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Restrictions on the Right to Vote in the Pandemic during the Election of the President of the Republic of Poland in 2020

Abstract: In 2020, presidential elections were due to be conducted in Poland. Despite the COVID-19 pandemic, it was decided not to introduce a state of natural disaster and, as a consequence, postpone the elections but to execute them on the grounds of episodicact. On the basis of the first episodic law, from 6 April 2020, the elections did not take place because they were completely unprepared. This law had many flaws. The elections were to be purely postal, so voters had no possibility of choosing which method to use to vote. The law's entry into force on the eve of the election meant that voters were disoriented until the last minute and did not know how they could vote, whether they would receive election packages, where they would have to deliver return envelopes with a ballot paper and were not sure whether their vote would be counted. The second episodic law, of 2 June 2020, did not contain so many flaws, and voters in the country could decide for themselves which method to use. However, voting was very difficult abroad, and in 20 countries was not carried out at all. There were also only three days to submit election objections. However, above all, the lack of impartiality in the public media, especially public television, which supported the candidate promoted by the ruling majority, limited voters' right to access truth-based information on public matters, candidates and their political programmes. These circumstances prompt us to consider whether the presidential elections in Poland in 2020 met the constitutional requirement of universality, equality and secrecy, and whether they were reliable and fair. Do they therefore serve to legitimize the office of the president of the Republic of Poland?

Keywords: active election rights, elections, election campaign, election objections, postal voting, presidential elections

Introduction

In accordance with Article 127(2) of the Constitution of the Republic of Poland of 1997, in 2020 the term of office of President Andrzej Duda, elected in 2015, was coming to an end, and there was a need to order the election of a new president. Therefore, the marshal of the Sejm, pursuant to Article 128(2) of the Polish Constitution and Arts. 289(1) and 290 of the Electoral Code,¹ issued a decision on 5 February 2020 to order the election of the new president of the republic,² setting the election date for 10 May 2020 and specifying the electoral timetable. However, the SARS-CoV-2 virus, referred to as COVID-19, which causes an acute infectious disease of the respiratory system, soon reached Poland. This first led to the issuing of the Regulation of the Minister of Health of 13 March 2020 on the declaration of an epidemic emergency in the territory of the Republic of Poland,³ and a week later, of the Regulation of the Minister of Health of 20 March 2020 on the declaration of the state of an epidemic in the territory of the Republic of Poland,⁴ and the introduction of a lockdown. This made it obvious that the ordered presidential elections could not be held in the same way as they had been done in the past, i.e. under the Electoral Code Act of 5 January 2011. It was difficult or even impossible to conduct an election campaign, as well as also being understood that the vote could not take place on the election day under the current rules. This problem applied not only to the presidential elections but also to local elections, in the case of the necessity of supplementary elections to the decision-making body in a commune or filling the executive body of the commune in the event of the vacancy of the office of the commune head, mayor or city president.

In this situation, there were two possible solutions. As in some other countries, the first option consisted of the introduction of one of the states of emergency (a state of natural disaster or a state of emergency),⁵ which, according to Art. 228(7) of the Constitution, would automatically extend the term of office of the incumbent president and postpone the presidential and local elections until after the end of this state. In addition to political problems, due to the lack of precision in the regulations in the Constitution and the Electoral Code regarding such a situation, this would primarily give rise to a number of strictly legal complications, different depending on when

1 The Act of 5 January 2011 – Election Code, 'Journal of Laws' 2020, item 1319.

2 The Decision of the Marshal of the Sejm of the Republic of Poland of 5 February 2020 on ordering the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 184.

3 The Regulation of the Minister of Health of 13 March 2020 on the declaration of an epidemic threat in the territory of the Republic of Poland, 'Journal of Laws' 2020, item 433.

4 The Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland, 'Journal of Laws' 2020, item 491 with changes.

5 As happened for example in the Czech Republic. For details, see V. Jirásková, *Wybory w dobie koronawirusa – Republika Czeska*, 'Studia Wyborcze' 2021, vol. 31, pp. 17–34.

the state of emergency was ordered (e.g. whether the elections are continued or start again, or whether new candidates can be proposed). Despite this, such a decision for the introduction of a state of emergency was encouraged by parliamentary opposition parties as well as by the majority of representatives of the doctrine of constitutional law,⁶ because in order to eliminate the particular threat of COVID-19, a special measure had to be used, and the legislator in the Act of 18 April 2002 on the state of a natural disaster clearly links infectious diseases of people with the state of a natural disaster.⁷ The second approach was to look for another solution. In the case of presidential elections, this was to be a specifically episodic electoral law adopted to attempt to conduct this election, whereas in the case of local elections, it was necessary to withdraw them on the basis of other decisions. The ruling groups of the so-called united right (*zjednoczona prawica*) chose the latter solution, striving at all costs to hold presidential elections as soon as possible. The solutions introduced established a peculiar kind of parallel, unconstitutional state of emergency, the scope and nature of which can be equated with the state of emergency provided for in the Constitution. This state of affairs which is a manifestation of the circumvention of the provisions of the Constitution.⁸ They even used the argument that the suddenness of the event required them to act outside or in breach of the binding constitutional provisions, which, as was rightly emphasized in the literature on the subject, may be a source of a constitutional crisis.⁹ It should be remembered that this decision was viewed differently at the time, and it should be assessed differently in two years' time, when our experience of the pandemic is greater.

Under Article 102 of the Act of 16 April 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus,¹⁰ a number of provisions of the Electoral Code were suspended, including in particular the powers of the National Electoral Commission in terms of specifying a voting card template and ordering the printing of cards. This prevented the holding of elections by this permanent, central and highest electoral body competent in the matters of conducting elections and referenda, and which also performs very important tasks related to the study of the financing of political parties. By breaking a number of constitutional and statutory provisions in the Sejm, including those relating to, inter alia, consultations on draft

6 See P. Tuleja, *Pandemia COVID-19 a konstytucyjne stany nadzwyczajne*, 'Palestra' 2020, no. 9, p. 18; P. Bała, *Constitutional Failure. Regulacja stanów nadzwyczajnych i zbliżonych w Konstytucji RP z 2 kwietnia 1997 r. a praktyka ustrojowa zwalczania epidemii COVID-19/SARS-CoV-2*, 'Przegląd Konstytucyjny' 2020, no. 2, p. 69.

7 See 'Journal of Laws' 2017, item 1897.

8 L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2020, p. 461.

9 P. Radziejewicz, *Kryzys konstytucyjny i paradygmatyczna zmiana konstytucji*, 'Państwo i Prawo' 2020, no. 10, p. 6.

10 'Journal of Laws' 2020, item 695.

laws, the content of justifications and the dates of subsequent readings of drafts,¹¹ the Act of 6 April 2020 on the special rules for conducting general elections for the President of the Republic of Poland ordered in 2020¹² was first adopted, and then, when the elections on 10 May 2020 did not take place, there was adopted the Act of 2 June 2020 on the special rules for the organization of general elections for the President of the Republic of Poland ordered in 2020 with the possibility of postal voting.¹³ Even before the Act of 2 June 2020 was adopted, on 3 June 2020 the marshal of the Sejm issued a decision on ordering the election of the president,¹⁴ for which she set the date for 28 June 2020. The possibility of issuing this decision outside the deadline specified in Article 128(2) of the Constitution raises doubts as to the admissibility of its adoption, but the considerations of this subject are outside the subject of this study.

Both laws were thus passed during a period of so-called legislative silence, when no changes should be made to electoral law. However, the uniqueness of the situation due to the pandemic meant that, in our opinion, episodic electoral regulations could be established but had to be done in consultation with all the major parliamentary opposition groups; this was missing in this case, and the ruling majority unilaterally imposed its will without respecting the opinion of other political groups.¹⁵

The purpose of this study is to examine to what extent episodic presidential election laws adopted in 2020 influenced voters' ability to exercise their right to active participation, and thus to answer the question of to what extent the pandemic limited the possibility of active participation in the election of the president of the Republic of Poland. The research was conducted mostly on the basis of the legal-dogmatic method and partly on research methods appropriate for social sciences related to the observation of real phenomena of interference with the law.

1. The Stability of Electoral Law and Restrictions on Electoral Rights

In a democratic state ruled by law, the problem of the stability, durability and immutability of law is extremely important. This issue is crucial and desirable for the

11 For details, see P. Uziębło Jak nie stanowić prawa, czyli uwagi na marginesie procesu uchwalania ustawy z 6.04.2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r., 'e-Palestra' 2020, no. 17 (www.palestra.pl, accessed 02.07.2021); K. Skotnicki, Państwo prawa a tryb uchwalania w 2020 r. ustaw regulujących wybory Prezydenta RP, (in:) J. Ciapała and A. Pyrżyńska (eds.), Dylematy polskiego prawa wyborczego, Warsaw 2021, pp. 139–157.

12 'Journal of Laws' 2020, item 827.

13 'Journal of Laws' 2020, item 979.

14 The Decision of the Marshal of the Sejm of the Republic of Poland of 3 June 2020 on ordering the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 988.

15 See L. Garlicki, Europejskie standardy rzetelności wyborów (Komisja Wenecka i Europejski Trybunał Prawa Człowieka), 'Przegląd Konstytucyjny' 2020, no. 4, p. 156; K. Skotnicki, Państwo prawa, *op. cit.*, p. 143.

state, but perhaps above all for society. This is because it creates a sense of legal certainty for all entities in the state, both physical and legal, and likewise for all citizens, for whom this is a key situation which guarantees legal security and allows them to plan their activities in a calm manner.¹⁶ It means that a special value for the legal order is the fact that it is not subject to frequent changes, and if they are introduced, they are justified by socio-economic or systemic changes, including, first of all, the fact that the legal regulation in force does not meet, or at least does not fully fulfill, its functions, and second, that there are special circumstances or reasons which make it necessary. In a democratic state ruled by law, changes to the law should, therefore, be made extremely rarely, and only when necessary. Only in a country with stable law is the sense of the legal security of citizens, and their trust in the state and the law, fully developed. If there is no such stabilization, it results sooner or later in chaos in the legal system, which affects not only the legal system itself but also all other areas of life, while at the same time leading to the belief that the state is setting a kind of legislative trap.¹⁷ As a consequence, when work on a new law is being introduced or when it enters into force, instead of looking for its benefits, citizens wonder what the 'hidden meaning' or what the 'catch' is.

However, the stability of the law is understandably not an absolute value or an unwavering paradigm. It is therefore up to the legislator, on the one hand, to seek legal stability and, on the other, to respond to changing reality, situations and circumstances.¹⁸ The law cannot hinder political or socio-economic change.

The requirement of legal stability is particularly understandable in the area of election issues. In this matter, any change always raises doubts as to whether it is being made in order to correct the election results in a way which is most favourable to the governing majority at that time. Moreover, specific examples of changes in electoral law which were established solely for that particular purpose can be presented.¹⁹ It is for this reason that the Constitutional Tribunal, in the justification of the judgment of 3 November 2006 in case K 31/06, made an extensive analysis of the problem of *vacatio legis* in relation to changes in electoral law, recognizing that a specific *minimum minimorum* in the case of significant changes should be made at least six months before the next elections, 'understood not only as the voting act itself, but as all the activities covered by the so-called election timetable, and possible exceptions

16 See T. Biernat, Wprowadzenie, (in:) T. Biernat (ed.), *Stabilność prawa w kontekście wartości, instytucji i funkcjonowania systemu prawnego*, Kraków 2016, p. 9.

17 For details, see B. Stępień-Załuca, *Stabilność prawa. Zadanie na dziś czy na wczoraj?* 'Przegląd Prawa Publicznego' 2017, no. 12, pp. 9–22 (sip.lex.pl, accessed 01.07.2021).

18 *Ibidem*.

19 Examples include the change in the electoral system in the narrow sense in the Act on Electoral Regulations for the Sejm and the Senate in 2001, and the adoption of the Act of 6 September 2006 on the amendment of the Act on Electoral Regulations for commune councils, *powiat* councils and voivodship assemblies, which introduced the institution of blocking lists in local elections.

to such a defined dimension could only result from extraordinary objective circumstances.²⁰

Establishing so-called legislative silence is intended, however, not only to prevent the election result from being influenced but also in order to properly prepare for the elections and the act of voting, both by the voters and also by those who will stand as candidates. After all, they must not be surprised, for example, by other rules for submitting candidates, conducting and financing an election campaign, the size of constituencies, the place of voting, the possibility of voting in an alternative manner, changing the way the ballot card is formatted, etc. The introduction of such changes creates a restriction of voting rights for both voters and candidates, because they are confused as to when and how to proceed. And it is, inter alia, to prevent this that the particularity of electoral matters means that both in the Constitution and in the Rules of Procedure of the Sejm there are provisions which impede the procedure of adopting codes.²¹

As we have already emphasized, the specificity of the pandemic situation meant that the most appropriate solution was the introduction of one of the extraordinary states (a state of natural disaster or even a state of emergency). We do not believe that in this situation, during the period of legislative silence, it was not permissible, as many doctrine representatives claim, to enact changes to the election law or even to adopt an episodic act,²² although this should be done by a consensus of all major parliamentary political forces. However, the ruling majority has preferred political considerations over legal ones, which most clearly demonstrates the departure from the principle of a democratic rule of law. At the same time, it introduced an exceptional legal chaos, which meant that four days before the elections scheduled for 10 May 2020, the legal status on the basis of which they were to be held was not established. This was on the one hand because there was an election code in force in which some were excluded and made it impossible for the National Electoral Commission to hold elections, and on the other hand because work on the first of the episodic acts was still ongoing; the Act of 6 April 2020 on special rules for holding general elections for the President of the Republic of Poland ordered in 2020 entered into force only on 9 May 2020, i.e. a day before the scheduled election date.²³

20 See also A. Rakowska and K. Skotnicki, Kodeks wyborczy jako szansa na stabilizację prawa wyborczego, (in:) S.J. Jaworski and K.W. Czaplicki (eds.), *Księga pamiątkowa z okazji obchodów 20-lecia demokratycznych wyborów w Polsce*, Warsaw 2011, pp. 107–120.

21 For details, see *ibidem*, pp. 118–119.

22 See for example R. Piotrowski, *Opinia o ustawie z dnia 6 kwietnia 2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r.* (druk senacki nr 99), *Opinie i Ekspertyzy*, OE-292 (senat.gov.pl; accessed 03.07.2021).

23 For details on the chronology of the deepening of this chaos before 10 May 2020, see R. Balicki, *Głosowanie korespondencyjne w polskim porządku prawnym – zmienne dzieje regulacji*, (in:) J. Ciapała and A. Pyrzyńska (eds.), *Dylematy polskiego, op. cit.*, pp. 202–203.

Therefore, it is not surprising that voters and also presidential candidates were confused; as we discuss in more detail later, they not only did not know about the legal basis of elections, which was not necessarily so important to them, but above all did not know about the voting methods and locations. Moreover, it should be remembered that Article 20(2) of the Act provided for the possibility of changing the date of elections, which is, of course, constitutionally doubtful and additionally exacerbated disinformation. For many voters, this meant that their participation in the elections was becoming questionable, and they were generally confused about the elections scheduled for 10 May 2020, especially as politicians accused each other of breaking the law and of irregularities regarding the elections. The lack of legal certainty was thus obvious, which constitutes a breach of the principle of trust in the law and, more broadly, in the state.²⁴

The presidential election of 10 May 2020, as is known, did not take place, which is undoubtedly an unprecedented event. It was also surprising that the National Electoral Commission adopted a resolution that this was due to the lack of presidential candidates²⁵ (strange since, in the reduced circumstances of the pandemic, the candidates were conducting their election campaign all the time), and that during the preparations, many actions were taken (e.g. printing of voting cards and appropriate envelopes) without a legal basis, which exposed the state to multi-million Euro losses, as was confirmed by the inspection of the Supreme Audit Office.²⁶

Work was immediately undertaken on the new regulation for the procedure for holding the presidential elections in 2020, which resulted in the adoption of the second episodic act – the Act of 2 June 2020 on the special rules for the organization of general elections for the President of the Republic of Poland ordered in 2020 with the possibility of postal voting. During its adoption, a number of procedural shortcomings also occurred in the Sejm (e.g. the unacceptable shortening of deadlines for subsequent readings of the draft law), which despite smaller political disputes, but also the overtiredness of society with the pandemic, to some extent also undermined the trust of citizens in the state and the law, as well as limiting electoral rights.

24 See for example A. Domańska and M. Wrzałik, *Przejawy zasady (nie)uczciwości wyborów na przykładzie wyborów prezydenckich*, (in:) J. Ciapała and A. Pyrżyńska (eds.), *Dylematy polskiego*, *op. cit.*, pp. 114–115.

25 The Resolution of PKW No. 129/2020 of 10 May 2020 on the impossibility of voting for candidates in the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 967.

26 In the report, the prime minister and representatives of his chancellery, the Minister of Internal Affairs and Administration, the Minister of State Assets, the Polish Security Printing Works and the Polish Post were accused of violating the law. The Supreme Audit Office also notified the prosecutor's office about the possibility of committing a crime during the preparations for these elections. See 'Dziennik Gazeta Prawna', 13.05.2021 (accessed 03.07.2021) Due to the subject of the study, we leave these issues beyond discussion.

2. Restrictions on the Exercise of the Active Electoral Right

The first episodic law (of 6 April 2020) established only postal voting for the presidential elections in 2020. Thus this method of voting, regarded as alternative and complementary to traditional voting by the regional electoral commission,²⁷ became the only way in which it was possible to cast a vote. This fact alone gave rise to understandable opposition, as in this way the voter was deprived of the opportunity of choosing a method to vote. The problem was that the manner of organizing these elections provided for in this Act did not guarantee that the elections would conform to the constitutional principles of universality, equality, directness and secrecy, and that they would be fair and honest. This was pointed out not only by opposition politicians but also by most of the opinions prepared during the work on the draft, by state authorities (e.g. the Supreme Court and the Ombudsman) as well as by numerous representatives of the scholarly community. Most of the allegations made related to limiting or even depriving voters of the opportunity to vote.

The first fact to mention is that voters were not sure whether they would receive the election package²⁸ or whether it would arrive before the elections. This was due to the fact that it was to be delivered by the designated operator, Poczta Polska, to the voter's address as indicated in the voters' register, as ordinary mail and not as a registered letter (Article 3(1)). Voters were not only not sure that they would receive the package but also had no claim to be issued such a package, or could even ask for it to be sent to another address. Finally, they had no possibility of claiming that they had not received their package, and it is not difficult to imagine a situation where a postal worker, knowing or guessing someone's political preferences and having completely different views, would make the conscious decision to not deliver such a package; such cases are known in the world. Unfortunately, these mail-outs were not treated as registered or valuable, and there was no document confirming the delivery of such a package to the voter.

Voters staying abroad were in a much worse situation. The deadline for notifying the consulate of the intention to vote had expired before the Act entered into force (Article 7(1)), which means that they were not able to vote at all in elections conducted on the basis of this Act.

In the case of voting at the seat of the regional electoral commission, the state's task is, *inter alia*, guaranteeing voters the possibility of free and secret voting. The introduction of a purely postal method of voting during the presidential elections meant that ensuring the conditions necessary to vote in secret was entirely trans-

27 A. Jackiewicz, *Postal Voting and Voting by Proxy as an Alternative Voting Methods in the Light of the Electoral Code in Poland*, *Białostockie Studia Prawnicze* 2016, vol. 20/A, p. 263.

28 The election package, pursuant to Article 3(3) of the Act, included a return envelope, a voting card, an envelope for the voting card, an instruction for correspondence voting and a declaration of voting in person and in secret on the voting card.

ferred to the voter and did not depend on the will of the person voting in this way. Understandably, there was the risk of so-called family voting, which means that the dominant person in the family not only imposes on the other members of the family who they are to vote for but can also control whether they actually vote for them, or can even fill in ballot papers for them. The same restriction of the voter's right to vote could, moreover, occur not only in the family but, for example, in nursing homes or prisons. It is understandable that such a danger occurs in these kind of places during each election; however, the episodic act of 6 April 2020 facilitated such behaviour and thus exacerbated the threat, which meant that the results of the elections conducted in the established manner might not reflect the actual voters' will.

Confirmation of a personal and secret vote is sent back in a return envelope not only with a completed ballot paper but also a relevant signed declaration. The problem, however, is that the person imposing and controlling the content of the vote cast could check the filling and signing of such a declaration in exactly the same way, and thus its compliance with the truth became questionable. For many voters, the requirement that the voter must provide his or her PESEL²⁹ number next to their signature on their declaration of personal and secret voting, (Article 5(1)) could also be completely incomprehensible and also restrict the right to vote.

Another major restriction was the establishment in the law of 2 April 2020 that voters would vote by delivering their return envelope, with the envelope containing the ballot paper and the declaration of personal and secret voting, to a specially prepared mailbox designated by the specified postal operator in the area of the commune where they appear on the electoral register (Article 5(2)), or in the district in Warsaw where they appear on the electoral register (Article 5(3)). The Act does not specify such important issues as the number or location of such mailboxes in the commune, nor whether this is decided by the postal operator or another entity, nor, above all, how voters will be notified. In this situation, it was understandable that many voters would be so confused that they would give up participating in the elections, including because of the fear of being infected with the virus.

We consider it obvious that the apparent facilitation for the voter to hand over the return envelope for this special mailbox to another person (Article 5(2)) was a solution that violated the constitutional principle of direct elections, as, in addition, it did not guarantee that the envelope would actually be thrown into that mailbox, as was very likely if the person fulfilling the request knew or guessed the vote of the

29 The PESEL number is an eleven-digit numeric symbol that allows you to easily identify the person who has it. The PESEL number includes the date of birth, serial number, gender and a control number, available at: <https://www.gov.pl/web/gov/czym-jest-numer-pesel> (accessed 09.07.2020).

voter who asked them to do such a favour. It is also understood that the status of the 'other person' was legally absolutely unclear.³⁰

Finally, attention should be paid to the fact that these special mailboxes of the postal operator were not ballot boxes, and only the postal operator was supposed to deliver them to the commune electoral commission, which also limited the active voting right of the person entitled to vote as it did not guarantee that this would actually happen.³¹

The special situation that took place on 10 May 2020 meant that it was impossible to file election objections. This happened because Article 321 of the Electoral Code states that 'an objection against the election of the President of the Republic of Poland shall be submitted in writing to the Supreme Court not later than within 14 days from the date of publishing the results of the elections to the public by the National Electoral Commission'³². However, such results were not published, hence there could be no deadline for lodging an objection. Therefore, despite the obvious irregularities (such as no possibility of voting in the elections), it was impossible to lodge an election objection. Consequently, the Supreme Court did not rule on the validity of the elections because it could not rule on something that did not take place.

Along with the turmoil related to the elections ordered on 10 May 2020, it is also necessary to indicate an event that not only limited but even violated the rights of voters. This happened after the Minister of Digitization provided the Poczta Polska S.A. (Polish Post S.A.), upon its request, with personal data from the PESEL register of living Polish citizens who had reached the age of majority by 10 May 2020 and who resided in Poland. The minister referred to Article 99 of the Act of 16 April 2020 on specific support instruments in connection with the spread of SARS-CoV-2 virus. The Ombudsman intervening in this case referred to the Regulation of the European Parliament and of the Council (EU) 2016/679 of 27 April 2016,³³ according to which the processing of personal data is lawful only if it is necessary to fulfill the legal obligation imposed on the administrator or if processing is necessary to perform a task carried out in the public interest or in the exercise of official authority vested in the administrator. In these circumstances, this was not the case, as at the time of transfer-

30 This was very clearly pointed out by Dr. hab. Ryszard Piotrowski, Prof. UW, in the opinion presented during the work on the draft in the Senate. See *Opinia o ustawie z dnia 6 kwietnia 2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r.* (druk senacki nr 99), https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/5487/plik/oe_292.pdf (accessed 09.07.2020).

31 In this case, the Supreme Court pointed out, in an opinion sent to the Sejm during the work on the draft, that the role of the designated postal operator was unclear.

32 Państwowa Komisja Wyborcza.

33 Article 6(1)(e) of Regulation of the European Parliament and of the Council (EU) 2016/679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (general regulation on data protection).

ring the data, there was no statutory basis for the performance by Polish Post S.A. of the tasks related to the conduct of elections. This was confirmed in the judgment of the Provincial Administrative Court in Warsaw of 26 February 2021.³⁴

As we have already indicated, the election of the president on 10 May 2020 did not take place, and the episodic law of 6 April 2020 was derogated on 2 June 2020 by another episodic law – on special rules for the organization of general elections for the President of the Republic of Poland ordered in 2020 with the possibility of postal voting. The new law generally removed the limitations of the active electoral law envisaged by its predecessor. First of all, it returned to the solution in which the basic form of voting was voting at the offices of the regional election commission, while each voter was given the possibility of postal voting (Article 2(1)). Thus, the voter had a choice regarding the method of voting. There were, however, some limitations that seem understandable. This is because voters did not have the possibility of postal voting in the case of separate voting precincts established in health centres, nursing homes, student houses or dormitories, prisons and detention centres and the external departments of such centres, and in voting precincts established on Polish seagoing ships, as well as in the case of a voter with a disability being given a proxy vote (Article 2(2)). If voters opted for postal voting, they were free to choose the method of collecting the election package – in person from the commune office or by delivery via the postal operator – and returning the return envelope – by the postal operator, in person at the commune office or at the precinct electoral commission (Article 5(1–4)).³⁵

However, the threat of the SARS-CoV-2 virus meant that the legislator decided to limit the voting possibilities in the commune, or in part of it, as a result of a deteriorating situation in a given area. In such a case, the National Electoral Commission therefore acquired the power to order only postal voting for a given commune or part of it (Article 15(5)). In practice, this was the case in only two communes.³⁶

Under the second episodic act regulating the elections of the president, although to a lesser extent than in the case of its predecessor, the possibility of voting by voters residing abroad was also limited or even excluded. The Act stated directly in Article 2(3) that ‘Foreign postal voting shall not be conducted [...] in countries where there

34 Judgment of the Provincial Administrative Court in Warsaw of 26 February 2021, IV SA/Wa 1817/20.

35 L. Garlicki, *Polskie prawo konstytucyjne...*, *op. cit.*, p. 295.

36 These were the commune of Baranów in the Greater Poland voivodeship and the commune of Marklowice in the Śląskie voivodeship; Resolution of PKW No. 197/2020 of 19 June 2020 on ordering only correspondence voting in the Baranów commune in the election of the President of the Republic of Poland ordered on 28 June 2020, ‘Polish Monitor’ 2020, item 544, and Resolution of PKW No. 198/2020 of 19 June 2020 ordering the voting only by correspondence in the Marklowice commune in the election of the President of the Republic of Poland ordered on 28 June 2020, ‘Polish Monitor’ 2020, item 545.

is no organizational, technical or legal possibility to carry out voting in this form.' In practice, 169 election districts were created abroad,³⁷ which is significantly fewer than in 2015, when 229 such districts were created.³⁸ Moreover, in Article 2(4) it was established that 'Due to the epidemic situation in the receiving state, it is allowed to indicate the territorial jurisdiction of the consul of the districts where only postal voting is possible.' In the end, only 20 countries voted by post.³⁹

When presenting the limitations in the implementation of active election law during the presidential elections in 2020, we would like to draw attention to one more circumstance, namely the lack of integrity and neutrality of the public media, and most of all public television, in informing the public about candidates and their programmes. The candidate with the support of the ruling so-called united right (*zjednoczona prawica*) was strongly favoured. He was presented much more often than the other candidates and only in a positive way, whereas a number of different allegations were made against the other candidates and they were generally attacked. The more neutral non-public media was not able to compensate for this. Thus, voters' right to access truthful information on public matters, candidates and their political programmes was limited.⁴⁰ Even the Supreme Court noticed this, but in its decision of 3 August 2020 confirming the validity of the election of the president, it stated that 'unequal access of candidates to the mass media does not affect the validity of the election, as long as unimpeded (legally and in fact) media pluralism is ensured [...]' However, the violations of these standards signalled in public space and in election objections did not take a form in which the possibility of free choice would be limited.⁴¹ This might be regarded as a controversial assessment.

Finally, a significant limitation of the electoral law related to the presidential elections held in 2020 as broadly understood was the shortening in the second episodic act of the time limit for submitting election objections to three days from the date on which the election results were made public by the National Electoral Commission (Article 15(2)), when it is now 14 days (Article 321(1)). The shortening of this deadline, as well as the time for the examination of the objections by the Supreme Court, was dictated by the desire to close the entire election procedure, including the declaration of the validity of the elections before the end of the term of office of the

37 The Regulation of the Minister of Foreign Affairs of 8 June 2020 on the creation of voting precincts in the elections of the President of the Republic of Poland in 2020 for Polish citizens staying abroad, 'Journal of Laws' 2020, item 1014.

38 The Regulation of the Minister of Foreign Affairs of 27 March 2015 on the creation of voting precincts in the elections of the President of the Republic of Poland for Polish citizens residing abroad, 'Journal of Laws' 2015, item 471.

39 See R. Balicki, *Głosowanie korespondencyjne...*, *op. cit.*, p. 204.

40 A. Domańska and M. Wrzaliak, *Przejawy zasady*, *op. cit.*, p. 115 ff.

41 Resolution of the Supreme Court of 3 August 2020, I NSW 5890/20, OSNKN 2020/4/27.

incumbent president. However, this did not allow for proper submission and consideration of the objections.⁴²

Conclusions

The COVID-19 pandemic changed the world. Therefore, the presidential elections held in Poland in 2020 would have been best postponed, as in such a case, the Constitution provides for the possibility of introducing a state of natural disaster. The ruling majority, however, tried to carry the elections out, disregarding the existing threat to the health and life of citizens. For this purpose, it was decided to introduce the unknown into the Constitution, an epidemic state and a state of epidemic that are extraordinary states de facto, and to elect the president on the basis of an episodic law. However, the law's adoption faced serious difficulties and only came into force immediately before the election date of 10 May 2020. Voters were thus confused as to whether an election would take place and how they would be able to vote.

As Ryszard Balicki aptly wrote, 'The law did not, fortunately, become the basis for electoral process; we were not witnesses to the events when election packages would have been passed form passed would be passed on by someone unknown to someone unknown [...] However, an unprecedented event took place – the elections were not held on the scheduled date.'⁴³ The episodic act had many disadvantages, including the fact that it significantly limited the possibility of exercising an active electoral law. Establishing only postal voting during these elections deprived the voter of the possibility of choosing the voting method. Voters were also not sure whether they would receive a voting package at all, where they would have to hand over a return envelope with their vote, and finally whether their vote would reach the election commission and be counted. The burden of securing the secrecy of voting was also transferred to the voter, which posed the risk of pressure from other people, especially in so-called family voting when the dominant person in the family decides the content of the vote of all family members.

The failure to run the election resulted in constitutionally questionable elections on 28 June 2020; another episodic law was also adopted, on 2 June 2020, regulating their implementation. This did not have as many flaws as its predecessor and, above all, left voters the option of choosing how to vote – traditionally, at the officiesf the regional electoral commission, or by postal voting. Due to the increase in the number of infections, however, it was possible to introduce only postal voting in a commune or a part of it; in practice, this fortunately happened in only two communes. Signif-

42 Despite this, more than 5,800 objections were reported, which in the history of direct presidential elections is the second most significant number since the 1995 elections, when as many as 593,238 objections were reported.

43 See R. Balicki, *Głosowanie korespondencyjne...*, *op. cit.*, p. 203.

icantly, the time for submitting an electoral protest was also reduced, from fourteen to only three days, which made it much more difficult to decide whether to come forward. Under both episodic laws, the possibility for voters residing abroad to vote was also severely restricted or even ruled out.

Throughout the electoral period, finally, there was a lack of neutrality in the involvement of the public media, especially public television, in favour of a presidential candidate supported by the ruling so-called united right. The lack of a reliable message limited voters' right to access truthful information about public affairs, candidates and their political agendas.

All this suggests that the presidential elections in Poland in 2020 raise serious doubts about whether the constitutional requirements of universality, equality, secrecy and, above all, reliability and honesty were fulfilled and thus whether they served the legitimacy of the president of the Republic of Poland in his office.

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