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Changes in the Electoral Code and Their Impact on the Security of the Election The Origin for Discussion Based on Selected Comments

Abstract: After the local government elections in Poland in 2018, the adopted solutions aimed at increasing the security of the elections were reviewed. Some of the solutions adopted so far have been abandoned, such as transmissions from the polling station, while others have been minimized (the division of the precinct electoral commissions in the precinct electoral commission for voting in the region and the precinct electoral commission for determining the results of voting in the region). In public opinion polls, the National Electoral Commission achieved record of confidence.

Keywords: *elections, security of elections, National Electoral Commission*

Introduction

The act of January 5th, 2011 – Electoral Code (Journal of Laws 2011/21, item 112) is a reasonably new legal act (Grobicka-Madej, 2014, p. 51), that was introduced to substitute the 5 previously existing statutes (Kopcińska, 2017, p. 64): The act of September 27th, 1990 on Election of the President of The Republic of Poland, the act of July 16th, 1990 on Elections to Municipal and County Councils and Provincial Assemblies, the act of April 12th, 1990 on Elections to the Parliament and Senate, the act of June 20th, 2002 on Elections of mayors, town mayors and city mayors; the act of January 23rd, 2004 on Elections to the European Parliament.

The act has been amended several times (Bitner, 2018, p. 19). The legislator replaced both technical and organizational aspects of voting. The intention behind the changes was to improve the security of the elections in various aspects (Składowski, 2019, p. 10) – and

above all – in the intention of the authors of the amendment – to affect the elimination of election fraud and unauthorized influence on determining election results.

As it is provided, the need for the amendment's introduction resulted from the scandal – the crash of the IT electoral system during the previous local elections, the delays in providing official election results caused by it, as well as a great number of spoilt votes (Michalak, 2018, p. 79). Based on the information and analyses available thus far, a practical conclusion can be drawn that at least some elections (e.g. local elections at some levels) in the past years did not reflect the actual preferences of the constituents in some places (Śleszyński, 2015, p. 26).

The doctrine (Rychard, 2015, p. 7) indicated that the local elections of November 16th, 2014 became a vital signal indicating the state of Polish democracy and its practice of operation. The IT system crash, the delay of the announcement of the results, the high percentage of spoilt votes, and finally the discrepancy between the exit poll results and the official results, resulted in the state of distrust as to the security of the elections.

The most important changes in the Electoral Code took place on January 11th, 2018, when a large amendment of the regulations was adopted, among others Electoral Code (act on amending certain laws to increase the participation of citizens in the process of selecting, operating and controlling certain public bodies). These changes – mainly in the part concerning the model of the election administration in Poland – referred to a previous legislative initiative originating from the same political environment, namely to the parliamentary draft for Electoral Code amendment, that was received by the Parliament on August 7th, 2014 (Sokala, 2018, p. 324).

In intention, the next changes could have been divided into two categories. The first concerns material protection of the political will of citizens, in particular in the form of a cast vote and includes changes referring to the form and security of voting cards, technical equipment of polling stations, the mode of calculating votes (Kawarski, 2013, p. 143), etc. The second category refers to the organizational aspect, i.e. to electoral authorities and other electoral commissions, persons of trust (Skotnicki, 2018, p. 85), separation of electoral commissioners - at province and district election commissioners and allocation of appropriate powers, establishment of electoral officers etc. taking part in electoral procedures, e.g. changes with respect to the state system Election Commission and lower level committees (territorial and precinct electoral commissions), establishment of electoral officers (Pytel, 2018, p. 57), etc. Not all of the postulates have been implemented.

Amendments to the Law That Are to Ensure the Security of Elections

The free elections do not always guarantee the trust of the voters in the electoral procedure correctness, nonetheless the electoral procedure in which the numerous erroneousness occurred resulting in the election result, can still enjoy the voters' trust (Rulka & Wróblewski, 2018, p. 50). As explained in the explanatory memorandum of the amendment, in order to

secure the proper course of elections, the two-day elections were abolished „whereas the fact of conducting elections within 2 days increases the risk of irregularities, fraud and counterfeiting” (*Poselski projekt ustawy o zmianie niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych – uzasadnienie*, 2018, p. 82).

In the same way - by repealing certain provisions - the issues of postal voting were treated, but with the explanation that „correspondence voting significantly increases the risk of irregularities. Voters should cast their vote through an act of personal participation in the electoral process. The right to vote for persons who, for reasons beyond their control, will not be able to go to the polling station will be guaranteed by the institution of voting by a proxy” (*Poselski projekt ustawy o zmianie niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych – uzasadnienie*, 2018, p. 82).

As noted in the doctrine, the Constitutional Tribunal (judgement of the Constitutional Tribunal of July 14th, 2011, file reference number K 9/11) positively assessed the institution of proxy voting, it may however seem that the allegations of the petitioners for the security of the procedure are partially justified (Chrzanowski, 2018, p. 112).

In relation to the vote by a proxy, only moderate or severely disabled voters (Szwed, 2018, p. 28) are entitled to a person who ends 75 years at the latest on the day of the election.

A reservation on the change of electoral districts is foreseen. The change could take place due to the change of municipal boundaries, change in the number of municipal councilors elected, change in the number of inhabitants in the voting circuit. Such modification was intended to prevent future changes in electoral circuits that could be related to the existence of groups supporting specific electoral lists in a given area.

As it was explained: „improper preparation of voting cards and insufficient explanation of the voting procedure for voters during the 2014 local elections resulted in the fact that a very large number of votes cast in the elections proved to be invalid”. As a result, by means of a statutory provision, a pattern of voting cards was to be determined, and was supposed not to be the so-called booklet. It was primarily due to the increase of overvoted ballots that resulted in a significant increase of the total number of spoilt votes in the 2014 elections – in comparison to the previous elections of 2010 (*Nieważne głosy, ważny problem*, 2016, p. 9).

The doctrine has argued that in connection to the voters’ trust for the electoral procedure integrity, the most important stage is the stage of establishing the results of voting, as at this very stage the falsification is the easiest and the most erroneousness occurs (Rulka & Wróblewski, 2018, p. 51). Here one could object that these claims are not circumstantiated in detail.

The provision specifying the required number of members of the relevant electoral commission present in the premises during the voting was modified. The change consists in increasing the limit of committee members from at least 3 members of the commission to

at least 2/3 of its composition. The counting of votes should also take place in the presence of at least 2/3 of the full composition of the relevant regional commission.

For a higher transparency, a change has been designed consisting in the possibility of registration by the persons of trust in the activities of the district electoral commission. The provision prohibiting the provision of the mentioned materials for purposes other than for the purposes of proceedings before courts and prosecutors' offices was to be removed, however, this change ultimately did not gain acceptance in the course of legislative work.

The issue of transmission or registration from the polling station on the day of voting is described in great detail. Eventually, such a change was introduced into the legal system, but the position of the Inspector General for Personal Data Protection of April 11th, 2018 (Bielak-Jomaa, 2018), unambiguously critical of the possibility of transmitting at polling stations caused another change in the Electoral Code and removal of provisions regarding transmission from polling stations.

New electoral bodies were planned to be elected – district electoral commissioners in the number of over 300 – ultimately, no distinction was made between the electoral and provincial electoral commissioners, and the appointment of 100 electoral commissioners.

Persons of trust have gained the right to take part in all the activities of the commission to which they have been appointed (also before the vote).

Separation of a precinct electoral commission for voting in the precinct (the so-called daily committee) and the precinct electoral commission for determining the results of voting in the precinct (the so-called night committee) was also planned within electoral commissions. It was envisaged that the tasks of the first of them would be to conduct the vote in the precinct and to ensure, on the election day, that the electoral law was observed in the place and time of voting. In turn, the second task will include determination of results of voting in the precinct and making them public and sending results of voting to the appropriate electoral commission (*Poselski projekt ustawy o zmianie niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych – uzasadnienie*, 2018, p. 91-92). *Ratio legis* of this division relied on entrusting the vote-counting to a commission that is not wearied by at least 15 hours of work related to the preparation and conduct of the election in the circuit, because of which determining the results of voting should take less time (Michalak, 2018, p. 93).

In addition, electoral officials appointed by the Head of the National Electoral Office were to be appointed in each municipality. The scope of their task is primarily to ensure the smooth functioning of the precinct electoral commissions in particular: preparation and supervision – under the leadership of the electoral commissioner – of the election process in precinct electoral commissions, creating and updating a training system for members of the precinct electoral commissions, organizing and conducting training for members of the precinct electoral commissions, delivering voting cards to the appropriate electoral commissions, providing service and technical and material working conditions of the precinct electoral commissions (provision of Article 191e of the Electoral Code).

As part of the care for IT security, regulations have been introduced that make programming for electronic handling of activities in the electoral process referred to in Article 161 §1 of the Electoral Code, is created in accordance with the requirements set by the National Electoral Commission and under its supervision. To handle these activities, you can only use software for which property rights are only vested in the State Treasury, as well as technical devices for which property rights apply only to the State Treasury, local government units or entities subordinate to them. They must be located on the territory of the Republic of Poland and be at the exclusive disposal of the National Electoral Commission and the National Electoral Office. Furthermore, the creation and operation of software cannot be entrusted to external entities in relation to the National Electoral Office – see art. 162 §2 and §3 of the Electoral Code.

Finally, additional criminal provisions were introduced. The first of them – Article 497a assumes penalization of having or accepting a voting card outside the polling station and taking it out of the polling station by unauthorized persons. Regulation of this issue in the intention of the project promoters was to ensure that the existing situations of carrying out or holding cards for voting outside the electoral premises were avoided (Rulka, 2017, p. 67-68). It was decided that the act would be a crime, just like the act specified in art. 507 consisting in granting to the election committee or taking on its behalf non-monetary property benefits (Osowski & Wilk, 2016, p. 29) other than gratuitous services consisting in the distribution of posters and election flyers by individuals, assistance in office work provided by individuals, use of objects and equipment, including motor vehicles, provided free of charge by individuals, free of charge provision of advertising space for electoral materials by individuals who do not conduct business in the field of advertising. The first act was punishable by imprisonment up to 2 years, the second by a fine of 1000 to 100,000 PLN.

Two offenses have also been introduced. For opening without permission collective packaging or keeping these envelopes in any place outside the headquarters of a pre-election electoral commission or the seat of a competent higher-level electoral commission – Article 513c, and the offense of interfering with violence, unlawful threat or deception of persons acting under the provisions of the Electoral Code in their activities consisting in monitoring or documenting electoral procedures – art. 513b.

Security of Local Elections in 2018 in the Face of Normative Changes

The implementation of the provisions of the Act was started with the election of electoral commissioners. According to previous rules, the functions of electoral commissioners were performed by judges. After the amendment, electoral commissioners are appointed for a period of 5 years by the National Electoral Commission, at the request of the minister competent for internal affairs (Sokala, 2018, p. 48-49), among persons with higher legal

education and who guarantee proper performance of this function (Article 161 § 3 of the Electoral Code).

Selection of candidates for electoral commissioners was made by conducting an examination in the form of a test. The organizer, at the request of the Ministry of Interior and Administration, became the National Institute of Local Government.

The results obtained by the candidates were not made public and the minister presented the NEC with a list of candidates, usually containing one candidate, more than the number of places to be filled at individual delegations of the National Electoral Office.

After the election of the electoral commissioners and the commencement of their term, the search for volunteers to perform the function of electoral officials began. Two basic criteria have influenced the restriction of applications. An electoral official, as a rule, cannot live or work in the commune in which he is to perform activities. Such shaping of the regulations meant that in practice, due to the very small number of applicants, there was no possibility of real selection of candidates for electoral officers. Despite these observations, in the vast majority of cases the cooperation of electoral commissioners with electoral officials proceeded correctly, and electoral officials correctly performed the activities entrusted to them.

On the other hand, the reluctance on the part of local government officials caused the necessary changes in electoral precinct related to demography. In the so-called transitional period, i.e. until 1 January 2019, modification of the voting precinct belonged to municipal councils. Most often local government officers were not obliged to modify electoral precinct because of fear of protests from local communities (Stec, 2016), leaving the decision to the electoral commissioners.

In the peer discussions among electoral commissioners that took place on the occasion of the National Scientific and Training Conference titled “the law on local elections after the 2018 amendments”, Poznań, May 23rd, 2018 as well as the discussions that took place on the occasion of the lecture of prof. Waław Komarnicki combined with the celebration of the World Election Day, Toruń, February 7th, 2019, the first shortcomings of the adopted solutions had been identified.

During the voting itself, in the local government elections, the shortcomings of the adopted regulations were noticed. The legislator introduced the requirement that the ballot box be made in such a way that during the voting it was not possible to throw the cards into the ballot in a different way than through the hole designated for this and it was not possible to remove the cards from the ballot box before opening the ballot referred to in Article 71 § 1 of the Electoral Code, or the discharge of cards from the ballot box. Such a solution did not consider the necessity of opening an election ballot for random reasons. In the course of the local government elections in 2018, accidental throwing identity documents, car keys, electoral seals or even the stamp of the electoral commission into the ballot box did occur.

A more serious problem that was noted concerned the co-functioning of the precinct electoral commission for voting in the precinct and the precinct electoral commission for determining the results of voting in the precinct (Sokala, 2018, p. 49-52). In the intention

of the authors of the Act, the introduction of two committees was to seriously limit, if not eliminate even the hypothetical ability of submitting to collusion by the members of the precinct electoral commission in order to misrepresent the results of the vote. The very assumption was based on unacceptable premises, because the mechanism of selecting members of the electoral commissions provided for the selection of their members among the candidates nominated by the election committees and possibly additionally from the supplementary recruitment announced by the election commissioner if in the first situation the appointment of the full committee would not be possible. With this assumption, the allegation of potential fraud in determining the results of the vote would be justified only if each member of the commission would submit to collusion. Which would mean that in each of the election committees there was an incorrect selection of candidate for member of the electoral commissions. Such considerations seem unlikely, and the adoption of the discussed solutions was rather a fulfillment of political declarations.

Two major problems have been identified in the operation of two precinct electoral commissions. The first is the problem of imperfections in the transfer of the polling station and the ballot box. At this stage, there were multiple counting of voting cards, documentation of material and technical activities. If the number of voting cards in the ballot box did not correspond with the entries regarding the number of cards issued by the so-called daily committee, it caused confusion in the process of taking over duties between committees, which resulted in starting the counting of votes aimed at establishing the results of the voting beginning hours after the closure of the polling station.

The second identified problem consisted in the lack of communication between the two precinct electoral commissions, in particular regarding information on electoral incidents. The precinct electoral commission for determining the results of voting in the region documented their work with an appropriate protocol in which she had, among others, describe the reason, if there is a discrepancy between the number of ballots issued and the number of cards in the ballot box. The members of this committee did not participate in the work of the district electoral commission on voting in the circuit and could not know the reason for the discrepancy in the number of ballots issued and placed in the ballot box. Paradoxically, therefore, the existence of two precinct electoral commissions has created an opportunity for falsification in the electoral process, because hypothetically the collusion of the so-called daily electoral commission based, for example, on removing ballot papers from the ballot could be considered as explanatory, and it should be emphasized that in the municipal council elections in single-mandate electoral districts 1 vote was taken on taking up the seat, with a turnout even below 100 people.

However, the inconsistency of the number of issued ballots with the number of cards in the ballot box resulted usually from two reasons. In the polling station, the voter was given a vote for one card too much, as a result of tacking voting cards - this was indicated by the difference in only one category of voting cards from voting penalties to municipal councils, district councils, province parliaments and voits, mayor, president of the city.

The second reason for non-correspondence resulted from the attendance at the polling stations and related queues at the ballot box. It was observed that if two or more electoral commissions were located in one building, in the situation of a queue to the ballot box, some voters would cast votes to the ballot box of another electoral commission. Careful vetting of ballot papers allowed for the observation of this fact in the face of the disclosure of voting cards with the stamps of another electoral commission.

Despite the advanced procedure aimed at eliminating mistakes and the possibility of falsifying the results of the election, prosaic calculating errors occurred when the vote for a given candidate was calculated as a vote for his opponent.

In total, according to public opinion polls after the 2018 municipal elections, the activities of the National Electoral Commission are positively evaluated by over two-thirds (69%) of Poles. At the same time, only 2% of those who took part in the last local government elections considered the results of the election as unreliable (*CBOS: zaufanie do PKW w górę*, 2019).

Conclusions

High ratings of the National Electoral Commission's activities coincided with changes in the Electoral Code related to the upcoming elections to the European Parliament. The experience of local government elections in 2018 allowed for the formulation of assessments for existing solutions. First of all, it should be noted that no further solutions were introduced which would be justified by the need to ensure the security of the elections.

The rules for appointing precinct electoral commissions for holding the vote in the precinct and precinct electoral commissions for determining the results of voting in the precinct were modified, stating that such commissions will act only in elections to local government bodies, while in elections to the Parliament and the Senate, in the elections of the President of the Republic and in the elections to the European Parliament, only one precinct electoral commission will be appointed, which will both hold the vote and determine its results.

The changes made so far in the law can be assessed as aimed at introducing mechanisms that increase security (Czaplicki, 2017, p. 34) as to the reliability of determining election results. At the same time, some of the proposed changes were rightly modified (duality of the precinct electoral commissions) or removed (broadcasts from polling stations). The elections are always to be accompanied by the faith of the voters in the sense of the election act itself (Izdebski, 2018), also resulting in the trust in the electoral result (Kawala, 2012, p. 11-12, Rulka, 2016, p. 96). Creating the suggestions on possible election frauds, unsupported by any evidence, does not have a positive effect on building the social capital (Rakowska-Trela, 2018, p. 25). The current legal regulations are a possible compromise between the need to secure the safety of elections and the activation of those groups of voters who particularly react to such terms as „conspiracy” or „falsification”. At the present time, it seems unnecessary to introduce further proposals.

The results of observation of the voting in the local elections on October 21st, 2018, do not indicate that the elections on the national scale might have been fraudulently proceeded or that errors in the committees' functioning or organizational difficulties had any significant impact on the elections' result (Haman, 2019, p. 2).

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