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Constitutional Regulations Concerning Elections and States of Exception

The Polish Constitution provides that elections of the President of the Republic of Poland shall be called by the Marshal of the Sejm for the date not earlier than 100 and not later than 75 days before the end of the term of office of the incumbent President, and in case the office of the President has been vacated – not later than on the 14th day after the office was vacated, setting the date of voting on a day free from work falling within 60 days from the date on which the elections were ordered. Validity of election of the President of the Republic of Poland shall be confirmed by the Supreme Court.

The term of office of the president starts on the date of their coming into office and lasts for 5 years.

Differently than the situation e.g. in the US, the president in Poland is replaced by the appointed person – the Marshal of the Sejm or, should they be unable, by the Marshal of the Senate, only in strictly specified situations such as inability to discharge the duties because of health condition, dismissal from office by a judgment of the Tribunal of State or resignation from office. The Marshal shall discharge the duties of the president only until a new president is elected – which is explicitly laid down in the Constitution. Therefore, there is no persons who in compliance with the Constitution could replace the President in case the term of office of the head of state came to an end and new elections failed to be carried out effectively. During the debate before 10 May, constitutionalists indicated that by analogy it could be suggested that the function of the interim head of state could be performed by the Marshal of the Sejm, though there are no appropriate regulations to support this idea. According to the principle of legalism in force in Poland, state authorities and public officials can do only as much as empowered by law. That is why acknowledgment of the analogy instead of invoking a specific (non-existent) law would in this case be tantamount to a breach of the Constitution. At the same time, also those constitutionalists that were sympathetic to the opposition were ready to violate the Constitution by employment of such analogy for a higher purpose of maintaining continuity of state authority. It should be stressed that the evident weakness of the Polish Constitution is an effect of the manner in which it was elaborated (frequent changes of governments and mixing of political interests) and passed (seeking compromise). The Constitutions of the pre-war period were free from this type of deficiencies or actually defects. In particular, the April Constitution allowed for

maintaining continuity of state authority even under the occupation when no elections could take place.

Given the above, carrying out elections within the constitutional time limit has been a priority of both the government and the opposition. Without elections we shall lose the head of state. What is the constitutional time limit remains an open question, however?

The setting of that date on 10 May 2020 was done in compliance with the provisions of the Constitution. However, the Constitution specifies situations whereby it is possible to postpone elections. This requires introduction of one of states of exception. In the situations of special threats, when ordinary constitutional measures are insufficient, an appropriate state of exception may be proclaimed: a state of martial law, a state of emergency or a state of natural disaster. During a state of exception it is impossible to change: the Constitution, the rules of election to the Sejm, the Senate and local government bodies, the Act on the election of the President of the Republic of Poland, and the Act on states of exception. During a state of exception and within 90 days after its end the term of office of the Sejm cannot be shortened, no national referendum can be held, elections to the Sejm, Senate, local government bodies and presidential elections cannot be carried out, and terms of office thereof are appropriately extended. Elections to local government bodies are possible only where a state of exception has not been introduced.

Introduction of a state of exception, and more precisely a state of natural disaster, which pursuant to the Constitution may be introduced: in order to prevent the consequences of natural disasters or technical emergencies having traits of a natural disaster and in order to remove them, by the Council of Ministers for a defined period of time, not longer than 30 days, on a part of or entire territory of the state, could postpone the elections. Such state may be prolonged by the Sejm.

It should be remembered, however, that the provisions of the Constitution provide that all details concerning introduction of states of exception are to be specified in a statute. During the times of the Civic Platform-Polish People's Party coalition, not only the issues of states of exception but also a state of epidemic were regulated in statutes. However, a state of epidemic does not authorize postponement of elections – it may be done solely on the basis of the provisions of the Constitution, i.e. upon proclamation of one of states of exception.

The above caused that acting in accordance with the principle of proportionality the government should employ the Act of state of epidemic. It best reflected the situation of Poland. On the other hand, a state of epidemic did not allow postponement of elections. Therefore, a question remained whether it is possible to instrumentally utilise the regulations on states of exception so as to introduce excessive restrictions of citizens' rights and freedoms in order to postpone the date of elections? By the same token, is it possible to

abuse the regulations on a state of natural disaster in the situation when in fact it was a state of epidemic that prevailed in Poland.

Under the provisions of the Constitution (which, it should be stressed – and this opinion is shared by politicians and lawyers of all political options – is very imperfect and at times actually problematic) it was not possible to shift the date of the elections. Being guided by the so-called greater political or social interest it was possible to bend the rules and introduce a state of natural disaster in a situation whereby in fact it was a state of epidemic.

Added to the above was a rather chaotic and hasty reform of the electoral system (reform of the provisions of statutes, not the Constitution, which is very laconic in this respect). That reform was (thanks to the majority in the Senate) obstructed by the opposition. Thirty days of deferral (in compliance with the Constitution) by the Senate caused that the electoral regulations were adopted three days before the elections. This in fact prevented holding the elections. Thus Poland found herself in a situation whereby the elections called in accordance with the Constitution could not take place.

Beyond the analysis remains the issue of the health of voters and whether elections by correspondence could contribute to spreading the disease. Those are political rather than legal issues. From the viewpoint of law, the correctly called elections did not take place. The Constitution does not provide for such a situation. Thus again constitutionalists have to resort to analogies rather than directly to the provisions of the Constitutions. What is more, during the debate in the Senate lawyers (also those from the opposition) indicated that the Constitution did not provide suitable grounds for resuming the elections. However, the elections have to take place because there is no other constitutional method for filling the office of President.

The above analysis illustrates far-reaching consequences of blocking the possibility of holding the election on 10 May 2020. It also shows that their postponement would violate the substance of the regulation on states of exception. Politicians in the country found themselves in a situation where they had to decide what was more important: the provisions of the Constitution and *ratio legi* of their passing, or the political and social interest. Paradoxically, in the current dispute the position of the government was more strongly based on the provision of the Constitution than the stance of the opposition. On the other hands, the outcome of the dispute has brought us closer to the solution forced by the opposition, whose main party, namely the Civic Platform took advantage of the situation to replace Małgorzata Kidawa-Błońska with Rafał Trzaskowski (currently President of Warsaw) as its presidential candidate. What is interesting, since the Constitution does not provide for resumption of the elections, in the existing situation it will be necessary to adopt additional regulation making it possible to run for the replaced candidate as well as the candidates from the failed elections of 10 May 2020.