

ELECTIONS THAT DID NOT TAKE PLACE IN POLAND IN 2020. WHAT WENT WRONG?

VOLBY, KTERÉ SE V POLSKU V ROCE 2020 NEUSKUTEČNILY. CO BYLO ŠPATNĚ?

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Abstract

On May 10, 2020, a presidential election was to be held in Poland. Due to the epidemiological situation, the government decided that it would be held exclusively by mail. This form of voting is provided for in the Electoral Code as an alternative to in-person voting at polling stations. There was a lot of controversy surrounding the election, regarding how the election was conducted and the entities involved in its organization. This led to the eventual postponement of the election date to June 28, 2020; hence the term “*election that did not take place*,” which is commonly used to describe the 2020 presidential election that was to be held by mail.

Keywords: presidential elections, Poland, COVID-19 epidemic

Abstrakt

Prezidentské volby v Polsku v roce 2020, původně naplánované na 10. května, čelily nepředvídaným výzvám kvůli přetrvávající pandemii COVID-19. V reakci na epidemiologickou situaci se vláda rozhodla pro výhradní hlasování poštou, jak je uvedeno v volebním zákoně jako alternativa k tradičnímu hlasování osobně na volebních místech. Nicméně proces voleb a subjekty zapojené do jejich organizace se staly předmětem intenzivní kontroverze, což vedlo nakonec k odložení voleb na 28. června 2020. Tato unikátní situace je od té doby běžně označována jako “volby, které se nekonaly”. Tato práce zkoumá detaily prezidentských voleb v Polsku v roce 2020, zkoumá problémy spojené s jejich organizací, rozhodnutí o použití hlasování poštou a širší implikace v kontextu epidemie COVID-19.

Keywords: prezidentské volby, Polsko, pandemie COVID-19

Legal Basis for the Election of the President of the Republic of Poland

In Poland, the president is elected by direct universal suffrage in a secret ballot. Presidential election candidates must be Polish citizens who are at least 35 years old on the election day. The election is 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, and in the event of the office of

president falling vacant - no later than the 14th day thereafter, specifying the date of the election which shall be on a non-working day and within a period of 60 days of the day of ordering the election (Art. 128 (2) of the Constitution of the Republic of Poland) (Act on the election of the President of the Republic of Poland; Act of January 5, 2011 - Electoral Code; see Dziemidok-Olszewska 2003:151; Mojak 1994: 139; Geberhner 2000).

Due to worsening epidemic conditions, as well as the political turmoil that occurred in the period

immediately preceding the election date designated by the Marshal of the Sejm, several successive changes were made to the election procedure. They mark the successive phases of the election process and determine the unique characteristics of the presidential election held in 2020. The first phase of the election covers the period from the ordering of the elections (February 5, 2020) to the enactment of the amendments to the Electoral Code (March 28, 2020); the second phase ends on the day before the designated election day (i.e., May 10, 2020); the third phase includes events directly related to the decision not to hold the election on the designated date; and the fourth phase includes the ordering and holding of the election on a new date (Dobrowolski 2022: 15; see Sula, Madej, Błaszczyszński 2022: 27–45).

In a decision dated February 5, 2020, Marshal of the Sejm Elżbieta Witek set the date of the presidential election for May 10, 2020 (Decision of the Speaker of the Sejm of the Republic of Poland of February 5).

Due to the epidemiological situation, a law was passed by the parliament concerning the rules for holding general elections for the office of the President of the Republic of Poland (Act of April 6, 2020 on the special rules for conducting general elections for the office of the President of the Republic of Poland ordered in 2020). The law stipulated special rules for conducting voting by mail in connection with a declared epidemic state in the territory of the Republic of Poland (Article 1).

Article 2 stipulated that the election would be conducted exclusively by mail. According to the act (Article 3), the postal operator (In this case, it was the Polish Post), obliged to provide universal service was to deliver the election packages directly to the voters' mailboxes at the addresses indicated in the voter register within 7 days before the day immediately prior to the election day.

The package was to include the following:

- a return envelope;
- a ballot;
- an envelope for the ballot;
- instructions for voting by mail; and
- a statement of personal and secret vote on the ballot.

Each voter was required to sign a statement and enter his or her name and PESEL number in the space provided. After filling out the ballot, the voter was to put it in the envelope for the ballot, seal it, put the envelope in the return envelope together with the signed statement, and place it, either in person or through another person, not earlier than 6:00 a.m. and not later than 8:00 p.m. on the election day, in a specially prepared postal mailbox of the designated operator in the commune or municipality where the voter is included in the voter register (Flis 2020).

The act passed by the Sejm also stipulated that if a state of epidemic was declared in the territory of the Republic of Poland, the Speaker of the Sejm could order a change in the election date specified

in a previously issued decision. The new date for the election of the President of the Republic of Poland set by the Speaker of the Sejm was required to correspond to the dates for holding the presidential election set forth in the Constitution of the Republic of Poland (Koślicki, Sobczak 2020).

In accordance with Article 228 (7) of the Constitution of the Republic of Poland, the election of the President of the Republic may not be held only during a state of emergency and within 90 days after its termination, and the President's term of office is then extended accordingly (Prokop 2012: 18–20). Decisions to impose one of the states of emergency specified in the Constitution can only be made by state bodies authorized to do so by the Constitution (Eckhardt 2014; Rakowski, Rakowska-Trela; (Act of April 18, 2002 on the state of natural disaster; Act of June 21, 2002 on the state of emergency; Act of December 5, 2008 on the prevention and control of infections and infectious diseases in humans).

The act was criticized by the opposition, which accused the government of hastily making amendments to the electoral code and violating the standards of a democratic law-abiding state (Wybory 2020; Szef PKW).

On April 20, 2020, less than three weeks before the election, citizens had no knowledge about the election, how it would be held, and whether it would take place at all. A date was set for May 10, 2020. The Electoral Code stipulates that elections are conducted by the National Electoral Committee; however, by the Decision of the Prime Minister of April 16, 2020 (no. BPRM.4820.2.3.2020), Poczta Polska S.A. (Polish Post) was obliged to implement measures to counter the COVID 19 pandemic, which consisted in taking and implementing the necessary steps to prepare for the 2020 presidential election to be held by mail (Decision no. BPRM.4820.2.3.2020 of April 16, 2020 ordering Poczta Polska S.A. to implement measures to counter the COVID-19 pandemic aimed at preparing and conducting the 2020 election for the office of the President of the Republic of Poland by mail).

Both the Ministry of State Assets and Poczta Polska S.A. were required to take measures to make sure that the election would be properly secured logistically and legally. The activities undertaken by the Ministry were mainly conceptual activities that analyzed the possibilities and prepared the Ministry for the implementation of the obligations imposed by the Act of April 6, 2020, which was in the legislative process. Given the short period of time, limited by the date of the election ordered for May 10, 2020, inaction could lead to the risk of inadequate implementation of the tasks within the scope of competence of the Minister of State Assets, as designated in the draft of the aforementioned act (Odpowiedź Ministra Aktywów Państwowych Answers of the Minister of State Asset).

The decision did not specify other conditions for the implementation of the order than those mentioned above; in particular, it did not specify the necessary conditions for the implementation of the order: the method of delivery, the procedures for the circulation of election documents, and the number of deliveries included in the scope of the order. The present task was dictated by the need to protect the health and lives of the persons taking part in the election (Chancellery of the Office of the Prime Minister, *Odpowiedź na skargę Rzecznika Praw Obywatelskich* [Answer to the complaint of the Commissioner for Human Rights]).

Mention should also be made of the Act of April 16, 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus (Act of April 16, 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus).

Article 102 of the act, referred to as the “anti-crisis shield,” stated: The provisions of the Act of January 5, 2011 - Electoral Code (Journal of Laws of 2019, item 684 and 1504, and of 2020, item 568) do not apply during the period of a state of epidemic threat or a state of epidemic in the conduct of a general election for the office of the President of the Republic of Poland ordered in 2020, with respect to:

- 1) the provision of the information referred to in Article 16 (1) in the form of a notice to voters;
- 2) the issuance of voting certificates;
- 3) the provision of the information referred to in Article 37d (1) to voters;
- 4) the mail voting referred to in Article 53a;
- 5) voting by proxy;
- 6) the determination by the National Election Commission of the design of the ballots and the ordering by that Commission of the printing of these ballots.” (Communication of the National Election Commission of May 7).

The National Election Commission, which conducts all elections in Poland, was deprived of its core competencies in this situation. The Electoral Code was not complied with, even though it was still in effect. The laws under which the May 10 elections were to be held was:

- the decision of the Speaker of the Sejm of the Republic of Poland of February 5, 2020 ordering the election of the President of the Republic of Poland;
- the Electoral Code, limited by Article 102 of the so-called Anti-Crisis Shield 2.0;
- Article 102 of the so-called Anti-Crisis Shield 2.0;
- the decision of the Prime Minister concerning the start of the preparations for the election by the Polish Post and the Polish Security Printing Works (Morawska 2021).

Situation Related to the Covid Pandemic

On March 11, 2020, the World Health Organization (WHO) recognized the outbreak of the COVID-19 disease caused by the SARS-CoV-2 coronavirus as

a pandemic (Coronavirus). In Poland, the first case of infection with the virus was identified on March 4, 2020 (The first case of coronavirus in Poland). The Minister of Health Prof. Łukasz Szumowski announced that at a press conference.

The Minister of Health, by means of regulations, introduced in Poland a state of epidemic threat from March 14 to 20, 2020, (Regulation of the Minister of Health of March 13, 2020 on the declaration of a state of epidemic threat in the territory of the Republic of Poland). The regulation was repealed on March 20, 2020, by sec. 3 of the Regulation of the Minister of Health of March 20, 2020 repealing the state of epidemic threat in the territory of the Republic of Poland (Journal of Laws, item 490) and a state of epidemic state from March 20, 2020 (Regulation of the Minister of Health of March 20, 2020 on the declaration of a state of epidemic in the territory of the Republic of Poland (Journal of Laws, item 491)).

During the pandemic, elections were a challenge for the governments in many countries (Michalak 2020). Special precautions and procedures were put in place to enable holding elections with minimal risk of spreading the pandemic. The measures that were taken are:

- voting by mail - some countries increased the availability of voting by mail or liberalized the conditions for using this option. This allowed voters to vote without having to go to a polling station;
- early voting - in order to avoid crowds on the election day, some countries extended the early voting period, allowing voters to cast their ballots early;
- intensification of the hygiene measures - the polling places were equipped with additional hygiene products, i.e. disinfectant liquids, protective masks, and gloves. Voters were also instructed to take appropriate precautions, i.e., wear masks and keep a social distance;
- regulations were introduced concerning limits on the number of people - in some cases, limits were set for the number of people who can be in polling stations at the same time to ensure safety and social distancing;
- the election campaign moved to the Internet and social media.

The Anti-Covid Act came into effect on March 8, 2020, and enabled the use of administrative, budgetary, and epidemiological measures in the fight against the coronavirus and its effects. Pursuant to an amendment to that act made on March 31, 2020 (Act of March 31, 2020 amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, and certain other acts), changes were made to, among others, the Electoral Code. The list of people who can participate in elections conducted by mail was expanded. In addition to persons with disabilities, that right was given to voters who are

subject to mandatory quarantine, isolation, or home isolation on the election day, as well as those who turned 60 years old at the latest on the election day (Article 40 of the Act amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, and certain other acts).

The parliamentary bill (print 328) on special rules for conducting general elections for the office of the President of the Republic of Poland ordered in 2020 was received by the Sejm on April 6, 2020, and was passed on that day by the Sejm and forwarded to the Speaker of the Senate. On May 5, 2020, the senate forwarded its resolution, in which it required to reject the bill. During its session on May 7, 2020, the Sejm rejected the resolution of the Senate. On May 8, 2020, the Act was sent to be signed by the President, who signed it on the same day. Subsequently, the Act was published and came into effect on May 9, 2020. Article 3 (1) of that Act stipulated that *The operator designated within the meaning of the Act of November 23, 2012 - Postal Law (...), hereinafter referred to as "designated operator," shall ensure, in the case of voting in the country, within a period from 7 days to the day immediately before the voting day, the delivery of election packages directly to the voters' mailboxes or to the voters' addresses indicated in Part A of the voter register referred to in Article 26 (6) (1) of the Act of January 5, 2011 - Electoral Code (...)* (Act of April 6, 2020 on the special rules for conducting general elections for the office of the President of the Republic of Poland ordered in 2020, Journal of Laws of 2020, item 827).

Implementing acts for this law, in the form of regulations, were to be issued by the Minister of State Assets.

On the date set by the Speaker of the Sejm, i.e. on May 10, 2020, the presidential election did not take place. In its Resolution no. 129/2020 (Resolution no. 129/2020 of the National Election Commission of May 10, 2020, on the determination of the impossibility of voting for candidates in the election for the office of the President of the Republic of Poland), the National Election Committee stated that *in the election for the office of the President of the Republic of Poland, ordered for May 10, 2020, there was no possibility of voting for the candidates. This fact is equivalent in its effect to the inability to vote due to a lack of candidates provided for in Article 293 (3) of the Act of January 5, 2011 - Electoral Code.*

The election was blocked by a dispute between Jarosław Kaczyński and Jarosław Gowin. The proposals for the elections made by the leader of the coalition party were not accepted by the government run by the Law and Justice party. The election that did not take place cost the Treasury nearly PLN 70 million (Polish Press Agency 2020).

The way to cover these expenses was provided for in the July amendment to the Act on the operation of healthcare in connection with and after the COVID-19

epidemic. The amendment provides that entities that, in connection with counteracting COVID-19, carry out the Prime Minister's order directly related to the conduct of the general election for the office of the President of the Republic ordered in 2020, with the possibility of voting by mail, may apply to the head of the National Election Office for a one-time compensation to cover reasonably incurred costs directly related to the implementation of the order. Indeed - the Polish Security Printing Works and the Polish Post have applied for reimbursement (Polish Press Agency 2020).

The head of the Chancellery of the Prime Minister, Michał Dworczyk, disclosed in the spring that on April 16 the Prime Minister issued decisions instructing the Polish Post and the Polish Security Printing Works to implement measures to counter Covid-19 under Article 11 (2), in connection with Article 11 (2a) and (3) of the "Covid" Act of March 2, 2020.

The Provincial Administrative Court in Warsaw ruled in September that the Prime Minister's April decision requiring the Polish Post to prepare for the May 2020 presidential election by mail was invalid. The court found that the decision grossly violated the law. The Prime Minister filed a cassation appeal to the Supreme Administrative Court against the judgment of the Provincial Administrative Court (Polish Press Agency 2020).

Consequences

According to many observers of the political scene, the government run by the Law and Justice party failed in terms of the overall organization of the election. It led to the biggest embarrassment of the Polish state in the last 30 years.

Citizens expressed their negative opinions about the organization of the election and the belief that voting by mail causes risks to their health and lives, and that it did not meet the standards of universality, equality, and secrecy. The Law and Justice government made itself extremely ridiculous by adopting the law on the mail election two days before May 10, when it was already clear that the government was unable to organize the election. The then Minister of State Assets Jacek Sasin was (and still is) negatively associated with the 2020 election and has become the "face" of the election. The same can be said about the Minister of Health Łukasz Szumowski, who issued contradictory messages depending on the political demand of his party bosses.

However, according to Law and Justice politicians, the fault lay with the political opposition, as the Senate - in compliance with the law - worked on the bill on the mail election for 30 days and local governments - also in compliance with the law - refused to provide the Polish Post with the personal data of residents (On the "election" that did not take place).

On May 13, 2021, Marian Banaś, the president of the Supreme Audit Office (SAO), presented the

results of an audit of the preparations for the 2020 mail election that ultimately did not take place either in the planned form or on the planned date.

During a press conference, Banaś said, among other things: *“organizing and preparing elections on the basis of an administrative decision should not have taken place and had no legal basis.”* On the same day, the SAO sent a notice to the prosecutor's office concerning its suspicion of a crime committed by the management boards of state-owned companies: the Polish Post and the Polish Security Printing Works. Marian Banaś also announced that the SAO was analyzing the statements sent by the other audited entities and was considering filing a notice concerning its suspicion of a crime committed by representatives of the Ministry of State Assets, the Ministry of Interior and Administration, and the Chancellery of the Prime Minister. The SAO was to notify the prosecutor's office about Prime Minister Mateusz Morawiecki, the head of the Chancellery of the Prime Minister, Minister Michał Dworczyk, the Minister of State Assets Jacek Sasin, and the Minister of Interior and Administration Mariusz Kamiński overstepping their authority and acting to the detriment of the public interest (Morawska 2021).

The allegations concerned the transfer to the Polish Post of citizens' personal data needed to organize the mail election (Chmaj 2020).

This decision was made by the then Minister of Digitization. In response to the Ombudsman's complaint, the Provincial Administrative Court ruled that the decision made by the Minister of Digitization on the matter was invalid.

In the grounds for its judgment, the Provincial Administrative Court stated that the Polish Post had no right to organize the mail election at all and should not have used data from the PESEL database provided to it by the Ministry of Digitization for this purpose. *“On the date of the contested action by the Authority [Minister of Digitization], the Participant [Polish Post] had no authority of its own in the organization of the election for the office of the President of the Republic of Poland, for the conduct of which the data made available by the Minister was needed”* - the administrative court ruled. The court also found that the executive branch did not have the right to order the Polish Post to do anything about the organization of the election, because at the time there were still no regulations in place that allowed it.

Conclusion

For the first time in Poland's history, we had to deal with the organization of an election that ultimately did not take place. The reason for this was, of course, the COVID pandemic in the world, but most importantly the legal disorder and the ineptitude of the state authorities, which tried at all costs to trick citizens into believing that the election would take place. Chaos, lack of competence, disregard for human health and life, contradictory reports about the spread of the virus, and scaremongering about the possible consequences of not participating in the election resulted in a very negative attitude among citizens towards both the election and the government. As a result, PLN 70 million was wasted on printing ballots. In its ruling of September 15, 2020, the Provincial Administrative Court concluded that there was no legal basis for holding the election in May, and in particular that holding it would violate the constitutional principles of equality, directness, and secrecy in presidential elections (Rychard, Haman 2020).

In a law-abiding state, the entity that makes a decision is responsible for its effects. In Poland, which is also considered a “democratic law-abiding state implementing the principles of social justice,” no member of the government has suffered consequences for his or her wrong decisions. To this day, none of the political decision-makers have been held accountable for their wrong decisions. Will they be judged by history? We will see.

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