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Political manoeuvres and legal conundrums amid the COVID-19 pandemic: the 2020 presidential election in Poland

Case study

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Political manoeuvres and legal conundrums amid the COVID-19 pandemic: the 2020 presidential election in Poland

Vasil Vashchanka

The COVID-19 pandemic presented politicians and election management bodies (EMBs) around the world with difficult choices. Numerous elections were postponed and during elections that were held, additional measures needed to be undertaken to protect public health (see International IDEA 2020). This case study of Poland's 2020 presidential election offers insights into some of the choices faced when decision-makers become aware that elections cannot proceed as planned. The debates surrounding Poland's postal voting have attracted considerable attention also outside the country and are explored in some detail (see also Kalandadze 2020). Emphasis is also given to changes in the legal framework that were made before the election was held on 28 June 2020, and the public health protection measures accompanying the polling. The Polish case holds lessons for other countries who face political, legal and administrative challenges in organizing elections during the current pandemic and the compromises that may be necessary. It illustrates the danger of proceeding with solutions that do not enjoy broad political support: one element among several that is ultimately required for holding a successful election.

Political and institutional context

Poland's 1997 Constitution established a semi-presidential republic, with a directly elected president who may serve no more than two five-year terms. While this post is largely ceremonial, the president does hold a powerful legislative veto, which the parliament may only override with a three-fifths majority. In addition to the written Constitution, elections in Poland are regulated by a codified act—the 2011 Election Code. The president is elected under a two-round system: if no candidate secures a majority (over 50 per cent) of valid votes cast in the first round, a second round is held between the two top candidates within two weeks.

Since unseating a government led by the Civic Platform party (PO—Platforma Obywatelska) in 2015, the conservative Law and Justice party (PiS—Prawo i Sprawiedliwość) has embarked on controversial reforms that have been criticized for eroding the political independence of institutions that underpin the functioning of the rule of law. Various legislative changes have extended the government's influence over the Constitutional Tribunal, National Council for the Judiciary, courts, prosecution service, civil service, and

the public media. Reforms of the judiciary have been particularly contentious, leading to investigations by the European Commission and its referrals of Poland to the European Court of Justice (ECJ 2019).

Against this background, the government's electoral reforms have also been viewed with suspicion. The Election Code underwent considerable revision in January 2018, which included changes in campaign and campaign financing rules as well as changes in election administration. Changes to the composition of the National Election Commission (NEC) took effect after the October 2019 parliamentary elections. The previous NEC was composed of nine judges: three from each of the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court. The new NEC includes two judges (from the Constitutional Tribunal and the Supreme Administrative Court) and seven members appointed by political parties in proportion to their representation in the Sejm (lower house of Parliament). Concerns were voiced by international observers that political appointments may compromise the independence and neutrality of election administration (ODIHR 2020a: 6).

At the same time, PiS popularity at home remained relatively stable as it presided over a growing economy and initiated social welfare programmes. In the October 2019 parliamentary elections, PiS retained its majority in the Sejm, although it narrowly lost control of the upper chamber (Senat). The incumbent President Andrzej Duda of PiS, who defeated PO's Bronisław Komorowski in May 2015, was well-positioned to face his challengers in the 2020 presidential election.

Presidential election scheduled for 10 May

The date of the presidential election in Poland is ordered by the Marshal (speaker) of the Sejm. The Constitution requires that the election be held no sooner than 100 days and no later than 75 days before the expiry of the term of office of the serving president. In line with this provision, on 5 February 2020 the Speaker of the Sejm called for a presidential election on 10 May 2020. This set in motion preparations by the election administration. The NEC appointed District Election Commissions and proceeded with other tasks including the registration of candidates. Elections are managed by a three-tier administration: the NEC and its executive body, the National Election Office (NEO) at the central level, District Election Commissions (DECs) at the regional level, and Precinct Election Commissions (PECs) at each polling station.

Candidates for presidential office are nominated by electoral committees, which are created with the support of at least 1,000 voters. Electoral committees apply to register with the NEC no later than 55 days before the election date (in this case, by 16 March) and submit supporting documents for registering their candidates no later than 45 days before the election date (by midnight of 26 March). These registration documents must include supporting signatures from at least 100,000 voters. In practice, this requirement can only be fulfilled by a well-organized and sizable team of signature collectors. Of 34 electoral committees registered with the NEC, only 10 were successful in registering their candidates for the 10 May election. Among them was PO's candidate Małgorzata Kidawa-Błońska—the only woman in the race.

Postponement: *cui bono?*

The first cases of the COVID-19 virus were confirmed in Poland in early March (see TVN24 n.d., which has rolling updates of new cases and deaths in Poland). By mid-March, the threat of an epidemic was clear and the government began introducing restrictions and lockdown measures, which continued to be extended throughout April. With the prohibition of non-essential movement, use of public spaces, and all meetings and gatherings, by the end

of March it was evident that the election could not proceed as planned and calls for postponing the election could be heard from various quarters, especially from opposition political parties (see, e.g. Wiadomosci 2020; Lewica2019.pl 2020). However, the Constitution provides only one clear avenue through which an election can be postponed: a state of emergency.

Three kinds of extraordinary regimes exist in the Constitution: martial law, a state of emergency, and a state of natural disaster. There are differences in their legal consequences and who may declare them but they do have one result in common: for the duration of any extraordinary regime, and for 90 days following its termination, national and local elections shall not be held, and the term of office of elected bodies shall be appropriately extended. The government was thus constitutionally authorized to declare a state of natural disaster for up to 30 days, but doing so would push the election date into the autumn.

The Minister of Justice, one of the leaders of the ruling coalition, said in a TV interview on 5 April 2020 that '[a]n election in the autumn, according to many experts, leading experts on epidemic issues [...] would be an election at the worst possible moment for the health and life of Poles' (*Gazeta Prawna* 2020). It is true that some public health experts expressed concerns about a second wave of the pandemic in the autumn, although it was far from evident that it would be any worse than the current one. It was already evident, however, that the lockdown restrictions would take a heavy toll on the economy, and the government would inevitably face popular discontent. Political analysts widely assumed that an autumn election would not favour PiS, which is why it chose to press ahead with the election on 10 May. Polls in March indicated that Duda could win the May election already in the first round, with the PO's candidate far behind (WNP 2020). As to the hindrance of the COVID-19 pandemic, PiS' answer was postal voting.

Postal voting planned...

Postal voting was initially introduced in the Election Code in 2014 as an alternative voting arrangement in national elections, available to any voter upon request. It was previously primarily used by voters abroad. In the 2015 parliamentary elections, some 9,900 postal ballots were mailed to voters in Poland and around 35,700 ballots were mailed to voters abroad, which was a rather modest scale for an electorate numbering nearly 30.7 million.

In 2018, the Election Code's provisions on postal voting were amended, limiting postal voting only to people with disabilities. Commenting on this change, its authors—PiS politicians—complained that postal voting was not sufficiently secure, did not safeguard secrecy and was vulnerable to fraud, although without citing any specific evidence (see e.g. Monitor Konstytucyjny 2020). So when in early April 2020 PiS unveiled legislative proposals to hold a presidential election solely by postal voting, the irony was not lost on its critics.

The legislation proposed by the government provided for postal voting as the only voting method. Unlike the current postal voting procedure envisioned by the Election Code, no prior application to vote by post would be necessary. Postal voting packets were to be sent to all registered voters, who would return their ballots to designated collection boxes on election day (only). The postal service would be collecting returned ballots throughout the day and delivering them to the PECs. Fewer PECs would now be formed—one per municipality or city district. These and other details of the proposed postal voting procedure were spelled out in a draft act that was adopted by the Sejm on 6 April 2020 (hereinafter 'postal voting bill') and submitted to the Senat (an English translation of the bill is available in the Annex of the OSCE ODIHR Opinion, ODIHR 2020c: 11). In addition to this separate bill, several election-related amendments were inserted into draft 'anti-crisis' legislation on supporting the economy during the COVID-19 epidemic.

The PiS government did not show much appetite for a wider debate or consensus-building on its postal voting initiative. Rather, it used its majority in the Sejm to push the bills

through as quickly as possible. The draft postal voting bill, introduced by the government on 6 April, went through all three readings in the Sejm on the same day. Opposition parties accused PiS of disregarding public health and pursuing its narrow political interests. While the Senat could not delay anti-crisis legislation, its Speaker made it clear that they would use all legally permitted time (30 days) to discuss the postal voting bill. This meant that this bill could realistically become law only days before 10 May.

Responding to numerous requests for comment, on 9 April the NEC issued a carefully worded statement explaining its position regarding the government's legislative proposals (NEC 2020). The NEC recalled that on 31 March it had requested the Chief Sanitary Inspector to provide guidance on the necessary health protective measures to be observed in electoral procedures. It underscored that the NEC itself was not part of the law-making process; as the body in charge of overseeing compliance with electoral law it would act in accordance with the legislation in force. The NEC also emphasized that electoral law should be based on clear and unambiguous rules derived directly from the Constitution, that it should be stable, and that its amendment process should not raise any legal doubts. In closing, the NEC reiterated its earlier call for all stakeholders to cooperate in organizing the election with due regard to the health of citizens and the effective exercise of constitutional electoral rights.

Knowing or anticipating that the NEC would not be able to carry out its postal voting plan until the requisite law was in force, PiS sought to bypass the NEC in preparations for the 10 May election. An amendment adopted with anti-crisis legislation removed the powers to approve ballot design and oversee the printing of ballots from the NEC. Another provision authorized voter registration data to be handed over to the postal service (Sejm/ISAP 2020). The draft postal voting bill gave the authority to print ballots and conduct other preparations to the Minister of State Assets. The Minister did not wait for these powers to be legally conferred and proceeded with the printing of ballots and preparing voting packets.

The government also had an answer to the ticking clock and the Senat taking its time with the postal voting bill. The bill included a provision allowing the Sejm Speaker to set a later date for the election within the constitutionally permitted period, which could push the election date until 23 May 2020. This rescheduling option was seen by many experts as constitutionally questionable. However, the Constitutional Tribunal had already been effectively disabled by disputes over the appointment of judges, so it was hardly expected to provide a check on PiS' moves.

...And reconsidered

As COVID-19 cases continued to rise and the lockdown continued in April, the government's plans for the May election came under mounting criticism at home and abroad. Several candidates, including PO's Kidawa-Błońska, threatened to boycott an all-postal election and objected to the incumbent President benefitting from favourable public TV coverage, while they struggled to campaign amid the COVID-19 restrictions (see, e.g., BBC 2020). The Polish Ombudsman criticized the postal voting bill and questioned the legality of ongoing preparations for the election. Rapporteurs of the Council of Europe's Parliamentary Assembly, mandated to monitor the functioning of democratic institutions in Poland, expressed their concern that 'organizing these elections under the current circumstances will undermine the legitimacy of the electoral process, and as a result undermine the legitimacy of the new President-elect, irrespective of their outcome' (Council of Europe 2020).

The Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), based in Warsaw, emphasized the importance of 'genuine campaign and real public debate' to democratic elections and warned that 'if the presidential election goes ahead under the current circumstances, it may fall short of a number of international

standards' (ODIHR 2020b). A legislative review of the draft postal voting bill by ODIHR concluded that its implementation within the timeframe envisaged 'may place an unreasonable burden on the implementing bodies and jeopardize important principles of democratic elections' (ODIHR 2020d).

Problems also became evident in the election administration, which relies on cooperation with regional and local authorities. Mayors of the municipalities controlled by opposition parties questioned the authority of the postal service to receive voter lists and refused to hand them over. District Election Commissions, which are composed of current or retired judges, saw dozens of withdrawals. In his testimony to a Senat committee, the NEC Chair pleaded for clear rules and admitted that the number of applications received was insufficient to appoint fully complemented PECs required for voting to be held in polling stations (Polskie Radio 24 2020). On 30 April the NEC Chair indicated that holding any election on 10 May was unrealistic (NEC n.d.a).

As the deadline for the Senat to return the draft postal voting bill to the Sejm drew nearer, attention increasingly turned to a man who would become decisive to the fate of the 10 May election. Jarosław Gowin was formerly a prominent PO politician and a government Minister, who had fallen out with PO's leadership in 2013 and left the party. Now elected on a PiS ticket, he led his own grouping in the parliament called *Porozumienie* ('agreement' or 'understanding'), which had enough MPs to deprive PiS of its majority. From early April Gowin made it known that he did not believe the election should be held in May amid the COVID-19 epidemic. His proposed solution was amending the Constitution to allow Duda to serve two more years, without possibility of re-election. This idea was roundly rejected by the opposition but Gowin remained in dialogue with PO. He understood that PO would be more cooperative if it had a chance to replace its presidential candidate, who was polling poorly.

On 7 May 2020 Gowin announced an agreement with Jarosław Kaczyński, the PiS Chairman. *Porozumienie* would support the postal voting bill but the election would not take place on 10 May. A later date would be set by the Sejm Speaker, and a new draft law on the presidential election would be developed by *Porozumienie*. Through this agreement the postal voting bill which provided for holding a presidential election on 10 May was adopted by the Sejm, signed by the President and published in the official gazette, and it entered into force on 9 May 2020—but it was never implemented.

Legal conundrums and practical solutions

The agreement announced by Gowin and Kaczyński on 7 May included an understanding that the Sejm Speaker would set a new election date after the 10 May election was declared invalid by the Supreme Court. This scenario assumed that the Supreme Court (which has the responsibility of resolving all election petitions after the poll and certifying an election's validity) would recognize an election which de facto did not take place, as being an invalid election. The President of the Supreme Court's chamber charged with resolving electoral disputes quickly expressed her surprise at the notion of any particular outcome from the Supreme Court's decision-making being assumed in advance (TVN24 2020a). Any speculations about the Court's eventual decision are just 'part of a public discourse', she affirmed, and would not influence the Court. The legal solution announced by Gowin and Kaczyński thus appeared somewhat uncertain.

A more certain legal basis to reschedule the election was supplied by the NEC on 10 May, when it adopted a decision stating that there was 'a lack of possibility to vote for any candidates' in the presidential election scheduled for 10 May 2020. The NEC explicitly equated this situation with article 293 of the Election Code, which applies if 'voting would be conducted only for one candidate' or no candidates had been registered to contest a presidential election. According to the Election Code, within 14 days after the NEC's

publishing its decision in the official gazette—stating the circumstances of article 293—the Speaker of the Sejm shall schedule a new election date. This legal solution relieved the Supreme Court of the burden of paving the way for implementing an agreement that was political in character. It was elegant, although perhaps not unassailable, since the NEC relied on a legal provision designed to prevent uncompetitive elections. Be that as it may, the Supreme Court chose not to create a legal conundrum and dismissed appeals against the NEC's decision of 10 May as inadmissible (see Supreme Court 2020).

On 12 May 2020 a new draft act on conducting the 2020 presidential election was adopted by the Sejm and submitted to the Senat the following day. The Sejm's Speaker made no secret that she expected the Senat's cooperation in adopting this bill faster than the ill-fated postal voting bill. But might the Senat choose to 'run down the clock', i.e. sit on the draft act until the 14-day deadline for setting the new election date had expired? To mitigate this risk the government took the step of delaying publication of the NEC's decision of 10 May in the official gazette until the Senat returned the draft act to the Sejm (which it did on 1 June). On 2 June, the Sejm voted on the Senat's amendments and President Duda signed the adopted act. It was published in the official gazette the same day. On 3 June speaker of the Sejm announced the new election date for 28 June.

Legal provisions for the presidential election of 28 June

The Act of 2 June 'On Special Rules for the Organization of the General Election of the President of the Republic of Poland Ordered in 2020 with the Possibility of Postal Voting' (Sejm/ISAP 2020a), hereinafter referred to as the 'Special Election Act', introduced a number of changes for the conduct of the 2020 presidential election compared to the Election Code. These changes reflected the circumstances of the COVID-19 epidemic situation and provided for continuity of the electoral process after the failed election of 10 May.

The Election Code provides deadlines for carrying out electoral activities and mandates the Speaker of the Sejm to publish key electoral deadlines together with the announcement of the election date. The Special Election Act gave the Sejm speaker the power to issue electoral deadlines different from those contained in the Election Code (upon receiving the opinion of the NEC). The election calendar was thus compressed to fit all necessary activities within the time period remaining until 28 June.

The Special Election Act provided an option to vote by post to any voter in Poland. Postal voting would also be organized abroad, except for countries where it was unfeasible for organizational, technical or legal reasons. If the COVID-19 epidemic did not allow for voting in-person in a given country, only postal voting would be held in that country. The deadline for PECs to report voting results from precincts abroad was extended from 24 hours to 48 hours.

Voters in Poland had to apply for a postal ballot through their municipal office; those abroad had to apply to the respective consul. In the case of a sudden and significant worsening of the epidemic in specific municipalities or areas in Poland, upon a recommendation from the Minister of Health, the NEC could decide that the election in these municipalities would be held exclusively by means of postal voting. This decision could be made no later than seven days before the election.

Importantly, the Special Election Act preserved the leading role of the NEC in conducting the election, similarly to the Election Code. Unlike the postal voting bill, the Act of 2 June did not give any role to the Minister of State Assets in the process and all other bodies involved in organizing the election would have a supplementary or supporting role. While the Election Code provides that only judges may be nominated to DEC, the Special Election Act replaced this requirement with the less demanding 'people with higher legal

education'. The minimum membership of a PEC was reduced to three members, compared to the minimum of five envisaged in the Election Code. Both DEC's and PECs were appointed anew for the 28 June election.

Under the Special Election Act, 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 could also be created and nominate new candidates. The same requirements of the Election Code applied to the registration of new electoral committees and candidates, subject to the now compressed election deadlines. Thus, the period between the notifying the NEC of a new electoral committee and the deadline for the submission of candidate nomination with supporting signatures was reduced from 10 to five days.

The compressed election calendar also reduced the campaigning period. A candidate was entitled to start campaigning from the day the NEC received the documents to register her or his electoral committee, which had to be done by 5 June. Among the Senat's amendments to the draft Special Election Act submitted to the Sejm was a proposal to increase the amount of free programming for candidates in the public media, in light of the reduced campaigning opportunities during the epidemic. This amendment was rejected by the Sejm. However, by the end of May restrictions on public gatherings were eased, allowing candidates to hold rallies.

The Special Election Act authorized electoral committees to use campaign funds accumulated for the 10 May election for the 28 June election. It also clarified that the limits on donations to electoral committees by individuals and by candidates set by the Election Code would apply cumulatively to the 10 May election and the newly scheduled election. For the electoral committees registered for the 10 May election who stayed in the race, the campaign spending limit established by the Election Code was increased by 50 per cent. For new electoral committees created since, the campaign spending limit was capped at 50 per cent of the spending limit set by the Election Code.

The deadline for lodging election petitions to the Supreme Court against the presidential election was reduced by the Special Election Act to three days, as compared to 14 days envisioned in the Election Code. The deadline for the Supreme Court's ruling on the validity of the presidential election was also reduced: to 21 days as compared to 30 days in the Election Code.

Health protection measures

The Special Election Act mandated the Minister of Health to determine personal protective equipment for members of PECs as well as detailed sanitary rules applicable to polling stations. These guidelines were issued on 15 June and provided for the following measures:

- disposable gloves for PEC members;
- hand sanitizer for PEC members and for voters at the entrance to each polling station;
- face masks and visors for PEC members;
- social distancing for PEC members and for voters;
- regular airing of polling station premises;
- not covering tables with cloth or other absorbent material; and
- regular disinfection of surfaces touched by voters and other people inside polling stations.

For polling stations abroad, these measures would not apply if they were not required by the epidemic situation in the host country.

On the eve of the election the NEC reminded voters that the existing requirement to cover their mouth and nose in public places also extended to polling stations, and encouraged them to observe social distancing and other health precautions.

The conduct of the 28 June election

Following the agreement on a new election date, PO's candidate Kidawa-Błońska withdrew and the party put forward a new candidate for the 28 June election—Rafał Trzaskowski, the Mayor of Warsaw. Trzaskowski's campaign was reported to have succeeded in collecting over a million voter support signatures in the shortened period—well over the required 100,000. Another nominated candidate, Waldemar Witkowski, who did not succeed in registering for the 10 May election due to insufficient support signatures, submitted additional signatures for the 28 June election. He was initially rejected by the NEC but the Supreme Court upheld his appeal and ordered his registration, bringing the total number of candidates on the ballot to 11.

Preparations for the 28 June election had to proceed quickly, given the tight election schedule. As the NEC chair explained: 'We have 25 days for activities that we would normally perform in three months' (*Gazeta Prawna* 2020b). Still, the NEC and the NEO, its executive arm, were able to complete their tasks and no serious problems were reported. Formation of PECs proved to be challenging due to the low numbers of applications, and some PECs had only the statutorily allowed minimum of three members. Training of PEC members was carried out both in personal meetings and via distance learning technologies.

According to the NEC, some 185,000 postal ballots were mailed to voters in the country (of which around 177,500 were returned) and some 343,000 ballots were mailed to voters abroad (of which about 285,000 were returned) (NEC n.d.b). A record number of voters abroad registered to vote—some 373,000—and the total number of eligible voters for this election exceeded 30.2 million. At the recommendation of the health ministry, the NEC ordered postal-only voting in two municipalities, affecting some 10,500 voters (TVN24 2020b). Due to COVID-19 concerns, voting abroad was not organized in several countries including Afghanistan, Chile, Peru and Venezuela.

Turnout on 28 June was the highest in the first round of presidential elections since 1995, over 64.4 per cent. According to exit polls, the highest turnout was estimated to be among voters aged 50 to 59 (72.8 per cent) and it was somewhat lower among voters aged 60 or more (55.9 per cent), indicating nevertheless that these older voters had not been put off by the epidemic (TVN24 2020c). Long queues of voters were reported on election day in some polling stations, especially in large cities, prompting the NEC to emphasize that PECs should adhere to the social distancing guidelines provided by the health authorities and not impose their own rules, e.g. by allowing only one voter at a time into the polling station (TVN24 2020d). Voting hours were the same as provided by the Election Code (07:00 to 21:00) and all voters in the queue by 21:00 were allowed to vote.

The NEC provided preliminary results from 99.8 per cent of polling stations by 10:00 on 29 June, confirming exit poll expectations that Duda and Trzaskowski will compete in the second round to be held on 12 July.

Conclusion

The 2020 presidential election in Poland offers both negative and positive lessons for other countries holding elections during the COVID-19 pandemic. Once the regular course of the electoral process was disrupted, it became more susceptible to political interference (from

which it is normally shielded by rule of law safeguards, including the principle of stability of electoral legislation). The ruling party's postal voting legislation had been opportunistic and poorly conceived, putting in jeopardy the quality and credibility of the electoral process and creating a real risk that the election and its results could be rejected by a part of the electorate and some of the key political actors.

Positively, an electoral misadventure was averted. The revised electoral rules adopted on 2 June were acceptable to the main stakeholders and largely reflected the necessities of the epidemic, even though the compressed time frame was an unwarranted stress-test for the election administration. Basic health precautions were undertaken, and at the time of writing it does not appear that holding the election caused a new spike in COVID-19 infections. The election was carried out using familiar voting methods, albeit postal voting was offered more widely in this election than before through special legislation. It remains to be seen whether postal voting will again become an alternative option for every voter in the Election Code. Still, more voters opted to vote by post abroad than in Poland. Voters were comfortable with in-person voting in polling stations, as evidenced by the nearly all-time high turnout on 28 June.

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