

E-VOTING IN POLISH LEGAL SYSTEM— CONCLUSIONS *DE LEGE LATA* AND *DE LEGE FERENDA*

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The aim of this paper is to discuss the concept of electronic voting (e-voting) in Polish legal system with particular emphasis on conclusions de lege lata and de lege ferenda in respect of the discussed subject. The research methodology assumes the use of, in particular, an analytical method, consisting, inter alia, in the analysis of legal regulations. Results and findings point that so far e-voting has not been yet introduced (either on the constitutional, or the statutory level) in Poland. Having regard to the fact that the currently binding Constitution does not preclude such introduction (naturally provided that compliance with the constitutionally set standard of elections is met, in particular the principle of universality, directness and secrecy of voting) one has to conclude that the introduction of electronic voting into the Polish law in the longer time perspective seems to be justified. This is supported by various factors including inter alia the policy of public authorities, gradual implementation of reforms aimed at creating and developing modern public administration system (e-Government), both in the country and on the EU level, as well as considerable support for this mechanism among the public in Poland.

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INTRODUCTION

The aim of this paper is to discuss the concept of electronic voting (also known as “e-voting”¹) in Polish legal system with particular emphasis on conclusions *de lege lata* and *de lege ferenda* in respect of the discussed subject. In my opinion, it is appropriate at the outset to answer the fundamental question why is electronic voting a topic worth presenting in this article?

In this context it should be firstly emphasized that this paper is an essential component of research in the field of the institution of e-voting because in the Polish law doctrine this topic has not been comprehensively discussed and described so far. Electronic voting is also a subject worth presenting due to the fact that for some time it has been one of the key challenges facing Polish public administration and forms part of a bigger process of reforms aimed at creating a modern system of electronic administration (e-Government) in Poland. The issue of e-voting is strictly connected with the standardisation processes of e-Government systems in EU Member States.

I. THE MAIN ASSUMPTIONS OF E-VOTING

At the outset, the main assumptions behind the institution of e-voting will be presented. In this context it is worth mentioning that the e-voting is a special voting method and refers mainly to voting via electronic means². What is important, electronic voting means the process of casting electronic votes and generally encompasses a wide range of electronic technologies³. This kind of voting constitutes one of the most important instruments of the

¹ Both names will be used interchangeably for the aims of the presented article.

² M. Musiał-Karg, *Elektroniczne Głosowanie. Wybrane Dylematy Dotyczące E-votingu*, in DEMOKRACJA ELEKTRONICZNA. KONTROWERSJE I DYLEMATY 82 (Edited by M. Marczevska-Rytko, Lublin 2013).

³ See L. Porębski, *Triumf demokracji czy początek prawdziwych kłopotów? Wokół idei głosowania elektronicznego*, in Demokracja w obliczu nowych mediów. Elektroniczna demokracja, wybory przez Internet, kampania w sieci–teoria, doświadczenia, perspektywy 40 (Edited by M. Musiał-Karg, Toruń, 2013). See also K. Kenski, *E-voting*, in ENCYCLOPEDIA OF POLITICAL COMMUNICATION, SAGE knowledge, <http://sk.sagepub.com/reference/politicalcommunication/n191.xml?term=e-voting> (last visited April 9, 2017).

electronic democracy⁴.

The institution of electronic voting is widely recognised by the Polish law doctrine⁵, first, as alternative voting, and second, as only one of a few various alternative voting methods. Above mentioned term “alternative voting methods” will further be understood as additional means of casting votes (physically) by the electorate in elections, which in the systemic approach shall be differentiated from traditional election procedures known in the law of elections in many countries, which involve electronic voting only in polling stations and solely with the use of traditional voting cards, and where the election outcome is determined by traditional means. Alternative voting methods comprise especially above mentioned electronic voting, as well as voting by Proxy, voting by post and with the use of so called “mobile ballot box”.

A. *The Concept of Electronic Voting*

It should be noted that the concept of e-voting shall be regarded within a broader category of election procedures carried out with the use of electronic means, which serve as a means to both carry out the elections and calculate their results. From this point of view one may conclude that the concept of electronic voting shall be classified as a subcategory within the above mentioned category. In all cases this subcategory shall refer first and foremost to the stage of carrying out the elections (specifically to the act of casting votes), although there exists no justification for not expanding the scope of its application also to the stage of calculating results of the elections.

Importantly enough, the previously referred to category of election procedures carried out with the use of electronic means encompasses various specialised methods of conducting elections and determining their outcome. One may name the following procedures involving electronic means in this regard:

- Electronic visualisation of election results (in this procedure the computer systems play a subsidiary role in collecting and visualising elections results carried out by traditional means);
- Electronically-supported voting (here the computer systems are the

⁴ M. Musiał-Karg, *Elektroniczne głosowanie ...*, 94 (2013); M. Musiał-Karg, *Demokracja bezpośrednia w obliczu zastosowania nowych technologii*. In *Demokracja w obliczu nowych mediów. Elektroniczna demokracja, wybory przez Internet, kampania w sieci—teoria, doświadczenia, perspektywy*, 90 and following (Edited by M. Musiał-Karg, Toruń, 2013).

⁵ Compare inter alia J. Zbieranek, *Alternatywne procedury głosowania w Polsce na tle państw Unii Europejskiej*, 3(27) STUDIA BIURA ANALIZ SEJMOWYCH 102 and following (2011).

main device for casting and counting votes and the votes are cast personally by voters at polling stations on voting machines);

- Distant electronic voting (in this procedure casting a vote is accomplished via a device remaining outside the polling station).

What is important, distant electronic voting comprises especially technics such as: voting via Internet (in that case the votes are cast remotely from a random location via Internet, whereas casting and counting occurs through a central computer voting system), voting with the use of a phone (especially mobile phone) or other similar devices (voting may in this case be carried out for example via an SMS), voting with the use of television systems (especially with the use of digital or interactive television)⁶.

The last two methods, out of the three listed above (meaning electronically-supported voting and distant electronic voting), are collectively referred to as electronic voting (e-voting). Thus, it should be clearly emphasized that the concept of electronic voting (e-voting) is a specific type of election procedure carried out with the use of electronic means and may have the form of two basic procedural types⁷: electronically-supported voting and distant electronic voting. It should be also noted that voting via Internet forms the most popular method of carrying out electronic voting⁸. Moreover, it is thus noteworthy that all forms of electronic voting may be theoretically applied in all kinds of elections (e.g. parliamentary, presidential or to local authorities)⁹.

B. Advantages and Drawbacks of the Institution of Electronic Voting

Considering the above, it is also worth noting that electronic voting has both advantages and drawbacks. Among its advantages one should notice

⁶ K. W. Czaplicki, *Alternatywne Sposoby Głosowania (Zarys problemów)*, in *Alternatywne sposoby głosowania a aktywizacja elektoratu. Międzynarodowa Konferencja Naukowa. Rzeszów 26-27 marca 2007 r.* 32 (Edited by S. Grabowska & R. Grabowski, Rzeszów 2007).

⁷ Various specialised papers show certain small differences as to what methods the electronic voting encompasses. Some representatives of the doctrine mention—next to the two above mentioned methods—additionally the computer voting. In particular papers the authors adopt various divisions and apply diverging terminology than the one presented. Compare inter alia. M. Musiał-Karg, 2013. *Elektroniczne głosowanie...*, 83; R. Czajkowski & A. Kaczmarczyk, *E-głosowanie—niezbędny element elektronicznej platformy do obsługi procedur demokracji w społeczeństwie informacyjnym. E-vote—an essential element of electronic platform for services for democratic procedures in the information society*, www.logistyka.net.pl/images/articles/1375/Ref-Czajkowski.doc (last visited April 8, 2017); R. K. Gibson, *Internet Voting and the European Parliament Elections: Problems and Prospects*, in *THE EUROPEAN UNION AND E-VOTING: ADDRESSING THE EUROPEAN PARLIAMENT'S INTERNET VOTING CHALLENGE*, 34 and the following (Edited by F. Mendez & A. H. Trechsel, London New York Routledge 2005).

⁸ L. Porębski, *Op. Cit.*, 40 (2013).

⁹ Compare: M. Musiał-Karg, *Elektroniczne głosowanie...*, 84 (2013).

inter alia the possibility of resigning from voting cards, and the concurrent possibility of immediate (in theory) counting votes collected in the operational memory of the computer and their transferring to the central system. It is also essential to note that the electronic voting (provided that it occurs via the Internet) allows every citizen to cast a vote while remaining in any place and thus increases comfort in terms of election participation, making the election procedure more available and independent from existence of local polling stations.

When it comes to disadvantages of e-voting, one should point at the risk—which is not possible to be wholly mitigated—of rendering the voting procedure less transparent and auditable, in particular due to lack of direct insight of members of the voting commissions or lack of persons of trust in the process of counting votes. Also, one of the drawbacks of e-voting is the risk of computer system crashes or obtaining, by unauthorised third parties¹⁰, unjustified access to data (election decisions) collected in the computer system.

II. *DE LEGE LATA* CONCLUSIONS RELATING TO THE CONCEPT OF ELECTRONIC VOTING IN POLISH LAW

The above presented doctrinal bases of electronic voting may serve as a starting point for formulating *de lege lata* conclusions relating to the concept of electronic voting in the Polish law. An analysis of Polish law on elections is necessary in this regard both on the constitutional (namely the provisions of the Constitution of the Republic of Poland from April 1997) and statutory level (act of 5 January 2011, the Elections Code).

A. *The Institution of E-voting and the Constitution of the Republic of Poland*

As far as *de lege lata* conclusions are concerned, it shall be firstly underlined that e-voting has not been *expressis verbis* admitted, nor prohibited in the Constitution of the Republic of Poland from 2 April 1997. E-voting in the Polish legal system is thus an issue that has been omitted in the constitutional regulation devoted to voting (elections). Therefore, logically, its admission or non-admission has been left for the ordinary lawmaker to decide.

¹⁰ Specific examples of electronic voting during which this risk materialised are provided by A. Kiedrowicz, *Op. Cit.*, 191 (2007).

B. *The Institution of E-voting and Polish Statutes*

In order to supplement the above it is worth presenting that the electronic voting has not yet been introduced to the Polish legal system in any of the statutes (including the Elections Code)¹¹.

It does not mean however, that the possibility of introducing electronic voting is not being discussed in Poland. Introducing it could be achieved by means of amending the currently binding Elections Code (or by adopting a completely new statute regulating the issues of electoral law). What is more, conclusions *de lege lata* have been put forward in Poland by legal theoreticians and practitioners, as well as in the public debate, regarding introduction of the e-voting procedure, in particular voting by Internet.

III. *DE LEGE FERENDA* CONCLUSIONS RELATING TO THE CONCEPT OF ELECTRONIC VOTING IN POLISH LAW

Having that in mind it is worth to mention the most important (according to the author) *de lege ferenda* conclusions in terms of introducing the concept of electronic voting into the Polish legal system. Thus, firstly, one should consider in which way in light of the provisions of the Constitution of the Republic of Poland it is possible to establish statutory procedures of electronic voting (e-voting) *pro futuro*, and, secondly, it should be decided whether such mechanism is worthy of introduction.

A. *Introduction of E-voting in Poland Has to Be Compliant with the Constitutional Standard of Elections*

Addressing this issue, it is worth noting that the introduction of e-voting in Poland in various election procedures (e.g. parliamentary elections, local government elections and presidential elections) has to be compliant with the Constitutional standard of elections set by various provisions of the Constitution of the Republic of Poland from 1997. In particular, introduction of such mechanism will have to be compliant with the principle of directness and universality of elections and secrecy of voting.

¹¹ Referring to the question that the concept of e-voting has not been yet introduced in the Polish legal system one should also underline that the Polish electoral law specifically governs questions related to the registration of electoral data and calculating the voting results with the use of electronic devices, they are however used only on the premises of polling stations. See A. Kiedrowicz, *Op. Cit.*, 192 (2007); R. Drapiński, *Zastosowanie techniki elektronicznej w procedurach wyborczych i referendalnych*, in *Demokratyczne standardy prawa wyborczego Rzeczypospolitej Polskiej. Teoria i praktyka* (Edited by F. Rymarz, Warszawa 2005).

The provisions of the currently binding Constitution from 1997 are not very specific in terms of the so-called elections issues. They are limited to setting out the conditions of passive (art. 62) and active election rights (art. 99 in case of MEPs and senators, and art. 127 in case of the President of the Republic of Poland). At the same time, the Constitution, as it is in the case of many constitutions in other countries, includes a catalogue of principles governing the electoral law, otherwise called “election adjectives”. These principles play a guiding role in legislative practice, which has to be observed by the ordinary lawmaker if the chosen method of regulating a given issue is to be deemed compliant with the Constitution. They are all (in my opinion) the right reference point for the question about which principles of the Constitution allow to establish the concept of electronic voting *pro futuro*.

Comparing the catalogue of the so called election adjectives set forth by the lawmaker for all kinds of elections (parliamentary, presidential and elections to local government authorities) one should conclude that there are universal adjectives that are applicable at all times, independent of the type of elections carried out. Among them there are: the principle of universality, direct voting, and the secrecy of voting¹². It appears then that when answering the question based on which rules is it possible to introduce the electronic voting mechanism on the statutory level one should take at least these three constitutional principles of electoral law into consideration.

In this regard, at the very beginning one should note that the constitutional principle of universality of the elections does not form in any way a barrier for introduction of e-voting into the Polish legal system. Moreover, this principle, when interpreted as a positive dictate for creating solutions enabling the enjoyment of the right to vote, not only does not limit, but rather incentivises the Polish lawmaker to adopt e-voting as a mechanism facilitating voting and motivating towards it. More problems may *prima facie* surround the possibility of introducing electronic voting in light of the constitutional principle of direct voting and secrecy of voting, but, as one should determine, also these rules does not form a barrier for introduction of e-voting.

Discussing the constitutional principle of directness of elections one should take into consideration that the electronic voting is a departure from the order for personal voting, understood as a personal appearance of the

¹² In case of parliamentary elections, the electoral adjectives are specified in Art. 96 Sec. 2 (universality, equality, directness, proportionality and secrecy of voting) whereas in elections to the Senate they are mentioned in Art. 97 Sec. 2 (universality, directness and secrecy of voting). The catalogue of rules of the electoral law is formulated separately on the constitutional level as regards the presidential election (Art. 127 Sec. 1) and elections to the local government authorities (Art. 169 Sec. 2).

voter at the local polling stations, and corresponds with the principle of directness in its ordinary sense adopted in Poland¹³. Having regard to the current understanding of the principle of directness adopted in the doctrine and case-law in Poland it has to be explicitly noted that e-voting is not contrary to the constitutional principle of directness of elections in the contemporary sense, as well as that it boils down to concluding that direct elections are one-tier elections, so, in other words, not indirect. Cotemporary understanding of the principle of directness of elections allows thus to adopt legal solutions which constitute a departure from the personal voting. What is more, the Polish Electoral Code since 2011 envisages two other solutions which form such a departure: Voting by proxy and voting by correspondence (by traditional post). Also, it is worth to consider the fact that the presented understanding of the directness of elections, allowing for compliance of e-voting with this principle, has found its ground in the recent case-law of the Polish constitutional court (the Constitutional Tribunal)¹⁴.

Taking all of the above into consideration, a relevant caveat has to be made, namely that, despite all things, solutions which would render e-voting the primary or the only way (method) of voting appear to be unconstitutional. Thus it has to be argued that there are no barriers in the Polish law for statutorily introducing electronic voting, provided that it is only a subsidiary (complimentary) form (technique) of voting, comparable to the current mechanisms of voting by proxy and traditional voting per post (traditional post).

As far as the constitutional principle of secrecy of voting is concerned, one should remember in this context that this principle which creates an obligation for electoral administration authorities to organize voting in such a way that the voting procedure guarantees the secrecy of the voter's decisions, upon introduction of e-voting will necessitate the obligation of the Polish authorities to safeguard necessary technical protections. E-voting may not exempt the Polish authorities from the obligation to implement and maintain technical and procedural solutions designed to safeguard secrecy of voting.

B. The Institution of E-voting in Poland Seems to Be Worthy of Introduction into the Polish Legal System in the Longer Time Perspective

Formulating conclusions *de lege ferenda* in terms of introducing

¹³ This rule may be described as the rule of directness *sensu largo* (as opposed to the directness *sensu stricto* which does not encompass the principle of personal voting).

¹⁴ See the ruling of the Constitutional Tribunal from 20 July 2011, case no: K 9/11.

electronic voting into the Polish legal system one should therefore point out, that such institution seems to be worthy of introduction in the longer time perspective. In the light of this (in my opinion) introduction of a solution allowing the voters to vote via the Internet shall be considered at the very beginning.

Despite certain undeniable and already underlined above drawbacks of this concept, the validity of introduction of e-voting into the Polish legal system results from its many advantages confirmed by experiences of other countries which have already implemented this method of voting, including the United States, which are the leader of use of electronic methods of voting¹⁵, or Estonia¹⁶, where in 2005 first state elections (local government elections) with the use of Internet were organised (Internet-based elections)¹⁷. Regardless of some cultural or legal differences, the experiences of such countries may set a good reference point for the direction of the Polish reform of the public administration, and also as for a way of regulating the e-voting procedures.

Introducing electronic voting into the Polish legal system is all the more justified due to the fact that introduction of e-voting together with other similar reforms may enable creating a modern system of the public administration (e-Government). What is important, the reforms aimed at creating e-Government form particularly important challenges for Poland, since Poland, as one of the Member States of the EU, is obligated together with other Member States to take gradual steps aimed at implementing mutual standardisation of e-Government systems within the EU.

Certainly the introduction of the e-voting procedures into the Polish legal order could be in this context a crucial factor facilitating the development of a modern system of the public administration (e-Government) not only in the scale of the country but also on the EU level. It is worth noting that other similar procedures are right now adopted in the

¹⁵ Compare: M. Musiał-Karg, *Elektroniczne głosowanie...*, 84 (2013).

¹⁶ U. Madise & T. Martens, *E-voting in Estonia 2005. The First Practice of Country-Wide Binding Internet Voting in the World*. In *Electronic Voting 2006. 2nd International Workshop Co-organized by Council of Europe, ESF TED, IFIP WG 8.5 and E-Voting CC, August, 2nd-4th, 2006 in Castle Hofen, Bregenz, Austria* 15. (Edited by R. Bonn Krimmer. Gessellschaft fur Informatik 2006).

¹⁷ It needs to be noted that—apart from the United States and Estonia—also other countries, including inter alia Germany, the Great Britain, the Netherlands, Austria, Switzerland, Brasil and Paraguay—with different results—have tried to introduce the mechanism of electronic voting. See M. Musiał-Karg, *Elektroniczne głosowanie...*, 84 (2013); A. Kiedrowicz, *Op. Cit.*, 190 (2007); K. Młyńczak-Sachs, *Głosowanie elektroniczne w Holandii—od maszyn głosowania przez wybory internetowe po kartki i ołówki*. In *Demokracja w obliczu nowych mediów. Elektroniczna demokracja, wybory przez Internet, kampania w sieci—teoria, doświadczenia, perspektywy*, 66 and the following (Edited by M. Musiał-Karg, Toruń 2013).

EU law, for example the electronic filing of statements for support of the European Citizens' Initiative may constitute a good reference point for solutions adopted in EU Member States (also for Poland) in respect of e-voting.

The introduction of electronic voting mechanism into the Polish legal order, in particular voting via Internet, appears to be, for the moment, justified also due to the existence of a relatively broad public support in Poland for this election method. As results from the available polls in Poland, the possibility of voting per Internet is supported by 76% of Poles¹⁸.

I am though convinced that it shall be consciously spotted, that the potential introduction of the e-voting institution into the Polish legal system would have to be preceded by—as in Great Britain—extensive and reliable studies of the real possibilities of application, in the Polish systemic conditions, of the above mentioned solutions considering technological requirements (especially security), as well as by a thorough analysis of the costs of implementation of this solution¹⁹. It would allow to avoid negative consequences of implementation of an underdeveloped, too burdensome for the state budget, procedure of electronic voting.

CONCLUSION

In summary, so far e-voting has not been introduced (either on the constitutional, or the statutory level) in Poland. Having regard to the fact that the currently binding Constitution does not preclude such introduction (naturally provided that compliance with the constitutionally set standard of elections is met, in particular the principles of universality, directness and secrecy of voting) one has to conclude that, in the long run, the institution of electronic voting is worthy of introduction into the Polish legal system. This is supported by various factors including *inter alia* the need for gradual implementation of reforms aimed at creating and developing modern public administration system (e-Government), both in the country and on the EU level, as well as considerable support for this mechanism among the public in Poland. Therefore, in my opinion, e-voting should be introduced in the future into the Polish legal system.

At the same time, however, one should bear in mind that the introduction of e-voting must be correlated to ensuring a high level of

¹⁸ Informations are available at:

<http://zmieniacunie.money.pl/ewybory;glosowanie;przez;internet;recepta;na;niska;frekwencje,168,0,1535400.html> (accessed April 9, 2017).

¹⁹ J. Zbieranek, *Op. Cit.*, 115.

security for such a voting method and the necessity of creation and operation of a complicated system, completely safe and preventing fraudulent tempering, that would process data gathered via electronic means. Possible introduction of the electronic voting into the Polish legal system shall be preceded by thorough studies of the costs of implementation of this solution as well as by extensive and reliable studies of the real possibilities of application, in the Polish systemic conditions, of the above mentioned solutions in the light of meeting all of the technological requirements.

Moreover, one should be aware that the introduction of such an institution into the legal system is primarily a political decision and, therefore, it should be taken into account that a significant role in the possibility of actually introducing such an institution into the legal system is played by the politicians.