

## Statement by the Political Accountability Foundation on amendments to the election law as of May 24, 2020

The Political Accountability Foundation (PAF) would like to express its concern regarding specific provisions included in the Act of May 12, 2020 on special rules for conducting the election of the President of the Republic of Poland ordered in 2020 with the possibility of postal voting (referred to as the “Hybrid Act”).

One of the Foundation’s duties, within the scope of citizen observation, is to assess the impact of proposed amendments on the electoral process, as well as the method of their introduction. Below, we would like to present the current situation around the presidential election and analyse selected provisions of the Hybrid Act, which in our opinion may cause problems in organising the election.

### 1. Assessment of events as of May 12, 2020 when the “Hybrid Act” has been adopted by the *Sejm*

The voting in the presidential election scheduled for May 10, 2020 did not take place as the institutional bodies administering the process, in accordance to the Act adopted on May 8, 2020, failed to duly prepare and organise the election.<sup>1</sup> The lack of preparation was observed in the following fields, i.a. ballot papers were not distributed to voters, no appropriate election commissions responsible for the reception and counting votes have been established. All of the above resulted in non-compliance with the provisions of Article 128, section 2 of the Constitution which stipulates that the presidential election shall be held on a day off, no sooner than 75 days and no later than 100 days before the expiry of the serving President's term.<sup>2</sup>

On May 10, the National Electoral Commission (NEC) adopted a resolution stating that there was no possibility to vote for candidates in the election of the President of the Republic of Poland.<sup>3</sup> The resolution entered into force as of the date of its adoption and was presented by the head of NEC as terminating the electoral process in the presidential election scheduled for May 10.

The NEC concluded that the lack of preparation for the May 10 election lead to the lack of possibility for voters to cast votes which has *the same implications as the situation described in Article 293 § 3 of the Election Code - no candidates are standing in the election*. Such an interpretation allows to apply Article 293, section 2 of the Election Code which stipulates that in the absence of candidates or if only one candidate is running in the presidential election, the Speaker of the *Sejm* (lower house of parliament) shall order a new election *not later than 14 days from the date of publishing of NEC’s resolution in the Gazette [Dziennik Ustaw]*.

On May 11 the Supreme Court issued a communication regarding electoral protests indicating that it would examine such protests only after NEC discloses the election result to the public, and that NEC’s resolution of May 10 (mentioned above) *“is not equivalent to a resolution on the basis of which the voting results are disclosed to the public”*.<sup>4</sup>

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<sup>1</sup> See PAF’s Statement on the conduct of the May 10 Presidential Election: <http://odpowiedzialnapolityka.pl/index.php/2020/05/15/statement-on-the-conduct-of-the-may-10-presidential-election-calendar/>

<sup>2</sup> The last possible date could have been Sunday May 17 or Saturday May 23, 2020 (if the latter was proclaimed a non-working day).

<sup>3</sup> Resolution of NEC No. 129/2020 of May 10 stating no possibility to vote for candidates in the election for President of the Republic of Poland.

<sup>4</sup> Communication of Supreme Court, May 11, 2020 ([http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=653-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia&fbclid=IwAR3xNUWT9is59DZomm64XyfVmkROI2a8WYX9S4TdwQdesAaM\\_AKqqV0VgI8](http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=653-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia&fbclid=IwAR3xNUWT9is59DZomm64XyfVmkROI2a8WYX9S4TdwQdesAaM_AKqqV0VgI8)).

The course of recent events resulted in the failure to meet the election dates set in the Constitution,<sup>5</sup> thus creating legal uncertainty with regards to the possibility to conduct the election in accordance with the requirements of the Constitution and the Election Code, e.g. within the time limits for candidate registration, collecting signatures, creating precinct election commissions or for conducting an informational campaign for voters. The solution applied by the NEC with the resolution of May 10 allows the Speaker of *Sejm* to order a new election within regulations provided by Election Code, i.e. Article 293, section 2. However, the date to schedule a new election is to be calculated once NEC's resolution is published in the Gazette, which has not yet been done.

The adopted interpretation does not resolve the issue of the unfinished Presidential election scheduled for May 10, 2020. Voters were deprived of their rights - could neither cast a vote nor lodge an electoral protest, and the election results could not have been published within the time limit recognized by the Constitution. Consequently, this situation may create a supposition that a failure to comply with constitutional time limits does not result in breaching the law. Holding this interpretation may pose a serious threat to the legitimacy of future elections and, most importantly, it may allow the executive to influence the date of future elections without taking into account the provisions of the Constitution, as well as legislative and judicial decisions.<sup>6</sup>

## 2. The "Hybrid Act"

One day after the presidential election scheduled for May 10, 2020, an election where voters did not have the opportunity to cast their votes in part due to legal chaos, a new draft act has been introduced to the *Sejm*. The so-called "Hybrid Act" (*Act on special rules on conducting the Election of President of the Republic of Poland ordered in 2020, including the possibility of postal voting*)<sup>7</sup>, was further complemented the next day, May 12, with an auto-amendment.<sup>8</sup> The draft act replaces the Act of April 6, which entered into force on May 9, and annuls the regulation which provided for voting to be carry out solely by mail-in ballots. The new Act introduces a mixed/hybrid voting system, combining traditional voting in polling stations with postal voting. It was adopted by *Sejm* on May 12 and passed on to the Senate.

The "Hybrid Act" introduces a number of changes improving upon the Act of April 6, however it still includes a number of provisions that may have a negative impact on the conduct of the electoral process. Moreover, the Hybrid Act is being considered in the Senate while neither the date nor the way of voting for the President of the Republic of Poland has been set in compliance with the requirements specified by the Constitution<sup>9</sup> and the Election Code.<sup>10</sup> This leads to further legal chaos, increases confusion among voters, as well as weakens the trust in the legal system and in the electoral process itself.

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<sup>5</sup> The NEC's resolution of May 10, 2020 excludes the possibility to conduct election within the time limit in compliance with the Constitution, i.e. not later than May 23, 2020.

<sup>6</sup> Article 293, section 2 of Election Code stipulates that new election may be ordered once the NEC's resolution is published in the Gazette [Dziennik Ustaw], thus finishing the previous election process. As for now it has not yet been done. It may seem that the Prime Minister, being in charge of publications in the Gazette [Dziennik Ustaw], would have an exclusionary impact on the date of future election without being subject to any control in this respect.

<sup>7</sup> *Sejm*, paper No. 368 of May 11, 2020.

<sup>8</sup> *Sejm*, paper No. 368-A of May 12, 2020.

<sup>9</sup> Article 128, section 2 of the Constitution.

<sup>10</sup> Article 293, section 2 of the Election Code.

First of all, we would however like to underline that, in comparison to the currently applicable Act of April 6, the Hybrid Act resolves some crucial issues for citizen observation organizations by returning the responsibility to conduct voting back to the precinct election commissions. Therefore, authorized organisations will be allowed to delegate citizen observers to precinct election commissions in accordance with Article 103c of the Election Code.

Unfortunately, other provisions proposed by the Hybrid Act raise many questions. We are mostly concerned about the following issues:

- **minimum number of members of precinct election commissions (PECs) is to be reduced to 3 members and the minimum number of PEC members present during voting and counting is to be reduced to 3 (2 in case of PECs who have 3 members)**

Such a way of composing election commissions poses a threat to the effective conduct of the vote. Moreover, it increases the risk of chaos and overcrowding in the polling station and, thus, the possibility that there will be no proper oversight of ballot boxes and ballots. Having just 2-3 persons working in the commission may not be enough to ensure the proper verification of postal voting packages, reception of voters and order in the polling station, all at the same time. It should be also noted that PEC members might be obliged to work continuously for many hours, as it may be impossible for them to take a break and, as a result, they will be more likely to make unintentional mistakes. In this case, mutual control of work between commission members remains impossible. Moreover, the proposed method of appointing PECs (Article 19, section 2 of the Hybrid Act), together with the reduction of the minimum number of members to 3, raise concerns whether pluralism will be ensured. It remains unclear a) whether election commissioners shall be responsible for securing that electoral committees (candidates) are pluralistically represented within the PECs and b) how they shall do so considering the current situation (during the preparation to election on May 10 we have noticed that, i.a., many commissions were dominated by representatives of just one committee and there was even an example of a commission that was mostly composed of members of one family).

- **merging precincts is to be allowed** - the provisions of Article 19, section 4 of the Hybrid Act raise concerns, as they allow to merge precincts, provided respective polling stations are situated within the same building, thus, creating a single election commission. It seems necessary to specify additional criteria to be taken into account by an election commissioner when taking a decision on this matter. In particular, the time limit for merging precincts should be specified, together with the maximum number of voters allowed to be included in the electoral register of a merged precinct. It should also be noted that merging precincts may extend the work time of precinct election commissions, contributing to overworking and other problems examined above.
- **Speaker of the Sejm to be allowed to discretionarily specify time limits for election activities** - pursuant to Article 15, section 1 of the Hybrid Act, the Speaker of *Sejm* is to be allowed, "after consulting with the National Electoral Commission", to discretionarily specify time limits for election activities (candidate registration, signature collection etc.). Furthermore, basing on section 4 of the Article in question, the Speaker would obtain the right to change the dates even once they have been established and announced. It is worth underlining that the Hybrid Act does not specify grounds for the possible change of the election calendar by the Speaker of the *Sejm*, apart from unspecified sanitary reasons. Moreover, the provisions of the Hybrid Act do not include any time limit for the possible



amendments to the election calendar, giving the right to the Speaker of the *Sejm* to change it even few days before the voting day. Introducing such changes will affect all participants of the electoral process - voters, candidates, election management bodies and other institutions responsible for administering the electoral process. It should be noted that the Constitutional Tribunal in one of the judgements (reference number K 9/11) issued its opinion on discretionary decisions taken by a body responsible for ordering the election with regards to scheduling a 1 or 2-day voting period. The Tribunal indicated that: “provisions of the law shall be unequivocal and create the feeling of certainty with regards to the crucial elements of the electoral process among all participants” and that “according to the principle of legal certainty whether voting in a specific election shall be conducted over 1 or 2 days shall result from legal acts, not from the decision of a body (...)”. This opinion should be treated as applicable also with respect to other activities resulting from the election calendar – possible shortening of time limits for election activities, even based on special circumstances, should be governed by a legal act.

- **District Election Commissions (DECs) to no longer be composed exclusively of judges, no indication of the method of recruiting new DEC members by election commissioners** (Article 18, section 1 of the Hybrid Act) - so far the judiciary character of election bodies has been recognised as a guarantee of their impartiality and professionalism. Proposed changes to the composition of District Election Commissions seem to follow the revisions to the judicial character of the election administration, which we perceive as negative. The Act lists the following requirements for DEC members – a law degree and a warranty that they will perform their duties in a proper manner. Moreover, DEC members cannot:
  - have political party affiliations and perform public duties incompatible with the role of a DEC member;
  - be convicted of having committed a deliberate crime prosecuted by public indictment, or for fiscal offences;
  - stand as a candidate in the election, be a candidate representative, financial representative, candidate proxy or electoral official.

These criteria, together, with the lack of information about the method of recruitment, raise serious concerns. The following questions arise in that matter:

- should candidates submit their candidatures themselves?
- could candidatures be proposed by election committees?
- could it be possible for candidates to be appointed while working at the National Election Office?
- is it obligatory for DEC members to hold Polish citizenship?
- if and how the knowledge of the Polish electoral legal framework will be verified?

Taking into consideration the introduction of “hybrid voting”, an additional revolution in the composition and the process of appointing supervisory election bodies is inadvisable.

This Statement outlines only selected provisions of the Hybrid Act, which in our opinion are essential for the electoral process to be conducted duly and efficiently. We have petitioned the Senate to annul these provisions so that the administration and oversight over the above-mentioned elements of the electoral process happens in accordance with the Election Code.

As domestic observers we would like to underline that amending the electoral legal framework taking into account interim political objectives only may lead to further erosion of quality of the Polish election law, as well as to weakening the public trust in the results of the election and, thus, to questioning the legitimacy of elected bodies.

### **3. Conclusion**

The current situation we find ourselves in is a situation of a “constitutional vacuum” and is caused by the legal and organisational chaos as well as the decision not to hold voting in the election ordered by the Speaker of the Sejm for May 10 in accordance with Art. 128 section 2 of the Constitution. The Constitution, in contrary to the Election Code, does not foresee the possibility not to hold voting in an election. However, none of the provisions of the Election Code regulates directly the situation we are in now.

The complexity and unpredictability of the aforementioned situation causes constitutional lawyers, political commentators, the authorities and the opposition to discuss a number of potential solutions:

- the introduction of extraordinary measures as stipulated by Art. 228 of the Constitution - a state of natural disaster is the most common suggestion - elections cannot be held during a period when extraordinary measures are in place, as well as within 90 days following their termination;
- holding a new election basing on the interpretation proposed by the NEC in its decision dated May 10 - the date of voting currently being considered is June 28;
- ordering a new election only after the current President’s term comes to an end on August 6 - treating this situation as synonymous to the vacation of office, outlined in Art 128 section 2 of the Constitution and Art 289 section 2 of the Election Code.

Even though there are multiple proposals how to escape this stalemate, it seems that these might not be a genuine attempt to resolve this constitutional crisis and to bring Polish law closer to international standards, but rather to adapt the legal framework to the temporary needs of the leading political parties in order to help them achieve interim political objectives.