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The Regulation of External Voting at National and International Level

The development of voter enfranchisement and universal suffrage is part of the commitment for civil rights and political freedoms. In general, several landmarks can be identified on the road to universal enfranchisement. Between 1870 and the 1940s, universal suffrage was established for males for example in Austria, Denmark, Italy, France, German, Spain and Switzerland. At the same time, the male suffrage already established was further extended to the entire male adult population in Belgium, Finland, Norway, the United Kingdom and Sweden. Several years later, universal suffrage reached a milestone and became "nearly universal." The earliest countries in Europe to give legal recognition to women's right to vote were Finland in 1906 and Norway in 1913. During the inter-war period and after World War II, women were given the right to vote in many European countries – Austria, Czechoslovakia, Germany Poland, Sweden and the United Kingdom in 1918-19, Hungary in 1920, Spain in 1931, France in 1934, Italy in 1945, Greece in 1952.² It is important to note that there are states in Europe where women were enfranchised merely a few decades ago (Switzerland in 1971 and Liechtenstein in 1984). In general, the next barrier to the right to vote was age. For a long time, the minimum voting age was between 23 and 30 as a rule until it was lowered to 18 later on in the 20th century.³ Let me emphasize

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² Rafael Lopez Pintor, Voter turnout in Western Europe, Stages in the Electoral History of Western Europe, http://www.idea.int/publications/voter_turnout_weurope/upload/Full_Reprot.pdf, 14., hereinafter: Pintor.

³ "At the beginning of the 20th century, it was 24 in Austria, 25 in Belgium, Prussia, the Netherlands and Norway, and 30 in Denmark. In Sweden the voting age for general elections was lowered to 21 from 23 only in 1945. In the UK, where women had been granted the right to vote in 1918, the voting age for women then was 30; it was reduced to 21 in 1928, and the voting age for both men and women was further

that the long journey of the extension of universal suffrage has not ended yet. Nowadays, one of the major challenges for broadening universal suffrage depends on the willingness of states to improve the efficiency of voting from abroad for citizens living abroad. In our days, the demand for voter enfranchisement for citizens living abroad cannot be separated from a broader sense of the notion, i.e. that the right to vote has become a basic human right.

Several different theories exist about citizens residing abroad. Some people tend to think that the state should not bear responsibility for its citizens if they do not live in the(ir) country of origin⁴, thus they should find their way in the world. Others show indifference to the subject, while a lot of people would like to bridge the distance between them and their expatriates residing abroad. Among those residing abroad we can find a lot to whom their country of origin does not mean anything anymore, but a lot of people still have emotional ties thereto and are interested in its current events. In some countries the issue of citizens residing abroad does not constitute a real problem because the number of people leaving the country is negligible. However, there are a lot of states where, due to various reasons, the number of citizens residing abroad is significant. Therefore the question of the country of origin and citizens residing abroad is a complex one. If citizens live abroad due to migration, we can talk about expatriates, if expatriates establish major communities abroad we can talk about a diaspora. Furthermore there are national communities claiming to belong to the country of origin due to historical reasons. This phenomenon is primarily typical of Central and Eastern Europe. Prior to the democratic transitions in the Central and Eastern European countries, the issue of voting from abroad only surfaced in relation to Western European countries. Following the transition, the question has become relevant in the historically challenged Central and Eastern European states as well. While Serbia, Croatia, Romania, Slovakia and Hungary have adopted electoral laws regulating this issue, Western Europe remains concerned about these developments in the Eastern part of the continent. Do we have to worry about

lowered to 18 in 1969. In France, the right to vote at age 18 was also established in 1969.” (Pintor, 15.)

⁴ NB where the context necessitates, the terminology used herein corresponds to that used by the pertinent opinion of the Venice Commission on out-of-country voting for the sake of clarity in the arguments presented. At the same time, we shall bear in mind that there are other terms (e.g. kin-state, home country) – also used by the Venice Commission and other international organs – that could be used correctly in this context under different approaches to the topic in international law. I shall also refer to these terms as the context might require.

Central and Eastern European countries regulating the right to vote from abroad, especially with respect to Hungary’s legislation on the issue? Does this amount to geopolitical threats? As far I am concerned, the answer is no. In Central and Eastern European countries dual identity is not a rare phenomenon. We can find Romanians and Slovaks living in Hungary who are Hungarian citizens and are not precluded from having a Romanian or Slovak citizenship, either.

The same practice exists between Romania and Moldavia. There are Hungarian citizens living in the neighbouring countries who are Romanian and Hungarian citizens at the same time. In the 21st century, we have to get used to the loosening up of the “texture of the nation-state”. In the European Union, a multiple (or layered) identity is rather appreciated than considered to be dangerous. Multiple identity and dual citizenship may enhance reconciliation. It is the joint responsibility of politicians to accept this approach. National minorities living in the neighbouring countries may belong to the host country’s political community as well as to the kin-state’s cultural community. They can form their opinion on the government’s functioning in the state they actually live in and in their country of origin, obviously, taking into consideration different perspectives. Italian or French citizens who hold another state’s citizenship receive the same treatment.

The relationship between the country of origin and citizens residing abroad (including the issue of voting from abroad) is not only dealt with on the state level but international organizations also deal with the issue. Regarding the right to vote from abroad, the Council of Europe and its institutions outline a sort of soft law in the form of various recommendations. The judgements of the European Court of Human Rights are already legally binding in addition to the jurisprudence that did not fail to define certain pertinent rights and obligations in certain member states.

The Principle of Out-Of-Country Voting

We cannot state that the right to vote from abroad is regulated in a uniform fashion on the European level. However, we can identify various tendencies. In my brief presentation I would like to touch upon the following topics:

1. Who is entitled to vote?
2. Under what rules?⁵

⁵ In this part, I will summarize the practices, soft law and regulation within the framework of the Council of Europe and include certain examples to underline arguments.

We shall endeavour to define the groups into which people voting from abroad can be categorized as a starting point.

1. *Who is entitled to vote?*

In general:

- a.) firstly, citizens of a state may be abroad on the day of the election for business or personal reasons;
- b.) secondly, there are citizens, who, for academic or employment purposes, spend a definite and temporary amount of time in another country, where they will reside for a given period;
- c.) lastly, the third category comprises citizens residing abroad for a much longer period of time, who may sometimes have double nationality, and who settle down in the host country on a more permanent basis.

2. *Under what rules?*

The Parliamentary Assembly of the Council of Europe (PACE) encourages member states to allow their citizens living abroad to participate to the fullest extent possible in the electoral process: see Resolution n° 1459 (2005) (paragraph 7) and Recommendation n° 1714 (2005) (paragraph 1.ii) on the abolition of restrictions on the right to vote; see also Recommendation n° 1410 (1999) on links between Europeans living abroad and their countries of origin (paragraph 5.iii). These documents are of political importance, thus are without any legally binding effect. It seems clear that the Parliamentary Assembly of the Council of Europe had realized the utmost importance of the issue of the right vote of expatriates at an early stage. In Recommendation 1410 (1999) on the links between Europeans living abroad and their countries of origin, PACE stressed the necessity for a coherent policy on links between European expatriates and their country of origin, both at the state and the European level. It recommended that the Committee of Ministers (CM) "prepare a recommendation to the member states with the intention of fostering voluntary participation of expatriates in political, social and cultural life in their country of origin." The Assembly also invited member states to take account of the phenomenon of expatriation, its benefits and challenges in their emigration policies, notably with a view to introducing support measures in the cultural, educational, political and social spheres based on the criterion of nationality rather than territoriality. Additionally, Resolution 1459 (2000) of PACE on the abolition of restrictions on the right to vote should also be mentioned here, as it is an important instrument in inviting member states to "grant electoral rights to all their citizens (nationals), without imposing residency requirements;

[...] facilitate the exercise of expatriates' electoral rights by providing for absentee voting procedures (postal and/or consular voting) and [to consider] the introduction of e-voting consistent with Recommendation Rec(2004)11 of CM and to co-operate with one another to this end." Furthermore, according to Recommendation 1714 (2005) of PACE on the abolition of restrictions on the right to vote, the Assembly encouraged member states to allow their citizens living abroad to participate to the fullest extent possible in the electoral process: "The Committee of Ministers agrees with the Parliamentary Assembly that member states should take measures to facilitate the exercise of voting rights of citizens living abroad, for example through postal, consular or e-voting." The Venice Commission also highlighted in the Code of Good Practice in Electoral Matters (Opinion n° 190/2002, 1.1.1.c.v.) that "the right to vote and to be elected may be accorded to citizens residing abroad".

Documents of the Venice Commission

The Venice Commission adopted its aforesaid report on out-of-country voting on 16 June 2011, to the drafting of which I contributed as co-rapporteur. When discussing the contents of the document, the parties had the following debate:

- a. Some were convinced that the report had to convey a positive message, since the right to vote could be derived from citizenship and – in principle – member states' regulations ensure the right to vote abroad.
- b. However, the other standpoint was to place emphasis on problems and counter-arguments.
- c. Finally, the Venice Commission was able to reach consensus: The final argument was that considering the large number of member states having permissive regulations, the report aimed at formulating a positive message; however, it also intended to draw attention to cases when a member state laid down certain specific conditions, restrictions and extraordinary rules for the exercise of the right to vote by its citizens residing abroad. Nevertheless, the report did not intend to formulate counter-arguments against the right to vote, which I personally consider very important and hereby emphasize once again.

Who is entitled to vote?

The Venice Commission's report lists more than thirty countries where the right to vote from abroad is recognised for citizens resident abroad or temporarily out of the country without any restrictions

concerning the period of absence or the obligation to have resided in the country. In this respect, either the period of absence or the duration of staying abroad is irrelevant, so the national legislation does not include any restrictions or limitations (including *inter alia*: France, Portugal, Italy, Belgium and Austria from Western Europe; Poland, Bulgaria, Romania, Serbia, Slovakia and Croatia from Central and Eastern Europe). According to legal literature this is the model of the ‘caring (responsible) kin-state’.

In which countries?

Countries which have a rather significant number of citizens residing abroad adopt the above presented model of the ‘caring kin-state’. These states seek to regulate the relationship between the country of origin and national communities living outside the borders that are defined in the constitution or through pertinent legislation. Typical examples are the Portuguese, Spanish and Italian constitutions. France established a special institutional network for French citizens residing abroad. Prior to the transitions in Central and Eastern European countries, the issue of citizens residing abroad was negligible, since living abroad was a suspicious phenomenon in itself. In the socialist countries talking about national communities abroad was forbidden. After the regime change, the situation changed significantly. Kin-states tend to think that they are responsible for the fate of expatriates residing abroad, and do not intend to abandon them or leave them “stranded”. Through the amendment of citizenship laws, Central and Eastern European countries guaranteed the possibility of acquiring citizenship for compatriots living abroad comprehensively.

Subsequently, the Venice Commission presents those countries as well which ensure the right to vote for citizens residing abroad but lay down certain conditions. This group primarily includes the United Kingdom and Germany. In these countries the right to vote of citizens residing abroad is restricted to a certain time limit. In the United Kingdom, citizens living abroad or temporarily out of the country, must have lived in the United Kingdom (at a specific moment) during the past 15 years and be entered into the electoral roll at their place of origin. In Germany, citizens living outside the country can vote provided they were continuously resident in Germany for a period of at least three months and have not been out of the country for more than 25 years. Consequently, the Venice Commission took a stand on certain fundamental questions of formal requirements of the participation on elections. Attaching the exercise of the right to vote to entering into the electoral roll is not considered disproportionate or too restrictive. Most countries provide their citi-

zens residing or staying abroad the opportunity to request their entry into a special electoral roll. The state expects citizens residing abroad to cooperate actively and apply for their entry into the electoral roll in person. Most of the time citizens have to turn to embassies and consulates, but there are countries where the petition must be filed with electoral bodies. Most states only allow citizens residing abroad to vote on parliamentary elections or referenda, participation in local elections is solely permitted in exceptional cases.

Voting methods

The Venice Commission adopted recommendations concerning the method of voting as well. In the countries studied, there are five different ways of conducting elections:

- a.) In the case of 16 countries (mostly including Central and Eastern European countries with a characteristic fear of “non-personal voting”, such as Poland, Romania, Serbia and Croatia) citizens resident abroad can only vote in person. (In all these cases, voting takes place at the diplomatic representations, missions or consulates of the country concerned.)
- b.) Vote in person or other methods
 - b1. Vote by post (solely by post: Italy, Germany, Austria)
 - b2. Proxy voting (vote by procuration) (e.g. France, United Kingdom)
 - b3. Advance voting (vote by anticipation) – which is especially advantageous for people who are on a brief stay abroad on election day, then they are allowed to cast their votes a few days or weeks earlier (Scandinavian states)
 - b4. E-voting (voting through the Internet, exceptional)

Arguments in favour of out-of-country voting and potential reasons for restrictions

The legal recognition of citizens is based on the principle of “nationality”. The citizens of a country therefore enjoy, in principle, all the civil rights recognised in that country. The principle of “out-of-country voting” enables citizens living outside their country of origin to continue participating in the political life of their country on a “remote” basis. Some countries even elect Members of Parliament specifically to represent citizens living outside the country (Croatia, France, Italy, Portugal, Romania, “the former Yugoslav Republic of Macedonia”).

Out-of-country voting guarantees equality between citizens living in the country and expatriates. It ensures that citizens maintain ties

with their country of origin and boosts their feeling of belonging to a nation of which they are members regardless of geographical, economic or political circumstances.

Finally in European Union Member States, owing to free movement, and taking into account the growing number of citizens making use of this freedom, it is necessary to find a solution to ensure the participation of these citizens in the political life of their country of origin, as a consequence of their mobility.

The starting point of potential restrictions

1. The assumption that a non-resident citizen is less directly or continuously concerned with, and has less knowledge of, a country's day-to-day problems – which may be termed a “tenuous” link with the country of origin;
2. The impracticality and sometimes undesirability (in some cases impossibility) of parliamentary candidates presenting the different electoral issues to citizens living abroad so as to secure the free expression of opinion;
3. The influence of resident citizens on the selection of candidates and on the formulation of their electoral programmes;
4. the correlation between one's right to vote in parliamentary elections and being directly affected by the acts of the political bodies so elected;

In the case of states whose citizens live abroad in large numbers, to the extent that their votes could appreciably affect election results, it seems more appropriate to provide parliamentary representation for the citizens residing abroad by pre-defined numbers of Members of Parliament elected by them. A solution of this kind has been adopted in, for example, France (in the Senate 12 senators represent French citizens living abroad), Italy (12 MPs and four senators represent Italian citizens living abroad; however, these citizens may choose between registering in a constituency within the country or in the constituency of Italians abroad) and Portugal (Portuguese citizens living abroad have four Members of Parliament).

The most recent judgement of the European Court of Human Rights

The practice of the European Court of Human Rights is quite careful when it comes to the issue of acknowledging the right to vote from abroad. On the one hand, the Court recognises that most European states guarantee their citizens the right to vote from abroad; however,

it does not deduct the responsibility of states for providing the aforementioned rights from this practice. In my opinion the Court's Grand Chamber weighed political aspects when, in *Sitaropoulos and Giakoumopoulos v. Greece*, it came to the conclusion that European countries had not yet reached consensus concerning the issue of voting from abroad. Two-thirds of the Council of Europe's member states – i.e. more than thirty countries – provide their citizens the right to vote from abroad, regardless of the duration of their stay abroad. It is beyond argument that there are countries which do not enable their citizens to vote from abroad or only do so with certain limitations. Nevertheless, as far as I am concerned a significant consensus exists regarding the issue within the member states of the Council of Europe. I have to note here that in other cases the European Court of Human Rights has been more permissive when deciding on the existence of consensus within its contracting parties.

Sitaropoulos and Giakoumopoulos v. Greece

As the Venice Commission so aptly observed, a decisive step had been taken by the European Court of Human Rights when it delivered a judgement on Greek officials working for the Council of Europe, who had asked to vote at the 2007 parliamentary elections.⁶ Since the adoption of the Greek Constitution in 1975, Article 51(4) has authorised the legislature to lay down the conditions for expatriate voters to exercise voting rights. However, for 35 years the Greek legislature has failed to implement this provision. Since then, no fresh initiative has been taken to promote Greek expatriates' right to vote. The applicants alleged that their inability to vote from their place of residence amounted to disproportionate interference with the exercise of their right to vote in 2007 parliamentary elections, in a breach of Article 3 of Protocol No. 1. In its judgement of 8 July 2010 the Court, sitting in Chamber, held by 5 votes to 2, that there had been a violation of Article 3 of Protocol No. 1. The Court undertook a comparative analysis of the domestic law of 33 Council of Europe member states and established that a large majority (29) had implemented procedures allowing voting from abroad. The Court did not consider that Article 3 of Protocol No. 1 had to be interpreted as generally imposing a positive obligation on national authorities to guarantee voters abroad the right to vote in parliamentary elections. The situation is, however, different in Greece owing to the existence of a specific constitutional provision. Without declaring that the Greek Constitution made it

⁶ ECtHR, 8 July 2010, *Sitaropoulos and Others v. Greece*, Application No. 42202/07, hereinafter: ECtHR Judgement of 10 July 2010.

compulsory to introduce the right to vote from abroad, the Court held that “the absence for such a long period of regulations on the right of expatriates to vote from their place of residence, despite the rule laid down in Article 51 § 4 of the Constitution, is likely to constitute unfair treatment of Greek citizens living abroad in relation to those living in Greece”.⁷ Referring to European practice (most states allow voting from abroad) and to the fact that the right to vote was at risk, which reduced member states’ margin of appreciation, the Court held that “the absence of the legislative implementation of the rules laid down in Article 51 § 4 of the Constitution for a period lasting more than three decades, combined with the development of the law of the Contracting States in this area, is sufficient to engage the liability of the respondent State under Article 3 of Protocol No. 1”⁸ According to the applicants’ view it was clear that under relevant international documents, such as the instruments of the Council of Europe, Parliamentary Assembly Resolution 1459 (2005), Recommendation 1714 (2005) and the Venice Commission Code of Practice in Electoral Matters, the member states were under an obligation to make the right to vote effective. Especially, the applicants noted the study that the chamber referred to in its judgement, at least twenty-nine member states of the Council of Europe guaranteed in practice the right to vote for expatriates living abroad in parliamentary elections. On 15 March 2012, in its judgement the Grand Chamber of the Court held unanimously that there had been no violation of Article 3 of Protocol No. 1. The Court notably found that neither the relevant international and regional law – ICCPR, American Convention on Human Rights and the African Charter on Human and Peoples’ Rights – nor the varying practices of the member states revealed any obligation or consensus, which would require member states to make arrangements for the exercise of voting rights by citizens living abroad. The Court also highlighted that the Contracting States enjoy a wide margin of appreciation in connection with their choice of electoral system. The Court noted that while the great majority of Council of Europe member states allowed their citizens to vote from abroad at the same time, some did not, and in those States who did allow voting from abroad the practices had a wide variety of approaches. The Court also observed that although the Greek Constitution contained a provision encouraging the legislature to arrange the right to vote for expatriates living abroad, it was not obliged to act accordingly. The Court found that the situation, namely, that the applicant had to travel back to Greece in order to

vote was not disproportionate to the point of infringing the right in the question. Today, in the world of modern technology, when voting by post is widely known and recognised, the Court’s argument might seem a little bit anachronistic. Last, but not least, let me emphasize an encouraging observation of the Court: “the Court also takes into consideration the fact that the rights under Article 3 of Protocol No. 1., is not a privilege in the twenty-first century, the presumption in a democratic State must be in favour of inclusion.” In spite of the fact that the Court held unanimously that there had been no violation of Article 3 of Protocol No. 1., they nonetheless expressed a favourable and positive approach to external voting. All in all, we can conclude that the European Court of Human Rights was taking political aspects into consideration when deciding on the case, contrary to expectations. However, the fact is that by its judgement, the Court proved that legally not binding recommendations of Council of Europe bodies show a tendency towards ensuring the right to vote for citizens residing abroad. Thus European legal development is heading in the direction of the recognition of the aforementioned right.

Conclusion

National practices regarding the right to vote of citizens living abroad and its exercise are far from being uniform in Europe. However, relevant legislation will hopefully adapt and abide by this more favourable trend for out-of-country voting in the immediate future, at least in relation to national general elections, as regards citizens who maintain their ties with their country of origin. That is true at least of persons who are temporarily out of the country. However, definitions of the temporary nature of a stay abroad may vary on a broad scale and if this criterion is adopted, it should be clarified. Distinctions should also be drawn according to the type of elections. National, single constituency elections are easier to open up to citizens residing abroad, while local elections are generally closed to them, particularly on account of their tenuous link with local politics. The proportion of citizens living out of the country may also vary on a country by country basis. Where these numbers are high, it might have a decisive impact on the outcome of the election, which may justify the implementation of specific measures. It is perfectly legitimate to require voters living abroad to register to be able to vote, even if registration is automatic for residents. The obligation to vote in an embassy or consulate may in practice severely restrict the right to vote of citizens living abroad. This restriction may be justified on the grounds that other means of voting (postal vote, proxy

⁷ Ibid, para 43

⁸ ECtHR Judgement of 10 July 2010, para 44

voting, e-voting) are not always reliable, and are, therefore, unavailable. Although the introduction of the right to vote for citizens who live abroad is not required by the principles of the European electoral heritage, the European Commission for Democracy through Law suggests that states, in view of citizens' European mobility, and in accordance with the particular situation of certain states, adopt a positive approach to the right to vote of citizens living abroad, since this right fosters the development of national and European citizenship.

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International Law and European Law Aspects of External Voting with Special Regard to Dual Citizenship

In the following the author shall analyze the international and European law aspects of participation in elections by citizens residing abroad and persons possessing dual citizenship. As a first step the legal concept of citizenship will be examined. Although the author is rather inclined to define citizenship as Hanna Arendt quite accurately described it: the right of the individual to have rights. A scholar of international law should also make reference to the most widely accepted definition of citizenship as elaborated by the Hague International Court of Justice in the *Nottebohm* judgement¹ of 1955. In the *Nottebohm* case, the facts of which were also related to a situation of multiple citizenship, the Hague International Court of Justice declared: „nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as the result of an act of the authorities is in fact more closely connected with the population of the State conferring nationality than with that of any other state.” Thus, the Court of Justice described citizenship as a complex relationship comprising elements of emotional attachment as well as existential aspects, while the whole concept is based on the social reality of the bond connecting the citizen with the state.

The legal content of citizenship was subject to significant changes throughout the centuries. However, it may safely be argued that only citizens of the state enjoy the totality of political rights, while full social and economic rights are also reserved exclusively for the citizens of the state. Citizens have the right of return to their country of origin and the right to establish themselves in the same at all times. Furthermore, in third countries they are entitled to consular and diplomatic protection afforded by their own state. Citizenship

¹ See judgment of 6 April 1955 in the *Nottebohm case* (Liechtenstein v Guatemala) (I.C.J. Reports [1955]), p. 4.