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## Institution of Non-Partisan Election Observers in the Polish Electoral Law

### Institucja społecznych obserwatorów wyborów w polskim prawie wyborczym

#### • Abstrakt •

Artykuł stanowi omówienie nowej instytucji polskiego prawa wyborczego, jaką są społeczni obserwatorzy wyborów. Instytucja ta, obok znanych polskiemu prawu wyborczemu mężów zaufania oraz międzynarodowych obserwatorów wyborów, stanowić ma kolejny instrument społecznej kontroli procesu wyborczego, wpływając tym samym na zwiększenie rzetelności i uczciwości wyborów. Instytucja ta została wprowadzona ustawą z dnia 11 stycznia 2018 r. o zmianie niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych.

Dokonana analiza pozwala na stwierdzenie, że na ocenę społecznych obserwatorów wyborów duży wpływ będzie miała jednak praktyka, na którą potrzebny jest ich udział przynajmniej w pełnym cyklu wyborczym.

**Słowa kluczowe:** Kodeks wyborczy; prawo wyborcze; obserwator społeczny; mąż zaufania; międzynarodowy obserwator wyborów

#### • Abstract •

The paper discusses a new institution in the Polish electoral law – namely, non-partisan citizen election observers. This institution, next to scrutineers and international election observers known previously to the Polish electoral system, is intended as another instrument of social control of the electoral process, increasing reliability and fairness of elections. This new institution was introduced by the Act of 11 January 2018 on amendments to some acts in order to increase participation of citizens in the processes of election and functioning and controlling of certain public bodies.

The analysis performed allows to conclude that final evaluation of the role played by non-partisan election observers will be heavily influenced by observation of how this institution is used in actual elections, at least over one full electoral cycle.

**Keywords:** Election Code; electoral law; non-partisan citizen observer; scrutineer; international election observer

Elections are in every respect a fundamental component of democracy, where “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote” (Schumpeter, 2010, pp. 336–337). Elections play a key role in expressing the will of the sovereign, “translating citizens’ preferences into public policies” (Lijphart, 1984, p. 3), shaping public confidence levels, stabilizing political systems, as well as offering democratic legitimacy to the authorities elected as a result (Sokół, 2007, pp. 19–20). Therefore, to ensure correctness, fairness and integrity of the electoral process, in addition to existing legal norms it is important to also create appropriate institutional guarantees. Undoubtedly, one of such institutions ensuring social control of the electoral process – apart from scrutineers and international election observers known previously to the Polish electoral law – is the new instrument of non-partisan citizen election observers.

The purpose of this paper is to present the institution of non-partisan election observers in the Polish electoral law through analysis of the applicable regulations, also of non-statutory level. It is worth noting that in the Polish electoral law, the institution of national non-partisan citizen election observers is a novelty. The legislator introduced this solution by changing the Act of 5 January 2011 – The Election Code by means of the Act of 11 January 2018 on amendments to some acts in order to increase participation of citizens in the processes of election and functioning and controlling of certain public bodies (*Journal of Law of 2018*, item 130).

Independent election observers are an institution known and widely used in the world. In the Polish electoral law, it was present already in the interwar period, embodied in the institution of scrutineers (originally called representatives of voter groups), whose role was intended to ensure fairness of the electoral process (Buczkowski, 1998, pp. 277–278; Skotnicki, 2018, p. 88–90). Next, a similar instrument appeared in the legal system in the last months of existence of the Polish People’s Republic as a result of Round Table negotiations on implementation of amendments to the electoral law (Szukalski, 2019, p. 7). The institution of scrutineers was formally re-introduced by the Act of 7 April 1989 – Electoral Law on elections to the Sejm of the People’s Republic of Poland for the years 1989–1991, the 10<sup>th</sup> term (Jarosz, 1989, pp. 4–8). Other comparable solutions were introduced already in the era of the Third Polish Republic. The indicated amendment to the Election Code strengthened the institution of scrutineers (partisan observers) by adding art. 103a and 103b respectively.

The Polish Election Code adopted in 2011 established in Art. 50 the institution of international election observers. In practice, such observers functioned in Poland previously as a result of permission granted by the National Electoral Com-

mission (Pyrzyńska, 2015). Formal introduction of this institution into the Polish electoral law was required by Poland's international obligations arising from the Document of the Copenhagen Meeting of the Conference on Security and Cooperation in Europe (currently OSCE) of 29 June 1990 in which it was recognized that such a solution would strengthen the electoral process (Banaszak, 2015). At the same time, international observers were granted the same scope of rights as national partisan observers (scrutineers), with the exception of the right to enter comments into the protocol (article 50 §2 of the Election Code). However, elections at the time could not be monitored by national independent observers representing entities other than (partisan) election committees, as only the latter were able to propose scrutineers (see: Skotnicki, Wrzalik, 2019). The expectation for such an institution to exist resulted from the Code of Good Practice in Electoral Matters adopted by the Venice Commission at its 52<sup>nd</sup> Session on October 18–19, 2002, which in art. 87 provides for existence of three groups of election observers: partisan national observers, non-partisan national observers and (non-partisan) international observers (*O demokracji, obywatelstwie i partycypacji*, 2014). A number of other international documents also focus on the function of social electoral observers and importance of national observers for the electoral process, including the Declaration of Global Principles for non-partisan election observation and monitoring by citizen organizations and Code of Conduct for non-partisan citizen election observers and monitors, announced on April 3, 2012 at the forum of the United Nations. The Declaration was subsequently approved on June 21, 2012 by the Venice Commission. Particularly important in this case seems to be the Code of Conduct for non-partisan citizen election observers and monitors, which contains 10 principles that should be followed by non-partisan observers (Declaration of Global Principles for non-partisan election observation...).

Lack of institution of national non-partisan election observers in Poland was also pointed out in consecutive mission reports of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR; for more see: *Republic of Poland Parliamentary Elections...*, 2012). Item Five of ODIHR Priority Recommendations from 2016 reads explicitly: “The Election Code should provide for full access of citizen non-partisan observers to all stages of the electoral process in line with the OSCE commitments and other international obligations” (*Republic of Poland Parliamentary Elections...*, 2016). Shortly after publication of the OSCE/ODIHR mission report in 2016, the Polish Ombudsman (Commissioner for Human Rights) Adam Bodnar sent – on March 9 – a letter to the Chairman of the National Electoral Commission (NEC) Wojciech Hermeliński concerning the failure to implement the institution of national non-partisan citizen elec-

tion observers in the Polish electoral law. In response to the Ombudsman's letter, the Chairman of the NEC explained that, in the current legal framework, the control process takes place only through electoral committee-nominated scrutineers. At the same time, he emphasized the need to amend the provisions of the Election Code in order to allow for introduction of citizen observers, impartial and independent of any electoral committees. A change to the Election Code act would be required, it was pointed out – what exceeded the scope of powers granted to the NEC. However, the chairman of the National Electoral Commission volunteered his participation in parliamentary work if a draft amendment bill addressing that matter was submitted to the Sejm (*Petition for Introduction of the Institution...*, 2016).

Two petitions for introduction of the institution of non-partisan citizen observers have also been submitted. In the first of them, filed in 2011 by a member of the Young Diplomats Forum Sławomir Szyszka, the author demanded legislative amendments enabling observation of elections and the work of electoral bodies in Poland – including constituency electoral commissions in voter circuits – by independent, non-partisan national observers. The petitioner emphasized that “independent national observers representing Polish NGOs should enjoy a similar status as international election observers” and he considered the lack of such an instrument in the Polish law to be “an oversight breaching the principle of justice”. In addition, Szyszka emphasized that this oversight meant that Poland was not fulfilling the obligations arising from its signing of Art. 8 of the Document of the Copenhagen Meeting, art. 26 of the OSCE Istanbul Summit Declaration from November 18–19, 1999, and Art. 25 of the Charter for European Security adopted at this Summit, which included provisions regarding the right to observe all stages of the electoral process, including by non-partisan national citizen observers. After consideration of the petition by the Senate Committee on Human Rights, the Rule of Law and Petitions on February 21, 2012, however, it was not proceeded upon (*Petition to Introduce Legislative Amendments Enabling Observation...*, 2011).

In the second petition (*Petition to Introduce Amendments to the Election Code Establishing...*, 2016), filed on 22 March 2016 by Karol Breguła and Tymon Radzik, the authors demanded introduction to the Election Code of the institution of national citizen election observers not associated with electoral committees. The authors of the petition referenced the correspondence exchanged by the Polish Ombudsman and the Chairman of the National Electoral Commission, both of whom supported the notion of establishing the institution of national non-partisan observers and offered their support and aid for possible

actions undertaken by the legislator to implement the solutions proposed in the petition.

A number of non-governmental organizations also called for introduction of the institution of national non-partisan citizen observers into the Election Code – they were, inter alia, the Stefan Batory Foundation, Fundacja Odpowiedzialna Polityka (the Responsible Politics Foundation), Fundacja ePaństwo (the eState Foundation), the Code for Romania Foundation and the Jagiellonian Club Association. It is also worth emphasizing that after official establishment of the institution of non-partisan citizen observers, the aforementioned organizations became involved in an educational campaign popularizing this new control instrument before the local elections in 2018.

It is worth recalling in more detail in particular the activities of the Stefan Batory Foundation. The Foundation published a Guide for Non-partisan Citizen Observers right before the 2018 local government elections, which was distributed free of charge. This guide presented the applicable provisions of the electoral law and basic guidelines regarding organization of monitoring/observation, focusing on activities that non-partisan citizen observers could undertake on the voting day itself, at the polling station. It also provided a template observation report form that observers could use to record their comments from the monitoring, and a check-list to help them prepare for observation prior to election day and conduct the observation on the day itself (Bijoś, 2018, pp. 4–7; Szukalski, 2019, p. 11).

The institution of non-partisan citizen election observers was provided for in the Election Code in the new Chapter 11a “Scrutineers and non-partisan citizen observers” (Articles 103a–103c). The role of scrutineers (i.e. partisan observers) is regulated in art. 103a, while art. 103c provides for the institution of non-partisan observers. §1 of the latter indicates who can nominate such observers and the types of electoral commissions to which a scrutineer can be appointed, while §2 regulates their role and tasks. It is undeniable that the provisions in question are laconic in nature and give rise to doubts in interpretation.

The right to appoint non-partisan citizen observers is vested in “associations and foundations registered in the Republic of Poland, whose statutory purposes include strengthening democracy, civil rights and contributing to the development of civil society”. Determining whether an entity nominating a given observer is an association or a foundation should not be a problem, as the organization’s legal form and thus its right to appoint a citizen observer can be checked in the National Court Register (for this purpose, the search engine available on the website of the Ministry of Justice searching through all entities entered in the National Court Register can be used). However, when interpreting the notion of “association” or “foundation”

itself in more detail, one should primarily be guided by provisions of the Act of 7 April 1989 – Law on Associations and the Act of 6 April 1984 on Foundations. In addition, as the legislator indicates directly, there are additional requirements that both associations and foundations must meet to be able to nominate non-partisan citizen observers. Namely, the aforementioned art. 103c §1 of the Election Code puts down as prerequisite for these to be entities “whose statutory purposes include strengthening democracy, civil rights and contributing to the development of civil society”. Therefore, there should be no doubt that the right to appoint citizen observers is granted to entities whose mission is oriented towards the values indicated above, and the corresponding goals must be included in the statutes of a specific association or foundation. Unfortunately, the Election Code does not regulate who and when is to verify whether the nominating entity meets the established criteria and what document(s) should the citizen observer present. There is also no explicit reference as to what institution could possibly regulate this in more detail. The required details can, in the end, be found in the resolution of the National Electoral Commission of 17 September 2018 on Guidelines for constituency electoral commissions regarding voting in voting circuits, regulating the tasks and mode of preparation as well as carrying out the voting in the elections to local government bodies on 21 October 2018 (see: *Guidelines of the National Electoral Commission*, 2018).

A template certification of a citizen observer can be found in the annex to the NEC resolution of 30 July 2018 on citizen observer certification template. Such a certificate should include: name of the association or foundation with the right to nominate citizen observers, number under which this entity was entered into the National Court Register (NCR), name(s), surname and PESEL identification number of the observer in question, name of the electoral commission to which they are appointed, its number and locality where the commission is seated, as well as identification of the relevant election and its date. The certification must be signed by a person empowered to act on behalf of the body representing the association or foundation externally (*Official Gazette of the Republic of Poland of 2018*, item 795). Registration of a non-partisan citizen observer can be done even the day before election. A citizen observer appointed to a constituency electoral commission in a voting circuit established abroad may be provided with a relevant certification even on the very day of the election, by fax or electronically through the consul of the Republic of Poland (article 103a §4 of the Election Code). Certification for a non-partisan citizen observer is always issued for a specific election; when a second round of voting is necessary there is no need to issue a new certification for the same person.

In terms of conditions that must be met by a candidate to the role of citizen observer, the Election Code invokes regulations applicable to scrutineers (partisan observers) to be applied also for non-partisan observers.

As citizen observer, in accordance with art. 103c §2 in conjunction with art. 103a §3 of the Election Code may serve a person with active voting capacity for elections to the Polish Sejm. Thus, any Polish citizen at least 18 years of age on the election day not convicted by a final court judgment, incapacitated or deprived of public rights or voting rights can step into the role. In addition, the person serving as citizen observer cannot stand as a candidate for election or be at the same time an electoral commissioner, electoral representative, financial representative, electoral officer or member of an election commission. Furthermore, in accordance with art. 55 §4 and art. 53 in conjunction with art. 103c §2 of the Election Code, the observer may also not serve as proxy of a disabled person or be a person providing technical assistance to a disabled voter during an election. It should be noted that during the elections to the European Parliament and local government elections, citizens of the European Union who, pursuant to art. 10 §1 pts 2, 3a and 4 of the Election Code have the active right to vote in elections to the European Parliament and vote and stand as candidate in municipal elections cannot be appointed as citizen observers. As in the case of scrutineers, the citizen observer function expires in the event of resignation by the observer, their death, their giving consent to becoming a member of the electoral commission, standing for election or assuming the function of a proxy, representative, electoral commissioner or election official and in the event of revoking of the nomination by the association or foundation that appointed the observer (article 103c §2 in connection with Article 103a §5 of the Election Code).

On the day of the election, a citizen observer must present to the chairman of the election commission: their identity document and, as mentioned above, a certification issued by the association or foundation nominating them as their observer, drawn up according to the template established by the National Electoral Commission in the Resolution of 30 July 2018 on citizen observer certification template (*Official Gazette of the Republic of Poland of 2018*, item 795). A member of the commission shall verify the right of the nominating organization to appoint non-partisan citizen observers. Such checks can be made with the use of the search engine made available on the website of the Ministry of Justice at: <https://erks.ms.gov.pl/web/wyszukiwarka-krs>. Where such verification is impossible for technical reasons or where other doubts arise, the electoral commission shall ask the appropriate higher-level territorial electoral commission or the local municipal office for assistance in this matter.



A non-partisan citizen observer present at the polling station premises is obliged to wear a badge with their name, surname, function and name of the association or foundation they represent (see: Announcement of the National Electoral Commission of 15 October 2018, ZPOW-713-10/18). The badge may not contain any partisan, campaign-linked elements and should be prepared by the entity that appointed the observer. In the event that the non-partisan observer does not have an appropriate badge, the relevant electoral commission should make available to that person e.g. paper, scissors and stationery needed for the badge to be made onsite (see: Announcement of the National Electoral Commission of 19 October 2018, ZPOW-501-189/18). The chairman of the committee informs the citizen observer of their rights and indicates the place on the polling station premises from which they will be able to observe the activities of the constituency electoral commission.

The Election Code explicitly sets out the rights of non-partisan observers, invoking once more the powers vested in scrutineers as the model applicable to non-partisan citizen observers as well. First, observers have the right to be present during all activities performed by the commission to which they have been appointed (article 103b §1 of the Election Code); second, they have the right to be present at the polling station throughout the entire process: during preparation for voting (between 6.00-7.00am) and during voting itself (between 7.00am-9.00pm); third, they have the right to be present also when the voting results are being determined and the relevant data is entered into the electronic data transmission network; fourth, they have the right to receive a copy of both protocols, as well as the right to record, using their own recording devices, the work of the commission before opening of the polling station (until 7.00am) and after its closing (from 9.00pm) while voting results are being determined without prior notification of their intent to make such recordings (see: art. 42 §5 in conjunction with art. 103c §2 of the Election Code; see also: Announcement of the National Electoral Commission of 11 June 2018, ZPOW-501-80/18). Non-partisan observers may not, at any stage of the polling, look at ballot papers and voters' lists, nor may they assist voters (including persons with mobility problems, the blind and visually impaired) in casting a vote. They may not give instructions on how to cast a valid vote (including by pointing out errors), they also cannot (unlike scrutineers) enter into the protocol comments containing specific allegations as to the improper work of the commission; they also cannot be present when the final protocol from the polling station is being transported and handed over to the appropriate higher-level election commission. Most importantly, a non-partisan observer cannot reveal their political preferences, even indirectly. When monitoring the election,



the non-partisan citizen observer should remain equally distanced from all political forces involved in the electoral process. The task of such an observer is to carefully monitor whether no political agitation takes place at the polling station and in the building in which this station is located, that there are no campaign posters displayed and that no leaflets or brochures are distributed (for more see: Skotnicki, Wrzalik, 2019).

Undoubtedly, it is crucial for a non-partisan observer to be guided by several principles in performance of their tasks, such as impartiality, competence, reliability, respect and distance (see: Skotnicki, Wrzalik, 2019; Bijoś, 2018).

To conclude the discussion of the institution of non-partisan citizen election observers, it should be stressed that assessment of this legal instrument is not easy at this point in time.

From a formal point of view, introduction of this institution was a response to postulates raised by the Polish academic community and non-governmental organizations over the years. Undoubtedly, introduction of non-partisan citizen observers into the legal framework also fulfilled expectations of the international community regarding the need to appoint impartial national observers, resulting primarily from art. 8 of the Document of the Copenhagen Meeting from 1990. This new institution, next to scrutineers and international election observers known previously to the Polish electoral law, is intended as another instrument of social control of the electoral process, increasing reliability and fairness of elections, and may also contribute to emergence of a separate principle of electoral fairness among other principles of electoral law (see: Kryszewski, 2016, pp. 21 et seq.), of which it will undoubtedly be an important guarantor.

Finally, one may wonder whether the competences of non-partisan national observers and the manner in which they should be carried out are properly defined. One repeated question is whether the Polish legislator should not strengthen their position by expanding their powers provided for in the Election Code, e.g. by adding the right to submit comments to the protocol (as in the case of scrutineers).

The first Polish experiences with this institution seem to be positive. However, a deeper reflection and formulation of *de lege ferenda* postulates will only be possible after this institution is present in electoral practice for a longer time. It should also be remembered that the eventual evaluation of this institution will largely depend on involvement of the public in various elections, as well as on how many associations and foundations will want to nominate such observers during the next election.

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