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Could the Election Deposit Become an Electoral Qualification? Remarks on the Example of the Election of Head of State

Abstract: An election deposit, understood as an obligation to pay a sum of money necessary to register a candidate in the elections, is not usually treated as an electoral qualification. The deposit is levied as a hedge against 'frivolous' candidates in the election process, who lack adequate public support. Equally often, as in the case of parliamentary elections, it is used in the presidential election. This way one guarantees political importance of a particular application. These deposits vary in rate, dependent (in most cases) on the type of mandate. From the smallest – in local elections, through the parliamentary elections (medium) to usually the highest rates in the presidential election.

Keywords: election deposit, electoral qualification, election

Słowa kluczowe: depozyt wyborczy, cenzus majątkowy, wybory

1. *Infamibus portae non pateant dignitatum?*

The election deposit, understood as an obligation to pay a sum of money in order to register a candidate in elections, is not usually treated as an electoral qualification¹ although there is little doubt that election deposit is derived from

1 As G. Kryszewski noted, although rules on a passive electoral law should refer to standards of an active electoral law, some additional limitations are permissible, narrowing the personal scope of the passive electoral law. See: G. Kryszewski, *Standardy prawne wolnych wyborów parlamentarnych*, Białystok 2007, p. 151.

electoral qualification². In spite of it being considered a ‘form of a barrier hindering access to electoral procedures on the part of some candidates’, it is accepted as a means of prevention against ‘frivolous’ candidates, persons lacking adequate public support, and consequently against the harmful – from the point of view of the stability of governance – balkanisation of the party system³. It is used in presidential elections just as willingly as in parliamentary elections. In this case, it is justified by e.g. verification of political significance of a given candidature⁴. The amount of the deposit varies greatly, and is usually connected with the kind of term of office: from the lowest and rarest in local elections, to parliamentary elections to usually highest rates in the elections of the head of state.

In consideration of the size of the matter of election deposits and due to the obligation to meet volume requirements, the issue in question is hereby discussed in only one aspect. This article aims at exploring the issue of election deposits against the background of solutions applied in European states in presidential elections, and to answer the question whether an excessively high amount of the election deposit causes the institution to covertly return to its source, which is today considered undemocratic. To put it simply: does the election deposit bear or could bear the features of electoral qualification? A closer look at the voting systems in this respect and their comparison to the status of life of a citizen of a given state may result in removing the conditional form from the questions above⁵.

The universality of elections may be expressed as the right to vote and to stand as a candidate to which all people who meet the conditions specified in the Constitution are entitled. Obviously, legal acts may provide a detailed determination of requirements for candidates; they cannot, however, constitute excessive hindrances for persons meeting constitutional requirements to participate in elections. An analysis of the principle of universal suffrage may lead to a conclusion that it is permissible to introduce some restrictions in terms of the circle of entities holding election rights – in accordance with the Latin maxim ‘*in-famibus portae non pateant dignitatum*’⁶. Even assuming that candidates for specific high-profile state functions must meet more restrictive requirements than other voters, it needs to be remembered that such introduced criteria must be rationally justifiable.

2 A. Żukowski, Z problematyki depozytów wyborczych na świecie, “StudiaBAS”, No. 3(27), 2011, p. 32

3 See: B. Michalak, “depozyt wyborczy”, (in:) B. Michalak, A. Sokala, P. Uziębło (eds.), Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych, Warszawa 2013, p. 38.

4 *Ibidem*.

5 An analysis of electoral deposits in parliamentary voting laws seems to be equally interesting, however the text’s volume restrictions forced authors to narrow the subject and presidential elections, as the most vivid examples.

6 The gates shall be closed before undignified.

One of such restrictions is the institution of election deposits. It is not an isolated mechanism, it is common in over 80 countries in the world. Usually, it is a requirement set forth along a number of other requirements, which may sometimes in practice be more difficult to meet, such as the collection of a specific number of signatures expressing support⁷. The last element to confirm the registration of a candidate in this case is the deposit.

This mechanism is also recommended by international organisations and institutions. As mentioned above, the institution of election deposit generally does not breach the criteria of standards of democratic elections⁸. The European Commission for Democracy through Law (the Venice Commission), as an advisory body of the Council, in order to ensure democratic and effective functioning of democratic institutions and electoral legislation, permits the introduction of election deposit. In terms of the universal election right, the Code of good practices in

electoral matters of 23 May 2003⁹, provides that this right can and even should be subject to certain conditions. Regarding the election deposit, the Code provides that it should be returned if a candidate or a party exceeds a given threshold, and the amount of deposit together with the required threshold should not be excessive. Therefore, it seems only reasonable to assume that acceptance of this institution is justified only when the amount of the deposit is established at a 'reasonable level'¹⁰, which is confirmed by the judicature of the European Court of Human Rights¹¹. *A contrario*, establishment of a deposit of too high an amount would constitute a breach of these standards.

An analogical view should be applied towards the issue of returning the deposit, as the mechanism in question provides for an election deposit, not an election fee.

7 According to A. Żukowski, that number is usually significantly lower than when registering candidates without procedure of electoral deposit (varies from few to several votes of support, exceptionally to several dozen or several hundred votes) A. Żukowski, *Z problematyki...*, *op. cit.*, p. 33.

8 M. Rulka i J. Zbieranek drew attention to the fact that Constitutional Courts of countries, which allowed for electoral deposit, rejected the allegation of its unconstitutionality. See more: M. Rulka, J. Zbieranek, *Kaucje wyborcze jako mechanizm przejrzystości procesu wyborczego*, Warszawa 2012, p. 9.

9 A basic document prepared by the Venice Commission, adopted at its 52nd session in Venice (18-19 October 2002), Code of good practices in electoral matters of 23 May 2003, Council of Europe CDL-AD (2002) 23 rev.

10 G. Kryszewski, *Standardy...*, *op. cit.*, p. 171.

11 According to one of judgments, the amount of deposit shall not disqualify serious candidates, but being in a difficult material situation. *Sukhovetsky v. Ukraine*–13716/02. Judgment 28.3.2006. [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-3458#{"itemid":\["002-3458"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-3458#{) (accessed on: 31.01.2015). See also e.g. Commentary No. 16 to Article 25 of the International Covenant on Civil and Political Rights of 19 December 1966 (Dz.U. z 1977 r. nr 38 poz. 167) [Journal of Laws of 1977 No. 38 item 167] or Decision No. 11406/05 *Fournier v. France*, 10.05.1988.

If the deposit is meant to eliminate 'frivolous candidates,' then it should be returned to those who received a certain level of support from voters¹². It usually depends on obtaining a given number of votes expressed as a percentage. Naturally, in order to avoid accusations of applying a qualification (census), this threshold should also be at a reasonable level. It is especially difficult to establish such reasonable level in presidential elections, in which there is only one winner.

Therefore, let us compare deposit models applied in presidential elections in Austria, Bulgaria, Lithuania, and Ukraine.

2. *Pensio*

An interesting solution, considered a functioning election deposit¹³, is the Austrian obligation for a presidential candidate to incur the cost of print of voting cards. This amount is equal to EUR 3,600¹⁴, and is not recoverable, which makes it possible to account it as an election fee. However, taking into account its amount and the amount of an average (or minimum) remuneration in Austria, it practically constitutes no restriction of the passive election right. Election deposits are intended to select such a group of candidates who have a real public support and serious political intentions, and will not hesitate to risk a certain amount of money.

What is significant here is the establishment of basic components of the deposit: its amount and rules concerning its return. Austrian regulations do not encumber the candidate with a big risk; therefore, the decision not to return the incurred costs seems justified. However, a failure to make the payment disqualifies a candidate¹⁵.

The amount of the deposit is established at various levels. It can be a specific sum of money or a multiple of minimum or average remuneration. Such solution, adjusted to the economic situation of citizens, is applied in the Republic of Lithuania. A presidential candidate is obligated to submit to the Central Election Commission of the Republic of Lithuania a document confirming the payment of the deposit in the amount of 5 times the average monthly remuneration¹⁶. In 2014 elections, the

12 Compare: International Standards and commitments on the Right to Democratic elections: A Practical Guide to Democratic Elections Best Practice, p. 24 and p. 33. <http://www.osce.org/odihr/elections/16859?download=true> (accessed on: 31.01.2015).

13 A. Żukowski, *Z problematyki...*, *op. cit.*, p. 39.

14 § 7 ust. 9 Bundespräsidentenwahlgesetz 1971 – BPräsWG BGBl. Nr. 57 in der Fassung BGBl. I Nr. 115/2013.

15 B. Naleziński, *Prawo wyborcze na urząd prezydenta w Austrii*, (in:) S. Grabowska, R. Grabowski (eds.), *Prawo wyborcze na urząd prezydenta w państwach europejskich*, Warszawa 2007, p. 27.

16 Article 36 section 2 Lietuvos Respublikos Prezidento Rinkimų Įstatymas, Prezidento rinkimų įstatymo 8, 11 ir 38 straipsnių pakeitimo įstatymo Nr. XI-2334 pakeitimai, įsigalioję 2014-01-01, neįtraukti į nuo 2013-11-23 naujai išdėstomo Lietuvos Respublikos Prezidento rinkimų įstatymotekstą.

amount of the deposit was LTL 11,500, which does not seem to be a sum that would excessively restrict access to stand as a candidate in the elections¹⁷. Furthermore, the election deposit is returned to the person who received more than 7% of valid votes, which also seems an acceptable solution. This, of course, also means that a portion of candidates will not receive their deposits back¹⁸.

In the Republic of Bulgaria, the amount of the election deposit for a presidential candidate was changed from BGN 250,000 to BGN 5,000¹⁹. In Bulgaria, the deposit is returned based on the decision of the Central Election Commission, unless the candidate failed to receive 1% of valid votes²⁰. Taking into account the amount of minimum remuneration, which was BGN 360 at the beginning of 2015, this sum is a 13-fold proportion. A relatively low risk connected with both elements of the deposit (amount and return) obviously had an effect on the number of candidates²¹.

N Finally, two models which, in spite of complying with international requirements, raise some doubts due to the amount of the deposit and conditions of its return.

In its assessment of the electoral code of Armenia, the Venice Commission concluded that the attempt to increase the presidential election deposit from 5,000 times to 8,000 times the minimum remuneration would lead to discrimination against potential candidates with a low economic status²². Whereas the final report, published in May 2013 by the Organisation for Security and Cooperation in Europe, on the course of presidential election in Armenia held on 18th February 2013 found no reservations concerning the amount of the deposit, which was AMD 8 m, an equivalent of EUR 14,700²³. The ban on increasing the deposit was also tantamount to conceding that its existing amount met the requirements of democratic election.

17 As reported by Lithuanian Department of Statistics, in 2013 the average monthly remuneration was 2 305 litas gross, www.stat.gov.lt (accessed on: 5.02.2015).

18 In presidential elections in 2014, as many as 5 of 7 candidates crossed 7% threshold, whereas in 2009 only two of 7 registered.

19 B. Pytlik, Różnice i modyfikacje w elekcji prezydenta w wybranych państwach Europy Środkowej, Wschodniej i Południowej, "Kwartalnik Kolegium Ekonomiczno-Społecznego. Studia i prace" 2012, No.1, p.79.

20 P. Uziębło, Prawo wyborcze na urząd prezydenta w Bułgarii, (in:) *Prawo wyborcze...*, *op. cit.*, p. 58.

21 Changes to the amount of the deposit were made in 2001. In the presidential elections conducted in 2001, 6 candidates took part, in 2006 seven (in both elections all of them reached more than 1% of votes). In 2011, there were as many as eighteen, half of whom crossed 1% electoral threshold. It is difficult, however, to draw far-reaching conclusions out of that, as in previous elections of 1992 and 1996 a number of candidates amounted to 22 and 13 respectively.

22 CDL-EL (2005)010, opinion no. 310/2004, European Commission for Democracy Through Law (Venice Commission), Draft Joint Opinion on the Draft Amendments to the Electoral Code of Armenia, 19.04.2005.

23 Until 2008, an electoral deposit in elections for a president of Armenia amounted to 5 million drams.

In 2013, the minimum remuneration in Armenia was AMD 32,000 (50,000 in 2014; and 65,000 currently). This meant that last presidential election required the deposit of 246 times the minimum remuneration (in 2015, it would have been 123 times). In other words, this sum would be equal to 20 years' minimum remuneration. The disproportion in relation to systems presented above is vast. As a result, out of 15 candidates submitted two years ago, only 7 (which is less than a half) were able to pay the deposit, and, consequently, to complete their registration (in 2007, nine candidates passed the procedure).

As mentioned above, also the form of return of the deposit plays an important role in this mechanism. Armenia set the threshold of return of the deposit at 5% of received votes. In practice, it meant that in last election only two candidates received a return of their deposits²⁴.

The last country to be discussed is Ukraine, which has undergone a few changes in its presidential electoral system over the recent years. In 1991, 1994, and 1999, candidates were registered based on collected signatures with voters' support. At the beginning, it was at least 100,000 signatures; in 1999, it was required to submit 1 million signatures. The election deposit of UAH 500,000 was introduced in 2004 election, when the obligation to collect signatures had not been ditched yet, but their required number had been lowered to 500,000. The election deposit was increased to a staggering UAH 2,5 m in 2010²⁵. At the same time, the obligation to collect signatures was repealed, which left practically only one requirement for a candidate, i.e. the deposit. Interestingly, as a result of these changes, the number of registered candidates did not fall, but increased instead. In 1991, there were 6 candidates; in 1994 – 7; in 1999 – 15; in 2004 (introduction of the deposit) – 26; in 2010 (increase of the deposit) – 18; finally, in the early election of 2014 – 23. In last election, as many as 11 candidates failed to obtain 1% of support, which raises questions concerning the achievement of the purpose – rejection of 'frivolous' candidates. As it turns out, the obligation to collect signatures was a much more effective solution.

However, the large number of candidates should not obscure significant figures. At the beginning of 2014, the minimum wage in Ukraine was UAH 1,218 a month, and the average wage was UAH 3,700. This means that the election deposit was 675 times higher than the average remuneration, and ca. 2,050 (!) times higher than the minimum remuneration. Expressed in months and years, the election deposit is equal to 56 years of remuneration of an employee receiving the average monthly pay in Ukraine. When expressed through the minimum remuneration, the amount of the deposit becomes even more absurd. It would be equal to approximately 170 years of

24 In presidential elections of 2008, four candidates reached over 5%.

25 Article 49 section 1 of the Ukraine's act "Pro wybory Prezidenta Ukrainy", "Widomosti Verchownoji Rady" 1999, No 14, p.81.<http://zakon1.rada.gov.ua/laws/show/474-14/print1299070987132750> (accessed on: 11.02.2015).

work of a person with minimum pay. Of course, to a large extent, the election deposit is not incurred in whole by a single candidate. It is collected through the work of the whole electoral staff and financial effort of people supporting a given candidate. Nevertheless, the amount of the deposit is impressive, especially when compared to the requirements imposed in other countries²⁶.

3. Reddo

Also the rules concerning the return of the deposit may give rise to concern. Upon the introduction of the institution in question in 2004, a regulation came into force under which the deposit was transferred to the state's budget in case of a candidate's failure to obtain at least 7% of votes of voters taking part in the election²⁷. Already at that time, this threshold was slightly demanding compared to solutions applied in other countries. In 1991 and in 1994, only 2 candidates exceeded the threshold. In 1999, 5 candidates made it through, which could have been the decisive factor in establishing the 7% threshold after the amendment introducing the UAH 500,000 deposit. In 2004, again only two candidates achieved more than 7%, and thus only they received the deposits back. When increasing the amount of the deposit, the Ukrainian legislator also changed the rules concerning its return, and such amended solution is applicable to this day. The election deposit is returned only to those candidates who have been elected to the office of the President of Ukraine or those who take part in the second round of presidential election²⁸. Thus, the deposit is returned to one (when the president is elected in the first round) or at most two candidates (if neither candidate obtains an absolute majority of votes) who obtained the largest number of votes in the first round.

As it is considered unacceptable to condition the return of the deposit upon the obtainment of a mandate or acceptance of a rule under which the deposit is absolutely irrecoverable, regardless of the election result, then Ukraine applies regulations which are dangerously close to breaching the standards of free elections²⁹. In the light of the assumed provisions of the election system, it is justified to ask the question in the title

26 Critical voice in Ukraine, even if they appear, they come rather from non-governmental organizations or publicists than representatives of the doctrine. See e.g. S. Kononczuk, Hroszy dla kandydata w prezydenty, *Ukrajinskij Nezaležnyi Centr Politycznych Doslidzeń*, <http://www.ucipr.kiev.ua/publications/groshi-dlia-kandidata-v-pre-zidenti> (accessed on: 15.01.2015 r.) or M. Naboka, Hroszowa zastawa dla kandydatiw: wporjadkuwannja czy poruszennijpraw?, <http://www.radiosvoboda.org/content/article/26645601.html> (accessed on: 15.01.2015).

27 P. Steciuk, K. Eckhardt, Prawo wyborcze na urząd prezydenta na Ukrainie, (in:) *Prawo wyborcze...*, *op. cit.*, p. 199.

28 Article 49 section 2 of the Ukraine's act "Prowybory...", *op. cit.*, <http://zakon1.rada.gov.ua/laws/show/474-14/print1299070987132750> (accessed on: 11.02.2015).

29 Compare G. Kryszewski, *Standardy...*, *op. cit.*, p. 171.

of this article. Does the election deposit as proposed by the Ukrainian legislator not bear the features of an electoral qualification? After all, restrictions of most natural nature should be permitted, at the same time excluding those which deviate from such naturalness and take on a political character³⁰.

The above-mentioned comments of the Venice Commission appear far too lenient and even permitting excessive restrictions of the passive election right³¹. It is our view that regulations concerning both elements of the election deposit in Armenia, and even more so in Ukraine, do in fact restrict the possibility for the societies of these countries to express their political will. As demonstrated by examples, it is not even the case of quantitative restrictions (number of candidates does not necessarily have to drop), but political and substantive ones. Such circumstances lead to a monopolisation of a given right by a certain type of entities³². Entities which, as compared to the general public, hold personal property or the property of the members of their political base which is of significant value. It needs to be underlined that this issue lies not only in individual provisions of electoral regulations, but in their context in the economic situation of the country and the wealth of its citizens.

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30 Compare e.g. L. Garlicki, Polskie prawo konstytucyjne. Zarys Wykładu, Warszawa 2006, p. 152; G. Kryszeń, Prawo wyborcze do parlamentu. Status prawny posłów i senatorów, (in:) Prawo konstytucyjne, S. Bożyk (ed.), Białystok 2014, p. 176 czy J. Galster, Prawo wyborcze do Sejmu i Senatu RP oraz status prawny posłów i senatorów, (in:) Prawo konstytucyjne, Z. Witkowski (ed.), Toruń 2006, p. 2014.

31 If a permissible proposal of the Venice Commission was traced over to the average monthly remuneration of a country of the Western Europe, a deposit could amount to e.g. ~ 17 and a half million Euros (5000x3500 Euros – the average remuneration in Germany in 2014).

32 A. Żukowski, Systemy wyborcze, Olsztyn 1999, p. 42.

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