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DOI: doi.org/10.13166/HR/VCAW3684

**PROBLEMS WITH THE USE OF
ELECTRONIC TECHNOLOGIES
ILLUSTRATED BY THE ELECTORAL
PROCESS IN POLAND: A LOOK
AT THE AMENDMENTS TO THE
ELECTORAL CODE MADE IN 2023**

ABSTRACT

Technology is omnipresent and developing very rapidly. It allows people to easily cooperate, communicate and access vast amounts of data. In this paper I analyse the amendments to the Electoral Code in 2023. I seek answers to the question of how technology can affect elections understood both as a process and subjective electoral rights. I analyse both risks (e.g., excessive sharing of personal data) and benefits related to the possibility of people's greater involvement in elections. New legal regulations, resulting from the relevant act of 26 January 2023 and concerning the use of new electronic technologies, mainly by polling observers, are analysed. The analysis covers supranational standards for the protection of human rights and legal science. Choosing this approach determined the use of research methods such as formal-linguistic and dogmatic.

KEYWORDS: *amendment, modern technology, human rights, electoral law, elections*

1. JUSTIFICATION FOR THE BILL AND THE BACKGROUND OF THE AMENDMENTS

The Act of 26 January 2023^[1] significantly expanded the possibility of using tools offered by modern technology.^[2] In this regard it implements the demands made by science that proclaim a social revolution resulting from the spread of the internet.^[3] Modern technology empowers citizens to expand the scope of their individual participation in public decisions through

^[1] Act of 26 January 2023 on amending the Electoral Code Act and certain other acts (Journal of Laws of 2023, item 497). For the course of the legislative process following the submission of the parliamentary bill on amendments to the Electoral Code Act and certain other acts, Sejm Paper No. 2897, <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=37534121BC4A2E-39C12589210041A39B> (19.04.2023).

^[2] See Article 1 points 5f, 16, 17, 19, 22, 23, 33, 34, 40, 42, 45, 47, 58, 68, 74, 118, 125; Article 2 points 2, 3; Article 10(2) point 2; Article 11 points 1–6 of the Act of 26 January 2023.

^[3] KOBOSKO, M.: *Ginące zawody jako konsekwencja zmian technologicznych na polskim rynku pracy*, *Studia z polityki publicznej*, 2021, no. 4, p. 76.

manifestations of electronic democracy, such as internet voting.^[4] Electronic civic participation is one of the consequences of the digitization of democratic processes. As assessed by many researchers,^[5] the use of information and communication technologies (ICT) in the public sphere can reinforce the exercise of democratic principles in states by making it easier to engage citizens by means of electronic tools.^[6] The Polish legislator did not resolve to adopt e-voting (voting by electronic means), which should be distinguished from i-voting, which is voting via the internet.^[7]

However, special attention should be paid to the amendments designed to ensure the integrity of the electoral process and the protection of voters' personal data (personal goods in the form of voters' image). It is stated in the grounds for the bill that it strengthens the position and powers of trusted representatives and social observers, who are representatives of the public who control the actions of members of electoral commissions, especially precinct ones. Accordingly, they should be given further powers related to the recording of the vote counting process, which will allow them to properly discharge their duties.^[8]

^[4] Zapendowska-kling, K.: Cele i sposoby realizacji polityki społecznej w dobie postępu technologicznego, *Studia z polityki publicznej*, 2021, no. 4, p. 57.

^[5] Sartori, G.: The Theory of Democracy Revisited. In: Blaug, R., Schwarzmantel, R. J (eds.) *Democracy*. New York Chichester–West Sussex: Edinburgh University Press, 2016, p. 192–196; Komito, L.: E-Participation and Governance: Widening the Net, *The electronic journal of e-Government*, 2005, no. 1, p. 39–48; KNEUER, M.: E-democracy: A new challenge for measuring democracy, *International Political Science Review*, 2016, no. 5, p. 667.

^[6] Kapsa, I.: The Legal Basis of Citizen Electronic Participation in Poland, *Przegląd Prawa Konstytucyjnego*, 2021, no. 6, p. 432.

^[7] Musiał-Karg, M.: Nowe technologie w procedurach wyborczych. Uwagi na temat bezpieczeństwa elektronicznego głosowania, *Przegląd Naukowo-Metodyczny. Edukacja dla Bezpieczeństwa*, 2015, no. 4 (29), p. 140; GÓRNY, M.: I-voting – opportunities and threats. Conditions for the effective implementation of Internet voting on the example of Switzerland and Estonia, *Przegląd Politologiczny*, 2021, no. 1, p. 134.

^[8] Justification for Sejm Paper No. 2897, p. 2.

2. PROTECTING THE INTEGRITY OF ELECTIONS AND THE DATA AND PERSONAL GOODS OF VOTERS

The Act introduced amendments to the extent indicated above, and they should be considered in respect of five aspects.

First, Article 42 of the Electoral Code^[9] was amended to allow trusted representatives to record the work of precinct electoral commissions (*obwodowe komisje wyborcze*, henceforth PECs) more extensively than before, including the voting itself. EC Article 42 § 5 was amended to read as follows: From the time when the precinct electoral commission undertakes the activities referred to in § 1 until the signing of the protocol referred to in Article 75 § 1, the activities of the precinct electoral commissions may be recorded nationwide by trusted persons using their own recording equipment.^[10]

According to the new paragraph 6a of Article 42 of the EC, materials containing the recorded course of activities referred to in § 5 may be transmitted by the trusted representatives to the minister competent for computerisation by means of:

1. an electronic service made available by the minister, after authenticating the applicant in the manner specified in Article 20a(1) of the Act of 17 February 2005 on the computerisation of activities of entities performing public tasks, who [the minister] shall preserve them [the materials] until the validity of the election is established;
2. an electronic service made available in the public mobile application referred to in Article 19e(1) of the Act of 17 February 2005 on the computerisation of activities of entities performing public tasks, after authenticating the trusted representative by means of the certificate referred to in Article 19e(2a) of the Act, issued to a user of the public mobile application after authentication performed in the manner specified in Article 20a(1) of the Act, who shall store them until the validity of the election is established.

^[9] Act of 5 January 2011 – Electoral Code (consolidated text: Journal of Laws of 2022, item 1277), hereinafter cited as *EC*.

^[10] Article 1(42)(b) of the Act.

Paragraph 6b stipulates that in order to carry out the task referred to in § 6a, the minister in charge of information technology shall process images of persons visible in the material containing the recorded course of activities referred to in § 5.

Paragraph 6c provides that the trusted person shall process the material containing the recorded course of actions referred to in § 5 exclusively for the purpose referred to in § 6 or § 6a, and shall remove it immediately, after transferring it under § 6a, from the recording device and any, whether physical or virtual, storage media on which it was recorded and of which the trusted person remains the holder.

Paragraph 6d reads, The material containing the recorded course of activities referred to in § 5, not transferred under § 6 or 6a, shall be erased from the recording device and any, whether physical or virtual, storage media on which it was recorded, not later than the end of the day following the day on which the precinct electoral commission transferred the record of the vote in the precinct to the higher-level electoral commission under Article 77 § 1.^[11]

A systemic and a linguistic interpretation (the use of the conjunction ‘or’) make it clear that the trusted person may process the material (pursuant to § 6c) for the purpose stated in paragraph 6 without transferring it under paragraph 6a. In contrast, the provision of paragraph 6d is at odds with the preceding paragraph 6c. What would be the evidentiary value of the obligation to erase the recorded material on the second day after the transfer of the record of the vote?

Second, the powers analysed above were also granted to international observers. The amended Article 50 § 2 reads, The observers referred to in § 1 shall have the powers of trusted representatives, except for the right to comment on records of the vote, the right to a per diem, and a holiday entitlement.^[12]

Third, the amendment also introduced new duties imposed on the electoral proxy. Under Article 103a § 2a the electoral proxy shall convey to the minister competent for computerisation information on persons who will serve as trusted persons, giving their name, surname and PESEL identification number if they

^[11] Article 1(42)(c) of the Act.

^[12] Article 1(43) of the Act.

are to perform the activities referred to in Article 42 § 6a. Pursuant to § 2b the information referred to in § 2a may be provided on a form bearing:

1. a qualified electronic signature, a trusted signature or a personal signature, sent using an electronic service made available by the minister competent for computerisation, after authenticating the applicant in the manner specified in Article 20a(1) of the Act of 17 February 2005 on computerisation of the activities of entities performing public tasks, from the date of acknowledging the notice of appointing an electoral committee by the competent authority until the election day;
2. an advanced electronic seal of the minister competent for computerisation, sent using an electronic service made available by the minister in the public mobile application referred to in Article 19e(1) of the Act of 17 February 2005 on of the activities of entities performing public tasks, after authenticating the applicant using the certificate referred to in Article 19e(2a) of the Act, issued to a user of the public mobile application after authentication performed in the manner specified in Article 20a(1) of the Act, from the date of acknowledging the notice of appointing an electoral committee by the competent authority until the election day.^[13]

Therefore, the electoral proxy is obliged to provide information about the candidates for trusted representatives, but only if they were to submit, as shop stewards, to the minister in charge of informatization, materials containing the recorded course of activities referred to in Article 42 § 5.

Fourth, according to the amended wording of EC Article 103c § 2, the provisions of the Code on trusted representatives shall apply *mutatis mutandis* to social observers, with the exception of Article 103aa, Article 103b § 1 points 3 and 4, and Article 103ba.^[14] So, the amendment expanded the powers of three types of observers: domestic-political (“trusted representatives), domestic-social, and international.

Fifth, the amendment equipped the prime minister with significant powers.

^[13] Article 1 point (58) of the Act.

^[14] Article 1 point 61 of the Act.

Pursuant to Article 15(1)(8) of the Act the Prime Minister, having consulted the National Electoral Commission, shall make in the Journal of Laws of the Republic of Poland announcements specifying the dates for launching the service of transferring materials containing the recorded course of activities referred to in Article 42 § 5 of the act amended by Article 1, to the minister competent for computerisation under Article 42 § 6a of the act amended by Article 1, and the service of transferring information on persons who will serve as trusted representatives referred to in Article 103a § 2b of the act amended by Article 1.

Pursuant to Article 15(2), the terms referred to in paragraph 1 points 1–6 may not be shorter than 30 days from the date of making the announcement. So, the launching of the service of transferring materials and information may take place within less than 30 days from the date of making the announcement.

3. THE EXPERT ASSESSMENT OF THE REGULATIONS BY CONSTITUTIONALISTS

During the meeting of the Senate Committees of Human Rights and the Rule of Law and Petitions, the Committee of Local Self-Government and State Administration, and the Legislative Committee, that took place on 17 February 2023, Prof. Marek Chmaj presented the conclusions of an expert opinion on the constitutionality of the draft act amending the Electoral Code and certain other acts. He stressed that Article 2 of the Polish Constitution of 2 April 1997^[15] implies an appropriate *vacatio legis*. In its Code of Good Practice in Electoral Matters, the Venice Commission also stressed the need for *vacatio legis*. The Polish Constitutional Tribunal ruled that the minimum *vacatio legis* for making amendments to the election law is six months starting from entry into force until the last possible date for the President of the Republic to order elections (14 August 2023). Chmaj noted that the time for the entry into force of the Act has recently passed. Referring to the issue of the significance of

^[15] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended).

the amendments, he noted that the amendment applies to 150 articles of the Electoral Code, which is one-third of the Act, so the amendments should be deemed extensive. The Constitutional Tribunal commented on the depth and scope of the amendment. In this case, the proposed amendment should be described as significant and likely to affect the electoral process. The amendment in this regard is incompatible with Article 2 of the Constitution (appropriate *vacatio legis*). The amendments should be described as broad and comprehensive. Chmaj estimated that the Act was likely to enter into force around 15 March 2023, so the legislative silence would be broken. A team of expert constitutionalists recommended dismissing the Act in its entirety. They stressed that it would be better to return to the proposal presented after the elections and hold a calm, essential discussion. It was stressed that the experts are in favour of making elections fair, accessible to voters. The next speaker was Prof. Ryszard Piotrowski, who argued that the Act should not apply to the upcoming elections (because it would affect their outcome). The second argument is that it was established by the Sejm in violation of the standards for three readings (two readings were held on one day). He expressed his doubts about the recording and transmission of voting recordings to the Minister of Digital Affairs. The Act does not specify the purpose of the Minister's data processing. Piotrowski stressed that the materials of the trusted representatives, depending on their meticulousness, are to be transferred to the minister. One could ask why. He noted that in this way the privacy of the voter is impaired (due to the implied statutory basis for the transfer of voting recordings). Piotrowski questioned the desirability of introducing an upper age limit (70 years) for members of circuit electoral commissions, while failing to do so for members of precinct commissions. He believed it would be controversial to introduce a system whereby the Act would be applied when so ordered by the Prime Minister. Passing the Act would deepen the constitutional crisis, undermining the credibility of elections. Meanwhile, creating rules to dispel doubts in this regard is unnecessary. The next speaker was Professor Piotr Uziębło, who raised the question of voter transportation as doubtful. In this regard, one can see the advantage of rural municipalities over urban ones. So, this issue may cause the problem of unequal opportunities to vote. Another issue highlighted by Uziębło is the finding that the recording of the work

of PECs (along with the voting itself) may violate the essence of secrecy. In addition, the possibility of receiving per diems by trusted representatives is still problematic. In Uziębło's opinion, they should not receive per diems, because, as a rule, trusted representatives act on behalf of electoral committees in a majority of political parties. This would, therefore, constitute public funding. The next speaker was Prof. Andrzej Jackiewicz, who noted that what would happen between elections would be defective should the election result be determined defectively. He emphasised the broad scope of the Act: as many as 178 articles would have to be amended – this would be the most extensive amendment. In Jackiewicz's opinion, Poland is not ready to adopt e-voting, but he expressed the hope that the State Electoral Commission would be able to supervise the Central Register of Voters. He argued that the fundamental issue would be the entry of the Act into force. The validity of the Act should be determined by the Act itself, not by internal laws made at the governmental level. The professor referred to the composition and functioning of the electoral commissions, saying it would be desirable to increase their composition according to the number of voters. Referring to the status of trusted representatives, he considered it unacceptable to record the entire electoral process. He pointed out the fact that it is impossible to verify whether the trusted representatives have deleted the recording or not (they are to record the voting process and hand over the recording). Jackiewicz concluded that the Act is necessary, but it should be drafted carefully to eliminate loopholes, observing legislative silence. It follows from the conclusion of Prof. Mariusz Jablonski's opinion, read out by Senator Krzysztof Kwiatkowski, that the Act passed by the Polish Sejm on 26 January 2023 contains significant amendments to the electoral law.^[16]

^[16] Zych, R.: Krótka analiza zmian wprowadzonych w 2023 r. do kodeksu wyborczego, <https://npb.usz.edu.pl/krotka-analiza-zmian-wprowadzonych-w-2023-r-do-kodeksu-wyborczego> (19.04.2023).

4. AN ATTEMPT AT EVALUATING THE NEW REGULATIONS IN LIGHT OF GDPR

Trusted representatives are observers authorized by the proxy of the electoral committee. They are important for the observance of the basic principles of electoral law, in particular the principle of free elections and the secrecy of the vote.^[17] The institution of trusted representatives, grounded in the EC, was incorporated into the electoral procedure only at the stage of voting.^[18] Even the law in force before the amendment permitted trusted representatives to register the activities of PECs only in Poland. I claim that this is a legislative error. If we assume, then, that the ratio legis of equipping the trusted representative with this right was to ensure the transparency of the act of voting, it should also be provided equally abroad and on Polish sea-going vessels. In my opinion, the instruments of electoral law relating to the secrecy of the vote (booths, screens, transparent ballot boxes) do not affect compliance with data protection. On the other hand, the proper performance of tasks by PEC members should be attributed the greatest significance in this respect.^[19] Meanwhile, the amendment made it necessary to assess the change in terms of its compliance with data protection regulations.

As noted by Jacek Zalesny, as per the proposed wording of EC Article 42 § 5, trusted representatives and social observers are to obtain the right to record the activities of the PEC in the voting precincts. As a matter of fact, the exercise of this right by eligible entities may violate the constitutional principle of secrecy of voting (Articles 96(2), 97(2), 127(1) of the Polish Constitution). The draft does not resolve how to separate the recording of the activities of the PEC by

^[17] Sokala, A.: mąż zaufania. In: Sokala, A., Michalak, B., Uziębło, P. (eds.) *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych*, Warszawa: Wolters Kluwer Polska, 2013, p. 129-130.

^[18] Zych, R.: Instytucja mężów zaufania w polskim prawie wyborczym. Analiza na przykładzie wyborów parlamentarnych z 9 października 2011 roku. In: Zych, R. et al. (eds.) *Wyzwania współczesnego prawa wyborczego*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2014, p. 289.

^[19] Zych, R.: Implementation of the Right of Man of Trust to Register the Work of Precinct Electoral Commissions in the Context of Personal Data Legal Protection, *Przegląd Prawa Konstytucyjnego*, 2022, no. 6, p. 462.

trusted persons and social observers from the recording of voting citizens. The proposed provision creates a legal framework for the recording of the act of voting by voters and the dissemination of material containing recorded voting activities in a way that violates the rights of those recorded by trusted representatives and social observers. As such, this provision may also trigger conflicts in voting precincts between registrants and voting citizens voting.^[20] Also, the Chairman of the Office for Personal Data Protection^[21] reported objections that raised doubts of the supervisory authority about the disposition of EC Article 42 § 6a, added by Sejm Paper No. 2897. The authority responsible for the protection of personal data, in accordance with the principle of transparency (Article 5(1)(a) of the GDPR^[22]), provided a principally positive assessment of the solutions designed to clarify the legal institution of trusted representatives (or social observers) recording the activities of the PEC by means of their own recording equipment (EC Article 42 § 5). This is because the existing regulation does not address (subject to EC Article 42 § 6) the issue of how a trusted representative (or a social observer) should deal with his or her recording of PEC activities, and consequently the rules for handling the data (information) obtained in this way. In the light of rules on processing, including the protection of personal data, the provision that a trusted representative (or social observer) may process data obtained with their own recording device only for the purpose referred to in EC Article 42 §§ 6 and 6a is to be viewed positively, and is obliged to delete it once that purpose has been fulfilled (EC Article 42 §§ 6c and 6d). It becomes doubtful whether

^[20] Zaleśny, J.: Opinia prawna z dnia 17 stycznia 2023 r. o zgodności poselskiego projektu ustawy o zmianie ustawy – Kodeks wyborczy oraz niektórych innych ustaw (druk nr 2897) z przepisami Konstytucji Rzeczypospolitej Polskiej, p. 16, <https://www.sejm.gov.pl/Sejm9.nsf/opinieBAS.xsp?nr=2897> (19.04.2023).

^[21] Opinion of the Chairman of the Office for Personal Data Protection dated 16 January 2023, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/A0202DB227FF2C93C125893A0045DCA9/%24File/2897-005.pdf> (19.04.2023).

^[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ. EU. L. of 2016. No. 119, item 1, https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=uriserv%3AOJ.L_.2016.119.01.0001.01.ENG&toc=OJ%3AL%3A2016%3A119%3ATOC (20.04.2023).

the minister in charge of computerisation, as a government administration body, rather than an electoral one, is the entity obliged to make available to the trusted representatives (or social observers) an electronic service enabling the recording of materials. It seems that it would be more appropriate for the electronic service referred to in EC Article 42 § 6a to be provided by an electoral body, such as the National Electoral Commission. The above issue appears to be relevant from the point of view of the status (within the meaning of the GDPR) held by the Minister of Digital Affairs in this case (administrator, co-administrator, processing body). This status does not arise directly from EC Article 42 § 6a, and the commented provision also does not specify the purpose for which the minister would process the data provided to them by the trusted representatives (or social observers). Thus, the solution proposed in EC Article 42 § 6a raises doubts about meeting the requirement of fairness and transparency (GDPR Article 5(1)(a)).

5. AN ATTEMPT AT EVALUATING THE NEW REGULATIONS IN LIGHT OF THE CODE OF GOOD PRACTICE IN ELECTORAL MATTERS

The Code of Good Practice in Electoral Matters^[23] provides that polling stations must include representatives of a number of parties, and the presence of observers appointed by the candidates must be permitted during voting and counting,^[24] counting must be transparent. The presence of observers, candidates' representatives and the media must be guaranteed. These persons must also have access to the records. Elsewhere the Code states that a) both national and international observers should be given the widest possible opportunity to observe elections; b) observation should not be restricted to the election day itself, but must cover the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make

^[23] Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report adopted by the Venice Commission at its 52nd Session (Venice, 18–19 October 2002), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(2003\)034-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(2003)034-e) (20.04.2023).

^[24] 3.2 Freedom of voters to express their wishes and action to combat electoral fraud.

it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting; c) the places where observers must not be present should be clearly specified by law; d) observation should be welcomed by the authorities due to their duty of neutrality.^[25] Observation of elections plays an important role as it provides evidence of whether the electoral process has been regular or not.^[26] Observation should focus particularly on the authorities' regard for their duty of neutrality.^[27] Generally, international as well as national observers must be in a position to interview anyone present, take notes and report to their organisation, but they should refrain from making comments.^[28] The law must be very clear about what places observers are not entitled to visit, so that their operation is not excessively restricted. For example, an act authorising observers to visit only places where the election (or voting) takes place could be construed by certain polling stations too restrictively.^[29] Compliance with the five underlying principles of the European electoral heritage (universal, equal, free, secret and direct suffrage) is essential for democracy. It enables democracy to be expressed in different ways but within certain limits. These limits stem primarily from the interpretation of those principles, whereas the present text of the Report interprets the minimum regulations to be observed in order to ensure compliance.^[30]

It should be recalled that the European Commission for Democracy through Law (Venice Commission), established in May 1990, is a kind of consultative body of the Council of Europe,^[31] an expert body dealing with constitutional law and promoting democracy within and beyond European borders.^[32] The

^[25] 3.2 Observation of elections.

^[26] Point 86 of the Report.

^[27] Point 88 of the Report.

^[28] Point 90 of the Report.

^[29] Point 91 of the Report.

^[30] Point 114 of the Report.

^[31] Suchocka, H.: W poszukiwaniu modelu ustrojowego prokuratury (w świetle prac Komisji Rady Europy *Demokracja poprzez prawo*), Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2014, no. 2, p. 161.

^[32] Jaskiernia, J.: 70 lat Rady Europy. Nowe wyzwania w obszarze demokracji, praworządności i ochrony praw człowieka, Państwo i Prawo, 2020, no. 3, p. 97.

Commission is particularly active in the former states of the Soviet Bloc, helping to draft new constitutions and acts on electoral law.^[33] Recommendations of the Venice Commission are not legally binding,^[34] but have an impact noticed by international observers. The report on the 2020 presidential elections highlighted that Poland is a party to key international and regional instruments related to the conduct of democratic elections. Poland is also a member of the Venice Commission.^[35]

6. CONCLUSIONS

To summarize, my view is that although the *vacatio legis* resulting from the Constitutional Tribunal's decisions has not been observed, the Act – as resulting from a special kind of decision-making process – does contain a number of provisions worthy of approval, as they implement the demands previously made in doctrine, such as increasing the accessibility of polling stations for the elderly or people with disabilities. However, an evaluation of the enacted institutional solutions will be possible after they have been put into practice.

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^[33] Suchocka, H., *op. cit.*, p. 161.

^[34] Jaskiernia, J., *op. cit.*, p. 99.

^[35] Office for Democratic Institutions and Human Rights, Republic of Poland Presidential Election 28 June and 12 July 2020 ODIHR Special Election Assessment Mission Final Report, p. 9, <https://www.osce.org/odihr/elections/poland/454699> (11.10.2022).

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