

# Statement by the Political Accountability Foundation on the latest changes in Polish electoral law, as of April 20th, 2020

The state of epidemiological hazard declared on 20 March 2020 in response to the COVID-19 outbreak introduced a range of limitations on the mobility of Polish citizens. These limitations—together with concerns regarding the possible further spread of the pathogen—have had an impact on the ongoing process of organising Poland's next presidential elections, initiated on 5th February by the Speaker of the Sejm (lower house of parliament), who established 10 May as the polling date<sup>1</sup>. Problems with collecting sufficient numbers of signatures to register candidates and electoral committees<sup>2</sup>, along with significant limitations on campaigning as well as the postponement of local elections scheduled for March and April – are only a few results of the measures taken by Polish government. This situation has led to a debate on the upcoming election, with proposals ranging from postponing to changing the method of conducting the vote.

An assessment of the potential impact of the amendments to the Electoral Code and the way in which these amendments were introduced falls within the scope of electoral observation, which is the main purpose of our Foundation.

## Procedure for amendment of the Electoral Code

Our initial assessment of the actions taken by the government and the parliamentary majority is not positive. Below, we provide a more detailed explanation of shortcomings both in the timing of the introduction of the legal amendments as well as in the substance of the amendments themselves.

### Timing

According to international best practices, any changes to electoral law should be made in a transparent way, in accordance with existing standards and regulations; they should be preceded by public consultations and cross-party consensus, in order to avoid doubts with regard to the proponent's intent. Any such changes should be proposed well in advance of the polling day, to ensure thorough deliberation and accurate implementation<sup>3</sup>.

Yet, this year, the first series of amendments to the Electoral Code were introduced just 40 days before the planned election—in the so-called „'Antivirus Act' of 31 March. These changes were passed in the middle of the electoral campaign—after the deadline for candidate registration had passed<sup>4</sup>. These were followed by additional amendments

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<sup>1</sup> The planned date for the 2nd round of the election is 24 May.

<sup>2</sup> [http://www.sn.pl/aktualnosci/SitePages/Komunikaty\\_o\\_sprawach.aspx?ItemSID=353-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty\\_o\\_sprawach](http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=353-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach)

<sup>3</sup> For example, the Venice Commission, operating under the framework of the Council of Europe, assumes that no changes to electoral law should occur within a year before elections (see: point II, 2b Code of Good Practice in Electoral Matters- Council of Europe, Strasbourg, 23 May 2003 CDL-AD (2002) 23 rev.)

<sup>4</sup> <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=915C2117FD648EE8C1258537003A81AA>

approved as part of the Detailed Rules on the General Election of President of the Republic of Poland in 2020 Act, approved by the Sejm on 6 April 2020 – 34 days before the polling day. In addition, it must be stressed that latter Act could receive presidential signature even as late several days before the scheduled vote.<sup>5</sup>

Furthermore, the above-mentioned provisions were passed against binding rules of legislative procedure.

- Art. 89.2 of the Sejm Regulations requires that any changes to the Electoral Code should not enter the first reading stage for 14 days after they have been proposed. In case of the above-mentioned 'Antivirus Act', this requirement was not met.
- Constitutional Tribunal case law since 2009<sup>6</sup> generally holds that a six-month period of legislative silence should apply to any electoral law changes during an election year. It is worth noting that late President Lech Kaczyński paid due attention to non-compliance with the relevant legislation and Sejm regulations on amending electoral laws. On 5<sup>th</sup> March 2009, Kaczyński referred provisions amending the Presidential Election Act, National Referendum Act and the Election of European Parliament Members Act to the Tribunal, citing a breach of constitutional timing requirements by the Sejm<sup>7</sup>. According to the President, in that case the Sejm did not respect the time period reserved for the head of state to decide whether to sign the legislation. Based on Article 2 of the Constitution, the Tribunal agreed with Kaczyński's reasoning and established a prohibition on substantial amendments to electoral law within six months prior to the election, counting from the day of the decision on the election date by the Marshal of the Sejm.
- It should be noted that in 2009 the time reserved for President to decide on signing would elapse within a few days after the deadline for scheduling the election, in contrast to the present case, in which this 14-day period would elapse after the constitutional deadline for holding the vote (provided that the election will be held on Sunday, as Polish electoral tradition dictates).

## Substance of amendments

The substance of amendments is crucial to the transparency and clarity of electoral law. The 6 April Act substantially changes the fundamental principles behind the Electoral Code without actually amending the Code itself. It could be said that as a result, the Code has been hollowed out of meaning by this Act, which runs contrary to the relevant case law of the Constitutional Tribunal.

It should be noted that the Antivirus Act was a direct amendment to the Electoral Code, raising the following question; why did the legislation passed a week later not take the same approach?

- In its judgement of 18th October 1994 (case No. K.2/94), the Constitutional Tribunal stated that 'the essence of a "Code" is to provide a coherent – and – as far as possible – comprehensive and permanent regulation of a particular sphere

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<sup>5</sup> This Act could receive presidential signature was late as a few days before the scheduled vote;  
<https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=E9F90DFB2E2E3CA0C12585420054AB28>

<sup>6</sup> See first and foremost reasoning of the Tribunal in cases: K 31/06, Kp 3/09 and K 9/11.

<sup>7</sup><https://www.prezydent.pl/archiwum-lecha-kaczynskiego/ustawy/ustawy-odeslane-do-tk/art,6,ustawa-o-wyborze-prezydencko-ogolnokrajowym-referendum-i-ordynacja-do-pe.html>

of law... Codes are drafted and passed following a separate, more complex procedure than "ordinary" Acts; the purpose of a "Code" is to "codify" a given branch of law', and further that 'the principles of proper legislation demand therefore that the legislature be particularly careful in amending the Codes, and in any case, that the legislature refrain from amending them indirectly, that is when the supposedly unchanged text of the Code becomes hollowed out of its meaning by the provisions of specialised acts. This is particularly important where an amendment concerns the fundamental norms established in the Code, those that determine the very essence of a particular branch of law'. This judgement is especially relevant to the changes to the electoral system provided in the 6 April legislation.

## **Amendments to electoral law proposed in the Detailed Rules on Presidential Elections Act of 6 April**

The government's proposed legal changes, especially those introduced in the 6 April legislation (hereafter referred to in this section as the Act), create significant uncertainty regarding the conduct of voting, thus leading to diminishing voters' trust in the whole process and – even more potentially detrimental – in its results.

Below we present several examples of inconsistencies, lack of clarity or contradictions between the proposed legislation and the existing provisions of the Electoral Code (hereinafter, Code):

- The Act makes incoherent references to the provisions of the Code. Some articles contained direct references to concrete Code provisions (see: art. 19.2 of the Act), while e.g. Article 20.1. introduces the general principle that in the absence of specific provisions of the Act, the relevant provisions of the Code shall apply accordingly. This leads to a lack of clarity regarding the exact scope of the Code's application in the context of May presidential election, raising doubts as to which provisions would remain binding and which would not. An example is Article 53b.7 of the Code, which grants voters with impaired vision a right to request a Braille sample ballot during a postal vote – whereas the Act of 6<sup>th</sup> April excludes the possibility to apply for a postal correspondence vote in 2020 presidential election, without nullifying the Article 53b of the Code. This results in a discrepancy that might exclude a certain category of voters from this election despite their rights being guaranteed by the existing law.
- Indirect delivery of ballots (to mailboxes, rather than directly into the hands of voters) **raises several questions regarding the proper conduct of the voting.:**
  - a. Would the vote still remain personal? There would be no confirmation who actually retrieved the package, whether it would be the addressee, a third person or even someone without voting rights. This method does not guarantee the right to a personal vote, which – according to Article 2.3. of the Act - must be ensured during election.
  - b. As delivery by hand to the entitled voter is not required, there is no guarantee that a ballot package will not be delivered to the wrong address or at least, to the wrong household member. There is no effective means of control over how many packages a single voter might receive, which might lead to

breach of the rule of equality (one person, one vote). At the same time, there seem to be no practical measures for preventing such occurrences.

- c. Due to the large delay between compilation of lists of registered voters and election day, during a possible second round a significant number of ballots could be delivered to deceased voters (who died in between the rounds). In addition, due to the proposed size of precincts subject to the municipal precinct election commissions, identifying such cases might prove impossible. This could lead to ballots being cast by unauthorized persons in the name of „'dead souls'.
- d. Lack of information regarding the number of ballot papers that were actually distributed among voters (that is, handed directly to an entitled voter, as it normally occurs at a polling station) would not allow for effective assessment of the most basic indicator of a fair election; whether the total number of printed papers received by the polling station is equal to the number of voted ballots plus the number of unused ones. Under the arrangements provided by the Act, there would be no means of effective control of the actual number of ballots issued to voters, and thus no way to know whether the entitled voters were indeed able to cast their ballots. The requirement to enclose a statement with a signature and personal identification number (PESEL) of a voter is insufficient, as such data can be acquired and used by an unauthorized person with relative ease.
- e. Since under the proposed system there is a chance that an unauthorized person will know the personal details of the entitled voter (e.g. in a shared household), there is a risk that unauthorized persons would vote instead of entitled voters, using the latter's PESEL numbers and falsifying signatures. If the PESEL number of a public person (e.g. a candidate) is leaked, this could result in as many as several hundred ballots cast in such person's name in a city the size of Kraków (~700 thousand inhabitants). Identification of the culprits would likely prove impossible, as their identities would not be properly recorded; moreover, indirect means, such as CCTV records, might be rendered useless by the current prevalence of face masks.
- f. It would be impossible to determine precisely how many ballot papers were cast into „postal ballot boxes”, and how many were delivered to electoral commissions, thereby making it more difficult to assess the conduct of the election. Furthermore, since ballots will be cast outside polling stations, it is not clear whether observers and candidate proxies would be able to observe the process at all.
- g. Ballot papers in packages can be cast in 'postal ballot boxes' by „'other persons' than the entitled voter themselves (Article 5.2 of the Act), which diminishes the guarantee of personal exercise of the right to vote because, at any stage of the process, neither the electoral commission nor the postal employees could verify the identity of the person casting the vote. In conjunction with the lack of the requirement of delivery by hand and the possibility of voter's PESEL and signature being used by a third person, the procedure established by the Act opens unlimited options for falsification, voting in another's name or group voting.
- h. Weather conditions (spring being a season of storms in Poland) could result in postal ballot boxes becoming flooded or destroyed, leading to destruction or dispersal of the ballot papers inside. Furthermore, destruction of such boxes could occur either from vandalism or from a purposeful attempt to influence the election results.

- i. Leaving the postal ballot boxes unguarded allows them to be damaged, opened or even stolen along with the ballots inside; while security concerns could be addressed by detailing law enforcement units to guard the boxes, this could have an intimidating effect on voters, especially those who are wanted for criminal acts—a category of citizens that still retains the right to vote.
  - j. Ineffective distribution of the postal ballot boxes might directly affect their accessibility, in particular for handicapped voters, and thus negatively impact the overall effectiveness of the process. There is a risk of the boxes becoming overfilled, postal employees becoming unable to keep up with the flow of ballot papers; conversely, there is also a risk that the number of postal employees would be too high to allow for effective monitoring of the process.
  - k. Voters would be unable to check whether they should have already received their ballots. Front door mailboxes are not particularly secure, so packages might be stolen before voters can retrieve them. Furthermore, postal workers could, whether purposefully or by omission, fail to deliver packages to certain addresses. An excess number of packages could also be delivered to some households. In other words, voters would have very little chance to prove that they did not receive the package in due time and to request a new package, which might lead to a breach of their voting rights.
  - l. There is a risk that the voters unaware of the relevant rules (which is likely if the rules are communicated remotely and on short notice) would assemble their mail-in ballots in an insecure way, for example putting all the ballot papers in a single envelope. This might lead to some votes not making it into the postal box (if there are more envelopes than signed statements containing PESEL numbers), effectively depriving some voters of their right to vote.
  - m. An election conducted exclusively by postal ballot would lead to homeless persons being effectively prevented from exercising their the right to vote (this would concern 30,330 people, according to data of the Ministry of Family, Labour and Social Policy)<sup>8</sup>
  - n. Article 14.1 of the Act states that the list of registered voters should be transmitted to the postal operator on the day of the Act's entry into force. This would greatly reduce the period when voters could still add themselves to the list. Under Electoral Code, a voter should be able to add their name to the voters' register until and including the 5<sup>th</sup> day before the polling day. However, if the polling date is moved and the Act enters into force before 10 of May, such period would be shortened by at least 5 working days, depriving some voters of the opportunity to exercise their rights.
- Vote counting in municipal precinct election commissions (Article 10 of the Act) might be conducted contrary to the established rules (such as the principle of joint counting, without separating into smaller teams), due to e.g. insufficient staffing of commissions in comparison to the number of ballots cast.
    - a. Counting of ballot packages would be more time-consuming than counting of the regular ballot papers, due to the additional burden of registering signed statements and unpacking a large number of envelopes. Commission staff would risk damaging ballot papers if sharp tools are used to open envelopes,

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<sup>8</sup> <https://www.gov.pl/web/rodzina/spada-liczba-osob-bezdomnych-w-polsce>

which would further complicate the counting procedure, especially in understaffed commissions.

- b. If the number of ballots cast significantly exceeds the staffing of a particular commission, the process of counting could last for days—potentially longer than a week—leading to staff exhaustion and encouraging procedural violations out of haste (lack of verification, counting in small teams, hasty and imprecise counting).
- c. Commission members would be prone to exhaustion and, due to contact with a large number of ballot papers in a non-sterile environment, would face an increased risk of contracting COVID-19, thus becoming both potential victims and spreaders of the SARS-CoV-2 disease. Although the Act requires that personal protective equipment be provided to election staff, a lack of proper training and prolonged exposure may undermine the effectiveness of such measures, thereby posing risks to the safety of staff members and their families.

## Conclusion

The above-mentioned list of issues and reservations regarding the Act of 6<sup>th</sup> April is by no means exhaustive. Several additional questions could be raised regarding the:

- delegation of competences reserved for the National Electoral Commission to the executive (Ministry of State Assets)
- conduct of the election campaign during a *de facto* state of emergency
- amending electoral law in the middle of the election campaign and possibility of the amendments entering into force just before the polling day

In addition, we believe that the measures provided by the Act of 6 April would not eliminate the threat raised by greater nationwide travel on the election day. Voters would still need to leave their homes in order to send their ballot packages back to the electoral commissions, putting their health at risk in queues to the postal ballot boxes - moreover, some voters might actually need to return to their permanent places of residence in order to pick up their packages.

**The draft Act currently being deliberated in the Senate, along with other changes to the electoral law, constitutes a threat to the correct course of voting in the Polish presidential elections scheduled for 10 May, which should be held according to the principles of universality, equality, fairness and full transparency. With all the above-mentioned issues in mind, we kindly request that our comments to the Act be considered before the final vote on the matter.**

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