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The Election for the Office of the President of the Republic of Poland on 10 May 2020 during the COVID-19 Pandemic – A Case Study

Abstract: Citizens' election rights are among the most important political rights in a democratic state. The SARS-CoV-2 pandemic has brought chaos to countries and thus to their proper functioning. Therefore, the authors of the text, analysing the case of the presidential elections in 2020, put forward the thesis that the provisions regulating the rules of these elections contain significant gaps, which were revealed by the pandemic. The Constitution of the Republic of Poland of 1997 contains a catalogue of conditions that make it possible to elect a president under an extraordinary procedure. They all relate to a necessity to shorten the president's term of office. However, no rules consider the likelihood of other obstacles to voting by the deadline, such as a pandemic.

Keywords: elections, Marshal of the Sejm, President of the Republic of Poland, National Electoral Commission

Introduction

One-man leadership exercised by the president in the state is an important value, especially in emergencies. The President of the Republic of Poland guarantees the

continuity of state power.¹ At the same time, the continuity of the president's office in the Constitution of the Republic of Poland is guaranteed by the institution of the temporary performance of the president's duties. Let us add that this is not a substitution carried out according to the usual rules but a 'double' substitution, performed successively by the Marshal of the Sejm and the Senate, which minimises the risk of discontinuity of power. In this case, the constitution-maker complied with the required diligence, ensuring that the office of the president was held continuously.² The representatives of the doctrine emphasise that the provisions assign the 'deputy' president the same systemic function as the President of the Republic of Poland.³ The Constitution of the Republic of Poland allows for the correct temporal functioning of the state in case of failure to elect a president. It even assumes that such situations will occur and lays down regulations for this circumstance, but the expiry of the term of office was not mentioned among the premises of 'replacing' the president. The lack of such provisions could have been the reason for actions taken to conduct the elections to the office of the President of the Republic of Poland, ordered for 10 May 2020.

The events accompanying the elections of the President of the Republic of Poland in 2020 allow us to argue that the provisions regulating the rules of this election contain significant gaps. Although the authors of the Constitution of the Republic of Poland of 1997 took into account premises enabling the election of the head of state outside the ordinary mode,⁴ i.e. in an extraordinary mode,⁵ all of them relate to the situation in which it is necessary to shorten the president's term of office. There are no provisions that consider the probability of obstacles that would prevent the voting from being held within the prescribed period. This gap is not fulfilled by the provisions of the Electoral Code,⁶ which regulates numerous issues related to the election and term of office of the President of the Republic of Poland, but does not comprehensively regulate these issues.

Disadvantages of the legal acts were revealed during the elections of the President of the Republic of Poland, organised during the crisis. Regardless of the ade-

- 1 Art. 126 sec. 1 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended), <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970780483> (accessed 31.01.2022), further: the Polish Constitution. D. Dudek, *Prezydent Rzeczypospolitej Polskiej – refleksje w 100-lecie instytucji*, 'Przegląd Prawa Konstytucyjnego' 2021, no. 4(62), p. 39.
- 2 M. Florczak-Wątor, *Konstytucyjne uregulowania problematyki zastępstwa prezydenta w Rzeczypospolitej Polskiej i państwach z nią sąsiadujących*, 'Przegląd Prawa Konstytucyjnego' 2010, no. 2–3, p. 187.
- 3 G. Pastuszko, *Marszałek Sejmu jako osoba wykonująca tymczasowo obowiązki Prezydenta RP – dylematy konstytucyjne*, 'Przegląd Prawa Konstytucyjnego' 2011, no. 1(5), p. 94.
- 4 Art. 127 sec. 4–6, Art. 128 sec. 2 of the Polish Constitution.
- 5 Art. 128 sec. 2 in connection with Art. 131 sec. 1 and 2 of the Polish Constitution.
- 6 Act of 5 January 2011 – Electoral Code (uniform text, Journal of Laws of 2020, item 1319 as amended), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20110210112/U/D20110112Lj.pdf> (accessed 31.01.2022).

quacy of the measures applied in Poland in spring 2020, it should be assumed that it was an example of such flaws. The legal assessment of the activities of the Polish government and parliament at the beginning of the coronavirus pandemic will certainly be the subject of many studies. This analysis attempts to assess selected aspects of the organisation of the elections of 10 May 2020 and the adequacy of actions taken by the authorities, with particular emphasis on the provisions constituting the basis for making specific decisions. For this purpose, an analysis of the Constitution of the Republic of Poland, the Electoral Code, other acts, resolutions, and communications of the National Electoral Commission (hereinafter: PKW) related to the election of the President of the Republic of Poland of 10 May 2020 will be carried out.

1. Constitutional Regulations

The rules governing the president's election during political transformations in Poland in 1989–1990 were subject to rapid changes.⁷ Originally, the election of the President of the People's Republic of Poland was made by the National Assembly,⁸ but in the following year, the regulations were changed.⁹ As a result of amending the Constitution of the Republic of Poland of 1952, according to point 1 of Art. 32b sec. 1, the election of the President of the Republic of Poland was conducted by the National Assembly. The solutions developed in the 1990s were consolidated in the Constitution of the Republic of Poland of 1997.

The most important regulations related to the elections of the President of the Republic of Poland are included in Art. 128 sec. 2 of the Constitution of the Republic of Poland: 'The election of the President of the Republic shall be ordered by the Marshal of the Sejm to be held on a day no sooner than 100 days and no later than 75 days before expiry of the term of office of the serving President of the Republic, and in the event of the office of President of the Republic falling vacant - no later than the 14th day thereafter, specifying the date of the election which shall be on a non-work-

7 R. Mojak, *Instytucja prezydenta RP w okresie przekształceń ustrojowych*, Lublin 1995, p. 182.

8 Art. 32a and Art. 32b of the Act of 7 April 1989 amending the Constitution of the Polish People's Republic (Journal of Laws No. 19, item 101) entrusted the election of the President of the People's Republic of Poland to the National Assembly, requiring an absolute majority in the presence of at least half of the members of the assembly. The term of office was six years, and the regulations forbid holding this office again, <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19890190101/O/D19890101.pdf> (accessed 31.01.2022). R. Grabowski, *Evolution of the Constitutional Organ on the Example of the Polish National Assembly*, 'Przegląd Prawa Konstytucyjnego' 2020, no. 5(57), p. 75, K.M. Bezubik, A. Olechno, *Could the Election Deposit Become an Electoral Qualification? Remarks on the Example of the Election of Head of State*, 'Białostockie Studia Prawnicze' 2016, no. 20/A, pp. 273–281.

9 Act of 27 September 1990 on the amendment to the Constitution of the Republic of Poland (Journal of Laws No. 67, item 397), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19900670397/O/D19900397.pdf> (accessed 31.01.2022).

ing day and within a period of 60 days of the day of ordering the election.’ Therefore, the Constitution defines the election schedule in an ordinary situation (the seat is filled) and an extraordinary situation (vacant seat). In both situations, there are specific deadlines within which a choice is possible, but in an emergency, they are shorter. In both cases, the Marshal of the Sejm must undertake activity in this respect, but the provisions leave him with only minimal decision-making slack. The situation where the deadline expires and voting does not take place has not been settled. In 2020, practice proved that there might be ineffective elections or ineffective attempts to conduct them by an organ without constitutional authority in this regard.

The provisions of Art. 127 sec. 2 and Art. 128 sec. 1 of the Polish Constitution refer to the term of office of the President. The former states that he is re-elected for a five-year term and may be re-elected only once, the latter indicates that his term of office begins on the day he takes office. A drawback of this regulation is the lack of references to the end of the term of office. Practice indicates a literal interpretation of the provisions, and the full terms so far lasted exactly five years, with a one-day tolerance. However, the Constitution of the Republic of Poland does not provide instructions on how to proceed in case of an inability to hold elections within the constitutional time limit unless an extraordinary state is introduced. It should be assumed that some crises may not justify introducing such a state, or it cannot be introduced before the election date due to too little time. In such a situation, it is important to establish when the term of office of the President of the Republic of Poland will end. Does it happen five years after taking office, or only after assuming office by the President-elect?

The analyses of the ‘replacement’ of the President of the Republic of Poland by the Marshal of the Sejm highlight this problem.¹⁰ According to the provisions of Art. 131 sec. 2 of the Constitution of the Republic of Poland, the ‘The Marshal of the Sejm shall, until the time of election of a new President of the Republic, temporarily discharge the duties of the President of the Republic in the following instances: 1) the death of the President of the Republic; 2) the President’s resignation from office; 3) judicial declaration of the invalidity of the election to the Presidency or other reasons for not assuming office following the election; 4) a declaration by the National Assembly of the President’s permanent incapacity to exercise his duties due to the state of his health; such declaration shall require a resolution adopted by a majority vote of at least two-thirds of the statutory number of members of the National Assembly; 5) dismissal of the President of the Republic from office by a judgment of the Tribunal of State.’ The ill-thought-out narrow catalogue of conditions necessary to perform

10 Z. Witkowski, Prezydent Rzeczypospolitej Polskiej, (in:) Z. Witkowski (ed.), *Prawo konstytucyjne*, Toruń 2001, p. 300.

the “substitution” is criticized¹¹, The ill-thought-out narrow catalogue of conditions necessary to perform the “substitution” is criticized.¹²

The provisions in force in 1990–1997 entrusted the National Assembly with determining the validity of the election of the President of the Republic of Poland. The Constitution of the Republic of Poland of 1997 introduced a significant amendment in this respect, transferring the competence to declare the validity or invalidity of an election to the Supreme Court (Art. 129 sec. 1 and 3). In the case of the presidential election ordered for 10 May 2020, the content of Art. 129 sec. 3 states: ‘If the election of the President of the Republic is declared invalid, new elections shall be held pursuant to the principles provided for in Art. 128 sec. 2 for vacancies in the office of the President of the Republic of Poland’, i.e. on a non-working day within 60 days from ordering elections.

2. Electoral Code

The provision of Art. 127 sec. 7 of the Polish Constitution on the principles and procedure of nominating candidates and holding elections and the conditions of validity of the election of the President refers to the Act.¹³ In this way, the legislator entrusted the clarification of the election rules to the legislator who decided to adopt the Electoral Code, assuming that it was to regulate the issue of elections in a comprehensive manner. The analysis of the code provisions relating to the presidential elections concludes that the Act does not fulfil its system function. Some provisions constitute an almost literal repetition of constitutional regulations (Art. 287–289, 292). Code regulations do not cover the areas related to the election of the President of the Republic of Poland, the regulation of which was assumed by the Constitution of the Republic of Poland. As an example, there are issues relating to the presidential term of office, the beginning and end of which are specified in the code as follows: ‘The President of the Republic takes office after taking the oath’ (Art. 291 § 4), the

11 D. Górecki, *Pozycja ustrojowo-prawna prezydenta Rzeczypospolitej Polski i rządu w ustawie konstytucyjnej z 23 kwietnia 1935 roku*, Łódź 1992, p. 53, F. Siemieński, *Ewolucja instytucji Prezydenta Rzeczypospolitej Polskiej*, ‘Annales Universitatis Marie Curie-Skłodowska Lublin – Polonia’, vol. XXXVII, 13, sectio G, 1990, p. 189, J. Ciapała, *Prezydent w systemie ustrojowym Polski*, Warsaw 1999, p. 127, M. Zubik, *Gdy marszałek Sejmu jest pierwszą osobą w państwie, czyli polskie interregnum*, ‘Przegląd Sejmowy’ 2010, no. 5, p. 78.

12 P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warsaw 2000, p. 178; G. Pastuszko, *op. cit.*, pp. 95–96.

13 R. Balicki, *Weryfikacja ważności wyborów ogólnokrajowych w Polsce*, ‘Przegląd Prawa Konstytucyjnego’ 2021, no. 4(62), p. 249.

‘outgoing President of the Republic shall terminate his office upon the swearing of the newly elected President of the Republic of Poland’ (Art. 291 § 2).¹⁴

While constitutional regulations provide for extraordinary situations related to holding the office of the President of the Republic of Poland, the code regulations are devoid of deeper reflection in this regard. Only the provisions of Art. 293 of the Electoral Code assume that the course of elections may sometimes deviate from the norm; however, the catalogue of extraordinary situations that may occur during the election for the office of the President of the Republic of Poland includes only two cases: the nomination of only one candidate (Art. 293 § 1) and the lack of candidates (§ 3).¹⁵ It is too narrow an approach that does not list the premises known to the Polish legal system in detail, described in detail in the acts regulating the introduction of emergency and epidemic measures, and does not refer to these legal acts. Meanwhile, it should be assumed that not in every such case will a state of emergency be introduced – postponing the election – either for objective reasons (too little time) or subjective reasons (type of threat, lack of political will).

Therefore, it can be concluded that the Electoral Code contains significant regulatory gaps. Despite its considerable volume, this act does not address many significant issues that the constitution-maker ordered to be regulated in the Act. It can be assumed that further shortcomings of the code regulations will emerge in the future, preventing the holding of elections in the event of abnormal situations, which will harm the functioning of the constitutional organs of the state.

3. Organisation of Elections during the Pandemic

The activities related to the elections for the office of the President of the Republic of Poland in 2020 were initiated by the Marshal of the Sejm of the Republic of Poland. On 5 February 2020 he issued a decision ordering the elections and setting their date for 10 May 2020 and scheduling election activities.¹⁶ The spreading SARS-CoV-2 epidemic disrupted the activity of administration bodies, candidates and supporting election committees. On 4 March 2020 the first case of infection with this virus was found in Poland. On 11 March 2020 the virus-induced COVID-19 disease was designated a pandemic by the World Health Organization. The Polish authorities initially

14 G. Maroń, *Instytucja przysięgi Prezydenta w polskim porządku prawnym*, ‘Przegląd Prawa Konstytucyjnego’ 2012, no. 2 (10), p. 159.

15 Pursuant to Art. 293 of the Electoral Code, the National Electoral Commission confirms this fact by way of a resolution, which it submits to the Marshal of the Sejm, makes it public and announces it in the Journal of Laws of the Republic of Poland, and the Marshal of the Sejm again orders elections no later than on the 14th day from the date of announcement of the resolution.

16 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, item 184), <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000184/O/D20200184.pdf> (accessed 31.01.2022).

introduced an epidemic emergency between 14 and 20 March 2020¹⁷ and then a state of epidemic.¹⁸ Despite the constitutional and statutory premises, it was not decided to introduce a state of natural disaster in Poland, as in many other countries.

Instead, a draft of a special act was prepared on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and resulting crises. This legal act was to provide the rulers with the tools necessary during a pandemic. The Act was adopted on 2 March 2020¹⁹ and entered into force on 8 March. On 31 March the Act was amended twice, interfering with numerous areas of the state's functioning, including the provisions of the Electoral Code. This included expanding the catalogue of people entitled to vote by correspondence method, including this subject to compulsory quarantine or isolation at home on the day of voting, as well as those who have reached the age of 60 at the latest on the day of the election (Art. 40).²⁰

Regardless of the procedure for amending the provisions of the Electoral Code, it should be stated that the above modification of the provisions was adequate to the epidemic situation at that time and made it possible to elect the President of the Republic of Poland within the constitutional period. The preparations for the elections were, however, interrupted by the Prime Minister, who, on 16 April, issued decisions based on which he ordered the Polish Security Printing Works S.A. to prepare the materials necessary for the correspondence elections of the President of the Republic of Poland²¹ and Poczta Polska (Polish Post) to take the organisational steps necessary for preparing and holding such elections.²² These decisions became the subject of court proceedings, in which a final judgment was issued. The Provincial Admin-

17 Pursuant to Art. 293 of the Electoral Code, the National Electoral Commission confirms this fact by way of a resolution, which it submits to the Marshal of the Sejm, makes it public and announces it in the Journal of Laws of the Republic of Poland, and the Marshal of the Sejm again orders elections no later than on the 14th day from the date of announcement of the resolution.

18 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, item 491, as amended), <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000491> (accessed 31.01.2022).

19 Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws, item 374, as amended), <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000374/O/D20200374.pdf> (accessed 31.01.2022), further: the Covid Act.

20 The Act of 31 March 2020 amending the Act on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them and some other acts (Journal of Laws, item 568), <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000568/O/D20200568.pdf> (accessed 31.01.2022). See: M. Dahl, M. Lewandowska, COVID-19 a proces legislacyjny – posiedzenia Sejmu Rzeczypospolitej Polskiej IX kadencji, 'Przegląd Prawa Konstytucyjnego' 2021, no. 5(63), p. 137.

21 Decision of the President of the Council of Ministers of 16 April 2020. BPRM.4820.2.4.2020.

22 Decision of the President of the Council of Ministers of 16 April 2020. BPRM.4820.2.3.2020.

Administrative Court in Warsaw on 15 September 2020²³ annulled both decisions because they had no legal basis. It also found that the decision of the President of the Council of Ministers ‘grossly violated Art. 127 sec. 1 of the Constitution of the Republic of Poland due to the fact that it commissioned Poczta Polska to prepare elections for the President of the Republic of Poland only by correspondence, i.e. in a manner that did not guarantee voters equal, direct and secret voting and was contrary to the applicable law.’²⁴ Moreover, the Provincial Administrative Court stated that the ‘violation of Art. 157 § 1 and Art. 187 § 1 and § 2 of the Electoral Code, because the above-mentioned provisions are clear, do not require interpretation and in a precise and binding manner *erga omnes* constitute the exclusive competence of the PKW as the highest authority competent in matters of holding elections in the Republic of Poland.’²⁵ Provincial Administrative Court also stated gross violation of Art. 7 of the Polish Constitution, Art. 6 of the Code of Administrative Procedure, Art. 5 of the Act of 8 August 1996 on the Council of Ministers,²⁶ Art. 11 sec. 2 in connection with Art. 11 sec. 2a, sec. 3 of the COVID-19 Act.

Holding the elections on 10 May 2020 in a manner not compliant with the Electoral Code – i.e. by correspondence by Poczta Polska – was to be guaranteed by the Act of 6 April 2020 on the special rules for holding general elections for the President of the Republic of Poland ordered in 2020.²⁷ The Act was based on similar assumptions, such as the decisions of the Prime Minister of 16 April 2020. Voting was to take place only by correspondence (Art. 2 sec. 1). Poczta Polska (Art. 3 sec. 1) was responsible for organising and holding the elections. Decisions significant for the elections were to be made by the minister competent for state assets (e.g. establishing the model of the voting card, Art. 3 sec. 9) and the votes were to be verified using the PESEL number (Art. 14 sec. 2). The manner of organising elections adopted in the Act raises doubts about ensuring the principle of direct elections and the method of iden-

23 Judgment of the Provincial Administrative Court in Warsaw on 15 September 2020 regarding the complaints of the Ombudsman and the Free Society Foundation based in Poznań against the decision of the Prime Minister of 16 April 2020, ref. BPRM.4820.2.3.2020 regarding the order of Poczta Polska S.A. implementation of activities in the field of counteracting COVID-19 aimed at the preparation and holding of the elections of the President of the Republic of Poland in 2020 by correspondence, Ref. no. VII SA / Wa 992/20, <https://bip.warszawa.wsa.gov.pl/download/attachment/3545/pelna-tresc-wyroku-w-sprawie-vii-sa-wa-992-20.pdf> (accessed 30.01.2022).

24 *Ibidem*, p. 33.

25 *Ibidem*, p. 39.

26 J. Szymanek, Bezpieczeństwo procesów wyborczych (uwagi de lege lata i de lege ferenda na tle rozwiązań stosowanych w państwach demokratycznych), *Zeszyty Prawnicze* 2017, no. 1(53), pp. 9–40.

27 The Act of 6 April 2020 on the special rules for holding general elections for the President of the Republic of Poland ordered in 2020 (Journal of Laws, item 827), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000827/O/D20200827.pdf> (accessed 30.01.2022).

tifying the entitled person and verifying the vote – the principle of secret voting.²⁸ The Act was adopted – after the Senate’s amendments were rejected – in the Sejm on 7 May 2020, signed by the President of the Republic of Poland on 8 May, with the announcement and entry into force on 9 May, i.e. on the day before the date for which the elections were called.²⁹

The National Electoral Commission, in a communique of 7 May 2020, assessed the situation as follows: ‘The National Electoral Commission informs that it has undertaken all activities related to the election of the President of the Republic of Poland, ordered by the Marshal of the Sejm of the Republic of Poland on 10 May 2020, to which it was obliged by law. However, on 16 April 2020, the Act on special support instruments in connection with the spread of the SARS-CoV-2 virus was passed.³⁰ Under Art. 102 of this Act, the information obligations resulting from the provisions of the Electoral Code imposed on commune heads and election commissioners, as well as provisions concerning the issuing of certificates of the right to vote, postal voting and proxy voting, were suspended. First of all, the powers of the National Electoral Commission concerning determining the specimen of the voting card and ordering the printing of the cards have been suspended. Depriving the National Electoral Commission of the legal possibility to print ballots made voting in the election of the President of the Republic of Poland on 10 May 2020 impossible. Election cards are a prerequisite for voting. The legal regulation deprived the National Electoral Commission of the instruments necessary to perform its duties. In this context, the National Electoral Commission informs voters, election committees, candidates, election administrations and local government units that voting cannot be held on 10 May 2020.’³¹

The analysis proves that the voting on 10 May 2020 could not take place not so much for epidemic reasons, but because of organisational and legal chaos. Considering that the establishment of the calendar of presidential elections by the Marshal of the Sejm takes place through a one-off legal act, it was not possible to reissue an ordinance with different content.³² Therefore, it should be concluded that the activi-

28 M. Musiał-Karg, Głosowanie korespondencyjne podczas pandemii COVID-19. Doświadczenia z polskich wyborów prezydenckich w 2020 r., ‘Przegląd Prawa Konstytucyjnego’ 2021, no. 2(60), p. 31.

29 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, no. 20/A, pp. 261–271.

30 Act of 16 April 2020 on specific support instruments in connection with the spread of SARS-CoV-2 virus (Journal of Laws, item 695), <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000695> (accessed 30.01.2022).

31 The announcement is available on the website: <https://pkw.gov.pl/aktualnosci/wyjasnienia-stanowiska-komunikaty/komunikat-panstwowej-komisji-wyborczej-z-dnia-7-maja-2020-roku> (accessed 30.01.2022).

32 J. Flis, Gang Olsena w amoku, ‘Tygodnik Powszechny’ 05.05.2020, <http://jaroslawflis.blog.tygodnikpowszechny.pl/2020/05/05/gang-olsena-w-amoku/> (accessed 30.01.2022).

ties of the Prime Minister and the Sejm aimed at preparing and holding the presidential elections for 10 May 2020 in an unconstitutional manner not compliant with the Electoral Code resulted in a constitutional crisis.³³

4. A Solution to the Constitutional Crisis

The rulers entrusted the solution to the constitutional crisis with the PKW, which on 10 May 2020 adopted a resolution that was the basis for actions aimed at setting the next voting date and – finally – electing the President of the Republic of Poland before the end of the term of office.

The PKW in Resolution No. 129/2020 of 10 May 2020³⁴ stated that ‘in the election of the President of the Republic of Poland ordered for 10 May 2020, it was not possible to vote for candidates’ (§ 1). However, the conclusion that the ‘fact indicated in § 1 is equivalent in effect to that provided for in Art. 293 § 3 of the Act of 5 January 2011 – Electoral Code, the impossibility of voting due to the lack of candidates’, which the PKW formulated in § 2 of the resolution, raises doubts. This statement did not correspond to the actual state of affairs. As well as the content of the Resolution of the PKW No. 121/2020 of 15 April 2020 on the list of candidates for the President of the Republic of Poland in the elections ordered on 10 May 2020³⁵ Content of § 2 of Resolution 129/2020 also disregards the legal status – the provisions of the Constitution of the Republic of Poland and the Electoral Code, in particular the provisions of Art. 161 § 3 of the Code. According to them, the PKW adopts resolutions within its statutory powers, particularly in the cases specified in Art. 161 § 1 and 2.³⁶

33 See NIK audit results, Actions of selected entities in connection with the preparation of general elections for the President of the Republic of Poland ordered for 10 May 2020 using correspondence voting, Registration number: D/20/502, <https://www.nik.gov.pl/kontrola/D/20/502/> (accessed 30.01.2022).

34 Resolution No. 129/2020 of the National Electoral Commission 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, item 967), <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000967/O/D20200967.pdf> (accessed 31.01.2022).

35 It confirmed the registration of the following candidates: Biedroń Robert, Bosak Krzysztof, Duda Andrzej Sebastian, Hołownia Szymon Franciszek, Kidawa-Błońska Małgorzata Maria, Kosiniak-Kamysz Władysław Marcin, Piotrowski Mirosław Mariusz, Tanajno Paweł Jan, Żółtek Stanisław Józef. See Resolution No. 121/2020 of the National Electoral Commission of 15 April 2020 on the list of candidates for the President of the Republic of Poland in the elections ordered for 10 May 2020, https://pkw.gov.pl/uploaded_files/1586984616_uchwala-o-liscie-kandydatow.pdf (accessed 30.01.2022).

36 § 1 The National Electoral Commission issues guidelines binding on election commissioners, election officials and lower-level election commissions, as well as explanations for government administration bodies and local government units, as well as for organisational units subordinate to them that perform tasks related to the conduct of elections, and for election committees, and radio and television broadcasters.

PKW Resolution No. 129/2020 resolved the constitutional crisis but – due to the existence of glaring regulatory gaps in the Electoral Code – was based on a fictitious claim that there were no candidates, which was contrary to the facts. Instead, it responded to the political demand by quickly explaining the problem. There was no pro-system attitude in the actions of the PKW that would allow the problem to be solved while at the same time generating a clear signal about the need to change the law. To this end, on 10 May 2020 it should have taken the same steps as after any actual election, i.e. convene a press conference and announce the voting results. It could have read as follows: ‘Since in the elections for the office of the President of the Republic of Poland, ordered for 10 May 2022, it was not possible to vote, the results of the elections, in terms of the number of votes cast for each candidate, amounted to 0 (zero) votes. The turnout was 0 (zero) per cent.’ Thus, the PKW would gain a basis for issuing a resolution in which the solution of the existing constitutional crisis would be entrusted to the Supreme Court. Then, the problem would be resolved in a manner that does not raise legal doubts, based on the existing provisions, indicating the Supreme Court as the only body authorised to make decisions on the validity of elections, i.e. Art. 129 of the Polish Constitution.

Conclusions

The conducted analysis allows for the following conclusions:

The regulations in force in Poland regulating the procedure for holding elections to the office of the President of the Republic of Poland are stable, as they have been in force since 1997, and their origins date back to 1990. They have also been repeatedly tested in practice – elections were held on their basis in 2000, 2005, 2010 and 2015. It should be noted that the 2010 elections took place after the death of the incumbent President of the Republic of Poland, under Art. 128 sec. 2 and Art. 131 sec. 1 and 2.

The election of the President of the Republic of Poland in 2020 was accompanied by emotions related to the polls of political parties and the candidates they support and the unusual epidemic situation. In addition, the course of the election was complicated by the Prime Minister and the Sejm. These authorities significantly modified the election procedure, containing derogations from the binding provisions of the Constitution of the Republic of Poland and the Electoral Code.

This disrupted the preparation for the elections, which were initially to be held under the constitutional and code provisions that had been in force for many years and verified in practice. As a result of the legally dubious entrustment of the powers

§ 2 The National Electoral Commission shall repeal resolutions of district and regional electoral commissions and decisions of election commissioners made in violation of the law or inconsistent with its guidelines and refer the matter to the competent commission for reconsideration or decide on the matter.

to prepare and conduct elections to Poczta Polska, especially in the form of remote general elections by postal voting unknown to Polish regulations, the voting was not properly prepared and did not take place within the prescribed period.

In this context, doubts can be expressed as to the comprehensiveness of the constitutional and code provisions regulating the principles of election to the office of the President of the Republic of Poland. The events of 2020 revealed the existence of numerous legal loopholes relating to the presidential term of office, the institution of a 'substitute' for the President of the Republic of Poland, and the catalogue of premises authorising the election authorities to take steps to conduct elections despite the occurrence of abnormal situations.

The Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases, and the emergencies caused by them is still in force. It has been amended 45 times, its volume has increased from 13 to 201 pages, and the scope of the regulations cover almost all areas of the functioning of the state and the people living in it. Based on it, an informal extraordinary state was introduced, which at the time of writing the article is already almost 22 months.

In 2020, the certainty as to the rules governing the election of the President of the Republic of Poland was seriously shaken. The findings made in this analysis allow us to treat the events of this period as a model example of a situation defined as the primacy of politics over law. Hence, numerous aspects of the identified problem elude research conducted in legal sciences and require a separate analysis, taking into account research areas typical for political science.

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