

LEGAL ASPECTS CONCERNING THE NEED TO DISTINGUISH BETWEEN THE CONCEPTS OF “ELECTION” AND “VOTING”. STATE *DE LEGE* *LATA* AND POSTULATES *DE LEGE FERENDA*

Dr. Radosław Zych

University of Szczecin, Poland

e-mail: radoslaw.zych@usz.edu.pl; <https://orcid.org/0000-0002-1221-9136>

Abstract. The aim of this paper is to prove the thesis that there is a need to distinguish between the terms “election day” and “voting day”. The following research methods will be used in the study: formal and dogmatic – to show the views of representatives of the legal doctrine, historical and legal in order to analyse documents of the National Electoral Commission and judicial decisions. Apart from the literature, the research is based on the sources of law in chronological order, taking into account their hierarchy. On the basis of terminological differences and linguistic inaccuracies in them, the author proposes to amend the law and formulates specific wording of the proposed provisions, expressing the hope that the results of the research will have an impact on the functioning of a legally aware society.

Keywords: electoral code; Constitution; voting; elections; legal terminology

INTRODUCTION

The purpose of this paper is to prove the thesis that it is necessary to distinguish between the terms “election” and “voting”. The author used the linguistic and the historical-legal method to analyse court rulings, documents of the National Electoral Commission (NEC), normative acts, and statements made by representatives of legal doctrine and electoral practice. Finally, a proposal *de lege ferenda* is made with the hope that the results of the present research will impact the functioning of a legally aware society. On the basis of terminological differences and linguistic inaccuracies in legal acts, the author proposes to amend the law and formulates a specific wording of the proposed provisions.

1. PREMISES UNDERLYING THE RESEARCH

The need to undertake scholarly research on the title issue stems from the Constitutional Tribunal’s view that the linguistic and logical correctness

of a provision is a condition for examining it in respect of other criteria.¹ This requirement, as a principle of the rule of law, is treated as the essential element of decent legislation [Wróblewska 2010, 150]. Moreover, the central issue is justified by the import of the maxim *in legibus magis simplicitas quam difficultas placet*, which requires the legislator to use correct linguistic expressions in their basic and commonly accepted meaning [Sobczyk 2008, 154]; earlier, Kruk pointed out the errors of legislative technique in relation to the flaws in the wording of the Electoral Act [Kruk 1990, 26]. One must agree with Choduń that “the mere knowledge of colloquial language is not enough to edit the text of legal acts and to provide their proper linguistic interpretation” [Choduń 2006, 30]. For this purpose, I will examine the views of some legal scientists, judicial decisions, and normative acts forming the Polish legal system.

2. THE MEANINGS OF THE TERMS “ELECTIONS” AND “VOTING” IN NEC DOCUMENTS

It is worth noting that the *differentia specifica* between the concepts of “voting day” and “election day” were the subject of “Guidance proposals for amendments to the Act of 27 September 1990 on the election of the President of the Republic of Poland” submitted to the Sejm Extraordinary Committee² by the National Electoral Commission in 1999.³ Also, representatives of the 2007 electoral practice distinguished the day of “voting” from the day of “election”, writing about an “intention to participate in voting for the Sejm and Senate in the elections ordered on 21 October 2007.”⁴

¹ Judgment of the Constitutional Tribunal of 22 May 2002, ref. no. K 6/02, Lex no. 54067; judgment of the Constitutional Tribunal of 20 November 2002, ref. no. K 41/02, Lex no. 57092; judgment of the Constitutional Tribunal of 4 February 2003, ref. no. K 28/02, Lex no. 76811.

² The Sejm Extraordinary Committee for considering draft electoral codes for the Sejm and the Senate and draft amendments to the act on the election of the President of the Republic of Poland.

³ It was pointed out that in Article 2 of the Act, the voting age limit (18 years) was referred to the election day, while in Article 62(1) of the 1997 Polish Constitution (Journal of Laws No. 78, item 483 as amended), this formula applies to the day of voting. A proposal was made to incorporate the constitutional formula in the provisions of the Act. Thus, the term “voting day” was considered as correct; “Przegląd Wyborczy. Biuletyn Informacyjny” 1999, no. 10-11, p. 6.

⁴ Report on the elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland held on 21 October 2007, “Przegląd Wyborczy. Biuletyn Informacyjny” 2007, no. 11-12, p. 17; “the elections ordered for 21 October 2007, especially on the voting day, were met with great interest in the national media”, *ibid.*, p. 26; “The National Electoral Commission did not find any violations of the electoral law that could affect the voting results and election results”, *ibid.*, p. 27.

The legislative distinction between the concepts of “voting” and “elections” was illustrated best by the wording of Article 188(1) of the Local Government Ordinance of 1998,⁵ whereby “if only one candidate has been registered in a constituency in elections to the council in a municipality of up to 20,000 inhabitants, voting is not conducted and the registered candidate is considered elected.” The NEC explained that the provision “refers to a situation where no voting is conducted and seats are filled without voting, but elections are held.”⁶ A consistent distinction between the terms “voting” and “elections” was made by the Commission in a report on the elections to the Polish Sejm and Senate held on 25 September 2005, writing about the “time and place of voting.”⁷

3. DOCTRINE’S UNDERSTANDING OF THE TERMS “ELECTIONS” AND “VOTING”

Prima facie, one might think that “elections” is an established concept, but I do not share this opinion. To prove this, in what follows I will present the views of the doctrine justifying the claim that not only a doctrinal distinction should be made between “election” and “voting”, but it should also be reflected in legislation.

An “established concept” is understood to be a legal concept which, because of its earlier application in other legal acts or practice, has an established meaning, going beyond what could be inferred only from its literal interpretation, and in this sense it was incorporated in a given legal act. A word or phrase featured in the Constitution has in fact a certain “interpretative import”, but it stems from the will of the constitutional legislator, who resolved to use a given concept in a specific meaning assigned to it at that time [Riedl 2015, 84].

As Mojak emphasized, the term “elections” should be understood narrowly, which mainly concerns the election act and activities directly related to it” [Mojak 1994, 162-63]. An analysis of historical studies leads to the conclusion that the doctrine representatives distinguished between “election” and “voting” (for example, Jarosz writes about “election in the act of voting”;

⁵ Act of 16 July 1998, the Electoral regulations for commune councils, powiat councils and voivodship assemblies (Journal of Laws No. 95, item 602 and No. 160, item 1060); “Prawo Wyborcze. Samorządowe prawo wyborcze. Zbiór aktów prawnych oraz wyjaśnień i opinii Państwowej Komisji Wyborczej (stan na 30 kwietnia 1999 r.)”, p. 61.

⁶ Guidelines of the National Electoral Commission (Wyb. 0101-3-T-198/98), “Prawo Wyborcze. Samorządowe prawo wyborcze. Zbiór aktów prawnych oraz wyjaśnień i opinii Państwowej Komisji Wyborczej (stan na 30 kwietnia 1999 r.)”, p. 273.

⁷ “Przegląd Wyborczy. Biuletyn Informacyjny. Wydanie Specjalne. Wybory do Sejmu i do Senatu Rzeczypospolitej Polskiej 25 września 2005 r.”, p. 131.

Jarosz 1985, 36]). Representatives are elected through voting [Jamróz 1993, 41]. As Mordwiłko emphasized, the act of voting leads to an election [Mordwiłko 2001, 71]. According to Kulig, voting is an essential part of the electoral process [Kulig 1995, 122]. As Bożyk argued, “the principle of directness [...] determines the degree of influence of voters, expressed in the act of voting, on the final result of the elections” [Bożyk 2000, 31]. According to Gebethner, “the will of voters is manifested in the act of voting” [Gebethner 2001, 21]. Dudek believes elections are a method of choosing individuals for the performance of public functions, while voting is a method of making decisions [Dudek 2008, 173]. However, the need to make a terminological distinction was most emphatically underscored by Skotnicki, who believed that elections are a long-term process split into many stages (voting is just one of them). He pointed to the incorrect use of the words “elections” and “voting” [Skotnicki 2001, 77]. The postulate was extended in 2011 to include the need to legally define “voting” and “voting day” (in the Constitution, “elections” denotes the day on which voting ends and the ballot boxes are opened [Rakowska and Skotnicki 2011, 23]).

As noted by Czaplicki, “making a choice in a voting act is the means by which in an organization based on democratic principles a decision is made” [Czaplicki 2008, 45]. Sokala and Michalak believe elections are “a cyclical process of voting representatives’ appointment of citizens for specific positions or to perform specific functions. Since elections are a multi-stage process involving various activities, it is wrong to equate with elections only the act of voting, which is merely part of the electoral process” [Sokala and Michalak 2013, 271]. On the other hand, the concept of voting, according to Sokala, should be identified as “an electoral act externalizing the voting decision of the voter as to the selection of a candidate or candidates for a specific position or to perform a specific function” [Sokala, Michalak, and Uziębło 2013, 65]. Thus, the meaning of the term “elections” does not coincide with the term “voting”. Also Chmaj and Skrzydło point out that “voting is one of the most important phase of the election procedure” [Chmaj and Skrzydło 2015, 88]. The studied terms can also be analysed semantically based on opinions of representatives of the doctrine on various institutions of electoral law. For example, in Muszyński’s opinion, an election campaign is “a statutorily regulated period for the preparation and holding of parliamentary, local and presidential elections, as well as for determining the activities necessary to organize and hold voting” [Muszyński 2001, 72; Rakowska 2011, 116]. This statement confirms that voting is different from elections. Another argument supporting the distinction between the analysed concepts is the view on the principle of proportionality of elections. According to Banaszak, “the indisputable elements of the proportionality principle are: a ban on applying factually unjustified measures altering

the proportions between the number of votes cast and the number of mandates resulting therefrom, or credentials” [Banaszak 2008, 5-6]. In Skotnicki’s view, “only in the act of voting do we get to know the real views of voters” [Skotnicki 2010, 18]. Thus, functional aspects call for a distinction between the concepts of “election” and “voting”. Mołdawa claims that “the extent of voter participation in a vote for the Sejm and Senate, i.e. voter turnout, is extremely important for legitimizing the parliament, and thus the system of government” [Kuciński 2007, 81]. Therefore, voting in elections is called voter turnout [Żukowski 2011, 6]. Another argument supporting the thesis about the necessity to make a terminological distinction is the age criterion. According to Uziębło, “in the case of active electoral law, this age is typically identified with civil legal age, and sometimes even younger. In Europe, this is illustrated by Austria, where in the last parliamentary elections it was possible to vote at the age of 16” [Uziębło 2014, 16]. Witkowski also notices the need for conceptual refinement: “In the opinion of the supporters of compulsory voting, compulsory participation in elections (in voting, in fact) is a minimum civic obligation similar to paying taxes, constituting the minimum of civic decency” [Witkowski 2015, 8]. Similarly, Hermeliński emphasizes that “the principle of democratism and freedom implies the requirement to ensure free decision-making by voters and voting under conditions free from pressure or any control” [Hermeliński 2020, 11]. Making distinctions in the presented matter can be justified by the need to ensure that the correctness of legal norms is approved by their addressees. According to Banaszak, “the law should be as comprehensible and logical as possible to minimize difficulties in its application” [Banaszak 1993, 38]. Mordwiłko, on the other hand, argued that “the statutory regulations should be clarified in such a way as to eliminate the possibility of different interpretations by participants of the electoral process” [Mordwiłko 1995, 44].

As Bałaban claimed in 1978, “it is very important to align a constitution with reality..., among other things, by introducing new provisions reflecting the newly arising needs” [Bałaban 1978, 68]. I believe that both the constitutional legislator and the national legislator should distinguish between the terms “elections” and “voting”. Due to the development of not only the institutions of electoral law but also research on them, it seems justified that in the process of interpreting constitutional concepts, it seems legitimate to reach beyond the constitutional law, taking into account the postulates of the doctrine of law, which should constitute an interpretative guideline allowing for the recognition of the exact content of a given term and thus the structure of the legal provision.

4. STATE *DE LEGE LATA* AND POSTULATES *DE LEGE FERENDA*

In regard to Article 5 of the Electoral Code⁸ Banaszak emphasized that it contains in fact of glossary of definitions of EC terms and does that in the manner provided for by para. 146⁹ of the annex to the Ordinance of the Prime Minister of 20 June 2002 on the Principles of Legal Technique.¹⁰ The point is to specify the content of ambiguous or indeterminate concepts in the context of electoral law regulations so that they leave no room for doubt” [Banaszak 2015, 17-18; Idem 2018, 13]. I will humbly disagree with this view, precisely because the term “election day” does not take into account the situational context, which is legally regulated *in concreto*. According to Biłgorajski, “the provision at hand (Article 5 EC) presents the referents of the terms, with “elections” among them [Biłgorajski 2017, 33]. In my opinion, this catalogue should be supplemented with the term “voting”, because according to para. 146(1)(4) of the Principles of Legal Technique, due to the scope of regulated matters, there is a need to redefine a given term. Therefore, we cannot agree with Kisielewicz and Zbieranek that “the provisions of Article 5 EC have an ordering and explanatory nature” [Kisielewicz and Zbieranek 2018, 42]. In 2010, Kubas argued that “the advantage of a code-based form of regulation would be its subjection to minor formal requirements provided for in the Principles of Legal Technique” [Kubas 2010, 112]. Although he did not refer to the issues at hand, in my opinion this opinion should be considered as an argument confirming the legitimacy of the above-formulated conclusion.

In the light of our considerations above, I deem it justified to distinguish the notion of “elections” in a broad sense, but also a narrow one, which comes down *de facto* and *de jure* to voting. Taking into account the views of the representatives of the legal doctrine, I propose changes in the law

⁸ Act of 5 January 2011, the Electoral Code, Journal of Laws No. 21, item 112 [hereinafter: EC].

⁹ In accordance with sect. 1: “In a statute or other normative act, the definition of a given term is formulated if: 1) the term is ambiguous; 2) the term is vague and it is desirable to limit its vagueness; 3) the meaning of the term is not commonly understood; 4) due to the scope of regulated matters, there is a need to establish a new meaning of the term.” And according to sect. 2: “If an ambiguous term appears in only one legal provision, its definition is formulated only if the ambiguity is not eliminated by placing it in the appropriate linguistic context.” As ruled by the administrative court, “the provision of § 146 sec. 1 of the annex to the regulation allows the possibility of introducing a definition of a given concept in a normative act if it is ambiguous, unclear, and the meaning of the term is not commonly understood or due to the area of regulated matters there is a need to establish a new meaning of a given term. The regulation prohibited the formulation of a definition only if a given concept had already been defined by law”; judgment of the Provincial Administrative Court in Lublin of 5 December 2012, ref. no. II SA/Lu 830/12, Lex no. 1306210.

¹⁰ Journal of Laws of 2016, item 283 as amended.

consisting in amending the provisions of the core acts concerning electoral law, i.e., the Constitution and the Electoral Code, hoping that this procedure would contribute to the terminologically correct formulation of acts of decision-making and law application, issued on their basis.

With regard to the constitutional law, the proposed amendment to the law would concern the following provisions: *de lege lata*, Articles 98(2), 98(5), 99(1), 99(2), 109(2), 127(3), and 128(2). In my opinion, the term “election day” should be replaced with the term “voting day”.

The second legal act that wants changing is the Electoral Code. With regard to this source of electoral law, the proposed amendments can be divided into several groups.

First of all, I believe that in the provisions listed below, the terms “election day” should be replaced with the term “voting day”. This treatment would apply to Article 11(1) and Article 12(4). A similar change, consisting in replacing the term “elections” with the term “voting” should be made in the provisions of the EC quoted below:

Article 12(5) and (6); Article 12(10); Article 13(2); Article 13a(2) and (4); Article 13b; Article 15(1) and (3); Article 16(1), (2), and (3); Article 26(11) and (12); Article 28(1); Article 29(3); Article 30(2); Article 34(2); Article 36(1); Article 37d(1) and (3); Article 51(2)(3); Article 51(4); Article 53b(1) and (9); Article 53c(2); Article 53e(1); Article 53l; Article 56(2); Article 117(1); Article 129(2)(2); Article 141(2); Article 142(1); Article 142(3); Article 158(1a); Article 160(1)(9a); Article 170(2); Article 170(3); Article 178(1); Article 182(5); Article 195(2); Article 202(3); Article 204(2); Article 204(4); Article 204(6); Article 211(1); Article 222(2); Article 247(4); Article 254(1); Article 279(1); Article 279(1)(5); Article 279(3); Article 299(4); Article 303(1); Article 305(2); Article 331(2); Article 364(2a); Article 400(1); Article 401(1); Article 402(1); Article 402(2); Article 410(3); Article 410(5); Article 422; Article 428(1); Article 436(2); Article 436(4); Article 437(2); Article 465; Article 478(3); Article 482(9); Article 483(2); Article 491(4); Article 495(2); Article 497a; Article 506(3).

The second group of provisions of the EC would be those in which the change would consist in replacing the term “election date” with “voting date”. It would include Article 195(1): “in the event of the Sejm’s term of office being shortened by virtue of its resolution or by order of the President of the Republic, the President shall order elections, setting the date of elections not later than 45 days from the date of entry into force of the Sejm’s resolution to shorten its term of office or from the day of announcing the order of the President of the Republic to shorten the term of office of the Sejm. The decision of the President of the Republic to order elections is made public in the Public Information Bulletin and announced in the Journal of Laws of the Republic of Poland no later than on the 5th day of its

signing. The provision of Article 194(2) shall apply accordingly”; Article 371(1): “elections to councils are ordered not earlier than 4 months and not later than 3 months before the expiry of the term of office of the councils. The date of the election is set for a day off from work not earlier than 30 days and not later than 7 days before the expiry of the term of office of the councils”; Article 371(2): “The Prime Minister, after consulting the National Electoral Commission, shall set, by regulation, the date of elections in accordance with para. 1 and specify the days on which the deadlines for the performance of electoral activities provided for in the code (electoral calendar) expire”.

The third group would be the EC provisions, the wording of which should be reformulated in a complex manner. They include:

- Article 372(1), which should read as follows: “If it is necessary to hold early elections to a given council before the end of the term of office or to elect a new council for reasons specified in statutes, elections are ordered and voting is held within 90 days from the date when this reason arises. The provisions of Article 371 shall apply *mutatis mutandis*, however in the electoral calendar the time limits for the performance of electoral activities may be shorter than those provided for in the code”;
- *de lege ferenda* Article 377: “Voting, in the situation referred to in Article 372, shall not be carried out if its date should fall within 12 months before the end of the term of office of the councils. In such a case the Prime Minister shall appoint, at the request of the minister competent for public administration, a person holding the function of the council until the end of the term of office”;
- *de lege ferenda* Article 386(5): “by-elections shall not be conducted if the voting day in them should fall within 6 months before the end of the term of office of the councils”;
- *de lege ferenda* Article 387(3): “If, due to the expiry of mandates, which could not be filled under §§ 1 and 2, the composition of the council was reduced by more than 2/5, the council is automatically dissolved and a new council is elected. Elections are not held if the voting day should fall within 6 months before the end of the council’s term of office”;
- *de lege ferenda* Article 390(9): “Elections of new councils are not conducted if the voting day in them should fall within 6 months before the end of the term of office of the councils”;
- *de lege ferenda* Article 390a(1): “Elections ordered pursuant to Article 371 are not conducted in a local government unit, in which, as a result of changes in the territorial division of the state, the council is dissolved, if the voting day in them should fall within the period of 6 months preceding the dissolution of this council. Elections to the new council are

held in the manner and on the terms set out in the Code after the entry into force of the changes in the territorial division of the state”;

- Article 390a(2): “If the date of establishing a new local government unit, including in the cases referred to in Article 390(1) points 1 and 3, falls in the year immediately following the date of the elections ordered pursuant to Article 371, elections to the new council shall be held in conjunction with these elections”. It should read: “after voting in the elections ordered [...]”.

Moreover, in Article 37a(1)(4) EC the terms “election date and voting times” should be replaced by “voting hours”.

I believe that the justification for the proposed changes is that the provisions of the articles of the Constitution and the EC should be unambiguous and their understanding consistent with the rules of the Polish language. According to Czaplicki, “in the process of enacting electoral law, the principle of good legislation must also be applied, requiring the formulation of regulations in a correct, precise and clear manner” [Czaplicki 2009, 10]. Therefore, the postulated amendments to the law should not raise doubts or lead to results that would be unacceptable for any reason. Priority should be given to the results of the linguistic interpretation of the legal provisions under study. The separation of “election” and “voting” does not only concern the linguistic sphere, and the concepts cannot be assigned the same meaning in legal interpretation. Supreme Court in 1995¹¹ drew attention to the fact that “legal provisions apply specific terminology for their own purposes”. An abstraction of the legal norm that elections refer to a fixed date would lead to a conclusion that cannot be ascribed to a rational legislator.¹² The term “elections” means the process of selecting person to occupy an office [Garner and Black 2014, 631], while the term “voting” is the casting of votes for the purpose of deciding an issue [ibid., 1808]. Thus, a linguistic interpretation confirms the legitimacy of making a distinction between them. Bearing the above in mind, I propose a rational use, and *de facto* the use of normative phrases¹³ making proper use of the terms “elections” and “voting”.

¹¹ Order of the Supreme Court of 4 December 1995, ref. no. III SW 50/95, p. 8. „Przełąd Wyborczy. Biuletyn Informacyjny. Wydanie specjalne. Wybory Prezydenta Rzeczypospolitej Polskiej w 1995 r.”.

¹² For terminological comments in another case, see Order of the Supreme Court of 4 December 1995, ref. no. III SW 1091/95, p. 12-13, ibid.

¹³ Example of another normative phrase: „Przełąd Wyborczy. Biuletyn Informacyjny” 2012, no. 5, p. 39.

CONCLUSIONS

The research results led me to the conclusion that the term “elections” is not an established concept, it is characterized by a considerable degree of generality. The rationale for this view is primarily the analysis of statements made by representatives of the legal doctrine, which show a distinction between the terms “voting” and “elections” in the longer run. Thus, the thesis about the need to distinguish these notions in the electoral law is justified not only by the confirmed legislative imperfections of legal texts. The results of the analyses and research carried out indicate that “elections” are one thing and “voting” is another thing. The raised issue should be the subject of an in-depth analysis when amendments to the Constitution are considered. The proposed amendments to the law (the Constitution and the Electoral Code) in terms of terminology would take into account, first of all, the findings of legal scientists, judicial decisions, practice and the essence of the institution of electoral law. In conclusion, the above-formulated proposal to introduce legislative changes would reflect the practice of holding elections, and voting in them as one of the activities resulting from the electoral calendar. If, for any reason, it would be impossible to amend the constitution, I believe that at least the electoral code should be changed in the indicated scope. I hope that this study will spark a scholarly discussion on the specific issues indicated in this paper.

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