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Election Petitions in Poland: The Efficiency Analysis of the Institution

Abstract: The article concerns the analysis of procedures connected with election petitions in Poland on the basis of the constituencies under the jurisdiction of the District Court in Toruń. It should be mentioned, however, that research is currently being conducted in other courts, which even at the preliminary stage appears to corroborate the results of the analysis presented in the article. The research focuses on the guarantees of the efficiency of the electoral petition in Poland. The election petition is the most important instrument which is available to verify the validity of elections. The Constitution does not regulate this matter, entrusting the legislator with this task. The possibility of submitting an election petition implements the principle of the external judicial review of the progress of an election or referendum, which can be initiated upon the request of a legal entity entitled to submit the petition. Considering the role of the petition proceedings as well as the values which remain protected within the procedure of settlement, the legislator should demonstrate the utmost care to increase their efficiency. However, the regulations concerning election petitions are scattered around the whole Electoral Code. Furthermore, for an election petition to be justified, there must be a cause-effect link between the law violation and the results of an election, with the burden of proof placed on the petitioner. The overall result is that in judicial practice only in few cases have grievances in election petitions been considered justified.

Keywords: *election petition; election verification; elections; electoral system; voting; democracy; civil rights*

Introduction

Elections constitute the foundations of the whole vertical structure of democracy (Żukowski, 2006, p. 17). In essence, they have many remarkable functions, for instance, creative, legitimising and integrative (Wojtasik, 2012). Moreover, elections hold governments to account (Antoszewski & Herbut, 2001, p. 210). The aforementioned functions – although they are by no means complete as they may vary in the case of elections to collective bodies and single-person authorities, central and local, and frequently depend on the social structure itself as

well as party or economic systems – constitute the foundations that guarantee the efficiency of the democratic system (Skotnicki, 2007, p. 12). Their appropriate realisation determines the existence of the democratic rule of the law. Due to the reasons stated above, it is essential that the proper course of rigorous control of election procedures should be ensured.

The election petition is a principal instrument for the verification of elections (Sokala, 2013, pp. 180–181). The Constitution does not regulate this matter, entrusting the legislator with this task. The possibility of submitting an election petition implements the principle of the external judicial review of the progress of an election or referendum, which can be initiated upon the request of a legal entity entitled to submit the petition (Rytel-Warzocho, 2008, p. 345). Considering the role of the petition proceedings as well as the values which remain protected within the procedure of settlement, the legislator should demonstrate utmost care to increase their efficiency. However, the regulations concerning election petitions are scattered around the whole Electoral Act dated January 5, 2011 – the Electoral Code, the Journal of Laws 2011 No. 21 item 112 as amended (Journal of Laws, 2011, No. 21, 112)¹. Additionally, for an election petition to be justified, there must be a cause-effect link between the law violation and the results of an election. Another difficulty is the fact that the burden of proof is placed entirely on the petitioner. The overall result is that in judicial practice only in few cases have grievances in election petitions been considered justified.

Verification of the Validity of Elections

In contemporary democracies three main models of verification of the validity of elections can be distinguished. The first one cedes to both chambers of Parliament the right to decide about the validity of elections. The countries which have chosen this solution are, among others, Italy and the United States of America (Mistygačz, 2011, p. 140). A different model which can be found in, for example, Great Britain has its origin in the principle *Nemo iudex in causa sua* (no one shall be the judge in his/her own case), and gives all the power of exercising control over the process of elections to the judiciary. The last model is a mixed one as it is Parliament that decides on the validity of elections and in the case of petitions concerning their legality, it is the judiciary that takes the final decision. Such a model has been adopted in, for example, Spain, Germany, Austria or France after 1958 (Mistygačz, 2011, p. 140).

In Poland the solution promoting full judiciary control has been adopted, eliminating at the same time the danger of partiality and the possibility of abusing the advantage of the parliamentary majority over the minority (Repel, 1995, p. 126; Gebert, 1981, p. 171). The significance of the adoption of this model in the early period of the political transformation after 1989 was commented on by the Supreme Court in the following words, „Giving the power to control the elections to the Supreme Court, and not any other Constitutional

¹ Act of January 5, 2011 – Electoral Code.

body means what follows: a) the legislator expects that the elections should be controlled by an impartial body, independent of any external factors and influences, b) the procedure of petition identification and recognition will have principal characteristics of legal action taken by every court, i.e. ruling on the basis of the evidence collected within the court's prerogative to apply the right standard of proof, c) the court's decision taken will constitute an attempt to apply law to established facts within the boundaries of the methods of law interpretation determined by judicial practice and tradition" (Banaszak, 2014, p. 50)².

Finally, this model was adopted under the provisions of article 5 of the Constitution Act of October 17, 1992, about the relationship between Poland's legislative and executive powers and local government (further referred to as the Constitution Act) (Journal of Laws, 1992, No. 84, item 426)³. According to the Constitution Act, "the validity of the elections and the validity of the election of a Member of Parliament which has been contested can only be resolved by the Supreme Court". This solution, according to article 26 of the aforementioned Act was also concerning the Senate and senators (Repel, 1995, p. 126). The methods of verification were determined by the provisions of the Electoral Law to the Sejm of 1993 (Journal of Laws, No. 45, item 205)⁴. All these provisions were maintained in the Constitution of Poland of April 2, 1997. The Constitution, entrusting specific legal regulations with the legislator, follows the Constitution Act and states only that the validity of general elections to Parliament (Paragraph 1, Article 101) and the validity of the Presidential elections (Paragraph 1, Article 129) are confirmed by the Supreme Court. The validity of local government elections is recognised, according to the legislator, by an appropriate District Court⁵. To recapitulate, the indications and procedures connected with lodging election petitions in different types of elections (to the Sejm, Senate, European Parliament, local government, Presidential elections as well as in the case of general or local referendums) are regulated by the Electoral Code.

In some countries, apart from establishing the model of controlling elections, constitutions and electoral laws determine in detail the procedures of verifying the election process: *ex officio* (the *ex officio* principle) or on request (the disposition principle). In Poland both procedures have been combined, which means that during elections the Supreme Court (or in the case of local elections District Courts) acts *ex officio* and is obliged to verify the

² The decision of the Supreme Court of December 5, 1995, SW 247/95.

³ The Constitutional Act of 17 October 1992 about the relationship between the legislative and executive powers of the republic of Poland and regional government.

⁴ The Act of 28 May, 1993. The Electoral Law to the Sejm.

⁵ In the Electoral Code apart from general regulations concerning the election petition, there are specific regulations concerning election petitions in different types of elections. Under these regulations i.e. Part 7, Chapter 6, Article 392, unlike all other elections, petitions in regional government elections are recognised by District Courts in non-contentious proceedings.

validity of elections even if no petitions are lodged (Banaszak, 2014, p. 50). However, if they have been lodged, the Supreme Court acts on request of petitioners.

It is worth noting at this point that in the countries where constitutions entrust electoral laws or the Electoral Code with detailed verification procedures (e.g. Poland), they do not give the verification procedure the full suspension force. The body verifying the validity of elections can declare the entire elections or the elections carried out only in one or several constituencies invalid (it must be emphasised that in the case of local government elections it is impossible to declare the entire elections invalid, but it can be done only in a particular constituency, which results directly from the jurisdiction) (Banaszak, 2014, p. 50). It leads to the invalidation of the mandate from the elections that have been annulled and the necessity to carry out re-elections.

The Institution of the Election Petition

Regulations concerning the election petition are scattered around the Electoral Code. The Chapter 10 of Part 1 is devoted to this matter as it contains general regulations referring to all types of elections that have been regulated legally, as well as detailed regulations concerning the validity of specific types of elections, following a referral pursuant to Article 83(2): „the terms of lodging petitions and the procedure of their recognition as well as deciding on the validity of elections are specified in the specific provisions of the code”. Such codification measures can give rise to complications in the process of acquiring knowledge about the proceedings and the application of the procedures on the part of an individual petitioner.

Petitions are recognised in non-contentious proceedings by: the Supreme Court in the case of general Parliamentary elections, elections to European Parliament, Presidential elections and nationwide referendums and District Courts in the case of regional elections and local referendums. As these are non-contentious proceedings, the regulations from Book 2 of the Civil Code apply. The election petition proceedings are characterised by numerous diversities (Rakowska, 2010, p. 191). They mainly concern: the assessment of the legitimacy of petitions and their foundations, formal requirements to lodge petitions, the time of lodging petitions and appeals, determining the circle of relevant participants before the court, the course of proceedings, the form of rulings published when petitions have been recognised as well as their appeals and costs of proceedings (Rakowska, 2010, p. 191).

The majority of scholars argue that the election petition is a specific civil non-code and non-contentious proceeding, and not entirely separate proceeding to which the appropriate regulations concerning the non-contentious proceeding from the Civil Code could only be applied in the alternative (Rakowska, 2010, p. 191). As Anna Rakowska (2010, p. 191) rightly stated, such a conclusion could be drawn from the literal interpretation of the provisions concerning the petition procedures, which unequivocally state that “the court recognises a petition in non-contentious proceedings,” and not that the regulations from Book 2 of the Civil Code can be applied to recognise an election petition. This formulation even more

firmly anchors the election petition proceedings in the non-contentious civil proceedings, which can prove significant in the process of interpretation: it indicates that in the case of doubts how to apply the particular regulations from the Civil Code, these doubts should be resolved in favour of their application (Rakowska, 2010, p. 192). It is difficult to contest this statement; however, it should be considered whether the fact that an election petition is characterised by so many differences from the non-contentious civil proceedings and the fact that it performs such a crucial controlling function should affect its diversity.

The petition that has been correctly lodged must meet certain formal requirements – namely, it should include personal details and address of an applicant or his/her legal representative, the indication of the court which is to recognise the petition, the proper contents of the application or statement, evidence to support the pleaded circumstances as well as the signature of an applicant or his/her representative. Furthermore, according to the Code, a petition must be lodged within the period determined by law, it must indicate the regulations that have been violated, it must include pleas on the grounds of the Electoral Code and present evidence in accordance with the pleas (Józefowicz, 1997, p. 24). The scope of petition must also be determined. Finally, the petition must be lodged in writing (Józefowicz, 1997, p. 24). “The strictness of the legislator concerning the basis and form of the petition justifies the opinion that if an applicant based his/her petition on a specific plea, the scope of the petition cannot be further extended or its legal basis modified, as the court recognises the lodged petition within the plea in law. The court cannot thus examine the petition beyond the plea in law included in the application, nor can it consider effective any other pleas in law (...) not indicated in the application” (Dauter, 2005, p. 76).

Thus, it is the applicant that is responsible for the scope and conduct of the procedure, and he or she is also in charge of the final form of the procedure by setting its limits through the indication of pleas in law and demonstrating evidence supporting the pleas. Courts are subject to the requirements and evidence presented by the applicant. Additionally, the disgruntled voter is obliged to prove the influence of the supported pleas on the result of elections. This constraint was recorded in the Electoral Code as a result of the implementation of regulations from the election laws to the Sejm and the Senate of 12 April, 2001 and the Presidential election laws (Buczkowski, 2011, p. 228). Earlier regulations referring to the relationship between the bases of petitions and election results used the wording “might have had impact on the election result,” which was in fact rather vague, but considerably facilitated overcoming formal barriers of lodging an election petition, and to a much greater extent passed the obligation of establishing the aforementioned relationship, or demonstrating its lack, to the competent authorities of the state (Buczkowski, 2011, p. 228). However, it must be emphasised that the ambivalent relationship between law infringements and the final outcome of elections established during the election petition proceedings have caused problems with verification, particularly evident and seized upon by the media when the validity of electing Alexander Kwaśniewski as President was being assessed in 1995 (Planeta & Chrabąszcz, 1996, pp. 82–94).

Despite the aforementioned considerations, the constraint that the applicant is obliged to prove the influence of the supported pleas on the result of elections can rise reflections and doubts on the grounds that the court undoubtedly does not have verifiable and indisputable testing methods and is unable to determine motivation processes taking place in the mind of the voter deciding about casting a given vote (not to mention the fact that it is not the nominal task of the court). Therefore, it appears justifiable to question the efficiency of this constraint in the current form.

Empirical analysis

The aforementioned doubts were confirmed by the results of the first stage of research presented in the table below, concerning electoral petitions from the constituencies falling within the competence of the Toruń District Court, lodged after the establishment of the Electoral Code in 2011.

Table 1. Results of Electoral Petitions Recognised by the Toruń District Courts after 2011.

Electoral petitions recognised by the Toruń District Courts after 2011	
Conduct of the Procedure	
Petitions Lodged	19
Petitions Left Without Further Processing	16
Number of Recognised Petitions	3
Petitions Dismissed	2
Valid Petitions	1

Source: Author's calculations on the basis of the archives of Toruń District Court.

The results indicate that the vast majority of petitions lodged was either left without further processing or dismissed. It is worth noting here that out of 35 petitions lodged after 2011, which fell within the competence of the Toruń District Court, 19 were electoral petitions – the remaining ones concerned preliminary electoral rulings in accordance with Article 111 of the Electoral Code – but only three of them were appropriately recognised with only one having positive effect. As a result, 84% of all the petitions were left unrecognised due to formal mistakes of the applicants and 11% were dismissed after appropriate recognition, which means that 95% of all the lodged petitions were lodged *de facto* ineffective.

The analysis presented above shows poor effectiveness of lodging electoral petitions. Only a small percentage of applications overcome formal barriers only to be rejected due to the problem concerning the impact of the infringement on the election results. The qualitative analysis has revealed that the most common reasons for leaving a petition without further processing are as follows: failure to enclose copies of the application and copies of

attachments to be delivered to all the persons concerned to the pleading; lack of pleas in law and evidence supporting the plea to invalidate elections – “a film cannot be treated as evidence in the electoral petition case in a given constituency”⁶; lack of evidence – petitioners themselves have no certainty and their pleas are based purely on conjectures. In the judgment of the court we can read that “the court is not a control body established to determine again the results of the elections and to do vote counts only because a candidate for the City Council wishes the court to do so”⁷. When it comes to petitions that were dismissed, the most common reason is lack of evidence that the mistake had any impact on the final outcome of the elections.

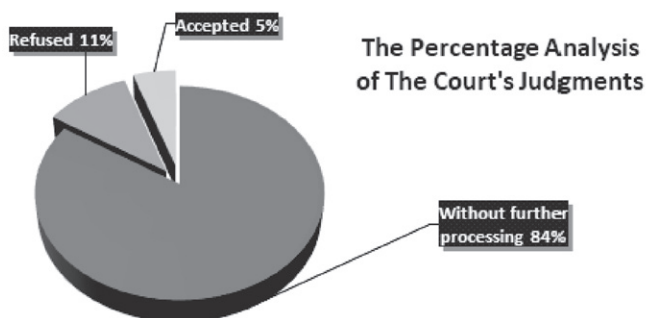


Image 1. Visualisation of the Results Presented in the Table 1.

Source: Author's calculations on the basis of the archives of Toruń District Court.

The elements of the election procedure presented here show that the realisation of civic control in the form of the election petition is a very difficult undertaking because the whole burden of availability in the proceedings rests on the citizen. Not only must they determine their pleas on the basis of binding electoral regulations, but they are also obliged to present relevant evidence. Moreover, they are under obligation to demonstrate the impact of the proven pleas in law on the result of the elections. This entire process gives rise to serious doubts about the practical application of this solution. Firstly, taking into consideration the fact that the electoral petition does not concern private matters of individual citizens and must constitute a significant indicator of consistent implementation of general principles of the democratic system (Banaszak, 2014, p. 49), the solutions functioning in the petition procedure are too complicated and constitute too heavy a burden on the shoulders of an individual citizen. Consequently, it seems proper that these issues should not be solved

⁶ The case concerned the information film made by the National Electoral Commission in the local elections of 2014 (Author's analysis on the basis of the archives of Toruń District Court).

⁷ Citations from judgments to the decisions of the Toruń District Court (Ibiden).

analogically to personal matters solved in civil proceedings, but they should be based on greater involvement of the state and should be solved analogically to administrative proceedings, fulfilling at the same time – at least partly – the *ex officio* principle. The burden of proof to a greater extent, or even in its entirety, should be with the state authority⁸. Secondly, applications should be made less formal because, as the results of pilot studies indicate, many instances where the pleas in law were justified and the impact on the result of elections could have occurred (particularly, in the case of local government elections) were left without further processing on the grounds of formal mistakes in the application. Not every citizen is capable of writing correct formal applications to courts⁹; however, according to current regulations, if the voter is to perform a controlling function over the election procedure by means of the election petition, he or she must have the aforementioned skill. The citizen's obligation to possess such broad knowledge of law or to take advantage of a professional representative can prove too heavy a burden for voters wanting to lodge an election petition. Therefore, it seems appropriate to conclude that the cases of election petitions are public affairs *par excellence*. The basic assumption that honest elections are in the best interest of every law-abiding citizen eligible for voting should involve seeking legal interest in petitions when democratic elections are in jeopardy (OSNAPiUS, 2010, No. 1–2, item 29)¹⁰. This attitude additionally emphasises the public nature of election petitions. Consequently, it appears fully justified to shift the burden of at least conducting evidence proceedings and indicating the link between the infringement and the election results from an individual to the state authority.

The Efficiency of the Election Petition

The elements of the election procedure presented here show that the realisation of civic control in the form of the election petition is a very difficult undertaking because the whole burden of availability in the proceedings rests on the citizens. Not only must they determine their pleas on the basis of binding electoral regulations, but they are also obliged to present relevant evidence. Moreover, they are under obligation to demonstrate the impact of the proven pleas in law on the result of the elections. This entire process gives rise to serious

⁸ It must be emphasised at this point that the criticism does not concern the choice of the model solution, which is based on social control in charge of common courts, but only putting on the voter the burden of proof not only connected with pleas in law, but also with the impact of infringements on the election results. Entrusting the court, as independent of the legislative and executive powers, with controlling the legitimacy of the election petition procedures seems a better solution than the parliamentary model, strongly affected by elements of political struggle.

⁹ Interestingly, research has shown that even applications made by professional legal representatives were repeatedly dismissed.

¹⁰ The Decision from 8 July, 2009, III SW 17/09.

doubts about the practical application of this solution. Firstly, taking into consideration the fact that the electoral petition does not concern private matters of individual citizens and must constitute a significant indicator of consistent implementation of general principles of the democratic system (Banaszak, 2014, p. 49), the solutions functioning in the petition procedure are too complicated and constitute too heavy a burden on the shoulders of an individual citizen. Consequently, it seems proper that these issues should not be solved analogically to personal matters solved in civil proceedings, but they should be based on greater involvement of the state and should be solved analogically to administrative proceedings, fulfilling at the same time – at least partly – the *ex officio* principle. The burden of proof to a greater extent, or even in its entirety, should be with the state authority¹¹. Secondly, applications should be made less formal because, as the results of pilot studies indicate, many instances where the pleas in law were justified and the impact on the result of elections could have occurred (particularly, in the case of local government elections) were left without further processing on the grounds of formal mistakes in the application. Not every citizen is capable of writing correct formal applications to courts¹²; however, according to current regulations, if the voter is to perform a controlling function over the election procedure by means of the election petition, he or she must have the aforementioned skill. The citizen's obligation to possess such broad knowledge of law or to take advantage of a professional representative can prove too heavy a burden for voters wanting to lodge an election petition. Therefore, it seems appropriate to conclude that the cases of election petitions are public affairs *par excellence*. The basic assumption that honest elections are in the best interest of every law-abiding citizen eligible for voting should involve seeking legal interest in petitions when democratic elections are in jeopardy (OSNAPiUS, 2010, No. 1–2, item 29)¹³. This attitude additionally emphasises the public nature of election petitions. Consequently, it appears fully justified to shift the burden of at least conducting evidence proceedings and indicating the link between the infringement and the election results from an individual to the state authority.

To recapitulate, rendering the procedure more flexible and obliging the state authority to greater activity paradoxically would reduce the level of bureaucracy and would streamline

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the procedure of lodging petitions, which at the same time would make the task of validating elections more real. The current procedure hampers the possibility of taking advantage of social control because the burden connected with procedural availability which rests on the citizens is too heavy and renders the task of exercising control over the elections virtually impossible.

Conclusions

To conclude, the number of formal errors made by citizens – frequently assisted by professional representatives – clearly supports the claim stated in this article, dealing with the maladjustment of the electoral petition procedure to the matter it concerns as well as to the subject which plays the pivotal role in the procedure. It seems essential that the electoral petition procedure should not be conducted in civil proceedings and that there should be a separate procedure with much greater involvement of the state authority – applications cannot exceed a certain degree of formality; otherwise citizens find them much too complicated. Therefore, the main burden of proof should be borne by the state authority. Courts or administration should not be obliged by pleas and evidence presented by the petitioner, but instead their greater activity in the process of collecting evidence would be a good solution. Furthermore, the obligation of demonstrating the impact of the infringement on the result of elections should also lie with the court.

First and foremost, making the aforementioned arrangements does not fall within the competence of the petitioner but of the body responsible for the validation of elections. Secondly, it is difficult to imagine that the impact of the infringement on the final outcome of elections can be determined with absolute certainty at the preliminary stage of submitting an application which in fact initiates control proceedings. In addition, particular attention should be paid to the fact that the petitioner, unlike the court or state authority, under the act of law does not have the necessary means to determine clearly the dependency discussed above (Buczkowski, 2011, p. 218).

It appears that the current model of controlling the electoral procedure analysed from the angle of the social factor distorts its basic assumptions, leading as a matter of fact to bureaucratic appearances of supervision over the electoral procedure. Consequently, workable solutions must be designed and proposals for legal changes of current regulations, which regardless of their negative assessment, are still being applied, must be implemented” (Buczkowski, 2011, p. 218). In other words, we should seriously consider the proposal of *de lege ferenda* concerning both changes in the codification of electoral petition rules, modifications of their certain elements and the validity of specifying electoral petition procedures.

The legal changes proposed above might give rise to concern in terms of being too burdensome for courts; however, a good solution to these problems could be greater involvement of returning officers (who, in the vast majority of cases, are currently retired judges),

who perform their functions as part of their regular jobs, which in fact comes down to being active exclusively during the period of elections.

To recapitulate and at the same time to present some preliminary *de lege ferenda* postulates, it must be claimed that firstly electoral petitions could be submitted to returning officers on a publicly available form, prepared specially for such purposes (without the necessity to meet the requirements of a procedural document in the civil proceedings). This solution would solve the problems resulting from formal obstacles. Secondly, returning officers would constitute some sort of a formal buffer between the petitioner and the court during the process of resolving the validity of the petition. Thirdly, it would enable this organ to hold the actual hearing of evidence since returning officers have access to ballots, electoral registers and all other indispensable documents, which potentially can be used as evidence. Another argument in favour of this solution is the fact that it does not require the involvement of a new administrative sector, but instead optimises the possibility of utilising the potential of the currently existing institution of returning officers.

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