Between Constitutional Tragedy and Political Farce

On the Postponement of the Presidential Elections in Poland

Aleksandra Kustra-Rogatka

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One of the two basic genres of ancient drama is tragedy – fate thwarts all the intentions and actions of the main protagonist, leading him to his doom. In such terms does the governing coalition in Poland attempt to present what befell the presidential elections in Poland – just a few days before the elections, the leaders of the two coalition parties issued the decision that the elections would not take place on the planned and constitutional dates. Was it indeed the lack of cooperation from the opposition, despite the strenuous attempts and herculean efforts of the government, that made it necessary to postpone the elections? Unfortunately, recent events in Poland are more reminiscent of a political farce in which the characters are drawn into a series of increasingly unbelievable, awkward or compromising events, and efforts to exit the situation lead to further entrenchment and even more compromise. What is tragic, however, is that those in government openly ignore the Constitution and demand post factum legitimacy for their unlawful activities by the captured judicial authorities.

What happened in Poland regarding the Presidential Elections?

Despite the obvious controversies arising from exposing voters to coronavirus infection and, as a consequence, the worsening of the epidemiological status in Poland, the ruling camp decided to hold the elections on 10th May. Therefore the adopted Act on Special Solutions related to the prevention and combating of COVID-19 contains a provision which has introduced changes to the electoral code and enabled general postal voting (Art. 40 of the special law).

The Act did not comply with numerous constitutional principles regarding elections: universality (not enough time to prepare lists of voters, no possibility for emigres to vote from abroad), equality (a political campaign is currently impossible) and the secrecy of the ballot (the voter would need to write his/her personal ID on the ballot sheet). Moreover, the amendment to the aforementioned special law has eroded the powers of the National Electoral Commission (PKW) – the most important body of the electoral administration in Poland. (The role of the PKW in the presidential election was reduced to announcing their result).

As there was a legal vacuum with regard to the body responsible for organizing Presidential elections, another bill has been presented in the parliament to regulate the actual implementation of this postal vote. This bill generated substantial debates. One of the notable criticisms of this proposed law is that it would further undermine the authority of the National Electoral Commission, with the organisation of the elections relegated to the Polish postal service Poczta Polska. Yet, just a week before the announced date of the elections, the bill was still in the Senate (the opposition-ruled second chamber of the Parliament). Nevertheless, in the meantime Prime Minister Mateusz Morawiecki entrusted Poczta Polska with preparation for the elections (the current deputy minister of national defence Tomasz Zdzikot became the new president of Poczta Polska) and tasked the Polish Security Printing Works with the printing of electoral cards. (The right to commission state-owned companies during the epidemic was given to the Prime Minister by the anti-crisis shield, a package of three acts which also contains the Act on Special Solutions. However, at the time of issuing this decision there were still no provisions allowing the preparation of correspondence elections by the Polish Post Office and the Minister of State Assets.)

Important reservations as to the realistic possibility of holding the presidential election on 10 May have ignited a dispute within the ruling camp that had been fairly united before. Deputy Prime Minister Jarosław Gowin – head of the "Agreement" ("Porozumienie") party, which is part of the ruling coalition – resigned in opposition to the 10 May election plan. At the same time, he presented a proposal of constitutional amendment providing for the extension of the term of office of the current President by two years. This controversial idea did not gain the approval of the opposition. Nevertheless, the opposition parties started political negotiations taking into account a few alternatives aimed at postponing the elections. The opposition-controlled Senate rejected the bill on 5 of May and the scenario in which an united opposition with support of several members of the Agreement party is able to block the overturning of the Senate's decision in Sejm started to be more and more feasible.

However, this did not happen. In the late evening of 6th May, a few days before the scheduled presidential elections, the leaders of the two parties forming the ruling coalition – Jarosław Kaczyński and Jarosław Gowin – issued a joint statement that they would not be held on 10 May, that the Supreme Court would subsequently annul them and new elections would be announced. The issuing of this statement was preceded by a long political meeting on Nowogrodzka Street, at the Law and Justice headquarters. A day later, the Sejm rejected the Senate's veto.

The absurdity of the fact that two politicians who hold no public office decided not to run elections on a date fixed in accordance with the Constitution requires no explanation. This is the best evidence that the ongoing rule of law crisis in Poland has deteriorated dramatically. However, the political implications of the decision not to hold the elections must be separated from the legal. While on a political level the agreement between Kaczyński and Gowin may prove to be an opportunity for the opposition, in terms of the legal ramifications, it testifies to the greatest constitutional crisis since the Constitution's inception in 1997.

The Supreme Court as a Governmental Enabler?

The key element of the Kaczyński-Gowin agreement was the decision to include the Supreme Court in the political game associated with the elections, an organ which, according to the Constitution, has the power to decide on the validity of the presidential elections. However, there is a fundamental difference between invalid elections and elections which were simply not held. Article 129 of the Polish Constitution explicitly states that the Supreme Court rules on the validity of the election of the President, and thus on the specific result of the voting, pursuant to which one of the candidates wins the elections. In addition to doubts related to the legal legitimacy of issuing a verdict on the annulment of elections which were never held, the greatest controversy was caused by a statement from both politicians, predicting or even assuming an appropriate resolution of the judicial authority. In a law-abiding state, it is unthinkable for politicians to place the court in the role of solely implementing an adopted political vision. The Chamber of Extraordinary Control and Public Affairs of the Supreme Court, whose jurisdiction is to rule on the validity of presidential elections is a so-called new chamber (created only within the scope of the governmental reform of the judiciary). Despite this, the President of this Chamber, Joanna Lemańska (also a close friend of the incumbent President Andrzej Duda) criticised the agreement between Kaczyński and Gowin, which *a priori* adopted the assumption regarding the future ruling of the Supreme Court on the recognition of the validity of presidential elections in Poland and issued a reminder that judges are independent and impartial in their decisions, and the content of any ruling is decided by the adjudicating panel.

Invalid elections or simply no elections? The resolution of the National Electoral Commission.

Perhaps this signal from the Supreme Court caused that another variant of the *post factum* legal legitimization of the political decision to postpone the election date outweighed everything else. Here, the National Electoral Commission – still the most impor-

tant electoral body in Poland – played a significant role. In the resolution adopted on 10th May, the National Electoral Commission stated that "in the elections of the President of the Republic of Poland ordered on 10th May 2020, there was no possibility of voting for the candidates" and that this fact "is equivalent in effect to the impossibility to vote due to lack of candidates." According to Article 293 (3) of the Electoral Code, in such a case (lack of candidates) the Marshal of the Sejm shall re-order elections within 14 days of the announcement of the resolution. The new election date should be within 60 days of the day when the Marshal of the Sejm decides. This means that the presidential elections in Poland should take place in the summer.

The National Electoral Commission's resolution is an attempt to save the situation, although it is based on the questionable procedure of using the analogy of legislation, which determines the legal ramifications of the actual situation (the factual impossibility to vote for the candidates) unregulated by law by referring to a provision of law that regulates a similar situation (lack of candidates). *De facto*, it outdates the previous variant of the legal legitimization of the political decision to postpone the Presidential elections in Poland.

What next?

On 11th May, the day after the elections that were not held, the ruling coalition presented a draft of a law on the presidential election to the Sejm. The draft restores the National Electoral Commission's jurisdiction to organise the elections and assumes that voting will take place at polling stations, but anyone who wishes shall be able to vote by postal service. The bill has been already passed by the Sejm, and the express tempo of the work promises another bill teeming with legislative errors and deficiencies. The bill raises many reservations as to its compliance with the constitution. It establishes a kind of hybrid of the "old" (not held) and new elections. The election committees of existing candidates applying for the office of the President retain their rights, but new election committees may also be submitted. *De facto*, this leads to a non-constitutional postponement of the elections, which can now also be supplemented with new candidates. The bill reduces the minimal composition of the constituency electoral committees to three people, which cannot guarantee proper control over the course of the election. Shortening the deadlines for the Supreme Court to submit protests regarding the annulment of the elections may significantly reduce the diligent examination of the elections' compliance with regulations. The bill provides for the possibility of disabling the legal timeframes regarding electoral activities and in such a case delegates the authority to establish these time frames to the Marshal of the Sejm (after consulting the Minister of Health). There are also doubts about the solutions adopted in the bill regarding postal voting (among others, the various methods of delivering electoral materials: in the form of registered mail, via an employee of the municipal office or two postal employees delivering to a mailbox, combined with the principle that the owner of the mailbox is responsible for the electoral materials). The political farce associated with the presidential elections in Poland can be mitigated only by responsible action of the opposition aimed at correcting most of these errors in the Senate. At a legal level, a blatant violation of the constitutional norms regarding presidential elections has already become a fact.

ABOUT THE AUTHOR

Aleksandra Kustra-Rogatka
Aleksandra Kustra-Rogatka is an associate professor at the Nicolaus Copernicus University in Toruń (Chair of Theory of Law and State)

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