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Directions and Scope of Amendments in Polish Electoral Criminal Law of 2018

Keywords: fair elections, secrecy of voting, voting card, prohibited acts, electoral code, amendment.

Słowa kluczowe: uczciwe wybory, tajność głosowania, karta do głosowania, czyny zabronione, kodeks wyborczy, nowelizacja.

Abstract

The subject of this paper is to discuss the new institutions of Polish electoral criminal law, which are the penal provisions from 2018 added to the Electoral Code. These institutions, in addition to the norms guaranteeing the fairness of the electoral process and, at the same time, contributing to ensuring the fairness of elections resulting from international documents, national law, jurisprudence and views of the doctrine. The author discusses the features of a new type of prohibited act resulting from the amendment to the Electoral Code.

Streszczenie

Kierunki i zakres zmian z 2018 r. w polskim wyborczym prawie karnym

Przedmiotem niniejszego artykułu jest zbadanie nowych instytucji polskiego prawa wyborczego, jakie stanowią przepisy karne dodane do kodeksu wyborczego w 2018 r. Instytucje te, obok znanych polskiemu wyborczemu prawu karnemu norm, stanowić miały

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kolejny instrument gwarantujący uczciwość procesu wyborczego, a zarazem przyczynić się do zapewnienia rzetelności wyborów. W artykule omówiono znamiona nowego typu czynu zabronionego wynikającego z nowelizacji kodeksu wyborczego. Studium wieńczy postulat *de lege ferenda*.

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I. Introduction

The aim of this paper is to examine new institutions of Polish electoral criminal law, which are the penal provisions added to the Electoral Code² (hereinafter EC). Author discuss the features of a new type of prohibited act resulting from the amendment to the EC. The following research methods were used in the study: historical and legal, formal and linguistic, dogmatic.

II. Amendment from 2018 to the Electoral Code

As it was written in the explanatory memorandum to the parliamentary bill³ of 2017: “it introduces additional criminal provisions. EC Art. 497 (a) provides for the penalisation of the possession or acceptance of a voting card outside the polling station and its removal outside the polling station by unauthorized persons. Regulating this issue will allow to avoid the occurring situations of taking out or possessing voting cards outside the polling station. In this way, it will be possible to regulate the actions of persons described above, in relation to whom so far it has been impossible to draw legal consequences against evident irregularities due to the lack of legal qualification”. It should be noted that, contrary to the statement made in the explanatory memorandum to the deputies’ bill, there was no lack of legal qualification with regard

² Cons. text Dz.U. 2019, item 684, 1504.

³ „Print no. 2001 of 2017. Justification for the parliamentary bill amending certain acts in order to increase the participation of citizens in the process of selecting, functioning and controlling certain public bodies”, <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2001> (24.10.2019).

to “obtaining” a ballot. Under the current legal status, giving up a voting card to another person was regulated only in the Penal Code⁴. Pursuant to PC Art. 248 sec. 5, whoever surrenders an unused ballot paper before the end of voting or obtains an unused ballot paper from another person for the purpose of voting, shall be liable to imprisonment for up to 3 years”.

It is impossible to establish the extent to which the problem of taking ballots out of the polling station in order to falsify the voting result was present in the elections so far. Part of the society was convinced that during elections, whether parliamentary or local, there were cases of election rigging by manipulating voting cards. Attempts were made to counteract this phenomenon by exposing the backstage of this practice and indicating how to fight it⁵. According to M. Niziołek, “proving that a given person not only took the unused ballot from the polling station, but also gave it to another person is certainly difficult. In order to prove the commission of a prohibited act, it was not enough that a given person was only “caught” taking the ballot paper out of the polling station, it was necessary to prove that he had given the ballot paper to another person”⁶.

In the opinion of the Sejm Analysis Bureau of October 14, 2017 on the compliance with European Union law of the parliamentary draft act amending certain acts in order to increase the participation of citizens in the process of selecting, operating and controlling certain public authorities⁷, was noted that: “the bill introduces additional penal provisions. The proposed EC Art. 497(a) assumes the penalisation of the possession or acceptance of a voting card outside the polling station and its removal outside the polling station by unauthorized persons”. The conclusions of the opinion stated that the MP’s bill did not infringe the law of the European Union. On the other hand, the Office of Studies and Analyses of the Supreme Court in the opinion of De-

⁴ Act of June 6, 1997 – Penal Code (Cons. text Dz.U. 2020, item 1444, 1517), hereinafter PC.

⁵ M. Niziołek, *Nowe przestępstwa wyborcze*, <http://www.wspolnota.org.pl/aktualnosci/aktualnosc/nowe-przestepstwa-wyborcze-1> (1.11.2019).

⁶ Ibidem.

⁷ Opinion of the Sejm Analysis Bureau of October 14, 2017 on the compliance with European Union law of a parliamentary draft act amending certain acts in order to increase the participation of citizens in the process of selecting, functioning and controlling certain public bodies with European Union law, <http://orka.sejm.gov.pl/Druki8ka.nsf/0/566828D-B126ABAF7C12581D9002EEB9F/%24File/2001-001.pdf> (10.12.2019).

ember 12, 2017 in relation to EC Art. 497(a) did not raise any objections as to the legitimacy of its adoption⁸. At its session on January 11, 2018, the Sejm adopted Act amending certain acts in order to increase the participation of citizens in the process of selecting, functioning and controlling certain public bodies⁹, pursuant to which Art. 497 (a) was added to the EC.

It is worth noting that the Code of Good Practice in Electoral Matters adopted by the European Commission for Democracy through Law¹⁰ states that: “unused voting slips must never leave the polling station”¹¹. Consequently, “any unused ballot papers should remain at the polling station and should not be deposited or stored in different premises. As soon as the station opens, the ballot papers awaiting use must be in full view on the table of the senior station official for instance. There should be no others stored in cupboards or other places”¹². Moreover, “the voter should collect his or her ballot paper and no one else should touch it from that point on”¹³. The Code is an important document as it contains the principles of European electoral heritage, the conditions for their implementation, conclusions and an explanatory report to the principles. The Code contains a minimum set of standards, compliance with which ensures compliance with the essence of the principles of European electoral law¹⁴. The Code is one of the most

⁸ Comments of the Office of Studies and Analyses of the Supreme Court of December 12, 2017 on the parliamentary draft act amending certain acts in order to increase the participation of citizens in the process of selecting, functioning and controlling certain public bodies sent at the letter of the Deputy Head of the Chancellery of the Sejm, A. Pogórski, dated November 10, 2017, no. GMS-WP-173–280/17 <http://orka.sejm.gov.pl/Druki8ka.nsf/0/3D96AA5848CDEEBFC12581F700445ACE/%24File/2001-007.pdf> (10.12.2019).

⁹ Act of January 16, 2018 amending certain acts to increase the participation of citizens in the process of selecting, operating and controlling certain public bodies (Dz.U. item 130).

¹⁰ Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report adopted by the Venice Commission at the 52nd Session (Venice, 18–19.10.2002), <https://bisnetus.wordpress.com/biblioteka/akty-ustrojowe/kodeks-dobrej-praktyki-komisji-weneckiej/kodeks-dobrej-praktyki-w-sprawach-wyborczych-calosc> (10.12.2019).

¹¹ The freedom of voters to express their will and to combat electoral crimes, point IX.

¹² 3.2.2. Voting procedure, point 33.

¹³ 3.2.2. Voting procedure, point 35.

¹⁴ B. Michalak, *Kodeks Dobrej Praktyki w Sprawach Wyborczych*, [in:] *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych*, eds. A. Sokala, B. Michalak, P. Uziębło, Warszawa 2013, pp. 99–100.

important international soft law regulations in the field of electoral law¹⁵. The European Commission for Democracy through Law, the so-called Venice Commission, operating within the Council of Europe, is an opinion-making and advisory institution dealing with constitutional matters¹⁶. The members of the Venice Commission together with the delegates of the Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities of Europe form the Council for Democratic Elections, which developed the Code¹⁷, then it was approved by the Parliamentary Assembly of the Council of Europe¹⁸. It is true that the Code is not a legally binding document¹⁹ (this is the basic document of the Venice Commission²⁰, consisting of a set of guidelines and an explanatory report), it is nevertheless recognized by all democratic European states²¹. Accordingly, the commitments entered into in the framework of existing international instruments should be respected²².

¹⁵ P. Uziębło, *Opinia prawna w sprawie zmian w kodeksie wyborczym wprowadzonych ustawą z dnia 14 grudnia 2017r.*, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/Opinia%20prawna%20w%20sprawie%20zmian%20w%20kodeksie%20wyborczym%20wprowadzanych%20ustawa%20z%20dnia%2014%20grudnia%202017r.pdf> (11.12.2019). On December 14, 2017, the third reading of the Act took place at the session of the Sejm. The Sejm passed Act on January 11, 2018.

¹⁶ K. Urbaniak, *Okręg wyborczy w świetle samorządowego prawa wyborczego*, “*Studia Politologiczne*” 2011, no. 22, p. 182.

¹⁷ P. Jakubowski, *Cisza legislacyjna – zasada prawa wyborczego w Rzeczypospolitej Polskiej*, “*Przegląd Sejmowy*” 2015, no. 4 (129), p. 12.

¹⁸ A. Sokala, *Kontrowersje wokół kształtu polskiej administracji wyborczej*, “*Studia Wyborcze*” 2014, vol. 18, p. 18.

¹⁹ M. Rulka, *Bezpośredniość wyborów do Parlamentu Europejskiego – głosa do postanowienia Europejskiego Trybunału Praw Człowieka z dnia 3 maja 2016 r. w sprawie nr 770032/12, William Dupré przeciwko Francji*, “*Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*” 2017, no. 15, p. 201.

²⁰ 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, p. 287.

²¹ P. Uziębło, *Zasada równości wyborów parlamentarnych w państwach europejskich i południowoamerykańskich*, Warszawa 2013, p. 41.

²² K.W. Czapliski, *Głosowanie elektroniczne (e-voting) – wybrane zagadnienia*, [in:] *Demokratyczne standardy prawa wyborczego Rzeczypospolitej Polskiej. Teoria i praktyka*, ed. F. Rymarz, Warszawa 2005, pp. 49–50, https://pkw.gov.pl/pliki/1463404802_37362.pdf (11.12. 2019).

By joining the Council of Europe by way of an international agreement, Poland undertook, at least indirectly, to respect common ideals and principles constituting the common heritage, realized through the bodies of the Council of Europe, at least with regard to a certain direction or legislative tendency²³. The Code contains important guidelines relating to voting procedures²⁴. It stresses the need to ensure that the ballot card is respected in order to ensure that voters express their will in the voting procedure and to prevent electoral crimes. Thus, the proposed EC Art. 497 (a) implements the postulates resulting from the content of 3.2.2. point 33 of the Code of Good Practice in Electoral Matters.

III. Analysis of the features of a prohibited act under EC Article 497 (a)

Pursuant to EC Art. 497(a) “on the day of elections, whoever holds the ballot outside the polling station or accepts or holds such a ballot outside the polling station, without being entitled to do so, shall be liable to a fine, restriction of liberty or imprisonment for up to 2 years”. Penalized behaviour consists in taking a voting card outside the polling station on the election day or accepting or holding such a card on the election day outside the polling station by a person who is not entitled to do so. As noted by P. Ruczkowski, this offense is universal, it can be committed intentionally, and is being prosecuted on public prosecution²⁵. The purpose of this provision is to guarantee fair and transparent voting processes and results²⁶. This misdemeanour relates to the ballot card, which is the basic electoral document, the material carrier of the vote cast by the voter²⁷.

²³ K.W. Czaplicki, *O potrzebie stabilności prawa wyborczego. Wybrane problemy*, Toruń 2009, p. 18, http://www.csw.umk.pl/mg/kom_02.pdf (13.12. 2019).

²⁴ J. Zbieranek, *Alternatywne procedury głosowania w Polsce na tle państw Unii Europejskiej*, “Studia BAS” 2011, no. 3(27), p. 96.

²⁵ P. Ruczkowski, *komentarz do art. 497a k.w.*, [in:] *Wybory samorządowe. Komentarz*, eds. M. Augustyniak, L. Bielecki, P. Ruczkowski, Warszawa 2018, p. 271.

²⁶ P. Ruczkowski, *op.cit.*, p. 271.

²⁷ R. Zych, *Istota i gwarancje zasady tajności głosowania w polskim prawie wyborczym*, Toruń 2016, p. 127.

As noted by A. Rakowska-Trela, the legislator amending the EC by Act of January 11, 2018²⁸, decided to penalize the conduct of taking the ballot card outside the polling station, accepting or holding the ballot card outside the polling station without being entitled to do so. It should be noted that such situations have previously been the subject of interest to electoral authorities and law enforcement²⁹. For example, the Ombudsman received a complaint from a citizen who, after collecting the ballot paper, did not throw it into the ballot box, but took it from the premises of the precinct electoral commission. In a letter to the Ombudsman, the citizen indicated that such behaviour was part of expressing his attitude towards the institution of elections, while criminal proceedings were initiated in the case. In connection with this situation, in 2017 the Ombudsman asked the Chairman of the National Electoral Commission to take a position. He pointed out that the issue of this type of behaviour is complex, as there may be a confluence of two values, i.e. on the one hand concern for the fairness of elections, and on the other hand, citizens' aspirations to express their views³⁰.

From the date of entry into force of the amendment³¹ taking the ballot card outside the polling station by an unauthorized person, accepting it or possessing it outside the polling station is a fairly severe crime-imprisonment for up to 2 years³². As J. Zbieranek notes, the offense specified in EC Art. 497 (a) is an intentional misdemeanour, common in action, threatened with a fine of 10 to 540 daily rates (PC Art. 33 (1), imprisonment from 1 month to 2 years (PC Art. 34 (1) or imprisonment up to 2 years³³. In the opinion of J. Zbieranek, the reviewed provision regulates the situation on the day of the elec-

²⁸ Act of January 11, 2018 amending certain acts in order to increase the participation of citizens in the process of selecting, functioning and controlling certain public bodies (Dz.U. item 130).

²⁹ A. Rakowska-Trela, *Komentarz do art. 497a k.w.*, [in:] *Kodeks wyborczy. Komentarz do zmian 2018*, eds. A. Rakowska-Trela, K. Składowski, Warsaw 2018, p. 263.

³⁰ A. Rakowska-Trela, *op.cit.*, p. 264.

³¹ Pursuant to Art. 19 of Amendment Act, "Act shall enter into force 14 days after its publication" 16.01.2018 or 30.01.2018.

³² A. Rakowska-Trela, *op.cit.*, p. 264, P. Ruczkowski, *op.cit.*, p. 271.

³³ J. Zbieranek, *Komentarz do art. 497a k.w.*, [in:] *Kodeks wyborczy. Komentarz*, eds. K.W. Czaplicki, B. Dauter, S.J. Jaworski, A. Kisielewicz, F. Rymarz, J. Zbieranek, Warsaw 2018, p. 924.

tion, and is aimed at preventing the practice of taking voting cards by voters outside the polling station and handing them over. Its structure clearly shows that the intention of the legislator was to prevent irregularities in voting, and in particular to counteract the so-called trading votes³⁴.

As A. Frydrych-Depka claims, “while it is easy to imagine an attempt to forge a ballot paper, its modification seems almost impossible. If, after W. Kozielowicz³⁵ we will assume that the modification of a document means giving it a different content than it originally had, i.e. an unauthorized transformation of the content of the authentic document while preserving the original authorship and remembering that adding additional numbers of lists and names or surnames to the ballot paper or making other signs or additions, no affects the validity of the vote cast on it³⁶, we must come to the conclusion that the sealed ballot cannot be converted³⁷”. In my opinion, A. Frydrych-Depka did not take into account the possibility of committing an offense under EC Art. 497 (a) by taking the card with the vote on it outside the polling station and placing an additional “x” by the perpetrator, resulting in the invalidation of the vote cast on a valid voting card. As Z. Kallaus pointed out, the modification consists in “removing a part of the content from an authentic document and replacing it with another³⁸”. Treating the “x” as the content of the ballot card, the perpetrator of the offense under PC Art. 497(a) may be the one who distorts the will of the voter externalized on the material carrier of the voice³⁹ – a ballot paper. The perpetrator will then remake the ballot paper and not counterfeit it, because a counterfeiting constitutes “giving the appearance of an authentic document to a specific object, while in fact it is not so⁴⁰”. It would be possible to counterfeit the ballot paper if the ballot card was sealed

³⁴ J. Zbieranek, op.cit. p. 924.

³⁵ W. Kozielowicz, *Uwagi do art. 248*, [in:] *Kodeks karny. Komentarz*, eds. R. Stefański, Warsaw 2019, LEGALIS.

³⁶ See: EC Art. 41.

³⁷ A. Frydrych-Depka, *Karta do głosowania: kilka refleksji z punktu widzenia polskiego wyborcy*, [in:] *Wokół wyborów i prawa wyborczego*, vol. 2, eds. A. Sokala, A. Frydrych-Depka, P. Raźny, Toruń 2019, p. 66.

³⁸ Z. Kallaus, *Przestępstwa przeciwko wiarygodności dokumentów*, [in:] *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, exercise book no. 7, Warsaw 1998, p. 24.

³⁹ R. Zych, op.cit., p. 127.

⁴⁰ Z. Kallaus, op.cit., p. 24.

with a committee seal similar to the official one. It would be much less conceivable to “add” additional positions with the candidate’s data and a place to put an “x” next to it, because the information about candidates registered in the election is made public.

The document can be altered by a person who, without being authorized to do so, makes changes to the content of the real document (deletion, corrections, annotation). On the other hand, forging a document means creating a new one and giving it such features that make it appear authentic, e.g. forging a signature⁴¹, stamps. In one of its judgments, the Supreme Court stated that: “a document is forged when it does not come from the person on whose behalf it was prepared (...) a forging document should be understood as making a document in order to pretend that the document comes from another person. The modification of a document takes place when an unauthorized person changes its content to something other than the authentic one. However, it is not a modification of the document, giving it a different content by the people from whom the document comes⁴². The review of the statements of the commentators on the PC and the case law leads me to the conclusion that there are no significant discrepancies as to the meaning of the term “document forgery”. Forging a document is a situation where some writing is seemingly given the character of a document coming from another person (which, of course, is not true). Consequently, it is the person who prepares the letter to look like a document drawn up by another person who is responsible for forging the document⁴³. Counterfeiting consists in making a counterfeit that imitates an authentic document⁴⁴.

Thus, the norm under EC Art. 497 (a) refers to a wide range of behaviours that could fill its hallmarks. It needs to be considered whether “acquiring” by the perpetrator of a voting card, which has not been stamped with the seal

⁴¹ Offenses against documents, <https://zakiewicz-adwokaci.pl/uslugi-prawne/prawo-karne/przestepstwa-przeciwko-dokumentom> (17.12.2019).

⁴² Judgment of Supreme Court of March 5, 2003 r., file ref. no. III KKN 165/2001. I give for: A. Nastuła, *Falszerstwo dokumentów ze szczególnym uwzględnieniem przestępczości internetowej jako wyzwanie dla organów państwa*, “Polonia Journal” 2018, no. 8, p. 78.

⁴³ B. Gadecki, *Glosa do wyroku Sądu Apelacyjnego w Łodzi z dnia 12 stycznia 2017 r., sygn. akt II AKa 251/16*, “Prokuratura i Prawo” 2019, no. 4, pp. 163–164.

⁴⁴ I. Jankowska-Prochot, P. Falenta, *Karnoprawne aspekty przestępstwa fałszerstwa intelektualnego*, “Journal of Modern Science” 2016, no. 1 (28), p. 237.

of one of the committees, could constitute the basis for legal classification of an act under EC Art. 497(a)? When answering this question, it is necessary to recall the statement of F. Rymarz, according to which “the strict and officially established content of the ballot card with instructions on the validity of the vote, as well as the formal rules for keeping the register and the list of voters, are important legal regulations that really determine the reliability and honesty of the elections⁴⁵”. Thus, this view may constitute an interpretative direction, allowing for the conclusion that “acquiring” by the perpetrator of a voting card, which has not been stamped with the seal of one of the committees, could not be the basis for the legal classification of an act under EC Art. 497(a).

However, I share the opinion of A. Frydrych-Depka about the need to clarify the understanding of the concept of electoral documents⁴⁶. The author suggests that the draft of the voting card should also be treated as an electoral document, i.e. an electronic file containing its matrix produced by the competent electoral body⁴⁷. In the light of understanding a document under the PC as any object or other recorded medium⁴⁸, it seems possible⁴⁹.

Moreover, as noted by A. Frydrych-Depka, “it is impossible not to note that voters are rather unaware that by taking the ballot paper out of the polling station they are committing a misdemeanour. Rushing and not wanting to wait in a crowded polling station for a seat to become available to vote, they leave the premises and sometimes even the building where the polling station is located, fill out the ballot paper, then return and throw the ballot into the ballot box⁵⁰”. The basis for the cited statement was the 2018 local elections re-

⁴⁵ F. Rymarz, *Konstytucjonalizacja Państwowej Komisji Wyborczej (wnioski de lege ferenda)*, [in:] *Demokratyczne standardy prawa wyborczego Rzeczypospolitej Polskiej. Teoria i praktyka*, ed. F. Rymarz, Warszawa 2005, p. 251.

⁴⁶ A. Frydrych-Depka, op.cit., p. 66.

⁴⁷ The need to clarify the concept of “election documents” was reported by: I. Jankowska-Prochot, *Semantic reduplication and cumulative concurrence of provisions of criminal law in the field of forgery of a document and election and referendum documents*, “Ius Novum” 2017, no. 4, pp. 53–54; S. Kowalski, *Karnoprawna ochrona wykazu podpisów wyborców w wyborach samorządowych*, “Prokuratura i Prawo” 2014, vol. 9, pp. 72–73; A. Frydrych-Depka, op.cit., p. 67.

⁴⁸ PC Art. 115 (14).

⁴⁹ P. Daniluk, *Uwaga nr 172 do art. 115*, [in:] *Kodeks karny. Komentarz...*, LEGALIS.

⁵⁰ A. Frydrych-Depka, op.cit., p. 67.

port⁵¹, and therefore EC Art. 497 (a) was already in force at that time, therefore the addressees of the legal norm should be aware of it.

It should be emphasized that the proper understanding of the concept of a document in substantive criminal law has far-reaching systemic consequences. The definitions contained in the PC of 1997 apply to specific acts providing for criminal liability⁵². It is worth noting that EC Art. 5 does not define the term “document”. Undoubtedly, at every stage of its use, the document requires effective protection against counterfeiting, processing and unlawful use as authentic⁵³. Adoption of EC Art. 497(a) was to foster the implementation of these postulates.

Analysis of the wording of EC Art. 497(a) (“who on the day of the election holds a ballot paper outside the polling station or has such a ballot card outside the polling station”) does not indicate that for the existence of a misdemeanour, the purpose of using the taken, accepted or held ballot card is required on the subject side. In order to fulfil the features of a prohibited act under EC Art. 497(a), the mere fact of taking the voting card outside the polling station, accepting it or possessing it is enough. The subject of this offense has not been specified individually. Thus, it will be any person capable of incurring criminal liability.

Due to the possible interpretation doubts, I propose *de lege ferenda* to clarify the legal norm with the following wording of EC Art. 497(a): “who on election day holds the ballot card received by the voter from the precinct electoral commission, handed over by a proxy or sent in a return envelope, outside the polling station or such a card outside the polling station accepts or holds it, without being entitled to do so, shall be liable to a fine, restriction of liberty or imprisonment for up to 2 years”. In this way, the suggested clarification would make it possible to extend criminal law protection to alternative voting methods.

⁵¹ Wybory samorządowe 2018. Raport główny z obserwacji procesu wyborczego, Warsaw 2018, p. 8, <https://ow.org.pl/wp-content/uploads/2018/11/Wybory-samorz%C4%85dowe-2018-full-1.pdf> (29.03.2019).

⁵² J. Raglewski, *Stosunek przepisów części ogólnej nowego kodeksu karnego do innych ustaw przewidujących odpowiedzialność karną*, “Przegląd Sądowy” 1998, no. 7/8, pp. 19–28; E. Zgajewska-Rytelewska, *Karnoprawne i Cywilnoprawne Pojęcie Dokumentu*, “International Journal of Legal Studies” 2017, no. 1 (1), p. 36.

⁵³ E. Zgajewska-Rytelewska, *op.cit.*, p. 45.

IV. An attempt to establish the *ratio legis* of the amendment

The legislator amended the EC by adding Art. 497(a) for this purpose, in order to strengthen the protection of the principle of fairness of elections, and indirectly – the secrecy of voting.

Pursuant to Art. 5 (23) (b) Amendment Act of 2018, in EC Art. 52 after §5 (stipulating that: “after receiving the ballot paper, the voter goes to a place in the polling station that ensures the secrecy for voting”), §5a is added as follows: “the number of easily accessible places enabling each voter to freely read the ballot paper and fill it in – in a way that is invisible to other people”.

It should be noted that in the above-cited legal norm, the legislator uses the following evaluation terms: “appropriate”, “easy”, “unrestricted”. The purpose of the provision is to ensure that the person who has received the ballot paper – and who wishes to go to a place ensuring confidentiality for voting at the polling station – can freely read the ballot paper and fill it in – in a way that others cannot see.

Probably the legislator establishing EC Art. 52 (a), in the wording quoted above, took into account the findings concerning the essence of the principle of secret voting. For it refers to the content of the vote on the ballot paper, not voting as a physical act⁵⁴ on importance in the public law and state sphere.

The EC Art. 52 (5) (a) clearly defines the obligation to prepare at the polling station an appropriate number of easily accessible places, enabling each voter to freely read the ballot paper and fill it in a manner invisible to other people. Thus, it is the commune head who is responsible, to a large extent, for enabling the voter to vote while observing the principle of secret voting. Moreover, the National Electoral Commission has repeatedly indicated the need for the commune heads to take effective action in this matter⁵⁵.

In a situation where the legislator did not order or forbid a certain behaviour, it belongs to the sphere of freedom of legal entities (the sphere of legally permitted actions). Freedom understood in this way is a two-sided freedom

⁵⁴ R. Zych, *op.cit.*, p. 193.

⁵⁵ Pismo Przewodniczącego Państwowej Komisji Wyborczej z 26 marca 2018 r., ZPOW-071-8/18, <http://www.bip.mokobody.pl/upload/Pismo%20PKW%20z%20dn.26.03.2018%20r..pdf> (18.12.2019).

resulting from the silence of the law (lack of legal regulation⁵⁶). However, the legislator in EC Art. 52 (5) described the “model procedure of voter conduct” after receiving the ballot paper. According to A. Biłgorajski, taking advantage of the principle of secrecy is a right, not an obligation, of the voter. The principle of secrecy voting generates an absolute obligation addressed to the authorities conducting elections to create conditions for each voter to vote in a way that prevents anyone from reading its content, and on the other hand – it is the source of the subjective right of each voter to cast a vote in secret, from which the latter may, albeit does not have to use⁵⁷. However, it should be recalled that the Supreme Court ruled in a judgment of June 17, 2014 stated that: “the legislator did not specify the manner of ensuring the secrecy of voting, in particular, it did not impose the obligation to prepare sheltered voting booths in the polling station, which means that the places designated for voting should fulfil a specific function, i.e. ensure the secrecy of voting⁵⁸”.

On the basis of the above arguments, it can be concluded that the legal nature of ensuring voting confidentiality to voters, as well as its implementation, raises doubts. In my opinion, public authorities should prepare polling stations with devices ensuring the secrecy of the vote in such a way that voters can use them.

V. Conclusions

The direction of amendment in the Polish electoral criminal law in 2018 was the adoption of criminal provisions. It typified new prohibited acts. Examined changes has been consisted in the amendment of the Electoral Code in 2018. The scope of the changes was to strengthen the criminal law protection of the voting card. The newly enacted prohibited acts, apart from the criminal law that already existed in the Polish election law, are an important in-

⁵⁶ W. Lang, *Prawa podmiotowe i prawa człowieka*, [in:] *Księga jubileuszowa Profesora Tadeusza Jasudowicza*, eds. J. Białocerkiewicz, M. Balcerzak, A. Czeżko-Durlak, Toruń 2004, p. 207.

⁵⁷ A. Biłgorajski, *Komentarz do art. 52*, [in:] *Kodeks wyborczy. Komentarz. Tom I. Komentarz do art. 1–151*, ed. A. Biłgorajski, Katowice 2017, p. 131.

⁵⁸ Judgment of Supreme Court of 17 June 2014, III SW 33/14, p. 4, <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20SW%2033-14.pdf> (10.01.2020).

strument to control the correctness and fairness of the electoral process. Despite the lack of constitutional and code regulations regarding the principle of fairness of elections, these requirements are met on the basis of international documents binding for the Republic of Poland. The aim of the amendment under study is to ensure the implementation of the principle of fairness of elections, and indirectly – secrecy of voting. I hope that my research conclusions will become a stimulus to start a debate on the features of a prohibited Act under EC Art. 497(a), possibly the need to clarify its wording.

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