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## **Conclusions and Recommendations (Not Only) *De Lege Ferenda* After the Crisis in the Polish Local Elections of 2014**

**Abstract:** The last local elections in Poland took place on 16th November 2014. The election ended in crisis due to collapse of the electronic system supporting the election. In this article the author claims that the crisis did not happen because of bad electoral law but rather as a result of bad management of the electoral process. The Polish electoral administration needs several reforms. First is a necessary reorganization of the National Electoral Office. Second is the evaluation of all procedures, laws and processes concerning organization of elections in Poland. Third, the electronic voting protocol should be given priority.

**Keywords:** local election in Poland, electoral code, electoral administration, Polish National Electoral Commission and National Electoral Office

**Słowa kluczowe:** kodeks wyborczy, administracja wyborcza, organizacja wyborów, Państwowa Komisja Wyborcza, Krajowe Biuro Wyborcze

### **1. Introduction**

The elections to the bodies of local government units in Poland, ordered as of 16 November 2014, ended with an unprecedented electoral crisis on the scale of the Third Republic. The failure of the election support system prevented the majority of territorial (municipal, local, district and voivodship) election commissions (TEC) from efficient collection of the results of voting from their subordinate district election commissions (DEC), and consequently from determination of the results of voting and elections of councillors to councils of communes, cities, counties and regional parliaments. As reported by the National Electoral Commission (NEC) during its subsequent press conferences<sup>1</sup>, the protocols generated from the

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1 Vide record of these conferences is available at the official YouTube channel of the NEC. See: <https://www.youtube.com/channel/UC0QkQmdh1jSuntKardYq-Tw> (accessed on: 30.12.2014).

IT system in the course of determination of the results of voting contained errors, and, due to the system's inefficiency, part of the territorial commissions was unable neither to verify the correctness of data flowing from the oblasts, nor to distribute the seats or even to print election protocols. Meanwhile, the media, widely reporting on IT problems, informed about distortions in election protocols or even falsified the results of the elections<sup>2</sup>. Consequently, the results of voting and elections in the area of many units were determined without the use of the dedicated IT support, but based on traditional solutions using spreadsheets or simply ordinary calculations. It obviously affected the prolongation of work of the members of election commissions, which, in the situation of great pressure from the media and politicians, deprived of efficient tools supporting the process of determination of the results of the elections, operated in very unfavourable conditions, which only increased the likelihood of further errors and mistakes, and finally only intensified the picture of the crisis.

The attitude of the National Electoral Commission and its administrative unit in the form of the headquarters of the National Electoral Office (NEO) did not make the matter easier, which, in the face of the obvious IT crisis, could not respond in time, delayed the issuance of new directives for election commissions, and constantly informed the public that the IT system was being improved and would be fully operational at any moment<sup>3</sup>, and consequently, could not manage the crisis situation neither in the organizational, nor in the communication way. All this only influenced the deepening of the picture of the crisis in the eyes of the public and started the wave of very strong, not always fully substantiated criticism against the NEO, and especially the NEC. As a result, the entire composition of the Commission, together with its secretary, who at the same time was the head of the NEO, handed their resignations on 1 December 2014. However, it did not solve, because it could not solve, the organizational and communicational inefficiency of the central election unit, revealed in the course of the local government elections. This issue is important because in 2015 two more elections, i.e. presidential and parliamentary, take place in Poland. They arouse much more interest and, as a matter of fact, they are much more significant politically, because they determine the future ruling and directions of the state policy for the coming years. It is these elections that determine the legitimacy of political power, which is crucial from the point of view of a democratic state of law.

2 Media revealed *inter alia* that in Szczecin, Krzysztof Woźniak won the elections for a president of that city, although he stood up in a different commune. See: W Szczecinie wygrał kandydat, którego nie było; <http://wiadomosci.wp.pl/kat,1342,title,W-Szczecinie-wygral-kandydat-ktorego-nie-bylo,wid,17043603,wiadomosc.html> (accessed on: 30.12.2014).

3 As an example, at the press conference on 17 November 2014 at 10 p.m., a judge Stanisław Zabłocki claimed that, according to information he received, a segment of information system responsible for printing protocols in elections for village mayors, mayors and presidents functioned properly. Whereas a still nonoperational module used in proportional elections to councils, was to obtain such efficiency in few hours.

Meanwhile, the failure of the IT system, organizational malfunction and imprecision of the NEO, as well as errors in the area of communication and supervisory policy of the NEC, resulted in undermined trust towards politicians, the media and citizens in the election authorities and, more broadly, the election procedures themselves. In the representative opinion poll carried out by the Public Opinion Research Center after the end of the second round of local government elections, the NEC was criticized by as many as two-thirds of Poles (63% of respondents), while only over one-fifth (22%) spoke positively about it. Despite the fact that in all social groups analysed by the Public Opinion Research Center majority of people negatively perceived the NEC's work, still, the highest percentage was recorded among people with the highest social status. The NEC's activity was very critically assessed by 76% of people with higher education, 77% of managers and specialists, 70% of people with income above PLN 1500 per person in the family and of employees of public institutions<sup>4</sup>. It means a spectacular bust of Poles' trust in election authorities, what is so dramatic due to the fact that so far they have enjoyed invariably high esteem, trust and opinion of independent and professional administration.

Despite the nationwide discussion, which started basically the day after the elections, concerning the reform of law and election institutions in Poland, so far neither a scientific analysis of the causes of the crisis, nor a more coherent and adequate vision of the necessary changes has emerged<sup>5</sup>. Unfortunately, most of the proposals, which in the first weeks after the election functioned in the media and political environment, were not comprehensive, overly focused on the codex layer, and often simply missed the point or even were politically conditioned. Meanwhile, the diagnosis must precede the treatment, and not vice versa. Preparation of any recovery plan requires in the first place to identify the causes of the situation and to formulate a detailed analysis of the problem. In this way, it will be possible to identify not only the areas of necessary changes, but also to offer concrete proposals for reforms. The main purpose of this article is to attempt to implement this postulate.

## **2. Bad management of the IT system implementation project**

The direct cause of the crisis was the failure of the election support IT system, and more specifically the system supporting the election commissions determining

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4 See: M. Feliksiak, *Opinie o działalności parlamentu, prezydenta i PKW*, "Komunikat z Badań CBOS" 2014, No. 169, p. 4 et seq.

5 Until completing this article (i.e. until 15 January 2015), there was no comprehensive analysis on causes of the existing crisis. Such an analysis (concerning however only the conduct of the election computerization process appeared on 31 March 2015, when the Supreme Audit Office directed to the National Electoral Office a post-audit address concerning using the State budget funds for providing IT services during municipal elections in 2014. Post-audit findings formulated by the SAO virtually in its entirety confirmed conclusions reached by the author of this article on the basis of the analysis conducted by himself.

the results of voting and the results of the elections called 'Election platform'. One of the most important functions of this system was to enable the district election commissions to introduce and verify, in terms of arithmetic correctness, the results of voting established by the commission while counting the ballots, and then to prepare the voting protocols (printing the paper version of them) in the oblast and transfer the results to the central system (sending data electronically), which was to be used by the higher-level commissions. On this basis, the TECs should in turn verify the correctness of determination of the results of voting by the DEC, establish the collective results of voting (arithmetic aggregation of votes established in subordinate district commissions) and, above all, the elections (i.e. transform the votes into the seats) in the area of municipality (municipal election commissions), city (urban election commissions), county (county election commissions) and voivodship (provincial election commissions), respectively. On the other hand, correctness of the TEC's arrangements was to be verified by the competent local election commissioners operating in their subordinate area as plenipotentiaries of the NEC<sup>6</sup>. It should be emphasised that this system was not used, and was never planned as such, as an electronic device for counting votes. In fact, these were and still are counted manually by the members of the DEC in Poland. The role of the system was, however, to eliminate possible accounting mistakes made by the commission, to prepare correct printouts of the protocols of voting and elections, and to send them to the central system.

Despite some difficulties and errors in generating voting protocols, the IT system essentially worked at the DEC level. The problems arose, however, from the TEC level, where, due to errors and distortions in the printouts of the forms (first they could not be printed), it was impossible to divide the seats between the election committees in the proportional elections. As a result, the TECs were unable to announce the complete election results. In the absence of protocols from the TEC, analogous verification and collective results of the elections could not be made by the provincial election commissioners (for the voivodship area) and the NEC (for the country area). The expectation of restoring the full efficiency of the system, which until the end did not achieve such efficiency, as well as the lack of preparation by the NEO of alternative tools supporting determination and verification of the results of the elections led to the situation where the disoriented territorial commissions were wasting their time, and in the end were forced to carry out the procedure of verification, summation and division of the seats, based on hastily prepared,

6 See § 3 of the resolution of the National Electoral Committee of 22 September 2014 on determining the conditions and manner of using electronic technology in elections to commune councils, poviats councils, voivodeship assemblies and councils of districts of the capital city of Warsaw, as well as in elections of village mayors, mayors and presidents of cities (M.P. poz. 903) [Official Gazette of the Republic of Poland, item 903].

often only on their own, traditional tools, such as spreadsheets, calculators, etc. Consequently, the process of determination and announcement of the results of the elections throughout the country lasted for a week.

Many critics of the NEC and the NEO saw the main reason for this failure in the contractor, claiming that it was a company without proper experience, with too little staff potential, employing students, and the criterion determining its victory was the low price. Errors were also alleged in the tender specification and the tender procedure itself. Not making assessment of neither the company's IT capabilities nor formal terms and conditions for the tender, it should be noted however that the terms of reference prepared by the NEO for the IT system made the price only valid at the level of 49%, while the rest of points was to be awarded for the preparation of preliminary projects of two system modules, including the most important, i.e. the election calculator for the DEC<sup>7</sup>. Moreover, this module essentially worked on the date of voting. It was a short time for completion of the entire system and, above all, not enough time for its post-production evaluation performed before the elections, first by internal testers and later by target users, that led to the failure (the tender was decided on 4 August 2014<sup>8</sup>). The mistake was found on the side of the IT project implementation management, already at its very beginning. Focusing on the formal aspect of tenders, the NEO completely missed the sphere of actual planning. No serious analysis of the risks in the project was carried out, the assumptions of the system or even the schedule for its implementation were not consulted with the branches and end users, and no contingency plan and replacement tools were prepared. The IT implementation project was poorly coordinated and supervised. The remarks made during its implementation were not always taken into account, and the defects were not repaired, probably due to time and personnel shortages. Also, the contractor received some key data too late, and protocol printouts were not audited at all<sup>9</sup>.

7 See: Specyfikacja istotnych warunków zamówienia na "Zaprojektowanie i wykonanie modułów do wyborów samorządowych 2014r. wraz z administrowaniem i utrzymaniem" of 11 July 2014 (KBWZP-3710-16/14), point XII, p. 6; <http://pkw.gov.pl/zamowienia-publiczne/zaprojektowanie-i-wykonanie-modulow-do-wyborow-samorzadowych-2014r.-wraz-z-administrowaniem-i-utrzymaniem.html> (accessed on: 30.12.2014).

8 See: Ogłoszenie o wyniku postępowania na "Zaprojektowanie i wykonanie modułów do wyborów samorządowych 2014r. wraz z administrowaniem i utrzymaniem" of 4 August 2014 (KBWZP-3710-16/14), <http://pkw.gov.pl/zamowienia-publiczne/zaprojektowanie-i-wykonanie-modulow-do-wyborow-samorzadowych-2014r.-wraz-z-administrowaniem-i-utrzymaniem.html> (accessed on: 30.12.2014).

9 Maciej Cetler, Vice-President of Nabino company, which co-created the system for election management, explained himself to journalists that 'information on municipal authorities (e.g. the council of Warsaw, assembly of Mazowieckie Voivodeship) to which election will take place in the given circuit, necessary to prepare software, Nabino received only on 15 October. He added that it had been only from this date that the company had been able to carry out reliable tests in terms of

What to do to avoid such situations in the future? First and foremost, the project management of the IT implementation should be approached professionally. It would be necessary to thoroughly review the NEO's IT resources (hardware, software, people, management), create a project team dealing with this only, and if necessary, also with the use of external experts and institutions, e.g. within the technical dialogue (competent state authorities, research institutes, the Polish Chamber of Information Technology and Telecommunications, companies from the IT industry, etc.), which would elaborate, with the active participation of end users of this system (primarily all the NEO's field branches and IT specialists in election commissions), substantive and IT assumptions (and therefore not only for the needs of a single election campaign) of the entire election IT system. Subsequently, this team should prepare the necessary tender specification, select a contractor, manage the implementation project of this system (in accordance with the project management methodologies, such as PRINCE2, developed for the needs of implementation of such complex tasks), coordinate the integration of this system, perform an ongoing evaluation and respond appropriately to occurring irregularities.

### **3. Lack of internal 'system reflection'**

Contingency plan is an important part of planning in every organization, in case of unforeseen situations. This is one of the foundations of modern management. Decision makers must understand that the more complex the organization and the dynamic environment, the greater the need to prepare such plans, as the likelihood of unexpected events increases. Such a plan must, therefore, specify alternative modes of action in case the relevant plan is unexpectedly disrupted or no longer suitable in changed conditions<sup>10</sup>. Analysing the minutes of the NEC's meetings revealed in 2014 owing to Mr. Przemysław Wipler<sup>11</sup>, it can be seen that nobody seriously considered the situation in which the elections could take place without IT support, even though the first serious signals of irregularities were already appearing. Moreover, they raised legitimate concerns of some members of the Commission. This is undoubtedly a supervisory mistake, but a non-situational one. Similar coordination and IT problems (although on a smaller scale and, due to extra minutes, solved on a regular basis) have already occurred in the past. The locations of a possible crisis would therefore be identified, if the irregularities occurring in the organization of the

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calculating election results. See: Przewodniczący Nabino. Wyjaśnienia firmy współtworzącej system do obsługi wyborów; <http://samorzad.pap.pl/depesza/szablon.depesza/dep/146232/> (accessed on: 30.12.2014).

10 R.W. Griffin, *Podstawy zarządzania organizacjami*, Warszawa 2004, pp. 223-224.

11 See: Ujawniamy protokoły PKW z 2014 roku; <http://www.wipler.pl/2014/11/ujawniamy-protokoły-pkw-z-2014-roku/> (accessed on: 30.12.2014).

IT support process in each elections were analysed seriously, such as: inappropriate coordination between the system integrator, which was the NEO, and the system contractors, failure to meet IT implementation schedules, lack of software audits, failure to react or disregarding by the decision-making centre of the problems signalled by the local branches of the NEO, etc.

So, here we are dealing with a serious general mistake regarding the issue, which, using the language of the system theory, can be identified as 'the lack of internal reflexivity'. This reflexivity, in the described case, should take the form of a constant, objective and professional analysis of both the election processes managed by the NEO and supervised by the NEC, as well as the modes of action and response of both institutions to the changing situation. The lack of both current and system evaluation of the election procedures applied led to the situation in which, in the face of the IT crisis, the right decision-makers did not have sufficient information enabling them to respond adequately and quickly to the crisis situation as well as to take actions aimed at long-term optimization of election process management.

In order to address such situations in the future, it is necessary to develop permanent procedures for evaluation and internal audit of the organization. It concerns the analysis of legal and IT 'instrumentation' of the both election administration and the institution itself, adaptation of its structure and employment to current tasks, identification of system 'bottlenecks' in the election process and, above all, the organizational analysis of various election and referendum actions. Such an idea should later contribute to the elimination of defective solutions and optimization of the existing ones, but above all, it must become a starting point for planning subsequent actions. The scope and continuity of these works must be handled by a specialized team of people with high analytical competences, preferably identified as a separate team in the NEO's structure at the central level. Such an analytical and legal team would be 'powered' by both information and analyses coming from the area. Therefore, this means the necessity to sensitize the branches to the matters of organizational efficiency assessment and the analysis of applicable law from the point of view of practice.

Regardless of the appointment of such an internal team, the NEO should cooperate with various specialized analytical institutions – both of the state nature, but primarily of the scientific and research nature – to continuously evaluate its activities and results. To that end, a permanent, working, interdisciplinary team (or thematic teams) should be established at the NEC/NEO, composed of high-class scientists, external experts familiar with the issues of election and referendum law, as well as election systems, modern methods of management and communication, who know the practical and organizational determinants of election processes in Poland and have IT knowledge (at least at the level of vision). On the one hand, this team would serve advisory and opinion-giving functions, and on the other – analytical and



scientific functions for the needs of the NEC/NEO<sup>12</sup>. It would be the role of a kind of external auditor, who would provide independent, scientific and, what is important, external views on election procedures. In this sense, it would be an important supplement and strengthening of the analytical team in the NEO. Moreover, it could deal with issues and problems that are not addressed directly by the NEC and the NEO or are not preferable by them to handle due to political or organizational reasons, and for which there are social expectations, such as pointing out future directions of changes in the electoral law, analysing the phenomenon of invalid votes, taking actions towards dissemination of knowledge about the elections and activation of society, etc.

However, the idea of establishing a similar research, analytical and educational agenda as a separate institution directly reporting to the NEC, is not new. Already in 2005, the idea of establishing the National Electoral Institute appeared. According to the assumptions of this project, the NEI would be an apolitical, permanent body that brings together the experts in the fields of law, political science, sociology, social psychology, pedagogy and administration. It would have its own legal personality, but the supervision over the Institute's activities would be carried out by the National Electoral Commission. Thus, a *sui generis* 'institutional triangle' would be created, under which two bodies would operate under the auspices of the NEC: the existing National Electoral Office (as a technical and administrative body) and the National Electoral Institute (as a research and education body). The new institution would conduct consultative and advisory activities for the needs of the NEC (but not only), extended with analytical, educational and information activities regarding comprehensive election issues<sup>13</sup>.

#### **4. Reform of the structure of the Polish electoral administration**

Another important aspect of the described crisis was slowness or even absence of decisions in the face of IT failure. Analysing the statements of the NEC's members, one could get the impression that they are not fully aware of the scale of irregularities and errors that occurred. As a result, reassuring messages that 'further errors were removed' and 'the system efficiency was restored' could not sound credible in a situation in which the TEC's members, surprised by such position of the NEC, still

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12 It should be noted here that such back-up facilities to a great extent already exist in the form of two Centres of Electoral Studies (research centers situated at the Faculties of Law of the Nicolaus Copernicus University in Torun and the University of Lodz). It is worth to take advantage of this potential, especially because it does not involve necessity to incur additional expenditures or introducing changes to the law.

13 See: J. Zbieranek, *Aktywizacja wyborcza obywateli. Propozycja powołania Państwowego Instytutu Wyborczego*, Warszawa 2005.



could not complete the procedure of verification and aggregation of the results of voting from the districts and, consequently, determine the results of the elections in their area and print out the appropriate protocols<sup>14</sup>. Without prejudging at this point whether the contractor or the NEO's election IT team was guilty, undoubtedly, the responsibility for this disinformation, which only deepened the scale and duration of the crisis and was to cause huge losses of a reputational nature for the NEC, and more broadly, undermined the public trust in the election institution and election procedures applied in Poland, resulted from incorrect information flow on the contractor's line – the NEO's election IT team – the NEO's field branches – the NEO's managers – the NEC's members. The persons managing and coordinating the IT implementation project bear direct responsibility for this state of affairs.

False image of the situation, lack of evaluation of previous actions and drawing conclusions from organizational and IT errors found, failure to use managerial tools, non-responsiveness during the crisis and incorrect communication policy, both internal and external, led to the decision-making paralysis and, as a consequence, to the resignation of the entire composition of the NEC and the head of the NEO. However, the honest attitude of the decision makers did not solve any of the systemic problems. The analysis of the crisis shows that the organization of the IT implementation project and information flow within the NEO failed most of all. For this reason, already during its course, some experts pointed out that the competences and the very nature of institutions, such as the NEC and the NEO, should be separated. The first one, however, is the guardian of the correctness of the election process, while the other one is responsible for the organization of the elections, and mistakes were made there<sup>15</sup>. Similar conclusions were formulated during the expert seminar organized by the Stefan Batory Foundation in Warsaw<sup>16</sup>. In the material prepared after this meeting, it was pointed out that in the current legal state, the NEC is responsible for the performance of the most important tasks related to the

14 Before 6 a.m. on 18 November 2014, the NEC informed media, referring to information from the software executor and an official responsible for providing IT services during the elections at NEO, that: 'the IT system of the National Electoral Commission has reached the full efficiency'. Whereas, in many places, instead of fully generating protocols, the system printed only a partially completed template, where a document ready to be signed should have appeared. See: PKW zapewnia: System działa w pełni; [http://www.rmfm24.pl/raport-samorzad-2014/news/news-pkw-zapewnia-system-dziala-w-pelni,nId,1553665utm\\_source=paste&utm\\_medium=paste&utm\\_campaign=chrome](http://www.rmfm24.pl/raport-samorzad-2014/news/news-pkw-zapewnia-system-dziala-w-pelni,nId,1553665utm_source=paste&utm_medium=paste&utm_campaign=chrome) (accessed on: 09.01.2015).

15 See: an utterance of Anna Materska-Sosnowska, a political scientist, to Onet portal: P. Henzel, Dr Materska-Sosnowska: ruszyła lawina, to największy kryzys od 1989 roku; <http://wiadomosci.onet.pl/tylko-w-onecie/dr-materska-sosnowska-ruszy-la-lawina-to-najwiekszy-kryzys-od-1989-roku/ec33p> (accessed on: 28.12.2014).

16 Information obtained through the author's participating observation in a seminar organized by the Stefan Batory Foundation in Warsaw on 8 December 2014 titled: *Elections: credibility and efficiency*.

elections, while the organizational, administrative, financial and technical conditions associated with the organization and holding of elections and referenda, is the domain of the NEO<sup>17</sup>. Therefore, the office is the institution supporting the NEC, but it is not directly responsible for such key organizational areas as: provision of IT software<sup>18</sup> or determination of results of elections, even if in practice it coordinates all related activities<sup>19</sup>.

It seems that in the face of errors in the decision-making process and ineffectiveness of supervision over the NEO, while at the same time placing the legal responsibility on the NEC for the correctness of the elections, serious consideration should be given to changing the relationship between these institutions. It would be even indispensable if it was decided to establish – as described in the previous section – the National Election Institute. This, of course, requires a code change, but firstly we should consider what nature the election administration would get in Poland.

Source literature contains many classifications of the election administration organization models in modern democratic countries. However, one should agree with Andrzej Sokala that the most clear division was distinguished on the basis of its independence criterion. In this sense, one can distinguish the governmental election administration (such a model can be found, among others, in Austria, Belgium, the Czech Republic, Denmark, Germany, Sweden, Italy and Great Britain), the administration completely independent of the government (it exists in Poland and in almost all Eastern European countries), as well as a mixed model, combining features of both (including France, Spain, Portugal, Slovakia and Hungary)<sup>20</sup>. The model of independent election administration adopted in our country (and in almost all countries with a similar history), is quite obvious in the light of the experience of a bygone era and the distrust of citizens in the state organs, understood in this context<sup>21</sup>. Moreover, this model has worked well over the last 20 years, and the crisis associated with a single election should not obscure this fact. It should be clearly stressed that the judging panel of senior election authorities (including, above all, the NEC) guarantees objectivity and independence from all kinds of political pressure. In this situation, the ideas to politicize or more ‘sensitize’ the composition of these bodies to political factors should be considered a step back. All the more that since 2002 the

17 See: Article 187 of the act of 5 January 2011 Electoral Code (Dz.U. z 2011 r. Nr 21, poz. 112 z późn. zm.) [Journal of Laws of 2011 No. 21 item 112 as amended].

18 Article 162 § 2 of the Electoral Code. An obligation to determine conditions and manners of using electronic technology and ensuring necessary software to do so, is imposed on the NEC.

19 See: D. Sześciło, Jakich zmian potrzebuje Państwowa Komisja Wyborcza I Krajowe Biuro Wyborcze?, a paper presented for the seminar organized by the Stefan Batory Foundation in Warsaw on 8 December 2014 titled: *Elections: credibility and efficiency*.

20 A. Sokala, Administracja wyborcza w obowiązującym prawie polskim, Toruń 2010, pp. 42-43.

21 *Ibidem*, p. 154.

level of distrust of Poles in political institutions and governmental administration is still high, especially in relation to political parties<sup>22</sup>.

Without negating the assumptions of the model itself, one can, and the past crisis has shown that one needs, to think about the disadvantages of its internal structure. First of all, it should be reformed in such a way as to clearly place the responsibility of specific bodies for the tasks they actually perform and organize the decision-making path. To this end, we should first identify the main categories of tasks that the election bodies face, and then assign them, along with competences and responsibilities, to the appropriate structures to implement them later.

In principle, we can distinguish the following categories of tasks: supervision over compliance with electoral law, organization of elections, election audit, information and education about elections, as well as policy financing control. Issues related to the organization of the elections (including their planning, implementation, coordination of activities of other entities, election informatics, etc.) should be the exclusive domain of the National Electoral Office. Its head could not be so much the executive body of the NEC, but a kind of 'executive power' of the election body.

It also means the need to separate the functions of the head of the NEO and the secretary of the NEC. On the one hand, it would eliminate the possibility of excessive dependence or even domination of the NEC by the NEO, and on the other, it would allow the Office to be fully independent (but also to bear legal responsibility) in terms of the organization of the elections. In this model, the NEO thus becomes a separate, specialized institution dealing exclusively with preparation and implementation of the technical side of the elections. The NEC would be 'separated' institutionally, although not functionally from the NEO. Its role would be to exercise supervision over compliance with electoral law by both the NEO and all public authorities, election committees, and citizens. It would also retain the right to settle disputes and to interpret electoral law. The Commission should also be responsible for the entire normative matter (passing binding guidelines, designing and giving opinions on normative acts related to elections and referenda, etc.) It could also act as a kind of court in election matters and be the highest instance of appeal against decisions of lower-level election commissions that should be directly subject to it. It should be also the addressee of all audits, analyses and inspections performed in relation to any state bodies involved in the election process, in particular the NEO. On this basis, it should later present its recommendations for future. The NEC would therefore retain its own judicial and independent character, as well as the current mode of creation, possibly with the exception of the implementation of the principle of membership cadential rotation.

One can choose one of two options in relation to other tasks. Establish a separate institution, as in the project envisaging the creation of the National Election Institute,

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22 Zob. A. Cybulska, *Zaufanie społeczne*, "Komunikat z Badań CBOS" 2012, No. 33, p. 15.

with a similar or analogous status to the NEO, which would be responsible for the matters of information and election education. It would also act as a specialized, and most importantly, an analytical and auditing body for the NEC and the NEO, organizationally-independent of controlled institutions, which would guarantee its high level of objectivity. On the other hand, the tasks in the field of policy financing control should be excluded from the election administration tasks area and delegated, e.g. to the Supreme Audit Office, as the appropriate body of law control, especially in the field of public finances.

In the second option, all the above tasks (with the possible transfer of supervision over the policy financing to the SAO) would remain the responsibility of the NEO. However, this means the need to radically reorganize the internal, staffing and organizational structure of the Office and to appoint new teams responsible for analysis and audit (e.g. analytical and legal team), as well as election information and education (e.g. election information team). Certainly, all of the above tasks would not be performed by the Legal Team and the Team for Election Organization of the NEO, being already overloaded and undervalued.

## **5. Improvement of the transparency of the proces of determination of the results of voting and elections**

The loss of organizational efficiency of the election institution has led simultaneously to undermined credibility of the procedures of determination of the results of voting and legitimacy of the local government elections. Some claimed that the result of the elections does not correspond to reality, is distorted or 'adulterated', and the parliamentary platform even accused of its falsification<sup>23</sup>. The surprise caused by the good result of the Polish People's Party in the elections to regional assemblies, media confusion related to the brochure format of ballots and validity principles of the vote, as well as the large number of invalid votes only strengthened and substantiated the votes of those who claimed that the results of these elections were unreliable. Immediately there were also ideas to increase the authority of persons of trust, implement current electronic monitoring of the DEC's operation, transparent ballot boxes, alternative way of counting votes, etc. The common denominator of these proposals was the conviction that the process of determination of the results

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23 It is about a statement of Jarosław Kaczyński of 26 November 2014 during a Sejm debate on a project concerning shortening the term of office of self-governments: 'From this most important stand in Poland, words of truth must be said: these elections were rigged. Even if someone didn't want to believe it, for various reasons, still a number of invalid votes, as well as this great confusion, which arose during vote counting, delegitimizes these authorities, and a constitutional value of democratic legitimacy of power is definitely higher than a constitutional value, that is cadence'.

of voting, and as a consequence, the elections, ceased to guarantee their integrity. In the hustle and bustle of this political and media storm, hardly anyone noticed that both the DEC and the TEC in Poland were conceived as a non-social mechanism, but a mechanism of par excellence political control of integrity and fairness of the elections. The DEC's members are recruited completely, with the exception of a single 'technical' person appointed by the commune head (mayor or president in cities), out of persons announced by election committees taking part in the elections<sup>24</sup>. Ratio legis of such a solution did not consist in, how it is sometimes mistakenly believed, allowing 'people to earn on the counting of votes', but in making the members of the commissions announced by various committees mutually 'looking at each other's hands', collectively determining the results of voting and jointly signing the protocol constituting the official confirmation of the results established by them. Immediately after the preparation, such a protocol must be hung in the election commission's cabinet, in a place that allows the voters to read it freely. The principle of the social control factor at the level of the DEC is so strongly established in Poland that it was equalled by, legitimate and consequently as the elections renewed in the face of many errors and irregularities in the activities of their members, any postulates of any professionalization of these commissions or implementation of more substantive recruitment criteria, such as the census of education or age.

District committees are an important, but not the only mechanism that guarantees honesty, reliability and transparency of the elections. Equally important, although in practice, poorly used institution of this type are the persons of trust, which are also reported to the commission by election committees. Unless the members of the DEC are not formal representatives of their reporting committees, the persons of trust are essentially responsible for correct counting of votes of their committee. Both have also the right to submit official observations (complaints, irregularities, doubts, etc.) to the protocol of the commission. The commission must then comment on these observations, and the higher-level commissions are required to investigate whether the electoral law was not violated in a given situation. Such observations are also of considerable importance in the situation of considering possible election protests by courts, which is another significant mechanism for controlling the integrity of the elections. In practice, however, such observations are rarely submitted, and they are sporadically associated with serious and substantiated allegations regarding the integrity and reliability of work of the district election commissions.

Electoral Code – like the previous electoral law – contains, as can be seen, a considerable and essentially completely sufficient set of mechanisms ensuring both fairness and transparency in the process of determination of the results of voting and elections. The fact that not all these institutions are actually used in practice, because, for example, election committees do not attach much importance to the

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24 See: Article 182 § 2, and with reference to the TEC Article 178 § 3 of the Electoral Code.

moral and intellectual or organizational qualifications of candidates for member of the DEC and persons of trust, cannot in any way burden the Polish election system or, more importantly, its administration institution. It should be clearly remembered here that in Poland the results of voting are not determined electronically, but manually by the members of the district election commissions, who count the ballots with the voted marked on them. At subsequent stages, only the summation and mathematical-formal verification of data determined by the DEC are made. Any possible falsification or irregularities in the determination of the results are possible at the stage of identification and counting the valid votes, which, according to the law, should be done jointly and collectively by all the DEC's members. Unfortunately, in practice, this order is often violated. Please note, that is mostly due to purely organizational reasons. Therefore, there are no substantively justified reasons to claim that the process of determination or announcement of the results was not transparent or was conducive to manipulation. The fact that the official, let us emphasize, collective results in the country were given by the NEC one week after the elections, cannot be any justification for the claims that they were falsified. Over 27 thousand of the DEC's throughout the country established and made public (displaying appropriate protocols in their premises) the results of voting in their districts on the post-election night, or no later than on Monday, 17 November 2014. Difficulties and delays appeared, as indicated above, at the stage of verification and aggregation of these data at the TEC level, which for this reason could not create their own protocol for several days. Therefore, the problem with possible non-transparency concerns not the process of determination of the results of voting, but at most the speed and form of their public announcement. Here, one should look for potential mistakes and possible improvements.

It cannot be subject to any discussion that the key factor affecting the sense of integrity and transparency in the process of determination of the results of the elections is the speed of making them public, importantly at the mass level, because only at this level there was a delay. What should be done to restore this sense? What steps can be taken to further improve the transparency of this process? Certainly, this will not be ensured by the implementation of transparent ballot boxes, as postulated during the wave of the last crisis by more and more people. This does not solve any of the problems raised, does not protect against possible attempts of forgery by the members of the commission, but creates only additional technical problems associated with the necessity of securing the ballots thrown in the ballot box against the possibility of revealing the votes.

The first mechanism that already exists, but as indicated above, is not properly used and for this reason one should seriously consider its thorough reform, is the institution of the persons of trust. It should become a key element of social control of the correctness and transparency of the elections at all its stages, and above all at the stage of organization, determination and publishing the results of voting and



elections. For this to happen, the institution should be modified from the person of trust currently acting for various election committees to the function of a national election observer. To this end, the catalogue of entities authorized to report such observers should be extended to non-governmental organizations having in their statute, as a goal of activity, in general, the development or monitoring of the state of democracy in Poland, etc. In addition, it should also be extended to affiliated researchers at national organizational units of a scientific nature. Reliability and scientific skills of the latter will guarantee not only the insight of observations, but also the proper evaluation and conclusions. In the next step, it is worth thinking about creation of tools for such observers in the form of instructions, guidelines, suggestions on what to pay special attention to, as well as checklists, election calculators, and maybe even special training courses, workshops, so that their observation could be on the one hand better in quality, and on the other hand easier for the observers themselves. They could be created, for example, by a special team for informational and educational issues of the NEO or an institution similar to the National Election Institute. Reports and minutes on such observations would not only be a form of social control of integrity and fairness of the voters, but would also be of great importance in the process of evaluation of organizational efficiency of the election commissions.

The second key area is the speed, not so much of determination of the results (this depends, on the one hand, on the efficiency of commission's members, but on the other hand, their supporting IT system), but of making them publicly available. In a situation where the IT support for the elections has been used for the past 10 years at the district level, and the voting protocol is nothing but a printout of the 'election calculator' used by the DEC, from a functional point of view there was a reversal of the relationship between what is the original and what is its derivative. Currently, the paper protocol, which is the official document of the elections and must be produced by the commissions at all levels, is only the computer printout showing the state of the database aggregating the results of voting after its completion at a given level (district, constituency, territorial unit, whole country). Therefore, there are no substantive or technical contraindications for the 'electronic version of the protocol' (in fact the right set of numerical data and other key information authorized by the DEC entering these data into the IT system, as well as verified and approved by the senior commission) to become an official, but electronic document of the elections, appropriately protected from modification. The paper protocol would in turn formally become what it has been for a long time: the paper archival document, constituting a duplicate, or a kind of copy of an appropriate source document, which would be the electronic protocol. As a result, electronic data, immediately after their preparation in real time, could be published on-line through a special system of visualization of the elections, integrated with the election commission support system. For the sake of full transparency of this process, all possible changes, corrections or errors found



after its preparation by the DEC or by the TEC in the verification process, would be included in this visualization with the time, entity and reason for modification, as usually given in repeatedly edited electronic documents. This would revolutionize the process of publishing the results of the elections and would introduce the maximum possible, on a massive scale, transparency of the process of determination of the results and access to them from anywhere and at any stage, without any burden of the election commissions and creation of new IT mechanisms. It would be enough to expand and modify the functionality of solutions used in the past.

The third area is to consider the implementation to the Polish electoral law of the possibility of a conscious and unambiguous vote, not so much 'officially' invalid, because by its legalization it becomes as important as 'against all' or 'for none of the above' candidates in the elections to collegial bodies. In source literature, this institution is called NOTA<sup>25</sup>. Regardless of the terminology used, the main rule in this case is to give the voter the opportunity to evade from the choice of proposals contained in the ballot, in a manner sanctioned by the electoral law<sup>26</sup>. Without resolving the controversy aroused by this negative voting system<sup>27</sup>, it should be noted that its implementation in Polish conditions would solve an extremely important problem from the point of view of the transparency of the process of determination of the results of voting, especially in relation to the municipal elections: interpretation of where do such great differences in the number of invalid votes, depending on the type of the elections, come from? In conjunction with the liberalization of the vote validity conditions, consisting, for example, in the recognition, as a clear act of the voter's will, of the signs other than just 'x' (e.g. so-called 'tick', underlinings, markings or other obviously interpreted graphic signs that allow you to clearly assign the voice to a specific option), this could consequently lead to absolute marginalization or actual elimination of invalid votes.

More importantly, the NOTA would create a systemic solution to the problem of the so-called whites, i.e. such ballots, on which the voter did not put any mark, which theoretically opens up the possibility of possible falsification of the results by later adding 'x' on such empty ballots. Its implementation would extend the range of political preferences of the citizens, possible to articulate in the course of the elections, could also be an important 'pro-quality' impulse for specific candidates reported by the election committees and would reduce the pressure for strategic voting, that is, incompatible with its first preference structure. It could also contribute

25 It is an acronym for *none of the above*.

26 M. Waszak, *Możliwość wskazania "żadnego z powyższych" na karcie wyborczej – na przekór logice demokratycznego głosowania*, Warszawa 2012, p. 5.

27 More on this technique, its pros and cons see: M. Waszak, *op. cit.*; B. Michalak, *Żaden z powyższych*, (in:) A. Sokala, B. Michalak, P. Uziębło, *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych*, Warszawa 2013, pp. 289-291.

to the increase in the voter turnout by encouraging a sincere voting of those who are undecided or those contesting the political scene, and so far practicing electoral abstention, voting strategically, for protest groups, or giving formally invalid votes.

## **6. Postulates (not only) *de lege ferenda***

The crisis that emerged during the 2014 local government elections was mainly caused by mistakes not of a legal, but of a managerial nature. In particular, mistakes were made at the stage of planning and implementation of the IT support project—no proper risk analysis was performed, no alternative plan was prepared, the deadline for the project was too short and the schedule was unrealistic, and, consequently, there was no time for tests and audits of the software. During the implementation of the project, its ongoing evaluation was not performed and the plan was not corrected even when it was already known, beyond any doubt, that the system would not work as it should. Surveillance, communication within the organization and the environment failed and crisis management skills were lacking. This means that the solutions should be sought in the organizational and managerial sphere, rather than in the legal sphere. However, taking into account the scope and effects (including social) of the disclosed, in the face of the crisis, failure of election administration, it seems necessary to seriously consider a number of code changes, which should, however, be addressed to what actually caused the crisis, as well as to what might become a systemic impulse to counteract similar situations in the future.

Taking the aforementioned reservations and conclusions into account, the following recommendations for entities deciding about the structure of the Polish election model can be formulated:

- 1) complete, professional and independent audit of both election procedures and institutions applying them (review of the electoral law, applied organizational procedures, identification of processes and tasks performed by the election organization, as well as IT and organizational resources of the NEO, etc.) should be conducted, preferably by an independent expert team acting on behalf of the NEC;
- 2) develop institutional mechanisms for constant and ongoing evaluation of operations performed by the election institution, and base the planning of future election campaigns on this, prepare legal and organizational recommendations aimed at elimination of mistakes and irregularities, as well as constant optimization of election processes;
- 3) conduct the internal reorganization of the election administration, which is consistent, functionally-oriented, factual and thought-out, however, does not lead to the loss of 'systemic memory' (chart of organization, job, staff),

preceded by a thorough analysis of tasks and processes implemented by the Office, which should result in:

- a) redefining the nature of relationship, responsibility, division of tasks and competences, as well as subordination between the NEC and the NEO;
  - b) relieving the Legal Team and the Team for Election Organization from all obligations, with the exception of the preparation and performance of the technical and organizational part of the elections;
  - c) establishment of a working task force – composed of employees of the NEO's headquarters, field IT specialists and external experts – involved in the implementation, management and coordination of IT projects;
  - d) establishment of an analytical and legal team within the NEO structure that would take over from the ZPiOW the tasks related to the legal service of the elections (preparation of guidelines, explanations and other legal acts) and at the same time would conduct continuous analytical and auditing activities for the needs of the election authorities;
  - e) establishment of an information and education team that would deal with the issues of informing about elections, conducting all kinds of internal election training courses, activating of voters and communication policy of the election authorities;
  - f) (alternative to the above) allocation of tasks and functions in the field of supervision, organization, as well as analytics and information, between three, closely cooperating, but organizationally independent institutions: The NEC, the NEO and the NEI;
- 4) transform an ineffective institution of the persons of trust, representing the interests of the election committees into social national observers, reported by a wider group of entities, thus establishing a real mechanism for social control of elections;
  - 5) legalize the data entered by the DEC into the IT system as an official, electronic and original version of the voting protocol and enable mass access to these data in real time;
  - 6) implement the category of an intentionally invalid vote, by placing 'I vote for none of the above candidates' option (NOTA in English) on the ballot and simultaneously liberalize the conditions of the validity of the vote.

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