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Opinion Nr ELE-POL/374/2020



**OPINION ON THE DRAFT ACT ON SPECIAL RULES FOR THE ORGANISATION
OF THE GENERAL ELECTION OF THE PRESIDENT OF THE REPUBLIC OF
POLAND ORDERED IN 2020 WITH THE POSSIBILITY OF POSTAL VOTING
(SENATE PAPER NO. 118)**

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I. BACKGROUND AND SCOPE OF THE OPINION

1. On 14 May 2020, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) received a request from Dr. Adam Bodnar, Commissioner for Human Rights of Poland, to provide a legal opinion (hereinafter “opinion”) on the Draft Act on special rules for the organisation of the general election of the President of the Republic of Poland ordered in 2020 with the possibility of postal voting (hereinafter “Draft Act”) of 12 May 2020. By letter of 15 May 2020, ODIHR confirmed the readiness to provide a legal opinion on the Draft Act.

2. This opinion reviews the Draft Act for compliance with OSCE commitments, other international standards and good practice for democratic elections. It also takes into account the findings of previous election observation activities in Poland.¹

3. The scope of this opinion covers only the Draft Act submitted for review. To the extent necessary, references are made to the Constitution, the Election Code, and other legislative acts of Poland. Thus limited, the opinion does not constitute a comprehensive review of the entire electoral legal framework of Poland.

4. This Opinion is based on an unofficial English translation of the Draft Act commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. This Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on electoral legislation of Poland in the future.

II. EXECUTIVE SUMMARY

5. The Draft Act was introduced to the *Sejm* (the lower house of parliament) on 12 May following a political agreement reached between factions within the ruling coalition not to proceed with the conduct of the presidential election scheduled for 10 May 2020.

6. The Draft Act provides that voters in a newly scheduled presidential election would have the option of voting either in person, at polling stations, or by post. Postal voting would also be organised abroad, except in countries where there are no possibilities to organise such voting. Electoral committees created to contest the 10 May 2020 election and their registered candidates would be entitled to contest the newly scheduled election. New electoral committees may be created, which may nominate new candidates. The Draft Act also introduces changes to the composition of the election administration, regulates certain aspects of campaign financing, and changes deadlines for electoral dispute resolution.

7. The Draft Act addresses some of the concerns expressed by ODIHR in relation to prior legislation on postal voting in the 2020 presidential election in Poland.² In particular, the Draft Act retains the authority of the NEC to manage the electoral process, allows for in-person voting in a polling station and potentially allows more time for adequate preparations by the election

¹ See all previous [ODIHR election reports on Poland](#). See also the ODIHR [statement](#) from 7 April 2020 on the importance of genuine campaign and public debate for democratic elections.

² See ODIHR Opinion on The Draft Act on Special Rules for Conducting the General Election of the President of the Republic of Poland Ordered in 2020 (April 27, 2020).

administration and for providing the requisite information to voters. At the same time, some concerns and recommendations previously expressed remain, and certain aspects of the Draft Act should be improved in order to ensure the effective exercise of electoral rights in line with international standards for democratic elections. Consequently, ODIHR makes the following key recommendations:

- ensure that amendments to electoral legal framework are adopted through a public and inclusive process that also respects the principles of legality and the rule of law, allows for a meaningful discussion and facilitates consensus of the key stakeholders.
- ensure that any decision to cancel in-person voting is taken by the NEC, sufficiently in advance of election day to enable proper implementation of postal voting and avoid potential disenfranchisement of voters;
- establish an early deadline for issuing public health guidelines applicable to the electoral process to enable appropriate regulation and implementation;
- reconsider provisions allowing the Marshal (speaker) of the *Sejm* to set and change electoral deadlines. To the extent that flexibility in electoral deadlines could be permitted in light of the epidemic situation, the law should explicitly state which deadlines can be changed and the final decision on such changes should be made by the NEC;
- consider retaining the judicial composition of DEC's that is provided for by the Election Code and reconsider respective provisions of the Draft Act, particularly since it remains unclear how they are related to the exigencies posed by the current situation;
- reconsider the proposed reduction of the minimum number of Precinct Election Commission (PEC) members and apply the provisions of the Election Code on PEC composition for the newly scheduled election;
- ensure that electoral committees registered to contest the newly scheduled presidential election are subject to the regular campaign spending limits envisaged by the Election Code;
- ensure that that the new timeline for the 2020 presidential election allows for a comprehensive voter information campaign, including information about the new voting arrangements and the protective measures introduced in polling stations;
- ensure that the deadlines for electoral dispute resolution are not shortened unreasonably.

These and additional recommendations, as highlighted in bold, are included throughout the text of this opinion.

III. INTRODUCTION

8. The Draft Act was introduced to the *Sejm* on 12 May following a political agreement reached between factions within the ruling coalition not to proceed with the conduct of the presidential election scheduled for 10 May 2020. A law providing for the conduct of 10 May 2020 election exclusively by means of postal voting entered into force on 9 May 2020, however, the National Election Commission (NEC) adopted a decision on the scheduled election day stating that it had not been possible for voting to take place.

9. The Draft Act provides that voters in the newly scheduled election would have the option of voting in person at polling stations or by post. Postal voting would also be organised

abroad, except in countries where it would not be organisationally, technically or legally possible. Electoral committees previously created to contest the 10 May 2020 election and their registered candidates would be entitled to contest the newly scheduled election. New electoral committees may also be created, which may nominate new candidates. The Draft Act also introduces changes to the composition of the election administration, regulates certain aspects of campaign financing, and changes deadlines for electoral dispute resolution.

IV. ANALYSIS AND RECOMMENDATIONS

A. LEGISLATIVE PROCESS

10. The Draft Act went through three readings in the *Sejm* on 12 May 2020 and was submitted to the *Senat* on 13 May 2020. The accelerated adoption process did not give stakeholders and the principal implementing institutions, an opportunity to express their views on the draft legislation. It also precluded any public debate on this matter of vital national interest. ODIHR reiterates its long-standing position that electoral legislation should be adopted through a public and inclusive process facilitating consensus of the key stakeholders.³ Additional benefits of greater public engagement in the present context would include the ability, to take stock of experiences of other countries which have held elections during the COVID-19 pandemic, to properly assess the Draft Act's financial implications, and to discuss the potential suitability of other voting options, such as early voting or extending voting time.⁴

It is recommended that amendments to the electoral legal framework are adopted through a public and inclusive process that respects the principles of legality and the rule of law, allows for a meaningful discussion and facilitates consensus of the key stakeholders.

B. STABILITY OF ELECTORAL LAW AND LEGAL CERTAINTY

11. Stability of electoral law is crucial to the credibility of the electoral process.⁵ Even exceptional reform of electoral legislation such as the Draft Act, which is intended to be applicable only to one election, should nevertheless be enacted so as to provide adequate time for it to be really applicable to the election.⁶ Stability of electoral law also facilitates legal certainty, which is an essential corollary of the rule of law. These principles have other important implications for the present context. Firstly, legislation adopted to counter the challenges posed by the COVID-19 virus to the electoral process should only introduce changes

³ Paragraph 5.8 of the 1990 OSCE Copenhagen Document provides that "legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability." UN Human Rights Committee, General Comment No. 25 (1996) provides that "[c]itizens also take part in the conduct of public affairs by exerting influence through public debate" (paragraph 8); See also, among many others, ODIHR Opinion on The Draft Act on Special Rules for Conducting the General Election of the President of the Republic of Poland Ordered in 2020, para. 12 (April 27, 2020), Joint Opinions of the ODIHR and Venice Commission on the draft electoral law of the Kyrgyz Republic ([CDL-AD\(2014\)019](#)) and on the draft law amending the electoral legislation of Moldova ([CDL-AD\(2014\)003](#)).

⁴ The explanatory note accompanying the Draft Act states that the Draft Act does not have financial implications for the state budget and does not estimate the costs of postal voting, personal protection equipment of postal workers and at polling stations, and other electoral expenses.

⁵ See the Venice Commission's [Code of Good Practice in Electoral Matters](#), Explanatory Report, paragraph 63.

⁶ See the Venice Commission's [Interpretative Declaration on the Stability of the Electoral Law](#), paragraphs 4 and 5.

which are necessary and proportionate to meet these challenges.⁷ Secondly, the legislative changes should enable effective responses to the existing health risks, based on the guidance of public health authorities. These considerations are further commented upon in the relevant sections below.

12. In accordance with international good practice, the Draft Act retains the regular option of voting in person at polling stations.⁸ The Draft Act also extends the option to vote by post to voters in Poland and abroad, with some exceptions (Article 2 of the Draft Act). The Minister of Health (after consulting the NEC) may, depending on their assessment of the pandemic, revoke the option to vote at the polling station. In such an event, the decision would be taken to hold the vote exclusively by post in specific municipalities or areas, not later than 7 days before the election day (Article 15.5 of the Draft Act). A decision to cancel in-person voting up to 7 days prior to election day may place an unreasonable strain on the election administration and the postal service, and result in disenfranchisement of voters who planned to vote in polling stations, especially since the deadline for applying for postal voting is set at 12 days before the election day (Article 3.1.(1) of the Draft Act). The Draft Act does not specify how postal voting will be carried out by affected voters, including the deadline applicable for mailing ballots to them. Moreover, the authority to make such decisions should be vested with the election management body, possibly in consultation with the health authorities, rather than a government minister.

It is recommended that any decision to cancel in-person voting is taken by the National Election Commission, sufficiently in advance of election day. The Draft Act should specify how postal voting will be carried out in such cases to avoid potential disenfranchisement of voters.

13. The Draft Act charges the Minister of Health to determine the necessary personal protection equipment for members of Precinct Election Commissions (PECs) as well as detailed sanitary rules applicable to polling stations, taking into account the need to protect the health of persons present at polling stations (Article 16 of the Draft Act). Public health guidelines will be of paramount importance for planning postal-voting and election-day procedures. The guidelines are not, however, envisaged to include all people present at polling stations (voters, candidates' proxies, citizen and international observers) and the handling of postal ballots, especially in relation to persons in quarantine and isolation. The content of these guidelines may be essential for other regulations of the electoral process and for determining procurement needs for the election, including personal protection equipment and adequately large premises. Thus, such guidelines should be issued as early as possible in the process.

⁷ See Paragraph 2 of the 2001 UN Human Rights Committee General Comment No. 29 which states that “Measures derogating from the provisions of the Covenant [the International Covenant on Civil and Political Rights] must be of an exceptional and temporary nature.” The 1990 Copenhagen Document states in Paragraph 25.3 that “measures derogating from obligations will be limited to the extent strictly required by the exigencies of the situation”, and in Paragraph 25.1 that “measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments.” The European Court of Human Rights (ECtHR) in the cases *Mehmet Hasan Altan v. Turkey* (Paragraphs 94 and 210) and *Şahin Alpay v. Turkey* (Paragraphs 78 and 180) evaluated “whether the measures taken...were strictly required by the exigencies of the situation and consistent with the other obligations under international law”.

⁸ See the Code of Good Practice paragraph I.3.2.ii.

Consideration should be given to establishing an early deadline for issuing public health guidelines applicable to the electoral process to enable appropriate regulation and implementation.

C. ELECTION ADMINISTRATION

14. The Draft Act retains the authority of the NEC to manage the electoral process, in contrast to the previously adopted legislation.⁹ At the same time, the Draft Act authorizes the Marshal of the *Sejm* to set deadlines for carrying out electoral actions envisaged by the Election Code and the Draft Act, in view of the new election date, after consulting the NEC (Article 15.1 of the Draft Act). The Marshal would also have the authority to change these deadlines, after consulting the NEC and the Ministry of Health, considering the epidemic situation in the country or in particular areas (Article 15.4 of the Draft Act). These provisions introduce a margin of flexibility into electoral deadlines in the face of a potentially dynamic epidemic situation. While such flexibility may be warranted, these powers ought to be more precisely circumscribed, as they affect legal certainty and the exercise of electoral rights and obligations. Furthermore, placing the final authority to change electoral deadlines in the hands of the parliament's speaker, a political figure, risks undermining the independence and impartiality of the election administration.¹⁰ To the extent that any flexibility in electoral deadlines should be permitted in the face of exceptional epidemic circumstances, this determination should be made by the election management body, i.e. the NEC.

It is recommended that provisions allowing the Marshal of the *Sejm* to set and change electoral deadlines be reconsidered. To the extent that flexibility in electoral deadlines could be permitted in light of the epidemic situation, the law should explicitly state which deadlines can be changed and the final decision on such changes should be made by the NEC.

15. The Draft Act introduces changes to the composition and appointment of district election commissions (DECs). The Election Code provides that DECs are composed from 4 to 10 judges nominated by the Minister of Justice and appointed by the NEC (Article 170.1-3 of the Election Code). Under the Draft Act, the DECs would be composed of 4-10 people who have higher legal education and “guarantee the proper performance of their functions”, nominated by respective election commissioners (Article 18.1-2 of the Draft Act). It is not evident how this change of the principle underlying the composition of the DECs is necessitated by the COVID-19 pandemic. The NEC had already appointed DECs for the 10 May presidential election. Notwithstanding the rationale, these legislative changes are not likely to improve confidence in the independence and impartiality of the election administration, which is of particular importance for exercising DECs' supervisory functions over PECs (Article 172.1(1) of the Election Code). By virtue of their status, judges are commonly perceived as more independent and impartial than other people with higher legal education.

⁹ See ODIHR Opinion on The Draft Act on Special Rules for Conducting the General Election of the President of the Republic of Poland Ordered in 2020, paragraphs 19-21, (April 27, 2020).

¹⁰ General Comment No. 25 of the UN Human Rights Committee provides that “[a]n independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant” (paragraph 20). The Venice Commission's Code of Good Practice advises that “[a]n impartial body must be in charge of applying electoral law” (Guidelines, paragraph II.3.1.a).

It is recommended that the judicial composition of DEC's that is provided for by the Election Code is retained and the respective provisions of the Draft Act are reconsidered, particularly since it remains unclear how they are related to the exigencies posed by the current situation.

16. The Draft Act sets the minimum membership of a precinct election commission (PEC) at 3 members (Article 19.1 of the Draft Act), compared to the minimum of 5 members envisaged in the Election Code (Article 182.8a of the Election Code). The reduction in the minimum membership would appear inconsistent with the imperatives of the COVID-19 epidemic which will necessarily impose a greater workload for the PECs in relation to social distancing and postal voting. Additionally, it may also be difficult to preserve the political balance envisaged by the existing method of commission formation in PECs consisting of only 3 members.

It is recommended that the reduction of the minimum number of PEC members be reconsidered and the provisions of the Election Code on PEC composition apply for the newly scheduled election.

17. The Draft Act provides that training of PEC members, provided for by Article 191e.1(2) of the Election Code, shall take place using electronic means which enable remote communication (Article 20 of the Draft Act). This may disproportionately affect the participation of some PEC members who may not have access to remote communication methods, among these the elderly and the disabled. Furthermore, while the health and safety of PEC members and election officers is of paramount importance, the imposition of only one method of training would deprive the election administration of operational flexibility to carry out their tasks in line with the latest public health guidelines. It would be preferable to allow the NEC and the National Elections Office to determine how to proceed with such tasks, depending on the epidemic situation in specific regions.

It is recommended that decisions pertaining to the means of training of PEC members are made by the NEC based on the recommendations of public health authorities.

D. POSTAL VOTING PROCEDURES

18. The Draft Act provides for a substantially similar postal voting procedure as the Act of 6 April 2020, with a number of modifications. Therefore, some of the comments previously made by ODIHR in relation to the delivery and retrieval of ballots, review of ballots for validity, and observation of elections by candidate proxies and citizen observers remain relevant also for the Draft Act.¹¹ Several recommendations made previously are also reiterated below.

Delivery of ballots to voters

19. Article 3.1(1) of the Draft Act requires voters to notify election commissioners through the municipal office of their intention to vote by post no later than 12 days before the election day. In case of voters who became subject to mandatory quarantine, isolation or home isolation after this deadline, the deadline for notification is the 2nd day before the election day. The latter deadline appears to be unfeasible as it may not provide adequate time to prepare and send electoral packets, particularly as the deadline for returning postal ballots by voters also falls on the same day (Article 8.2(1) of the Draft Act). Thus formulated, the draft act may effectively

¹¹ See ODIHR's Opinion Nr ELE-POL/373/2020 of 27 April 2020, paragraphs 25-40.

disenfranchise voters under mandatory quarantine within the 12 day deadline for registration as it is unlikely that a shift in technical deadlines for sending postal ballots to such voters would be feasible.

Receipt of ballots from voters

20. Voters may return their ballots by post no later than the 2nd day before the election day (Article 8.2(1) of the Draft Act), or deliver them personally or through another person to the municipal office up to the 2nd day before the election day (Article 8.5(1) of the Draft Act) or to the precinct election commission (PEC) during voting hours (Article 8.8 of the Draft Act). The deadline for posting ballots up to the 2nd day before the election day is rather short and its feasibility should be verified by the postal operator.

Timely delivery of ballots posted by voters within the legal deadline should be guaranteed.

21. Voters are requested to write the address of the respective PEC on the return envelope (Article 8.2 of the Draft Act). This address should therefore be clearly indicated in the voting instructions sent in the electoral packet.

It would be advisable for the return envelope to already be pre-filled with the correct PEC address.

22. The postal operator is required to set up enough postal collection boxes in each municipality, approximately one box per 750 voters who intend to vote by post (Article 8.3 of the Draft Act). However, as the number of voters who intend to vote by post will only be known 12 days before the election day (Article 3.1(1) of the Draft Act), the time required to set up additional postal boxes as well as to communicate their location to voters will be notably limited. Consideration could be given to setting up properly secured ballot drop boxes at municipal offices and informing voters about such drop boxes in postal voting instructions sent in electoral packets.¹²

Consideration could be given to setting up ballot drop boxes at municipal offices to facilitate the return of postal ballots.

23. With respect to ballots delivered by voters to PECs during voting hours, it is important that the procedures for handling such ballots are developed by the NEC and known to the PEC. As there is no limit on the number of voted ballots a person could return, the practice is open to agents collecting completed ballots on behalf of a candidate or facilitating schemes to influence voters' choices, including family voting, or intentional spoiling of voters' ballots.¹³

ODIHR recalls its previously made recommendation to introduce reasonable limitations on the return of ballots through another person.

24. Municipal offices are charged with receiving voters' applications for postal voting (Article 3.1(1) of the Draft Act), preparing and sending electoral packets (Article 5.2 of the Draft Act), keeping track of packets sent or picked up by voters (Article 5.10 of the Draft Act), and receiving return envelopes delivered in person (Article 8.5(1) of the Draft Act). Packets

¹² See examples of practices with ballot drop boxes in the United States [here](#).

¹³ See ODIHR Opinion Nr ELE-POL/373/2020 of 27 April 2020, paragraph 29.

which could not be delivered to voters are returned to PECs or the director of the National Election Office (NEO) branch before the end of voting (Article 5.8 of the Draft Act). Information about such undelivered packets should be promptly communicated to the municipal office.

Voters who requested postal ballots should be notified if their packets could not be delivered and be given an opportunity to pick them up at municipal offices or have the option to vote in person instead.

25. Postal ballots are to be delivered to PECs by the postal operator during voting hours (Article 8.7 of the Draft Act). Until election day, return envelopes will therefore be in custody of the postal operator, which must ensure their security and integrity. With deliveries of all return envelopes being made on the same day to all PECs there is a chance that some ballots may be delivered to wrong PECs and there will be little time to correct delivery errors. The PECs should be trained on the procedures for receipt of return envelopes from the post and their chain of custody.

It is recommended that a mechanism be developed to re-direct incorrectly delivered ballots to the correct PECs on election day.

Review of ballots

26. Ballots delivered to the PEC are to be placed in the ballot box in their envelopes (Article 8.9 of the Draft Act). The Draft Act does not introduce rules for the determination of validity of postal ballots, except for ballots which do not bear the necessary marks of authenticity (Article 11 of the Draft Act). Instructions for PECs on determining the validity of postal ballots will presumably be issued by the NEC. Considerations presented in the previous ODIHR opinion on this subject matter remain relevant for such future instructions.¹⁴

E. VOTER EDUCATION

27. The Draft Act directs the NEC to carry out information campaigns in the media about the option of postal voting and how it can be exercised (Article 3.11 of the Draft Act). This provision echoes the concern expressed by ODIHR in its opinion of 27 April 2020 in relation to the previous act on postal voting, which left very little time for voter education campaigns. It is noteworthy that the Draft Act does not repeal a previous legislative amendment, which removed the obligation that election commissioners mail information to voters about the date, time and method of voting no later than 21 days before the election.¹⁵ It will be important for the new timeline for the 2020 presidential election to take into account the need to inform all voters about the new voting arrangements and the protective measures introduced in polling stations. Such an information campaign would enable voters to exercise their rights and strengthen their confidence in the electoral process.¹⁶

¹⁴ See ODIHR Opinion Nr ELE-POL/373/2020 of 27 April 2020, paragraphs 34-36.

¹⁵ Article 37d.1 of the Election Code, which provides for this obligation of election commissioners, would not apply to the 2020 presidential election by virtue of Article 102(3) of the Act of 16 April 2020, which remains in force.

¹⁶ See General Comment No. 25 of the UN Human Rights Committee: “States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. [...] Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community” (paragraph 11).

It is recommended that the new timeline for the presidential election allows for a comprehensive voter information campaign, including about the new voting arrangements and the protective measures introduced in polling stations.

F. CAMPAIGN FINANCE

28. The Draft Act clarifies that the limits of donations to electoral committees by individuals and by candidates, as well as the limit of bank loan guarantees set by the Election Code would apply cumulatively to the 10 May election and the newly scheduled election (Articles 14.13 and 14.14 of the Draft Act).

29. Electoral committees which registered for the 10 May election may also take part in the newly scheduled election (Article 14.1 of the Draft Act). Their campaign spending limit is increased by 50 per cent (Article 14.10 of the Draft Act). For new electoral committees, created to contest the newly scheduled election, the campaign spending limit is capped at 50 per cent of the regular spending limits envisaged by the Election Code (Articles 14.11 and 14.12 of the Draft Act). Such cap would skew the equal playing field, giving the opportunity to candidates who also campaigned in the 10 May election to spend considerably more funds for their presidential campaign.¹⁷

It is recommended that new electoral committees, registered to contest the newly scheduled presidential election, be subject to the regular campaign spending limits envisaged by the Election Code.

G. COMPLAINTS AND APPEALS

30. Article 15.2 of the Draft Act reduces the deadline for lodging complaints against the presidential election to the Supreme Court to 3 days, compared to 14 days currently envisioned in the Election Code (Article 321.1 of the Election Code). At the same time, the deadline for the Supreme Court ruling on the validity of the presidential election is reduced to 21 days (Article 15.3 of the Draft Act), compared to 30 days currently envisaged in the Election Code (Article 324.2 of the Election Code). These changes do not have an evident link to the COVID-19 epidemic.

31. The 3 day-day window for lodging complaints may be too short to prepare well-founded appeals. Consideration could be given to introduce the same deadline as for elections to the *Sejm*. The reduction of the already short time for the Supreme Court's ruling, on the other hand, appears unjustified and may prevent the Supreme Court from proper consideration of all electoral appeals.

It is recommended that the proposed deadline to lodge electoral appeals be reconsidered. The current deadline for the Supreme Court's ruling on the validity of the election should be preserved or extended.

¹⁷ Paragraph 7.6 of the OSCE Copenhagen Document commits OSCE participating States to provide political parties and organizations "with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities". The Venice Commission's Code of Good Practice in Electoral Matters advises that "equality of opportunity must be guaranteed for parties and candidates alike", in particular with regard to the election campaign (Guidelines, paragraph I.2.3.a).