



Doi: <https://doi.org/10.17398/2695-7728.39.201>

ELECTORAL RIGHTS OF EU CITIZENS IN POLAND AS A
MANIFESTATION OF THE GLOBALIZATION OF DEMOCRACY.
SELECTED ISSUES

*LOS DERECHOS ELECTORALES DE LOS CIUDADANOS DE LA UE
EN POLONIA COMO MANIFESTACIÓN DE LA GLOBALIZACIÓN DE
LA DEMOCRACIA. TEMAS SELECCIONADOS*

MARTA CZAKAWSKA¹

Univeristy of Bydgoszcz. Poland

Recibido: 30/10/2023 Aceptado: 20/11/2023

ABSTRACT

Guaranteeing, respecting and realizing human rights, including the right to vote, is one of the fundamental duties of the state. This burden seems to be even greater when the State is a member of a supranational organization, since it is also obliged to take care of individuals who are citizens of other States in this regard. Therefore, it is crucial to introduce such legal solutions as to fully guarantee the implementation of the rights resulting from the applicable common legal regulations.

Keywords: electoral rights in the European Union, citizenship of the European Union, voting.

¹ Kujawy and Pomorze Univeristy in Bydgoszcz, attorney-at-law, District Chamber of Legal Advisors in Bydgoszcz.

RESUMEN

Garantizar, respetar y hacer realidad los derechos humanos, incluido el derecho al voto, es uno de los deberes fundamentales del Estado. Esta carga parece ser aún mayor cuando el Estado es miembro de una organización supranacional, ya que también está obligado a cuidar a los individuos que son ciudadanos de otros Estados en este sentido. Por lo tanto, es crucial introducir soluciones jurídicas que garanticen plenamente la implementación de los derechos resultantes de las normas jurídicas comunes aplicables.

Palabras clave: derechos electorales en la Unión Europea, ciudadanía de la Unión Europea, voto.

Summary: 1. Introduction. 2. European Union regulations and electoral rights. 3. Electoral rights of a citizen of the European Union - comments de lege lata. 4. Conclusion. Bibliographic references.

1. INTRODUCTION

The idea of unifying the European nations was born out of the experience of the tragic events of World War II. The fathers of modern Europe² successfully sought to create a supranational organization, which was to be a social and economic response to the cataclysmic events of 1939-1945. Over the years, the idea of, "unity in diversity"³ took on a new meaning - here were the organs of the European Union and its entire community, with more than half a billion members, facing new challenges - a powerful economic crisis, a migration crisis on a scale never seen in the entire history of a united Europe after 1948, a real threat to the security of member states due to the outbreak of war in Ukraine in 2022, and a crisis of democratic institutions.

² Politicians such as Konrad Adenauer, Joseph Bech, Johan Willem Beyen, Winston Churchill, Alcide De Gasperi, Walter Hallstein, Sicco Mansholt, Jean Monnet, Robert Schuman, Paul-Henri Spaak, Altiero Spinelli are considered to be the pioneers of the European unification process.

³ "(...) is the motto of today's European Union, which aims to defend common values such as freedom, peace and solidarity in a Union formed by different cultures and languages", after: "Unity in diversity," <https://cordis.europa.eu/article/id/27389-unity-in-diversity>, accessed 26.10.2023.

The European Union, which faces new challenges, takes a series of actions each time using various measures, most often of a legal nature, which are aimed primarily at unification, integration of the people of the member states. These measures are also aimed at creating the right conditions for their multifaceted development, respecting their needs while preserving available resources and, above all, their national traditions⁴. In the era of globalization in the broadest sense, the primary goal of which is, "to gradually erase the differences in living conditions and the goals set by individual societies, and thus create a common space for them"⁵, the development of democratic processes and the even involvement in this process of the society concentrated in a supranational organization⁶ such as the European Union is one of the priority objectives of its activities.

It should be emphasized that this state of affairs has not always been the case. In the 1970s and 1980s, the view that, "supranational power does not require legal normalization of its legitimacy"⁷ was not completely marginal. Nevertheless, "the concept of a European identity implying a system of pluralistic democracy guaranteeing freedom of expression within the framework of the constitutional organization of competencies, as well as the possibility of enjoying the procedures necessary for the protection of human rights"⁸, became a permanent part of the treaty regulations, first appearing in the text of the Single European Act (hereinafter JAE) of February 17, 1986⁹, then in the Maastricht Treaty of February 7, 1992¹⁰ (hereinafter TM). Undoubtedly, one of the basic categories of human rights is political rights, particularly electoral rights. These values are also reiterated in the current Treaty on European Union of December 13, 2007

⁴ Agata Pyrzyńska, "Electoral rights of citizens of the European Union countries residing outside their country of origin as a guarantee of the principle of sustainable development," *Sustainable Development - Scientific Debut* 2015, edited by Jakub Berezowski, Henryk A. Kretek (Racibórz: Publishing House of the State Higher Vocational School in Raciborz, 2016), 67.

⁵ Panajotis Kondylis, "The Global Economy, Global Democracy and the Global Struggle for the Distribution of Resources," *Studies in the History of Philosophy*, no. 3(6) (2015), 21-26, translated by Lech Zielinski and Anna Ziolkowska, <https://doi.org/10.12775/szhf.2015.027>.

⁶ Jan Galster argues that, "The Union is in a certain way independent of the member states, free from their influence and pursues its own general interest in its activities," Jan Galster, "Legal Status of the European Union," *Fundamentals of European Union Law*, edited by Jan Galster, (Torun: TNOiK Publishing House, 2010), 122-123.

⁷ Krzysztof Wójtowicz, "Democratic standards of the European Union and the Constitution of the Republic of Poland - experience of system practice", *Twenty years of the Constitution of the Republic of Poland. Polish constitutional thought and international democratic standards*, edited by Jerzy Jaskiernia, Kamil Spryszak (Torun: Wydawnictwo Adam Marszałek, 2017), 437.

⁸ Krzysztof Wójtowicz, *Standards ...*, 438.

⁹ Dz.U. L 169 z 29.6.1987.

¹⁰ Dz.U. 2004.90.864/30.

(hereinafter TEU)¹¹, where in the body of the preamble the signatories of the act indicated that in creating the European Union they are "inspired by the cultural, religious and humanist heritage of Europe, from which arise universal values, which constitute inviolable and inalienable human rights, as well as freedom, democracy, equality and the rule of law. In turn, the foundations of the functioning of the European Union are laid down in Article 2 of the TEU, which states that , "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, as well as respect for human rights, including the rights of persons belonging to minorities”.

Democratic standards are also defined in Article 10 TEU, where it is stated that the basis of the functioning of the Union is representative democracy (Article 10(1)), citizens are directly represented at the Union level in the European Parliament (Article 10(2), sentence 1). In addition, in the text of this provision, the signatories introduce the principle of political pluralism and public participation, as every citizen has the right to participate in the democratic life of the Union, and decisions are taken as openly and as close to the citizen as possible (Article 10(3)), with political parties at the European level contributing to the formation of European political consciousness and the expression of the will of the citizens of the Union (Article 10(4)).

Crucial for further consideration is the circumstance of the introduction, first under the provisions of the Maastricht Treaty and then in the content of Article 9 TEU, of the institution of citizenship of the European Union. According to the wording of the second and third sentences of Article 9 TEU, a citizen of the Union is any person who has the nationality of a Member State, and citizenship of the Union is additional to national citizenship and does not replace it. It is an autonomous concept, typical only of EU law, but remaining on the borderline between national law and international law .

The prerequisite for acquiring EU citizenship is to have the citizenship of the country of origin while fulfilling the condition of accession in the EU of that country . In an era of huge fluctuation of society, its mobility dictated by a variety of reasons - from economic, to educational, health, to tourism, the granting of voting rights to citizens of EU member states, turned out to be not so much a reasonable and apt legislative solution, but even necessary for the full realization of their fundamental political rights¹² . This fact is not in doubt. They arise

¹¹ Dz.U. UE 2012 C 326/13.

¹² Dominika E. Harasimiuk, "EU citizenship - an element of national, European identity or merely an

primarily in the context of the scope of electoral rights granted to EU citizens in the context of EU and national regulations¹³. Taking into account the circumstance of the lack of a uniformly understood concept of democracy¹⁴, which can be considered only after its definition, it should be stated that the EU regulations in the field of passive and active electoral rights, are an obvious example of the phenomenon of globalization of electoral democracy¹⁵.

Poland, with its accession to the EU, was obliged to implement EU law, and as a consequence introduced institutions hitherto unknown to the Polish legal system, such as EU citizenship or elections to the European Parliament. The purpose of this paper is not to make an exhaustive review of the views of representatives of legal science in this regard, but to carry out an analysis of the current legal status, which will allow an attempt to answer the question of whether the electoral rights of EU citizens are guaranteed and realized in the Polish legal system.

2. EUROPEAN UNION REGULATIONS AND ELECTORAL RIGHTS

One of the fundamental rights granted to citizens of EU member states is the freedom of movement and residence on the territory of member states, which is an example of the principle of freedom of migration as one of human rights and freedoms¹⁶. In practice, this allows one to carry out life and work activities in any EU member state. Also connected with this activity is the exercise of his electoral rights. It follows from the wording of Article 22(1) (formerly Article 19 TEC) that any citizen of the Union residing in a Member State of which he or she is not a national has the right to vote and stand for election in local elections in the Member State of his or her residence on the

additional status for citizens of member states?", *Ius Novum*, no. 3 (2017), 122-142.

¹³ Damian Kiwior, "The institution of citizenship of the European Union," (Rzeszów-Przemysł: Publishing House of the Higher School of Law and Administration, 2013), 868, <https://wspia.eu/media/lhodni3b/79-kiwior-damian.pdf>, accessed 26.10.2023.

¹⁴ Gracjan Cimek, "Toward a Globalizing Democracy," *Colloquium of the Faculty of Humanities and Social Sciences*, no. 2 (2010), 11-24.

¹⁵ Bartłomiej Michalak points out that electoral democracy is, "one of the theoretical concepts of modern liberal democracy, placing particular emphasis on the institution of elections and seeing in them the essence of the entire democratic system," Andrzej Sokala, Bartłomiej Michalak, Piotr Uziębło, *Lexicon of Electoral and Referendum Law and Electoral Systems*, (Warsaw: Wolters Kluwer, 2013), 38.

¹⁶ Małgorzata Czermińska, "Freedom of movement of persons in the European Union and human rights and freedoms. The Principle of Migration Freedom", *Krakow International Studies*, no 2 (2013), 11-24; Article 21 (formerly Article 18 of the EC Treaty) of the Treaty on the Functioning of the European Union of 25 March 1957 (*Journal of Laws of 2004 No. 90*, item 864) (hereinafter TFEU).

same terms as citizens of that State.

Electoral rights are therefore one of the most important criteria determining the formation of a democratic state under the rule of supremacy of the Nation¹⁷. The Constitution of the Republic of Poland¹⁸ sets forth the normative bases of active and passive electoral rights in Poland. The legislator ascribed special importance to them, which he expressed in Article 62 of the Constitution, stating that a Polish citizen has the right to participate in a referendum and the right to elect the President of the Republic, deputies, senators and representatives to the organs of local self-government, if he turns 18 years of age at the latest on the day of voting.

Krzysztof Wójtowicz rightly notes that at the current stage of European integration, there is no European demos, in view of which the status of EU citizen acquires, in a way, a special character¹⁹. This issue has also become the subject of a decision of the Constitutional Court, which in its judgment of May 11, 2005²⁰ indicated that:

"The Constitution as "the supreme law of the Republic of Poland" does not, at the same time, make membership in a self-governing community dependent on possession of Polish citizenship," and that "membership (...) in a community (is decided - MCz footnote) by the place of residence (center of life activity), which is the basic type of ties in this type of community"²¹. According to the TK, the solution so adopted in the Constitution is also an expression of "the application of the principle of equality and the principle of non-discrimination," is "also a consequence of the right to freedom of movement and freedom of settlement in the territory of any member state of the Union.

In addition, according to the Court:

"The replacement of the censor of state citizenship by the censor of domicile involves the establishment of European citizenship and the guarantee of the right of any citizen of the Union residing in a Member State of which he is not a

¹⁷ Marta Czakowska, "The right of a citizen to participate in public life on the example of active electoral right in elections", *Twenty years of the Constitution of the Republic of Poland. Polish Constitutional Thought and International Democratic Standards*, edited by Jerzy Jaskiernia, Kamil Spryszak (Toruń: Adam Marszałek Publishing House, 2017), 206.

¹⁸ The Constitution of the Republic of Poland of 2 April 1997 (*Journal of Laws of 1997, No. 78, item 483*, as amended), hereinafter referred to as the Constitution.

¹⁹ Krzysztof Wójtowicz, *Standards ...*, 439-440.

²⁰ Judgment of the Constitutional Tribunal of 11 May 2005, ref. no. K 18/04, OTK-A 2005, No. 5, item 49.

²¹ Judgment of the Constitutional Tribunal of 11 May 2005...

citizen to vote and stand for election to the European Parliament in the Member State in which he resides"²² .

The freedom of movement of persons, as a manifestation of the principle of equality and the principle of non-discrimination, would be meaningless if the , "right to participate in the elections of representative bodies in the place of settlement (and that with the exercise of electoral rights under the conditions determined by the territorially competent state)" is not guaranteed ²³.

The Court further stated that the recognition of rights constitutionally guaranteed to Polish citizens as "exclusive" rights is unfounded and finds no basis in the nature of constitutional subjective rights ²⁴. The granting, at the level of the Basic Law, of a certain right to a Polish citizen does not necessarily mean that it can only be granted to him, as the Court assesses. This is because the Constitution sets a certain minimum standard, which the ordinary legislator is obliged to satisfy - from the point of view of constitutionality, one can only examine whether the minimum requirements have not been violated - that is, whether the statutory and fundamental provisions do not close the way for a Polish citizen to effectively exercise. In the Court's view, the provisions of the Constitution contain a minimum standard that the ordinary legislator is obliged to fulfill from the point of view of constitutionality²⁵ .

The Court can only examine whether the minimum requirements have not been violated - whether the statutory and basic provisions do not close the way for a Polish citizen to effectively benefit ²⁶. Despite the incoherent reasoning used by the Court in this judgment, it concluded by stating that there are no obstacles to extending constitutional rights and freedoms by means of the norms contained in ordinary laws also to other categories of persons, in this examined case, EU citizens legally settled on Polish territory ²⁷.

²² Judgment of the Constitutional Tribunal of 11 May 2005...

²³ Krzysztof Wójtowicz, *Standards ...*, 440.

²⁴ Rafał Stronk, "Electoral Rights of Foreigners in the Polish Legal Order," in *Current Challenges of Electoral Law*, edited by Marek Zubik, Jan Podkowik (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 2021), 154; Krzysztof Kozłowski, , "Selected Constitutional-Legal Aspects of the Electoral Rights of EU Citizens Who Are Not Polish Citizens," *Legal Journals of the Bureau of Sejm Analyses of the Chancellery of the Sejm*, no. 3(67) (2020), <https://orcid.org/0000-0002-7439-7165>, <https://doi.org/10.31268/ZPBAS.2020.52> , 54-80.

²⁵ Judgment of the Constitutional Tribunal of 11 May 2005...

²⁶ Judgment of the Constitutional Tribunal of 11 May 2005...

²⁷ Judgment of the Constitutional Tribunal of 11 May 2005...

In addition to the TFEU, the catalog of basic acts of EU law regulating the issue of electoral rights includes, first of all, the Charter of Fundamental Rights of the European Union²⁸ and two directives that are fundamental for specifying the realization of electoral rights of EU citizens: Council Directive 93/109/EC of December 6, 1993²⁹ and Council Directive 94/80/EC of December 19, 1994³⁰.

According to the provision of the second sentence of Article 22(1) TFEU, the right to vote and to stand as a candidate in municipal elections in the Member State of residence shall be exercised subject to specific conditions laid down by the Council, acting unanimously in accordance with a special legislative procedure and after consultation with the European Parliament; these conditions may provide for derogations if justified by the specific problems of the Member State. As for elections to the European Parliament, according to Article 223(1) and the implementing provisions, any citizen of the Union residing in a Member State of which he or she is not a national shall also have the right to vote and stand for election to the European Parliament in the Member State of his or her residence under the same conditions as nationals of that State³¹.

In primary law, special attention has been paid to granting voting rights to EU citizens in local elections. The realization of electoral rights, as one of the categories of basic human rights, is never possible if the fundamental principles of electoral law are not guaranteed. The catalog of these principles includes, first and foremost, the principle of universality and the principle of equality of

²⁸ Charter of Fundamental Rights of the European Union, Official Journal C 2012. No. 362/02; the Charter of Fundamental Rights incorporates the fundamental rights and freedoms enshrined in the Rome Convention and rights derived from the constitutional traditions of member states. The Charter begins with a Preamble, then consists of 54 articles grouped into seven chapters: Dignity, Liberty, Equality, Solidarity, Rights of Citizens, Justice, General Provisions. Thus, this act lacks the traditional division into personal rights, political rights, social rights, economic rights, etc. due to each person. The introduction of the Charter was guided by the idea of creating, "new standards for the protection of individual rights in the EU," Roman Szewczyk, "Charter of Fundamental Rights of the European Union," *Studia Elbląskie*, no 11 (2010), 243-255; more on this topic Jolanta Bucińska, "Social human rights in the European Charter of Fundamental Rights," *Roczniki Nauk Prawnych*, no 1, vol 15 (2005), 101-115.

²⁹ Council Directive 93/109/EC of December 6, 1993 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament by citizens of the Union residing in a Member State of which they are not nationals, Official Journal of the EU.L 1993 No. 329, p. 34 (hereinafter Directive 93).

³⁰ Council Directive 94/80/EC 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, Official Journal of the EU.L 1994 No. 368, p. 38 (hereinafter Directive 94).

³¹ Bogumił Naleziński, „Commentary to Article 62,” *The Constitution of the Republic of Poland. Volume I. Commentary to Articles 1-86*, edited by Marek Safjan and Leszek Bosek, (Warsaw: CH Beck, 2016), Legalis

electoral rights. No election, whether at the state or supranational level, can be considered to meet democratic standards if the fundamental principles of electoral law are not only established, but above all if they are fully guaranteed and implemented. The granting of subjective electoral rights to the widest possible circle of people, which is free from discriminatory (in addition to natural exclusions, such as age, state of consciousness, state of mind) restrictions is the essence of the principle of universality of elections ³². Therefore, the circumstance of granting electoral rights to EU citizens in local elections and elections to the European Parliament should be fully approved. With regard to the first type of election, the key determinant in this case is the census of residence, as a factor that proves the conduct of the center of one's life activity there.

Undoubtedly, now that, especially after the COVID-19 pandemic, the provision of remote work has become a widespread phenomenon, the notion of a center of life activity is somewhat losing its former meaning, which was related to the social, professional, educational, personal activities carried out. The embedding of an individual in one particular place is now not so clear. In my opinion, this new center now has a more mental dimension, referring to our inner consciousness and identification with a particular local community. Of course, this legal-administrative dimension still plays an extremely important role - for it is difficult to function without being tied to a specific territorial-administrative unit. After all, at the level of local government, key decisions are made in each country regarding the day-to-day functioning of the unit - from issues related to road infrastructure, industry, waste management, local taxes, to education, health, environmental protection and traditions. Since an EU citizen settled in a particular area, outside his or her country of citizenship, for various reasons resides in an area with a local government, it is crucial, given the provisions of primary law, to enable him or her to fully exercise electoral rights, if only to strengthen ties with the local community.

The European Parliament is the only EU institution whose members are elected by direct, equal and secret ballot. Despite the work initiated in the late 1970s to create a uniform electoral law for the European Parliament for all member states, so far it has not been possible to create such an act, but only to develop rules common to all member states³³.

³² Andrzej Sokala, Bartłomiej Michalak, Piotr Uziębło, *Lexicon...*, 170.

³³ More on this topic : Anna Frydrych, From , "a uniform electoral procedure for all member states to

The subject of the regulation of Directive 93 is the participation of the EU citizen in elections to the European Parliament. The solutions used are universal rules, which are the basis for all member states³⁴. The prerequisites for the exercise of the active right to vote in this case are the possession of citizenship of the Union within the meaning of Article 8(1) of the TFEU and the fulfillment by a non-citizen of the Member State of residence of the other requirements for the right to vote and stand for election that the relevant state imposes on its citizens. The catalog of these conditions may, of course, vary from country to country, but among the most common are the census of domicile, residence in the territory of a Member State for a certain period of time³⁵. The legislator has clearly indicated that the choice by an EU citizen of where to participate in the elections to the European Parliament, actively or passively, is entirely up to his decision (Article 4 of Directive 93).

Implementing the principle of equality of elections, there is also a ban on exercising the passive right to vote more than once in a given election. The same is also true of the active right to vote - it is possible to vote only once during the same election. Exclusions in the form of disenfranchisement of a citizen by law in the Member State of residence or origin prevents him from exercising his electoral rights in any other Member State³⁶. Article 9 of Directive 93 sets out the rules of candidacy-any EU citizen who seeks to apply to stand for election in the country in which he resides, without being a citizen of that country, is obliged to submit a set of documents consisting of acts confirming the citizenship of his country, his address in the electoral territory of the Member State, his place of residence, a declaration that he has not stood for election in another country, and the relevant certificate, issued by the administrative authority of his country of origin, confirming that there are no grounds for considering that he has been disenfranchised from standing as a candidate³⁷. The enumerative indication of the EU citizen's obligations in this case is aimed at eliminating abuses and unlawful actions involving the

holding elections, "in accordance with the principles common to all member states," European Parliament, "direct voice" of a united Europe, edited by Aleksandra Kustra, (Torun: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2009), 72-89; Jacek Wojciechowski, "The problem of unification of the electoral law to the European Parliament," *Space, Economics, Society*, no 3/1 (2013), 39-52.

³⁴ Krzysztof Mucha, "Electoral rights of a citizen of the European Union," *Electoral Studies*, no. 29 (2020), 41-53, DOI: <https://doi.org/10.26485/SW/2020/29/2>, <https://orcid.org/0000-0001-8382-8521>.

³⁵ Agata Pyrzyńska, *Electoral rights ...*, 71.

³⁶ Agata Pyrzyńska, *Electoral rights ...*, 71.

³⁷ Krzysztof Mucha, *Electoral rights ...*, 45.

multiple exercise of voting rights. The Member State of residence of the EU citizen may take steps to verify that an EU citizen who has applied to vote in a country other than his or her country of origin has not previously been deprived of this right by a relevant court ruling or administrative decision. Then the Member State of residence may request the EU citizen's Member State of origin to provide him with the relevant and necessary information for the whole procedure. The consequence of negative verification of this data is that the member state of residence will be entitled to take steps to prevent such a person from taking part in the elections ³⁸.

In turn, the object of the regulation of Directive 94 is to define the rules of participation of an EU citizen in elections in the country of residence at the level of local elections. In the case of local elections, a distinction arises regarding the possibility of voting and standing for election to the legislative and executive bodies of a specific administrative subdivision. "Local elections" means universal and direct elections for the election of members of self-governing representative bodies and, if so stipulated by the laws of a Member State, of the head and members of self-governing executive bodies of the basic level, and shall be held in a , "local community of the basic level", i.e. an administrative unit listed in the Annex to this Directive, which, in accordance with the internal regulations of each Member State, have bodies elected by universal and direct suffrage and are empowered to manage within their own competence, at the level of the basic political and administrative organization, certain local affairs (Art. 2(1a) and (b) of Directive 94).

A number of caveats and exemptions for the exercise of the passive right to vote in local elections by EU citizens are set out in Article 5. According to its content, a member state can decide on this issue on its own, that is, it is regulated at the level of national legislation whether only national citizens or also citizens from other EU countries residing in the local community can run for executive bodies. The scope of the exercise of the active right to vote at the level of local elections is defined in Article 4 of Directive 94. According to its content, every EU citizen, if he or she so wishes, is entitled to participate in elections to both the legislative and executive bodies, while it is allowed that the possibility to participate in voting is linked to the condition of a certain minimum period of residence in the territory of a certain EU member state. Analogous to the provisions of Directive 94, the issue of deprivation of voting

³⁸ Agata Pyrzyńska, *Electoral rights ...*, 72.

rights in the country of origin of the EU citizen on the basis of criminal or civil law is resolved ³⁹.

3. ELECTORAL RIGHTS OF A CITIZEN OF THE EUROPEAN UNION - COMMENTS DE LEGE LATA

With the Polish accession to the European Union, it became necessary to transpose.

Community regulations on the realization of the electoral rights of EU citizens into Polish law. The first general elections to the European Parliament were held in 2004, and the first local elections with the participation of EU citizens were held in 2006.

In the long-awaited Polish Electoral Code ⁴⁰, which came into force on August 1, 2011, in Articles 10 and 11 the legislator regulated the institution of active and passive electoral rights. In the current state of the law, the active electoral right in the elections to the European Parliament in the Republic of Poland - a citizen of the EU, not being a Polish citizen, who, no later than the day of voting, turns 18 years old, and permanently resides in the territory of the Republic of Poland. In addition, he is also entitled to the active right to vote in elections to the governing bodies of local government units, an EU citizen has the right to vote only in elections to the municipal council - an EU citizen who is not a Polish citizen, who turns 18 years old at the latest on the voting day, and permanently resides in the territory of that municipality, and in the election of the head of the municipality in a given municipality - this right is held by a person who has the right to be elected to the council of that municipality. Thus, the legislator excluded the possibility of exercising the active right to vote in elections to the county council and the provincial assembly. This exclusion is not fully understood, although it is permissible under primary law and Directive 94. Most of the decisions important for the functioning of the local community are made at the level of the commune, as the basic unit of local government. However, it should be noted that the regional assembly makes key decisions regarding the distribution of funds from the EU budget intended for investments in the region. Therefore, this is an example of the competence of

³⁹ Krzysztof Mucha, *Electoral rights ...*, 46.

⁴⁰ The Act of 5 January 2011 – the Electoral Code, i.e. Dz.U. of 2023, item 2408, as amended, hereinafter referred to as the Code.

the authority, which has a significant impact on the daily lives of the inhabitants of a given region.

The scope of the right to stand as an EU citizen is set out in Article 11 of the Code. It states that the right to be elected is vested in the person who has the right to vote in those elections. In addition, it is necessary to be at least 21 years old on the day of voting and to have been permanently resident for at least five years in the Republic of Poland or in another EU Member State. If you want to stand for election to the municipal council, you must be at least 18 years old on the day of voting and have a permanent residence in the municipality. An EU citizen cannot stand as a candidate for the position of executive body of a local authority. As a rule, the right to stand for election of an EU citizen is the same as that of a Polish citizen. The differences in this respect relate only to the circumstances of not being able to stand as a candidate in elections to executive bodies of local government⁴¹. Such solutions raise certain doubts. In practice, it often turns out that in a given local community, a socially active EU citizen who is not a Polish citizen, valued by this community, enjoys recognition and respect, cannot run for the office of mayor only because of the lack of Polish citizenship. This is an expression of an incomprehensible differentiation, not dictated at all by legal, economic and social considerations.

4. CONCLUSION

The exercise of electoral rights, as one of the basic human rights, is not obligatory in most democratic countries. Certainly, the passive electoral right does not have such a status. The privilege of exercising one's electoral rights is of increasing interest to a society that can be described as EU civil society.

There is no doubt that Article 62(1) of the Constitution is not a provision that would be in conflict with those provisions of the TFEU which confer electoral rights on non-Polish EU citizens in Poland. Certainly, when constructing the wording of this provision, the constitution-maker was not guided by the idea or concern about the "influence of non-citizens on the outcome of elections" to national public authorities⁴². Moreover, with the accession of Poland to the European Union in 2004, this provision of the

⁴¹ Krzysztof Mucha, *Electoral rights ...*, 49.

⁴² Krzysztof Kozłowski, *Selected...*, 61.

Constitution has not changed.

The exercise of both the passive and active electoral right by an EU citizen in Poland is associated with the fulfilment of the requirements resulting not only from the primary law and directives, but also from the law in force in the country. In order to fully implement the principle of equality and non-discrimination, it is necessary to create the same conditions for EU citizens who are not Polish citizens as for Polish citizens in terms of the documentation necessary for them to submit during the electoral process.

It is worth noting that while in the field of elections to the European Parliament there is a flow of information between the electoral bodies of individual EU Member States regarding EU citizens exercising their right to vote, such regulation and practice does not take place at the level of local elections. It seems that this is not a mistake that has a huge impact on the course and results of the elections, because local elections are held at different intervals, and the terms of office of the authorities are not the same in all countries.

In addition, in order to fully respect the provisions of EU law on the prohibition of duplication of voting and/or standing for election, the flow of information between electoral administrations in individual countries should be strengthened, and even consideration should be given to the creation of an EU-wide unified electronic system to which independent electoral administrations from individual Member States would have access.

The notion of "flourishing democracy" may be too much of an exaggeration, but in my opinion, the development of democratic forms of governance is heading in the desired direction. The inevitable processes of fluctuation of cultures, market economies and globalization result in the fact that the concept of democracy must be constantly reconsidered, taking into account the current socio-economic conditions.

BIBLIOGRAPHIC REFERENCES

- Bucińska Jolanta, "Social human rights in the European Charter of Fundamental Rights," *Roczniki Nauk Prawnych*, no 1, vol 15 (2005).
- Charter of Fundamental Rights of the European Union, Official Journal C 2012. No. 362/02.
- Cimek Gracjan, "Toward a Globalizing Democracy," *Colloquium of the Faculty of Humanities and Social Sciences*, no. 2 (2010).

Council Directive 93/109/EC of December 6, 1993 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament by citizens of the Union residing in a Member State of which they are not nationals, Official Journal of the EU.L 1993 No. 329, p. 34.

Council Directive 94/80/EC 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, Official Journal of the EU.L 1994 No. 368, p. 38.

Czakowska Marta, "The right of a citizen to participate in public life on the example of active electoral right in elections", *Twenty years of the Constitution of the Republic of Poland. Polish Constitutional Thought and International Democratic Standards*, edited by Jerzy Jaskiernia, Kamil Spryszak (Toruń: Adam Marszałek Publishing House, 2017).

Czermińska Małgorzata, "Freedom of movement of persons in the European Union and human rights and freedoms. The Principle of Migration Freedom", *Krakow International Studies*, no 2 (2013).

Frydrych Anna, „From „a uniform electoral procedure for all member states to holding elections „in accordance with the principles common to all member states,“. *European Parliament, "direct voice" of a united Europe*, edited by Aleksandra Kustra, (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2009).

Galster Jan, "Legal Status of the European Union," *Fundamentals of European Union Law*, edited by Jan Galster, (Toruń: TNOiK Publishing House, 2010).

Harasimiuk Dominika E., "EU citizenship - an element of national, European identity or merely an additional status for citizens of member states?," *Ius Novum*, no. 3 (2017)

Judgment of the Constitutional Tribunal of 11 May 2005, ref. no. K 18/04, OTK-A 2005, No. 5, item 49.

Kiwior Damian, "The institution of citizenship of the European Union," (Rzeszów-Przemyśl: Publishing House of the Higher School of Law and Administration, 2013), 868, <https://wspia.eu/media/lhodni3b/79-kiwior-damian.pdf>, accessed 26.10.2023.

Kondylis Panajotis, "The Global Economy, Global Democracy and the Global Struggle for the Distribution of Resources," *Studies in the History of Philosophy*, no. 3(6) (2015), translated by Lech Zielinski and Anna Ziolkowska, <https://doi.org/10.12775/szhf.2015.027>

Kozłowski Krzysztof, "Selected Constitutional-Legal Aspects of the Electoral Rights of EU Citizens Who Are Not Polish Citizens," *Legal Journals of the Bureau of Sejm Analyses of the Chancellery of the Sejm*, no. 3(67) (2020), <https://orcid.org/0000-0002-7439-7165>, <https://doi.org/10.31268/ZPBAS.2020.52>

Mucha Krzysztof, "Electoral rights of a citizen of the European Union," *Electoral Studies*, no. 29 (2020), DOI: <https://doi.org/10.26485/SW/2020/29/2>, <https://orcid.org/0000-0001-8382-8521>.

- Naleziński Bogumił, „Commentary to Article 62,” *The Constitution of the Republic of Poland. Volume I. Commentary to Articles 1-86*, edited by Marek Safjan and Leszek Bosek, (Warsaw: CH Beck, 2016), Legalis.
- Pyrzyńska Agata, "Electoral rights of citizens of the European Union countries residing outside their country of origin as a guarantee of the principle of sustainable development," *Sustainable Development - Scientific Debut 2015*, edited by Jakub Berezowski, Henryk A. Kretke (Racibórz: Publishing House of the State Higher Vocational School in Raciborz, 2016).
- Sokala Andrzej, Michalak Bartłomiej, Uziębło Piotr, *Lexicon of Electoral and Referendum Law and Electoral Systems*, (Warsaw: Wolters Kluwer, 2013).
- Stronk Rafał, "Electoral Rights of Foreigners in the Polish Legal Order," in *Current Challenges of Electoral Law*, edited by Marek Zubik, Jan Podkowik (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 2021).
- Szewczyk Roman, "Charter of Fundamental Rights of the European Union," *Studia Elbląskie*, no 11 (2010).
- The Act of 5 January 2011 – the Electoral Code, i.e. Dz.U. of 2023, item 2408.
- The Constitution of the Republic of Poland of 2 April 1997 (*Journal of Laws of 1997*, No. 78, item 483).
- Treaty on the Functioning of the European Union of 25 March 1957 (*Journal of Laws of 2004* No. 90, item 864) .
- Unity in diversity," <https://cordis.europa.eu/article/id/27389-unity-in-diversity>, accessed 26.10.2023.
- Wojciechowski Jacek, "The problem of unification of the electoral law to the European Parliament," *Space, Economics, Society*, no 3/1 (2013).
- Wójtowicz Krzysztof, "Democratic standards of the European Union and the Constitution of the Republic of Poland - experience of system practice", *Twenty years of the Constitution of the Republic of Poland. Polish constitutional thought and international democratic standards*, edited by Jerzy Jaskiernia, Kamil Spryszak (Torun: Wydawnictwo Adam Marszałek, 2017).

MARTA CZAKAWSKA

Attorney-at-law District Chamber of Legal Advisors in Bydgoszcz
Kujawy and Pomorze Univeristy in Bydgoszcz
m.czakowska@wp.pl

Orcid: 0000-0002-5839-9267