



A Comparative Study on the Right to Vote for Convicted Prisoners, Disabled Persons, Foreigners and Citizens Living Abroad

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About ETHOS

ETHOS - Towards a European Theory Of Justice and fairness, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinates the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019

Executive Summary

This report makes up, with the country studies it draws on, a comparative case study which examines the legal rules and practices related to the exercise of the right to vote, including eligibility and representation aspects, and aims to explore the extent to which these enable the participation and representation of all community members. It focuses in particular on the voting rights of foreigners, prisoners, citizens living abroad, and persons with (mental) disabilities. This is fully in keeping with the approach in the task description in the ETHOS grant agreement which states, *inter alia*, that deliverable 3.4 will be a “comparative case study which examines the legal rules and practices related to the exercise of the right to vote... with a particular focus on the voting rights of foreigners, prisoners, citizens living abroad, and persons with (mental) disabilities (European Commission 2016, p. 22, emphasis added).

Mapping the contours of the right to vote in European states show this right to be a fundamental yet limited expression of some key features of justice as understood by and institutionalized through the law. The groups this study has focused on – convicted prisoners, disabled persons, foreigners and citizens living abroad – are disparate, and illuminate different aspects of the matter under examination.

When it comes to convicted prisoners, the general trend is towards increasing electoral participation and a gradual expansion of the franchise. The franchise for disabled persons raises different questions. The trend, as for convicted prisoners, has been toward the expansion of the franchise for disabled persons, especially for mentally disabled persons who were hitherto widely disenfranchised. That is not the case for mentally disabled persons. Though the CRPD has made some advances in this area also, it remains fairly common for mentally disabled persons who do not have legal capacity to be denied the right to vote. The final groups that have been examined are foreigners and citizens living abroad. On the whole, foreigners are excluded from the national franchise in the countries under study, although there are broad exceptions for elections for the European Parliament and municipal elections. If it is the case that the franchise has been evolving in a particular direction for convicted prisoners (towards a wider franchise) and physically disabled persons (towards greater state obligations), there is much less clarity as to whether there is a development towards thinking

that foreigners ought to be given greater rights of political participation in the communities and countries where they live.

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I. Introduction

This report makes up, with the country studies it draws on, a comparative case study which examines the legal rules and practices related to the exercise of the right to vote, including eligibility and representation aspects, and aims to explore the extent to which it enables the participation and representation of all community members. It focuses in particular on the voting rights of foreigners, prisoners, citizens living abroad, and persons with (mental) disabilities. This is fully in keeping with the task description in the ETHOS grant agreement which states, *inter alia*, that deliverable 3.4 will be a “comparative case study which examines the legal rules and practices related to the exercise of the right to vote... *with a particular focus on the voting rights of foreigners, prisoners, citizens living abroad, and persons with (mental) disabilities* (European Commission 2016a, p. 22, emphasis added).

The methodological approach of this Deliverable is led by two choices based on the guidelines developed in D3.3 that are leading for all subsequent Work Package 3 deliverables (see D.3, Annex 2). The first choice concerns the selected groups. With respect to the right to vote, this comparative study D3.4 looks in particular detail at the following vulnerable minorities across the six countries in view: disabled persons (both physically and mentally disabled), criminals and imprisoned persons, foreigners and refugees, and citizens living abroad. As with the other comparative deliverables D3.5 and D3.6, all country reports feeding into this comparative report focused on one of these groups – disabled persons – and then on two or more of the remaining groups depending on the particularities of the country under study. This choice was made by country rapporteurs in collaboration with the work package coordinators and was motivated by finding the best possible balance between depth and breadth of research. While guaranteeing that disabled persons are able to exercise their right to vote is a challenge across all six countries under study, this is not the case for the other vulnerable groups under study. Some countries have, from the perspective of developing an integrative perspective on justice in Europe, particularly noteworthy systems of inclusion or exclusion that warrant a deeper look, while others have no particularly significant legislation modulating the right to vote for a particular group in question. Allowing country rapporteurs to draw on their expertise in identifying which cases are of particular relevance thus allows a

more far-reaching and insightful comparative study of the European legal orders' conceptions of justice as representation.

The second choice concerns the types of legislation and documentation that were examined. In line with the work of this work package in general (see D3.3, Annex 2), the country reports on which this comparative report is based examined the *positive* law context of the rights to housing, education and the vote in the six countries under study (Austria, Hungary, the Netherlands, Portugal, Turkey and the United Kingdom). While there will be occasional mention on the 'gap' between law 'in the books' and law 'in practice', in principle that is not the object of study. As such, the reflections on the juridification of justice in these countries at the end of this report ought to be understood as the extent that justice, in its various guises, is realized and institutionalised in documented law rather than the extent to which it is *de facto* realized.

In the grant agreement description of the research activities of work package three, of which this deliverable forms a part, is phrased as follows: "The empirical focus of the work is on legal materials: doctrinal and scholarly works; legal instruments, in particular constitutional and legislative frameworks at EU, Council of Europe, and national levels; and the case law of European courts (Court of Justice of the European Union, European Court of Human Rights, and national courts)" (European Commission 2016a, p. 21). This focus has vast methodological implications. In contrast with empirical, social scientific research, research into the content of the law ('black letter law') and the analysis thereof (in this case in terms of justice and fairness) comprises desk research. Legal scholars study, for instance, "rights, their scope and limits, procedural dimensions and relevant balancing mechanisms" (European Commission 2016a, p. 21) on the basis of legal materials detailed above. The objective is not to ascertain causal or constitutive relations between social phenomena but to identify and analyse *the content of the law* on these matters. As such, there are, for instance, no sample groups whose representativeness can be contrasted with original populations. Furthermore, there is no fieldwork, or indeed quantitative or qualitative social scientific research of any kind. This certainly limits the kind of conclusions that can be drawn for this study, which limit themselves to identifying and analysing, in a host of different legal systems and a number of relevant levels (international, regional, national etc.), the content of the relevant laws on the right to vote.

The ETHOS consortium committed, in the grant agreement, to including “the perspective of gender and generations (the young and the old)” whenever possible (European Commission 2016b, p. 4). For this deliverable however, these categories – often the basis of (unjust) exclusions in other contexts – were less relevant. In all countries under study minors are excluded from the franchise, and none of these countries legally disenfranchise people on the basis of their gender. These matters are therefore put to the side for the remainder of this report.

II. International Law

As reported in ETHOS deliverable 3.3, there are several international human rights instruments relevant for the right to vote. The most important for our purposes here are the International Covenant on Civil and Political Rights (the ICCPR) and the Convention on the Rights of Persons with Disabilities (the CRDP). The six countries in this comparative study – Austria, Hungary, the Netherlands, Portugal, Turkey and the United Kingdom – have all signed and ratified these treaties.

Article 25 of the ICCPR holds that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors...

However, the UN Human Rights Committee have interpreted this article to mean that exceptions and limitations to this right can (only) be justified by objective and reasonable criteria,¹ showing that this article is not interpreted in the widest possible sense.

Article 29 of the CRPD holds that:

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

a) To ensure that persons with disabilities can *effectively and fully participate in political and public life on an equal basis with others*, directly or through freely chosen representatives, *including the right and opportunity for persons with disabilities to vote and be elected*, inter alia, by:

i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice... (emphasis added).

As we will see, not all states that are party to the CRDP meet their explicit obligations to disabled persons vis-à-vis their right to vote, either by not taking adequate steps to ensure that disabled persons that are formally enfranchised are in fact provided with the opportunity to vote, or by continuing to deny suffrage to certain disabled persons as a direct or – more commonly – indirect consequence of their disability.²

¹ UNHRC, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996). See Granger *et al.* 2019 pp.40-41

² Granger *et al.* 2019 pp.44-45

Of the four groups under study in this report – disabled persons, convicted prisoners, foreigners and citizens living abroad – international law has by far the most to say about disabled persons with respect to the right to vote. Of the remaining three vulnerable groups, the right to vote for foreigners is entirely absent from international law. Indeed, it is a matter of great controversy even in democratic theory whether and when there ought to be a right to vote for foreigners – the standard, and perhaps also the dominant position is that only citizens have the *right* to vote, though others may be *granted* suffrage by a democratic citizenry exercising its putative right to determine its own membership (Altman 2005). While there has been a fair amount of litigation on this subject before the ECtHR, international legal instruments are not generally used to argue against limitations on the right to vote for citizens living abroad. However, for the right to vote for convicted prisoners, the UN Human Rights Committee, which reviews compliance with the ICCPR, has noted that blanket criminal disenfranchisement is disproportionate and thus in conflict with Article 25 of the ICCPR, which guarantees the right to vote for all citizens and stipulates that this right cannot be subject to “unreasonable restrictions”.³

III. European Law

European Union Law

There is little relevant EU treaty law or jurisprudence on the right to vote amongst member states, this generally being considered a competence of the states themselves with a correspondingly high margin of appreciation. This being said, there are certain key cases that are relevant to understanding the right to vote in Europe. This is especially the case for the right to vote in elections for the European Parliament. While the franchise for European Parliamentary elections normally tracks the contours of the franchise in particular member

³ Article 25, ICCPR. See also: Consideration of Report by Senegal to the Human Rights Committee, CCPR/C/37/Add.4, April 7, 1987; Consideration of Report by Luxembourg to the Human Rights Committee, CCPR/C/79/Add.11, December 28, 1992, D (10); Human Rights Committee, Comments on United Kingdom of Great Britain and Northern Ireland (Hong Kong), U.N. Doc. CCPR/C/79/Add.57 (1995), para. 19

states (so that, for instance, a person who is disenfranchised for national elections as the result of a criminal conviction in the Netherlands will be also barred from participating in elections for the European Parliament. In that regard, *Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde*,⁴ was a key case in that it recognized an *autonomous* right to vote in elections for the European Parliament for European Union citizens, thus significantly narrowing the margin of appreciation of member states in this area. This case, and other relevant EU law and case law are canvassed and analysed in ETHOS deliverable 3.3 (Granger *et al.* 2018 pp 67-73).

The European Convention on Human Rights

All six countries under study are party to the European Convention on Human Rights (ECHR), and thus the case law of the European Court of Human Rights (ECtHR) is particularly relevant. This is especially the case for this report on the right to vote, as the jurisprudence on the right to vote has – in the European context – overwhelmingly come from the ECtHR rather than other supranational or international bodies or Courts.

1. General Principles

The most relevant article of the ECHR in this context is Article 3 of the First Protocol of the ECHR. It reads:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Interestingly, and in contrast to other Articles in the ECHR, the formulation of this right in the text focuses exclusively on the obligations of states, rather on the individual right to vote (despite the title of the Article, which is ‘Right to free elections’, as opposed to ‘obligation to hold free elections’ or similar). Despite this, the jurisprudence of the Court has held that there

⁴ C-650/13 Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde EU:C:2015:648

is an individual right to vote.⁵ In a guide that the ECtHR has published on this article⁶, the reasoning was grounded as follows:

[H]aving regard to the preparatory work in respect of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, comprising the right to vote (the “active” aspect) and to stand for election (the “passive” aspect) (*Mathieu-Mohin and Clerfayt v. Belgium*, §§ 48-51; *Ždanoka v. Latvia* [GC], § 102).

A fortiori, in a landmark decision, the court reasoned that, far from implying that the duties of the state were lesser in the case of the right to vote, the focus on state obligation vis-à-vis individual rights “was intended to give greater solemnity to the Contracting States’ commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference”.⁷ In that same decision, which is discussed below in the context of the right to vote for criminals, several other general principles are noted:

- “[T]he rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law”.⁸
- “[T]he right to vote is not a privilege... [and] Universal suffrage has become the basic principle”.⁹

⁵ Granger *et al.* 2018, p.47

⁶ Guide on Article 3 of Protocol No. 1 – Right to free elections. Available: https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf

⁷ *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX) § 50. See also Granger *et al.* 2018 p.47. For this reason, from now on when referring to the ECtHR jurisprudence and related laws and cases, the ‘right to vote’ and the ‘right to free elections’ will be used interchangeably.

⁸ *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX) § 58

⁹ *Ibid.* § 58

- Yet, “the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere”.¹⁰

The precise scope of this ‘wide’ margin of appreciation has been the subject of much ECtHR jurisprudence. While it is for the Court to decide when and whether particular limitations on the right to free elections meet the demands of the ECHR in each case, it has summarized the test that it puts such limitations to in the following way:

“[Limitations must] not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; [they must be]... imposed in pursuit of a legitimate aim; and... the means employed... [must] not [be] disproportionate (see *Mathieu-Mohin and Clerfayt*, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.”¹¹

The core principle guiding the Court in deciding whether limitations to the right to vote fall within the (wide) scope of the margin states have for interpretation is the ‘proportionality test’. This has several elements, two of which could be usefully labelled the ‘proportionality principle’ and the ‘legitimate aim principle’. The analysis in ETHOS deliverable 3.3 showed these principles to be jointly necessary and sufficient for a limitation to be ruled acceptable in light of the Convention (that is, for the ‘proportionality test’ to be met). It is thus not enough for a limitation to pursue a legitimate aim if it is otherwise disproportionate, nor is it enough for a limitation to be proportionate *in abstracto*: it must be proportionate *with regard to* a legitimate aim.¹² The proviso mentioned after the formulation of these principles above, that

¹⁰ *Ibid.* § 59. This is founded on an earlier decision to this effect in *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113. § 52

¹¹ *Ibid.* § 61

¹² Granger et al. 2018 p.49-50

conditions “must not thwart the free expression of the people” and must “not run counter to the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people” has, in other court decisions, been taken to mean that “the margin of appreciation doctrine cannot result in excluding *individual* [citizens] or *groups* [of citizens] *from taking part in the political life of the country*”.¹³

2. The right to vote for disabled persons

With regard to the right to vote of disabled persons, there is less ECtHR case law that on the right to vote for convicted prisoners (treated below). In an important case against Hungary, the Court has ruled (against, as we have seen, the CRPD), that there is *in principle* scope for excluding mentally disabled persons – despite holding Hungary to be in violation of Article 3 of Protocol 1 of the ECHR.¹⁴ In this decision we can see the courts twin test, familiar from but predating the *Hirst* decision (proportionality and legitimate aim) in play.

It was considered by the Court a legitimate aim falling within the margin of appreciation that states party to the ECHR wishes “to ensure that only such persons vote who are able to assess the consequences of their decisions”.¹⁵ Yet, in the case at hand, the Court found against Hungary since the limitation being examined was an *automatic* consequence to mentally disabled persons being placed under the protection of partial guardianship. The automatic nature of this limitation of their right to vote was insensitive, in other words, to a “protected person’s actual faculties” as well as failing to make a distinction between persons under full and partial guardianship.¹⁶ As in analogous cases where the Court has resisted similar limitations of the right to vote, the Court mandated that a judge would have to make the decision to limit the franchise in the case of mentally disabled persons, determining their personal situation as rendering them unable to assess the consequences of their voting act in light with a states’ legitimate aim to secure that.

¹³ Granger et al. 2018 p.49; emphasis in original. See also: *Aziz v. Cyprus*, no. 69949/01, ECHR 2004-V, § 28; *Tănase v. Moldova* [GC], no. 7/08, ECHR 2010, § 158.

¹⁴ *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010. See also Granger et al. 2018 p.49.

¹⁵ *Ibid.*

¹⁶ *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010. Affirmed in, *Gajcsi v. Hungary*, no. 63012/10, 23 September 2014

3. The right to vote for convicted prisoners

In the case law of the ECtHR, we see a generalization of the above approach to interpreting the principle of proportionality also when we consider criminals' right to vote. As in the case of the right to vote for persons with mental disabilities, the Court has made little objection to the principled notion that it can be in a state's legitimate interest to limit the franchise temporarily with regards to certain criminals, particularly those guilty of egregious crimes related to the nature or functioning of the democratic state. However, and again in line with the approach described above, the Court took issue with the *automatic* and *general* disenfranchisement of certain classes of convicted prisoners.¹⁷

The first and most important case setting up the Courts approach to this question was the 2005 *Hirst v. the United Kingdom*. At the time, the UK imposed a blanket ban on prisoners' voting rights for all those imprisoned. This did not distinguish between the gravity of the crime, nor the type, as even prisoners imprisoned for one day were formally disenfranchised for the duration of their sentence. This rule affected 48,000 prisoners in 2005. The Court ruled that the blanket nature of the ban rendered it disproportional, and thus a violation of Article 3 Protocol 1 of the Convention.

It was also in this decision that the ECtHR first noted the relevance of a judicial decision rendering a convicted criminal disenfranchised, although it merely noted that the Venice Commission had made a recommendation to this effect.¹⁸ This would become an area of some contention. In a case against Austria the Court first noted that, on the one hand, the mere limitation of disenfranchisement to a sub-set of more serious criminals (Austria was disenfranchising criminals who were serving sentences of one year or over for voluntary crimes) did not meet the proportionality test developed in *Hirst*.¹⁹ Further, the Court held that it was an "essential element" of the *Hirst* proportionality test against indiscriminate, blanket bans that a judge would order the disenfranchisement of a criminal, a decision it upheld in *Scoppola v. Italy (no. 2)*.²⁰ Yet, in a later decision, the Grand Chamber overturned

¹⁷ Granger et al. 2018 p.49-50; *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX)

¹⁸ *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX) § 71; Granger et al. 2018 p.50

¹⁹ *Frodl v. Austria*, no. 20201/04, 8 April 2010

²⁰ *Ibid.* §§ 34-35.

this decision, and the reasoning in how the decision in the *Frodol* case interpreted the *Hirst* requirement to require the disenfranchisement decision to be taken by a judge:

That reasoning [i.e. the decision in the *Frodol* case] takes a broad view of the principles set out in *Hirst*, which the Grand Chamber does not fully share. The Grand Chamber points out that the *Hirst* judgment makes no explicit mention of the intervention of a judge among the essential criteria for determining the proportionality of a disenfranchisement measure. The relevant criteria relate solely to whether the measure is applicable generally, automatically and indiscriminately within the meaning indicated by the Court... While the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed.²¹

In the case at hand against Italy the Grand Chamber overturned the earlier decision and held that disenfranchisement *was* proportional *despite* not being decided by a judge, because the relevant Italian laws were sufficiently fine-grained to themselves meet the *Hirst* proportionality test.²² The legislator (Italy) had taken steps to ensure that its disenfranchisement policy was reactive to the length of the sentence and thus, indirectly, to the severity of the crime (much like, in fact, the Austrian law that did not pass the proportionality test in the *Frodol* case). The duration of the disenfranchisement measure was also varied to meet specificities of different criminal behaviour. The Court has thus clearly stepped back from the full interpretation of the *Hirst* case given in the *Frodol* decision.²³

4. The right to vote for foreigners and citizens living abroad

The ECtHR has generally given wide scope to states in limiting the right to vote for foreigners permanently resident on their territory. Similarly, it has left to states a wide margin of

²¹ *Scoppola v. Italy* (no. 3) [GC], no. 126/05, 22 May 2012 § 99.

²² *Ibid.*

²³ Granger et al. 2018 p.50

appreciation regarding limitations on the right to vote for citizens permanently resident abroad, as especially the Courts case law on the British limitation of the voting rights of citizens living abroad after 15 years of non-residency in the United Kingdom demonstrate (see the section on Britain, below, for details and discussion).

When determining whether limitations are proportionate to an aim the Court has considered legitimate, supervision can be stricter. The Court has decided that here the doctrine that states have a generally wide margin of appreciation in these matters is limited by the principle that individuals or groups of persons ought not to be excluded from partaking in the political life of the country where they live.²⁴ In the ETHOS report on Justice in Europe Institutionalized (deliverable 3.3), attention was drawn to a particular case where the Court held, for instance, that the exclusion of Turkish-Cypriots from the franchise in the Republic of Cyprus amounted to a disproportionate limitation in violation of Article 3 of Protocol 1 of the ECHR, and besides that amounted to discrimination under Article 14.²⁵

Some attempts to secure voting rights for citizens living abroad grounded on the EU law right of freedom of movement have not been met with success. This is discussed further in the section on the United Kingdom, below.²⁶ The logic of the applicant's arguments was grounded on an analogy between restricted freedom of movement in light of limitations on the right to vote and restricted freedom of movement in light of residence requirements for social benefits. Such a logic had been accepted by the CJEU (and the ECJ before it) in the latter case, although, since attempts to make the link to the right to vote have been rejected on several occasions, this argument will not be explored further. That is not to say, however, that citizens living abroad for lengthy periods of time have no political rights. Like all UK residents they can, for example, petition the UK government in the 'e-petitions' procedure run jointly

²⁴ *Aziz v. Cyprus*, no. 69949/01, ECHR 2004-V, § 28; *Tănase v. Moldova* [GC], no. 7/08, ECHR 2010, § 158. Cited and discussed in Granger et al. 2018 p.49

²⁵ *Ibid.*

²⁶ E.g. *Preston v Wandsworth Borough Council and Lord President of the Council* [2011] EWHC 3174 (Admin), para 60, discussed in Dupont 2019, p.29; see also [2016] EWHC 957 (Admin); [2016] EWCA Civ 469.

by the government and by the UK Parliament.²⁷ Petitions gaining over 100,000 signatories are debated in a separate chamber in the Houses of Parliament (Westminster Hall).

IV. The Right to Vote for Convicted Prisoners Compared

The country studies that looked in detail at the question of the enfranchisement of imprisoned criminals were those reporting on the right to vote in the Netherlands, Turkey, and Austria. The main question is whether any persons can be disenfranchised as a consequence of criminal actions. If so, it is important to look at which convicted prisoners can be disenfranchised in which circumstances and for which period of time.

The United Kingdom

Before we turn to the substantive details of prisoners and convicted criminals with regard to the cases of ETHOS country studies that analysed the right to vote for convicted prisoners in detail, let us look turn to the UK. While the country report on the right to vote in the UK did not specifically look at the right to vote for prisoners, some significant case law on this question in the European Court of Human Rights originated in the UK (most especially the *Hirst* case,²⁸ whose impact for the juridification of justice claims in the area of criminal enfranchisement and disenfranchisement were discussed above).

As a common law country, the national jurisprudence (i.e. case law) on the right to vote for criminals in the UK can also be expected to have an impact in the juridification of the right to vote for other persons, and indeed on the right to vote in general. The UK country report on the right to vote shows this indeed to be the case; in a recent decision by the UK Court of Appeals cited a Supreme Court decision on criminal disenfranchisement to argue that there was no general constitutional right to vote in the UK, and that limitations on the franchise in the UK authorized by a majority in Parliament were legal as long as they were not designed in an 'abusive' partisan manner to maintain a certain majority in Parliament.²⁹

²⁷ <https://petition.parliament.uk/help> (accessed April 4th 2019)

²⁸ *Hirst v. the United Kingdom* (no. 2) ([GC], no. 74025/01, ECHR 2005-IX)

²⁹ Dupont 2019, p.27; [2016] EWCA Civ 469, para 47-50

Also when theorizing justifications for the hierarchy that UK law seems to make between physically disabled persons and mentally disabled persons (see the section on the right to vote for disabled persons for detail on this hierarchy), Dupont notes that UK seems to frame its approach to the right to vote in epistemic terms, and with reference to the epistemic case for criminal disenfranchisement. Criminals and children are excluded from the franchise because they “are not regarded as fulfilling the psychological requirements for voting, such as the capacity to understand and balance the interests affected by political decisions’ (p.28), whereas in the case of mentally disabled persons, this prejudice is expressed *via* the lack of measures to ensure that persons with mentally disabled persons “can access and understand the information needed to evaluate and compare the political proposals put forward during campaigns” (*ibid.*). We will explore the underlying, epistemic conception of representative justice in the final section, below.

Austria

In the case of Austria, certain convicted criminals are disenfranchised for the duration of their prison sentence. When one examines the types of crimes for which disenfranchisement is a possible sanction, one can see two types emerge: the first considers disenfranchisement as a penalty for *politically relevant* crimes, or crimes that target the democratic fundamentals of Austrian political society. In this category one may place crimes such as attacks on highest representatives of the state, treason, crimes linked to the prohibition act (*Verbotgesetz*) and, especially, crimes linked to elections.³⁰ The second category includes crimes by virtue of their severity. In this category one finds crimes against the military, genocide, crimes against humanity, and terrorism (*ibid.*). Of course, the boundaries between these categories are somewhat blurred, and some (e.g. attacks against the highest representatives of the state) ought to be considered part of both categories, but nevertheless, the underlying justificatory structure of considering for disenfranchisement these categories of felons is different. In the first case, the logic would appear to be about protecting democracy from ‘corruption’ by persons motivated in part by an anti-democratic ideology or preferences. In the second case,

³⁰ National Council Election Order § 22; hereon NRW, Apostolovski and Möstl 2019, p.9

the motivation would be more oriented to protecting the epistemic process from malignant persons, or expressively using the franchise to further communicate the severity of the crime.

In line with the ECtHR ruling on the *Frodol* case discussed above, and the principle that the ‘blanket’ disenfranchisement of certain classes of criminals is in violation of the European Convention of Human Rights, Austrian law requires that the disenfranchisement sanction be applied by a judge.³¹ (Recall however that the Grand Chamber has subsequently decided that the application by a judge, sensitive to the particularities of the specific case, was, *contra* the *Frodol* decision, not necessary to meet the proportionality test described in the *Hirst* decision.³²) As is typical in most but not all cases of criminal disenfranchisement, and indeed as was the case also prior to the amendment that put in place the requirement for decisions regarding disenfranchisement to be taken by a judge, the amended National Council Election Order (NRWO) places an upper ceiling on disenfranchisement at the end of the prison sentence.³³

The particularities of the amendment of the NRWO are curious in light of the aforementioned *Scoppola* decision. In a number of cases, the Austrian Constitutional Court decided on the constitutionality of the un-amended NRWO, which mandated the disenfranchisement of criminals convicted for prison sentences of one year or more for crimes that were voluntarily committed. For instance, in its decision of 27 November 2003 (B669/02 Slgnr. 17058), the Austrian Constitutional Court ruled that the un-amended NRWO fell within the margin of appreciation of signatories to the ECHR in the matter of Article 3 of Protocol 1 of the Convention.³⁴ In a decision of 27 September 2007 (B1842/06), the Austrian Constitutional Court explicitly addressed the *Hirst* ruling and the proportionality standard. It held:

[T]he legal position in the United Kingdom at issue in the judgment in the *Hirst* case differs decisively from the one in Austria that is relevant here: section 22 of the National Assembly Election Act does not provide for blanket forfeiture of the right to

³¹ § 446a Criminal Procedures Act or Strafprozessordnung; Apostolovski and Möstl 2019, p.10

³² *Scoppola v. Italy* (no. 3) [GC], no. 126/05, 22 May 2012 § 99.

³³ § 446a Criminal Procedures Act; Apostolovski and Möstl 2019, p.21

³⁴ See Apostolovski and Möstl 2019, p.17

vote in respect of all convicted prisoners, irrespective of the type or seriousness of the offence they have committed or their individual circumstances. The precondition for imposing forfeiture of the right to vote is a final sentence for one or more intentionally committed offences carrying a prison sentence of more than one year; sentences to a fine, sentences to less than one year's imprisonment and conditional prison sentences do not result in forfeiture of the right to vote. Moreover, section 44(2) allows the judge to conditionally suspend the legal consequences of the conviction, including therefore disenfranchisement; in this respect the Austrian legal system also makes legal provision for consideration to be given to the individual circumstances of the person concerned.

It was therefore only in light of the *Frodl* ruling, which interpreted the *Hirst* proportionality test to see as “absolutely essential” a decision by a judge, that the Austrian legislator amended the NRWO. But, as the *Scoppola* decision makes clear, the Grand Chamber of the ECtHR does not require an intervention by a judge to meet the *Hirst* proportionality standard. This raises the interesting, albeit necessarily hypothetical, question if the un-amended NRWO would meet the proportionality standard adopted in *Scoppola v. Italy (No. 3)* – if so, the Austrian legislator amended their laws despite their falling within the margin of appreciation.³⁵

The Netherlands

The Netherlands, like Austria, disenfranchises some serious criminals from the passive right to vote in elections. Article 54(2) of the Constitution of the Netherlands reads as follows:

2. Anyone who has committed an offence designated by Act of Parliament and has been sentenced as a result by a final and conclusive judgment of a court of law to a custodial sentence of not less than one year and simultaneously disqualified from voting shall not be entitled to vote.

³⁵ In line, therefore, with the two cases in front of the Austrian Constitutional Court discussed above: 27 November 2003 (B669/02 Slgnr. 17058); 27 September 2007 (B1842/06)

As noted by Laura Henderson in the country report on the right to vote in the Netherlands, this provision functions as a triple, cumulative filter: 1) an individual must have committed an offence that Parliament explicitly designated could be sanctioned with disenfranchisement; 2) an individual must have been finally sentenced to imprisonment of one year or longer; and, 3) a judge must have ruled that the disenfranchising part of the penalty was applied to that individual.³⁶ This triple test was introduced in 1983, and replaced a more generalised criminal disenfranchisement rule similar to that the United Kingdom was sanctioned for in the 2005 *Hirst* judgement of the ECtHR.³⁷

Unlike in the Austrian case, which permits the disenfranchisement of convicted prisoners on two (overlapping) grounds – the severity of their crime and its political relevance – the Netherlands has a more restricted principle at play when determining which crimes are eligible for disenfranchisement. The government of the Netherlands has formulated the criterion thus: “exclusion from the right to vote must only be possible in the case of criminal acts that, according to their legal definition, *seriously undermine the foundations of the Dutch system of government.*”³⁸ In other words, while the Austrian system makes eligible for disenfranchisement persons imprisoned for one year or more (a weak severity proviso) for a set of political and a further set of serious crimes (with overlap between the sets), the Dutch system makes eligible for disenfranchisement persons imprisoned for one year or more for crimes that are considered by the Dutch government to belong to the *overlap* of these two sets: crimes that are both severe (i.e. ‘*seriously undermine the foundations...*’) and political (‘... of the Dutch *system of government*’).

It is also interesting to review some of the restrictions and details of how the right to vote for convicted prisoners who do not meet the triple conditions laid out in the Constitution and described above is guaranteed in the Netherlands. Importantly, the Netherlands does not

³⁶ Henderson 2019, p. 9

³⁷ I.e. all prisoners were disenfranchised in an automatic and blanket fashion. *Ibid.*

³⁸ Emphasis added. Kamerstukken II 1984/1985, 18 973, number 3, p. 7, cited in Melle Bakker, ‘Uitsluiting van kiesrecht’ in Ron deJong (ed), *Strafbepalingen in het verkiezingsproces: Ontstaan, functioneren en toekomst* (Kiesraad, 2015) p. 98 and Henderson 2019, p.12.

organize ballots in prisons.³⁹ Instead, those prisoners who are not disenfranchised and whose imprisonment prevents them from casting their ballot outside of their prison confinement can vote *only* by proxy. Article B6 of the Election Act allows such persons to vote by instructing a third person to vote on their behalf.⁴⁰ While this law surely addresses concerns about guaranteeing the security and freedom of voting, it does so at a considerable cost. Ordinarily, proxy voting is an option given to those who wish to use it at their convenience, and is not mandated by circumstances outside of an individual's control (this is all the more so since all polling booths were required to be accessible to disabled persons as of the 1st of January 2019 – we will return to this in the appropriate section below). Article B6 of the Election Act prevents convicted prisoners who, formally, retain the right to vote following a conviction that does not meet one or more of the conditions necessary for criminal disenfranchisement in the Dutch constitution, from voting other than by proxy. This has the effect of a *de facto* disenfranchisement of those prisoners who do not wish to select such a proxy, either for concerns regarding the secrecy of the ballot or the privacy of voting. It also raises barriers to those prisoners who, due to social isolation or otherwise, do not feel that they have a confidant that would vote as they instructed.

Unlike in the case of Austria and the United Kingdom, there are no rulings by the ECtHR on the Dutch provisions for criminal disenfranchisement. One can suppose that this is in part because criminal disenfranchisement in the Netherlands is rather restricted: the triple test described in the Constitution of the Netherlands appears to meet the proportionality tests described, variously, in the *Hirst* decision in 2005 and the *Scoppola* decision in 2012. Indeed, even the *Frodl* decision which the Grand Chamber of the ECtHR stepped back from would seem to be met by the third requirement of Article 54(2) of the Constitution, as described above.

³⁹ The organization of voting in prisons could result in impermissible coercion, pressure and, plausibly, could be too burdensome for states to be obliged to organize, even if one endorses the ideal view that convicted prisoners ought as a matter of principle have the right to vote. The Dutch Constitution seems to offer one possible way out of this dilemma – although it raises other difficulties regarding the secrecy of the ballot.

⁴⁰ See also Henderson 2019 p. 12-13

Turkey

Convicted prisoners are disenfranchised in Turkey to a wide extent, although this has narrowed somewhat in light of ECtHR jurisprudence, including an important ruling against Turkey in 2013.⁴¹ Criminal disenfranchisement is grounded on a constitutional provision – Article 67 of the Constitution of Republic of Turkey (CRT). In the original version of the Turkish Constitution adopted in 1982, not only *convicted* prisoners, but also detainees awaiting trial were disenfranchised from participating in elections and referenda. This element of Article 67 was, however, amended in 1995 to exclude detainees from disenfranchisement, in line with the view that such a restriction was incompatible with the presumption of innocence in criminal law.⁴² A further amendment was made in 2001 to hold that only persons convicted of an *intentional* crime that has led them to be incarcerated were to be disenfranchised. While this may seem to introduce a severity condition that we also see operating at greater force in the cases of Austrian and Dutch criminal disenfranchisement, indeed this was part of the argument offered by Turkey in a case in front of the ECtHR,⁴³ it has been noted that “the law focuses the moral element of a crime instead of... on the severity or type of the crime”.⁴⁴

In a decision against Turkey by the European Court of Human Rights, it was decided that disenfranchisement cannot extend before the actual prison term in order to meet the proportionality test first laid out in the *Hirst* decision in 2005. The applicant in that case had been released early from prison following good behaviour, in line with ‘Law No. 647 for good behaviour’.⁴⁵ However, the applicant’s disenfranchisement was to run until the end of the original prison term of sentencing, not the actual prison term. The ECtHR ruled that this was a violation of Article 3 of Protocol 1 of the ECHR, holding that “the measure restricting the right to vote in Turkey is indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence — leaving aside the suspended sentences shorter than one year (see paragraph 14 above) – or the individual

⁴¹ ECHR, *Söyler v Turkey*, Appl. No. 29411/07, 17.09.2013

⁴² See ETHOS report on the right to vote in Turkey: Karan 2019 pp.16-17

⁴³ ECHR, *Söyler v Turkey*, Appl. No. 29411/07, 17.09.2013, § 30.

⁴⁴ *Ibid.* p.17. Unlike in the Dutch case, in Turkey enfranchised prisoners can vote in prison.

⁴⁵ ECHR, *Söyler v Turkey*, Appl. No. 29411/07, 17.09.2013, § 11.

circumstances of the convicted persons” and further specifying that “The Court does not consider that the sole requirement of the element of “intent” in the commission of the offence is sufficient to lead it to conclude that the current legal framework adequately protects the rights in question and does not impair their very essence or deprive them of their effectiveness”.⁴⁶ The Court also considered that in mandating the disenfranchisement of this class of convicted criminals who had been released from prison before the end of their original sentence, Turkey’s law was “harsher and more far-reaching” than those the Court had previously examined in the United Kingdom (referring to *Hirst* and others), Austria (*FrodI*), and Italy (*Scoppola*). The *Söyler* decision against Turkey thus clarified two elements. First, it was not enough to meet the proportionality test in *Hirst* to base a limitation on the right to vote for convicted criminals on the moral element of the crime being ‘intent’ (recall that also in the Austrian case is intent used alongside other measures to modulate the laws on criminal disenfranchisement). Second, extending disenfranchisement beyond the actual term of imprisonment cannot meet the proportionality principle laid out in *Hirst*.

As a final comment on the Turkish case, it is interesting to note the arguments offered by Turkey in the *Söyler*. Turkey held that the ‘legitimate aim’ it was pursuing in disenfranchising criminals was their *rehabilitation*. The Court summarizes this argument in its ruling as follows: “the restriction on the applicant’s right to vote pursued the aim of encouraging citizen-like conduct”.⁴⁷ The Explanatory Report of the (Turkish) Criminal Code concurs with this idea when justifying Article 53 of the Turkish Criminal Code, which expands on the detail of the Constitutional provision for criminal disenfranchisement discussed above. In this light, it holds that, “the rationale behind punishment is to ensure that the criminal comes to regret committing the offence and that he or she is reintroduced into society”.⁴⁸ This type of justification could be called an “instructive” rationale for criminal disenfranchisement,⁴⁹ and was accepted by the Court in principle (explicitly notwithstanding the question of the efficacy of this approach).

⁴⁶ *Ibid.* § 41-42.

⁴⁷ *Ibid.* § 37.

⁴⁸ Quoted in Karan 2019 p.18.

⁴⁹ Poama, A. and Theuns, T. (2019), ‘Making Offenders Vote: Democratic Expressivism and Compulsory Criminal Voting’, *American Political Science Review*, 113(3), pp. 796-809

V. The Right to Vote for Disabled Persons Compared

All six country studies analysed in detail the right to vote of disabled persons. As we shall see, a distinction is commonly made between mentally disabled persons – who may be disenfranchised outright by law – and physically disabled persons who are not explicitly disenfranchised by law in any of the countries under study. For this second group the question arises however to what extent their legal right to vote is effective in light of the presence or absence of positive obligations on the part of the state to ensure that voting conditions are such that persons of various physical limitations can indeed vote.

Austria

The rights of disabled persons are protected in Austria by a constitutional text, the Bundes-Verfassungsgesetz (B-VG). Article 7 of this law contains what can be called an “equality clause” for all Austrian citizens:

All nationals are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded. No one shall be discriminated against because of his disability. The Republic (Federation, provinces and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of everyday life.⁵⁰

Further, and rather unusually, in Austria since 1964 the ECHR and the First Protocol have the status of constitutional law. The relevant case law of the ECtHR, discussed above, is thus particularly important in the Austrian legal system. Following the jurisprudence of the ECtHR, Article 3 of Protocol 1 on the ECHR is relevant for general elections (for the national parliament), but also, in the Austrian case, to elections for Austrian provinces, following an analogous decision by the ECtHR in the case of German Länder.⁵¹ Protections for disabled

⁵⁰ Constitution (Bundes-Verfassungsgesetz) (AUT). See Apostolovski and Möstl 2019, p.5

⁵¹ Timke v. Germany, Application No. 27311/95. See Apostolovski and Möstl 2019, p.6

persons derived from the ECHR do not however protect the right to vote in local elections, nor in referenda.⁵²

Contrary to the case of convicted prisoners, Austria does not disenfranchise any disabled persons formally. This has been noted by the committee on the CRPD, which noted that Austria, “ensures persons with psychosocial and intellectual disabilities the right to vote and to be elected”.⁵³ This has been the case in Austria since 1987.

It is clear from the CRPD that the formal right to vote for persons with disabilities is not sufficient. Signatory states like Austria are under a Treaty obligation to ensure an *effective* right to vote. The Austrian legislator has foreseen a series of safeguards intended to ensure this right for disabled Austrian citizens. One of the important provisions to this effect is § 66 of the NRWO, which holds that blind and visually impaired persons must be provided with stencils to assist them in voting, and may be accompanied by a person of their choice to help them cast their ballot.⁵⁴ In their country report on the right to vote in Austria, Apostolovski and Möstl note the interesting historical development of this provision:

In 1992, § 66 NRWO initially foresaw rules on personally casting the vote and stated that blind, severely visually impaired or frail persons might bring a person to aid them to the polling booth. This was amended in 1998 to “modernize” the language, then stating that persons with physical or sensory disabilities may be assisted by a person while voting... Just one year later, in 1999, the provision was again amended, now foreseeing the provision of stencils for blind or visually impaired persons and accompanying persons for voters with physical or sensory impairments.⁵⁵

Persons that are long-term resident in medical facilities can cast their vote either in special polling booths close to or in their facilities, or may be visited at their bedside by mobile polling

⁵² *Ibid.*

⁵³ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Austria, adopted by the Committee at its tenth session, CRPD/C/AUT/CO/1, 1. Cited in Apostolovski and Möstl 2019, p.10

⁵⁴ *Ibid* p. 14

⁵⁵ *Ibid.*

booths. Such mobile booths may also visit bedridden persons in private accommodation.⁵⁶ There is also a widespread and general possibility for postal voting in general, European, and regional elections in Austria that can facilitate disabled persons' right to vote.⁵⁷ Finally, for national and European elections, though not for (all) regional elections, laws exist that in principle mandate that at least one polling booth per municipality is accessible to persons with physical handicaps.⁵⁸ However, the obligation is not absolute, as the legislation includes a clause that municipalities must make a polling booth accessible only if "technically possible". This has been criticized for making the provision less effective.⁵⁹

Hungary

In Hungary, the general provision against the discrimination of disabled persons (amongst other classes of protected person) is codified in the Act on Equal Treatment and Equality of Opportunities (Act CXXV of 2003). Hungary does disenfranchise some mentally disabled persons, in contrast to Austria, namely those persons who have been disenfranchised by a court following the declaration of their being placed – fully or partially – under legal guardianship. This rule can be found in Article 13/A of the law on electoral procedure (Act CCIII of 2011), which sets out as a principle that courts are to disenfranchise "those adult persons whose mental capacity required for the exercise of the franchise is a) permanently or recurrently significantly reduced because of his or her psychological condition, intellectual disability or addiction; or b) is permanently and entirely lacking because of his or her

⁵⁶ According to § 73 NRWO and § 59 of the law regulating the elections of the European Parliament - EuWO. See Apostolovski and Möstl 2019 pp.14-15

⁵⁷ *Ibid.* p.15

⁵⁸ Various, the Elections to the Parliament Act (§52(5)) the European Parliament Act (§39(6)), the Act on municipal elections in the province of Carinthia (Kärntner Gemeinderats- und Bürgermeisterwahlordnung) (AUT), §50(5); the Act on municipal election in the province of Upper Austria (Oberösterreichische Kommunalwahlordnung) (AUT), §41(3)); the Act on Municipal Elections in the province Styria (Steiermärkische Gemeindewahlordnung 2009) (AUT)§50(4); Austria, the Act on municipal election in the province of Tyrol (Tiroler Gemeindewahlordnung) (AUT), §47(3); the Act on municipal election in Vienna (Wiener Gemeindewahlordnung 1996) (AUT), §51(1); and the Act on municipal election in the province of Vorarlberg (Vorarlberger Gemeindewahlordnung) (AUT), §26(3).

⁵⁹ Angela Wegscheider, 'Politische Partizipation von Menschen mit Behinderungen' [2013] SWS-Rundschau Vol. 53, No 2, pp. 216-234 (221). Cited in Apostolovski and Möstl 2019 p.15

psychological condition or intellectual disability”.⁶⁰ Prior to the case against Hungary on this matter before the ECtHR, Hungary submitted all mentally disabled persons placed under full or partial guardianship to disenfranchisement, for which it was found by the Court to be in breach of Article 3 of Protocol no. 1.⁶¹ The procedure by which such persons are disenfranchised stipulates that the opinion of a psychiatric expert ought to provide the basis for the court’s decision that either of the two above conditions (which are each sufficient alone) are met in an individual case.⁶²

In Hungarian law, there is a rather extensive formulation of the obligations of the state vis-à-vis disabled persons. Act No. XXXVI on Electoral Procedure stipulates some of the assistance physically disabled persons may request including (in Section 88):

- a) the sending of a notification in Braille transcription;
- b) the sending of simplified information material;
- c) use of a Braille voting template at the polling station or during mobile voting;
- d) use of an accessible polling station.⁶³

The one limit to this provision is that it must happen at the prior request of a disabled voter, which may put up barriers to vote for certain disabled persons either unaware of their right, or otherwise unwilling or unable to pre-declare their disability to the polling station in advance of their vote.

In the same law disabled persons are given the right to have a person of their choice assist them in the voting booth. In what could be taken as a model for such types of laws, Section 181 (1) also formulates an alternative for those unable or unwilling to have a person of their choice accompany them – they are given the choice to have two members of the commission staffing the polling station assist them instead. Similarly laudable is the extension of the applicable scope of that section from persons who ‘cannot read’ or who are prevented from

⁶⁰ As cited in Salát 2019, p.14

⁶¹ Alajos Kiss v. Hungary, no. 38832/06, 20 May 2010. See also Granger et al. 2018 p.49

⁶² Articles 444-4446 of the law on civil procedure (Act No. CXXX of 2016 on civil procedure)

⁶³ Act XXXVI of 2013 on Electoral Procedure (2013). Cited in Salát 2019, p. 9. See also section 181 on the regulations and procedure for requesting mobile voting, and sections 103-105 for the procedure by which voters are removed from the regular roll of voters and placed on a roll of mobile voters.

exercising their right to vote ‘by a physical handicap’ to ‘any other cause’ that would prevent them from exercising that right. There is however a potential for abuse that must be recognized in such a wide scope – any person potentially could be coerced into taking another person with them to ‘assist’ them citing this Article, giving a plausible reason for meeting the ‘any other cause’ condition, which could, at least in theory, threaten the secrecy of the ballot.⁶⁴

The Netherlands

The Netherlands has made several advances towards better protecting the right of disabled persons to vote in recent years. In 2008, the constitution of the Netherlands was amended to remove a prior exclusion that had applied a blanket disenfranchisement to all mentally disabled person declared incompetent by a judge. As Laura Henderson notes in the ETHOS country report on the right to vote in the Netherlands, this had the peculiar effect of disenfranchising wealthier mentally disabled persons in a disproportionate manner, as these person were more often declared mentally incompetent by a judge in order to have their assets protected.⁶⁵ When discussions for the change in the constitution enfranchising all mentally disabled persons were underway, the Election Council (*Kiesraad*) noted the inequality with which persons of similar mental disability were subjected to depending on whether they had been declared to be legally incompetent.⁶⁶

As in other similar cases, it was the CRPD that pushed the Netherlands to change their law. The Council of State, one of the four highest courts of the Netherlands, ruled that the disenfranchisement of all mentally disabled persons declared to be legally incompetent could be in conflict with Dutch treaty obligations under the CRPD. The Council of State judgement on this matter, on 29 October 2003, noted explicitly how the ICCPR and the Universal Declaration of Human Rights were not binding on all persons, and therefore not actionable right for the applicant, Martijn G., but that Article 25 of the CRPD which guaranteed the right to vote ‘without any unreasonable restrictions’ and ‘without any of the distinctions’

⁶⁴ The potential for unnoticed abuse at a large scale based on the weak standard formulated in this provision seems, however, rather low.

⁶⁵ Henderson 2019, pp.15-16

⁶⁶ Kiesraad, 2008, ‘Wilsonbekwamen mogen stemmen,’ 28 July, cited in Henderson 2019 p. 16: <https://www.kiesraad.nl/actueel/nieuws/2008/07/28/wilsonbekwamen-mogen-stemmen> accessed 26 November 2018.

proscribed by Article 2 of the ICCPR, and that the CRPD was binding on all persons and was thus an actionable right. Yet, in this case specifically, the Council of State did not find a violation for an interesting reason. It held, in line with the jurisprudence of the ECtHR on this matter, that it *could* in principle fall within states margin of appreciation to exclude some mentally disabled persons. The ruling was that *in certain concrete cases* their exclusion could be an unreasonable limitation. Thus, the decision ought to be made by a judge (if at all) taking into account the particularities of the case. However, the Council of State argued that it was not for the court but for the legislator to define those certain concrete cases, so found no violation of the CRPD. Subsequently, the Dutch Parliament referred to the importance of this decision, and of bringing Dutch law in conformity with the CRPD, when debating the changes to the constitution enfranchising legally incompetent persons.⁶⁷ This led to the legislator in fact abandoning any disenfranchisement of legally incompetent mentally disabled persons, despite the narrow legitimate scope for this argued for by the Council of State.

Another recent change in the law has also resulted in a major advance for the obligations of the Dutch state vis-à-vis voters with physical disabilities. Since January 1 2019, all polling stations must legally be accessible to physically disabled persons, according to Article J4(2) of the Election Act (*Kieswet*). Where in exceptional circumstances a municipality is not able to meet this 100% demand, it has an obligation under J4(3) of that act to inform the City Council about the reasons of the failure. Prior to this recent change, municipalities were required to ensure only 25% of polling station to be accessible in this way.

As well as mandating that polling station must be accessible to voters with physical disabilities, these persons are also permitted to have a person of their choice assisting them in the voting booth. However, the provision for this in Article J28 of the above act is narrower than the provision examined above in the case of Hungary in two ways. First, only physically disabled persons can bring a person of their choice with them into the voting booth – this possibility is not currently extended to voters with mental disabilities. Second, where persons with physical disabilities are unable or unwilling to designate a person to assist them, there is no provision for assistance by personnel staffing polling station.⁶⁸

⁶⁷ See Kamerstukken II 2005/2006, 30 471 number 3, p. 2; cited in Henderson 2019 p. 16

⁶⁸ For a discussion, see Henderson 2019, p.13

Portugal

As in Hungary, but unlike in Austria and the Netherlands, mentally disabled persons who do not have legal capacity are formally disenfranchised. The 1976 Constitution of the Portuguese Republic guarantees the right to vote to:

“[E]very citizen who has attained the age of eighteen years subject to the incapacities provided for in the general law” Article 49(1)⁶⁹

The general law that limits the right to vote in Portugal is the Parliamentary Election Law (Law n^o14/79, of 16 May). This law restricts the franchise to those who:

“[A]re clearly acknowledged to be demented, even if they are not barred by a sentence, when they are committed to a psychiatric establishment or declared to be demented by a medical board composed of two doctors” Article 2(1b)⁷⁰

This same limitation on the right to vote is found at the local level, in municipal elections.⁷¹ Thus, mentally disabled persons who have been recognized as such in the above formal legal procedure are expressly deprived of their right to vote much like, as Brito and Morris point out in the ETHOS country study on the right to vote in Portugal, children.⁷² While the specific limitation is not repeated in the law regulation the elections for members of the European Parliament in Portugal, the restrictions in the Parliamentary Election Law apply, and persons considered legally to be mentally disabled in Portugal are thus also disenfranchised from participating in European elections.⁷³

As in Hungary (and indeed, as we shall see below, in Turkey), an important legal distinction is made between mentally and physically disabled persons. With the former, the above threshold limits their right to vote. In the case of the latter, however, there is no formal disenfranchisement. The question of the right to vote for physically disabled persons thus

⁶⁹ For discussion see Brito and Morris 2019, p.7, 11

⁷⁰ For discussion see *ibid.*

⁷¹ Organic Law n^o1/2001, of 14 August. Article 30

⁷² Brito and Morris 2019, p.7

⁷³ Note however that Portuguese persons resident in EU member states that do not disenfranchise mentally disabled persons are able to exercise their right to vote irrespective of any mental disability, following the EU-wide principle that the rules regulating the national franchise regulate the franchise in European Parliament elections taking place in that country. See also *ibid* p.11

centrally concerns the extend of legally formalized obligations on the part of the state to guarantee an *effective* right to vote for persons who, due to their physical disability, may otherwise be *de facto* disenfranchised, or for whom the burden of exercising their right to vote is unduly high as a result of their physical disability.

One place where state obligations vis-à-vis the effective right to vote for physically disabled persons is stipulated is in the law governing the elections of the President of the Portuguese Republic (Law-Decree nº319-A/76, of 3 May). Article 71 of that law reads as follows:

- (1) The elector affected by a disease or a notorious physical disability, that the board verifies not being able of practicing the acts described in Article 81, can vote accompanied by another elector chosen by him, that guarantee (*sic*) the fidelity of the expression of their vote and is obliged to absolute secrecy.⁷⁴

Two aspects of this article are interesting to note, as they are usually left implicit in other countries' juridification of the right of physically disabled persons to choose an individual to assist them in the voting booth. First, the intention of this exercise is clearly formulated as allowing the physically disabled person "the fidelity of the expression of their vote"; in other words, it would not be permissible for someone chosen to accompany the physically disabled person in the voting booth to try to influence or manipulate the disabled person's electoral choice. Second, the accompanying person is legally obliged by this article to protecting the secrecy of the physically disabled person's vote. While this does not have legal expression in the texts ensuring the possibility of disabled persons to vote in other countries under study, one can imagine that it is precisely such concerns that motivate the choice of, for instance, Hungary to secure the assistance, if requested, of officials at the polling station, rather than exclusively the assistance of an individual chosen by the disabled person in question.

Apart from the possibility of bringing a person of their choice with them in the voting booth, physically disabled persons in Portugal enjoy few of the other legal rights intended to secure their effective right to vote that we have seen in other countries under study. For

⁷⁴ *Ibid* p. 11

instance, neither mobile voting booths, possibilities for electronic voting, proxy voting through a third person nor braille ballots for those with visual impairments are available in Portugal.⁷⁵ Combined with the fact that while accessibility for physically disabled persons is recommended by the appropriate bodies in Portugal, it lacks a legal foundation that renders this obligatory, the effective right to vote for physically disabled persons in Portugal is severely limited. This is especially the case as, for the time being, there are no notable legal cases where physically disabled voters in Portugal have attempted to use the general provisions for equality and against discrimination on the grounds of disability to make a case for the idea that the lack of effective measures protecting their *de facto* right to vote is respected, a situation that is similar in Turkey, as we shall see below.

Concern with the disenfranchisement of disabled persons in Portugal is split along the lines of the franchise of physically and mentally disabled persons. Brito and Morris report: “In media and websites of disabled associations, the major problem regarding disabled persons and the right to vote is about the accessibility of polling station and the preparation of alternative ways to enable blind persons to vote (alone, since they can vote accompanied by someone of their trust)”,⁷⁶ and also that they did not, in their research “find any NGO’s or Associations of disabled persons who were actively questioning the disenfranchising of mentally disabled persons”.⁷⁷ On the other hand, the disenfranchisement of mentally disabled persons is starker, and has prompted more international concern, particularly in light of Portugal’s obligations as a state that has both signed and ratified the CRPD. The Committee on the Rights of People Living with Disabilities, monitoring and reporting on compliance with the CRPD, noted that “with deep concern that in the State party a large number of persons with disabilities are subjected to full or partial guardianship and therefore deprived of such rights as the right to vote”.⁷⁸ Of the two concerns – the *de facto* effective right to vote for physically disabled persons and the *de jure* right to vote for mentally disabled persons – the

⁷⁵ *Ibid* p.14

⁷⁶ *Ibid* p.19

⁷⁷ *Ibid* p.17

⁷⁸ CRPD 2016. Concluding observations on the initial report of Portugal. CRPD/C/PRT/CO/1. United Nations.

former seems to have more traction in Portuguese domestic politics. Indeed, the State Secretary for the Inclusion of the Persons Living with Disabilities announced that blind persons would be able to vote with braille ballots for the first time in the 2019 elections for the European Parliament, a measure that enjoyed cross-party support. In contrast, Brito and Morris note that “at least for now, the enfranchisement of persons with intellectual disabilities is out of question” in the Portuguese context.⁷⁹

Turkey

Restrictions on the right to vote for disabled persons in Turkey are rather similar in Turkey as in Portugal. Both countries restrict the right to vote for mentally disabled persons, despite obligations to the contrary under the CRPD. Both countries also only weakly protect the effective right to vote for physically disabled persons by formulating clear provisions mandating that officials make polling stations and the act of voting accessible – unlike for instance in the cases of Hungary and the Netherlands, in the case of physically disabled persons, and Austria in the case of all persons. Furthermore, despite extensive domestic legal bases for the equality of disabled persons and non-disabled persons, and equally far reaching proscriptions of discrimination based on disability in Turkey,⁸⁰ there are no notable cases of disabled persons using such legislation in the national courts to secure their right to vote.⁸¹

In Turkey, mentally disabled persons are disenfranchised in accordance with the Law on Basic Provisions (articles 7 and 8). This law specifies that all those persons declared legally incompetent and/or banned from public service tasks and offices are disenfranchised.⁸² The Turkish Civil Code defines the category of persons legally incompetent to extend to all persons who, due to mental disorder or infirmity, prodigality, alcoholism or drug addiction, misconduct or a custodial sentence (as discussed in the section on criminal disenfranchisement in Turkey, above), or an unsavoury lifestyle, are unable to handle their own affairs, and/or need assistance for their protection and care, and/or jeopardizes the

⁷⁹ Brito and Morris 2019, p. 19

⁸⁰ See Karas 2019, especially pp.15-16

⁸¹ *Ibid.*

⁸² See Karan 2019, p.19

safety of others. Such persons are given a legal guardian and stripped of their right to vote.⁸³ Ulaş Karan, the ETHOS rapporteur for the right to vote in Turkey, notes that there is an exception to this general rule that retains the right to vote for those persons who have been declared legally incompetent of their own volition “on the basis of their inability to properly manage their work due to their disability...”⁸⁴ The extent of the disenfranchisement of those declared legally incompetent is fairly wide. In a report by the OSCE on the referendum of 16/04/2017, almost 200 thousand people were barred from participating in that referendum on the basis of their legal incompetence.⁸⁵

Suffrage for patients of mental hospitals tracks the distinction between voluntary and involuntary legal incompetence that we saw in the exception to the general rule disenfranchising the legally incompetent, above. When patients have been hospitalized in an involuntary manner, this decision must be taken by the court and comprises, as part of that procedure, the court’s judgement that that individual is legally incompetent. All such persons are thus barred from exercising their right to vote in Turkey. Patients who are hospitalized in mental hospitals on a voluntary basis need no such intervention by a civil court and thus ordinarily retain their right to vote unless they are disenfranchised in a separate procedure. However, such patients’ effective right to vote is quite limited. According to Article 14 of Law No. 298, such persons can petition their electoral board for the possibility to use a mobile voting booth. Yet, that law was designed to accommodate the circumstances of bedridden patients in general, so it is unclear whether it can effectively be used for formally franchised persons who are resident in mental hospitals. Furthermore, there are no voting stations in mental hospitals, nor are there even theoretical possibilities for patients in mental institutions in rural areas to have recourse to Law No. 298.⁸⁶

Also with regard to the effective right to vote for physically disabled persons there are many shortcomings in Turkey. Although the Law on the Basic Provisions of Elections and Voter

⁸³ Turkish Civil Code (Law No. 4721), Articles 405,406 and 407

⁸⁴ Karan 2019, p.20

⁸⁵ OSCE, Office for Democratic Institutions and Human Rights Limited Referendum Observation Mission Final Report, Turkey, 22.06.2017, p.9, fn.27.

⁸⁶ For discussion see Karan, 2019 p. 21

Registers⁸⁷ requires that authorities make note of any disabilities (Article 36) in order to take those measures necessary for disabled voters to vote (Article 74), there are few legally mandated measures to ensure the effective right to vote, even of physically disabled persons. While physically disabled persons are permitted to have a person of their choice accompany them in the voting booth (Article 93), there is no possibility of postal ballots, nor are ballots available in braille. As discussed above, mobile voting is only available for some, bedridden patients in hospitals.⁸⁸

While the exclusions described above are very wide, several articles in the Constitution of Republic of Turkey (CRT) give the legal grounding for positive duties on the part of the state to ensure for disabled persons an effective right to vote. Article 5 holds that:

“The fundamental aims and duties of the State are [...]to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law...”

More specifically with regard to disabled persons, Article 61(2) states that

“The State shall take measures to protect the disabled and secure their integration into community life.”

The Law on Persons with Disabilities also prohibits discrimination on the basis of disability, and states that the basic principle of policies regarding the disabled must be to combat discrimination. While none of these laws reference the act of voting specifically, the widespread disenfranchisement of persons with mental disabilities, and the general lack of an effective right to vote for Turks suffering from physical disabilities could be understood to be in conflict with these laws.⁸⁹ There are also clear tensions with regard to Turkey’s international legal obligations, especially in light of the CRPD.

⁸⁷ Law No. 298

⁸⁸ Karan 2019, p. 20

⁸⁹ *Ibid.* p.19 for discussion.

The United Kingdom

The United Kingdom protects disabled persons' right to vote rather extensively, both in terms of *de jure* and *de facto* enfranchisement measures. Since the Electoral Administration Act of 2006, legal incapacity is no longer a ground for disenfranchisement (Section 73). The Mental Capacity Act of 2005 specifies further that no one other than the disabled person can decide on behalf of the disabled person how to vote (Section 29). In this sense, there is a similarity with the Portuguese concern at the "fidelity" between a disabled person's electoral choice and the expression of their vote.⁹⁰ There are also a fairly wide range of detailed measures that intend to secure the effective right of disabled persons to vote by specifying obligations on the part of the state.

For instance, the Representation of the People Act (RPA) of 1984 stipulates that; as far as is "reasonable and practical" every polling station must be made accessible to disabled persons (Section 18B(4)). Importantly from the perspective of justice, UK law also mandates that disabled persons themselves must be included in reviewing the needs of disabled persons with regard to disabled access. In a paper on questions of justice that can be found in the annex of ETHOS deliverable 2.3, Simon Rippon and Miklos Zala point to a demand of justice that seems to resonate with this approach, namely that disabled persons have a privileged epistemic standpoint from which to evaluate injustices that they are subjected to.⁹¹

While it is not made mandatory for mobile voting booths to be made available, UK voting policy does require that officials organizing the vote take a ballot paper to electors physically unable to enter a polling station, and to take their marked ballot and place it (folded) into the ballot box.⁹² Further, disabled persons may take an individual of their choice into a polling station. The RPA specifies that those accompanying disabled persons in the voting booth must be at least 18 years of age and must either themselves be entitled to vote in the election in

⁹⁰ Law-Decree nº319-A/76, of 3 May. Article 71. Discussed in the sub-section on the right to vote for disabled persons in Portugal, above.

⁹¹ De Maagt *et al.* 2019. For a discussion in light of the right to vote for disabled persons in the UK see the country report by Pier-Luc Dupont: Dupont 2019, p.19

⁹² Electoral Commission (2018), *Handbook for polling station staff: Supporting local government elections in England and Wales*, 20.

question or be the parent, sibling, spouse, civil partner or child of the voter.⁹³ Unlike is the case in the Netherlands, which permit assistance in the voting booth for physically but not for mentally disabled persons, in the United Kingdom no distinction is made between these types of disability.⁹⁴ Further, and similarly again to the concern in Portugal with the secrecy of disabled persons votes, the RPA expressly forbids persons assisting disabled electors from communicating any information whatsoever about for whom the elector has voted or intends to vote.⁹⁵

Partially-sighted persons are permitted to use a device known as a “tactile voting template” to cast their votes, and all voting stations are required to display a large-print version of the ballot paper in a well-lit area.⁹⁶ Furthermore, all officials manning a polling station must know how the tactile voting template can be used and be able to explain its use to disabled persons with visual impairments.⁹⁷ There are also provisions in place allowing and regulating the casting of a voter’s ballot when they are “incapacitated from voting by blindness or another disability”.⁹⁸ In such circumstances, the senior electoral official, referred to in the laws and regulations as the ‘presiding officer’, can mark the voter’s ballot paper on their behalf and as the voter directs.⁹⁹ Pier-Luc Dupont notes that the regulations describing this policy in the *Handbook for polling station staff: Supporting local government elections in England and Wales* are the only place in the laws and regulations governing the right to vote of disabled persons where attention is given to the vulnerability of disabled persons, in that instructions are given to the effect that all those present at the moment of such instruction (candidates, election agents, or other officials of the polling station) ought to be invited to

⁹³ RPA 1983, Schedule 1, rule 39(3)

⁹⁴ Dupont 2019, p. 21

⁹⁵ RPA 1983, Section 66(5)

⁹⁶ RPA 1983, Schedule 1, rule 29(3A)(a) and (b)

⁹⁷ Electoral Commission (2018), *Handbook for polling station staff: Supporting local government elections in England and Wales*, 21.

⁹⁸ Dupont 2019, p. 21

⁹⁹ RPA 1983, Schedule 1, rule 38(1)

hear the instruction to ensure that the ballot paper is marked in accordance with the wishes of the disabled elector.¹⁰⁰

VI. The Right to Vote for Foreigners and Citizens Living Abroad

The last two groups selected for analysis in the ETHOS country studies on the right to vote are foreigners and citizens living abroad, which, given that similar issues are at stake, are treated together in this section. The country studies on Austria and Portugal analyse the specific case of the right to vote for foreigners. The country reports on Hungary and the United Kingdom to this with regard to citizens living abroad. While the majority of such citizens are expatriates (persons who emigrated from the country of their citizenship to live in another country), there are also citizens in both the United Kingdom and Hungary who have never been legally resident in the country of their citizenship. Especially in the case of Hungary the franchise of such persons has been a matter of stark political consequence, as we shall see.

Austria

As in all EU member states, and in accordance with the Treaty of European Union, non-Austrian EU citizens resident in Austria have an equal right to vote in local (municipal) elections and Austrian elections for members of the European Parliament. Other than these exceptions, which are also reciprocally granted to all Austrian citizens resident in EU countries other than Austria, non-Austrians cannot vote for elections in Austria. In fact, according to the case law of the Austrian constitutional court, non-Austrians are otherwise prohibited from voting by the Constitution of Austria, as we shall see.

The provision in Austrian law regulating the right to vote for citizens of other EU countries resident in Austria is in the Austrian constitution (B-VG) in Article 23(a). As Apostolovski and Möstl note in their country report on the right to vote in Austria, there is a requirement for EU citizens to register in advance of European Parliament elections that does not exist for Austrian nationals resident in Austria.¹⁰¹ There is an interesting exception to the

¹⁰⁰ Dupont 2019, p. 21. Citing: Electoral Commission (2018), *Handbook for polling station staff: Supporting local government elections in England and Wales*, 20-21.

¹⁰¹ Apostolovski and Möstl 2019, p.16

general rule that non-Austrian EU citizens are entitled to vote in municipal elections in the case of Vienna. Vienna, uniquely in Austria, is both a municipality and its own province. Non-Austrian EU citizens are not entitled to vote in provincial elections however, and so are disenfranchised from local elections if resident in Vienna by consequence of Vienna's unusual dual status.¹⁰²

As noted above, non-EU citizens resident in Austria are not enfranchised in any elections. Some moves have nevertheless been made at the municipal/provincial level to try to integrate the interests of such persons. In Graz, for example, such otherwise disenfranchised migrants elect a representative board, the *MigrantInnenbeirat*, to advise the municipal council on the interests of migrants. A far more legally important attempt to include migrants in the political process was made in 2002, when Vienna put into place a right to vote (in the hybrid municipal/provincial elections, given Vienna's special status) for all non-Austrians who had been resident in Vienna for at least 5 years and who were older than 16 (the age of suffrage in Austria generally). Recall that before this norm both EU and non-EU citizens resident in Vienna were disenfranchised.¹⁰³

Members of the municipal council opposed to this measure brought a case before the Constitutional Court, arguing that extending the right to vote to non-Austrians violated two main constitutional norms. First, they argued that Article 3 of the Basic Law on the General Rights of Citizens (*Staatsgrundgesetz, StGG - Staatsbürgervorbehalt*), and Articles 26, 95 and 117 of the B-VG were violated by the provision, as they lay down a principle of homogeneity that hold that basic electoral principles ought to be the same across Austria. The Court did not engage this argumentation, but there was also a second, more fundamental argument addressed by the Court, namely, that the opening article of the constitution laying out the basic principles of democratic governance prevented Vienna from including non-Austrian voters. Article 1 (B-VG) states that "Austria is a democratic republic. Its law emanates from the people". The Court ruled that this reference to 'the people' must be understood in the

¹⁰² Act on municipal election in Vienna (Wiener Gemeindewahlordnung 1996) (AUT), § 16; cited in Apostolovski and Möstl 2019, p.16

¹⁰³ For a discussion see *ibid.* p.18

legal sense to refer to Austrian citizens. Further, the norm should be understood in a narrow, exclusive sense; i.e. the law emanates from ‘only’ the people - understood as Austrian citizens - and from no others. Once read in this way it is clear that the Viennese provision cannot be interpreted as being constitutional.¹⁰⁴

Hungary

The most particular aspect of Hungary’s voting laws may well be the expedited process of granting citizenship and, with it, the franchise, to supposedly ‘ethnic’ Hungarians (hereon non-territorial Hungarians) living in bordering states. Hungarian electoral law grants such persons the franchise, and combines this electoral largesse with, again rather unusually, a relatively complicated mechanism for expatriate Hungarian citizens to vote in Hungary. The liberality regarding the inclusion of non-territorial Hungarians combined with electoral restrictions placed on expatriate Hungarians indicates a political motive, and indeed, both the manner in which the former have tended to vote in favour of the party instituting the relevant rule and the way in which Hungarian expatriates have tended disproportionately to vote against the governing party seems to confirm this.

Already in the 1989 Constitution, an Article noted that “[t]he Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary”.¹⁰⁵ Of course, this provision could be read in a perfectly standard liberal manner as a moral duty of assistance and support of non-territorial Hungarians in the light of non-competition with the neighbouring states in which they may be permanently resident citizens. However, several governments, most notably the Orbán governments have interpreted this ‘responsibility clause’ in a much more far-reaching manner.¹⁰⁶ First, in 2002, the Orbán government legislated a form of quasi-citizenship for non-territorial Hungarians, which, though it did not grant the right to vote for these persons, did

¹⁰⁴ *Ibid.*

¹⁰⁵ Article 6(3) of the Hungarian Constitution of 1949, following the amendments of October 23rd 1989.

¹⁰⁶ Paul Blokker and Krisztina Kovacs (2015), ‘Hungarian Citizenship and Franchise Politics and their Effects on the Hungarian-Romanian Relations’, in: E. Baseska and D. Kochenov (eds), *The Principle of Good Neighbourly Relations in Europe: Theory and Practice*, Brill/Nijhoff pp.4-5

grant them far reaching social rights.¹⁰⁷ Under pressure from the Council of Europe and the European Union, this Act was limited to Hungarian non-citizens living in Hungary (i.e. its extra-territorial nature was curbed) in 2003.¹⁰⁸ Soon afterwards, however, Hungary formalized fast-track citizenship for ethnic Hungarian non-citizens resident in Hungary.¹⁰⁹

It was with the new constitution, the 2011 Fundamental Law, passed unilaterally by the Orbán-led Fidesz party, that non-territorial Hungarian's were formally enfranchised. In the preamble, the 'National Avowal' (*Nemzeti hitvallás*) the Hungarian people are defined as "one single Hungarian nation that belongs together", which is taken to mean non-territorial Hungarians as well as Hungarian citizens. Shortly after the re-election of a Fidesz majority in 2010, this part of the Fundamental Law was given concrete effect in terms of a naturalization procedure for non-territorial Hungarians. Article 4(3) the Act LV of 1993 on the Hungarian Citizenship, as amended by Act XLIV of 2010, gave a preferential path to citizenship for persons who are not citizens of Hungary nor live in Hungary, but can demonstrate a probable Hungarian descent, speaks Hungarian, and has no criminal record (nor otherwise poses a threat to Hungarian security. Thus, ethnic Hungarians living permanently outside of the state of Hungary can acquire dual citizenship despite neither being born in Hungary nor having parents who are Hungarian citizens. Such persons, even when they have acquired citizenship, do not have the same right to vote as Hungarian citizens resident in Hungary, nor even as many ex-patriot Hungarian citizens who have previously lived in Hungary.

The Act on the Election of Members of the National Assembly of 2011 stipulates that non-resident, non-domiciled citizens can vote in Parliamentary elections, but only for the party lists and not for the proportion of Parliament elected in single member districts. Further, such persons cannot vote in local elections. While the set of Hungarian citizens meeting the condition of being non-resident and non-domiciled is not exclusively comprised of extra-territorial Hungarians who have taken up Hungarian citizenship in line with the 'preferential

¹⁰⁷ Act LXII of 2001 on Hungarians Living in Neighbouring Countries, known as the 'Status Act'.

¹⁰⁸ Paul Blokker and Krisztina Kovacs (2015), 'Hungarian Citizenship and Franchise Politics and their Effects on the Hungarian-Romanian Relations', in: E. Baseska and D. Kochenov (eds), *The Principle of Good Neighbourly Relations in Europe: Theory and Practice*, Brill/Nijhoff p.6

¹⁰⁹ Mária Kovács and Judit Tóth 'Hungary: Kin-State Responsibility and Ethnic Citizenship', p.154

path' to citizenship described above, all such extra-territorial Hungarians that have never lived in Hungary are included in that set. The relevant contrast is to be made with both 'ordinary' Hungarian citizens resident in Hungary and expatriates. Many expatriates retain an address in Hungary after their emigration. In Hungarian law such persons continue to be considered as 'domiciled' in Hungary.¹¹⁰ Thus, in accordance with the above law, they retain their full right to vote in Parliamentary elections (including a vote for the single member districts). Yet, there is an advantage for non-resident non-domiciled Hungarian citizens, including all non-territorial Hungarian citizens, in that they have access to a postal vote, while domiciled Hungarian expatriates must vote in person at a Hungarian embassy or consulate.¹¹¹ Finally, a law passed by Parliament in December 2018 but not yet in force at the time of writing would grant non-domiciled non-resident Hungarian citizens who are not residents of another EU state the right to vote in European Parliament elections in Hungary.¹¹²

The Hungarian Constitutional Court was asked to rule on the constitutionality of treating domiciled and non-domiciled expatriates differently, as described above. In a very divided decision (7 votes in favour and 5 dissenting), the Court found that this differentiation was not unconstitutional. In the ETHOS country report on the right to vote in Hungary, Orsolya Salát summarizes the reasoning as follows: "the Court considered that emigrés had a closer and more direct relationship to the country, as demonstrated by their having (and maintaining) a domicile in Hungary. This more direct relationship grounds an expectation of more investment on their part into their voting."¹¹³

Portugal

As in all countries of the European Union, non-Portuguese EU citizens resident in Portugal have the right to vote elections for the European Parliament, provided that they are enfranchised in the country of their EU citizenship. The most interesting electoral regulations regarding the right to vote of foreigners in Portugal lies elsewhere. Portugal grants citizens of historically Portuguese-speaking countries who are resident in Portugal the right to vote in

¹¹⁰ Orsolya Salát 2019, p.19

¹¹¹ Articles 259 – 266 of Act No. XXXVI of 2013 on Electoral Procedure, cited in Salát 2019, p. 18

¹¹² Salát 2019, p. 18

¹¹³ Salát 2019, p.20

national elections, on a reciprocal basis (so only when Portuguese citizens resident in the historically Portuguese-speaking country are also enfranchised). Since it is the franchise for national elections that sets the franchise for elections to the European Parliament, this means that non-EU citizens resident in Portugal can, under the above conditions, have a vote in this election also. This is similar to the enfranchisement of non-EU citizens who are members of Commonwealth countries and resident in the UK, as we shall see below.

The relevant EU regulation enfranchising EU citizens resident in EU countries other than their country of (EU) citizenship is EU Council Directive 94/80/EC, which was transposed into Portuguese Law in 1996 by Law nº50/96, of September 4th.¹¹⁴ In the spirit of reciprocity, the right to vote for such EU citizens in local elections was made conditional on Portuguese citizens being granted the right to vote in their country of citizenship.¹¹⁵ Non-EU citizens resident in Portugal are enfranchised for the elections of the European Parliament only when they are also enfranchised for national elections in Portugal.

Currently only Brazilian nationals resident for at least three years in Portugal have full voting rights in national elections, under the Treaty of Friendship, Cooperation and Consultation established between the Portugal and Brazil in 2000, provided that they apply for and acquire the status of equality and full rights and duties under the stipulations of that treaty. Portuguese law does however permit the extension of the franchise to citizens of historically Portuguese-speaking countries, based on the principle of reciprocity.¹¹⁶ As Brito and Morris show in their ETHOS country report on the right to vote in Portugal, other historically Portuguese-speaking countries (i.e. Portuguese ex-colonies) have not made such reciprocal enfranchisement arrangements with Portugal, for a variety of reasons.¹¹⁷ Declaration nº30/2017 formalizes the right to vote in local elections for foreigners in Portugal. Historically Portuguese-speaking country nationals are, subject to reciprocity, enfranchised in

¹¹⁴ This law amended the Law on Electoral Registration (Law nº69/78, November 3rd) and the Law on Election of the Organs of the Local Authorities (Law nº701-B/76, of September 29th)

¹¹⁵ Brito and Morris 2019, p.12

¹¹⁶ E.g. in the law regulating Elections of the President of the Republic (Decree-Law nº319-A/76, of May 3rd)

¹¹⁷ Brito and Morris 2019, p.12-13

local elections after a period of residence of four years. At the time of writing this applies to Brazilians (i.e. those who have not applied for and acquired the status of equality and full rights and duties, since those citizens are already enfranchised after a minimum of three years of residency) and Cape Verdeans. Citizens from other countries, subject to reciprocity agreements, can vote in Portuguese local elections after five years of residency. At the time of writing, that includes citizens of Argentina, Chile, Iceland, Norway, Peru, Uruguay and Venezuela.¹¹⁸

The United Kingdom

As is the case in all EU member states, the United Kingdom, at the time of writing, grant the right to vote for EU nationals in elections held in Britain to the European Parliament, and in local elections. This is expected to change when the United Kingdom leaves the European Union at an as yet unspecified future date. The United Kingdom has made some bilateral attempts to secure political participation rights for its citizens after Brexit. On January 21st 2019 Britain signed an agreement with Spain guaranteeing rights to participation in local elections for British citizens resident in Spain. Unlike other electoral rights granted by the United Kingdom to citizens of commonwealth countries, this agreement was similar to the Portuguese approach in securing such rights to vote reciprocally (that is, following the exit of Britain from the European Union Spanish citizens resident in the United Kingdom will also have their right to participate in local elections preserved).

Just like is the case in Portugal, the United Kingdom grants fairly extensive rights to vote for foreigners' resident in the UK with whom the UK considers it has a historically significant relationship. In Britain, this is cast in terms of membership of the Commonwealth of Nations (hereon the Commonwealth), a voluntary association of 53 sovereign states headed by Queen Elizabeth II,¹¹⁹ who is also the head of state of 16 of the member countries.

¹¹⁸ Brito and Morris 2019, p.12

¹¹⁹ The current members of the Commonwealth are: Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Botswana, Brunei, Cameroon, Canada, Cyprus, Dominica, Fiji, the Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone,

While the majority of members of the Commonwealth were colonies of the United Kingdom, there are several exceptions including Mozambique, Namibia, Papua New Guinea, Rwanda and Samoa.

The most recent Representation of the People Act (1983), entitles all people to vote in UK general (parliamentary) elections if they are registered in a parliamentary constituency, are not subject to a legal incapacity to vote, are either Commonwealth citizens or Irish citizens, and are at least 18 years old.¹²⁰ Commonwealth citizens subject to immigration controls must also have a status that permits them to be permanent residents known in the UK as 'indefinite leave to remain' to be eligible to vote. As well Commonwealth and Irish citizens, citizens of UK crown dependencies (Jersey, Guernsey and the Isle of Man) and British overseas territories have the right to vote in UK elections only if they have established legal residence in the UK.¹²¹ The exception is Gibraltar, who has been combined with an electoral region in England and Wales for the purposes (only) of the European Parliamentary elections.¹²² This change to electoral law was made following a ruling against a former exclusion by the ECtHR in 1999.¹²³ Unlike is the case in the Netherlands with regard to Dutch service personnel stationed in countries of the Kingdom of the Netherlands other than the (European) Netherlands, in the UK there are no exceptions made for the above limitations of the right to vote for people in military or civil service.¹²⁴

Singapore, the Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, the United Kingdom, Vanuatu and Zambia.

¹²⁰ See discussion in Dupont 2019, p.8

¹²¹ The British overseas territories are former colonies that have not regained full sovereign status but have fairly extensive local devolution from British rule. These are: Bermuda, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, the Ducie and Oeno Islands, St. Helena and its dependencies (Ascension Island and Tristan da Cunha), and the Turks and Caicos Islands.

¹²² European Parliament (Representation) Act 2003 and The European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004, Article 2. Cited in Dupont 2019, p.8

¹²³ *Matthews v UK* App no 24833/94 (ECHR, 18 February 1999).

¹²⁴ Compare the Dutch country study on the right to vote (Henderson 2019, p.10) to Dupont 2019, p.8

In rather stark contrast to Hungarian efforts to extend the right to vote for non-domiciled, non-territorial Hungarians, UK electoral law limits the franchise in national elections for UK citizens living abroad to those who have resided in the UK at some point in the previous 15 years. UK citizens that meet this 15-year threshold period are able to register in the constituency that they (last) lived as an ‘overseas elector’.¹²⁵ Overseas electors can vote in national but not in local elections. Service personnel who are citizens of the United Kingdom are exempted from the 15 year limitation, as are their spouses and civil partners when such persons live abroad in order to be near to service personnel stationed abroad.¹²⁶ Such persons are also enfranchised to vote in local as well as national elections, in contrast to other British citizens living abroad.

Unsurprisingly, the 15-year rule limiting the right to vote for British citizens living abroad has been the subject of some litigation, none of it successful. Applicants heard in two cases decided on merit by the European Court of Human Rights argued that the rule violated their right to vote as stipulated in the ECHR, but the ECtHR ruled in both cases that the limitation fell within the UK’s pursued a legitimate aim, was proportional, and thus fell within the UK’s margin of appreciation in limiting the right to vote.¹²⁷ A further series of cases in front of British courts, including one each by the above applicants in the *Doyle* and *Shindler* cases, argued that the 15 year restriction prevented UK citizens from freely exercising their right to freedom of movement under the Treaty of European Union, as some people may be dissuaded from taking up long-term residence abroad for fear of losing their right to vote. In all such cases the judges found the measure not to run counter to freedom of movement under UK law, and the judge’s interpretation of the relevant EU law.¹²⁸

¹²⁵ RPA 1985, Section 1(2)(3)(4).

¹²⁶ RPA 1985, Section 15(5).

¹²⁷ *Doyle v UK* App no 30158/06 (ECHR, 6 February 2007) and *Shindler v UK* App No. 19840/09 (ECtHR, 7 May 2013).

¹²⁸ [2011] EWHC 3174 (Admin), [2016] EWHC 957 (Admin), and [2016] EWCA Civ 469. For a discussion see Dupont 2019 pp.26-27

VII. Conclusion: Representation and Justice in the Right to Vote

This report has given a comparative perspective on the legal rules and practices related to the exercise of the right to vote, including eligibility and representation aspects, in Europe, by looking at the way in which voting is regulated legally in six European countries, in the European Convention on Human Rights, and in European Union law. As such, it has explored the extent to which voting law, human rights, and relevant jurisprudence enables the participation and representation of all community members. Given that vulnerable persons make up those most frequently excluded in terms of political participation and representation, this report has focused on foreigners, prisoners, citizens living abroad, and persons with (mental) disabilities. In this conclusion, the link is made more explicitly to the conceptions of justice that these legal frameworks reveal, in order to participate to an empirically informed integrative perspective on justice and fairness in Europe.

Mapping the contours of the right to vote in European states show that the right to vote is a fundamental yet limited expression of some key features of justice as understood by and institutionalized through the law. The groups this study has focused on – convicted prisoners, disabled persons, foreigners and citizens living abroad – are disparate, and illuminate different aspects of the matter under examination.

When it comes to convicted prisoners, the general trend is towards increasing electoral participation and a gradual expansion of the franchise. The European Convention of Human Rights and the case law of the European Court of Human Rights has been instrumental in this process. It is no longer the case in any of the countries under study that convicted prisoners can be disenfranchised beyond their prison sentence. Furthermore, the ECtHR has been pushing for an *individualized* approach to ascertaining the proportionality of disenfranchisement for criminal convictions, and insists on a link, either of severity or of type, with the crime committed and legitimacy of disenfranchisement. The United Kingdom, The Netherlands, Austria and Turkey (the four countries whose ETHOS country studies examined the right to vote for prisoners) nevertheless all continue to disenfranchise certain criminals.

Disenfranchising criminals can be justified from different perspectives in line with different views about the nature of representative justice. One logic works on the basis of

analogy to a ‘social compact’ between citizens; on this idea, the right to vote is a privilege accorded to upstanding citizens that can be withheld when a citizen flagrantly breaks the compact through their criminal action. Contrarily, however, in the cases reviewed in section IV, III.B.1 and III.B.3 the ECtHR understands the right to vote not as a privilege but as a fundamental right, deviations from which need to be justified (most explicitly in the *Hirst* judgement). Recall in this regard that the Court held that:

any conditions imposed must... reflect... the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.¹²⁹

Perhaps a better interpretation of the evolving, wider enfranchisement of convicted prisoners would be through a ‘republican’ logic of protecting the processes of democratic government and election from persons considered by some to be a threat to those procedures. This would especially explain limitations such as those in the Netherlands, which are targeted to crimes that are especially significant in potentially undermining the foundations of the democratic system of government. Finally, it is interesting to note an argument made by Turkey when defending criminal disenfranchisement, namely that such a policy can serve to *educate* and *rehabilitate* offenders back into society. This may be called an ‘instructive’ rationale and could be associated to a vision of criminal justice that is focused on rehabilitation.¹³⁰

This type of ‘republican’ approach provides us with a theoretical lens to understand – and potentially critique – the development that can be seen in the comparative study of the individualization of criminal disenfranchisement policy. However, it does not explain the general trend to the inclusion of criminals in the franchise. This trend reflects how the notion of ‘one person one vote’ has become a standard approach to measuring the democratic character of a polity, an approach which still nevertheless raises tensions when challenged by the exclusion of long-term resident foreigners.

The franchise for disabled persons raises different questions from the perspective of justice. The trend, as for convicted prisoners, has been toward the expansion of the franchise

¹²⁹ Mathieu-Mohin and Clerfayt v. Belgium, judgment of 2 March 1987, Series A no. 113. § 61

¹³⁰ ECHR, *Söyler v Turkey*, Appl. No. 29411/07, 17.09.2013, § 32. For a discussion of instructive justifications of disenfranchisement see Poama and Theuns (2019).

for disabled persons, especially for mentally disabled persons who were hitherto widely disenfranchised. Again, this is illustrative of the general dominance of one particular model of representative democracy in Europe, although it has been noted that the supranational law- and policy-making depends on an *idealised* conception of what liberal democratic constitutions require, masking a much greater variety and constitutional discord between European states on democratic fundamentals (Theuns 2017). That mentally disabled persons and convicted criminals particularly have seen advances in the franchise towards higher inclusivity show the waning of the alternative, *epistemic*, approach to realizing justice through representative processes.

The underlying justice conception that may help us understand epistemic exclusions is that in order to qualify for the right to vote a citizen must meet an *epistemic* standard. That approach, whereby the franchise needed to be ‘earned’ by demonstrating that an individual or group had the independence of mind and the ‘competence’ to wield the right to vote responsibly, was a dominant position in European states slowly developing electoral processes over the 20th century, and was also at the heart of longstanding disqualifications of poor people and women. An epistemic conception of the right to vote is fraught with philosophical issues and complexity, however, as epistemic boundaries are hard to draw, and it is not evident that once we accept the salience of epistemic standards in one domain they ought not be used across the board in organizing representation and government (for instance by granting multiple votes to educated people, as was the case in many nascent democracies in the nineteenth century).

A different version of such an epistemic justification for the exclusion of mentally disabled persons focuses not on their supposed incapacity for political judgement, but on the idea that they may be considered to be too easily to manipulate or be taken advantage of to be able to cast a ‘free’ ballot that is part of, to take again the formulation of the ECHR, the ‘an electoral procedure aimed at identifying the will of the people’. The concern that some countries show with allowing disabled persons to have access in the voting booth to a person of their choice to assist them in the act of voting may lend some credence to this interpretation.

It must be emphasized, however, that despite the general waning of epistemically grounded electoral exclusions, progress for the enfranchisement of mentally disabled persons

towards an ideal of representative justice that is more egalitarian and democratic is slow and varied.¹³¹ Though the CRPD has made some advances in this area also, it remains fairly common for mentally disabled persons who do not have legal capacity to be denied the right to vote. For instance, Hungary, Portugal and Turkey all continue to disenfranchise persons ruled to be without legal capacity, albeit in slightly different ways (see section V). Given, then, that progress towards a more democratic and egalitarian approach to the franchise is wavering in this way, forces us to look for other types of arguments that are used to deny disabled persons the right to vote.

Aside from exclusions justified on the philosophically spurious grounds of epistemic competence, another way to understand the exclusion of mentally disabled persons from the franchise in terms of underlying justice conceptions is to point to the fact that persons without legal capacity are not 'subjected' to the law (at least, not in the same way that persons with legal capacity are subjected), and that therefore the case is weaker for their being, indirectly through representative procedures, co-authors of the law. If certain persons are not subject to the law, then the 'social compact'-type reasoning may appear to have less purchase on explaining their justice-based claim to an equal stake in law-making power through the right to vote. The fact that disenfranchisement of mentally disabled persons is based in several cases in this study on *legal incompetence*, gives some weight to the idea that the notion of legal subjection has, in some cases, replaced epistemically exclusionary conceptions of the right to vote.

The questions that arise in the context of *physical* rather than mental disabilities are of a different order. No countries under study deny the formal right to vote for physically disabled persons, yet, as assessed in section V, there exist wide disparities in how well protected physically disabled persons' right to vote is. Both the trend and international legal pressure (especially triggered by the CRPD) has been towards sharpening physically disabled persons' rights and, consequently, state obligations to ensure that their *legal* right to vote is also a *de facto* right that physically disabled persons can use. Although there is a large

¹³¹ It should also be noted that a powerful leftover of the once-dominant epistemic approach to limiting the franchise remains in the almost total disqualification of minors from voting.

difference between how poorly, for instance, Portugal and Turkey protect physically disabled persons' right to vote, and how extensively, for instance, the United Kingdom formalizes state obligations in this regard, there is little attempt to justify the lack of more extensive provisions besides available resources. We can thus conclude that the justice standard that seems to emerge is one that recognizes that, at least *ideally* all physically disabled persons ought to have an effective right to vote.

The final groups that have been examined are foreigners and citizens living abroad. These groups' general exclusion from the franchise show the limits of the, albeit irresolute, progression towards the acceptance in the European legal orders of a more egalitarian and participative model of justice in representation. On the whole, foreigners are excluded from the national franchise in the countries under study, although there are broad exceptions for elections for the European Parliament and municipal elections. If it is the case that the franchise has been evolving in a particular direction for convicted prisoners (towards a wider franchise) and physically disabled persons (towards greater state obligations), there is much less clarity as to whether there is a development towards thinking that foreigners ought to be given greater rights of political participation in the communities and countries where they live.

Two particular examples discussed in section VI shed light on the justice considerations in question. In the first, the city of Vienna attempted to enfranchise foreign residents and migrants in 2002, but was overruled by the Austrian Constitutional Court, which ruled that the Constitutional provision that held that in Austria the law emanates from 'the people' must be understood, legally, as excluding all non-Austrians from the franchise. This decision, arguably more than any other discussed in section VI, illustrates a conception of justice that tightly binds the right to vote to national citizenship. What is particularly poignant is that the ruling means that even an ordinary majority of representatives in the Austrian national parliament, exercising their right to democratic self-government, would not be able to extend the franchise beyond Austrian citizens, thus functioning also as a limitation on their democratic authority. The resulting conception of representative justice is one that promotes a particularly nationalist orientation. Theoretically, this brings to light a core tension in democratic theory – that justifications of the membership of the democratic community cannot themselves be submitted to processes of democratic legitimation and therefore often

fall back on ethnic or national determinants of community membership, with consequent exclusions and injustices of such limitations.

The second example, unique in this report, is how Portugal grants the right to vote for certain resident foreigners based on a principle of *reciprocity*. While reciprocity considerations are not alien to theories of justice in law and politics, the intersection of reciprocity and representation is interesting. Usually, the right to vote is considered to be something largely inalienable, universal and fundamental for those that hold it (typically, adult resident citizens). Adding an element of mutual reciprocity, whereby certain foreign residents have the right to vote in Portugal by virtue of their state according Portuguese residents that rights reciprocally (as is the case in Brazil) changes this conception of the right to vote into something more malleable, fungible, and adaptive. This is common in other aspects of inter-state relations, such as for instance visa-waivers, but it is uncommon to see it extended to the franchise.

Reciprocity can be theorized in terms of ‘transactional’ justice, a conception that has strong echoes in the social contract tradition of theorizing state obligation. Yet, a transactional approach has implications for the manner in which justice is conceived; it is hard, for example, to conceive of certain deontic rights and duties that are owed a person if their due, in terms of justice, is a measure of their own reciprocal engagement with others. In the Portuguese case it is notable, further, that eligibility for the most extensive reciprocal arrangements are made possible only with countries sharing Portuguese linguistic and cultural ties, again emphasizing ethnic and cultural kinship as an important determinant of political rights.

To conclude, this comparative study highlights the multiple, overlapping ways in which European states understand representative justice through the institutionalization of the right to vote. Some of these perspectives are evolving as one in a similar direction, such that we may imagine an abstract, idealized goal of representative justice at an undefined future point. Others illustrate more naturally significant tensions that remain in how representative justice is understood in different European states, and even within these states.

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