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Introduction

The reader is presented with the 20th anniversary compendium of the "Białostockie Studia Prawnicze" [Białystok Legal Studies]. As we face dynamic change, the editorial team, constantly striving to improve the contents and appearance of the publication, has decided to change the graphic design of the cover, which we sincerely hope will be well received by our readership.

Journal No. 20 consists of two parts – Election Law and Alternative Forms of Voting (Part A) and the position of the executive in the [political] system in the modern world (Part B).

Election law is nowadays one of the key elements of a well and fully functioning democratic system. Universality and equality of election law guarantee participation in the election system by all those entitled to vote. According to the sovereignty principle, the nation exercises its power indirectly – that is through elected representatives as Members of Parliament, or directly, through a referendum process or a 'people's initiative'. In the vast majority of democratic countries the model of exercising power is based on representative democracy. Encouraging voters' participation has, for many years, been one of the most important tasks implemented with varying success by the authorities. Based on available statistical data it is very obvious that more and more democratic countries are struggling with the issue of low election turnout. The diminishing participation of the electorate is worrying. Successively diminishing turnout affects local and parliamentary elections equally, including European Parliamentary elections, as well as presidential elections.

A number of countries have introduced a range of means aiming to reverse this perturbing trend. Simplifying election law, running elections on a non-working day and making voting mandatory are just some of the solutions deployed. The condition of the fundamental elements of a democratic country is therefore worth discussing. A number of papers are therefore devoted to the methods of electing the government bodies and authorities in various countries (the parliament, president, the head of the European Commission, judges and magistrates).

This issue of the "Białystockie Studia Prawnicze" also contains analysis of the issues raised by compulsory elections, the electoral system of Iran and immigrants' voting rights.

The procedure of selecting members for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also been scrutinised. It is worth paying particular attention to the opinions of Poles concerning proposed changes to the election law which form the basis for the research presented in one of the papers within this volume. The issue of gender parity, that is the criteria determining the minimum or maximum requirement for the participation of women on the electoral lists of candidates, has also been subject to detailed analysis in light of the provisions of the 2011 Polish electoral code. Observations based on the example of the election of a head of state in the context of potential links between the required electoral deposit and the material wealth status [of candidates] are thought-provoking.

Alternative voting methods are also considered. E-voting, postal vote or voting by proxy are solutions aiming not to replace but to support the traditional voting method, and to increase electoral turnout. Consideration of the articles devoted to postal voting in Poland and Switzerland will allow readers to gain a comparative perspective on this important issue. It is worth noting the issue of electoral crimes against elections and referenda in Poland are also contained in this volume.

Because of the evolving position of the executive power in the political system it was essential to include in the analysis those factors influencing the role, the functioning and the extent of the executive in developed countries.

We remain hopeful that the issues raised in the journal will meet with a lively reception and encourage further debate, also in other scientific journals. The evolution of electoral law is an on-going and irreversible process which is of interest to many research fields.

Elżbieta Kużelewska
Volume Theme Editor

ELECTION LAW
AND ALTERNATIVE VOTING METHODS

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Alternative Voting Methods Through the Example of Postal Voting and E-Voting in Switzerland

Abstract: To many observers, Swiss democracy seems to be complicated and a difficult to understand labyrinth of political institutions that directly involve citizens in the political decision making process. Swiss electoral law enables voters to participate in elections and referendums using one of three instruments: traditional voting (in polling stations), postal voting or electronic voting.
The main thesis of this paper is the predication of how alternative methods of voting, postal voting and e-voting, change the way that Switzerland's direct democracy functions. An analysis of Switzerland's experiences in the use of alternative voting methods in decision-making at federal, cantonal and local levels of the state, seems to be a very interesting project and one worthy of scientific exploration.
Keywords: alternative voting methods, postal voting, e-voting, Switzerland
Słowa kluczowe: alternatywne metody głosowania, głosowanie korespondencyjne, e-głosowanie, Szwajcaria

1. Introduction

Switzerland is the only country in the world where citizens are able to exercise power through the institution of democracy on all three levels of the administration: on the federal, canton and local level. For many observers Swiss democracy is a complex labyrinth of political institutions[1] which is difficult to characterise and unravel, which, apart from state decision making, also serves for citizens' involvement in the decision making process. The Swiss system enables all entitled citizens three forms of participation in elections and referenda. Each voter can exercise their right to vote traditionally – by going to a polling station – but also through postal

1 The Swiss Labyrinth. Institutions, Outcomes and Redesign, J.-E. Lane (ed.), Londyn 2001. Comp: M. Musiał-Karg, Elektroniczne referendum w Szwajcarii. Wybrane kierunki zmian helweckiej demokracji bezpośredniej, Poznań 2012, p. 121.

voting[2]. Additionally, federal legislation also permits e-voting as a form of taking part in federal elections and referenda[3]. E-voting has so far been implemented in three cantons in Switzerland[4].

The main thesis of this article is that alternative voting methods – both postal and e-voting – will help transform the functioning of direct democracy. This perhaps results from the number of referenda which are incomparably greater than in other countries (an average Swiss may vote in four referenda a year, jointly answering up to 15 referendum questions[5]). It is worth stressing that it was the postal vote rather than the e-vote that had the greatest impact on the electorate (changing the structure of the votes cast). E-voting seems to be modifying rather than revolutionising changes which result from the ability to cast a vote by traditional mail.

The analysis of the experience of the Swiss Confederation on utilising alternative voting methods in the decision making process on various levels of the state administration seems an interesting and worthwhile academic question.

One of the most important research questions presenting itself in this context is the issue of how (and to what extent) the above methods of voting in Switzerland influence the shape of the Swiss direct democracy? Finding an answer to this question is important as, due to the widely debated issue of the crisis of representative democracy manifesting itself through ever lower elections turnout, more and more countries are considering introducing various additional forms of voting. Analysis of the Swiss experience may, in this context, turn out to offer a useful contribution not only at the discussion stage but also during implementation of these new solutions to augment the existing election procedures.

The subject matter of this article is based on research on democracy, especially on voting procedures. Due to the fact that the Swiss Confederation predominantly uses direct democracy it needs to be noted that studies covering this form of exercising power are conducted not only by political scientists but also those involved in constitutional studies. Specialist literature contains works considering

2 This procedure is also provided for through election law in a number of EU countries, e.g. in Austria, Belgium, Denmark, Finland, Spain, Ireland, Estonia, Lithuania, the UK or Germany. A postal vote is also deployed in the United States for those voters who are out of the country on the day of the elections. The vote is enabled and coordinated through American embassies and consulates, whose staff would instruct voters on the correct postal voting procedure, registration and posing the polling card. Głosowanie korespondencyjne za granicą, Ambasada Stanów Zjednoczonych Ameryki, http://polish.poland.usembassy.gov/poland-pl/visa_requirements/gosowanie-korespon-dencyjne-za-granic.html (accessed on: 31.03.2011); Federal Voting Assistance Program, http://www.fvap.gov/ index.html (accessed on: 31.01.2011).

3 E-voting is also possible in Estonia.

4 As of January 2015.

5 This state of affairs is the result of firstly, combining the federal and canton or local level referenda and, secondly, putting more than one issue to the vote. In this way during one day a Swiss voter may vote on five or more issues.

purely theoretical questions linked to the direct form of exercising power as well as its practical dimension. Foreign authors,[6] involved in various aspects of the subject, include: Ian Budge, V. Uleri and Michael Gallagher, Benjamin Barber, R. Hague i M. Harrop, Thomas E. Cronin, David Held or T. Gebhart. Polish authors[7] of note include: Maria Marczewska-Rytko, Marcin Rachwał, Magdalena Musiał-Karg, Elżbieta Kużelewska, A. Rytel-Warzocha and Piotr Uziębło. An important aspect of the subject under discussion is the so called Swiss context. Foreign researchers working in this field include: Wolf Linder, Gregory Fossedal, Kris Kobach or Andreas Ladner[8]. Among Polish academics[9] researching the Swiss Confederation are: Z. Czeszejko-Sochacki, Andrzej Porębski, Michał Tomczyk, Agnieszka Nitszke and Ewa Myślak. The achievements of these researchers form the background to the discussion in this article.

2. Postal vote

The introduction of the postal vote in Switzerland was motivated by the need to reduce the time and cost of accessing polling stations and therefore increase citizen's participation in voting.

The potential to increase the election turnout was a significant factor in introducing the postal vote given that, from the end of the Second World War to the

6 I. Budge, The New Challenge of Direct Democracy, Cambridge 1996; The Referendum Experience in Europe, M. Gallagher, V. Uleri (ed.), Basingstoke-Londyn 1996; B. R. Barber, Strong Democracy Participatory Politics for a New Age, Berkeley–Los Angeles–London 2003; R. Hague, M. Harrop, Comparative government and politics. An introduction, Hampshire 2001; Th. E. Cronin, Direct Democracy. The Politics of Initiative, Referendum, and Recall, Cambridge, Massachusetts, London 1989; D. Held, Models of Democracy, Paperback, Cambridge 1995; T. Gebhart, Direkte Demokratie und Umweltpolitik, Deutscher Universitats-Verlag 2002.

7 M. Marczewska-Rytko, Idea demokracji bezpośredniej od okresu antycznego do czasów Internetu i globalizacji, (in:) Demokracja bezpośrednia. Wymiar globalny lokalny, M. Marczewska-Rytko, A.K. Piasecki (ed.), Lublin 2010; M. Marczewska-Rytko, Demokracja bezpośrednia w teorii i praktyce politycznej, Lublin 2002; M. Rachwał, Demokracja bezpośrednia w procesie kształtowania społeczeństwa obywatelskiego w Polsce, Warszawa 2010; M. Musiał-Karg, Referenda w państwach europejskich. Teoria, praktyka, perspektywy, Toruń 2008; E. Kużelewska, Referendum w procesie integracji europejskiej, Warszawa 2006; A. Rytel-Warzocha, Referendum ogólnokrajowe w państwach Europy Środkowo-Wschodniej, Warszawa 2011.

8 G.A. Fossedal, Direct Democracy in Switzerland, New Brunswick–London 2002; K. W. Kobach, The referendum: Direct Democracy in Switzerland, Dartmouth 1993; A. Ladner., Switzerland: Subsidiarity, Power-Sharing, and Direct Democracy, (in:) The Oxford Handbook of Local and Regional Democracy in Europe, J. Loughlin, F. Hendriks, A. Lidström (ed.), Oxford 2011.

9 Z. Czeszejko-Sochacki Z., System konstytucyjny Szwajcarii, Warszawa 2002; A. Porębski, Wielokulturowość Szwajcarii na rozdrożu, Kraków 2009; M. Tomczyk, Polityka Szwajcarii wobec Unii Europejskiej, Łódź 2013; Nitszke, Zasady ustroju federalnego w państwach niemieckojęzycznych. Studium porównawcze, Kraków 2013.

1970s each elections have returned an ever diminishing turnout. Given this negative trend, the canton authorities decided to first of all to consider and then to introduce voting by post.

The postal vote was introduced gradually. It was constituted at the federal level in 1965 for the following parts of the electorate: those that were ill, those that on the day of the vote were staying in hospital, those unable to access a polling station due to ill health, for those covered by a military insurance and for those living away from home for the purpose of employment[10].

This form of voting was being introduced in the various cantons from the mid '60s onwards. Most of the associated states implemented postal voting in the 1980s and 1990s. The majority of cantons allowed postal vote by application[11].

Table 1. The introduction of postal vote in Switzerland

Canton / abbreviation	Limited postal vote		Universal postal vote	
	By application	Without the need to apply	By application	Without the need to apply
Argovia / AG	01.01.1967			01.01.1993
Appenzell Outer / AR	01.0.1967			24.05.1988
Appenzell Inner / AI				11.06.1979
Basle-County / BL	01.05.1962			01.07.1978
Bazylea-City / BS	13.06.1976			30.12.1994
Berne / BE	01.01.1967	01.05.1970		01.07.1991
Friburg / FR	19.09.1966		01.09.1976	23.05.1995
Geneva / GE	25.06.1950			01.01.1995
Glaris / GL	01.01.1967			01.07.1995
Grisons/ GR	01.01.1967			01.01.1995
Jura / JU	01.01.1979			01.05.1999
Lucerne / LU	01.01.1967		01.12.1978	01.10.1994
Neuchâtel / NE	01.01.1967		26.04.1995	01.01.2001

10 Bundesgesetz über die Einführung von Erleichterungen der Stimmabgabe an eidgenössischen Wahlen und Abstimmungen vom 25. Juni 1965, art. 5 ust. 1; por. S. Luechinger, M. Rosinger, A. Stutzer, The Impact of Postal Voting on Participation. Evidence for Switzerland, "Swiss Political Science Review" 2007, No 2, p. 171.

11 S. Luechinger, M. Rosinger, A. Stutzer, The Impact of Postal…, *ibid.*, pp. 171-172.

Nidwald / NW			20.12.1979	29.06.1994
Obwald / OW	01.04.1974		01.07.1978	01.12.1995
Schaffhausen / SH	22.03.1968			01.08.1985
Schwyz / SZ	08.10.1971		01.03.1992	01.01.2000
Solothurn / SO			01.01.1981	01.01.1985
St. Gallen / SG	01.06.1967			01.05.1979
Ticino / TI	01.12.1998			15.04.2005
Thurgovia / TH	01.01.1967	01.09.1978		01.08.1985
Uri / UR	04.06.1967			01.01.1995
Vuad / VD	07.02.1979		01.01.1990	25.03.2002
Valais / VS	01.10.1972		01.10.1996	01.01.2005
Zug / ZG	01.07.1969			01.04.1997
Zürich / ZH	17.12.1995		01.01.1985	01.10.1994
SWITZERLAND	**01.01.1967**			**15.12.1994**

Source: S. Luechinger, M. Rosinger, A. Stutzer, The Impact of Postal Voting on Participation. Evidence for Switzerland, „Swiss Political Science Review"2007, No 2, p. 173.

The dates when the postal vote was introduced in the various regions of the Confederation are presented in Table 1. At the federal level, a universal postal vote was introduced towards the end of 1994. Until then it was available in the following cantons: Argovia, Appenzell, Basle – district, Berne, Lucerne, Nidwald, Schaffhausen, Solothurn, St. Gallen, Thurgovia and Zürich. It needs to be borne in mind that different parts of Switzerland introduced this system at different times, starting from 1978 (Basle) up to practically just a few weeks before the federal decision (postal vote was introduced in Zürich 1994).

After the universal postal vote was enabled at the federal level some cantons took the decision that those eligible could only vote by post after making an application or after requesting that voting materials are sent to them. In those cantons where the postal vote was universally enabled, the appropriate voting materials were sent out automatically to all eligible to vote.

Nowadays a postal vote at both federal and canton level is universally available to all citizens of Switzerland eligible to vote. Before the vote, all receive an election package including ballot paper(s) which can be ticked and either sent by post or put in the ballot box at the polling station. Cantons have a statutory duty to ensure a simple and easy procedure for the postal vote. They are also obliged to pass legislation which

guarantees control over eligibility to vote, ensuring the ballots are secret, counting all votes and preventing misuse[12].

The analysis of the share of the postal vote against other forms of voting (at the polling station or by proxy) have indicated that the share of postal vote has been steadily increasing over the years accompanied by the corresponding steady decrease in the number of voters voting traditionally, at the polling station[13].

In summary, it is necessary to highlight the two seemingly most significant facts linked to the use of postal vote as a tool for participation in direct democratic procedures.

Firstly, a significant share of voters engage in new voting methods, which are supplementary to the traditional methods of taking part in elections. This is borne out by data: in the majority of cantons the leading method of casting a vote in elections and referenda is postal vote. It is possible to conclude that in almost all Swiss cantons the majority of voters vote by post. It is said that approximately 80-90% of votes are cast by post. Only in Ticino and Valais does voting at a polling station enjoy a majority[14]. Secondly, research by Swiss academics (S. Luechin, M. Rosinger, A. Stutzer) proves that the introduction of the postal vote in Switzerland has visibly (and statistically significantly) contributed to the increase in the turnout at general elections and referenda. The long term trend for the turnout in Switzerland indicates an average increase of 10%. Given how frequent the referenda are in this small European country and the diversity of questions put to the vote this result seems significant[15].

3. E-voting

Switzerland is an example of a European country which pioneered the process aiming at the implementation of a voting system based on the usage of new technologies. Due to the dynamic development of these technologies and the diminishing general elections/referenda turnout, the Swiss government started to consider utilising ITC as part of holding a referendum as early as the 1998. Nowadays Switzerland uses three systems of e-voting:

12 Bundesgesetz über die politischen Rechte vom 17. Dezember 1976 (Stand am 1. Februar 2010), art. 8 ust. 1, Die Bundesbehörden der Schweizerischen Eidgenossenschaft, http://www.admin.ch/ch/d/sr/1/161.1.de.pdf (date of access: 8.10.2012).

13 VoxIt: The Standardized Post-Vote Surveys. Neuchâtel: SIDOS, za: S. Luechinger, M. Rosinger, A. Stutzer, The Impact of Postal..., *ibid,* p. 175.

14 M. Musiał-Karg, Elektroniczne referendum w Szwajcarii..., *ibid,* p. 171.

15 S. Luechinger, M. Rosinger, A. Stutzer, The Impact of Postal…, *ibid*., p. 191.

Geneva E-voting System, *Zürich E-voting System* and *Neuchâtel E-voting System*. All three are based on using e-voting as part of the decision making process at the local, canton and federal levels.

Currently the majority of Swiss voters cast their votes in referenda and elections by post. This form of distance voting is already a standard practice in Switzerland and, according to experts, has helped Swiss voters accept the next new participation method – the electronic vote[16].

The systems of electronic voting used in the Confederation are examples of remote voting by internet. Elections and referenda where it is possible to vote through the means deployed there should be called e-elections or e-referenda as system being developed in Switzerland are based on utilising the Internet in voting procedures.

All three projects to a differing degree consider utilising modern technologies enabling voting in elections and referenda through the internet. Currently most cantons use the Zürich system, followed by the Geneva system. The *Neuchâtel E-voting System* is only used in its own canton. It is worth bearing in mind that referendum and election procedures differ in each federal state. In order to meet the varying needs of Swiss cantons it was decided that three different systems of e-voting should be developed and introduced. Systems used in Geneva and Zürich cantons are only used for voting. In contrast, the system used in Neuchâtel canton offers a broad spectrum of administrative services and voting by internet is just one aspect of how the system can be used.

The primary aim of introducing e-voting was providing the electorate with an additional voting platform and enabling the future use of an electronic signature when submitting applications related to a people's initiative, a referendum or registering candidates before general elections.

In a January 2002 report on the possibility of e-voting and associated risks and opportunities the Federal Council highlighted the reasons for introducing e-voting in Switzerland: adjusting voting procedures to the changes in Helvetian society, adding an innovative form of participating in referenda and elections that is attractive to voters, making it easier to take part in general elections, a potential for increasing turnout, better protection for the principle of equality of a democratic vote (the one person one vote principle) in light of breaches apparent with traditional forms of participation in elections and referenda[17].

16 D. Braendli, The scope of e-voting in Switzerland, E-Voting and Electronic Democracy: Present and the Future – An International Conference, Seoul, South Korea, March 17-18 2005, p. 2.

17 Bericht über den Vote électronique Chancen. Risiken und Machbarkeit elektronischer Ausübung politischer Rechte vom 9. Januar 2002, Bundesblatt nr. 4, 29. Januar 2002, s. 645-700 (BBl 2002 645), Bundesblatt, Die Bundesbehörden der Schweizerischen Eidgenossenschaft, www.admin.ch/ch/d/ff/2002/645.pdf (dare of access: 15.06.2014).

It is worth highlighting that the federal structure of the state, the complexity of the electoral system in Switzerland and the institutions of direct democracy developed like nowhere else in the world make the use of e-voting tools particularly attractive to those voters[18].

The systems of e-voting operating in Switzerland differ in structure but the most important steps (stages) of casting votes using these systems look very similar. Having a polling card containing data for use in e-voting, the voter, after entering their user ID or the number of the polling card, choses their answer to a referendum question, then enters a PIN code from the polling card and a password concealed on a scratchcard and submits the vote. At the end of the procedure they receive a confirmation that the vote has been cast.

It is important to add that, despite the initial intention of introducing different electronic voting channels in elections and referenda, the only currently enabled method of participation is through the internet. Voting through a mobile (offered as part of the *Zürich E-voting System*) was abandoned after very small uptake of this form of participation.

Map 1. The extent of the use of e-voting systems in Swiss cantons

Source: E-voting. Joint Federal-Canton project, information booklet on e-voting, Bundeskanzlei, Berno 2012, p. 6.

The two systems developed and introduced by the French speaking cantons are operating on the basis of centralisation – with the confederate states playing the leading role; they also have the ownership of the project. In Zürich the operating system stresses the role of the local authorities, who organise the vote at the local

18 A. Ladner, G. Felder, L. Schädel, From e-voting to smart-voting – e-Tools in and for elections and direct demo- cracy in Switzerland, „Working Paper de I'IDHEAP" no. 4/2008, p. 2.

level and then pass the results to the canton. The extent of the use of e-voting in Swiss cantons is shown on Map 1.

The system of electronic voting has been implemented in thirteen member states of the Swiss Confederation. The following cantons (apart from Geneva, Zürich and Neuchâtel) are participating in the joint federal/ canton project: Argovia, the city of Basle, Berne, Friburg, Grisons, Lucerne, Schaffhausen, Solothurn, St. Gallen and Thurgovia. The majority of cantons have decided to implement the Zürich solutions. *Zürich E-voting System* is used in Argovia, Friburg, Grisons, St. Gallen, Solurthurn, Schaffhausen and Thurgovia. In turn, the Geneva project has been adopted in the city of Basel, Bern and Lucerne. With the exception of Neuchâtel, none of the confederate states are using the *Neuchâtel E-voting System*. This is undoubtedly due to the fact that the adoption of this system would require the use of the entire *Guichet unique* platform, which would be a multi-dimensional project.

The issues discussed in this article raise several important questions. First of all, Switzerland is a leader in terms of the volume of referenda conducted there with the possibility of casting an e-vote. Secondly, the number of cantons interested in implementing e-voting has been systematically growing – the current number of cantons taking part in the project stands at thirteen confederate states. Thirdly, the Swiss experience so far indicates that e-voting does not significantly alter the turnout in referenda. On-line voting is chosen mainly by voters who regularly participate in referenda and elections[19]. Fourthly, the opportunity to vote through the internet is taken up by a large group of voters who had previously been voting by post[20].

4. Conclusions

The solutions adopted in the Swiss Confederation concerning the participation of eligible voters in general referenda and elections form an interesting case study against the backdrop of other European countries (with the exception of Estonia[21]).

As previously mentioned, from the point of adopting the postal vote on the federal level, in 1994 this form of participation in elections and referenda had become an important part of the Helvetian electoral system. The Swiss have appreciated this form of participation mainly due to the ease of opportunity to vote at a convenient (designated) time and place. The positive attitude of the Swiss towards postal voting is still evident today; something that is borne out in the structure of votes cast in referenda or elections, with the majority of these being postal votes.

19 Th. Christin, A. Trechsel, Who votes via the Internet? A scientific approach to polling in Carouge and Meyrin. Analysis of questionnaires on voting via the Internet in the communes of Carouge and Meyrin (Geneva), Geneva State Chancellery, September 2004, p. 17.

20 *Ibidi*.

21 Estonian voters can also vote electronically.

Despite the fact that postal vote is the most frequently chosen method of partaking in elections, e-voting, and more specifically voting by internet, enjoys a growing popularity, especially among the Swiss abroad. Without a doubt this form of participation of the electorate has become a vital determinant of the functioning of today's direct democracy in Switzerland. The introduction of e-voting (as previously the postal vote) has made it easier for voters to participate, bringing direct democratic procedures ever closer to the citizens.

In summary, it is worth highlighting that the Swiss experience with utilising alternative forms of voting may be a valuable indicator both during consideration and during adoption of alternative voting methods in other countries. It would seem that the Swiss practice in terms of e-voting and the postal vote may be a very useful platform to determine the direction of development of the procedures for participation in general elections/referenda in Europe and worldwide.

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Compulsory Votnig as the Solution to Low Electoral Turnout – the Treatment Worse than the Disease?

Abstract: The objective of the paper is to analyse the issue of compulsory voting, i.e. the electoral system in which voters are obliged by law to participate in elections. The first section provides the landscape of compulsory voting in Europe and sanctions for non-participation. The second part discusses the arguments for and against compulsory voting which are based on different constructions of the same categories as democracy, freedom, equality, representation, civil rights and obligations. The final section examines the impact of compulsory voting on electoral turnout.
Keywords: obligatory voting, compulsory voting, electoral turnout
Słowa kluczowe: obowiązkowe głosowanie, przymus wyborczy, frekwencja wyborcza

1. Introduction

Mandatory voting is the legal obligation to take part in elections which is currently in place in 29 countries in the world. It enjoys the greatest popularity in South and Central America, where countries in which voting is not mandatory are in the minority. In Europe obligatory participation in elections currently exists in seven countries, and in all of these it has been rooted in election procedures for at least several decades, or even, as in Lichtenstein and Belgium, for over a century.

The fact that mandatory voting is not a political novelty does not mean that the debate over it has been closed. This article presents the key arguments of both the supporters and the opponents of this solution, specifically in the context of the growing voter abstention. The hypothesis over the impact of mandatory voting on elections turnout in European countries will also be verified.

Although Polish academic literature alternatively uses: "przymus wyborczy" (compulsory participation in elections), "przymus głosowania" (compulsory

voting), "obowiązek wyborczy" (mandatory participation in elections), "obowiązek głosowania" (mandatory voting) which, according to some researcher[1] – have the same range of meanings this text intentionally deploys the term mandatory voting ("obowiązkowe głosowanie") as the most normatively neutral. Terms containing the word 'compulsory' have strong negative language and cultural connotations in Poland, dictating, consciously or not, a certain narrative for the subject under analysis which should be avoided in academic papers.

2. The institution of mandatory voting in Europe

Mandatory voting in modern Europe is a legal rather than a political obligation. Political coercion was, and in some regions of the world still is, a characteristic of undemocratic political regimes where high election turnout was achieved through the means of propaganda persuasion and threats, for example, of losing one's job. The institution of mandatory voting currently exists in just seven European countries (in Switzerland in only one canton); in five of those, mandatory voting is part of the constitution. Formally, only in Greece does the legislator foresee no sanctions for failing to fulfil the legal obligation to participate in a vote (Table 1). Some European countries which used to have compulsory participation as part of their legal system have since abandoned mandatory voting: The Netherlands in 1970, Italy in 1993, the Austrian *Lände* of Styria, Tyrol and Vorarlberg in 1992, all Swiss cantons with the exception of Schaffhausen at the end of the 19th and the beginning of the 20th centrury.

Table 1. Mandatory voting in modern Europe

Country	Date of introduction	Sanction	Constitutionalisation
Belgium	1893	yes	yes
Cyprus	1960	yes	no
Greece	1926	no	yes
Lichtenstein	1878	yes	yes
Luxemburg	1919	yes	no

1 Ł. Żołądek, Przymus wyborczy. Geneza, praktyka funkcjonowania, argumenty za i przeciw, „Studia Biura Analiz Sejmowych" 2011, No 3(27). The author quotes terminology deployed in other languages: *compulsory voting* (less common: *mandatory voting* lub *obligatory voting*) in English, *le vote obligatoire* in French, *Wahlpflicht in German, il voto obbligatorio in Italian, el voto obligatorio* in Spanish, the Dutch *stemplicht* (compulsory voting) and *opkomstplicht* (compulsory turnout at a polling station).

Switzerland (ex. Schaffhausen canton)	1903	yes	yes
Turkey	1982	yes	yes

Source: S. Birch, Full Participation. A Comparative Study of Compulsory Voting, New York 2009, p. 36.

The countries which have mandatory elections do exempt older and disabled people from participating in elections; Schaffhausen canton exempts citizens over 65, Cyprus those over 70 and Luxemburg over 75. Non-participation can also be excused on the basis of natural or unforeseen events, such as a proof of travel, illness or 'a higher force'. Otherwise citizens failing to fulfil their duty to vote are subject to financial penalties.

In the Swiss canton of Schaffhausen the fine is merely symbolic – 3 Swiss Francs, in Belgium the fine for failing to participate for the first time is €25-55, and €137.50 thereafter, in Luxemburg citizens would pay upwards of €100 for the first absence and up to €1000 for persistent avoidance of the mandatory voting. Generally the financial fines are used less and less often as the costs of their recovery exceed the income from the fines. In Belgium, absence from elections may result in limiting citizens' rights through removal from the electoral register as well as a fine (if a citizen failed to participate in elections more than four times in 15 years), and in being unable to receive a nomination, promotion or award from public authorities for the following decade. It is interesting to note that in South American countries the sanctions for failing to participate are much more severe: in Brazil you may be refused a loan or credit by a national bank, in Peru you may be refused access to public services, and in Bolivia you may have difficulties in obtaining a passport or a driving licence, in Argentina your access to public service posts or promotions will be limited and it may be impossible to enrol a child at a state nursery[2].

3. Contested issues in the debate over mandatory voting

Introducing or maintaining mandatory voting is not the principal subject for public debate in modern European democracies; it does, however, have a long history especially in those countries where this mechanism was introduced as part of legislation governing elections. The issue was also taken up in countries without mandatory voting, where this is being considered as a remedial measure to counteract a failing turnout.

Both the supporters and opponents of mandatory voting invoke in their arguments such terms as freedom, democracy, equality, representation, legitimising, responsibility and citizen's rights and responsibilities. It would seem that the most

2 Ł. Żołądek, Przymus…, *op. cit*., p. 19.

heated debate centres around the understanding of the concept of freedom. The supporters of a mandatory vote maintain that absolute freedom is an illusion and that reducing it to the choice between going to a polling station or exercising the right not to vote is a form of absolutism of individual's rights. Elections legislation, argue the supporters of mandatory voting, is not solely the matter of individual's rights, it has a social function. Emmanuel-Joseph Sieyès, a French priest from the period of the French revolution, wrote that the vote belongs to the nation, not to individual citizens[3]. This meant, for him, that the nation can entrust election law only to the most active among citizens – at the time this meant men paying appropriately high taxes.

According to some contemporary lawyers this theory justifies the introduction of mandatory voting because the community (the nation) can oblige its own citizens to participate in the vote so that they meet, through participation in elections, their citizen potential. Supporters of mandatory voting add that this is not contrary to the freedom of choice, as the compulsion concerns the act of attending at a polling station, not the decision of who to vote for or whether to cast a valid vote. Free elections that lie at the foundations of a democratic system do not mean elections where voting is not mandatory but elections where the act of voting is free. As argued by Justine La-croix,[4] the liberal paradigm is not at loggerheads with the principle of obliging citizens to take part in general elections, because it does not constitute a threat to personal liberties, but it is a directive resulting from social and political integration, a step up in spreading democracy to all social groups.

Opponents of mandatory voting find a completely different message in liberal thought and demonstrate that compulsory participation strikes into the very heart of natural human and citizens' rights and is a symptom of authoritarian, not democratic, tendencies. Their arguments are centred on primacy being given the status of liberty and elevate it above other core democratic values, such as equality or justice. In their opinion nothing in democracy justifies limiting the rights of an individual, *ergo* compulsory participation in elections is not democratic.

Another set of arguments of the supporters of mandatory voting relates to equal participation in elections. Because of the large size of contemporary societies in which we are living, we have decided on having a representative form of democracy and the elections are one of very few means through which we can express our viewpoint on political issues. With a falling turnout, non-participation in elections most frequently affects those citizens with lower social, economic and cultural capital, and those of

3 E-J. Sieyès, Qu'est-ce que le tiers-état?, Paris 2009.

4 J. Lacroix, De suffrage universel à la participation universelle. Pour une obligation libérale de se rendre aux ur- nes, „Raison publique" 2008, No 8, pp. 95-111.

a lower social standing[5]. The institution of elections becomes therefore an instrument for marginalising a part of the population, despite there being ostensibly equal access to general elections and referenda. The introduction of mandatory voting strengthens the participation of all social groups. The opponents of mandatory voting retort that the introduction of compulsory electoral participation doesn't begin to address the problem of marginalising certain groups. It is rather like implementing the saying of Lech Wałęsa "Break the thermometer, Mister, and you won't have a fever" (*Stłucz Pan termometr, a nie będziesz miał gorączki*). It would therefore be better to concentrate on solving real problems where they occur, that means first of all at the economical level, instead of artificially trying to alleviate the symptoms, which include lower election turnout among voters of a lower socio-economic status. The introduction of fines for those failing to attend at a police station would do nothing to improve the situation of those who do not, for economic reasons, participate in elections[6].

The opponents of mandatory voting point out that compulsory participation in elections deprives non-participation of meaning, dismissing its role in informing the political class. Non participation is not just the result and the symptom of socio-political inequalities but also a rationalised and motivated political act which manifests itself in a refusal to partake in voting. This isn't so much about Anthony Downs' theory of a rational choice, much-criticised in political science[7], which analyses voters' behaviour using an economic toolkit, and which interprets the participation of the majority of voters in votes as irrational behaviour from the point of view of a cost/benefit analysis. Those citizens not participating in a vote are not just those with no interest in politics but also those who think that the parties and their candidates do not meet their expectations, do not implement objectives that are socially significant and those who, though their refusal to go to the ballot box, and want to express their dissatisfaction, disappointment and disagreement with the political class[8]. Those in support of mandatory voting respond that compulsory participation does not deprive citizens of an opportunity to register their protest

5 A. Lijphart, Unequal Participation: democracy's Unresolved Dilemma, „American Political Science Review" 1997, t. 91, nr 1, s. 1-14; A. Lijphart, The Problem of Low and Unequal Voter Turnout and What we can do about it, „Po- litical Sciences Series" 1998, vol. 54, p. 1-13.

6 See. S. Birch, Full Participation. A Comparative Study of Compulsory Voting, New York 2009.

7 A. Downs, An Economic Theory of Democracy, New York 1957. More on the subject of the characteristics of non-voters in e.g.: K. Skarżyńska, Człowiek a polityka. Zarys psychologii politycznej, Warszawa 2005, pp. 204-220, A. Amjahad, Des abstentionnismes? Révélations typologiques, (in:) Amjahad, J-M. De Waele, M. Hastings (ed.), Le vote obligatoire. Débats, enjeux et défis, Paris 2011, pp. 35-50.

8 More on the subject of the characteristics of non-voters in e.g.: K. Skarżyńska, Człowiek a polityka. Zarys psychologii politycznej, Warszawa 2005, pp. 204-220, A. Amjahad, Des abstentionnismes? Révélations typologiques, (in:) Amjahad, J-M. De Waele, M. Hastings (ed.), Le vote obligatoire. Débats, enjeux et défis, Paris 2011, pp. 35-50.

because they are able to cast a vote which is not valid, or an empty vote[9] (which in Poland is regarded as invalid). Such a way of voting raises far fewer issues with interpretation as to the voter's intentions than non-participation and puts the political class in a much more difficult situation. In political systems which do not have mandatory voting, politicians frequently interpret low turnout in a way that is convenient to them: that is, as an absence of general dissatisfaction with the general political situation, and as an acceptance of the current political offer on the market. A large number of empty and invalid votes in a mandatory voting system indicates a clear refusal to support the whole current political class.

The support for mandatory voting is also based on the concept of citizenship which stresses not just the rights but also duties.In modern democracies the list of duties is not particularly extensive or onerous. It includes the duty to pay taxes, to attend school, to respect the law and, in some countries, military service. The majority of people do not object to the fact that, in order to be able to enjoy the full rights, citizens people do not object to the fact that, in order to be able to enjoy the full rights, citizens should also meet their obligations towards the state and their community. The duty to go to a polling station may therefore be added to the general list of the duties of a modern citizen – a moderate price to be paid for strengthening democracy which would become more representative. The opponents maintain that participation in elections enforced under the threat of sanctions does nothing to help further legitimise a democratic regime and is a missed opportunity to create an active and politically engaged society.

The debate between the supporters and opponents of mandatory voting is sometimes reduced to a division between left and right-wing, where the "leftist" perspective is seen as "naturally" supportive of a compulsory vote and the right wing as diametrically opposed. The "proof" for the leftist tendencies of the supporters of mandatory voting is supposed to lie not so much in the ideology but in political interest of seeing the potential to increase the share of the vote for left wing parties and candidates. None of the statistics or models indicate, however, that mandatory voting increases the support for left-wing parties[10]. It is possible that this would have been the case if non participation really affected just citizens from marginalised, overlooked or discriminated groups, where left wing manifestos may appeal more than the right-wing. However, as indicated earlier, the issue of a low turnout is much more

9 Literature in French distinguishes between an invalid vote (*vote nul*) and an empty vote (*vote blanc*). The 2014 EU Parliamentary elections in Frane for the first time implemented the provisions of the Act of 21 February 2014, where election results include the number of invalid votes (e.g. spoilt ballot papers, those with hand-written annotations) and empty votes, that is, those which do not indicate support for any candidate or party. Before, empty votes were counted as invalid.

10 P. Bernhagen, M. Marsh, The partisan effect of low turnout: Analyzing vote abstention as a missing data problem, "Electoral Studies" 2007 vol. 26, No. 3, p. 558.

complex and often indicates apathy, dissatisfaction or even anger of the electorate. This results in citizens forced to appear at a polling station under the threat of a fine more likely to vote for extreme rather than mainstream parties. However, the debate over whether mandatory voting is more appealing to right or left wing politicians should not overlook the fact that the proposal of introducing a compulsory vote in 2001 in the UK (not implemented) originated in the Labour Party. Commentators interpret this in light of potential electoral gains for Labour. Social research indicates that the greatest participation in elections is from the middle class which is more likely to support the Conservatives and those from lower social classes who are traditional Labour voters do not participate as often in elections. Some see an obvious connection between the introduction of a compulsory participation in elections and an increase in Labour's share of the vote, indirectly confirmed by Labour's proposal of changes to the British election system.

In Poland the public debate over mandatory voting is largely absent, neither NGOs nor any of the political parties seem interested in initiating it. Potential arguments for and against as well as the spread of the support for such initiative can be glimpsed from a discussion thread on the students' forum from the Department of Social Science of the Silesian University (Wydział Nauk Społecznych Uniwersytetu Śląskiego), which took place in October 2005[11]. The question of "What do you reckon to the idea of mandatory voting" received almost exclusively negative responses coinciding with the arguments of the opponents of mandatory voting cited above, or referring to, not always adhering to politically correct language, to an elitist concept of democracy:

"The highest percentage of non-voters is amongst those with lower level of education and those with higher qualifications are also the most likely to vote therefore I think that it's better when the thickos don't turn out and vote for the likes of themselves".

"Mandatory voting will actually discourage people from participating in elections; instead of thinking who to vote for they will just tick boxes at random or invalidate their votes (better the latter…). If the authorities are legitimised by voters this support must not be random which, I think, is a risk if voting was compulsory"

"If the mob were to vote I see no further opportunity for the development of our country."

"If this were a statutory duty there would be immediately a million ways of bypassing it. I am not convinced I would go to the polling station if I was told to go; I go because I think I ought to (we live in a democracy, after all) not because someone compels me to."

11 http://forumwns.org/printview.php?t=1175&start=0&sid=5d55ba994f6779365cfdfbf72e11c8ba (accessed on: 14.12.2014).

"This is about social awareness; if someone is lacking this then perhaps it is better that they don't vote – less harmful..."

"Such compulsion would be at loggerheads with democratic ideals where liberty is a value (this includes freedom to participate in elections)."

"In Poland there is a right, not a duty, to vote."

The e-forum included just one voice which could be regarded as moderately in favour of potential introduction of mandatory voting in Poland:

"If voting was now mandatory (…) people would value their own vote more, according to the principle of if I have to vote, at least let this be a vote that is thought through."

In the discussion thread quoted above no-one referred to the introduction of mandatory voting as a way of improving elections turnout in Poland, which is the worst on average in Europe.

4. Mandatory voting and elections turnout

Diminishing turnout is an issue for most contemporary political systems in our part of the world and voting absenteeism has become, with few exceptions, a structural problem. Demotivated voters are particular visible amongst lower socio-economic classes. Mikołaj Cześnik writes: "Numerous research projects on participation in voting unanimously indicate that participation on elections in unequal in modern democracies. Those from the upper strata of the society participate in this procedure much more frequently than those from lower social or disadvantaged background, which means that their interests are less well represented in elected bodies and there is less chance that their expectations may be realised. Low turnout, which by its nature is uneven, leads to uneven representation, and therefore to unequal political influence. (…) The danger lies in the fact that a system where one of the principal values of democracy – equality – is compromised may be seen as unjust and corrupt, which in turn may undermine the legitimacy of such a system ad lead to attempts to overthrow it."[12]. Sociologists warn that this may lead to a breakdown of political trust which in turn may feed unregulated and uncontrolled social protests. High elections turnout would guarantee to a larger degree that conflicts over diminishing resources, unavoidable in politics, may find their outlet in conventional methods of participation that is in the ballot box.

The comparison of elections turnout in post-war Europe unsurprisingly proves that this is much higher in those systems where voting is compulsory. The difference between those and the countries where voting is not compulsory ranges between 6.2% (in the 1980s) to 12.42% (at the beginning of the 21st century), as shown in Table

12 M. Cześnik, Partycypacja wyborcza Polaków, Warszawa 2009, pp. 3-4.

2. What's interesting is that having compulsory voting in the past mostly results in a higher turnout a long time after it has been established, as may be observed in the turnout in the Netherlands, Italy and Austria (Table 3).

Table 2. Average turnout in general elections in 29 European countries (%)

	1940s	1950s	1960s	1970s	1980s.	1990s	2000-2005
Countries where voting is mandatory	93.23	94.26	92.90	90.39	86.10	84.16	80.52
Countries where voting is not mandatory	81.58	83.57	83.68	83.13	79.91	74.71	68.10

Source: P. Delwit, L'introuvable électeur? La participation électorale en Europe (1945-2005), (in:) A. Amjahad, J-M. De Waele, M. Hastings (eds.), Le vote obligatoire. Débats, enjeux et défis, Paris 2011, p. 28.

Table 3. Average turnout in 29 European countries 1945-2005 (%)

	1940s	**1950s**	**1960s**	**1970s**	**1980s**	**1990s**	**2000-2005**
Austria	95.70	95.32	93.79	92.22	91.51	83.59	80.49
Belgium	93.07	93.15	91.31	92.97	93.83	91.47	91.63
Bulgaria						76.94	61.35
Cyprus				80.65	95.15	91.94	91.75
Czech Republic						82.79	58.00
Denmark	85.78	81.77	87.37	87.51	86.07	84.35	85.84
Estonia						64.39	58.24
Finland	76.61	76.49	85.01	77.84	73.89	67.40	66.67
France	79.92	80.00	76.62	82.35	71.83	68.43	64.42
Greece				81.11	80.79	77.90	75.76
Spain				72.27	73.12	76.92	73.62
Netherlands	93.40	95.36	95.04	84.73	83.45	76.04	79.55
Ireland	70.98	74.34	74.26	76.45	72.88	68.45	62.57
Iceland	88.30	90.75	91.26	90.34	89.40	87.17	87.70
Lithuania						63.97	52.31
Luxemburg	91.63	92.15	89.56	89.49	88.10	87.39	91.68

Latvia						77.90	71.51
Malta	75.44	78.05	90.25	94.07	95.29	96.19	96.95
Germany	78.49	86.81	87.05	90.93	87.07	79.65	78.39
Norway	79.33	78.82	82.83	81.59	83.07	77.10	76.30
Poland						48.40	43.34
Portugal				87.44	77.82	65.69	62.88
Romania						79.55	60.16
Slovakia						79.98	70.07
Slovenia						79.57	65.30
Switzerland	71.69	68.98	64.11	52.3	47.67	43.85	45.23
Sweden	77.56	78.70	86.1	90.42	89.06	84.96	81.75
UK	72.55	80.24	76.56	75.02	74.13	74.60	60.89
Italy	90.68	93.79	92.83	92.25	89.77	85.38	81.44

Source: P. Delwit, L'introuvable électeur? La participation électorale en Europe (1945-2005), (in:) A. Amjahad, J-M. De Waele, M. Hastings (eds.), Le vote obligatoire. Débats, enjeux et défis, Paris 2011, p. 27.

Elections statistics to a large degree show that the introduction of mandatory voting does solve the problem of low turnout not only in Europe, but also in South and Central American countries, where the introduction of sanctions for non-participation resulted in the number of non-voters falling fivefold. The effectiveness of this solution leaves no doubt; however, this cannot be said of its compliance with the accepted concept of democracy and political culture prevalent in a given country, understood as the collection of attitudes, values and models of behaviour concerning the relationship between the citizens and the authorities[13]. Introduction of compulsory voting as a way of ensuring a high turnout can be regarded by some as a desperate measure by politicians who lack other means of motivating the citizen to participate in elections; by others it is seen as an effective and simple measure to strengthen the polity, creating an inclusive dynamics, re-integrating marginalised groups, increasing the effectiveness of representation, which may be one of the factors in consolidating a democratic system.

13 See:. J.J. Wiatr, Socjologia polityki, Warszawa 1999, p. 189.

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Compulsory Voting in Belgium. A Few Remarks on Mandatory Voting

Abstract: Democracy is not possible without the participation of citizens in politics. One of the duties required of citizens for development of democracy is the selection of representatives to parliament. Belgium is one of several European countries with compulsory voting. The Belgian compulsory voting system is the oldest and the most stable in the world. Although views on mandatory voting are split, it remains in use and non-participation in elections is sanctioned. The aim of the article is to analyze compulsory voting in Belgium, identifying the reasons for its introduction and discussing the ongoing debate in that country on whether the practice should be maintained or abolished.
Keywords: elections, compulsory voting, Belgium
Słowa kluczowe: wybory, przymus wyborczy, Belgia

1. Introducing the term compulsory voting

Mandatory voting (compulsory voting, obligatory voting) takes place in many countries in the world. Compulsory voting appears in two forms – as a political or a legal requirement. The first form is characteristic of non-democratic countries. The legal duty is present in those democratic countries where participation in elections is mandatory. Those democratic countries which decided to introduce mandatory voting did it in a bid to increase turnout in general elections. Compulsory voting is a legally binding voting rule, most commonly enshrined at a constitutional level[1]. It is understood as a requirement to participate in the elections, not the obligation to cast a vote. Despite its name, it carries no requirement to actually vote, just a requirement

1 G. Kryszeń, Przymus wyborczy, "Przegląd Sejmowy" 2004, No. 3(62), p. 63.

to turn up and register at a polling station[2]. Moreover, compulsory voting does not imply the obligation to vote for one of the political parties. A voter may cast a vote (valid or not) at a polling station; they may also refuse to put the ballot paper in the box. According to Lijphart, compulsory voting means just the requirement to turn up at a polling station. Compulsory voting does not require stating a preference. Lijphart regards compulsory voting as less restrictive and onerous for citizens than many other legal requirements, for example the requirement to pay taxes, mandatory education or military service. Not voting means deriving advantages from democracy without personally contributing[3].

Currently compulsory voting occurs in twenty-nine countries in the world[4]. The first countries (apart from Belgium) to introduce compulsory voting were: Liechtenstein (in 1862), Argentina (1914), Luxemburg (1919) and Australia (1924)[5]. Additionally, the United States have experimented with compulsory voting (Dakota 1898, Massachusetts 1918)[6]; Venezuela (in mid 1990s) and the Netherlands (1967) have both abolished compulsory voting. Currently compulsory voting exists in six western European countries: Belgium, Greece, Liechtenstein, Luxemburg, Switzerland (Schaffhausen canton[7]) and in Cyprus. Austria, Italy and the Netherlands have abolished it.

Non-participation results in more or less onerous sanctions. Compulsory voting (and potential sanctions for failing to take part in elections) directly influences turnout. All the twenty-nine countries where voting is compulsory have a high election turnout, approximately 10-15% higher than the countries which have not introduced compulsory voting[8].

Therefore there are two elements that comprise the term compulsory voting – the requirement to vote and the sanctions for failing to do so. If a country does not penalise those who do not vote, then compulsory voting requires solely attendance at a polling station and failing to meet this requirement does not result in sanctions

2 A. Lever, Compulsory voting: a critical perspective, "British Journal of Political Science", March 2009, p. 3.

3 A. Lijphard, Unequal Participation: Democracy's Unresolved Dilemma, "American Political Science Review" 1997, vol. 91, No. 1, p. 10.

4 http://www.idea.int/vt/compulsory_voting.cfm (accessed on: 18.04.2014.).

5 M. Gratschew, Compulsory Voting in Western Europe, (in:) Voter Turnout in Western Europe, p. 25.

6 S. Jackman, Compulsory Voting, International Encyclopedia of the Social and Behavioral Sciences, p. 3.

7 A. Żukowski, Przymus wyborczy – istota, przesłanki i implikacje, "Prawo i Polityka" 2009, No. 1(1), p. 112.

8 International Institute for Democracy and Electoral Assistance (IDEA), http://www.idea.int/ (accessed on: 18.04.2014).

being applied. In some countries only registered voters have a duty to vote. But the entry onto electoral register is not compulsory[9].

In the case of Belgium, automatic voting may be a better tactic than compulsory voting. Voters are required to turn up at a polling station where they may return a blank ballot paper. Therefore 'abstaining from voting' does not have a special significance in the voting terminology in Belgium. The abstaining votes are regarded as empty or invalid votes. It's the turnout that matters.

This article aims to analyse compulsory voting in Belgium, showcasing the reasons for introducing mandatory voting and to familiarise the reader with the debate over maintaining or abolishing mandatory voting in that country.

2. The evolution of elections legislation in Belgium

Elections in Belgium were census based. In 1891 only 1% of the members of the society were eligible to vote (men over 25 years of age and paying land tax)[10]. According to the 1830 elections regulations, voters voted in the seat of the authorities of their constituency. The distance from home, the timing of the elections, as well as lack of political awareness of part of the electorate were the reasons for declining election turnout[11]. The reformed Constitution of 1893 abolished the property requirement and introduced mandatory, multi-party elections. Men over 25 had two or three votes[12]. Fathers and landowners, as well as higher education diploma holders, were privileged in the number of votes they had. The changes were championed by three political parties: *Partie ouvrier belge*, *Parti liberal* and some of the democrats from the *Parti catholique*[13]. Between 1919-1948 only men were eligible to vote still, but all had only the one vote and the minimum age requirement was lowered to 21. Mandatory voting was introduced in 1893. Each person on the electoral register is required to participate in elections[14]. Between 1948 and 1981 both men and women

9 M. Gratschew, Compulsory Voting…, *op. cit.*, p. 26.

10 R. Jankowska, Głosowanie obowiązkowe a demokracja. Przykład Królestwa Belgii, (in:) S. Wróbel (ed.), Dyle- maty współczesnej demokracji, Toruń 2011, p. 321

11 Konstytucja Królestwa Belgii, Translation and introduction W. Skrzydło, Warszawa 2010, p. 11.

12 A. Głowacki, System konstytucyjny Belgii, Warszawa 1997, p. 7.

13 J.-B. Pilet, Choosing compulsory voting in Belgium: strategies and ideas combined, http://ecpr.eu/Filestore/Pa- perProposal/53cb7c8c-38e0-4a02-8cdc-47d70494182f.pdf, 2007, (accessed on: 20.04.2014) pp. 3-4.

14 Art. 105-107 the Electoral Code of Belgium of 12th April 1894 [Code Lectoral de 12 avril 1894], Interieur 15.04.1894, nr 1894041255, p. 1121, http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&c- n=1894041230&table_name=loi&&caller=list&fromtab=loi&tri=dd+AS+RANKLNK0001 (accessed on: 20.04.2014 .).

over 21 could vote in general elections. The age requirement for both genders was reduced to 18 in 1981[15].

Belgium was the first country in the world to have replaced the first-past-the post electoral system with proportional representation[16]. The principle of proportionality and confidentiality of elections was introduced into the Constitution in 1920[17]. Article 62 of the Belgian Constitution states unequivocally that voting is mandatory and secret[18].

3. The introduction of compulsory voting in Belgium

Compulsory voting has been in existence in Belgium since 1893[19] and extends to cover the elections to the European Parliament[20]. Belgium was the first country in the world where, the duty to vote extended nationally. Before that voting was mandatory in some Swiss cantons but not at a national scale[21]. Until 1893 voting was not compulsory in Belgium. An appropriate amendment was introduced in to the Belgian Constitution in order to for "the views and attitudes of the society to be as fully reflected as possible to enable the Parliament to be representative and secure strong democratic representation"[22]. Essentially, compulsory voting was introduced in order to popularise the idea of voting amongst uneducated parts of society and to prevent employers from denying the workers the right to vote by detaining them at work. Compulsory voting stemmed from a view that each citizen has a duty to take an interest in the matters of state, especially given the fact that in 1861 in Brussels

15 J. Stengert, Histoire de la législation électorale en Belgique, Revue belge de philologie et d'histoire. Tome 82 fasc. 1-2, 2004. Histoire medievale, moderne et contemporaine – Middeleeuwse. moderne en hedendaagse geschie- denis, p. 248.

16 M. Hooghe, K. Deschouwer, Veto Players and Electoral Reform in Belgium, "West European Politics", 2011, vol. 34(3), p. 628.

17 A. Młynarska-Sobaczewska, Prawo wyborcze do parlamentu Królestwa Belgii, (in:) S. Grabowska, K. Składowski (eds.), Prawo wyborcze do parlamentu w wybranych państwach europejskich, Kraków 2006, p. 80.

18 Konstytucja Królestwa Belgii…, *op. cit.*

19 J. Briggs, K.Celis, For or Against: Compulsory Voting in Britain and Belgium, "Social and Public Policy Review" 2010, 4(1), p. 2

20 P. van Aelst, J. Lefevere, Has Europe got anything to do with the European elections? A study on split-ticket voting in the Belgian regional and European elections of 2009, "European Union Politics" 2012, vol. 13(3), p. 8. The turnout in EP elections in Belgium in 1979-2014 had never fallen below 90% – A. Muxel, Les enjeux. Des élec- tions européennes en manque d'électeurs, mais une relative stabilisation de la participation, "SciencePO Juin" 2014, No. 4, p. 3, http://www.cevipof.com/rtefiles/File/ELECTIONS%20EUROPEENNES/noteMUXEL.pdf (accessed on: 20.04.2014 r.).

21 J. Stengert, Histoire de la legislation…, *op. cit.*, p. 268.

22 L. Żołądek, Przymus wyborczy. Geneza, praktyka funkcjonowania, argumenty za i przeciw, "Studia BAS" 2011, 3(27), p. 12.

only 10% of those eligible to vote took part in elections[23]. In the general elections in 1843 the turnout was 14%[24]. Low election turnout became the chief argument for the introduction of compulsory voting in Belgium. In Belgium, voting has been compulsory for all men since 1919 (the multiple vote system was replaced by the one man one vote system), and for all women since 1949[25]. The constitutional introduction of mandatory voting aimed to guarantee that all new voters – all male citizens of Belgium who had a vote – would turn out en-masse and contribute to the electoral success of the new socialist workers party[26]. The Liberal Party was not keen on the change and opted for the elections to be voluntary. One of its MPs – Charles Graux – has described the abstaining socialist voters as poor and unhappy social rejects, ignorant in political matters and incapable of informed voting[27].

The second key argument for introducing mandatory voting was the desire to diminish the share of votes of radical parties. Catholic parties counted on an increase in the number of votes of their supporters, especially in rural areas. Paradoxically, the reasons for the victory of the ultra-right Vlaams Block in the 1991 elections were thought to lie in compulsory voting. Voters with a duty to vote expressed their frustration by voting for an extreme right-wing party. The logic of this argument holds to a degree. However, one needs to bear in mind that in the French speaking part of the country[28] compulsory voting equally applies yet it has not resulted in the electoral victory of the extreme right-wing parties[29].

Another argument for introducing compulsory voting was the desire to guarantee that political parties would not pay the potential opposition voters off for not voting in elections. At the time it was commonly acknowledged that elections in those times were corrupt (using money or a bottle of whisky)[30]. Political elites were convinced that introducing a duty to vote would reduce costs of an election campaign because compulsory voting would replace large expenditure related to encouraging voters to turn out and come to a polling station[31]. Until then the electoral candidates

23 A. Żukowski, Przymus wyborczy…, *op. cit.*, p. 113.

24 M. Rachwał, Przymus wyborczy a legitymizacja władzy politycznej, "Studia Polityczne" 2012, No. 4, p. 236.

25 A. Żukowski, Przymus wyborczy…, *op. cit.*, p. 114.

26 M. Hooghe, K. Deschouwer, Veto Players…, *op. cit.*, p. 628.

27 A. Malkopolou, The History of Compulsory Voting in Europe. Democracy's Duty?, Routledge 2015, p. 1.

28 See more on language divisions in Belgium in e.g. : E. Kużelewska, "Language Border and Linguistic Legislation in Belgium", Michigan State International Law Review 2015, vol. 3(1), http://msuilr.org/?forum-conveniens=langu-age-border-and-linguistic-legislation-in-belgium (accessed on: 29.04.2014).

29 M. Hooghe, K. Deschouwer, Veto Players…, *op. cit.*, p. 623.

30 J.C. Courtney, D. Wilby, Le débat sur le vote obligatoire, Revue parlamentaire canadienne/hiver 2007, p. 42, http://www.revparl.ca/30/4/30n4_07f_Courtney-Wilby.pdf (accessed on: 29.04.2014).

31 L. Żołądek, Przymus wyborczy…, *op. cit.*, p. 12.

would meet the voters travel costs and subsistence on the day of the elections, hence for example the legendary "d'Alost sausages"[32]. Elections took place in the capital. The introduction of compulsory voting would remove the financial burden from the shoulders of the politicians for a number of reasons, one of which was the fact that elections now took place in local authorities, without the need to travel to the capital. Compulsory voting introduced in 1893 was enforced with minimal sanctions[33].

Each citizen who is entitled to vote is obliged to participate on the *Election Day*. Belgian citizens over 18 as well as those registered as residents in local authorities are automatically registered as voters[34]. Before the elections each registered voter receives a polling card together with a summons (*lettre do convocation*). Each person registered on the electoral roll in each local authority has the duty to participate in elections [35]. In parliamentary elections as well as in regional council and provincial elections a residency census is required – a voter must have been living in a given locality for the period of at least six months. This duty does not apply to certain categories of persons, for example those who have been legally declared as unable to vote, or those who are serving a custodial sentence longer than three months.

The situation of Belgian citizens living abroad is interesting. Since 1999 they are entitled to vote, however they are not automatically entered onto the electoral register[36]. They are required to get registered at an embassy. They then get issued with a polling card and from then on, voting is compulsory for them. The same system includes non-Belgians living in Belgium. Compulsory voting concerns not just the citizens of that country but also foreigners who, without having Belgian citizenship, are registered on the electoral roll[37] (this is the case only with European Parliamentary elections and local elections). Since 1999 EU citizens living in Belgium have a right to vote in local elections [38]. The decision on whether to register on the electoral roll is theirs. If they decide to enter their names on the list of voters, voting becomes mandatory for them and carries the threat of sanctions for failing to participate. From 2004 onwards, the right to vote in local elections has been extended to all non-

32 J. Stengert, Histoire de la legislation…, *op. cit.*, p. 268

33 R.B. Achour, Etat de la question. Pour ou contre le vote obligatoire?, Institut Emile Vandervelve 2010, p. 21, http:// www.iev.be/getattachment/04267ce6-9f77-4518-9bd5-b4b7d1bc174c/Pour-ou-contre-le-vote-obligatoire--.aspx (accessed on: 29.04.2014).

34 J.-B. Pilet, Choosing compulsory voting…, *op. cit.,* p. 2.

35 Art. 105-107 of the Electoral Code of Belgium of 12 April 1894 [Code Lectoral de 12 avril 1894], Interieur 15.04.1894, no 1894041255, p. 1121, http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&c-n=1894041230&table_name=loi&&caller=list&fromtab=loi&tri=dd+AS+RANKLNK0001 (accessed on: 29.04.2014).

36 Loi du 18 décembre 1998.

37 L. Żołądek, Przymus wyborczy…, *op. cit.*, p. 17.

38 Loi du 23 mars 1989 r. elative à l élection du parlement européen, art. 39; La loi du 27 janvier 1999 [Moniteur belge du 30 janvier 1999].

Belgian citizens who have been living in Belgium for at least five years[39]. Both these forms have encountered multiple difficulties along the way. There were fears over upsetting the linguistic balance in Brussels which is home to many Europeans and other non-Belgian citizens.

According to Belgian law, voters are required to turn up at a polling station and confirm their identity to the members of the electoral commission. They do not have to mark the ballot paper in any way.

4. Sanctions for failing to vote

Non-participation in elections carries the risk of sanctions as specified under Chapter VI of the Belgian Electoral Code w Art. 207-210[40]. In the first years after compulsory voting was introduced in Belgium the sanction was a formal caution applied to those who failed to turn up at a polling station for the first time[41].Voters who are unable to participate in voting present the magistrate with reasons for absence together with required proof. Within eight days of the results of the elections being declared, the crown prosecution drafted a list of voters who did not participate without a leave of absence. Those voters face criminal proceedings in court[42]. In Belgium the fine for failing to turn up on elections day for the first time is €5-€10 (the magistrate may increase it to €30-€60), for the second time €10-€25 (and even €60-€150) [43]. Voters who do not participate in elections and whose absence was not excused pays a fine without a right of appeal. If a voter fails to attend at least four times in 15 years they are struck off the electoral register for the period of 10 years and in that time they may receive no nomination or hold a public post[44]. This is a kind of restriction of citizens' rights and may be an effective deterrent as around 16% of Belgians are employed in the public sector[45]. However, it is worth stressing that Belgium allows vote by proxy as well as a postal vote[46].

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39 J.-B. Pilet, Choosing compulsory voting…, *op. cit.,* s. 2; La loi du 19 mars de 2004 [Moniteur belge du 23 avril 2004].

40 The electoral code [Code electora] of 18th April 1894, "Interieur" 1894.04.15, nr 1894041255, p. 1121, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1894041230&table_name=loi (accessed on: 29.04.2014).

41 S. Birch, Full participation. A comparative study of compulsory voting, United Nations University Press, 2009, p. 8.

42 A. Młynarska-Sobaczewska, Prawo wyborcze do parlamentu…, *op. cit.*, p. 84.

43 Code électoral art. 209-210, http://www.elections.fgov.be/index.php?id=3300&L=0 (accessed on: 06.05.2014 r.).

44 A. Młynarska-Sobaczewska, Prawo wyborcze do parlamentu..., *op. cit.*, p. 84.

45 E. Lund, Compulsory voting: a possible cure for partisanship and apathy in U.S. politics, "Wisconsin International Law Journal", vol. 31(1), pp. 95-96.

46 E. Dydak, A. Saczuk, Królestwo Belgii, (in:) K.A. Wojtaszczyk, M. Poboży (eds.), Systemy polityczne państw Unii Europejskiej, Volume I, Warszawa 2013, p. 134.

It is worth highlighting that statutory sanctions for failing to meet the electoral duty tend to stay on paper, with the exception of the fine. Since 2003 there have been no convictions for failing to participate in elections due to the fact that, because of the number of pressing cases, the crown prosecution has not filed any cases[47].

Table 1. Electoral turnout in federal elections in Belgium 1981-2014

Elections	Turnout (%)
2014	89.45
2010	89.22
2007	91.08
2003	91.63
1999	90.53
1995	91.10
1987	93.40
1985	93.59
1981	94.60

Source: own table.

Over the period of 30 years the elections turnout in Belgium has been maintained at a comparable, high level of around 90%. Belgians' active participation is the result of their conviction that voting is their moral duty and their high citizenship awareness. A few days before the elections, the media publicise the duty to participate in elections, reminding voters of the sanctions for non-participation[48]. Despite a generally high turnout, the regional disparity between Wallonia and the Flanders is intriguing. The Belgian federal elections have noted that a quarter of the residents of Wallonia and Brussels were either absent or returned an invalid or empty ballot paper, whereas for the residents of Flanders that percentage was 15%[49].

5. Discussions over abolishing compulsory voting in Belgium

From the moment it was introduced until the 1970s compulsory voting was questioned by many. The questioning peaked in 1970 when the Netherlands abolished compulsory voting. At that time, first and foremost the Flemish started to re-consider

47 R.B. Achour, Etat de la question…, *op. cit.*, pp. 21-22.

48 J.-B. Pilet, Choosing compulsory voting…, *op. cit.*, p. 3.

49 G. Pion, Le vote blanc et nul en Wallonie: analyse écologique et individuelle, Belgeo (Revue Belge de Géographie): Miscellaneous 2010, No. 3, p. 249.

their stance on elections and the idea to copy the Dutch idea became popular, especially with new regional parties. These parties were also behind the introduction of a referendum and direct mayoral elections in cities. In the early 1990s the Flemish liberals (PVV, now VLD) started the campaign to abolish mandatory voting. It was suggested that compulsory voting contributes directly to 'pathological' results of general elections, leading to difficulties in forming a federal government. The liberals valued more a single vote of an informed voter than those of passive citizens who participate in elections because they are legally required to do so. Those passive citizens are then able to impulsively vote for extremist parties, without subscribing to their ideologies in any way[50].

For the Flemish Liberals obligatory voting is symptomatic of an over restrictive state and is at loggerheads with the principle of personal freedom. According to the VLD, nobody should be forced to elect their representatives if they don't want to. The right to vote should be regarded simply as a right, and citizens are free to enjoy their rights or not[51].

With regards to the arguments over a potential violation of basic individual rights and liberties by mandatory voting this issue was probed in 1971 by the European Human Rights Commission (and, contrary to what is quoted in literature, settled by the European Human Rights Tribunal)[52]. Until 1998 individual complaints were brought before the Commission which, if a case was regarded as valid, would take up the applicant's petition in the European Human Rights Tribunal. Only the XI Protocol of 1994 (enacted in 1998) introduced the opportunity to lodge an individual complaint directly with the European Human Rights Tribunal. In 1971 the Commission declared the complaint of *X versus Austria* as inadmissible. The Commission concluded that the use of compulsory voting does not constitute a breach in basic rights and liberties because the electoral duty remains unchanged, and in reality is a misnomer, especially in Western Europe. The Commission argued that many systems with compulsory voting do not require their citizens to vote but to participate in elections[53]. This participation, being present at a polling station is what is mandatory, not the act of voting. The Commission concluded that compulsory voting is not in breach of the right to the freedom of thought, conscience and religion (Art. 9 of the European Human Rights Convention)[54]. The Commission indicated that

50 A. Malkopolou, The History of Compulsory…, *op. cit.*, p. 1-2.

51 L. de Winter, J. Ackaert, Compulsory Voting in Belgium: a Reply to Hooghe and Pelleriaux, "Electoral Studies", vol. 17 (4), p. 427.

52 B. Engelen, Why Compulsory Voting Can Enhance Democracy, Acta Politica 2007, No. 42, p. 30.

53 Decyzja Europejskiej Komisji Praw Człowieka w sprawie *X versus Austria*, Application No. 4982/71, http://hudoc. echr.coe.int/sites/eng/pages/search.aspx?i=001-27952 (accessed on: 06.05.2014).

54 L. Baston, K. Ritchie, Turning out Or Turing off? An analysis of political disengagement and what can be done about it?, London 2014, http://electoral-reform.org.uk.downloadefile/turning-out-

only the presence (participation) is mandatory; the voters are free to return empty or invalid ballot papers[55]. Proposals to abolish compulsory voting have started to appear in Belgium since the early 1990s. Any material changes do not, however, seem likely due to the fact that abolishing mandatory voting requires a constitutional reform. Amending the Constitution over this matter seems practically impossible due to the *supermajority* requirement of at least two thirds of the votes[56]. Moreover, unlike the leaders of the major liberal parties (e.g. the VLD), the Belgians are not interested in abolishing compulsory voting and regard it as an important issue meeting legislative requirements[57].

Abolishing compulsory voting meets with the opposition of socialist party leaders who realise that in the event of compulsory voting being abolished they stand to lose voters and, consequently, parliamentary seats. Although the socialists are not significant *veto-players* in Parliament (due to a small number of seats) they would be unlikely to block the decision by themselves; however abolishing compulsory voting has never been officially included on the Parliametary agenda and put to the vote[58]. The Christian Democrats party's stand is close to that of the Socialists – they are not keen on the change proposed by the Liberals. The potential abolition of compulsory voting would serve to undermine the well-grounded and comfortable position of the Christian Democrats[59]. Liberal parties whose vote lies generally with the better educated and socially engaged voters, are not worried about electoral loses resulting from the potential abolition of compulsory voting.

The Liberals, realising the difficulties with amending the Constitution required to abolish compulsory voting, changed their strategy in 2008. One of the arguments for abolishing compulsory voting are the limited sanctions imposed on those for fail to fulfil their duty to vote. Those sanctions are too limited to be effective in persuading citizens to participate in the vote. This means that anybody failing to vote is almost certain that they won't be punished. The leader of the Liberal Party therefore proposed – maintaining the constitutional principle of mandatory voting – to abolish the provision of the electoral law (through the ordinary majority of votes) governing the sanctions for non-participation. Should the Liberals' plan succeed, they were hoping that voters would realise that, if mandatory voting is no longer enforceable, the adherence to the constitutional rule would slowly be relegated to the closet, as

or-turning-off-.pdf (accessed on: 06.05.2014), p. 36.

55 Europejska Konwencja Praw Człowieka, http://www.echr.coe.int/Documents/Convention_POL.pdf (accessed on: 06.05.2014).

56 Konstytucja Belgii z 1994 r., Tytuł VIII [Constitution of Belgium of 1994, Title VIII].

57 M. Hooghe, K. Deschouwer, Veto Players…, *op. cit.*, p. 632.

58 M. Hooghe, K. Deschouwer, Veto Players…, *op. cit.*, p. 632.

59 K. Deschouwer, Political Parties and Their Reactions to the Erosion of Voter Loyalty in Belgium: Caught in a Trap, (in:) P. Mair, W.C. Müller, F. Plasser (eds.), Political Parties and Electoral Change, Sage 2004, p. 202.

was the case with other countries. The Liberals' proposal, like the others beforehand, was not debated in Parliament[60].

In turn, the supporters of maintaining compulsory voting argue that the duty to vote guarantees that the citizens legitimise political institutions. *Participation is the lifeblood of democracy*[61]. Citizens are therefore required to actively express their will through voting. This was well illustrated by Flemish socialists who proclaimed that the duty to vote guarantees that the Parliament does not become a company where a small minority of wealthy shareholders wields power because the majority of shareholders are absent[62]. The Christian Democrats maintain that mandatory voting ensures that the least well educated citizens are integrated into a democratic system. They do not deny that those voters are, or were, politically ignorant. Ignorance in political matters resulted from the lack of familiarity. However, mandatory voting has allowed the lower social classes to become familiar with the electoral cycle, enabling them to learn how to vote and respect elections. It has also contributed to developing an interest in increasing their rights[63].

Table 2. If compulsory voting was abolished in Belgium, would you vote in elections?

	YEARS				
Answers	1991	1995	1999	2003	Average (%)
Always	34.9	43.1	47.4	41.8	41.8
Mostly	12.1	14.3	14.9	14.8	14.0
Sometimes	12.5	13.3	11.5	14.3	12.9
Never	30.5	24.7	21.5	26.8	25.9
Don't know	10.0	4.6	4.7	2.3	5.4
Total	100	100	100	100	100
Number of respondents	2691	3638	4229	2221	

Source: Belgian Election Studies (ISPO) of 1991, 1995, 1999, 2003 (Billiet, Swyngedouw et al. 1991-2004). Data in the table as %.

In light of the research aimed at assessing, through questionnaires, the possible negative impact of abolishing compulsory voting on elections turnout, 26.6% of Belgians have responded that they would not participate in elections when this was

60 M. Hooghe, K. Deschouwer, Veto Players…, *op. cit.*, p. 633.

61 M.N. Franklin, Electoral Participation, (in:) L. Leduc, R.G. Niemi, P. Norris (eds.), Comparing Democracies: Elec- tions and Voting in Global Perspective, London 1996, p. 216.

62 J.-B. Pilet, Choosing compulsory voting…, *op. cit.*, p. 9.

63 Malkopolou, The History of Compulsory…, *op. cit.*, p. 2.

no longer compulsory, and 13% of Belgian respondents would 'sometimes' take part[64]. On the other hand, the data contained in the table optimistically indicate that over 50% of respondents would always or mostly take part in elections even after this was no longer compulsory. It is therefore feasible to propose that the attitude towards compulsory voting in Belgium is not that of resentment, but of respect. The Belgians treat voting as an important duty which they are obliged to perform as citizens of their country[65]. A potential abolition of compulsory voting would result in a drop in turnout, (but just over half would still participate in the vote) and a strong conviction that conservative parties would gain[66].

Opponents of compulsory voting answer the arguments about an increased turnout by pointing at other methods. Apart from mandatory voting these include: making the election day a non-working day or a national holiday, introducing an automated registration, establishing polling stations in shopping centres, extending elections over two days or introducing other incentives[67]. The discussion includes voices saying that non-participation is also a form of political expression. Low turnout may simply mean the lack of voters satisfaction with political powers or be an expression of political apathy. According to the opponents of mandatory voting the electoral duty does not help legitimise those in government. Compulsory voting does affect a higher turnout but does not legitimise the government due to a relative large share of asinine votes,[68] and invalid votes or protest votes.

The discussion taking place in Belgium over the need to change electoral law (in particular the proportional representation and the d'Hondt method, unaltered since their introduction in 1899) has included the necessity to maintain compulsory voting. Although some small modifications have been introduced into the Belgian electoral system, nevertheless these have not substantially affected the key dimension of the electoral process[69]. The majority of Belgians are for maintaining compulsory voting, arguing that this neutralises political polarisation. Should voting cease to be compulsory, the following voter profile would dominate: male, well educated, about 35 years of age[70].

64 G. Kryszeń, Przymus wyborczy…, *op. cit*., p. 67.

65 E. Lund, Compulsory voting…, *op. cit.*, pp. 97-98.

66 A. Lijphart, Thinking about democracy. Power sharing and majority rule in theory and practice, Routledge 2008, p. 205.

67 L. Hill, Compulsory voting in Australia: a basis for a 'best practice' regime, "Federal Law Review" 2004, vol. 32, p. 485.

68 G. Kryszeń, Standardy prawne wolnych wyborów parlamentarnych, Białystok 2007, p. 250.

69 M. Hooghe, K. Deschouwer, Veto Players…, *op. cit.*, p. 628.

70 S. Marien, Is Compulsory Voting a Good Idea? The Consequences of Compulsory Voting in Belgium, PartiRep Research Network Brussels/Leuven 2007, pp. 8-9, M. Hooghe, K. Pelleriaux, Compulsory Voting in Belgium: an Application of the Lijphart Thesis, "Electoral Studies" 1998, vol. 17(4), pp. 421-423.

6. Conclusions

Belgium is among 20 world countries with highest general elections turnout [71]. Compulsory voting is without a doubt one of the most effective means of increasing turnout in elections. Mandatory voting stimulates the government to simplify voting procedures (e.g. no need to register each time before elections or making the elections day a non-working day). Due to the fact that the electorate often do not realise that voting is in their own interest compulsory voting becomes a kind of guardian of democratic election rights. Mandatory voting moves the onus onto the citizens but the state compensates for this by introducing institutional cost saving solutions (like voting on non-working days or the ease to enter the electoral register). The sanctions are less vital. An important feature of compulsory voting is the fact that voting is perceived as a citizen's duty[72]. Compulsory voting in Belgium was introduced as an element of universal suffrage. It became not just one element in the legal-political system but a tradition or a habit. It represents a way of life where social norms are more important than sanctions. The consensus amongst Belgians is that voting is not just a right, it is a form of responsibility for the state. The Belgians turn out for the elections because this is part of participating in democracy.

The supporters of mandatory voting point out that the will of the electorate is better reflected in their chosen representatives in Parliament. The elections are a democratic duty of the citizens therefore compulsory voting increases the democratic level of elections and legitimacy of the elected authorities as well as successfully making the common voting right universal.

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The Direct Election of the Prime Minister in Israel's Constitutional System (1992-2001)

Abstract: In Israel, in the period from 1992 to 2001, for the first and only time in the history of modern democracies, the law was changed to enable direct elections for the Prime Minister. This was an attempt to circumvent weaknesses in the political system which were mostly attributed to the strict rule of proportional representation in electing the Knesset: a high degree of fragmentation and ideological polarisation of parliament, excessive power of small sectarian parties, lengthy processes of forming coalition governments, and the dysfunction of government and political institutions in general. Direct elections for the Prime Minister were supposed to increase stability, efficiency and legitimacy of the Prime Minister, government and political system. The reform was unsuccessful because the expectations of its creators – that the voters would adapt to the new institutional rules – failed to materialise. Instead of expressing undivided political loyalty to the Prime Ministerial candidate and his party, most voters divided their votes in the simultaneous elections for Prime Minister and parliament: the huge majority gave one vote to the candidate for Prime Minister of one of the two biggest parties, Labour Party or Likud, while the second vote was used massively to support small parties. The reform further deepened the crisis of the political system and produced numerous theoretical dilemmas about its nature.
Keywords: Israel, constitutional system, Knesset, Prime Minister, direct election, government, political parties
Słowa kluczowe: Izrael, system konstytucyjny, Kneset, premier, wybory beposrednie, partie polityczne

1. Constitutional foundations of the State of Israel's political system

The constitutional system of the State of Israel was formed under the significant influence of the British political model and British constitutional conventions[1].

1 This is mainly due to the fact that until May of 1948 the British Mandate of Palestine was under legal regulations based broadly on British legislature, which remained in force to a significant extent after the State of Israel was formed. Comp. L. Wolf-Phillips, *The Westminster Model in Israel*, "Parliamentary Affairs" 1973 No. 26, p. 415 onwards.

Additional influence over the eventual shape of the political system of the country was due to some measures deployed in other European democracies as well as in the United States. This resulted in an individual Israeli legal and political system, characterised by the lack of holistic and systematic regulation of all fundamental constitutional matters[2].

Israel is one of few modern countries which does not have a written constitution as the highest-level normative legal act, regulating the fundamental principles and institutions of the state political system[3]. At the basis of the Israeli constitutional system are currently 11 'basic acts'[4] whose content still does not address several vital issues concerning the political system. In particular, they do not contain the principles of the political system, expressed *expressis verbis*. These even include addressing the measures that are fundamental for all political systems such as indicating the nature of the sovereign, and the fundamental forms of exercising the state's highest powers[5].

The analysis of the legal-political measures adopted in the ratified fundamental acts engenders the thesis that the concept of national sovereignty forms the foundations of the Israeli public authorities. This stemmed equivocally from the statements included in the Declaration of Independence which stated: "We, the members of the National Council[6], representatives of the Jewish community herby proclaim the establishment of the Jewish state". This formula refers just to the Jewish nation, but the same act also expresses the principle of equal political rights of all residents of Israel, regardless of nationality and religion. The de-facto sovereign

2 Por. S. Navot, *Constitutional Law of Israel*, Alphen aan den Rijn 2007, p. 83 onwards.

3 The project to create a singe Act of the Constitution was abandoned within two years of the establishment of the state of Israel when it transpired that it would not be possible to achieve a consensus over the final shape of the fundamental act that all significant political factions could subscribe to. This was the consequence of the Knesset adopting the Harari Act on 13th June 1950, which introduced the principle that the future Constitution should be created in stages, with each chapter being voted through in turn. Each chapter has been conceived as a separate fundamental act, which is passed by the Knesset with the ordinary majority of MPs. More on the reasons for this decision of the Israeli Parliament in. G. Gross, *The Constitutional Question in Israel*, (in:) D. J. Elazar (ed.), *Constitutionalism. The Israeli and American Experiences*, Jerusalem 1990, p. 53 onwards.

4 Moreover basic laws which, however, do not have the character of fundamental acts, include, according to the Israeli constitutional law science, the Declaration of Independence of 1948, as well as some ordinary acts of Parliament. Rubinstein, *HaMishpat Hakonstitutionali shel Medinat Israel* (The Constitutional Law of the State of Israel), Jerusalem 1992 (Hebr.).

5 This article mainly makes use of the texts of the Basic Laws of Israel contained in the English language collection: *The Constitution of the State of Israel 1996-5756*, Jerusalem 1996. The most recent amendments of these acts are sourced from the Knesset official internet service http://www.knesset.gov.il (accessed on: 14.05.2014).

6 The National Council was established in the Spring of 1948 as a temporary representative body, which represented different Jewish political organisations. The meeting of this Council in Tel Aviv on the 14th May 1948 passed the Israeli Declaration of Independence.

was therefore the whole nation living on the territory of Israel, included those citizens representing the Arab minority[7]. The role of the sole representative of the whole nation was assigned to the single-chamber Parliament – the Knesset[8], the membership of which was established from the very beginning on the basis of direct general elections. The 1958 Basic Law: the Knesset guarantees until this day the citizens of Israel both the right to decide the political make-up of the Parliament and the right to stand for a seat in this highest-level representative body.

The contents of the regulations which shape the political system indicate that the ultimate authority in Israel is exercised by the sovereign practically only within the framework of the institutional representative democracy, that is through Members of Parliament elected to the Knesset[9]. Citizens taking part in elections determine not only the political makeup of the Parliament but they also influence directly the makeup of the Cabinet and the direction of domestic and foreign policy pursued later by the governing majority. As the result, the practical deployment of the principle that the government with its typical executive functions, bears direct political responsibility before the elected representative body, seems particularly significant. There is no doubt that the adoption and consistent implementation of this principle gives the guarantee that the will of the electorate, expressed in the act of voting in general elections, will be respected.

2. Elections to the Knesset

For over 50 years, from the point of the declaration of independence, the Knesset has been the only main state body in Israel directly elected by the general population[10].

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7 Compare. S. Navot, *Constitutional Law…, op. cit*., p. 251 onwards.; A. L. Bendor, *The Constitutional Significante of the Jewishness of Israel*, (in:) F. Oz-Salzberger, Y. Stern (eds.), *The Israeli Nation-State: Political, Constitutional and Cultural Challenges*, Boston 2014, p. 118 onwards.

8 The first national representative body of Israel was the Constitutional Assembly, whose membership (120 Members) was decided through general and direct elections in January 1949. The task of this body was to prepare and pass the Constitution for the newly established State of Israel. During the first session on 16 February 1949, the Constitutional Assembly passed a Temporary Act, regulating, for the time being, the structure of the highest state bodies. Under the provisions of this legislative Act, the Constitutional Assembly was re-named Knesset (the name of the chief religious council in the old Jewish State 5-2 BC), which name is still retained by Israel's highest representative body. Compare S. Bożyk, System konstytucyjny Izraela, Warszawa 2002, p. 19 onwards.

9 Apart from the representative form of exercising the highest authority in the state, the Israeli fundamental acts do not provide for other means of the sovereign (the nation) participation in the process of making decisions of special significance for the state or the citizens. It would seem, however, that this does not preclude the possibility of deploying other institutions of direct democracy as the Knesset could decide, as part of the legislative function exercised by the Parliament, to settle a particular matter through a national referendum.

10 Israel has decided first and foremost not to hold direct presidential elections and therefore the President has from the very beginning been chosen by the Parliament. Until 2000 the president

In general elections, the active electoral right was given to Israeli citizens over 18, the passive over 21 years of age[11]. The active electoral right was denied only to those whose rights were suspended by the courts as well as those convicted of offences against state security and given more than a five years custodial sentence. A notable measure was a formula for limiting the passive electoral right for those members of the Knesset only who during their time as elected members decided to leave their parliamentary faction. In such cases they are not permitted to stand in the next elections on the mandate of those parties which had formed parliamentary factions during the previous term[12].

Art 4. of the *Basic Law: the Knesset* establishes the principle that the membership of the Knesset is to be decided through general elections. This means that during parliamentary elections the territories of the whole country form one constituency and therefore all 120 members are elected from a national ballot paper. That the country is not divided into individual constituencies has been from the outset one of the most intriguing features of Israel's electoral system.

In Israel candidates can only stand with a mandate from a political party, with each party submitting one list of candidates for the whole country[13]. However, certain limits had to be introduced here, aiming to disqualify (from standing for parliamentary election) those political groupings targeting the principles of democracy or constituting a serious threat to the security of the state and its citizens. *The Basic Law: the Knesset*, amended in 1985 adopted a rule (under Art. 7A) that the lists of candidates for general elections from parties that: 1) negate the existence of the State of Israel as a Jewish state, 2) deny the democratic character of the country, 3) encourage racism, will not be permitted[14].

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was chosen for the period of five years and the same person could serve as president for two consecutive terms. Basic Law: The President of the State of 1964 amended at that time has established the rule that the president is elected by the Knesset for the period of seven years, for a single term, without the possibility of being re-elected.

11 The principles of the electoral law governing the parliamentary elections are defined under the Basic Law: the Knesset, and the detailed procedures for carrying out elections are provided by the 1969 Knesset Elections Act.

12 See more in: A. Diskin, Elections and Voters in Israel, New York 1991, p. 43 onwards.; G. Rahat, R.Y. Hazan, Israel: The Politics of an Extreme Electoral System, (in:) M. Gallagher, P. Mitchell (eds.), The Politics of Electoral Systems, Oxford 2005, p. 333 onwards.

13 Those parties represented in the Knesset in the intervening term may register their lists of candidates without meeting any additional requirements, the lists of other political parties must be supported by at least 2500 voters' signatures. Candidates are placed on the lists in order determined each time by the parties' governing bodies. The top places on the lists, which would generally translate to parliamentary seats, are reserved for the leading politicians of each political party.

14 Compare S. Navot, The Constitution of Israel. A Contextual Analysis, Oxford 2014, p. 101 onwards.

The electoral system to the Knesset is also characterised by the fact that during the act of voting each elector votes for one of the submitted lists of candidates, therefore is unable to vote for individual candidates on the list. The number of votes given to each list is the basis for dividing the number of seats each party will hold, with only the parties that have received the minimum of 1.5% of valid votes nationally able to participate in the division. The low limit clause, together with proportional representation using the Sainte-Laguë method, has turned out to be advantageous in practice for smaller political parties as it has enabled them a continuous presence in the parliament [15]. The method for dividing the seats used in Israel has resulted in the percentage of seats in the Knesset occupied by each political party equating roughly to the scale of support shown to each party by the voters voting for their list of candidates.

3. The distribution of political forces in the Knesset and forming the government

The results of general elections in Israel have, been influenced by the country's political party system from the very beginning[16]. Despite deep divisions between the individual for many years there have been no problems with achieving a stable governmental majority. After the establishment of Israel the left wing Workers' Party of Israel (*Mapai*) maintained for a long time the status of the strongest political grouping[17]. In 1968, after joining by several small political groupings, it adopted the name the Labour Party (*Mifleget HaAvoda*). This party has never, however, managed to assemble more than half the votes in general elections required to ensure the absolute majority of seats in the Knesset. Therefore each time it was forced to form a coalition government with much smaller political parties[18]. The Labour Party (*Mapai* until 1968) had continued to be part of each government coalition in the years 1949-1977, where it always played a dominant role.

Such significant successes of the social democrats were the result of the fragmentation of the Israeli right wing lasing many years. Only in 1973 all significant right wing groupings formed a common bloc *Likud* (Unity), which from the outset

15 See. D. Peretz, The Government and Politics of Israel, Boulder 1979, p. 166 onwards.; A. Diskin, Elections…, *op. cit.*, p. 177 onwards.

16 At the same time the proportional representation system adopted in the Knesset elections continuously shaped the Israeli political party system which did not evolve, unlike in classic two-party systems – two dominant political groupings. Compare. G. Sheffer, Political Change and Party Sys- tem Transformation, (in:) R. Y. Hazan, M. Maor (eds.), Parties, Elections and Cleavages: Israel in Comparative and Theoretical Perspective, London 2000, p. 149 onwards.

17 This party was formed in the 1930s, headed by David Ben Gurion, later the first Israeli Prime Minister (1948-1954 and 1955-1963).

18 Generally these were centre-left coalitions, sometimes with the participation of religious parties.

became an alternative to the cabinets dominated by the social democratic party. *Likud* won the general elections for the first time in 1977, creating a right wing coalition government. This coalition clung to power in 1977-1984, with at the time only a slim majority in the Knesset over the opposition's political groupings[19].

Particular difficulties with establishing a majority government surfaced in Israel after the general elections of 1984. The elections resulted in the success of the Labour Party which won 44 seats, with Likud coming a close second, (41 seats). Apart from these two, 12 other groupings had their members in the Knesset, but none were able to get more than 4 seats[20]. The result was a far-reaching decomposition of the political make-up of the parliament, which made it practically impossible to form a governing coalition. The most sensible way out was for the two main parties to form a coalition government[21]. The governments of the so called "great coalition", also called the government of national unity have existed since 1990 in Israel[22].

The main reason of the serious political fragmentation of the parliament was thought to be the proportional representation system, favouring small political parties[23]. It was therefore no accident that the voices indicating a need for change to the existing electoral system surfaced during the 'great coalition' government. The need to reform election legislation became obvious in the face of disintegration of the government of national unity in March 1990. A new government coalition was formed with great difficulty and comprised the *Likud* and some small religious parties. Inside the coalition there was room for serious disagreements and divisions which led to a breakup in its ranks in January 1992. The Yitzhak Shamir government thus became a minority cabinet unable to continue to function[24], which resulted in early general elections to the Knesset being ordered.

19 I the 1977 general elections *Likud* won 43 seats in the Knesset, the Labour Party – 32. The next elections in 1981 returned almost an identical result for both leading political parties: Likud won 48 seats, the Labour Party 47. Compare S. Bożyk, System konstytucyjny…, *op. cit.*, p. 79.

20 Such significant fragmentation of the Israeli Parliament, which only has 120 seats, had not occurred since 1948. Multi- party fragmentation was to become a constant on Israel's political scene. See G. Sheffer, Political Change…, *op. cit.*, p. 161 onwards.

21 On the circumstances of establishing and running this coalition see N. Lochery, The Israeli Labour Party: in the shadow of the Likud, London 1997, p. 195 onwards.

22 Both the leading parties also won almost an identical number of seats in the 1988 general elections.: Likud – 40, the Labour Party– 39. 14 small political parties also had their representatives in the Knesset, that is more than four years previously.

23 See more in G. Doron, M. Harris, Public Policy and Electoral Reform: The Case of Israel, Boston 2000, p. 82 onwards.

24 See more in G. Goldberg, HaBocher HaYisraeli, 1992 (The Israeli Voter, 1992), Jerusalem 1994 (Hebr.).

4. The introduction of direct Prime Minister elections

The debate over the need for electoral reform flared up again, before the parliamentary term was shortened in 1992. There were several proposals for changes to the Israel's proportional representation electoral system[25], but it was the proposal for the formula for direct general elections of the Prime Minister that received the most interest. The proponents of this idea indicated that its introduction into Israeli political system would alleviate the negative consequences of the principle of proportional representation in parliamentary elections, by limiting the political fragmentation of the Knesset, and would make the process of forming the government more efficient. The direct elections of the head of the government would further legitimise their authority and their position within the political system as well as raising the rank of the cabinet in the structures of the main state bodies[26]. As it shortly transpired, the reform of the Israeli electoral law was to be limited solely to the shaping of the system for direct and general elections of the Prime Minister.

This does not necessarily mean, of course, that all political groupings in Israel were included to support this reform of the political system. From the very beginning the system for direct elections of the Prime Minister was opposed by *Likud*, including its political leader Yitzhak Shamir, at the head of government at the time. In the course of parliamentary works on the change in legislation the Prime Minister insisted on imposing strict party discipline and whipping all the MPs to vote against the proposals. At the last moment, Yitzhak Shamir changed his mind, just before the vote was taken in the Knesset and agreed that *Likud* MPs could vote according to their conscience, and not be driven by decisions taken previously by the party leadership[27].

The introduction of direct elections of the Prime Minister required changes to the contents of the 1968 Basic Law: the Government in Force, as its provisions determined the procedure of forming the government. The Israeli parliament decided, however, to pass a new Basic Law on The Government, which was adopted by the Knesset on 18th March 1992[28]. In reality, the large portion of the provisions of the previous basic law was transferred to the text of the new act without any changes. Wholly new provisions concerned the running of the direct general elections of the Prime Minister. The provisions determining the procedures for forming the government, the principles of governmental responsibility and the relationship between the executive and other Israeli state bodies have also been amended. It is worth adding that the adoption of the elections of the Prime Minister directly by

25 Comp. G. Rahat, R. Y. Hazan, Israel: The Politics…, *op. cit.*, p. 342 onwards.

26 More on the objectives of this reform of the electoral system in Israel in. H. Diskin, A. Diskin, The Politics of Electoral Reform in Israel, "International Political Science Review" 1995, vol. 16, No. 1, p. 31 onwards.

27 Comp. G. S. Mahler, Kneset. Parlament w systemie politycznym Izraela, Warszawa 1996, p. 189.

28 The passing of the basic law required the whole of the previous 1968 basic law to be repealed.

the citizens necessitated amendments to other fundamental acts, especially the *Basic Law: the Knesset*.

The new procedure for electing the Prime Minister through direct general elections under the provisions of the new Basic Law: the Government was to be deployed together with the elections to the Knesset for the new term. The earliest parliamentary elections in June 1992 were not yet linked with direct elections of the head of government at the same time. The result of these elections to the Knesset seem to confirm that the reform of the electoral system was the right thing to do, with the effects anticipated with the next parliamentary elections[29]. The elections were won by the Labour Party (44 seats) but in order to form a government it needed to sign a coalition agreement with two other groupings: *Merec* (formed before the 1992 elections coalition of the secular left) and *Shas* (a party of the Orthodox Sefradi Jews). In this way a government majority (of 62 seats) was achieved in the Knesset, with the cabinet headed by the Labour leader Yitzhak Rabin[30]. This was a relatively stable majority as it remained during the whole parliamentary term (1992-1996)[31], however, the Knesset continued to experience deep political divisions[32].

5. Direct elections of the Prime Minister and the system of government

It needs to be highlighted that the procedures for forming the Israeli government as well as its organisation and functioning had, until 1968, been practically largely based on custom and traditions originating clearly from British constitutional conventions, deployed in the administration of the British Mandate of Palestine. Some of these traditions, for example the practice of selecting the Prime Minister exclusively from among the MPs, were later regulated through the provisions of subsequent basic laws[33]. For the first time the legal norms for the selection of the Israeli government, its position within the political system, its structure and the extent of powers were determined under the provisions of the 1968 *Basic Law: the Government*.

As for the procedure of forming the government, the 1968 Basic Law adopted the principle that this starts with the president designating the Prime Ministerial candidate. The Prime Minister appointed by the head of state would then form the government.

29 Comp. G. Doron, B. Kay, Reforming Israel's Voting Schemes, (in:) A. Arian, M. Shamir (eds.), The Elections in Israel – 1992, Albany 1995, p. 299 onwards.

30 The Prime Minister Y. Rabin could also count on the support of the few Arab MPs, on condition that his government would continue the peace process in the Middle East.

31 The Prime Minister Y. Rabin in 1995 was murdered by a Jewish religious fanatic and Simon Perez became the head of government.

32 In the 1992 elections apart from the coalition partners 10 other political parties got seats in the Knesset, including Likud (32 seats), which for the previous 15 years had been the leading government coalition partner.

33 See: D. Peretz, The Government..., *op. cit.*, p. 144 onwards.

After forming the cabinet the Prime Minister presented to the Knesset the make-up of the cabinet and its works programme together with a bill for a vote of confidence. Only after a vote of confidence was passed in the parliament the government would take up its constitutional duties as an executive authority[34].

By introducing in 1992 the principle of direct general election of the Prime Minister into the Israeli constitutional system, the legislator has at the same time attempted to prop up the parliamentary government system which thus far functioned in the country. As the consequence, such significant reform of the legal political system has not led to radical transformation in the relationship between the legislative authority and executive bodies. It is noteworthy that the relationship between the government and parliament had been formed from 1949 in accordance with the principle assuming that "establishing" a government able to effectively exercise executive powers is a particular responsibility of the Knesset[35]. As a rule, the make-up of the government was to be called up by the president, but it had to refer to the balance of political power in the parliament. The government was to bear political responsibility before the parliament, which meant that the Knesset could at any time pass the vote of no confidence and force the government to resign.

The principle of political responsibility of the Prime Minister and as a consequence of the whole cabinet was maintained after the 1992 changes to the mode of selecting the head of the government, but the form and consequences of discharging this responsibility had changed. The new *Basic Law: the Government* under Art. 19, stated that "The Knesset may by means of a majority of its members adopt an expression of no confidence in the Prime Minister". The same provisions moreover stated that: "An expression of no confidence in the Prime Minister will be deemed to be a Knesset decision to dissolve prior to the completion of its period of service". The adoption of such provisions meant that the passing of a vote of no confidence in the Prime Minister and their government by the Knesset would necessarily lead to the dissolution of parliament and trigger out of term elections of the parliament and the Prime Minister[36].

6. The principles of direct elections of the Prime Minister

The principle of direct elections of the Prime Minister by the body of the citizens[37] is defined under Art. 3 of the 1992 Basic Law: the Government, which states: "The

34 Comp. E. Likhovski, Israel's Parliament, Oxford 1971, p. 125 onwards.

35 See e.g.: S. Navot, Constitutional Law…, *op. cit.*, p. 128 onwards.

36 The same consequences were foreseen (in Art. 20 of the Basic Law: the Government) in the case where the parliament fails to pass a new budget act in the prescribed period of three months from the beginning of the financial year.

37 The issue of the legal and political regulation of the procedures of electing the Prime Minister of Israel is subject to many detailed studies, both in Israel and in western countries. See e.g.

Prime Minister serves by virtue of his being elected in the national general elections, to be conducted on a direct, equal, and secret basis in compliance with the Election Law". In order to refine these general principles of electing the head of government the provisions of Art. 3 refer to other normative acts, especially to the *Basic Law: the Knesset*[38].

In defining the framework for the active electoral rights, Art. 6 of the *Basic Law: the Government* provided that all "persons entitled to vote in the elections to the Knesset shall be entitled to vote in the elections for the Prime Minister". According to Art. 4 of the *Basic Law: the Knesset* this right was given to all citizens of Israel over 18 years of age on condition that they have not had this right removed through a court order.

The scope of the passive electoral right has been defined under Art. 8 of the *Basic Law: the Government.* Based on its provisions, the office of the Prime Ministers is open only to those people who meet the following conditions: 1) have passive electoral right to the Knesset and were over 30 at the time of standing for office[39] 2) were placed in a primary position on the list of candidates for a seat in the Knesset, if the elections of the Prime Minister ran concurrently with parliamentary elections, 3) they were members of the Knesset when the elections of the Prime Minister were running separately. Art. 8 also provided that a politician who occupied the post of a Prime Minister for seven consecutive years could not stand for office in the next elections.

Art. 4 of the of the *Basic Law: the Government* adopted the principle that the Prime Minister of Israel will be elected together with the elections to the Knesset, outside of exceptional circumstances. This meant that the institution of managing the elections could be deployed only sporadically (e.g. where the elections had to be repeated, for example due to electoral protests), as in Israel parliamentary elections are conducted in periods governed by the provisions of basic laws. When a parliamentary term is at an end, the elections always take place on the third Tuesday of the month of *cheshwan*[40], which falls in the year when the Knesset term ends. However, when the year of the elections falls after the leap year[41], the elections

A. Brichta, Political Reform in Israel: The Quest for Stable and Effective Government, Brighton 2001; G. Doron (ed.), HaMahapecha HaElec- toralit (The Electoral Revolution), Tel Aviv 1996 (Hebr.).

38 A number of measures concerning electoral laws in parliamentary elections, under the provisions of the basic Law: the Knesset and ordinary acts, were also deployed in elections of the Prime Minister.

39 The passive electoral right in Knesset elections belongs to citizens of Israel over 21 years of age

40 In the Hebrew calendar this is the eight month of the lunar year Jest which usually starts at the end of October

41 Because a lunar year, having 354 days in the Hebrew calendar, is 11 days shorter than the solar year, a leap year containing an additional month is introduced 7 times in 19 years.

take place on the first Tuesday of the month of *cheshwan*. So that as many voters as possible may be able to participate in elections and to guarantee therefore the general principle of the elections the Basic Law: the Knesset introduced the rule (Art. 10), that the day of the election is to be a non-working day. In turn Art. 11 of the Basic Law: the Government, states that if the day of the elections to the Knesset and the elections of the Prime Minister fell on a bank holiday, a day before a bank holiday of a day after bank holiday, the elections are to take place on the first following Tuesday, which becomes a bank holiday for all workers.

Independently of joint elections to the Knesset and the head of government, separate elections of the Prime Minister were also envisaged. The system of election through separate elections could be deployed if: 1) none of the candidates were elected in the joint elections with the elections to the Knesset, 2) the attempt to form a government by the Prime Minister chosen in joint elections was unsuccessful, 3) the number of ministers in the current government fell below eight[42], 4) the office of the Prime Minister is vacant due to death, resignation or impeachment through the decision of the parliament. Only members of the Knesset could stand in these separate elections.

The *Basic Law: the Government* in Art. 9 gave a right to register candidates to the post of the Prime Minister to: 1) political parties and their coalitions, who submitted lists of candidates to the Knesset and are represented in the outgoing by political factions with at least ten MPs 2) other political parties which submitted lists of candidates to the Knesset supported by the signatures of at least 50 000 voters. In separate elections it is possible to submit candidates for: 1) political groupings represented in the Knesset and having political factions with at least ten MPs, 2) party coalitions represented in the Knesset by factions that have at least ten MPs.

The condition for the selection for the office of the Prime Minister, under Art. 13 of the Basic *Law: the Government*, was for one of the candidates to receive more than half of valid votes. One more condition was envisaged: that the Prime Ministerial candidate had to be elected to the Knesset at the same time. If none of the candidates met these requirements, there was to be a second round of voting with just the two candidates who have amassed the most votes in the first round[43]. The round was won by the candidate with the largest number of valid votes. Elected in this way, the Prime Minister elect would then appoint ministers and apply to the Knesset for a vote of confidence in his government. If the Prime Minister elect failed

42 According to art 33 the 1992 Basic Law the Government the members of the government could not be less than 8 or more than 18.

43 If there was only one candidate remaining in the first or second round of the elections, the condition of being elected to the office of the Prime Minister was having more votes for than against that candidate.

to accomplish this within the framework envisaged in the basic law[44] it would be necessary for the president to call another election of the Prime Minister[45]. In turn, in the situation where the Knesset would refuse to pass a vote of confidence in the Prime Minister and his cabinet, the parliament would be dissolved, triggering new parliamentary elections and the election of the head of the government.

The provisions of the Basic Law: the Government envisage circumstances where a Prime Ministerial election may be necessary before the end of term. This would become the case, for example, if the Knesset passed the vote of no confidence in the Prime Minister and his cabinet, as discussed above, or if it failed to pass the budget act on time, which would be equated to the Knesset's decision to dissolve before the end of parliamentary term. Out of term elections for a Prime Minister would also be triggered by:

1) death of the Prime Minister, 2) resignation of the Prime Minister, 3) the Prime Minister being regarded as unable to perform his function for the period longer than 100 days 4) impeachment by the Knesset[46]. It is worth highlighting one additional circumstance which resulted in the necessity of carrying out pre-term elections, namely, the possibility of dissolving the Knesset by the Prime Minister in office, envisaged under Art 22 of the Basic Law: the Government. This power could only be used in special circumstances and with the president's agreement. Under the provisions of the basic law, the Prime Minister had the authority to order the dissolution of the Knesset only if he was absolutely convinced that the majority of MPs are now in opposition to the government, which therefore cannot effectively function[47].

44 Under the provisions of Art. 14 of the Basic Law: the Government it was envisaged that Prime Minister elect would have 45 days to establish a government and apply to the Knesset for the vote of confidence.

45 Prime Ministerial elections were then to be repeated within 60 days of being ordered by the president.

46 This eventuality was considered under two provisions of the Basic Law: the Government. Art. 26 stated: "Should the Prime Minister be convicted of an offence involving moral turpitude, the Knesset may remove him from office, pursuant to a decision of a majority of the Knesset members." In turn, under Art 27a principle was adopted that The Knesset may, pursuant to a vote of 80 of its members, remove the Prime Minister from office" if the motion is submitted by at least 40 members.

47 In 2000 Prime Minister Ehud Barak did not take the step of dissolving the Knesset, despite the existence of legal indications for such decision. Instead he resigned himself, which prevented the pre-term parliamentary elections. Therefore in 2001 only separate elections to the Prime Minister's office were held.

7. Direct elections of the Prime Minister in practice under the Israeli political system

The system of appointing the Prime Minister to office through direct general elections, introduced by the 1992 *Basic Law: the Government* was only used three times in Israel. In 1996 and 1999 prime ministerial elections were concurrent with parliamentary elections to the Knesset, and in 2001 there were no parliamentary elections held, only separate elections of the chief executive[48]. In short, this was a short lived but interesting experiment in relation to choosing a chief executive.

The first general elections of an Israeli Prime Minister took place on 29th May 1996. It was without a doubt a historic event, as never before had this form of election for the head of the government been used in any political system[49]. The contest for the position of the Prime Minster was between two candidates, the then current Prime Minister Simon Perez (the Labour Party) and Benjamin Netanyahu (*Likud*). The election was won, with a tiny margin, by B. Netanyahu (50.5% of the votes), who beat the favourite S. Perez (49.5% votes)[50] the victory of the *Likud* leader was probably helped by his election stance on putting a stop to excessive concessions towards the Palestinians, which was ascribed to his opponent and outgoing Prime Minister.

In the parallel elections to the Knesset most votes and seats went, for a change to the party of S. Perez. The Labour Party won 34 seats in the 1996 elections, and *Likud* 32 seats. As it turned out, a significant proportion of voters were voting for smaller parties fighting for seats in the parliament. As the result, the most seats in the Knesset were won by: Sefaradi Guardians of the Torah (*Shas*) – 10, National Religious Party (*Mafdal*) – 9 and *Merec* – 9. Significant gains (7 seats) were made by a nationalist right group Israel Our Home (*Yisrael be-Alija)*, representing the many Jewish emigrants who during 1991-1995 came to Israel from the former Soviet countries[51]. After the elections B. Netanyahu created a majority government coalition involving: *Likud*, *Shas*, *Mafdal* and *Yisrael be-Alija.*

The following elections of the Israel's prime minster took place on 17th May 1999. Once again, only two candidates ran for office: the outgoing Prime Minister

48 Detailed analysis of the three consecutive elections of the Israeli Prime Minister are found in A. Diskin, The Last Days in Israel: Understanding the New Israeli Democracy, Portland-Oregon 2003.

49 Cf. R.Y. Hazan, G. Rahat, Representation, Electoral Reform, and Democracy. Theoretical and Empirical Lessons From the 1996 Elections in Israel, "Comparative Political Studies" 2000, vol. 33 No. 10, p. 1310 onwards.

50 See e.g.: A. Arian, The Israeli Election for Prime Minister and the Knesset, 1996, "Electoral Studies" 1996, vol. 15 No. 4, p. 570 onwards; R. Y. Hazan, Presidential Parliamentarism: Direct Popular Election of the Prime Minister, Israel's New Electoral and Political System, "Electoral Studies" 1996, vol. 15, No. 1, p. 21 onwards.

51 It is estimated that during just a few years, at least 800 000 immigrants from the former Soviet Union came to Israel, which in 1990 had the population of less than 5 million.

Benjamin Netanyahu (*Likud*) and the leader of the opposition Labour Party Ehud Barak. In the 1999 elections the head of government was soundly defeated (43.9% of votes), by E. Barak, who won 56.1% of the votes[52]. The result of the elections was unsurprising as B. Netanyahu's political errors (especially in the Palestinian question) resulted in a marked fall in popularity of his cabinet.

The Prime Minister elections were accompanied by early parliamentary elections[53] . These elections resulted in the greatest yet fragmentation of the Knesset since the Israeli state was born, as 15 political groupings won seats. The largest number of seats went to: Labour – 26, *Likud* – 19, *Shas* – 17, *Merec* – 10 and *Ysrael be-Alija* – 6. Such political diversity in the parliament made it difficult to form a new government, consequently the government of E. Barak had representatives of six political parties.

The third time the direct and general election system for choosing the chief executive was used was during the elections on 6th February 2001. However this time, due to unexpected resignation of E. Barak from the post of the head of government in December the previous year[54], only elections to the office of Prime Minister were held. These were won with overwhelming majority by *Likud* representative Ariel Sharon (62.4% of the votes), the outgoing Prime Minister E. Barak won only 37.6% of the electorate votes[55]. After the 2001 elections a "government of national unity" was formed with the two main Israeli political parties[56]. The coalition of *Likud* and the Labour Party, initiated by the Prime Minister elect Ariel Sharon, held until 2005, although not without difficulties[57]

8. Consequences

There is no doubt that the principle of direct general elections of the Prime Minister introduced in Israel in 1992 was an innovative and interesting political

52 See. R.Y. Hazan, A. Diskin, The 1999 Knesset and Prime Ministerial Elections in Israel, "Electoral Studies" 2000, vol. 19 No. 4, p. 628 onwards.

53 The pre-term elections in 1999 in Israel were triggered by the loss of support of the majority of the Knesset members for Prime Minister B. Netanyahu's policies.

54 Prime Minster E. Barak decided to resign due to lack of a sufficient parliamentary majority which he needed in order to guarantee the continuation of the Middle East peace process. He hoped for a greater support of the members of the Knesset following a potential decisive election success.

55 See. A. Diskin, R.Y. Hazan, The 2001 Prime Ministerial Election in Israel, "Electoral Studies" 2002, vol. 21 No. 4, p. 659 onwards.

56 The creation of the "government of national unity" by Likud and the Labour Party (with the participation of two other political parties) was due to the resurgence of the Palestinian uprising (the Intifada) in 2000 and an increased threat to national security.

57 In 2005 A. Sharon left Likud and formed his own right wing party the Kadima (Forward), which soon became the third political power in Israel's political party system. Cf. S. Bożyk, Izrael, (in:) S. Bożyk, M. Grzybowski (ed.), Systemy ustrojowe państw współczesnych, Białystok 2012, p. 256 onwards.

experiment. General elections of the chief executive did not bring the intended results in practice. This system of choosing the Prime Minister has not resulted in stabilising the Israeli political party system and has not helped overcome the fragmentation of the Knesset. It is true that the electorate voted for the two serious candidates to the Prime Minister's office but at the same time – when voting in parliamentary elections – the majority lent their support to the party lists submitted by small political parties, which then had modest representation in the Knesset. Direct elections of the Prime Minister did not have major impact on strengthening the position of the Prime Minister in the structure of Israeli leading state bodies.

It is not, therefore, a coincidence that after the general elections to the Prime Minister's office on 6th February 2001, Ariel Sharon's government (on the initiative of the two main parties in the government coalition) submitted a bill to abolish this system of selecting the chief executive. As the result on 7th March 2001 the Knesset passed a new *Basic Law: the Government* which repealed the general elections as a method for filling the office of the Prime Minister. This resulted in much-altered legislation containing legal measures which returned to the de facto methods of filling the office of the Prime Minister used in Israel prior to 1992.

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Changes in Presidential Election Law in Turkey – Progress in the Democratisation Process?

Abstract: The adoption of the new presidential election system in Turkey has strengthened the democratic legitimacy of the head of state, by virtue of the presidency now being determined by popular vote. The new law, however, has many democratic deficits. Moreover, the circumstances of its adoption as well as coupling it with the introduction of a particular type of presidential system, tends to indicate that the intentions of the AKP leaders have less to do with the willingness to democratize the country than with political interests. Paradoxically, as a result, a theoretically more democratic presidential election law can open the door for the enhancement of authoritarian tendencies in the Turkish state. One consequence of introducing the presidential system to strengthen the president's office by way of popular vote, is that it can create too strong an executive power which is not sufficiently balanced by other institutions forming the Turkish political system – both nationally and at regional/local level.
Keywords: president, election law, elections in Turkey, democratization, presidential system, politicisation
Słowa kluczowe: prezydent, prawo wyborcze, wybory w Turcji, demokratyzacja, system prezydencki, upolitycznienie

1. Introduction

In the Republic of Turkey, after the Second World War, the choice of the country's president was made by the members of the Turkish parliament – the Grand National Assembly of Turkey, in accordance with the Constitutions of 1924, 1961 and 1982. Such a method of selecting the head of state was compatible with the country's parliamentary political system. General elections took place only in the case of Kenan Evren; this was the outcome of a particular situation which had arisen after a coup in 1980. Subsequent Presidents of Turkey were once again appointed by the Parliament[1].

1 A. Szymański, System konstytucyjny Turcji, Warszawa 2006, pp. 5-15 & 54.

However, amendments to the Turkish fundamental act, accepted first by the Parliament (10th of May 2007) and subsequently by the citizens in a referendum (21st October 2007) allowed for the adoption of the electoral law concerning presidential elections, enacted on 26thJanuary 2012A[2], major change was the introduction of direct general elections of the President. On the 10th August 2014, in the first round [of the elections], Turkish citizens elected President Recep Tayyip Erdoğan – the leader of the governing (since 2002) Justice and Development Party (AKP, *Adalet ve Kalkınma Partisi*)[3].

Sources written on the subject indicate that general presidential elections "give the head of state independent and democratic legitimacy, thus effectively protecting it from being dominated by the parliament and the political parties"[4]. In a word, they contribute to progress in democratic consolidation, as they give citizens the right to elect another fundamental state body, as well as strengthening the (real) division of power and the independence of the Parliament in exercising its legislative and control function. At the same time, they highlight that this type of measure may prove dysfunctional for the democratic nature of the political system if the said system at the same time is lacking certain balancing elements such as the strengthening of one of the main state organs of executive power. This concerns, in this context, certain conditions (political, social or economic) conducive to democracy, as well as specific features of the political system, such as: federalism and the effective principle of the division of power and judicial control[5]. The aim of this article is to answer the question whether the adoption of the new electoral law, including the introduction of direct presidential elections, will aid the democratization process in the country or, on the contrary, will be conducive to the development of authoritarian tendencies which have been (again) noticeable in Turkey over the last few years. The author will test the hypothesis that the new legislation, despite strengthening the democratic legitimacy of the head of state, will be a "critical juncture", potentially leading to Turkish issues with democracy being exacerbated. This will be determined by the political conditions at the time the new law was adopted and is being enacted, as well as issues with the political system that exist in Turkey, which do not provide checks and balances to the strengthened position of the head of state as an executive body.

2 Cumhurbaşkanı Seçimi Kanunu, Kanun No. 6271, Kabul Tarihi 19/1/2012 (Resmi Gazete, 26 Ocak 2012, No. 28185), http://ilo.org/dyn/natlex/docs/SERIAL/91819/106649/F1826753979/91819.pdf (accessed on: 12.02.2015).

3 Erdoğan won 51.79% of votes. Data after: Yüksek Seçim Kurulu, www.ysk.gov.tr/ysk/content/conn/ YSKUCM/ path/Contribution%20Folders/HaberDosya/2014CB-Gecici-416_d_Genel.pdf (accessed on: 30.09.2014).

4 A. Pułło, System prezydencki, (in:) M. Domagała (ed.), Konstytucyjne systemy rządów, Warszawa 1997, p. 73.

5 *Ibid.*, pp. 73-74.

The first part of this article will outline the presidential elections procedure – before the changes and after the changes have been introduced. This will be followed by the analysis of factors – formal and political – critical to providing an answer to the issue of the significance of the new legal provisions of presidential elections for democratisation. This will require analysis of the contents of legal acts, to indicate functional and dysfunctional elements for the democratic character of the political system, as well as utilising aspects of the analysis of the decision making – that is considering the factors behind the decision to change electoral law and the choice of how to interpret the results of these changes.

2. The outline of electoral procedures in Turkish presidential elections

The Turkish Constitution of 1982 has a simplified procedure for electing the President as compared to the Constitution of 1961. Under the provisions of Art. 101-102 of the 1982 fundamental act, the Grand National Assembly of Turkey had been, until recently, electing a president for the period of seven years, from among parliamentarians and Turkish citizens with passive electoral rights. All of those had to have a degree and be over 40 years of age.

Fielding a candidate from outside the Parliament was possible with a written application from at least one fifth of all the MPs. The period between presenting the presidium of the Assembly with the list of candidates and the end of the elections was 30 days. In order to be elected, the presidential candidate had to win two thirds of the vote of the total number of MPs in a secret ballot. If, in the course of the two rounds of the elections, which were held at least two days apart, no-one got the required majority, the third round was held, decided by the absolute majority of votes of the total number of MPs. If the outcome was undecided even in the third round, there was a fourth round, with the two candidates from the third round with the best results. If it proved impossible to choose a President from between the two candidates with the absolute majority of votes, the Parliament was dissolved and fresh elections were held. The possibility of such outcome forced MPs to seek compromise.

Nobody could hold the office twice. The President was required to be neutral, which meant that, as well as resigning his parliamentary seat (if held), the president had to sever links with his own party. The President was sworn into the office in front of the National Assembly (Art. 103 of the Constitution). In case of an illness or if the President left the country, or if the office became vacant due to death, resignation or any other reason, he was replaced by the chair of the Assembly until the new head of state was elected (Art. 106 of the Constitution)[6].

6 Türkiye Cumhuriyeti Anayasası, Kanun No. 2709, Kabul Tarihi 7.11.1982 (Resmi Gazete, 9 Kasım 1982, No. 17863), www.tbmm.gov.tr/anayasa.htm (accessed on: 10.02.2007); comp. A. Ławniczak, Prawo wyborcze na urząd prezydenta w Turcji, (in:) S. Grabowska, R. Grabowski

The principles of the new Turkish presidential elections law are set out in the Constitution (mainly under Art. 101-103 and Art. 67) and expounded in the Presidential Elections Act and the much amended *Law on Basic Provisions on Elections and Voter Registers*[7]. The President is still elected from among parliamentarians over 40 who hold a degree, or from among Turkish citizens who meet the above criteria and who have passive electoral rights to the Parliament. The main difference is that the President is now elected by the nation, not the MPs. Therefore the provisions of the law on elections and voter registers started to apply. Active electoral rights in presidential elections are held by Turkish citizens over 18 years of age. This does not apply, however, as with Parliamentary elections, to serving soldiers and junior officers, students of military academies and those convicted by a court and serving a custodial sentence with the exception of those convicted of an unintentional offence (in which case voting takes place in a penal institution under the supervision of a qualified judge). Voting is mandatory (which, as with other elections is not always enforced in practice).

In May 2012, therefore, after the Parliamentary elections of 2011, the provisions of the above 1961 Act were amended in order to make it easier for Turkish citizens living abroad to vote. On the basis of the amended legislation a special register is created, with the names of persons registered in Turkish consulates and embassies. This register is separate from the central national electoral register, linked to the general, internet-based, register of residents serviced by the Turkish Home Office. Electoral commissions, consisting of five representatives of political parties and civil servants, are established in around 100 polling stations abroad. After the vote the ballot boxes are sent over to Turkey. Votes are counted together with national votes at a district level (Tur. *ilçe*). Elections abroad were held between 31 July 2014 and 3 August 2014. Their disadvantage was the underdeveloped system of information regarding registration (many people did not register and ultimately did not vote), which was reported by the Organization for Security and Co-operation in Europe (OSCE) before the elections[8].

(eds.), Prawo wyborcze na urząd prezydenta w państwach europejskich, Warszawa 2006, pp. 271-281; A. Szymański, Prezydent w systemie politycznym Republiki Turcji: na tle aktualnej debaty ustrojowej, (in:) T. Mołdawa, J. Szymanek (eds.), Parlament. Prezydent. Rząd. Zagadnienia konstytucyjne wybranych państw, Warszawa 2008, pp. 134-135.

7 All current legislation on presidential elections in Turkey after: Konstytucja Republiki Tureckiej, tr. K. Wojciechowska-Litwinek, D. Haftka-Işık, K. Stanek, Ö. Emiroğlu, Warszawa 2013; Cumhurbaskani Seçimi Kanunu…, *op. cit., loc. cit.*; Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkinda Kanun No. 298, Kabul Tarihi 26.4.1961 (Resmi Gazete, 2 Mayıs 1961, No. 10796), www.mevzuat.gov.tr/MevzuatMetin/1.4.298.doc (accessed on: 10.02.2015).

8 Republic of Turkey. Presidential Election 10 August 2014, OSCE/ODIHR Needs Assessment Mission Report 7-9 May 2014, Warsaw, 3 June 2014, p. 6, http://www.osce.org/odihr/elections/turkey/119439?download=true (accessed on: 5.02.2015).

The presidential term was reduced from seven to five years and lasts until the new head of state takes the office. The same person may be elected to office again (it is possible to hold the office of the President of Turkey twice). Presidential candidatures, both from the Grand National Assembly of Turkey and from outside, need to be submitted in writing by at least 20 MPs. Political parties which have won more than 10% of the votes in parliamentary elections prior to presidential elections may submit a joint candidate.

Elections have to be held within 60 days of the end of term. The same number of days is applicable if the office becomes vacant for any reason other than the end of term. The elections are run and controlled, just like parliamentary elections, by the Supreme Electoral Council (consisting of seven members and four deputies elected by the judiciary for four years), county and district councils (elected for two years, the first ones consist of judges, the latter – persons appointed by political parties and civil servants apart from the chair – an experienced judge) and electoral commissions established for the duration of elections. Political parties may have their representatives in the top level electoral bodies, including the Supreme Electoral Council; however, they do not have the right to vote.

The electoral campaign lasts from the point of finalising the list of candidates (11 July 2014 with the last presidential elections) until the last evening before the elections day. The general rules for conducting the campaign are no different to presidential elections. In March 2014, an appropriate amendment of the law enabled running the campaign and having election materials in other languages than Turkish. A specific outcome with regards to presidential elections is refining the rules of financing the campaign. Candidates must not receive resources from political parties, just from individual citizens who set up a special bank account for this purpose. Loans are not permitted. Candidates are obliged to submit reports to the Supreme Electoral Council which controls the financial side of the elections (within ten days of the elections results) concerning campaign expenses.

In order to be elected, a candidate is required to gain an absolute majority of valid votes (which was accomplished in 2014 by Erdoğan). If they fail to reach this majority, a second round of elections takes place on the second Sunday after the first round. The second round is open to the two candidates with the largest number of votes. The winner is the candidate with the largest number of valid votes. Should one of the two candidates in the second round die, or be deprived of the passive electoral rights, their place is taken by the candidate with the second largest number of votes. What is of interest is that, in the second round, if there is only the one candidate, the vote takes the form of a referendum. Should the candidate receive the majority of valid votes, he becomes the President of Turkey.

Presidential candidates, other than the Prime Minister and ministers, must resign government posts. Just as before, the president elect must resign party membership to remain impartial. If they were elected from within the Parliament,

they give up their parliamentary seat. They are still sworn-in in front of the Turkish Parliament, under Article 103 of the Constitution. The provision for the president being replaced, if necessary, by the leader of the Parliament, under Art. 106 of the Constitution, remains unchanged.

3. Functional and dysfunctional elements of electoral law[9]

Certain measures adopted as part of the law on presidential elections in Turkey would indicate that it could be conducive to democratisation of the state. The abovementioned legal acts facilitate the participation of Turkish citizens living abroad and therefore have strengthened the common and general nature of the elections of the head of state. As indicated before, the disadvantage was an underdeveloped system of information regarding registration for the elections which resulted in a relatively low participation in 2014 elections. However, the OSCE assessment indicated that the change is positive. This assessment also included detailed guidelines for financing electoral campaigns, contained in the amended legislation, which re-inforced the principle of transparency. The OSCE also highlighted the fact that the campaign could be conducted in various languages and dialects, not just in Turkish, which again is significant for democratisation. This was important for Kurdish candidates, and could have been a factor (although not *the* factor) in Selahattin Demirtaş, the candidate of Kurdish political groupings led by the People's Democratic Party (HDP, *Halkların Demokratik Partisi*), getting 9.76% of the votes[10].

However, the existing electoral law has many flaws with regards to the democratic character of the whole procedure of electing the President of Turkey. This is with regards to both the act of electing the President as well as the general electoral rules which apply in the case of presidential elections. The OSCE points out a number of deficiencies in this context. On one hand, the general nature of both passive and active electoral rights is limited. In the first instance, there is a lifelong exclusion on standing in elections for prisoners and those who have not completed military service (which is an important duty, and exemptions, for example, due to belief, are difficult to obtain). Moreover, the requirement of the minimum of 10% of the vote for the parties who wish to register presidential nominees limits the number of candidates standing for elections as well as the possibility for independent candidacy. This was reflected in the August 2014 elections where there were three presidential candidates. Ekmelledin İhsanoğlu theoretically stood as an independent candidate, but was supported to a greater or lesser degree by the two opposition parties – The Republican People's Party (CHP, *Cumhuriyet Halk Partisi*) and the

9 This chapter primarily after: Republic of Turkey. Presidential Election 10 August 2014, *op. cit*., pp. 3-10.

10 Data after: Yüksek Seçim Kurulu, *op.cit., loc. cit.*

National Movement Party (MHP, *Milliyetçi Hareket Partisi*) and later by 11 other groupings. The higher education requirement raises some issues over the principle of non-discrimination. It is worth recalling that active electoral rights are limited in the case of prisoners (with exceptions) and the military. The new legislation is not a sufficient guarantee that the electoral register will not contain names of those not eligible to vote. This is due to electoral lists often lacking accurate data.

Moreover, electoral legislation acts do not sufficiently provide for regulating and controlling the bodies organising and running the elections. In practice, this causes lack of transparency in the work of these bodies as well as threatening impartiality in assessing electoral complaints. The lack of an appeals procedure over the outcome of a complaint based on a decision of the Supreme Electoral Council is also a concern. It is far from certain whether the right of Turkish citizens to submit individual complaints to the Constitutional Tribunal over the abuse of the fundamental rights and freedoms by public authorities, under Article 148 of the Constitution (after exhausting other means), applies here.

Another failing is that electoral law in presidential elections does not sufficiently provide for several issues concerning the elections campaign, significant from the perspective of democratic principles. The Law on Presidential Elections lacks sufficient detail, including on the role of political parties, which are the means of association for citizens, in the electoral process. This concerns various aspects, including media participation in the campaign. It remains undefined whether time on air should be allocated to individuals or to political parties. The absence of a clear definition of air time in presidential campaign led to abuses of the position in office and the exertion of influence over the media by Erdoğan. As the result, the AKP leader appeared on TV news three times as often as İhsanoğlu[11]. The same applied to the issue of financing the campaign. Although this was to be done through private support from individual citizens, not from public resources, the lack of clear limitations of such support can in practice lead to significant differences in the sums expended, depending on the means of the candidate. This was perceivable in the August 2014 elections where Erdoğan, then the Prime Minister, received much greater financial backing than the other candidates, including, contrary to legislation, public resources. In terms of citizens' donation the AKP politician received over 24 million Turkish Lira, and İhsanoğlu – 2.1 million Turkish Lira[12].

11 Erdoğan used just over 47 thousand airtime units, İhsanoğlu – around 16 thousand. Data after: Erdoğan media ile beyin yıkıyor, "Zaman" of 19 August 2014 r., http://www.zaman.com.tr/gundem_erdogan-me- dya-ile-beyin-yikiyor_2238375.html (accessed on: 10.02.2015).

12 Data as of 3rd August 2014 after: Turkish Elections. Presidential Elections (August 2014), Rethink Institute, Washington DC, http://www.rethinkinstitute.org/turkish-elections (accessed on: 10.02.2015).

Political parties and independent candidates have the right to observe the course of the elections. However, there are no specific provisions for individual citizens and those from overseas playing the role of observers.

4. The issue of politicizing the electoral law

A negative phenomenon in Turkey is the fact that democratisation stops being the aim of the reforms and becomes the means to achieve other goals. The latter serve the political power struggle which results in greater and greater social and political polarisation, linked not only to deficiencies in democracy but also to the lack of political stability in the country[13]. The politicisation of legal reforms is noticeable with the law on presidential elections in Turkey. In answering the question of how this law contributes to democratisation of the Turkish state, it is necessary to indicate what motivated the AKP politicians who accepted the new system of presidential elections, later accepted by society in a referendum.

In order to do that, it is necessary to examine the circumstances that led to the change. On the 27th of April 2007 the first round of presidential elections took place in the Turkish Parliament, without a decisive outcome. The candidate of the ruling Justice and Development Party – then the foreign secretary Abdullah Gül failed to secure the required majority of two thirds of the votes; this was partly due to the opposition boycotting the elections (with a few exceptions). Gül seemed like a less controversial candidate than the Prime Minister Erdoğan. However, according to secular, Kemalist elites – namely the army – the large part of the judiciary and the civil service, as well as part of the intelligentsia and the media – the very likely presidential choice of a nominee of a party with Islamist roots would threaten the constitutional principle of secularism. The ruling party would have gained an institution whose task is to safeguard that principle. Moreover, the choice of the AKP candidate could have led to the secular elite losing not only the influence over executive power but also the judiciary. The president approves the nominations for the highest judiciary offices. Consequently, late on the evening of the 27th of April 2007, the high command issued a statement which was interpreted as a warning to the government, in which the army professed its readiness to defend the secular order. This was met with a vociferous protest from the AKP. The opposition CHP applied to the Constitutional Tribunal to have the first round of the elections declared invalid due to the lack of the required quorum of the two thirds of Members of Parliament. The Tribunal, under significant political pressure, approved the application on 1st May 2007; a decision that the Prime Minister Erdoğan described as a "blow to democracy". In the re-run of the first round of the elections 6th May 2007 the required quorum was again not reached.

13 E. Alessandri, Democratization and Europeanization in Turkey after the September 12 Referendum, "Insight Turkey" 2010, No 4, p. 24.

Gül withdrew his candidacy just after, which made it impossible for the Parliament to choose the president. The Grand National Assembly of Turkey agreed to early elections, which were to take place on 22nd July 2007. The new parliament elected Gül for president on the 28th August 2007, in the third round of the elections[14].

Before its dissolution, the Turkish Parliament passed amendments to the Constitution on 10th May 2007, introducing general elections of the President. This was mainly the initiative of the AKP, which wanted to open the door for the party's presidential candidate to be elected by the citizens and to avoid an early move by the opposition to obstruct this. The then President Ahmet Necdet Sezer vetoed the changes on 25th May 2007, officially due to concerns over the stability of the country as the result of having a strong president in opposition to the Prime Minister. The presidential veto was rejected on 31st May 2007. Therefore Sezer, on 15 June 2007, decided to hold a referendum over the proposed amendments to the Constitution, which was held in October 2007[15].

It is clear that the AKP government, in striving for the introduction of general elections of the President, was not motivated by the desire to advance democratisation. At the time the pace of Turkish democratic reforms slackened noticeably. The Justice and Development Party did not have as the first priority strengthening the democratic legitimacy of the president (although officially the change was ascribed to the democratisation process), but a political interest, linked to the desire to take over another important state office. The very good results achieved by the AKP in the July 2007 elections would allow them to speculate that their candidate would enjoy the greatest support in the contest for the office of the President of Turkey, and that this would allow it to avoid the impasse and political perturbations, which may have been repeated if the head of state had continued to be elected by Parliament.

Another issue which would indicate that AKP actions were motivated by other matters than democratisation has been the use of the new law on presidential elections, mainly the introduction of the general elections, to justify a wider political project which, if implemented, may intensify authoritarian tendencies in Turkey. Erdoğan and many other AKP politicians would welcome the introduction of a presidential system, which in practice may lead to over-strengthening of the executive power at the expense of the legislative arm and the judiciary.

These plans did not appear at the time when AKP came to power. The presidential system was repeatedly debated in the media and during countless meetings and conferences before 2002. Reforms were even drafted on this issue, e.g.

14 A. Szymański, Konsekwencje kryzysu politycznego w Turcji dla jej europejskich aspiracji, "Biuletyn" (PISM) 2007, nr 22, http://www.pism.pl/files/?id_plik=582 (accessed on: 13.12.2007 r.).

15 Commission Staff Working Document. Turkey 2007 Progress Report, Brussels, 6.11.2007, SEC(2007) 1436, p. 7, http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/turkey_progress_reports_en.pdf (accessed on: 11.12.2007).

in 1999-2000 President Süleyman Demirel commissioned the Turkish Foundation for Economic and Social Studies (TESEV, *Türkiye Ekonomik ve Sosyal Etüdler Vakfı*) to prepare such proposal[16]. There were many arguments for the introduction of a presidential system, quoted by Turkish politicians, academics or publicists in 1999-2007. Such a system was regarded by its supporters as a panacea for all the ills related to the faulty functioning of the parliamentary system in Turkey. They argued that the introduction of a presidential system would stabilise the Turkish political system. First of all, this would mean a technocratic, expert-led government and a strong presidential administration, independent of party political pressure and therefore more capable of solving Turkish problems. Secondly, it would have ended party favouritism and the fragmentation of the party political system – parties would have to join forces and support one of the two presidential candidates. The introduction of a presidential system would, according to its supporters, also enable strengthening of the democratic character of the Turkish political system. A president would be elected by the will of the nation. Therefore a presidential system would introduce the abovementioned elements; that is, a real division of powers, as well as guaranteeing a greater independence for the parliament in exercising its legislative and control functions. A strong president would be able to better protect the Republic and its principles, secularism or nationalism[17].

So the introduction of a presidential system was strictly linked to presidential general elections – as per the two arguments above in favour of such a system of government. This was also clearly Erdoğan's standpoint. Therefore after the new electoral law had been introduced it was stressed that, along with introducing general presidential elections, it will be expedient to make full use of the existing prerogatives of the head of state (e.g. leading the sessions of the Council of Ministers) and, secondly, increase the president's competencies so that his position in the political system is compatible with the method of election and increased legitimacy. The second question is enabled by constitutional changes which mean the introduction of a presidential system in Turkey. The debate over this issue intensified in 2014/2015 due to parliamentary elections in June 2015. Their results were significant from the perspective of introducing constitutional changes (Erdoğan spoke of the need for

16 G. Aktan, Perhaps a presidential system…, "Turkish Daily News" of 24th June 2006 r., hwww. turkishdailynews. com.tr/article.php?enewsid=47055 (accessed on: 14.05.2007)

17 See more in: Presidential system debates resurfaces, "Turkish Daily News" 11 March 2005, http:// www.turkish- dailynews.com.tr/article.php?enewsid=7973 (accessed on: 15.05.2007 r.); Y. Kanlı, Turkey needs administrative reform, "Turkish Daily News" of 20 October 2006, http://www. turkishdailynews.com.tr/article.php?enewsid=57199 (accessed on: 15.05.2007); G. Aktan, Why a presidential system?, "Turkish Daily News" on 16 May 2006, http://www.turkishdailynews.com. tr/article.php?enewsid=43482 (accessed on: 15.05.2007 r.).

a "new constitution") opening the doors for the introduction of a presidential system in Turkey[18].

Although in theory the arguments cited above are still valid, the analysis of what Erdoğan and other AKP politicians say allow for an assertion that the conviction of the necessity for the state to function effectively, as enabled through a strong presidential administration, started to dominate the presidential system debate over the arguments on making progress in the democratisation of Turkey.

Moreover, the introduction of the new government system is indicated not only as a means for solving problems created by the parliamentary system, but also by mechanisms inherent in a democratic system. In this context it is imperative to link Erdoğan's stance on the issue of introducing a presidential system with his negative attitude towards some measures inherent in a democracy. The Turkish President criticizes first and foremost the principle of the division of powers, which was supposed to be strengthened by direct presidential elections, as opposed to the president being elected within the Parliament. According to Erdoğan, this principle makes it impossible for state structures to function effectively and efficiently. First and foremost, this limits the executive authority by implication in a lengthy decision making process with the involvement of multiple bodies (the Turkish President complains that he cannot himself decide who to cooperate with), excessive bureaucracy and legislative and control procedures (including those in which the courts play a key role)[19]. Hence the necessity to strengthen the competences of the executive at the expense of legislative and the judiciary authority.

The critics of the drive to introduce a presidential system maintain that this can lead to authoritarian or dictatorial rule by the President (a "sultanate") through decrees automatically voted through by a weak parliament[20]. Regardless of whether such a scenario comes to pass, the introduction of a presidential system "á la AKP", or perhaps better "á la Erdoğan", may mean in practice significant weakening of the principle of the division of powers and the system of checks and balances with regards to executive authority[21]. This has been reflected in the actions of the AKP government since 2010, more on which below.

18 S. İdiz, Erdoğan aims to create stronger presidential system, "Al-Monitor" (Turkey Pulse), 3 February 2015, www. al-monitor.com/pulse/originals/2015/02/turkey-erdogan-presidential-system-campaign.html# (accessed on: 10.02.2015).

19 H. Hayatsever, Separation of powers an obstacle, says Erdoğan, "Hurriyet Daily News" 18 December 2012, www.hurriyetdailynews.com/separation-of-powers-an-obstacle-says-erdogan.aspx?pageID=238&nid=37052 (accessed on: 28.12.2012).

20 Cumhurbaşkanı Erdoğan'dan başkanlık sistemi açıklaması, "Radikal" 29 January 2015, www.radikal.com.tr/ politika/cumhurbaskani_erdogandan_baskanlik_sistemi_aciklamasi-1282893 (accessed on: 10.02.2015).

21 M. Yetkin, Turkey's future: Strong president or balanced democracy?, "Hurriyet Daily News" 7 July 2014, www.hurriyetdailynews.com/turkeys-future-strong-president-or-balanced-democracy.aspx?pageID=449&nID= 68746&NewsCatID=409 (accessed on: 18.08.2014).

In accordance with statements made by Erdoğan and some of the other AKP politicians, the comprehensive introduction of a presidential system (the first step to which was changing the electoral law) does not necessarily mean a strengthening of the democratic system. Paradoxically, the more the democratic legitimacy of the head of state, the more the door is open for the Turkish political system to become increasingly authoritarian in character.

5. Systemic problems in the process of democratization

The above scenario is plausible due to the systemic conditions that exist in Turkey, that pose some of the fundamental issues in the process of democratisation.

In that country there are insufficient factors which could balance the strengthened position of the president. Firstly, strong executive power is not balanced by regional or local authorities. Turkey has a centralised state structure linked to a traditional strong state model[22]. This does not permit properly devolved local authorities. There are local authorities elected through local or regional elections on different levels but these are under the control of central administration. Moreover, prefects and governors nominated by the central government function alongside elected authorities on the district and county level. Only at the municipal level and in rural areas administrative bodies function independently as local authorities. Higher administrative units perform statutory duties independently only in certain domains[23].

Secondly, the traditional model of a strong state and its elites is linked to authoritarian tendencies reflected in Turkish political practice. These are a longstanding problem in Turkish political culture (this is therefore not characteristic of the AKP government)[24]. These tendencies lead towards the strengthening of the executive power at the expense of the legislative power and the judiciary and towards a certain model of a strong political leadership. In both cases the division of powers and the system of checks and balances are weakened.

The AKP is clearly aiming to consolidate power in its hands. It has taken over all the important state institutions. At the same time the actions of the government through its legislative initiatives that are later passed by the Parliament as

22 More in. A. Szymański, Model państwa w Republice Turcji, (in:) A. Lisowska, A. W. Jabłoński (eds.), Państwo w procesach przemian. Teoria i praktyka, Toruń 2009, pp. 188-198.

23 A. Szymański, System konstytucyjny Turcji, *op. cit.*, pp. 90-94; A. Güney, A.A. Çelenk, Europeanization and the dilemma of decentralization: centre-local relations in Turkey, "Journal of Balkan and Near Eastern Studies" 2010, No. 3, pp. 241-257.

24 L. M. McLaren, Constructing Democracy in Southern Europe. A comparative analysis of Italy, Spain and Turkey, London, New York 2008, p. 260.

amendments to legal provisions and which are then approved by the President[25], lead in the direction of strengthening the police and the executive authority at the expense of the judiciary. Such is the case with the Minister of Justice. This occurs specifically with nominations to the highest judiciary offices in the country (e.g. the Supreme Council of Judges and Prosecutors) in order to control the actions of judiciary bodies and exclude or limit the remit of the courts and the prosecution. The second aspect anticipates, for example, changes to the Internet Act, which would increase the powers of the Information and Communication Technologies Authority or amendments to the regulation on the National Security Agency, which limit the agents' responsibility before the courts[26]. These type of actions by the Turkish Government began with constitutional changes in 2010 (which in many aspects had a democratic character) and continued in the following years in reform packages concerning the judiciary powers[27]. It is clear, therefore, that the critical approach to the division of powers voiced by Erdoğan influences the AKP government actions.

This specific state model is accompanied by strong leadership. The AKP governments, as with the centre-right governments of the 1980s and at the start of the 1990s, are characterised by a specific decision making process. Both the Prime Minister and later President Turgut Özal and Erdoğan are strong, charismatic leaders who make decisions independently or after consulting with a small circle of advisors, ministers or party members[28]. These narrow circles of state elites participating in the decision making process in both cases got smaller and smaller with the passage of time.

Thirdly, the principle of the rule of law in Turkey left a lot to be desired. As mentioned above, an important factor in balancing the strengthening of the position of the executive authority as the result of the introduction of general elections is the work of the courts, including their function of control. The AKP government is aiming for limiting the remit of judiciary bodies, including first and foremost the Constitutional Tribunal, which once again exposes the dislike of the party politicians for the principle of the division of powers and the checks and balances. This is not just, as mentioned before, about increasing the remit of the executive authority in terms of nominations for the judiciary offices or even actions aimed at reducing the authority of these bodies in relation to certain institutions. There is a noticeable tendency to

25 Exceptions existed during the Gül presidency. Moreover, the passing of certain legal acts was on condition of the document being amended.

26 Turkish Parliament approves controversial intel bill, "Hurriyet Daily News", 17 April 2014, http://www.hurriy- etdailynews.com/turkish-parliament-approves-controversial-intel-bill.aspx?pageID=238&n ID= 65214&NewsCa- tID=338 (accessed on: 17.04.2014).

27 S. Yazıcı, Turkey's Constitutional Amendments: Between the status quo and Limited Democratic Reforms, "Insi- ght Turkey" 2010, No. 2, pp. 1-10.

28 M. Heper, Islam, Conservatism and Democracy in Turkey: Comparing Turgut Özal and Recep Tayyip Erdoğan, "Insight Turkey" 2013, No. 2, p. 145.

disregard court decisions and sentences and undermine the credibility of the judiciary bodies by AKP politicians. In the first case this is evident, for example, through the continuation of large public infrastructure projects in spite of the court decision to suspend the works. In the second case, the credibility of the main judiciary bodies is undermined. The best example of this is the work of the Constitutional Tribunal, whose decisions are negated when they are detrimental to the ruling party. In such cases, the AKP indicates the political, not substantive, motives for the actions of this institution[29]. This is a risky phenomenon because it aims to take Turkey back to the period from before 1961 (when the Constitutional Tribunal was introduced to the new fundamental act) and therefore depriving the political system of independent control over the compatibility of legal acts with the Constitution.

6. Conclusions

At the start of this article the author posed a question whether the adoption of the new electoral law, and in particular the introduction of the common and general elections of the president, will facilitate democratization of the Turkish state. The analysis confirm the hypothesis that the current legislation, despite strengthening the democratic legitimacy of the head of state and removing some of the earlier deficiencies in the context of democratisation, may form a critical juncture, in which this may lead to an increase in authoritarian tendencies in Turkey's political system. This situation is due to the circumstances in which the new system for electing the head of state was adopted and the association made by politicians linked to the Justice and Development Party between general elections for the President and the necessity of introducing a presidential system "á la AKP". These issues indicate that the intention of this party is to further political interests rather that to aim for greater democratisation of the country. As the result, paradoxically, the more democratic system of presidential elections may open the doors to a less democratic political system. The introduction of a presidential system in Turkey (as a further result of strengthening the position of the President thanks to general elections) will mean in practice the executive power becoming too strong, without being sufficiently balanced by other political institutions, within the framework of the legislative authority and the judiciary. A centralised model of a strong state, the attempts by Turkish politicians to excessively strengthen the executive authority, (which are a traditional element of the political dilemma in Turkish political culture), and the issues with respecting the rule of law, do not allow for sufficient checks and balances for a centralised executive authority, such as those in the USA, that is, relatively strong [devolved] regional and

29 Erdoğan: Anayasa Mahkemesi kararına saygı duymuyorum, "Radikal" of the 4th April 2014, www.radikal.com.tr/ politika/erdogan_halkimiz_bize_guven_oyu_vermistir-1184843 (accessed on: 15.04.2014).

local authorities and the principle of the division of powers and the control of the courts.

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Elections to the State *Duma* in the Russian Federation 1993-2011

Abstract: Subsequent to December 1993, when the first elections were held for the newly formed Russian parliament, five further parliamentary election processes have been conducted. These occurred in the years 1995, 1999, 2003, 2007 and 2011. With the exception of the 1995 and 1999 elections, all were far from being of free and democratic character. In particular the 2007 election constituted a political farce with its outcome predetermined. Among others, the weaknesses of the system relate to a lack of parliamentary tradition in Russia, constitutional and legal solutions that favour the president, and the absence of developed and stable party structures.
Keywords: Duma, elections, Russia, Yeltsin, Putin
Słowa kluczowe: Duma, wybory, Rosja, Jelcyn, Putin

1. Introduction

Modern Russia's political practice demonstrates constant although, as a rule, unsuccessful, attempts to build opposition groups and alliances able become the alternative to the dominant political regime. One of the causes of this state of affairs was the polarisation of political movements in the Soviet Union at the end of the 1980s and the start of the 1990s, not conducive to creating further alternatives and reducing political choices to the dichotomy of 'democratic' or 'antidemocratic'[1]. This was linked to disorientation of a large part of the elite, which often found itself in random situations – this made it difficult to construct its own political identity. This problem was exacerbated through the opportunism of individual politicians as well as parties

1 В. Гельман, Правящий режим и проблема демократической оппозиции в постсоветском обществе, p. 3 printout from http://www.igpi.ru/monitoring/1047645476/jan1994/Analiz.htm (accessed on 03.02.2004).

and social groups. The factor which significantly weakened the political role of the Parliament was the conviction that it was the Kremlin[2], not the Parliament who held real power. This was, to a degree, the result of the provisions of the Constitution, but if truth be told, the Parliament did very little to change this. In these circumstances the political aim of the majority of political party leaders was the fight for the presidency, not the reform of the political system and changing the Constitution. The authority of the President could be advantageous for the opposition, assuming it won the office. The concentration of the efforts by parliamentary blocs on presidential elections meant that any alliances were fleeting. There were too many personal ambitions and objectives. This situation was masterly exploited by Boris Yeltsin who, for a long time and mostly successfully controlled the opposition through the application of the 'divide and rule' principle. The very political aim of the Russian opposition cast a shadow over it – the objective was not to create an alternative for the programme pursued by the Kremlin, but an alternative to the authority itself.

This analysis aims to showcase the running of the elections to the *Duma* in 1993-2011 and their results, as well as some changes to the electoral law and the political circumstances which contributed to the opposition being marginalised by the Kremlin. In the years 1990-2011 the opposition managed three times to create a fairly unified front to challenge the regime. This occurred for the first time in 1990-1991, when liberal and nationalist forces, aiming to overthrow communism, were truly unified under the leadership of Boris Yeltsin; for the second time in 1992-1993, that is during the constitutional crisis, when recent allies faced each other in the fight over free Russia, and for the third time in 1998-1999 during the impeachment procedure of the president. Post 2000 a 'rationed opposition' phenomenon may be observed in Russia, where the Kremlin decides on the character, the strength, the quality and the potential of the 'opposition'. After the 2007 elections parliamentary opposition was practically eliminated in Russia through changes to selection procedures and expansive propaganda directed at Russians through mass media under the ruling elite's control.

2. Elections to the *Duma* – 12 December 1993

On the 21st September 1993 President Boris Yeltsin issued a decree dissolving the Congress of People's Deputies and the Supreme Soviet. At the same time he ordered general elections to the parliament and a constitution referendum to be held on 12th December 1993. The new constitution proposal envisaged a two chamber parliament in Russia – the Federal Assembly – consisting of the state *Duma* (the lower chamber) and the Federation Council (the upper chamber).

2 The Kremlin as a political camp centred on the president.

The work on the new constitution ran concurrent to a short and not entirely honest election campaign. The campaign ran according to new regulations. The elections to the 178 seat upper chamber – the Federation Council – were to follow majority rule. Candidates were elected in 89 two seat constituencies with boundaries corresponding to those of the members of the Russian Federation. In the elections to the 450-seat lower chamber – the state *Duma,* the proportional majority rule applied. Half the seats in the lower chamber (225) were filled with candidates from federal lists submitted by political parties and blocks which passed the threshold of the 5% of the vote (proportionally to the number of votes gained). The fight over the second half of the seats in the *Duma* was in first past the post constituencies where – according to the majority rule – the candidate with the largest number of votes won (the turnout could not be less than 25% of those eligible to vote).

Of the 21 parties and groups which managed to assemble the required 100,000 signatures under the lists of candidates before the deadline, eight were refused to have their lists registered, which equated to being excluded from the elections.

There were various reasons for the refusal. Some groups submitted lists with fewer signatures than the number required by the regulations. Two parties have withdrawn their lists, calling their supporters to vote for democrats. The Russian All People's Union of Siergei Baburin met all the conditions but breached the rule that the 100,000 signatures had to be collected in at least seven constituencies, with no more than 15% of signatures from each constituency. Among the eight parties that had to withdraw from elections campaign, the majority were organisations that were more or less opposed to the current President. Of the parties and blocs standing, only eight passed the election threshold [3]. The turnout was relatively low– 54.8% – noticeably lower than in the elections to the Congress of People's Deputies in 1990 (77%)[4].

Elections to the 5th *Duma* (the first since the February Revolution) were an acute surprise to the Kremlin. The political scene was unexpectedly entered by a new and victorious political force – the Liberal Democratic Party of Russia (LDPR – 22.9%) and its leader Vladimir Zhirinovsky. The pro-presidential Choice of Russia came second (15.5%) but could practically feel the growing strength of Giennadi Ziuganov's communists panting down its back (12.4%). The poor result for the Choice of Russia's liberals, which was hotly tipped as a decisive winner by political commentators, was a huge surprise. It transpired that political reforms fronted by Yegor Gaidar, which brought a dramatic drop of the standard of living, affected the ratings of the whole wide reform bloc. Democratic parties were incapable of uniting and unable to prepare

3 Some parties and coalitions which did not get their lists registered entered their candidates into the Duma in the first past the post constituencies. They either joined existing parliamentary factions or formed their own groups.

4 I. Mikhailovska, Russian voting behavior as a mirror of social-political change, "East European Constitutional Review" 1996, vol. 5, No. 2-3, p. 57.

a unified and convincing manifesto as an alternative to populist promises made by Zhirinovsky.

The real winner of the 1993 elections were the LDPR, but also the Communist Party of the Russian Federation (CPRF). The first one not only confirmed, but consolidated its position on the political scene[5]. In turn, the communists not only became a force in the Parliament but managed to unify a large proportion of nostalgic (for the Soviet Union) electorate, which was going to prove a stable foundation for the future development of the party. One of the major reasons for the success of the communists and nationalists in December 1993 was an active campaign through the mass media [6]. Until then, the Kremlin was not able to exploit its control over state television. In the next elections the circles close to Yeltsin tried not to make this mistake again.

A material, and the most important, outcome of the elections was the defeat of Yeltsin. Despite pacifying the Parliament and restricting the opposition activities, electoral manipulation and creating a broad pro-Kremlin electoral bloc, the President did not succeed – not only did he not fully meet expectations, but not even to a degree which would have permitted the government of Victor Chernomyrdin to function without disruption. The situation could have been even more difficult. The anarchic opposition[7], fragmented by personal ambitions and devoid of moral legitimacy, was replaced by new, vigorous, united political blocs enjoying full democratic legitimacy, whose leaders – Zhirinovsky and Ziuganov – became significant figures in the fight over political leadership. It turned out that Yeltsin's power did not have to be as absolute as it could have been expected even at the end of 1993.

Despite the obvious fact that the term 'democratic', when applied to the 5th *Duma*, is somewhat stretched, it needs to be acknowledged that it did have an undisputed imput into building Russian parliamentarism. It is impossible to overlook the huge legislative accomplishment of this body which, during its short two year term, passed 328 acts The December 1993 parliamentary elections were a vital step in setting and ordering[8], the Russian political scene. They were also the decisive factor for the emergence of a party political system. Those groupings that entered the Parliament had a real social mandate, a formal permission from voters to act. They also acquired a relatively large dose of independence. However, it needs to be remembered that in their elections' decisions, Russians were guided more by favouring certain politicians

5 In the 1991 presidential elections Zhirinovsky won 7.8% of votes.
6 D. Yergin, T. Gustafson, Russia 2010. And What it Means for the World, New York 1994, p. 55.
7 As a Soviet provenance legislative body.
8 Российская газета" 22.11.1995.

and ideologies they represented rather than analysis of political manifestos[9]. Accordingly, it was difficult for parties to maintain a strong position in Parliament.

The term of the 5th *Duma* was determined as two years. This was due to extraordinary state of affairs in the country in the autumn of 1993 and the not entirely free nature of the elections[10]. Those two years were a transition period for Russian democracy and for political parties. It is received knowledge that only the 6th State *Duma* was to be formed through the first fully democratic elections.

3. The *Duma* elections – 17 December 1995

The decisive test of the Russians' electoral preferences as well as the power of the political and financial resources of the candidates before the 1996 presidential elections, were the parliamentary elections of the 17th December 1995. These were different to the elections from two years before. The political climate was different: the Kremlin wasn't able to interfere so much in the elections process. Political life flourished as never before.

Where in 1993 there were around 150 organisations with the legal means to take part in elections, in 1995 there were already 259[11]. The level of readiness of various political parties to participate in elections was also much better than in 1993.

The dominant position of the Kremlin enabled it, however, to deploy a range of legal and informal means in order to achieve its tactical aims. With the use of complex pressures, the presidential centre tried to unite factions which declared loyalty whilst at the same time weakening the opposition. In order to split the opposition the Kremlin mainly exploited internal conflicts within parties. Another element of the political fight was to make it more difficult for the opposition to access popular public media dependent on the authorities. The Kremlin also applied specific pressures which were, in reality, a veiled form of corrupting the opposition's politicians. The prize, in this instance, were profitable posts in state and private owned business.

Electoral legislation was conducive to getting rid of political competition. The need for the parties to collect the sufficient number of signatures (200,000) required in order to be registered in the Central Electoral Commission (CEC), resulted in opportunities for significant manipulation. Questions over 3-5% of the lists with signatures could result in the entire list [of nominees] being withdrawn and consequently result in the exclusion of the party or parties from the electoral contest. Due to procedural failings, the CEC had struck off the lists submitted by *Yabloko*

9 О.Т. Вите, Центризм в российской политике (Расстановка сил в Государственной думе и вне ее), "Polis" 1994, No. 4, p. 49.

10 A. Czajowski, Demokratyzacja Rosji w latach 1987-1999, Wrocław 2001, p. 90.

11 Е.В. Березовский, Политическая елита российского обшества на рубежие эпох, Москва 1999, p. 148.

and the nationalist *Derzhava* movement of the former vice president Alexander Rutskoy. *Yabloko* and *Derzhava* appealed to the Supreme Court. Similar appeals were lodged by several other political parties and groupings whose applications were not accepted in the first place by the electoral commission. The Supreme Court ordered the commission to accept the applications of *Yabloko* and *Derzhava*, the Democratic Party, the Marxist *Our Future* and of the nationalist bloc the *Land Assembly*.

In the end 69 political parties and blocs took part in the elections, although 43 groupings passed the registration threshold[12] (including 17 electoral blocs); only four of these passed the 5% elections threshold[13]. The 1995 elections turnout was high at 64.4%.

CPRF's victory (22.3%) was not a surprise for politicians' and public opinion alike. What was surprising was the scale of their success in the first past the post constituencies[14]. There, the communists gained the upper hand as a result of fragmentation of the democratic parties, whose candidates jointly won (in Percentage terms) greater support than the communists. A huge sensation was the poor outcome for the pro-Kremlin group Our Home-Russia of the Prime Minister Victor Chernomyrdin (10.13%). The result for the LDPR (11.18%) was also worse than expected – their 1993 voters switched their support to CPRF[15]. The democratic *Yabloko* group got 6.89% of support.

Evgeni Bieriezovski, searching for the basis of the almost universal defeat of political parties and election blocs in the 17th December 1995 elections, pointed out the exaggeration in political parties' own ratings, and their leaders who hugely overestimated their social popularity. This resulted in a poor election strategy and consequently a defeat. Another reason was the 'lack of perspective' for *stricte* elections alliances and blocs, whose existence was the result of weakness of political parties[16]. The reasons for the democrats' defeat could be found in the society becoming disillusioned with politicians and groups accused of causing an economic and political crisis in Russia, as well as lack of ability to form one coherent bloc able to oppose the communists.

The elections campaign for the 6th *Duma* was a brilliant lesson in political marketing, a study in the deterioration of societal support and the motives for political choices in society. The 1995 elections did significantly raise the role of parties in political life. This period can even be regarded as an apogee of the Russian

12 *Ibidem*, p. 148

13 Apart from the fraction of the four main groups, the following groups of MPs were also registered in the Duma: "Agricultural Deputies Group", "Power to the Nation" and "Russian Regions".

14 *Ibidem*, p. 157.

15 В. Шейнис, Пройден ли исторический рубеж?, "Polis" 1997, No. 1, p. 85.

16 Е.В. Березовский, Политическая елита…, *op. cit*., p. 158.

multi-party system. It turned out that (like in Poland) the centre of gravity in the body politic started to migrate from single parties to electoral blocs.

The 1995 parliamentary elections were transparent in showing the balance of power before presidential elections. It became clear that the communist leader Ziuganov would stand in the second round. This mobilised all the forces afraid of the return of the old nomenclature. It became equally clear that Ziuganov in the second round would not be defeated by Yavlinski nor Chernomyrdin. Therefore the single candidate for the anti-communist forces for the office of the President could only be Yeltsin[17].

4. The *Duma* elections – 19 December 1999

The December 1999 elections were very different from previous elections. For the first time the election campaign was fought through television on a massive scale – the only source of information reaching almost all potential voters. An interesting element of the election was the fact that media sympathies were divided between two new blocs: "Fatherland – All Russia" (OVR) – supported by the former Prime Minister Evgeni Primakov and the Mayor of Moscow Yuri Luzhkov, and the pro-Kremlin bloc "Unity" under the leadership of Siergei Shoygu.

The prize in this contest was not so much winning the elections to the Duma as a fight over Yeltsin's political legacy. The real aim of the electoral overtures became clear during the campaign, which concentrated on promoting individual leaders rather than political parties themselves. Both blocs were so absorbed by the fight, that deliberately and of their own free will, they gave the communists free rein; these had accepted their role as the opposition and had rescinded the last vestiges of power. The campaign was joined, however, by the Central Electoral Committee, which issued a string of incomprehesible decisions, e.g. refusing to register Zhirinovski's LDPR[18].

26 political parties and electoral blocs stood in the December elections, of which only six managed to get their deputies into the *Duma*. The communists won the elections decisively (24.29%); however, the strongest group in the *Duma* were independent MPs. One of the suprises of the elections was the success of the Union of Right Forces bloc of the former Prime Minister Siergei Kiriyenko (8.5%) and a total annihilation of a once powerful grouping Our Home-Russia of Victor Chernomyrdin (1.2%). The defeat of the 'Zhirinovski bloc' (6.0%) was hardly a surprise. Such a result was engendered by the moral degeneration of the party regarded by society as the most corrupt grouping in the 6th Duma. It turned out that in the long term it was

17 Е. Охотский, Л. Шмарковский, Выборы-95: три дня и после, "Власть" 1996, No. 2, p. 59.

18 On the 13th of December 1999 the Commission declared that the party could stand in elections but that Zhirinovski himself was barred. A. Łabuszewska, Spiskowa teoria imitowania demokracji, "Tygodnik Powszechny" 1999, No. 51-52.

impossible to reconcile subserviance and feigned opposition to the authorities. Another grouping whose elections result was widely off the mark of the party leadership expectations was Yabloko. Yavlinsky's party maintained its (almost unchangd from the last elections) level of support (5.93% in 1999 and 6.89% in 1995), but the results in the first past the post constituencies and the loss of majority on Yabloko's home turf in St Petersburg were indications of the waning support for this grouping.

The most sensational result of the December elections was the relatively weak result for the Fatherland – All Russia bloc (13.3%) – tipped to be an almost certain eletions winner as late as autumn 1999. It transpired that a manifesto constructed almost exclusively around Anti-Yeltsinism was too weak a foundation to guarantee success. F – AR pursued power without any coherent programe or alternative to the Kremlin ideology. Potential voters may also have been put off by militaristic rhetoric of the group's leaders who were setting out to 'make war with Yeltsin'[19].

The real winner of the parliamentary elections was the pro-Kremlin bloc Unity (23.3%). The grouping's success foreshadowed Vladimir Putin's future victory in the 2000 presidential elections. The election manifesto for this grouping was replaced by an election strategy based on some fundamental assumptions. Firstly, the campaign was based around the ever growing popularity of Prime Minister Putin, who received a blank confidence cheque from Russians. Secondly, the staff of Unity carried out a character assassination on the leaders of the main competition in the power struggle F – AR. Thirdly, Unity leaders managed to play up the voters' nostalgia for a strong state (both domestically and on the international stage). And fourthly, in its elections campaign, Unity liberally used state resources and means[20].

5. The *Duma* elections – 7th December 2003

Elections to the Duma in December 2003 were the first elections where the winner– the pro Kremlin "United Russia" – was known even before the voting started. The only unknown was how big a majority will this grouping achieve over the other stakeholders. The Kremlin very carefully prepared for the encounter. Special emphasis was put on defining the institutional roles of various elements of the political system. Firstly, an attempt was made to define anew the role of political groupings in the system. The new Political Parties Act, adopted on 11th July 2001, clearly favoured large and strong political parties. Therefore the potential for new

19 A phrase used by the F-AR chief of electoral staff Gieorgiy Boos in an interview for "Niezawisimoja gazieta" of 21.08.1999.

20 That all state forces were thrown in aid of the virtual bloc Unity was noted by M. Deliagin, Czy nowy autorytaryzm rosyjski może okazać się skuteczny, (in:) A. Madziak-Miszewska (ed.), Rosja 2000. Koniec i początek epoki?, Warszawa 2000, p. 58.

political groupings critical of the President was marginalised. Under the new act it became very difficult to form a party. The Act stipulates that periodically checks will be carried out on already registered organisations with the possible loss of the political party status if these cease to meet certain legally defined conditions. According to Ministry of Justice data, on 15th February 2002 there were only seven political legally active parties in Russia[21]. Another element of the reform aiming to eliminate small groupings from political existence was raising the electoral threshold to 7% (the provision applied since the 2007 elections), and broadening the remit of the Central Electoral Commission which acquired the right to annul the results declared by regional commissions.

In the 2003 parliamentary elections the pro-presidential United Russia and *Rodina*, linked to the current administration, won a decisive victory (37.57% and 9.02%). This was hardly a surprise, given the massive campaign and the Kremlin's (or the oligarchs' links to the current administration) almost full control over the media. The most prominent opposition groupings, that is, Yabloko and SPS, had not reached the electoral threshold – their support was around 4% each – and were therefore eliminated from the contest. How much of the democrats' defeat was down to their fragmentation and mistakes in the manifesto, and how much to the actions by the Kremlin is difficult to judge; the fact is that the force of the opposition, small to start with, was weakened beyond limit. The remaining quasi opposition parties, that is CPRF and LDPR, secured the support proportionate to their capabilities (12.61% and 11.45%). This guaranteed them a presence in the Parliament but without any influence over the shape of legislation. The communists and LDPR were much weakened by a clever manoeuvre by the Kremlin, who in 2003, therefore before the elections, instigated, a new national – patriotic grouping *Rodina* (founded by D. Rogozin), which attracted the CPRF and LDPR voters.

The 2003 elections were monitored by around 1200 foreign observers. They were declared as "free but unfair". The OSCE Representative George Bruce stated that a number of OSCE and European Council obligations had not been met, as well as many benchmarks of free and democratic elections[22]. The most frequently voiced concerns were over the secret nature of the ballot and the public television bias towards United Russia.

6. The *Duma* elections – 2nd December 2007

Elections in December 2007 were the first elections under the provisions of the new electoral legislation passed in April 2005, which raised the elections threshold

21 С. Заславский, Закон о политических партиях принят. Что дальше?, "Конституционное право: восточноевропейское обозрение" 2002, No. 1 (38), 2002, p 17.

22 "Коммерсантъ-Власть" on 23.10.2007

from 5% to 7%. This, together with the prohibition for parties to form electoral blocs struck a blow at smaller opposition parties which had practically no chance to secure the level of support required. An even greater weapon against the opposition was abolishing the first-past-the-post constituencies, where democratic parties won at least a few seats. This eliminated any possibility of politicians independent of the regime, representing the regions, business and democratic circles, ever being elected[23]. The minimal turnout threshold to declare elections valid was abolished, as was the possibility of voting 'against all'. In order to be registered in the CEC the parties were obliged to collect at least 200 000 voters' signatures under the list of candidates, or to pay a deposit of 60 million rubels ($2.35 million). The deposit was to be returnable after the elections but only for those parties which secured at least 4% of the votes. The parties represented in the *Duma* – "United Russia", "Just Russia", the Communist Party of the Russian Federation and Liberal Democratic Party of Russia were exempt from the obligation to collect signatures or pay a deposit. A symptomatic gesture by the Kremlin which showed that political outcomes were determined before the elections and were independent of the electorate's votes was limiting drastically the number of OSCE observers from 400 (in 2003) to only 70 in 2007.

The strongest party on the Russian political scene before the 2007 elections was the pro-Kremlin party of power – United Russia. The CPRF and the LDRP continued to play a role, but these two groupings became reconciled to the limited role of opposition and were not an alternative to the Kremlin establishment. Other notable political groupings include the other party of power – Just Russia. Opposition parties including: the Russian People's Democratic Union of the fomer prime minister M. Kasyanov, the Republican Party of Russia of V. Ryzhkov, the United Citizen Front of G. Kasparov, the National Bolshevik Party of Limonov – all united in Other Russia and Yabloko groupings of G. Yavlinsky, were considered from the outset to be the victims of the 7% electoral threshold. In the case of some parties the CEC denied them a chance to even stand in elections by querying their support letters. Among those excluded were the People's Democratic Union, the United Citizen Front, the Republican Party of Russia, the Great Russia of D Rogozin and the National Bolshevik Party. 11 parties were finally permitted to stand in the elections.

The parliamentary elections campaign was a farce. Russian state television excluded opposition representatives from participating in debates. The average Russian was bombarded with the Kremlin propaganda and the pro-Kremlin United Russia. In the end, United Russia received 64.3% of votes, CPRF – 11.57%, LDPR – 8.14% and Just Russia– 7.74%. The remaining groupings did not pass the elections threshold[24].

23 M. Wojciechowski, Prezydent Rosji wzmacnia ustrój autorytarny, "Gazeta Wyborcza" on 13.09.2004.

24 http://kprf.ru/vibory2007/chronicle/53685.html (accessed on: 11.12.2014).

Of those parties that entered the parliament the communists were the most disappointed with the result; they even challenged the outcome of the elections. The opposition outside the Parliament declared loudly but futilely that these were the least fair elections in the history of Russia. This was confirmed by the observers from the OSCE parliamentary assembly and the Parliamentary Assembly of the European Council.

In the 2007 elections it is worth noting the 10% increase in the turnout in comparison to the 2003 elections– up to 63.72%. This could have been, to a degree, the result of the mass mobilisation of society by the Kremlin but it could have been, as speculated, the result of electoral fraud.

7. The *Duma* elections – 4th December 2011

The elections that took place in 2011/2012 unexpectedly demonstrated that Russian quasi-authoritarianism fell in a trap of democracy. It turned out that the propaganda, social engineering and manipulation cannot wholly replace policies and Russian's growing aspirations. The relative economic stability afforded by the Putin administration quite naturally led to a boom in political expectations expressed mainly by the Russian youth (which often does not remember the chaotic times of Yeltsin) and the middle class. The slogans of modernising democracy formulated by the "temporary president" Dmitry Medvedev turned out to be empty, especially when contrasted with reality. The December parliamentary elections were won by United Russia with 49.5% of the votes, followed by CPRF – 19.2%, "Just Russia" – 13.2% and LDPR – 11.7%. Yabloko, with 3.3%, did not pass the election threshold. A grouping of anti-government opposition – "Parnas" (National Freedom Party) – was not allowed to stand[25]. The Russian Ministry of Justice in September 2011 already had refused to enter this grouping into the register of political parties. As an explanation, the Department stated that the statute of the grouping contains entries contrary to the Political Parties Act and other federal acts[26].

The result of the parliamentary elections was quite surprising and not quite clear cut. United Russia won decisively, but its result was much worse than in the 2007 elections. The inconsistency of this result was undoubtedly due to electoral fraud in favour of United Russia but also to the fact that in a non-democratic regime the ruling party gets results that are, from the point of view of those in government, far from satisfactory. The fraud uncovered was often so brazen that one could

25 J. Rogoża, Wybory parlamentarne w Rosji: powrót polityki, OSW 07.12.2011. http://www.osw.waw.pl/pl/publika- cje/analizy/2011-12-07/wybory-parlamentarne-w-rosji-powrot-polityki (accessed on: 21.12.2014).

26 The party was formed in 2010 by four leaders of democratic opposition: Mikhail Kasyanov, Vladimir Milov, Boris Niemcov and Vladimir Ryzhkov.

suspect these were not the result of any orders from the Kremlin but rather a 'grass roots initiative' of the local activists keen to demonstrate the success of their political fieldwork. Perhaps the Russian elections were a plebiscite of political preferences before the presidential elections, a way of probing the real level of support for the administration before the key outcome? If this was the case, then the ruling oligarchy failed. It wasn't the outcome of the vote that was deemed a failure, but rather the prevalent view among the Russians that the elections were fraudulent. This had finally stripped any vestiges of democratic legitimacy that the administration might have had.

The 2011 parliamentary elections brought the opposition back onto the electoral scene; which, as it turned out, had a considerable esteem in the society despite information blockade in the pro-government media. The following personages got actively involved: Gary Kasparov, who encouraged boycotting the elections, Boris Niemcov – who called for the whole ballot papers to be crossed out, or the famous blogger Alexei Navalny – called for voting for every party other than United Russia. Their voices were heard mainly by residents of big cities, often via the Internet, which the administration failed to control successfully. The role of the internet, including the social media, turned out to be key. First of all, this was the means for organising protests efficiently (through Facebook, Twitter and VK), as well as for estimating the level of support. Frequent negative comments concerning the Prime Minister (Putin) were also significant. The main advantage of the internet was, however, that it allowed electoral fraud to be uncovered quickly. Russians filmed and photographed the process of voting and then posted these on the internet.

Activating the opposition was a function of a great social unease, the like of which had not been seen for years. On the 5th and 6th of December protests against fraudulent elections took place in many Russian cities. The greatest protest, on the 5th of December in Moscow, assembled between five and eight thousand people [27]. For several weeks it would seem that a wave of the "colourful revolution" would sweep the regime in Moscow, especially as the protests were joined by activists from the parliamentary opposition attempting, with the help of society, to improve their position in relations with the Kremlin. The scale of the social protests forced the authorities to make certain concessions to the protesters. Liberalisation of electoral law was announced. President Medvedev issued generalised statements on bringing back direct elections of governors and increasing the pluralism in the media. But no real dialogue was entered into with the protesters. Instead, the authorities made concerted efforts to discredit the opposition and cause a breakup in its ranks.

27 J. Rogoża, Wybory parlamentarne…, *op. cit*., http://www.osw.waw.pl/pl/publikacje/analizy/2011-12-07/wybory--parlamentarne-w-rosji-powrot-polityki (accessed on: 21.12.2014).

8. Conclusions

The procedural side of democracy in its liberal variant treats elections as a valid delegation of authority, which is at odds with the traditional understanding of authority in Russia – both by the political regime and society[28]. Moreover, the very institution of elections has not engendered the difference between the sovereign and authority in Russia. Such view on the issue has been (and remains so) convenient for the group remaining in power, which could use it to explain its non-democratic actions.

The disastrous constitutional crisis in 1992-1993, and the procedure of the impeachment of Yeltsin in 1998 relegated the legislative authority to be more and more of a facade – a fig leaf to presidential authoritarianism. The presidential regime deprived the parliament of autonomy, allowing it to act but restricting those actions to the areas non-confrontational to the administration. Parliament's functions became drastically restricted as the result of adopting the Constitution of 1993. The most important one – legislative – was left to the Duma, but the shift of legislative initiative to the President and the government caused the parliament's autonomy in this area to be doubtful.

To an even greater degree this was the case with any amendments to the political system, which the parliament lost to the President in 1993. It would also seem that the Russian Parliament did not integrate and socialise the political community due to insufficient means and authority. The element that did galvanize the system and socialised the political community was without the doubt the President and associated elements of the power set-up. It was similar with the Parliament's participation in forming the government. A major impediment for any anti-presidential action by the *Duma* was the attitude of the Federation Council which tended to lend its support to the president (it was a rather staunch ally of the Kremlin) and therefore limited the actions of the lower chamber even further.

After 1999, parliamentary elections clearly indicated that the political role of parliamentary opposition is nearing its end. The regime did not, however, decide to take direct, undemocratic action against rebel MPs. Gradual limiting of the opposition through depriving it of political ('taking over' of various opposition leaders) and economic resources has been more than evident. Repercussions did not touch directly politicians and their parties but were aimed at people assisting them or financing them. Cutting the opposition off from the majority of mass media meant that the regime could manipulate the elections, and the political scene, at will, relegating from political existence those grouping whose opposition was particularly troublesome for the Kremlin. The 2003 parliamentary elections, where the anti-

28 Por.: Л. Бляхер, «Презумпция виновности». Метаморфозы политических институтов в России, "Pro et Contra" 2002, No. 3, vol. 7, pp. 82-83.

Kremlin opposition was practically eliminated, only confirmed the trends that were evident before. Parties remaining on the political scene were forced to accept that their opposition would be controlled. The elections in 2007 and 2011 were a poor imitation of democracy by the Kremlin. The final elimination of the parliamentary opposition did, however, return the political system to a functional balance, based on real inequality of its various elements, that is the absolute dominance of the Kremlin or the 'political corporation' running Russia.

The general level of liberty in the Putin era went down significantly in comparison to the Yeltsin period. The first Putin presidency (2000-2008) prepared the ground for greater authoritarianism. Its proliferation undoubtedly stimulated the political regime, which liberally applied the resources of authority in this area. The Russian political system still contains, however, elements of a competing oligarchy, has preserved elements of democratic legitimisation in the formal sense (elections), as well as elements of economic liberalism. Moreover, the middle class play a role in Russia; despite still being linked to the state it is more independent and numerous than, say, in Belarus. The political role of 'the marginals' as the political basis for authoritarianism seems to be lesser.

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The Electoral System, Active Electoral Rights and the Role of the Electorate in the Islamic Republic of Iran

Abstract: This study examines the constitution of the Islamic Republic of Iran, its electoral system and the active voting rights of Iranian citizens. The article illustrates the dichotomy between constitution and reality in which the role of the electorate and the casting of votes at polls, gives the impression of being pointless as all final decisions in the country require approval of the clergy and elected representatives in par- liament are subject to the authority of the Supreme Leader. The author analyzes the meaning of the electoral system and the electoral law and studies the phenomena of very high electoral frequency.
Keywords: Iran, right to vote, electorate, president, parliament, clergy
Słowa kluczowe: Iran, prawo wyborcze, elektorat, prezydent, parlament, duchowni

1. Introduction

The aim of this article is to analyse the nature of the electoral system and the role of the electorate in Iran in terms of the theoretical premises of this system, in contrast to the real significance of the votes of the electorate, and how these translate into Iranian political reality. The hypothesis is that the intended creation of a state, mirroring the structure of a republic, based on the principle of social sovereignty and the triple separation of powers, has not been reflected in reality, and that the form of exercising power from the very start has largely resembled an autocracy, or more precisely, a hierocracy. This allows a thesis that from the very start the Iranian Republic has been a republic in name only. The author, therefore, undertakes to prove the thesis that the significance of having elections and casting votes for parliamentary and presidential candidates in Iran is of little significance, as the authority in effect choses itself, and having active electoral rights is merely a show of nostalgic upholding of the spirit of democracy by the electorate. This qualitative study is based on a literature review of available academic sources on the political system of

Iran, newspaper articles, Iranian internet portals, items related to political sciences, religious studies, cultural studies of Iranian society and in particular issues around Shi'ism.

2. The genesis and the structure of the political system of the Islamic Republic of Iran

Iran, and more precisely the Islamic Republic of Iran, is, as the name would indicate, a republic, whose constitutional system is based around the authority of representatives chosen by the nation for a limited time[1] in direct or indirect elections[2]; Islamic, as the state is subject to Shia Muslim law referring back to the principles written in the Quran, or the Sharia law. The role of religion in the Islamic Republic is decidedly dominant and the significance of the church as an institution is equally decisive[3]. Until 1979, Iran had been a constitutional monarchy, governed by the Shah whose power was practically absolute. The structure of the state was formed by three bodies: legislative, executive and judiciary, with the monarch at the head of these bodies which, in theory, were supposed to limit its universal authority[4]. The social and religious revolution in 1979 completely changed the political system and the idea of the leader. Currently in Iran [the Prophet] Muhammad occupies the highest level in the state hierarchy. As he is not a physical, perceivable person, it was accepted that Muhammad has two instruments through which he can exercise his power on Earth. These are the Quran and the Sunna of the prophet as the principle tool and the Islamic leader as the second. This can only be a *welajat-e faghih*, or a Muslim lawyer. In reality, the state is led by a man with a very wide ranging prerogatives and unlimited immunity, answerable only to God[5]. The first religious leader in the new state was the instigator of the Islamic revolution Ruhollah Khomeini, and after his death in 1989 the prerogatives of the religious leader passed to the Ayatollah Ali Khamenei. The term of the supreme leader lasts until his death and is key for the endurance of the Islamic Republic. It is worth mentioning that the first concepts for the new state, conceived during the Islamic revolution under the Prime Minister Mehdi Bazargan, were closer to a liberal vision of an Islamic state, more democratic, with a Constitution modelled on the Fifth Republic of Charles de Gaulle[6]. Khomeini, however, totally rejected any initiatives aiming to introduce democracy in Iran.

1 Słownik Języka Polskiego PWN, http://sjp.pwn.pl/szukaj/republika.html (accessed on: 23.12.2014).
2 Słownik Języka Polskiego SJP, http://sjp.pl/republika (accessed on: 23.12.2014).
3 http://edu.gazeta.pl/edu/h/Republika+islamska (accessed on: 23.12.2014).
4 M. Stolarczyk, Iran. Państwo i religia, Warszawa 2001, p. 123.
5 *Ibid,* p. 125.
6 E. Abrahamian, Historia współczesnego Iranu, Warszawa 2011, p. 212.

Therefore the idea of Mehdi Bazargan that the citizens chose between an Islamic Republic and a Democratic Islamic Republic through a ballot in a referendum was, for Khomeini, simply unacceptable. Khomeini equated the word 'democracy' or 'democratic' with all the evil emanating from the western world. As the result, the vote was only over the one just, in the eyes of the leader of the revolution, concept of an Islamic state based on the Shia variant of Islam, that is placing faith in unassailable absolutism of Allah, the power of the Prophet Muhammad, the twelve imams and awaiting the return of the hidden imam, as well as trusting in justice of the Quran headed by the *welajat-e faghih*[7]. The new system was accepted in a referendum by 98% of society, for whom the only alternative available on the ballot papers was to maintain the unpopular and intolerable absolute monarchy. In this situation the likelihood of a failure for those who stood behind Khomeini was virtually none. In its political structure the Islamic Republic of Iran acknowledged the triple separation of power: the one-chamber Islamic parliament, the Madjles, as a legislative body, the office of the president and the council of ministers as an executive body and the supreme court and regional courts as the judiciary. It is impossible to overlook the fact that the courts ceased to be divided into secular and religious courts and were strongly re-islamified, with the whole institution of the judiciary based on the Quran and subject to religious authority. The term of the Parliament and the President is four years, followed by general elections. Since 1999, local authorities have been established through local elections. This is where the character of Iran as a republic ends, as anything beyond this is a broad ideology, so characteristic of this country.

3. The nature, creation, and the extent of the prerogative of the Supreme Leader in Iran

During the period of works on the Constitution the steer of the country was in the hands of Khomeini and in a way he himself guaranteed such a course of works that, in the end, the most important offices in the state went to the clerics. The key change to the Constitution and the power structure was designating Khomeini as the Supreme Leader, a title which held a wide spectrum of authority thanks to which Khomeini could determine the direction and guidelines for domestic policy, control their implementation, influence the decision making by the executive, legislative and suggest the extent of the remit of the courts[8]. To a large degree the chaos which engulfed the country in 1979/1980, the spirit of anti-imperialism, the façade of the revolutionary tone and the strong propaganda of the *welajat-e faghih* theory facilitated the amendments to the Constitution in favour of the clerics. Taking

7 E. Abrahamian, Historia współczesnego Iranu, Warszawa 2011, p. 213 onwards.

8 A. Krasnowolska, Rewolucja 1978-1979 i Islamska Republika Iranu, (in:), Eadem (ed.), Historia Iranu, Wrocław 2010, p. 885.

into consideration a gradual growth in anti-clerical sentiment in the country during the three decades of the Islamic Republic, in all likelihood Khomeini's concept, in another country and in other circumstances, through rational discourse and in the times of internal peace, would not have had strong citizen support. The first, vital issue of the changes to the power structure in the post-1979 Iran was the principle of the leader's responsibility before the nation. In the early years the Shah as the head of state swore before the Parliament that he was going to follow the principles with dignity and be faithful to the Constitution, and in this way remained loyal to the nation. Overstretching this loyalty had its consequences in the loss of the throne, as happened for example with the removal of the Shah Mohammad Ali Shah Kadjar in 1925. Meanwhile the position of the Supreme Leader was accepted as practically timeless, perpetual, and immutable and, according to the Constitution, the Leader is only judged by God and de facto is not answerable to the nation[9]. Theoretically, the 86 seat chamber of clerics called the Assembly of Experts watches over the Supreme Leader fulfilling his duties. The term of the Chamber is eight years and its members are elected in general elections. Iranian citizens may therefore decide, through ballot papers, which group of clerics sits in the Assembly. This choice is, in reality, very limited: the only alternative is a vote for a slightly more liberal and progressive cleric as supposed to die-hard Islamic conservatives. Such an alternative may be missing the point, because each candidate is in reality connected to the same circles, that is, the clerical establishment. In this situation the actual, real, proper [voter] rights and the possibility of chosing the appropriate candidate are largely debatable. This is particularly so, given that the most important decision maker in the country is elected to office by the clerics of the Assembly, not the citizens, and what is more, it is the same clerics who verify the work of the leader and may therefore decide to recall him[10]. The Assembly's decisions are to a large degree influenced by the Council of Guardians of the Constitution – an institution created in order to check that the work of the Parliament is in accordance with the principles of Islam – as well as opinions given by three noble and esteemed clerical dignitaries observing the work of the Assembly. It is thus possible to have an impression that the will of the nation is in this case completely overlooked and that, in reality, the most important state functions are entrusted to people from one clerical circle[11]. In summary, the Supreme Leader is a cleric, elected by the Assembly of Experts which is voted in by Iranians in general elections but, as the candidates are all clerics, in reality the authority lies with the clerical establishment. The elections to the Assembly of Experts are sourced

9 M. Stolarczyk, Iran..., *op. cit.*, p. 125.

10 M. Piskur, System polityczny Islamskiej Republiki Iranu, (w:), Portal Spraw Zagranicznych, http://www.psz.pl/ 117-polityka/mariusz-piskur-system-polityczny-islamskiej-republiki-iranu (accessed on: 23.12.2014 r.).

11 T. Coville, Najnowsza historia Iranu. Republika Islamska, Warszawa 2009, p. 69.

from candidates who are all clerics, and the lack of opportunity for citizens to elect the Supreme Leader is at loggerheads with the principles of elections in a republican system. Equally controversial are the elections to the Iranian Parliament and the functioning of the judiciary.

4. The Iranian Parliament and judiciary paradox

Every four years citizens have a right to vote in direct elections for candidates to the Parliament (Madjles), the only legislative body in the country. The Madjles consists of 290 members and functions as one chamber (the Senate was abolished under the new Constitution); it organises its own work stream and establishes its own rules, therefore creating an impression that it is a fully autonomous body. The Madjles is, however, constantly scrutinised by the Council of Guardians. The aforementioned regulating body consists of twelve members, including six theologians nominated by the Supreme Leader and six lawyers appointed by the Madjles from a list of candidates received from the Supreme Judiciary Council. The Supreme Judiciary Council is supervised by the Supreme Leader who appoints the Supreme Judge as its Chairman [12]. The task of the Parliament is to represent the nation and decide state policies, as well as questioning the executive authority and the judiciary. On the issue of the judiciary a curious phenomenon transpires. The Parliament has the right to query the work of the judiciary body whose membership and guidelines are largely dependent on the approval of the Supreme Leader[13]. A situation could therefore occur where the Supreme Leader is required to consider a complaint against a body appointed to work in accordance with his expectations and suggestions. This is analogous to the Supreme Leader having to consider a complaint against his own earlier decisions. It is therefore possible to conclude that the enshrined in law freedom of the Madjles to assess the judiciary is also open to discussion and generally creates an impression that it is a non-binding rule on paper. The Supreme Leader appoints judges who in theory are independent dignitaries, who cannot be recalled and whose pronouncements are in accordance with Islamic principles[14]. To question their work may therefore imply the lack of competence to appoint adequate judges on the part of the Supreme Leader as well as querying the justice of divine laws.

5. The puppetry of the president's function

The nature of the function of the President of Iran is also controversial. Both secular and clerical men faithful to Islamic principles, practicing Shi-ites over 25

12 A. Krasnowolska, Rewolucja..., *op. cit.*, p. 885.
13 E. Abrahamian, Historia..., *op. cit.*, p. 216.
14 M. Piskur, System..., *op. cit.*

may stand (in 2013 the upper age barrier of 75 years was abolished). The contenders are verified and approved by the Council of Guardians of the Constitution. For example, in the last elections in Iran in 2013, 686 people registered their presidential candidacy. The Council of Guardians of the Constitution gave its references and approved eight[15]. The President is elected by citizens every four years in a direct vote. The elections may end in round one, but if the majority of votes does not indicate one winner, the second round takes place with the two highest scoring candidates. The incubent President may stand for office just once more after four years. Unlike in most countries with the office of a President, the person occupying this office in Iran is not regarded as the most important person in the state, does not have the status of the leader of the country and remains under the authority of the Supreme Leader. The existence of this function as an executive body in the state would seem doubtful. The Supreme Leader may either approve the citizen's presidential choice or reject it; however, in the case of acceptance, this does not guarantee that the President will be independent of the Supreme Leader. Carrying out the duties of the President is constantly scrutinised by the *welajat-e faghiha*. The President is not the first, but the second most important and influential persona in the state. Each President's decision about appointing ministers must be upheld by the Madjles and the Supreme Leader. Any moves of the President in relation to the Council of Ministers, which the President has established since 1989 when the office of Prime Minister was abolished, appointing the vice-president proposing reforms together with the government, developing policies, strategies and international agreements are referred to, verified and approved by the Supreme Leader[16]. While consulting with the parliament and securing the support of MPs in parliamentary questions over direction of policies and ministerial nominations are understandable and within the president's remit, the procedure of securing acceptance by a religious authority is unique and raises further doubts over maintaining this office in the explicitly clerical state system in Iran.

6. Irrationality of the political and electoral system in Iran

Considering the most important aspect of the Constitution defining the state system and contrasting them with reality it is possible to conclude that the hybrid republic based on the Iranian electoral system with the concurrent elements of a hierocratic, authoritarian, state is an artificial creation devoid of logic. On one hand Iran functions as a state where the principle that authority comes from the people seems to apply. Citizens elect the members of Parliament, the President, local

15 U. Pytkowska, Kampania prezydencka w Iranie ruszyła pełną parą, (in:), Solidarni z Iranem, http://solidarnizi- ranem.pl/pl/publicystyka/item/209-kampania-prezydencka-w-iranie-ruszyla-pelna-para-urszula-pytkowska (accessed on: 30.12.2014).

16 M. Piskur, System..., *op. cit*.

authority representatives and the clerics to the Assembly of Experts. The procedures are clear and stress the importance of the electorate's votes. Electoral rights are given to both men and women over 16 (until 2005 it was 15). On the other hand, the electoral decisions of the voters are subject to control which in turn is justified as a symptom of care for the welfare of the nation; Khomeini himself openly stated that it is right that the highest spiritual authority should control the work of the President or other highest state officials in order to ensure that they make no mistakes or do not contravene the law and the Quran[17]. What we have is, therefore, control and authority of church dignitaries over the President, the parliament and the judiciary. The three bodies that have separate powers are in fact subject to one person. Prerogatives of the Supreme Leader also include nominating the chairman of the Radio and Television Council, leadership of the armed and security forces as well as the army of Guardians of the Islamic Revolution – a paramilitary force established in order to control society in terms of observing the norms of the Islamic code of conduct, applicable not just in politics but also in citizens' everyday life[18]. The whole political system in Iran resembles the dictatorship by one central communist party coupled with the curious phenomenon of a divine leader whose power is greater than that of a king or a Shah. Citizens were given electoral rights which in reality make no difference. Even in the first years of establishing the structures of the Islamic Republic Khomeini moulded his own person into a *Duce* persona and was very effective in combating anti-Islamic, representations from opponents contrary to his vision, discussions and discourse. Any protests and gatherings were brutally supressed, purges took place at universities and centres of science, troublesome editorial offices were closed and a moral code of conduct for men and women was introduced, which started to limit civil rights[19]A nation that is scared, isolated from the rest of the world and intensely indoctrinated is easier to administer, making retaining absolute power not that difficult, as can be seen in examples of regimes in other parts of the globe lasting for many years.

The role of the electorate in Iranian elections is a kind of absurdity – such law is surreal and the society seems to be fully aware of this. Since the 1980s it has been possible to see in the Iranian nation a tendency to negate the strongly hierocratic system. The vision of the country in a constant recession produced a lot of social dissatisfaction. Since 2005 governments have been formed by people chosen for their noted pragmatism in politics and more liberal attitude towards citizens. The nation expected liberties, freedom of speech, the opening of the country to the West and modernisation. There was a gradual effort to distance from the clerical dimension

17 E. Abrahamian, Historia..., *op. cit.*, p. 214.

18 A. Krasnowolska, Rewolucja..., *op. cit.*, p. 885.

19 N.R. Keddie, Współczesny Iran. Źródła i konsekwencje rewolucji., Kraków 2007, p. 245.

of the state, which started with the death of Khomeini in 1989[20]. The progressive reforming undercurrent observed in Iran in the 1990s and early 2000 was contrary to the interests of the clerics and traditionalists who suppressed any pro-Western movements and demonstrations, freedom of the press and any protests against the code of moral conduct. At that time it was possible to see how much the nation, especially the young electorate, expressed its open hostility towards the bearded and turbaned rulers. Unfortunately after the 2005 victory of Mahmud Ahmadinejad in presidential elections, a conservative in the camp of the Supreme Leader Khamenei, once again strengthened the position of the clerics. Indeed 2005 became a symbolic moment of the return of Iran to Khomeinism, strengthening of the Islamic doctrine and maintaining strongly reactionary policies. In such circumstances the chances for changing the system into truly republican are indeed slim. The position of the clerical establishment in Iran is too strong and too rooted in tradition and morality, and so thoroughly permeates the consciousness of many citizens, that it suppresses any hope of change in many. The superimposition of religion into politics is so prevalent that a multitude of people regard the Supreme Leader as a messenger of the Prophet, and any attempt to overthrow him as fighting God himself. The paradox is that at the same time there is a strong conviction about the need to preserve the republican status of the country, even if this is a parody of a republic. Despite relevant awareness that the country is run by the clerics the nation gladly celebrates elections campaigns under its own volition, and votes actively in all elections. According to the Polish Press Agency (Polska Agencja Prasowa – PAP) the 2008 parliamentary elections turnout in Iran was 55.4%, and in 2012 64%[21]. According to statistics the electoral turnout tends to be around 50-70%. As voting is not compulsory and the authorities do not enforce attendance at polling stations and the elections results do not reflect the number of votes cast, the result is very predictable, and the winner is usually a person acceptable to the Supreme Leader, with the Parliament under constant scrutiny. This would indicate that such well-developed electoral system in Iran is a phoney, irrational creation of a system that manipulates the electorate; it remains as a ritual without a force of causation. For many, the statement below which defines the electoral system in Iran is apposite – it is a country where… *more important than how one votes is how one counts the votes*, as observed once by Joseph Stalin in relation to another country and another reality[22]. There is a need here to explain and justify the irrationality of the electoral system in Iran in terms of the role of the electorate. In a country ruled by *welajat-e faghih* like George Orwell's Big Brother, active electoral rights and the act of voting maintains the spirit of democracy, freedom and self-determination in citizens;

20 N.R. Keddie, Współczesny Iran. Źródła i konsekwencje rewolucji., Kraków 2007, p. 257.

21 Polska Times, http://www.polskatimes.pl/artykul/522423,iran-64procentowa-frekwencja-w-wyborach-parlamentar nych,id,t.html?cookie=1 (accessed on: 30.12.2014).

22 U. Pytkowska, Kampania..., *op. cit*.

it is a petition for respecting the electorate, a way to communicate with the leadership and propagating the truth that the Iranian nation is not indifferent to authorities' actions. The spirit of democracy which states that power is in the hands of the people protects citizens from total enslavement.

7. Closing remarks

In 2014, 35 years had passed from when the Islamic Republic of Iran had been declared. The President's office, since 2013, had been occupied by Hasan Rouhani. He is regarded as a moderate cleric and the first since Khomeini to have talked by telephone to the President of the United States, a world power with which Iran has had no diplomatic relations since 1979. The new President declared that Iran will open up to the world. In domestic matters it remains reactionary. Despite this, the new President brings new hope that a man elected by the nation will not be a puppet in the hands of the Supreme Leader, and will find the courage and the will to listen to the petitions and appeals of the majority of the electorate and lead the country onto a more democratic, less clerical, less radically Islamic pathway.

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The President of the European Council – from Rotation to Election

Abstract: This article discusses the principles of election of the President of the European Council, modified by the Treaty of Lisbon. The current procedure for selecting a permanent President of the European Council is presented against the background of the original model of the rotating presidency of both the European Council and the Council. It is worth mentioning that the Council, although in a modified form, has, until now, been using the system of rotating presidency. Key issues discussed in the article relate to two essential points. The first concerns procedural aspects of the election of the European Council president (including qualification requirements, the rules of election and the validity of the principle of incompatibilitatis). The second refers to an analysis of the potential impact of changes in the method of determining the European Council president on the scope of his competences.
Keywords: European Council, President of the European Council, selectionprocedure
Słowa kluczowe: Rada Europejska, przewodniczący Rady Europejskiej, procedura wyboru

1. Introduction

The European Council is currently one of the key institutions of the European Union, with the authority to determine strategic guidelines for the development of the whole international organisation as well as the stance on important, sensitive issues of European policies. At the same time, the European Council is one of the most interesting elements of the current corporate system of the European Union, as this institution evolved from customary meetings of member states' representatives; only in time was this practice sanctioned through the treaties of the primary law (for the first time in the Single European Act[1]).

1 The Single European Treaty, signed on 17 and 28 February 1986, came into force on 1 July 1987 (Dz.U. WE L 169 of 29.06.1987).

The amendments to the foundation treaties of the European Union so far included many aspects of the activities of the European Council. One of the important issues was modifying the corporate system of coordinating the work of this institution. In its first incarnation the European Council was headed by the head of government or a head of state of a member state, based on a half-annual rotation of the presidency of the European Council[2]. Following the latest reform under the Lisbon Treaty[3] a permanent head of the European Council was introduced, and elected for a term of two and a half years.

In the context of the changes introduced, the primary aim of this article is an analysis of the current rules for electing the President of the European Council against the background of evolving legislative conditions. The secondary aim is to indicate what potential impact the modified rules have on the method and effectiveness of acting within the corporate system of the European Union.

2. The evolution of the rules for the presidency of the European Council

The permanent function of the president of the European Council was established under the Lisbon Treaty – the latest treaty to amend foundation treaties. The concept in itself was not new; it appeared in the 1970s, with ready proposals for treaty amendments prepared by the European Convention during the works on the European Constitution[4]. New regulations concerning the functioning of the European Council were part of the systemic reform of the European Union, which was intended as to be the answer to the issue of the effectiveness of the Union's corporate structure. An ineffective presidency model was indicated as one of the causes of inefficiency, in terms of the practical functioning of both the Council of the European Union and the European Council. This resulted in insufficient ability of the European Council to dictate the general directions and incentives for the development on the European Union, which contributed to the leadership crisis of the whole of the European Union[5].

2 Such rule was introduced in the original version of the Treaty on the European Union signed in Maastricht on the 7 February 1992, enacted on 1 November 1993 (Dz.U. WE C 191 of 29.7.1992).

3 The Lisbon Treaty, amending the European Union Treaty and the European Community Treaty, signed 13 December 2007, enacted on 1 December 2009 r. (Dz.U. UE C 306 of 17.12.2007).

4 K. Wojtowicz, Projekt Traktatu ustanawiającego Konstytucję dla Europy – podstawy ustroju i porządku prawnego Unii Europejskiej, "Przegląd Sejmowy" 2004, No. 2, p. 32; Projekt Traktatu ustanawiającego Konstytucję dla Europy (CONV 850/03), 18.07.2003, final version – Traktat ustanawiający Konstytucję dla Europy (Dz.U. C 310 of 16.12.2004).

5 See in particular C. Grant, Restoring leadership to the European Council, "Center for Euroean Reform Bulletin" z 1.04.2002 r., see: text http://www.cer.org.uk/publications/archive/bulletin-article/2002/restoring-leader- ship-european-council (accessed on 26.01.2015), A. Szczerba-Zawada, Pozycja ustrojowa Rady Europejskiej w systemie instytucjonalnym Unii Europejskiej,

Hitherto, the rotational leadership of one of the member states in the European Council, changed every six months did not facilitate the coherent functioning of the European Council. This was especially so because the state leadership was to a large degree burdened with duties associated with the concurrent leadership of the Council of the European Union, and therefore also presiding over the Council's advisory bodies. The practice of joint rotational presidency in two key institutions of the European Union had a negative impact on its effectiveness[6]. The concept of the reform of this model of functioning for the European Council (and the Council) was justified on the basis of new challenges of the prospective broadening of the EU membership to include ten new member states, and the growing need to increase the effectiveness of leadership across the European Union.

Having a permanent President of the European Council was seen as a more effective measure to promote and realise the interests of the Union, both inside and outside the organisation. The change of the mechanism for the leadership of the European Council was not treated as a strictly theoretical, doctrinal goal but as a solution to increase it's essential ability to function within the framework of the European Union on the eve of the greatest enlargement of this organisation in history.

Despite a broad consensus over the need for the reform of the model for the functioning of the European Council reaching the compromise over the nature and formula for the leadership of this institution turned out to be quite complex. The Convention outlined the difference in opinion between the different member states. One of the concepts, favoured in particular by France and Germany, was the introduction of a permanent President of the European Council. Representatives of smaller member states, supporters of a 'community model' opting for the existing rotational model of leadership, adjusted to improve its effectiveness in practice, strongly opposed such concept. On one hand, they argued, introducing a permanent presidency of the European Council, elected for a term of office and therefore outside the appropriate control of member states may negatively impact on democratic legitimacy of the Union. On the other hand, it was alleged, a departure from a rotational system of leadership of the European Council will aid the concentration of power in the hands of largest member states of the European Union[7]. The opponents of the concept of introducing the new model of a permanent, term based President of the European Council also pointed out that this kind of change to the corporate system of the European Union may disrupt the functioning of the established model

Warszawa 2013, p. 96, K.M. Witkowska-Chrzczonowicz, Dynamika rozwoju Rady Europejskiej w systemie instytucjonalnym Unii Europejskiej, Toruń 2014, pp. 132-135.

6 A. Szczerba-Zawada, Przewodniczący Rady Europejskiej, czyli o postlizbońskiej formule przewodnictwa w Radzie Europejskiej, "Przegląd Sejmowy", 2014, No. 4 (123), p. 245.

7 See more in: J. Tallbegr, Bargaining Power in the European Council, "Journal of Common Market Studies", 2008, vol. 46, No. 3, pp. 689-690.

of institutional balance and cooperation and coordination as part of the Union decision making procedures[8].

Finally a compromise was reached over the presidency of the European Council, along the median of the stances of the two main groups of member states. The idea of institutionalising permanent presidency of the European Council was linked with a quantitative definition of the remit of the president. In this way the role of the permanent President of the European Council in the corporate system of the Union was defined in a way that was almost analogous to the rotational leadership of the member states.

The Constitution for Europe Treaty developed a compromise concept of permanent presidency of the European Council; this finally came into force under the provisions of the Lisbon Treaty[9]. The authority of the President of the European Council is defined under Art. 15, Section 6 of the consolidated version of the Treaty on the European Union.

3. The procedure for electing the President of the European Council

The permanent President of the European Council is elected, in accordance with the provisions of Art 15 Para. 5 of the consolidated version of the Treaty on the European Union, by the European Council (through a qualified majority vote) for the term of two and a half years. His mandate may be renewed once. Other institutions, including the European Parliament (unlike with the procedure of electing the President of the European Commission) do not have any rights in the procedures of electing the President of the European Council, who personifies an intergovernmental, not community, dimension of integration within the European Union Framework.

The decision of the European Council on the choice of its President is taken through a qualified majority of votes, under the provisions of Art. 235 section 1 para.2 second sentence of the TFEU. This means that only heads of state or government of the European Union member states take part in voting. Other members of the European Council (the president of the European Commission and possibly the incumbent President of the European Council) do not participate in the vote. The decision of the European Council is made according to guidelines specified under Article 16 Section 4 TEU and under Article 238 section 2 TFU. Previously, decisions

8 See more e.g.: I. Pernice, Democratic Leadership in Europe: The European Council and the President of the Union, (in:) J.M. Beneuyto Pérez, I. Pernice (eds.), The Government of Europe: Which Institution Design for the European Union, Baden-Baden 2004, pp. 36-44.

9 See. P. Craig, The President of the European Council, (in:) J.M. Beneyto, I. Pernice (eds.), Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts. Lisbon and Beyond, Baden-Baden 2011, pp. 208-212.

on the choice of the President of the European Council were made according to the Nice System (in force until 31st October 2014).

In terms of a qualified majority vote, the European Council deploys appropriate guidelines adopted by the Council of the European Union. The principles of a qualified majority vote deployed until 31st October 2014 were based on weighted votes; in essence, this boiled down to countries having a different number of votes[10]. The distribution of votes happened through negotiations at international conferences and was relatively proportionate, with consideration given to such factor as the economic potential of member states, their population and territorial extent with favourable treatment of smaller countries. For all the decisions to be made so far by the European Council on electing its President (both Herman von Rumpoy during the first term on 1st December 2009 and during his re-election on 1st March 2012, and Donald Tusk – 30th August 2014) the qualified majority required at least 255 votes 'for', given by at least two thirds of member states in the European Council (guidelines for decisions that were not the result of an application by the European Commission).

The Treaty of Lisbon materially altered the process through which the Council of the European Union makes its decisions through a qualified majority (which was in place since 1st November 2014), applicable also to decision-making by the European Council through a qualified majority (as is the case with electing its president). It was replaced by the requirement of double majority in terms of the number of states and the population size, without defining the number of votes. Under the provisions of Art. 238 Section 2 TFEU, which cover decision-making by the European Council through a qualified majority of votes, passing a decision requires the support of at least 72% of the European Council members representing those member states whose joint population equals at least 65% of the total population of the European Union. This requirement will be applicable to future decisions on electing the President of the European Council[11].

The Treaty Regulation regarding the choice of the President of the European Council is very laconic; in order to define the procedure more precisely, Declaration No.6 was endorsed and attached to the final Act at the intergovernmental conference which adopted the Lisbon Treaty signed on 13th December 2007[12]. Member states' representatives working on the reform treaty decided that the choice of the person for

10 More on valid votes in international organisations in: Z.M. Doliwa-Klepacki, Encyklopedia organizacji międzynarodowych, Warszawa 1999, pp. 217-222; H.G. Schermers, International Institutional Law, vol. 2, Functioning and Legal Order, Leiden 1972, pp. 331-335.

11 More on the rules for making decisions through a qualified majority of votes see: A Doliwa-Klepacka, Stanowienie aktów ustawodawczych w Unii Europejskiej, Warszawa-Białystok 2014, pp. 48-51 and its references.

12 Declaration concerning Article 15 sections 5 and 6, Article 17 Sections 6 & 7 and Article 18 of the Treaty on the European Union, see the full text: http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=artic- le&id=14434&Itemid=4316 (accessed on 26.01.2015).

the office of the President of the European Council needs to consider the need to give regard to the geographical and demographic diversity of the Union and its member states (in order to ensure appropriate balance of political forces and influences)[13].

The Treaty on the European Union does not specify any conditions for a presidential candidate to the leadership of the European Council. The only Treaty restriction concerns the prohibition to hold a national public function after being elected President of the European Council (Art. 15 Section 6 TEU)[14]. This requirement – *incompatibilitas* – seems justified in practice. It also underlines the departure from the previous model of the rotating presidency of the European Council by a head of state or government of whichever member state's turn it was to hold the office for a semester.

That the function of the President of the European Council cannot be held jointly with a national function will aid the concentration of efforts on meeting the full remit of the European Council as well as lend authority to the office which can be held without having to compromise the interests of a national office.

New treaty measures (entrusting the autonomous right to choose the President to the members of the European Council) will undoubtedly increase the responsibility of the European Council members for personnel decisions. Although there are no specific procedural guidelines in this area, it would seem that experience in the practical functioning of the European Council would be crucial to the role. The introduction of the criterion of the candidate's rank, appropriate to the membership of the European Council (that is the function of a President or a Prime Minister) was supported by the Benelux countries, while work was still in progress on the text of the reforming treaty[15]. This was not formally adopted under the Treaty provisions, but it would seem justified pragmatically in order to ensure the efficient running of the European Council, effectively influencing the effectiveness of the whole European Union corporate framework. The requirement for efficient functioning of the European Council also determines the factors that need to be considered when deciding who to elect as the President of the European Council. Substantive

13 Analogous requirements apply for electing the President of the Commission and the High Representative for Foreign Affairs and Security Policy. On this, see interesting discussion by A. Gostyńskia, Learning from Herman: A handbook for the European Council President, "Center for European Reform Bulletin" of 21.08.2014. full text http://www.cer.org.uk/insights/learning-herman-handbook-european-council-presidentsthash.1Kuy3MVQ. dpuf (accessed on 30.01.2015).

14 See remarks by J. Barcz, Unia Europejska na rozstajach. Traktat z Lizbony. Dynamika i główne kierunki reformy ustrojowej, Warszawa 2010, p. 188.

15 See J.W. Sap, The European President, "European Competition Law Review", 2005, No. 1, p. 49, C. Closa, Institu- tional Innovation in the EU: The 'Permanent' Presidency of the European Council, (in:) F. Laursen (ed.), The EU's Lisbon Treaty. Institutional Choices and Implementation, Farnham 2012, pp. 123-124.

considerations (such as experience in working as part of the European Council) and the administrative abilities of the candidate ought to be essential requirements.

So far, this approach seems to be justified in practice. The first President of the European Council chosen by heads of state and heads of government was Herman von Rompuy (at the time of the elections – the prime minister of Belgium)[16]. His term began on 1st December 2009 (until 31st May 2012). After re-election to office[17] he continued in this role from 1 June 2012 till 30 November 2014. The second elected President in history is Donald Tusk (at the time of election – Prime Minister of the Republic of Poland), whose term began on 1st December 2014, (until 31st May 2017)[18]. According to the press, four serious presidential candidates were considered: Donald Tusk, the Danish Prime Minister – Helle Thorning-Schmidt, the president of the European Commission Jose Manuela Barroso, and the Prime Minister of Latvia – Valdis Dombrovskis[19]. Evidently, each candidate had the practical experience of the functioning of the European Commission required.

A very significant modification to the pre-Lisbon system of presidency of the European Council was the extension of the term of office from six months (when this function was being held jointly with presidency of the Council) to two and a half years for permanent presidency nowadays. As mentioned before, the presidential mandate may be renewed once. This change should also have a positive effect on taking effective action within the European Council framework, as it creates an opportunity to implement not just quick wins but medium to longer term goals. It should also improve cooperation with other institutions of the European Union through better coordination, and consequently strengthen the position of the European Council within the Union corporate framework.

Discretional authority of the European Council with regards to making a decision on the choice of a candidate for President of the European Council extends to the right to decide to withdraw the mandate from the President in case of an impediment or serious misconduct (Art. 15 Section 5 TEU). A President may be recalled following the same procedure as with presidential elections. The Treaty provisions clearly indicate that the European Council is not obliged to act to recall the President even

16 Decision of the European Union (2009/879/UE) of 1 December 2009 on selecting the President of the European Council (Dz.U. UE L 315 of 2.12.2009).

17 Decision of the European Union (2012/151/UE) of 1 March 2012 selecting the President of the European Council (Dz.U. UE L 77 of 16.03.2012).

18 Decision of the European Union (2014/638/UE) of 30 August 2014 selecting the President of the European Council (Dz.U. UE L 262 of 2.9.2014).

19 "Kto pokieruje sprawami Unii? Przedstawiamy sylwetki kandydatów", 31.08.2014 r., zob. http://www.tvn24.pl/wiadomosci-ze-swiata,2/kto-pokieruje-sprawami-unii-przedstawiamy-sylwetki-kandydatow,463315.html (accessed on: 29.01.2015), Ch. Bremner, "Zdecydowała wolta Camerona. Kulisy wyboru Tuska na przewodniczącego Rady Europejskiej" of 1.09.2014, http://www.polskatimes.pl/artykul/3558577,zdecydowala-wolta-camerona-kulisy-wyboru-tuska-na-przewodniczacego-rady-europejskiej,id,t.html?cookie=1 (accessed on: 29.01.2015).

if the above guidelines are met. The treaty clearly envisages a possibility of passing a decision to recall the President, but does not regard this as an obligation, giving the European Council discretion to make its own assessment of the situation. However, it is prudent to regard the change of rules applicable to the President of the European Council as an important measure for political control[20]. The most punitive measure would be, of course, to withdraw the mandate from the President; not being re-elected could also be perceived as a lesser, less drastic, but nevertheless serious consequence of a negative assessment of the president's term in office.

4. Modifying the rules for appointing the President of the European Council and practical application of their authority

Established by the Lisbon Treaty, the President of the European Council as a political concept was to be a symbolic leader of the European Union and was presented as such to the public. His appointment could be regarded as a metaphorical answer to the question once posed by the American Secretary of State, Henry Kissinger "Does Europe have a telephone number?". It was noted from the very start that the actual position of the President of the European Council as the leader of the Union will depend on two main factors. On one hand – on the charisma, authority and diplomatic skills of the politician chosen to the office. On the other – on the will of the member states and on their decision on how much that authority will depend on implementing treaty framework agreements.

Currently the remit of the President of the European Council includes first and foremost leading the work of the European Council on defining strategic directions and political priorities of the European Union. This authority is exercised in cooperation with the European Commission, in particular with its President. Ensuring readiness and continuity of the works of the European Council is based on the work of the General Affairs Council. This restriction clearly indicates that, although in theory the permanent President of the European Council is better established, the actual centre of power lies still in the capitals of the member states[21]. Consequently the main task of the President is really coordinating and facilitating a compromise between member states, improving the compatibility and the effectiveness of the European Council's actions. In this area he presides over the European Council and leads on its work, ensures the readiness and the continuity of the works of this institution and facilitates consensus reaching in the European Council. It is possible to assume that

20 See more in K. M. Witkowska-Chrzczonowicz, Dynamika rozwoju Rady Europejskiej w systemie instytucjonal- nym Unii Europejskiej, Toruń 2014, pp. 173-177.

21 It is worth stressing here that in the Council – the fundamental legislative body of the European Union – the system of rotational presidency is still in place, the only amendment made following the Treaty of Lisbon was the formal adoption of the joint presidency of a member states triad.

President's mediation skills are of key importance, as is maintaining regular contact with heads of state or heads of government of member states, also outside of the seat of the European Council in Brussels.

The President of the European Council briefs the European Parliament after each session. This, however, does not equate to being answerable politically to this institution.

The President of the European Council represents the European Union outside on foreign policy and security matters (without impacting on the authority of the High Representative for Foreign Affairs and Security Policy). As part of his diplomatic remit, the President of the European Council is to strengthen the European Union presence on the international scene. It would seem, however, that treaty restrictions to the framework of how the President of the European Council carries out these tasks ("without impacting on the authority of the High Representative for Foreign Affairs and Security Policy") indicates that the High Representative's function in the area of foreign policy and security of the European Union is more important. The President of the European Council has more of a representative role. In practice he represents the European Union at international summits (usually together with the President of the European Commission), such as annual G8 and G20 summits, as well as EU-China, EU-USA, EU-Japan, or EU-Russia summits. As part of his diplomatic role the President of the European Council also hosts heads of state from outside of the EU.

5. Conclusions

The reform of the guidelines for the functioning of the European Council under the provisions of the Treaty of Lisbon is an example of a structural change to the European Union corporate system. Apart from extending the scope of the particular remit of the European Council, the most significant modification concerned the establishment of its permanent President, elected by the heads of state and heads of government for a two and a half years term. The departure from rotational leadership of a head of state or head of government of the state currently presiding over the Council of the European Union is, without a doubt, a sign of a greater autonomy of both institutions and bolstering the political significance and independence of the European Council.

The legal position of the President of the European Council is relatively strong, but practical ability to exercise the authority outlined in the Treaties depends on their individual work style and personality. Institutionalising the permanent presidency of the European Council and extending the term of presidency should have a positive impact on the effectiveness of President's actions. It needs to be remembered that the European Council has been given the authority to check that the actions taken by

its President are appropriate. This is a significant change in relation to the previous formula of rotational national leadership.

So far, observing the office of a permanent President of the European Council, chosen by heads of state and heads of government, in practice may lead to a generalised assessment of the significance of this function and how much it is able to influence strategic decisions in real terms. The analysis of the structure and tasks of the European Council would lead to the conclusion that the President is first and foremost its representative. Any influence that the President may have over members of the European Council is down to his personal authority and political skills, but it is doubtful that his position and decision making powers exceed those of the heads of state or heads of government. It is important to remember that political decisions in strategic areas of coordinating European Union actions (e.g. common foreign and security policy) are made according to an intergovernmental formula. The voices that count most are those of the largest and economically strongest states: Germany, France and the UK.

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Systems of Selection and Appointment of Judges and the Issue of Judicial Independence: American, English and German Experiences

Abstract: The article aims to investigate the influence of different systems of selection and appointment of judges adopted in the legal systems of the United States, England and Wales, and Germany on judicial independence. In these countries, the following methods are used for the selection of judges: appointment by the executive, appointment by the career or civil service judiciary, shared or parity appointments and appointment by judicial committees. Comparative law analysis shows that the adoption of a particular method for the selection of judges, especially in connection with the term of office, may have an impact on their independence and impartiality. Especially risky seems to be the American justice system, which rooted in the idea of "popular constitutionalism" methods of election and re-election of judges could jeopardize fair trial guarantees. In England and Wales, of great importance in strengthening the independence of the judiciary was the introduction of the Constitutional Reform Act of 2005 and the institution of the Supreme Court. In Germany, independence of the judiciary is guaranteed by the Constitution and the Constitutional Court. Further observations indicate that both in common and continental law, the universal guarantee of independence of the judiciary is for judges to follow ethical and professional dignity principles.
Keywords: judicial selection, judicial independence, Constitution, fair trial, judicial conduct
Słowa kluczowe: wybór sędziów, niezawisłość sędziowska, konstytucja, rzetelny proces, etyka sędziowska

1. Introductory notes

The literature on the subject lists several systems of appointing judges in European countries and in the USA: by executive appointment, through elections (direct or indirect), as career or civil service judiciary, by shared or parity appointment and through nomination by a judiciary committee.

Parity systems are based on judiciary posts being filled proportionally, based on a set criteria, including: political party, area, ethnic origins or gender. A shared appointment involves giving a range of bodies the right to appoint judges, for example with half the posts being filled through appointment by the President and half by one of the chambers of the Parliament. These model solutions can be deployed, due to constitutional differences between countries, in mixed forms, which makes it all the more difficult to ascribe them to any one system[1].

Parity and shared appointment systems are deployed in various configurations in European countries in level judiciary bodies at the highest, acting as constitutional tribunals or supreme courts. Elements of these methods can also be found in elections to international criminal tribunals; these elections are regarded in literature and case law as a vital guarantee of independence and objectivity of presiding judges and of a due criminal process[2].

A comparative legal analysis also needs to indicate the difference between the judge's role in determining the outcome of criminal proceedings (which is the main area covered in this article) in an Anglo-Saxon system and in the legal systems of continental Europe. In general, an English or an American judge is an impartial arbiter in an adversary trial in court which aims is to settle the argument between the prosecution and the defence, and in the German legal justice system analysed here (which the doctrine classifies as one of the systems in the civil law tradition) the judge has a statutory duty to uncover the material truth, regardless of the parties' evidence drive[3].

2. The impact of the selection and nomination system on independence of judges

The basic method of appointing federal judges in the USA is nomination by the President, who acts with the Senate's counsel and approval; the decision making process has a political dimension as over 90% of judges appointed by the President comes from his own party[4]. When filling posts in federal courts (district courts and

1 M.L. Volcansek, Judicial Elections and American Exceptionalism, Deapaul Law Review 2010-2011, vol. 60, pp. 805-806 and literature cited there.

2 P. Wiliński, H. Kuczyńska, Rzetelny proces karny w orzecznictwie międzynarodowych trybunałów karnych, (in:) P. Wiliński (ed.), Rzetelny proces karny, Warszawa 2009, pp 188-189.

3 On the differences between the role of an Anglo-Saxon and Continental judge see W. Gontarski, Porównanie niekontradyktoryjnego (kontynentalnego) procesu karnego z procesem kontradyktoryjnym (anglosaskim), (in:) P. Kruszyński (ed.), Proces karny. Rozwiązania modelowe w ujęciu prawnoporównawczym. System prawa karnego procesowego, Warszawa 2014, pp. 145-158.

4 I. Kraśnicka, A. Ludwikowska, Wprowadzenie do systemu prawa Stanów Zjednoczonych, Toruń 2012, pp. 188-189 and references quoted there.

courts of appeal) the President is aided by the Attorney General, and their competences are assessed by the American Bar Association (ABA): Standing Committee on the Federal Judiciary. Similar procedure applies when nominating judges to the Federal Supreme Court, their choice is of vital importance to the President as the decisions in this court (acting as a Constitutional Court) impact on the functioning of the political system of the whole country. In appointing judges to this highest judiciary body the President is aided not just by the Attorney General, the ABA Standing Committee on the Federal Judiciary and the Senate Judiciary Committee who vet the candidates, but also by the judges of the Supreme Court acting on their own initiative or by request of the President. In recent years the process of appointing judges to the Supreme Court has evolved, and the role of various advisory bodies, especially the ABA Committee, participating in the procedure has also changed. A characteristic of this process is the strong involvement of various pressure groups in the process of appointing judges to the Supreme Court, which may significantly influence the Senate's decision to reject a particular candidate[5].

In the case of the President nominating federal judges there is no such risk to their independence because under the Third Amendment to the USA Constitution their appointment is life-long. The situation with appointing state judges is quite different. Against the background of the variety of measures adopted in individual states it is possible to distinguish three fundamental methods of selecting these judges[6]:

1) Appointment by the governor or state legislature
2) Through general elections:
   – *partisan election*, where political party membership is stated next to the name of the judge, or
   – *non-partisan elections,* where this information is not given.
3) *Merit Selection* also known as the Missouri Plan, where candidates for judges are selected following a special procedure by legislative committees, based on potential judges' achievements and on competence criteria. The final appointment is usually made by the state governor from among three to five candidates selected by the committee.

American doctrine signals a number of issues associated with elections and nominations of state judges in the context of their independence on one hand and responsibility on the other. It underlines the fact that a lively discussion over the proper role of judges in the USA has been ongoing for about 200 years. Supporters

5 *Ibid*, pp. 190-192, and references quoted there.

6 More on the development and detailed characteristics of these forms of selecting judges in the article by I. Kraśnicka, Systemy wyborów sędziów stanowych w USA (included in this publication) and J. Rosinek, Some Thoughts on the Problems of Judicial Selections, Court Review, Summer 2004, pp. 20-24.

of a strong and independent judiciary have maintained for years that the role of the judges is to honestly interpret the law and the Constitution, independently of such external factors as politics or public opinion. Therefore they ask that judges are not elected in general elections but appointed. On the other hand, those in favour of judges being accountable to society maintain that judges carry out government policy, acting within a democratic system and therefore they should, periodically, answer for their actions directly to society through elections, regardless of any impact on their independence[7].

The shortcomings of having judges chosen through general elections include low voter awareness and knowledge with regards to candidates for judges, with the high costs of election campaigns implying a risk that judges' impartiality may be affected by the sympathies of their campaign donors[8]. It is worth referencing the decision in the case of the *Republican Party of Minnesota v. White* (536 U.S. 765, 788 (2002), where the Supreme Court pronounced that candidates for judges under the First Amendment have a right to air their views on issues they will later be considering as judges. In turn, in the case *Caperton v. A.T. Massey Coal Co* (556 U.S. 868,881-86 (2009)) the Supreme Court of the USA found, for the first time, that behaviour pertaining to the judge's election campaign may affect due process rights. The court accepted that a serious bias risk, too high to be tolerated in accordance with the Constitution, arose in the situation when newly elected Judge of the West Virginia Court of Appeals B. Benjamin recognised an appeal concerning his most significant sponsor in the judiciary elections campaign, Don Blankinship. The sponsor spent several million dollars to ensure the electoral success of Judge Benjamin, knowing that straight after the elections his case was heading for the Court of Appeals[9].

However, the real threat to independence and impartiality of judges lies not in their first selection (through general elections, by appointment or through the *Missouri Plan* procedure) for a limited term, but in the method of extending that term *(retention)*. At the end of the last century in the USA in the Courts of Appeal and in the courts of the First Instance (county and district courts) the vast majority of judges underwent various forms of selection and retention.

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7 D.C. Brody, The Use of Judicial Performance Evaluation Enhance Judicial Accountability, Judicial Independence, and Public Trust, "Denver University Law Review" 2008-2009, vol. 86, pp. 115-117 and C.G. Geyh, The End- less Judicial Selection Debate and Why it Matters for Judicial Independence, "The Georgetown Journal of Legal Ethics" 2008, vol. 21, pp. 1259-1263 and literature quoted there.

8 C.G. Geyh, The Endless Judicial Selection Debate..., *op. cit.*, pp. 1265-1270, and research results included therein.

9 For the analysis of this decision see: M.H. Redish, J. Aronoff, The *Real* Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and The Dangers of Popular Constitutionalism, "William & Mary Law Review" 2014, vol. 56, pp. 4-5 and 20-30, and quoted case law SN USA.

Table 1. Selection and retention systems for state judges in the USA

Courts of Appeal Joint number of appeals judges: 1.243 Joint number of those who underwent various selection procedures: 1.084 (87%) Joint number of those who underwent competitive selection: 659 (53%)	
First selection conditions appointment: 582 (47%) partisan elections: 495 (40%) non-partisan elections: 166 (13%)	**Following selection conditions** appointment: 133 (11%) partisan elections: 400 (32%) non-partisan elections: 166 (13%) retention elections (non-competitive): 518 (58%)
Courts of the First Instance (Trial Courts) of general jurisdiction Joint number of judges: 8.849 Joint number of those who underwent various selection procedures: 7.378 (87%) Joint number of those who underwent competitive selection: 6.650 (77%)	
First selection conditions appointment: 2.061 (24%) partisan elections: 3.661 (43%) non-partisan elections: 2.759 (33%)	**Following selection conditions** appointment: 1.013 (12%) partisan elections: 2.360 (28 %) non-partisan elections: 2.891 (35%) retention elections: 2.127 (25%)

Source: J. Rosinek, Some Thoughts on the Problems of Judicial Selections, Court Review, Summer 2004, p. 21.

In the literature on the subject it is therefore argued that a state judge, in the instance of the first appointment (regardless of the selection method), usually for the period of a few years, may be afraid to pronounce independently and impartially and risk the displeasure of voters or the appointing executive body. The popular constitutionalism which is at the foundations of the general elections method of selecting judges, is juxtaposed with real constitutionalism and its embodiment in the criminal process that is the concept of the due process of law[10].

On the issue of the impact of the selection method for the appointment and retention of a state judge on his/her later interpretation of the law, there is insufficient research that would unequivocally prove such a link, which leads to continued debate among the proponents of such thesis[11], and its opponents[12]. However, the majority of authors present a uniform view on the importance of the judges' ethics for maintaining independence and impartiality, its corporate embodiment is the *American Bar Association's Model Code of Judicial Conduct*[13].

10 M.H. Redish, J. Aronoff, The Real Constitutional Problem..., *op. cit*., pp. 33-45.

11 See, apart from M.H. Redish and J. Aronoff cited above, also P. Bruhl and Ethan J. Leib, Elected Judges and Statutory Interpretation, "University of Chicago Law Review" 2012, vol. 79, pp. 1215-1230.

12 Bertrall L. Ross II, Reconsidering Statutory Interpretive Divergence between Elected and Appointed Judges, "Uni- versity of Chicago Law Review" 2013, vol. 89, pp. 53-80.

13 See e.g. C.G. Geyh, The Endless Judicial Selection Debate..., *op. cit*., p. 1259 onwards

3. Appointing judges in England and Wales and the 2005 Constitutional Reform Act

The English and Welsh justice system deploys community magistrates (lay judges or Justices of the Peace) in magistrates courts (of which there were around 30 000 in 2007); according to the 2003 *Courts Act*, these are appointed in the name of the Queen by the Lord Chancellor. When making a decision on appointment, the Lord Chancellor applies first and foremost the criteria of the appropriate personal character and competences required to work as a judge and whether the candidate would therefore be accepted by the rest of the judiciary. At the same time, this method of appointing judges by the executive has been met with criticism in the doctrine as the nominees more often than not come from higher social class and are not representative of the community (especially as the proportion of ethnic minority magistrates are just a few percent)[14]. Before being employed, magistrates are given a one year foundation course on their future duties. The aim of the training is to give them basic knowledge of the law and evidence-led trial, on the rules of criminal procedures and sentencing guidelines and the role of other participants in criminal proceedings (e.g. the justices' clerk and court staff and the representatives of the sides in a trial).

Magistrates may be recalled by the Lord Chancellor in circumstances envisaged in the 2003 *Courts Act* (Art. 10), for example: an inability to practice in the profession, or misconduct, failing to meet professional standards and discharge decision making duties.

In turn, professional judges in magistrates courts – *district judges* – previously called *stipendiary magistrates*, are professionals who receive a salary for discharging their duties. They are called up by the Queen on the basis of the Lord Chancellor's recommendations from among barristers and solicitors with at least seven years professional work experience. There are around 140 of district judges, aided by numerous deputies employed part time and awaiting their chance of full employment. District judges work until pensionable age (generally until the age of 70), but may be prematurely deprived of the office by the Lord Chancellor if they become unable to carry out their duties or are guilty of misconduct (*inability or misbehaviour).*

Crown Courts*,* which are courts of the first instance in more serious criminal cases which require an act of indictment as well as an appeals body for decisions made in Magistrates' Courts, have High Court judges (around 20) considering the most serious cases, and circuit judges, who consider around 80% of all cases, as well as recorders employed part time, who may combine their function as a judge with their solicitor practice. Circuit judges are appointed by the Queen on the basis of the Lord Chancellor's recommendation and, as full time judges, must have at least 10 years

14 J. Sprack, A Practical Approach to Criminal Procedure, Oxford 2008, pp. 90-91.

practical experience in the judiciary or have held a post in an administrative court. They may likewise be deprived of their post by the Lord Chancellor before retirement in case of inability to perform their function or misconduct. Like district judges, recorders are appointed by the Queen on the Lord Chancellor's recommendation from eligible barristers with at least 10 years professional experience, but for a limited period of time, until they have presided over a certain number of cases; when not settling cases, they may carry out their legal practice.

The Lord Chancellor's dominant role in appointing and recalling judges resulted from the fact that England and Wales do not have a Constitution as a highest ranking legal act which on the Continent usually determines the guarantees of the independence of judges. After the provisions of the European Convention of Human Rights were incorporated into the legal system of England and Wales under the 1998 *Human Rights Act* there was a need to legally guarantee the independence of English courts (as required under Art. 6 Section. 1 ECHR), and to create the institution of the Supreme Court. This requirement had not been met by the Appellate Committee of the House of Lords as it was dependent on the upper chamber of the Parliament. The situation changed after the 2005 *Constitutional Reform Act* (CRA) was passed – which introduced the institution of the Supreme Court to the UK legal system. This act, according to the government justification of a government project, reshaped the relationship between the legislature and the executive into a modern format[15]. In terms of appointing judges the significant development was the establishment of the Judicial Appointments Commission, which limited the role of the Lord Chancellor to accepting or, exceptionally, rejecting its recommendations on candidates for judges. The CRA has also significantly affected the system of appointing and disciplining judges through establishing the Office of the Judicial Appointments and the Conduct Ombudsman.

Article 1 of the CRA places a duty on all government ministers, but in particular the Lord Chancellor, to uphold judicial independence. Judicial independence is defined in English literature as the freedom of judges to uphold the rule of law and protect human rights, and to maintain impartiality in every case they deal with and in all circumstances. It is thought that this is not just a privilege of the judiciary but that it implies *a right of the people and of a person and a duty of the judiciary and a judge*[16].

Highlighting the limited potential of the Lord Chancellor (as a government minister who, after the reform, does not even have to be a lawyer) to safeguard judicial independence, this underlines the vital role of the judges themselves in ensuring

15 D. Woodhouse, United Kingdom. The Constitutional Reform Act 2005 – defending judicial independence the English way, "The International Journal of Constitutional Law" 2007, vol. 5, pp. 153-154.

16 D. Woodhouse, United Kingdom. The Constitutional Reform Act 2005..., *op. cit*., pp. 156-157 and literature quoted there.

transparency and accountability of their actions. The guidelines on the conduct of judges, assembled in 2002 as part of the *Guide to Judicial Conduct* and adopted by the judiciary of England and Wales in October 2004, should be of help here[17].

English studies also stress the vital role in safeguarding judicial independence that is assigned to a "a proactive, open, and accountable Supreme Court [that]is likely to be more effective in protecting judicial independence than a government minister – even one with the exalted title of lord chancellor"[18].

4. The systems of appointing judges in Germany and constitutional guarantees of their independence

The choice of the German system for these analyses is due to at least the following factors. First of all, this is a classic example of a continental civil law system which fully subscribes to the principle of 'material truth' in criminal proceedings. Secondly, this country has a federal system of states with a certain amount of autonomy (also in terms of appointing judges) which, however, is difficult to compare with the autonomy of the states of the USA.

At present the courts of law of the Federal Republic of Germany dealing with criminal cases include (local) district courts (*Amtsgerichte),* regional (state level) courts *(Landgerichte*) and higher regional courts (*Oberlandesgerichte – OLG)*[19]. Criminal cases are also dealt with by the Federal Supreme Court *(Bundesgerichtshof* – BGH), state level constitutional courts *(Landesverfassungsgerichte*) and the Federal Constitutional Court (*Bun- desverfassungsgericht* – BVerfG).

Election of judges, where political factors are clearly at play, applies first and foremost to constitutional tribunals; which merit therefore a short summary. The status of the Constitutional Court is defied in Germany under Art. 92-94 of the Constitution of the Federal Republic of Germany (*Grundgesetz – GG).* Art. 94 Section 1 GG specifies that half of the Court's judges are elected by the Parliament (*Bundestag*), and half by the *Bundesrat* (federal council) through a qualified majority of 2/3 of the votes. Detailed guidelines for the selection of these judges are provided under the Federal Constitutional Court Act *(BverfGG*), issued on the basis of Art. 94 Section 2 GG. Formally, judges of the Court are appointed by the President of the Federal Republic of Germany, but his role is simply to enact the decision of the Parliament and the Council. The requirement for the majority of the two thirds of votes in the

17 Przewodnik etyki sędziowskiej. Zasady etyki dla sędziów Anglii i Walii. Guide to Judicial Conduct (Introduction by R. Sarkowicz), Warszawa 2007.

18 D. Woodhouse, United Kingdom. The Constitutional Reform Act 2005..., *op. cit*., p. 165.

19 Regarding the remit and guidelines for the functioning of German courts of law in criminal proceedings see e.g.: Ł. Malinowski, Postępowanie po wniesieniu aktu oskarżenia do sądu, (in:) Proces karny. Rozwiązania modelowe w ujęciu prawnoporównawczym, *op. cit*., pp. 422-436.

electoral bodies is to guarantee the non-partisan character *(Unparteilichkeit)* of judges and ensure cross party nature of the composition of the Court *(*Überparteilichkeit*)*. The result of this method means that smaller parliamentary factions may count on securing one or two appointments to the Court. Sitting judges also act as advisors in elections, but their lists of recommendations are not binding for the electoral body. The German doctrine criticises the significantly political nature of electoral procedures to *BverfG* as reducing the chances of 'politically neutral' judges, and a greater transparency of such elections is called for, as well as having regards to the views of the judges sitting in the Constitutional Court[20].

In the Federal Republic of Germany independence of the judiciary is guaranteed under the Constitution, first and foremost under Art. 97 which in Section 1 declares that judges are independent and are answerable only before legal acts[21].

Both the doctrine and the BVerfG case law assume that the concept of judiciary independence covers both the material (Art. 97 Section 1 GG), and the personal (Art. 97 Section 2 GG) aspect which basically guarantees that the judge cannot be removed from their post (see e.g. the Tribunal's view in the decision of 23rd May 2012, 2 BvR 610/12, BvR 625/12, the decision of 14th July 2006, 2 BvR 1058/05 and other decisions referenced later in this article)[22].

The Federal Constitutional Court dealt with the case of compatibility of state regulations concerning elections to state-level constitutional courts with the constitutional principle of judiciary independence. In the decision of 23rd July 1998 (1 BvR 2470/94) BVerfG decided that the rules for electing judges to the Bavarian Constitutional Court by the Parliament of this federal state through ordinary, not qualified, majority, were compatible with the German Constitution. In this decision the Court highlighted the fact that it is not the method of electing judges that is of fundamental importance to their independence, but their adherence to professional principles and the ethics of the profession.

In terms of selection of judges to German courts of law, the judiciary career model applies. Law graduates are required to pass a final exam and those with the best results have a chance of applying for a post in courts of the lower instance (*Amtsgerichte).* Each federated state *(Bund*) of the Federal Republic of Germany has temporary commissions for appointing professional judges; acing on the basis of Art. 95 Section 2 of the Constitution and the Act on the Selection of Federal Judges (*Richterwahlgesetz* – RiWG).

20 F. Wittereck, Die Verwaltung der Dritten Gewalt, Tübingen 2006, pp. 268-271 and literature cited there.

21 See e.g. M. Fornauf, Die Marginalisierung der Unabhängigkeit der Dritten Gewalt im System des Strafrechts, Frankfurt am Main 2010, pp. 79-83. See also the decision of 23.05.2012 by the German Constitutional Court BVerfG, 2 BvR 610/12 (para 12-14).

22 Decisions of the Federal Constitutional Court are quoted after its official internet page: www.bundesverfassungsgericht.de (accessed on: 17.06.2014).

Candidates for judges are presented by the appropriate Minister of Justice of a federal state, or representatives of an election committee, and then voted by the presidium of the court where the candidate is to take up the post.

The election committee has access to candidates' personal files and documents concerning their career history and achievements. Based on this, it assesses the candidate's professional competences and personal characteristics that would predispose them to meet the demands of the post, and makes a decision through a secret ballot. If the minister approves the recommended candidate, he then presents the candidature to the president of the Federation who appoints the candidate to the office of a judge – the appointment needs to be countersigned by the German Chancellor or the appropriate Minister (Art. 60 and 58 GG).

As previously quoted sources have indicated, this process of selecting judges in Germany also has its critics; they allege lack of transparency and the choice being dictated not solely by the candidate's level of professional knowledge but also political leanings. It also needs to be noted that the Constitution of the Federal Republic of Germany leaves the federated states a large degree of freedom to shape their own detailed regulations of selecting judges of courts of law (Art. 98 Section 3-5 GG).

Judges in courts of law are generally appointed for life, although there is a mechanism for appointing a judge for a trial period of several years, (*Probierichter)*, which is similar to the institution of a court assessor, now withdrawn from the Polish justice system.

It is worth including select examples of case law based on the decisions of the Federal Constitutional Court concerning the principle of independence of judges in courts of law. The case law indicates that a 'probationary judge' does not enjoy all the attributes of judicial independence but has every right (together with judges of other German states) to apply for a lifelong office of a judge in the state appropriate to the court where he currently works. In a BVerfG decision of 4th December 2006 (2 BvR 2494/06) concerning this issue, the court decided that regulations in force in the state of Schleswig-Holstein, which essentially debarred candidates from outside of the state from applying for the office of a judge in a district court in this state (including a fully-fledged judge from Lower Saxony), were in accordance with the Constitution.

In turn, in the decision of 16th March 2005 (2 BvR 957/05) the Federal Constitutional Court decreed as compatible with the Constitution of the Federal Republic of Germany (and in particular with the Art. 97) a decree of the Nordrhein-Westfalen Ministry of Justice, which made an appointment of a judge of a state court to a post in a higher state court (*Oberlandesgericht*) dependent on being previously delegated to that court.

Among decisions concerning internal factors, resulting from how courts organise their own work but potentially impacting on independence and impartiality of judges, are on one hand decisions declaring that computerisation of courts and electronic processing of data held in court files does not impact on the freedom of

casework of judges (decision BVerfG of 6 October 2011, 2 BvR 2576/11), on the other hand decisions declaring that a judge enjoying the guarantees of independence has rights under Art. 101 Section 1 GG protecting him from being disproportionally burdened with work by the president of the court (decision BVerfG of 23 May 2012, 2 BvR 610/12).

5. Conclusions

For the purpose of this article this necessarily abridged analysis of the legal systems of the USA, England & Wales and Germany facilitates a hypothesis that the methods of election, and appointment of judges, may impact on the independence and impartiality of judges. Measures adopted in Anglo-Saxon law and on the Continent (on the example of Germany) imply various threats to these basic traits of the legal and social status of judges. Particular risks seem to be posed by the American justice system where the establishment of the popular constitutionalism method of election and re-election of state judges may threaten the guarantees of due legal process. American research to a significant degree justifies the thesis that particularly with direct elections of state judges they may feel constrained in their future casework by the views of their voters. This threat is particularly real in those states where judiciary offices are term-based, and judges themselves are subject to re-election procedures where the assessment of their work so far by either the electorate or the nominating body counts. Only federal judges (especially in the Supreme Court) are free of such influences since the Constitution guarantees them their function for life.

In the English legal system the weakening of the dominant influence of the administrative component for the nominations of judges, that is, of the Lord Chancellor (acting on his own behalf or on behalf of the Queen), may be observed, coupled with a growth in the influence of the judiciary community on selection procedures. A significant change was triggered by the 2005 Constitutional Act which introduced not only the Judiciary Appointments Commission but also the institution of the Supreme Court, tasked among other things with providing the guarantee of judiciary independence. This, in turn would suggest a somewhat controversial thesis that the English solutions for selecting judges to the courts of law are getting closer to the model of a professional career, dominant on the Continent and specifically adopted in Germany. The discussion of the German justice system highlights the importance of elevating the guarantees of independence and the impartiality of judges to a constitutional level for ensuring independence and the impartiality of judges, and protection through the case law of the Constitutional Court.

In all legal systems analysed here central government bodies (Parliament, and in the case of the USA – President) have secured a dominant influence on appointing the judiciary of the highest instance courts. However, the views of the doctrine quoted in

this article, as well as case law from the USA, Germany and England, stress that the universal guarantee of the independence of judges presiding over cases in courts of all instances is their adherence to professional integrity and ethics.

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The Systems of Selecting State Judges in the USA

Abstract: The article aims to introduce the selection of systems used throughout the United States of America to appoint or elect state judges. It opens with a brief overview of the federal specifics of the courts structure in the USA. The federal system of judicial appointment is subsequently described to provide comparative perspective to the state system. Evolution of the state judge selection methods follow, which provides readers with background on the historical development of the subject with emphasis on the political circumstances in particular periods. Next, currently used selection methods are described including the appointment procedures as well as unique partisan and non-partisan judicial elections, and the Missouri Plan based on merit selection. The penultimate section contains statistical analysis embracing all fifty states and the District of Columbia. Finally, the fifth part focuses on two key problems concerning the partisan election method and the response to those problems provided by the United States Supreme Court.
Keywords: judicial selection, partisan election, non-partisan election, judge appointment, Missouri Plan
Słowa kluczowe: wybory sędziów stanowych, sędziowskie wybory partyjne, mianowanie sędziów stanowych, Plan Missouri

1. Introduction

The federal system of the United States of America is reflected in the structure of the judiciary. Outside of federal courts there are, in different states, over 50 separate court systems. Individually constructed judiciary systems carry with them significant differences not just in their structures but also in the way judges are selected, including the possible use of general elections, where citizens of a given district can themselves decide into whose hands they entrust decision making in disputes arising from the premise of state law.

It is worth highlighting that American judges are not required to undergo any additional training through, e.g. an application, because the graduation certificate

from a school of law and passing a bar exam in the USA gives them the right to practice in any legal profession[1].

The aim of this article is to make the reader acquainted with methods of selecting state judges in the United States, with particular references to the general elections method used, as well as select key issues that had been, more than once, subject to a decision by the Supreme Court of the United States.

2. Federal judiciary and state judiciary – introduction

The United States Constitution, passed in 1787 by the 13 original states, passed the judicial power at the level of the newly established federation to the Supreme Court, and to 'such inferior courts as the Congress may from time to time ordain and establish'. (Art. III cl.1). The Congress passed the *Judiciary Act* as early as 1789, thereby establishing federal courts at lower levels. These courts are known as "Article III courts"[2], and judges presiding over those courts enjoy a life-long term of office and a permanent salary, guaranteed by the provision of the Constitution itself[3].

At the state level the judiciary system is defined under appropriate state provisions. A State Constitution usually indicates a basic framework for the functioning of the judicial power and defines its structure (as well as general methods for choosing judges), with specific measures adopted by state legislature in separate acts[4].

The American *common law* system gives judges wide ranging powers. As a judiciary power, they have control over legislative authority and the executive as

1 What's more, training in law is not even a legal requirement for a nomination for a federal judge. A judiciary career in the United States does not have the character of a gradual progression to the courts of a higher instance; a High Court Judge (or even a Supreme Court Judge) may be (and has been) an attorney who had never tried a case in any court. See: W. Burnham, Introduction to the Law and Legal System of the United States, St. Paul 2006, pp. 176-177.

2 This list includes the Court of International Trade whose 9 judges preside over civil cases concerning international trade agreements, in which the United States are a party. See The United States Court for International Trade: http://www.cit.uscourts.gov/ (accessed on: 11.09.2014).

3 Additionally at the federal level there are 'Article I Courts' established to manage cases concerning authority delegated by the states to the federal authority under Article I of the American Constitution. These are specialised courts, such as the *U.S. Court of Federal Claims*, *U.S. Tax Court* or bankruptcy courts, as bankruptcy falls under a federal law as uniform for the whole of the USA territories. Judges of those courts are appointed for a fixed term and do not enjoy the unconditional guarantees of Art. III of the Constitution. More on these courts in A. Ludwikowska, R.R. Ludwikowski, Sądy w Stanach Zjednoczonych. Struktura i Jurysdykcja, Toruń 2008, pp. 25-26.

4 Generally, it can be assumed that most states have courts of the first instance (*trial courts*) and *courts of appeals* – usually, though not always, with a state level supreme court at the top of the structure. See more in: I. Kraśnicka, A. Ludwikowska, Wprowadzenie do systemu prawa Stanów Zjednoczonych, Toruń 2012, p. 197 onwards.

part of the system of checks and balances. They have also an opportunity to modify or amplify existing laws and case law, based on legal precedents, is an important source of law in the United States.

3. Appointment of federal judges

The method of appointing the majority of federal judges (Article III judges) is defined in the very Constitution of the United States, which delegates this authority to the executive and legislative powers. Under Art. II sec. 2, judges of the Supreme Court of the United States and all lower instance federal courts are appointed by the President of the United States with the advice and the agreement of the Senate. It is worth highlighting that the very same Constitution establishes the life-long term of office for federal judges (Art. III sec.1), with the sole available procedure for re-calling a federal judge being through impeachment – a procedure reserved for re-calling the President of the USA and federal officials (Art. II sec. 4).

Appointment to the office of a federal judge is the most prestigious nomination in USA judiciary. Federal courts are presided over by just under 900 judges[5]. The pinnacle of the judiciary career is, of course, the office of a judge of the U.S. Supreme Court, which has nine judges deciding, usually with a lot of media interest, on key issues for American citizens (that is on constitutionality of the provisions of federal and state law), such as single sex marriages[6], the right to possess weapons[7] or constitutionality of the mandate for a compulsory health insurance[8].

4. Evolution of the methods of appointing and electing state judges

Before independence from the British Crown was declared, judges of the American colonies were crown officials, imposed from above and, as such, they symbolised dependency and subjugation to the King. In the revolutionary Declaration of Independence of 1776, one of many grievances and symptoms of the tyranny of the King towards the Colony was the judges' full dependence on the royal will (for holding their office and receiving a salary and its amount)[9]. Therefore after passing the Constitution, in the first period of functioning of the United States of America, state judges were mostly appointed by the state's executive authorities and/

5 According to the data of *United States Courts* on 31.12.2014: http://www.uscourts.gov/JudgesAndJudgeships/FederalJud- geships.aspx (accessed on 09.09.2014).

6 Np. *United States v. Windsor*, 570 U.S. (2013).

7 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

8 *National Federation of Independent Business v. Sebelius*, 567 U.S. (2012).

9 The Declaration of Independence of the United States, proclaimed on 4 July 1776. The original text is available on the USA National Archives website: http://www.archives.gov/exhibits/charters/declaration_transcript.html (accessed on: 09.09.2014).

or legislative bodies, similar to federal judges. Very quickly, however, individual states introduced elements of citizen elections of judges. Georgia, in 1812 and Indiana, in 1816, introduced such measures as part of their state constitutions[10]. During the presidency of Andrew Jackson (1829-1837), a grass roots demand for the "voice of the people" to be heard in the process of selecting judges appeared in pretty much all states[11]. In 1832, Mississippi, as the first state, introduced common elections of judges of all levels as the method of appointment to office. New York joined it in 1846[12]. During the following decades all then existing states and all new states incorporated into the Union, elected their judges, if not altogether than at least in part, through general elections[13].

Parallel to the introduction of this method of choosing judges was the emergence of critical voices which, in time, became much amplified and bolstered by real abuses by judges, contributing to the return of the system of judges being nominated by the executive authority. The main reason for the criticism was that the elections were being politicised. In the pioneering states of Mississippi and New York judicial candidates stated their political leanings on the ballot papers, therefore becoming a cog in the political machine which, in turn, meant that they were dependent on political parties and under their supervision. As the result another method appeared – judges being appointed to office following elections, but elections that were apolitical, without political affiliations stated on the ballot papers[14]. Already at the beginning of the 20th century, many lawyers, including the former US president William Howard Taft, strongly voiced the need for changes and categorically regarded partisan election of judges as a mark of disrespect for the justice system. In 1913 Albert M. Kales of Northwestern University founded the American Judicature Society and began working on a new method of selecting state judges, which was to include elements of electoral procedure, nomination and a competency-based assessment of individual candidates by independent commissions. Templates for this method for selecting judges were modified over the years, until in 1937 the American Bar Association presented the final version of non-partisan, competence based method for the selection of state judges, the so called *merit-selection plan*[15].

10 L. M. Friedman, A history of American law, New York 2005, p. 81.

11 A. Champagne, K. Cheek, The cycle of judicial elections: Texas as a case study, 29 Fordham Urb. L. J. 907 (2002), p. 907.

12 L. M. Friedman, A history…, *op. cit*., p. 81.

13 A. Champagne, K. Cheek, The cycle…, *op. cit*., p. 907.

14 A. Champagne, K. Cheek, The cycle…, *op. cit*, p. 908 and also L. C. Berkson, Judicial selection in the United States: a special report, (in:) E.E. Slotnick (ed.), Judicial Politics, Readings from Judicature, Chicago 1999, p. 44.

15 K. Tokarz, Women Judges and Merit Selection under the Missouri Plan, 64 Wash. U. L. Q. 903 (1986), pp. 910-911.

The first state to deploy this method in practice was Missouri, where in 1940 a constitutional amendment was adopted, introducing the *Nonpartisan Court Plan*. According to the new legislation, the selection of judges was subject to extraordinary procedure in several phases. First, an independent commission composed of citizens – lawyers and laymen – assessed potential candidates for judges, selecting the winners of this stage and presenting them to the state governor. The governor would make the final choice of a judge and appoint them to a specific post, usually for the period on one year. After that time the so called retention elections took place where local voters in general elections decided on whether the judge should retain or leave his post[16].

Such method of choosing judges proved hugely successful and soon the *Missouri Plan* was being implemented in other states in a more or less modified format. Nowadays this system is statistically the most frequently used selection method for judges in the majority of US states (see data in the later part of this article).

5. Contemporary methods of appointing and electing state judges

Nowadays state judges are elected or nominated in a variety of ways, in different states. Along with those representing the American doctrine, it is possible to surmise that the 50 states and the District of Columbia apply a curious patchwork of election and appointment methods for selecting state judges[17].

Generally, three methods are used, shaped by the process described above:

1. The procedure of appointing judges, which includes an executive appointment by the state governor, and the procedure of appointment by the legislative authority, that is through voting by the state legislature.
2. General elections, with two electoral systems: *partisan elections* where judges are elected in party political elections (in order to stand, candidates need to win in *primary elections*), where the electorate for a given area has a vote; and *non-partisan election*s, where judges are voted in by the electorate of a given area but their names on the ballot papers are not accompanied by the information on their political affiliation (in this system, candidates for judges also go through party primary elections, but in the end voters are not made aware of their political party membership).
3. *Merit Selection* also known as the *Missouri Plan*, or committee nomination, is, generally speaking, based on candidates for judges being chosen through a special procedure (with a number of potential variants) by legislative committees based on their track record and competency criteria. The final

16 S. O'Connor, The Essentials and Expendables of the Missouri Plan, 74 "Missouri Law Review" (2009), pp. 485-486.

17 K. Tokarz, Women…, *op. cit*., p. 907.

> appointment is usually made by the state governor from among three to five candidates presented by the Committee. In some states the governor's appointment needs to be confirmed by the state legislature. After a fixed period of time voters answer a simple question: should judge XY continue in office Yes or No?[18].

Statistically the most frequently used method for choosing state judges is the *Missouri Plan*. In 15 states and in the District of Columbia the plan is used to select judges to all courts. In 9 other states Merit Selection is used to choose judges of the courts of appeal, with judges of the lower instance courts being chosen through general elections (partisan or non-partisan). In total, 24 states deploy this method and in nine others the *Missouri Plan* is used to a symbolic degree (but it is still used) in the case of by-elections on some judiciary levels. The next largest group (15) are states where the choice of judges is through general non-partisan elections. Partisan elections of judges take place in only six states. In the smallest group, of only five states, judges are appointed by the governor (three states), or the state legislature (two states)[19].

When the above statistics are overlaid on the map of the United States, strong divisions are not difficult to spot. All the northern states, from Michigan to Washington and even Oregon, have adopted the method of non-partisan elections of judges to office. They were joined by some south eastern states – Arkansas, Georgia or Mississippi, faithful to its original objectives). Partisan elections are the dominant method of selecting judges in three states in the middle east of the country (Illinois, Ohio, Pennsylvania) and in the three typically southern states (Texas, Louisiana and Alabama). The middle states (from Wyoming, Utah and Arizona as far as Iowa and Tennessee) have adopted the *Missouri Plan* – wholly or partially. It is worth adding that the Missouri Plan nowadays uses a mixed system, with partisan elections used to fill judges' offices in some courts. This group of states was joined by geographically distant New York, Florida, the majority of the small states of the east coast (e.g. Massachusetts, Vermont, Rhode Island) and the District of Columbia, as well as Hawaii and Alaska. Governor appointment was maintained in two opposite states – California in the west and Maine in the east and in New Jersey. Virginia and South Carolina are the only states where judges are elected by legislative authorities (the final vote is taken by the

18 See e.g. L.C. Berkson, *Judicial…*, *op. cit.*, p. 45 or Road Maps. Judicial Selection: The Process of Choosing Judges, American Bar Association 2008, pp. 5-7.

19 Based on: Road Maps. Judicial Selection: The Process of Choosing Judges, American Bar Association 2008, p. 7. The divisions suggested here are generalised, on closer scrutiny the process of selecting judges at various levels, the combination of election methods are very varied. Even in the case of judges being voted in by the state legislature in South Carolina and Virginia there is an element of preparing candidates by special commissions used as part of the procedure.

joint chambers of the state parliament)[20]. What is interesting is that this division does not exactly correlate with the traditional divisions between Republican and Democrat states in terms of electoral preferences of their residents. Partisan elections of judges are used in the three traditionally Republican states – Texas, Louisiana and Alabama – and three Democratic states – Illinois, Ohio or Pennsylvania. The common political denomination is only present in those states who retained the executive appointment of judges or appointment by the legislature, although even here, among the 'blue' Democrat-voting states, there is the splinter state of the republican South Carolina.

6. Controversies surrounding elections to the office of judge in the United States in the case law of the Supreme Court of the United States

The deployment of the general elections method, especially partisan elections, either as the basic method of or as part of the Merit Selection, fuels the discussion (from the very start) over the dangers of such mechanisms and the exchange of arguments between its vehement critics and staunch supporters. The key issues here reached the Supreme Court of the United States, whose judges have the final say about compatibility of American law with the Federal Constitution.

The issue of politicising the elections campaign and its financing seems to encompass most controversies over the general elections to judicial offices.

Making the political sympathies or the convictions of the judicial candidates public is, on one hand, treated as the right of society to have access to information on the fundamental values the candidates subscribe to; on the other hand, it seems to contravene the idea of independence of the judicial authority. Mounting regular election campaigns by judicial candidates (including top level offices within the state authority, such as the president of the state supreme court) requires significant funds which can amount to huge expenditure sums of several million dollars in the course of one campaign[21]. Qualitative and quantitative studies carried out by independent bodies and academics indicate that the majority of voters (76%), and almost half the judges (46%) think that financial contributions of different interest groups have

20 Detailed information on systems for choosing judges in different states and references to appropriate legal provisions are based on the database of the still functioning *American Judicature Society* available on their web page under the following address: http://www.judicialselection.us/judicial_selection/ methods/selection_of_judges.cfm?state=VA (accessed on 31.08.2014).

21 Candidates in elections to state supreme courts managed to collect the sum of around 211 million dollars in campaigns between 2000 and 2009, two and a half times more than in the previous decade. The largest sums were accumulated in those states where partisan general elections take place. See e.g. the report American Progress: B. Corriher, Partisan Judicial Elections and the Distorting Influence of Campaign Cash, October 25, 2012. The on-line version is available here: https://cdn.ame-ricanprogress.org/wp-content/uploads/2012/10/NonpartisanElections-3.pdf.

a bearing on decisions made by judges selected through such mode; the analysis of over 2300 decisions by state supreme courts seem to confirm these concerns[22].

During the last few years the Supreme Court of the United States has addressed these problems on several occasions.

In 2002 in the case of *Republican Party of Minnesota v. White*[23] the judges decided with a 5:4 majority, that the state legislation in force in Minnesota, which prevents judicial candidates from disclosing their political preferences, is incompatible with the United States Constitution as it contravenes the First Amendment and the right to free speech contained therein. This has strengthened the free hand of candidates to make use of political emotion in campaigns for judicial offices. The financing of judicial campaigns was significantly impacted by the last of well publicised decrees in 2010, where (with a 5:4 majority) the Supreme Court found that in the context of elections, there is no difference in the freedoms arising from the First Amendment between physical persons and companies, and the latter have a right to unlimited political and campaign expenditure, which do not amount to an element of corruption[24]. The judges of the Supreme Court had also spoken on the matter of the interrelationship between a donor financing a judiciary elections campaign (for a record amount of over $3 million) and the judge taking part in a case where the benefactor is one of the parties. With a 5:4 decision, the Supreme Court declared that such support may lead to an extreme partiality[25].

The latest decree in the above area was issued in April 2015 in the case of *Williams-Yulee v. The Florida Bar*. With another 5:4 decision, the Florida State legislation, which prohibited candidates from personally applying for campaign funding, was upheld as not contrary to the First Amendment[26].

It needs to be highlighted that in all the above cases the decisions were made with the majority of just one vote, therefore the 'supreme' judges themselves did not have a uniform stance on the issue. What is interesting, winners in campaigns for top state judiciary offices (for example the first woman to lead the Supreme Court of Alabama in history – Sue Bell Cobb), as well as the retired judge of the Supreme Court itself – Sandra O'Connor – have consistently argued over the years for a reform necessary to prevent such abuses and proposed abandoning the general elections method (especially partisan) for filling judiciary offices, which in turn has been met with staunch opposition from their supporters[27].

22 J. Shepherd, Justice at Risk. An Empirical Analysis of Campaign Contributions and Judicial Decisions, „American Constitution Society for Law and Policy" 2013, pp. 1 and 15.

23 *Republican Party of Minnesota v. White* 536 U.S. 765 (2002).

24 *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010).

25 *Caperton v. A. T. Massey Coal Co.* 556 U.S. 868 (2009).

26 *Williams-Yulee v. The Florida Bar* 575 U.S. (2015).

27 *C.f* S. O'Connor, The Essentials…, *op. cit.*, p. 486 onwards., J. Shepherd, Justice…, *op. cit.*, Introduction by Sue Bell Cobb. In response e.g.: Ch.W. Bonneau, In Defense of Judicial Elections, New York 2009.

The use of general elections (and, what follows with the elections campaign with all its controversies and potential threats to independence of judges) is a specific aspect of American judiciary system, not encountered in any other country in the world[28].

That the controversy remains current is confirmed very much by subsequent decisions of the Supreme Court of the United States. The issues highlighted in this article (only briefly, due to the limited length of text) put a huge question mark over the appropriateness of this method in choosing representatives of the judicial authority. A decision by the Supreme Court that this method is not constitutional seems the only effective way to remove these problematic procedures. However, considering the historic factors behind the election of judges, American society's involvement in political life and elections, and the simple fact that most states regard this method as the best, such a decision by the Supreme Court at this stage would seem impossible.

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28 The New York Times has prepared a worldwide comparison of methods of chosing judges indicating that general elections are used only in smaller Swiss cantons and as an element in the selection of the Supreme Court judges in Japan. See: Judicial Selection in Other Countries. New York Times, May 25, 2008. On-line version available on: http://graphics8.nytimes.com/packages/pdf/national/20080525_judicial_ selection.pdf (accessed on: 31.08.2014).

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The Election of Lay Judges and the Principle of Participation by Citizenry in the Administration of Criminal Justice

Abstract: Participation in the administration of justice not only by professionals, but also by representatives of the citizenry, is one of important manifestations of contemporary modern democratic states. In recent years, one can notice not only a reduction in the catalogue of cases involving lay judges, but also a tendency to introduce restrictions on the right to stand as a lay judge (e.g. the requirement of completion of at least secondary education, adequate health, non-performing this function by a councilor of a municipality, county or province) as well as to regulate the electoral process more precisely (e.g. explicit exclusion of political parties from proposing candidates for lay judge appointments, raising the amount of citizens filing candidacy from 25 to 50, defining documents that must be attached to the application for a lay judgepost).
The current system of election of lay judges in Poland is a legacy of communism, its principles founded in the 50s and 60s of the twentieth-century. Objections to the current selection system provoke proposals for making amendments. At least four possible ways of selecting lay judges can be proposed: general elections, drawing from among members of the local community, selection by competent courts or the introduction of a lay judgeexamination.
Each of the abovementioned options presents advantages and disadvantages. Perhaps it is worth considering complementing the current electoral process with the ability to nominate candidates as lay judges from among members of the academic community, or possibly other persons enjoying the respect of society by the senates of universities, which should serve to increase the authority and competence of candidates insofar that in essence it constitutes a guarantee of their quality.
Keywords: lay judge, citizenry, election, criminal proceeding
Słowa kluczowe: ławnik, czynnik społeczny, wybory, postępowanie karne

1. Introduction

Opinions on citizenry participation in the administration of justice diverge in the doctrine. In spite of research conducted in the past on the role of lay judges in the Polish criminal procedure and their influence on takingprocedural decisions,

this matter has not been fully examined yet. The article aims at addressing the role of lay judges in the criminal procedure in Poland and presenting a way of their election. The election for the said function is one of issues treated subsidiarily in the literature. In 2015, another four-year term of lay judges in common courts in Poland comes to an end. At the same time, this will also be an election year for a next term, a period from 2016 to 2019. Among other things, the above factor should justify increased interest in lay judges in our country, although – at first glance – they seem to constitute a marginal phenomenon in Polish courts, taking part in hearing of less than 0.6% of all criminal cases conducted in the first instance[1]. Thus, the question arises, whether this is a correct realization of the principle of citizenry participation in adjudicating, or perhaps it proves nonexistence of such principle.

According to the doctrine, lay judges perform at least three main, different,but at the same time complementary functions: they act as a factor of social control (protecting a professional factor from falling into routine, and having disciplining influence on it), they are social judges *sensu stricto*(guaranteeing collegiality of adjudicating), as well as they act as a link between the justice and society[2]. Social control consists not only in the presence of lay judges in the composition of a court and their participation in all procedural acts during a hearing, but also in a possibility of actively influencing the course of a proceeding and its result, it prevents routine of professional judges and disciplines them to greater diligence and correctness of a proceeding, finally it strengthens judicial independence, as influencing a lay judge is more difficult than influencing a professional judge being subject to evaluation, pressure from public opinion and media. The second function is performed by deciding, together with a professional judge, on guilt and punishment. Whereas the third is connected to the fact that a lay judge brings to adjudicating not only her or his own life experience and knowledge, but also an opinion and a sense of justice of his or her community. On the other hand, a lay judge passes on to her or his community not only her or his own opinions, assessments and experiences related to adjudicating, but also the point of view and penal policy of the legislator and representatives of the justice[3].

1 S. Waltoś,W dziesięciolecie obowiązywania kodeksu postępowania karnego, "Państwo i Prawo" 2009, vol. 4, p. 6.

2 See: D.Pożaroszczyk,Refleksje na temat instytucji ławników w polskim procesie karnym, (in:) B.T. Bieńkowska, D. Szafrański (eds.), Problemy prawa polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym. Część czwarta, Warszawa 2013, pp. 174-180 and the literature quoted therein.

3 F. Prusak, Czynnik społeczny procesie karnym, Warszawa 1975, p. 27-29.

2. Social factor in criminal procedure

Allowing not only professionals, but also representatives of the society, that is so-called social factor, to participate in administration of justice is one of important indications of a contemporary, modern democratic state. Participation of the social factor, however, is not limited merely to passing sentences. In the criminal procedure, where participation of citizens is of particular importance due to the need of ensuring guarantee to the parties (especially to the accused), by exercising – in a sense – social controlover the course of the proceeding, the principle of citizenry participation can be understood within the framework of the following material scopes:

1) the principle of social factor participation in a narrow sense (*sensu stricto*), which determines direct participation of citizenry in administration of justice (in Polish procedurethese are lay judges),
2) the principle of social factor participation *sensu largo*, which covers –apart from the aforementioned direct participation in the administration of justice – also forms of indirect participation, that is cooperation in the criminal procedure in other roles, e.g. a social representative or a social guarantor,
3) the principle of social factor participation in the broadest sense, which – including the aforementioned forms – covers also participation of this factor as the public during a hearing or supplementally, as citizens collaborating in criminal prosecution[4].

In spite of concerns whether, under the Constitution of the Republic of Poland of 2 April 1997[5], Article 182 of which in enigmatic way provides for the citizenry participation in the administration of justice and, at the same time, refers to provisions of a statute, it is possible at all to distinguish the said principle[6], the doctrine – often by the force of tradition – seems to approve its existence. It is indicated that in directive approach, this provision orders the authorities of criminal procedure to allow for the citizenry (social factor) participation in the criminal procedure whenever a special provision formulates such possibility, especially in a situation, when initiative to participate in the procedure comes from the citizens themselves[7].

Direct citizens' participation in the administration of justice may appear in one of three variants:

1) 'total' participation, occurring in the form of civil courts composed exclusively of non-professional entities,

4 B. Janusz-Pohl, Zasada udziału czynnika społecznego, (in:) P. Wiliński (ed.), System prawa karnego procesowego.Tom III Cz. 2. Zasady procesu karnego, Warszawa 2014, p. 1457.

5 Dz.U. z 1997 r. Nr 78, poz. 483 z późn. zm. [Journal of Laws of 1997 No. 78 item 483 as amended].

6 See: S. Waltoś, Ławnik – czy piąte koło u wozu?, (in:) T. Grzegorczyk (ed.), Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana, Warszawa 2011, p. 524-526.

7 B. Janusz-Pohl, Zasada…, *op. cit.*, p. 1451.

2) participation within the framework of mixed composition, i.e. professional judges and lay judges,
3) participation in the form of the jury functioning under the principle of division of competences between social judges ('judges of fact') and professional judges ('judges of law')[8].

The first model is quite rarely found. The best-known example is an English judge of peace. Whereas in Poland, bodies composed exclusively of non-professionals were civilian courts established in 1946 and social courts functioning between 1960 and 1990[9]. The second model is known *inter alia* in Germany, Austria, Belgium, Denmark, Russia[10]; whereas the jury functions most of all in Anglo-Saxon countries (Great Britain, USA), but also in France[11].

In the Polish legal system, the system of mixed – professional and lay judges – composition has become established. The constitutional principle of social factor participation in administration of justice is detailed in Article 4 §§ 1 and 2 of the act of 27 July 2001 Law on the common court system (l.c.c.s.)[12], providing that citizens take part in administration of justice by participation of lay judges in hearing cases before courts in the first instance, unless statutes provide otherwise, and while hearing cases, lay judges have rights equal to the rightsof judges. In turn, Article 169 §§ 1 and 2 of this act guarantees that lay judges are independent in terms of adjudicating and are subject only to the Constitution and statutes. Unlike professional judges, they are merely allowed neither to preside over a hearing and a deliberation, nor exercise judge's activities outside the trial, unless provided otherwise in statutes.

3. Participation of lay judges in adjudicating in criminal cases in Poland

The scope of lay judges' participation in criminal cases is regulated by the Code of criminal procedure of 6 June 1997[13], which – in Article 3 – confirms the principle of social factor participation in justice ('within the scope set forth in the statute a criminal proceeding is conducted with participation of social factor'). This scope

8 *Ibidem*, p. 1438-1439.
9 See: M. Fajst, Udział czynnika społecznego w wymiarze sprawiedliwości, "Studia Iuridica" 1998, t. XXXV, p. 50-62.
10 See: A. S. Bartnik, Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości IIIRP. Analiza socjologiczno-prawna, Warszawa 2009, p. 26-27 and the literature quoted therein.
11 See: K. Wieczorek, Udział czynnika społecznego w orzekaniu w polskim i amerykańskim procesie karnym, Szczecin 2012, p. 16.
12 Tekst jedn. Dz.U. z 2013 r., poz. 427 z późn.zm. [The uniform text, Journal of Laws of 2013 item 427 as amended].
13 Dz.U. z 1997r. Nr 89, poz. 555 z późn. zm. [Journal of Laws of 1997 No. 89 item 555 as amended].

is presently significantly narrower, than it was when the Code of criminal procedure entered into force. Act of 15 March 2007 amending an act – Code of civil procedure, an act – Code of criminal procedure and certain other acts[14] put an end to the existing principle of collegiality of a panel of judges and introduced the primacy of a single person composition of the court in the first instance. The lay judges adjudicate only in a regional court in cases concerning crimes, that is acts subject to the penalty of at least 3 years imprisonment, where a composition of one judge and two lay judges is binding (Article 28 §2 c.c.p.), whereas – in the case of crimes subject to the penalty of life imprisonment – a court proceeds in a panel of two judges and three lay judges (Article 28 § 4 c.c.p.)

On 1 July 2015, a new act of 27 September 2013 amending an act – Code of criminal procedure and certain other acts[15], entered into force, and introduced possibility of expanding, by a decision of the court, the formation of the court in the first instance, not only to three judges as previously, but also to one judge and two lay judges. The condition in this case is having regard to particular complexity of the case or its significance. It is puzzling that the legislator does not limit possibility of enlarging composition to include lay judges only in the case of regional courts, but literally allows it in the first instance, thus also in a district court. The problem is that lay judges in criminal matters were removed from district courts by the said 2007 amendment. Thus, will it be necessary to select also lay judges to district courts for the imminent and next terms, who may not even have a chance to adjudicate in a criminal proceeding at all, since lay judges in the composition will be a unique and an optional phenomenon?

4. Election criteria for a lay judge

In the Polish system of justice, a term of office of lay judges is four calendar years following the year when election took place; whereas, upon expiry of the term, a lay judge may participate only in hearing of a case commenced before with his participation, pending its completion (Article 165 § 1 and 2 l.c.c.s.). Selected as a lay judge may be a person, who pursuant to Article 158 § 1 l.c.c.s.:

1) is a Polish citizen and enjoys full civil and civic rights,
2) has unimpeachable character,
3) is at least 30 years of age,
4) has been employed, has conducted business activity or lived in a place where he or she is a candidate for at leas a year,
5) is not over 70 years of age,
6) is capable of fulfilling lay judge's duties, as regards health condition,

14 Dz.U. z 2007 r. Nr 112, poz. 766. [Journal of Laws of 2007 No. 112 item 766].
15 Dz.U. z 2013 r., poz. 1247. [Journal of Laws of 2013 item 127].

7) has completed at least secondary education.

Additionally, when adjudicating in labor law cases, a lay judge may be a person demonstrating specific knowledge in staff matters (Article 158 § 3 l.c.c.s.).

The function of a lay judge cannot be performed, in view of clear prohibition provided for in Article 159 § 1 l.c.c.s., by:

1) personsemployed in common courts and other courts, as well as in the public prosecutor's office, persons, who are members of bodies, from rulings of which commencing a court proceeding can be demanded
2) police officers and other persons holding positions connected to prosecution of offences and minor offences,
3) advocates and trainee advocates,
4) legal advisors and trainee legal advisors,
5) clergymen,
6) soldiers on active duty,
7) officers of Prison Service,
8) councilors of gmina, poviat and voivodeship.

As in the case of narrowing a catalogue of matters in which lay judges participate, in recent years one can observe a tendency towards introducing restrictions as to possibility to stand for the function of a lay judge (e.g. census of at least secondary education, suitable health condition, ban on performing this function by a councilor of gmina, powiat and vovivodeship), as well as a tendency towards stricter regulation of the selection process itself (e.g. explicit exclusion of the possibility to submit candidates for lay judges by political parties, increasing the number of citizens proposing candidates from 25 to 50, providing for in a statute what documents must be submitted to the proposition of a candidate for a lay judge)[16]. Introduced impediment to obtain the status of a lay judge, and a lower number of mandates to occupy surely eliminated many random persons, looking at the function of a lay judge mainly through the prism of financial compensation, or representing low intellectual level. Some persons could have been discouraged by perspective of necessity to spemd around PLN 100 on a clean criminal record certificate and a medical certificate, without a guarantee that they would be selected by a municipal council. Thus, motivation and substantive level of lay judges was significantly higher between 2012 and 2015 than in previous terms of office. It should be noted however, that a cost related to submitting documents in the course of lay judges recruitment for the 2016 – 2019 term significantly decreased, as obtaining information on criminal records is currently associated with a payment of PLN 30 (§ 3 section 1 of the Ordinance of the

16 Such amendments were introduced by the act of 15 April 2011 amending the act – Law on the common court system (Dz.U. z 2011 r. Nr 109, poz. 627) [Journal of Laws of 2011 No. 109 item 627]

Minister of Justice of 18 June 2014 setting the fee for the provision of information from the National Criminal Register[17]), whereas a medical certificate on the lack of impediments to perform the function of a lay judge can be obtained free of charge from a doctor providing primary health care service (e.g. a specialist in family medicine).

5. Postulates of lay judges'election system modification

It should be noted that the present system of electing lay judges in Poland is a heritage of the Polish People's Republic. Its rules were established in 50s and 60s of the XX century[18]. Insofar as a mechanism of appointing lay judge candidates – who were initially top-down nominated by presidiums of national councils, subsequently meetings of employees of workplaces, village meetings and meetings of members of social organizations, whereas presently by social organizations, groups of at least 50 citizens and presidents of particular courts – has been in a way modified, the act of the selection to a lay judge function itself, still belongs to the local legislative body – municipal councils have replaced in this respect national councils functioning in the previous system. An obligation to convene a committee, previously appointed by the presidium of a national council, presently by a municipal council, a task of which is to provide opinion on proposed candidates – was sustained. The same problems remained however, resulting from unprecise procedures and unmeritorious factors at the stage of assessing candidates by a committee of a municipal council. Research on practical aspects of lay judges election to the 2004-2007 term indicated a vast variety of practices adopted in respective municipal councils, as well as – in extreme cases – applying the criterion of decision-maker's political or personal sympathies towards specific candidates[19]. Even now, when political parties are formally excluded from possibility of proposing candidates, there are no obstacles to force through 'yours' in the course of the committee's work on opinions, and then during the final voting by a municipal council. The election calendar is also similar to the calendar in force in the previous system – election of lay judges in October of the year preceding a new term of office, lay judges making vow at the latest in December.

As a result of reservations towards the system of lay judges'election binding for years, there is a discussion and proposals made in the literature. At least four possible ways of appointing lay judges are indicated:

17 Dz.U. z 2014 r., poz. 861. [Journal of Laws of 2014 item 861].

18 On evolution of a mode of proposing and selecting lay judges at that time see: M. Rybicki, Ławnicy ludowi w sądach PRL, Warszawa 1968, p. 220-235.

19 See: A. S. Bartnik, Sędzia czy kibic?..., *op. cit.*, p. 44-54.

- the general elections[20]– it seems that the only advantage is in this case is the full democratism of such procedure, while disadvantages include the potentially low turnout of voters, significant costs of organizing the general voting (even if correlated with municipal elections), fear of considerable politicization of elections, and consequently the justice itself, substantive value of candidates giving way to election social engineering andpopulist tricks; as research shows, also judges[21] and councilors are against[22],
- drawing from among members of a local community, similar to procedure of selecting the jury in the US[23]– the obvious advantage would be detachment from politics (lay judges appointed as a result of fortune), yet disadvantages prevail also in this case (need to adjudicate by random persons, with no desire to do so and having no proper knowledge, intelligence, life experience and predisposition),
- selection by proper courts[24]– in the case of candidates already having previous experience in performing the function of lay judges and evaluated positively by judges with whom they adjudicated, such a procedure would certainly work, the proper dimension of social factor would be negated however, there would be fear of dominating and subordinating lay judges to interests of judicial environment, it could lead to the loss of – in a sense – control influence on professional judges and justice, whereas lay judges themselves would catch technocratic rite – as a matter of fact even now, having a possibility to propose their candidates for lay judges, presidents of courts don't hurry to use this prerogative,
- an exam for a lay judge[25] – an advantage of this concept would be, as it seems, increased professionalism, authority, and acceptance of lay judges by the society and representatives of justice; on the other hand, such exam could prevent from running and attract strongly determined individuals, but not necessarily competent and having so-called soft competences – maybe the idea would be worth considering as one of few elements of lay judge selection process.

20 A supporter of this manner is A. S. Bartnik, Sędzia czy kibic?..., *op. cit.*, p. 199.

21 See: P. Sitniewski, Analiza wyników ankiet prezesów sądów w zakresie wyboru ławników, jakości ich pracy oraz funkcjonowania w ramach wymiaru sprawiedliwości, (in:) J. Ruszewski (ed.), Ławnicy – społeczni sędziowie w teorii i praktyce. Ocena funkcjonowania i procesu wyboru ławników sądowych na przykładzie sądów Apelacji Białostockiej, Suwałki 2011, p. 94.

22 J. Ruszewski, Udział radnych w wyborze ławników oraz ocena ich udziału w sprawowaniu wymiaru sprawiedliwości w opiniach radnych, (in:) J. Ruszewski (ed.), Ławnicy – społeczni sędziowie w teorii i praktyce..., *op. cit.*, p.158.

23 More on procedures related to determination of the composition of the juries in the USA see: K. Wieczorek, Udział czynnika…, *op. cit.*, p. 94-121.

24 See: D. Pożaroszczyk, Refleksje na temat…, *op. cit.*, p. 182.

25 See: D. Pożaroszczyk, Refleksje na temat…, *op. cit.*, p. 182.

Each of the above mentioned alternatives is equally – if not more – controversial than the lay judges' election system binding in Poland. Maybe it would be worth considering whether to complement the current election process with a possibility to propose lay judge candidates from among members of academic society and possibly other persons enjoying social respect by senates of schools of higher education, what should also increase candidates' authority and competence, giving in a way a guarantee of their high standard.

6. Summary

Summarizing consideration concerning participation of social factor in administration of criminal justice in Poland, one has to agree with assertion that lay judges in the Polish Peoples' Republic – against expectations of authorities of that time – became a factor mitigating the justice, although authoritarianism does not tolerate the full independence of judges and lay judges, and – if does not find other solution – will willingly eliminate participation of representatives of the society in the administration of justice[26]. It seems that also today lay judges are a thorn in technocrats – trusting only in totally professionalized justice – flash.

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26 See: S. Waltoś, Ławnik…, *op. cit.*, p. 526.

Waltoś S., W dziesięciolecie obowiązywania kodeksu postępowania karnego, Państwo i Prawo 2009, z. 4

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Offences Against Elections and Referenda – Selected Legal, Criminal and Criminological Aspects

Abstract: This research paper elaborates on the problem of offences against elections and referenda, and analyses provisions of the XXXI Chapter of the Polish Penal Code, penalizing electoral offences. A detailed description of particular acts prohibited by law has been provided. Moreover, attention is given to issues causing interpreting problems. The paper presents a statistical overview of the occurrence of offences on the basis of data concerning initiated proceedings, and convictions by finaljudgments.
Keywords: offences against elections and referenda, electoral abuse, disruption of elections, abuse of the freedom to vote, electoral corruption, infringement of the votingconfidentiality
Słowa kluczowe: przestępstwa przeciwko wyborom i referendum; nadużycia wyborcze; zakłócanie przebiegu wyborów; naruszenie swobody głosowania; łapownictwo wyborcze; naruszenie tajności głosowania

1. Introduction

One can find a thesis in the literature that the origin of offences against elections should be sought in the Ancient Rome, where election abuses took forms of various briberies. However, formed legal constructions of the respective types of election offences, as well as the election process itself appeared in constitutional monarchies

in the XIX century[1]. This kind of offences was penalized in the Penal Code of 1932[2], in its successor of 1969[3], as well as in the currently binding Penal Code. In the Penal Code of 1932, such regulation was provided for in Chapter XX broadly titled as: 'Offences against voting'. It is worth mentioning that the 1932 Code was a model for creation of provisions of Chapter XXXI of the current penal act of 1997[4].

The aim of this paper is to present legal, criminal and criminological aspects of offences against elections and the present scale of this phenomenon. Undertaking this subject matter resulted from the fact that committing offences penalized in the Chapter XXXI of the Penal Code disrupts proper functioning of democracy, thus it constitutes a particularly important issue from the state's point of view.

Provisions of this Chapter play a very important role in a democratic state, as they protect the core institutions of this system. They safeguard proper functioning of exercising the power by the nation, both in indirect and direct forms. Undoubtedly, major importance of these regulations results from the fact that through elections citizens decide about the head of state, composition of both chambers of the Parliament, bodies of regional government, and – since 2004 – also the European Parliament. Whereas, in a referendum they answer questions concerning matters particularly important for the state.

Therefore, an in-depth analysis of features of respective prohibited acts is necessary to a good understanding of the present wording of the Chapter XXXI and indicating issues rising controversies in the dogmatics. There are many valuable papers in the subject-matter literature devoted to the issue of election offences. Due to the fact, however, that elections and referenda are an integral part of our system, there permanently exists a need to present the current scale of this phenomenon and to describe regularities governing it. This is why the article presents the actual size of offences against elections and referenda, what the latest data concerning a number of proceedings instituted for a specific prohibited act and a number of persons convicted under the given provision are for, what allows drawing conclusion on threat of this category of offences.

A generic object of protection under provisions of Articles 248-250 of the Penal Code is the correct course of the elections[5] to: the Sejm, the Senate, bodies of local

1 W. Kozielewicz, Rozdział IX. Przestępstwa przeciwko wyborom i referendum, (in:) L. Gardocki (ed.), System Prawa Karnego. Przestępstwa przeciwko państwu i dobrom zbiorowym, t. 8, Warszawa 2012, p. 710, 711.

2 Rozporządzenie Prezydenta Rzeczypospolitej Polskiej z mocą ustawy z dnia 11 lipca 1932 r. (Dz.U. z 1932 r. Nr 60, poz. 571 z późn.zm.) [Journal of Laws of 1932 No. 60 item 571 as amended].

3 Ustawa z dnia 19 kwietnia 1969 r. – Kodeks karny (Dz.U. z 1969 r. Nr 13, poz. 94 z późn. zm.) [Journal of Laws of 1969 No. 13 item 94 as amended].

4 W. Kozielewicz, Rozdział…, *op. cit.*, p. 710, p. 711.

5 J. Piskorski, Przestępstwa przeciwko wyborom i referendum, (in:) M. Królikowski, R. Zawłocki (eds.), Kodeks Karny.Część Szczególna. Komentarz do art. 222-316, Warszawa 2013, p. 257.

government, the European Parliament and elections for the President of the Republic of Poland, as well as referenda. Electoral law is protected both in nationwide and individual aspects. These regulations are to guarantee holding of elections to the aforementioned bodies and referenda in a reliable way, in accordance with the law and principles of democracy, as well as exercising citizens'electoral law[6].

The binding Penal Code describes criminal behaviors related to the process of elections and referenda, both nationwide and local, in a very precise and casuistic way. It is worth noting that there is a number of prohibited acts directed against these institutions, provided for in other legal instruments, namely Electoral Code[7], Act on nationwide referendum[8] and Act on local referendum[9].

2. Electoral abuses (Article 248of the Penal Code)

Article 248 of the Penal Code[10] penalizes violations of electoral and referendum law in the conduct of the elections (so-called electoral abuses). There can be found extremely different views in the literature concerning the object of acts typified in this provision. A. Marek claims that the electoral abuse is a common offense[11], meaning that every person, who is capable of being held criminally liable, that is who reached the age of criminal responsibility and is not mentally incompetent, can be the object of criminalized acts. M. Szewczyk notes that only persons responsible for preparation of lists of candidates and voters can be perpetrators of acts under pts 1 and 2. Above all, a member of electoral committee, which is responsible for safeguarding the proper course of accepting and counting votes, can be the object of an offense typified in pt

6 M.Budyn-Kulik, Komentarz do rozdziału XXXI k.k., (in:) M.Mozgawa (ed.), M.Budyn-Kulik,P. Kozłowska-Kalisz,M. Kulik, Kodeks Karny. Komentarz, Warszawa 2012, p. 579.

7 Ustawa z dnia 5 stycznia 2011r. – Kodeks wyborczy (Dz.U. z 2011 r. Nr 21, poz. 112 z późn. zm.) [Journal of Laws of 2011 No. 21 item 112 as amended].

8 Ustawa z dnia 14 marca 2003r. – o referendum ogólnokrajowym (Dz.U. z 2003 r. Nr 57, poz. 507 z późn.zm.) [Journal of Laws of 2003 No. 57 item 507 as amended].

9 Ustawa z dnia 15 września 2000r. – o referendum lokalnym (Dz.U. z 2000 r. Nr 88 poz. 985 z późn. zm.) [Journal of Laws of 2000 No. 88 item 985 as amended].

10 Article 248. Anyone who, in connection with elections to the Sejm or the Senate, or elections for the President of the Republic of Poland, elections to the European Parliament, or local elections or a referendum: 1) prepares a list of candidates or voters not including eligible people or including ineligible people, 2) uses deceit in order to improperly prepare the list of candidates, the electoral roll, protocols or other electoral or referendum documents, 3) destroys, damages, hides, forges or remakes protocols or other electoral or referendum documents, 4) interferes or allows interference with the collection or counting of votes, 5) provides another person, before voting has ended, with an unused ballot paper,or obtains an unused ballot paper from another person in order to use it for voting, 6) commits an abuse while preparing a list with the signatures of citizens who put forward candidates for elections, or to initiate a referendum – is liable for imprisonment for up to three years.

11 A. Marek, Kodeks Karny. Komentarz, Warszawa 2010, p. 540.

4. The perpetrator of an offense under pt 6 can be a person who prepares lists with signatures of citizens submitting candidates for elections or initiating a referendum[12]. L. Tyszkiewicz emphasizes however, that although the discussed offense is not an individual offense, it may be committed most of all by a person participating in the election or referendum procedure[13]. J. Piskorski claims that acts typified in pts 1, 2, 4 and 6 belong to a group of individual offences, an act under pt 3 is however a common offence. Criminal behavior provided for in pt 5, in part concerning ceding a ballotpaper to another person, is an individual offence, as it should be assumed that only a voter can come into its possession. Whereas, behavior consisting in obtaining a ballot paper will be acommon offence[14].

This provision's individual object of protection is legality of voting[15]. The legislator, in Article 248 of the Penal Code, precisely itemizes types of criminal behavior, which constitute electoral abuses.

Behavior penalized in pt 1 consists in preparing lists of candidates or voters, excluding eligible persons, or including ineligible persons. This act can be committed by both action and omission. It is an offence with criminal consequences from exposing to a concrete danger. Preparation of a list of candidates or voters inconsistent with the law is a result belonging to the features of this prohibited act[16].

Pt 2 of Article 248 of the Penal Code criminalizes usage of deceit in order to improperly prepare lists, protocols, or other electoral and referendum documents. This offence is of a formal character and may be committed by both action and omission[17]. The term 'document' used in the wording of this provision shall be defined in accordance with Article 115 § 14 of the Penal Code[18].

Pt 3 stipulates criminal responsibility for: destroying, damaging, hiding, forging or remaking protocols and other electoral and referendum documents[19]. It is a substantive offence, which can be committed only as a result of perpetrator's action[20]. According e construed as total destruction or significant infringement of the item's substancto the theses of Article 288 § 1 of the Penal Code, the term

12 M. Szewczyk, Przestępstwa przeciwko wyborom i referendum, (in:) A. Zoll (ed.), Kodeks Karny. Komentarz do art. 117-277 k.k., Warszawa 2013, p. 1319.

13 L. Tyszkiewicz, Przestępstwa przeciwko wyborom i referendum, (in:) M. Filar (ed.), Kodeks Karny. Komentarz, Warszawa 2012, p. 1164 and A. Marek, Kodeks…, *op. cit*.

14 J. Piskorski, Przestępstwa…, *op. cit.*, p. 256.

15 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 580.

16 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 580.

17 *Ibidem*, p. 580.

18 Article115 § 14. A document is any object or record on a computer data carrier to which a specific right is attached, or which, in connection with the subject of its content, constitutes evidence of a right, a legal relationship or a circumstance that may have legal significance.

19 See more: S. Kowalski, Karnoprawna ochrona wykazu podpisów wyborców w wyborach samorządowych, "Prokuratura i Prawo" 2014, No. 9.

20 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 580.

'destruction' shall be, hindering its usage in accordance with the intended purpose[21]. Generally speaking, this means its annihilation or deprivation of features it has had so far. 'Hiding', simply put, means creating a state of the document's unavailability for eligible persons and willing to use it[22], locating in a place different than where it should be located, so it is not possible to use it properly[23]. On the basis of Article 270 §1, 'forging'means 'making some item to appear as document, in order to create the impression that its contents comes from an issuer it mentions, whereas in fact this is not the case'. It refers to both forging the entire document and its excerpt. The term 'remaking' shall be construed as making amendments to the content of the authentic document; it may consist in crossing out, adding insertions, as well as erasing[24]. The Supreme Court in its judgment of 9 January 2013, issued under Article 270 § 1 of the Penal Codestated that: 'A behavior of an offender, who either makes a document to appear that its content comes from the given issuer – which is not true (such behavior is document's 'forging' within the meaning of Article 270 § 1 of the Penal Code), or – in the second form of criminal activity – an offender makes amendments to the content of the authentic document really issued by an issuer entitled to do so (such behavior is document's 'remaking' in the meaning of the Article 270 § 1 of the Penal Code) – shall be subject to penalization'[25].

The next point (4) of Article 248 of the Penal Code, provides for typification of electoral fraudthrough interference or allowing interference while collecting votes, which is a formal offence. The first of verbal features indicates that this offence may be committed by action, whereas the second (allowing interference) unquestionably indicates omission (it is an offence improper from omission)[26].

It shall be emphasized that the term 'abuse' itself is not very clear and precise, therefore there are critical voices in the literature relativized to its usage by the legislator[27]. It is stressed however, that abuse always has to result from violation of law and obligations resulting from it. The described prohibited act may be committed e.g. by incorrect counting of the cast votes, or destroying ballot papers with cast votes[28].

Criminal behavior provided for in pt 5 consists in ceding an unused ballot paper to another person, before the voting has ended or obtaining such an unused ballot

21 A. Marek, Kodeks…, *op. cit*., p. 613.
22 M.Budyn-Kulik, Komentarz…, *op. cit*., p. 580, p. 641.
23 M. Szewczyk, Przestępstwa…, *op. cit*., p. 1321.
24 M.Budyn-Kulik, Komentarz…, *op. cit*., p. 580, p. 631.
25 Wyrok Sądu Najwyższego z dnia 9 stycznia 2013 r., VKK97/12, [Judgment of the Supreme Court of 9 January 2013, V KK 97/12], "Prokuratura i Prawo" 2013, No. 4, "Orzecznictwo" supplement, item 5.
26 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 580.
27 L. Tyszkiewicz, Przestępstwa…, *op. cit*., pp. 1163-1164.
28 A. Marek, Kodeks…, *op. cit*.

paper from another person in order to use it for voting. It is a formal offence, which can be committed only by action[29].

The last one of penalized acts (pt 6) under Article 248 consists in committing an abuse while preparing a list with the signatures of citizens who put forward candidates for elections, or to initiate a referendum. This prohibited act is of a formal character, and can be committed by both action and omission (an offence improper from omission)[30].

All mentioned minor offences can be committed only with intentional guilt. Therefore, irregularities committed unintentionally will not constitute an offence within the meaning of this provision, even if an error, under which an offender acted, was not justified[31]. Clarifying a form of intentional guilt it should be noted that minor offences, referred to in pts 1, 3, 4 and 6 can be committed both in direct and conceivable intent. The act typified in pt 2, without any doubt, can be committed only with direct intent, what is unambiguously prejudged by the phrasing 'in order to'. In the case of ceding provided for in pt 5, two forms of intent are possible; however, when obtaining is concerned, only direct intent is possible[32].

The offence stipulated in Article 248 of the Penal Code is punished by imprisonment from one moth for up to three years.

As noted by the classic of the Polish criminology B. Hołyst – 'crime is not the statutory expression. Neither it constitutes an element of legal language'[33]. Whereas one cannot discuss with the first statement, the second assumption seems incorrect, as criminal lawyers use the term crime on everyday basis, and therefore it became an integral part of the legal language, entering it permanently. It should be repeated after B. Hołyst that, in traditional criminological understanding, crime is a set of prohibited acts punishable under the statute, committed at the specific time in the area of specified territorial unit. Crime is inextricably linked to problems concerning its size, understood as share of criminal behaviors in the overall activity of members of the society[34]. Such understood size of crime consists of the following types: actual crime, disclosed, stated and judged.

Size of the first type are never known, as these are all criminal acts in a given area at a given time. Law enforcement authorities never have full knowledge on that subject, some part of the actual crime is included in the area of so-called 'dark number' of offences. The disclosed crime, often referred to as apparent in the literature, reflects all acts information on which was obtained by law enforcement authorities, and

29 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 580.
30 *Ibidem*, p. 580.
31 L. Tyszkiewicz, Przestępstwa…, *op. cit*., p. 1164.
32 M. Szewczyk, Przestępstwa…, *op. cit.*, pp. 1322-1323.
33 B. Hołyst, Kryminologia, Warszawa 1994, p. 53.
34 *Ibidem*, p. 54.

therefore initiated a preparatory proceeding. The stated crime means all acts criminal character of which was confirmed as a result of conducted preparatory proceeding, and crime judged means a set of acts, criminal character of which was confirmed in a court proceeding[35].

The statistics given below was taken from data presented on the official website of the police[36], as well as data sent by the National Police Headquarters and placed on the website of the Ministry of Justice[37].The police statistical data refer to a number of instituted proceedings, what means that they concern the area of so-called disclosed crime, whereas data disclosed in statistics conducted by the Ministry of Justice are sent by courts, preparing criminal charters. The statistics conducted by the Ministry is a court statistics including data on the stated crime.

As rightly pointed by B. Hołyst, scope of recording and efficiency are advantages of the police statistics, whereas its inaccuracy is a disadvantage, as some of recorded acts lack features of an offence. Wide scope of information on an offence and offender, verified in the course of preparatory and court proceedings, is an advantage of the court statistics. The court statistics usually includes lower number of convictions than offences recorded in the police statistics[38].

Moreover, it should be noted that the police statistics use the statistical unit in the form of a number of instituted proceedings (where can be no suspects, can be one, two or more), whereas the court statistics are based on a number of final convictions of adults. Thus, different reports are used to build these two types of statistics.

Table 1. A number of proceedings instituted under Article 248 of the Penal Code and special acts between 1999 and 2014

Article 248 andspecialacts	1999	2000	2001	2002	2003	2004	2005	2006
	71	69	12	12	69	84	46	23
	2007	2008	2009	2010	2011	2012	2013	2014 (Article 248)
	56	64	23	22	19	33	15	95

Source: www.policja.pl (accessed on: 25.01.2015).

Prohibited acts in the form of offences and delinquencies under non-code, special acts correspond with the offences described in Article 248 of the Penal Code. These may include Articles 494 – 513a of the Electoral Code[39], Articles 80 – 87 of the

35 *Ibidem*, p. 54.
36 Website:www.policja.gov.pl (accessed on: 25.01.2015).
37 Website:www.ms.gov.pl (accessed on: 25.01.2015).
38 B. Hołyst, Kryminologia…, *op. cit*., p. 55, 60.
39 Ustawa z dnia 5 stycznia 2011 r. – Kodeks wyborczy (Dz.U. z 2011 r. Nr 21, poz. 112 z późn. zm.) [Journal of Laws of 2011 No. 21 item 112 as amended].

Act on nationwide referendum[40], Articles 68 – 73 of the Act on local referendum[41], which cover also main financial abuses and illegal electioneering[42].

Table 2. Adults finally convicted under Article 248 of the Penal Code between 2001 and 2012

Article 248	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
pt 1	2	2	-	3	1	2	5	4	-	2	1	1
pt 2	4	1	2	50	19	5	12	2	-	2	2	2
pt 3	1	2	6	2	2	4	13	2	7	4	3	1
pt 4	-	-	-	1	-	1	-	-	-	-	-	-
pt 5	-	-	-	-	2	-	1	-	-	-	4	-
pt 6	-	-	-	-	-	-	-	9	28	21	4	-

Source: http://ms.gov.pl/ (accessed on: 25.01.2015).

The largest number of offences under Article 248 of the Penal Code wasinstituted in 2014, in a year when municipal elections took place – as many as 95 proceedings. The attention might also be drawn to data of 2004, when 84 proceedings were initiated (under Article 248 and special acts). It is worth to signal that it was the year when the first European Parliament elections took place in Poland, and which were then added to the catalogue of institutions protected by provisions of the Chapter XXXI of the Penal Code. The lowest number of proceedings for electoral abuses and acts under special statutes was instituted in 2001 and 2002, only 12 proceedings. It should be mentioned that the parliamentary elections took place in 2001, and the municipal elections in 2002. One can repeat after J. Piskorski that offences against elections are not a serious criminal problem in quantitative terms, and correlation between a number of recorded acts and years, when elections take place, is a noticeable regularity[43].

Observing data concerning final convictions of adults under Article 248 of the Penal Code, one can notice that the largest number of final judgments concerned an act under pt 2, so using deceit in order to improperly prepare lists, protocols, or other electoral and referendum documents. In 2004, as many as 50 persons were convicted, and in 2005 – 19. One can also note a low number of persons convicted (from a few to several persons) under pt 3 (destroying, damaging, hiding, forging or

40 Ustawa z dnia 14 marca 2003 r. – o referendum ogólnokrajowym (Dz.U. z 2003 r. Nr 57, poz. 507 z późn. zm.) [Journal of Laws of 2003 No. 57 item 507 as amended].

41 Ustawa z dnia 15 września 2000 r. – o referendum lokalnym (tekst jedn. Dz.U. z 2013 r., poz. 706) [Journal of Law of 2013 item 706].

42 G. Łabuda, Komentarz do art. 248 k.k., (in:) J. Giezek (ed.), Kodeks karny. Część szczególna. Komentarz, War- szawa 2014, p. 861.

43 J. Piskorski, Przestępstwa…, *op. cit.*, p. 249.

remaking protocols and other electoral and referendum documents). Conviction for minor offences provided for in pts 1, 4 and 5, represents a rare event in practice, and if happens, it concerns only few persons annually. Lack of convictions for an act under pt 5 of Article 248 of the Penal Code before 2004 results from the fact that this was a year when the said provision was added to the Penal Code[44].

3. Interference with the conduct of elections (Article 249 of the Penal Code)

Article 249[45] forms criminal liability for interference with the conduct of elections, which is a common offence. An individual object of protection of this provision is the freedom to exercise electoral law[46].

The subject regulation aims at ensuring protection for convening an assembly before voting; the free exercising of the right to stand or to vote in election; conducting the voting and counting of votes, as well as drawing up protocols or other electoral or referenda documents.

A causative act of an offence under Article 249 of the Penal Code consists in interference. It is assumed that it means preventing or obstructing the conduct of the aforementioned activities, being the object of protection of this provision[47]. It is an interferencewith a modality, provided for in the law, of exercising by citizens' rights involving participation in an electoral or referendum act[48].

In accordance with the wording of this provision, the punishable interference must take place with theuse of violence, the unlawful threat or deceit. The violence means physical interaction with an individual, which is to prevent resistance or to overcome it[49]. The unlawful threat of violence is a statutory term, defined in Article 115 § 12[50]. The deceit consists in misleading the other person in order to enforce the specific conduct[51]. One should also remember to take into consideration theses

44 Ustawa z dnia 23 stycznia 2004 r. – Ordynacja wyborcza do Parlamentu Europejskiego (Dz.U. z 2004 r. Nr 25, poz.219) [Journal of Laws of 2004 No. 25 item 219].

45 Article 249. Anyone who by using violence, the unlawful threat of violence or deceit interferes with: 1) an assembly before voting, 2) the free exercise of the right to stand or to vote in an election, 3) the voting or counting of votes, 4) drawing up protocols or other electoral or referendum documents – is liable to imprisonment for between three months and five years.

46 J. Piskorski, Przestępstwa…, *op. cit*., p. 261.

47 L. Tyszkiewicz, Przestępstwa…, *op. cit*., p. 1164.

48 M. Szewczyk, Przestępstwa…, *op. cit*., p. 1325.

49 *Ibidem*, p. 1325.

50 Article 115 § 12. An illegal threat is both the threat mentioned in Article 190, and also a threat to bring criminal proceedings, or to spread defamatory information concerning the threatened person or a next of kin. A declaration that criminal proceedings will be instituted is not a threat if made solely to protect a legal right violated by an offence.

51 M. Szewczyk, Przestępstwa…, *op. cit*., p. 1325.

resulting from provisions penalizing prohibited acts, to features of which belongs such conduct, when examining the terms violence and threat.

It is the accepted view in the literature that the discussed minor offence is a non-consecutive, because the legislator did not include the effect to the features of this offence[52]. In a slightly different manner this issue is presented by

L. Tyszkiewicz, who indicates that the discussed act may be a substantive offence. A result, that belongs to the features of the prohibited act, is occurrence of the state of factual difficulties in exercising the aforementioned acts, and not the non-exercise of these acts[53]. Following the said author, switching-off the power in a polling station, during vote-counting, explained with alleged failure, can be given as an example of committing a minor offence under Article 249 of the Penal Code[54]. It is worth mentioning that the said minor offence belongs also to the category of multi-action offences[55].

The objective side of an offence provided for in Article 249 consists in intent; it is emphasized that the said act can be committed only with the direct intent[56].

For the discussed minor offence, the legislator envisaged in the Penal Code a penalty of imprisonment from 3 months for up to 5 years.

Table 3. A number of proceedings instituted for an act provided for in Article 249 of the Penal Code between 1999 and 2014

Article 249	1999	2000	2001	2002	2003	2004	2005	2006
	-	4	9	19	8	3	5	19
	2007	2008	2009	2010	2011	2012	2013	2014
	13	1	2	14	9	1	-	11

Source: www.policja.pl (accessed on: 25.01.2015).

Table 4. Adults validly convicted under Article 249 of the Penal Code between 2001 and 2012

Article 249	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
pt 1	3	2	1	-	-	-	-	-	-	-	-	-
pt 2	-	1	1	-	1	1	-	3	-	1	-	2
pt 3	2	3	-	2	-	-	1	-	-	-	-	1

Source: http://ms.gov.pl/ (accessed on: 25.01.2015).

52 J. Piskorski, Przestępstwa…, *op. cit.*, p. 264 oraz M. Szewczyk, Przestępstwa…, *op. cit.*, pp. 1324-1325.
53 L. Tyszkiewicz, Przestępstwa…, *op. cit.*, p. 1165.
54 *Ibidem*, p. 1165.
55 J. Piskorski, Przestępstwa…, *op. cit.*, p. 265.
56 M. Budyn-Kulik, Komentarz…, *op. cit.*, p. 582 and L. Tyszkiewicz, Przestępstwa…, *op. cit.*, p. 1165.

When analyzing the above data, it can be observed that the largest number of proceedings for an act provided for in Article 249 of the Penal Code was instituted in 2002 and 2006 (19 proceedings in each year); in these yearsthe municipal elections took place in our country. In 1999 no proceeding was initiated under the discussed provision.

When observing statistical data on the number of finally convicted adults under Article 249 of the Penal Code, one can observe minimal and occasionally occurring convictions for interference with the conduct of elections. It should be noted that convictions under pt 4 were not included, as there was no data in statistics available at the official website of the Ministry of Justice. It is noteworthy that the said provision was added to the Penal Code by the amendment of 23.01.2004.

4. Infringement of the freedom to exercise electoral rights (Article 250 of the Penal Code)

Another prohibited act, provided for in Chapter XXXI, is voter intimidation (Article 250 of the Penal Code), thus the freedom of exercising the electoral rights. According to some authors, it is a common offence, so can be committed by every person, provided that it corresponds to the general characteristics of the object of legal and criminal liability[57]. It is sometimes argued that in the case of committing an offence abusing dependence, it will be an offence individual toward the act[58].

The object of protection of provision of Article 250 of the Penal Code is unrestricted participation in elections and a referendum, free from influences[59]. Some provide safety, freedom, physical integrity of a person enjoying the right to vote as a side object of protection[60].

A causative action here consists in influencing the way of voting of an individual, forcing him or her to vote or refraining from voting. Criminality of these behaviors depends on a mean used by a perpetrator, thus using the violence, the unlawful threat of violence or exploiting a situation of dependence will be a condition for criminality. Behaviors, where a perpetrator uses no aforementioned mean, are irrelevant from the point of view of regulation provided for in Article 250 of the Penal Code[61].

57 Article 250. Anyone who, through the use of violence or the unlawful threat of violence, or by exploiting a situation of dependence, influences the vote of an eligible person, or forces such a person to vote, or not to vote is liable to imprisonment for between three months and five years.

58 L. Tyszkiewicz, Przestępstwa…, *op. cit*., p. 1166.

59 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 582.

60 M. Szewczyk, Przestępstwa…, *op. cit*., p. 1327.

61 M.Jachimowicz, Przestępstwo naruszenia swobody głosowania (art. 250 k.k.), "Prokurator" 2009, No. 1, p. 92.

Influencing the voting means shaping the content of the electoral act against the will of an eligible person, but in accordance with the will of a perpetrator, e.g. casting an invalid voice or casting a vote for a person, who is not actually supported. Forcing to vote covers not only casting a vote in the polling station. It will take place even when a voter casts an invalid vote, or in accordance with her or his will, or will take ballot papers out and hand them a perpetrator.

Putting pressure through the aforementioned means, so that a person willing to vote would not go to the polling station, but also physical stopping of such person, can be deemed as refraining from voting. Moreover, it covers all behaviors leading to the lack of possibility to cast a vote[62].

The described act can be committed by both action and omission[63]. Some authors regard the given offence as a formal offence, others as a substantive offence. After an in-depth analysis, it seems justified to repeat the view saying that the act typified in Article 250 of the Penal Code is of consecutive character. Thus, influencing the way of voting of an eligible person, voting against her or his own will, or refraining from voting, will be the result of criminal behavior described in this provision[64].

When the objective side is concerned, the discussed minor offence is of intentional character and can be committed only with the direct intent[65].

The offence under Article 250 of the Penal Code is subject to a penalty of imprisonment from 3 months for up to 5 years.

Table 5. A number of proceedings instituted for an act under Article 250 of the Penal Code between 1999-2014

Article 250	1999	2000	2001	2002	2003	2004	2005	2006
	1	4	5	1	9	5	9	71
	2007	2008	2009	2010	2011	2012	2013	2014
	27	7	4	6	3	1	2	7

Source: www.policja.pl (accessed on: 26.01.2015).

Table 6. Adults finally convicted under Article 250 of the Penal Code between 2001 and 2014

Article 250	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
	-	-	-	-	1	-	-	-	-	-	1	1

Source: http://ms.gov.pl/ (accessed on: 26.01.2015).

62 L. Tyszkiewicz, Przestępstwa…, *op. cit*., p. 1165.
63 J. Piskorski, Przestępstwa…, *op. cit*., pp. 270-271.
64 *Ibidem*, p. 270-271.
65 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 582.

The largest number of proceedings instituted for an act under Article 250 of the Penal Code can be observed in 2006, in comparison to the remaining years; there were as many as 71 proceedings – in that year the municipal elections took place in Poland. The lowest number of initiated proceedings was in 1999, 2002, 2012 – 1 each year (in 2002 also the municipal elections took place in our country).

When a number of convictions for the infringement of the freedom to exercise electoral rights is concerned, they took place only in: 2005, 2011 and 2012 – one each year.

5. Electoral bribery (Article 250a of the Penal Code)

Article 250a[66] penalizes an offence of electoral bribery. In §1 of this provision, the legislator criminalized electoral venality, whereas in §2 electoral bribery. The first prohibited act is an individual offence, as it can be committed only by a person eligible to voting. The legislator does not indicates existence of particular features characterizing the object in the case of the second prohibited act, thus it is a common offence.

The subject of protection of Article 250a is an objective election honesty[67], whereas the objectivity shall be construed as conducting the electoral act in accordance with believes of a voter[68]. The described provision, as R.A. Stefański notes, is to protect not only the correctness of elections, but also contribute to reduce the 'corruption foreground'[69].

In the case of passive electoral bribery (§ 1), the causative action consists in accepting financial or personal benefit, or requesting such benefits for voting in a certain way. To the financial and personal benefit refers, in a very laconic way, Article 115 § 4 of the Penal Code[70]. It is worth recalling theses formulated on the basis of this regulation.

66 Article 250a. § 1: Anyone who, being entitled to vote, accepts financial or personal benefit or requests such benefits for voting in a certain way is liable to imprisonment from three months to five years. § 2. Anyone who provides financial or personal benefit to a person entitled to vote in order to persuade him or her to vote in a certain way, or for voting in a certain way, is liable to the same penalty. § 3. In the case of lesser significance, the offender of the act specified in §§ 1 or 2 is subject to a fine, restriction of liberty or imprisonment for up to two years. § 4. If the offender of the act specified in § 1or § 3 in conjunction with § 1 notified the relevant prosecution body of the fact and circumstances of the offence before this authority learned about them, the court will apply an extraordinary mitigation of punishment, and may even waive inflicting a penalty.

67 M. Szewczyk, Przestępstwa…, *op. cit*., p. 1331.

68 R. A. Stefański, Przestępstwo korupcji wyborczej (art. 250a), "Prokuratura i Prawo" 2004, No. 4, p. 70.

69 *Ibidem*, p. 70.

70 Article 115 § 4. Materia or personal benefit is a benefit for the person hero himself, or a third party.

The financial benefit is simply increasing of assets or decreasing liabilities; it includes *inter alia* money, securities, property rights and items of material value[71]. Also a loan bearing no interest or bearing grossly understated interest, can be regarded as the financial benefit[72]. The term 'personal benefit' shall be construed as meeting other than material needs, or such needs, in which prevailing importance is attributed to intangible benefit. A. Marek names as examples of the personal benefit *inter alia*: promotion, awarding the medal, and even providing gratuitous sexual services[73]. Granting a leave or reducing duties might also be a personal benefit[74]. It is worth mentioning that casting an invalid vote falls within the scope of the term of voting in a certainway[75]. The prohibited act provided for in §1 is of a formal character and may be committed by both action and omission.

The essence of an active electoral bribery (§ 2) is providing the above mentionedbenefit to a person entitled to vote in order to persuade her or him to vote in a certain way or for voting in a certain way. The fact whether the offered benefit has been accepted or not is irrelevant from the point of view of this offence[76]. It is a formal offence, of the action[77].

It is worth to signalize in this place that our legislator omitted penalization of acceptance and giving promise of the benefit. This move should be deemed as intentional, as giving promises by candidates to voters, often not kept, is inseparably connected with the conduct of the election campaign[78]. There emerged the postulate[79] in the literature to penalize these behaviors, however it was refused.

The subject side of the offence provided for in § 1 consists in intentionality in the form of the direct directional intent[80], what results from the wording and drafting of this provision.

Minor offences provided for in § 1 and 2 of Article 250a are subject to a penalty of imprisonment from 3 months for up to 5 years.

It is worth to draw attention to the wording of §3 of this provision, providing for mitigated punishment due to the case of lesser significance. The Supreme Court in a judgment of 9 October 1996 stated that 'when considering whether there is a case of lesser significance in the given instance, subjective-objective features of the act

71 A. Marek, Kodeks…, *op. cit*., p. 312.
72 M. Szewczyk, Przestępstwa…, *op. cit*., p. 1333.
73 A. Marek, Kodeks…, *op. cit*., p. 312.
74 M. Szewczyk, Przestępstwa…, *op. cit.,* p. 1334.
75 R.A. Stefański, Przestępstwo…, *op. cit*., p. 71.
76 *Ibidem*, p. 75.
77 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 583.
78 R. A. Stefański, Przestępstwo…, *op. cit*., p. 76.
79 J. Skorupka, Podstawy karania korupcji w kodeksie karnym *de lege lata* i *delege ferenda* (wybrane zagadnienia), "Państwo i Prawo" 2003, No 12, p. 78 et seq.
80 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 583.

shall be taken into consideration, emphasizing these elements, which are specific for the given type of offences. For the case of lesser significance is the privileged form of the act having feature of an offence of a basic type, characterized by majority of mitigating subjective-objective elements'[81]. The act provided for in § 3 is subject to a fine, limitation of liberty or imprisonment for up to 2 years.

In § 4 the legislator regulated institution of active repentance; taking advantage of it causes obligatory mitigation of punishment. The court may also waive inflicting a penalty. It should be emphasized that only a perpetrator of an offence provided for in § 1 (passive electoral bribery) and a perpetrator, whose behavior constitutes the case of lesser significance are entitled to take advantage of the benefit of the active repentance.

Table 7. A number of proceedings initated for an act under Article 250a of the Penal Code between 1999 and 2014

Article 250a	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
	4	4	7	62	20	4	2	57	34	9	5	62

Source: www.policja.pl (accessed on: 26.01.2015).

Table 8. Adults finally convicted under Article 250a of the Penal Code between 2001 and 2012

Article 250a	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
§1	-	-	-	-	-	-	-	5	5	1	47	13
§2	-	-	-	-	-	-	-	12	9	1	15	7
§3	-	-	-	-	-	-	-	-	3	7	3	11
§3 in conjunction with §1	-	-	-	-	-	-	-	3	-	-	10	1
§3 in conjunction with §2	-	-	-	-	-	-	-	1	-	-	4	1

Source: http://ms.gov.pl/ (accessed on: 26.01.2015).

When analyzing the above statistical data, it should be kept in mind that the provision of Article 250a of the Penal Code entered into force on 1 July 2003[82]. The

81 R.A. Stefański, Przestępstwo…, *op. cit*., p. 78.

82 Wyrok Sądu Najwyższego z dnia 9 października 1996 r., V KKN 79/96 [Judgement of the Supreme Court of 9 October 1996, V KKN 79/96], "Orzecznictwo Izby Karnej i Wojskowej Sądu Najwyższego" 1997, N.o 3-4, item 27.

largest number of initiated proceedings on electoral corruption can be observed in 2006 and 2014, when 62 proceedings were initiated in each year. Whereas, only 2 proceedings were initiated in 2009.

The first finally binding judgments for an act under Article 250a of the Penal Code were given in 2008. The largest number of final convictions for both electoral corruption and electoral bribery, took place in 2001 (47 for an act under § 1, 15 for an act under § 2). In the same year, 14 persons were convicted for the case of lesser significance.

6. Breaching the secrecy of voting (Article 251 of the Penal Code)

The last prohibited act provided for in Chapter XXXI of the Penal Code is breaching the secrecy of voting. The offence under Article 251 of the Penal Code[83] is a common offence, thus can be committed by every person, corresponding to the general characteristics of the object of legal and criminal liability.

The object of protection of the said provision is, guaranteed in Article 96 section 2, Article 97 section 2, Article 127 section 1 and Article 169 section 2 of the Constitution of the Republic of Poland[84], the rule of the secrecy of voting.

The said prohibited act is of a substantive character, whereas acquiring knowledge of another person's way of voting, against the wish of that person, is a result of a criminal behavior. It can be committed by both action and omission[85]. Acquiring knowledge on another person's way of voting, against the wish of that person, constitutes the essence of causative action.

The activity feature 'acquiring knowledge on the way of voting' means 'taking any action leading to acquiring knowledge on the way of voting, e.g. peeping at a person casting a vote, identifying an anonymous ballot paper'[86]. Consent of a person casting a vote lead to exclusion of criminality of the act[87].

This offence may be committed with intentional guilt. There is a dispute in the literature on intent. Some authors claim that the said act can be committed only with

83 Ustawa z dnia 13 czerwca 2003 r. – o zmianie ustawy Kodeks karny oraz niektórych innych ustaw (Dz.U. z 2003 r. Nr 111, poz.1061) [Journal of Laws of 2003 No. 111 item 1061]. Article 251. Anyone who, in violation of the rules on the secrecy of voting, acquires knowledge of another person's way of voting, against the wish of the voter, is liable to a fine, the restriction of liberty or imprisonment for up to two years.

84 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. z 1997 r. Nr 78, poz. 483 z późn.zm.) [Journal of Laws of 1997 No. 78 item 483 as amended].

85 M. Budyn-Kulik, Komentarz…, *op. cit*., p. 584.

86 M. Szewczyk, Przestępstwa…, *op. cit*., p. 1137.

87 L. Tyszkiewicz, Przestępstwa…, *op. cit*., p. 1167.

direct intent[88], whereas remaining ones provide for occurrence of both forms of intent[89].

The offence of breaching the secrecy of voting is subject to a fine, the restriction of liberty or imprisonment for up to 2 years.

Table 9. A number of proceedings instututed for an act under Article 251 of the Penal Code between 1999 and 2014

Article 251	1999	2000	2001	2002	2003	2004	2005	2006
	-	4	-	-	1	3	3	5
	2007	2008	2009	2010	2011	2012	2013	2014
	5	1	1	1	3	-	1	1

Source: www.policja.pl (accessed on: 26.01.2015).

It is clear from data included in the table that proceedings for an offence under Article 251 of the Penal Code were institutedincidentally.

Table 10. Adults finally convicted under Article 251 of the Penal Code between 2001 and 2012

Article 251	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
	-	-	-	1	-	1	-	-	-	-	-	-

Source: http://ms.gov.pl/ (accessed on: 26.01.2015).

When proceedings instituted for an act under Article 251 of the Penal Code are concerned, the largest number was observed in 2006 and 2007. In 1999, 2000, 2002 and 2012 no proceeding for an act under the said provision was instituted.

In 2001 and 2012, the provision of Article 251 of the Penal Code constituted a basis for issuing the final judgment only twice, it took place in 2004 and 2006.

7. Summary

The size of crime against elections and referenda can be discussed after a scrupulous analysis of the police and court statistics. The particular significance is assigned to the second one, as it is the most credible information on the scale of crime in Poland. It is explained by the fact that it presents a number of adults convicted with valid and finally binding judgment.

88 *Ibidem*, p. 1167.

89 M.Budyn-Kulik, Komentarz…, *op. cit*., p. 584 oraz M. Szewczyk, Przestępstwa…, *op. cit*., p. 1138.

Summarizing statistical data concerning offences against elections and referenda (Articles 248-251 of the Penal Code) one can observe that they do not constitute a serious threat, in terms of quantity. Unfortunately, data for 2013 and 2014 have not been yet included in the above court statistics.

It results from the police statistics that proceedings for acts provided for in the Chapter XXXI of the Penal Code are initiated very rarely. Whereas observing data of the Ministry of Justice it can be immediately noted that finally binding convictions for acts under the Chapter XXXI take place episodically.

In both statistics it is difficult to observe any regularities, only obvious dependences between a number of instituted proceedings and years in which elections took place, are noticeable. After analyzing statistical data and correlating them with a number of persons convicted in general in particular years, it can be definitely noted that a threat of offences against the elections and referenda is indeed marginal. It cannot be ignored however, due to repeatedly emphasized importance of the proper use of institutions of direct and indirect democracy for the functioning of the state and society. This phenomenon should be steadily examined and regularities related to committing prohibited acts against elections and referenda verified.

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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 andbeyond.
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 itself[1].

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. Pudzianowska, 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 participation[2] 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 inexpensive[3].

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 authorities[4]. 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, enjoyingpolitical 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 rare[5]. 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 citizenship[6]. 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 elections[7].

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 life[8]. 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 exclusion[9]. 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 Freedoms[10].

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

6 D. Pudzianowska, 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 threeof 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 law[11] 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/EC[14]. 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 residence[15].

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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 LocalLevel, "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 ot 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 market[16]. 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].

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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, burmistrzówi prezydentów miast zarządzonych 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 literature[21].

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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 force[22]. 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 origin[23]. 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 citizens[24].

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 same[26].

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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Procedure of Appointing Members of the European Committee for the Prevention of Torture And Inhuman or Degrading Treatment or Punishment

Abstract: The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) examines, through visits, the treatment of persons deprived of their liberty (Article 1 of the European Convention for the Prevention of Torture, 1987). CPT activity is based on two principles – cooperation and confidentiality. There are two types of visits, periodic visits and ad hoc visits. Without doubt, the CPT is one of the most important monitoring bodies in the area of interest of the Council of Europe. Due to the specific nature of its work it is worth to look at the members forming the Committee, as well as the legal rules of their appointment, the more so that these issues are not the subject of numerous studies in the doctrine, but are, however, important to the quality of the practical connotations of the operation of international law. The purpose of this discussion is to present the essence of CPT, the specific nature of its composition and the rules for appointing members, both at the national procedure (i.e. pre-selection), as well as on the international stage of the contest.
Keywords: European Committee for the Prevention of Torture, human rights, international organizations
Słowa kluczowe: "Europejski Komitet Zapobiegania Torturom", prawa człowieka, organizacje międzynarodowe

The activity of The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, for more than 25 years, has been a regular element of the European human rights protection mechanism of the Council of Europe[1]. It is considered to be, besides the European Court of Human Rights, the most important international body monitoring compliance with the rights of an individual on the European continent. This is due to the fact that it upholds the prohibition of torture and inhuman or degrading treatment or punishment, which

1 More on the issue e.g.: B. Filipek, Kontrola przez Radę Europy wykonywania zobowiązań przyjętych przez państwa członkowskie, Kraków 2007, the unpublished doctoral dissertation.

today, as shown by the case law of the European Court of Human Rights, is quite frequently violated by the countries. Hence the important role of the body under discussion. Because of the uniqueness of its work, it is worth to take a look at the characteristics of the composition of the Committee and the rules of its appointment. The issue of the procedure for the appointment of its members is not a subject of numerous studies in the doctrine. However, it has important practical connotations, both at the level of practice of the countries and the bodies of the Council of Europe choosing members of the Committee, as well as with regard to the quality of their work. The aim of these considerations is to analyze the functioning of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in the specifics of its composition and the rules for appointing members, both at the stage of the national procedure (so-called pre-selection) and at the stage of international competitive procedure.

1. The specificity of the international human rights monitoring bodies

International agreements do not provide for a uniform standard of operation and organization of international control in respect of compliance with human rights by states. In accordance with the principle adopted in international relations that an international agreement depends on the consensus of the parties, functioning of the treaty instruments control in the agreement is optional. When analyzing treaty provisions, it may be noted that arrangements for establishing mechanisms in monitoring human rights and international human rights control bodies? fall into three groups: a) international agreements that do not provide for any control procedure; b) international agreements, which do not provide for any control procedure, but their implementation – to varying degrees – may be controlled by international bodies within a wider system existing in individual international organizations, for example in the system of the Council of Europe or the UN; c) international agreements containing special inspection procedures and/or international bodies monitoring compliance with human rights.

Treaties that provide for legal instruments for the protection of individual rights, provide for specific measures to control the observance of human rights: reports (preliminary, periodic)[2], individual complaints and inter-state complaints[3],

2 See more: R. M. M. Wallace, International Law, FifthEdition, London 2005, pp. 236-238.

3 A complaint can be brought against a state or international organizations/bodies. A state's complaint against another state is called an interstate complaint. A complaint brought by individual or a group of individuals is called an individual complaint. See more: K. Łasak, Warunki dopuszczalności skargi zbiorowej w systemie Europejskiej Karty Społecznej, (in:) Polska i Rada Europy 1990-2005, H. Machińska (ed.), Warszawa 2005, p. 237. Examples of regulations providing for a system of individual complaint (also an interstate complaint) considered by judicial bodies are: European Convention for the Protection of Human Rights and Fundamental

visitations (so-called on-the-spot tests)[4] and petitions[5]. The indicated catalog of legal instruments occurs in the treaties in different ways: it can be limited to only one instrument for instance to the visitation, as in the case of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), or refer to a few of the measures, e.g. reports and complaints, as in the case of the International Covenant on Civil and Political Rights (1966)[6].

In the framework of international procedures, international bodies performing control functions can be classified in several categories.

In terms of the rules of creation, international institutions for the protection of human rights can be divided into[7]:

- created by organs of international governmental organizations based on their resolutions, e.g. International Criminal Tribunal for the former Yugoslavia or Commissioner for Human Rights of Council of Europe;
- international treaty bodies, i.e. acting on the basis of the records of the treaty (also known as treaty bodies), these are the bodies specialized in the protection of a specific category of rights and freedoms (in accordance with the subject of the treaty). Most often they operate under the system of international governmental organizations, not constituting their statutory bodies, but they use the administrative, financial and organizational facilities of the entity in which they operate, e.g. The European Court of Human Rights operating in the system of the Council of Europe.
- statutory organs of international governmental organizations which while performing functions related to the management of the organization, also conduct, as a guardian of statutory objectives, control functions in the field

Freedoms of1950 (Dz.U. z 1993 r. Nr 61, poz. 284) [Journal of Laws of 1993 No. 61 item 284], Inter-American Convention on Human Rights of 1969(with a functioning Inter-American Court of Human Rights) or African Charter on Human and Peoples' Rights of 1981 (with jurisdiction of the African Court on Human and Peoples' Rights).

4 An example of a treaty providing for a form of visitation is the European Convention for the Prevention of Torture nad Inhuman or Degrading Treatment or Punishment of 1987, http://conventions.coe.int/Treaty/en/Treaties/ Html/126.htm (accessed on: 27.01.2015). See more: R. Kuźniar, Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe, Warszawa 2004, pp. 189-190.

5 Petitions are appeals addressed to an international body, in which a natural or legal person, usually directly concerned, points to infringement of the relevant international agreement. The petition, in its essence is similar to a complaint, is considered by international bodies. This instrument was applied in the European Union legislation. See more: G. Michałowska, Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej, Warszawa 2007, pp. 246-247.

6 International Covenant on Civil and Political Rightsof 1966 (Dz.U. z 1977 r. Nr 38, poz. 167) [Journal of Laws of 1977 No. 38 item 167].

7 A. Bisztyga, Ochrona praw człowieka w systemie Rady Europy, (in:) B. Banaszak, A. Bisztyga (eds.), System ochrony praw człowieka, Kraków 2003, pp. 115-152.

of human rights observance by member states, e.g. Committee of Ministers of the Council of Europe.

The next division is the distinction of the international control bodies of human rights due to the nature and specificity of the decision-making activities:

a) Judicial authorities – they play the judiciary role in the system of international law, they settle disputes regarding violations of the rights of a human being in a typical procedure of court proceedings. They act under the laws of the treaty or on the basis of the resolutions of international bodies of international governmental organizations.
b) Extrajudicial authorities – usually committees and commissions, or one-man committees, elected for the defined terms of office, in a numerically determined composition. Non-judicial authorities use different (occurring together or individually) control measures, inspired by confidential negotiations, provide good service, formulate recommendations etc. The specificity of the activity of non-judicial authorities consists in making decision, which, however, are different in the means of conditions and with different legal effects than international court judgments. They act according to the treaty law or on the basis of the resolutions of international bodies of international governmental organizations.

In addition, considering the composition criterion (number of members) of international control bodies of human rights, it is still possible to differentiate them into: collective bodies and single-person bodies, which may also function either under the treaty or on the basis of the above-mentioned resolutions of organs of government organizations.

It is also worth paying attention to another possible division of international control bodies of human rights, namely their distinction due to their functions: control (monitoring body) and creating standards of observing human rights (standard-setting body). This distinction appears to be quite theoretical, because contemporary international control bodies of human rights, to a lesser or larger extent, while exercising control functions, naturally play also a creative role as regards the standards of observing human rights.

2. Origins and the specificity of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter refferedto as: Committee or CPT) was established under the Article 1 of the European Convention for the Prevention of

Torture and Inhuman or Degrading. Treatment or Punishment (hereinafter referred to as: ECPT or the Convention against Torture), adopted by the Council of Europe[8]. The Convention was opened for signature by the member states of the Council of Europe on November 26th, 1987. It was entered into force on February 1st, 1989, after the ratification of 7 countries. By 1st of January, 1991, 20 out of 24 member states of the Council of Europe ratified the Convention, and and currently 47 countries are its parties[9]. The Committee started its operations in November 1989, and on 16th of November 1989, and adopted its rules of procedure, so-called Procedural rules[10].

ECPT does not contain a new catalog of rights and freedoms, but instead it establishes a control mechanism aimed at monitoring the implementation by member states of the Article 3 the European Convention on Human Rights signed in 1950 (hereinafter referred to as the ECHR)[11], which prohibits torture[12]. The Convention against Torture was concluded in the belief that 'the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits'[13].The first list of countries to conduct the visit in (in 1990), was established by the drawing of lots. It included: Austria, Denmark, Turkey, Malta and the United Kingdom[14]. The first country which was visited by the Committee was Austria.

Although the ECPT directly refers to the provisions of the ECHR control mechanism, i.e. European Court of Human Rights (hereinafter referred to as the Court), the key differences between the specificity of the activities of the CPT and the Court should be pointed out.

8 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, done in Strasbourg on 26 November 1987 (Dz.U. z 1995 r., Nr 46, poz. 238) [Journal of Laws of 1995 No. 46 item 238].

9 http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=1&DF=&CL=ENG (accessed on: 27.01.2015).

10 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Rules of Procedure, (Adoptedon 16 November 1989 andamended on 8 March 1990, 11 May 1990, 9 November 1990, 31 January 1991, 20 September 1991, 12 March 1997 and 7 March 2008) CPT/Inf/C(2008)1, Strasbourg.

11 Convention for the Protection of Human Rights and Fundamental Freedoms, done in Rome on 4 November 1950 (Dz.U. z 1993 r. Nr 61, poz. 284) [Journal of Laws of 1993 No. 61 item 284].

12 See more: K. Ginther, The European Convention for the Prevention of Torture and Inhuman or Degrading Tre- atment or Punishment, 'European Journal of International Law' 1990, vol. 2, No. 123; H. Haug, Efforts to Eliminate Torture through International Law, 'The International Review of the Red Cross' 1989, No. 775, pp. 9-27.

13 Preamble paragraph 5 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987, *op. cit.*

14 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,1st General Report on the CPT's activities covering the period November 1989 to December 1990, CPT/Inf (91)3 – Appendix 3, Strasbourg 1991, p. 1.

Firstly, the main objective of the Court is to determine whether a breach of the ECHR occurred. While the task of the CPT is to prevent physical or mental abuse of persons deprived of liberty[15].

Secondly, the Court is bound by the treaty provisions of the ECHR about the standards of human rights and freedoms. CPT is not bound by the provisions of specific international agreements, although it may refer to several treaties and other international instruments and the case law formulated on this basis.

Thirdly, the Court consists of professional lawyers specializing in the field of human rights. CPT consists not only of such lawyers, but also doctors, experts in criminal matters, criminologists, etc.

Fourth, the Court exercises its jurisdiction only after the complaint an individual or inter-state complaints (so-called complaints procedure). CPT performs its functions ex officio as to the periodic or ad hoc visits.

Fifth, the proceedings before the Court end with issuance of legally binding judgment, which states whether there was an infringement of the provisions of the ECHR or not. Whereas the result of the activities of the CPT is the development of the reportof the conducted visit and, if necessary, recommendations on the activities of the member states to correct the abuses of the prohibition of torture and inhuman or degrading treatment or punishment[16]. In case of refusal of the member state with regards to the compliance with the recommendations, the CPT may make a public statement on the matter.

The CPT is an international non-judicialary body of a collegial nature, which operates on the basis of the treaty and, like the ECHR, is not a part of the statutory institutions of the Council of Europe, and functions within the so-called system of the Council of Europe. CPT is not an investigative authority, but it ensures extrajudicial preventive mechanism in order to protect persons deprived of their liberty against torture and other forms of ill-treatment[17]. Therefore it complements the judicial activities of the European Court of Human Rights. It is undisputed that the Court is the most important body established in order to control the observance by member states of the prohibitions arising out of the provision of Article 3 of the

15 The European Committee for the Prevention of Torture And Inhuman or Degrading Treatment or Punishment, 1st General Report on the CPT's activities covering the period November 1989 to December 1990, CPT/Inf (91) 3, Strasbourg 1991, pt 1; The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Austrian Government on the visit to Austria carried out by the European Committee for the Prevention of Torture And Inhuman or Degrading Treatment or Punishment (CPT) from 20 May 1990 To 27 May 1990, CPT/Inf(91)11, Strasbourg 1991, p.10.

16 A. Cassese, A New Approach to Human Rights: The European Convention for the Prevention of Torture, 'American Journal of International Law' 1989, No. 83, pp. 128-153.

17 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT standards, CPT/Inf/E (2002)1 – Rev.2013, Council of Europe, Strasbourg 2013, p. 4.

ECHR[18]. However, the other body which aims at such control is the Committe, with its preventive instruments[19].

Control of compliance with the statutory requirements of the ECPT by CPT consists primarily in carrying out the periodic and ad hoc visits[20], in the places which are particularly vulnerable to the possibility of ill-treatment of people (prisons, juvenile detention centers, police stations, centers for detained immigrants as well as psychiatric hospitals and nursing homes). In addition, an important aspect of the work of CPT is to maintain so-called permanent dialogue with the member states, that is, recurring reports of CPT and members' answers[21].

3. The procedure of appointing members of the CPT

CPT is composed of representatives of the member states of the Council of Europe which are parties to the ECPT. The members of the Committee represent diverse expert environments. They are independent and impartial experts with diverse backgrounds, including lawyers, doctors and specialists in the field of prison system or police ('The Committee members are chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by this Convention')[22]. The members of the Committee shall be elected for a period of four years, with the possibility of being re-elected twice. Members of the CPT are acting on their own behalf (i.e., do not represent the country on behalf of which they are delegated)[23]. In order to fully guarantee independence, they do not visit the countries from which they were appointed.

18 Z. Hołda, Europejski Komitet Zapobiegania Torturom (z problematyki instytucji kontrolnych w obszarze Rady Europy), "Annales Universitatis Mariae Curie-Sklodowska' 2008, vol. XV, No. 2, p. 49.

19 At the same time, it is worth remembering that, especially after 2000, Tribunal has very often referred to the Committees visitation reports as a material helpful in the findings of fact. The case-law of the European Court on Human Rights, under provision of Article 3 of the European Convention on Human Rights is particularly wide, Z. Hołda, Europejski Komitet Zapobiegania Torturom…, *op. cit.*

20 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), The CPT standards 'Substantive' sections of the CPT's General Reports**,** CPT/Inf/E(2002)1 – Rev. 2006, Council of Europe, Starsbourg 2006, p. 4.

21 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Historical background and main features of the Convention, CPT/Inf. (90)3, Strasbourg 1990, p. 3.

22 Article 4 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, done in Strasbourg on 26 November 1987 (Dz.U. z 1995 r. Nr 46, poz. 238) [Journal of Laws of 1995 No. 46 item 238).

23 *Ibidem*.

The selection procedure of the Committee members is regulated in ECPT and is two-staged. The first stage is the national proceedings – competition followed by the candidates applying by the state to the Council of Europe, the second stage is the election of a member to the CPT by the Committee of Ministers of the Council of Europe, with the participation of the Parliamentary Assembly of the Council of Europe (hereinafter referred to as PACE)[24].

3.1. National procedure

In Poland, the recruitment of candidates for membership to the CPT is within the competence of the Minister of Justice, who announces the recruitment most often in advance, before the mandate of the representative from Poland expires (usually it is one year)[25]. The current term of office of the Polish representative in the CPT expired on 19 December 2015[26]. The Minister of Justice decided to initiate the selection procedure of candidates already in the autumn of 2014, setting the deadline for submitting entries to the 18 December 2014 ('The Minister of Justice announces that due to the expiration of the term of office of a member of the European Committee for the Prevention of Torture on behalf of Poland and in accordance with the provisions of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Resolution 1540 (2007) of the Parliamentary Assembly of the Council of Europe, which regulate the matter of choosing a CPT member, the Minister of Justice decided to start the procedure for selecting candidates for the CPT member on behalf of Poland')[27].

Candidate applications together with a CV and documents confirming relevant qualifications shall be sent to the Department of International Cooperation and Human Rights of the Ministry of Justice (hereinafter referred to as: MoJ).

According to the MoJ, a CPT candidate should meet the following requirements that are subject to the provisions of ECPT i.e. have a high moral qualifications and professional qualifications as well as experience in the field covered by the mandate of the CPT and have fluent command of English or French (the official languages

24 Article 5 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, done in Strasbourg on 26 November 1987 (Dz.U. z 1995 r. Nr 46, poz. 238) [Journal of Laws of 1995 No 46 item 238).

25 In other countries of the Council of Europe, procedures of appointing candidates as CPT members are similar. See e.g.: in Ireland, where a competitive procedure at a national level is conducted by the Ministry of Justice and Equality, http://www.justice.ie/en/JELR/ADVERTISEMENT%20English%20-%20CPT%20Nomination.pdf/Files/ADVERTISEMENT%20English%20-%20CPT%20Nomination.pdf (accessed on: 28.01.2015).

26 The term of office of a Committee's member from Poland started on 20 December 2015 and will last four years.

27 http://webcache.googleusercontent.com/search?q=cache:GhRqtJAIcGQJ:bip.ms.gov.pl/pl/ogloszenia/new-s,6605,ogloszenie-o-naborze-na-czlonka-europejskiego.html+&cd=1&hl=pl&ct=clnk&gl=pl&client=firefox-a (accessed on: 27.01.2015).

of theCouncil of Europe, including also CPT)[28]. In addition, a person should be available in terms of time and profession, in a state of health that ensures the ability to effectively carry out the tasks of a CPT member, because this activity relies largely on monitoring visits in other countries[29], which last a dozen or so days and take place several times a year.

National procedure, so-called pre-selection, is conducted by means of a competitive procedure, during which three candidates for a CPT member on behalf of Poland are selected from among those nominated. The final election of a representative from the list of three persons indicated by MoJ is made by the Committee of Ministers of the Council of Europe.

3.2. International procedure

The election of CPT members in the Council of Europe takes place in accordance with the provisions of the ECPT and refining Resolution 1540 (2007) of the Parliamentary Assembly of the Council of Europe[30]. The Committee of Ministers of the Council of Europe selects a member to the CPT from the list of three candidates presented by a country. This follows the recommendation of the PACE Bureau[31], which previously forwards a list of candidates for consideration and opinion of the Sub-Committee on Human Rights of the PACE Committee on Legal and Human Rights.

The 2007 resolution is the last regulation of the Council of Europe regarding the appointment of members of the CPT. Previously in this regard the following documents of the PACE were binding: Recommendation 1257 (1995)[32] ,Recommendation 1323 (1997)[33] and Resolution 1248 (2001)[34].

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28 Roule 12, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punish- ment (CPT), Rules of Procedure, (Adopted on 16 November 1989 and amended on 8 March 1990, 11 May 1990, 9 November 1990, 31 January 1991, 20 September 1991, 12 March 1997 and 7 March 2008) CPT/Inf/C(2008)1, Strasbourg, p. 8.

29 *Ibidem*.

30 Parliamentary Assembly, Resolution 1540(2007) Improving selection procedures for CPT members, http://as-sembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1540.htm (accessed on: 26.01.2015).

31 The Bureau of the CEPA shall consist of the President of the Assembly, her or his 20 deputies and the chairpersons of five largest political groups, Parliamentary Assembly, Resolution 1379 (2004) Composition of the Bureau of the Assembly, http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17224&lang=en (accessed on: 26.01.2015).

32 Parliamentary Assembly, Recommendation 1257 (1995) on the conditions of detention in Council of Europe member states, http://www.assembly.coe.int//Main.asp?link=http://www.assembly.coe.int/Documents/AdoptedText/TA95/EREC1257.HTM (accessed on: 25.01.2015).

33 Parliamentary Assembly, Recommendation 1323 (1997) on strengthening the machinery of the European Co- nvention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, http://www.assembly. coe.int/Main.asp?link=/Documents/AdoptedText/ta97/EREC1323.htm (accessed on: 27.01.2015).

34 Parliamentary Assembly, Resolution 1248 (2001) European Committee for the Prevention of Torture (CPT): composition, http://www.assembly.coe.int/Main.asp?link=/Documents/

Recommendation 1257 (1995) applies to the conditions of detention of persons in prisons in the member states of the Council of Europe[35]. The document underlines the important role of CPT in the protection of the rights and freedoms of individuals detained in detention centers. However, the recommendation does not regulate any rules for the selection of Committee members, but nevertheless constitutes an important document regarding the CPT function. In subsequent recommendations clarifying the principles for appointing members of the CPT, there are numerous references to it, due to the important issue of linking the CTP function with the relevant competences of its members, which is to ensure the expert nature of the Committee as an international body for controlling human rights.

The Recommendation 1323 (1997) relates to the strengthening of the mechanism of the Convention Against Torture. From the outset it refers to the Recommendation 1257 (1995), reaffirming support for the activities of the CPT performing preventive functions through a system of visits in the countries[36]. It may be noted that the ratification of the ECPT by a growing number of countries from Central and Eastern Europe is a huge challenge for the CPT, which has a major role to play in improving the conditions of detention of persons deprived of liberty in those countries. The recommendation 1323 refers in its provisions also to the composition of the CPT, where special attention is put to professional criteria, gender and age. The aim is to ensure a more balanced composition of the Committee, e.i. increasing the involvement of specialists from the prison service and forensic medicine, as well as increasing the number of women. In the final provisions, the document draws attention to the building of effective cooperation between the CPT and PACE, in particular the Committee on Legal Affairs and Human Rights on the performance of ECPT obligations by the countries.

The Resolution 1248 (2001) directly relates to the recommendation of the Recommendation 1323 (1997), in which the need for a more balanced composition of the CPT is stressed[37]. It was also stressed that there is the need for rapid entry into force of Protocol No. 2 to the Convention against Torture, which provides for new rules for the renewal of the composition of the CPT and the possibility of their re-election. The resolution indicated that the composition of the CPT of that time was not balanced, both from the point of view of women's representation, as well as because of the different professional competences of its members. PACE indicated,

AdoptedText/ta01/ERES1248.htm (accessed on: 24.01.2015).

35 Parliamentary Assembly, Recommendation 1257 (1995) on the conditions of detention in Council of Europe member states …, *op. cit.,* p. 1.

36 Parliamentary Assembly, Recommendation 1323 (1997) on strengthening the machinery of the European Co- nvention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment…, *op. cit*., p. 1.

37 Resolution 1248 (2001) European Committee for the Prevention of Torture (CPT): composition…, *op. cit.,* p. 1.

that it is partly responsible for this state of affairs, as well as the composition of national delegations, and it perceives some possibility in this area of exercising a certain control. It notes, however, that in practice the PACE Bureau was not able to examine their own national candidates as members of the CPT. This task belongs to the Committee of Legal Affairs and Human Rights. In view of the above, the PACE asked the National Delegations in the Resolution to check whether the lists of their CPT candidates are compliant with the requirements of Recommendation 1323 (1997). A similar position was also presented to the Committee on Legal Affairs and Human Rights which was obliged to study the listof candidates provided by the national delegations in accordance with the criteria of recommendation 1323[38].

The Resolution 1540 (2007) of PACE is a specific instruction for countries and Sub-Committee on Human Rights of PACE (hereinafter referred to as: Subcommittee). The resolution at the very beginning of its provisions refers to the earlier regulation of the principles of the appointment of CPT members, i.e. Resolution 1248 and Recommendation 1323. It underlines the fact that PACE attaches great importance to the work of the CPT. 39 At the outset of the document, it is noted that the Committee in terms of the effectiveness and efficiency of its activities is conditioned by the moral condition, professional qualifications and personal implications of all its members.

In order to facilitate the selection of suitable candidates for CPT at the national level, the Resolution clarifies the most important issues related to the selection criteria. It indicates the need for equal treatment in terms of gender equality, with a preference for candidates of the under-represented sex in CPT. The list of candidates should include at least one man and one woman, except when all the candidates are the under-represented sex in the CPT (less than 40%). A list that does not comply with this rule is rejected by the PACE Bureau.

It is also recommended to organize the procedure of national consultation concerning suitable candidates with relevant state bodies and non-governmental organisations (such as ministries of Justice, Interior and Health, prison administration, academic institutions, non-governmental organizations working in the field of combating torture and assistance for prisoners and people in psychiatric institutions). What is also underlined is the important consultative and information role regarding the candidates to be held by the national delegations in the PACE – at the opinion stage by the PACE Bureau. Therefore, the knowledge of representatives of national delegations in PACE on the subject of candidates for CPT is extremely significant.

As an important element of national priority, the resolution indicates conducting interviews with the qualified candidates, in order to make a correct assessment of their qualifications, motivation and availability, as well as language

38 Resolution 1248 (2001) European Committee for the Prevention of Torture (CPT): composition…, *op. cit.,* p. 1

skills, which can be carried out by an independent panel of experts. Taking into consideration the time-consuming and physically demanding nature of the work in the CPT, candidates should have sufficient predisposition in this regard.

Concerning the status of the independence of the CPT members as a criterion for qualifying candidates, PACE explains in the resolution, that the independence of the CPT members is not disputed by the mere fact that they are government officials or are employed in the public sector. However, if the persons at the central

are responsible for defining the national policy in a given sector and, therefore, they may be responsible for their actions (including political responsibility), they should not be members of the CPT[39].

In the case of dual citizenship of the candidate, for the purpose of the ECPT, i.e. the principle of representation in the CPT by a citizen of the state – the ECPT party, the conclusive factor is so-called effective citizenship, i.e. citizenship of the country in which the candidate exercises his or her political rights. In this regard, the Resolution indicates that the Article 4 of the act 3 of ECPT[40], which prohibits the presentation of candidates who do not have the nationality of a member state (the party), is obsolete, as people, having dual nationality, must not be automatically disqualified from the contest procedure. In the opinion of the PACE, this should be taken into account and considered by the Committee of Ministers of the Council of Europe in its opinions and creation work concerning the candidates for CPT, even in the context of the cessation of the application of Article 4 of the act 3 of ECPT.

The instructions of the Resolution regarding the principles for the selection of CPT members are also addressed to the Subcommittee on Human Rights, which evaluates candidates. As part of the work of the Subcommittee, activities should be undertaken consisting in inviting the heads of national delegations to list their candidates from their countries. This will enable gaining additional information about the individual candidates, as well as national competition procedures, according which they were selected. An important parallel issue is the obligation for the Subcommittee Chairperson to collect all data on the availability of time, language skills of candidates for CPT, etc.

The Resolution requires rejection of the list of candidates, in particular when there is no relevant information, even if deficiencies do not apply to all the candidates from the list. The rejection should also occur in a situation where not all candidates meet the minimum requirements provided for in ECPT. In addition, another reason for the rejection of the list of candidates may be the lack of fulfilment of the criterion

39 Resolution 1540 (2007) Improving selection procedures for CPT members..., *op. cit*., p. 1.

40 Article 4 section 3 "No two members of the Committee may be nationals of the same State'. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, done in Strasbourg on 26 November 1987 (Dz.U. z 1995, Nr 46, poz. 238) [Journal of Laws of 1995 No. 46 item 238).

of balanced representation of both sexes, except for when all the candidates on the list are the under-represented sex in the CPT (less than 40%).

An important aspect, which is possible in individual cases, is questioning the candidates (so-called improvement of information). This occurs if the Subcommittee decides that the information contained in the candidate's résumé is not sufficient or if the information provided by the chairman of the national delegation prevent valid choice from a list of people reported by the country. Questioning of a candidate may also be the case if the Subcommittee finds that national preselection was insufficiently precise to be able to make a correct indication of the person as the CPT member. When pre-selection procedures at the level of domestic internal proceedings do not raise any objections of the Subcommittee, the preferences of national delegations to the candidate shall be deemed to be the relevant opinion when choosing a member to CPT.

The work of the Subcommittee on Human Rights concerning judging candidates to the CPT ends with the release of recommendations, with a concise justification relating to candidates from the list. The recommendation of the Subcommittee is directed to the PACE Bureau and is the basis for the formulation of its opinion, passed then to the Committee of Ministers of the Council of Europe. Communication between the PACE and the Committee of Ministers is an important element in the international procedure for appointment of the CPT members since it positively determines the selection of highly qualified candidates.

4. Summary

The procedure for electing members of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is significant for several reasons. Although this issue is not the subject of a broad discussion neither in Polish, nor in foreign literature, it appears that it deserves attention, especially for those who claim to perform international functions in the CPT. The national and international procedures for election of members to the Committee should ensure strictly expert composition, uphold their political and professional independence, but most importantly – it must guarantee the personal involvement of candidates in their work. The Council of Europe, as visible for more than 25 years of existence of the CPT, has been also working to meet this challenge, as evidenced by resolutions and recommendations that particularise both the delegating of candidates from countries through the national pre-selection, and their choice in the international procedure by PACE and the Committee of Ministers of the Council of Europe. It should be noted that the CPT compositions from 1989 onwards have been characterized by the high professionalism, which is confirmed by both the standards and the results of the checks carried out in the member

states during the visits (reports and recommendations). Regulation of the PACE in terms of procedures for selection of the CPT members is yet another significant aspect, it constitutes a better alternative to improve practices and mechanisms (both national and international), and nominates the most qualified candidates for the Committee, without the necessity of changing the content of ECPT. Having regard to the achievements of the Council of Europe in this area, one can only hope that it succeeds.

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Industrial Democracy and Involvement of Employees in the Societas Europaea

Abstract: Industrial democracy denotes a specific proposition as well as the practice of shaping relations between employees and employers in an enterprise. The intensification of discussion on industrial democracy has happened due to changes that have occurred in this area on the basis of EU law. The European Union legislature has not only developed the idea of industrial democracy, moving it from domestic work establishments on to a plane of cross-border businesses, but it has also introduced one of the most powerful forms it takes the participation of employees in the bodies of enterprises. New legal solutions have contributed to the evolution of views on the sociological approach to industrial democracy. In order to determine the reasons for the development of worker participation in an enterprise it is reasonable to determine to what extent industrial democracy and industrial citizenship manifest themselves in an enterprise in a way similar to political democracy and state citizenship. The considerations in this respect have been supplemented by a presentation of legal solutions which are the basis for functioning of industrial democracy in the Societas Europaea.
Keywords: industrial democracy, involvement of employees, Societas Europaea, industrial citizenship
Słowa kluczowe: demokracja przemysłowa, uczestnictwo pracowników, spółka europejska, obywatelstwo przemysłowe

1. Introductory remarks

The idea of democratising industrial relationships has been the subject of discussion for a long time, and extensive literature has been written on this topic. One of the ways that it can be displayed is ensuring that the employee participates in company management. In order to determine the processes related to this type of participation, we can use such expressions as: 'industrial democracy', 'participation', 'people's capitalism', 'co-deciding', 'company democracy', 'self-government', 'organisational democracy' and 'workplace democracy', depending on the economic conditions.

The issue of democracy inside a workplace (industrial democracy – author's note) has, once again, become prevalent on account of the changes that have occurred in the European Union law. The European Union legislator has expanded on the idea of industrial democracy by relocating it from national workplaces onto the level of cross-border companies of which activity extends beyond local markets. The concept of industrial democracy has gained legal frameworks on the basis of Council Directive 2001/86/EC of 8.10.2001 supplementing the statute for a European Company with regard to the involvement of employees[1], European Parliament and Council Directive 2003/72/EC of 22.07.2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees[2], European Parliament and Council Directive 2005/56/EC of 26.10.2005 on cross-border mergers of limited liability companies[3] as well as European Parliament and Council Directive 2009/38/EC of 6.05.2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees[4].

The new legal solutions have contributed to the evolution of views concerning the sociological expression of industrial democracy. This idea is more and more often linked to the term 'industrial citizenship', which further points towards the analogy between democracy within the meaning of a political system and industrial democracy. The need to determine the extent to which industrial democracy and industrial citizenship are manifested within a company similarly to political democracy and state citizenship seems to be justifiable. An analysis of this issue makes it easier to determine the reasoning behind employee participation within a company. However, it should be emphasised that the analysis does not settle this issue unequivocally because of the other theories that exist in this field.

In the second part of the paper, the theoretical considerations will be complemented with an overview of legal solutions that form the basis of the functioning of industrial democracy in cross-border companies. Due to the scale of the issue, I will only concentrate on one subject – the European Company, which seems to be justified considering the constantly increasing number of European Companies[5] as well as advanced forms of the participation of employees in the management of those entities.

1 OJ EUL 294 of 10 November 2001, p. 22, here in after referred to as 'directive 2001/86'.

2 OJ EUL 207 of 18 August 2003, p. 25, here in after referred to as 'directive 2003/72'.

3 OJ EUL 310 of 25 November 2005, p. 1, here in after referred to as 'directive 2005/56'.

4 OJEU L122 of 16.05.2009, p. 28, hereinafter referred to as 'directive2009/38'.

5 According to data of April 2014 in 25 countries the European Economic Area in total 2125 European companies were registered, indicating increase by 159 EC in the last five months. Out of it, 289 companies were identified as 'normal', i.e. conducting business activity and hiring more than five employees (in October 2013, there were 269 'normal' companies), News of European Companies: Slowdownornewdynamics?www.worker-participation.eu (accessed on: 22.10.2014).

2. The directions for the development of industrial democracy

The term 'industrial democracy' made its first appearance in an English doctrine – in the paper by Sidney and Beatrice Webb entitled '*Industrial democracy*', which was published in 1897. The concept was associated with trade unions[6] and their right to conclude collective agreements (later called collective labour agreements). There is no doubt that the use of this term was incorporated into the basic assumptions of the Fabian Society, which was created by Sidney and Beatrice Webb, together with G.B. Shaw. The views of the members of the Society had a substantial impact on the policies of London authorities concerning education, health and the management of municipal companies. The Fabians thought that the road to new social order leads through the expansion of voting rights as well as the magnification of the role and authority of municipal institutions (self-governments). They emphasised the country's role in regulating the relationship between work and capital. In 1900, the Fabian Society joined the Labour Party[7], which allowed for this idea to have a far greater reach.

Initially, the theory of industrial democracy was also a reflection of the increasing English labour force, the socio-political situation of which was constantly improving, as a result of the government's operations. In the 1870's, this was not possible because of, among others, the abolishment of the provision of the legal responsibility for protesting as well as for breaking the labour agreement by an employee. Trade unions were given a legal personality, which guaranteed the inviolability of their leaders and trade cash offices in the case of a strike, whereas workers were meant to be treated on par with entrepreneurs during judicial investigations. Among the additional elements that influence the development of the concept under discussion, one must also mention the workers' struggle initiated at the end of the 1890's in order to improve working conditions and to gain representation in the parliament[8].

The discussion on the forms of industrial democracy in companies was also undergoing thanks to the initiative of European trade unions. However, it should be noted that there are differences in the range of the institutional representation of employees in companies. The dominant role was played by the view, which stated that the priority of trade unions is not to engage company management by having representatives in the management board (e.g. trade unions in the south of Europe, in Scandinavian countries as well as in Great Britain). Trade unions thought that the introduction of employee representatives into the top rungs of companies would

6 S. Rudolf, Demokracja przemysłowa w rozwiniętych krajach kapitalistycznych, Warszawa 1986, p. 19.

7 H. Zins, Historia Anglii, Wrocław 2001, p. 321-322.

8 H. Zins, Historia Anglii, Wrocław 2001, p. 320-321.

lead to an unavoidable conflict between work and capital[9]. The consequence of such a stance was aimed to create a strong position of the trade unions beyond the corporate structure of the company. The main focus was placed on the development of independent collective negotiations with employers concerning the wages and working conditions of employees.

A different stance was especially presented by German trade unions, who saw the importance of employee representation not only during collective negotiations, but also when engaging in organisational matters of the company. They thought that, thanks to this, companies will become more democratic, competitive as well as effective. This trend only gained approval in Europe after World War II along with the desire to create a more just global society[10], in which forms of industrial democracy would play a central role. In reality, these views were only realised in some national companies.

Another heyday of the view on industrial democracy took place in the 1970's as a result of different 'forms of conflict' in western nations, especially student and worker demonstrations in France and the wave of strikes in Italy. The participants of those demonstrations emphasised the autonomy of the working class' actions, spontaneously creating workers' committees that were above the existent capitalist economic order and its legal mechanisms[11]. The essence of those movements also found its reflection in the manner that the interests of workers employed in West Germany were portrayed, especially through employee participation in company management in the form of the 'co-deciding' system (*Mitbestimmung*).

From the above, it appears that the discussion on industrial democracy was under way mostly in the context of solutions foreseen in individual countries. As was stated by A. Sorge, it was only the increase of the importance of international companies that inspired representatives of the doctrine to search for 'certain standards' in the field of industrial democracy.

On an international level, the model of industrial democracy gained a real shape thanks to the development of European Union bodies, which initiated partial regulations in this field by means of solutions concerning group releases[12] and the transfer of companies[13]. A wide range of worker's rights, which are a part of the

9 R. Taylor, Industrial democracy and the European traditions, "Transfer: European Review of Labour and Research" 2005, vol. 11, No. 2, p. 157.

10 H. Lewandowski, Uczestnictwo pracowników w zarządzaniu przedsiębiorstwem, "Studia Prawno-Ekonomiczne" 1984, vol. 32, p. 42.

11 A. Sorge, The evolution of industrial democracy in the countries of the European Community, "British Journal of Industrial Relations" 1976, vol. 14, No. 3, p. 275.

12 Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ EUL 48 of 22.2.1975, p. 29).

13 Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of

industrial democracy organisation in supranational companies, appeared especially as a result of the creation of the first supranational company – the European Company (*Societas Europaea*)[14]. The idea of creating a European Company was born in the 1950's, whereas the first official concept of employee participation in the company was presented by the European Commission in the Statute for a European Company project in 1970[15]. The lengthening works over this regulation[16] were primarily caused by an overly controversial solution, according to which employees were to obtain the right to participate in the body of the company. Less doubts were caused by the right to information and consultation, and as a result, in 1994, it was awarded to employees by means of Council Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees[17].

In the evolution of the concept of industrial democracy, one can see two main trends, which were dependant on the traditions of individual nations. The first relies on the tradition of the role of trade unions as entities, which are prepared to fight for employee rights by means of 'conflict'[18]. In this case, the functioning of a company is altered through collective labour agreements. On the other hand, the second trend relies on cooperation with the 'capital', which is expressed through the creation of a non-union representative team.

On the European level, the main reason for the development of the last-mentioned trend should be searched for in the ongoing globalisation, which caused the necessity to 'optimise all economic and social resources as part of national economic systems'. The development of globalisation and IT technologies still requires a 'humanistic' organisation of company operations, also because recognising human capital is one of the factors influencing the competitive advantage of companies[19]. An important concept, which appeared in supranational companies, is the relationship between non-union representatives and trade unions. A tendency can be seen here of engaging trade unions in the sphere of co-managing a company by participating in the appointment of members of bodies representing employees

undertakings, businesses or parts of businesses (OJ EUL 61 of 5.3.1977, p. 26).

14 A. Sorge, Theevolution…, *op. cit.*, p. 275.

15 Proposed statute for the European Company, Supplement to Bulettin of the European Communities 1970 (8), here in after referred to as the 'Project of 1970'.

16 On legislation works over projects of EC Statute see J. Wratny, Regulacja partycypacji pracowniczej w prawie wspólnotowym, "Praca i Zabezpieczenie Społeczne' 1993, No. 4, pp. 4-5.

17 Council Directive94/45/ECon the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups undertakings for the purposes of informing and consulting employees (OJ EUL 254 of 30. 09.1994, p. 64).

18 On the issue of the conflict inherent in the nature of arangement negotiations see: J. Wratny, Problem partycypacji pracowniczej (in:) M.Matey-Tyrowicz, T. Zieliński (eds.), Prawo pracy RP w obliczu przemian, Warszawa 2006, p. 512.

19 See: R. Taylor, Industrial…, *op. cit*., p. 159.

as well as during negotiations in the role of experts. Presenting the mechanisms of industrial democracy in a specific company requires an analysis of the theoretical principles of this concept.

3. The theoretical bases of industrial democracy and their significance for labor rights

In its simplest form, the essence of democracy in the political sense means that members of the society have the right to participate in the organisation and management of a country. The use of the term 'democracy' in relation to employee participation in company management is dictated by the analogy of a company being like a country, but on a microscale[20]. Democracy in the political sense is strictly associated with the rights and responsibilities of citizens as lawful members of the state. As a result of the above, in industrial democracy, we can recognise the existence of employee citizenship within a company. The use of the term 'democracy' in relation to employee participation can also be associated with the right of subjects that represent employees to employ legal norms. The law is one of the essential competencies possessed by the state authorities[21].

It is essential to determine the current way of justifying the participation of employees in managing a company with the use of the concepts of political democracy and citizenship. In order to obtain the appropriate differences, a reference point for further solutions will be provided by one of the key British theories on industrial democracy and industrial citizenship. That concept was strictly associated with the right to associate oneself with trade unions.

The theory on the relationship between citizenship and industrial citizenship was developed by a British sociologist, Thomas Humphrey Marshall, in the 1950's[22]. It became the model for later solutions in this field. According to T.H. Marshall, there is a basic plane of equality between people, which is based on the full participation in collective life. He claims that political rights detached from civil rights when not only men, but also women were awarded with the right to vote[23]. As one could imagine, this meant that political rights became closely connected with citizenship, understood as the participation in a given community. T.H. Marshall thought that social rights only came after political and civil rights.

20 T. Wuestewald, B. Steinheider, Police managerial perceptions of organizational democracy: a matter of style and substance, "Police Practice and Research" 2012, vol. 13, No. 1, p. 44.

21 W. Sanetra, Demokracja pracownicza wczoraj i dziś, "Acta Universitatis Wratislaviensis" No. 1690, Prawo CCXXXVIII, Wrocław 1994, p. 117.

22 *Ibidem*, p. 118.

23 T. H. Marshall, Citizenship and social class and other essays, London 1950.

A political right is the right of association. This right is given to the citizens of a particular country. According to T.H. Marshall, the right to create trade unions and collective negotiation institutions (collective labour agreements) contributed to the occurrence of the 'secondary' citizen status in the industry[24], thereby completing the system of political rights. Trade unions have created a secondary system of industrial citizenship, which is parallel and supplementary in relation to the system of political citizenship.

As a consequence, the author articulated a unique thought that industrial citizenship should be treated as a group of rights that are sperate from social rights. First of all, he assumed that it is an expansion upon the freedom of association, and not the right to a predetermined wage or to other social matters. Second of all, in contrast to social rights, those rights are of an 'active' character, i.e. they require the active participation of citizens in order to have an impact on the community. As a result of this, they more so resemble political rights, which give citizens political power in order to alter the composition of the government.

A question arises if the idea of citizenship, which is strictly associated with the operation of trade unions in T.H. Marshall's concept, can still be related to companies when taking into account the ever-decreasing number of trade unions[25].

It is also worth considering if the concept of industrial citizenship can be associated with forms of representing employees other than trade unions.

It must be stated that, currently, there is still a need to explain the relationship between citizenship and work in order to better understand the employee participation in company management. In the doctrine, an attempt was made to pinpoint universal values that form the basis for industrial citizenship. The modernisation of the concept of industrial citizenship occurred through a stricter cross-reference of this theory with industrial democracy. The results of those investigations consist of double-sided findings. First of all, it was determined that a particular characteristic of civil rights, which, in a sense, explains the basis for employee participation in company management, is the reference to a community[26]. Together with industrial democracy, industrial citizenship makes it possible to treat a business as a community, in which employees also participate. It is in this community that important decisions are made, which have an impact on individuals and communities. This is why it is assumed that it is undemocratic to deprive employees of their contribution in making such decisions[27].

24 *Ibidem*, p. 20.

25 *Ibidem*, p. 44.

26 On the level of unionization in particular member states see: J. Stelina, Związki zawodowe a pozazwiązkowe przedstawicielstwo pracowników w zakładzie pracy, (in:) Z. Hajn (ed.), Związkowe przedstawicielstwo pracowników zakładu pracy, Warszawa 2012, p. 171.

27 A postulate of introducing the term 'community of the staff of the workplace to legal language was proposed also by A. Sobczyk, W sprawie demokratyzacji przedstawicielstwa załogi, (in:) J. Wratny

A similar theory, which strictly refers to industrial democracy as a starting point, assumes that people are able to manage themselves. As a result, one of the ways of conceptualising the very nature of an organisation is the system of a voluntarist cooperation between interested stakeholders. By stakeholder in a given company, we should understand: clients, suppliers, employees, shareholders and the community. Managing some of those relationships is somewhat like managing a political system. For example, shareholders have the right to choose representatives of the management board. Therefore, it cannot be assumed that they are undemocratic in the philosophical sense of managing and basing on a voluntary service, since those relationships are slightly different to the voting power in a political system[28]. This is why democracy in this sense allows for larger groups of employees to influence the processes and decisions made within a company, and makes it possible for employees to become equal partners of workplace relationships[29]. It is becoming more common for employers to notice the need to invite employees to participate in management, considering the fact that it favors an increased openness to innovation.

Second of all, a democratic system assumes that the contribution of citizens cannot solely be limited to periodic elections. The essence of participation relies on it providing the possibility to learn through the action and interaction with others. It is considered that this not only favours political processes, but also self-realisation, while, at the same time, having psychological advantages. In the case of industrial citizenship, such a view on citizenship accentuates the active participation of employees in industrial production in order to have a quantitative (wages) and a qualitative (dignity) impact on the working conditions[30]. Additionally, it is widely accepted that industrial citizenship is a means of making it impossible for people to achieve common goals and complete common tasks. As a consequence, providing employees with 'greater needs' supports their effectiveness, which increase the competitiveness of companies.

In the modern discussion on industrial democracy, besides the 'refreshed' concept of industrial citizenship, the term 'corporative citizenship' also appears[31]. This expression is derived from treating a corporation like a citizen of a community, such as a commune, a voivodeship or a country, and entrusting it with responsibilities

(ed.), Aktualne problemy reprezentacji pracowniczej w zbiorowych stosunkach pracy, Warszawa 2014, p. 50.

28 G. Mundlak, Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just want my wages, Tel Aviv University Law Faculty Papers 2008, paper 82, "Theoretical Inquiries in Law" 2007, vol. 8, p. 549-552, and the literature quoted therein.

29 J.S. Harrison, R.E. Freeman, Is organizational democracy worth the effort?, "Academy of Management Executive" 2004, vol. 18, No. 3, p. 52.

30 L. Florek, Demokratyczne (zbiorowe) stosunki pracy, (in:) Problemy prawa pracy. Księga poświęcona Zbigniewowi Salwie, "Studia Iuridicia" 1992, vol. 23, p. 23.

31 G. Mundlak, Industrial…, *op. cit*., pp. 553-554.

that are expected from citizens – people. This view is closely related to corporations creating a positive international image as part of the so-called 'social responsibility of business' as well as creating corporation policy codes, also called the codes of good practices[32].

To sum up the hitherto made assumptions, it must be emphasised that referring to the concept of industrial democracy and industrial citizenship draws attention to the two main rights of employees as part of the participation in company management. First of all, the right of employees to call forth their representatives is accentuated (voting rights). Second of all, employees are given the right to actively engage in company matters by receiving appropriate information and the ability to express one's opinion. A characteristic feature of the ideas of industrial democracy and industrial citizenship is also the fact that attention is being paid to the economic effect of the employee participation in management[33].

4. Distinctive features of industrial democracy within a European Company

A European Company is a supranational structure, the employer of which has provided employees with the opportunity to participate in the management of the company. Despite the small number of research on this topic, the goal of these considerations is not a detailed discussion on the entire regulation related to the employee participation in company management. The conducted analysis will aim to answer what is the main trend in the matters of industrial relationships in a European Company in comparison with the hitherto solutions that were practiced in the laws of specific member states.

The first, distinctive characteristic of employee participation in a European Company is the dependence of that participation on the initiative on the employer's side. Article 3, section 1 of Directive 2001/86 states that the management board or the administrative bodies of companies participating in the creation of a European Company draw up a plan of its creation and make the necessary steps in order to initiate negotiations with representatives of the company employees concerning the conditions of the employees' participation in the European Company. This means that employees, or their representatives, do not have to submit a formal motion in this case.

As a matter of fact, the participation of employees in a European Company is guaranteed in a way. This solution, which was unheard of in European nations, foresees that the registration of a European Company that employs workers

32 *Ibidem*, p. 560.

33 M. Gładoch, Przedstawicielstwo pracowników w dobie rozwoju gospodarki globalnej, "Praca i Zabezpieczenie Społeczne" 2009, No. 8, p. 3.

is dependent on the prior conclusion of agreements concerning employee partnership. The above obligation was imposed by a European Union legislator in Article 12, section 2 of the regulation on EC statute[34], which makes the creation of a company dependent on the fulfilment of one of the following conditions: there was a conclusion of the agreement on the conditions of participation, or a decision was made not to initiate negotiations or to end the negotiations after their initiation and basing on the principles of informing employees, or when the time period dedicated for the negotiations has expired, and no agreement was concluded. In the last of the mentioned cases, registering a European Company requires the parties to accept prearranged 'statutory' conditions of participation.

The fundamental element of employee participation in managing a European Company is the priority of negotiation solutions between the employer and the employees concerning the conditions of participation. This is accounted for in pt. 8 of the preamble of Directive 2001/86, which states that specific procedures of informing employees and consulting employees on a transnational level, as well as participation, should be determined firstly by means of an agreement between the parties or, in the case of a lack of agreement, through the application of auxiliary norms. This leads to a conclusion that all procedural and material principles of employee participation are not enforced by the law in the first place. This differentiates the system of employee participation in company management from the one known in some European countries thus far (Germany)[35].

From the point of view of these considerations, it is important that, in the case of coming to an agreement on the conditions of participation, the employees are not represented by trade unions, but by a new, unheard of entity – the 'special negotiation team'. The members off this entity come from countries in which companies participating in the creation of the European Company employ workers. The European Union legislator does not pinpoint entities, which are responsible for choosing the member of the special negotiation team, leaving this decision to the legislation of member states. The Polish Act on the European Company[36] implements Directive 2001/86 as the primary rule for appointing members of the special negotiation team and determines their appointment through a representative union organisation. It is only in the case when this procedure is unsuccessful that the right of appointment is given to the employees – team meeting (Article 65 of the Polish Act on the European Company). First of all, this leads to a conclusion that trade unions

34 More on the issue see: J. Stelina, Zakładowy dialog społeczny, Warszawa 2014.

35 Regulation No. 2157/2001/EC of 8 October 2001 on the Statute for a European company (SE), (OJ ECL 294 of 10.11.2001), here in after referred to as 'regulation on the SE statute'.

36 B. Keller, F. Werner, The Establishment of the European Company: The First Cases from an Industrial Relations Perspective, "European Journal of Industrial Relations" 2008, vol. 14, No. 2, p. 163.

have a decisive influence on the appointment and activity of the representatives of 'Polish' employees in a special negotiation team[37]. Second of all, there is no doubt that the members of the special negotiation team will consist of people that come from different companies from numerous countries, who have different experiences in the field of industrial democracy. As a result of the fact that the appointed representatives can have contradictory interests, there is a fear that this type of a structure can weaken the negotiation power of the employees.

The key meaning in the context of the forms of representative democracy in the now established European Company is had by the freedom that the parties have when choosing the way in which employees will participate in the management. The European Union legislator is proposing participation by means of forms foreseen in representative democracy, i.e. through a new – compared to trade unions – entity, which is the 'representative body' as well as through the representatives of employees that are in the management body (in the monistic model[38]) or in the supervisory body (in the dualistic model). It should especially be emphasised that the parties of the agreement on employee participation can determine – instead of the representative body – another (authorial) procedure of informing and consulting (Article 4, section 2, item 'f' of Directive 2001/86).

The participation of employees in the management of a European Company is realised through a mechanism that includes informing, consulting and participation[39] (Article 2, section 'h' of Directive 2001/86). Therefore, it not only relies on the appointment of representatives, but also on the active influence when it comes to company matters, which is especially visible in the case of informing. In literature, it is rightly noticed that employees have the right to information, which is of a 'vital significance' for them[40], and the bodies representing the employees are obliged to communicate information as well as state the stance and interests of the employees[41].

37 Ustawa z dnia 4 marca 2005 r. o europejskim zgrupowaniu interesów gospodarczych i spółce europejskiej (Dz.U. z 2005 Nr 62, poz. 551 z późń. zm.) [Journal of Laws of 2005 No. 62 item 551 as amended], herein after referred to as the 'act on European company'.

38 In such a situation, the literature says about treating employee representations as a prolonged arm of trade unions. See: J. Wratny, Związki zawodowe i inne formy przedstawicielstwa pracowniczego. Panorama zagadnień, (in:) Aktualne problemy…, *op. cit*., p.15.

39 In a monistic system, there is only the Management Board in a company, whereas in a dualistic system – the Management Board and the Supervisory Board. In the European company, founders, while drafting a company's statute, have a right to choose freely one of the models of directing a company, what is provided for in Article 38b of the regulation on the SE statute.

40 As it results from Article 2 pt k of Directive 2001/86, participation means not only the influence of the body representative of the employees and/or the employees' representatives in the affairs of the company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ, but also the right to oppose the given candidatures.

41 J. Wratny, Prawo pracowników do informacji i konsultacji w sprawach gospodarczych, "Praca i Zabezpieczenie Społeczne" 2006, No. 6, p. 30.

To sum up, it must be stated that the main trend of changes in the field of employee participation on a European level is dependent on the 'elasticity and the use of soft law techniques'[42]. This is primarily supported by the experiences of member states in the field of works on the statute of a European Company, which, for over thirty years, were not able to make uniform settlements on employee participation because of the different cultural traditions. Therefore, the view stating that no fundamental increase (improvement) of the mechanisms of industrial democracy should be expected in a European Company through the introduction of 'hard law' seems to be correct[43].

It should also be noted that, because of the priority of negotiation forms of participation, in practice, we can come across substantial differences between different European Companies. The content of agreements concerning employee participation, adapted to the needs of the negotiation parties without prior substantive standards, can therefore lead to a situation where it will be hard to talk about any common, homogeneous system of industrial democracy in a European Company.

5. Summary

'The relationship of capital and work is fundamentally undemocratic', as was noticed by D.R. Biggins[44]. Even at the end of the 19th century, it was noticed that the existing differences between capital and work need to be overcome on the path to the democratisation of industrial relationships. In particular, this thought was expanded upon after the traumatic experiences of World War II. The development of industrial democracy was meant to 'ease' tensions and to make the labour market more just.

Initially, the regulations of given countries were dominated by the model of industrial democracy, in which every negotiated agreement between the employer and the employee was part of a battle and not a compromise established as part of cooperation. The decisive role in this model was played by trade unions. Means of representation that were not part of trade unions became more popular after World War II. The idea of industrial democracy in its theoretical conceptualisation was perceived in a similar way, i.e. through the operation of trade unions. A theory

42 A separate problem, omitted here due to its wideness, is determination whether there has been an access to information on employees non-associated in trade unions, under the Polish act on European company.

43 B. Keller, F. Werner, Industrial democracy from a European perspective: The example of SEs, "Economic and In- dustrial Democracy" 2010, vol. 31, No. 4S, p. 44.

44 *Ibidem*, p. 49. Additionally, this conclusion is supported by prolonged works on regulation concerning European private company, where it is envisaged that employees' participation in management will be regulated in an act directly binding in member states – in a regulation. See more on the issue: Giedrewicz-Niewińska, Wpływ wielkości pracodawcy na uczestnictwo pracowników w zarządzaniu zakładem pracy, (in:) G. Goździewicz (ed.), Stosunki pracy u małych pracodawców, Warszawa 2013, pp. 269-274.

appeared, which treated the right to collective negotiations as an element of the status of citizens, who have the right to associate themselves with trade unions. Due to the above, it was thought that citizens have social rights that are acquired not only through the use of political rights (e.g. the choice of appropriate authorities), but also through collective negotiations. In this way, the concept of a 'secondary' industrial citizenship appeared.

The changes that occurred in industrial relationships (as a result of globalisation and the development of IT technologies), as well as the decreasing number of trade unions[45], required the search for universal values, which were independent of national traditions and union movements, forming the basis for industrial democracy and industrial citizenship on the European level. In modern conceptions, it is clearly emphasised that democracy in a workplace cannot be a sheer example of political democracy. It should be acknowledged that industrial democracy should only be based on democratic assumptions; it should create a 'democratic space'[46]. Therefore, on the one hand, there is an attempt to justify industrial democracy using some philosophical values and, on the other hand, using arguments of an economic nature. Currently, it is recognised that the justification for employees to participate in management is perceiving the company as a community, the members of which (including workers) have defined rights. Moreover, it is accepted that, since the democratic system assumes active participation of its citizens not only in voting, then workers should be given a share in company matters in order to ensure self-fulfilment and effectiveness.

The directions of changes that are present in the theory of industrial democracy can also be found in the regulation concerning a European Company. It must be emphasised that the 'model' of employee participation in a European Company is different than national models. Employees have acquired the ability to represent their interests through a representative body, which is independent of trade unions, as well as through membership in a company. Non-confrontational methods of membership have gained major importance. It should be noted that such relationships are influenced by the necessity of reaching an agreement on employee participation in order to be able to register a European Company (Article 12 of the Act on the European Company). This is why there is no need to use conflictual solutions (strikes) when conducting negotiations. As it appears, in this case, the inability to register

45 D. R. Biggins, Democracy at Work, "Social Alternatives" 1993, vol. 12, No. 2, p. 39.

46 A similar situation, when it comes to union movement, existing in the USA, did not lead to formation of non-union forms of employee participation. In the United States, employees receive specific social rights by means of individual negotiations with employers, effects of which are written down in employee contracts. It comes from the assumption that respective groups of employees have different needs. See more on the issue: C. L. Estlund, Citizens of the corporation? Workplace Democracy in a Post-Union Era, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 13-84, New York 2013.

a European Company is a sufficient means of putting pressure on the employer. As a summary, it should be stated that the legal regulation in force in a European Company is continuing a process, which was initiated in 1994 by the directive on European workplace councils, making the principles[47] of employee management on a European level more flexible, which, in turn, leaves the parties with the ability to make autonomous decisions concerning the level and shape of industrial democracy.

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47 V. F. Caimano, Executive Commentary, "Academy of Management Executive" 2004, vol. 18, No. 3, p. 96. Democracy, in a political sense, is based on certain set of values and principles related to the society and the state, composed of: a) the principle of the civil society sovereignty, b) the principle of the freedom and equality of individuals in the society, c) the principle of competition of public life entities, d) the principle of majority, e) the principle of pluralism, f) the principle of consensus, meaning that individuals or organizations competing with each other on formally equal rights, consent to respect the rules of the game and agree to the generally common goals of this game (competition). Also: A. Jamróz, Demokracja, Białystok 1996, p. 6.

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Conclusions and Recommendations (Not Only) *De Lege Ferenda* After the Crisis in the Polish Local Elections of 2014

Abstract: The last local elections in Poland took place on 16th November 2014. The election ended in crisis due to collapse of the electronic system supporting the election. In this article the author claims that the crisis did not happen because of bad electoral law but rather as a result of bad management of the electoral process. The Polish electoral administration needs several reforms. First is a necessary reorganization of the National ElectoralOffice. Second is the evaluation of all procedures, laws and processes concerning organization of elections in Poland. Third, the electronic voting protocol should be given priority.
Keywords: local election in Poland, electoral code, electoral administration, Polish National Electoral Commission and National Electoral Office
Słowa kluczowe: kodeks wyborczy, administracja wyborcza, organizacja wyborów, Państwowa Komisja Wyborcza, Krajowe Biuro Wyborcze

1. Introduction

The elections to the bodies of local government units in Poland, ordered as of 16 November 2014, ended with an unprecedented electoral crisis on the scale of the Third Republic. The failure of the election support system prevented the majority of territorial (municipal, local, district and voivodship) election commissions (TEC) from efficient collection of the results of voting from their subordinate district election commissions (DEC), and consequently from determination of the results of voting and elections of councillors to councils of communes, cities, counties and regional parliaments. As reported by the National Electoral Commission (NEC) during its subsequent press conferences[1], the protocols generated from the

1 Vide record of these conferences is available at the official YouTube channel of the NEC. See: https://www.youtube.com/channel/UC0QkQmdh1jSuntKardYq-Tw (accessed on: 30.12.2014).

IT system in the course of determination of the results of voting contained errors, and, due to the system's inefficiency, part of the territorial commissions was unable neither to verify the correctness of data flowing from the oblasts, nor to distribute the seats or even to print election protocols. Meanwhile, the media, widely reporting on IT problems, informed about distortions in election protocols or even falsified the results of the elections[2]. Consequently, the results of voting and elections in the area of many units were determined without the use of the dedicated IT support, but based on traditional solutions using spreadsheets or simply ordinary calculations. It obviously affected the prolongation of work of the members of election commissions, which, in the situation of great pressure from the media and politicians, deprived of efficient tools supporting the process of determination of the results of the elections, operated in very unfavourable conditions, which only increased the likelihood of further errors and mistakes, and finally only intensified the picture of the crisis.

The attitude of the National ElectoralCommission and its administrative unit in the form of the headquarters of the National ElectoralOffice (NEO) did not make the matter easier, which, in the face of the obvious IT crisis, could not respond in time, delayed the issuance of new directives for election commissions, and constantly informed the public that the IT system was being improved and would be fully operational at any moment[3], and consequently, could not manage the crisis situation neither in the organizational, nor in the communication way. All this only influenced the deepening of the picture of the crisis in the eyes of the public and started the wave of very strong, not always fully substantiated criticism against the NEO, and especially the NEC. As a result, the entire composition of the Commission, together with its secretary, who at the same time was the head of the NEO, handed their resignations on 1 December 2014. However, it did not solve, because it could not solve, the organizational and communicational inefficiency of the central election unit, revealed in the course of the local government elections. This issue is important because in 2015 two more elections, i.e. presidential and parliamentary, take place in Poland. They arouse much more interest and, as a matter of fact, they are much more significant politically, because they determine the future ruling and directions of the state policy for the coming years. It is these elections that determine the legitimacy of political power, which is crucial from the point of view of a democratic state of law.

2 Media revealed *inter alia* that in Szczecin, Krzystof Woźniak won the elections for a president of that city, although he stood up in a different commune. See: W Szczecinie wygrał kandydat, którego nie było; http://wiadomosci.wp.pl/kat,1342,title,W-Szczecinie-wygral-kandydat-ktorego-nie-bylo,wid,17043603,wiadomosc.html (accessed on: 30.12.2014).

3 As an example, at the press conference on 17 November 2014 at 10 p.m., a judge Stanisław Zabłocki claimed that, according to information he received, a segment of information system responsible for printing protocols in elections for village mayors, mayors and presidents functioned properly. Whereas a still nonoperational module used in proportional elections to councils, was to obtain such efficiency in few hours.

Meanwhile, the failure of the IT system, organizational malfunction and imprecision of the NEO, as well as errors in the area of communication and supervisory policy of the NEC, resulted in undermined trust towards politicians, the media and citizens in the election authorities and, more broadly, the election procedures themselves. In the representative opinion poll carried out by the Public Opinion Research Center after the end of the second round of local government elections, the NEC was criticized by as many as two-thirds of Poles (63% of respondents), while only over one-fifth (22%) spoke positively about it. Despite the fact that in all social groups analysed by the Public Opinion Research Center majority of people negatively perceived the NEC's work, still, the highest percentage was recorded among people with the highest social status. The NEC's activity was very critically assessed by 76% of people with higher education, 77% of managers and specialists, 70% of people with income above PLN 1500 per person in the family and of employees of public institutions[4]. It means a spectacular bust of Poles' trust in election authorities, what is so dramatic due to the fact that so far they have enjoyed invariably high esteem, trust and opinion of independent and professional administration.

Despite the nationwide discussion, which started basically the day after the elections, concerning the reform of law and election institutions in Poland, so far neither a scientific analysis of the causes of the crisis, nor a more coherent and adequate vision of the necessary changes has emerged[5]. Unfortunately, most of the proposals, which in the first weeks after the election functioned in the media and political environment, were not comprehensive, overly focused on the codex layer, and often simply missed the point or even were politically conditioned. Meanwhile, the diagnosis must precede the treatment, and not vice versa. Preparation of any recovery plan requires in the first place to identify the causes of the situation and to formulate a detailed analysis of the problem. In this way, it will be possible to identify not only the areas of necessary changes, but also to offer concrete proposals for reforms. The main purpose of this article is to attempt to implement this postulate.

2. Bad management of the IT system implementation project

The direct cause of the crisis was the failure of the election support IT system, and more specifically the system supporting the election commissions determining

4 See: M. Feliksiak, Opinie o działalności parlamentu, prezydenta i PKW, "Komunikat z Badań CBOS" 2014, No. 169, p. 4 et seq.

5 Until completing this article (i.e. until 15 January 2015), there was no comprehensive analysis on causes of the existing crisis. Such an analysis (concerning however only the conduct of the election computerization process appeared on 31 March 2015, when the Supreme Audit Office directed to the National Electoral Office a post-audit address concerning using the State budget funds for providing IT services during municipal elections in 2014. Post-audit findings formulated by the SAO virtually in its entirety confirmed conclusions reached by the author of this article on the basis of the analysis conducted by himself.

the results of voting and the results of the elections called 'Election platform'. One of the most important functions of this system was to enable the district election commissions to introduce and verify, in terms of arithmetic correctness, the results of voting established by the commission while counting the ballots, and then to prepare the voting protocols (printing the paper version of them) in the oblast and transfer the results to the central system (sending data electronically), which was to be used by the higher-level commissions. On this basis, the TECs should in turn verify the correctness of determination of the results of voting by the DEC, establish the collective results of voting (arithmetic aggregation of votes established in subordinate district commissions) and, above all, the elections (i.e. transform the votes into the seats) in the area of municipality (municipal election commissions), city (urban election commissions), county (county election commissions) and voivodship (provincial election commissions), respectively. On the other hand, correctness of the TEC's arrangements was to be verified by the competent local election commissioners operating in their subordinate area as plenipotentiaries of the NEC[6]. It should be emphasised that this system was not used, and was never planned as such, as an electronic device for counting votes. In fact, these were and still are counted manually by the members of the DEC in Poland. The role of the system was, however, to eliminate possible accounting mistakes made by the commission, to prepare correct printouts of the protocols of voting and elections, and to send them to the central system.

Despite some difficulties and errors in generating voting protocols, the IT system essentially worked at the DEC level. The problems arouse, however, from the TEC level, where, due to errors and distortions in the printouts of the forms (first they could not be printed), it was impossible to divide the seats between the election committees in the proportional elections. As a result, the TECs were unable to announce the complete election results. In the absence of protocols from the TEC, analogous verification and collective results of the elections could not be made by the provincial election commissioners (for the voivodship area) and the NEC (for the country area). The expectation of restoring the full efficiency of the system, which until the end did not achieve such efficiency, as well as the lack of preparation by the NEO of alternative tools supporting determination and verification of the results of the elections led to the situation where the disoriented territorial commissions were wasting their time, and in the end were forced to carry out the procedure of verification, summation and division of the seats, based on hastily prepared,

6 See § 3 of the resolution of the National Electoral Committee of 22 September 2014 ondetermining the conditions and manner of using electronic technology in elections to commune councils, poviat councils, voivodeship assembies and councils of districts of the capital city of Warsaw, as well as in elections of village mayors, mayors and presidents of cities (M.P. poz. 903) [Official Gazette of the Republic of Poland, item 903).

often only on their own, traditional tools, such as spreadsheets, calculators, etc. Consequently, the process of determination and announcement of the results of the elections throughout the country lasted for a week.

Many critics of the NEC and the NEO saw the main reason for this failure in the contractor, claiming that it was a company without proper experience, with too little staff potential, employing students, and the criterion determining its victory was the low price. Errors were also alleged in the tender specification and the tender procedure itself. Not making assessment of neither the company's IT capabilities nor formal terms and conditions for the tender, it should be noted however that the terms of reference prepared by the NEO for the IT system made the price only valid at the level of 49%, while the rest of points was to be awarded for the preparation of preliminary projects of two system modules, including the most important, i.e. the election calculator for the DEC[7]. Moreover, this module essentially worked on the date of voting. It was a short time for completion of the entire system and, above all, not enough time for its post-production evaluation performed before the elections, first by internal testers and later by target users, that led to the failure (the tender was decided on 4 August 2014[8]). The mistake was found on the side of the IT project implementation management, already at its very beginning. Focusing on the formal aspect of tenders, the NEO completely missed the sphere of actual planning. No serious analysis of the risks in the project was carried out, the assumptions of the system or even the schedule for its implementation were not consulted with the branches and end users, and no contingency plan and replacement tools were prepared. The IT implementation project was poorly coordinated and supervised. The remarks made during its implementation were not always taken into account, and the defects were not repaired, probably due to time and personnel shortages. Also, the contractor received some key data too late, and protocol printouts were not audited at all[9].

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7 See: Specyfikacja istotnych warunków zamówienia na "Zaprojektowanie i wykonanie modułów do wyborów samorządowych 2014r. wraz administrowaniem i utrzymaniem" of 11 July 2014 (KBWZP-3710-16/14), point XII, p. 6; http://pkw.gov.pl/zamowienia-publiczne/zaprojektowanie-i-wykonanie-modulow-do-wyborow-samorzadowych-2014r.-wraz-z-administrowaniem-i-utrzymaniem.html (accessed on: 30.12.2014).

8 See: Ogłoszenie o wyniku postępowania na "Zaprojektowanie i wykonanie modułów do wyborów samorządo-wych 2014r. wraz z administrowaniem i utrzymaniem" of 4 August 2014 (KBWZP-3710-16/14),http://pkw.gov.pl/zamowienia-publiczne/zaprojektowanie-i-wykonanie-modulow-do-wyborow-samorzadowych-2014r.-wraz-z-administrowaniem-i-utrzymaniem.html (accessed on: 30.12.2014).

9 Maciej Cetler, Vice-President of Nabino company, which co-created the system for election management, explained himself to journalists that 'information on municipal authorities (e.g. the council of Warsaw, assembly of Mazowieckie Voivodeship) to which election will take place in the given circuit, necessary to prepare software, Nabino received only on 15 October. He added that it had been only from this date that the company had been able to carry out reliable tests in terms of

What to do to avoid such situations in the future? First and foremost, the project management of the IT implementation should be approached professionally. It would be necessary to thoroughly review the NEO's IT resources (hardware, software, people, management), create a project team dealing with this only, and if necessary, also with the use of external experts and institutions, e.g. within the technical dialogue (competent state authorities, research institutes, the Polish Chamber of Information Technology and Telecommunications, companies from the IT industry, etc.), which would elaborate, with the active participation of end users of this system (primarily all the NEO's field branches and IT specialists in election commissions), substantive and IT assumptions (and therefore not only for the needs of a single election campaign) of the entire election IT system. Subsequently, this team should prepare the necessary tender specification, select a contractor, manage the implementation project of this system (in accordance with the project management methodologies, such as PRINCE2, developed for the needs of implementation of such complex tasks), coordinate the integration of this system, perform an ongoing evaluation and respond appropriately to occurring irregularities.

3. Lack of internal 'system reflection'

Contingency plan is an important part of planning in every organization, in case of unforeseen situations. This is one of the foundations of modern management. Decision makers must understand that the more complex the organization and the dynamic environment, the greater the need to prepare such plans, as the likelihood of unexpected events increases. Such a plan must, therefore, specify alternative modes of action in case the relevant plan is unexpectedly disrupted or no longer suitable in changed conditions[10]. Analysing the minutes of the NEC's meetings revealed in 2014 owing to Mr. Przemysław Wipler[11], it can be seen that nobody seriously considered the situation in which the elections could take place without IT support, even though the first serious signals of irregularities were already appearing. Moreover, they raised legitimate concerns of some members of the Commission. This is undoubtedly a supervisory mistake, but a non-situational one. Similar coordination and IT problems (although on a smaller scale and, due to extra minutes, solved on a regular basis) have already occurred in the past. The locations of a possible crisis would therefore be identified, if the irregularities occuring in the organization of the

calculating election results. See: Przestrogi Nabino. Wyjaśnienia firmy współtworzącej system do obsługi wy- borów;http://samorzad.pap.pl/depesza/szablon.depesza/dep/146232/(accessed on: 30.12.2014).

10 R.W. Griffin, Podstawy zarządzania organizacjami, Warszawa 2004, pp. 223-224.

11 See: Ujawniamy protokoły PKW z 2014 roku; http://www.wipler.pl/2014/11/ujawniamy-protokoly-pkw-z-2014-roku/ (accessed on: 30.12.2014).

IT support process in each elections were analysed seriously, such as: inappropriate coordination between the system integrator, which was the NEO, and the system contractors, failure to meet IT implementation schedules, lack of software audits, failure to react or disregarding by the decision-making centre of the problems signalled by the local branches of the NEO, etc.

So, here we are dealing with a serious general mistake regarding the issue, which, using the language of the system theory, can be identified as 'the lack of internal reflexivity'. This reflexivity, in the described case, should take the form of a constant, objective and professional analysis of both the election processes managed by the NEO and supervised by the NEC, as well as the modes of action and response of both institutions to the changing situation. The lack of both current and system evaluation of the election procedures applied led to the situation in which, in the face of the IT crisis, the right decision-makers did not have sufficient information enabling them to respond adequately and quickly to the crisis situation as well as to take actions aimed at long-term optimization of election process management.

In order to address such situations in the future, it is necessary to develop permanent procedures for evaluation and internal audit of the organization. It concerns the analysis of legal and IT 'instrumentation' of the both election administration and the institution itself, adaptation of its structure and employment to current tasks, identification of system 'bottlenecks' in the election process and, above all, the organizational analysis of various election and referendum actions. Such an idea should later contribute to the elimination of defective solutions and optimization of the existing ones, but above all, it must become a starting point for planning subsequent actions. The scope and continuity of these works must be handled by a specialized team of people with high analytical competences, preferably identified as a separate team in the NEO's structure at the central level. Such an analytical and legal team would be 'powered' by both information and analyses coming from the area. Therefore, this means the necessity to sensitize the branches to the matters of organizational efficiency assessment and the analysis of applicable law from the point of view of practice.

Regardless of the appointment of such an internal team, the NEO should cooperate with various specialized analytical institutions – both of the state nature, but primarily of the scientific and research nature – to continuously evaluate its activities and results. To that end, a permanent, working, interdisciplinary team (or thematic teams) should be established at the NEC/NEO, composed of high-class scientists, external experts familiar with the issues of election and referendum law, as well as election systems, modern methods of management and communication, who know the practical and organizational determinants of election processes in Poland and have IT knowledge (at least at the level of vision). On the one hand, this team would serve advisory and opinion-giving functions, and on the other – analytical and

scientific functions for the needs of the NEC/NEO[12]. It would be the role of a kind of external auditor, who would provide independent, scientific and, what is important, external views on election procedures. In this sense, it would be an important supplement and strengthening of the analytical team in the NEO. Moreover, it could deal with issues and problems that are not addressed directly by the NEC and the NEO or are not preferable by them to handle due to political or organizational reasons, and for which there are social expectations, such as pointing out future directions of changes in the electoral law, analysing the phenomenon of invalid votes, taking actions towards dissemination of knowledge about the elections and activation of society, etc.

However, the idea of establishing a similar research, analytical and educational agenda as a separate institution directly reporting to the NEC, is not new. Already in 2005, the idea of establishing the National ElectoralInstitute appeared. According to the assumptions of this project, the NEI would be an apolitical, permanent body that brings together the experts in the fields of law, political science, sociology, social psychology, pedagogy and administration. It would have its own legal personality, but the supervision over the Institute's activities would be carried out by the National Electoral Commission. Thus, a sui generis 'institutional triangle' would be created, under which two bodies would operate under the auspices of the NEC: the existing National ElectoralOffice (as a technical and administrative body) and the National ElectoralInstitute (as a research and education body). The new institution would conduct consultative and advisory activities for the needs of the NEC (but not only), extended with analytical, educational and information activities regarding comprehensive election issues[13].

4. Reform of the structure of the Polish electoral administration

Another important aspect of the described crisis was slowness or even absence of decisions in the face of IT failure. Analysing the statements of the NEC's members, one could get the impression that they are not fully aware of the scale of irregularities and errors that occurred. As a result, reassuring messages that 'further errors were removed' and 'the system efficiency was restored' could not sound credible in a situation in which the TEC's members, surprised by such position of the NEC, still

12 It should be noted here that such back-up facilities to a great extent already exist in the form of two Centres of Electoral Studies (research centers situated at the Faculties of Law of the Nicolaus Copernicus University in Torun and the University of Lodz). It is worth to take advantage of this potential, especially because it does not involve necessity to incur additional expendituresor introducing changes to the law.

13 See: J. Zbieranek, Aktywizacja wyborcza obywateli. Propozycja powołania Państwowego Instytutu Wyborczego, Warszawa 2005.

could not complete the procedure of verification and aggregation of the results of voting from the districts and, consequently, determine the results of the elections in their area and print out the appropriate protocols[14]. Without prejudging at this point whether the contractor or the NEO's election IT team was guilty, undoubtedly, the responsibility for this disinformation, which only deepened the scale and duration of the crisis and was to cause huge losses of a reputational nature for the NEC, and more broadly, undermined the public trust in the election institution and election procedures applied in Poland, resulted from incorrect information flow on the contractor's line – the NEO's election IT team – the NEO's field branches – the NEO's managers – the NEC's members. The persons managing and coordinating the IT implementation project bear direct responsibility for this state of affairs.

False image of the situation, lack of evaluation of previous actions and drawing conclusions from organizational and IT errors found, failure to use managerial tools, non-responsiveness during the crisis and incorrect communication policy, both internal and external, led to the decision-making paralysis and, as a consequence, to the resignation of the entire composition of the NEC and the head of the NEO. However, the honest attitude of the decision markers did not solve any of the systemic problems. The analysis of the crisis shows that the organization of the IT implementation project and information flow within the NEO failed most of all. For this reason, already during its course, some experts pointed out that the competences and the very nature of institutions, such as the NEC and the NEO, should be separated. The first one, however, is the guardian of the correctness of the election process, while the other one is responsible for the organization of the elections, and mistakes were made there[15]. Similar conclusions were formulated during the expert seminar organized by the Stefan Batory Foundation in Warsaw[16]. In the material prepared after this meeting, it was pointed out that in the current legal state, the NEC is responsible for the performance of the most important tasks related to the

14 Before 6 a.m. on 18 November 2014, the NEC informed media, referring to information from the software executor and an official responsible for providing IT services during the elections at NEO, that: 'the IT system of the National Electoral Commission has reached the full efficiency'. Whereas, in many places, instead of fully generating protocols, the system printed only a partially completed template, where a document ready to be signed should had appeared. See: PKW zapewnia: System działa w pełni; http://www.rmf24.pl/ raport-samorzad-2014/news/news-pkw-zapewnia-system-dziala-w-pelni,nId,1553665utm_source=paste&utm_ medium=paste&utm_ campaign=chrome (accessed on: 09.01.2015).

15 See: an utterance of Anna Materska-Sosnowska, a political scientist, to Onet portal: P. Henzel, Dr Materska- Sosnowska: ruszyła lawina, to największy kryzys od 1989 roku; http://wiadomosci.onet.pl/tylko-w-onecie/dr-ma- terska-sosnowska-ruszyla-lawina-to-najwiekszy-kryzys-od-1989-roku/ec33p (accessed on: 28.12.2014).

16 Information obtained through the author's participating observation in a seminar organized by the Stefan Batory Foundation in Warsaw on 8 December 2014 titled: *Elections: credibility and efficiency*.

elections, while the organizational, administrative, financial and technical conditions associated with the organization and holding of elections and referenda, is the domain of the NEO[17]. Therefore, the office is the institution supporting the NEC, but it is not directly responsible for such key organizational areas as: provision of IT software [18] or determination of results of elections, even if in practice it coordinates all related activities[19].

It seems that in the face of errors in the decision-making process and ineffectiveness of supervision over the NEO, while at the same time placing the legal responsibility on the NEC for the correctness of the elections, serious consideration should be given to changing the relationship between these institutions. It would be even indispensable if it was decided to establish – as described in the previous section – the National Election Institute. This, of course, requires a code change, but firstly we should consider what nature the election administration would get in Poland.

Source literature contains many classifications of the election administration organization models in modern democratic countries. However, one should agree with Andrzej Sokala that the most clear division was distinguished on the basis of its independence criterion. In this sense, one can distinguish the governmental election administration (such a model can be found, among others, in Austria, Belgium, the Czech Republic, Denmark, Germany, Sweden, Italy and Great Britain), the administration completely independent of the government (it exists in Poland and in almost all Eastern European countries), as well as a mixed model, combining features of both (including France, Spain, Portugal, Slovakia and Hungary)[20]. The model of independent election administration adopted in our country (and in almost all countries with a similar history), is quite obvious in the light of the experience of a bygone era and the distrust of citizens in the state organs, understood in this context[21]. Moreover, this model has worked well over the last 20 years, and the crisis associated with a single election should not obscure this fact. It should be clearly stressed that the judging panel of senior election authorities (including, above all, the NEC) guarantees objectivity and independence from all kinds of political pressure. In this situation, the ideas to politicize or more 'sensitize' the composition of these bodies to political factors should be considered a step back. All the more that since 2002 the

17 See: Article 187of the act of 5 January 2011 Electoral Code (Dz.U. z 2011 r. Nr 21, poz. 112 z późn. zm.) [Journal of Laws of 2011 No. 21 item 112 as amended].

18 Article 162 § 2 of the Electoral Code. An obligation to determine conditions and manners of using electronic technology and ensuring necessary software to do so, is imposed on the NEC.

19 See: D. Sześciło, Jakich zmian potrzebuje Państwowa Komisja Wyborcza I Krajowe Biuro Wyborcze?, a paper presented for the seminar organized by the Stefan Batory Foundation in Warsaw on 8 December 2014 titled: *Elections: credibility and efficiency*.

20 A. Sokala, Administracja wyborcza wobowiązującym prawie polskim, Toruń 2010, pp. 42-43.

21 *Ibidem*, p. 154.

level of distrust of Poles in political institutions and governmental administration is still high, especially in relation to political parties[22].

Without negating the assumptions of the model itself, one can, and the past crisis has shown that one needs, to think about the disadvantages of its internal structure. First of all, it should be reformed in such a way as to clearly place the responsibility of specific bodies for the tasks they actually perform and organize the decision-making path. To this end, we should first identify the main categories of tasks that the election bodies face, and then assign them, along with competences and responsibilities, to the appropriate structures to implement them later.

In principle, we can distinguish the following categories of tasks: supervision over compliance with electoral law, organization of elections, election audit, information and education about elections, as well as policy financing control. Issues related to the organization of the elections (including their planning, implementation, coordination of activities of other entities, election informatics, etc.) should be the exclusive domain of the National Electoral Office. Its head could not be so much the executive body of the NEC, but a kind of 'executive power' of the election body.

It also means the need to separate the functions of the head of the NEO and the secretary of the NEC. On the one hand, it would eliminate the possibility of excessive dependence or even domination of the NEC by the NEO, and on the other, it would allow the Office to be fully independent (but also to bear legal responsibility) in terms of the organization of the elections. In this model, the NEO thus becomes a separate, specialized institution dealing exclusively with preparation and implementation of the technical side of the elections. The NEC would be 'separated' institutionally, although not functionally from the NEO. Its role would be to exercise supervision over compliance with electoral law by both the NEO and all public authorities, election committees, and citizens. It would also retain the right to settle disputes and to interpret electoral law. The Commission should also be responsible for the entire normative matter (passing binding guidelines, designing and giving opinions on normative acts related to elections and referenda, etc.) It could also act as a kind of court in election matters and be the highest instance of appeal against decisions of lower-level election commissions that should be directly subject to it. It should be also the addressee of all audits, analyses and inspections performed in relation to any state bodies involved in the election process, in particular the NEO. On this basis, it should later present its recommendations for future. The NEC would therefore retain its own judicial and independent character, as well as the current mode of creation, possibly with the exception of the implementation of the principle of membership cadential rotation.

One can choose one of two options in relation to other tasks. Establish a separate institution, as in the project envisaging the creation of the National Election Institute,

22 Zob. A. Cybulska, Zaufanie społeczne, "Komunikat z Badań CBOS" 2012, No. 33, p. 15.

with a similar or analogous status to the NEO, which would be responsible for the matters of information and election education. It would also act as a specialized, and most importantly, an analytical and auditing body for the NEC and the NEO, organizationally-independent of controlled institutions, which would guarantee its high level of objectivity. On the other hand, the tasks in the field of policy financing control should be excluded from the election administration tasks area and delegated, e.g. to the Supreme Audit Office, as the appropriate body of law control, especially in the field of public finances.

In the second option, all the above tasks (with the possible transfer of supervision over the policy financing to the SAO) would remain the responsibility of the NEO. However, this means the need to radically reorganize the internal, staffing and organizational structure of the Office and to appoint new teams responsible for analysis and audit (e.g. analytical and legal team), as well as election information and education (e.g. election information team). Certainly, all of the above tasks would not be performed by the Legal Team and the Team for Election Organization of the NEO, being already overloaded and undervalued.

5. Improvement of the transparency of the proces of determination of the results of voting and elections

The loss of organizational efficiency of the election institution has led simultaneously to undermined credibility of the procedures of determination of the results of voting and legitimacy of the local government elections. Some claimed that the result of the elections does not correspond to reality, is distorted or 'adulterated', and the parliamentary platform even accused of its falsification[23]. The surprise caused by the good result of the Polish People's Party in the elections to regional assemblies, media confusion related to the brochure format of ballots and validity principles of the vote, as well as the large number of invalid votes only strengthened and substantiated the votes of those who claimed that the results of these elections were unreliable. Immediately there were also ideas to increase the authority of persons of trust, implement current electronic monitoring of the DEC's operation, transparent ballot boxes, alternative way of counting votes, etc. The common denominator of these proposals was the conviction that the process of determination of the results

23 It is about a statement of Jarosław Kaczyński of 26 November 2014 during a Sejm debate on a project concerning shortening the term of office of self-governments: 'From this most important stand in Poland, words of truth must be said: these elections were rigged. Even if someone didn't want to believe it, for various reasons, still a number of invalid votes, as well as this great confusion, which arose during vote counting, delegitimizes these authorities, and a constitutional value of democratic legitimacy of power is definitely higher than a constitutional value, that is cadence'.

of voting, and as a consequence, the elections, ceased to guarantee their integrity. In the hustle and bustle of this political and media storm, hardly anyone noticed that both the DEC and the TEC in Poland were conceived as a non-social mechanism, but a mechanism of par excellence political control of integrity and fairness of the elections. The DEC's members are recruited completely, with the exception of a single 'technical' person appointed by the commune head (mayor or president in cities), out of persons announced by election committees taking part in the elections[24]. Ratio legis of such a solution did not consist in, how it is sometimes mistakenly believed, allowing 'people to earn on the counting of votes', but in making the members of the commissions announced by various committees mutually 'looking at each other's hands', collectively determining the results of voting and jointly signing the protocol constituting the official confirmation of the results established by them. Immediately after the preparation, such a protocol must be hung in the election commission's cabinet, in a place that allows the voters to read it freely. The principle of the social control factor at the level of the DEC is so strongly established in Poland that it was equalled by, legitimate and consequently as the elections renewed in the face of many errors and irregularities in the activities of their members, any postulates of any professionalization of these commissions or implementation of more substantive recruitment criteria, such as the census of education or age.

District committees are an important, but not the only mechanism that guarantees honesty, reliability and transparency of the elections. Equally important, although in practice, poorly used institution of this type are the persons of trust, which are also reported to the commission by election committees. Unless the members of the DEC are not formal representatives of their reporting committees, the persons of trust are essentially responsible for correct counting of votes of their committee. Both have also the right to submit official observations (complaints, irregularities, doubts, etc.) to the protocol of the commission. The commission must then comment on these observations, and the higher-level commissions are required to investigate whether the electoral law was not violated in a given situation. Such observations are also of considerable importance in the situation of considering possible election protests by courts, which is another significant mechanism for controlling the integrity of the elections. In practice, however, such observations are rarely submitted, and they are sporadically associated with serious and substantiated allegations regarding the integrity and reliability of work of the district election commissions.

Electoral Code – like the previous electoral law – contains, as can be seen, a considerable and essentially completely sufficient set of mechanisms ensuring both fairness and transparency in the process of determination of the results of voting and elections. The fact that not all these institutions are actually used in practice, because, for example, election committees do no attach much importance to the

24 See: Article 182 § 2, and with reference to the TEC Article 178 § 3 of the Electoral Code.

moral and intellectual or organizational qualifications of candidates for member of the DEC and persons of trust, cannot in any way burden the Polish election system or, more importantly, its administration institution. It should be clearly remembered here that in Poland the results of voting are not determined electronically, but manually by the members of the district election commissions, who count the ballots with the voted marked on them. At subsequent stages, only the summation and mathematical-formal verification of data determined by the DEC are made. Any possible falsification or irregularities in the determination of the results are possible at the stage of identification and counting the valid votes, which, according to the law, should be done jointly and collectively by all the DEC's members. Unfortunately, in practice, this order is often violated. Please note, that is mostly due to purely organizational reasons. Therefore, there are no substantively justified reasons to claim that the process of determination or announcement of the results was not transparent or was conductive to manipulation. The fact that the official, let us emphasize, collective results in the country were given by the NEC one week after the elections, cannot be any justification for the claims that they were falsified. Over 27 thousand of the DECs throughout the country established and made public (displaying appropriate protocols in their premises) the results of voting in their districts on the post-election night, or no later than on Monday, 17 November 2014. Difficulties and delays appeared, as indicated above, at the stage of verification and aggregation of these data at the TEC level, which for this reason could not create their own protocol for several days. Therefore, the problem with possible non-transparency concerns not the process of determination of the results of voting, but at most the speed and form of their public announcement. Here, one should look for potential mistakes and possible improvements.

It cannot be subject to any discussion that the key factor affecting the sense of integrity and transparency in the process of determination of the results of the elections is the speed of making them public, importantly at the mass level, because only at this level there was a delay. What should be done to restore this sense? What steps can be taken to further improve the transparency of this process? Certainly, this will not be ensured by the implementation of transparent ballot boxes, as postulated during the wave of the last crisis by more and more people. This does not solve any of the problems raised, does not protect against possible attempts of forgery by the members of the commission, but creates only additional technical problems associated with the necessity of securing the ballots thrown in the ballot box against the possibility of revealing the votes.

The first mechanism that already exists, but as indicated above, is not properly used and for this reason one should seriously consider its thorough reform, is the institution of the persons of trust. It should become a key element of social control of the correctness and transparency of the elections at all its stages, and above all at the stage of organization, determination and publishing the results of voting and

elections. For this to happen, the institution should be modified from the person of trust currently acting for various election committees to the function of a national election observer. To this end, the catalogue of entities authorized to report such observers should be extended to non-governmental organizations having in their statute, as a goal of activity, in general, the development or monitoring of the state of democracy in Poland, etc. In addition, it should also be extended to affiliated researchers at national organizational units of a scientific nature. Reliability and scientific skills of the latter will guarantee not only the insight of observations, but also the proper evaluation and conclusions. In the next step, it is worth thinking about creation of tools for such observers in the form of instructions, guidelines, suggestions on what to pay special attention to, as well as checklists, election calculators, and maybe even special training courses, workshops, so that their observation could be on the one hand better in quality, and on the other hand easier for the observers themselves. They could be created, for example, by a special team for informational and educational issues of the NEO or an institution similar to the National Election Institute. Reports and minutes on such observations would not only be a form of social control of integrity and fairness of the voters, but would also be of great importance in the process of evaluation of organizational efficiency of the election commissions.

The second key area is the speed, not so much of determination of the results (this depends, on the one hand, on the efficiency of commission's members, but on the other hand, their supporting IT system), but of making them publicly available. In a situation where the IT support for the elections has been used for the past 10 years at the district level, and the voting protocol is nothing but a printout of the 'election calculator' used by the DEC, from a functional point of view there was a reversal of the relationship between what is the original and what is its derivative. Currently, the paper protocol, which is the official document of the elections and must be produced by the commissions at all levels, is only the computer printout showing the state of the database aggregating the results of voting after its completion at a given level (district, constituency, territorial unit, whole country). Therefore, there are no substantive or technical contraindications for the 'electronic version of the protocol' (in fact the right set of numerical data and other key information authorized by the DEC entering these data into the IT system, as well as verified and approved by the senior commission) to become an official, but electronic document of the elections, appropriately protected from modification, The paper protocol would in turn formally become what it has been for a long time: the paper archival document, constituting a duplicate, or a kind of copy of an appropriate source document, which would be the electronic protocol. As a result, electronic data, immediately after their preparation in real time, could be published on-line through a special system of visualization of the elections, integrated with the election commission support system. For the sake of full transparency of this process, all possible changes, corrections or errors found

after its preparation by the DEC or by the TEC in the verification process, would be included in this visualization with the time, entity and reason for modification, as usually given in repeatedly edited electronic documents. This would revolutionize the process of publishing the results of the elections and would introduce the maximum possible, on a massive scale, transparency of the process of determination of the results and access to them from anywhere and at any stage, without any burden of the election commissions and creation of new IT mechanisms. It would be enough to expand and modify the functionality of solutions used in the past.

The third area is to consider the implementation to the Polish electoral law of the possibility of a conscious and unambiguous vote, not so much 'officially' invalid, because by its legalization it becomes as important as 'against all' or 'for none of the above' candidates in the elections to collegial bodies. In source literature, this institution is called NOTA[25]. Regardless of the terminology used, the main rule in this case is to give the voter the opportunity to evade from the choice of proposals contained in the ballot, in a manner sanctioned by the electoral law[26]. Without resolving the controversy aroused by this negative voting system[27], it should be noted that its implementation in Polish conditions would solve an extremely important problem from the point of view of the transparency of the process of determination of the results of voting, especially in relation to the municipal elections: interpretation of where do such great differences in the number of invalid votes, depending on the type of the elections, come from? In conjunction with the liberalization of the vote validity conditions, consisting, for example, in the recognition, as a clear act of the voter's will, of the signs other than just 'x' (e.g. so-called 'tick', underlinings, markings or other obviously interpreted graphic signs that allow you to clearly assign the voice to a specific option), this could consequently lead to absolute marginalization or actual elimination of invalid votes.

More importantly, the NOTA would create a systemic solution to the problem of the so-called whites, i.e. such ballots, on which the voter did not put any mark, which theoretically opens up the possibility of possible falsification of the results by later adding 'x' on such empty ballots. Its implementation would extend the range of political preferences of the citizens, possible to articulate in the course of the elections, could also be an important 'pro-quality' impulse for specific candidates reported by the election committees and would reduce the pressure for strategic voting, that is, incompatible with its first preference structure. It could also contribute

25 It is an acronym for *none of the above*.

26 M. Waszak, Możliwość wskazania "żadnego z powyższych" na karcie wyborczej – na przekór logice demokratycznego głosowania, Warszawa 2012, p. 5.

27 More on this technique, its pros and cons see: M. Waszak, *op. cit.*; B. Michalak, Żaden z powyższych, (in:) A. Sokala, B. Michalak, P. Uziębło, Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych, Warszawa 2013, pp. 289-291.

to the increase in the voter turnout by encouraging a sincere voting of those who are undecided or those contesting the political scene, and so far practicing electoral abstention, voting strategically, for protest groups, or giving formally invalid votes.

6. Postulates (not only) *de lege ferenda*

The crisis that emerged during the 2014 local government elections was mainly caused by mistakes not of a legal, but of a managerial nature. In particular, mistakes were made at the stage of planning and implementation of the IT support project– no proper risk analysis was performed, no alternative plan was prepared, the deadline for the project was too short and the schedule was unrealistic, and, consequently, there was no time for tests and audits of the software. During the implementation of the project, its ongoing evaluation was not performed and the plan was not corrected even when it was already known, beyond any doubt, that the system would not work as it should. Surveillance, communication within the organization and the environment failed and crisis management skills were lacking. This means that the solutions should be sought in the organizational and managerial sphere, rather than in the legal sphere. However, taking into account the scope and effects (including social) of the disclosed, in the face of the crisis, failure of election administration, it seems necessary to seriously consider a number of code changes, which should, however, be addressed to what actually caused the crisis, as well as to what might become a systemic impulse to counteract similar situations in the future.

Taking the aforementioned reservations and conclusions into account, the following recommendations for entities deciding about the structure of the Polish election model can be formulated:

1) complete, professional and independent audit of both election procedures and institutions applying them (review of the electoral law, applied organizational procedures, identification of processes and tasks performed by the election organization, as well as IT and organizational resources of the NEO, etc.) should be conducted, preferably by an independent expert team acting on behalf of the NEC;
2) develop institutional mechanisms for constant and ongoing evaluation of operations performed by the election institution, and base the planning of future election campaigns on this, prepare legal and organizational recommendations aimed at elimination of mistakes and irregularities, as well as constant optimization of election processes;
3) conduct the internal reorganization of the election administration, which is consistent, functionally-oriented, factual and thought-out, however, does not lead to the loss of 'systemic memory' (chart of organization, job, staff),

preceded by a thorough analysis of tasks and processes implemented by the Office, which should result in:

a) redefining the nature of relationship, responsibility, division of tasks and competences, as well as subordination between the NEC and the NEO;
b) relieving the Legal Team and the Team for Election Organization from all obligations, with the exception of the preparation and performance of the technical and organizational part of the elections;
c) establishment of a working task force – composed of employees of the NEO's headquarters, field IT specialists and external experts – involved in the implementation, management and coordination of IT projects;
d) establishment of an analytical and legal team within the NEO structure that would take over from the ZPiOW the tasks related to the legal service of the elections (preparation of guidelines, explanations and other legal acts) and at the same time would conduct continuous analytical and auditing activities for the needs of the election authorities;
e) establishment of an information and education team that would deal with the issues of informing about elections, conducting all kinds of internal election training courses, activating of voters and communication policy of the election authorities;
f) (alternative to the above) allocation of tasks and functions in the field of supervision, organization, as well as analytics and information, between three, closely cooperating, but organizationally independent institutions: The NEC, the NEO and the NEI;

4) transform an ineffective institution of the persons of trust, representing the interests of the election committees into social national observers, reported by a wider group of entities, thus establishing a real mechanism for social control of elections;
5) legalize the data entered by the DEC into the IT system as an official, electronic and original version of the voting protocol and enable mass access to these data in real time;
6) implement the category of an intentionally invalid vote, by placing 'I vote for none of the above candidates' option (NOTA in English) on the ballot and simultaneously liberalize the conditions of the validity of the vote.

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The Role of the Electoral Commissioner in the Division of Municipalities Into Constituencies

Abstract: The subject of this article is to analyze the role of the electoral commissioner in the process of creating constituencies for municipal elections. It presents the evolution of the position of the electoral commissioner with the focus on his functions in relation to the creation of constituencies by the municipality. Thepaper shows the legal nature of a resolution of the municipal council concerning the creation of constituencies and also of a replacement order issued by the electoral commissioner. In addition, the article discusses the problem of supervision and control of a resolution of the municipal council about creation of constituencies for the local elections. The main aim of the article is to show that the competence of the commissioner to issue a replacement order infringes Article 87 paragraph 2 of the Polish Constitution, because it grants him the right to enact local laws, and because the lack of possibility to file a complaint within the administrative courtfor there solution on creation of constituencies is at variance with Article 45 paragraph 1 of the Polish Constitution.
Keywords: electoral commissioner, constituencies, replacement order
Słowa kluczowe: komisarz wyborczy, okręgi wyborcze, postanowienie zastępcze

1. Introduction

Local elections are the manifestation of the independence of territorial self-government from the state authority and the organs of this local government are responsible for their organization. The electoral body which supervises the proper course of local elections is the electoral commissioner who has a number of competences in relation to the function performed by him.

One of them, granted under Article 17 § 2 of the Electoral Code[1] is the electoral commissioner's right to issue a provision on the creation of constituencies in municipal council elections if, after unsuccessful summoning of the municipal council to perform tasks in accordance with the law, the council did not do so on time or when its resolution on establishing constituencies is illegal. In addition, the Electoral Code pursuant to Article 420 regulated, differently than required by Article 101 of the Local Government Act[2] the possibility of lodging an appeal against the resolution of the commune council on creation of constituencies by voters. The indicated provisions raise doubts as to their compliance with the Constitution, which was also pointed out by the Supreme Administrative Court, which addressed a constitutional question to the Constitutional Tribunal to examine their compliance with the Constitution of the Republic of Poland[3].

The subject of this article is to analyze the role of the electoral commissioner in the process of creating constituencies for municipal elections. It presents the evolution of the political position of the electoral commissioner, including the tasks in relation to the creation of constituencies by the municipality. The subject of consideration was the legal character of the resolution of the municipal council to establish constituencies and a substitute provision issued by the electoral commissioner. In addition, the article discusses the issue of supervision of the voivode and the review of the lawfulness of the resolutions of the municipal council for the formation of constituencies for municipal councils.

The purpose of the article is to demonstrate that the competence for substitute provision issuance of the commissioner violates Article 87 of the section 2 of the Constitution of the Republic of Poland, since it grants him the right to enact local law, while the inability to lodge a complaint to the administrative court for the resolution on creation of constituencies, pursuant to Article 101 of the LGL deprives voters of the right to access to court pursuant to Article 45 of the act 1 of the Constitution of the Republic of Poland. In addition, the lack of a legal measure against a substitute provision violates the independence of the municipality and deprives it of judicial protection guaranteed by Article 165 of the section 2 of the Constitution of the Republic of Poland.

1 Act of 5 January 2011 – Electoral Code (Dz.U. z 2011 r. Nr 21, poz. 112 z późn. zm.) [Journal of Laws of 2011 No. 21 item 112 as amended], here in after referred to as EC.

2 Act of 8 March 1990 Local Government Law (tekst jedn. Dz.U. z 2011 r. poz. 594) [the uniform text Journal of Laws of 2011 item 594], here in after referred to as LGL.

3 A legal question of the SAC of 10 December 2013 available at the CT website: http://trybunal.gov.pl/rozprawy/komuni-katy-prasowe/komunikaty-po/art/7095-podzial-gminy-na-okregi-wyborcze-odwolanie-od-orzeczenia-panstwowej-komisji-wyborczej/s/p-514/; P 5/14 (accessed on: 15.12.2014).

2. The division of municipality into constituencies by the electoral commissioner – a historical outline

Division of the municipality into constituencies constitutes a special competence of the electoral commissioner. In the period of almost 25 years of the functioning of the institution of electoral commissioner, this competence has not been regulated in a homogeneous way.

Originally, in the EC for municipal council's elections[4], this competence was awarded directly to the electoral commissioner. Provincial election commissioner was entitled, at the request of the competent board of the municipality (the city), to determine, separately for each council, the boundaries and numbers of the single-member constituencies or number of multi-member constituencies, their boundaries and numbers as well as the number of councilors elected in constituency. The decree of the provincial electoral commissioner regulating the constituencies was announced in the provincial official journal and informed the voters by posting the announcements no later than on the 45th day before the election day. These notices also mentioned the seat of the relevant territorial electoral commission (Article 14 sections 1 and 2). The Election ordinance for municipal councils in the Article 25 section 2 point 3, states directly that the tasks of the provincial electoral commissioner include creation of constituencies.

In the Election Act of 16 July 1998[5], the electoral commissioner's competence in this area was initially not regulated. Only through Article 4, point 52 of the amending law of 15 February 2002, the provision of the Article 203a[6] was added.

This regulation did not authorize the commissioner either to divide the municipality into constituencies or to issue substitute solutions. It only authorized the commissioner to call the relevant municipal authorities to perform tasks related to the division of the municipality into constituencies in a lawful manner within the prescribed period, and in case of ineffective expiry of the deadline – to apply to the voivode for their substitutive performance.

The wording of the provision of Article 203a was amended by Article 1 pt 67 of the act of 20 April 2004 amending[7] the Ordinance on the day of the accession of

4 Act of 8 March 1990 (Dz.U. z 1990 r. Nr 16, poz. 96) [Journal of Laws of 1990 No. 16 item 96]

5 Dz.U. Nr 95, poz.602 [Journal of Laws No. 95 item 602]

6 Article 203a section 1 reads: If the competent authorities of a commune do not execute on time, in a manner consistent with the law, tasks related to the establishment electoral districts, establishment of district electoral commissions, preparation of electoral registers or division of a commune to electoral circuits, an electoral commissioner with territorial competence calls these authorities to execute tasks in a manner consistent with the law, within the prescribed time, and in the case of ineffective expiry of time limit, requests province governor for their replacement execution'

7 (Dz.U. z 2004 r. Nr 102, poz. 1055) [Journal of Laws of 2004 No. 102 item 1055]; Article 203a section 1 reads: 'If the competent authorities of a commune do not execute on time, in a manner

the Republic of Poland to the European Union. The new content of this provision authorized the electoral commissioner, first, to call on the bodies of the territorial self-government unit to perform, on time and in a manner consistent with the law, the tasks related to the division of municipalities into constituencies, and secondly to the substitute division of the municipality into constituencies in case of ineffective expiry of the deadline. After carrying out this task without delay, the electoral commissioner was obliged to inform the National Electoral Commission.

In the currently binding electoral law, the above solution was actually reproduced in extenso in Article 17 section 2 of the EC[8]. According to Article 167 § 3 of the EC, the electoral commissioner issues provisions in the scope of his statutory powers, which means that the performance of competences in the division of the municipality into constituencies requires the commissioner to issue such an act. Moreover, the EC entitled the commissioner to verify the resolutions of municipal councils in the constituency matters pursuant to Article 420 §§ 1 and 2 of the EC.

3. Legal character of the resolution on the divison of municipalities into consittuencies

The resolution of the municipality council on establishing constituencies is essential for shaping the entire electoral process since it serves to ensure that the mandates of the municipal council are occupied favorably due to the place of residence of voters. Therefore, the principle in the creation of constituencies to municipal councils is for the division of the municipality into the constituencies to be performed according to a uniform standard of representation calculated by dividing the number of inhabitants of the municipality by the number of councilors elected to the particular council (Article 419 § 2 of the EC). The division of municipalities into constituencies is permanent (Article 419 § 1 of the EC). The judgment of the

consistent with the law, tasks related to the establishment electoral districts, establishment of district electoral commissions, preparation of electoral registers or division of a commune to electoral circuits, an electoral commissioner with territorial competence calls these authorities to execute tasks in a manner consistent with the law, within the prescribed time, and in the case of ineffective expiry of time limit,immediately executes these tasks and notifies the national Electoral Commission of the fact'.

8 According to Article 17 § 1: 'If the competent authorities of a commune do not execute on time, in a manner consistent with the law, tasks related to the establishment electoral districts or their change, appointment or changes in composition of elecotral commissions, an electoral commissioner with territorial competence calls these authorities to execute tasks in a manner consistent with the law, within the prescribed time, and in the case of ineffective expiry of time limit, immediately executes these tasks and notifies the national Electoral Commission of the fact'; whereas Article 17 § 2 reads: 'The provision of §1 shall apply accordingly, if the competent organ did not divide a commune, poviat or voivodeship into electoral circuits on time or in a manner consistent with the law'.

Voivodeship Administrative Court in Poznan of 22 September 2009 stated that 'The guarantee of the durability of the division into constituencies is of great importance for ensuring the democratic character of electoral proceedings. [...] The essence of this regulation is to ensure the sustainability of once defined constituencies and, therefore, carrying out possible changes in the division of municipalities into constituencies was strictly regulated by the legislature and subject to strong control (of the voivode and electoral commissioner)'. The resolution of the municipal council on the formation of constituencies for the municipal council is an act of local law. Pursuant to article 87 of the act 2 of the Constitution of the Republic of Poland ' Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments'. The creation of this right is a manifestation of the independence of the units of territorial self-government.

Adoption of a resolution on the division of municipalities into constituencies is an expression of the municipality's independence, since the organization and conduct of local elections, including the division of municipalities into constituencies, is the municipality's own task. This task is not included in the category, or tasks from the scope of the government, nor associated with the obligation from the scope of the preparation and conducting of general elections and referendums, which is regulated in Article 8 of the LGL. The creation of constituencies for the municipal council elections is the implementation of the unit's own tasks. According to P. Dobosz '[...] conducting general elections and referenda by their very nature is non-governmental, unknown to territorial self-government in the sense that they do not belong to a category of the so-called own tasks. It is also difficult to consider them as government tasks, firstly because they are listed next to tasks in the field of government administration, and if they were, there would be no need to separate them, and secondly because they are rather categories of national tasks'[9]. According to T. Moll 'the confirmation of the thesis cited above appears to be the solution adopted in Article 4a of the Act on Poviat Self-Government[10] and in Article 14 of section 3 of the Act on Voivodship Self-government[11], where the tasks in the scope of organization of preparations and conducting of general elections and referenda are clearly distinguished from other tasks of these units of territorial self-government. It should be added that not all the electoral issues are commissioned to the municipality.

9 IISA/Po350/09, available at website:www.orzeczenia.nsa.gov.pl (accessed on: 15.12.2014).

10 P. Dobosz, (in:) K. Bandarzewski, P. Chmielnicki, P. Dobosz, W. Kisiel, P. Pryczko, M. Mączyński (eds.), Komentarz do ustawy o samorządzie gminnym, Warszawa 2004, p. 135.

11 Act of 5 June 1998 on Poviat Self-government (tekst jedn. Dz.U. z 2013 r. poz. 595 z późn. zm.) [Journal of Laws of 2013 item 595 as amended].

It is not commissioned to the municipality in this respect, in which it involves local elections'[12].

Resolution of the municipal council on the division of this unit into constituencies is an act of local law since it corresponds to the conditions, compliance with which is necessary for the act to be considered as generally applicable source of law. Firstly, the act of local law is a statutory act and has executive character in relation to the act. The detailed procedure for creating constituencies in local elections is provided for in Section VII, chapter 10 of the EC. The authorization to adopt a resolution on the creation of constituencies is contained in Article 419 § 1 of the EC. According to that provision, 'The division into constituencies, their boundaries and numbers, and the number of councilors elected in each constituency shall be determined, at the request of the mayor, by the municipal council according to a uniform standard of representation calculated by dividing the number of inhabitants of the municipality by the number of councilors elected to the council [...]'.

Local law acts must have a normative character, i.e. they must contain general and abstract norms. They have a general character, i.e. they apply to the generally specified recipients and are addressed to external recipients. Resolutions being acts of local law are the law for all who are in a situation provided for therein[13].

In addition to the aforementioned features, the acts of local law are also characterized by the fact that they usually directly define the principles of behavior of specific categories of addressees, and thus their rights and obligations. They are reproducible, cannot be consumed by a single use; they are protected by the possibility of applying sanctions[14]. The resolution of the municipal council on the division of the municipality into constituencies meets the above criteria, as it contains the general and abstract standards, and its recipients are the voters of the municipality. As emphasized by the Supreme Administrative Court in its judgment of 24 February 2010, 'These voters are not named by name, but in general, i.e., every resident of a municipality wishing to exercise their active electoral rights must comply with the arrangements contained in such a resolution. The abstractness of the directive should be confirmed using the same constituencies for the oncoming elections. The arrangements contained in the resolution are legally sanctioned by provisions guaranteeing the correctness of the voting process and calculation of election results'[15].

12 Act of 5 June 1998 on Voivodeship Self-government (tekst jedn. Dz.U.z 2013 r. poz. 596 z późn. zm.) [Journal of Laws of 2013 item 596 as amended].

13 T. Moll, (in:) B. Dolnicki (ed.), Ustawa o samorządzie gminnym. Komentarz, Warszawa 2010, p. 147.

14 More on features of local law acts: D. Dąbek, Sądowa kontrola aktów prawa miejscowego – aspekt materialno-prawny, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, No. 3, pp. 76-103.

15 D. Dąbek, Prawo miejscowe, Warszawa 2007, p. 31.

The condition for the validity of the act of local law is its announcement in the provincial official journal. Pursuant to the article 419 § 2 of the EC, the resolution of the municipal council regarding constituencies is announced in the provincial official journal and it is made public in a customarily adopted manner. In addition, one copy of the resolution shall be forwarded immediately to the voivode and the electoral commissioner. The resolution on the division of the municipality into constituencies shall enter into force within 14 days from the day of announcement, pursuant to Article 4 section 1 of the Act of 20 July 2000 on promulgation of normative acts and certain other legal acts[16].

Considering the above, it should be stated that the resolution on the division of the municipality into constituencies is an act of local law. Recognition of the resolution of the municipal council as the local law entails further consequences. Indeed, only the local acts adopted by the authorities of the municipality, poviat and the territorial self-goverment organs of the voivodeship shall be subject to surveillance and control by the administrative courts.

Thus, the normative acts issued by entities in the territorial self-government entities, but which are not bodies specified in the territorial self-government body acts, are not subject to the supervision of government administration bodies or judicial control. This applies in particular to the acts of supervisors of the organizational units of territorial self-governments, but also entities not included in the structure of territorial self-government, for example the electoral commissioner. In principle, these acts are not included in the constitutional sources of universally binding law and from that point of view, they are not entitled to complaint to the administrative court[17].

Hence, it was rightly observed the Supreme Administrative Court that '[...] while entrusting in Article 419 § 2 of the EC the electoral competence to the municipal council to make local laws remains in accordance with Articles 94 and 87 section 2 of the Constitution of the Republic of Poland [...], entrusting this competence to the electoral commissioner in the provision of Articles 1 and 2 in conjunction with Article 420 § 1 of the EC violates these provisions. The electoral commissioner [...] is not an organ remaining in the local government structure. The electoral commissioner is undoubtedly the part of the structure of the electoral administration, but the scope of his powers, as well as the unique constitutional position does not him to be able to replace the body representing territorial self-government'[18].

16 IIOSK2001/09, available at website:www.orzeczenia.nsa.gov.pl (accessed on:15.12.2014).

17 Tekst jedn. Dz.U. z 2011 r. Nr 197, poz. 1172 z późn. zm. [The uniform text Journal of Laws of 2011 No. 197 item 1172 as amended].

18 M. Brzeski, Problemy kontroli sądowoadministracyjnej działalności prawotwórczej podmiotów samorządu teryto- rialnego niebędących organami tego samorządu, (in:) B. Dolnicki, J.P. Tarno (eds.), Samorząd terytorialny w Polsce asądowa kontrola administracji, Warszawa 2012, p. 39.

It seems that the substitute provision of the electoral commissioner should be included in local law, because it replaces the act of local law in the strict sense. Only the legislator acting in contradiction with Article 87 section 2 of the Constitution of the Republic of Poland entrusted the provision of this right to the competent body – the electoral body.

Moreover, the legislator assumed that since a substitute provision is not issued by the self-government body, it should not also be subject to publication in the provincial official journal. The act on promulgation of normative acts and other legal acts as well as the EC do not provide for the publication of a substitute provision in the provincial official journal.

However, doubts arise over the identification by the Supreme Administrative Court of the decision of the electoral commissioner issued on the basis of Article 17 of the EC with the provision issued pursuant to Article 420 § 2 of the EC. This provision, in contrary to Article 17 of the EC, does not state that the electoral commissioner should issue them in order to replace the resolution of the commune council, but it only regulates the complaint of the voters to the electoral commissioner for the municipal council's arrangements on constituencies, which the commissioner considers when issuing the provision. This provision does not refer to the proper application of the provision of Article 17 § 2, of the EC, nor does it speak of a legal nature of this provision: if this is a substitute provision or the provision shall prevail only for the compliance or noncompliance of the resolution.

The legal consideration of a substitute provision is not limited to the problem of whether it is an act of local law. The competence to issue a provision under Article 17 § 2 of the EC also points to the specific supervisory powers of commissioner over the activities of the municipal council. This problem is presented in the next part of the article.

4. Electoral commissioner as a specific supervisory authority

As mentioned in the introduction, the autonomy of territorial self-government is the systemic principle guaranteed in Article 16 section 2 and Article 165 of the Constitution of the Republic of Poland. In addition, the laws regulating the system of territorial self-government at all levels also state that the municipality, poviat and self-governmental voivodship perform public tasks on their own behalf and on their own responsibility, and this independence is subject to judicial protection[19].

It is stressed in the literature that '[...] the essence of the autonomy of territorial self-government entities is that, in the framework of the applicable legal order, the

19 M. Brzeski, Problemy kontroli sądowoadministracyjnej działalności prawotwórczej podmiotów samorządu teryto- rialnego niebędących organami tego samorządu, (in:) B. Dolnicki, J.P. Tarno (eds.), Samorząd terytorialny w Pol- sce asądowa kontrola administracji, Warszawa 2012, p. 40.

municipality (poviat, voivodeship) on its own, without external dictates and top-down instructions, decides about all local (regional) matters, the purpose of communal property, the principles of using public facilities, spatial development, the scope of undertaken investments, the order, methods and means of their implementation, as well as related financial and material expenditures'[20]. The autonomy of the territorial self-government, however, is not an absolute principle and its boundaries are set by criteria for supervision of territorial self-government unit. However, the Constitution of the Republic of Poland explicitly stipulates that the only criterion for supervision over legal acts is legality (Article 171 section 1), and exhaustively lists the supervisory authorities. Pursuant to Article 171 section 2 of the Constitution, these are the President of the Council of Ministers and the voivode, and in the area of financial matters, the regional chambers of auditors. Besides, the acts governing the powers of the supervisory authorities should clearly regulate the surveillance measures and the consequences of their use.

Judicial protection of the territorial self-government, which will be mentioned later in this article, is exercised by the ordinary courts, the Constitutional Tribunal, but above all by administrative courts, which under its jurisdiction, according to Article 3 § 2 pt 7 of the Law on procedure before the administrative courts, adjudicate on complaints against acts of supervision over the activities of the territorial self-government.

In this context, the question about the political position of the electoral commissioner is legitimate, which, although it was not passed by the Constitution of the Republic of Poland to the supervisory authorities, fulfills similar functions in the procedure of creating constituencies. The legislature granted him, in fact, on the basis of Article 17 § 2 of the EC the competence to examine the lawfulness of the resolutions on the division of municipalities into constituencies and, and in the case of finding a violation of the law or inactivity of the commune council, to issue a substitute provision regarding this matter. Such positioning of the electoral commissioner towards the municipal bodies, and especially his imperious interference in the operation of the municipal government may raise serious doubts from the point of view of compliance with the Constitution of the Republic of Poland.

The Supreme Administrative Court in its legal question to the Constitutional Tribunal noted that 'the electoral commissioner is not a supervisory body and cannot enter the sphere of independence of the territorial self-government unit'. Thus, the substitute provisions issued by the electoral commissioner cannot be included in the acts of supervision over the establishment of local law by territorial self-government bodies.

However, it should be noted that the legislator, by granting the commissioner the power to issue a substitute provision, also granted him a peculiar means of

20 See footnote 3.

supervision. In the event of issuance of a substitute provision in a situation when the commune council adopted a resolution on the division of constituencies, but the commissioner declared its non-compliance, the commissioner's action resembles a voivode's supervision measure in the event of its annulment in the event of its unlawfulness pursuant to Article 91 of the LGL with the difference, however, that annulment has cassation nature and results in the elimination of a general legal act from legal transactions. The electoral commissioner does not have the competence to declare the invalidity of the resolution of division of the municipality into constituencies.

The resolution on the division of the municipality into constituencies is subject to the supervision of the voivode under the procedure applicable to acts of local all acts of local law pursuant to Article 91 of the LGL and 'supervision' of the electoral commissioner pursuant to Article 17 § 2 of the EC. The applicable law, thus, allows a situation when two legal acts with different content may exist – a resolution of the commune council to establish constituencies and a substitute provision of an electoral commissioner, which may be a serious problem in the case of their application.

On the other hand, a substitute provision of the commissioner recalls the legal nature of a substitute provision of the voivode issued in cases provided for by law. At present, the voivode issues a substitute provision in the event of inactivity of the commune council on adoption of a resolution on the expiration of the councilor's mandate or dismissal of persons indicated in Article 98 of the LGL[21] and based on Article 12 section 3 of the Act of 27 March 2003 on Spatial Planning and Development[22], thus in a situation when the municipal council did not adopt a study of the conditions and directions of the spatial development of the municipality, did not commence its modification or by adopting such a study, did not specify areas of public-purpose investment of national and voivodeship importance, the voivode, after undertaking activities aimed at reconciliation the date of implementation of these investments and the conditions for introducing these investments to the study, calls on the municipal council to adopt the study or change it within the prescribed period; after its ineffective expiration, the voivode draws up a local zoning plan or its change for the area affected by the omission of the municipality, to the extent necessary for the feasibility of the public purpose investment and issues a substitute provision regarding this matter. Spatial Planning and Development Act states that the plan adopted in this mode has legal effects, such as the local zoning plan.

It is stressed in the literature that the substitute provision of the voivode is a special act of supervision, different in particular to supervisory decisions which

21 See Article 2 of Local Government Law, Article 2 of Act on Poviat Self-Government and Article 6 of Act on Voivodeship Self-Government.

22 J. Jagoda, Sądowa ochrona samodzielności jednostek samorządu terytorialnego, Warszawa 2011, pp. 21-22.

remove a resolution or order issued by the commune authority from the legal market, but do not introduce new acts (replacing deleted ones) in this place, which gives rise to assigning them 'cassation' character[23]. While the essence of the substitute provision issued by the voivode is that it replaces, in the case of the municipal authority to idle, the relevant act, that this body should enforce[24].

The substitute provision of the electoral commissioner is issued, however, not only in the case of the municipality's inaction in the form of failure to adopt a resolution on the creation of constituencies, but also in a situation when he finds that the resolution is unlawful.

In addition, it should be noted that Article 13 pt 8a of the Law on publication of normative acts requires for the supervisory decisions regarding acts of local law laid down by local government units to be announced in the provincial official journal. Due to the fact that the substitute provision of the electoral commissioner is not an act of supervision in the strict sense, it is not necessary to publish it in order to have legal effects.

It follows from the foregoing that the legislator has given the electoral commissioner a kind of supervision measure and thereby violated Article 171 section 2 of the Constitution of the Republic of Poland. The substitute provision violates the independence of territorial self-government unit since only the supervisors of a territorial self-government unit can entrust the legislator with the power to intervene in the independence of territorial self-government.

5. Control of the acts of local law legality by administrative courts – general remarks

The issues related to the judicial review of local law acts are generally regulated by the provisions of the Act of 30 of August 2002. – Law on proceedings before

23 Article 98 of Local Government Law: 'If the competent authority of a commune, against obligation resulting from provisions of Article 383 § 2 and 6 as well as Article 492 § 2 and 5 of the act referred to in Article 24b section 6, as well as Article 5 sections 2 and 3 of the act of 21 August 1997 on the limitation of conducting business activity by persons performing public functions, as regards respectively expiration of the mandate of a councilor, expiration of a mandate of a village mayor, recalling from the position or termination of a contract of employment with a deputy village mayor, secretary of a commune, a treasurer of a commune, head of organizational unit of a commune and a person managing or a member of body managing a communal legal person, does not adopt a resolution, does not recall from the position or does not terminate the contract of employment, a province governor calls the commune authority to undertake a proper act within 30 days'.

24 Tekst jedn. Dz.U. z 2012 r. poz. 647 z późn. zm [The uniform text Journal of Laws of 2012 item 647 as amended].

administrative courts[25], which are applied or co-used with special procedural provisions contained in constitutional laws[26]. The control of the legality of local law acts may be direct when the local legal act law is appealed to the court, and interim when the act of supervision annulling the act of local law is contested[27].

All acts of the local law are under the scope of judicial review[28]. The entities with locus standi in relation to local law acts include in particular: everyone whose legal interest or entitlement was violated by the act concerned[29]; voivodes, when they did not use the possibility of annulment of the act of local law under the supervision procedure[30].

The competence of the administrative court during reviewing the legality of local law acts is determined on the basis of regulations of Article 147 of the LPBAC and on the basis of Article 94 of the LGL. The provision of Article 147 of the LPBAC in § 1 states that the Court, having regard to a complaint against a resolution or act

referred to in Article 3 § 2 points 5 and 6, annul this resolution or act in whole or in part or states that it was issued in violation of the law if the special provision excludes the annulment thereof. In accordance with the particular provision – Article 94 sections 1 and 2 of the LGL, the resolution or order of the municipal authority shall not be annulled after one year from the day of their adoption, unless the obligation to submit a resolution or order within the time limit set in Article 90 section 1, or if they are an act of local law. The second passage of this article provides, however, that if the resolution or order was not annulled due to the expiration of the deadline set out in section 1, and there are premises for annulment, the administrative court decides on their non-compliance with the law. A resolution or order shall cease to have legal force as of the day of ruling on their non-compliance with the law. The annulment of local law acts is not subject to a time limit; thus, it can occur at any time.

Indirect control of local law acts is a consequence of granting the territorial self-government the right to judicial protection of independence. The basic legal form of the protection of this independence is the permission of the authorities of the territorial self-government units to bring a complaint to the administrative court on the activities of the state agencies exercising supervision over this territorial

25 P. Chmielnicki, (in:) K. Bandarzewski, P. Chmielnicki (eds.), P. Dobosz, W. Kisiel, M. Kryczko, M. Mączyński, S. Płażek, Komentarz do ustawy o samorządzie gminnym, Warszawa 2007, p. 703.

26 A. Matan, (in:) B. Dolnicki (ed.), Ustawa o samorządzie gminnym. Komentarz., Warszawa 2010, pp. 914-915.

27 Tekst jedn. Dz.U. z 2012 r. poz. 270 z późn. zm. [The uniform text Journal of Laws of 2012 item 270 as amended], here in after referred to as LPBAC.

28 In the case of communal acts of local law it is the act on communal self-government.

29 M. Stahl, Zagadnienia proceduralne sądowej kontroli aktów prawa miejscowego, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, No. 3, p. 53.

30 Article 3 § 2 pt 5 of LPBAC: 'Supervision over public administration activity by administrative courts covers adjudication on complaints against local law acts of bodies of self-government territorial units and local bodies of government administration'.

self-government. Therefore, Article 3 § 2 point 7 of the LPBAC courts provides for a complaint to the administrative court for acts of supervision over the activities of territorial self-government bodies. The provision of Article 92a of the LGL states that in the case of submission of a complaint by a municipal authority to a supervisory decision, the administrative court shall appoint a hearing no later than within 30 days from the date of receipt of the complaint to the court. The determination of the maximum 30-day deadline for the appointment of the trial by the administrative court at which the municipal authority's complaint is to be resolved for the supervisory decision was made due to the fact that, in the light of Article 92 section 1 of the LGL, delivery to the municipal authority of a supervisory decision confirming the invalidity of a resolution or order of a municipal body legally suspends the execution of this resolution or order, which in turn results in the inability to take any action based on it. The administrative court, considering the complaint of the body of the territorial self-government unit on the supervisory act, repeals this act (Article 148 of the LPBAC). The appointed provision does not mention any reasons to repeal the contested act by a court supervision. The standards resulting from the constitutional act do not make it either. In the light of the applicable legal status it must be stated that the court must repeal the surveillance act regardless of the degree of infringement of the law. It is due to the fact that the of sanctions of being declared null and void in relation to supervision acts that may be affected by qualified defects is excluded. A final judgment of the administrative court, including a complaint affects the completed supervisory proceedings in such a way that it opens the possibility of reconsidering the case and deciding on the merits.

6. Control of the legality of the municipal council's resolution on constitutencies

The legislator in the EC, even though the resolution of the commune council on constituencies is a local law act, shaped the issues regarding the control of its legality in a way that fundamentally deviates from the generally presented principles.

According to the EC, the direct control of legality exercised by administrative courts in relation to the acts of local law was replaced by a detailed regulation contained in Article 420 of the EC. On the basis of this regulation, the electoral commissioner obtained the right to verify the resolutions on constituencies. This procedure is triggered by a complaint, submitted by at least 15 voters within 5 days from the date of making the resolution public. The electoral commissioner examines the case within 5 days and issues a provision, delivering it promptly to the complainants and the municipal council (Article 420 § 1 of the EC). The decision of the electoral commissioner may be appealed to the National Electoral Commission

within 5 days from the date of its delivery. The decision of the National Electoral Commission is not subject to a remedy (Article 420 § 2 of the EC).

On the basis of this regulation, in court decisions it is assumed that the procedure of appealing against resolutions of municipal councils regarding electoral districts was regulated comprehensively in the EC. The provision of Article 420 of the EC introduces a special procedure for appealing against municipal council resolutions on constituencies. Its unambiguous wording excludes the substantive jurisdiction of administrative courts in such matters. Consequently, in such cases Article 101 of the of the LGL connected with Article 3 § 2 pt 5 of the LPBAC shall not apply. Complaints submitted in this mode are rejected[31].This means that, as a result of this particular regulation the voters were actually deprived of judicial way to assess the legality of the resolution on constituencies. In the light of the principle of administrative court to consider whether any act of local law, this should be assessed as a breach of the principle of access to a court. In place of the administrative court, verification of such resolutions was entrusted to electoral administration bodies, while excluding the possibility of challenging the decision of the National Electoral Commission to the court. Contrary to what is said in the case-law, it is difficult to assume that the content of the regulation contained in Article 420 of the EC is ambiguous and comprehensively regulates the procedure of filing complaints regarding the division of municipalities into constituencies. First of all, as already pointed out before, it raises doubts about the content of the decision issued by the election commissioner because of the complaint. The legislator states only that the commissioner 'issues a provision'. Therefore, the question should be asked whether the wording 'issues a provision' is tantamount to giving the electoral commissioner also, in this case, the competence of the substitute division of municipalities into constituencies. Or if is this only the name of the form of implementation by the electoral commissioner of its statutory powers. If indeed the legislator was going to issue a substitute provision, why only Article 420 § 2 of the EC provides for a possibility of appeal against such decision to the National Electoral Commission (not provided for in Article 17 § 2 of the EC).

Analysis of the content of the justification of the legal question indicates that the Supreme Administrative Court identifies the phrase 'issues a provision' with the substitute provision referred to in Article 17 § 2 of the EC. It appears that the Supreme Administrative Court does not notice that the Article 17 § 2 of the EC and the Article 420 § 2 of the EC are regulated by two different institutions (two different competences of an electoral commissioner). In the case of Article 17 § 2 of the EC, the electoral commissioner acts as supervisory body, while in the case of Article 420 § 2 of the EC, as the authority to verify the resolution because of a complaint.

31 Article 101 section 1 of LGL: 'Any person, whose legal interest or right were violated by a resolution or an order of a municipal body in the case concerning public administration, may – after ineffective letter of formal notice – contest a resolution before an administrative court'.

Another doubt is related to the fact that the analyzed provision does not specify material premises for lodging a complaint to the election commissioner, which may lead to the conclusion that the possibility of appealing against the municipal council's resolutions on constituencies occurs each time, without any doubts as to the legality of the resolution issued by the council. In other words, the literal interpretation of the Article 420 § 1 of the EC may lead to the conclusion that the commissioner is entitled to control the division of the municipality into constituencies not only in terms of compliance with the law, but also for all other reasons beyond the law (e.g. purposefulness, effectiveness).

Considering that the right to access to court expressed in Article 45 section 1 of the Constitution, it cannot be limited in the form of closing the court path, it should be stated that the special regulation in question should not exclude the possibility of challenging resolutions on the division into constituencies on general terms (under Article 101 of the LGL in conjunction with Article 3 § 2 pt 5 of the LPBAC). Hence, the rejection of complaints, brought on this basis, by administrative courts should be evaluated as defective.

As to the indirect control of the administrative court regarding the resolution on the division of the municipality into constituencies, it should be stated that this issue is regulated in two ways. The legislator while regulating in a special way the 'supervisory proceedings in the EC, did not exclude the voivode's supervision at the same time. This means that, on the one hand, supervisory proceedings will take place in relation to such a resolution on general terms in accordance with the provisions of Chapter 10 of the LGL. It follows from this regulation that in the event of a conflict with the law, the voivode declares its invalidity – Article 91[32] of the act 1 of the LGL. The commune council is entitled to lodge a complaint to this supervisory decision of the voivode to the administrative court on general terms – Article 3 § 2 pt 7 of the LPBAC. On the other hand, the legislator equipped the electoral administration body – electoral commissioner with the competence to call the bodies of the territorial self-government to execute on time, in a manner consistent with the law tasks regarding the division of the municipality into constituencies, and then to the substitute division of the municipality into constituencies in case of ineffective expiry of the deadline.

In this situation, the question should be posed whether the two procedures are competitive or complement each other. A kind of supervision exercised by the electoral commissioner is limited to the verification the conduct of municipalities. As a result of the action of the election commissioner, either the inactivity of the

32 Article'93 section 1 of LGL: 'After the lapse of the time limit specified in Article 91 section 1, a supervisory authority may not in by itself declare the resolution or the order of the municipal body to be invalid. In such case, the supervisory authority may contest the resolution or the order before an administrative court'.

municipal council in the division of the municipality into constituencies is removed or the resolution adopted in this respect against the law is rectified. Whereas, the voivode's supervision is of a cassation nature, which amounts to eliminating a legally unlawful resolution from legal transactions. It appears that if both authorities declare a conflict between the resolution and the law, it is possible to talk about the complementary nature of the subject proceedings (the voivode 'cancels' such a resolution from legal turnover, and the electoral commissioner issues a verification substitute provision). As mentioned earlier, the situation becomes complicated when both authorities come to different conclusions, namely the voivode does not find any inconsistency with the law or finds an irrelevant violation (such a resolution remains in the legal circulation), and the electoral commissioner issues a substitute provision. Then, in the course of legal transactions, there will be two decisions regarding the division of municipalities into constituencies in this situation, a question arises regarding the binding power of each of these decisions.

The legislator, entrusting the electoral authority, which is not strictly a supervisory body, supervisory competences consisting in the possibility of replacing a municipal council in adopting a local law act, did not provide the municipal judicial protection in the scope of its independence, which should be considered a violation of Article 165 section 2 of the Constitution of the Republic of Poland. There is no special regulation that would provide for the possibility of challenging the substitute election commissioner's decision to the administrative court. For example, the special regulation on the ground of EC is Article 384 § 1. It provides that '[...] from the electoral commissioner's decision on expiration of the councilor's mandate [...], a complaint may be lodged to the administrative court'. It also does not seem that such a basis could be Article 3 § 2 pt 7 of the LPBAC since the substitute provision is a kind of supervisory decision.

7. Final conclusions

The analysis of the political position of the election commissioner in the process of the division of municipalities into constituencies for municipal councils elections indicates that under the EC, the commissioner, who is primarily an electoral body, was granted a series of competences reserved for public administration authorities and administrative courts.

The legislator, introducing the possibility of issuing a provision pursuant to Articles 17 § 2 and 420 § 2 of the EC certainly having in mind the specifics of the electoral procedure. It was probably guided by considerations of speed of proceedings and trust in professional and apolitical preparation in the field of electoral law of electoral administration bodies. Nevertheless, as it was demonstrated above, those

rules give rise to serious doubts as to their conformity with the Constitution of the Republic of Poland.

First of all, they grant the electoral authority the right to establish local law. Issuing a provision on the basis of Article 17 § 2 of the EC replaces the resolution of the municipal council in the strict sense, which is contrary to Articles 87 section 2 and 94 of the Constitution of the Republic of Poland. Secondly, the procedure for appealing against a resolution pursuant to Article 420 of the EC, in principle, excludes the possibility of challenging a resolution on the creation of constituencies to the administrative court pursuant to Article 101 of the local government act and thus deprives voters of the right to access to court provided for in Article 45 section 1 of the Constitution of the Republic of Poland. Thirdly, they finally give the electoral body supervision over local authority and authorize it to legislate local law, while depriving the municipality of the possibility of appealing the substitute provision of the election commissioner to the administrative court. Such a solution is an infringement of the judicial protection of independence of the territorial self-government guaranteed in Article 165 of the Constitution of the Republic of Poland.

In the process of creating constituencies for municipal councils elections, the electoral commissioner should be able to safeguard the proper course of this process, but in no case, can he imperviously interfere in the activities of the territorial self-government Therefore, it appears to be justified to formulate the following conclusions *of the law as it stands*. First of all, the electoral commissioner, instead of issuing a substitute provision, should, on the ground of the Election Ordinance of 16 July 1998, apply to the voivode for a relevant act. Secondly, the voters must be guaranteed the right to access to court and the opportunity to challenge any local law regardless of their subject. Only the electoral process formed in this way will correspond to the standards of a democratic state ruled by law[33].

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33 The Decision of VAC in Poznan of 13 June 2013, IISA/Po467/13, available at website: www.orzeczenia.nsa.gov.pl (accessed on: 15.12.2014).

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Evolution of Election Law in the Senate of the Third Republic of Poland

Abstract: This article presents evolution of the election law in the Senate of the Third Republic of Poland (1989-2011). The issue of electoral formula applied during election to the 'second house' of the Polish parliament was given particular attention. For the purpose of the study, it was assumed that the electoral formula is the principle of transforming votes into seats.
Nowadays, three electoral formulas are applied – i.e. majority, proportionate and mixed. The majority formula is used for election to the Polish Senate; however, it was not until 2011 that one-seat constituencies were used (multi-seat constituencies were previously applied). It is worth emphasizing that the adopted legal solutions result in the necessity to hold by-elections, which receive little public attention. Therefore, the possibility of establishing a mixed formula ought to be taken into consideration in order to reduce negative impact of currently applied legal solutions, such as the difficulty in obtaining seats by smaller political parties and the need to holdby-elections.
Keywords: The Senate of the Third Republic of Poland, election law, electoral formula
Słowa kluczowe: Senat III RP, prawo wyborcze, formuła wyborcza

1. Initial assumptions

Given the way in which the sovereign exercises power, we can distinguish between two basic forms of democracy, namely direct democracy and representative (indirect) democracy[1]. In the case of direct democracy, citizens themselves make decisions (or they express opinions), while representative democracy is about electing representatives who make decisions in specific issues on behalf of their sovereign. In today's world, due to the territorial extent of countries and the large number of citizens, democracies are representative in nature. According to R. Legutko, 'we are now dealing with indirect democracies, therefore, citizens are kept away

1 See more: P. Uziębło, Demokracja partycypacyjna. Wprowadzenie, Gdańsk 2009, pp. 13-19.

from decision-making centers'[2]. In view of the circumstances indicated, it should be stressed that elections are an extremely important instrument for the citizens of modern democratic states to influence the functioning of the political system. Thanks to this procedure, once every few years, the sovereign has a real impact on politics and real power over the political elites. In this context, Jan Jakub Rousseau expressed a rather extreme view, stressing that 'the English people think that they are free, but they are wrong; they are free only during the election of parliamentary members; as soon as they have been chosen, they become slaves, they become nothing'[3].

In the context of the functioning of modern democracies, it should be remembered that the possibilities of citizens' influence on the political system do not end with elections, because there are several institutions of direct democracy such as: people's assembly, referendum, plebiscite, people's initiative, people's veto, social consultations, as well as the participatory budget (civic), which has been developing intensively in recent years (also in Poland). However, the weakness of the current forms of direct democracy is the fact that they usually remain under the control of political elites[4]. Therefore, their use is not determined by citizens but by representatives (e.g. parliamentarians).

As rightly pointed out by G. Bingham Powell Jr., 'Elections are not the only instruments of democracy. They must support organizations and rules encouraging congruence and cooperation. Nonetheless, elections seem to be a key instrument of democracy, which is supposed to create connections that force or strongly encourage politicians to take citizens into account. There is a general consensus that elections based on the principle of political rivalry, more than anything else, in today's times determine the democratic character of the political system of a national state'[5].

Election procedures draw the attention of political elites, for whom it is a competition for power and the possibility to implement their own electoral program, as well as that of the citizens and mass media. At this point, it should be emphasized that elections can be carried out according to different rules, which significantly affects their final result. Therefore, the political elite, and in particular political parties with the right majority in parliament, try to shape the electoral system in such a way that it is appropriate from the point of view of their interests. As emphasized by Z. Jackiewicz, 'analyzing the changes in the electoral law and the course and results of the next elections, we find a lot of data proving that the Polish policymaker plays a special role in the field of elections: he is not only the creator of

2 R. Legutko, Problemy demokratycznej partycypacji, (in:) J. Miklaszewska (ed.), Polityka i świat wartości. Uczestnictwo obywateli w życiu społeczno-politycznym, Kraków 1998, p. 34.

3 J.J. Rousseau, Umowa społeczna, Warszawa 1966, pp. 112-113.

4 See more: M. Rachwał, Demokracja bezpośrednia w Polsce – fikcja czy rzeczywistość?, "Przegląd Politologiczny" 2010, No. 1, pp. 103-114.

5 G. Bingham Powell, Jr., Wybory jako narzędzie demokracji. Koncepcje większościowe i proporcjonalne, Warszawa 2006, p. 8.

the legal rules under which elections are held but also the entity co-deciding on the results of the elections'[6].

The aim of the article was to present the evolution of electoral law to the Senate in the Third Polish Republic (1989-2011). The issue of the electoral formula used in the elections to this chamber of the Polish parliament has taken a special place in the deliberations. For the purposes of this draft, it was assumed that the electoral formula means the principle of transforming the votes of voters into mandates[7]. In addition, attention was paid to the issue of supplementary elections to the Senate.

In the discussed period, elections to the Senate were held according to the majority formula; however, single-mandate districts apply only since 2011 (previously several-mandate districts were used). What is significant, since 1991, getting a senator's mandate was dependent on obtaining a relative majority. At this point, the question arises about the influence of the adopted electoral formula on the composition of the 'second chamber' of the Polish parliament. Taking into account the experience of other countries, it was hypothesised that the established solution resulted in a deformation of the voters' will, i.e. the winning committee had a much greater representation in the Senate than the obtained percentage result.

2. A few comments on the election formula

As pointed out by K. Polarczyk, in the general and direct elections 'two basic electoral formulas are used: majority and proportional, while two parliamentary formulas can be used for the election of parliamentarians to a particular chamber, which means that part of the parliamentary seats of the chamber are filled according to the majority rule and part according to the principle of proportionality. This is referred to as a mixed formula. The majority formula is the most-used and to this day predominant. The proportional formula was first used in Belgium in 1889'[8]. Thus, in fact, we can distinguish three basic electoral formulas, i.e. majority, proportional, and mixed, which do not have a uniform character and occur in different variants.

In the case of the majority system, the mandate is obtained by the candidate who has the most votes in the single-mandate constituency. The majority system occurs in two forms, i.e. the majority may be sufficient to obtain a mandate (most votes in the district) or an absolute majority (over 50% of the validly cast votes in the district)

6 Z. Jackiewicz, Wpływ prawodawcy na wyniki wyborów,"Państwo i Prawo" 1995, z. 3, p. 44.

7 In some elaborations, an electoral formula is called also a general name 'electoral system'. In this article a distinction was made, in accordance with a wording of the 'elecotral system' entry in a publication: 'Leksykon politologii. See more: R. Herbut, System wyborczy, (in:) A. Antoszewski, R. Herbut (eds.), Leksykon politologii, Wrocław 2002, pp. 441-444.

8 K. Polarczyk, Parlament polski na tle parlamentów innych państw. Analiza statystyczna, Raport nr 214 Biura Studiów i Ekspertyz Kancelarii Sejmu, Warszawa 2003, p. 42.

must be obtained. Choices conducted using the relative majority always end with the first round; however, this means that the winning candidate may have the support of a minority of voters. Thus, the elections carried out according to the indicated formula are cheaper, although the social standing of the winning candidate may be some kind of weakness. On the other hand, the acceptance of an absolute majority often involves the necessity to conduct a second round of elections, which occurs when none of the candidates during the first round receives more than 50% of the votes. In the second round, those entitled to vote choose one of the two candidates who obtained the most votes during the first round of the election. It should be added here that the majority system can also be used in multi-mandate districts. Then, 'the voter has as many votes as there are seats to fill in the given district. Those candidates who have obtained the most votes in succession shall be considered as elected'[9].

The essence of the proportional system is that the number of seats obtained by the election committee reflects the percentage of votes gathered by the candidates of a given committee. Therefore, if 10% of the votes were cast for party X, it should receive 10% of the seats. In practice, however, no version of the proportional formula guarantees the achievement of such an ideal state, which in effect leads to a certain disproportion between the size of social support and the number of mandates obtained in the created representative body[10]. The size of the difference in question depends, among others, on the adopted method of converting the votes of voters into mandates. It should be emphasized that the use of a proportional formula requires that constituents vote on party lists, and a larger number of representatives are elected in the district. 'The methods of proportional distribution of seats used in practice belong mostly to one of two groups:

- methods based on a fixed quota, such as the Hamilton/Hare-Niemayer method;
- divisional methods (based on *a posteriori* quota), like the Jefferson /d'Hondt or Webster/Sainte-Laguë method'[11].

From the point of view of this draft's subject, the most important is the majority formula, because elections to the Senate in Poland take place in accordance with this solution. That is why the basic advantages and disadvantages of the subject election formula are presented below.

In practice, the majority system excludes smaller groups from the competition. 'It is a system adapted to the situation in which two strong, nationwide political parties compete, as in Great Britain or the USA. Then, its virtues are most fully

9 A. Antoszewski, R. Alberski, Systemy wyborcze, (in:) A. Antoszewski, R. Herbut (eds.), Demokracje zachodnioeuropejskie. Analiza porównawcza, Wrocław 1997, p. 231.

10 R. Herbut, System…, *op. cit.*, p. 442.

11 J. Haman, Demokracja. Decyzje. Wybory, Warszawa 2003, p. 74.

revealed, the main ones boiling down to stabilizing the political scene by eliminating weak parties and strengthening the bond between the constituent and the member of parliament. The former casts his vote not for an abstract program or ideology but for a specific person'[12]. The above-mentioned advantages cause huge popularity of the majority formula in Poland as well as of the postulate to adopt this solution, inter alia, in elections to the Sejm. In a survey conducted in 2008, 64% of respondents voted for the introduction of single-mandate electoral districts, and only one-eighth (12%) was against such a solution[13].

The relative majority system shows serious disadvantages when many political parties (electoral committees) participate in the competition. Then, a situation may arise where the majority of voters will not be represented in the created representative body. To illustrate the shortcomings mentioned, the example can be cited of a district with five candidates, among which the winner received 21%, three more 20% each, and the last candidate 19% of votes. In the described situation, up to 79% of voters will not have their representative. 'If this effect is repeated in a larger number of districts, it may happen that a party supported by a minority of voters will become the government'[14].

3. The evolution of electoral law to the Senate

After the Second World War, a unicameral parliament was established in Poland, which was the result of the official results of the 1946 referendum. Discussions on the restoration of the second chamber were initiated in the 1980s, but the proposal for the restitution of the Senate (submitted during the 'Round Table') resulted rather from the need for political compromise than from model thinking[15]. The final decisions adopted at the 'Round Table' resulted in the restoration of the Senate to the Polish political system. During the deliberations of the government side with the opposition, the principles of elections to both chambers of the parliament were also agreed. In relation to the Senate, among others, the following entry was included: 'In the Senate elections, two senators are elected from each province, and in the capital and Katowice provinces – 3 each'[16]. Thus, each province at that time (49) was an electoral district to this house of parliament. In 47 districts (provinces), two senators were elected, and in the Warsaw and Katowice provinces – three each. Essentially, this

12 A. Antoszewski, R. Alberski, Sytemy wyborcze…, *op. cit.*, p. 231.

13 Data quoted after: Centrum Badania Opinii Społecznej, Polacy o proponowanych zmianach w systemie poli- tycznym. Komunikat z badań, Warszawa 2008.

14 A. Antoszewski, R. Alberski, Sytemy wyborcze…, *op. cit.*, p. 231.

15 See more: R. Mojak, Transformacja ustroju politycznego w latach 1989-1997, (in:) W. Skrzydło (ed.), Polskie prawo konstytucyjne, Lublin 2000, pp. 69-93.

16 Stanowisko w sprawie reform politycznych, (in:) W. Salmonowicz (ed.), Porozumienia Okrągłego Stołu, Olsztyn 1989, p. 8.

led to a situation in which the provinces, which were significantly different in terms of the number of inhabitants, had the same representation in the Senate. As a result, the elections to the Senate were not equal in the material aspect. At this point it is worth recalling that the agreements concluded at the 'Round Table' gave the Senate a strong democratic legitimacy, because, unlike the Sejm, it was elected in 1989 in a completely free election[17].

In legal terms, the process of fundamental systemic reconstruction was started on April 7, 1989 with a thorough change of the Constitution of the Polish People's Republic[18]. The subject of this amendment[19] reflected the content of the agreement concluded at the 'Round Table' on political reforms[20]. Among others, provisions regarding the Senate were added to the text of the Constitution of the People's Republic of Poland. Its Article 2 sec. 1 was replaced by the following: 'The working people exercise state power through their representatives elected to the Sejm, the Senate and the national councils.' In addition, the text of the Constitution of the People's Republic of Poland included other regulations pertaining to the Senate; when focusing on the most important laws regarding electoral law, there are several issues to be noted.

In terms of the size of the Senate and the length of its term, the following provision was introduced: 'The Senate consists of 100 senators and is elected for the term of office of the Sejm'[21]. However, sec. 2 was added to Article 94, reading as follows: 'Senate elections are common, direct and take place in secret ballot'[22]. Therefore, the principle of equality and proportionality was not mentioned among election adjectives. It resulted from the content of the agreement concluded at the 'Round Table'.

The elections to the Sejm and the Senate in 1989 took place in two rounds, according to the majority vote. The condition for filling the mandate of a member of parliament and senator in the first round was to obtain an absolute majority of votes in the constituency. The relevant provision was as follows: 'Two candidates who received the highest number of votes are deemed elected to the Senate in the

17 Compare: J. Wawrzyniak, Sejm i Senat w latach 1989-1997, (in:) J. Bardach (works coordinator), Dzieje Sejmu Polskiego, Warszawa 1997, p. 311.

18 See more: W. Sokolewicz, Kwietniowa zmiana Konstytucji, Państwo i Prawo 1989, z. 6, p. 3.

19 Ustawa z dnia 7 kwietnia 1989 roku o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej (Dz.U. Nr 19, poz. 101) [Journal of Laws No. 19 item 101].

20 At the 'Round Table' a political 'contract' was entered into covering: 1) A position on political reforms; 2) A position on social and economic policies; 3) A position on union pluralism. These acts were also called social agreements; M. Kallas, A. Lityński, Historia ustroju i prawa Polski Ludowej, Warszawa 2003, p. 190.

21 Constitution of the Polish People's Repbulic Konstytucja Polskiej Rzeczypospolitej Ludowej enacted by the Legislative Sejm on 22 July 1952 (tekst. jedn. Dz.U. z 1976 r. Nr 7, poz. 36 z późn. zm.) [The uniform text Journal of Laws of 1976 No. 7 item 36 as amended].

22 *Ibidem*, Article 28 section1.

2-mandate electoral district, provided that each of them received more than half of the valid votes. Three candidates who received the highest number of votes are deemed elected to the Senate in the 3-mandate electoral district, provided that each of them received more than half of the valid votes'[23]. In order to fill seats in constituencies where candidates for members of parliament and senators did not obtain in the first round the required, absolute majority of validly cast votes, a second round of elections was held.

Elections to the Senate, which were held in 1991, 1993 and 1997, took place on the basis of the new electoral law[24] according to the majority system, but instead of the absolute majority, a system based on a relative majority was introduced. The issue of electoral districts and the number of senators elected in them has not changed. '100 Senators are elected to the Senate, according to the majority rule, in electoral districts. The electoral district for the Senate is the area of the province. Two senators are elected in each electoral district, and three senators are elected in each of the districts covering the area of the Warsaw Province and the Katowice Province'[25].

According to the Constitution of the Republic of Poland of 1997: 'Elections to the Senate are common, direct and take place in a secret ballot'[26]. The omission of the principle of equality and proportionality in the case of elections to the Senate 'should be understood only as leaving a regulatory freedom to an ordinary policymaker, and in no case can it give grounds for *a contrario* interpretation, that is to say that the constitution excludes the reference of equality and proportionality to the Senate elections'[27]. Thus, in the electoral law, on the one hand, solutions can be introduced which will mean establishing the principle of equality, and on the other hand, accept any election formula. Here, it is worth adding that the Constitution of the Republic of Poland of 1997 (as opposed to the Small Constitution of 1992[28]) did not maintain the requirement to link the Senate with the structure of the existing provinces.

On 1 January 1999, the territorial reform of the state came into force, according to which the number of provinces decreased to sixteen, which required changes to be made in the electoral law. The creators of the new electoral law had a great deal of freedom in shaping the electoral system to the Senate, as there were no constitutional

23 *Ibidem*, Article 94 section 2.

24 Ustawa z dnia 7 kwietnia 1989 roku – Ordynacja wyborcza do Senatu Polskiej Rzeczypospolitej Ludowej (Dz.U. z 1989r. Nr 19, poz. 103, art. 11) [Journal of Laws of 1989 No. 19 item 103, Article 11].

25 Dz.U. z 1991 r., Nr 58, poz. 246, z późn. zm [Journal of Laws of 1991 No. 58 item 246 as amended].

26 Ustawa z dnia 10 maja 1991 r. – Ordynacja wyborcza do Senatu Rzeczypospolitej Polskiej (Dz.U. z 1991 r. Nr 58, poz. 246 z późn. zm., art.b2) [Journal of Laws of 1991 No. 58 item 246 as amended, Article 2].

27 Constitution of the Republic of Poland of 2 April 1997 (Dz.U. z 1997 r. Nr 78, poz. 483 z późn. zm., art. 97 ust. 2) [Journal of Laws of 1997 No. 78 item 483 as amended, Article 97 section 2].

28 L. Garlicki, Komentarz do art. 97, (in:) L. Garlicki (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, Tom I, Warszawa 1999, p. 8.

obstacles to introduce elections in one hundred single-mandate electoral districts or a proportional system. Finally, on 12 April 2001, the Electoral Law was passed to the Sejm and the Senate of the Republic of Poland[29]. However, it was not decided to introduce significant changes in the regulations governing how the Senate is elected. Of the 40 constituencies formed, there were two to four elected senators – on a relative majority basis[30]. So the representatives to this chamber were still elected in the majority system from the multi-mandate electoral districts. The electoral law of 2001, however, departed from the previously functioning system, in which each province was an electoral district to the Senate[31]. It distributed senatorial seats between sixteen provinces, and then twelve of them were divided into smaller districts. The number of senators representing individual provinces resulted from a uniform representation standard. 'In this way, the vivid inequality that existed during the time the electoral regulations were in force for the Senate in 1989 and 1991 were removed'[32].

On 5 January 2011, the Electoral Code was adopted, which specifies, among other things, the rules and procedure for the submission of candidates, conduct and terms of validity of elections to the Senate of the Republic of Poland[33]. An important change regarding the creation of the 'second chamber' was the introduction of single-mandate constituencies[34]. As mentioned earlier, the establishment of elections in single-mandate constituencies in Poland has a large group of supporters. In this regard, it is worth mentioning, for example, the activities of the Civic Movement for Single-Mandate Electoral Districts[35]. However, the basic goal of civic postulates is to introduce such a formula in the elections to the Sejm of the Republic of Poland.

29 The Senate shall be composed of 100 senators elected in voivodeships for a period of the term of the Sejm in free, general, direct elections, in secret ballot"; Ustawa konstytucyjna z dnia 17 października 1992 roku o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej orazosamorządzieterytorialnym (Dz.U. z 1992 r. Nr 84, poz. 426 z późn. zm., art. 3 ust. 2) [Journal of Laws of 1992 No. 84 item 426 as amended, Article 3 section 2].

30 Dz.U. z 2001 r. Nr 46, poz. 499 z późn. zm [Journal of Laws of 2001 No. 46 item 499 as amended].

31 22 two-mandate circuits, 16 three-mandate circuits and 2 four-mandate circuits were established.

32 In order to conduct elections to the Senate, electoral circuits shall be established in the territory of particular voivodeships. In the electoral circuit, from 2 to 4 senators shall be elected. The electoral circuit covers the area of a voviodeship or its part. Borders of the electoral circuit shall not infringe borders of the electoral circuits established for the elections of the Sejm'; Ustawa z dnia 12 kwietnia 2001 roku – Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej I do Senatu Rzeczypospolitej Polskiej (Dz.U. z 2001r. Nr 46, poz. 499 z późn. zm., art. 191) [Journal of Laws of 2001 No. 46 item 499 as amended, Article 191]

33 S. Gebethner, Wybory do Sejmu i do Senatu. Komentarz do ustawy z dnia 12 kwietnia 2001 r. – Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej, Warszawa 2001, p. 279.

34 Dz.U. z 2011r., Nr 21, poz. 112 z późn. zm [Journal of Laws of 2011 No. 21 item 112 as amended].

35 Act of 5 January 2011 Electoral Code (Dz.U. z 2011 r. Nr 21, poz. 112 z późn. zm., art. 260) [Journal of Laws of 2011 No. 21 item 112 as amended, Article 260].

In the discussed context, it is worth pointing to the issue of supplementary elections to the Senate. The indicated procedure usually does not raise the interest of the electorate, which is why the voter turnout is very low. To illustrate the subject matter, it can be pointed out that in the votes held in three districts on 7 September 2014, the turnout did not exceed 10 percent[36]. Therefore, it seems purposeful to submit a *de lege ferenda* application, so that amendments to the electoral law eliminate (considerably limit) the need to carry out supplementary elections to the 'second chamber'. In this context, one can cite at least an offer to establish an institution of the 'deputy senator', which was proposed while considering the presidential draft amendment of the Electoral Law to the Sejm and Senate of 2001[37]. According to the initiative, on the electoral sheet, next to the surname of the candidate for senator, the name of his/her deputy would also be entered. Therefore, the constituent would vote at the same time for a given candidate and for the person who (in the event that the chosen senator would be unable to exercise their function) would automatically take their place[38]. Another way to solve the signaled problem would be to establish a mixed, majority-proportional electoral law. Supplementary elections would then only be carried out if the mandate of the senator elected in the single-mandate constituency had expired and was not assigned to any list of candidates elected in accordance with the principle of proportionality. In other cases (expiration of the mandate occupied in the single-mandate constituency, as well as the electoral list), the Senate would be supplemented by filling the vacant seat with another candidate on the electoral list submitted by the same committee that nominated the senator whose mandate expired.

4. Election practice

Referring to electoral experiences, S. Gebethner pointed out that 'elections to the Senate bring about a clear distortion of voters' will expressed in the act of voting. In the 1997 elections, no more than 40% of constituents voted for AWS candidates, and 51% of AWS senators sat in the Senate. While in 1993, 21% voted for SLD candidates,

36 As we can read at the website of the Civic Movement for Single-mandate Electoral Districts, the said civic movement requests 'introduction of 460 single-mandate electoral circuits (SEC) in elections to the Sejm of the Republic of Poland with equal right to be a candidate for all citizens, regardless of whether they are supported by parties or they run by themselves'; O co walczymy?, jow.pl/abc/ (accessed on: 06.01.2015).

37 Obwieszczenie Państwowej Komisji Wyborczej z dnia 8 września 2014 roku o wynikach wyborów uzupełniających do Senatu Rzeczypospolitej Polskiej przeprowadzonych w dniu 7 września 2014 roku (Dz.U. z 2014 r., poz.1208) [Journal of Laws of 2014 item 1208].

38 Druk nr 2545 [Paper No. 2545], Sejm of the Republic of Poalnd of IV term.

which gave it 37% of seats in the Senate'[39]. Subsequent choices that were made in 2001, 2005, 2007 and 2011 also confirmed the correctness of the adopted research hypothesis. In 2001, the Coalition Electoral Committee of the Democratic Left Alliance – Labor Union (Sojusz Lewicy Demokratycznej – Unia Pracy) received the support of 41.04% of voters in the parliamentary elections, while in the Senate it had 75 representatives (out of 100), of whom only one obtained more than 50% of votes (Adam Gierek enjoyed the support of nearly 65% of voters in constituency No. 31 Sosnowiec). The elections to the Senate in 2005, 2007 and 2011 were completely dominated by the candidates of two political parties, i.e. Civic Platform (Platforma Obywatelska) and Law and Justice (Prawo i Sprawiedliwość). For example, in 2007, only one independent candidate (Włodzimierz Cimoszewicz) was elected. In contrast, in 2011, after the introduction of single-mandate constituencies for the Senate, the Civic Platform and Law and Justice parties won a total of 94% of seats in the 'second chamber' of the Polish parliament. The winning Civic Platform had 63 senators, although the vast majority of candidates of this political party did not receive support in their electoral districts in the order of 50% (only 7 of Civic Platform senators received support of the absolute majority of voters)[40].

The same thesis can be formulated that the majority voting formula, when using relative majority, results in an unrepresentative composition of the Senate. The largest political groups (electoral committees) have, in the composition of the 'second chamber', more representatives than the support expressed in percent. On the other hand, it should be pointed out that the adopted electoral formula has led to the marginalization of smaller political parties and independent candidates[41].

5. Summary

Since the restoration of the Senate to the Polish political system in 1989, it is elected according to the majority rule in accordance with the principle of relative majority (except in 1989, when absolute majority was in force). Until the elections in 2007, multi-mandate electoral districts were in force, which changed in 2011, when 100 single-mandate electoral districts were established pursuant to the Electoral Code. At this point, it should be noted that adopting such an electoral formula is in line with the demands of a large part of the society; however, it applies above all to the Sejm elections. Therefore, we can treat the establishment of single-seat constituencies

39 Biuletyn nr 3862 z posiedzenia Komisji Ustawodawczej Sejmu RP IV kadencji, http://orka.sejm.gov.pl/Biuletyn.nsf/B4?Open (accessed on: 06.01.2015).

40 S. Gebethner, Wybory…, *op. cit.*, p. XXIV.

41 All data related to the elections of 2001, 2005, 2007 and2011 were taken from the website of the National Electoral Committee, http://pkw.gov.pl/wyniki-wyborow-i-referendow/wybory-i-referenda.html (accessed on: 21.05.2015).

in the Senate elections in 2011 as an excellent opportunity to test the pros and cons of such a system in the Polish socio-political realities. Considering previous experience, it should be pointed out that this solution creates major problems in winning seats by smaller parties and independent candidates, while the largest election committees have more seats in the representative body than the level of public support they have obtained.

To conclude, it seems to be deliberate to submit a *de lege ferenda* application, so that in the future we can consider establishing a majority-proportional electoral law for the Senate (this solution is also worth considering in the Sejm)[42]. In this way, the weaknesses of the majority regulation (e.g. considerable difficulties in obtaining a mandate by smaller groups) can be reduced, and significantly reduce the need to carry out supplementary elections to the Senate.

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42 'Teaching are experiences with the use of such electoral system in Scotland (the majority-proportional compensative system – ref. M. R.). In 1999, in elections to a regional parliament the conservative party received support of 15.5% of the electorate, but received no mandate directly in any of 73 single-mandate circuits. However, thanks to the existence of compensative mandates, conservatives obtained 18 seats, i.e. 14% of mandates'; S. Gebethner, Wybory…, *op. cit.*, p. XXV.

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Postal Voting and Voting by Proxy as an Alternative Voting Methods in the Light of the Electoral Code in Poland

Abstract: On 1 August 2011, the Electoral Code, a new act that comprehensively regulates electoral matters in the Republic of Poland, became effective. The article is devoted to the two new mechanisms incorporated in Polish electoral law: postal voting and voting by proxy. The author analyzes them as alternative voting methods in the light of the Electoral Code. Judgments of the Polish Constitutional Tribunal, the Code of Good Practises in Electoral Matters adopted by the Venice Commission and the doctrine of Polish constitutional law, are also taken into consideration. The article focuses on the procedural issues of postal voting and voting by proxy, as well on potential threats to the principle of personal voting and safety of the elections. In the author's opinion, the new alternative voting methods warrant considering Poland as a state that strives to overcome electoral barriers that hinder participation in public life for a large groups of voters. These provisions constitute an important step towards fuller implementation of the principle of universal suffrage and to enable citizens to truly participate in the broadest possible scope.
Keywords: voting by proxy, postal voting, elections
Słowa kluczowe: głosowanie przez pełnomocnika, głosowanie korespondencyjne, wybory

1. Electoral law and voter turnout

Electoral law of contemporary democratic states is the sphere of public law, which is subject to permanent and most frequently evolutionary modifications, which are dictated by, among other things, changes in the political concept of the state, sometimes temporary needs of political parties, but sometimes they also result from the need to improve the electoral law per se, so as to make it fulfil the functions stemming from the principle of representative democracy.

Some of the contemporary tendencies observed in relation to changes in the electoral law are attempts at coping with the problem of low voter turnout which

afflicts the European democracies more and more[1]. At the same time, analysis of the causes of this phenomenon and of the methods of its prevention, also within the scope of the so called electoral engineering, has become an important research area. Thus, changes in the electoral law become a response to two categories of causes of low turnout. Firstly, these are the situations which result in the culpable absence, i.e. the cases in which the voter can participate in the election process, but does not consciously choose to do so. This, among other things, follows from the discouragement and lack of confidence of the voters in politics and politicians, the lack of an electoral alternative or the lack of need to get involved in public life in general. Secondly, these are the causes which result in the so called forced absence, i.e. a situation, in which the voter, despite the willingness to vote, cannot do it – they just do not have the physical ability to cast a vote for reasons such as illness, old age, disability, and distance from the voting place. As reported by J. Zbieranek, barriers of such type relate to about 30% of voters[2], which shows how important it is to eliminate them in the context of the effective implementation of the principle of universal suffrage. The mechanisms of electoral law with such features are alternative voting methods. The research purpose of this study is the overview of Polish normative solutions in this regard, and the answer to a question how the legislator tries to respond to the phenomenon of the participation crisis.

2. Alternative voting methods in the Electoral Code – introductory remarks

On 5th of January 2011, the Act on Electoral Code was passed in Poland. It started to be applicable as at 1st of August 2011[3]. The obvious aim of the concept of a single normative act superseding the electoral regulations which had so far been applicable in Poland with regards to parliamentary, presidential, local government and the so called European elections was to harmonise the Polish electoral law[4], however,

1 J. Blondel, R. Sinnott, P. Svensson, Representation and voter participation, "European Journal of Political Research" 1997, No. 32, pp. 243-244; R.L. Pintor, M. Gratschew (eds.), Voter Turnout Since 1945: Aglobal Report, Stokholm 2002 and A. Ellis, M. Gratschew, J.H. Pmmet, E. Thiessen, Aktywizowanie wyborców. Inicjatywy z różnych państw świata, Warszawa 2008, pp.13-15.

2 J. Zbieranek, Nowe procedury: głosowanie korespondencyjne i przez pełnomocnika, (in:) K. Skotnicki (ed.), Kodeks wyborczy. Wstępna ocena, Warszawa 2011, pp. 37-40. See also: A. Błaszczak, J. Zbieranek, Gwarancje korzystania z czynnego prawa wyborczego przez osoby starsze i osoby z niepełnosprawnościami, "Biuletyn RPO. Źródła" 2012, No. 8, pp. 9-10, where authors provide demografic data presenting the scale of significance of various physical barriers hindering or even preventing voting.

3 Dz.U. z 2011 r. Nr 21, poz.112 z późn. zm [Journal of Laws of 2011 No. 21 item 112 as amended].

4 On the issue of unification of electoral law and on legislative works on Electoral Code see: K. Skotnicki, Przebieg prac nad Kodeksem wyborczym, (in:) K. Skotnicki (ed.), Kodeks wyborczy. Wstępna ocena, Warszawa 2011, pp. 11-35.

on this occasion, cautious reforms of the electoral law were undertaken, also with regards to the new options for participation of citizens in the public life in the form of alternative voting methods. In a democratic state, one can almost talk about 'the obligation of the legislator to create a real opportunity for everyone who is eligible for voting, to participate in elections'[5], which, in the light of the standards observed in other democratic states which evolve in the same direction, caused the creation of such legal framework, which enabled the alternative voting to be almost unavoidable.

The Polish Electoral Code stipulates two alternative voting methods: postal voting and proxy voting. They are applicable in almost all the election procedures (with exclusions which will be discussed further in the text).

Both solutions are related to deviations from the principle of voting in person, in the situations in which the strict requirement to cast a vote in person at a polling station would cause either the actual impossibility of voting or significant hindrance which would practically discourage the voter from participation in elections. As explained by G. Kryszeń, the requirement of voting in person at the polling station is not strictly observed in a large number of states, and the exceptions to it are made mainly in order to increase the voter turnout, and thus to strengthen the principle of universal suffrage[6]. However, an observation must be made that any alternative voting methods are understood as alternative in relation to the traditional personal voting at the polling station. At the same time, it is necessary to notice the difference between the issue of personal voting at the polling station and the issue of personal voting understood as the independent and autonomous performance of activities related to casting a vote. Such an understanding of the personal voting is assumed in the Electoral Code, which acknowledges in Article 38 § 2 that postal voting constitutes a form of personal voting. In the case of the proxy voting, the act does not provide for any similar regulation.

3. Postal voting according to the Electoral Code

The above-mentioned postal voting is a solution which the Electoral Code has introduced for the first time into the Polish electoral law[7].This is a voting method which arouses controversy, but is permissible in member states of the Council of Europe[8]. It is provided for in the electoral laws of Australia, Bangladesh, Bosnia,

5 M. Chmaj, W. Skrzydło, System wyborczy w Rzeczypospolitej Polskiej, Warszawa 2011, p. 39.

6 G. Kryszeń, Standardy prawne wolnych wyborów parlamentarnych, Białystok 2007, p. 222.

7 The first attempt at introducing a mechanism forpostal voting to Poland took place during works on the voting system to the European Parliament at the turn of 2002 and 2003, see: Zbieranek, Nowe procedury…, *op. cit*., p. 48-49, pp. 51-56.

8 The Venice Commission – in Code of good practices inelectoral matters includes this voting method, making however subjective reservations, as well as conected to relability of postal system – Code of good practices in electoral matters. Guidelines and explanatory reports, Adopted by

Estonia, Finland, Greece, Spain, the Netherlands, India, Ireland, Iceland, Japan, Canada, South Korea, Canada, Lesotho, Germany, New Zealand, Pakistan, Portugal, Federal Republic of Germany, Slovenia, the United States, Switzerland, Sweden, Great Britain, Lithuania, Latvia and the Philippines. In the great majority of these states, the postal voting was narrowed down to a group of people remaining beyond the state borders, and only in few of them, this right was vested also in the citizens on their territories, whereby in some of them, all voters were taken into account and in some others, only their certain categories, e.g. the disabled people or the elderly people[9].

The amendment to the Electoral Code of 11 July 2014[10] extended the possibility of voting by post, providing such an option to each voter. Before that amendment, the Polish Electoral Code stipulated that such a voting method will only be available to the disabled voters and to voters who cast their vote in polling wards established abroad. At present, the Electoral Code regulates this type of voting in Section I, chapter 6a (previously, the relevant provisions were included in Section I, chapters 7a and 8).The limitation of the range of the postal voting is the exclusion of this method in local government elections, whereby the disabled voters[11] may vote by post also during these elections. Furthermore, the postal voting is excluded in the case of voting in polling wards established in a health care institution, nursing home, penal institution and custody suite, student dormitory and in polling wards established on Polish marine ships, and also in the case of delegation of the right to vote by the disabled voter.

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the Venice Commission at its 52nd session (Venice, 18-19 October 2002), Opinion no. 190/2002, CDL-AD (2002) 23 rev, p. 21; The Venice Commission to correspondence voting devotes also Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of The Council of Europe. Adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004) on the basis of a contribution by Mr Christoph Grabenwarter (substitute member, Austria), Studyno. 260/2003, CDL-AD(2004)012. Both documents available at: www.venice.coe.int (accessed on: 12.06.2014)

9 Enumeration of states, in electoral law of which provides for the postal voting was prepared on the basis of: Z. Szabo, Distance voting, Raport sporządzonego na potrzeby Zgromadzenia Parlamentarnego Rady Europy, Doc. No. 11434 of 12 July 2007, Parliamentary Assembly Working Papers, Ordinary Session 21-25 January 2008, vol.1, p. 90; G. Kryszeń, Standardy prawne…, *op. cit.,* pp. 224-225; M. Qvortrup, Absentee Voting in a Comparative Perspective: A Preliminary Assessment of the Experiences with Postal Voting, Submissionfor The Joint Standing Committee on Electoral Matters, Australian Federal Parliament, text available at Aca- demia.edu (accessed on: 12.06.2014). J. Zbieranek, Nowe procedury…, *op. cit.,* pp. 46-48; J. Zbieranek., Alternatywne procedury głosowania w Polsce na tle państw Unii Europejskiej, "Biuro Analiz Sejmowych" 2011, No. 3, pp. 99-102.

10 Ustawa z dnia 11 lipca 2014r. o zmianie ustawy – Kodeks wyborczy oraz niektórych innych ustaw (Dz.U. z 2014 r. poz. 1072) [Journal of Laws of 2014 item 1072].

11 With significant or intermediate level of disability within the meaning of an act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (Dz.U. z 2011 r. Nr 127, poz. 721, z późn. zm.) [Journal of Laws of 2011 No. 127 item 721 as amended].

In the case of voting in the home country, the voter notifies the village mayor (city mayor or city president) of the intention to vote by post, and if voting abroad is considered – the territorially competent consul must be notified by the 15th day before the date of elections. After the formal validation of the application, the voter is entered into the suitable list of voters in the area of the commune where the voter is entered into the register of voters. In the case of the voting by post abroad, the voter is entered into the list of voters in the polling ward competent for the precinct electoral commission indicated by the regulation of the minister of foreign affairs, wherein at least one precinct electoral commission competent for the purposes of the voting by post, is indicated within the confines of the territorial jurisdiction of each consul.

The voter who declared the intention to vote by post in their country receives the election package from the commune office no later than 7 days before the date of elections. In the case of a voter who expressed their intention to vote by post abroad, it is the competent consul who is responsible for the sending of the election package, which should be done immediately after receiving a ballot paper from the competent election commission, however no later than 10 days before the election date.

Pursuant to Article 53g § 1. of the Electoral Code, the election package includes:

1) a return envelope;
2) a ballot paper or papers;
3) an envelope for the ballot paper or papers;
4) postal voting instructions;
5) an overlay or overlays on the ballot papers made in the Braille alphabet – if the voter requested them;
6) declaration on the personal voting by secret ballot.

The voter who votes by post, puts the completed ballot paper into the ballot paper envelope, which they seal, and then inserts this envelope into the return envelope including the signed declaration and sends it to the relevant precinct election committee[12], in the case of voting in their home country, and in the case of voting abroad – at their own expense, to the address of the competent consul[13]. The envelopes for the ballot papers removed from the return envelopes delivered to the precinct election committee are thrown into the ballot box. In the case of voting by post abroad, the consul delivers the return envelopes received by the time of completion of the voting, to the relevant precinct election committee. This causes the ballot papers to reach the relevant ballot box a bit later.

12 A voter can hand over a returnable envelope to a representative of operator designated within the meaning of an act of 23 November 2012 – Postal law (Dz.U. z 2012 r., poz. 1529) [Journal of Laws of 2012 item 1529]. It is also possible to cast a vote before the day of election, as a voter can personally deliver the returnable envelope when voting in a country – to a proper municipal office, when voting abroad – to a proper consul.

13 Return envelopes, if voting in a country, are free from postal charges.

The Polish solutions for postal voting must be considered modern. The legislator broadened the circle of people who can vote this way, making the use of this voting method possible by all voters. However, it will only be evident in practice during the following elections whether the mechanism enjoys popularity[14], or whether it has not become a subject of abuse, as this voting method also entails certain risks. The said risks can be related to, among others, the danger of not maintaining the secrecy of voting – thus creating conditions for the potential phenomenon of 'vote trading' or simply exerting pressure on the voters (e.g. within a given household), and the danger of forgeries, postal system imperfection or problems with meeting the formal requirements of such voting[15]. Despite these doubts the Venice Commission– in the above-mentioned code of good practice in electoral matters takes this voting method into consideration, pointing, however to subjective reservations as well as reservations related to the reliability of the postal system.

The Polish legislator considers the unauthorised opening or destruction of the election package or sealed envelope to be particularly dangerous for the postal voting and provides for a penal provision for such an act (Article 513a), which imposes a fine.

Just as is the case with proxy voting, the opinion on the postal voting was expressed by the Constitutional Tribunal in the already quoted judgement, claiming that the postal voting does not infringe upon the principle of voting secrecy and the standards of integrity of a democratic state, positively assessing this voting method as an optional form of voting that implements the principle of universal suffrage[16].

4. Proxy voting pursuant to the Electoral Code

A relatively new solution in the Polish electoral law is the second alternative voting method provided for by the Electoral Code – voting by proxy[17]. As reported by G. Kryszeń, such a method is available in the electoral law of such states as: Belgium,

14 In parliamentary elections in 2001, 807 persons in the country took advantage of correspondence voting, whereas only some of them did it effectively (647 persons) – see: A. Błaszczak, J. Zbieranek, Gwarancje korzystania…, *op. cit.,* pp. 69-70.

15 On advantages and disadvantages of correspondence voting writes D.P. Bannon, Electoral participation and Non Voter Segmentation, (in:) W.W. Wymer Jr, J. Lees – Marshment (eds.), Current Issues in Political Marketing, Binghampton 2006, pp. 114-116, see also M.Qvortrup, First past the Postman: voting by Mail In Comparative Perspective, "The Political Quarterly" 2005, vol. 76, No. 3, pp. 416-418, where we can also find remarkes on a genesis of correspondence voting and effects of introducing this type of voting *inter alia* to United Kingdom, Australia and New Zeland.

16 Judgment of the Constitutional Tribunal of 20 July 2011, K 9/11.

17 When works on Electoral Code were taking place, proxy votingwas introduced to the voting system binding in presidential and self-government elections, on the basis of which elections in 2010 took place. At that time, several thousand voters, the elderly or with disabilities, took

France, Ghana, Georgia, Guiana, Spain, The Netherlands, Latvia, Mali, Sweden and Great Britain, whereby the approach to this mechanism differs as regards the group of people entitled to grant a proxy and to accept it, the number of possible proxies which can be accepted by one voter, the varying period of validity of a proxy and the method of its granting[18].

The Polish Act deals with the proxy voting in Section I, chapter 7[19]. Also in the Polish version, this is a solution which is limited in its nature with regards to the subjects it covers –as pursuant to Article 54, this voting method may only be taken advantage of by a disabled voter with a significant or moderate degree of disability[20] or a voter who is 75 years old on the election day at the latest. Only such a person may delegate their rights to vote. Furthermore, the legislator decided that such a voting method is excluded in the case of voting in separate polling wards and in polling wards established abroad and on Polish marine ships, and also if the disabled voter declares the intention of postal voting.

The regulations of the Electoral Code specify who can act as a proxy holder and how the procedure of granting and withdrawing of a proxy should look. Pursuant toArticle55 of the Act, the proxy holder can be a person entered into the register of voters in the same commune as the person who delegates the right to vote. The Code also rightly allows for a situation in which the right to vote is delegated to a person who has a certificate regarding the voting right(if the regulations, especially those concerning the given elections provide for a possibility of obtaining such a certificate), thus allowing for e.g. the empowering of a family member who resides in a different commune.The code enables the acceptance of the proxy from one voter only – an exception is provided for in the case of listed categories of people – it is additionally possible to be a proxy for two persons of which one is a family member in adrogation

advantage of the procedure of voting by proxy in both elections. See: A. Błaszczak, J. Zbieranek, Gwarancje korzystania..., *op. cit.,* p. 22.

18 G. Kryszeń, Standardyprawne…, *op. cit.* ,p. 223, about differences writes J. Zbieranek, Nowe procedury…, *op. cit.,* pp. 42-44, writes J. Zbieranek, Alternatywne procedury..., *op. cit*., p. 96-98. See also: A. Krasnowolski, Głosowanie przez pełnomocnika, głosowanie antycypowane i głosowanie korespondencyjne w krajach europejskich i Kanadzie, Warszawa 2006, p. 10 et seq.; K. Skotnicki, Zasada powszechności w prawie wyborczym. Zagadnienia teorii i praktyki, Łódź 2000, p. 263 et seq.

19 The idea of proxy voting, as the idea of postal voting, was one of few arguable areas during works of the extraordinary Sejm commission taking care of bills – see K. Skotnicki, Przebieg prac…, *op. cit.,* p. 25.

20 Within the meaning of an act of 27 August 1997on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (Dz.U. z 2011 r. Nr 127, poz. 721) [Journal of Laws of 2011 No. 127 item 721]. The scope of persons eligible to take advantage of this voting method was a subject to controversy during works on Electoral Code, as well as even after its entry into force – see J. Zbieranek, Nowe procedury…, *op. cit.,* p. 56.

or guardianship relation[21]. This is to prevent the use of this mechanism contrary to the intentions of the legislator, e.g. by paid collection of proxies to vote[22].

Because of the safety of elections, the procedure of proxy voting per se is formalised. On the ninth day before the election date at the latest, the voter applies for drawing up of a proxy act to the competent commune head, providing the relevant data regarding the principal, including the documents which identify them as person eligible for voting in this manner and the documents which certify the ability of a given person to be the proxy. The proxy act is established before the commune head or other officer authorised by them at the place of residence of the voter or at a different place in the area of the commune requested by the voter.

In as much as the institution of proxy voting per se is advantageous from the point of view of the principle of universal suffrage, it must be borne in mind that it rouses controversy from the point of view of other electoral principles. Taking into account the voices of doctrine, G. Kryszeń points out that what raises doubts is its

compliance with the principle of direct elections and the principle of voting secrecy[23],which leads him to the conclusion that proxy voting is contrary to 'fundamental requirements of free elections[24]. The essential risk for the concept of proxy voting is the situation in which the proxy holder casts a vote in accordance with their own views,and not according to the will of the voter that delegates the right to vote[25]. An opinion about the doubts resulting from the proxy voting was also expressed by the Constitutional Tribunal which welcomed this institution as an additional guarantee for the use of the voting rights by citizens. The Tribunal rejected the arguments that the proxy voting is contrary to the principle of direct voting, arguing that this principle means that the voting act is a one-step process which does not create an obligation to vote in person[26].

21 A proxy cannot be a person who is a member of district committee competent for the voting district of a person granting a proxy vote, men of confidence, as well as candidates in the subject elections.

22 The Electoral Code in Article 60 § 2 literally prohibits a proxy from collecting any charges from a person granting a proxy for voting in hero r his name, and in Article 60 § 3 prohibits granting a voting proxy for any financial or personal benefit.

23 J. Mordwiłko, W sprawie ustanowienia z polskim prawie wyborczym instytucji pełnomocnika oraz możliwości głosowania drogą pocztową (głosowania korespondencyjnego), "Przegląd Sejmowy" 2001, No. 1, p. 67-71, where author presents short review of the doctrine views on the content of the principle of direct elections and doubts connected to the issue of casting vote in person.

24 G. Kryszeń, Standardy prawne…, *op. cit.,* p. 223.

25 K. Skotnicki, Zasada powszechności…, *op. cit.,* p. 267.

26 Judgment of the Constitutional Tribunal of 20 July 2011, K 9/11. Additionally, the Tribunal dismissed the charge of violation of the principle of equality in formal regard, using the argument that a proxy casts a vote in the name of a voter, and not in his name. Therefore, she or he does not have two votes, but one her or his own (as a voter) and one vote executed in the name of another voter.

Taking into account the views of the doctrine which indicate the risks related to the proxy voting, the Polish normative model for this voting mechanism, limited in terms of the group of people which it covers and also relatively formalised, seems to be a solution prudent enough that being treated as an exception to the rule of personal voting, it fits in with the principles of a democratic state. Nevertheless, only the practice during several subsequent elections will show whether this mechanism is not a subject of abuse.

It is worth noticing that the Electoral Code provides for penal provisions related to the institution of the proxy voting, which are additionally supposed to prevent the pathological behaviour oriented towards gaining benefits, related to giving a proxy – both on the part of the person who grants the proxy and the proxy holder per se. On the one hand, pursuant to article 511, he who collects a charge from the person that delegates the right to vote on his behalf – is subject to a fine, and pursuant Article 512, he who delegates his voting right for a material or personal benefit – is subject to imprisonment or fine[27].

5. Conclusions

The solutions of the Polish Electoral Code presented above undoubtedly help to implement the principle of universal suffrage, which, per se, determines the group of people that represent the electorate – however, in the context of the issue of participation, it is essential to treat the proxy voting or postal voting as the guarantees of this principle, allowing as large a part of this electorate to participate in elections. The elimination of the above-mentioned risks should cause the further development of the concept of alternative voting methods, which is proven by the amendment to the Electoral Code which concerns the postal voting. The introduction of these methods and the progress in their implementation also create the grounds for a discussion of the future of e-voting in Poland. However, various problems which accompanied the local government elections in the year 2014 undoubtedly did not contribute to the creation of a good 'political climate' for the discussion of the introduction of *e-voting* in Poland and for further progress in the field of alternative voting methods.

As well as the solutions provided for by the Electoral Code, which have been mentioned above, attention must also be paid to aspects related to dissemination of information. According to A. Błaszczak and J. Zbieranek, the information campaign regarding new solutions before the parliamentary elections which were held in the year 2011 was fairly limited and rather late. It must be noted here that the Electoral Code per se imposes a number of information responsibilities on the local governments, State Election Committee and precinct election committees, referring

27 See: A. Błaszczak, J. Zbieranek, Gwarancje korzystania…, *op. cit.,* pp. 51-54. The same authors write more on potential of informative factor and postulates in this regard (pp. 84-93).

particularly to the disabled. (see Chapter 5a of the Electoral Code). Obviously, making the voters aware of new solutions will not have an immediate effect, and the popularisation of knowledge in this respect requires appropriate information actions taken by the state authorities.

The solutions included in the Electoral Code, without any doubt, constitute an important step forward towards better implementation of the principle of universal suffrage. Both the solutions established in the Polish electoral law and the new mechanisms of alternative voting, in the opinion of the author, allow for making Poland a part of the group of states whose aim is to overcome barriers regarding elections. Both the normative solutions and the judgement of the Constitutional Tribunal prove the importance given to the principle of universal suffrage, even accepting the risks posed by the optional voting methods.

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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 pateantdignitatum?*

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 qualification[1] although there is little doubt that election deposit is derived from

1 As G. Kryszeń 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. Kryszeń, Standardy prawne wolnych wyborów parlamentarnych, Białystok 2007, p. 151.

electoral qualification[2]. 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 system[3]. 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 candidature[4]. 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 above[5].

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 deposists 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 support[7]. 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 elections[8]. 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 2003[9]. 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 Rights[11]. *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 Cimmission, 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. Kryszeń, 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"]} (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 voters[12]. 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 deposit[13], is the Austrian obligation for a presidential candidate to incur the cost of print of voting cards. This amount is equal to EUR 3,600[14], 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 candidate[15].

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 remuneration[16]. 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 elections[17]. 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 back[18].

In the Republic of Bulgaria, the amount of the election deposit for a presidential candidate was changed from BGN 250,000 to BGN 5,000[19]. In Bulgaria, the deposit is returned based on the decision of the Central Election Commission, unless the candidate failed to receive 1% of valid votes[20]. 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 candidates[21].

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 status[22]. 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 14,700[23]. 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 Lithaunian 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 Oipinion on the Draft Amendments to the Electoral Code of Armenia, 19.04.2005.

23 Until 2008, an elecotral 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 deposits[24].

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 2010[25]. 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 Ukrajiny", "Widomosti Werchownoji 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 countries[26].

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 election[27]. 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 election[28]. 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 elections[29]. 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 orgnaizations or publicists than representatives of the doctrine. See e.g. S. Kononczuk, Hroszy dla kandydata w prezydenty,Ukrajinskij Nezależnyji Centr Politycznych Doslidżeń, http://www.ucipr.kiev.ua/publications/groshi-dlia-kandidata-v-pre- zidenti (accessed on: 15.01.2015 r.) or M. Naboka, Hroszowa zastawa dlja kandydatiw: wporjadkuwannja czy poruszennjapraw?,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/print12990709 87132750 (accessed on: 11.02.2015).

29 Compare G. Kryszeń, 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 character[30].

The above-mentioned comments of the Venice Commission appear far too lenient and even permitting excessive restrictions of the passive election right[31]. 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 entities[32]. 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 propsal of the Venice Commisssion 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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The Mechanism of Quota in the Light of Electoral Code Regulations Introduced in 2011

Abstract: The article describes the process of introducing the electoral quota system into Polish legislation. This system is one of the most popular instruments forincreasing the participation of women in politics. Women are underrepresented in the Polish Parliament with only 23.9% of politicians being female. This situation was supposed to be changed by implementing the electoral quota system, which requires the equal number of 35% male and female candidates in the electoral polls for all parliamentary, district council and county council elections. The first draft of the electoral quota act was the Parity Act, proposed as one of the people's legislative initiatives in 2009. The article also describes the attempts to increase the required number of 35% male and female candidates by implementing the clause which sets the rule of placing the names of female and male candidates alternately on the electoral polls, theso-called "zipquota".
Keywords: Women in politics, electoral quota, parity system, electoral list, act of 2011
Słowa kluczowe: Kobiety w polityce, kwoty wyborcze, parytety wyborcze, listy wyborcze, kodeks wyborczy z 2011 roku

1. Introduction

Women gained the right to vote and stand in elections in Poland in the year 1918 under the decree on electoral law issued by Józef Piłsudski. Already in the year 1919, they were eligible for political offices and could stand in the elections to the Legislative Sejm. Despite the fact that the women in Poland were the first in Europe to obtain the suffrage, their representation in the Polish parliament is still rather small. In the year 1991, there were 10% of women in the Sejm and 8% in the Senate. In 1993, their percentage in the Sejm and Senate increased to 13%. During the term of office of the Sejm in the year 1997, the percentage of women was kept at the level of 13%, and in the Senate, it fell to 12%. It was only after the elections in the year 2001 that the women's representation increased to 20% in the Sejm and

23% in the Senate. The percentage of women in the Sejm both after the elections in the year 2005 and 2007 was still at the level of 20% while in the Senate it decreased to 14% in 2005 and 8% in 2007[1]. The low level of participation of women in the parliament is not only a problem in Poland. It also affects the whole of Europe. The globally applied mechanisms which are aimed at facilitating the use of the right to be elected by women are electoral gender quotas and parities. Such a solution was adopted, among others, in France, Belgium and Slovenia. The Women's Congress[2] in 2009 triggered discussions in the Polish media and political circles, regarding the introduction of parities into the Polish electoral law, which resulted in the adoption of the so called Quota Act[3] in 2011. However, before the act was passed, it went through a long legislative path and its original provisions were amended significantly. In the final version, it introduced the electoral quotas and not parities as the act initiated by citizens originally proposed. As the elections in the year 2011 demonstrated, the adopted solution did not ensure a significant increase in the representation of women in the Sejm. The consequence of this was another draft act which introduced the zipping principle to alternate between male candidates and female candidates on the electoral list. This study will discuss the assumptions of the parity act initiated by the citizens, then the act of 2011 on amendment to the laws for elections to the Sejm, Senate, municipal council and European Parliament will be subjected to analysis and finally the consequences resulting from the entry of the act into force will be shown together with the possible options for improvement of these legal solutions.

2. Quotas or perities – definitions

In the political discourse and in the media, the terms 'quotas' and 'parities' are misused; these two words are applied interchangeably, though their meanings are different. Parities (in Latin *paritas, franc. parité* means equality)[4] occur in a situation in which the requirement of representation of one group constitutes an adequate number to the percentage of that group in the entire population. In the case of electoral parities, this means that the 50% winnable seats on the lists should be taken

1 B. Balińska, Polityka równości płci Polska 2007 Raport, Warszawa 2007, p. 25.

2 The Congress of Women is a social movement, activizing socially and politically women in Poalnd. The starting point were activities undertaken when organizing the First Congress of Women, that is a convention of more than 4 thousand women from all over the country, who discussed women contribution to the history of the last two decades in Poland.

3 Ustawa z dnia 5 stycznia 2011 r. o zmianie ustawy – Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw, ustawy – Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej oraz ustawy – Ordynacja wyborcza do Parlamentu Europejskiego (Dz.U. z 2011 r. Nr 34, poz. 172) [Journal of Laws of 2001 No. 34 item 172].

4 B. Dunaj, Wielki słownik języka polskiego, Warszawa 2009, p. 442.

by women. Quotas are defined by Pippa Norris[5] as 'the instrument which introduces specific criteria in the form of the minimum or maximum threshold for a given group, into the procedure for selection of members to the bodies coming from universal elections or from the nomination in the public sphere or to the recruitment in the private sector.[6]' Thus the quotas do not specify precisely what percentage ratio between a group of women and a group of men should exist. The quota system may be introduced at the constitutional and statutory level, but also in internal regulations of political party[7]. In France, the introduction of electoral gender quotas was bound to the amendment to the constitution. In Poland, there are statutory quotas, but before the year 2011, they also appeared in internal regulations of the parties – these were the so called voluntary quotas (Left-Wing Alliance, Labour Party, Freedom Union and Civic Platform)[8]. We can also face a situation in which failure to fulfil the quota requirements entails consequences in the form of lack of registration of the electoral list (Poland, Slovenia), leaving of a blank place, if no women starts from it (Belgium), or results in the reduction of the financing of the party from the public funds (France)[9]. In some countries, we can encounter zipping which is a type of quotas that introduces the obligation to alternate between women and men on electoral lists. In Australia and New Zealand, women's lists of candidates are notified, that is, the said lists comprise women exclusively[10]. In the case of single-mandate constituencies in Wales and Scotland, the twinning of districts is observed, i.e. the candidates from the neighbouring constituencies are notified in pairs – a woman is a candidate in one constituency and a man in the other.

3. Attempts at introducing electoral parities to Poland

The first proposal for introduction of quotas in Poland was presented in the 1990's, within the framework of the act on the equal status of women and men. The draft act assumed the introduction of a requirement of the 40% representation of candidates on electoral lists and in all the bodies nominated and appointed by the authorities. The draft was lost in the committee before the expiry of the term of office of the Sejm in 1997[11]. The proposal for introduction of the quota system was put

5 Pippa Norris – an American political scientist, focusing in her research on equal opportunities for women and men in politics.

6 Ł. Wawrowski, Polityka równych szans. Instytucjonalne mechanizmy zwiększania partycypacji kobiet w struktu- rach politycznych na przykładzie państw Unii Europejskiej, Toruń 2007, p. 587.

7 M. Fuszera, Kobiety, wybory, polityka, Warszawa 2013, p. 19.

8 Ł. Wawrowski, Polityka…, *op. cit*., p. 592.

9 Ł. Wawrowski, Polityka…, *op. cit*., p. 592.

10 M. Szewczyk, Parytet płci w ujęciu prawno-porównawczym, "Studia Iuridica Toruniensia" t. 9/211, Toruń 2011, p. 145.

11 M. Fuszera, Kobiety…, *op. cit.,* p. 21.

forward again in the Polish Sejm by the Freedom Union and the Parliamentary Group of Women before the parliamentary elections in the year 2001. The parties proposed an amendment to the electoral law by introducing the obligatory requirement of 30% of women on electoral lists. The consequence of failure to fulfil the requirement of 30% would be the lack of registration of such a list. However, in the end, this solution was not accepted. Again, the problem of under-representation of women on electoral lists was touched upon at the Women's Congress in 2009. The Congress was organised under the name 'Women for Poland. Poland for Women', and one of its proposals was to amend the electoral law by introducing a provision regarding the parities on electoral lists. It was argued that women have no equal chances in politics, are under-represented, and this translates into their insufficient representation in the composition of parliaments. In October 2010, the Citizen's Committee for Legislative Initiative 'Time for Women' referred the draft act on amendment to the provisions of the Act on Elections to the Sejm and Senate of the Republic of Poland, provisions of the Act on Elections to Municipal and County Councils and Provincial Assemblies and provisions of the Act on Elections to the European Parliament, in connection with the introduction of the gender parity to candidate lists'[12].

The draft proposed the inclusion of the following paragraph in the provisions for elections to the Sejm and Senate – in Article 143:

'The number of women on the regional list must not be lower than the number of men'[13].

In the provisions of the Act on elections to municipal and district councils and provincial assemblies, section 2a was to be added to Article 43[14].

'The number of women on the list may not be lower than the number of men. This principle is not applied in the case of supplementary elections to the council in a municipality inhabited by up to 20,000 people'.

In the rationale provided for the act initiated by the citizens, a reference was made to the principle of equality before the law guaranteed in Article 31, section 1[15] of the Constitution of the Republic of Poland and the principle of equal treatment of

12 Obywatelski projekt ustawy – o zmianie ustawy – Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i Senatu Rzeczypospolitej Polskiej, ustawy – Ordynacja wyborcza do rad gmin, rad powiatów i sejmików wojewódz- kich oraz ustawy – Ordynacja wyborcza do Parlamentu Europejskiego, w związku z wprowadzeniem parytetu płci na listach kandydatów, Sejm paper No. 2713, p. 5.

13 Obywatelski projekt ustawy – o zmianie ustawy – Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i Senatu Rzeczypospolitej Polskiej, ustawy – Ordynacja wyborcza do rad gmin, rad powiatów i sejmików wojewódz- kich oraz ustawy – Ordynacja wyborcza do Parlamentu Europejskiego, w związku z wprowadzeniem parytetu płci na listach kandydatów, Sejm paper No. 2713, p. 6.

14 *Ibidem.*

15 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku (Dz.U. z 1997 r. Nr 78, poz. 483 z późn. zm.) [Journal of Laws of 1997 No. 78 item 483 as amended].

women and men established in Article 33 of the Polish Constitution, including the right of women to hold public offices and receive public honours. An observation was made in the rationale that despite the fact that 'women constitute the lasting majority' of the citizens as a whole, they constitute a minority in the percentage composition of the public state authorities coming from the universal elections[16]. Doubts appeared among constitutionalists and lawyers, whether the Parity Act complies with the Constitution of the Republic of Poland in light of equality guaranteed by the Constitution. As well as non-constitutionality, the opponents of the draft raised the argument that the number of women on electoral lists was not specified exactly, so they could occupy 50% of places and more, without top-down limitations. Also, there were reservations that the draft interferes with the autonomy of political parties, and Article 11 of the Constitution of the Republic of Poland ensures freedom of establishment and operation of political parties in order to influence the shape of the state policy by means of democratic methods[17]. The opinions issued with regards to the draft act were contradictory and did not specify unambiguously whether the proposed draft act was conformant with the Constitution. The first reading of the act in the Sejm took place in January 2010, and then the draft was sent to committees and sub-committees. Civic Platform proposed an amendment in accordance with which candidates – both women and men were supposed to constitute 35% of persons on the list of candidates (in each case) in elections to the Sejm, European Parliament and local government. The ultimate solution adopted by the legislator is a compromise between the proposals of the Women's Congress and the draft parity act initiated by the citizens.

4. Quota Act in Poland

In January 2011, the president signed an Act that amended the electoral law for municipal and district councils and provincial assemblies, the electoral law for the Sejm and Senate of the Republic of Poland and the electoral law for the European Parliament. Provisions of the act were included in the Electoral Code from August 2011[18]. Article 211 of the Electoral Code, § 3 introduced the quota requirement on the electoral lists to the Sejm. The number of candidates – women, must not be lower than 35% of the number of all candidates on the list. Similar solutions were included in the regulations concerning elections to commune councils, Article 425 § 3 of the Electoral Code. On the list referred to in § 2, point 2 of the Electoral Code:

16 *Ibidem*, p. 7.

17 A. Szmyt, Opinie w sprawie wprowadzenia parytetu płci na listach wyborczych, "Przegląd Sejmowy" 2010, No. 3(98), p. 137.

18 Dz.U. z 2011 r. Nr 34, poz.172 [Journal of Laws of 2011 No. 34 item 172].

1) the number of candidates – women must not be lower than 35% of the number of all candidates on the list;
2) the number of candidates – men must not be lower than 35% of the number of all candidates on the list;[19]

In the specific provisions concerning elections to district councils, Article 457 § 2 of the Electoral Code, in the case of notification of a list comprising 3 candidates:

1) the number of candidates –women
2) the number of candidates – men

– must not be lower than 1[20].

Article 213 § 1 of the Electoral Code imposes a sanction on the electoral committee for failure to meet the quota requirements on electoral lists. No less than 35% of women and no less than 35% of men must be present on the electoral list in order to have it registered. The quotas may only be applied in the case of the proportionate electoral system. The amendment to the electoral law introduced single-mandate constituencies to the Senate and to the councils in municipalities with up to 20, 000 inhabitants, therefore the quotas did not apply to electoral lists to the Senate and the council in municipalities with up to 20,000 inhabitants.

5. Electoral gender quotas in parliamentary elections in 2011

Shortly after the amendment to the electoral law for the Sejm and Senate, an opportunity appeared to check the effectiveness of the quotas in the parliamentary elections in the year 2011. As the amendment to the Code also involved the introduction of single-mandate constituencies to the Senate, the requirement for the 35%representation of each gender on the list of candidates to the second chamber of the parliament could not be fulfilled. The election committees of political parties presented the electoral lists to the Sejm taking into account the mechanism of quotas, most of the parties even exceeded the statutory minimum and the percentage of women on the lists was as follows: Left-Wing Alliance – 44.4%, Civic Platform – 43.4%, Polish Peasants Party – 41.7%, Law and Justice – 39.8%. [21]. Despite this, the number of women in the Sejm after the elections in 2011 increased only by 3.9 percentage point in comparison with the parliamentary elections in 2007, when women constituted 20%. The reason for this minor increase can be sought in taking advantage of certain vagueness of the Act. The electoral law did not include any

19 Ustawa z dnia 5 stycznia 2011r. – Kodeks wyborczy (Dz.U. z 2011 r. Nr 21, poz.112 z późn. zm.) [Journal of Laws of 2011 No. 21 item 112 as amended].

20 *Ibidem.*

21 M. Fuszara, Kwoty, listy wyborcze i równość płci w wyborach parlamentarnych w 2011 roku, Warszawa 2012, p. 9.

provisions regarding the place from which the female candidates and male candidates can start. No zippered quota was introduced, thus the electoral lists were designed by the political parties in such a way that women would often be put further down the candidate list. On the lists registered by the election committee of the Law and Justice party, there were 21.1% of women who occupied the first three positions[22], while the first position was occupied by 24.8%[23]. In the case of Left Wing Alliance, female candidates in the first three positions constituted 36.6%, while 15%[24] of women started from the first position. In Civic Platform 40.6% of women were found among the first three on the candidate list, and 34% of them started from the first position. In the Polish Peasants Party only 22.0% of women were assigned the first three positions on the list and 15% of women were given number one. The Palikot Movement ranked 10% of women in the first position and the first three positions were occupied by 39.8% of women. The result of measures taken by the parties was an insignificant increase in the percentage of female candidates, which were elected to the Sejm. According to the internal policies of the parties, the first three positions on the list are more often than not taken by candidates who are recognisable by the voters and who have already served in several positions in the Sejm or Senate[25]. The Civic Platform and Law and Justice parties, which decided to give high positions to women, would thus be represented by 34% and 17% female members of parliament accordingly. On the electoral lists of the Polish Peasants Party, only few women started from a high position, which translated into just 7% of female members of the parliament in the parliamentary club of this party. The practice of the election committees showed that it was not the placement of women on the list itself which was important, but rather the position which they occupied[26].

6. Attempts at introducing the zipping system to electoral lists

The draft of the amendment to the Electoral Code from August 2011 was received by the Marshal of the Sejm – Mrs. Ewa Kopacz in October 2012. The amendment proposed by the Palikot Movement aimed at introduction of parities and the alternate appearance of the male and female candidates on electoral lists. The proponents justified that only such a solution will guarantee political equality of women and men in the political life[27]. What raised doubts in the provision regarding the parties

22 On the basis of data from the National Electoral Commission, http://wybory2011.pkw.gov.pl/wsw/pl/000000.html (accessed on: 13 grudnia 2014).
23 *Ibidem*.
24 *Ibidem*.
25 *Ibidem*.
26 *Ibidem*.
27 A parliamentary bill, Sejm paper No. 1146, at: www.sejm.gov.pl (accessed on: 13 December 2014).

was its constitutionality. The opinion issued by Mr. Andrzej Seremet indicated that the parity solution was not compliant with the Constitution, as gender was not an objective evaluation criterion and might lead to unjustified inequality[28]. In January 2013 Marshal Ewa Kopacz received another draft act prepared by the Parliamentary Group of Women – on amendment to the Electoral Code Act[29] of July 2011. The said draft consisted in the introduction of the alternate appearance of women and men on electoral lists to the Sejm, municipality, city and district councils as well as provincial assemblies and European Parliament. The proponents raise the argument that the practices in drawing up the electoral lists are clearly in favour of men. 'It would be fair if the same percentage of persons – 3 women and 3 men respectively – was awarded the first position on the list'[30]. In both rationales, it was acknowledged that the quota solution per se was not an effective mechanism, as demonstrated by the parliamentary elections in the year 2011. It was indicated that the practice of application of the current legal regulations did not fully ensure equality between women and men with regards to putting them on the electoral lists. On top of this, there were voices that the zipping system would not cause any changes and might even make the current situation worse. Jarosław Flis, in his opinion on the draft acts that introduced the parity on the electoral lists argues that the act would not, most probably, bring about any of the intended final effects[31]. The exertion of pressure on political parties to put women higher on the electoral lists may turn out to be ineffective, as 90% of positions in the Polish electoral system does not give chances for election[32]. This follows from the model of open electoral lists and the conviction of the parties that only a candidate ranked first is able to win the elections, therefore the most recognized politicians occupy the highest positions on the electoral lists[33]. Although in May 2014, the draft act submitted by the Parliamentary Group of Women was adopted by the extraordinary committee, the work on the proposed solutions still lasts.

7. Summary

The introduction of the mechanism that ensures a greater participation of women in the Polish parliament was a long-lasting process which was initiated in the 1990's and came to an end no sooner than in 2011. The adopted Quota Act is

28 M. Seremet, Ocena poselskiego projektu ustawy o zmianie ustawy – Kodeks wyborczy, Sejm paper No.1146, p. 7.

29 A parliamentary bill, Sejm paper No. 1151, at:www.sejm.gov.pl, (accessed on: 13 December 2014).

30 *Ibidem,* p. 2.

31 J. Flis, Opinia w sprawie projektów ustaw wprowadzających parytet na listach wyborczych (druk nr 1146 i 1151), p. 1.

32 *Ibidem*, p. 8.

33 *Ibidem*, p. 9.

a compromise between the draft act proposed within the framework of the citizen's legislative initiative and the regulations agreed by the Polish legislator. Shortly after passing the amendment to the electoral law, there appeared an opportunity to check the effectiveness of the adopted mechanism. After the parliamentary elections in the year 2011, the number of women in the Sejm increased by 3.9 percentage points in comparison with the term of office of the Sejm in the year 2007. The reason for such a minor increase can be associated with the internal policies of the parties applied during the distribution of positions on electoral lists. Despite the fact that the parties abode by the requirement of 35% with a certain surplus, women would not always be put on favourable positions on the candidate lists. The practice of the Polish elections shows that the higher the occupied position of the candidate on the list is, the higher is the probability of their victory. Therefore, the Parliamentary Group of Women and the Palikot Movement drew up an amendment to the electoral regulations, proposing the introduction of the zipping system on the electoral lists. They raised an argument that the zipper quota mechanism was a more effective solution because of the compulsion related to the alternate appearance of female and male candidates on electoral lists. The zipping practice applied by the Civic Platform party during the drafting of the electoral lists in the year 2011 turned out to be more advantageous for female candidates and allowed their presence in the Polish Parliament. Also, there are opinions that the introduction of the zipper quota may not contribute to an increase in the participation of women in politics at all. As the work on the Polish draft zipper quota act still continue, and there is no unambiguous opinion on the effectiveness of the amendment, it will only be possible in practice to prove its effectiveness. The consequence of the currently applicable legal solution is an increase in the number of female candidates on electoral lists. The facilitated access to the electoral lists may, in the long run, help women exist on the political stage, and thus, increase their chances for victory in the next elections.

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Opinions of the Poles about Postulated Changes in Electoral Law

Abstract: After many years of effort, in 2011, a large package of new solutions was introduced to the Polish electoral law (postal-voting, quotas, etc.). But the process of changing electoral law cannot be considered as complete. Some of the solutions implemented require adjustment and modification (such as electoral quotas). It is also worth taking into account, inter alia, demographic changes and technological developments; considering the prospects for the evolution of mechanisms in the long term (such as the introduction of electronic voting and reducing the voting age). A few weeks before the European Parliament elections in 2014, the Centre of Electoral Studies and the Public Opinion Research Center, conducted polls to assess public opinion on a group of constructions that were being considered by experts and in parliamentary works on electoral law. The research shows that Poles are against the proposed reduction in voting age (to 16 years) as well as against removal of the 'electoral silence' period. Opinion on electoral quotas was divided. The research also showed that although Poles are open to new, remote methods of voting (e.g. postal voting), they still preferred the 'classic way' of voting in polling stations which they regarded as being the most trustworthy.
Keywords: electoral law, elections, public opinion surveys
Słowa kluczowe: prawo wyborcze, wybory, badania opinii społecznej

1. Introduction

In 2011, the Electoral Code Code was adopted. In addition to rearranging the already existing election rules, it also introduced many new important mechanisms and legal structures. The conceptual and legislative work on successive amendments, however, are still continued. A wide variety of proposals for innovation concerning the election law are taken into consideration in expert discussions, public debate,

and in Parliament. Some of them cause much controversy. Since the process of legal amendments should be accompanied by a deep reflection involving also the voter attitude and opinion research, in April 2014, the Centre of Electoral Studies of the Nicolaus Copernicus University and the Public Opinion Research Center decided to conduct a mutual research concerning those issues. We agreed that the impending elections to the European Parliament may constitute a certain point of reference, and the pre-election period as well as attention, of at least part of respondents, paid to the matters related to the elections may help them – at least to some extent – form opinions and assess the proposed amendments to the electoral law.

In our research, we focused on the issues that had been recently discussed, such as: the percentage of candidates of different genders on electoral rolls and potential modifications in this respect; proposals for amendments to the structure of so called election silence; the lowering of voting age; the restriction on the campaign advertising. In our research, the issues associated with alternative voting procedures were rather widely discussed. Taking into account the theme of the volume – the problematic aspects in this article have been further expanded to the latest research results (April 2015) that are dedicated to the knowledge and preferences of Poles concerning the existing procedures: voting by correspondence and by proxy. In addition, the trends related to the communication channels and sources of knowledge about elections were contextually examined.

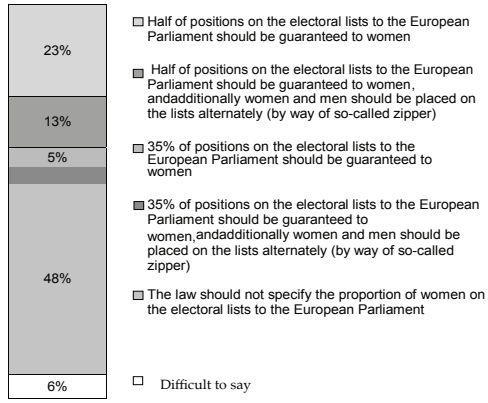
Therefore, the purpose of this article is first and foremost to provide, on the basis of the results of public opinion research, information concerning reviews, evaluations as well as, to some extent, the knowledge of Polish voters concerning the selected structures of the electoral law. This material may be helpful in in-depth, interdisciplinary analyses of specific legal mechanisms, and may also potentially allow a broader reflection of the legislator and political environments on certain directions of electoral law reforms.

2. The gender quotas on electoral rolls

The 2011 Electoral Code guarantees 35% of the participation on electoral rolls for both men and women. However, legislative work on the modification of this mechanism is under way, for it is indicated that the mechanism is ineffective in its current form. On the basis of our research, it can be stated that the solution accepted in the Electoral Code satisfies a relatively small proportion of society, though it can undoubtedly be considered a consensual solution taking into account contradictory arguments and views. The opinions of Poles on the mechanisms of improving the balance of both genders in the representative bodies are diverse. On the one hand, almost half of the surveyed (48%) think that the law should not specify the percentage of women on electoral rolls at all; on the other, the proponents of the

legal guarantees of gender equality (total of 45%) are by far more in favour of parity on electoral rolls (36%) than of women being limited to the level of 35 per cent (9%). Less important than the determination of the quota participation of candidates of both genders on electoral rolls is placing the names of candidates – men and women – alternately on the so-called zippered electoral lists.

Figure 1. In your opinion, what share of women on electoral lists to the European Parliament should be guaranteed by the law? Which of the below solutions do you like?



We asked our respondents a similar question in September 2011, before the impending elections to the Sejm and the Senat. 26% of them were in favour of legally guaranteed gender parity on electoral rolls to the Sejm, 13% – of at least 35-percentage participation of men and women on electoral rolls. More than a half of respondents (51%) were against the percenatge of candidates on electoral rolls being determined by law on the basis of their gender. This means that the number of proponents of balancing the proportion of candidates of both genders in the election has increased in recent years.

The opinions concerning balancing the number of women and men on electoral rolls are determined by gender of respondents. Generally, solutions aiming at promoting gender equality are more often supported by women (total of 51%) than by men (39%). What is interesting, their attitude towards the increase in the proportion of women on electoral rolls depends on the financial status (*per capita* income in a household) and – but to a lesser degree – on the education level. The need to provide the legal mechanisms that would guarantee a specified number of positions on electoral rolls for female candidates is indicated primarly by economically disadvantaged and less educated women. Similar, though lesser, dependence can be observed in the case of men. What is more, the opinions in this respect among men vary according to their age. The majority of proponents of

balancing the chances of women in politics through the gender quotas on electoral rolls is constituted by elderly respondents (65 years old and over, the total of 51%), and the minority – by young men aged 18 to 24 (30%, while 69% are against it). The opinion in this matter does not significantly depend on declared political views (specified according to the left wing-right wing index) or the religiousness of the people surveyed, irrespectively of their gender.

Public support for legal solutions designed to promote women in politics is therefore not a matter of wroldview, but can result from the resentment of groups that are economically and socially weaker[1].

Table 1. Women opinions on gender quotas on electoral lists

Monthly income*per capita* in a household	In your opinion, what share of women on electoral lists to the European Parliament should be quaranteed by the law? Which of the below solutions do you like?			
	Half of positions on the electoral lists to the European Parliament should be guaranteed to women (possibly, additionally women and men should be placed on the lists alternately, by way of so-called zipper)	35% of positions on the electoral lists to the European Parliament should be guaranteed to women (possibly, additionally women and men should be placed on the lists alternately, by way of so-called zipper)	The law should not specify the proportion of women on the electoral lists to the European Parliament	Difficult to say
	as a percentage			
Up to PLN 500	54	10	27	9
501–750	44	4	44	7
751–1000	39	12	40	9
1001–1500	33	14	50	3
Over PLN 1500	28	16	51	5

Tabele 2. Women opinions on gender quotas on electoral lists

Education	In your opinion, what share of women on electoral lists to the European Parliament should be quaranteed by the law? Which of the below solutions do you like?			
	Half of positions on the electoral lists to the European Parliament should be guaranteed to women (possibly, additionally women and men should be placed on the lists alternately, by way of so-called zipper)	35% of positions on the electoral lists to the European Parliament should be guaranteed to women (possibly, additionally women and men should be placed on the lists alternately, by way of so-called zipper)	The law should not specify the proportion of women on the electoral lists to the European Parliament	Difficult to say
	as a percentage			
Elementary/ lower secondary	39	16	30	15
Basic vocational	49	8	37	6
Secondary	42	7	43	7
Higher	32	12	54	2

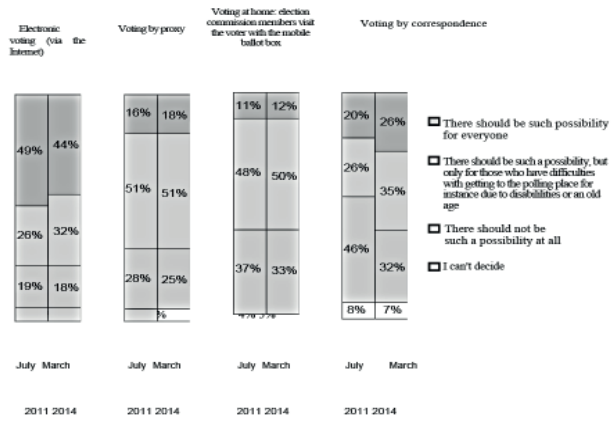
1 B. Roguska, J. Zbieranek, Wiedza i opinie Polaków o prawie wyborczym i mechanizmach kampanii, Warszawa 2011.

3. The Poles about voting procedures

The works on the introduction of so called alternative voting procedures – that enable voting outside the polling places – have been carried out in Poland for nearly 20 years. In the first instance, the legislator decided to address them to the groups of voters facing the greatest difficulties with voting. Since 2010, people with disabilities and advanced in age can vote by proxy; in addition, since 2011, voters with disabilities and those who are outside the country may vote by correspondence. At the time of conducting the research, the conceptual and legislative works on the implementation of other procedures (voting via the Internet) and on allowing all voters to use the already introduced procedures (voting by correspondence) took place .

The reform of voting procedures is not only purely organisational or technical but also social process – and should be accompanied by regular public opinion research indicating different aspects of changes, including issues of trust in procedures. In accordance with the existing arrangements resulting from the earlier March survey conducted by the Public Opinion Research Center and the office of the Commissioner of Human Rights, Poles are generally in favour of introducing alternative voting procedures into the Polish electoral law, but they think that these procedures should be addressed mainly to the voters having difficulties with getting to the polling place.

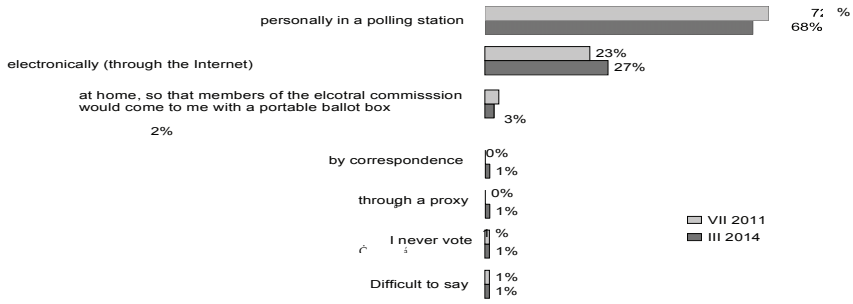
Figure 2. Please say for each of the presented form of voting, if there should be such a possiblity or not?



Source: B. Roguska, J. Zbieranek, Ułatwienia w głosowaniu – wiedza, opinie i oczekiwania, War- szawa 2014.

When asked about their own preferences, the majority of the surveyed (over two thirds) indicate that they would like to vote at the polling place. Only one-third of respondents indicate a different procedure, but it is worth noting that this group grows.

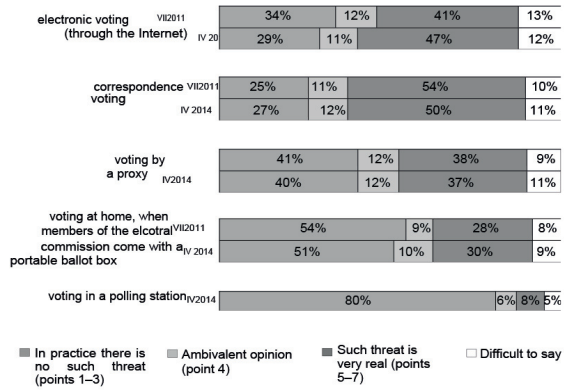
Figure 3. If you could choose how to vote, you would prefere voting:



Source: B. Roguska, J. Zbieranek, Ułatwienia w głosowaniu – wiedza, opinie i oczekiwania, War- szawa 2014.

In April 2014 survey, we asked Poles about their trust in specific – existing or still only proposed – voting procedures. Security and integrity of procedures are extremely important and these issues are often discussed in the public debate, it is thus essential to look closely at the opinions of voters themselves on this subject.

Figure 4. Works on amending procedures of casting votes are in progress. In addition to the traditional voting in a polling station, other voting methods are proposed. Do you see the threat of abuse or even electoral fraud in the case of*:



Respondents marked their answers on the seven-point scale

** In 2011 the quesiton read: 'It is sometimes said that there is a danger of abuse, and even electoral fraud connected to the possibility of voting in a way different than in the polling station. Do you see such a threat in the case of:'*

First of all, the Poles were asked about the traditional procedure of voting at the polling place. The vast majority of respondents (80%) said that they could not see

risks and dangers of malpractices, while 8% stated that they are real. As regards the alternative voting procedures, the opinions of the Poles are more varied.

The least safety concerns regarding the question of the safety of voting were caused by voting with the use of the mobile ballot box, which would be taken by the members of the election commission to voters' homes. According to more than a half of the surveyed (51%), this is not associated with any threat. Slightly more doubts were caused by the procedure of voting by proxy – in this case, the opinions of the surveyed are divided. When it comes to two other procedures, the views of respondents that indicate risks predominate. With respect to the procedure of voting via the Internet, almost 47% of the polled have serious doubts, while the minority (29%) indicate the lack of any threat. While assessing the procedure of voting by correspondence, half of the surveyed (50%) indicate the danger of malpractices, while 28% do not share these concerns.

It is worth noting that these results compared with the same survey conducted in 2011 are almost the same. The high score of the traditional voting procedure at the polling place, which shows the high trust in electoral authorities, should also be underscored. In contrast, in the case of the alternative procedures, the lesser the direct control of the election authorities is, the greater doubts they raise. While using the mobile ballot box and voting by proxy might be viewed as procedures with relatively broad and direct engagement of election – or even public – authorities, the remote procedures, such as voting by correspondence and electronic voting (via the Internet), are in this context regarded as subject, due to their specificity, to less control.

When it comes to the effective functioning of alternative voting procedures, the issue of great importance is to inform voters (in particular the recipients of those procedures) about these procedures. Besides the public opinion research, which is shown above, carried out in April 2014 by the Center of Electoral Studies and the Public Opinion Research Center, we decided to present in this article the latest results covering the period directly preceding the election of the President of the Republic of Poland (April 2015) from the survey which was a common initiative of the Public Opinion Research Center and the Commissioner of Human Rights. It aimed at presenting the state of knowledge of Poles concerning voting by correspondence and by proxy. It is worth noting that the above-mentioned survey was conducted during the last days before the deadline for submitting the notification of using these facilities.

As it has already been underlined, the procedure of voting by correspondence was introduced into the Polish law in 2011 with a view of two groups of voters who had particularly big problems with getting to the polling places: Poles with disabilities and those who were abroad. This procedure was introduced during the general elections in 2011 when the intention to use it was expressed by nearly 23,000 voters (mostly residing outside the country, and to much lesser extent – voters with

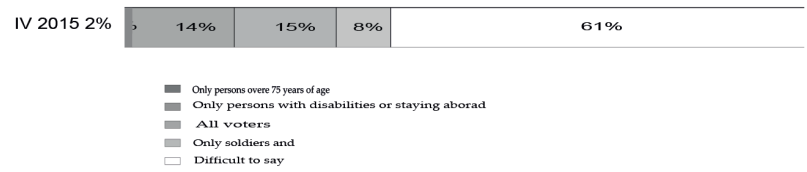
disabilities living in Poland). This was considered a success, given the then-huge level of unawarness regarding the new procedure among Poles. As a result of the research carried out in 2011 by the Public Opinion Research Center, a couple of weeks before the general elections, the new procedure was completely unknown for the majority of the surveyed, including the vast majority of people with disabilities.

In 2014, in the course of the legislative work on the amendment to the Electoral Code, it was decided that the procedure of voting by correspondence will be available to all Poles. At the same time, it was established that voting by correspondence would be used for the first time on such a wide scale during the Polish presidential elections in 2015. At that time, experts, social organizations and the Commissioner of Human Rights pointed out (and appealed to, among others, the State Election Commission) that the following few months should be devoted to a comprehensive, well thought-out information campaign aiming at disseminating knowledge about the method of voting by correspondence and people entitled to benefit from it.

Unfortunately, the study carried out in April 2015, only several (!) days before the deadline for submitting the notification of the intention to make use of the procedure, shows that only 15% of Poles were aware that each citizen could vote by correspondence. As much as 60% of the polled did not know anything about this possibility, while others indicated incorrect answers. 14% of the surveyed were convinced that this procedure is available only to voters with disabilities and those who reside outside Poland. Sailors and soldiers were indicated by 8%, and 2% are convinced that it is a sole privilege of people aged oved 75.

It is worth noting that the youngest voters (aged 18 to 24) have slightly better knowledge on who is entitled to vote by correspondence – almost one in four of the surveyed belonging to this group know that everyone can benefit from this procedure. The group of the elderly voters (over 65), in turn, is characterised by little knowledge – among them, only one in ten knew the right answer.

Figure 5. Who, according to the provisions, can vote by post?



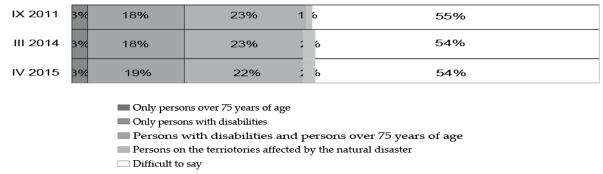
Source: J. Zbieranek, Wiedza o ułatwieniach w głosowaniu przed wyborami prezydenckimi, Warszawa 2015.

In this context, very rare declarations of use of this procedure are of no surprise. An intention to vote by correspondence was indicated by less than 3% of the

interviewees, the undecided constituted 6%, and 92% of the polled did not intend to use it.

The voters with disabilities and advanced in age (over 75) can make use of another procedure – voting by proxy. It has been applied in the same formula since 2010. Regular research conducted in 2011 (before the parliamentary elections) and 2014 (before the elections to the European Parliament and the municipal elections) indicated that it was not widely known to people in Poland. In April 2015, only 22% of all of the surveyed possessed the complete knowledge on who is entitled to benefit from this procedure. Every fifth respondent indicated partially correct answers. The majority of the polled (54%) does not have any idea about the procedure. Therefore, the level of awarness of Poles is very similar to this in previous years.

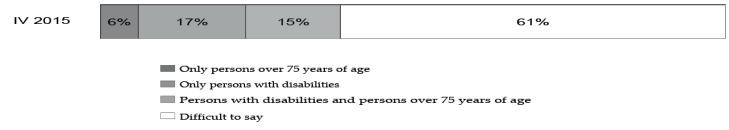
Figure 6. Do you know who, according to the current provisions of electoral law, can vote through a proxy?



Source: J. Zbieranek, Wiedza o ułatwieniach w głosowaniu przed wyborami prezydenckimi, Warszawa 2015.

Unfortunately, among those who are entitled to benefit from the procedure of voting by proxy the awareness is also rather low, which is worrying. Such opportunity is known only to one fifth of respondents aged over 75. Almost 80% of elderly people know nothing about this procedure or incorrectly indicate those who are entitled to it.

Figure 7. Do you know who, according to the current provisions of electoral law, can vote by proxy?



Source: J. Zbieranek, Wiedza o ułatwieniach w głosowaniu przed wyborami prezydenckimi, War- szawa 2015.

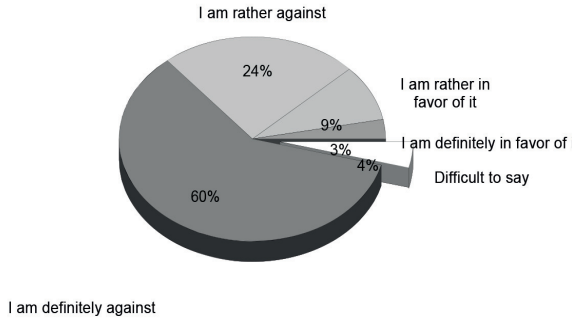
Those who have legal disability status are better informed, though also in this group, the majority of respondents have no knowledge about the procedure of voting by proxy or incorrectly define those who are entitled to use it[2].

4. The opinions on lowering the voting age to 16

Over the recent several years, it has been proposed in the public debate to enable the citizens to participate in the elections upon the completion of 16 years of age. The proponents of lowering the voting age indicate that such a change will contribute to the better representation of young people and may increase the citizenship activity among the youth. Conceptual works on this proposition are under way. What is more, the project of a legal act providing for introducing such an amendment in the elections to the European Parliament has been prepared[3].

In research conducted in March 2014, we asked Poles what is their opinion on the proposition of lowering the voting age to 16 years. The research shows that the majority of interviewees (84%) are against this change. What is worth noting, 60% are strongly opposed. Only 12% of the polled support voting by citizens who are 16 years old.

Figure 8. The proposition of lowering the voting age is being discussed. What do you think about the proposition of entitiling citizens who are 16 or over – not 18 or over, as it is today – to vote in the elections?



2 More on proposed ammendments and evolution of the election procedure to the European Parliament: K.F. Oelbermann, F. Pukelsheim, Future European Parliament Elections: Ten Steps Towards Uniform Procedures, „Zeitschrift fur Staats und Europawissenschaften", 2011, No. 1, pp. 9-28, M. Rulka, J. Zbieranek, W kierunku jednolitego aktu? System prawa wyborczego do Parlamentu Europejskiego, (in:) W stronę europejskiego demos? Polskie wybory do Parlamentu Europejskiego w 2009 roku w perspektywie porównawczej, J. Kucharczyk, A. Łada (eds.), Warszawa 2010, Drugie sprawozdanie w sprawie wniosku dotyczącego zmiany Aktu dotyczącego wyborów przedstawicieli do Parlamentu Europejskiego w powszechnych wyborach bezpośrednich z dnia 20 września 1976 r. (2009/2134(INI).

3 J. Zbieranek (ed.), Europejskie wybory młodych, Toruń 2014.

It is worth mentioning that the proposition of lowering the voting age to 16 is negatively assessed by the youngest respondents, who themselves were that age not a long time ago. 82% of the polled aged 18-24 are against the implementation of such a law, whereas 15% of them support it.

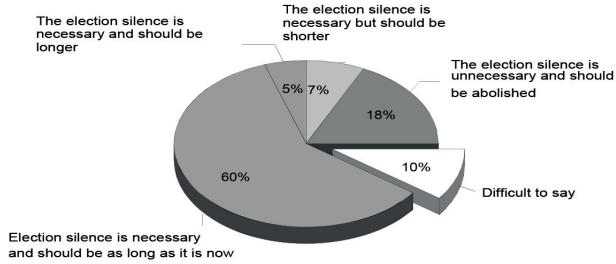
5. Opinions on the political campaign mechanisms

a) Election silence

The Electoral Code prohibits the electoral agitation and publishing electoral surveys for 24 hours before the election day and until the end of voting. The aim of this period, commonly known as the election silence, is to, among others, reduce the level of emotions and provide voters with the chance of quiet, undisturbed consideration in the run-up to the elections. For several past years, however, relevant arguments have been appearing supporting the elimination of the silence, as sometimes it is considered unnecessary anachronism, which, together with the dynamic development of the Internet communication channels, has completely lost its rationale. We decided to find out what Poles think about the election silence.

The vast majority of the surveyed (72% of respondents) find the election silence necessary, 60% point out that it should be preserved in the current form, while 7% think it should be shorter, and 5%, in turn, that it should be longer. Importantly, the opinions on the election silence are similar in particular age groups – including the youth. Only 18% of respondents are strong opponents of the election silence.

Figure 9. 24 hours before the election day until the end of voting, so called election silence is legally imposed, during which such activities as, for instance, the political agitation and presenting the poll results are prohibited. What do you think about the election silence?

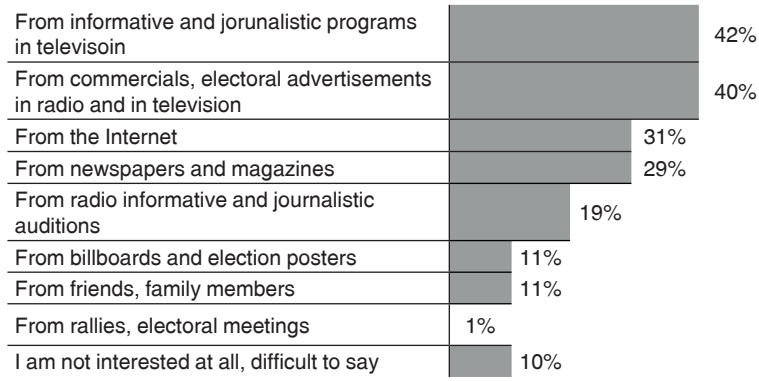


b) Sources of knowledge about elections

In further phase of the research, we drew our attention to the question of transferring information on topics related to the elections. The most common source of information about candidates in the elections to the European Parliament is television. Over two fifths of respondents (42%) indicated the informative and

opinion-forming television programmes as one of the main sources of knowledge about the elections. Almost the same number of people (40%) mentioned election spots and advertisments in this context. The channels of obtaining information about the elections and candidates to the European Parliment that are similar in popularity are the Internet and press (31% and 29% respectively). The role of radio is less significant – the informative and opinion-forming radio programmes were indicated as the most important source of knowledge about the elections by 19% of the polled. Even fewer people declared that they gain information about the elections primarly from billboards, campaign posters and conversations with friends and faimily (each 11%). Only few people (1%) use such methods of obtaining information about candidates as campaign meetings and mass meetings.

Figure 10. From where, primarily, do you get information on candidates in elections to the European Parliament? Please indicate no more than three sources from the given list



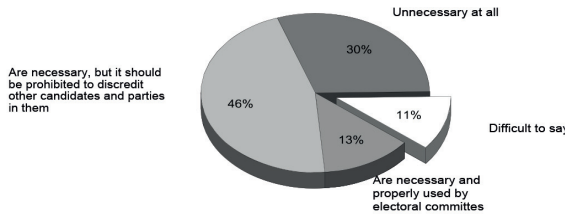
Using the Internet is the most varied method, depending on the socio-demographic characteristics of respondents. For young people, aged 18 to 24, it is the most important source of knowledge about elections and candidates to the European Parliment, replacing some more traditional media – the Internet was indicated by as much as 60% of the surveyed belonging to this age group, while informative and opinion-forming television programmes – by only 28%. Among slightly older respondents, aged 25 to 34, the Internet was also indicated as the most common source of knowledge about elections (50%). The importance of the Internet in obtaining information about elections decreases with age – in the oldest group (65 or more) it was indicated by 7% of respondents.

The use of the Internet is also related to education. It was indicated by 50% of respondents with higher education and 18% of those with basic education as one of the main sources of information about elections.

c) Opinions on electoral commercials

As the research results indicate, election spots belong to the most frequently mentioned sources of knowledge about the elections. Not only are they used to promote one's own political group, but also often to discredit one's political oponents. Examples of negative campaigning were provided by the 2014 campaign before the European elections. There are some postulates that occur, also in the course of the legislative work on the amendment to the Electoral Code, to statutorily prohibit discrediting other candidates, not only in unpaid, but also in paid election programmes shown in radio and television broadcasts. Research show that such a prohibition would be appreciated by Poles. In the opinion of almost half of the surveyed (46%), the radio and television spots are needed, but discrediting other candidates should be prohibited. Almost one in three respondents find such a form of political campaign unnecessary. Only 13% of them think that the election spots are needful and efficiently used by the election committees.

Figure 11. In elections to the European Parliament parties conduct a campaign inter alia through television and radio commercials. In your opinion, the television and radio commercials are:



6. Summary

The study allows to draw several conclusions that may be useful in the course of further conceptual and legislative works on amendments to the electoral law. Poles clearly speak out against the proposal to allow citizens of the minimum age of 16 to vote. The vast majority of the surveyed would like to preserve the election silence.

Poles have enormous trust in the procedure of voting at the polling place, but express many doubts concerning the safety of remote procedures – voting by correspondence and electronic voting (via the Internet).

The results of research showing voters' knowledge about the alternative voting procedures currently functioning in the Polish electoral law could raise serious concerns. The vast majority of subjects do not know anything about the procedure of voting by correspondece. Poles are slightly better informed about the issue of voting by proxy (applied already in several elections). But what is most troubling, those

voters who may particularly need such procedures have relatively little knowledge about them. Only less than one in five disabled voters know that thay can vote by correspondence. Similarly – only every fifth elderly voter is aware that they can vote by proxy.

Coming back to the opinions of Poles, the system of gender quotas on the electoral rolls is controversial. The current solution surely satisfies small group of the surveyed. On the one hand, still almost half of the polled believe that the law should not specify the proportion of women and men on electoral rolls. On the other, two fifths of respondents postulate the solution that goes even further – in the form of parity, the smaller group, in turn, are proponents of so called zipper system.

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REVIEWS

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Amanda Bittner and Royce Koop (eds.)

Parties, Elections And The Future Of Canadian Politics

University of British Columbia Press, Vancouver 2013 (pp. 342)

Issues of political system of Canada, similarly to other dominions which create the British Commonwealth, have not been the subject of particular interest of constitutional law doctrine in European continent. This remark can also be related to the study of this branch of law in Poland because its representatives have devoted only several more extensive studies to Canada's political system. Among them, there is, first of all, there is a monograph of M. Grzybowski *Szkice kanadyjskie (państwo, ustrój, obywatele)*, Kielce 2003 and study of R. Radek *System konstytucyjny Kanady*, Warsaw 2011. Those studies, however, have only minor extension because they are concentrated on some system institutions or they only contain general characteristic of contemporary Canada's governmental system.

In consequence, the majority of publications dealing with political system of this country is the work of representatives of Canadian study of constitutional law and political science. Those publications also include a monography, reviewed in this text, which is one of the newest studies focused on transformations and recent problems of political system and national regime of Canada. The publication was prepared by a team of 17 authors in which two political scientists of younger generation took up the function of editors: prof Amanda Bittner from Newfoundland University in Saint Johns and prof. Royce Koop from University of Manitoba in Winnipeg.

Authors of the studies included in this monograph focus their attention on two fundamental issues. First of them is an issue of evolution and current shape of Canada's party system as well as role of those political parties which have been receiving the highest support from the electorate in recent years. Second plane of considerations includes selected aspects of voting rights to the federal parliament and the issue of political representation with significant impact on factors of another parliamentary

elections as well as their influence on the political line-up at the House of Commons of Canada. Detailed considerations were preceded by extended introduction (*Change and Continuity in Canadian Parties and Elections*), in which general presentation of the newest transformations in the party and elections system of Canada was made by authors.

Each of authors adopting the problematic aspects of party system modification in Canada jointly agree that three changes of: 1993, 2004 and 2001 had the highest significance for the shape of political scene in this country during the last 25 years. Undoubtedly, we should agree with them because each of those dates was involved with far-reaching transformations both in the previously existing party system and in the political line-up in the federal parliament.

Through many decades, the political party of Canada had all features of two-party classical system because only two dominant parties had been competing between themselves: Progressive Conservative Party of Canada and Liberal Party of Canada. Radical breakthrough following in 1993 when the conservatives (having 169 so far, i.e. the absolute majority in the House of Commons) suffered 'historical' defeat in the parliamentary elections receiving barely 2 MP seats. Since then, there has been a significant dominance of liberals who also receive the absolute majority of votes in the House of Commons (in 1997 and 2000) and who created one-party parliament which, of course, was beneficiary for stabilization in office functioning.

Another breakthrough moment was federal parliament elections in 2004. Those elections brought, among all, significant decrease in support for the Liberal Party, therefore liberals were forced to establish minority office of Paul Martin. In this manner, a period of several year minority governments functioning begun in Canada which had to count for support from the weaker parliamentary groups. Next elections to the House of Commons in 2006 and 2008 brought, in turn, a success of the Conservative Party of Canada which received 124 and 143 seats accordingly in the general number of 308 seats in the lower house of parliament.

For the third time, a far-reaching reshuffle on the political scene of Canada was brought by the last parliamentary elections of 2011. They were finished by a complete success of conservatives who received 166 seats and created first majority government since 2004. On the other hand, the Liberal Party received only 34 seats which was the worst result in the history of this party. Due to this, the role of formal opposition was taken over by New Democratic Party for the first time which held 103 seats in the House of Commons.

Presented analysis of various federal parliament elections system aspects and model of political representation in the monograph was connected with normally discussed in this part transformations in the party system of Canada. A great deal of attention was brought on the evaluation of adopted reforms in House of Commons voting rights, the aim of which was, first of all, improvement of deputies election and provision of the most rational representation in the federal parliament of particular

provinces and election districts. At the same time the issue of money role increasing in the electoral system in Canada was underlined, especially within the scope of financing of political campaigns.

Authors of text dealing with the parliamentary elections concentrated only on the House of Commons voting system because it is the only chamber of the federal government the panel of which is elected in general and direct voting. However, remarks on the manner of shaping of the second chamber of the Canadian Parliament (the Senate) was missing for me especially because there are proposals of introduction of general elections also to this chamber. The panel of Senate is elected traditionally in a manner of Senators nominations which are done by the General Governor (representing the Head of State in Canada who is formally the Monarch of the United Kingdom of Great Britain), whereas the motions within this scope are always filed by the Prime Minister of the federal government. Such a system of forming the second chamber of parliament is undoubtedly unique in modern political systems. I will also add that in the content of reviewed monograph, there was a lack of evaluation of results to the Quebec province in 2012 which allowed for success of French speaking and separatist *Bloc Qyebecois*.

Apart from the mentioned introduction, the whole study consists of 14 separate but not very extensive chapters. First of them (*Has Brokerage Politics Ended? Canadian Parties in the New Century*), the author of who is Kenneth Carty, characterises the transformations in the system of Canadian political parties which took place at the beginning of 21st century. He focuses his particular attention of the process of systematic decrease in support from the electorate fro candidates of the Liberal Party, particularly between 2004-2011, with the congruent (within the same period) increase of seats received by New Democratic Party.

In next chapter (*Candidate Recruitment in Canada: The Role of Political Parties*), William Cross and Lisa Young shows the political mechanism of candidate selections to be House of Common's deputies. It is worth to underline, analogically to other political systems, the dominant role in the process of appointing candidates are played by political parties, that is why receipt of a seat by independent candidate is very rare.

Three following chapters were devoted to more detailed issues within the scope of electoral practice. In the third chapter *Constant Campaigning and Partisan Discourse in the House of Commons*), Kelly Blidook and Matthew Byrne focus their attention on several aspects of political campaign, including that conducted by the MPs during the House of Commons proceedings. The topic of fourth chapter (*Constituency and Personal Determinants of MPs' Positions on Social Conservative Issues in the 37th and 38th Canadian Parliaments*), written by Munroe Eagles, is issue of parliamentary debates on social problems during two cadencies of the parliament. Fifth chapter (*City Minister: The Local Politics of Cabinet Selection*), the author of which is Antony

M. Sayers, deals with selected issues of government creation after parliamentary elections.

Chapter six (*Women Voters, Candidates, and Legislators: A Gender Perspective on Recent Party and Electoral Politics*) Elizabeth Goodyear-Grant analyses the problem of visible activation of woman in the Canada's political life. Systematic growth of woman share both in the panel of federal parliament and in broader scope - in the panel of legislatures of particular provinces, is a proof for this process in a view of the author. There is also a question, how new tendencies in the party and electoral system of Canada may support growing activity of woman in taking part in parliamentary elections as well as implementation of its basic functions.

The content of seventh chapter (Revisiting the "Ethnic" Vote: Liberal Allegiance and Vote Choice among Racialized Minorities) prepared by Alison Harell, is the issue of ethnic minority taking part in elections. In Canada it can be counted into significant issues of electoral system, and this is due to necessity of provision of active possibility to take part in elections of native residents of this country (Eskimoo and Indians) who are dispersed within a large territory in the northern ends of the province.

In the chapter eight (*The Canadian Party System: Trends in Election Campaign Reporting 1980-2008*) Blake Andrew, Patrick Fournier and Stuart Soroka characterise the conduct of political campaigns in elections to the federal parliament. In turn, Russell A. Williams in the ninth chapter, entitled *Parties, Politics, and Redistribution: he Constitutional and Practical Challenges of Politicized Apportionment*, deals with very important problematic issue of deputy mandates divisions in the parliament in relation to the number of votes cast for particular political parties. No less important issues were mentioned in the tenth chapter (*Too Littre, Too Soon: State Funding and Electoral District Associations in the Green Party of Canada*), where Harold J. Jansen and Lisa Lambert dealt with the issue of elections financing. Their considerations were base both on the analysis of binding legal regulations and experiences from electoral practice, taking the problem of financing of taking part in the elections of Canadian Green Party.

Three another chapters of the study are also noteworthy in which there also were adopted other problems connected with the functioning of the party system of Canada. In the content of eleventh chapter (*When Partisans Are Attacked: Motivated Reasoning and the New Party System*) Scott Matthews presents the frames and forms of political discourse in conditions of changing party system. Amanda Bittner dealt with the similar problematic in the twelfth chapter (*Coping with Political Flux: The Impact of Information on Voters' Perceptions of the Political Landscape 1988-2011).* First of all, she wants to determine how often and significant transformations in the Canadian party system are seen by the voter. In thirteenth chapter (*Situating the Canadian Case*) Richard Johnston concluded several general reflections on political system of contemporary Canada.

The study which closes the presented monograph is fourteenth (*Parties and Elections after 2011: The Fifth Canadian Party System?*) by Royce Koop and Amanda Bittner They ponder what the consequences of the results of the 2011 House of Commons election would be, which ended by a undisputable victory of the Conservative Party of Canada and creation of a majority cabinet. Here a very important question occurs: is there another (historically fifth) model of party system in Canada since 2011? There is no unanimous answer granted by editors of this monograph.

The reading of reviewed monograph leads to a basic conclusion that it is very valuable and extremely current study on basics institutions of Canada's contemporary political system. Therefore, they can be strongly recommended to those interested in various aspects of the structure and functioning of political systems of democratic countries.

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Bogdan Mucha

Finansowanie Kampanii Wyborczych Do Legislatur Stanowych W Systemie Federalnym Stanów Zjednoczonych [Financing of Electoral Campaigns to State Legislatures in the Federal System of USA]

Wydawnictwo Adam Marszałek, Toruń 2010 (pp. 344)

In 2010, a book written by Bogdan Mucha entitled '*Financing electoral campaigns to state legislatures in the US federal system*' was published. As far as I know, it has not been revived in the well-known legal or political science magazine, that is why it is placement in 'Białostockie Studia Prawnicze' *[Białystok Legal Sudies],* which are fully devoted to issues of elections and voting rights, is justifiable. The reviewed book is a really important position which supplements the important gap in the field of studies devoted to the political system of United States (especially within the last years, valuable Polish language monograph studies are very rare), as well as to the issues of voting right.

The selection of topic shall be accepted with appreciation for at least two reasons. Firstly, the, problematic issue of campaign financing (election campaign) is a controversial issue not only in USA but also in other democratic countries. Appearing disputes result mainly from the fact that complication of election procedures requires a large amount (not to say: higher and higher) financial assets. Neither political parties nor candidates are not able to cover necessary costs out of their pockets. The result of public debates on the source of electoral procedures financing are different models of adopted solutions. B. Mucha Limits himself in the performed analysis to the US territory and here – what can be found out by the reader of the reviewed book – you may encounter differentiated approach to this issue. Secondly, the study concerns – in accordance with the title – electoral campaigns to

state parliaments. The author undertook an analysis of state law which must arouse recognition due to the necessity to get acquaint with solutions that functions in all EU Member Stares. It is worth-underlining also in this context that the problems of American federalism is quite rarely adopted by Polish authors in monograph studies (recently in works of Tomasz Wieciech, nevertheless, the top place is taken by the book of Jerzy Jaskiernia of 1979 entitled *Pozycja stanów w systemie federalnym USA) [Position of United States in the USA federal system]*.

B. Mucha monography consists of four chapters preceded by a brief *Introduction*. The sum up of the considerations was provided by the author on the several pages of *Conclusion.* The book was also provided with an extensive *References* divided into components: non-serial publications, studies and articles, other publications and press articles, jurisdiction of federal and state courts, legal acts and documents other than websites. I wish to bring your attention to the references because it gives the notion of solidarity of author's scientific workshop. Regardless off its volume (44 pages) it also includes a list of numerous sources and studies in English language and – as I believe – all the most important monographs of Polish authors which should be used in preparation of the topic. However, there is a lack of broader use of studies and articles in the Polish language.

Book publication via well-known publishing house, recognizable and valued within the circle of political scientists and constitutionalists, ensures a solid technical preparation of the book. Nevertheless, I had an opportunity to see some inadequacy in several places (for e.g. on the page 334, there is provided a use of Polish translation of USA Constitution without provision of translator name or even the place and date of translation issue). They are so tiny, however, that they cannot decrease the general value of work in any degree.

Particular chapters are devoted to: general characteristics of elections to state legislatures and state legal regulations of election campaigns, normative constructions of election funds, methods of financing of elections to the court legislatures as well as the significance of state elections financing methods to receive the aim in the form of 'pure elections'. Even if at first glance, the reader may get the impression of some confusion of plots of the conducted considerations, reading of the book protects the idea of author regarding its composition. It is also worth mentioning that the chapters are proportionally extensive, at least in terms of their volume. However, the internal structure can raise some doubts which will be mentioned below.

The aim of the paper, indicated in the *Introduction,* shall be evaluated as extremely ambitious. It was determined as 'a demonstration of election campaigns functioning mechanisms to the state legislation authorities within the background of dynamically evolving federal system'. Such a generally outlined aim is specified by the author pointing out that 'it is to show the interaction between system elements and effects of adopted solutions in the reflection of liberal model of campaign financing and model which reflects public financing to reach an effect in a form of 'pure

elections' in the broad scope (page 7). The two basic financing models for election campaigns indicated in this way have been subject to deepened analysis in further part of this book, especially in Chapters III and IV. Preceding further remarks, it should be mentioned here that a detail analysis of election campaign financing to all state legislatures would be impossible. That is why the author is rightly limited to indication of model solutions.

In this case, those are regulations adopted in Illinois (a liberal model) as well as Maine and Arizona (a model of full financing from public funds).

Chapter I has the following wording: *General characteristics of elections to the court legislatures and legal regulations of state electoral campaigns.* First of all, the author went on to analyse the position of states in the federal political system of United States. Next, he characterised the competences to regulate state election processes in American federal system jointly with the problematic issue of so-called supremacy clause. Apart from the fact that the content of pointed out issues was not expreses *expressis verbis* in the title of he chapter, it results logically from the whole project and its title as well as from the aim of paper characterised above. It is hard to imagine any construction of introductory issues if the subject of analysis is constituted by norms of state law.

In this part, the subject of author's interests is the general political system position of states within the background of the federalism theory, resolutions of USA constitution of 1787 and court ruling. This extremely interesting issue cannot overshadow the basic topic of the monograph, nevertheless, the author gives a show of its scientific capabilities, extremal reliability and erudition. First pages of the book are read with a real pleasure, especially that the author does not neglect the reference to the source materials thanks to which the reader receives a hint to take up its own research. The demonstration of high independence in the sphere of law-making allows to better understand the significance of state legislation for regulating electoral processes including the financing of election campaigns, especially in the background of historical and cultural differences between individual states. In this Place, B. Mucha underlines the significance of *Voting Rights Act* of 1965 (p. 28-29) which prevented the adoption of discriminatory laws against minorities (formerly the Afro-American people, now the ban is more universal) and guaranteed equality of voting right also at state level. In this manner, through the actions of the federal legislator and the adjudication activity of courts, the universalization of active (largely passive) electoral law in the entire Union took place.

Two last points of chapter I were devoted to purely electoral issues. First of all, decisions of federal law were discussed, and then, state regulations. It should be emphasized that both of the commented points have an almost identical internal layout, thanks to which the reader receives a precise picture of the legal regulation of electoral law at the federal and state level. In this part, the author points out the process of voting rights in the over 200 years history of the Union (p. 43-44), the

scope of federal authorities' entitlements within the scope of voting rights (p. 44-55 as well as significance of federal courts jurisdiction (p. 55 and n.), also within the scope of election campaign financing (p. 59-74). Proceeding to the state regulations B. Mucha discusses preliminarily the issues of voting right is state constitutions (pages 74-81). Due to the extensiveness and particularity of regulations, they have (apart from norms of federal law) decisive significant for the legislator decisions within the subject of introduction of particular solutions also within the scope of election campaigns financing. One may have here some reservations to the analysis of the phenomenon *gerrymande- ring* nevertheless, the explanation for this matter of facts shall be deemed logical from the point of view of primary topic of the paper (s. 81). Considerations regarding the significance of state jurisdiction for regulation of election procedures (pages 81-83) are very humble, and within the subject of election campaign financing, the author limited himself to just one paragraph. Probably, the author reached an assumption that the reader would have an opportunity to get acquaint to the more detailed regulations in next parts of the book, nevertheless the said analysis should be treated as too general. In the section devoted to the meaning of the judgments of state courts, the author gives a testimony to the knowledge of the latest trends in the jurisdiction, seeing the growing role of state courts in the area of voting rights, including the financing of election campaigns (pp. 81-87).

Chapter II title is: *Normative construction of electoral funds.* B. Mucha discussed thee a notion and functions of electoral funds, their systematics, basic forms of state electoral funds including aims of their destination. It is pity that the author did not precede the considerations on the election funds with more general considerations in which he would present the importance of this institution for the specified purpose of work. The need to analyse the election funds in the paper on financing of election campaigns is quite obvious, nevertheless, from the point of view of reliability of scientific bases, it would be useful to include a mention on this topic (especially due to the fact that it is also not perceptible in the *Introduction*). Specifying the legal norms governing the election funds, B. Mucha indicates that, in many cases, the solutions adopted by particular states have become a source of inspiration for the federal legislator (pp. 90-91). The author determines and characterises the functions of electoral funds in an interesting manner. Four of them are distinguished: protective, regulatory, simulative and reporting-control (pp. 91-99). Subsequently, B. Mucha discusses the systematics (or rather: classification) of electoral funds (pp. 99-103). The authors shall be praised again for the clarity and reliability of reasoning. Lack of reference to relevant subject literature (especially that B. Mucha does not spare bibliographic indications in other fragments) shows that this fragment includes original conclusions of the author.

First two points of chapter II have introductory meaning. Definitely, the most comprehensive part of this chapter are considerations on basic forms of state election funds (for this reason, it is possible to notice a certain defect in the internal structure

of the commented chapter). The election funds of candidates are divided into supplied with internal sources, i.e. candidate's own funds, and supplied with external sources: payments of individual persons, fees from election funds of political parties as well as funds and payments of legal persons beyond a party. Such an internal structure of the commented part of this book may bring some doubts, especially in the presence of the abovementioned division of funds in accordance with the subject criterion. Certainly, the author wanted to highlight the basic meaning of election funds of candidates in this manner (cf. comments on p. 103), nevertheless, this made the text structure unclear.

Regardless of the presented structural doubts, the commented part of the book must arouse attention of even poorly interested reader. Characterising the financing of electoral campaigns by the candidate out of its pocket B. Mucha relates to the practice including specific financial expenses in particular elections (pp. 105-113). This gives a certain picture of the chance dependence for an electoral success of the candidate – colloquially speaking – the wealth of his portfolio. What is particularly interesting (especially for political scientists) are comments referring to political debutants who, for the first time, attempted to obtain a representative's mandate and, on the other hand, persons applying for re-election. The author also brings attention to the federal provisions which aim is to equalize chances of candidates.

Subsequently, B. Mucha deals with the issue of external sources of supplying candidates' electoral funds. For natural reasons, this issue remains in the area of public interest due to the threat of political corruption (p. 113). Hence, certain restrictions in US law arise when it comes to the scope of financing of election campaigns. Payments from private persons are the sign of their support to the candidate and views expressed by him. They can adopt extremely diverse forms, including cash payments and even personal or material benefits (p. 117). In majority of states, there are limits that determine the maximum amount of payments including the prohibition of financing by specific categories of people (pp. 118-122). The external source shall be considered as payments from electoral funds of political parties. Approaching this train of thought, B. Mucha justly notices that the basic task of two dominant parties in the American political scene (Republicans and Democrats) is supporting their own candidates in federal and state elections (p. 122). Therefore, he analyses the national (federal) funds of both parties, and only then – state funds. B. Mucha pays a lot of attention to funds and contributions from non-party legal entities: corporations and trade unions and other organizations (p. 128 and n.).

At the end of considerations provided for electoral funds, B. Mucha analyses aims of spending of accumulated financial assets. He divides them into four groups, but the large amount of funds is spent on advertisement in mass media (p. 163). He analyses (unfortunately in a quite superficial manner) the stand of the Supreme Court which questioned, as compliant with the Constitution, the limitation of expenses on advertisement, seeing it as restriction of freedom of speech (pp. 165-166).

Chapter III was entitled: *Financing methods of elections to the court legislatures.* It consists of five points (differentiated in volume) on: general conditions for financing the election to state parliaments, bases of the liberal model of financing the election financed from public funds, and federal implementations of financing the election from public funds. First of all, B. Mucha characterise the general scope of complicated factors which are determined by election financing methods. Determinants of political nature are believed as the most important (pp. 169-173). Factors connected with the structure of election districts is provided on second place (pp. 173-175). There is no doubt that the size of the borough and, especially, the number of potential electros, significantly determines the amount of expenses incurred for conducting election campaign. Next, B. Mucha draws the attention to problems connected with collection of appropriate funds by a political candidate who competes for re-election (pp. 175-177).

he greatest deal of space is spend by B. Mucha on legal determinants of elections financing. He indicates that they include, in particular, the determination of payment amounts, limitations in the expenditure of accumulated funds and financing of political campaigns from public assets (p. 177 and n.). The author draws the attention to differentiation of state regulations in the subject of potential possibility of spending funds, highlighting that the collected funds can be also spent on other purposes than candidate promotion, especially referendum campaign (pp. 182-183). An important rule governing the process of spending money on election campaigns is the openness and related necessity to submit reports (pp. 184-191). Due to this, the voters receive the full image of involved entities and support of a specified candidate. Thus, the principle of transparency enables the public, in a later period, to control the manner of adopting decisions by the representatives.

In chapter III, B.Mucha placed arrangements in a form of two basic models of election campaign financing: liberal financing and financing from public funds. Liberal model is characterised by lack of practical limitations when it comes to the source and the amount of performed payments (p. 191). The only guarantee against possible fraud is the disclosure of financing sources, manifested in the necessity to submit reports. When it comes to specific solutions adopted in particular states which adopt liberal model, they are quite different.

Much more uncertainty is connected with the alternative model, which allows for public financing of election campaigns. In relation to this issue, B. Mucha analyses the differences between European countries and USA (pp. 199-209). Due to controversies within the background of elections financing (and especially of political parties), full financing of political campaigns is present in just six states. In the following 12, a partial financing of election campaigns from public funds was adopted (p. 211).

The last, IV Chapter of the books is entitled: *The significance of financing methods of state election campaigns for establishment of the aim within the form of 'pure*

elections'. The concept of 'pure election', and in particular, its reference to the concept of 'fair' elections, is of key importance for B. Mucha's considerations. Unfortunately, there are no definitions of this concept at the start of the commented chapter, as a result of which, a reader has to independently draw the conclusion that it concerns the elimination of abuse in the field of financing election campaign (cf. comment on p. 228). Chapter IV consists of three points. The first of them is focused on the liberal model functioning in the state of Illinois, the second and the third one on the model of financing from public funds applied in the state of Maine and Arizona, respectively. In the third point, the author draws conclusions from the comparison of both models in the context of achieving the aim in the form of 'pure elections'.

In Illinois, in accordance with the assumptions of the liberal model, legal regulation of election campaign financing is limited to the necessity of submitting a report. There are, however, no restrictions on the subject of payments made, as well as spending of accumulated funds (p. 232). In Maine, in turn, since 1996, the law that implements the model of financing the election campaign from public funds has been in force (p. 245). The State of Maine adopted precedential solutions, imitated later in several other states. The essence of the adopted solution in Maine is the prohibition of collecting payments from private persons by candidates who use public funds (p. 246). The candidate has a possibility of selection of its campaign financing. Similar model of electoral campaign financing is present in 1998 in the state of Arizona. In this case, the candidate can also declare financing of the campaign from his own funds, then, his opponent – provided he adopted financing from public funds – receives a compensatory surcharge – (p. 263).

Evaluating the characterised models in the context of 'clean elections', B. Mucha concludes that the establishment of transparent mechanisms for financing election campaigns supports competitiveness of election procedure and involvement in it of voters themselves (p. 280). A particular significance for respecting the idea of 'pure choice' is the obligation to submit a report – in both models) (p. 282). Nevertheless, the solutions used in the public funding model are the most useful (pp. 282-283).

In conclusion, B. Mucha performs the summing up of his considerations. He notices the complication of the legal situation of a candidate appearing in elections to the state legislature who is bound by norms of federal and state law (p. 285). He draws attention to the legal and institutional weakness of political parties, because funds are collected by individual candidates, not by parties (p. 286).

He emphasizes that the issue of financing election campaigns is of public interest, not just politicians (pp. 287-288). B. Mucha draws the attention to the advantages of financing an election campaign from public funds, indicating that the liberal model in modern times shows larger and larger weaknesses, which is proved by new corruption scandals (pp. 288-289). At the same time, it is found, that radical solution is unacceptable which completely eliminates the incomes from private persons (p. 290).

It is necessary to share the view presented in the reviewed book that candidates in the United States conduct two campaigns: one for voters' support and the other one for funds which allow for conducting the actual campaign (p. 240). Fortunately, there is no simple relationship between the amount of funds raised and the actual support of the electorate. With this, appropriate money certainly facilitates the performance of effective election campaign, but it cannot replace the political program offered to the voters and personal features of candidates.

Undoubtedly, the book of B. Mucha needs attention and recognition both in terms of topic selection and its preparation. For those interested in the functioning of the US political system and the issue of election and electoral law, it should be a compulsory reading.

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Anna Pacześniak

Europeizacja Polskich Partii Politycznych [Europeanization Of Polish Political Parties]

Wydawnictwo Naukowe Scholar, Warszawa 2014 (pp. 270)

Year 2014 was full of numerous publishing houses and events that sum up the decade of Polish EU membership. This anniversary also concerns the presence of Polish MPs in the EU Parliament, and domestic political parties as a fully legal members of party structures on the European level. Have Polish political parties been changed within this period under the influence of EU membership? This question seems to constitute the largest problem investigated in the habilitation thesis of Anna Pacześniak from the University of Wrocław titled *Europeizacja polskich partii politycznych* (Europeanization of Polish Political Parties). This is undoubtedly a very interesting, comprehensible and valuable analysis which confirms the author's reputation as one of the leading Polish researcher of europeisation or European integration and political parties in general. She earned this reputation with the entire series of earlier publications, analysing different aspects of europeisation, therefore, the high level of the reviewed publication is not surprising.

The title Europeanization is a very unclear term. The author is fully aware of that fact. Parties are subject to many different influences and the key research difficulty is separation of Europeanisation effects from all other potential sources of party change. The paper starts with a general definition of europeanization understood as transformation of national political parties under the impact of European integration, especially as 'response to changing external surroundings, leading to specific internal results' (p. 228). The Europeanization of a given party is independent of its attitude towards European integration and does not mean that it becomes a supporter of integration (pro-integrative). The authors also provide that from the point of view

of the same parties, the Europeanisation is a 'process boiling down to management performed by party elites, dynamics which is subject to their full control' (p. 44).

The work focuses on three areas of Europeanisation understood in such a manner: structural-organizational, program and cultural. The most interesting I found the cultural dimension of europeanization, in the analysis of which, the author focuses on the potential impact of MEPs on other party members, both as a source of knowledge of Europe and added value as well as potential source of problems (e.g. connected with maintenance of internal unity, including divisions). In the conclusion, she notices a small impact of MEPs as 'agents' for europeanization of their parties as well as, in general, lack of transfer of European cultural patterns to the national level. Referring to all three dimensions, the author notices that the 'traditional party structure is not easily subject to erosion and the observed adaptation changes have a superficial, but probably permanent, nature' (p. 229).

The main advantages of the book are mainly adoption as a basis and effective use of a range of theoretical concepts in the scope of political science or European studies which deserves acknowledgement due to the fact, justly observed by the author on p. 33, that 'the dominant dimension of the analysis of europeanization is the empirical approach, rarely rooted in and supported with a theoretical basis'. The author has fully and efficiently used the accomplishments of the Polish and foreign science (both English and French) as well as collected valuable empirical material based on, e.g. survey study (47 respondents) conducted by her as well as 20 individual in-depth interviews among elites of four Polish political parties (cf. nevertheless below). I also very liked the placement of detailed clarifications regarding every selections and methodological dilemmas which is very rarely visible in the Polish literature.

It seems that with maintenance of very high general evaluation of work, several points which can be a point of departure for further considerations and reflections can be pointed out. Below, I would like to mention only one of them. The author selected four Polish political parties as cases to be analysed: PO, PiS, SLD and PSL. The period of analysis included years 2001-2013. This decision is justified in chapter II and III mainly through relevance of the aforementioned parties in the Polish parliamentary-office system and not through fulfilment or lack of fulfilment, on their side, of certain features useful for the analysis of the phenomenon of europeanization. This leads to the question of specific results that would be brought by the analysis of the parties which, in the referendum of year 2003, openly called for voting 'against', i.e. LPR and Samoobrona. As the author justly notices, quoting the papers of Claudio Radelli, that if europeanization can also consist in active opposition towards Union institutions and regulations, then, it is also worth to focus on the analysis of europeanization of parties which are clearly euro-sceptical.

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