

THE ACCEPTANCE BY THE NATIONAL ELECTORAL COMMISSION OF A NOTIFICATION ON THE FORMATION OF AN ELECTION COMMITTEE OF A CANDIDATE FOR THE PRESIDENT OF THE REPUBLIC OF POLAND – A GLOSS ON THE DECISION OF THE SUPREME COURT OF 23 MARCH 2020, REF. NO. I NSW 4/20

Dr. Paweł Bucoń

Department of Civil Law, Faculty of Law, Canon Law and Administration,
The John Paul II Catholic University of Lublin, Poland
e-mail: pawel.bucon@kul.pl; <https://orcid.org/0000-0002-4413-2588>

Abstract. The view taken by the Supreme Court challenging the resolution of the National Electoral Commission imposing on it the obligation to accept the notification on the formation of the Election Committee of the Candidate for the President of the Republic of Poland Sławomir Grzywa does not deserve approval. The National Electoral Commission correctly applied the provisions of the Election Code by setting a deadline of three days for the submission of one thousand signatures of support due to the fact that initially the signatures were provided on sheets containing an annotation contrary to the requirement of the Act. The fact that there was coronavirus outbreak across the country during the period when the obligation to provide signatures existed could not be taken into account. The provisions of the Election Code do not specify how election activities should be carried out during the period of epidemic emergency, and the only possibility of suspending election procedures would then be the introduction of a state of emergency, which, however, was not declared.

Keywords: registration of the Election Committee of the candidate for the President of the Republic of Poland in the coronavirus pandemic, the impact of the coronavirus pandemic on the deadlines in the election procedure, National Electoral Commission

In its decision of 23 March 2020 (I NSW 4/20), the Supreme Court examined the appeal filed by the election agent of the Election Committee of the Candidate for the President of the Republic of Poland Sławomir Grzywa, against the resolution of the National Electoral Commission¹ of 16 March 2020 on the refusal to accept the notification on the formation of the said Committee.

¹ Hereinafter: PKW.

The facts of the case were as follows. On 4 March 2020, the election agent of the Election Committee of the Candidate for the President of the Republic of Poland, Sławomir Grzywa, while notifying PKW about the formation of the committee, submitted an appropriate number of one thousand signatures confirming support for the candidate. PKW found the signature list as defective. It questioned the correctness of the signatures, as they appeared on sheets which were annotated incorrectly. The annotation did not constitute a literal repetition of the formula set out in Article 303(1)(3) of the Election Code.² Therefore, PKW assumed that they could not be considered as proper proof of support for a candidate.

On 9 March 2020, PKW called the election agent of the Election Committee of the Candidate for the President of the Republic of Poland, Sławomir Grzywa, to provide within three days, i.e. by 12 March 2020, a correct list of citizens supporting the submission of the election committee. In practice, PKW's decision meant that the agent had to submit anew a thousand signatures of support for the candidate on properly prepared sheets, containing an annotation strictly corresponding to the formula set out in the Election Code. Only 89 signatures were submitted within the deadline set by PKW. Having this fact in mind, PKW refrained from verifying the correctness of the signatures submitted.

Since the defect was not removed by submitting a list containing at least one thousand signatures of Polish citizens holding the right to vote for the Sejm of the Republic of Poland, who supported Sławomir Grzywa as a candidate for the President of the Republic of Poland, within the three-day period set out in Article 97(2) of the EC, PKW refused to accept the notification on the formation of the Election Committee of the Candidate for the President of the Republic of Poland Sławomir Grzywa. The PKW's resolution was appealed against to the Supreme Court, which consequently gave the ruling which is the subject of this gloss.

First of all, the Supreme Court did not share the view taken by PKW as regards the "restrictive" interpretation of Article 303(1)(3) of the EC. It concluded that the fact that the sheets on which voters expressed their support did not constitute a literal repetition of the formula referred to in the indicated provision does not render the support invalid. As the Supreme Court stated, the persons who had put their signatures, after becoming acquainted with the contents of the annotation on the individual sheets of the list, were fully aware of whom (which person) they had been supporting and for what purpose (in which election). For this reason the Supreme Court concluded that there was no legal basis for requesting the election agent to remove the defect in the notification on the formation of the election committee.

² Act of 5 January 2011, the Election Code, Journal of Laws of 2019, item 684 as amended [hereinafter: EC].

When considering the correctness of the view taken by the Supreme Court, the lack of precision of the provisions of the Election Code defining the essence of the “defect”, the occurrence of which may result in PKW’s not accepting the notification on the formation of an election committee of a candidate in the presidential election or refusing to register a candidate, should be pointed out. Therefore, the legal regulation set out in Article 97(2) and Article 304(4) of the EC should be examined. In this way, in the process of systemic interpretation, using the semantic equivalence directive, the doubts that arise in relation to the linguistic meaning of the term “defect” may be clarified. In the process of interpretation of the aforementioned provisions, the assessment of the manner in which they were drafted, namely the use of the plural form (“defects”) and not the singular form (“defect”) by the legislator, should be left aside. There should not be the slightest doubt that the finding of even one defect in the submission gives grounds to call the agent of the election committee to remove the defect (or to refuse to register the candidate for President).

Unlike Article 304(2) of the EC, which governs the procedure for the registration of a candidate for President,³ Article 97(2) of the EC does not define in detail (in the form of a list) the scope of PKW’s examination whether the notification on the formation of an election committee is correct. The legislators limited themselves to imposing on PKW, within three days from the date of delivery of the notification, an obligation to call the election agent to remove the defects – within three days from the date of making the information about the defects in the notification public. The decision on the refusal to accept the notification, together with the justification, shall be immediately made public and delivered to the election agent.

On the other hand, according to Article 304(4) of the EC, if the submission of a candidate for President has defects, PKW shall immediately call the election agent to remove the defects within three days from the date of making the information about the defects in the submission public, and if the defects are not removed within the deadline, the National Electoral Commission decides to refuse to register the candidate. In connection with Article 304(2) of the EC, a question arises as to what the legislator means by the term “defects” in the submission of a candidate for President. Namely, whether PKW determines the existence of a defect only as a result of the process for examining the correctness of the submission of a candidate for President, as referred to in Article 304(2) of the EC, or whether it may determine the existence of such a defect

³ Pursuant to Article 304(2) of the EC, the National Electoral Commission, when verifying the correctness of the submission of a candidate, shall examine: 1) whether the candidate fulfils the conditions set out in Article 11(1)(3); 2) the compliance of the data referred to in Article 297(4) on the basis of officially available documents; 3) whether the nomination has been supported by signatures of at least 100,000 citizens in accordance with Article 303(1)(3).

through findings other than those stipulated in the said Article. It should be emphasised here that Article 304(2) of the EC does not contain the phrase “in particular”. The specification of conditions for the correct registration of a candidate is therefore enumerative in this provision – it is a closed list.

Only the fact that a candidate does not have the right to be elected triggers an obligation on the part of PKW to refuse to register the candidate (Article 304(3) of the EC). Otherwise, we are dealing with defects, the finding of which gives rise to an obligation on the part of PKW to immediately call the election agent to remove them within three days from the date of making the information about the defects in the submission public. Thus, the defect referred to in Article 304(4) of the EC undoubtedly relates to the other two issues referred to in Article 304(2) of the EC.

However, the question arises as to whether, despite the list enumerating the issues to be reviewed by PKW under Article 304(2) of the EC, there may be other defects justifying the demand for their removal. It should be undoubtedly pointed out that the defect referred to in Article 304(4) of the EC can be the election committee’s failure to submit the documents listed in Article 303(1) (1) of the EC. Thus, if the submission did not contain e.g. an indication of the candidate’s affiliation to a political party, this would be a reason justifying a call for the removal of the defect. It is therefore difficult to understand why the legislators did not include in Article 304(4) a reference to Article 303(1). As both the determination of the circumstances referred to in Article 304(2) of the EC and the determination of failure to fulfil the obligations specified in Article 303(1) of the EC constitute a defect which gives rise to an obligation on the part of PKW to call for its removal pursuant to Article 304(4) of the EC.

The above statement is significant for the assessment of the view taken by the Supreme Court in the ruling being discussed in this gloss. Referring the conclusions from the analysis of Article 304 of the EC to the procedure of accepting the notification on the formation of the election committee, it should be pointed out that, under Article 97(2) of the EC, a defect occurs whenever the notification is found to be inconsistent with the requirements set out in the Election Code. In the case resolved by the Supreme Court in the ruling being discussed here, the decisive factor is Article 299 of the EC, pursuant to which after collecting, in accordance with the requirements set out in Article 303(1) (3) of the EC, at least one thousand signatures of citizens having the right to vote in parliamentary elections and supporting the candidate, the election agent notifies the National Electoral Commission that the election committee has been formed.

The reference to Article 303(1)(3) of the EC should be interpreted in such a way that any violation of the statutory requirements related to the notification of the formation of an election committee constitutes a defect as defined in Article 97(2) of the EC. The election committee is therefore required to

provide a list of one thousand citizens supporting the submission, containing a legible indication of the name(s) and surname, address of residence and identification number (PESEL) of the citizen who gives his/her support, with his/her handwritten signature on the list. Each page of the list must contain the name of the election committee submitting the candidate and an annotation: “I give my support to the candidate for the President of the Republic of Poland [name(s) and surname of the candidate] in the election called for (day, month, year).”

In the case of submitting the candidacy of Sławomir Grzywa, PKW stated that the annotation deviated from the statutory formula. The Supreme Court did not question the PKW’s findings in this respect, but made a different legal assessment of the facts. It did not agree with the restrictive interpretation of the provisions of the election law presented in the PKW’s resolution. In the opinion of the author of the gloss, the view taken by the Supreme Court gives rise to justified doubts. If in this case the requirements laid down in the provisions of the Election Code were violated, it is difficult to find the reasoning presented by the Supreme Court convincing. The provisions in question do not provide any basis for creating deviations from the obligations imposed on an election committee in the process of submitting a candidate for President. Therefore, it should be assessed that PKW correctly applied the provisions of the Election Code and rightly decided to refuse to register the candidate Sławomir Grzywa due to the fact that the election committee failed to submit a list of support by at least one thousand citizens as required by Article 303(1) (3) of the EC.⁴

Summing up this aspect of the analysis, it should be pointed out that the PKW’s statutory obligation is to verify whether all the statutory requirements concerning submission of a notification on the formation of an election committee have been fulfilled.⁵ They also include a correctly prepared list of support (i.e. in accordance with the Act) given by citizens who have the right to vote. The unquestioning acceptance of the view taken by the Supreme Court

⁴ It is a well-established doctrine and case-law that the lack of the required number of signatures of electors supporting the formation of an election committee is a defect pursuant to Article 97(2) of the EC, if the submission was made at such a time that the removal of the identified defects in the number of signatures is not possible, due to the fact that the lack of the required number of signatures of electors cannot be supplemented after the deadline for the submission of the notification. The deadline for submitting a list of citizens supporting the formation of an election committee cannot be extended by calling the election agent to remedy the lack of the required number of signatures [Czaplicki and Zbieranek 2018, 262; Banaszak 2018, 198–99; Jaworski 2012, 264]. See also decision of the Supreme Court of 19 September 2002, ref. no. III SW 28/02, OSNP 2003, No. 4, item 89; decision of the Supreme Court of 31 August 2011, ref. no. III SW 10/11, OSNAPiUS 2011, No. 11–12, item 151.

⁵ Decision of the Supreme Court of 19 September 2002, ref. no. III SW 28/02, OSNAPiUS 2003, No. 4, item 89.

pro futuro potentially puts PKW at risk of the accusation that it accepted a notification of the formation of an election committee which includes signatures of support in a manner infringing the statutory requirements.

The ruling of the Supreme Court also deserves attention due to the fact that it raised the problem of the possibility to conduct election activities affected by the coronavirus pandemic. Referring to this part of the Supreme Court's reasoning, it is only theoretically possible to consider whether or not the coronavirus pandemic could be regarded as a natural disaster as defined in Article 232 of the Constitution,⁶ and whether its occurrence did not justify the possibility to introduce the state of natural disaster by the Council of Ministers. This measure would have had significant consequences for the election of the President of the Republic announced for 10 May 2020. According to Article 228(7) of the Constitution, the introduction of the state of natural disaster (or any other state of emergency) prohibits by law the holding of elections for the office of the President of the Republic of Poland and extends his term of office until 90 days after the end of that state.

As is well known, the Council of Ministers did not decide to introduce a state of natural disaster, so the coronavirus pandemic did not formally affect the sequence of implementation of election activities defined by the provisions of the Election Code. Nevertheless, the Supreme Court found it appropriate to call into question the possibility to conduct election activities within the statutory deadlines. It assumed that collecting a thousand signatures of support for a candidate in the presidential election within the three-day period set out in Article 97(2) of the EC is objectively possible under normal conditions of the functioning of the state apparatus. As the Supreme Court noted, we did not face such a situation on 9–12 March 2020 due to the threat to human life and health caused by the coronavirus. The Supreme Court took into account the necessity to comply with strict hygienic and sanitary requirements in interpersonal contacts at that time and the real concerns of people signing the lists and collecting signatures of support for Sławomir Grzywa's nomination about the possibility of getting infected with coronavirus. In view of the above, the Supreme Court concluded that the obligation imposed by PKW on the election agent to provide a thousand signatures of support was impracticable from the outset. Its fulfilment was hindered by objective factors justified by extraordinary circumstances, completely beyond the election agent's control.

Referring to this part of the Supreme Court's reasoning, it should be reminded that, in the opinion of the author of the gloss, PKW correctly applied the provisions of the Election Code specifying the procedure for accepting a notification of the formation of an election committee. Due to the fact that the submitted signatures of support for the candidate were provided on sheets

⁶ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

containing an annotation inconsistent with Article 303(1)(3) of the EC, PKW, acting pursuant to Article 97(2) of the EC, called the election agent to remove the defect in the notification within three days from the date of making the information about the defects in the notification public.

The question arises whether PKW, while exercising these powers, was obliged to take into account the threats related to the coronavirus pandemic. With regard to this issue, it should be noted that the provisions of the Election Code do not contain any norms referring to extraordinary circumstances due to which it might be difficult to meet the election deadlines. The institution of a state of emergency (Chapter XI of the Constitution of the Republic of Poland) is provided for in the event of situations of particular threats in which ordinary constitutional measures would prove insufficient.

The deadlines for the implementation of election activities result from the election calendar, which was laid down in an appendix to the decision of the Speaker of the Sejm of the Republic of Poland of 5 February 2020 on the ordering of the election of the President of the Republic of Poland.⁷ The National Electoral Commission does not have any power to suspend, extend or reschedule the deadlines set in the election calendar. This is not possible even in the event of extraordinary circumstances.

Therefore, the justification for creating deviations from the election calendar cannot be the introduction of a state of epidemic emergency in the territory of the Republic of Poland (from 14 March 2020)⁸ followed by the state of epidemic (from 20 March 2020).⁹ There are statutory grounds for both states.¹⁰ Therefore, neither the state of epidemic emergency nor a state of epidemic may be regarded as a state of emergency in the constitutional sense. The Constitution of the Republic of Poland sets out a closed list of states of emergency in Article 228(1), and it may not be extended by way of an act.

No provisions provide PKW with grounds to waive its obligation to verify the correctness of collecting an appropriate number of signatures supporting the submission of a candidate for President. Neither does it have any powers that could lead to further suspension or modification of election procedures. In particular, it should be stressed that PKW does not have the right of legislative initiative, nor is it entitled to request the Council of Ministers or the President

⁷ Journal of Laws, item 184.

⁸ A state of epidemic emergency was introduced by the Regulation of the Minister of Health of 13 March 2020 on the declaration of a state of epidemic emergency in the territory of the Republic of Poland (Journal of Laws, item 433 as amended) and revoked by the Regulation of the Minister of Health of 20 March 2020 on the revocation of a state of epidemic emergency in the territory of the Republic of Poland (Journal of Laws, item 490).

⁹ Regulation of the Minister of Health of 20 March 2020 on the declaration of a state of epidemic in the territory of the Republic of Poland (Journal of Laws, item 491 as amended).

¹⁰ Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans (Journal of Laws of 2019, item 1239 as amended).

of the Republic of Poland to exercise powers related to the introduction of a state of emergency, which would result in the postponement of the elections.

Therefore, since no state of emergency was introduced due to the coronavirus pandemic, PKW had no legal grounds to create derogations from the rules defined by the provisions of the Election Code. As a state authority, it is bound by the principle of legality (Article 7 of the Constitution). It is therefore entitled to make decisions only on the basis and within the limits of the law. Since the legislators did not create special regulations specifying the procedure for the registration of candidates for the President of the Republic of Poland and collection of signatures of support for the candidacies, PKW was obligated to apply the provisions of the Election Code normally in force.

Given the above, even if the collection of signatures did indeed constitute a threat to human life and health, the view taken by the Supreme Court undermining the obligation of PKW to apply the provisions of the Election Code does not deserve approval. If the Supreme Court deems the application of Article 97(2) of the EC inappropriate, the question arises what regulations were to be applied by PKW in a situation of a defect referred to in the provision in question. Although the Supreme Court assumed (as pointed out above – erroneously) that such a defect did not exist despite the fact that the signatures were collected on sheets which did not contain an annotation required by the Act, it did not answer the question as to what provision PKW was supposed to apply in a situation where it would not be possible to carry out an election activity due to the coronavirus pandemic.

The critical position of the author of the gloss on the Supreme Court's ruling is also due to the fact that it created a real threat to the respect of the principle of equal opportunities for candidates in presidential elections. The coronavirus pandemic is a threat that all election committees have to face. It is therefore unjustified to exempt any of them from the obligation to collect signatures of support in the quantity and form laid down in the Election Code.

It should also be noted that the coronavirus pandemic was not an obstacle to the registration of other candidates in the presidential elections. The first case of infection was recorded in Poland on 4 March 2020, while the decision of the Speaker of the Sejm to order elections for the office of President of the Republic of Poland was announced on 5 February 2020, i.e. one month earlier. During this period, there were no obstacles to the process of collecting signatures. The fact that the signatures under the submission of Sławomir Grzywa were collected on the sheets with the annotation inconsistent with the content laid down in the Election Code was an error made by the election committee.

In conclusion, it should be stated that the view taken by the Supreme Court challenging the resolution of the National Electoral Commission and imposing on it the obligation to accept the notification on the formation of the Election Committee of the Candidate for the President of the Republic of

Poland Sławomir Grzywa does not deserve approval. The National Electoral Commission correctly applied Article 97(2) in conjunction with Article 299(1) and Article 303(1)(3) of the EC by setting a deadline of three days for the submission of one thousand signatures of support due to the fact that initially the signatures were provided on sheets containing an annotation contrary to the requirement of the Act. The fact that there was coronavirus outbreak across the country during the period when the obligation to provide signatures existed could not be taken into account. The provisions of the Election Code do not specify how election activities should be carried out during the period of epidemic emergency, and the only possibility of suspending election procedures would then be the introduction of a state of emergency.

REFERENCES

- Banaszak, Bogusław. 2018. *Kodeks wyborczy. Komentarz*. Warsaw: C.H. Beck.
- Czaplicki, Kazimierz W., and Jarosław Zbieranek. 2018. "Komentarz do art. 97." In Kazimierz W. Czaplicki, Bogusław Dauter, Stefan Jaworski, et al., *Kodeks wyborczy. Komentarz*, 261–64. Warsaw: Wolters Kluwer.
- Jaworski, Stefan J. 2012. "Problemy prawne rejestrowania list kandydatów i kandydatów w wyborach do Sejmu i Senatu RP w świetle przepisów Kodeksu wyborczego. Uwagi na tle praktyki w wyborach parlamentarnych 2011 r." In *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, vol. 1, edited by Piotr Kardas, Tomasz Sroka, and Włodzimierz Wróbel, 260–71. Warsaw: Wolters Kluwer.