Who will Count the Votes in Poland?

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In the shadow of an international outcry concerning a grotesque and speech-restrictive Polish law which would punish anyone attributing to Polish nation co-responsibility for crimes during the 2nd World War, a much more dangerous change has been quietly brought about, and just completed. A change which gives the ruling party Law and Justice (PiS) necessary mechanisms to "control" the election outcomes. To put it bluntly – a change of the electoral system which will make it possible for PiS to commit electoral fraud allowing it to stay in power, regardless of the voters' preferences.

In the parliamentary elections of 2015, the disproportion between the number of raw votes obtained by PiS (37.6 percent, with an electoral turnout just under 51 percent) and the number of parliamentary seats obtained (235 out of 460, i.e. just over 50 percent) suggested to many observers that PiS will attempt to consolidate its control over the electoral process for its own advantage. Following in the footsteps of its role-model, Orban's Hungary, PiS at the end of 2017 enacted a massive change to the electoral law, introducing enhanced control by the parliamentary majority and by the executive over the mechanism for conducting elections, a thorough "de-judicialisation" of the electoral institutions, and also entrusting the new-model "commissioners" (no longer judges) with full authority (albeit as from elections after the next) for redrawing electoral boundaries. It has also just appointed a governmental apparatchik to a central job in the election administration.

What was suspicious was the frenzy accompanying the enactment of the new law by the end of the last year; in fact, no serious explanation has ever been produced by PiS for the need to change the electoral law in the first place. Despite a hard-line PiS propaganda machine claiming that in various previous elections (in which PiS kept losing), some allegedly monstrous irregularities had been committed, nothing of the sorts has ever been demonstrated. Indeed, the only (and a rather marginal) incident happened back in 2005 when the Supreme Court found the elections to Senate in one district invalid. If anything, it showed that the judicial supervision of elections worked well, and when an isolated incident of irregularities happened, intervened immediately and properly. Apart from that, no electoral protests had been found by courts as having a serious character which would have an impact on the electoral process.

As with everything that PiS addressed in its "reforms", the main focus of the changes in the electoral law are the cadres. Under the new law, adopted by the parliament on 14 December 2017, the main body in charge of elections, the National Electoral Commission (Polish Acronym: PKW) will be completely restructured. It should be added that the importance of the PKW goes well beyond the election itself and also includes control over allocation of funds to political parties – a huge source of income for parties that make it to the parliament. Rather than, as is the case now, being composed of 9 judges, appointed in equal numbers by three Presidents of the top courts: the Constitutional Tribunal (CT), the Supreme Court (SC) and the Supreme Administrative Court (SAC), from among the judges of those courts, the new PKW will be composed only of two judges of the CT and SAC, accompanied by 7 members *appointed by the Sejm*. The head of the National Electoral Bureau (not to be confused with the Commission), which is an executive arm of the Commission, is under the new law appointed by the new PKW from among three candidates submitted by the Minister of Interior. So a full control over the key elections official rests with the government. Until now, this main official responsible for the actual nuts and bolts of the elections, was appointed by the PKW, at the motion of the Chairper-

son of PKW, not of the Minister. It had its logic: the Head of the Bureau was responsible before the Commission which, itself, has no resources, bureaucracy, budget or capacities to actually run the elections – all that is done by the Bureau. Now, losing the power of full control over the appointment of the head of the Bureau, the Committee's supervisory role becomes illusory, and the head of the Bureau will owe his/her appointment directly to the Minister, and indirectly to the parliamentary majority which elects the majority of the PKW.

The election of the Head of the Bureau a few days ago, on 21 February 2018, confirmed the worst fears of politicization of that office: PKW (still in its "old", and about-to-expire iteration) elected one of the three candidates presented to it by minister of interior Mr Joachim Brudziński (the most trusted collaborator of the leader of PiS, Jarosław Kaczyński). She is Magdalena Pietrzak, working until that time in a high administrative governmental office, namely, as deputy director of the department of parliamentary affairs of the office of Prime Minister – a certainly well placed person in the governmental bureaucracy under PiS. But the other two candidates were even closer to PiS party politics, so the PKW was faced with a choice among three politically positioned candidates. The choice was equivalent to a famous saying of the founder of Ford automobiles factory: you can select any colour of your Ford, under the condition that it is black.

Under the new law, the responsibility in local electoral districts will fall upon 100 "commissioners" who will be appointed by PKW, but again, from the candidates proposed by the Minister of Interior (with the additional proviso that if the PKW fails to appoint them within 100 days after the entry of the law in force, they will be appointed directly by the Minister, without even asking the PKW). By their pedigree, those commissioners will therefore be representatives of the Minister rather than of the PKW, in their districts. Most importantly, these commissioners, as well as chairpersons of the electoral commissions at the district level, will not need to be judges (as they currently have to be). Hence, the judicial penetration of the electoral administration, starting at the top with the PKW, and all the way down, which has been a strong fixture and a major achievement of the Polish electoral system since 1991, has now been terminated.

An additional power conferred upon the public administration is the competence to redraw the boundaries of electoral districts. According to the new law, within 60 days of its entry in force, the local self-governments (communes) are obligated to redraw the boundaries. If they don't, it will be done by the commissioners (as we have just seen, the officials appointed from the lists supplied by the Minister); if they do it, the head of state administration at the level of "voivodship" has the right to change these boundaries. Either way, the final decision about electoral boundaries will be done by the officials subordinate to the government – which, of course, raises a spectre of gerrymandering. Further, after the next round of elections, the commissioners will maintain a right to change the boundaries.

In addition it should be kept in mind that under the new law on the SC also of December last year, electoral disputes will be considered by a new chamber of the Court, composed exclusively of judges appointed by a "new" National Council of Judiciary (KRS), with the majority of members elected by the parliamentary majority. All this shows that the electoral process will be fully controllable by the ruling party, from the beginning to the end, i.e. either by the parliamentary majority or by the Minister of Interior who is a member of a narrow party leadership.

There is also another, rather ominous change, regarding the technicalities of ballots which, according to some critics, is a cause for concern. Up to now, a ballot is valid only if there is a symbol "x" placed next to the name of a candidate chosen by the voter, while any other signs, symbols, inscriptions, additional notes etc. render the ballot card invalid. It was a guarantee against a third person placing a sign "x" next to another name and erasing or changing the original "x". Under the new law of December 2017, this guarantee is now gone, and a ballot with one sign crossed out and another added may be considered valid, with the local electoral commission having discretion in evaluating

such ballots, thus opening up a space for arbitrariness and even electoral deceptive practices.

Most importantly, however, a *de facto* subordination of the electoral personnel to politicians of the ruling party (namely, to the Minister for Interior), combined with the elimination of judges both in PKW and as commissioners in the electoral districts, completely erodes the process of its integrity. Taking into account some politically sensitive functions of the PKW even outside the elections themselves, namely the supervision of the spending of state subsidies by parliamentary parties (with the sanctions in the form of refusing public funds to parties with regard to which financial irregularities have been found; in the extreme, the PKW can initiate the procedure for banning a party), entrusting these functions to representatives of the ruling party may be catastrophic for the freedom of political parties and for the democratic process generally. As the (old) National Council of Judiciary (KRS) stated in its opinion on the draft electoral law, "With the new composition of the National Electoral Commission, large parliamentary parties will be able to hinder the day-to-day functioning of their political opponents, which constitutes a real threat to the functioning of democratic system in Poland".[1]

Comrade Stalin famously (or infamously, if you prefer) is believed to have said that it really does not matter who votes; what matters, is who counts the votes. In Poland, party faithfuls will be counting votes, and late 2018 will see the beginning of an elections cavalcade, starting with local elections, and followed, in consecutive years, with a sequence of European, parliamentary and presidential elections, in this order. Elections should not only be fair, but also should be seen to be fair. This precious advantage has been just removed from the Polish electorate. Whether or not a massive fraud to entrench PiS in power will be committed, remains to be seen, but all the mechanisms to make it happen are already there.

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[1] "*Opinia Krajowej Rady Sądownictwa z dnia 7 grudnia 2017 w przedmiocie poselskiego projektu ustawy o zmianie niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych*" [Opinion of the National Council of Judiciary of 7 December 2017 concerning a private members' bill on change of certain statutes aimed at increasing the participation of citizens in the process of electing, functioning and supervision of certain public bodies], unpublished document, 7 December 2017, on file with the author. Incidentally, note the Orwellian title of the new electoral law of December 2017 cited in the document of KRS.