of the election commissioner regarding the division of the commune into electoral districts (and Art. 456 § 2, the same as to the merits, with regard to the elections to district councils) were also amended to equip the parties with the right to appeal the decisions of the National Electoral Commission to the Supreme Administrative Court. Last amendment referring to the discussed matters was established by the Act of 12 February 2019[9], which transformed the substance of Art. 218 § 2 of the EC. Given rule stated that the decision by the NEC rejecting the appeal against the refusal to register a list of candidates for deputies by the District Electoral Commission was final. According to the mentioned amendment, decision of NEC may be now appealed to the Supreme Court.

Among the provisions mentioned above, two had been submitted to the review of the Constitutional Court, and they had been recognized as non-compliant with the provisions of the Constitution of the Republic of Poland which contributed to the transformation of discussed rules. In the context of the above-posed question whether the admissibility of the judicial review of the decisions of the NEC is justified regardless of the case scope, particularly important is the Constitutional Court's judgment of 18 July 2012[10] which stated the non-compliance of Art. 218 § 2, second sentence of the Electoral Code on matters referred to in Art. 215 § 4 of the Act, with Art. 45 section 1 in con-

[8] Dz.U. 2018, item 1349.

[9] Dz.U. 2019, item 273.

[10] Constitutional Court's judgment of 18 July 2012, Ref. K14/12. The judgement was announced on 24 July 2012 in Dz.U. item 847.

nection with Art. 77 section 2 and in connection with Art. 99 section 1 and 2 of the Constitution of the Republic of Poland.

For the clarity of the arguments, a request to investigate compliance with the Basic Law, Art. 218 § 2 of the Electoral Code should be seen against the background of the whole Article 218[11]. That regulation in § 1 provided that the decision of the District Electoral Commission in the matters specified in Art. 215 § 3–5, Art. 216 § 2 and Art. 217 § 2 is delivered immediately to the person submitting the list of candidates for deputies, and pursuant to the wording of § 2, the decisions of the DEC mentioned in § 1 might be appealed against to the National Electoral Commission, the resolution of which was final and no other remedy was available. Therefore, the cited provisions provided for the possibility to appeal to the NEC in cases: 1) – when the District Electoral Commission refused to register the list in its entirety or concerning some of the candidates, if its submission was subject to other defects than the lack of the required number of correctly submitted signatures of voters, and the person submitting the list did not remove the defect within 3 days despite the notice [Art. 215 § 3 of EC]; 2) – if the District Electoral Commission decided to refuse to register the candidate because they did not hold the right to be elected [Art. 215 § 4 of EC]; 3) – if the District Electoral Commission refused to register a list in its entirety as a result of failure to remove within 3 days a defect of not meeting the condition of the percentage share of women and men on the election list[12]; 4) – if the refusal to register a district list was due to failure to complete the list of properly submitted signatures of voters supporting the submission of the list until 12.00 p.m. on the 40th day prior to the election day [Art. 216 § 2 in connection with Art. 216 § 1, and in connection with Art. 211 § 1 of the EC]; 5) – when the District Electoral Commission, on the basis of the proceedings conducted due to reasonable doubt as to the veracity of the data contained in the list of signatures, or the credibility of the signatures, refused to register the list of candidates for deputies because of failure to obtain the number of properly made signatures of voters required by the Code.

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[11] B. Dauter, *Art. 218,* [in:] *Komentarz...*, pp. 534–537; B. Banaszak, op.cit., pp. 384–389.

[12] According to Art. 211 (3) of the EC, referred to in the text of Art. 215 (5): "On the list of candidates: 1) the number of female candidates cannot be smaller than 35% of the total number of candidates on the list; 2) the number of male candidates cannot be smaller than 35% of the total number of candidates on the list.

According to the proposers, Art. 218 § 2, the second sentence of the Code breeched the constitutional right to claim violated rights and freedoms in court (in this case the right to be elected) in such a way that it didn't not provide for the possibility of appeal to a court against a negative decision of the NEC on the registration of a list of candidates for deputies[13]. As the pattern of the constitutionality review of the contested provision, Art. 99 section 1 and 2 was indicated in connection with Art. 45 section 1 and Art. 77 section 2 of the Constitution. It is worth noting here that while Art. 45 section 1 constitutes in a general way the right to a fair and public examination without any undue delay by an independent, impartial and independent court (right to a court), Art. 77 section 2 is a *lex specialis* with respect to it, stating that a statutory deprivation of individuals of the way to claim the violated rights and freedoms before a court is unacceptable. While the first of those provisions refers to the rights of every kind[14], including those regulated in the extra-constitutional regulations, Art. 77 section 2 prohibits depriving of the court decision regarding the rights and freedoms resulting from the Basic Law[15]. It should be noted that the Constitution does not exclude the possibility of introducing certain restrictions on the right to a court, as long as they do not result in excluding the power to claim the rights and freedoms of a constitutional nature and they do not breech the principle of proportionality, as expressed in Art. 3 section 3 of the Constitution, which formulates conditions of the introduction by the authorities of restrictions on the exercise of constitutional rights and freedoms. In this sense, Art. 77 section 2 of the Constitution provides – apart from Art. 31 section 3 – a determinant of permissible restrictions of the judicial proceedings, as the conditions of their introduction mentioned in Art. 31 section 3 also include the right to a court arising from the content of Art. 45 section 1 of the Basic Law. The conditions of the right to be elected to both chambers of the Parliament are determined in Art. 99

[13] Reasons for Judgment K 14/12, p. 62.

[14] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2009, p. 239; P. Sarnecki, *Art. 45,* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Warsaw 1999, pp. 1–2; D. Dudek, *Zasada ochrony wolności i praw człowieka,* [in:] *Zasady ustroju III Rzeczypospolitej Polskiej,* ed. D. Dudek, Warsaw 2009, pp. 108–111.

[15] Constitutional Court's judgment of 27 May 2008., Ref. 57/06, OTK ZU No. 4/A/2008, item 63. Differently: M. Haczkowska, *Art. 77,* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* ed. M. Haczkowska, Warsaw 2014, p. 171.

section 1 and 2 of the Constitution[16], hence the right to be elected – although not mentioned in the content of Chapter II for the systematics of the Basic Law – acting as a law of a constitutional nature – is protected under Art. 77 section 2 in connection with Art. 45 section 1[17].

The review objective of the Constitutional Court was to determine whether Art. 218 § 2, second sentence of the EC which didn't not provide for means of appeal against the decisions of the National Electoral Commission examining appeals against the decision of the District Commissions, directly affected the right to be elected. The analysis of the Code provisions, cited above [mentioned in Art. 218 § 1 of the EC], under which District Electoral Commissions take decisions which are appealed against to the NEC indicated that the violation of the constitutional right to a court occurs exclusively in the cases referred to in Art. 215 § 4, i.e. in cases in which the District Electoral Commission refused to register a candidate because they did not hold the right to be elected. Maintaining this position by the NEC whose decision was final, deprived the individual of the right to claim the constitutional right under Art. 99 section 1 and 2. For other cases, the pattern of review is not violated: it is not caused by the lack of an appeal against the decision of the NEC constituting an appeal against the refusal to register the district list because of non-removal on time the list defects other than the number of correctly made voter signatures or the identical legal status associated with the negative decision of the district commission because of failure to meet the parity condition. Also, the inability to appeal to a court against a decision of the NEC concerning the refusal to register a list due to the failure to complete the list with the required signatures in support of the list within the prescribed time, and the refusal as a result of the confirmation of reasonable doubt on the veracity of the data contained in the lists of signatures of voters, or the credibility of these signatures cannot be regarded as a violation of Art.45 section 1 in connection with Art. 77 section 2 of

[16] However, Art. 99 sections 1 and 2 – in addition to the merits expressed in the determination of the requirement for citizenship and age of the candidates for deputies and senators – has also a referring character, because it grants the right to be elected only to individuals who have the right to vote. Therefore, to determine the full content of the right to be elected, Art. 62 of the Constitution is essential as it formulates the conditions for the right to vote, Reasons for the CC Judgment 14/12: 64 and L. Garlicki, *Art. 99,* [in:] *Konstytucja Rzeczypospolitej...*, p. 2.

[17] Reasons for the Constitutional Court's Judgment 14/12, p. 63.

the Constitution – because they are not directly connected with a constitutional right to be elected, and only procedural issues arising from the provisions of the Act, decided by specialized electoral authorities.

Similar findings were the grounds for the Constitutional Court in its judgement of April 6, 2016[18] finding Art. 420 § 2, second sentence of the Electoral Code as non-complying with Art. 45 § 1 in connection with Art. 77 § 2 and Art. 165 § 2 of the Constitution of the Republic of Poland. In this case, the questioned provision was amended by the recalled Act of 15 June 2018 in a way ensuring appeal to the court against the decision of the National Electoral Commission. The same amendments as to the subject matter were made in relation to Art. 456 § 2 of the EC[19].

Nevertheless it should be indicated that still wide is the list of regulations which do not provide for a means of appeal against the decision of the NEC – the following ones need to be mentioned in particular: Art. 254 § 2 which regulates the procedure of appeals against decisions concerning arrangements for the distribution of the broadcasting time among electoral committees in order to disseminate their election programmes by public radio and television broadcasters[20], and equivalent in content: Art. 326 § 4 in respect to the presidential elections, and Art. 348 § 2 concerning the elections to the European Parliament[21]; Art. 405 § 2 which does not provide a means of appeal against decisions by the NEC on the appeal against the decision by the electoral commissioner who refused to accept a notice on the establishment of the electoral committee of an organization (or the electoral committee of voters)[22] at a provincial scale and Art. 432 § 2 which constructs the appeal procedure concerning the refusal to register a list of candidates for councillors in commune councils[23].

To summarize the above, a view should be expressed that the judicial review of the decisions of the National Electoral Commission should include all

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[18] Constitutional Court judgement of 6 April 2016, Ref. PS/14 (Dz.U. item 1232).

[19] Art. 456 of the EC, specifying the appeal mode, is applicable respectively in relation to the division of the province into constituencies, by virtue of Art. 463 § 2 of the EC.

[20] F. Rymarz, *Art. 254,* [in:] *Komentarz...*, p. 598.

[21] Idem, *Art. 326; Art.348,* [in:] *Komentarz...*, pp. 675–677, 703.

[22] B. Banaszak, *Kodeks wyborczy...*, p. 603.

[23] Ibidem, p. 633; B. Dauter, *Art.432,* [in:] *Komentarz...*, pp. 859–860.

these resolutions that shape the individual's legal position in the election procedure, in a real way exhausting the possibility to claim their rights and freedoms. In other cases, relating to matters of a technical nature relating to the election procedure, the authority and the experience of the central electoral body appear to be sufficient to take the final decision in the case. At the same time a positive assessment deserves the direction of the changes initiated by the amendments of January 11, 2018 and of June 15, 2018 and finally shaped by the Act of 12 February 2019.

III.

The definition of electoral agitation has been outlined broadly in Polish law: in accordance with Article 105 § 1 of the Electoral Code, electoral agitation should be considered as public inducement or encouragement to vote[24] in a certain way or to vote for a candidate from a particular electoral committee[25], while pursuant to the provisions of Article 107 § 1 of the Code, on the day of voting and 24 hours prior to it, conducting of agitation is prohibited. Article 115 § 1 of the Electoral Code is related to the above-mentioned provisions, and it states the prohibition to publicize the results of election polls 24 hours prior to the voting day and is binding until the voting completion [in the subsequent electoral laws shortening of this period can be observed[26]; similar are: Art. 498 and Art. 500 of the Electoral Code, penalizing violations of the above prohibitions.

The introduced restriction is aimed at implementing the principle of free elections by providing voters with the possibility of making a final decision

[24] According to the position expressed by the Supreme Court in the judgment of 18 February 1947 (Ref. K 2251/46), the public character of incitement can be referred to "when the thing happens in a place generally available for individually undefined persons in the conditions of the immediate possibility of gaining certain knowledge by these persons".

[25] A. Rakowska, *Formy i granice kampanii wyborczych według kodeksu wyborczego*, [in:] *Kodeks wyborczy. Wstępna ocena,* ed. K. Skotnicki, Warsaw 2011, p. 116.

[26] Ibidem, p.120. Said restriction concerns all forms of publicizing the results of surveys, including via the Internet, but only on the territory of the Republic of Poland, which is often used to publish surveys on foreign servers. It is emphasized that the ban on the publication of surveys is related to the fact that they are one of the stimuli affecting the most strongly the preferences of undecided voters, F. Rymarz, *Art. 107,* [in:] *Kodeks...*, p. 289.

regarding their voice disposal under conditions free from any form of propagating candidates or political programmes[27], calming the emotions connected with intense agitation, and additionally – as the doctrine of constitutional law emphasizes – it raises the importance of the election act itself[28], without disturbing it by the campaign carried out intensively until the last moment before closing of the polling stations[29]. It is also worth noting that electoral silence serves not only the voters, but also the entities striving for election, exhausted by a lasting many weeks campaign – it is a means of mitigating the tensions resulting from pre-election struggle of both parties of the electoral proceedings[30].

In regard to the electoral silence institution, in the current form, criticism has recently been formulated, questioning the legitimacy of its maintenance in the Polish legal order. The opponents of the electoral silence indicate that it has become a fictitious institution[31], impossible to implement, referring mainly to manifestations of campaigning on the Internet and the accompanying behavior of social network users[32] or leaving in the public space some electoral materials placed in it before the start of the election silence[33]. Among the arguments against the ban on agitation, there is also a reduction in the voter turnout due to lack of access to information and

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[27] B. Banaszak, op.cit., p. 185; M.M. Wiszowaty, *Instytucja ciszy wyborczej – geneza, regulacja prawna, ratio existendi,* „Studia wyborcze" 2012, No. 14, p. 7.

[28] A. Rakowska, op.cit., p. 123.

[29] It is worth pointing out that, according to the position of the National Electoral Commission, it does not constitute electoral agitation such an action as prompting to take part in the voting, without indicating specific candidates or electoral committees. See the explanation by the NEC of 27 September 207 regarding the campaign for the participation of voters carried out in the social media, ZPOW-557-/07.

[30] A. Frydrych, B. Michalak, M. Sobczyk, *Zagadnienia prawnej regulacji ciszy wyborczej i dopuszczalności prowadzenia w okresie ciszy wyborczej kampanii społecznej na rzecz podwyższenia frekwencji wyborczej,* [in:] *Prawo wyborcze. Analizy. Rekomendacje. Interpretacje,* ed. J. Zbieranek, Warsaw 2009, p. 19.

[31] M. Borski, *Granice agitacji wyborczej w kodeksie wyborczym,* [in:] *Aktualne problemy prawa wyborczego,* Zielona Góra 2015, p. 52.

[32] R. Balicki, *Cisza wyborcza to fikcja, ale gdy ją złamiesz, słono zapłacisz,* „Gazeta Wrocławska" (October 7, 2011), http://www.gazetawroclawska.pl/artykul/459486,cisza-wyborcza-to-fikcja-ale-gdy-ja-zlamiesz-slono zapłacisz,id,t.html (18.03.2019).

[33] M.M. Wiszowaty, op.cit., p. 28.

violation of the freedom of speech, press and media (the last of the recalled arguments against the election silence is not reflected in positions expressed by international organizations that uphold the observance of democratic ideas and the decisions of Constitutional Courts, expressing the opinion on the positive influence of electoral silence on the democratic character of electoral proceedings[34]. The last formalized disapproval of the issue in the course of legislative work was a bill amending the Electoral Code written by deputies from *Nowoczesna* party[35], assuming the abolition of the election silence and the ban on publishing polls on the day preceding the voting. In order to address reliably the proposed changes, it is reasonable to analyze the reasons for the submitted bill and the arguments raised by the movers. The authors of the bill have pointed out that the need to adopt an appropriate amendment to the electoral rules resulted from the need to adapt them to the contemporary shape of social and political relations, referring to the principles of conducting election and referendum campaigns, including deep changes in voter behavior caused by changes in the electoral process and development in technology. The movers distinguished several fundamental reasons justifying the lifting of the ban on agitation as early as 24 hours before the voting day.

First, according to the bill authors, the *ratio legis* of the electoral silence introduction has lost its relevance: this institution was introduced for the first time in reaction to the bad experiences of the Weimar Republic period to counteract the brutalization of the election campaign – in the opinion of the movers, the political life in modern Poland is far from the standards of that time, therefore, it is unjustified to maintain the institution introduced into the legal order in completely different realities[36].

It should be noted that this argument does not fully fit into the practice of electoral campaigning in relation to the Polish electoral and referendum proceedings – a negative campaign observed cyclically, characterized by aggres-

[34] G. Kryszeń, *Ramy czasowe kampanii wyborczej do parlamentu*, „Administracja Publiczna. Studia krajowe i międzynarodowe" 2006, No. 1, p. 11.

[35] Bill of 12 January 2016, Law... amending the Act – Electoral Code, the Act on the Local Referendum and the Act on the Nationwide Referendum, print No. 224/VIII term, hereinafter: Bill 224.

[36] Reasons for the Bill No. 224, p. 1.

sion and accumulation of bad emotions is contrary to the postulate of abolishing the election silence: it should rather be assumed that abolition of the ban on agitation on the day preceding the voting and on the election day would lead to an escalation of confrontational, aggressive and conflicting behavior in the conditions of the fight for votes until the last moment. It is also difficult to believe that the regulation objective has expired, because during the campaign physical violence is not manifested any longer (at least not universally) – the sense of introducing electoral silence was to extinguish the negative emotions accompanying agitation and this reason is still valid, especially in the light of a chaotic way of agitation and scarcely meeting any merits in favor of certain groups or candidates.

Second, the authors of the bill pointed to the inadequacy of the arguments presented by those supporters of maintaining the election silence, who cite the need to provide voters with the right to a rational and balanced decision who they will vote for: the public opinion polls cited by the movers show that concerning the parliamentary elections in 2011, only 12% of voters took then the final decision regarding their voice disposal, while in the presidential election of 2015–11%. In the opinion of the bill movers, this undermines the thesis that the electoral silence encourages a large group of voters to reflect on candidates and political programmes[37].

When analyzing the position, the question should be asked: what percentage of undecided voters who decide on the voting direction during the electoral silence period – using the extinction of an intense campaign – would the movers consider sufficient to maintain the ban on agitation in the period immediately preceding the election? According to the information provided by the National Electoral Commission presented before the parliamentary elections of 2015, 30,544,948 people were entitled to vote in those elections. The turnout amounted to 50.9% in the elections to the Sejm, which means that 15,595,335 voters took part in them. Referring to the percentage of the undecided (according to the estimations), quoted by the bill authors – and slightly underestimated by them, more than one and a half million of voters resolve their personal doubts about the way of voting during the election silence, and in the conditions of poor voter turnout it should be considered a large group.

[37] Ibidem, p. 2.

Third, a different character of the contemporary media was raised, including in particular electronic media, which have changed their image since the period of the election silence introduction in Poland (1989), when the mass media were unidirectional, allowing for a clear distinction between broadcasters – possible to be controlled for violation of the ban on agitation – and recipients of the media content. Nowadays, according to the authors of the bill, the border between the sender and the recipient gets blurred, which is clearly visible in the case of social networks and discussion forums on news portals – the relationship between public and private statements can be assessed in a similar way, which leads to the difficulty in a clear identification of a particular behavior as a violation of election silence and in punishing the perpetrator. This raises questions about the real boundary of the ban on agitation, unfavorable for building trust and respect for the State and its law and lowering the prestige of electoral proceedings[38]. Agreeing with the bill movers in the sense that violations of electoral silence on the Internet occur – although not in the mass range, as claimed by those concerned[39], and constitute a phenomenon difficult to identify from the viewpoint of identifying those responsible for the violations of the ban on agitation (it is worth emphasizing that the National Electoral Commission itself, clearly states that "the ban on conducting an election campaign during the so-called election silence also includes any activity on the Internet [...]", admitted at the same time that "it is not competent to issue opinions in this respect", and the assessment of possible violations of the ban on agitation "[...] will belong to the law enforcement bodies and courts", indicating thus, it does not have any effective means of action in the matters discussed)[40], a question should be asked whether violation of certain prohibitions by a very small percentage of the society, which is an expression of low political culture and weak legal awareness, constitutes a sufficient reason to liquidate the entire institution, especially in the conditions of a young democracy, where the election silence should lead to the construction of such values. Examples from some developed Western de-

[38] Ibidem.

[39] M. Bartoszewicz, *Kilka uwag o ciszy wyborczej,* [in:] *Aktualne problemy...,* p. 22.

[40] Explanation of the National Electoral Commission of 18 June 2010 on the so-called *"election silence",* http://pkw.gov.pl/wyjaśnienia-informacje-i-pisma-okolne-pkw-22827 (18.06.2019).

mocracies should be indicated, where the fact of occurrence of electoral law violations in the discussed area does not cause decriminalization of the negative behavior, but on the contrary – raises a resolute reaction manifested in adapting legal solutions to the development of information technologies[41]. In addition, it should be noted that in a significant number of cases related to the presentation of specific electoral content on the Internet, familiarization with them depends on the activity of the recipient, who decides whether they want to get acquainted with the form and content of the message[42] – in the light of the above-mentioned decision of the Supreme Court in 1947, it may be wondered whether, as a result of failure to meet the condition of directness, we have to deal with election agitation in such situations.

Fourth, the electoral silence in its current form was presented as an institution favouring groups holding power and controlling public media: as the bill movers emphasized, during the period of banning election campaigning, it is possible to present the achievements of the government camp in public broadcasters' programmes (e.g. in the form of accounts of the ceremonial receipt of specific investments, highlighting the good economic situation of the country, or even by promoting the value system associated with the group holding power), which the opposition is deprived of. Such actions are aimed at suggesting the undecided electorate the re-election of the ruling party, which violates the principle of equal access to the media of all participants in the electoral proceeding[43].

This postulate does not fully correspond to the reality either – the bill movers do not pay attention to the fact that currently voters have a much wider scope of information than in the period before the political breakthrough and in the first years immediately after it – commercial media are a counterweight to public broadcasters and – as practice proves it – very often, they constitute a source of content that remains in a strong opposition to the contents presented by the public media. Therefore, while accepting the position expressed

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[41] M.M. Wiszowaty, op.cit., p. 26. The author points to the French Committee on Polls, which prosecutes violations of the electoral law during the election silence in the area of "leaks" regarding support for certain candidates, including those from foreign media.

[42] A. Rakowska-Trela, *Długość kampanii wyborczej – znaczenie, obowiązująca regulacja, propozycje de lege ferenda"*, [in:] *Aktualne problemy...*, p. 339.

[43] Reasons for the Bill No. 224, p. 2.

by the bill movers that the practice of emphasizing the achievements of the camp in power occurs – it should be noted at the same time that public media are not the first source of information for masses of voters, and some of them contest them, and with the co-existence of numerous non-public broadcasters it does not allow for an uncritical acceptance of the fact that control of state-owned mass media has a significant impact on a significant increase in the chances of re-election of those who have ruled so far.

Fifth, it was emphasized that the institution of election silence does not appear in several European legal systems – often with long democratic traditions: in the United Kingdom, Ireland, Sweden, Denmark, Finland, Estonia, Belgium and the Netherlands. The ban on agitation in the period immediately preceding the voting and on the election day is also absent in the United States. The authors of the bill argued that despite this there are no objections as to the democratic nature of electoral proceedings in those countries[44].

This argument of the bill promoters can be easily reversed: is the democratic nature of electoral behavior expressed in the elimination of the election silence? Does the discussed limitation really reduce the right to conduct agitation freely, because it is forbidden to conduct it during the voting day and 24 hours before it? It seems that a long, several-dozen-day-lasting electoral campaign, whose timeframes are known to citizens in advance, allows to present fully the programmes of individual groups and profiles of candidates in such a way that – especially in the light of the constitutional principle of proportionality – one should not consider as a democratic character limitation of the election in the short period without the possibility of conducting agitation, which serves to extinguish the negative emotions often accompanying the campaign and to dispose quietly of their voice by the entitled. Just as a simple dependence cannot be derived from the existence of electoral silence as a prerequisite for guaranteeing free elections – although it may contribute to the realization of this value[45] – and similarly it is difficult to claim that the elimination of the ban on agitation is associated with the rise of democratic character of the elections.

Regarding the anticipated social consequences of the introduction of the proposed changes, the bill supporters expressed a view that the adoption of

[44] Ibidem, p. 3.

[45] M. Bartoszewicz, op.cit., p. 19.

the amendment to the Electoral Code in the discussed area would increase the electoral turnout by extending the period in which the undecided voters would receive the up-to-date information on groupings and candidates; it would increase citizens' interest in public affairs and raise a positive perception of the entire electoral process, as a result of eliminating negative social behavior on the Internet, lowering the seriousness and importance of elections[46].

It seems that this assumption of the bill authors is the easiest to refute – in my opinion the effects of the elimination of the electoral silence would turn out to be completely opposite to those intended by the bill movers. Conducting agitation until the last moments before the closure of polling stations, conducted in the conditions of an increasing chaos, rush (and as a result, a hardly substantive message) to encourage voting in a certain way, will not increase voters' interest in public affairs, and on the contrary – it will increase their fatigue with a long-term campaign, information noise, and will introduce an element of impatience, having a repulsive rather than encouraging effect. As to the increase in voter turnout, one may also wonder whether the group of undecided voters will be influenced by the agitation also on the day of voting – perhaps their indecision will deepen, due to the lack of a possibility of a balanced and calm consideration for whom to vote. In connection with the conclusions of the bill authors is the assessment of the postulated lifting of the ban on publishing surveys on the day preceding the voting: it seems that the ban on presenting the results of surveys should be maintained due to the fact that its liquidation will not only allow access to the information for the undecided but it will create specific election behavior: a conformist or negative voting, while any pathologies on the Internet referred to by the bill providers will remain – after all, the ban on the publication of polls should be maintained on the day of the voting.

IV.

The above observations lead to the conclusion that in relation to the problem of admissibility of court control in relation to the decisions of the National Electoral Commission – also the subject of interest of the Constitutional

[46] Reasons for the Bill No. 224, p. 4.

Court – it is necessary to postulate for the interested parties a possibility of challenging the decision of the NEC in those cases where constitutional rights and freedoms are restricted, and in technical matters expressed in meeting formal conditions, the final settlement should be left in the hands of a specialized, central electoral body. As regards the electoral silence, it should be stated that in the conditions of young democracies, with insufficiently developed and established legal culture, the abolition of the election silence – which, due to the long electoral campaign – is not particularly painful either for the political environment or for voters – can bring more harm than good and instead of contributing to the creation of the civic society through the increase in interest in participating in elections and referenda, will cause the manifestation of a negative agitation, characterized by emotions, in place of desirable high substantive level, which does not increase the importance of electoral proceedings. This does not mean that this institution should not be transformed toward adapting it to the standards of the present day, so that in some areas it would not just be a façade of law protection – eliminating of pathological behavior, lowering the rank of elections, especially with respect to violations of the ban on agitation on the Internet is a difficult task, but – as the experience of other countries shows – it is possible to undertake. The actions of the Polish legislator should be heading in this direction; the mere resignation from the electoral silence is not the optimal solution and will not lead to raising the democratic character of the elections.

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