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Postal Voting. Poland and Solutions in Other Countries

Keywords: elections, postal voting, electoral law, changes of electoral law

Słowa kluczowe: wybory, głosowanie korespondencyjne, prawo wyborcze, zmiany prawa wyborczego

Abstract

The article examines the thesis that the electoral law in Poland is treated instrumentally. Changes of postal voting regulations in Poland have been collated with solutions applied in other countries. The analysis focuses on the motivation politicians had to revise the Election Code and introduce postal voting. The article indicates to the *ad hoc* nature of solutions adopted and their short-term political benefits for various political groupings. The discussion focuses on the course of political actions related to the presidential election in Poland during the coronavirus pandemic.

Streszczenie

Głosowanie korespondencyjne. Polska i rozwiązania w innych państwach

Artykuł stanowi weryfikację tezy o instrumentalnym traktowaniu prawa wyborczego w Polsce. Na tle rozwiązań stosowanych w innych państwach ukazano dynamikę regulacji prawnych dotyczących głosowania korespondencyjnego w Polsce. Szczegółnej analizie poddano motywacje polityków do dokonywania zmian w Kodeksie wyborczym do-

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tyczących głosowania korespondencyjnego. Wskazano na doraźność przyjmowanych rozwiązań i łączenia ich z bieżącymi korzyściami politycznymi poszczególnych formacji politycznych. Omówiono przebieg działań politycznych związanych z przeprowadzeniem wyborów prezydenckich w Polsce w sytuacji zagrożenia epidemiologicznego ze strony koronawirusa.

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I. What is Postal Voting?

Democratic elections are defined by three factors: their universal nature, equal rights, and secrecy of voting. Of course, we may add another characteristic of election rights. They certainly include the principle of direct participation, although it is not a prerequisite of democratic procedures. This is true, especially that a number of countries apply indirect election methods. Provided that other mentioned principles of electoral law are observed, the indirect nature of elections does not necessarily mean that democratic procedures are compromised. Electoral law may stipulate proportional or majority voting. In the former case, it is necessary to define the vote-to-mandate conversion rate. In the latter case, it is important to specify the type of majority required (absolute or relative).

The principle of the universal nature of elections is indisputable. All citizens enjoy either passive or active election rights. In practice, however, there might be some limitations, such as age, place of birth or residence. However, any restriction of election rights in other instances may only be authorized by a court ruling or other judicial authority, and it needs to be supported by the applicable law.

Under the electoral law, equality may be formal and substantive. Formal equality means that every voter has the same number of votes and substantive equality is about ensuring that every vote is concerned with equitable outcomes.

Secret voting means that the election process organizer has to ensure that no one can determine which candidate or political party the citizen actually voted on.

However, much doubt has been raised by direct voting. In general, it means that the vote is cast for a person or a political party to acquire a mandate. Thus, the voter does not give the candidate the opportunity to make his final election decision. In other words, the voter does not appoint another person to elect further representatives to exercise the mandate on her behalf.

A personal voting is something different than direct voting. In this particular case, a vote is cast in person. The voter may not engage any other person and delegate own voting power to that person. However, many countries have implemented procedures to allow for it, e.g. proxy voting. Sometimes, the law also provides for other options to vote, for instance without the need for a voter to be present at the polling station. This may include Internet voting or postal voting. In no way, do such procedures affect the principle of direct voting. It is merely the question of a technique used to deliver the vote to the election committee.

II. Why do We Use It?

The basic form to exercise the election right is voting in person by casting a vote into a ballot box in a polling station in the presence of the election committee. Not only does it ensure secrecy, but it also guarantees that no one can influence the will of the voter as expressed in the ballot and that the ballot will certainly reach the committee that determines election results. The vote cast does not disappear and it is not changed.

Therefore, what are the goals of those who promote alternative voting methods? Firstly, the universal nature of elections is built by the turnout. Alternative voting methods have been introduced to facilitate or enable voting for people who, for various reasons, have difficult access to the polling station². Obstacles to appear in a polling station include a major distance, health issues, and a stay abroad.

The effort to increase voter turnout should not be a purely statistical process. The legitimacy of elected representatives is proportional to the number

² A. Trubalski, *W sprawie głosowania korespondencyjnego jako jednej z alternatywnych procedur wyborczych w wybranych państwach. Opinia prawna*, "Przegląd Sejmowy" 2018, No. 1(144), p. 182.

of voters supporting them. The support rate may be expressed as a percentage of all participating voters or the total number of eligible voters. The former figure always is higher than the latter. A growing turnout translates into an increase in the latter rate. Thus, the legitimacy of elected representatives may become stronger. This is one of reasons why politicians promote possibly the widest participation of citizens in elections.

Equally important, if not the most important, reason for introducing alternative voting methods is the principle of universal suffrage. Therefore, relevant authorities and public institutions create opportunities for all citizens to exercise their voting rights, including those who cannot vote in person at a polling station. This is less a question of the good will of the state but more of its duty. It is the obligation to ensure that every citizen can exercise his or her rights. Therefore, state authorities need to create conditions for all citizens to participate in elections. It should be stressed that reasons of social exclusion in terms of restricted access to election procedures may vary. These include different forms of physical disability, both permanent and temporary. However, regardless reasons and duration of disability, the state needs to create technical possibilities for citizens to exercise their rights.

Other reasons of restricted access to voting may include permanent or temporary absence at the place of domicile due to professional duties or family reasons, studying and many more. Special arrangements need to be made for such people to enable them to exercise their rights. Thus, election authorities are responsible for preparing solutions that will guarantee equal access to voting for all citizens. Various methods alternative to voting in person are not the expression of the good will of the state. Conversely, it is a constitutional duty. The issue, however, is to select appropriate, optimal legal and technical solutions that will ensure that all eligible citizens can exercise their voting rights without exception and to guarantee effective and fair procedures in the best way possible.

III. Experience of Other Countries

In many countries around the world, alternative ways of voting have been successfully used for quite some time. The most common are postal voting,

proxy voting, voting in person at home (mobile ballot box) and Internet voting. In parallel, different solutions facilitate voting by people with disabilities. These include, for example, wheelchair accessible polling stations or stations equipped with specialized equipment to allow blind and partially sighted people to cast their votes. Persons with disabilities are also permitted to use the assistance of third parties.

Finally, postal voting in national elections has been applied in many countries. In some instances, the latter is available for all citizens, but most often it is designated for specific groups only. However, changes of election procedures have been introduced gradually well in advance. Previously, it was also the case in Poland.

Apart from Poland, postal voting exists in almost thirty countries: Australia, Bangladesh, Bosnia, Estonia, Philippines, Finland, Greece, Spain, Netherlands, India, Ireland, Iceland, Japan, Canada, South Korea, Lesotho, Lithuania, Latvia, Germany, New Zealand, Pakistan, Portugal, Slovenia, United States of America, Switzerland, Sweden, United Kingdom. In some countries, regulations allow for the all-postal voting. All-postal voting is also possible in five American states (Hawaii, Colorado, Oregon, Washington, Utah). However, in most countries there are some restrictions³.

Procedures may vary significantly across countries. However, in principle, postal voting is one of the forms that complement voting at a polling station. As a rule, legislation sets out specific conditions which a voter needs to fulfill to be able to use this method. In Belgium, the Netherlands and Italy, postal voting can be used by citizens who are abroad during the elections. In Lithuania, people who are unable to appear in person at a polling station due health or professional reasons may vote by mail. This also applies to people arrested and detained. In Luxembourg, voters over 75 years of age, citizens staying abroad, and those who are unable to appear at a polling station for personal or professional reasons may resort to postal voting⁴.

³ J. Zbieranek, *Alternatywne procedury głosowania w polskim prawie wyborczym – gwarancja zasady powszechności wyborów czy mechanizm zwiększania frekwencji wyborczej*, Warsaw 2013, pp. 47–53; J. Marszałek-Kawa, D. Plecka (eds.), *Dictionary of Political Knowledge*, Toruń 2019.

⁴ Idem, *Alternatywne procedury głosowania w Polsce na tle państw Unii Europejskiej*, "Studia BAS" 2011, No. 3(27), p. 100.

A very liberal approach to postal voting has been adopted in Spain. This method of voting can be exercised by citizens staying abroad, as well as those residing in the country. This can be done without giving any reason. However, a person who has already applied cannot change their mind and vote in person.

Postal voting techniques are very similar in particular countries. In those countries in which only some citizens can vote by mail, early registration is mandatory. In general, to receive a ballot and vote, a voter needs to inform the relevant election bodies well in advance.

Then, a voting package is posted to such voters by a relevant election committee. The voter completes the ballot and sends it to the relevant election committee. The law clearly defines deadlines for particular activities. An envelope with a ballot must reach a relevant election committee by a specified date. After the election commission has checked the posting, the vote is added to the ballot box.

For example, in the Netherlands, voters already receive a package with a return and a ballot envelopes 12 weeks before the voting day. The ballot itself is sent to the voter four weeks before the election. For the vote to be valid, it must reach the relevant election committee by 3 p.m. on the election day.

Slovakia has a 50-day period for voters staying abroad to register for postal voting. In Estonia, citizens abroad have 30 days to do the same. The Estonian voter should send the electoral package to the nearest diplomatic post immediately after receiving the voting package so that the diplomatic post can send it back to the election committee four days before the date of voting at the latest.

In the UK, all eligible voters vote by mail. Once lists of candidates are approved, voting packages are sent to voters. This takes place about three weeks before the election day. A citizen should send a ballot to the election commission before the voting deadline. It can be sent by post, but if a citizen does not make it in due time, he or she can deliver the ballot to the polling station directly.

In Germany, the request to use postal voting must be submitted as soon as possible. A complete set of ballot papers is delivered no earlier than six weeks before the voting. The voter must ensure that his ballot is sent in a special envelope to the election committee no later than 6 p.m. on the election day. Thus,

it must be sent by post no later than three days before the election. It is also possible to deliver a ballot to the election committee in person.

According to the German electoral code, the fact that the vote was secret needs to be confirmed by the voter's signature on a special form which contains voter's personal information. The voter is responsible to maintain secrecy. It includes inserting a ballot into an envelope together with a signed confirmation form.

The same is true in a number of other countries. For example, in the United Kingdom, the voter needs to sign a special statement and state his date of birth. Information is then checked against data in the request for postal voting. In case of non-compliance, the vote is considered invalid.

Other regulations apply in Finland. While staying abroad, a voter is responsible to keep secrecy when filling in the ballot. He signs a secrecy statement which is sent to the election committee in the country together with the ballot in a separate envelope. The correspondence should include secrecy statements signed by two witnesses. Witnesses may not include closest relatives, but they need not be Finnish nationals.

Alternatives to voting in person include the possibility to cast vote before the election day. Such a solution is applied, for example, in Denmark. If someone desires to take part in the election but cannot vote by mail and the person is not able to appear in a polling station on the election day, the state allows the person to exercise his or her election rights through the so-called advance voting. The person then receives documents, as those who vote by mail, and may cast her vote at a designated venue. Voting should take place between the third and the first week before the election day. People using *advance voting* receive a different ballot with no names of candidates printed. The voter fills in empty fields and puts the name of the candidate or a party he/she has voted for.

Regulations introducing alternative voting methods, including postal voting, have generally been implemented well in advance before elections. The aim was to prepare election infrastructure and establish appropriate procedures to ensure secrecy and efficiency of voting on the one hand, and, on the other, that would not complicate administrative management provided by election committees, as well as other public and state bodies and institutions, e.g. consulates.

For the first time in Europe, the possibility of postal voting had been introduced in the UK. It was introduced at the beginning of 1918, when such a possibility was created for soldiers serving their duty in units outside the United Kingdom. This form of voting was used in the elections held on 14 December 1918. Early March 2000, provisions were adopted to make postal voting available for all citizens. For the first time, British citizens were able to use postal voting in the parliamentary election held on 7 June 2001.

In Germany, the possibility of postal voting was introduced to the electoral law in 1956. It was designated for people who, for example, were unable to access the polling station in person. The first such voting took place in Germany in the parliamentary election in September 1957. In 2008, Germany introduced the possibility of postal voting for all eligible voters without the need to state reasons. Election regulations were amended a year before the Bundestag election held in September 2009. Then, postal voting was used by about 4.9 million people, i.e. 18.4% of all voters. After ten years, in the 2019 election, already 10.7 million people, or 28.4% of all voters, resorted to this voting method. This long-term experience in Germany has allowed the local election in Bavaria to take place with all-postal voting on 29 March 2020, i.e. during the pandemic. The federal state decided on using the method two weeks before the election⁵.

In Switzerland, a postal voting system was introduced gradually. It took Switzerland almost 30 years to implement postal voting throughout the country without any restrictions. The first was the Geneva Canton in 1950. Finally, at federal level, postal voting was introduced in 1965. In Switzerland, people working abroad, sick people or people in hospitals could also exercise postal voting. Since 15 December 1994, the voting has been already available to everyone without any need to express their request. This was introduced three months before the first of nine referendums scheduled in 1996⁶. In the Swit-

⁵ P. Jaźwiński, *Głosowanie korespondencyjne w innych krajach – sprawdzamy*, “Konkret 24”, 2.04.2020.

⁶ M. Musiał-Karg, *Głosowanie korespondencyjne oraz e’voting jako alternatywne procedury uczestnictwa w wyborach i referendach Konfederacji Szwajcarskiej*, [in:] *Uwarunkowania demokracji przedstawicielskiej we współczesnej Polsce i Europie*, eds. N. Kusa, M. Musiał-Karg, A. Stelmach, Poznań 2018, pp. 75–76.

zerland, the percentage of voters using postal voting has been growing from one election to another to reach over 80%.

Since May 2004, postal voting has been also available in Slovakia. For the first time, this method of voting was used in the parliamentary election two years later. This possibility is open to voters who have their permanent residence in Slovakia but on the day of elections they stay outside the country. The same applies to Slovak nationals who do not have their permanent residence in the country.

IV. The Beginning and Evolution of Legal Regulations Concerning Postal Voting in Poland

In Poland, postal voting and proxy voting were introduced under the election code in 2011. Since then, rules have been amended on several occasions to define groups of eligible citizens. Some people considered it to contribute to the implementation of universal suffrage and increased voter turnout, while others saw a threat to the principle of equality and secrecy. It was stressed that postal voting was uncertain and largely vulnerable to fraud and manipulation.

Rules governing postal voting have changed over nearly twenty years of having the Election Code. Arguments supporting and opposing postal voting have also evolved.

In its original version, the Code of 5 January 2011⁷ made postal voting available to citizens voting abroad. A voter could notify a relevant consulate about his/her intention to vote at the latest 15 days before the election day. Such requests could be made orally, in writing, by telegraph, by fax or by email. Such a draft provision was put for voting by MPs representing the Civic Platform (PO) and it was supported by the Parliamentary Club of Law and Justice (PIS). The then largest parliamentary groups were in agreement regarding the introduction of postal voting.

A few months later, the amendment of the Election Code of 27 May 2011 made postal voting available for all people with major or moderate disabili-

⁷ The Act of 5 January 2011 Election Code (Dz.U. No. 21, item 112).

ty⁸. The amendment was also promoted by MPs representing the Civil Platform (PO). The amendment introduced other solutions for people with disabilities who wish to participate in elections. A decision was made to develop and distribute Braille language overlays for people with visual impairment. The number of polling stations adapted to people with disabilities increased. Voters had to notify their interest in postal voting 21 days before the election day at the latest.

During the parliamentary debate on the amendment of the electoral law, MP Marek Ast (PIS) raised doubts about the possibility to guarantee secrecy in case of postal and proxy voting. He also questioned the compliance of the changes with the Constitution. “The Constitution reads clearly that the election needs to be secret and direct. Both proxy and postal voting breach these principles”, said Mr. Ast at the session of the Sejm on 25 May 2011⁹.

In its ruling of 20 July 2011, the Constitutional Court concluded that postal voting was in line with the Polish Constitution¹⁰. It should be stressed, however, that the ruling was not unanimous. Some judges expressed different opinions.

Until 2014, the Polish Election Code reserved postal voting for only two groups of voters: people with disabilities and people voting in constituencies located abroad. The amendment to the Election Code of 11 July 2014 extended postal voting to all voters. The authors of the amendment argued that all-postal voting was more in line with the constitutional principle of universal suffrage and would increase the voter turnout.

The draft law was submitted in July 2013 by members of the Civil Platform. All parliamentary groups, apart from the Law and Justice, supported the bill. At the Sejm session of October 2013, Grzegorz Schreiber, a member of the Law and Justice, requested the parliament to reject the draft at its first reading, since he was concerned about the possibility of electoral fraud and vote buying. He said: “we will not support any violation of the Constitution. We cannot support the law that allows electoral manipulation: copying, fal-

⁸ K. Korycki, *Alternatywne techniki głosowania a frekwencja wyborcza*, “Studia Wyborcze” 2017, vol. 23, p. 93.

⁹ Shorthand report of the 93rd session of the Sejm of the Republic of Poland on May 25, 2011, p. 37.

¹⁰ The judgment of the Constitutional Tribunal of 20 July 2011, OTK ZU 6A/2011, item 61 (Dz.U. No. 149, item 889).

sifying, adding ballots to ballot boxes, and the destruction of electoral packages. These are the facts we need to be aware of when we use postal voting”¹¹.

On 22 October 2013, during a parliamentary debate, Law and Justice MP Krystyna Pawłowicz argued that “the draft law is very dangerous as it violates basic electoral standards and values, as well as the constitutional principle of direct elections and the principle of voting secrecy. Thus, it creates a very real threat to voting secrecy and fraud before the ballot gets to a ballot box. Universal suffrage cannot be pursued at any price, i.e. breaking other rules, especially those I have mentioned, namely direct voting and secrecy”¹².

Three years after the introduction of the universal postal voting in autumn 2017, Law and Justice members proposed to eliminate this method of voting. At that time, they reiterated shortcomings of the solution, such as undetectable counterfeiting, the threat of election results being falsified by vote buying, and they claimed that postal voting.

Various bodies and institutions expressed their objection to the complete elimination of postal voting, including the Ombudsman, the State Election Commission, members of the National Electoral Office and, of course, the community of people with disabilities.

At its session of 14 December 2017, the Sejm adopted a new Election Code which lifted postal voting. On December 21, the Senate adopted amendments that restore postal voting for disabled people only. During their earlier vote, the Senate rejected amendments of Civil Platform senators, which aimed to restore postal voting in their previous form available for all voters.

In the middle of January 2018, the President signed a new law. The law stipulated that only people with severe or moderate disability had their right to use postal voting in subsequent elections. The amendment was heavily criticized by Polish people abroad, who had used the method since the time it was introduced to the Polish law. As a matter of fact, amendments adopted by the Parliament deprived many Polish citizens living abroad of the possibility of voting.

In 2020, the situation changed dramatically due to the COVID-19 pandemic. The rapid spread of the pandemic and approaching presidential elec-

¹¹ pk/jk, *Głosowanie korespondencyjne. W Sejmie tylko PiS przeciw*, PAP, 23 October 2013.

¹² Shorthand report of the 52nd session of the Sejm of the Republic of Poland on October 22, 2013, p. 77.

tion scheduled on 10 May forced the government to introduce measures to hold the election in extraordinary sanitary emergency.

Based on the law adopted on March 31 to prevent the negative economic consequences of the pandemic, i.e. the First Anti-Crisis Shield, the Parliament amended the Election Code. Postal voting was extended to encompass two more groups of voters. According to Article 40 of the law, apart from disabled people, postal voting included voters “who were subject to compulsory quarantine, isolation or home isolation on the election day”, and to those “who were 60 years old on the day of the election at the latest”.

The voter should notify about his intention to use postal voting 15 days before the election. The exception applies to voters who are subject to compulsory quarantine, isolation or home isolation on the election day. The mentioned people should notify their intention to use postal voting five days before the election at the latest.

The proposed amendment to the Election Code was put on the table at night of 27–28 March 2020 by the Law and Justice with the second reading. It was included in an amendment to the law on combating effects of the pandemic. It is worth noting that promoters of the amendment did not provide any justification for it during the session of the Sejm. The amendment was heavily criticized by the opposition. They pointed out that the procedure for amending the Election Code was not in line with the ruling of the Constitutional Court of 2006. In that ruling, the Court stated that it was unacceptable to make any changes to the electoral law less than half a year before the election. However, the Sejm adopted the amendment by a slim majority¹³. The Senate adopted the anti-crisis law containing amendments to the Election Code on March 31. The President signed the law on the same day. Thus, the Election Code was changed 40 days before the election.

On 6 April 2020, one week after the amendment of the electoral law was adopted, the Law and Justice submitted to the Sejm a draft law on special rules of presidential elections in Poland in 2020. Yet another amendment to the Election Code was on the table. It assumed that postal voting in the forthcoming presidential election would be the only way for all voters to participate.

¹³ 222 members of parliament voted for the amendment, 214 were against, and 3 abstained.

During the Sejm session of April 6, on the grounds of urgent need to amend the Code, MP Krzysztof Sobolewski (PIS) stated: “The overriding responsibility of the state is to enable all eligible citizens of the Republic of Poland to participate in the universal presidential election scheduled in 2020. Considering conditions of the pandemic and restrictions to movement of people, it is necessary to create an appropriate mechanism supporting the election. Such a mechanism is to promote postal voting (...). This draft bill foresees that all-postal voting is the only method used during the presidential election of 2020. (...) While taking into account the current situation in the country related to the epidemic, the draft presented meets requirements to hold the election within a constitutional time frame. This stems from the obligation of the legislative branch to protect the health and life of Poles without restricting their active voting rights”¹⁴. It was clear from the pronouncement by the member of parliament that the introduction of all-postal voting during the presidential election was necessary due to the health security of voters and to hold the election within the pre-established deadline of 10 May 2020. Additionally, the draft law stated that during the epidemic the Speaker of the Sejm may order a change of the election date laid down in the previous decision.

The amendments to the Election Code were heavily criticized by the parliamentary opposition. 230 MPs voted in favor of the law, 226 against and 2 abstained. The law passed to the Senate, which, according to the Constitution, had 30 days to take a stance on the law adopted by the Sejm. The upper chamber used the entire statutory time allocated to process the law. The Senate expressed their negative position on the law on May 6. This prevented the law being adopted to hold the all-postal voting on May 10.

It is worth to emphasize perhaps one more issue that has been previously mentioned, namely time required between amendment of the law and the law becoming effective. In 2014, when the Polish Parliament adopted postal voting for everyone who wished to use the method, changes to the Election Code were adopted three hundred days before the upcoming election. The amendment of the Election Code of 2018 maintained postal voting for disabled people only. Then, the Parliament decided on the amendment in Janu-

¹⁴ Shorthand report on the 10th session of the Sejm of the Republic of Poland on April 6, 2020, p. 53.

ary 2018. It was over nine months before the local government election and a year before the election to the European Parliament.

Recently, the Sejm adopted postal voting for people quarantined and 60+ citizens on 31 March 2020. It was merely 40 days before the election and in the middle of the election campaign.

Concluding, it is true that the issue of postal voting has been present in Polish politics for at least twenty years. From the moment of introducing the method into the Election Code, positions of various political parties have evolved. Often contradictory short-term interests of political parties have had their impact on the attitude presented by politicians regarding groups eligible to postal voting. Therefore, the approach to postal voting was instrumental depending on immediate political interests. Since no political party presented a long-term position on the subject, we observed hectic behavior determined by temporary needs of the presidential election in 2020. It seems that the determination to pursue individual short-term political interests, in particular those of the largest political factions in the country, translated into an instrumental approach to postal voting. Today, after the presidential election, it seems to be a good time to stop focusing on emotions and temporary benefits, and thoroughly consider detailed rules of postal and electronic voting.

Extraordinary conditions of the pandemic should inspire us to look for sustainable new solutions in the electoral law. It may happen again that elections in Poland are held in an unusual setting. Therefore, it should be worth to develop procedures for extraordinary circumstances. Then, we can avoid accusations that specific solutions are adopted to cater needs of specific political groups shortly before the election.

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