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Voting Rights for Immigrants. Reflections on the Background of EU Citizenship

Abstract: Voting rights are traditionally associated with the institution of citizenship. This relationship, however, is subjected to change, i.e. under the influence of globalization and international migration. The scope of migration flows raise challenges for modern electoral law as well as for democracy itself. The subject of this article is the issue of voting rights in the context of the migration phenomenon in the European Union. The considerations in this article include the voting rights of immigrants (third-country nationals and migrants) and citizens of EU member states within the framework of free movement of persons. This distinction becomes necessary and highlights asymmetric solutions for the political participation of immigrants from the EU and beyond.

Keywords: migrants, voting rights, European Union

Słowa kluczowe: migranci, prawa wyborcze, Unia Europejska

1. Introduction

The active and passive election right is traditionally connected with the institution of citizenship. This relation, however, is subject to some specific changes, among others, under the influence of globalisation and resulting international migrations. The scale of migration flows poses challenges for today's electoral law, and for democracy itself¹.

1 T. Hammar, in his work "Democracy and the Nation State: Aliens, Denizens, and Citizens in a World of International Migration" (1990) posed a thesis that the existence of a large group of immigrants – long-term residents with access to labor market as well as social and social security benefits, but without political rights (so-called *denizens*), who cannot decide on the shape of politics, can be harmful to democracy; as: S. Łodziński, D. Pudziałowska, M. Szaranowicz-Kusz, Prawa wyborcze dla cudzoziemców – tak czy nie? Analiza procesu przyznawania praw

The subject of this article is the issue of election rights in the context of migratory phenomena in the European Union, which is an area with a long history of diverse migrations, remaining an attractive destination for migrants from third countries. At the same time, European Union is unique for its fundamental right of free movement of persons. Therefore, deliberations presented herein will encompass political rights (in an approach limited to election rights) of immigrants – citizens of third countries, as well as migrants – citizens of EU member states exercising the right of freedom of movement of persons. The above distinction becomes necessary and highlights the asymmetry of solutions in the scope of political participation² of migrants from EU and from outside EU.

As a EU member state, Poland is included in the stream of above-mentioned processes. Although the scale of migration in Poland justifies concentration around the phenomenon of intensified – after Polish accession to the EU – emigration of Polish citizens, further deliberations require a change of the standpoint, highlighting the fact that it is also under the effect of integration with the EU that the Polish transformation from a typical emigrant country into an emigration-immigration country is taking place; and in the light of the projected sharp drop of labour supply by 2060, a wider opening to the inflow of migrants may become a necessity. However, Poland as a destination country is still less attractive than the so-called ‘old’ EU countries. The challenge lies in increasing the country’s attractiveness taking into account actions for broader political participation of immigrants. The granting of the active and passive election right constitutes a pronounced expression of a country’s attitude towards immigrants. Also, it is worth noting that this solution is inexpensive³.

2. Citizenship and electoral rights in the subjective sense

Citizenship is a legal relation which connects an individual with the state. This relation results in rights, rights reserved for the citizens of such state, which include the influence on the selection of authorities⁴. Citizenship should be considered the

wyborczych na poziomie lokalnym cudzoziemcom z państw trzecich w wybranych krajach Unii Europejskiej, Warszawa 2014, p. 9.

2 As M. Trojanowska-Strzęboszewska rightly notes, enjoying political rights by immigrants cannot be completely equated with their political participation; enjoying certain rights is a prerequisite for participation; as: M. Trojanowska-Strzęboszewska, *Prawo do udziału w wyborach na szczeblu lokalnym jako forma partycypacji politycznej imigrantów. Polska na tle innych krajów europejskich*, “Political Preferences” No. 7/2013, p. 97. Having consideration to the above, further deliberations in the article on granting electoral rights to immigrants shall be understood as one of premises for increasing their political participation.

3 K. Groenendijk, *Local Voting Rights for Non-Nationals in Europe: What We Know and What We Need to Learn*, Bruksela 2008, p. 8.

4 A. Młynarska-Sobaczewska, *Wolności i prawa człowieka i obywatela*, (in:) D. Górecki (ed.), *Polskie Prawo Konstytucyjne*, Warszawa 2012, p. 86-87.

basic premise for the holding of election rights; exceptions from this rule are rare⁵. However, the political rights (including the active and passive election right) do not have to necessarily be connected with the institution of citizenship. The autonomous nature of political rights (including election rights in the subjective sense) is proven, among others, by the granting of such right to individuals not being citizens of a given country. Some interesting solutions can be derived from previous eras as well as from contemporary relations in the scope of citizenship and political rights, varying across countries. As an example, it is worth making a reference to the solution from the French colonial empire, whereby, in 1946, under the Lamine Guèye Act, election rights were granted to the residents of French colonies without granting them citizenship⁶. In the light of the studies of K. Groenendijk conducted in 2008, seventeen states (out of 29 studied European states) granted the active election right to specific categories of foreigners from third countries in local elections⁷.

The group of people entitled to vote is derived from the principle of universal suffrage. This principle was devised in 19th century, when it was assumed that not all residents of a given country should have the right to express themselves as a nation. As a result, the ancient concept of citizenship qualification was assumed by designating a group of entities which were entitled to participate in the political life⁸. It is worth highlighting that election qualification is understood in two ways. This term may mean that, firstly, each premise conditioning the use of subjective election rights by an individual (such as qualification based on gender or education; or such as today's election qualifications, based on nationality, age, and domicile). Secondly, election qualification in the doctrine is understood as a discriminating exclusion from subjective election rights based on the lack of required qualifications (characteristics). However, the advocates of this view perceive citizenship qualification, and not the election qualification, as a natural and non-discriminatory exclusion⁹. It is worth mentioning that it is the opinion of the European Commission for Human Rights that not granting election rights to foreigners complies with the first Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰.

5 M. Jagielski, Prawo wyborcze, (in:) R. M. Małajny (ed.), Polskie prawo konstytucyjne na tle porównawczym, Warszawa 2013, p. 259.

6 D. Pudziałowska, Obywatelstwo w procesie zmian, Warszawa, 2013, p. 76.

7 K. Groenendijk, Local Voting Rights..., *op. cit.*, p. 3.

8 M. Jagielski, Prawo..., *op. cit.*, p. 257.

9 B. Michalak, A. Sokala, P. Uziębło, Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych, Warszawa 2013, p. 26.

10 Article three of the first additional protocol reads: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'; (Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Dz.U. z 1993 r. Nr 61, poz. 284 [Journal of Laws of 1993 No 61 item 284]).

3. Citizenship, electoral rights and European integration

The institution of citizenship is subject to the dynamics exerted by the development of instruments of international law¹¹ or the increasing integration within the European Union. The Maastricht Treaty (Article G.C)¹², setting forth a new stage in the process of creating stronger ties between the nations of EU member states, introduced European Union citizenship for all citizens of EU member states, and granted them a number of rights. According to the changes introduced by the Maastricht Treaty into the Treaty Establishing the European Community (Article 8b)¹³, each citizen of the European Union residing in a member state who is not a citizen of such state has the right to vote and stand as a candidate in local elections in a member state in which such given person resides.

Furthermore, under Article 8b par. 2 of the EC Treaty, each citizen of the European Union residing in a member state who is not a citizen of such state obtained the right to vote and stand as a candidate in elections to the European Parliament in the member state in which they reside.

It is worth highlighting that the granting of the active and passive election right to citizens of EU member states residing in a different member state who are not citizens of such different member state is connected with the right of freedom of movement and residence in the territory of EU member states. Such reasoning transpires from the provisions of Directive 94/80/EC¹⁴. It was duly considered that the barriers for migrating EU citizens (e.g. for the purpose of performance of work) may result from limited abilities to participate in the social and political life of the region of residence¹⁵.

11 It is worth to mention for example The Convention on the Participation of Foreigners in Public Life at Local Level, signed in Strassbourg on 5 February 1992, where Parties (under Article 6 section 1) undertook to grant active and passive electoral right in local elections to foreigners lawfully and habitually residing the territory of the given state for 5 years; as: Convention on the Participation of Foreigners in Public Life at Local Level, "European Treaty Series", No. 144.

12 Treaty on European Union, Dz.Urz. UE 191 z 29.7.1992, p. 7 [Official Journal of the European Union 191 of 29 July 1992, p. 7].

13 Treaty establishing the European Community, Dz.Urz. UE 224 z 31. 8. 1992, p. 11 [Official Journal of the European Union 224 of 31 August 1992, p. 11].

14 Council Directive 94/80 of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (Dz.Urz. UE, L368 z 31.12.1994, p. 3) [Official Journal of the European Union L368 of 31 December 1994, p. 3].

15 However, the Directive provides for some limitations – in the case of a passive electoral right member states may provide that only their own nationals may hold the office of elected head (Article 5 section 3 of the Directive). Additionally, in accordance with the Directive, a member state may require a person submitting her or his application to stand as a candidate, having a citizenship of other member state, a declaration (or even a certificate from her or his home state) that she or he has not been deprived of the right to stand as a candidate in her or his home member state (Article 9 of the Directive). Similarly, in the case of exercising a passive electoral right in elections of the European Parliament, a citizen of the EU is obliged to submit a certificate confirming that she or

It becomes necessary to highlight that the argument about the lack of political rights as the barrier for migration did not, however, constitute a premise for the EU law to grant election rights to immigrants – citizens of third countries. At the same time, in 1990s, it was noticed that a lack of acceptance of political activity of foreigners (citizens of third countries) contravened the contribution of economic immigrants and the exploitation of their potential on the labor market¹⁶. A significant number of European countries opened a debate concerning the possibility to grant election rights to immigrants; also, it was signaled that the law of EU member states (and selected Swiss cantons) provided for such rights to be granted to immigrants from third countries. Such a direction of changes – granting election rights to citizens as part of an integration group, followed by positive changes in the scope of granting election rights to citizens from outside the group – evokes an instinctive comparison to the experiences of Nordic Integration.

4. Electoral rights of migrants in Poland

As mentioned above, the basic premise for the holding of election rights in Poland is Polish nationality. However, in connection with Polish accession to the

European Union and the need to adjust national law to *acquis communautaire*, it was necessary to apply exceptions from the above. Granting citizens of other EU member states election rights in local elections stirred some doubts. However, it needs to be highlighted that these were mainly reservations of legal nature rather than social concerns. Such state of affairs may be explained by the then common conviction that Poland was unattractive as a destination country for migrants from other EU member states; thus, the scale of the phenomenon could be a factor halting potential concern of the society^{17,18}.

he has not been deprived of the right to stand as a candidate in her or his home member state; as: Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (Dz. U. UE, L329 z 30.12.1993, p.7) [Official Journal of the European Union L329 of 30 December 1993, p. 7].

16 S. Łodziński, D. Pudzianowska, M. Szaranowicz-Kusz, *Prawa wyborcze...*, *op. cit.*, p. 9.

17 This argument is confirmed *inter alia* by the fact that in elections to the European Parliament conducted in Poland in 2014, for almost 30.6 million voters (included in registers) only 340 voters were citizens of other member states of the EU; as: *Sprawozdanie z wyborów do Parlamentu Europejskiego przeprowadzonych w dniu 25 maja 2014 r.*, Państwowa Komisja Wyborcza, Warszawa 2014, p. 8. In the case of local elections conducted in Poland in 2014, among 30.5 million voters, only 637 were EU citizens not being Polish citizens; in: *Dane statystyczne dotyczące wyborów do rad oraz w wyborach wójtów, burmistrzów i prezydentów miast zarządzanych na dzień 16 listopada 2014 r.* <http://pkw.gov.pl/obwieszczenia-i-komunikaty-samorzad-2014/informacje-statystyczne-na-temat-wyborow.html> (accessed on: 08.01.2015).

18 It is worth to note considerably limited public awareness on rights resulting from the union citizenship among Polish citizens at that time. Studies conducted in November 2007 showed

An answer to the doubts of constitutional nature in the scope of the right of citizens of other EU member states to participate in local elections came in the form of a decision of the Constitutional Court of 11th May 2005. In the decision, the Court ruled that there were no inconsistencies between the said law and the Constitution of the Republic of Poland, stating that election rights in local elections to which citizens of other member states were entitled 'do not threaten the Republic of Poland as a common good of all citizens due to the constitutionally determined nature of self-governmental communities and tasks imposed on them together with competences granted to them in connection therewith'¹⁹.

The Constitutional Court also addressed the allegation that the granting of the active and passive election right to citizens of the European Union who are not Polish nationals constituted a breach of Article 4 par. 1 of the Constitution, which sets forth the principle of sovereignty of the Nation, and in its decision (of 31st May 2004)²⁰ it ruled that the replacement of the qualification of national citizenship with the qualification of domicile was linked to the establishment of European citizenship.

It needs to be noted that the argument of the Constitutional Court of 11th May 2005 – concerning the lack of threat to the sovereignty of Poland in connection with the granting of election rights in local elections to citizens of other EU member states – due to the nature of self-governmental communities, within which decisions concerning the state as a whole cannot be passed, raises questions about the possibility to grant election rights in local elections in Poland to foreigners from third countries. The Court explicitly underlined that the criterion of membership of a self-governmental community was not dependent on the holding of Polish citizenship, but on the place of residence. Unfortunately, the claim stating that a self-governmental community constitutes a community of residents did not serve as a premise for the Polish legislator to grant election rights in local elections in Poland to foreigners from third countries. A lack of such solution is criticized in literature²¹.

that merely 31% of respondents from Poland indicated having active and passive electoral rights by a citizen of other EU member state in local elections; at the same time, a similar number of respondents incorrectly indicated having active and passive electoral rights by a citizen of another member state in elections to the national parliament; in: *ElectoralrightsofEUcitizens. Analyticalreport.FlashEu- robarometer 292/2010*, pp. 8-9.

- 19 Judgment of the Constitutional Tribunal of 11 May 2005 (Case file No K18/04), *Wybrane orzeczenia Trybunału Konstytucyjnego związane z prawem Unii Europejskiej (2003-2014)*, "Studia i Materiały Trybunału Konstytucyjnego", vol. L, 2014, p.137.
- 20 Judgement of the Constitutional Tribunal of 31 May 2004 (Case file No K15/04), *Wybrane orzeczenia Trybunału Konstytucyjnego związane z prawem Unii Europejskiej (2003-2014)*, "Studia i Materiały Trybunału Konstytucyjnego", vol. L, 2014, p. 63.
- 21 Compare e.g.: P. Uziębło, *Podstawowe prawa i wolności polityczne cudzoziemców w RP*, "Białostockie Studia Prawnicze" 2007, No. 2, p. 150.

6. Political participation of immigrants – arguments for and against

As mentioned above, election rights have been traditionally considered rights to which only the citizens of a given state are entitled. A view stating that citizens of a given state should participate in the process of making political decisions constitutes one of main arguments against the granting of election rights to foreigners. Furthermore, an objection against larger political participation of immigrants is explained by an attempt to prevent the risk of influences from foreign governments, which could affect political processes through their citizens. It is also argued that the granting of election rights in local elections to foreigners (or stateless persons) poses the risk of a knock-on effect, and the argument against granting election rights in national elections would lose its force²². Yet another argument against the expansion of election rights onto foreigners pertains to the risk connected with the possibility of transmission of political conflicts by immigrants from their countries of origin²³. It needs to be noted here that some arguments against the granting of election rights to foreigners is based on specific concerns and risks, which may be implied by the very attitude to migration and foreigners. However, considering the added value of legal migrations and the benefits generated by foreign workforce of complementary nature in relation to the national workforce, most EU states have decided to grant – usually in an extent limited to local elections – election rights to foreigners from outside EU. What arguments were the basis of such actions? Among arguments justifying the granting of election rights to foreigners, there is one worth highlighting, an argument specified in the Preamble to the Convention on the Participation of Foreigners in Public Life at Local Level. It was highlighted that, at the level of local communities, foreigners usually had the same obligations as citizens²⁴.

Linked to the above is the view that residents of a community who regularly pay taxes should be represented in the bodies deciding about, e.g. how collected funds are to be spent, in accordance with the motto of colonists under the rule of the British Crown in 18th century: ‘no taxation without representation.’ There is some correlation between the above justification and the following premise: the obtainment of election rights by foreigners inspires their sense of responsibility for the host country and allows them to consider themselves ‘co-hosts’²⁵.

Another significant argument which is difficult to refute, in particular under the democratic ideals of the European Union, is the issue of exclusion of immigrants from democracy while exploiting their potential at the same time. Finally, a justification

22 K. Groenendijk, *Local Voting Rights...*, *op. cit.*, p. 6.

23 S. Łodziński, D. Pudzianowska, M. Szaranowicz-Kusz, *Prawa wyborcze...*, *op. cit.*, p. 11.

24 Preamble of the Convention on the Participation of Foreigners in Public Life at Local Level “European Treaty Series”, No. 144.

25 <http://blog.iom.pl/content/prawa-wyborcze-dla-cudzoziemc%C3%B3w-tak-czy-nie> (accessed on: 13.01.2015).

for the granting of election rights to foreigners may lie in the fact that none of the European countries which have granted election rights in local elections to non-citizens have abolished such rights due to negative consequences of the same²⁶.

7. Final notes

Keeping in mind the fact that above deliberations do not exhaust the issue of political inclusion of immigrants in the host country by way of granting election rights to immigrants, the reflections contained herein are meant as an impulse for a broader discussion which could expose the arguments supporting the granting of election rights to immigrants. However, an analysis concerning election rights of immigrants in Poland, which, on the one hand, points to a lack of solutions in the scope of granting election rights in local elections to foreigners from third countries; and on the other hand, points to such possibilities (lack of constitutional obstacles), is meant not merely to be an impulse for a discussion about challenges which Poland must face in the coming years, in the context of expected increased demand for economic immigration in the country over the next years. It is worth noting here that these changes cannot be postponed. An argument of the lack of solutions in the scope of election rights for foreigners due to currently low – compared to other EU countries – scale of immigration in Poland appears to fail to withstand criticism. The limited – compared to other EU states – attractiveness of Poland as a migratory destination needs to be underlined. A move that could increase attractiveness of the country, encourage immigrants, communicate a clear attitude of the host state towards immigrants could be the granting of election rights to foreigners. Any actions in this respect must be of ex-ante nature.

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26 K. Groenendijk, Local Voting Rights..., *op. cit.*, p. 8.

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