DE GRUYTER
OPEN

LAW AND ADMINISTRATION
IN POST–SOVIET EUROPE

The Journal of Kolegium Jagiellonskie Torunska Szkola Wyzsza
Vol. I/2017: 50–62

DOI: 10.1515/lape-2017-0005

Zbigniew Szonert
Kolegium Jagiellońskie Toruńska Szkoła Wyższa

On the election system from the perspective of the experience of the National Electoral Commission member

Key words: Supreme Administrative Court, National Electoral Commission, Polish election law

Personal memories from 1995 to 2003

I had been working in the National Electoral Commission as its member between 1995 and 2003, hence the experience from that period allows forming conclusions *de lege ferenda* concerning constitutional system foundations of this very substantial organ, which the National Electoral Commission undoubtedly is, in democratic state of law. The conclusions which were formed in the mentioned period by the managerial bodies of the National Electoral Commission, and have not only remained up-to-date, but are also the evidence of perspicacity and wisdom of the individuals who were forming them while working on the project of the new Polish Constitution.

At that time I was holding simultaneously the post of a judge of the Supreme Administrative Court and a membership of the National Electoral Commission. The function of the head of the National Electoral Commission was held subsequently by Judge Wojciech Łączkowski and Judge Ferdynand Rymarz. Both Gentlemen were the judges of the Constitutional Tribunal, highly competent lawyers, and individuals of noble personalities. These in particular made the atmosphere of work in the nine-person panel of the National Electoral Commission filled with the sense of responsibility for taking, frequently hard, decisions. It was them who should take merit for the fact that in those days the National Electoral Commission was perceived as the undisputable authority in the society, as well as government and political circles.

Recalling the atmosphere of work and the high level of the matter of state discussions during meetings of the National Electoral Commission its head at that time, Judge Ferdynand Rymarz, wrote," The head of the National Electoral Commission was but a *primus inter pares* (the first amongst the equals) and his vote was formally and actually equal with the other members`. I held strictly to this rule and did not impose my views on the others. In discussions I presented my opinion as the last one"[1].

Such a distance towards so eminent a state post, branded with the sense of personal dignity and responsibility, was a characteristic feature of the heads of the National Electoral Commission, who acting this way were role models of ethics and morality worth being followed. On October 3, 1995, at a meeting of the National Electoral Commission an MP Irena Lipowicz

[1] F. Rymarz, *Gowns in Rosy Colours*, Lublin 2015, p. 145.

said, "The authority of the National Electoral Commission and its position within the state has been rooted enough to make its decisions, even these socially debatable and arguable, become unquestionable, which is rarely appreciated"[2].

President Aleksander Kwaśniewski, judged the effects of the National Electoral Commission`s activity in a similar way. Referring to the elections to the European Parliament he stated that it had been conducted," according to the highest European standards, and the wise presence of its members in media guaranteed precise information, which the society had acquired, granting the Poles certainty that the National Electoral Commission was doing its best and informing thoroughly on what was happening during the election"[3].

Moral nobility and political independence of the then head of the National Electoral Commission and the judge of the Constitutional Tribunal Professor Wojciech Łączkowski were proved most imminently when he protested against the election lie of Aleksander Kwaśniewski (untrue information about his university degree) by refusing to accept from him a significant state medal for outstanding merits. It was then that around 650 thousand of voters forwarded their election protests to the Supreme Court. Yet, eventually the Supreme Court announced the validity of the elections, despite five opposing statements.

As a result, the alteration was introduced to the bill on the election of the President of the Republic, which stated the duty to include a proved by documents university degree of a candidate in an election proclamation[4]. At that time the efficiency and effectiveness of the National Electoral Commission as well as election organs was supported by a meticulous and politically neutral fulfillment of duties by the National Electoral Bureau, election commissioners and directors of delegatures of the National Electoral Bureau, members of circuit and district election commissions, and self-government administration. All of the above mentioned institutions participated in consultations, training sessions and conferences organized to discuss results of their activity and the outcome of elections.

Additionally, the National Electoral Commission held academic conferences on election law. Participants of these conferences were election commissioners, their deputies and directors of delegatures of the National Electoral Bureau, as well as invited guests: the heads of the Constitutional Tribunal, the Supreme Court, Supreme Administrative Court, vice ministers of the President's and Ministers of Justice Chancelleries, the heads of constitutional law departments, and other individuals interested in a subject of a conference. The cases of election forgery or abuse were extremely rare.

Making the self-government administration a political structure had place as late as between 2008 and 2015, which contributed to a great extent to losing trust towards district election commissions, which were the decisive link in the system of election organs, taking decisions on reliability of procedures and results of elections, especially towards the organs of local self-government.

It is also worth mentioning that both judges of the National Electoral Commission and the Secretary of the National Electoral Bureau took part in radio and television programs on the issues concerning elections and referenda. Watching these programs citizens could acquire thorough information, granting citizen knowledge motivating towards active participation in elections and referenda, necessary in a democratic state of law. Neglecting this direct contact between the judges and voters, and replacing it with sponsored TV commercials and billboards resulted in significant weakening of electoral participation of citizens, and more importantly confusion on the way of voting.

W. Łączkowski and F. Rymarz, supported by the experience of the secretary of the National Electoral Bureau, W. Czaplicki, undertook numerous initiatives during the period between 1995 and 2003 in order to strengthen the legal position of the National Electoral Commission in the system of the main organs of authority. To achieve this aim proposals to make the legal and system position of the National Electoral Commission constitutional had been forwarded during the legislation works on the project of the new Constitution.

However, the Constitution was passed, after the referendum on April 2, 1997, without taking into consideration substantial motion of the management of the National Electoral Commission at that time concerning the strengthening of the legal and system position of the election organs. Due to the fact that these motions seem to be still extremely up-to-date, it is worth discussing some significant ones of them from the perspective

[2] The Buletin of XXVI Commission of the National Assembly, Warszawa 1995, p. 78.

[3] The speech made by Aleksander Kwaśniewski on 15th June 2004 while he was handing to Polish MPs certificates on their election to the European Parliament, Przegląd Wyborczy, the Information Bulletin, Special Edition, Published by the National Electoral Bureau, Warszawa 2004, p. 134–135

[4] F. Rymarz, *Gowns in Rosy Colours*, Lublin 2015, p. 130.

of motions *de lege ferenda*. Another factor making the discussion relevant is a commonly noticeable citizen reflection on the need of the modification of chosen State system institutions in the context of real protection of the citizen rights and precise description of citizen duties. This issue was commented upon by the then head of the Constitutional Tribunal, Professor Marek Safian, in the following manner: modern constitution is becoming the act describing the sphere of rights and duties of an individual towards a state (public authority), it is meant to compose universal and indisposable rights of an individual into the legal system, and simultaneously the whole system of values and rules composing the axiology of the legal system[5]. Such a composing, as Judge Ferdynand Rymarz remarks, may be in the form of raising the National Electoral Commission in its judging panel to constitutional rank, as the guarantee of fulfilling fundamental civic rights, i.e. active and passive electoral rights[6].

Making the National Electoral Commission constitutional

The issue of active participation of the National Electoral Commission in legislations works of the Constitutional Commission of the Polish Parliament in 1997 was reflected on in an interesting way by Judge Ferdynand Rymarz, the head of the National Electoral Commission at that time[7]. It was already then that the Author remarked that, "Polish democracy is a fairly feeble phenomenon, not shaped enough, hence endangered with various political disturbances." From today`s perspective one may firmly state that this view was prophetic, since in the following years political practice differed from civic standards and culture behaviours characteristic for the states of deeply rooted democratic tradition.

Forwarding the motion concerning taking into consideration the fundamental rules of election system in the Constitution, the representatives of the National Electoral Commission referred to the recommendation included in the document created in 2000 by IFES in Washington ordered by the UN. The recommendation stated as follows," When it comes to the legal status of election organs, it is a commonly accepted pattern that they are included in a Constitution of a particular state, which creates a mechanism limiting the possibility of introducing alteration in an easy way by means of a bill or a decree issued by authorities. This tendency is becoming regularity in case of new democracies during the process of reforms in election administrations of particular states."[8]The issue of making the National Electoral Commission was worked upon by the Constitutional Commission of the National Assembly in 1994 and 1997. It was at its meeting on December 8, 1994, that the project of the subsection of the Constitution under the title "The National Electoral Commission" forwarded by a group of MPs, was being discussed. The content of the above mentioned subsection was to include the following statements that satisfied the demands forwarded at that time by the management of the National Electoral Commission.

> Article 1
>
> The National Electoral Commission supervises the democratic process of the elections to Sejm (the lower house of the Parliament), Senat (the higher house of the Parliament), presidential election, and the election to local self-government organs.
>
> The National Electoral Commission performs other duties described in bills.
>
> Article 2.
>
> The National Commission may forward a motion to the Constitutional Tribunal, within its competence, to determine commonly binding interpretation of bills.
>
> Article 3.
>
> The National Electoral Commission consists of 9 judges: three from the Constitutional Tribunal, three from the Supreme Court, and three from NSA
>
> The head of the National Electoral Commission as well as his two deputies are chosen from amongst its members by the members themselves.
>
> Article 4.
>
> The procedure of appointing and dismissing the members of the National Electoral Commission, its organization and modus operandi are described in the bill.

The supporters of making the National Electoral Commission constitutional emphasised at that time that it is actually the State organ issuing legal regulations, including the ones commonly binding, which

[5] M. Safian, The Lecture *Constitution and the Civil Law* given on 4th November 2004 at the Catholic University of Lublin.

[6] F. Rymarz, *Making the State Election Commission Constitutional, Democratic Standards of the Election Law of the Polish Republic*, Warszawa 2005, p. 238.

[7] *Ibidem*, p. 237–257.

[8] R. Lopez-Pintor, *Electoral Management Bodies of Governance,* "International Political Science Review" vol. 23, September 2000, p. 20.

requires its proper position within the organs of authority. There ought to be an entry in the Constitution determining the law-making character of resolution of the National Electoral Commission, correlated with the regulations concerning the determining of the hierarchy and the sources of law, since the National Electoral Commission actually issues regulations of commonly binding character, e.g. the ones referring to:

– the way of appointing and dismissing district election commission,
– the format of voting cards and post-election financial reports,
– the rules of making lists of voters and updating them,
– the format of confirming application for the registration of district lists of candidates for posts of MPs and senators,
– the format of the protocol of registration of election lists,
– the format of the protocol of voting and seal of district and circuit election commissions,
– the format of lists of signatures supporting a candidate for the post of senator as well as district lists of candidates for the post of MPs,
– the format of voting cards, the rules of printing and storing them,
– the format of financial reports of election committees and others.

In the above mentioned publication judge Ferdynand Rymarz remarks that the subject of these exemplary resolutions is the fulfillment of the real, practical performance of passive and active electoral rights, including the right to reliable and fair election. Therefore, leaving these issues in the form of "directives" or not binding "explanations" is highly debatable.

It was emphasised in the constitutional debate that the eventually accepted regulation authorizing proper ministers and the National Broadcasting Council (KRRiT) to issue decrees in election matters seemed to breach the statutory independence of the National Electoral Commission, since the judging panel of the Commission determines the fact that the National Electoral Commission is an organ of the state that is subordinate only to an act, due to the fact that while in the office the judges, whether making decisions or supervising particular fields of administration mandated to them, subordinated only to an act and not decrees issued by the ministers.

By the force of an act determining the rules of election and referenda law the National Electoral Commission acquires the role of a legislative organ, controlling the execution of electoral rights, and the means of performing the direct democracy. The role of the President in appointing members of the National Electoral Commission on the request of an appropriate president of supreme courts was also emphasized.

During the discussions of Constitutional Commission also a significant issue was being taken into consideration concerning the name "Election Tribunal" given to the National Electoral Commission as a quasi-court organ, a symbiosis of the three supreme courts. As a consequence of this idea, the role of the National Electoral Commission was to be limited to supervising elections, not conducting them. The competence of such a supreme election organ ought to have comprised as well the evaluation of the validity of elections, and the right for constitute and perform the interpretation of the election law.

Despite the favorable attitude on the part of representatives of government organs, including the President, concerning the issue of making the National Electoral Commission constitutional, the majority declared against it and the proposed changes referring to the range of competence of this organ. This standpoint was explained by the fact that the National Electoral Commission actually played the role of "a technical organ", which was assigned for assisting at the conduct of election and issuing exclusively particular acts of decision, not law, making character.

Concluding the ponderings upon making the National Electoral Commission constitutional, which had place during the numerous meetings of the Constitutional Commission of the National Assembly in 1995, with the participation of the Management of the National Electoral Commission, one ought to remark that as a result of the voting 13 MPs voted for crossing out the regulations concerning the issue, 12 MPs were for it, while 5 MPs withheld. Such a result of voting proves how close, in fact, was the solution of this so significant, from the system perspective, issue.

The situation that had place after the years of the regress in the efficiency of election organs, as well as the decrease of social trust towards the election organs and the results of elections, makes grounds for the judgement that the legislative suggestions forwarded in the process of creating the new constitution were the evidence of prudence and wisdom of the people, who were capable of predicting the consequences of neglecting their initiative.

Desirable legislative alterations of the election system

Concerns the legal situation of the National Electoral Commission

Taking into consideration the level of conflict and fragmentation of the Polish political scene, where the struggle for power and not the concern for the common welfare of the Nation seems to be the supreme aim of most political parties, nowadays there exists no real possibility of amending the Constitution of 1997.

Therefore, it is worth concerning the possibility of statutory solution of existing hardship in the manner that might have a positive influence on reestablishing social approval and trust towards the election organs, the way of their functioning and the future outcome of the elections to Sejm and Senat, European Parliament, local self-government organs, referenda and citizen legislative initiatives.

The existing state of legal regulations to some extent in advance justifies the lack of structural and competence conditions or the proper fulfillment of the roles ascribed for particular election organs.

The personal constitution of the National Electoral Commission consisting of 9 judges of the supreme judicial instances is not capable of the appropriate taking in and fulfilling the assignments assigned to it, when it comes to the organization of elections and referenda, supervision of their conduct and determination of their results, financial supervision over the use o budget means granted to political parties for their activity, establishing commonly binding legal regulations, as well as other tasks determined in an act.

The majority of the above mentioned assignments are of managerial and technical-executive character, for performance of which the National Electoral Bureau has been appointed.

It is not the role of judges, in the 9-person panel, to recognize in substantively particular matters of executive character associated with the procedure of preparing election procedures and techniques, especially highly specialized ones from the sphere of IT, the substantive assessment of financial reports of political parties, or connected with organizational and substantive preparation of local structures of election organs for performing their assigned tasks.

These exemplary assignments are to be performed by the administrative executive apparatus of the National Electoral Commission, i.e. the National Electoral Bureau.

Any possible faults and negligence of the apparatus ought not to be the responsibility of the National Electoral Commission, as it has been in recent times, since the role and basic task o this judicial organ should be focused on the supervision of preparation and conduct o elections and referenda.

The high authority and competence of the judging panel of the National Electoral Commission predestine it for performing functions and tasks proper for a judiciary organ.

These are mainly the assignments associated with:

a) the supervision over activities of the National Electoral Bureau as an independent, organizationally, structurally and personally separate supreme organ or election matters
b) supervision of following the law regulations concerning elections and referenda by all obliged individuals, and undertaking intervention in any case of breaking he law, regardless of who has done it. The drastic example of breaking the law had place during the referendum campaign in 2013on the dismissal of the President of the capital city of Warsaw, when the people holding at that time the highest positions in the State were openly discouraging the inhabitant of Warsaw from taking part in the referendum. It might have been because of that, that the opposition on the side o the National Electoral Commission had not been taken any notice of, although it was the breach of Articles 249 and 250 of the Criminal Code, as well as the fundamental rules of direct democracy. The similar situation had place when the state post has been taken advantage of and public finances have been used or election campaign.
c) the supervision over following the rules of financing political parties and election campaigns, as well as the proper keeping of the Register of the benefits of individuals holding managerial positions in the government administration.[9]
d) adjudicate on the validity of the countrywide elections and referenda, since there is no substantive justification for the Supreme Court to do it in the panel less competent than the judges of the National Electoral Commission, as a rule. This issue had been discussed during the legislative work on the Constitution of 1975.
e) stating legal acts on election and referendum matters

[9] Art. 12 point 8 of the act from 21st August 1997 on limiting the possibility of running businesses by individuals holding public functions. (J.L. No.106, item 679, as amended).

on the basis of an act. Since there is no substantive justification for the acts on the election law to be issued by ministers not having specialized, when it comes to election matters, executive apparatus, and for the acts of the rank of a decree to bind the judges who are exclusively submitted to the constitution and acts.

Shaping the role and assignments of the National Electoral Commission in the above presented manner,invariably in judging panel, guaranteeing political distance to actions of the Government and political parties, is possible only by statutory changes, especially the Electoral Code of 5 January 2011, which had been amended approximately 10 times by 2012[10]. Hence, it is not necessary to amend the Constitution, except its Article 87, which is about the sources of law.

Concerns the legal situation of the National Electoral Bureau

The following issue that requires meticulous concern, in the context of the above proposed statutory regulations, is the legal and system position of the National Electoral Bureau, which so far has been the integral part of the National Electoral Commission for the organizational and administrative matters.

The legal position of the National Electoral Bureau is described in the articles 187–191 of the Electoral Code. It is stated there that the National Electoral Bureau provides the service of the National Electoral Commission, election commissioners, as well as other election organs. Thus, it is an executive and managerial organ towards the National Electoral Commission.

Its tasks include providing organizational and administrative, financial and technical conditions associated with the organization and conduct of election and referenda in the range described in the Electoral Code and other act.

The following issues in particular require the elaboration in the form of project of legal acts, which eventually are passed in binding form by the National Electoral Commission:

- the regulations of circuit and district election commissions,
- the procedure and way of fulfilling assignments associated with establishing results of voting and elections by election commissions
- the procedure and way of accepting the application and registration of the circuit lists of candidates for the position of MPs and senators as well as confirmation of the acceptance of application of these candidates,
- elaboration of the format of voting cards, the procedure of printing them and delivering them to circuit election commissions,
- elaboration of the rules and procedure of applying the electronic system of processing and transferring data on the results of elections and referenda,
- elaboration of formats of protocols of voting and protocols of elections as well as the procedure of accepting them in circuits in the country and abroad,
- the rules of redistributing the time on air between election committees to broadcast their election programs on radio and TV,
- other, not mentioned tasks, described in the Electoral Code and particular act,

The Chief of the National Electoral Bureau is the disposer of financial means of the state budget meant for the activity of election organs and election aims. He also forwards motions on and controls the usage of budget subsidies for the activities of political parties, which are made available by the Minister of Finance on the request of the National Electoral Commission. Within this duty the National Electoral Bureau accepts the financial reports of election committees, checking if the limit for election agitation has not been exceeded. The possible rejection of the financial report of an election commission is decided upon by the National Electoral Commission on the request of the National Electoral Bureau.

The analogical procedure is applied by the National Electoral Bureau to keep and check the Register of benefits for individuals holding managerial positions in the government administration. The activities of the National Electoral Bureau are managed by it chief, in the rank of the secretary of state, appointed for his post by the National Electoral Commission. The Chief of the National Electoral Bureau is an executive organ of the National Electoral Commission.

This short characteristics of assignments and the legal position of the National Electoral Bureau implies that this organ fulfills all the necessary requirements to be separated both structurally and organizationally, in order to make it fully responsible for the fulfillment of responsible assignments that are ascribed to it.

Taking into consideration the character of operational-executive tasks associated with the organization and conduct of elections and referenda, as well as ad-

[10] J.L. No. 78 item. 483 as amended.

ministrative activities connected with the rules of financial settlement and financial activities of political parties and election committees, and other tasks mandated on the basis of separate act, the National Electoral Bureau ought to be granted legal status separate from the National Electoral Commission. The scope of specialized knowledge required for the proper performance of tasks ascribed for this office demands locating it on the level of a central organ of the state administration subordinate to the National Electoral Commission and servicing this organ in organizational, administrative and financial matters.

The issues presented in this part of the study, mostly of the character of *de lege ferenda* conclusions, refer to the rules of the organization and functioning of election organs.

These issues are present in the currently led debates on increasing the efficiency of state organs and institutions serving broadly understood sphere of law and citizen`s freedoms.

However, the election of personnel, from general elections, in all representative organs, is of no less significance in the Polish system of elections.

This issue will be discussed in the further part of the study.

Remarks on the election system

The fundamental importance of the election law for respecting constitutional rules of the state system had already been noticed at the dawn of the Second Republic. The weight of this matter was emphasized in the comments to the Election Law to Sejm and Senat in 1922 by priest Kazimierz Lutosławski, Ph.D., who wrote, "with the best constitution, a weak law may put the power in the hands of people, who will violate it with their every deed, and will lead the State against the Constitution"[11].

This warning is coming dramatically into existence in the current socio-political situation in Poland, considering that the choice of deputies to various representative organs of authority is systematically deteriorating, since public life is getting dominated more and more by leader-based political parties, waging permanent war amongst each other.

The election system determines the basic rules of citizens` participation in the election process as well as the rules of shaping representative organs of authority in a state. It is the foundation of democracy provided it is adjusted to particular social and political reality of a particular state, particular society, the level of social awareness and general level of culture. Otherwise, it might merely be the faking of a democratic state.

The election system must also take into account democratic traditions and political culture, which, as it is commonly known, has been shaped throughout almost centuries. Therefore, one may not claim that during the transition from a totalitarian to democratic system, the election system may be modeled on the experience of states having deeper rooted democratic traditions. What is beneficial for societies with well founded legal and civic culture, understanding the essence of democracy and its significance for the common welfare, may not be appropriate for societies whose awareness was manipulated and deprived during the period of communism and post-communism.

The above remarks are associated with the current socio-political situation in Poland, where the election system does not meet social expectations, not guaranteeing the selection of the representation in authority organs at all stages from amongst competent people, with high level of national and patriotic awareness, people with clean hands, not fouled with scandals, from amongst the people not tangled into suspicious circles.

The dominating in Poland proportional election system strengthens strictly party based system of authority. People from beyond the part system have no access to representative organs. It is actually like that, however, theoretically such a possibility does exist by establishing so called citizen election committees. Yet, the practice of setting up citizen election committees, in the reality of Polish social awareness, and taking into account the fact that political parties are financed from the state budget, is marginal.

While discussing the election system one ought to distinguish between the constitutional rules of the election system and election procedures, understood as the organization of elections, way of counting votes and determining the results of elections and referenda.

The currently in force in Poland proportional election system, due to its complexity, is comprehended by a narrow group of professional politicians and election officers.

The most of the society perceives this system through the prism of multi-mandate election districts, where a vote is usually given for a randomly pointed candidate placed on a many-page election list, including frequently hundreds of names, grouped according to a party key.

[11] http://www.rpo.gov.pl

The system is modified at times. In the Polish election law there has been set so called election threshold at the level of 5%. Below it votes are not counted for parties that have not reached this level during elections, but are distributed to parties and committees that have reached this critical point.

This way of the distribution of mandates is a complex mathematical calculation, entirely incomprehensible for the electorate, and additionally misshaping an actual result of elections expressing preferences of voters during the voting. Thus, in this system votes of voters are transferred against their will for candidates and parties whose programs they do not support.

Therefore, one may not expect that voters will identify with deputies of public authorities created in such a way, being aware of the fact that both axiological and program selection is illusory in this system of voting. Apart from that personal criteria of candidates are of little significance since voting lists and the order of placing candidates on them are an exclusive discretional competence of parties` management.

The situation of particular candidates in this system is the derivative of conditioning of particular political parties, their programs, and ideologies proclaimed by them[12].

This system has led to making public authorities political to extremes, and extremely negative assessment of so called *partyjniactwo* (party-focused behaviour)

The changes in the current proportional election system ought to be heading towards the liquidation of election limits as well as the requirement to place candidates on lists in alphabetical order. Such a legislative endeavor would return to a certain degree democratic credibility and transparency of election system on the one hand, and on the other would make it possible indirectly to identify a voter with a mandatory in an axiological way.

The currently existing election system is the contradiction of democratic legal order, since it creates to authorities people designated by political parties, not by voters, by the society (in just few cases by non-party election committees).

Due to that fact numerous attempts to break proportional election system and omnipotence of political parties in designing deputies, was futile.

The constitutional rule of assuming innocence until conviction by a valid judgement ought not to be an obstacle on the way to eliminating discredited people from public political activity, ones who lack elementary moral qualifications to perform public functions, and against whom preliminary proceedings of public prosecutor`s office is in progress.

Towards this category of people more rigorous rules of depriving of the right to hold mandate ought to be applied, also in case of running for positions in organs of public authority. This issue, however, has not been regulated in the current legislation.

Therefore, it seems that the rule of assuming innocence, until the guilt has been proved with a valid judgement of a court, when it comes to public officials and deputies requires constitutional rational interpretation.

The Constitutional Tribunal has dealt with this issue in fragmentary way recognizing a case on the request of the Ombudsman.

The Ombudsman expressed a view that dismissing a customs officer as a result of bringing in an indictment against him and applying preliminary custody, breaks the rule of assuming innocence. Solving this question in its decision from 19th October 2004 (sign. K1/04) the Tribunal stated what follows," The problem of honesty and reliability of people in public service is of great significance in Poland. Thus, people doing this service should undergo special rigours. The legal status of custom officers stands out when compared to other uniformed services, and the specifics of their job justifies the admissibility of the application of more rigorous requirements concerning their employment. The activities of custom services shape the state authority, hence high requirements referring to the ethics of its officers. Therefore, the changes questioned by Ombudsman are justified and do not break the constitutional rule of the equality of citizens towards the law."

The above mentioned rule ought to be applied even more strictly to deputies of the public authority organs, who are the first to shape the image and authority of the state, and set legal order in force.

The declarations on lustration on possible service or cooperation with security organs are another problem.

The act of 11 April 1997 on exposing the work or service for state security organs or cooperation with these between 1944 and 1990 of people holding public functions (Dz. U. z 1999 r. Nr 42 poz.428 as amendmed) meant for candidates in general elections for the office of the President of the Republic or running for posts of MPs or senators obligation to forward declarations on lustration on possible service or cooperation with security organs.

[12] A. Jarecka, *The Rule of Generality and Equality in the Polish Election Law*, Warszawa 2000, p. 165.

The fact of forwarding a declaration by a lustrated individual contrary to the truth of the lustration declaration results in depriving this person by a court of the passive electoral right for 10 years.

At the same time, however, the fact of public announcement on the cooperation with these organs does not bear any negative consequences for a candidate, when such a cooperation ought to disqualify such a person in moral and citizen dimension when it comes to public service.

The independence of a deputy

Professor Paweł Śpewak, who was until recently present in politics, stated in "Rzeczpospolita" newspaper that, "in Polish politics one may not be independent, act according to one`s own views. Party discipline is important. The leader of a party and his circle decide on everything for all MPs"[13]. In this realty election mandate ceased to be the foundation of MP`s independence, despite the fact that the institution of an election mandate determines the actual sense of a representative democracy. On the ground of the theory of law an election mandate is most frequently referred to as an authorization granted to a deputy by voters as a result of an election act. The authorization defined in this way implies the acquisition of certain rights and duties as a result of elections and is of strictly personal character. It means that these rights and duties refer exclusively to a mandatory himself, not organization on behalf of which he holds the mandate. Therefore, the mandate of an MP, a councilor is a free mandate.

The institution of a free mandate includes three features:

1) general character, which means that a councilor is treated as the one expressing the will of electors or the whole self-governing community, and not only voters who voted for him.
2) independence, which means the lack of legally binding obligation towards individual pr institutionalized groups of voters.
3) irreversibility, means that a councilor may not be individually dismissed by legally accessible means, and he loses his mandate only in case of being convicted with a valid judgement for a purposefully committed crime[14].

The same features might be attributed to a mandate of an MP or a senator. The lack of legal regulation of the institution of a representative mandate in the current system election law have led to pathological deformation of this fundamental institution of the representative democracy. It is about the fact that deputies usually bound by their membership in a particular party are mostly directed in their actions by party discipline and articulate interests of their parties, not the ones of a community they are representing. The tendency of subduing deputies to party interests was getting stronger gradually when political parties were getting leader-based character, and focusing their attention on political struggle in order to gain power.

The principle of a free mandate is expressed in art. 4 of the Constitution, which states that the Nation performs the authority either through its representatives or directly, and in art.104 point 1, which states that MPs are representatives of the Nation, as well as in art.104 point 2, which includes the following text of the MPs` oath," I solemnly declare to perform my duties towards the Nation reliably and conscientiously, protect the sovereignty and interests of the State, do everything for the wellbeing of the homeland and welfare of citizens, obey the Constitution and other laws of the Polish Republic."

According to these constitutional rules an MP ought to make his choices and decisions in agreement with his beliefs and the system of values. He ought to be able to communicate freely with his electorate, chose the source of information independently and use them in accordance to the reason of State[15].

At the same time the act on performing a mandate of an MP and senator from 9th May 1996, which was amended many times, states that MPs and senators perform their mandate according to the welfare of the Nation. In art. 6 of this act it is stated that an MP or senator cannot be held responsible for his activities within the mandate, except in case he violates the rights of a third party. Then, he may be held responsible by a court with the agreement of Sejm or Senat. Holding one liable for other activities also requires the agreement of Sejm and Senat. In art. 14 the act states that while performing his assignments an MP or a senator has the right to express his views as well as forward motions in cases under proceedings at Sejm and its organs` meet-

[13] P. Śpiewak, *Politics has seduced experts,* „Rzeczpospolita" from 1st–3rd April 2009

[14] Z. Bukowski, T. Jedrzejewski, P. Rączka., *The System of Local Self-government*, Toruń 2005, p. 155–157; *The Local Self-government in Poland*, P. Tarno (ed.), Warszawa 2004, p. 138–140.

[15] B. Banaszak, *Mandate is not a protective umbrella*, „Rzeczpospolita" from 20th January 2005.

ings, e.g. interpellations and inquiries. They also have the right to acquire information and clarification from member of the Council of Ministers and members of the state organs. The act also states that MPs` salary is equal to the one of a under-secretary of state.

All these guarantees of MPs and senators independence aim at strengthening the idea of a free mandate.

The mandate of an MP, senator, and councilor is a free mandate. It means that a mandatory ought to take all decisions independently according to his own beliefs, taking into consideration interests of a represented community and currently binding law regulations. Therefore, he ought not to act according to political or business instructions, and the pressure of other influential corporate circles, if it meant braking the above described rules. The lack of legal regulation of the institution of a representative mandate in the currently binding law has led to pathological deformation of this fundamental institution in the system of representative democracy.

It is about the fact that deputies, who are usually members of a particular political party are most often obeying party discipline and articulating party interests, and not the ones of a represented community.

Political pressure put by managerial organs of political parties on their deputies is expressed in a number of way, particularly the following ones:

– forcing so called party discipline in matters under voting
– punishing in disciplinary or financial way for violating party discipline
– deciding on the order on election lists
– refusing to place a candidate on election lists of party committees

All the above mentioned exemplary situations contradict the constitutional idea of a free representative mandate.

MPs repeating once again their representative functions in conditions of moral enslavement, become entirely dependent on their party directives and lose their independence in articulating personal views recommended to voters in a phase of an election campaign.

Another significant element here is so called "political correctness" created by influential social circles, mainly political and business, by indoctrinating to the society interests and influences of beliefs and rules that are beneficial for them.

In democratic states with stable political scene voters have the choice between parties which can be easily identified on the basis of their election programs as the right wing, central or left wing orientation. Hence the tendency to limit the formula of a free mandate with party membership. In the system of proportional elections this membership frequently decides on organizing and financing of an election campaign of an MP, and in consequence, on his election chances. These situation is in no way similar to the one in Poland, where socio-economic programs of development are no longer of significance for the majority of political parties struggling for the power.

Also authorities and independent individuals no longer play dominant role in social and political life, whereas the public space has been filled with the ones who are always at disposal and submissive, with mediocre qualifications.

The qualifying and moral requirements of representative personnel

The quality of representative personnel in organs of authority decides on the quality of public life, the quality and condition of a democratic state of law, the quality of stated law. However, currently binding election law neglects entirely the qualifying requirements that ought to be met by candidates to organs of representative authorities, apart fro the requirements concerning their age, citizenship, and not being recorded in the register. Yet, we must bear in mind that this is about the people who are to decide on the future of the nation and the state, on laws and duties of citizens, on the quality of life both in local and whole-country scale.

Professor Wojciech Łączkowski, the former head of the National Electoral Commission, referred many times to the exceptional significance of ethic, moral, and substantive qualifications in the election process of people aspiring to functions in representative organs. Professor drew attention to the fact that people holding representative functions in the organs of authority perform difficult and responsible assignments associated with elaborating and stating law. The law whose establishing is becoming harder and harder in rapidly changing social, political, and economic reality. Speaking about insufficient requirements that candidates meet in the Polish election law (age, citizenship, domicile, public and electoral rights, incapacitation) W. Łączkowski demanded setting further requirements in the election law that should be as follows:

– the requirement of flawless personality. Sine this requirement is applied to a judge performing law, it

is even more appropriate for a person creating the law. Although not precise, this notion, has already been determined in the process of judes concerning public dishonesty, corruption and abuse, agential connections, alcohol abuse and others.

– mental disorder ought to be an obstacle for a candidate, should it be stated by specialists on the motion of a court proceeding in the case in the course of "election procedure, since behaviour of some MPs might cause serious doubts concerning their mental condition
– the requirement of appropriate substantive qualifications, considering the fact that the work of a parliamentarian is becoming a job as well as the requirement of experience in performing public activities[16].

From the ethical point of view it was impossible to accept the standpoint of the Polish Sejm, which in 2015 refused to annul the immunity of an MP, Jan Bury, the leader of a Parliamentary Club of PSL party and forwarding the case to the Commission of MPs Ethics. He was accused due to his participation in an affair connected with putting pressure on the President of the Supreme Audit Office about the filling of the post of the director of delegature of the Supreme Audit Office in Rzeszów. Independently, the public prosecutor`s office undertook a separate proceeding concerning his participation in corruption cases in Podkarpacie region.

The standpoint of the parliamentary majority that the behaviour of the MP would be judged by voters in the oncoming elections, in which Jan Bury held the first position on the PSL (Polish People`s Party) list, was highly unacceptable from moral and citizen point of view. Sejm decided that it is not its role to judge MPs in moral categories, especially taking into consideration the fact that the ones criticizing Bury and supporters of expelling him form the party were in minority in PSL.

The above described case was not separate in the parliamentary practice of recent years, when the standards of ethical behaviour were subordinated to political objectives of parties.

Referring to the above mentioned example of disrespecting ethical requirements by parliamentary majority it is worth quoting the opinion of Professor W.Łączkowski on this matter, "Assuming that voters ought to have the largest possible independence of candidates, one would have to take a an incorrect assumption that all voters are able to assess properly and get to know real vices and virtues of candidates. Since well prepared pre-election meetings and still improving socio-technical methods make learning the truth on a candidate more and more difficult"[17].

Conclusions

In the light of the above statements, the standpoint is being confirmed that concerns the necessity of setting in the election law the requirement of flawless personality when it comes to individuals running for public functions based on election.

It is these, exemplary negative phenomena and the lack of social opposition towards them that contributed to the current crisis in the dimension of national states and the world dimension, to the crisis of family and civilization in its all social aspects.

The common appeal to restore the meaning of values in the lives of states and nations is broadly heard. Professor Jacek Raciborski expressed a harsh judgement concerning the state of Polish democracy concluding his lecture entitled "The State and the People-New and Old Relations". He stated that, "those who we have chosen do not have power, whereas the ones having power have not been chosen by us."

Referring this thesis no one present at the conference dared to risk explanation who might be the main player behind the scenes of Polish politics, even though there is no doubt the majority was aware of that.

This shameful and concealed dilemma of Polish reality had been noticed and harshly defined in the speeches of other independent intellectuals. The example being the following statement of Professor Marek Rymkiewicz made in 2004 referring to this matter, "The most noticeable example of a complete fake image of the contemporary Poland is a statement appearing daily that we are living here in a democratic state-governed in a democratic way by democratically elected representatives... By whom and what Poland is being governed everyone can easily see. This is a country ruled by various cliques, coteries, mafia, gangs and business groups. Yet, this is merely a surface- and all these mafia men, gangsters, presidents, ministers, bankers, and professors are not aware themselves what there is beneath, under them. There is the system underneath that allows to hold in

[16] W. Łączkowski, *The Change Directions of the Polish Election Law in the Democratic Standards of Election Law*, Warszawa 2005, p. 199–203.

[17] *Ibidem*, p. 199

a so-so order and obedience forty (almost) million of Poles"[18].

This extremely negative assessment of the past, hopefully, Polish reality, included in a text by Professor Marek Rymkiewicz, brings hope and courage, that currently Poland in the new political constellation will return to values rooted in Its history, tradition and culture of a democratic state of law.

The eminent authority in the field of defense of democratically understood human rights, i.e. his freedom and respect towards dignity, the late Janusz Kochanowski, Ph.D., referring to human rights stated," I have no intention of joining the choir of personalities admiring the possibility of infinite multiplying of entirely undetermined, unclear human rights... The choice of fundamental human rights reaches 110 positions... It is being multiplied beyond control and aberrations appear...the leading motif of my activity bases on the rights for freedom, the truth and justice. This is my canon. Not unlimited number, the magma of unclear human rights, but the triad that strengthens human dignity. I cannot imagine life without the right for freedom, truth and justice...To my view we have gone too far in individualization in emancipation, relieving us from the category of conscience, duty towards the nation and the state. Should it go deeper, we will waste the whole capital gathered for centuries. I am for the tradition respecting the significance of family, church and religion in upbringing and social life, or the role of a national state, which the Poles were fighting and dying for. I am expressing here my view, which I have every right to, and as the Ombudsman I have been appointed to defend citizens no matter what their views are"[19].

The above quoted statement by the late Janusz Kochanowski, Ph.D, aims at emphasizing the greatness of this man, his nobility and nonconformity in the way of performing his Office for the welfare of the Polish Republic.

What decides then on the essence of a democratic system of performing power, and consequently on the type of a real model of a democratic state?

The answer for such a question can be found in the teaching by Saint John Paul II. The pope, worldwide known philosopher and unquestioned moral authority of our times, was teaching according to the social teaching of the Church that, "the essence of democracy is in the sphere of social conscience, its morality, and not merely in the sphere of institutions, structures, election procedures or rules of functioning. All these necessary attributes of a democratic state, though, are undoubtedly important and necessary. Nevertheless, when there is the lack of the awareness of idea and the will to obey ethical norms, then democracy can easily be transformed into a kind of totalitarian system".

Therefore, the lasting foundation of each stable democracy is based on the state of social conscience which can be characterized by the high morale of leading elites, high level of citizen awareness of a society and the conscience shaped within a variety of organizations and associations.

In his encyclical *Contessimus Annus* as well as in *Veritatis Splendor* Saint John Paul II foresaw the oncoming crisis of democracy especially since the agnostic relativism connected with the priority of an arithmetic majority creates a real threat of new totalitarian system. The warning of John Paul II included in the encyclical was expressed in the following way, "Nowadays they tend to state that agnosticism and skeptical relativism are the philosophy and attitude appropriate for democratic forms of politics. Those who claim that know the truth and follow it are not, from the democratic point of view, trustworthy, since they disagree with the statement that the majority decides what truth is, or that the truth changes depending on the changeable political balance. Thus, one ought to remark that in the situation when there is no ultimate truth that could be a guideline for political activity and giving it direction, it is easy ideas and beliefs instruments serving aims of authorities. History teaches that democracy without values can be easily transformed into open or hidden totalitarian system"[20].

References

LEGAL SOURCES

The act of 21 August 1997 on limiting the possibility of running businesses by individuals holding public functions. (J.L. no. 106, item 679, as amended).

LITERATURE

Banaszak B., *Mandate is not a protective umbrella*, „Rzeczpospolita" from 20th January 2005.

[18] J.M. Rymkiewicz, *The Poles live today in the world of fiction*, Fakt Idee from 18th March 2004.

[19] J. Kochanowski, *I am a Constitutional Organ*, Dziennik from 19th–20th January 2008.

[20] E. von Kuehnelt-Leddihn, *Democracy – opium for the people*, Łódź–Wrocław 2008, p. 87.

Bukowski Z., Jedrzejewski T., Rączka P., *The System of Local Self-government*, Toruń 2005.

Jarecka A., *The Rule of Generality and Equality in the Polish Election Law*, Warszawa 2000.

Kochanowski J., *I am a Constitutional Organ*, Dziennik from 19th––20th January 2008.

Kuehnelt-Leddihn von E., *Democracy – opium for the people*, Łódź––Wrocław 2008.

Łączkowski W., *The Change Directions of the Polish Election Law in the Democratic Standards of Election Law*, Warszawa 2005.

Lopez-Pintor R., *Electoral Management Bodies of Governance,* "International Political Science Review" vol. 23, September 2000, DOI: https://doi.org/10.1177/0192512102023001001.

Rymarz F., *Making the State Election Commission Constitutional, Democratic Standards of the Election Law of the Polish Republic*, Warszawa 2005.

Rymarz F., *Gowns in Rosy Colours*, Lublin 2015.

Rymkiewicz J.M., *The Poles live today in the world of fiction*, Fakt Idee from 18th March 2004.

Safian M., The Lecture „*Constitution and the Civil Law*" given on 4th November 2004 at the Catholic University of Lublin.

Śpiewak P., *Politics has seduced experts*, „Rzeczpospolita" from 1st–3rd April 2009.

The Local Self-government in Poland, Tarno P. (ed.), Warszawa 2004

The speech made by Aleksander Kwaśniewski on 15th June 2004, Przegląd Wyborczy, the Information Bulletin, Special Edition, Published by the National Electoral Bureau, Warszawa 2004, p. 134–135.

http://www.rpo.gov.pl