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## ***Editorial Words***

*Dear Readers,*

In the final days of the old academic year, I am pleased to have been able to be the editor of the latest issue of ASEJ Scientific Journal of Bielsko-Biala School of Finance and Law. Running a publishing business is part of both the mission of running a university and the mission of every academic's job - these are standards that span the globe. As a senior scientist, I am pleased to see the number of scientific articles submitted by young scientists for both this issue and previous issues. The intellectual potential of young academics can be measured in many ways, but one of them is their prolificacy in the field of publishing, especially in respected and recognised journals such as ASEJ Scientific Journal of Bielsko-Biala School of Finance and Law. I hope that the articles published in this issue, covering both legal and economic issues, will be a contribution to further research and deliberation by the scientific world not only in Poland and Europe, but also in other corners of the world.

Addressing legal considerations of democracy is extremely important, especially in these times when the aggression of the Russian Federation against sovereign Ukraine could become a trigger for other conflicts or the growth of autocratic aspirations. Armed conflicts, such as the war in Ukraine, undoubtedly lead to the awakening of 'old demons' in every society. This is because the fear of war begins to stifle, in many cases, sober thinking about the development of the society in which one lives, lives or educates. Such times also generate a favourable atmosphere for the growth of systemic intentions other than democracy. Unfortunately, it is sad that expressions of democracy such as expressions of the power of the sovereign often only manifest themselves during general elections if other forms are forgotten or trivialised.

Increasingly, voices are being heard on the old continent that directly criticise the solidarity policy of the European Union or democracy as a system in which political options that are inconvenient for those in power can speak in public and sit in opposition in the parliaments of Europe and the world. Building a modern civilisation of peace based on prosperity and modern technological solutions and social constructs requires a strong will on the part of those in power not to succumb to peer pressure and their own ambition to rule forever.

Unfortunately, the standards that are currently being constructed within the exercise, or rather the execution and service of the public as democratically elected authorities, show that more and more those in power wish to choose paths of pressure, fear and support for their own - which goes against the basic principals of democracy as a form of system.

I therefore encourage everyone interested in legal issues to read this issue and to express their own thoughts within legal science, economics or politics and security. The pen can be a heavy weapon that has often changed the world!

*prof. dr Anzor Devadze*

*Editor of the ASEJ, Issue 3, Volume 26, 2022.*

# The importance of freedom of expression in a democratic state. Some reflections on the 25th anniversary of the 1997 Constitution of the Republic of Poland

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**Abstract**— This study is devoted to the analysis of the role that freedom of expression plays in a democratic state. At the beginning, the author puts forward the theses that: 1) freedom of expression can emerge and function only in democratic countries; 2) without freedom of expression, there can be no democracy; 3) freedom of expression is a value that forms other freedoms and rights; 4) freedom of expression is a guarantee of protection of other freedoms and rights; 5) freedom of expression is a condition for the realisation of political pluralism; 6) freedom of expression is a condition for the realisation of the principle of national sovereignty. The following part of this study is devoted to the verification of the above-mentioned theses.

**Keywords**— freedom of expression, democratic state, Constitution of the Republic of Poland.

## I. INTRODUCTION

For many years, both in philosophy and in legal science, justification has been sought for granting freedom of expression a special rank and stronger protection as compared to other freedoms and rights (Schauer F, 1982; judgment of the Constitutional Tribunal of 12.5.2008, SK 43/05, paragraph III.2.3). Among the main types of argumentation deployed, emphasis is put, among others, on the role that freedom of expression plays in the functioning of a democratic state (Sadurski, 1994; Sadurski 1992), that is in a state of pluralism of views and behaviour and tolerance, and - from a political viewpoint - a state in which political freedom and the rights of the individual are guaranteed as the moderating or limiting factors in relation to the behaviour of public authorities; a state in which every individual can develop freely, benefiting from the guarantees of the possibility of such development, with

monitoring institutions which supervise the realisation of individual freedoms and rights (Wyrzykowski 1998; Garlicki 2003; Banaszak 2009). In proceeding to analyse the interrelationship between freedom of expression and democracy, I pose the following theses:

- 1) freedom of expression can emerge and function only in democratic states,
- 2) without freedom of expression there can be no democracy,
- 3) freedom of expression is a constitutive value for other freedoms and rights,
- 4) freedom of expression is a guarantee for the protection of other freedoms and rights,
- 5) freedom of expression is a condition for the realisation of political pluralism,
- 6) freedom of expression is a condition for the realisation of the principle of national sovereignty. The following part of this study is devoted to verification of the above theses.

## II. NO DEMOCRACY WITHOUT FREEDOM OF EXPRESSION

Without freedom of expression there can be no democracy. The free exchange of views and information is the guarantee of the functioning of a democracy based on the free and consciously formed will of the community, and is a necessary condition for the development of civil society and the self-fulfilment of individuals (judgement of the Constitutional Tribunal of 5.5.2004, P 2/03; judgement of the Constitutional Tribunal of 23.3.2006, K 4/06; judgement of the Constitutional Tribunal of 11.10.2006, P 3/06). The freedom to freely present views, judgements and assessments - on the one hand - corresponds to the constitutional features of a democratic state (such as pluralism or the prohibition of discrimination) and, on



the other hand, correlates with the freedom to obtain information, which is not restricted to a specific type or kind of information, nor to any single source of information. Any restriction of the freedom of expression, consequently, constitutes an interference with a fundamental principle of a democratic state and, therefore, poses a danger to this type of state and all the features it entails (Szymanek 2007).

Freedom of expression is both a constitutive freedom of a democratic constitutional order and a freedom indispensable for the effective protection of individual rights. As a result, a system with a possible gap caused by the omission of freedom of expression would be an incomplete, ineffective and inefficient, and, consequently, also undemocratic as it would deviate from the model of state respecting the necessary minimum for the protection of human rights. Freedom of expression, therefore, is a fundamental freedom and at the same time it is dual in its own way, because it is directed to the individual and to the state - which, without due respect for this freedom, is nowadays regarded as either incompletely democratic or not democratic at all (Szymanek 2007).

### III. FREEDOM OF EXPRESSION AS A CONSTITUTIVE VALUE OF OTHER FREEDOMS AND RIGHTS

While freedom of expression - on the one hand - is a consequence and a precondition to freedom of thought, forming a guarantee for the freedom to externalise and communicate thought to other participants in social life (Jaskiernia 2008), it is - on the other hand - regarded as a precondition to or element of exercise of a number of further freedoms and rights. This primarily refers to those freedoms and rights that are implicitly contained in the discussed freedom, as well as to the so-called 'consequential freedoms and rights', i.e. those derived from freedom of expression and impossible to realise without guaranteeing the former. It is for this reason, among others, that freedom of expression is a constitutional value, and therefore also a freedom particularly protected against excessive (disproportionate) intervention by the legislator (Szymanek 2007).

By way of example, it may be pointed out that such human and civil freedoms as, in particular, the freedom of assembly, association (coalition), religious practice (freedom of public expression of religious, philosophical and ideological convictions) and the freedom of elections (the right to vote in public elections and the right to vote in referendums) cannot be realised without the freedom of expression, which lies, as it were, at their root. After all, the practice of religion is nothing other than externalisation of ideas of a particular kind. Just as assembly or association (political parties, associations) is a form of such externalisation. One consequence of the above situation are problems with qualifying violations of individual freedom. Some of them may be treated either as violations of freedom of conscience or as violations of freedom of expression. This is also the case with freedom of association and assembly (Łętowska 1997; Kamiński 2010; Sokolewicz 2011). Guarantees of freedom of expression are also necessary components of the right to a fair trial (prohibition of self-

incrimination, right to defence), the right to privacy (issues of correspondence), or the right to public information (Łętowska 1997).

As a result, freedom of expression interferes and overlaps with other freedoms and rights, while fulfilling a very important social function, whose core is dissemination of information and ideas on matters of public interest and concern, matters of public importance. This makes the freedom of expression a social freedom as it always operates *pro publico bono*, involving not only pluralism, the right to information or the right to participate in public life, but also the 'right to openness', and this has particular relevance to the sphere of politics or even, from a broader perspective, social engagement of the individual (Szymanek 2007).

The vital importance of freedom of expression for the realisation of many other freedoms and rights gives it, in the event of a conflict, priority over such other rights and freedoms and additional immunity from any restriction. Indeed, the consequence of restrictions on freedom of expression is an immediate, almost automatic restriction of other freedoms and rights, for example, those mentioned above (Sokolewicz 2011). Any restriction of the freedom of speech must not, as a consequence, limit other, 'lesser' freedoms (inherent in or derived from this freedom) or eliminate the citizen's right to reliable, objective information, free from any (including political, religious or, e.g., ideological) pressure. Indeed, the essence of freedom of expression, that - regardless of the type of restriction - cannot be violated or in any way questioned, is access to pluralistic information, and this constitutes a *conditio sine qua non* of the existence of a democratic state of law (Szymanek 2007).

### IV. FREEDOM OF EXPRESSION AS A GUARANTEE FOR THE PROTECTION OF OTHER FREEDOMS AND RIGHTS

Freedom of expression is also a freedom performing a specific guarantee function, meaning that it is one of the mechanism safeguarding all other freedoms and rights. Without freedom of expression, it would be difficult to effectively protect such human rights as freedom from torture and various forms of degrading treatment, the prohibition of slavery, the right to fair trial, freedom of conscience, social and cultural rights, etc. This is because freedom of speech, shaping the phenomenon of so-called public opinion, creates specific patterns of behaviour, attitudes and assessments which, considering the entirety of the relevant events and effects, promote pro-freedom standards of behaviour, on the one hand, by promoting freedoms and human rights and, on the other hand, by discrediting all possible manifestations of their infringement or at least limitation. This in turn means that a possible restriction of freedom of expression is (or in any case can be) not only a restriction of only one freedom (freedom of expression) or even of other freedoms (i.e. so-called consequential or derivative freedoms) but also - in certain situations - can be a restriction of a broader mechanism securing all other freedoms and rights (Szymanek 2007). Without adequate standards of freedom of expression, it is therefore

impossible to ensure the fundamental principles that are the foundations of a modern democratic state: the rule of law, pluralistic democracy and respect for human rights (Nowicki 1998). This means that the limitation of freedom of expression, especially in relation to the press and other mass media, must be subjected to a specific regime, which should prescribe an exceptionally 'cautious' limitation of this freedom, and therefore an exceptionally meticulous control of the reasons for such a limitation (Szymanek 2007).

#### V. FREEDOM OF EXPRESSION AS A CONDITION FOR THE REALISATION OF POLITICAL PLURALISM

The term 'political pluralism' can be understood in two ways. In a narrower, constitutional sense, pluralism refers strictly to political parties, which constitute a constitutionally indispensable component of a free and democratic legal order, synthetically defined by the formula of a democratic legal state (judgment of the Constitutional Tribunal of 8.3.2000, Pp 1/99). The multiplicity of freely operating parties is an important guarantee for the state to maintain its democratic character (Gebethner 2000). In a broader, extra-constitutional sense, political pluralism includes - along with political parties - also other, diverse forms of voluntary participation of citizens in the expression of their will; theoretically without pretending to influence state policy (Skrzydło ed., 2008; Gulczyński 1998). These will include associations, trade unions, employers' organisations, religious associations, foundations, etc. The possibility of their creation and operation provides the basis for the existence of a civil society that is tolerant of other programmes, views and ideas. Although political parties have a special status because of their functions in a parliamentary democracy, they are "only" one of many elements in the structure of public life. They are neither the only element, nor do they have a monopoly; moreover, they cannot restrict the activities of other structures of public life (Judgment of the Constitutional Tribunal of 27.5.2003, K 11/03; Sarnecki 2003).

Freedom of expression is a necessary prerequisite for the realisation of the principle of political pluralism. After all, as already mentioned, assembly or association (political parties, associations) is a form of externalising ideas, and therefore cannot be realised without the freedom of expression lying, originally, at its root (Lętowska 1997). Freedom of expression is therefore counted among the most important principles on the basis of which civil society exists, functions and develops. After all, the possibility of unfettered externalisation of diverse opinions and access to a wide range of information are basic conditions for building a democratic society.

On the one hand, the principle of political pluralism, by implying respect for minority views and the free circulation of ideas - both sympathetic to and alien to the majority - provides an additional guarantee for freedom of expression and creates an institutional framework for its implementation. Political pluralism thus provides an opportunity to reinforce, within decision-making processes, the point of view of wider social circles (Żukowski 2000). On the other hand, the limitations of the principle of political pluralism will also indirectly limit the

scope of freedom of expression. Indeed, an individual wishing to externalise ideas through political parties or other associations has to reckon with both *sui generis* restrictions on freedom of expression and restrictions on political pluralism. Thus, we are dealing in this case with a kind of accumulation of restrictions.

Acting within the framework of a democratic state and in a kind of association with that state, political parties, associations, trade unions, employers' organisations, religious associations, foundations, etc. are forced to comply with the law, which sets the boundaries of acceptable and constitutionally protected political pluralism. By way of example, it can be pointed out that extreme parties preaching intolerance, xenophobia, racism and anti-Semitism or resorting to violence in order to gain power or at least influence state policy are considered unacceptable in a democratic system (Jaskiernia 2003).

Moreover, political pluralism has its natural opponents, whose behaviour is not without significance to the extent of freedom of expression. These are, firstly, people who are so strongly attached to their political, ethical or world-views or who are so selfishly guarding their own interests (sometimes mystified and presented as national or even all-human) that they do not allow proponents of other views or interests to compete on equal terms (Winczorek 2006). In the second group of opponents of pluralism - less exposing their beliefs - we should include people who, in their perception of society, are inclined to downplay the importance of the differences occurring in it and overestimate the importance of factors uniting the society, as a matter of fact or assumption, in particular the national interest based on a solid foundation of national ethos. It is difficult not to notice that such an approach creates a climate conducive to restrictions on the rules of contemporary democracy and to the narrowing of the scope of freedom of expression for those with differing views (Sokolewicz 2007).

#### VI. FREEDOM OF EXPRESSION AS A CONDITION FOR THE IMPLEMENTATION OF THE PRINCIPLE OF NATIONAL SOVEREIGNTY

The concept of a democratic state immanently contains the principle of the supreme power of the people, which - only to emphasise its special constitutional significance - is expressed directly in the basic laws (Sokolewicz 2007). An analysis of the constitutions of modern democratic states leads to the conclusion that three basic consequences follow from the formula "power belongs to the people (nation)": the sovereign's right to appoint certain state organs, the sovereign's right to co-determination and the sovereign's right to express its opinion on the subject of the exercise of political power (Sobolewski 1971). It is *prima facie* apparent that none of the above-mentioned rights could be realised without freedom of expression.

The first-mentioned power of the sovereign is most often exhausted by the right to appoint representatives who make up the composition of the representative body, the parliament. Together with the act of appointing its representatives, the sovereign chooses a particular political orientation, presented in



the course of an election campaign by the political parties operating in a given country. It is through freedom of expression that the parties are able to present their programme and the sovereign can familiarise itself with it. Besides, the very act of voting is a kind of articulation of one's political sympathies, as is the fact of belonging to a particular party.

Model democracy, especially representative democracy, can be approached as the rule of public opinion. Candidates (political parties) participating in elections represent various opinions of the public. Their competition for seats reflects particular interests of different social groups. Political pluralism, after all, can be seen as a consequence of transferring the concept of economic liberalism to the field of politics - this way, the free 'market' of programme and personal proposals has complemented the free economic market, and the free competition of political parties has complemented the competition of economic actors (Muszyński 2002). The change of power in successive elections follows changes in the society's views and demonstrates the need to pursue previously undervalued interests. The clash of opposing opinions, while maintaining the free play of political forces, ensures cyclical renewal of the state government. Freedom of expression, therefore, fosters the process of identification of interests by citizens and their representatives, and supports the formation of correct relations between the governed and the governors.

The second of the sovereign's entitlements is the sovereign's participation in the process of state governance through the use of direct democracy institutions, such as the referendum or the popular initiative. It is freedom of expression that provides citizens with the information they need to participate in social debates and democratic governance. The very act of casting a vote in elections or referendums is an act of exercising this freedom.

The third-mentioned right of the sovereign applies equally to all state bodies and the acts and decisions they make. The condition and guarantee for its realisation is that the members of the collective subject making up the sovereign are guaranteed freedom of expression. This freedom, by creating the possibility of shaping, and at the same time, articulating public opinion about the authorities, their achievements and omissions, and the free exchange of views in a public forum, makes it possible to subject those in power to scrutiny and criticism in order to eliminate corruption and arbitrariness. This allows the sovereign to correct the irregularities of power (Sokolewicz 2011), which is aptly reflected in the words of Alexis de Tocqueville: '(...) her watchful eye can trace the secret springs of politics. She brings public personhood before the tribunal of opinion' (de Tocqueville 1976).

With freedom of expression, the governed can give vent to their frustration and dissatisfaction caused by the policies of those in power, e.g. in the form of protest marches, demonstrations, strikes, petitions and letters to government representatives. Of course, the aim of these actions is usually more than just 'shouting' resentment at those in power. The protesters are usually concerned with achieving tangible, material benefits, e.g. wage increases, fight against unemployment, a better healthcare system, minority rights, etc.

According to Wiesław Waclawczyk, however, the psychological aspect of such actions should not be underestimated, as verbal discharge of aggression often prevents physical violence. The nonchalance of those in power towards protesters may result in an escalation of conflict and consequences that are difficult to foresee. This observation seems to correspond to a fairly widespread belief that the desire to verbally discharge aggression is a natural human need, and therefore suppressing it may prove more dangerous to those in power than allowing people to publicly articulate their grievances, even in an aggressive form (Waclawczyk 2009).

The role of freedom of expression in the functioning of a democratic state, realising the principle of the sovereignty of the people, is therefore multifaceted. Firstly, freedom of expression fosters the process of identification of interests by citizens and their representatives, and supports the formation of correct relations between the governed and the governors. Secondly, freedom of expression provides citizens with the information they need to participate in societal debates and democratic governance. Thirdly, freedom of criticism allows those in power to be subjected to scrutiny in order to eliminate corruption and arbitrariness. The exercise of the sovereign's powers, derived from the principle of sovereignty of the people, is therefore only fully possible when the members of the collective sovereign can effectively exercise their freedom of expression. This was recognised by Alexis de Tocqueville when he wrote that: "The sovereignty of the people could never be realised without freedom of the press; on the contrary, preventive censorship and the popular vote were in conflict with each other to such an extent that they could not meet in the institutions of the same nation (Bladocha 2001).

These considerations are not without significance to the limits of freedom of expression. Any communication that refers to the emergence, composition or exercise of political power or which serves or involves the control of politicians and political institutions must enjoy the broadest possible protection. After all, as I have mentioned on several occasions, in a democratic society it must, first and foremost, be ensured that political discussion can take place broadly and openly, and any exceptions to this principle must be interpreted narrowly.

## VII. CONCLUSIONS

Certain authors question the relationship between freedom of expression and democracy by pointing out that:

- 1) freedom of expression guarantees (as mentioned above) also the freedom to express contents that are dysfunctional with regard to the axiology of democratic rule,
- 2) democracy allows the majority to establish - as long as the majority does so within the framework of formally democratic procedures - arbitrary restrictions on freedom of expression,
- 3) freedom of expression with politically indifferent (neutral) content or even politically involved content, but which does not assume a public character, is actually indifferent to democracy (Sokolewicz 2011).

The aforementioned objections have been subjected to

careful critical analysis in legal science. The first of the above-mentioned arguments stems from the desire to ensure comfort to the ruling elite. The second refers to a simplistic and today already anachronistic understanding of democracy as unlimited power of the current majority, ignoring the real complexity of democratic institutions and procedures. The third - ignores the fact that in the private sphere, freedom of expression is a manifestation of the autonomy of the individual and serves his or her development and self-realisation, which is of considerable importance from the point of view of the principles and values of a democratic state (Sokolewicz 2011).

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