

ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK

Universität Bremen

ZERP

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Introduction of political participation rights for non-EU-national immigrants in Germany

The paper was presented at the ESF and ELIAMEP Exploratory workshop on “Rights, Legal Mobilization and Political Participation in Europe” 8-10 October 2009 in Athens (Saturday, 10 October 2009: Morning session: Law, mobilization and the rights of immigrants – The case of Germany).

IMPRESSUM

Herausgeber/ Redaktion/ Vertrieb:	Zentrum für Europäische Rechtspolitik Universität Bremen Universitätsallee, GW 1 28359 Bremen
Nachdruck:	Nur mit Genehmigung des Herausgebers
ISSN (Internet):	1868-7520

Bremen, im November 2009

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1. On the significance of the issue of legal mobilization

Within the ambit of legal sociology in Germany, mobilization was debated for the first time in the eighties of the last century.¹ In the early nineties, the legal sociology initiatives for a debate on legal method was taken up again with the aim of showing the correlation between significant socio-political issues and the development of legal methods to implement political objectives. Under the influence of the political and social problems concomitant with the reunification of Germany these issues attracted particular interest. People tried to address the issue of the relationship between legal dogmatics and legal practice from a new angle.² A lasting effect did not ensue from these debates though.

Consequently, such legal sociology method has not so far been applied to the subject of this workshop. By comparison, the inclusion of the methods of empirical social research have become established particularly in studies into the procedure and structure of litigation or reports from ministerial administrative authorities in connection with drafting legislation. Recently it was suggested to distinguish between legal („legal opportunity structure“), social and individual influencing factors of legal mobilization.³ For the purposes of today's workshop, the present contribution on political participation of migrants in Germany brings into new focus the connection between political objectives and the voice of those affected by the implementation of such objectives. Shown by means of examples will be the historical development of the implementation of socio-political calls for political participation in legally binding structures. This presentation will deal with the conditions under which political objectives may be accomplished within the framework of their legal structures, and which aspects are a hindrance. In view of the different stages of articulation of these interests, in conclusion hypotheses about how specifically the interests of immigrants in equal treatment relate to the anxieties of the host society in Germany may be formulated only tentatively.

1 Cf. *Blankenburg*, Mobilisierung von Recht, *Zeitschrift für Rechtssoziologie*, (1)1980, pp. 33-64.

2 See *Blankenburg*, Mobilisierung des Rechts: eine Einführung in die Rechtssoziologie, 1995.

3 Cf. *Fuchs/Konstatzky/Liebscher/Berghahn*, Rechtsmobilisierung für Lohngleichheit, *Kritische Justiz* 2009; pp. 253-270 with a comparison of the countries Germany, Austria and Switzerland. The authors identify legal („legal opportunity structure“), social and individual influencing factors of legal mobilization.

2. The situation of migrants in Germany

In 2005, Germany had a population of about 82.4 million. About 6.75 million (more than 8 per cent) held no German passport. Not quite one third thereof, approximately 2.1 million people are citizens of other EU Member States (Union citizens). A little more than two thirds of the non-Germans (about 4.6 million) are citizens of other states not belonging to the EU. Thereof, Turkish nationals at about 1.7 million account for the largest group, followed by those from Serbia/Montenegro (500,000) and Croatia (228,000). The major portion of the non-German population consists of persons who came to Germany in the course of the recruitment of foreign labour and subsequent immigration of family dependants or were already born here as their children. In late 2005, one third had already lived in Germany for more than 20 years, more than one half had durations of residence in excess of 10 years. The average duration of residence of non-nationals in Germany was 16 years. Two thirds of non-national children and young persons were born here.

The non-national population is not evenly spread across the whole of Germany: approximately nine tenths live in the western ("old") German Laender, eight tenths in West German cities. Already today, the portion of non-national immigrants in (West) German cities accounts for 20 to 30 per cent. The land statistical office of North Rhine-Westphalia has calculated that the portion of non-nationals (excluding changes of nationality) in some cities of North Rhine-Westphalia will increase to 40 per cent and more by 2010. Within the cities, the distribution of immigrants is not even either. They concentrate in disadvantaged parts of a city. Here the gap between voting and residential populations is particularly wide, which goes to show how important active participation of non-nationals is particularly at the local level in the intended political bodies.⁴

3. The notion of political participation

Since from the early seventies issues of political participation of migrants in social decision-making processes relevant to integration have been thought

4 Data according to *Storz/ Wilmes*, *Wahlrecht und Einwanderung*, homepage der Bundeszentrale für politische Bildung, cf. <<http://www.bpb.de/themen/R8AQSN.html>>; Statistisches Bundesamt, *Fachserie 1, Bevölkerung und Erwerbstätigkeit*, Wiesbaden 2008; also cf. *Strohmeier*, *Demographischer Wandel und soziale Segregation*, in: Bertelsmann Stiftung (Hrsg.), *Demographie konkret – soziale Segregation in deutschen Großstädten*, Gütersloh 2008, pp. 10-14.

about in the Federal Republic of Germany, concrete proposals to that end related either to the granting of voting rights or to other possibilities of participation at the local level. In the course of time, life in the community produced many forms of political participation: in the present "National Integration Plan" in the "field of action of social integration" there are in particular forms of involvement available which are open to migrants (definition by Mikrozensus)⁵, EU nationals from another Member State and non-EU nationals. These are, for instance, council committees as subsidiary bodies of local councils, working groups of experts, youth parliaments, involvement in quarters management and other forms of civic commitment in political parties, churches and religious communities, trade unions, federations and associations. Hence, the focus of activities in the national integration programme above all is on "possibilities of participation at local level".⁶

On the other hand, what is missing in this programme are proposals for action, expert's opinions, initiatives and model projects explicitly tailored to forms of "political participation". In the following this will be understood to mean the subjective right to participate in elections to local parliaments the requirements of which are provided for in the Basic Law and in the Laender and local constitutions as well as in electoral laws. This refers to the right to vote and to the right to stand for election. Both rights are tied to German citizenship, residence in Germany, and to a particular age (as a rule age 18). Merely citizens of the Union are allowed to participate in local elections subject to the same conditions as Germans.

5 About 15 million people with a migration background live in Germany, i.e. in 2005 almost one fifth of the population in Germany, thereof 8 million Germans. According to the more recent definition by the Federal Statistical Office, people with a migration background are people who were not born in the territory of the present Federal Republic and immigrated in 1950 or thereafter, do not hold German citizenship or were naturalized. Germans are also deemed to have a migration background if one parent satisfies at least one of the requirements mentioned, cf. 7. Bericht der Beauftragten der Bundesregierung für Migration, Flüchtlinge und Integration über die Lage der Ausländerinnen und Ausländer in Deutschland, Berlin, Dezember 2007, p. 12. Also see Merkle, Lebenswelten in Deutschland, Ergebnisse aktueller Studien von Sinus Sociovision, in: Lange/Polat (Hrsg.), Unsere Wirklichkeit ist anders. Migration und Alltag, 2009, pp. 62-79.

6 See on recent developments of non-national advisory councils the „Landesgesetz über die Einrichtung von kommunalen Beiräten für Migration und Integration“ (Gesetz- und Verordnungsblatt Rheinland-Pfalz 2008. 294), which came into force on 1.1.2009, cf. *Edinger*, Neue Beiräte als Motoren der Integration, Treffpunkt 3/08-1/09, pp. 3-6.

4. Social debates 1971-1989

The lead bodies of the welfare organisations responsible for "social guidance of non-nationals" were the first to voice the demand for granting the right to vote and the right to stand for election in local elections. As early as 1971, a few years after the conclusion of agreements on the recruitment of non-national workers, who were then still called guest workers, an appropriate resolution was adopted by the Central Association of the German Caritas Federation. The federal conference of the Verbandes der Arbeiterwohlfahrt (AWO) [Workers' Welfare Organization] endorsed the demands. The first commissioner of the federal government dealing with non-nationals, *Heinz Kühn*, addressed the subject in a memorandum in 1979. The memorandum includes a survey of supporters such as Caritas, the workers' welfare organisation, the trade unions, the German Child Welfare League and *Terres des hommes*. In September 1987, the charitable institution of *Deutscher Paritätischer Wohlfahrtsverband* also stated that the "introduction for non-nationals ...of local voting rights was a necessary step towards further equal treatment". The same demand was also voiced as early as 1986 by the Federation of German Trade Unions (DGB), specifically by the metal workers' union. In its resolution of 1986, the political body *Vereinigung Europa-Union Deutschlands* reaffirmed the resolution adopted by its federal congress as early as 1971 to grant non-nationals holding a permanent residence permit voting rights in local, vocational and social self-government as well as in company workers' representations. In its comment of 1988, the Protestant Church of Germany (EKD) emphasized that intermediate stages could be introduced on the way to full naturalization; local voting rights were to be regarded as a part of a comprehensive right of establishment. The subject was also mentioned by the political parties. Positive comments came from the party executive of the SPD (Social Democratic Party) in 1988 and from the GRÜNEN in 1984. While the FDP (Free Democratic Party) wanted to grant local voting rights only subject to the condition of "guaranteed reciprocity", the CDU (Christian Democratic Party) expressly rejected such right.⁷ The issue of the admissibility of local voting rights for non-nationals was discussed at great length among legal experts.⁸

In parallel with these socio-political debates, in 1977 the introduction of local voting rights started to be discussed for citizens of the Union with respect

7 For supporting documents for the comments mentioned see *Sieveling et al.* (Editor), *Das Kommunalwahlrecht für Ausländer*, 1989, pp. 269-280.

8 Further details *Zuleeg*, *Juristische Streitpunkte zum Kommunalwahlrecht für Ausländer*, *ZAR (Zeitschrift für Ausländerrecht und Ausländerpolitik)* 1988, 13-20. with numerous references to those advancing different opinions.

to the organs of the EU, particularly the European Parliament. In 1988, the EC Commission presented its proposal, adopted in 1994, for a directive on voting rights for nationals of the Member States in local elections in the state of residence.⁹

5. The judgement by the Federal Constitutional Court of October 1989

The Federal Constitutional Court provided an answer to the issue of the legal admissibility of local voting rights for third-country nationals in two judgements regarding legislation of the Laender of Schleswig-Holstein and Hamburg of 31 October 1990¹⁰. It declared local voting rights for non-nationals to be incompatible with the Basic Law (BL) making reference to the lack of membership of non-nationals of the German people¹¹ and to the homogeneity principle (inter alia, consistent constitutional conditions for the right to vote at federal, state and local levels). The then still prevailing idea of the people constituting the German nation determined by ethnic criteria finds expression in the decision regarding the law of the Land of Schleswig-Holstein : the people from whom all state authority emanates is the German people composed exclusively of German nationals (and pursuant to Article 116 (1) of the BL, of persons having equal status). However, with regard to Union citizens the court did not exclude a local voting right ("opening clause"). On the other hand, the court made reference to the law of nationality and citizenship and the possibility for the legislator of shaping naturalization of non-nationals.¹²

In connection with the ratification of the Maastricht Treaty on European Union, in Germany in 1992 local voting rights for Union citizens¹³ were rendered possible by an act amending the constitution (BL)¹⁴.

9 COM (88)371. For final references to the discussion in the EC see *Sievekink* et al. (Editor), footnote 7, pp. 281-326.

10 BVerfGE 83, p. 37 (Schleswig-Holstein) und BVerfGE 83, p. 60 (Hamburg).

11 Cf. Art. 20 (2) of the BL reads however: „Alle Staatsgewalt geht vom Volke aus“ (All state authority emanates from the people).

12 Naturalization has meanwhile been facilitated, see the Gesetz zur Reform des Staatsangehörigkeitsgesetzes vom 15.7.1999, BGBl. I p. 1618, last amended by Artikel 5 des Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 19.8.2007 (BGBl. I p. 1970).

13 Directive 94/80/EU, EC Office Journal 1994 L 368, p. 38.

14 Amendment to sentence 3 in Article 28 (1) of the BL by the Act of 21.12.1992, BGBl. I p. 2086. To implement this Basic Law amendment, electoral provisions on

6. The issue of naturalization as a new item on the agenda of the debate on extension of political participation

Instead of granting local voting rights to third-country nationals, the Federal Constitutional Court had made reference to the method of facilitated naturalization under the law of nationality and citizenship. That would be a means to achieve the equal treatment aimed at, particularly the right to vote at all political levels.¹⁵ As a result, the enthusiasm of the preceding social debates on voting rights was clearly dampened. Thus, in the case of issues concerning improved political participation of third-country nationals, reference was made to the Schleswig-Holstein judgement and the necessary and possible modification of the law of naturalization mentioned therein. The sole reference to yet to be facilitated and hence improved naturalization requirements reduced the issue of the introduction of political participation of migrants de facto to "compulsory naturalization under the law on nationality and citizenship". For the purposes of migration research this would be called assimilation pressure.

As a consequence of this socio-political assessment, the law on nationality and citizenship was amended in the nineties following protracted debates.¹⁶ In 1990, special provisions on nationality and citizenship were incorporated into the then new Aliens Act which for the first time granted legal claims to naturalization. These new provisions were introduced into the law on nationality and citizenship by means of the Immigration Act 1994. Recent amendments to the law on naturalization were made under the so-called Directive Implementation Act 2007¹⁷. By this Act suggestions made by the Standing Conference of the Ministers of the Interior were taken up according to which the same standards of naturalization are to apply nationwide. The changes include, inter alia, proof of German language proficiency in speech and writing on a uniform level, furthermore greater requirements for applicants for naturalization to

the right to vote and stand for election of Union citizens in local elections were enacted in the electoral laws of the federal Laender. The setting aside under constitutional law of the principle of German citizenship as a condition of the right to vote in local elections by the Maastricht Treaty of 1993 is justified by the "opening clause" (obiter dictum) of the decision by the Federal Constitutional Court, without the court or academia to this date having resolved the inconsistent statement by the constitutional court that citizens not holding German citizenship (Union citizens) have a local voting right.

15 Accordingly, the law on nationality and citizenship was revised; cf. footnote 12.

16 For issues of the law on nationality and citizenship see the comment on the act in: *Hofmann/Hoffmann* (Hrsg.), *Ausländerrecht. Handkommentar*, 2008, p. 1983.

17 Cf. footnote 11. Under which the EU directives on residence and asylum law were implemented.

abide by the law, the introduction of naturalization courses imparting civic knowledge as well as the principles and values of the constitution and the introduction of evidence of successful completion of such courses.¹⁸

A significant change of the law on nationality and citizenship occurred as a result of the introduction of the acquisition of nationality by birth in respect of children of migrants born in Germany. Thus the ethnic narrowing of the notion of the people by the Federal Constitutional Court was disregarded once more: for one thing, the relaxation of the principle of prohibited multi-nationality removed a great obstacle to naturalization of non-nationals (creating a new category of migrants: "Germans with a migration background"); and for another thing, in 2000, exclusively newborn children from migrant families were enabled to acquire German nationality by being born in Germany pursuant to the principle of territoriality ("ius soli", cf. Section 4 (3) of the StAG [German Nationality Act]) instead of the principle of parentage ("ius sanguinis") otherwise applicable under German law.

7. Naturalization as a road to political participation of migrants?

More recent studies on naturalization of non-nationals in Germany show that there is a considerable disparity between the naturalization potential (non-nationals having the qualification for naturalization) and the number of actual cases of naturalization.¹⁹ Accordingly, in 2007 the naturalization quota was merely 1.67 per cent of the 4.1 million non-nationals aged 16 and over recorded in the central register of foreign residents who have the minimum period of residence of 8 years basically necessary for naturalization by right pursuant to Section 10 (1) of the StAG.²⁰

18 Further details are contained in the 7. Lagebericht (footnote 5), pp. 139 seq. The implementation of the newly laid down provisions are constantly being evaluated.

19 Cf. *Worbs*, Die Einbürgerung von Ausländern in Deutschland, Working Paper 17 der Forschungsgruppe des Bundesamtes für Migration und Flüchtlinge, Nürnberg 2008, pp. 21, 28 seq.

20 In 2007, a total of 96,395 third-country nationals were naturalized, cf. Statistisches Bundesamt, Bevölkerung und Erwerbstätigkeit. Einbürgerungen 2007, Fachserie 1 Reihe 2.1, pp.26 seq.; the average duration of residence of 4,407,645 third-country nationals living in Germany in the same year was 9.6 and more years, cf. Statistisches Bundesamt, Bevölkerung und Erwerbstätigkeit. Ausländische Bevölkerung, Ergebnisse des Ausländerzentralregisters 2007, Fachserie 1 Reihe 2. According to a press release by the commissioner for integration of 2.9.2008, still too many naturalization authorities fail to apply the new provision of Section 10 (3) of the StAG

In view of the principle of avoidance of multi-nationality with some exceptions applicable under the German law on nationality and citizenship, the method of acquiring German nationality apparently proves to be an impasse on the way towards increased political participation of migrants and their equal status with Union citizens. As long as naturalization is to be the only way of achieving equal treatment of non-nationals before the law, the obstacles to naturalization should be removed. This also relates, for instance, to the principle of avoidance of multi-nationality. While about 50 per cent of naturalization happens with multi-nationality being accepted, the principle has meanwhile turned into an exception. For instance, depending on the willingness of foreign states to deprive their citizens of their native nationality, citizenship is granted with or without acceptance of multi-nationality. In the case of Turkish nationals, citizenship is usually granted without multi-nationality being accepted, in the case of other states where deprivation of nationality poses problems, multi-nationality is accepted.

Problems are different in the case of children born to non-national parents: here the so-called option model applies. When children born to non-national parents after 2000 reach age 18, they must decide in favour of German nationality or the nationality acquired through their parents.²¹ For dual nationals born since 2000, the obligation to opt for one or the other nationality thus begins in 2018. For integration policy reasons, the obligation to exercise an option is not considered to be sensible: abolishing the so-called option model²² is being debated in politics.²³

8. Political initiatives in Germany since 1990

Irrespective of the situation under constitutional law and the accompanying focusing of legal policy debates on the issue of naturalization, the Land of Hesse in 1997 by its Bundesrat initiative to amend the Basic Law prompted new considerations regarding the introduction of local voting rights for non-

under which the minimum residence periods in Germany may be reduced to six years if there is documented evidence of especially successful integration, as for example by a very good command of the German language.

21 Cf. Sections 4, 29 of the StAG.

22 According to the so-called option model, the children born to non-national parents in Germany must choose upon reaching majority between German nationality and the nationalities acquired through their parents.

23 Cf. draft bill to amend the Nationality Act, BR-Drs. 647/08.

nationals.²⁴ In 1998, the SPD and BÜNDNIS 90/DIE GRÜNEN in its coalition agreement announced that they would support general local voting rights for migrants permanently resident in the federal territory. This intention was not given effect. According to the coalition contract of the CDU, CSU and SPD of 11.11.2005²⁵, the issue of local voting rights for non-nationals who are not EU citizens is to be reviewed. In March 2007²⁶, the German federal government declared in its response to the written question by the parliamentary group DIE LINKE that pursuant to the judgement by the Federal Constitutional Court of 1990 the introduction of local voting rights for third-country nationals was constitutional.²⁷

The federal government declared that it had no reason for taking legislative decisions because of the fact that there existed a local voting right subject to various legal requirements for third- country nationals in the EU Member States of Belgium, Denmark, Finland, Great Britain, Ireland, the Netherlands, Portugal, Spain, Estonia, Lithuania, Slovakia, Slovenia, Hungary, Iceland and the Czech Republic.²⁸ The constitutionally required qualified majority of the Bundestag was not foreseeable. The federal government regarded the exclusion from local voting rights neither as legal discrimination against non-EU citizens nor as democratic deficiency. Just as little was a constitutional amendment required because the average duration of residence of all third country nationals was 16.8 years and 21 per cent of all third-country nationals was born in Germany. The Basic Law was not required to make allowance for this change of actual circumstances and to define the concept of the leading national element appropriately wider.

In early July 2007, the parliamentary group DIE LINKE brought in a motion in the Deutscher Bundestag calling for the introduction of a local voting

24 For the development of new debates see in detail *Sieveling*, Kommunalwahlrecht für Drittstaatsangehörige – „kosmopolitische Phantasterei“ oder Integrationsrecht für Einwanderer? ZAR 2008, pp.121-126.

25 ZAR 2005, 385.

26 BT-Drs. 16/4666. Also see BT-Drs. 16/4361 regarding „Umsetzung des Prüfauftrages zur Einführung des kommunalen Wahlrechts für Drittstaatenangehörige“ (implementation of the mandate to review the introduction of local voting rights for third-country nationals).

27 Pursuant to Article 79 (3) of the BL this was not excluded in principle, since the court considered the introduction of a local voting right for Union citizens to be expressly consistent with Article 79 (3) of the BL. However, it constituted granting an admissible privilege based on European law which made allowance for the integration process within the European Union.

28 With reference to a study by Österreichische Stiftung für Politikberatung und Politikentwicklung of February 2007 (footnote 46).

right for third-country nationals.²⁹ In early September 2007, the government of the Land of Rhineland-Palatinate proposed the renewed motion for a bill proposed as early as 1997 in the Bundesrat for an amendment of the Basic Law. That motion was defeated.

On 10 October 2007, the parliamentary group BÜNDNIS 90/DIE GRÜNEN submitted to the Deutscher Bundestag a "draft bill to amend the Basic Law (local voting rights for non-nationals)". This law – with reference to the discussion in the Joint Constitutional Commission of the Bundestag and Bundesrat of 1993³⁰ – is to promote the integration of all non-national fellow citizens residing in Germany by granting them local voting rights in order to eliminate the unequal treatment between Union citizens and the other non-nationals.

In an interview, the constitutional lawyer *Isensee* considered this advance by the LINKEN and the GRÜNEN to be "simply unconstitutional".³¹ By way of "cosmopolitan fantasies" it was being tried to steamroll the leading national element and to introduce anti-democratic outside control". The local authorities were "part of the state authority and required democratic evidence of authority. Such authority could only be granted by "demos", the people, which is defined by nationality".

This provision was "somewhat modified" as a result of Union citizenship also enabling the right to vote. By contrast, the report on this interview quotes the constitutional lawyer *Schneider*. He interprets the fact that EU citizens may participate in local elections in Germany as an argument for the fact that German nationality cannot be the sole prerequisite for the right to vote. Today, Germany is an immigration country. "People who have lived here for years are no longer non-nationals but residents must also be allowed to have an influence on decisions pertaining to their affairs. These local affairs have nothing to do with nationality they are factual issues which must concern everybody". Moreover, local law refers to the notion of inhabitants and not to that of nationals.³²

In terms of a reply to the question of: who is the people as the democratic subject of legitimation?³³, reference is continued to be made to the judge-

29 BT-Drs. 16/5904 of 4.7.2007.

30 BR-Drs. 800/93, pp. 97 seq.

31 Cf. *Kailitz*, Ein Kreuzchen in der Wahl-Heimat, Das Parlament vom 29. 10./5. 11. 2007 (Nr. 44/45), p. 6 .

32 All quotations from the report by *Kailitz* (footnote 31).

33 On this and on the following considerations Wallrabenstein, Das Verfassungsrecht der Staatsangehörigkeit, 1999, pp.102 seq. with numerous references.

ment by the Federal Constitutional Court regardless of the change in the constitution that has occurred meanwhile. The idea it imposes on the significance of the notion of the people by equating the democracy principle of Article 20 (2) of the BL with the body politic of nationals as the German people is opposed to the view of the linguistic and normative openness of the constitutional notion meanwhile held by the majority of constitutional law teachers.

9. Recent statements

9.1 *Political parties*

The 27th Regular Federal Delegates Conference of the parliamentary group BÜNDNIS 90/DIE GRÜNEN adopted the motion: "The extension of local voting rights to include non-EU citizens" in Nuremberg in November 2007. In its 2009 election programme it says: "Non-EU citizens are also (...) to be given local voting rights".³⁴ As far as apparent, there are no new programmatic statements on the subject by the SPD. According to the chairman of the Committee for the Interior of the German Bundestag, Edathy, the SPD group of the Bundestag is trying to enlist the support of its coalition partner (CDU/CSU) for the introduction of local voting rights for non-nationals with a long-term residence status in Germany³⁵ - so far apparently without success. The election message of the CDU confines itself to the statement that they will strive to achieve that natives and migrants live together in harmony.³⁶

There was a detailed debate in connection with a public hearing of the Committee for the Interior of the German Bundestag in September 2008 to which experts contributed written and oral comments on the "Draft Law to Amend the Basic Law (local voting rights for non-nationals)" submitted by the group BÜNDNIS 90/DIE GRÜNEN.³⁷ Parliamentary consequences have not so far ensued.

34 Bundestagswahlprogramm 2009 BÜNDNIS 90/DIE GRÜNEN, p. 164.

35 Comment by *Edathy*, *Kommunales Wahlrecht für Drittstaatler*, FORUM MIGRATION 10/2007.

36 Kurzversion des Regierungsprogramms 2009-2013 von CDU und CSU, Berlin 2009.

37 For the record of the hearing and comments (also by the author) visit <http://www.bundestag.de/bundestag/ausschuesse/a04/anhoerungen/Anhoerung_16/Protokoll.pdf> and <http://www.bundestag.de/bundestag/ausschuesse/a04/anhoerungen/Anhoerung_16/Stellungnahmen_SV/index.html>.

9.2 *Initiatives by civil society*

There are more recent statements by civil society groups. Thus, PRO ASYL in connection with a campaign against racism and discrimination reproached the German federal government with failing to make efforts and take measures to overcome exclusion from society and to open up opportunities for participation despite integration summits and integration plans. Especially the longstanding call for local voting rights for third-country nationals remained unfulfilled in Germany although they were already successfully exercised in other EU Member States.³⁸ On the occasion of the 2009 election year, PRO ASYL, the Cross-Cultural Council in Germany, and the Federation of German Trade Unions published a joint statement on "Priorities for German and European migration and refugee policy". This position paper calls for local voting rights for all citizens legally and permanently resident in Germany and for an amendment to Article 28 of the Basic Law.³⁹ The Protestant Church took up this subject in a recommendation for the last time in 2002.⁴⁰ The Landesarbeitsgemeinschaft der kommunalen Migrantenvertretungen Nordrhein-Westfalen (LAGA NRW) [Land working groups of local migrant representations of North Rhine-Westphalia], a group of local action groups and of the head organisations of the seven welfare organizations in Germany have repeatedly since 2008 conducted press campaigns calling for the introduction of local voting rights for

38 PRO ASYL, press release of 21.3.2008, <<http://www.proasyl.de/de/presse/presseuebersicht/?0>>.

39 The position paper can be downloaded from: <http://www.proasyl.de/de/news/detail/news/bundestagswahl_2009>.

40 Shaping life together. A contribution by the Council of the Protestant Church in Germany on issues of integration and the living together of people of different background, language or religion, EKD-Texte 76, 2002, para 39-42 (40). There it says: "Nach der Einführung des Kommunalwahlrechts für Unionsbürger bedarf es einer erneuten sorgfältigen Prüfung, auf welche Weise die Teilhabe der Nichtdeutschen an der politischen Verantwortung für das Gemeinwesen gefördert und gestärkt werden kann. Da die Verleihung des vollen Wahlrechts an alle Ausländer an verfassungsrechtlichen Hürden scheitert, sollten andere Möglichkeiten der politischen Partizipation untersucht werden, die über die beratenden Kompetenzen der Ausländerbeiräte und der Ausländerbeauftragten hinausgehen."(Following the introduction of local voting rights for Union citizens it is necessary to once again carefully examine how it is possible to promote and strengthen the participation of non-Germans in political responsibility for the community. Since granting full voting rights to all non-nationals is rendered impossible due to constitutional obstacles, other possibilities of political participation should be investigated which go beyond the advisory competence of non-national advisory councils and commissioners for non-nationals).

migrants. Currently, an Internet campaign is under way to collect signatures.⁴¹

10. Recent developments in the EU

The call for political participation of migrants received significant support as a result of developments in Europe over the past few years.⁴² The introduction of local voting rights for Union citizens⁴³ has apparently refuted the inseparable connection among national sovereignty, nationality and voting right. Despite missing German citizenship, Union citizens are entitled to vote in local elections both in their home Member State and in the country of ordinary residence.⁴⁴ Community law does not prohibit the extension of local voting rights to include third-country nationals.⁴⁵ The exclusion of third-country nationals results in a continuing unequal treatment of Union citizens on the one hand and third-country nationals permanently resident in Germany on the other hand. Above all, this is contrary to the generally desired integration in spite of the persistent differences of opinion on the integration-promoting effects of voting rights for non-nationals. At any rate, there can be no doubt that a great number of Member States have afforded migrants living in their country the opportunity to participate in local elections.⁴⁶

Furthermore, in 2003 the European Union took legal steps regarding residence status of third-country nationals who are long-term residents in the Member States, granting them a legal position approximated to the status of Union citizen: By Council Directive 2003/109/EC concerning the status of

41 <<http://www.wahlrecht-fuer-migranten.de/xd/public/content/index.html?pid=518>>. So far 1.902 people have supported the initiative (Internet access of 19 September 2009).

42 On this in detail *Sieveling*, footnote 24, and *Hanschmann*, „Die Ewigkeit dauert lange, besonders gegen Ende“ – eine rechtliche (Neu-)Bewertung des kommunalen Wahlrechts für Drittstaatsangehörige, *ZParl* (Zeitschrift für Parlamentsfragen), 2009, pp. 74-85.

43 Cf. Article 19(1) EC.

44 On this see the judgements by the ECJ of 12.9.2006 case C-145/04 – Spain/United Kingdom, EC Official Journal C 281 of 18.11.2006, 2, ECR I 2006, 7917 and of 12.9.2006 case C-300/04 – Eman, Sevinger, EC Official Journal C. 281 of 18.11.2006, 5, ECR I 2006, 8055.

45 In European Parliament elections such casting of two votes is not possible.

46 Cf. *Bauer*, Das kommunale AusländerInnenwahlrecht im europäischen Vergleich, Aktualisierte Fassung, Wien, Januar 2007 (Österreichische Gesellschaft für Politikberatung und Politikentwicklung – ÖGPP). Already see *Sieveling* et al., footnote 7, pp. 330-385.

third-country nationals who are long-term residents⁴⁷ they are granted a "long-term resident's EC residence permit" following five years of legal residence and - under certain circumstances defined in the directive - also the right to reside in another Member State⁴⁸ within the EU. In 2007, this directive was implemented by the Law to Implement Residence and Asylum Law Directives of the European Union into the German Residence Act.⁴⁹ As a result, third-country nationals with long-term resident status were placed on an equal footing with Union citizens.

As it says in consideration three - this directive respects the fundamental rights and observes the principles recognized in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union. Consideration twelve of the directive emphasizes: In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive.⁵⁰

11. Current initiatives as mirrored in discussions relating to international law

The development of international law over the preceding years greatly influences the extension of political participation to include migrants: with the evolution of transnational affiliations of migrants the role of nationality limited to one nation has lost its persuasive force. The national civil rights status has lost in weight. Migrants are integrated into affiliations transcending the national state. This development may also be observed in the international protection of human rights. The development under European and international laws of actionable rights of protection gives rise to transnational citizenry relations. Legal positions which traditionally were reserved to the national population due

47 Official Journal EC 2004 L 16/44.

48 Exercising this right would mean, for instance for third-country nationals in the Netherlands, losing their local voting right when immigrating further to Germany.

49 Law concerning residence, gainful employment and integration of non-nationals in the federal territory (Residence Act) of 30 July 2004 (BGBl. I S. 1950), last amended by Article 1 of the (Richtlinienumsetzungs-)Gesetzes of 19 August 2007 (BGBl. I S. 1970), sections 9a seq., 38, 91c AufenthG.

50 No mention is made here of political integration because the EC is not competent to issue regulations to that effect.

to being tied to national nationality become independent and consequently may be enjoyed by everybody regardless of his or her nationality.⁵¹ A clear example to that effect is the EC directive concerning long-term residence. The protection of human and social rights on a universal basis under international law regardless of the nationality of the persons involved creates a "citizenship of the place of residence" (*Benhabip*) which is based on multiple ties to local and regional levels and to transnational institutions.⁵² As normative links to equal treatment of migrants advocated herein with regard to their participation in local elections of their place of residence, mention should be made of Article 3 (1) of the Basic Law on the one hand, and Articles 14 and 16 of the ECHR on the other hand.

12. Concluding consideration

The foregoing references show clearly that the political and social approaches to give effect to the call for political participation of migrants not holding German citizenship were unsuccessful, the main reason being that it was impossible to mobilize sufficient political majorities for the required amendment to the Basic Law. Apparently, the experience gained in the rest of Europe, above all in the Netherlands, is (has become) known too little.⁵³ Just as little were people willing to draw the obvious conclusions from the change in the constitution that has actually occurred – the respect for the judgement by the Federal Constitutional Court continues in effect although developments under European and international laws have long since disclosed its intrinsic inconsistency. Equality of treatment in society, particularly necessary for reasons of European and international laws and for integration, of migrants not holding

51 In detail *Kotalakidis*, Von der nationalen Staatsangehörigkeit zur Unionsbürgerschaft, 2000, p. 86 seq.; also see *Atikcan*, Citizenship or Denizenship: The Treatment of Third Country Nationals in the European Union, SEI Working Paper No. 85, 2006. The concept of „Denizenship“ reflects a new legal status beyond the traditional nationality. Also see *Nowrot*, Den „Kinderschuh“ entwachsen: Die (Wieder-)Entdeckung der rechtssoziologischen Perspektive in der Dogmatik der Völkerrechtssubjektivität, *Zeitschrift für Rechtssoziologie*, (28) 2007, pp. 21-48.

52 *Niederberger*, Die Dämmerung der Souveränität oder das Aufstreben kosmopolitischer Normen? Eine Neubewertung von Staatsbürgerschaft in Zeiten des Umbruchs, in: *Kreide/Niederberger* (Hrsg.), *Transnationale Verrechtlichung*, 2008, pp. 209 seq. (214, 230). On the issue of plural affiliations in social contexts see *Sen*, *Die Identitätsfalle. Warum es keinen Krieg der Kulturen gibt*, München 2007, pp. 38 seq.

53 Vgl. *Groenendijk*, Local Voting Rights for Non-Nationals in Europe: What We Know and What We Need to Learn, in: Bertelsmann Stiftung, European Policy Centre, Migration Policy Institute (eds.) *Delivering Citizenship*, 2008, pp. 49 seq.

German citizenship, i.e. Union citizens, with long-term resident migrants should be recognized as the most important objective of German migration and integration policy. To that end, above all political awareness will have to change and anxieties of ethnic Germans will have to be reduced.⁵⁴ Maybe, the generation of those who are young now at the appropriate time will take the necessary step towards equality of treatment of migrants with regard to political participation by introducing local voting rights because then for reasons of demographic development the major portion of the population in Germany will be "Germans with a migration background".

54 Recent perspectives of political education are already aimed at that, cf. *Lange/Polat*, footnote 5.

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