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# EUDO CITIZENSHIP OBSERVATORY

## *ACCESS TO ELECTORAL RIGHTS*

### *POLAND*

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June 2013



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# Access to Electoral Rights

## Poland

*Piotr Korzec & Dorota Pudzianowska*

### 1. Introduction

In the public debate concerning voting rights, historical context has been highly relevant. Public discussion has concentrated on the democratic credentials of the proportional representation system of the bicameral Parliament, but the elaborate political structure of local self-government seems to outgrow the political needs of the citizenry. In the 2011 national elections, the overall turnout was 48.92 percent<sup>1</sup> while turnout abroad was 85.84 percent<sup>2</sup>. The exercise of national sovereignty through elections retains powerful symbolic significance. Similarly, despite a rather modern and open tradition underlying the constitutional definition of local self-government<sup>3</sup> based on theories formulated before 1918, when the country was run by foreign powers, there has been no discussion of giving third-country nationals the right to elect public authorities, even when these councils perform the most mundane tasks at the local level. EU-citizen voting in local or European Parliament elections has been the subject of political contention that has not ended with the Constitutional Tribunal's decisions that turned out rather favourably to European legislation. The electoral system has been amended in 2011 and seems to provide enhanced material representation in national, local and EU elections<sup>4</sup>.

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<sup>1</sup> <http://wybory2011.pkw.gov.pl/att/pl/000000.html#tabs-1>

<sup>2</sup> The turn-out data for abroad polling stations might be confusing but all they mean is that 119,678 of the 139,415 voters who had already made the effort to register to vote abroad effectively did vote, <http://wybory2011.pkw.gov.pl/att/pl/000000.html#tabs-2>.

<sup>3</sup> Article 16.1 of the Constitution reads: „The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law.”

<sup>4</sup> Among other material changes in voting methods, voting abroad by correspondence has been put into place, which seems very substantial given the post EU accession diaspora of 2,000,000.

## 2. Eligibility: Who has electoral rights under national law?

### 2.1 *Citizen residents*

#### 2.1.1. Age

The age threshold for suffrage is generally set at eighteen years on the day of the elections. Article 10 of the Electoral Code of 2011<sup>5</sup> (hereinafter: EC) merely formalizes this norm, which has prevailed since 1989.

The age requirement for running as a candidate varies according to the office sought. The age limit has been set to eighteen years of age for running in elections to legislative bodies of local self-government (Article 11.1.(5) EC); to 21 years of age for running in elections to the *Sejm* (i.e. the ‘lower’ chamber of the Parliament) and the European Parliament (Article 11.1.(1) EC and Article 11.1.(4) EC, respectively); to 25 years in elections for the executive body at the lowest level of local self-government (*wójt/burmistrz/prezydent miasta* – Article 11.1.(5) and Article 5.(6) EC); to 30 years of age for running in elections to the Senate (i.e. the ‘upper’ chamber of the Parliament) according to Article 11.1.(2); and to 35 years for running in presidential elections (Article 11.1(3) EC).

#### 2.1.2. Mental disabilities

The mentally disabled can be disenfranchised as a result of a decision on legal incapacity (Article 10.2 (3) of the Electoral Code) under the Code of Civil Procedure. The Electoral Code has thus precluded any attempt to neuter – by way of interpretation conforming to the European Convention on Human Rights (ECHR) and its *Kiss v. Hungary* (Application No: 38832/06) standard<sup>6</sup> – the constitutional provision disenfranchising the legally incapacitated (Article 62.2 of the Constitution of 1997<sup>7</sup>).

#### 2.1.3. Criminals

According to the Electoral Code, prisoners can be disenfranchised by a specific decision of a criminal court (Article 10.2.(1) EC), but disenfranchisement needs to be a special means of punishment. Article 39 of the Criminal Code extended potential criminal penalties to include the deprivation of public rights. Similar provisions apply to the electoral rights of persons tried by the Tribunal of the State as part of the responsibility of public officials for violations of the Constitution or the law (Article 10.2.(2) EC). This is warranted by Article 62.2 of the Constitution.

As far as standing as candidate is concerned, the Electoral Code provides for additional limitations. First, anyone sentenced to prison (including a conditionally suspended prison term) for an intentional crime prosecuted *ex officio* (thus excluding the crimes of defamation, insult, offence to the dignity of a person, and causing bodily harm lasting less than seven days) or for an intentional tax crime (Article 11.2.(1) EC) is excluded from running in elections. This effect lasts until the punishment is completed and has been cleared

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<sup>5</sup> The Act of 5 January 2011 – the Electoral Code [Ustawa z dnia 5 stycznia 2011 r. – Kodeks wyborczy (Dz. U. z dnia 31 stycznia 2011 r.)].

<sup>6</sup> Such an interpretation could rely on the fact that legal incapacitation is an all-or-nothing institution of the civil code and should not produce effects in respect to electoral rights unless this is within the scope of a reasoned decision of a civil court.

<sup>7</sup> Article 62.2: ‘Persons who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights, shall have no right to participate in a referendum nor a right to vote.’

in the Criminal Register.<sup>8</sup> Second, a court decision which cites the person's condemnable involvement in the country's socialist past can preclude eligibility as a political candidate (Article 11.2.(2) EC)<sup>9</sup>. Third, the Polish Electoral Code extends disenfranchisement of foreign nationals by their home countries to preclude running for office in similar circumstances as regulated by the law of the EU Member State of citizenship (Article 11.2.(3) EC).

The Electoral Code requires the Minister of the Interior to be responsible for the exchange of information concerning the right to vote of citizens within the EU (Article 24 EC).

## 2.2 Citizens abroad

### 2.2.1. Residence and the Franchise

The Polish Electoral Code does not require residence for voting in parliamentary or presidential elections (Article 10.1.(1) EC) – the nationality and age requirements suffice. Local self-government elections, however, include a residence condition (Article 10.1.(2-4) EC).

Similar principles apply to candidacy rights. The only exception concerns running in elections for the European Parliament and local mayoral executive positions (*wójt, burmistrz, prezydent miasta*, Article 5.(6) EC). In the first case, a Polish citizen is required to show residence of at least five years in Poland or any other EU country before being able to run as a candidate (Article 10.1(2) in conjunction with Article 11.1(4) EC) while EU citizens must prove their residence in Poland. Running in local mayoral elections (*wójt, burmistrz, prezydent miasta*), on the other hand, does not require residency (Article 11.1(6) EC) but forbids running as a candidate in two localities in the same elections (Article 472 EC). This is a strikingly odd situation because the candidate can run even though he or she cannot vote in the particular elections under Article 10.1.(3) in conjunction with 10.1.(4) EC. Lastly, only Polish citizens can stand as candidates in local mayoral elections (Article 11.1 (6) EC).

### 2.2.2. Temporary Absence abroad

Citizen residents who are temporarily absent can cast votes from abroad in national elections (parliamentary, presidential) and elections to the European Parliament. This is because voting in national elections does not distinguish between citizens resident abroad and citizens temporarily abroad and provides for all citizens present in a particular district abroad to be able to vote (Article 35.1 EC). Similarly, non-citizens can cast their votes in Polish elections to the European Parliament when abroad. Polish citizens need to document their right to vote with a valid Polish passport (Article 31.1 and 31.2 EC) or a Polish ID when voting within the

<sup>8</sup> Such disenfranchisement can never be shorter than the time-span of other special punishments (Article 107.6 Criminal Code). In the case of a conditionally suspended prison term, the term of clearance is six months after the end of the term of probation (Article 76.1). Otherwise, the term is ten years after the punishment was executed, after it was subject to clemency or after it stopped being executable (Article 107.1 Criminal Code). Where the prison sentence does not exceed three years, the term can be shortened upon request to five years by a court decision in specific cases. An executable prison sentence for a sexual crime against a minor under fifteen years of age never goes off the register.

<sup>9</sup> Based on Article 21a .2a of the Act of 18 October 2006 on Revealing Information on Documents of the Organs of State Security from the years 1944-1990 and the Contents of such documents [Ustawa z dnia 18 października 2006 r. o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944-1990 oraz treści tych dokumentów, Dz. U. z 2007 r. Nr 63, poz. 425, z późn. zm.].

territory of the European Union (Article 35.5). As for second-country nationals, they can document their right to vote with a valid ID or a passport of an EU Member State<sup>10</sup> (Article 31.1 and 31.2 EC).

The Electoral Code provides for permanent polling stations within consular services as well as on Polish ships wherever at least fifteen voters are present (Article 14 & 15 EC). The polling stations are set up by a Regulation of the relevant Minister.

### 2.2.3. Residence abroad

Citizens who reside permanently abroad can cast votes from abroad in national elections (Article 35.1 and 35.5) by voting at consular services in person or by correspondence. They can also vote by returning to the country on election day, provided they obtain a statement issued by the relevant consular services affirming their right to vote (Article 35.3 EC).

Citizens who reside permanently abroad can run as candidates in national parliamentary and presidential elections as well as mayoral executive elections (Article 5.(6) and Article 11.1.(6) EC, cf. 2.2.1 *supra*). The Polish electoral system does not provide, however, for a special representation of citizens living abroad, and overall running as a candidate from abroad seems a highly impractical scenario considering that there are no votes to be obtained unless the candidate is able to attract local voters locally.

Under the conventional reading of the Electoral Code, all Polish citizens can run in elections whereas second country nationals need to prove residence in Poland. The right to stand in European Parliament elections in Poland is conditional on permanent residence in Poland (Article 10.1(2) EC); this condition can easily be met by any returning Polish citizen, unlike newly arrived second country nationals. Both Polish and second country candidates, however, need to meet the five-year-long residence within the EU condition (Article 11.1.(4)).

## 2.3 Foreign residents

### 2.3.1. Third-country nationals

Even though the Polish Constitution of 1997 defines local self-government as an association of inhabitants<sup>11</sup> and the Constitutional Tribunal has expressed the view that non-citizens voting in local elections does not violate the principle of national sovereignty or the principle of the Republic as the Common Good of Polish Citizens (Article 62 of the Constitution)<sup>12</sup>, third country citizens do not have any electoral rights. The decision of the court was confirmed in the Judgment of 31 May 2004, (case call No. K 15/04) where the principle of national sovereignty (Article 4 of the Constitution) was considered not to be violated by second-state nationals voting in European Parliament elections in Poland.<sup>13</sup>

<sup>10</sup> Article 35.1: “Voters who are abroad and have valid Polish passports or – in the case of the citizens of the European Union – a valid passport or other ID document are enlisted on the list of voters prepared by the territorially competent consul.”

<sup>11</sup> Article 16.1: „The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law.”

<sup>12</sup> cf. Judgment of the Constitutional Tribunal concerning the Accession Treaty of Judgment of 11 May 2005, (case-call No. K 18/04), [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_18\\_04\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf), para. 26 quoted n. 19 *infra*.

<sup>13</sup> [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_15\\_04\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_15_04_GB.pdf).

### 3. Electoral rights of EU citizens

EU Directives on voting-rights were implemented in Poland before it joined the EU. The Act on Amendment of the Electoral Ordinance for the Local Elections and other Acts were signed on 20 April, 2004 and came into force on 1 May 2004. Elections to the European Parliament were regulated by the Act of 23 January 2004 – Electoral ordinance to the European Parliament. Both acts essentially transpose relevant Directives. Voting rights remain unaffected by the 2011 Electoral Code.

Regarding the practicalities of running in elections within a system based on the influence of political parties, it is important to note that the Act on Political Parties does not allow for foreigners' membership in political parties.<sup>14</sup> According to an opinion issued by the Legislative Council of the Government,<sup>15</sup> however, Article 11 of the Constitution does not prohibit amending the statute: '[the principle of residence] presupposes the concentration of the life in Poland, understood as having a special bond [between the EU national resident in Poland] with the Polish Republic where the person concerned has an undoubted interest in participating within the Polish territory in the policy-making of the local self-government and the policy-making of the EU'.<sup>16</sup>

Finally, it is worth mentioning that Poland has reformed its access to citizenship regulations, as a result of which residents have gained legally-enforceable access to citizenship. Subsequently, they can, through naturalisation, fully participate in exercising the "supreme power in the Republic of Poland" that is "vested in the Nation" (Article 4.1 of the Constitution), with the "Nation" exercising "such power directly or through their representatives" (Article 4.2 of the Constitution) for the Common Good (Article 1 of the Constitution).

#### 3.1 Local elections:

The local elections 94/80/EC Directive was implemented on the day of accession to the EU, as provided for by the Act on Amendment of the Electoral Ordinance for the Local Elections, and other Acts which were made on 20 April 2004 and became operative on 1 May 2004.<sup>17</sup> The implementation scheme provided that the new rules would apply to the next elections held after accession (Article 8)<sup>18</sup>, and the 2004 implementation was importantly corrected by the Judgment of the Constitutional Tribunal of 20 February 2006 (case-call No. K 9/05)<sup>19</sup>

<sup>14</sup> The issue was raised by the European Commission on 16 April 2012 within the EU-Pilot scheme (case 3331/12/JUST).

<sup>15</sup> 'The Opinion of 14 September 2012 Concerning the Interpretation of Article 11 of the Constitution of the Republic of Poland and the Possibility of Amending the Act on Political Parties of 27 June 1997' [Opinia z 14 września 2012 r. dot. interpretacji art. 11 Konstytucji Rzeczypospolitej Polskiej i możliwości ewentualnej nowelizacji ustawy z dnia 27 czerwca 1997 r. o partiach politycznych Rada Legislacyjna], the Legislative Council, call-No. RL-0303-16/12, <http://radalegislacyjna.gov.pl/dokumenty/opinia-z-14-wrzesnia-2012-r-dot-interpretacji-art-11-konstytucji-rzeczypospolitej-polskiej>, <http://radalegislacyjna.gov.pl/sites/default/files/dokumenty/dokument.pdf>.

<sup>16</sup> Polish verbatim: „Zaakcentowania wymaga ten ostatni wymóg – skoncentrowania swojej działalności życiowej w Polsce, gdyż dzięki temu można wykazać pewnego rodzaju więź z Rzeczpospolitą, a osoba taka posiada niekwestionowany interes w uczestniczeniu na terytorium RP w polityce samorządu terytorialnego i polityce Unii Europejskiej”

<sup>17</sup> Act of 20 April 2004 Amending the Electoral Ordinance to the Councils of Communes, *Powiaty* and *Voivodships* [Ustawa z dnia 20 kwietnia 2004 r. Ustawa o zmianie ustawy – Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw oraz niektórych innych ustaw.] O.J.: 2004, No. 102, Item. 1055.

<sup>18</sup> Article 8 of the Act.

<sup>19</sup> [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_9\\_05\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_9_05_GB.pdf)



with respect to a twelve month residence condition that no longer applies, which happened before the November 2006 local elections. The implementation was replaced by the EC in 2011 with no modifications of the right to vote.

The 2011 Electoral Code does not differ from the earlier law regulating candidacy rights in communal elections. Second-country nationals can stand as candidates to the lowest level local assembly (the Communal Council) as well as to the second level Communal Council in cases where the lowest level commune takes the hybrid form of first and second level of local self-government.<sup>20</sup> Only Polish citizens can stand as candidates in the communal executive elections and only Polish citizens can run in second and third level local self-government.

This area of law has been solidified by a number of judgments of the Constitutional Tribunal. The Tribunal did not endorse the principle of representation of residents in local self-government that the Constitution may be interpreted to suggest in Article 16, but it did acquiesce to the competence of legislator to fully decide on the requirements of the local elections Directive.<sup>21</sup> In 2006, acting on the motion of the Commissioner for Citizens' Rights concerning the prerequisite of twelve months prior residence to vote and stand in local self-government elections, the Constitutional Tribunal suggested that the requirements must be identical for both Polish citizens and second-country nationals. The Constitutional Tribunal considered Polish and second-country nationals on an equal basis with respect to Article 169<sup>22</sup> and Article 16<sup>23</sup> of the Constitution, even though the general right to vote under Article 62<sup>24</sup> of the Constitution only concerns Polish nationals. The matter was confirmed in the Judgment of 31 May 2004, (case call No. K 15/04 where the principle of national sovereignty

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<sup>20</sup> The hybrid form of a commune [Polish *gmina* denotes the first level of local self-government] exercises the competences of the *powiat* [i.e. the second-level self-government]; this hybrid system applies in certain towns. Both levels of self-government are thus exercised by one set of self-government authorities under Article 92.2 of the Act on the *Powiat*-Level Local Self-Government of 5 June 1998, as amended which reads as follows: 'A town with the rights of a *powiat* [second-level local self-government unit] is a commune [first-level local self-government unit] exercising the tasks of a *powiat* according to this Act', <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19980910578>.

<sup>21</sup> '25. The Polish constitutional legislator may, in a sovereign manner, regulate the process of elections to State authority organs and elected organs of local self-government within the territory of Poland. [...] Any such statutory regulation should also take into consideration the constitutional principle of sympathetic disposition towards the process of European integration and cooperation between States.'; '26. 'The right to vote and to stand as a candidate at local elections vested in EU citizens who, although not holding Polish citizenship, are resident in Poland (Article 19(1) of the EC Treaty) does not constitute a threat to the Republic of Poland as a common good of all Polish citizens (Article 1 of the Constitution) nor to its national independence. The local self-governing community participates in exercising public authority of a local nature, and decisions or initiatives regarding the State as a whole may not be adopted within local self-government (cf. Article 16 of the Constitution)' ; '27. Furthermore, granting foreign EU citizens the right to vote and to stand as a candidate at local elections does not contradict Article 62(1) of the Constitution, which guarantees Polish citizens the right to elect, inter alia, their representatives to organs of local self-government. The aforementioned constitutional right is not of an exclusive character, in the sense that, should the Constitution grant it directly to Polish citizens, it might not also be vested in the citizens of other States.', Judgment of the Constitutional Tribunal concerning the Accession Treaty of Judgment of 11 May 2005, (case-call No. K 18/04), [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_18\\_04\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf).

<sup>22</sup> Article 169.2 of the Constitution: 'Elections to constitutive organs shall be universal, direct, equal and shall be conducted by secret ballot. The principles and procedures for submitting candidates and for the conduct of elections, as well as the requirements for the validity of elections, shall be specified by statute.'

<sup>23</sup> Article 16.1 of the Constitution : 'The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law.'

<sup>24</sup> Article 62.1 of the Constitution: 'If, no later than on the day of voting, he has attained eighteen years of age, Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the *Sejm* and Senate and organs of local government.'

(Article 4 of the Constitution) was considered not to be violated by second country nationals voting in European Parliament elections in Poland.<sup>25</sup>

### **3.2 EP elections for EU citizens residing in the country**

EU citizens participate in EP elections on the same terms as Polish citizens. On arriving in the country, they need to register with the communal services running the register of voters (Article 18.8 EC). They can even cast their vote in elections to the EP through the voting districts for those temporarily out of the country where the consular services will register the voter and coordinate with the communal services as they would for a Polish citizen under Article 35 EC (cf. 2.2.2 *supra*).

Running in EP elections in Poland is also conditioned on the double residence requirement: the candidate needs to reside in Poland and to document five year residence within the EU prior to elections (Article 11.1(4) EC).

The new Electoral Law has scrapped the condition that second-country residents must be in the Register of Voters for Parliamentary Elections, formerly provided for by Article 8 of the EP Electoral Ordinance and as regulated by Article 11 of the antecedent Parliamentary Elections Ordinance. As a result, an EU citizen can directly register in the voting list before he or she is in the Register of Voters. However, compared to the old regulations the situation of second country voters is fragile because the Electoral Code has delegated a number of issues to a Regulation of the Minister of Internal Affairs and specifically fails to address a number of important issues. First of all, the details concerning the origin and the country-of-origin electoral institution and applicable procedures are to be regulated by the Minister for Internal Affairs. Further, the Electoral Code does not specifically provide for the enjoyment of voting rights to be ascertained by a declaration (rather than a specific official document) whereas the former Parliamentary Elections Ordinance did specifically provide for proof to be made by way of a solemn declaration when registering in Poland (Article 11.9(d)) and did specifically provide that such a declaration of registration with Polish Register of Voters would suffice when voting while temporarily abroad<sup>26</sup> (cf. 2.2.2 *supra*).

### **3.3 EP elections for national citizens abroad.**

In principle, citizenship is sufficient for Polish nationals to vote in parliamentary, presidential and European Parliament elections and most consulates operate polling stations for EP elections because consular areas with more than fifteen potential voters must— under the law — operate polling stations for the purposes of voting in person as well as by correspondence.

There is, however, an argument to be made that the Electoral Code provides for a national residence condition for Polish citizens to vote (Article 10.1.(2)). This argument, hinges on the use of the comma in Article 10.1.(2), which accords the right to vote to ‘a

<sup>25</sup> [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_15\\_04\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_15_04_GB.pdf).

<sup>26</sup> Polish voters who reside in Poland and vote through the consular services need to state the relevant Register of Voters for the purposes of communicating the change of the place of voting to the relevant services (Article 35.2). It would thus follow that second country residents of the Republic of Poland are not covered by this provision. Most likely, however, this is a simple misspelling, because the Electoral Ordinance to the European Parliament of 2004 did not specify this condition in its Article 37, and the most recent Electoral Code is new in securing that voters are not included in any two Lists of Voters within the EU. It is fair to say that this omission is a simple mistake in consolidating the instruments and the omission can be rectified in the Regulation required of the Minister for Foreign Affairs by Article 35.4. As the EC does not provide for such a declaration, however, the second country national might be obligated to prove the right to vote by a written certificate.

Polish citizen [...] and a citizen of the European Union who is not a Polish citizen, [...], and resides on the territory of the Republic of Poland.”<sup>27</sup> In this Article, the right to vote in EP elections seems generally contingent on the residence-in-Poland condition because the specification of the age of the second-country national has been made by a clause with two commas. Whereas the first comma is compulsory before the term ‘who’ (‘który’) in Polish, the fact that the clause is closed off with a second comma suggests that the final specification ‘and resides in Poland’ apply both to second-country nationals and Polish citizens. The observation is corroborated by the fact that the grammatical form of the disposition in the 2004 ordinance did not make use of similar punctuation.<sup>28</sup> There is no evidence of a relevant legislative intent other than the fact that residence was a condition for voting in a 2003 project of the law<sup>29</sup>; the legislative intent to keep the status quo, on the other hand, is apparent in the fact that the 2011 Electoral Code does provide for consular polling stations in EP elections as generously as it does for other national elections where any Polish citizen has the right to vote regardless of their residence. The argument, therefore, rests on this punctuation-mark observation. Misuse and abuse of the commas is common in legal instruments and legal textbooks and the detail has not been discussed by academic commentaries.<sup>30</sup> Accordingly, this interpretation should be considered as potential rather than real.

## 4. Exercising electoral rights

### 4.1 National and regional elections

#### 4.1.1. Voter registration

The Electoral Code provides for a mixed system including a general Register of Voters and a List of Voters for particular elections.

Communal services create the Register of Voters for the relevant territory based on the registers of residents held by the Registered Residence Register (Article 18.2 EC). This is *ex officio* in respect to Polish citizens (Article 18.8 EC). The Register of Voters is the basis for the preparation of the List of Voters for relevant elections (Article 26.4 EC).

EU residents need to apply to be in the Register of Voters and are listed in part B of the Register of Voters. The difference is not significant, however, since Article 19 EC states that a number of Polish citizens will have to apply to be in the Register in cases where they do not have any permanent registered residence as well as in cases where they wish to be in the register relevant to their actual place of residence as opposed to their registered place of

<sup>27</sup> Article 10.1.(2) EC: „[...] A Polish citizen who is 18-years-old on the day of the elections and a citizen of the European Union who is not a Polish citizen and is 18-years-old on the day of the elections, and resides in the territory of the Republic of Poland”.

<sup>28</sup> Article 8.1: ‘The right to elect deputies to the European Parliament in the Polish Republic is also vested in the citizen of the European Union who is not a Polish citizen and who is at least 18 years old on Election Day and is ordinarily resident in the Polish according to the law [...]– (Prawo wybierania posłów do Parlamentu Europejskiego w Rzeczypospolitej Polskiej ma również obywatel Unii Europejskiej niebędący obywatelem polskim, który najpóźniej w dniu głosowania kończy 18 lat oraz, zgodnie z prawem, stale zamieszkuje w Rzeczypospolitej Polskiej [...]).’

<sup>29</sup> The Project prepared by the Ministry for the Interior on 24 June 2003, cf. [http://www.msw.gov.pl/wai/pl/50/21/Projekt\\_ustawy\\_o\\_wyborze\\_czlonkow\\_Parlamentu\\_Europejskiego.html](http://www.msw.gov.pl/wai/pl/50/21/Projekt_ustawy_o_wyborze_czlonkow_Parlamentu_Europejskiego.html) and <http://www2.mswia.gov.pl/download.php?s=1&id=340>.

<sup>30</sup> Mariusz Jagielski, Prawo wyborcze – wersja β [Electoral law – beta version], manuscript, on file with the author, p. 19, (retrieved on 21 November 2012 at [http://www.wpia.us.edu.pl/sites/wpia.us.edu.pl/files/addressbook/9212/prawo\\_wyborcze\\_wersja\\_beta.doc](http://www.wpia.us.edu.pl/sites/wpia.us.edu.pl/files/addressbook/9212/prawo_wyborcze_wersja_beta.doc)). No mention of the problem in Anna Rakowska & Krzysztof Skotnicki, “Changes in Electoral Law Introduced by the Election Code”, *Przegląd Sejmowy* 4(105)/2011.

residence. But it is difficult to say how the Register of Voters will operate once the institution of Permanent Registered Place of Residence is struck off the *corpus juris* in 2014.

Independently of the Register of Voters, voters can enlist directly on the List of Voters prepared for particular elections five days before election day (Article 28 EC, for national elections only) (cf. 4.1.2, voting anywhere in the territory) or enlist in the Register of Voters and the List of Voters as a resident, with the right to contest exclusion from the List of Voters (Article 36 & 37 EC). The only rule governing the system is the rule that a voter cannot be on two lists (Article 26.2 EC). The flexibility of the system is not without its discontents, however, and mass migrations between the first and second rounds of voting in mayoral elections in communes have led to a caused a block of the List of Voters between the two rounds of election.<sup>31</sup>

There is no Register of Voters abroad, and these voters need to register on the List of Voters made by the consular services for the national elections (parliamentary, presidential, EP).

Citizens residing abroad need to register with the relevant consular services responsible for running the polling station within the special voting district. They can register to vote in person or through correspondence with the consular services.

Second-country citizens are subject to the same registration procedure as Polish citizens. Specific details of registration, however, shall be regulated by the Minister of the Interior by the way of a Regulation (cf. 3.2 *supra*).

Lastly, there are no differences in registration procedures between levels of election, or between residents abroad and residents in Poland.

#### **4.1.2. Casting the vote**

There are multiple methods of casting a vote:

##### ***Polling station in the district where the voter is registered?***

In principle, voters vote in the district where they are registered. The communal services hold the Register of Voters that forms the basis of the List of Voters for particular elections.

Special arrangements are made in respect to special voting districts in national elections (presidential, parliamentary, EP):

- Eligible voters on Polish ships at sea can register in the List of Voters prepared by the Captain (Article 34.1), based on the decision to run a polling station on the ship with more than fifteen voters (Article 15). Such polling stations are assimilated into the voting district of the owner of the ship (Article 15.5 EC).
- Eligible voters can vote in hospitals, old-age pensioners houses, prisons, student houses<sup>32</sup>, military camps and assimilated services where applicable, etc.<sup>33</sup>

These principles also apply to second-country nationals in EP elections.

##### ***Polling station anywhere in the national territory***

<sup>31</sup> Project of an amendment of the Electoral Code, Sejm RP of the VII term, item 318.

<sup>32</sup> Article 12 & 29 EC.

<sup>33</sup> Article 30 EC.

Eligible voters also have the possibility to cast their vote anywhere in the national territory. There are two formal tracks provided for the exercise of this right that remains conditional on application by the interested voter.

(1) The voter can register with the List of Voters prepared in the commune where the voter resides and that is different from the place of residence given in the Register of Voters (Article 29.1 EC). The application can be filed five days before the election date. The same applies to voters who are not registered as residents in Poland (Article 29.4 EC). This way of voting is limited in scope in supplementary elections to the Senate in that voters enjoy the right to participate in the supplementary election based solely on their place of residence (Article 29.3 EC).

(2) Alternatively, the voter can apply for an official statement by the communal services attesting the voter's right to cast a ballot. The statement can be obtained by the voter based on the Register of Voters or – a later stage – based on the List of Voters (Article 32.1 EC). Delivery of such a statement to the voter is made on an application in writing, by fax or by submitted electronically. This voting method is limited to electoral districts where supplementary elections to the Senate are held (Article 32.4 EC). This institution is also used in two other situations:

(i) The statement can be delivered by the Captain of a Polish ship at sea where the ship has been granted the status of a polling station under Article 15 EC (Article 34.3 EC) because enlisting on the ship would have removed the voter from the list in the commune of origin.

(ii) The statement can also be issued by the Consul based on the list of voters abroad, where the Consul issues a statement attesting the citizen's right to vote (Article 35.3 EC). This applies both to voters resident abroad as well as voters who thought they would vote abroad but are returning to the country. Once such persons enlist to vote with the consular services they would have been removed from the list of voters in their commune of origin.

These principles apply to second country residents in EP elections.

### ***Absentee voting through mail ballot***

Mail ballot is possible for handicapped persons. The arrangement can be made by application 21 days prior to the election. Absentee voting does not apply to voting in polling stations in hospitals and such institutions or in student houses. It also does not apply where proxy voting or voting abroad has been applied for (*infra*) (Article 61a.2). Mail ballot for handicapped persons is available to second country voters.

Voting by mail ballot is possible for voters abroad during national presidential, parliamentary and national European Parliament elections, which is the essential achievement of the 2011 Electoral Code<sup>34</sup>, though it requires registration to vote abroad by any approved means of communication (Article 62 EC). Any consular voting district will have at least one correspondence polling unit (Article 14.2). The voter needs to apply fifteen days before the election (Article 63.1) or ten days before the second round of voting in presidential elections (Article 65). These principles also apply to second country residents in EP elections when travelling abroad.

<sup>34</sup> Anna Rakowska, Krzysztof Skotnicki, "Changes in Electoral Law Introduced by the Election Code", *Przegląd Sejmowy* 4(105)/2011, 27.

### ***Proxy voting***

Proxy voting is available to handicapped persons and persons aged 75 or over (Article 54.1 & 54.3 EC, respectively). Proxy voting requires making a mandate in the presence of the mayor or another employee of communal services and can be applied for up to ten days before election day. The mandate is revocable.

These procedures also apply to second country residents voting in EP elections.

### **4.1.3. Running as candidate**

There are no special requirements for running as a candidate in national parliamentary or presidential elections. This is not very significant since the Polish electoral system does not provide for discrete representation of the out-of-country population.

There is a residence requirement of residing within the EU for five years before running for elections to the European Parliament. However, Polish citizens do not need to prove residence in Poland. There is a regulation of *incompatibilitas* for EU (Article 333 EC) and Polish law (Article 334 EC) as provided for by Article 103 of the Constitution.<sup>35</sup>

The practicalities of standing as candidate in EP elections exhibit some differences which are worth being mentioned. A candidate who is not a Polish citizen needs to make a declaration that he is not running in another Member State and provide a specific statement from relevant authorities of the Country of Origin (Article 341.1(2) EC)<sup>36</sup>. The lists of candidates are proposed by electoral committees that can belong to a political party, a coalition of political parties or to the voters themselves (Article 341). Any committee needs to propose a list containing five to ten candidates (Article 342) and the list needs to be supported by the signatures of at least 10,000 voters from the relevant voting district (Article 343). The number of signatures required is set to 5,000 in elections to the Sejm (Article 210) and a single candidate for a Senator needs to present 2,000 signatures of support (Article 265). There is a five per cent support-of-the-list threshold for the candidates to be able to win a seat (Article 335 EC).

### **4.1.4. Method of representation of voters residing abroad**

Poland uses a system of ‘assimilated representation’ – the votes cast abroad are assimilated in the voting district for Central Warsaw (Article 14.3 and 78.2 EC). The principle of

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<sup>35</sup> Article 103 of the Constitution: ‘1. The mandate of a Deputy shall not be held jointly with the office of the President of the National Bank of Poland, the President of the Supreme Chamber of Control, the Commissioner for Citizens' Rights, the Commissioner for Children's Rights or their deputies, a member of the Council for Monetary Policy, a member of the National Council of Radio Broadcasting and Television, ambassador, or with employment in the Chancellery of the Sejm, Chancellery of the Senate, Chancellery of the President of the Republic, or with employment in government administration. This prohibition shall not apply to members of the Council of Ministers and secretaries of state in government administration. 2. No judge, public prosecutor, officer of the civil service, soldier on active military service or functionary of the police or of the services of State protection shall exercise the mandate of a Deputy. 3. Other instances prohibiting the holding of a mandate of a Deputy or prohibiting the performance of a mandate jointly with other public functions may be specified by statute.’

<sup>36</sup> Article 341.1(2) also requires the delivery of “A certificate duly made by the relevant authority of the Member State of the European Union of which the candidate for running in the elections is a national stating that the candidate has not been stripped of the right to stand in elections to the European Parliament in such a Member State and that the authority in question has no relevant information whatsoever concerning the stripping of such a right.”

assimilated representation does not influence the presidential elections and parliamentary elections to the Sejm as those are governed by proportional representation. Assimilated representation might appear rather odd in the newly-adopted majoritarian system in elections to the Senate, since all overseas voters vote for or against candidates running in Central Warsaw (Article Article 14.3, 78.2 & 272 EC).

Votes cast on board Polish ships at sea with the status of polling stations are assimilated in the voting district of the owner of the ship (Article 15.5 EC).

In the event of the results of elections in overseas polling stations in consulates and sea ships not being communicated within 24 hours of the vote, the voting in such polling stations is considered null and void in parliamentary Sejm and Senate elections, presidential elections and national elections the European Parliament (Articles 230.2, 272.2, 314.2, 353.2 EC, respectively).

## **4.2 Local elections**

### **4.2.1. Voter registration**

Under the EC, the registration procedure is the same for all elections (cf. section 4.1.1).

### **4.2.2. Casting the vote**

The probability of ‘voting outside of the constituency’ is smaller. The possibility of enlisting in two communes simultaneously no longer exists, though it is still possible to change residence and enlist in another commune just before an election.<sup>37</sup> Student houses do not run polling stations (Article 12.4). Proxy and Correspondence voting is available for the elderly and handicapped.

### **4.2.3. Representation in the Communal Council (Local Assembly at the basic level)**

Electoral rights are limited in communal elections by two institutions:

(i) Elections to assemblies of the lowest level of local self-government are majoritarian (Article 415 EC)<sup>38</sup>. Constitutional authorisation of this procedure is a departure from the nationally sacrosanct principle of proportional representation. Interestingly, the Constitutional Tribunal Judgment of 8 February 2005, (case-call No. K 17/03)<sup>39</sup> authorised the use of a majoritarian system in the election of Communal Councils with less than 20,000 inhabitants. It has been argued, however, that the new majoritarian system is unsatisfactory under the Constitution because those towns that have up to 50,000 inhabitants but do not fall into the hybrid first-and-second level of self-government category<sup>40</sup> (such as Bełchatów, Będzin, Pabianice, Zgierz), will suffer from the system of un-proportional representation.<sup>41</sup> It is possible, therefore, that the departure from proportional representation will be further limited to provide for a proportional representation electoral system in such cases.

<sup>37</sup> Cf. text at n. 32 *supra*.

<sup>38</sup> Majoritarian representation does not apply to towns exercising the competence of the second level (*powiat*) of self-government, which have been dubbed ‘hybrid communes’ above, cf. text at n. 18 *supra*.

<sup>39</sup> [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_17\\_03\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_17_03_GB.pdf)

<sup>40</sup> Cf. note 21 & 39 *supra*.

<sup>41</sup> Anna Rakowska, Krzysztof Skotnicki, “Changes in Electoral Law Introduced by the Election Code”, *Przegląd Sejmowy* 4(105)/2011, 12.

(ii) In elections to all three levels of the local assemblies, there can be no voting where the Election Commission registers fewer candidates than there are seats on the Council. In such cases, the candidates are *ex lege* nominated councillors leaving the un-manned mandates empty (Article 380, and the *renvoi* in Articles 450 & 459). The decision to staff the Council without elections must be published by the relevant executive body of the local self-government (Article 381 EC).



