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**Report from the 6<sup>th</sup> Scientific Round Table of the Constitutional Judiciary  
“Free and Fair Elections” November 25, 2022, Department of Constitutional Law  
of the Cardinal Stefan Wyszyński University in Warsaw**

On November 25, 2022, a scientific seminar – the 6<sup>th</sup> Constitutional Judiciary Roundtable – was held in Warsaw on the topic of “Free and Fair Elections”. The event was organised by the Department of Constitutional Law at Cardinal Stefan Wyszyński University in Warsaw. The three sessions concluded with a discussion, analysing the content and importance of free and fair elections in Poland. These topics are gaining importance, especially ahead of the elections scheduled for next years. Speakers and discussants drew attention to the role of courts and tribunals, this time in ensuring “Free and Fair Elections”.

Prof. M. Granat welcomed the guests, among whom were the President of the National Electoral Commission – judge S. Marciniak and S. J. Jaworski, the President of the NEC in 2009–2014. The moderator of the first session on the concept of free and fair elections was Dr. Hab. Katarzyna Kubuj, INP PAN. The papers were delivered by Dr. Hab. J. Flis, Prof. of the Jagiellonian University, titled “Challenges for the fairness of elections in Poland”, Dr. Hab. P. Laidler, Prof. UJ, titled “Free and Fair Elections in Anglo-Saxon Legal Culture”, att. Dr. M. Derlatka titled “The principle of free elections in the German Fundamental Law (does free mean reliable?)”.

J. Flis drew attention to the sensitive points as challenges to the fairness of elections in Poland. Pouring votes into ballot boxes is a bottom-up initiative, which is a small scale of abuse. It is very important to justify this behaviour, which is a sense of injustice. The speaker drew attention to irregularities in the counting of votes based on the 2014 examination of ballot papers. Moreover, electoral commissions in smaller units are smaller than in larger ones. The speaker raised the issues of demographic adjustment and practical aspects of the d’Hondt method. Another problem is coalition lists. The inter-party disproportionality index in the elections to the Sejm in 2019 was 6.6%, and in the Senate – 9.4%. The consequences

of preferential voting are most favourable to the losing candidates. The speaker outlined the issue of urban distortion or abuse of distribution power in the aspect of the Government Local Investment Fund. To sum up, the sensitive points are different and occur at different levels.

P. Laidler pointed out that concepts synonymous with free and fair elections appearing in the Anglo-Saxon doctrine include one man-one vote, although they do not fully reflect their essence. The concept of free and fair elections in Anglo-Saxon culture includes, for example, the election campaign that does not limit the participation of citizens, institutions supervising the course of elections and reporting expenses. In the US dimension, the racial aspect matters. There were factors of centralisation, with the organisation of elections being handled by individual states. The Voting Free Act of 1965 equalises electoral opportunities. Centralisation activities are aimed at strengthening the principle of free and fair elections. Constituency demarcation is defined in both the UK and the US. Another problem is ensuring equal access to the voting procedure. In the US, the Election Act came into force in April, requiring voters to show a photo ID, which can be problematic for the poorest. In 1962, the Supreme Court stated that it was not a political issue for judges to rule on changing electoral districts. The research results showed that the COVID-19 pandemic impacted the election result in the US Presidential election in 2020. Most postal voters supported the Democratic party (this is why the term “stolen elections” appeared on this occasion). In conclusion, according to the speaker, judges should not interfere in political matters.

M. Derlatka decided that the terms “reliable” and “honest” can be considered identical. The speaker drew attention to the restraint in using these terms in the constitutional texts. The reliability principle is related to the principle of political pluralism, which may justify its omission from the catalogue of electoral adjectives. The specificity of election reliability is that it refers to both legal and political rules. In the narrow sense – to the process of determining the election result; in the broader sense – to the functioning of the electoral system *sensu largo*. In the German doctrine, a special role is attributed to the principle of freedom of election (it was explicitly expressed in two articles of the Basic Law). It has been firmly established since the Weimar constitution. Some describe her as an “icon of the electoral process”. The Constitution does not indicate a separate premise for reliable elections. Although, as the Tribunal points out, voting must be free from coercion. In this context, there are doubts about the use of alternative voting procedures. The grounds for invalidating a vote in Germany may be that the voter enters the booth with a child who, if he loudly commented on how the parents cast their vote, would be grounds for invalidating the vote. The Tribunal found the use of electoral machines unconstitutional. All essential elements of the electoral procedure must be subject to public scrutiny.

The second panel was moderated by Prof. A. Młynarska-Sobaczewska (INP PAN). In this part, readings were given by: Dr. Hab. P. Uziębło, Prof. UG, titled “Legal Aspects of Election Campaigning in Social Media” and Dr. Hab. M. Bernaczyk, Prof. UWŕ titled “The

great absentees: on the role of the state in adapting the electoral system to the challenges of digital constitutionalism”.

P. Uziębło noticed that conducting the election campaign adapts to social and technological changes. The weight of the campaign is shifting to the Internet, including social media undergoing rapid transformation. They become the subject of interest of politicians. The speaker outlined the main problems. The speaker asked about the limits of freedom of speech and the beginning of the agitation. The election campaign, unlike agitation, has not been legally defined. According to the orator, the bans on agitation apply to social networking sites of public offices. However, from the perspective of social media, it is important whether a given profile has “public” or “private” settings. In the case of personal profiles, one can talk about the exchange of opinions between friends. Hence, this type of activity cannot be classified as agitation, and as a result – violation of electoral silence. Another problem concerns the publication of pre-election polls during the election silence period. The publication of such information, even in a veiled form, can influence a particular group’s electoral behaviour and negative results. Another problem is the publication of surveys on foreign portals, which entails incurring criminal liability by Polish citizens staying abroad and identifying the source of information (using VPN or Tor browser). The impact on the principle of free and fair elections should be considered through the prism of equal electoral opportunities.

M. Bernaczyk noted that the jurisprudence of the Constitutional Tribunal indicates that the legislator must set boundaries for the activities of actors in public life to ensure free and fair elections. The increasing degree of identification of the information source reduces the susceptibility of its recipient to manipulation. The feature of the “audience” cannot be considered in a physical, spatial way.

The proceedings of the third panel were chaired by Prof. A. Szmyt (UG). The papers were presented by Dr. Hab. G. Kuca, Prof. UJ, and Dr. M. Mistygacz (UW), titled “Judicial Electoral Procedures. Practical problems”, att. W. Hermeliński, retired judge of the Constitutional Tribunal – entitled “The Supreme Court and elections in Poland”, Dr. P. Chybalski (UKSW) titled “Constitutional courts and the principle of proportionality of elections”.

G. Kuca raised civil issues. M. Mistygacz – carnistic. One group of issues discussed by the speaker concerned substantive law issues, and the other – formal law issues of Art. 111 of the Electoral Code. According to the reporter, the proceedings should be public. The time limit for examining the application or complaint is instructional. Within this period, the judges set the date of the hearing, notify the participant in the proceedings, or just “set up the case”. The short time limit for examining a case prevents the application of other provisions of the Code of Civil Procedure. The substantive legal aspect concerns the qualification of the dissemination of information as “untrue”. According to M. Mistygacz, crimes related to elections should be regulated in the penal code, not in the electoral code.

W. Hermeliński outlined a broader scope of the Supreme Court’s tasks than just adjudicating on the validity of elections. P. Chybalski discussed the problem of dividing the country into 100 single-seat constituencies in elections to the Sejm into 100 single-mandate

constituencies against the Constitution as well as jurisprudence and constitutions of selected European states. The speaker is a supporter of constitutionalising legislative silence.

The whole discussion was summarised by judge S. Marciniak. The seminar was closed by Prof. M. Granat (UKSW). It was a successful scientific event, broadening the knowledge of the essence and guarantee of the principle of free and fair elections.