

# Electoral Administration in Poland. Present Legal Solutions and Possible Future Changes

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## Abstract

*The paper deals with the issues concerning the so far existing model of the election administration and the problems connected with the regional and local elections conducted in December 2014 in Poland. The computer system failure making it impossible to announce the election results on time challenged the social confidence in the election process and led to questioning the range and necessity of changes within the election system. The paper discusses in detail the origin and evolution of the election administration bodies underlining its specific character i.e. its composition of independent judges. Evaluating the National Election Committee activity alternative solutions are presented—the ones recommended in the election law by the Council of Europe through its Venice Commission.*

**Keywords:** regional elections, election administration in Poland, changes within the election system, Venice Commission Code of Good Practice in Electoral Matters

## Introduction

In December 2014 shortly after local-government elections Public Opinion Research Centre (PORS) conducted a survey of the result which showed that only 58% of the respondents thought the election for the Regional Council results given by the National Electoral Commission (NEC) were reliable. 22% of the respondents did not believe the results to be credible. A large number of people withheld giving their opinion which may show they had certain doubts concerning the election results.<sup>1</sup> Analysing the reasons of the local-government election crisis Michalak and Zbieranek indicated its direct and indirect causes. They were right in assuming that the direct cause was the faulty computer system. Thus it turned out that it was possible to have legal solutions in a state pointed out as the model solutions which were questioned by the considerable part of the electorate.<sup>2</sup> It is not enough that the electoral procedures are democratic, it is necessary for the created legal mechanism to be accepted by the participants of the electoral procedure. It could be even stated that less democratic solutions than the Polish ones might be present in the election procedure and they would be accepted elsewhere provided they were approved by the electorate.

For the last 25 years the model of the electoral administration was based mainly on its “neutral” character and its “separation” from contemporary social life. Therefore, the activity of the National Electoral Commission (NEC) as well as of that of the National Electoral Office (NEO) were not known by the voters and the result was that the latest self-government elections brought about the crisis concerning the electoral procedure. The present model of Polish electoral administration was

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1. See: Zaufanie do procedur wyborczych. Komunikat z badań CBOS, nr 174/2014, Warszawa, by Beata Roguska [Public Opinion Research Center survey report].

2. Among the political party electorate from the latest Regional Council elections voters of the Civic Platform and the Democratic Left Alliance found the results given by the National Electoral Committee (NEC) as the most reliable. Not so very reliable these results were found by the Polish People's Party voters. Definitely the least trust in these results was represented by voters of the Law and Justice party. See: Zaufanie do procedur..., op. cit., page 3.

the consequence of the political system changes after 1989 which was described in detail in many publications (Czaplicki 2000; Sokala 2007; 2010, 63–77). This model created at the very beginning of the political system transformation was the result of different circumstances arising out of the political situation of that time rather than the thoroughly thought out doctrinal concept. It can be clearly visible in the evolutionary character of the introduced changes in the years 1991–1993.

The starting point for the above mentioned evolution was the legal status in which the National Electoral Commission (NEC) was functioning under the statute of 7 April 1989—Act on Elections to the Sejm of the Polish People’s Republic X Term of Office for the years 1989–1993. This Commission was composed of the chairman, from 2 to 4 deputy chairmen, a secretary and 15 members appointed by the Council of State at the latest 40 days before the election day from among the voters who had been put forward by the political parties and social organization authorities or by their alliances. The Council of State could also appoint other members to the Commission and had the right to dissolve it after it had completed its task (art.38). However due to the majority character of the Sejm and Senate electoral system, the Commission functioned till the end of the Sejm X Term of Office. At the time when the new regulations were created it was believed that the new body would have a different character. In enacted by the Sejm on 8 March 1990—the Act on the Electoral System to Municipal Councils, it was assumed that to conduct election to the municipal councils a one-person body was appointed—the Election Commissary General. The Commissary was to perform its duties within the region supported by the plenipotentiaries—the regional election commissaries (Czaplicki 2000, 86).<sup>3</sup>

What was the turning point for the new regulations was the first general election for the Polish People’s Republic President in 1990. The election was prepared and conducted by the appointed by the Sejm Marshal—National Electoral Commission with the changed composition. At that time a new procedure of shaping the NEC and regional election committee composition was adapted. The NEC of that time had the following composition: 5 judges of the Constitutional Tribunal, 5 judges of the Supreme Court and 5 judges of the Supreme Administrative Court. In the case of regional election commissaries the composition was also judicial in its character, they were composed of 10 judges of the Appellate Courts, County Courts and Regional Courts. As it was rightly stated by Sokala “with respect to electoral bodies of the highest and middle level it was assumed that they were to be apolitical and legal professionals” (Sokala 2007, 46). Only the circuit electoral commissions were to be composed of “voters” (Chruściak 1999, 50). The next Electoral system to the Sejm from 1993 maintained those principles but introduced significant amendments with respect to the electoral system to municipal councils and to the Act on the Election for the Polish People’s Republic President.<sup>4</sup> The amendments provided for the NEC appointed under this Act to be the only and constant electoral body for parliamentary, Polish People’s Republic President and municipal councils elections. Thus the legislator decided to remove the office of the General Electoral Commissioner so far responsible for organizing and conducting elections to local-government bodies. This office was abolished under art. 168 of the Act of 1993 on 27 November 1993 when the mandate of the General Electoral Commissioner appointed in 1990 expired.

## Binding legal regulations

In addition, enacting the present Electoral Code strengthened the position of the National Electoral Commission and the National Electoral Office. When the above mentioned Act came into force it definitely excluded any distinct electoral administration in local-government elections. It is

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3. See also: Ustawa z dnia 8 marca 1990 r. Ordynacja wyborcza do rad gmin. [Electoral Law to Municipal Councils], Art. 26 and 30. DzU z 1990 r. nr 16 poz. 96. It is worth stressing that the legislator did not specify the criteria for the person to be appointed for the position of the General Commissary or the regional election commissary. The problem was left for consideration by the appointing body.

4. See: Art. 164 and 165 Electoral law to Sejm from 1993. In Uchwała Trybunału Konstytucyjnego z dnia 16 czerwca 1993 r. dotycząca ustalenia powszechnie obowiązującej wykładni przepisów ustawy z dnia 10 maja 1991 r. — Ordynacja wyborcza do Senatu Rzeczypospolitej Polskiej oraz ustawy z dnia 28 maja 1993 r. — Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej. DzU z 1993 r. nr 50 poz. 234.

also worth noticing that enacting the electoral code allowed for changes as far as the position of the electoral commissaries is concerned.

At the beginning of the process of creating a democratic foundation the most significant problem of that time was to guarantee that the future election will be conducted without any suspicion of the executive body influence. Nobody questioned the idea of providing free suffrage through the composition of the central electoral organ. The Bill was prepared by the Constitutional Committee of X Sejm, which shows how relevant that problem was, and provided for the new NEC to be composed of the judges exclusively. Judges being members of the NEC authorized the new electoral procedures. Appointing such members had its justification. As pointed out by Kisielewicz the fact that the NEC was composed of judges was connected “with the necessity to guarantee its independence and objectivity — features crucial especially at the very beginning of our democratic political system formation and the social trust in democratic mechanisms for creating elected authority” (Czaplicki et al. 2006, 41). Adopting such a solution is deemed by many authors as a strong guarantee of professionalism and independence of the highest electoral body in Poland and thus as a result of the essential guarantee for free suffrage (Sokala 2007, 71).

It can be noted that electoral collegial bodies are characteristic of countries having authoritarian governments in the past. Similar institutions can be found in Eastern and Central European countries as well as in Portugal, Spain or Greece. Taking that into consideration the Polish model of election administration is one of the models known in Eastern and Central Europe.<sup>5</sup> The wide spread of such electoral bodies can be understood when we have a closer look at the fact that 23 National Electoral Commissions are present in the Association founded in 1991.<sup>6</sup> In Eastern and Central Europe, electoral commissions are most frequently permanent bodies as it is the case in Romania or Croatia, there are also bodies appointed ad hoc for conducting particular elections. In most of them members of the national electoral bodies are appointed by Parliament for carrying out a given election. It seems worth noticing that in our Eastern and Central Europe some countries like Slovenia or Hungary turned their organs into bodies connected with the executive branch. Poland is not the only country to have judges as members of their electoral bodies. Similar solutions have been adopted in Croatia.<sup>7</sup> Partly “judicial” membership of such a body can be found in Portugal where the chairperson is appointed by the Higher Council of Magistracy. In Spain there are also judges-members of their commission.<sup>8</sup>

What can be understood as the “Polish specific character” of the national electoral body is the problem of its position in the constitution, establishing its membership and the range of its liability.

5. Association of Central and Eastern European Election Officials (ACEEEO). The ACEEEO was founded in 1991. The Charter was signed by representatives of the electoral authorities in Albania, Azerbaijan, White Russia, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Yugoslavia, Kazakhstan, Kyrgyzstan, Lithuania, Latvia, Macedonia, Moldova, Poland, Russia, Rumania, Ukraine, Turkey, Hungary.

6. It seems equally interesting to show indirectly which of these countries have national electoral commissions of that type. At present there are 23 countries-members in the Association.

7. The Act on the State Electoral Commission of the Republic of Croatia (official gazette of the Republic of Croatia “Narodne novine”, No. 44/06 and 19/07) stipulates that the State Electoral Commission has a permanent membership consisting of the chairperson, four deputy chairpersons and four members. The chairperson of the State Electoral Commission of the Republic of Croatia is the President of the Supreme Court of the Republic of Croatia by position. Two deputy chairpersons are elected by the general assembly of the Supreme Court of the Republic of Croatia from among the ranks of judges of that court at the proposal of the President of the Supreme Court of the Republic of Croatia. The deputy chairpersons, who are not elected from among the ranks of judges of the Supreme Court of the Republic of Croatia, and the members are elected by the Croatian Parliament in such manner that one deputy chairperson and two members are elected at the proposal of the majority political party (or coalition), and the second deputy chairperson and two members at the proposal of the opposition political party (or coalition) consistent to the political structure of the Croatian Parliament.

8. Section 9 of the RPIA describes the composition of the Central Electoral Commission, a permanent body which consists of: a) Eight judges of the Supreme Court, designated by lot by the General Judiciary Council. b) Five University professors of Law, Political Science or Social Science (Sociología) in active service, appointed on a joint proposal by parties, federations, coalitions or electors’ groups represented in the House of Congress. 2. Appointments referred to in the preceding subsection shall be made in the ninety days following the constituent meeting of the Congress of Deputies. Where there has been no such proposal for persons referred to in paragraph a) within said time limit, the Bureau of the Congress of Deputies, after having heard the political groups of the House, shall designate those persons, taking into account the proportional representation of said groups in Congress.

Under art. 152 of the Electoral Code the permanent electoral bodies are: the National Electoral Commission and election commissioners. In addition art. 157 sets forth that the National Electoral Commission is a permanent, supreme electoral body competent to carry out elections and referendums. In essence the most specific character of Polish solutions so far have been three features: lack of term of office for NEC members, an unspecified procedure of appointing judges by the appropriate Presidents, and the specific liability procedure for NEC members. Under art. 157 § 2–3 to be appointed as a NEC member two criteria must be fulfilled: one must be a judge of the Constitutional Tribunal, Supreme Administrative Court or the Supreme Court, and to be designated by the President of that Court. Taking into consideration the authority and legal expertise of the judges it is clear that as the members of NEC they do not have to be specialists in electoral law procedure. It is also relevant that a member must be designated by the court President himself and not appointed or given opinion on by the court General Assembly. Thus from the formal point of view appointing of NEC members turns out to be a discretionary competence of the court President. Such a solution does not seem particularly democratic in its nature. Moreover, as can be seen in practice of the latest years, so far the membership changes in NEC have been rare. The Polish People's Republic President, after enacting the electoral code has introduced changes within the NEC membership only four times.<sup>9</sup> Thus a member of NEC was not only not removable as a judge but also from the member of NEC position. In the context of appointing NEC members two provisions of the binding electoral code are especially difficult to understand. The provision of art. 159 § 1 providing that members of the National Electoral Commission shall perform their duties in the Commission irrespective of their functions within performance of duties as a judge. NEC membership is an honourable accompaniment to the position of a judge. It does not seem fully logical to appoint a permanent electoral body whose members cannot devote all their time to their function. A judge performing that function should have the possibility to be relieved at least partly as far as his other duties are concerned. Appointing retired judges to NEC can also be questionable.<sup>10</sup> As can be understood looking at the origin of this provision the intention of the legislature was to take into consideration the situation of retired judges of the Constitutional Tribunal but in fact it prolonged the NEC membership of other retired judges as well.

Another problem connected with NEC membership is the institution of its expiry. It is applied in the situation of resigning from the membership, signing consent to candidature in elections or of taking up duties of the plenipotentiary or person of trust (art. 153 § 2), of death of a member of the Commission, when a member of the Commission who is a retired judge has turned 70 years of age, of dismissal by the President of the Republic of Poland at the reasoned request of a President who has designated a judge to be a member of the Commission. The provision of art. 158 of the electoral code does not leave any doubt as to the fact that the reasons for NEC membership expiry were given *numerus clausus*.

This provision is also not unambiguous. It is possible to construe its content in such a way that the motion must contain from the formal point of view a “justification” without making a decision as to its content, or what seems more justified, there must be “justified circumstances”

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9. Polish People's Republic President's Decision of 28 October 2015 on appointing as a member of NEC (M.P. 2014 item 1138), Polish People's Republic President's Decision of 24 March 2010 no 1131–8–10 on appointing as a member of NEC (M.P. 2010 no 35 item 492), Polish People's Republic President's Decision of 17 October 2007 no 1131–37–07 on appointing as a member of NEC (M.P. 2007 no 77 item 823), Polish People's Republic President's Decision of 18 June 2003 no 113–10–2003 on appointing as a member of NEC (M.P. 2003 no 35 item 477).

10. The provision understood literally provides for such an option but it is an exception to the general principle that NEC members are judges performing their duties. The solution from art. 157 § 4 that a retired judge can be appointed member of NEC does not seem very logical. What is worth stressing in this context is the fact that one of the reasons of retirement are health problems. Thus a retired judge on the basis of ill health cannot perform his judicial functions but can be appointed as a member of NEC. Pursuant to art. 69 of the Act of 27 July 2001 a judge can retire reaching 67 years of age or reaching the age specified in § 1a, unless no later than 6 months before reaching that age he makes a statement informing the Minister of Justice about his will to continue to perform his duties as a judge and delivers a certificate proving he is capable of performing his duties as a judge, issued in accordance with the requirements specified for a candidate for a judge. When a judge makes such a statement and delivers the certificate he may perform his function as a judge but no longer than when he reaches the age of 70. Such a judge can retire at any time making a proper statement to the Minister of Justice.

allowing for the President's motion to be justified. Thus the President may find a motion based on the lack of capability by a given person to combine the function of a judge and a NEC member as justified. The term of office of NEC membership for a judge could be also interpreted as such a condition when making a decision by the First President of the Supreme Court or the President of the Supreme Administrative Court. Such a wide range of circumstances when asking the Head of State to remove an NEC member does not seem to protect him adequately. Moreover, it may constitute a negative signal for public opinion and it can influence the way a judge's impartiality when performing his judicial functions is evaluated.

Concluding this part of the presentation it can be stated that within the present legal regulations there are exceptional independence guarantees for NEC members in performing their duties, which is not necessarily transferred onto the democratic character of the electoral procedures themselves.

It is worth noticing that in Poland the NEC composition is overestimated. In essence the NEC members perform their duties "by the way" of performing the duties of a judge. There does not seem to exist any threat for democracy if NEC composition was specified differently. The optimal composition for the electoral bodies depends on their social approval. It depends more on how the duties are performed and not on the composition. It should be noted here that the Code of Good Practice in Electoral Matters of the European Commission for Democracy Through Law (the Venice Commission) which proves that "only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre-election period to the end of the processing of results" (recommendation 68). Council of Europe Venice Commission recommendations do not give unambiguous answers as to which legal solutions concerning the shape of electoral bodies are the proper ones. "In states where the administrative authorities have a long-standing tradition of independence from the political authorities, the civil service applies electoral law without being subjected to political pressures." Thus according to the Venice Commission we should agree with the fact that it is normal and acceptable for elections to be organized by administrative authorities, and supervised by the Ministry of the Interior (recommendation 69). However, in states with little experience of organizing pluralist elections, there is according to the Venice Commission—a great a risk of government's pushing the administrative authorities to do what it wants. This applies both to central and local government—even when the latter is controlled by the national opposition (recommendation 70).

This is why independent, impartial electoral commissions must be set up from the national level to polling station level to ensure that elections are properly conducted, or at least to remove serious suspicions of irregularity (recommendation 71). Electoral commissions have been noted in a number of member States: lack of transparency in the activity of the central electoral commission; variations in the interpretation of counting procedure; politically polarized election administration; controversies in appointing members of the Central Electoral Commission; commission members nominated by a state institution; the dominant position of the ruling party in the election administration (recommendation 72).

The Venice Commission does not decide about the judicial composition of this body. In compliance with recommendations 75 and 76 "a judge or law officer: where a judicial body is responsible for administering the elections, its independence must be ensured through transparent proceedings. Judicial appointees should not come under the authority of those standing for office." It can be added that Political parties should be represented equally in the central electoral commission; "equally" may be interpreted strictly or proportionally, that is to say, taking or not taking account of the parties' relative electoral strengths. Moreover, party delegates should be qualified in electoral matters and should be prohibited from campaigning. Apart from that, in an electoral commission there can be representatives of national minorities; their presence is desirable if the national minority is of a certain importance in the territory concerned—a representative of the Ministry of the Interior.<sup>11</sup> It seems that there is a possibility to return to the demands for the mixed NEC membership

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11. According to the Venice Commission itself because of the reasons connected with the history of the given country it is not always proper for the representative of the Ministry of Interior to be a member of the commission. Nevertheless, co-operation between the central electoral commission and the Ministry of the Interior is possible if

as the abovementioned recommendations do not exclude them. It can be even assumed that the NEC members appointed from among the scholars could present a more open attitude to the solutions concerning the electoral procedure than when its composition is merely judicial.

## Conclusions

As the abovementioned recommendations show in Central Europe the standard is the mixed composition of electoral commissions. Nothing stops us from enlarging the NEC composition with the representatives of the political parties present in the Parliament or to let them serve as observers. I personally believe that participation of politicians in the electoral process does not constitute a threat, on the contrary it would secure the democratic character of the whole procedure. In my opinion there is no better way to control electoral procedure than through the representatives of the civic society. The effectiveness of such a control could be best illustrated by the reciprocal control of the signatures by the political campaign employees representing their candidates. As it has been clearly pointed out by the Venice Commission even in democracies with long-standing tradition where there is no electoral body but there is some other impartial body having competences in electoral matters political parties must have a possibility to observe its work (recommendation 78). So far the activity of the National Election Commission contrary to its decisions has been surrounded by “authority” and “secrecy.”<sup>12</sup> It could be even noted that this style of work is the result of the experience gained by judges during their work as a judge. At the same time and already for a long period of time main political parties have had allegations concerning obeying electoral law procedure during elections. The solution in that respect could be the requirement of openness for all the interested voters.

There is still no regulation concerning NEC transparency. It is worth noticing here that most of the electoral bodies similar to the NEC have reporting duties with respect to the representative body. The NEC’s duties in this respect are more limited. It has a duty after each election to inform the President, the Sejm and Senate Marshals and the Prime Minister about following the code provisions and the need to change them if that is the case. But there is no general norm concerning the necessity to report on its own activity characteristic of other bodies—even the Constitutional Tribunal. In this case NEC activities and its application of electoral law are completely unknown to the majority of people.

In my opinion it would be worth considering introduction of more openness in the activity of the National Election Commission as is the case with other commissions and inviting media not only during the election conferences but also during some sittings e.g. when they debate the electoral law. The minutes from the Commission sittings could also be made public and published at its website.<sup>13</sup>

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only for practical reasons, e.g. transporting and storing ballot papers and other equipment. For the rest, the executive power should not be able to influence the membership of the electoral commissions.

12. It is noticed in the doctrine—according to Michalak and Zbieranek (2015)—there has been call for the change of the NEC information policy particularly as far as giving information concerning electoral law and its procedures and educating on the one hand voters and on the other hand which is also very important educating approximately half a million people engaged in the electoral process (first of all members of electoral commissions).

13. The practice so far is that the NEC takes minutes of its sittings but it is not published. On demand of an MP P. Wipler the NEC gave him access to 48 sittings minutes from 2014 and they were published by him at his website (<http://www.wipler.pl/>).

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