

ALTERNATIVE METHODS OF VOTING - PERSPECTIVES OF INTRODUCTION IN POLAND

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Abstract

The term "voting method" is ambiguous. It can be understood as a way of ticking a ballot paper, as well as a way of transferring/delivering it or even deliberate non-participation in the act of voting (to cast an absent vote). In this paper we use this term in the second of the above indicated meanings. So we use it to determine the legal framework for process of voting i.e. an elector (voter) behavior aiming to obtain a ballot paper and cast a valid vote.

There are many methods of such an understanding of casting a vote. The most common method of voting in Poland, as in the vast majority of modern countries in the world, is that on the day of the poll (in case of general elections or referendums), voter (a person voting) is going to a polling station, in which he/she obtains a ballot paper from the legitimate electoral commission carrying the elections out and ensuring their lawful conduct, which then fills in the polling booths shielded by screens and throws into the ballot box. The aforementioned method of voting can be described as a fundamental (basic) one, provided by all Polish acts on electoral law and referendum statutes¹. At the same time, there are also many other ways of casting votes, which, because of being different from the basic method, are known as alternative methods of voting. The literature indicates: early voting (also known as advance polling or voting), voting in special (separate) circuits, voting on the basis of the right to vote certificate, voting using a mobile ballot box (auxiliary urn), holding more elections at the same time, voting by proxy, correspondence (postal) and electronic voting (e-voting)². Many of them have been used in Poland for many years. These are: voting in the special (separate) circuits created in certain facilities of health care, in prisons and detention centers, using of an auxiliary ballot box or voting on the basis of the right to vote certificate, which, despite being

¹ These are: the Act of 27 September 1990 on Election of the President of the Republic of Poland (consolidated text, the Journal of Laws 2010, No 72, pos. 467); the Act of 16 July 1998 on Elections to municipal councils, county councils and regional councils (consolidated text, the Journal of Laws 2003, No 159, pos. 1547 with amendments); the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (consolidated text, the Journal of Laws 2007, No 190, pos. 1360 with amendments), the Act of 20 June 2002 on direct elections of borough leader, mayor and the president of the city (the Journal of Laws 2002, No 113, pos. 984 with amendments); the Act of 23 January 2004 on Elections to the European Parliament (the Journal of Laws 2004, No 25, pos. 219 with amendments); the Act of 15 September 2000 on Local Referendum (the Journal of Laws 2000, No 88, pos. 985 with amendments) and the Act of 14 March 2003 on Nation-Wide Referendum (the Journal of Laws 2003, No 57, pos. 507 with amendments).

² See J. Filip, *W poszukiwaniu nowych dróg dla głosowania i ich wpływ na aktywność wyborców*, „Studia Wyborcze” 2009, v. VII, p. 11-12.

known for a long time³, was particularly popular during the second round of the recent presidential elections on 4 July 2010 (due to the holiday period).

The aim of this paper is to consider the possibility of introduction voting by proxy, correspondence (postal) and electronic voting in Poland. Discussion around these three alternative voting methods has been very visible in the last ten years in Poland. Many politicians and representatives of science see these institutions / instruments as the cure for low turnout, with which we deal in the each following elections and referendums.

Keywords: voting, legitimate electoral commission, alternative methods of voting.

1. Voting by proxy

Voting by proxy (sometimes also referred to as the voting by representative) means - as we all know - that a person entitled to vote at the election or referendum authorizes any other person authorized / entitled to vote during this election or referendum to vote on his/her behalf.

In the Polish literature there is a dispute whether the mentioned institution is modeled on the power of attorney institution known in civil law, or not⁴. Above all, however, the question is posed whether such a voting method does not affect the constitutional principles of directness and equality of elections. On one hand, person appointing someone else to vote on his/her behalf (granting a proxy) does not vote in person, which, according to several legal scholars in constitutional law, violates the constitutional principle of electoral directness.

On the other hand, the voter who has received authorization to vote (a proxy), has an additional number of votes equal to the number of obtained power of attorney, and thus greater influence on the outcome of the election or referendum, which violates the principle of equality of elections both in its formal, as well as in material aspect⁵.

In the case of proxy voting, there are also many other problems due to which disputes are taking place, such as a circle of people who can give the power of attorney, a circle of people who can take the power of attorney, the maximum number of proxies received, the duration of the mandate, the possibility of its withdrawal, and technical aspects of using this institution / instrument.

Despite these concerns, the possibility of voting by proxy seems to be Poland's most popular and the process of its implementation has even begun.

The method of voting by proxy has been provided first time in Poland in three draft bills of Sejm electoral law (providing the conduct of elections according to the principle of majority, the mixed proportional - majority principle and the principle of

³ More on this topic see K. Skotnicki, *Instytucja zaświadczeń o prawie do głosowania*, „Studia Prawno-Ekonomiczne” 1993, v. XLVII and K. Skotnicki, *Zasada powszechności w prawie wyborczym. Zagadnienia teorii i praktyki*, Łódź 2000, p. 242–252.

⁴ See K. Skotnicki, *Głosowanie przez przedstawiciela*, (in:) *Międzynarodowa Konferencja Naukowa nt.: Alternatywne sposoby głosowania a aktywizacja elektoratu*. Rzeszów, 26-27 marca 2007 roku, ed. S. Grabowska, R. Grabowski, Rzeszów 2007, p. 119 and polemics by A. Rakowska, *Głosowanie przez pełnomocnika (uwagi krytyczne)*, „Studia Wyborcze 2007, v. IV, p. 73-74.

⁵ More generally see the two works mentioned above, as well as K. Skotnicki, *Zasada powszechności w prawie wyborczym...*, p. 262–275; K. Skotnicki, *Prawne problemy ustanowienia w Polsce alternatywnych sposobów głosowania*, „Przegląd Wyborczy” 2009, No 9-10, p. 20-25.

proportionality), prepared in 1992 by the National Electoral Commission⁶. The mentioned proposals provided a very narrow circle of people able to grant a proxy for voting purposes. There were only two groups: Polish citizens living permanently abroad and Polish citizens temporarily living abroad while being permanent residents of Poland. The reason for this was the pursuit of the National Electoral Commission to refrain from creating extremely costly polling station abroad, while ensuring that Polish citizens living abroad temporarily or permanently were able to participate in the elections⁷. The idea of introducing the possibility of voting by proxy has not found recognition in the eyes of the members of parliamentary committee analyzing the draft bills and was not the subject of further detailed work.

Since then, the discussion about the possibility of introducing voting by proxy in Poland, has gone on continuously but with varying intensity. The Act of 12 February 2009 (amending the Act on the Election of the President of Republic of Poland, the Act on a Nation-wide Referendum and the Act on Elections to the European Parliament, hereinafter: the Act)⁸ introduced voting by proxy during the European Parliament elections. According to the amended regulations voters numbered among the people with severe or moderate disabilities and voters who have completed 75 years could grant a proxy to vote on their behalf.

The President had not signed the Act and in the beginning of March 2009 brought an application to the Constitutional Tribunal to examine its compliance with the Constitution. One of the objections which were raised referred to voting by proxy. In support of the plea in this respect, it was indicated, that the Polish Constitution does not explicitly express the standard of review of the constitutionality of this institution, because it does not regulate the mode of elections to the European Parliament. Therefore, the Polish regulations in this respect should be confronted with the European law⁹. Constitutional Tribunal did not share this view and refused to examine the constitutionality of the voting by proxy institution¹⁰. Nevertheless, bringing the claim to the Constitutional Court resulted in that during the European Parliament elections in 2009, voters were not able to vote by proxy.

Back in 2009, on the 19th of November, an act amending the Act on Election of the President of the Republic of Poland, the Act on elections to municipal councils, county councils and regional councils and the Act on direct elections of borough leader, mayor and president of the city was enacted. The discussed amendment introduced the possibility of voting by proxy in the presidential and local government elections¹¹. This regulation repeats the approach adopted in the aforementioned amendment of the Act on Elections to the European Parliament. Therefore, only voters having documented a significant or moderate degree of disability or tantamount (according to a relevant decision issued under

⁶ See *Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej. Projekty*, Wydawnictwo Krajowego Biura Wyborczego, Warszawa 1992.

⁷ It was clearly stressed by K. Czaplicki, director of the National Electoral Office and the Secretary of National Electoral Commission during presentation of the concept of voting by proxy to the members of parliament at the 8th Meetings of the Special Committee for consideration of the bill on Elections to the Sejm of Republic of Poland, held on 8 September 1992. See „Biuletyn Komisji Nadzwyczajnej do rozpatrzenia projektu ustawy Ordynacja wyborcza do Sejmu RP” no 615/I kad., p. 22-23.

⁸ Journal of Laws No 202, pos. 1547.

⁹ <http://www.prezydent.pl/x.node?id=17043125>

¹⁰ OTK-A 2009, no 9, pos. 138.

¹¹ Journal of Laws No 213, pos. 1651.

the provisions of the Act of 27 August 1997 on professional and social rehabilitation and employment of disabled persons) and persons over 75 years of age can benefit from voting by proxy.

The first time, voting by proxy was possible during the presidential election held on June 20 (I round) and 4 July (second round). At the time of this writing there were no official data, which would indicate how many voters granted the power of attorney and how many of these votes were cast. Nevertheless, it did not seem to be a common phenomenon. Inquiry carried out before the election by the Institute of Public Affairs had shown that knowledge about the possibility of voting by proxy was negligible. Only 22% of the respondents were aware of that possibility, including just 16% in the group of respondents of age over 60 years¹². It should, however, be taken into account that the media widely publicized the possibility of voting on the basis of a right to vote certificate, which was addressed to a different and decidedly larger group of voters using the beginning of summer vacation.

The next possibility of voting by proxy will take place in the autumn of this year's local government elections. We do not expect that suddenly a much larger group of voters will decide to vote this way. However, it is expected that awareness of the possibility of voting by proxy will gradually consolidate, which will increase the political activity of the group of society, it was created for.

It is also expected that the adopted institution of voting by proxy will be transferred to other acts dealing with elections, including in particular the Act on Elections to the Sejm of Republic of Poland and to the Senate of Republic of Poland. We believe that this should be done as soon as possible. The idea is also supported by the need to consolidate the electoral law in Poland in relation to work towards the electoral code. Above all, the need to speed up the legislative work in this field is connected with the date of the next parliamentary elections, which is autumn 2011.

It is possible however that, bearing in mind the Polish Presidency of the Council of the European Union, which is set for the second half of 2011, a decision to shorten the term of the Sejm will be made. It would be absolutely correct from a political point of view and as a consequence the elections would be held in the spring of 2011. It should be however noted, that any amendment to the electoral law should be made in advance, before the elections are taking place. Although the doubts may arise whether the implementation of voting by proxy institution to the parliamentary elections, when it exists on the basis of other electoral regulations should be considered important (as mentioned by the Constitutional Court in its Judgement of 3 November 2006, ref. K 31/06)¹³, we are of the opinion that the general principle of a democratic rule of law as well as voters individual rights require to make relevant changes to the parliamentary electoral law, taking into account the relevant period of grace. Referring to the perspective of voting by proxy in Poland, the extension of the group of voters entitled to voting by proxy should also be considered. In particular, in relation to Polish citizens residing abroad. It is understandable, after all, that most of them do not have opportunity to reach poll station created abroad.

¹² <http://civicpedia.ngo.pl/ngo/562132.html>

¹³ OTK ZU no 10/A/2006, pos. 147.

2. Correspondence (postal) voting

Another method of alternative voting, which is at the moment gaining popularity in the world, is correspondence voting, recently introduced in Lithuania, Estonia and Slovakia¹⁴. Correspondence voting is that way of voting where a person entitled to vote at the request, receives the ballot papers a specified time before polling day and after completing it, within the prescribed deadline, supplies it to the relevant electoral commission.

The advantage of this method is that it does not affect the principle of election directness, understood as a personal voting and it is consistent with inalienability of vote. It is significant also that it does not cause a significant increase in the cost of elections. For many it is therefore considered to be the most promising alternative method of voting¹⁵.

Nevertheless, the method can at the same time give reasons for serious reservations. Especially as it abuses the constitutional principle of equality, secrecy and freedom of elections in the way that these principles can be violated during the many stages of the election or referendum. Firstly, there is no certainty whether the officer will send the package with the ballot papers and the postman deliver it, which is an important factor in cases when for the validity of voting it is necessary to reach the required turnout (which takes place in Poland during the nation-wide referendum (with the exception of a constitutional referendum) and a local referendum). Secondly, the difficult to prove pressure can be exerted on the voters, especially in poll stations established in places such as prisons, psychiatric institutions, hospitals, nursing and health homes and even in voters homes (so-called phenomenon of the family voting). Thirdly, the greatest danger of the correspondence voting is phenomenon of buying and selling ballot papers, which is often much cheaper than conducting a broad campaign, and above all much more efficient¹⁶. With a faint public interest in elections or in referendum, this threat is particularly realistic. Finally, it seems that it is easier by this method of voting to "throw" these votes in the ballot box.

It is a real danger particularly during the local government elections or referendums, especially in small municipalities¹⁷. For example, the rivalry between the villages forming part of the municipality (or in a small town with conflicts between different groups of people) it can be easily imagined the behavior of the officer or the postman concerned individual's vote. When the turnout is critical for the outcome of the election or referendum (eg. in case of a referendum on the dismissal of the municipality authorities) such cards do not even need to be filled in or sent to the Electoral Commission.

¹⁴ This voting method is also known as "vote by mail" or "postal voting", which does not seem accurate, as in countries such as Britain, where the supply of completed ballots to the electoral commission is not entrusted to the post office but to the private individuals, or even party activists. Por. K. Skotnicki, *Rejestr wyborców i głosowanie korespondencyjne w Wielkiej Brytanii*, (in:) *Prawo wyborcze. Analizy. Interpretacje. Rekomendacje*, ed. J. Zbieranek, Warszawa 2009.

¹⁵ See J. Filip, *W poszukiwaniu ...*, op. cit., p. 21-22.

¹⁶ In Germany in 2002, it was possible to buy a package of 10 thousands of votes for 59.000 EUR. See R. Balicki, A. Preisner, *E-voting – szanse, możliwości, zagrożenia*, (in:) *Międzynarodowa Konferencja Naukowa ...*, op. cit., p. 53.

¹⁷ More on the topic see K. Skotnicki, *Możliwość wykorzystania alternatywnych sposobów głosowania podczas wyborów samorządowych*, (in:) *Wybory i referenda lokalne – aspekty prawne i politologiczne*, Kraków 2010, p. 119-120.

Despite these concerns, we think that in the event of a postal voting, the risk of distorting the real intention of the voter is much smaller than in the case of voting by proxy¹⁸. The avoidance of any interferences can be achieved in two different ways. One way is to restrict the circle of people who can vote this way. Nevertheless, you may wonder whether the demand of the Venice Commission, which in the code of good practice in electoral matters recommends that postal voting should be used to enable especially hospital patients and persons in custody to vote is legitimated, as these are the groups of people relatively easy affected by the exerted pressure¹⁹. In our opinion, postal voting should be available primarily to people with disabilities, the elderly and those living abroad. On the other hand, extensive requirements should be established to ensure privacy and freedom of voting, involving the sending ballot papers in two envelopes (the first one containing the ballot papers is unmarked and put into the other one - addressed to the appropriate election commission together with a signed declaration of an independent and secret voting). We are aware that proposed solutions will not fully secure that method of voting against any irregularities. However, if established, they can prove a postal voting to be an excellent example of "the victory of utility over the security"²⁰.

Postal voting in Poland was introduced in the bill of 18 December 2003 on Elections to the European Parliament which was enacted by the Polish Sejm and sent to the Senate for further legislation proceedings. In accordance with art. 2 para 3 of the mentioned regulation, it is possible to vote in person at the polling station or by correspondence. Further provisions regulating the manner of absent voting were however very brief and did not determine such important issues as the date on which a ballot papers should be delivered to the electoral commission to be taken into account in determining the outcome of the voting. Therefore, the National Electoral Commission fully reasonably reported many objections to the aforementioned regulation and submitted 45 proposals of amendments and additions, including new clauses. The Senate during its legislation scrutiny of the bill shared the Commission's objections and considered that the proposed provisions are not worked out. As a consequence, all clauses related to the postal voting were removed. Therefore, since the Senates amendments had not been rejected by the Sejm, the postal voting has not been established.

In assessing the opportunity to enact the possibility of postal voting in Poland, one must also take into account the problem of the entity, that may be entrusted with delivery of ballot papers to voters and back, after its completion, to the relevant electoral commission. There is no doubt that this task can not be entrusted to an individual. In light of the Act of 12 June 2003 on Postal Law²¹ however, the only entity entitled to provide such services in Poland, would be the state public entity "Polish Post", that the quality of service has for a long time now raised many objections. Bearing in mind the above, it is the natural fear that many votes could be delivered to the appropriate electoral commission with a long delay, which casts doubt on the sense of introducing the possibility of postal voting.

¹⁸ See P. Uziębło, *Zmiany oraz projekty zmian ordynacji wyborczych w latach 1997-2008*, (in:), *Zmiana ordynacji wyborczej a zmiana konstytucji*, Międzynarodowa Konferencja Naukowa, Rzeszów 3-4 marca 2008 r., Rzeszów 2008, p. 48.

¹⁹ See G. Kryszewski, *Standardy prawne wolnych wyborów parlamentarnych*, Białystok 2007, p. 227.

²⁰ See R. Balicki, A. Preisner, *E-voting – szanse, możliwości, zagrożenia*, (in:), *Międzynarodowa Konferencja Naukowa ...*, op. cit., p. 53.

²¹ The Journal of Laws No 130, pos. 1188 with amendments.

In conclusion, considering the possibility of introducing a postal voting in Poland, we recognize the advantages of the institution, but we treat it with great caution.

3. E-voting

It is rather generally agreed that a future-oriented method of voting is electronic voting, known as e-voting. Interest in that way of voting emerged in the mid-nineties, and although still growing, in practice has not yet reflected in significant results²². By this method of voting it is understood to vote by using special voting equipment - mostly touch screens (referred to as "electronic voting machines") at polling stations (so-called direct electronic recording) and voting outside the polling station using personal computers and the Internet, mobile phones or cable television (so-called remote e-voting).

The electronic voting machines is particularly popular in South America (mainly Brazil) and the U.S. where they are set up even outside the polling stations (in supermarkets). At the same time, their installation is not a problem, it is rather more a matter of IT preparation of a state and the associated costs. From this perspective, it seems that in Poland it is possible to introduce e-voting²³. Another problem connected with e-voting is rather serious one. It is skepticism to all the technical innovations, presented especially by older people who approach them all with caution or even downright suspicion, but above all do not know how to use them. E-voting can also be expected to increase distrust of the announced results of elections and referendums. That they are not unrealistic fears prove well-known cases of manipulation of election results by the producers of voting machines, as well as developers and programmers²⁴. Therefore, it is not surprising that even today a wit circulates that "a citizen voted for an X party, a voting machine swapped it for a Y party, a system operator changed it to Z, but the change has not been applied because someone in the central <<by mistake>> switched the system off, and after turning it back on it came out that the vote had already been casted for Q party. Giving the official elections results, the committee announced that the R party won (the R party did not participate in these elections, but has accepted electoral success with great satisfaction)²⁵."

Since the use of voting machines makes sense only if it is the only way to vote, one can worry about a significant proportion of people treating this method of voting in a sceptical way, that can stay at home instead of going to vote, reducing the already low voter turnout. This method of voting does not solve the problem of voting by the disabled, sick or elderly who do not leave the house and cannot go to the polling station. Therefore, we believe that the prospect of introduction of e-voting in Poland, in the near future, does not seem real.

It is more likely, however, to introduce – also not too soon - one method of voting outside the polling station, especially the Internet voting. This requires a voter to possess a computer (or at least access to it) connected to the Internet, running an appropriate program, and often equipped with a special reader. An open question of course arises, whether the acquisition of a relevant program and the reader should be made only by the person who wants to cast his/her vote using Internet or maybe this should be funded, or at

²² See J. Filip, *W poszukiwaniu ...*, op. cit., p. 19.

²³ Computing is already successfully used in Poland for example as regards Land Registry and in connection with the election as regards the electoral registration data or data transmission.

²⁴ See R. Balicki, A. Preisner, *E-voting ...*, (in:) *Międzynarodowa Konferencja Naukowa ...*, op. cit., p. 57.

²⁵ *Ibidem*, p. 73.

least co-financed by the state, which is responsible for carrying out a general elections or a referendums.

Bearing in mind the above, Internet voting may not be the only (basic) method of voting, but only an alternative one. In Poland, many people do not have a computer or access to it and therefore do not know how to use it and in particular (as a consequence), cannot use the Internet. Therefore the doubts, whether this method does not affect the principle of equality of elections and does not lead to participation (in the voting) only wealthier and more educated people, should be considered as legitimated²⁶. Fully valid remain also all the concerns regarding older people approach to technical innovations and falsification of a election result together with the danger of infringement of freedom of expression of the voter will and the voting secrecy.

The "Recommendations of the Committee of Ministers for member states on legal, operational and technical standards for electronic voting" adopted by the Council of Europe Committee of Ministers on 30 September 2004 may be seen as a support for Internet voting introduction. The mentioned document was elaborated on the basis of standards for electronic voting prepared by the European Commission for Democracy through Law (better known as Venice Commission)²⁷.

In conclusion of the undertaken analysis, it should be noted that from three alternative ways of voting, whose introduction has been lately discussed in Poland, the implementation has taken place only in case of proxy voting. We already have the first modest experience in this field during this year's presidential elections and it should also be expected that this year they will be deepened during the local government elections. It is necessary to urgently consider the possibility of using this method during the elections to the Sejm and the Senate. Two other alternative methods of voting, postal and electronic voting (regardless of whether it would take place inside or outside the polling station), do not seem to find the application in the near future. And that is a pity. We believe that they should be introduced as soon as possible for Polish citizens abroad, because now only a small group of people entitled to vote is legitimated to use this method. Postponing the time of introduction the possibility of postal voting will make it pointless as replaced by the electronic voting.

We have no doubt that the use of alternative methods of voting would be increasing and that it is almost unavoidable. On one hand, for many voters (sick, elderly, living abroad) it is the only chance to benefit from its individual political rights. On the other hand, it is a consequence of technological progress, leading in the future to understate the role of representative bodies for various forms of direct democracy. We do not believe, however, that introducing the alternative methods of voting will contribute significantly to increasing turnouts at elections or referendums, because in the entire modern world the reluctance of societies to politics and above all, to the politicians, is evident.

²⁶ See K. Wojtyczek, *Konstytucyjna regulacja systemu wyborczego w III Rzeczypospolitej*, (in:) *Demokratyczne prawo wyborcze Rzeczypospolitej Polskiej (1990-2000)*, ed. F. Rymarz, Warszawa 2000, p. 121-123; K. Czaplicki, *Głosowanie elektroniczne (e-voting) – wybrane zagadnienia*, (in:) *Demokratyczne standardy prawa wyborczego Rzeczypospolitej Polskiej. Teoria i praktyka*, ed. F. Rymarz, Warszawa 2005, p. 45; G. Kryszewski, *Standardy ...*, op. cit., p. 231.

²⁷ They are published as an annex to the article of K.W. Czaplicki, *Głosowanie elektroniczne ...*, op. cit., p. 49-66, and discussed in G. Kryszewski, *Standardy ...*, op. cit., p. 231.