

RESEARCH ARTICLE

# Inclusive Democracy: Franchise Limitations on Non-Resident Citizens as an Unjust Restriction of Rights under the European Convention on Human Rights

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The Public International Law and Policy Group (PILPG) advises parties in peace negotiations, on drafting post-conflict constitutions, and assists in prosecuting war criminals. As part of this work, PILPG assists States in establishing and implementing electoral systems that meet international standards for democratic elections, and undertakes election monitoring. Free and fair elections are crucial for the legitimacy of democratic States and are protected by human rights law. The present article focuses on the issue of the franchise and on the restrictions permitted under the European Convention on Human Rights (ECHR). Specifically, this article addresses franchise restrictions on non-resident citizens across ECHR member States. Setting out the protections for the franchise in Article 3 of Protocol No. 1 ECHR, this article analyses the permissible limitations on those rights according to the jurisprudence of the European Court of Human Rights (ECtHR). The article presents a comparative analysis of other voting rights cases, such as the limitations on prisoners' franchise. After considering whether residency-based limitations pursue legitimate and proportionate aims, it questions whether blanket restrictions disenfranchising non-resident citizens should be permissible today. The article concludes by advocating the importance of an inclusive franchise for the legitimacy of democratic systems as well as the protection of individual rights, and inviting the ECtHR to revisit its jurisprudence on this topic.

**Keywords:** Voting rights; Expatriate voting; Disenfranchisement; Prisoner's voting; Article 3 of Protocol No 1 ECHR; European Court of Human Rights

## I. Introduction

Free and fair elections are crucial for the legitimacy of democratic States and are protected as a human right. Jurisprudence and scholarship often emphasise the connection between democracy and human rights. For example, the European Convention on Human Rights (ECHR or the Convention) was designed to 'maintain and promote the ideals and values of a democratic society'.<sup>1</sup> According to the European Court of Human Rights (ECtHR or the Court) democracy is the only political model contemplated by the Convention and the only one compatible with it.<sup>2</sup> While neither the Court nor other sources have been able to conclusively define democracy,<sup>3</sup> the political rights of freedom of expression, association, and assembly as well as participation in free and fair elections are well-established elements. These rights have often been reiterated in ECtHR case law as interrelated and imperative to democracy, and are widely protected under international

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<sup>1</sup> See *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 737, para 53; *Soering v the United Kingdom* (1989) 11 EHRR 439, para 87.

<sup>2</sup> *United Communist Party of Turkey and Others v Turkey* (1998) 26 EHRR 121, para 45.

<sup>3</sup> International law has made slow progress with the specification of core democratic principles, beyond the ideas first set out in the Universal Declaration of Human Rights, see eg Kevin Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1 Essex Human Rights Review 1, 8. Golubok suggests that defining democracy may even be unnecessary, see Sergey Golubok, 'Right to Free Elections: Emerging Guarantees or Two Lawyers of Protection?' (2009) 27 Netherlands Quarterly of Human Rights 361, 361.

and regional human rights law.<sup>4</sup> While freedom of association, expression, and assembly are guaranteed rights for all people within a State's jurisdiction, the right to participate in free and fair elections is generally restricted to citizens.<sup>5</sup> Rubio-Marín notes that electoral rights are citizen rights, and not just human rights.<sup>6</sup> Citizenship in this way constructs 'the polity that defines the nation', codifying and institutionalising identity in law.<sup>7</sup>

In addition to restrictions based on citizenship, other limitations on a citizen's right to participate in free and fair elections are permissible under human rights law. Despite the fundamental importance of democracy and human rights, these political rights are not absolute and States around the world have imposed restrictions, including restrictions on the franchise. This includes limits on the age of those eligible to vote, limitations on persons convicted of certain crimes, and also limits on the rights of non-resident citizens.<sup>8</sup> While limitations are permissible under both regional and international human rights instruments like the ECHR and ICCPR, restrictions on the franchise must not be unreasonable or discriminatory.<sup>9</sup> While limitations on the voting rights of convicted criminals has been highly contentious in the European Convention system and received much attention, the restrictions imposed on the voting rights of non-resident citizens has received less attention. As such, this article focuses on the limitations on the franchise of non-resident citizens.

The notion of citizenship embraced by the traditional conception of the nation-state is 'fundamentally a territorial one'.<sup>10</sup> Traditionally, political communities possessed inter-relationships and obligations as a result of sharing the same physical space.<sup>11</sup> The relationship between territory and citizenship has been identified as the key dynamic in arguments for or against emigrant citizen franchise.<sup>12</sup> A citizen's relationship with their State necessarily changes when they leave the territory, altering their interactions both with the State and its institutions.<sup>13</sup> Historically, residency was a standard requirement of election laws and citizens were sometimes even deprived of their nationality upon emigration —dying a 'social death'.<sup>14</sup> This has changed over time, due in part to developments in transport, communication, technology, society, and the

<sup>4</sup> See eg Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 21; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 19, 22 and 25; Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9, arts 3, 10, and 11; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 23; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58, art 13(1).

<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended) 213 UNTS 222 (ECHR) arts 10 and 11 provide that 'everyone' possess the rights of freedom of expression, assembly and association, which must be applied without discrimination under Article 14. Equally, Articles 19 and 22 ICCPR provide that 'everyone' has the right to freedom of expression and association, which must be applied without distinction under Article 2. ICCPR, art 25 provides however that 'every citizen' shall have the right and the opportunity, without any of the distinctions mentioned in Article 2, to vote and be elected in genuine periodic elections.

<sup>6</sup> Ruth Rubio-Marín, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants' (2006) 81 NYU Law Review 117, 119 and n 4. Beckman notes that '[p]olitical rights are consequently conditioned by membership status rather than by residence in the territory of the state', see Ludvig Beckman, 'The Subjects of Collectively Binding Decisions: Democratic Inclusion and Extraterritorial Law' (2014) 27 Ratio Juris 252, 253.

<sup>7</sup> Kim Barry, 'Home and Away: The Construction of Citizenship in an Emigration Context' (2006) 81 NYU Law Review 23, citing Gertrude Himmelfarb, 'The Illusions of Cosmopolitanism' in M. Nussbaum and J. Cohen (eds), *For Love of Country: Debating the Limits of Patriotism* (Beacon Press 1996) 74.

<sup>8</sup> 'Non-resident citizens' is a broad term chosen to represent a variety of emigrant citizens. It includes those who never resided in their State of citizenship; those who left temporarily or permanently; and those with dual citizenship, either in their State of residence or another third country. Emigrant attitudes toward their States of citizenship vary, as do their reasons for leaving, and their skills, ambitions and statuses in the immigration State. Some emigrants participate regularly with their State of citizenship, some leave and disengage, while most fall somewhere in between. See Barry (n 7) 32.

<sup>9</sup> See ICCPR, arts 2, 25; ECHR, art 14; ECHR, Protocol No 1, art 3.

<sup>10</sup> Rubio-Marín (n 6) 118. There are also other connections than territory, most notably based on blood or ethnicity, and the concepts of *jus soli* and *jus sanguinis*. Citizenship is a complex topic —for example with the emergence of 'EU citizenship'— with much scholarship dedicated to it that cannot be covered here. For a definition of citizenship, see also the *Nottebohm Case (Liechtenstein v Guatemala)* (Judgment) [1955] ICJ Rep 4.

<sup>11</sup> Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2004–2005) 32 UW Australian Law Review 1, 2, 20.

<sup>12</sup> Michael Collyer and Zana Vathi, 'Patterns of Extraterritorial Voting' (2007) Development Research Centre on Migration, Globalisation and Poverty Working Paper T22, 9 <[www.migrationdrc.org/publications/working\\_papers/WP-T22.pdf](http://www.migrationdrc.org/publications/working_papers/WP-T22.pdf)> accessed 27 February 2017.

<sup>13</sup> *ibid* 4.

<sup>14</sup> David Fitzgerald, 'Rethinking Emigrant Citizenship' (2006) 81 NYU Law Review 90, 92.

law. States around the world increasingly comprise relatively large numbers of both resident non-citizens and non-resident citizens.<sup>15</sup> Today, non-resident citizens more often carry their political rights with them when they go abroad, and there is a growing acceptance of dual citizenship.<sup>16</sup> As provided for under human rights law, people have the right to move, to leave their State of origin, and to pass on or change their nationality.<sup>17</sup>

Tensions about the proper relationship between citizens, the State, and its territory continue to define debates regarding migrant franchise.<sup>18</sup> Citizens who leave their States to join a new society, yet claim active membership in their State of citizenship, challenge the neat picture of nation-states as distinct and separate geopolitical spaces inhabited by a group with a common political destiny and membership status.<sup>19</sup> These issues relate generally to the problem of 'constituting the demos'.<sup>20</sup> Citizenship, so long a 'symbol of rootedness, exclusivity, and permanence', has been discovered in contemporary times to be 'portable, exchangeable, and increasingly multiple'—which requires new analysis.<sup>21</sup> In today's increasingly globalised world, and with the benefits of modern technology, people are becoming both more mobile and more connected. However, immigrants' voting rights have received far more attention than that of emigrants,<sup>22</sup> which some scholars say lacks prominent attention.<sup>23</sup> Beckman notes the 'unresolved relationship' between democratic rights and territorial borders.<sup>24</sup> As such, this article critically assesses the limitations on the voting rights of non-resident citizens, and considers whether limitations on the basis of residency are compatible with the European Convention on Human Rights.

Today, some emigrants submit that their citizenship should entitle them to the right to vote, to run for office, and to participate in their State's political sphere even when abroad.<sup>25</sup> These political membership claims are rooted in their ongoing legal status as citizen of that State.<sup>26</sup> However, these claims have been contested in various courts and to date, the right of non-resident citizens to vote under human rights law remains ambiguous.<sup>27</sup> This article presents an analysis of the law according to the ECtHR regarding the voting rights of non-resident citizens among Council of Europe member States. The article first sets out the laws protecting the franchise and the permitted limitations on those rights, for example regarding felons and non-resident citizens. The article then considers the reasons for States' limitations and whether they represent a legitimate aim that is proportionate to the resulting disenfranchisement. This article argues that blanket restrictions on the voting rights of non-resident citizens are an unjustified interference with the citizen's rights. While the ECHR permits some limitations on franchise, it is

<sup>15</sup> Estimates vary regarding the number of citizens living abroad. In 2000, approximately 175 million people lived outside their country of citizenship, see Barry (n 7) 17[16]. See also Marcel Szabó, 'International Law and European Law Aspects of External Voting with Special Regard to Dual Citizenship' (2014) 16 *Minority Studies* 25, 40.

<sup>16</sup> It is estimated that around half of the world's countries recognise plural nationality. Barry (n 7) 42, 50, identifies an international trend in States recognising dual citizenship. See also David Martin, 'The Trend Toward Dual Nationality' in D. Martin and K. Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Brill 2003) 7–8; Rubio-Marín (n 6) 127; Fitzgerald (n 14) 98; Szabó (n 15).

<sup>17</sup> For example, the following articles guarantee a person's right to leave any State, including their own: UDHR, art 13.1; ICCPR, art 12.2; ECHR, Protocol No 4; Treaty Establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 3 (TEEC) art 18, which equates to Treaty on the Functioning of the European Union (2012) OJ C 326 (TFEU) art 21. See further Dimitry Kochenov, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link' (2009) 16 *Maastricht Journal of European & Comparative Law* 197.

<sup>18</sup> Fitzgerald (n 14) 109. Tensions exist especially in the case of refugees, which is addressed in scholarship eg Ruvy Ziegler, *The Voting Rights of Refugees* (CUP 2017).

<sup>19</sup> Rubio-Marín (n 6) 120.

<sup>20</sup> Robert Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 *Philosophy & Public Affairs* 40, 40–42. Goodin notes that the question of who constitutes the demos is unresolved and has received relatively little attention in scholarship.

<sup>21</sup> Barry (n 7) 18.

<sup>22</sup> Fitzgerald (n 14) 90; Collyer and Vathi (n 12) 5.

<sup>23</sup> Mercurio and Williams (n 11) 2; Claudio Lopez-Guerra, 'Should Expatriates Vote?' (2005) 13 *The Journal of Political Philosophy* 216; Peter Spiro, 'Perfecting Political Diaspora' (2006) 81 *NYU Law Review* 207, 208. Ziegler notes that the disenfranchisement of non-resident citizens has 'largely passed under the public radar', see Reuven (Ruvy) Ziegler, 'Voting Eligibility: Strasbourg's Timidity' in K. Ziegler, E. Wicks and L. Hudson (eds), *The UK and European Human Rights: A Strained Relationship?* (Bloomsbury 2015) 167.

<sup>24</sup> Beckman (n 6) 253.

<sup>25</sup> Barry (n 7) 51.

<sup>26</sup> *ibid* 52.

<sup>27</sup> With the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, which is ratified by only 43 States, there is no clear internationally agreed obligation for the involvement of emigrants in elections. Collyer and Vathi (n 12) 20.

contended that the current limitations based on residence do not strike the right balance to protect human rights and democracy.

## II. Right to Vote and Permissible Limitations under the ECHR

Despite the great importance of voting rights to democracy, franchise is not absolute and both the ICCPR and ECHR permit similar restrictions. To be permissible according to Article 25 of the ICCPR, restrictions on franchise must be based on objective and reasonable criteria and be established in law.<sup>28</sup> The UN Human Rights Committee (HR Committee) has held that restrictions are permissible provided they are not 'discriminatory or unreasonable'.<sup>29</sup> In General Comment No. 25, the HR Committee noted that '[i]f residence requirements apply to registration [of voters], they must be reasonable'.<sup>30</sup> The discriminatory nature of a provision is to be judged on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality.<sup>31</sup> Since residency is not specifically prohibited as a basis for discrimination under Article 2 ICCPR, to which Article 25 refers, it is apparent that residency restrictions may be permissible.<sup>32</sup> The ECHR permits similar restrictions.

While the ECHR explicitly protects freedom of association, assembly, and expression, its protection of franchise has been extrapolated by the Court based on Article 3 of Protocol No 1.<sup>33</sup> This Article guarantees the right to free elections and provides that member States 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'. While this Article does not expressly provide for an individual's right to vote, the Court has held that the rights to vote and stand for election are implicit in Article 3 of Protocol No 1.<sup>34</sup> The Court considers the requirements of Article 3 regarding participation in government to have been met if the people can participate in the composition of the legislature of the member State at regular intervals.<sup>35</sup> The ECtHR has emphasised that Article 3 'enshrines a characteristic principle of democracy' that is 'of prime importance in the Convention system'.<sup>36</sup> While Article 3 rights are not absolute and limitations are permissible,<sup>37</sup> the exclusion of any groups or categories of the general population from voting must be reconcilable with the purposes underlying Article 3.<sup>38</sup>

<sup>28</sup> HR Committee, 'General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)' adopted at the Fifty-seventh Session (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, paras 4, 14. For further commentary on this article, see eg Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary* (3rd edn, OUP 2010) ch 22.

<sup>29</sup> HR Committee, *Gillot et al v France* (Comm No 932/2000) para 12.2. See also HR Committee, *J Debreczeny v Netherlands* (Comm No 500/1992); HR Committee, *Alba Pietraroia on behalf of Rosario Pietraroia Zapala v Uruguay* (Comm No 44/1979); HR Committee, 'General Comment No 18: Non-discrimination under Article 26 of the International Convention on Civil and Political Rights' adopted at the Thirty-seventh Session (10 November 1989) UN Doc HRI/GEN/1/Rev.1, paras 4, 10, 11 and 14.

<sup>30</sup> HR Committee, 'General Comment No 25' (n 28) para 11.

<sup>31</sup> The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant. *Gillot et al* (n 29) paras 13.2 and 13.5.

<sup>32</sup> Caroline Carter, 'The Right to Vote for Non-Resident Citizens: Considered Through the Example of East Timor' (2010–2011) 46 *Texas International Law Journal* 657.

<sup>33</sup> Reference throughout to 'Article 3' refers to Article 3 of Protocol No 1 ECHR unless otherwise stated. For discussion of the *travaux préparatoires* of this article, see Golubok (n 3) 364–366.

<sup>34</sup> This is reiterated by the Court in numerous cases. See eg *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1, paras 46–51; *Alajos Kiss v Hungary* (2013) 56 EHRR 38, para 36; *Shindler v the United Kingdom* (2013) 58 EHRR 5, para 99; *Anchugov and Gladkov v Russia* (2013) ECHR 638, para 93.

<sup>35</sup> Jeroen Schokkenbroek, 'Free Elections By Secret Ballot' in P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 915.

<sup>36</sup> *Mathieu-Mohin and Clerfayt* (n 34) para 47.

<sup>37</sup> The Court has determined that there are 'implied limitations' to Article 3 of Protocol No 1 ECHR. See eg *Sitaropoulos and Giakoumopoulos v Greece* (2013) 56 EHRR 9, para 64, where it held:

Given that Article 3 of Protocol No. 1 is not limited by a specific list of 'legitimate aims' such as those enumerated in Articles 8 to 11 of the Convention, the Contracting States are free to rely on an aim not contained in such a list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case (see *Ždanoka*, cited above). Nevertheless, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with.

See also Golubok (n 3) 371–376.

<sup>38</sup> *Mathieu-Mohin and Clerfayt* (n 34) para 52; *Py v France* (2008) ECHR 7, para 46; *Hirst v the United Kingdom (No. 2)* (2006) 42 EHRR 41, paras 60, 62; *Anchugov and Gladkov* (n 34) para 96.

On the basis of the rights grounded in Article 3 of Protocol No 1, individuals have challenged their State's franchise limitations before the ECtHR.<sup>39</sup> The resulting jurisprudence provides insight into the Court's interpretation of franchise rights and democracy, permissible interferences, and therefore the frontiers of political rights and communities. The sections below consider the ECtHR's jurisprudence regarding States' limitations on the right to vote, focusing on the two most common issues of disenfranchisement: non-resident citizens and convicted criminals.

### **A. Residency Restrictions on Franchise under the ECHR**

Council of Europe member States have taken different approaches to the franchise, with some permitting wide ranging voting rights for non-residents, and others imposing various restrictions. Marking the low point of the franchise, eight Council of Europe member States do not allow voting in parliamentary elections from abroad (including Armenia, Ireland, and Malta), while non-resident citizens of more than 30 States retain voting rights (including Austria, Belgium, Spain, and the Netherlands).<sup>40</sup> As such, a clear majority of States permit non-resident citizens to vote, however the specifics of the voting rules vary. While some States disenfranchise non-resident citizens only after a certain period abroad (such as Germany after 25 years and the UK after 15 years), 35 States place no restrictions based on the period of absence.<sup>41</sup> Furthermore, in France, Italy, Croatia, and Portugal, non-resident citizens have specially designated representatives in parliament.<sup>42</sup> The ECtHR has heard several cases brought by applicants challenging their State's residency-based restrictions on franchise. In almost all of these cases, the Court has found the limitations imposed not to be in violation of Article 3 of Protocol No 1, as they were deemed to fall within the State's margin of appreciation. These cases are discussed below.

In the oft-cited 1999 case of *Hilbe v Liechtenstein*, the applicant—a national of Liechtenstein—was disenfranchised due to his residence in Switzerland.<sup>43</sup> The ECtHR held that the restrictions on non-resident citizen's franchise were not in violation of Article 3, and considered the residence requirement to be justified by four factors.<sup>44</sup> Firstly, it was deemed justified based on the assumption that a non-resident citizen is less directly concerned with their State's day-to-day problems and has less knowledge of them. Secondly, it was held impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad, and that non-resident citizens have no influence on the selection of candidates or the formulation of their electoral programs. Thirdly, it was deemed justified based on the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected. Finally, the Court considered the legitimate concern that the legislature may have to limit the influence of citizens residing abroad on issues that primarily affect residents. Despite noting that it was possible that the applicant Hilbe had not severed his ties with Liechtenstein and that some of the above factors were inapplicable to his case, the Court held that the law cannot take account of 'every individual case and must lay down a general rule'.<sup>45</sup> The Court considered that the applicant cannot argue that he is affected by the acts of political institutions to the same extent as resident citizens, and that this fact justified the residency limitations.<sup>46</sup> The ECtHR found that such measures were not unreasonable or arbitrary and, therefore, not in violation of Article 3 of Protocol No 1.

Also in 1999, the ECtHR decided the case of *Matthews v UK*, which is noteworthy as one of the cases in which the Court found the State's limitations to be in violation of the ECHR.<sup>47</sup> In that case, the applicant Matthews was rejected from registering with the Electoral Registration Officer for Gibraltar (a territory of the UK) as a voter in the European Parliament elections. While noting the State's wide margin of appreciation,

<sup>39</sup> The ECtHR has also considered several cases under Article 3 of Protocol No 1 ECHR regarding the right to stand as a candidate for election. While these cases are interesting regarding their insights on the Court's interpretation of Article 3, they are not directly relevant to the analysis in this article regarding the franchise of non-resident citizens.

<sup>40</sup> *Sitaropoulos and Giakoumopoulos* (n 37) paras 33, 35, 38, 74; *Shindler* (n 34) paras 72–76. See also the European Commission for Democracy Through Law, 'Report on Out-of-Country Voting' (24 June 2011) Study No 580/2010 (CDL-AD (2011)022) paras 20–61 (Venice Commission Report).

<sup>41</sup> *Shindler* (n 34) paras 72–75, citing the Venice Commission Report (n 40). See also Spiro (n 23) 212.

<sup>42</sup> This system is currently rare but it is growing in popularity. Collyer and Vathi (n 12) 10, 17, and Table 3; Mercurio and Williams (n 11) 28. The system is also employed by several States outside of Europe, see eg Hajnalka Juhász, 'External Voting in the International Practice: A Comparative Analysis and Overview' (2014) 16 *Minority Studies* 47, 56–57.

<sup>43</sup> *Hilbe v Liechtenstein* ECHR 1999-VI.

<sup>44</sup> *id.*

<sup>45</sup> *id.* See also *Py* (n 38) para 51.

<sup>46</sup> *Hilbe* (n 43).

<sup>47</sup> *Matthews v the United Kingdom* (1999) 28 EHRR 361.

the ECtHR held that the applicant, as a resident of Gibraltar, was completely denied the opportunity to express her opinion in the choice of the members of the European Parliament by the UK based on her residency. However, the Court distinguished this position from that of citizens disenfranchised due to non-residence, as 'such individuals have weakened the link between themselves and the jurisdiction'.<sup>48</sup> In *Matthews*, the Court found that the European Parliament legislation formed part of Gibraltar's legislation, therefore 'directly affecting' the applicant.<sup>49</sup> In those circumstances, the applicant's right to vote was denied and the UK was held in violation of Article 3.

In the 2005 case *Py v France*, the applicant challenged a restriction in referenda in New Caledonia limiting the franchise to persons who were resident for at least 10 years.<sup>50</sup> The ECtHR reiterated that a residence requirement for voting is not, in principle, an arbitrary restriction of the right and, as such, is not incompatible with Article 3.<sup>51</sup> The Court held that member States enjoy a wide margin of appreciation given that their electoral laws 'vary from place to place and from time to time' and that franchise laws vary according to the historical and political factors in each State.<sup>52</sup> As the applicant *Py* had returned to mainland France, the Court held that they were not affected by the decisions of the New Caledonian political institutions to the same extent as resident citizens. The Court found this position justified the residence requirement for voting.<sup>53</sup> Having determined that the restriction served a legitimate aim, the Court considered whether it was proportionate. At the time, New Caledonia was in a transitional phase on its path to acquiring full sovereignty. The ECtHR concluded that given its turbulent history, the 10-year residence requirement was instrumental in alleviating the 'bloody conflict'.<sup>54</sup> The Court considered that the particular history and status of New Caledonia warranted the restrictions on the applicant's right to vote and found no violation of Article 3 of Protocol No 1. A similar case heard by the UN HR Committee was also deemed not to violate the franchise protections in Article 25 ICCPR.<sup>55</sup>

One of the most important decisions regarding non-resident citizens' voting rights is the 2012 Grand Chamber decision in the case of *Sitaropoulos and Giakoumopoulos v Greece*.<sup>56</sup> In this case, the Court directly considered the question of whether Article 3 requires States to introduce a system enabling citizens to vote from abroad. The applicants in the case alleged that Greece had disproportionately interfered with their right to vote by not facilitating their participation in Greek elections from their permanent residence in France. The applicants claimed that they had close connections to Greece, followed political developments, owned taxable property, and were licensed to practice law there.<sup>57</sup> To justify their restrictions, Greece argued, *inter alia*, that they had a wide margin of appreciation, that expatriates were not as affected by parliament as resident citizens, and that expatriates developed social, economic, political and cultural ties in their new host States.<sup>58</sup> Importantly, the restrictions on franchise in this case were first determined by the Chamber to be in violation of Article 3,<sup>59</sup> however, this contentious finding was unanimously reversed by the Grand Chamber following the State's request.

As in *Hilbe*, the Grand Chamber in *Sitaropoulos* articulated four factors that may justify residence-based restrictions on franchise. These were:

(...) the presumption that non-resident citizens are less directly or less continually concerned with their country's day-to-day problems and have less knowledge of them; secondly, the fact that non-resident citizens have less influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the

<sup>48</sup> *ibid* para 64.

<sup>49</sup> *id.*

<sup>50</sup> *Py* (n 38).

<sup>51</sup> *ibid* para 48, citing *Hilbe* (n 43); *X v the United Kingdom* (1979) 15 DR 137; *X and Association Y v Italy* (1981) 24 DR 192; *Luksch v Germany* (1997) 89-B DR 175; *Polacco and Garofalo v Italy* (1997) 90-A DR 5.

<sup>52</sup> *Py* (n 38) para 46.

<sup>53</sup> *ibid* para 51.

<sup>54</sup> *ibid* para 62.

<sup>55</sup> *Gillot et al* (n 29). The HR Committee held that the residency restrictions were reasonable given the unique and special nature and purpose of the referenda in question.

<sup>56</sup> *Sitaropoulos and Giakoumopoulos* (n 37).

<sup>57</sup> *ibid* para 52.

<sup>58</sup> *ibid* paras 54–57.

<sup>59</sup> *Sitaropoulos and Giakoumopoulos v Greece* App No 42202/07 (ECtHR, Chamber Judgment, 8 July 2010).

legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country.<sup>60</sup>

The Grand Chamber surveyed regional and international law in order to determine that nothing revealed an obligation or consensus that would require Council of Europe member States to facilitate voting for citizens living abroad.<sup>61</sup> On this basis, States enjoyed a wide margin of appreciation. Furthermore, given that the applicants in this case could have travelled back to Greece to vote, the restriction on voting from abroad was not deemed disproportionate in the circumstances.<sup>62</sup> As such, the Grand Chamber found no violation of Article 3 of Protocol No 1.

Most recently, Shindler brought a case against the UK, claiming to have been deprived of his rights by not being allowed to vote in UK elections after having resided abroad for more than 15 years.<sup>63</sup> Shindler's disenfranchisement came about under the *Representation of the People Act* 1985, which he challenged before the ECtHR as an unjustified interference with Article 3. Like in *Sitaropoulos*, Shindler claimed that he maintained close ties to the UK, including his pension, bank accounts, and tax obligations, which were all subject to political decisions by the UK Parliament.<sup>64</sup> He argued that the four factors identified by the ECtHR in earlier cases to justify residence restrictions on franchise were now outdated due to globalisation, modern technology, and low cost travel that enabled citizens abroad to maintain connections with their State of citizenship.<sup>65</sup> UK citizens could live abroad but continue to work, for example, for UK newspapers as journalists, for UK businesses, or as lawyers advising on UK law.<sup>66</sup> Shindler also highlighted the Council of Europe's numerous statements and recommendations in support of out-of-country voting rights.<sup>67</sup> He claimed that the UK laws had the effect of completely disenfranchising him.<sup>68</sup> In response, the UK emphasised the Court's previous case law and wide margin of appreciation, arguing that citizens residing abroad for more than 15 years had a diminished connection with the UK and were not directly subject to UK laws.<sup>69</sup>

In agreeing with the UK, the Court found no violation of Article 3 of Protocol No 1. The Court emphasised that residence restrictions on the right to vote were not necessarily a violation of Article 3, and reiterated the four factors mentioned above in *Sitaropoulos* to justify the limitation.<sup>70</sup> The Court found that the UK pursued the legitimate aim in this case of restricting the franchise to citizens with a close connection to the UK and to those most directly affected by its laws.<sup>71</sup> The case therefore turned on the proportionality of the restriction and whether it struck a fair balance between the competing interests.<sup>72</sup> The Court held that the 15-year rule was not disproportionate, even in the face of Shindler's strong connection with the UK. They held that it would be a 'significant burden' for the State to assess every applicant's connection with the UK in order to determine their eligibility to vote.<sup>73</sup> This was despite the fact that while there is a large number of UK expatriates, only a small percentage of them actual vote.<sup>74</sup> The ECtHR upheld this general measure as one promoting legal certainty, and avoiding 'the problems of arbitrariness and inconsistency inherent in weighting interests on a case-by-case basis.'<sup>75</sup> The Court held:

<sup>60</sup> *Sitaropoulos and Giakoumopoulos* (n 37) para 69. See also Venice Commission Report (n 40) para 69; and other cases including *Doyle v the United Kingdom* (2007) ECHR 165 (Admissibility).

<sup>61</sup> *Sitaropoulos and Giakoumopoulos* (n 37) paras 48, 71.

<sup>62</sup> *ibid* para 25.

<sup>63</sup> *Shindler* (n 34).

<sup>64</sup> *ibid* para 89.

<sup>65</sup> *ibid* para 88.

<sup>66</sup> *id.*

<sup>67</sup> For example, Council of Europe, Parliament Assembly Resolution No 1459 'Abolition of Restrictions on the Right to Vote' (24 June 2005) para 11, in which the Parliamentary Assembly of the Council of Europe invites member States to grant electoral rights to all their citizens without imposing residency requirements; Council of Europe, Parliament Assembly Recommendation 1500 'Participation of Immigrants and Foreign Residents in Political Life in the Council of Europe Member States' (21 January 2001) para 4, which stresses that 'democratic legitimacy required equal participation by all groups of society in the political process'. See also *Shindler* (n 34) para 90.

<sup>68</sup> *Shindler* (n 34) para 92.

<sup>69</sup> *ibid* paras 93–95.

<sup>70</sup> *ibid* para 105.

<sup>71</sup> This was despite the fact that neither the applicant nor the government identified the legitimate aim, see *Shindler* (n 34) para 107. See also Ziegler, 'Voting Eligibility' (n 23) 174–175.

<sup>72</sup> *Shindler* (n 34) para 109.

<sup>73</sup> *ibid* para 116.

<sup>74</sup> *ibid* paras 24, 25.

<sup>75</sup> *ibid* para 116.

(...) that the law could not take account of every individual case but must lay down a general rule (...) while never discounting completely the possibility that in some circumstances the application of a general rule to an individual case could amount to a breach of the Convention.<sup>76</sup>

Based on the law in 2013, the ECtHR concluded that member States are permitted but not obliged to guarantee non-resident citizens unrestricted franchise.<sup>77</sup> The European Commission for Democracy through Law agreed with this assessment of the law based on 'the principles of the European electoral heritage'.<sup>78</sup> The Commission nonetheless suggested that due to European mobility, States should 'adopt a positive approach' to non-resident franchise in order to develop national and European citizenship.<sup>79</sup> The ECtHR did, however, observe a 'clear trend in favour' of non-resident franchise, with 44 States granting the right to vote to citizens abroad, and 35 not imposing any time limits thereon.<sup>80</sup> Despite this, the Court concluded that there was as yet no common European approach (consensus), although the issue should be kept under consideration due to the evolving 'attitudes in European democratic society'.<sup>81</sup> The Court identified key issues to be resolved, including whether to focus on promoting political participation in the State of citizenship or residence or both, as well as modalities such as practical issues and security.<sup>82</sup>

### **B. Prisoner Disenfranchisement under the ECHR**

Contrary to the above cases on franchise restrictions for non-residents where the ECtHR grants States a wide margin of appreciation, the Court is typically stricter regarding limitations on the voting rights of criminals. In such cases, the Court has held States in violation of Article 3 of Protocol No 1 for imposing blanket bans on prisoners from voting. The leading case is the Grand Chamber's 2005 decision in *Hirst v UK (No. 2)*.<sup>83</sup> In that case, the ECtHR held that an automatic blanket ban on all convicted prisoners from voting in UK elections violated Article 3. Despite the UK pursuing the legitimate aim of enhancing civic responsibility and respect for the rule of law by disenfranchising those who had breached society's basic rules,<sup>84</sup> the Court condemned the UK's legislation as a 'blunt instrument' indiscriminately stripping away the voting rights of a significant category of persons.<sup>85</sup> This was because the UK law applied automatically to prisoners irrespective of their individual circumstances, the length of their sentence, or the nature or gravity of their offence. The ECtHR held that such a 'general, automatic and indiscriminate restriction on a vitally important Convention right' goes beyond any acceptable margin of appreciation and violates Article 3.<sup>86</sup> The Court held that '[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates'.<sup>87</sup>

While the majority of the judges in the Grand Chamber found the UK in violation, five judges dissented. They were critical of the majority, arguing that the case should have been decided along the lines of the Court's other jurisprudence on voting restrictions (discussed above), with no violation found due to the wide margin of appreciation.<sup>88</sup> Many others, particularly in the UK, were also critical of the decision, which has been the subject of much debate and controversy.<sup>89</sup> As such, the issue did not end with the *Hirst (No. 2)* decision, as the UK delayed amending their impugned legislation and several subsequent cases were brought before the ECtHR.<sup>90</sup> Other similar cases were also brought before the Court against other member States. For example, in the 2010 case of *Frodl v Austria*, the ECtHR again found a violation of Article 3 for prisoner

<sup>76</sup> *ibid* para 105.

<sup>77</sup> *ibid* para 114.

<sup>78</sup> Venice Commission Report (n 40) para 99. Reiterated in *Shindler* (n 34) para 71.

<sup>79</sup> *id.*

<sup>80</sup> *Shindler* (n 34) para 115. See also Council of Europe, 'Congress of Local and Regional Authorities Electoral Lists and Voters Residing De Facto Abroad' (13 March 2015) CG/2015(28), 14–15.

<sup>81</sup> *id.*

<sup>82</sup> *ibid* para 114.

<sup>83</sup> *Hirst* (n 38). The HR Committee heard a similar case regarding restrictions on the franchise of prisoners and cited *Hirst* with approval. See HR Committee, *Yevdokimov and Rezanov v Russian Federation* (Comm No 1410/2005).

<sup>84</sup> *Hirst* (n 38) para 74. The same legitimate aim was found in *Scoppola v Italy (No. 3)* (2012) 56 EHRR 19, paras 90–92.

<sup>85</sup> *Hirst* (n 38) para 82.

<sup>86</sup> *id.*; *Sitaropoulos and Giakoumopoulos* (n 37) para 68; *Shindler* (n 34) para 103.

<sup>87</sup> *Hirst* (n 38) para 62; *Anchugov and Gladkov* (n 34) para 96.

<sup>88</sup> *Hirst* (n 38) Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens, paras 4 and 5.

<sup>89</sup> See eg Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 Human Rights Law Review 503.

<sup>90</sup> See eg *Greens and MT v the United Kingdom* (2010) ECHR 1826; *McHugh and Others v the United Kingdom* (2015) ECHR 155; *Millbank and Others v the United Kingdom* (2016) ECHR 595.

disenfranchisement.<sup>91</sup> *Frodl* was a prisoner serving a life sentence for murder who was denied the right to vote under Austrian legislation, which disenfranchised any prisoner serving a term of imprisonment for more than one year for an offence committed with intent. The ECtHR found Austria in violation of Article 3, despite that the provisions in question were more narrowly defined than in *Hirst (No. 2)*. The ECtHR found the provisions in violation as a judge had not made the ruling on disenfranchisement, and no link had been made between the offence committed and its relevance to voting rights.<sup>92</sup>

The issue of prisoner franchise was again before the ECtHR Grand Chamber in the 2012 case of *Scoppola (No. 3) v Italy*.<sup>93</sup> This case is noteworthy as the Grand Chamber reversed the Chamber's decision to hold no violation of Article 3 of Protocol No 1. The applicant *Scoppola* complained about being permanently disenfranchised following the imposition of a lifetime prison sentence. In the Chamber's decision, the Court found Italy in violation of Article 3 due to the automatic nature of the ban and its indiscriminate application.<sup>94</sup> However, the Grand Chamber reversed this decision, holding that the disenfranchisement was limited to certain crimes and was not a general, automatic, indiscriminate ban like in *Hirst (No 2)*.<sup>95</sup> While distinguishing the facts in the present case, the Court confirmed the general principles set out in *Hirst (No 2)* and:

(...) the fact that when disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it is not compatible with Article 3 (...).<sup>96</sup>

The Court reaffirmed these principles despite the fact that the UK intervened as a third party in *Scoppola*, arguing that *Hirst No 2* was wrong and inviting the Court to revisit its decision.<sup>97</sup> The Court declined to do so, and held that, if anything, a trend was discernible towards permitting fewer restrictions on prisoners' voting rights.<sup>98</sup> Furthermore, Judge Thór Björgvinsson dissented in support of the Chamber's finding of a violation in *Scoppola No 3*. His central reason for dissenting was that he found the position taken by the Grand Chamber as incompatible with the Court's findings in *Hirst*. He claimed that the Grand Chamber's decision in *Scoppola* 'stripped the *Hirst* judgment of all its bite as a landmark precedent for the protection of prisoners' voting rights in Europe.'<sup>99</sup> *Scoppola No 3* is therefore an exceptional decision compared with the Court's jurisprudence on prisoners' franchise, and is more in line with cases on non-resident voting, that enjoy a wide margin of appreciation.

Subsequently, there have been a number of other cases regarding prisoner voting in which the Court found a violation of Article 3 of Protocol No 1. For example, in *Söyler v Turkey* the Court found a violation of Article 3 due to an automatic and indiscriminate voting ban on the applicant who was convicted for unpaid cheques.<sup>100</sup> The Court noted that this minor offence could not warrant such a harsh measure on a vitally important Convention right. Another contentious case was the 2013 decision in *Anchugov and Gladkov v Russia*.<sup>101</sup> The applicants in that case argued that the Russian Constitution's blanket ban on their electoral rights while in prison was a *de facto* deprivation of their citizenship.<sup>102</sup> The ECtHR found a violation of Article 3 as the prisoners were disenfranchised regardless of the length of their sentences, the nature or gravity of their crimes, or their individual circumstances.<sup>103</sup> Here, the Court distinguished *Scoppola* and upheld *Hirst*, arguing that the Russian measures were disproportionate.<sup>104</sup> The Court reiterated that the margin of appreciation was wide, but not all embracing.<sup>105</sup> The most recent case is the 2016 decision in *Kulinski and Sabev v Bulgaria*, where the Court found a violation of Article 3 and reiterated its case law that automatic

<sup>91</sup> *Frodl v Austria* (2010) 52 EHRR 5.

<sup>92</sup> *ibid* paras 34, 35.

<sup>93</sup> *Scoppola* (n 84).

<sup>94</sup> *Scoppola v Italy (No. 3)* App No 126/05 (ECtHR, Chamber Judgment, 18 January 2011) paras 47–49.

<sup>95</sup> *Scoppola* (n 84) paras 106–108.

<sup>96</sup> *ibid* para 96.

<sup>97</sup> *ibid* paras 75–80. For analysis of the *Hirst* and *Scoppola* decisions, including the UK's intervention, see above Bates (n 89).

<sup>98</sup> *Scoppola* (n 84) paras 94–96.

<sup>99</sup> *ibid*, dissenting opinion of Judge Thór Björgvinsson, 25–29.

<sup>100</sup> *Söyler v Turkey* (2013) ECHR 821.

<sup>101</sup> *Anchugov and Gladkov* (n 34).

<sup>102</sup> *ibid* para 84.

<sup>103</sup> *ibid* paras 101–112.

<sup>104</sup> *ibid* paras 101–106.

<sup>105</sup> *ibid* para 103; *Hirst* (n 38) para 82; *Alajos Kiss* (n 34) para 42.

and indiscriminate bans are disproportionate to any legitimate aim.<sup>106</sup> Through numerous cases the Court demonstrated its consistency in finding a violation of Article 3 where States impose automatic and indiscriminate restrictions on prisoners' voting rights.

### ***C. Franchise Restrictions under the ECHR: Legitimate Aims and Disproportionate Interferences***

The ECtHR's jurisprudence on franchise leads to the conclusion that due to the fundamental importance of voting and democracy, any restrictions on franchise must be justified by a legitimate aim and proportionate. Decisions of the ECtHR demonstrate that the arbitrary denial of the right to vote is a violation of the Convention. The Court has extrapolated Article 3 of Protocol No 1 to imply the principle of equal treatment of all citizens in the exercise of their franchise.<sup>107</sup> When considering a limitation imposed by a State, the ECtHR will determine whether the restrictions imposed 'do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness', and that they are 'imposed in pursuit of a legitimate aim, and that the means employed are not disproportionate'.<sup>108</sup> Given its importance to democracy, '[t]he severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.'<sup>109</sup>

Despite the Venice Commission finding a 'favourable trend' for out-of-country voting,<sup>110</sup> due to the wide variety of systems in place, the ECtHR has held that States maintain a wide margin of appreciation regarding residency restrictions.<sup>111</sup> The Court has often reiterated that States enjoy a wide margin of appreciation regarding electoral rules given the 'numerous ways of organizing and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought'.<sup>112</sup> Therefore, the ECtHR held that 'any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another'.<sup>113</sup> While member States have considerable latitude, the rules for parliamentary elections have to be justified on reasonable and objective grounds.<sup>114</sup> As such, the margin of appreciation is not unlimited and it is for the Court to determine whether the requirements of Article 3 have been met. However, in making their assessment of franchise restrictions, a clear distinction can be made between the Court's jurisprudence on the disenfranchisement of prisoners compared to non-resident citizens.

As seen above, the Court has typically been critical of States' franchise restrictions on prisoners, while at the same time granting a wider margin of appreciation regarding restrictions on non-resident citizens. The Court has 'acknowledged that any general, automatic and indiscriminate departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates'.<sup>115</sup> Despite this finding, the Court has upheld blanket bans on non-resident citizens voting, yet struck down blanket bans on prisoners voting. In a similar case regarding automatic, blanket restriction on the franchise of those under partial guardianship (with intellectual or mental disabilities), the Court also found a violation of Article 3.<sup>116</sup> In this case the Court held that it could not uphold a blanket ban on the right to vote of all persons under protection regardless of their actual mental faculties.<sup>117</sup> If the Court considers such blanket bans to be a violation of the ECHR in these conditions, why not also when applied to non-resident citizens? There appears to be an inconsistency here in the Court's jurisprudence.

This is perhaps because prisoners continue to reside in the State where they cannot influence the government via franchise, whereas non-resident citizens are assumed to be less affected by the State and therefore it is more permissible to disenfranchise them. But at the same time, a legitimate aim for disenfranchising

<sup>106</sup> *Kulinski and Sabev v Bulgaria* (2016) ECHR 685.

<sup>107</sup> *Mathieu-Mohin and Clerfayt* (n 34) para 54.

<sup>108</sup> *Hilbe* (n 43); *Labita v Italy* (2000) ECHR 161, para 201; *Hirst* (n 38) para 62; *Anchugov and Gladkov* (n 34) para 96; *Sitaropoulos and Giakoumopoulos* (n 37) para 64; *Shindler* (n 34) paras 100–101.

<sup>109</sup> *Hirst* (n 38) para 71; *Anchugov and Gladkov* (n 34) para 97.

<sup>110</sup> Venice Commission Report (n 40) para 92; *Shindler* (n 34) para 71.

<sup>111</sup> *Melnychenko v Ukraine* (2004) ECHR 528, paras 53–59. The Council also noted that there are no uniform standards internationally on the franchise of citizens abroad, see Council of Europe, 'Electoral Lists' (n 80) 14.

<sup>112</sup> *Grosaru v Romania* (2010) 61 EHRR 1, para 43; *Hirst* (n 38) para 61.

<sup>113</sup> *Podkolzina v Latvia* (2002) ECHR 405, para 33.

<sup>114</sup> *Aziz v Cyprus* (2004) 41 EHRR 11, para 37.

<sup>115</sup> *Sitaropoulos and Giakoumopoulos* (n 37) para 68; *Sukhovetsky v Ukraine* (2007) 44 EHRR 57, para 52.

<sup>116</sup> See *Alajos Kiss* (n 34).

<sup>117</sup> *ibid* para 44.

prisoners (as part of their criminal punishment) is more readily discernible than for non-resident citizens. With the exception of circumstances regarding special elections (like perhaps the New Caledonia case above), in standard elections it is more difficult to identify a legitimate aim for denying franchise to non-resident citizens. Ziegler has criticised the Court's 'non-interventionist' approach regarding the franchise of non-resident citizens, arguing that the Court failed to provide guidelines on the circumstances in which non-resident citizens' disenfranchisement may be justified.<sup>118</sup> He notes that despite the fact that neither the Government nor the applicant identified a legitimate aim in *Shindler*, the Court found that the UK pursued the legitimate aim of restricting the franchise to citizens with a close connection to the State and to those most directly affected by its laws.<sup>119</sup> Ziegler criticises the Court here for its extremely low level of scrutiny and acceptance of this aim without further assessment.<sup>120</sup> Given the curtailment of a vital Convention right, there must be a compelling, legitimate aim justifying why a non-resident citizen's rights would be denied—beyond simple assumptions of disconnection or administrative burden.

Trócsányi is also critical of the Court's jurisprudence regarding franchise restrictions on non-resident citizens. He questions the Court's finding of no consensus, despite the fact that two-thirds of the Council of Europe member States (more than 30 States) allow non-resident citizens to vote regardless of how long they have been abroad.<sup>121</sup> As such, it is only a minority of States that restrict out-of-country voting. He deems this a 'significant consensus' and notes that in other cases the ECtHR has been more permissive regarding the existence or not of a consensus.<sup>122</sup> Furthermore, the Court itself has noted that such a consensus is not necessarily decisive, holding in *Hirst No 2* that 'even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue.'<sup>123</sup> Trócsányi argues that the Grand Chamber took political issues into consideration in *Sitaropoulos*, but that it nonetheless illustrates the European legal development toward the recognition of out-of-country voting.<sup>124</sup> This recognition is in line with the Court's jurisprudence that no restriction on electoral rights should have the effect of excluding groups of persons from participating in the political life of the State.<sup>125</sup>

### III. Justifying Non-Resident Citizen Disenfranchisement: Proportionate, Legitimate Aims?

From the above discussion, it is clear that some ECHR member States limit the right of non-resident citizens to vote in varying circumstances. In order for such restrictions on voting rights to be permissible under the ECHR, they must pursue a legitimate aim and be proportionate. States, the Court, and scholarship have proffered various reasons to justify restrictions on non-resident citizens' franchise. These reasons include: (1) the reduced impact of State elections on non-resident citizens and their weakened link with the State; (2) the practical difficulties for States in providing for voting from abroad; and (3) irresponsible voting by non-resident citizens. States must balance these concerns against the interference with the citizen's right to vote, and ensure that any restrictions are proportionate to the aim pursued. This third section addresses these arguments for restricting the franchise of non-resident citizens and considers whether they should be considered legitimate aims and the proportionality of measures under the ECHR.

#### A. Non-Residents' Reduced Connection or Stake in the State of Citizenship

As demonstrated by the above analysis, much of the scholarship and jurisprudence on non-resident citizen franchise focuses on the non-resident's diminished stake in their State of citizenship.<sup>126</sup> In *Hilbe*, the Court held that as non-resident citizens are not directly affected by the acts of the political bodies so elected, the legislature may have a legitimate concern to limit the influence of citizens abroad on issues that primarily affect residents.<sup>127</sup> Equally in *Matthews v UK*, the Court highlighted opposition to non-resident citizen fran-

<sup>118</sup> Ziegler, 'Voting Eligibility' (n 23) 172–173.

<sup>119</sup> *Shindler* (n 34) para 107.

<sup>120</sup> Ziegler, 'Voting Eligibility' (n 23) 174–175.

<sup>121</sup> László Trócsányi, 'The Regulation of External Voting at National and International Level' (2014) 16 *Minority Studies* 13, 21.

<sup>122</sup> *id.* Much has been written on the Court's approach to determining a European consensus.

<sup>123</sup> *Hirst* (n 38) para 81.

<sup>124</sup> Trócsányi (n 121) 23.

<sup>125</sup> *Tănase v Moldova* App No 7/08 (ECtHR, Grand Chamber, 27 April 2010) paras 158 and 178.

<sup>126</sup> Carter (n 32) 661–662. This is despite the fact that in 1990, the German Federal Constitutional Court explicitly rejected the principle of affected interests as the basis for a claim to political equality and franchise. See 83 *Bundesverfassungsgericht* 37 (50) and Article 20(2) of the German Basic Law; Jo Shaw, 'E.U. Citizenship and Political Rights in an Evolving European Union' (2007) 75 *Fordham Law Review* 2549, 2576–2577, and [98].

<sup>127</sup> See *Hilbe* (n 43); *Py* (n 38) para 51.

chise on the basis of direct affect, noting that non-residents ‘have weakened the link between themselves and the jurisdiction’.<sup>128</sup> In *Hirst v UK (No. 2)*, the Court noted that franchise eligibility may be geared to criteria, such as residence, ‘to identify those with sufficiently continuous or close links to, or a stake in, the country concerned.’<sup>129</sup> Scholars have noted the vagueness of such expressions and the varying degrees of intensity regarding a non-resident’s connectedness or how their interests are affected by their State of citizenship.<sup>130</sup>

Scholars have contended that considering the interests of non-resident citizens facilitates an assessment of a political community’s membership that strikes the right balance between denouncing strictly territorial conceptions and ‘conceding that political borders should not be eliminated entirely’.<sup>131</sup> Admittedly, non-resident citizens are affected by the laws of their State of citizenship in different ways to residents –or are more affected by some laws and less by others. However, it is incorrect to claim that such an affect is not direct or at times also insubstantial. This is particularly the case today, with widespread migration trends, persistent financial ties, ongoing military obligations, globalisation, and technological developments facilitating communication and transportation. Both Shindler and the applicants in *Sitaropoulos* claimed to retain strong connections with the UK and Greece respectively. The ‘Brexit’ referendum in the UK on the question of EU membership serves as a powerful example of the impact on citizens abroad of political decisions taken at home.<sup>132</sup> Despite the fact that the outcome of the referendum clearly and potentially deeply affected them, UK citizens who had resided abroad for more than 15 years were ineligible to vote. This sub-section considers in turn some issues regarding a non-resident’s connection to or interest/stake in their State of citizenship.

### 1. Financial Ties to the State of Citizenship

Some scholars have justified disenfranchising non-resident citizens on the basis that non-residents are not (usually) liable to pay taxes in their State of citizenship.<sup>133</sup> In this regard, a twist can be put on the old American adage to read ‘no representation without taxation’!<sup>134</sup> This argument presents however a double standard, as the suggestion to disenfranchise resident citizens who do not pay tax would never be accepted. Furthermore, this justification is reminiscent of the historical position in which only propertied males could vote, to the exclusion of women, the landless, and slaves.<sup>135</sup> General Comment No 25 notes that it is unreasonable to restrict the right to vote on certain grounds, including property requirements.<sup>136</sup> Rubio-Marin claims that ‘[b]eing economically productive is not a required civic virtue in our democracies’, noting that the vote of an impoverished artist counts as much as that of a rich entrepreneur.<sup>137</sup> She emphatically reminds us that ‘[p]olitical membership (...) is not for sale, nor should it be.’<sup>138</sup>

In addition to these more philosophical arguments, the case has also been made that often non-resident citizens do retain financial ties to their State of citizenship, including tax liabilities. Even accepting that non-resident citizens may have less extensive interests than those of resident citizens –as territorial absence will typically reduce the impact of governmental power<sup>139</sup>– many non-resident citizens own property, have pensions, operate businesses, or have other investments in their State of citizenship. Many remain liable for taxes, notwithstanding their non-residence, and many contribute (sometimes very large sums of) money by way of remittances.<sup>140</sup> In addition, numerous non-residents return to their State of citizenship to live, and

<sup>128</sup> *Matthews* (n 47) para 64.

<sup>129</sup> *Hirst* (n 38) para 62.

<sup>130</sup> Lopez-Guerra (n 23) 223, citing Iris M Young, *Inclusion and Democracy* (OUP 2000) and Ian Shapiro, ‘Democratic Justice and Multicultural Recognition’ in P. Kelly (ed), *Multiculturalism Reconsidered* (Polity Press 2002).

<sup>131</sup> Carter (n 32) 662, citing Rainer Baubock, ‘Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting’ (2007) 75 *Fordham Law Review* 2422.

<sup>132</sup> See eg Allan Tatham, ‘The Legitimacy of Discriminatory Disenfranchisement? The Impact of the Rules on the Right to Vote in the Breman/Brexit Referendum’ (2016) 8 *Perspectives on Federalism* 1.

<sup>133</sup> Although some States try to tax their citizens abroad, this is the exception. For example, the USA requires all citizens, including non-residents, to submit tax forms yearly. Rubio-Marin (n 6) 132.

<sup>134</sup> Mercurio and Williams (n 11) 21.

<sup>135</sup> Fitzgerald notes: ‘Whatever its tactical merits as an argument, the remittance justification for emigrant citizenship is based on illiberal reasoning.’ Fitzgerald (n 14) 113.

<sup>136</sup> HR Committee, ‘General Comment No 25’ (n 28) para 10.

<sup>137</sup> Rubio-Marin (n 6) 133.

<sup>138</sup> *ibid* 144. See also in agreement Lopez-Guerra (n 23) 230.

<sup>139</sup> Spiro (n 23) 231.

<sup>140</sup> Rubio-Marin (n 6) 131; Barry (n 7) 28–30; Lopez-Guerra (n 23) 229.

therefore have an important interest in the government and laws there.<sup>141</sup> In the face of these interests, it is questionable whether it can be considered a legitimate aim to remove such non-resident citizens from the electorate on the basis of a diminished connection to the State. Furthermore, disenfranchising all non-resident citizens on the basis of a few who have no (or a greatly diminished) interest in the State of citizenship is arguably a disproportionate measure and an unjustifiable interference with their human rights.

## 2. Impact of Globalisation and Technological Developments

Linking the franchise to State territory may have made sense in the past, but makes less sense today. Today, the world is more connected generally via globalisation and people are much more mobile. Through media such as the internet, satellite and digital television and radio, and affordable air travel, one's physical location can have little bearing on their access to (political) information.<sup>142</sup> For example, a citizen living abroad may still email their members in parliament and sign public petitions online regarding issues pertinent to them, despite living thousands of miles away. Via the internet they can watch parliamentary debates and press conferences in real time, and engage in dialogue via online platforms. Furthermore, electoral campaigns are now primarily conducted via online social networks, which have no territorial limitation.<sup>143</sup> Therefore, non-resident citizens can more easily remain in touch and up-to-date with domestic issues and make informed decisions at the polling booth.<sup>144</sup> Furthermore, many resident citizens may not be as politically engaged as those abroad, yet there has been no suggestion to disenfranchise them. It is submitted that globalisation and technological developments have rendered such territorial based restrictions on franchise less compelling.

It is also important to highlight that the discussion usually assumes that a person has left their State of citizenship and settled in another State, potentially taking up citizenship there. For example this was the case in *Shindler* who had retired to Italy with his Italian wife. However, non-resident citizens may not take up permanent residence in one other State, but may move between various States over numerous years. This form of migration is also becoming more common, opposed to the old-fashioned emigrant who left their home State to resettle permanently in one other country often far, far away. Even if the person leaves their State of citizenship to reside (semi) permanently in other State, the development of ties in the State of residency does not necessarily mean the loss of connections with the State of citizenship. Also in the case of dual citizenship, a person may retain significant interests in the State where they do not reside. Furthermore, even if a person is franchised in their State of residence, this does not necessarily address their interests in the State of citizenship.

In addition, due to increasing globalisation and international interdependence, what happens in one State may not only impact their citizens, but also those in other States. Improved technology and globalisation mean that non-resident citizens are more directly, and more likely to be directly affected by decisions in their State of citizenship. With the number of international and bilateral agreements, as well as the globalised nature of politics and economics, it is more difficult to argue that someone in Italy is not affected by legislative decisions made in the UK. In a world connected by common concerns, such as free and fair trade, the environment and terrorism, it is important to recognise the non-resident citizen as part of the national political community.<sup>145</sup> It is noteworthy to recall that States may retain personal jurisdiction over their citizens abroad, and that some domestic laws, including criminal law, apply extra-territorially.<sup>146</sup> There is a body of scholarship devoted to the democratic principle that anyone who is subject to or affected by a law/decision should have a say in its making.<sup>147</sup>

Given the level of contact, connection, and involvement that non-residents may now have with their State of citizenship, and for decisions taken in that State to affect them even when abroad, the aim of diminishing their input in parliament appears of questionable legitimacy. Once again, disenfranchising a whole category of non-resident citizens based on those who may have reduced connections with the State appears a disproportionate measure.

<sup>141</sup> Spiro (n 23) 219.

<sup>142</sup> *ibid* 220. See also the applicant's arguments in *Shindler* (n 34).

<sup>143</sup> *Sitaropoulos and Giakoumopoulos* (n 37) para 61, referring to third party intervention in the case.

<sup>144</sup> Mercurio and Williams (n 11) 23–24.

<sup>145</sup> *id.* Regarding non-resident citizens who have never lived in their country of citizenship, Spiro argues that 'there should be no categorical bar to voting among those who are born in other countries but who may still have substantial interests in the state of which they are external citizens'. Spiro (n 23) 229.

<sup>146</sup> Barry (n 7) 27; Beckman (n 6) 255, 259. See eg the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

<sup>147</sup> There is much debate in the scholarship. See eg Robert Dahl, *Democracy and its Critics* (YUP 1989); Lopez-Guerra (n 23); Beckman (n 6); Goodin (n 20).

## **B. Irresponsible Voting by Non-Resident Citizens**

This issue of irresponsible voting has mainly been raised in the scholarship, however, it can potentially be seen as implicit in the concern articulated above that non-resident citizens are less impacted by elections in their State of citizenship. Shaw suggests that the expatriate voter may be a relatively disconnected and ill-informed voter, and thus 'hardly one who adds to the democratic quality of the electoral process'.<sup>148</sup> Some contend that as non-resident citizens are uninformed of the issues in an election, they will not exercise their franchise in a conscientious manner.<sup>149</sup> Others argue that individuals who will not be subjected to the decisions of the group should be excluded from their making.<sup>150</sup> This concern can be seen in the ECtHR's judgments in *Hilbe* and *Py*, and is connected to the issue of irresponsible voting. This argument is based on concerns that non-resident citizens may lack the information and responsibility to exercise their vote wisely, since they will not be directly affected by their vote's consequences.<sup>151</sup> Permitting non-resident citizens to vote therefore inserts a measure of inequality between the residents who must face the consequences of the State's political decisions and those non-residents who may be less affected.<sup>152</sup>

These are, of course, generalisations about non-resident citizens, and while undoubtedly true in some instances, they will not be true in all. It is worthwhile to recall that in addition to inevitable irresponsible and ill-informed non-resident citizens, there are also numerous such *resident* voters. The suggestion that irresponsible and/or ill-informed resident voters be disenfranchised would not be entertained,<sup>153</sup> and it is proposed the same logic should apply to non-resident citizens. Furthermore, non-residents with little interest in or connection to the State 'will probably not vote anyway', especially given the efforts needed to enrol and request ballots within certain time periods.<sup>154</sup> As such, it appears unlikely that the floodgates will be open to millions of irresponsible citizens seeking to vote from abroad.<sup>155</sup> However, there are some special circumstances where States do have relatively large numbers of non-resident citizens. Ireland presents perhaps the best example, as there are almost as many non-resident Irish citizens as resident citizens.<sup>156</sup> In this situation, preventing non-resident voters from decisively influencing or 'upsetting' home state politics may be a legitimate aim of disenfranchisement.<sup>157</sup> However, the measure of disenfranchising this whole category may be viewed as disproportionate given the alternatives available. For example, a representational system like in France, Croatia, and Portugal could be implemented, whereby non-resident citizens are grouped together to elect specific members of parliament to represent citizens abroad.<sup>158</sup> In this way, the distinct interests of non-resident citizens can be represented in the legislature without diluting/detracting from the interests of resident citizens.

## **C. Practical Difficulties for the State in Providing for Voting from Abroad**

Residency restrictions on franchise may also be based on the (perceived) difficulties and costs associated with out-of-State electoral processes.<sup>159</sup> This has been reiterated by the ECtHR in its jurisprudence above, particularly in the case of *Sitaropoulos*. For example, in that case the Court found that it was not necessary for Greece to facilitate citizens voting from abroad, and that the applicants could travel back to Greece in

<sup>148</sup> Shaw (n 126) 2565.

<sup>149</sup> Spiro (n 23) 218–220.

<sup>150</sup> Lopez-Guerra (n 23) 225.

<sup>151</sup> Collyer and Vathi (n 12) 6.

<sup>152</sup> Fitzgerald (n 14) 113.

<sup>153</sup> HR Committee, 'General Comment No 25' (n 28) para 11, also prohibits restrictions to franchise based on education. The General Comment obliges States to take effective measures to ensure that all persons entitled to vote are able to do so, which includes providing voter education and registration campaigns to ensure the effective exercise of voting rights by an informed community.

<sup>154</sup> Venice Commission Report (n 40) paras 72, 77. See also *Shindler* (n 34) paras 24, 25.

<sup>155</sup> Aims of preventing the 'floodgate' of non-resident citizens from voting are unconvincing. Anecdotal evidence suggests that turnout among eligible non-resident voters has generally been low. A 1999 Council of Europe report concluded that 'in countries which allow their expatriates to vote, the actual participation rate is so low as to have little effect on the outcome'. Spiro (n 23) 215; Mercurio and Williams (n 11) 5.

<sup>156</sup> Spiro (n 23) 228. See also Lopez-Guerra (n 23), who uses Mexico, the Philippines and Cook Islands as examples of States with large numbers of citizens abroad.

<sup>157</sup> This is indeed argued by Lopez-Guerra (n 23), contending that permanent expatriates who are no longer subject to the laws of their homeland should not be able to vote and decide the laws of that State. He differentiates between a citizen being 'affected by' and 'governed by' the State's law, asserting that only those subject to the law should have a role in its decision-making process. See Beckman (n 6) 260 for a critique of Lopez-Guerra, and generally regarding the various conceptions of being 'subject' to the law as it applies to non-resident citizens.

<sup>158</sup> The Venice Commission also recommended that it may be a solution for States with large numbers of citizens abroad to adopt this style of representation, see Venice Commission Report (n 40) paras 64, 70, 83, 95. See also Lopez-Guerra (n 23) 233–234.

<sup>159</sup> Carter (n 32) 660.

order to vote.<sup>160</sup> Trócsányi notes that in the face of modern technology, the Court's assessment that the applicants travel back to Greece to vote 'might seem a little bit anachronistic'.<sup>161</sup> In contrast to the Court's jurisprudence, it is submitted that in most contexts, the perceived practical challenges can be overcome and do not ultimately justify residency-based restrictions on franchise.<sup>162</sup> This relates to challenges regarding facilitating secure voting from abroad, as well as potentially identifying those eligible non-resident voters.

Firstly, practical difficulties and costs in facilitating voting from abroad have been identified as a reason to disenfranchise non-resident citizens. These can certainly be legitimate concerns, depending on the number of voters abroad, their locations, and the State's available resources. Moves to facilitate out-of-country voting by mail (and now increasingly online) can address many logistical concerns and prevent the need for citizens to return home to vote. As an alternative, the Venice Commission has recommended holding voting in embassies and consulates.<sup>163</sup> The Commission argues that voting in embassies and consulates can overcome practical difficulties, including organisational difficulties (such as drawing up rolls or providing election equipment), as well as difficulties in securing the integrity of the election process conducted abroad.<sup>164</sup> Additionally, UN HR Committee General Comment No. 25 requires States to take measures to ensure that people who are enfranchised are able to vote.<sup>165</sup> Absent extenuating circumstances, it is submitted that the ECtHR should not find franchise restrictions based on logistical difficulties a legitimate aim or proportional measure.

Secondly, as noted above, the UK argued in *Shindler* that the alternative to the general rule disenfranchising those abroad for 15 or more years, was to restrict only certain cases, perhaps based on actual ties with the UK.<sup>166</sup> The UK argued that this alternative system would be very difficult to administer fairly in practice,<sup>167</sup> and the ECtHR agreed, claiming it would be a 'significant burden' for the State to assess every non-resident citizen to determine their eligibility to vote.<sup>168</sup> The Court has reiterated that the law cannot necessarily take account of every case, but must set down a general rule, notwithstanding the fact that in some individual cases the general rule may mean a breach of the ECHR.<sup>169</sup> This ruling is in contrast to the Court's jurisprudence on prisoner disenfranchisement, where they specifically hold that States must take individualised decisions reflecting upon the individual circumstance of the convicted person.<sup>170</sup> If it is possible regarding prisoners, why is it not for emigrants? One can envisage an administrative process—potentially run by the embassies—whereby non-resident citizens apply for absentee ballots and establish therein their eligibility to vote. Given the importance of the right to vote and its relationship with democracy, this appears to be a reasonable balancing of both the interests of States and individuals.

#### **D. Complete Disenfranchisement in both States of Residency and Citizenship**

Finally, another issue often raised regarding franchise restrictions on non-resident citizens is that it may have the effect of completely disenfranchising the individual from local and national elections in both their State of citizenship as well as residency. The ECtHR noted in *Aziz v Cyprus*<sup>171</sup> and above in *Matthews v UK*, where it found violations of Article 3, that the applicants in those cases were completely precluded from expressing their political opinion due to restrictions on franchise. This will often be the case for citizens residing abroad who do not have dual citizenship and therefore cannot participate in local or national elections in their State of residence. Given the increase in migration today, it is possible that this situation of complete disenfranchisement may be the case for a large and growing number of emigrants. In such circumstances, it is relevant to question whether the State of citizenship's refusal to allow voting from abroad curtails the 'very essence' of the right to vote and renders it ineffective?

The fact that residency restrictions can have the effect of completely disenfranchising citizens has also been raised at the EU level. While the EU provides resident non-citizens with democratic participation rights

<sup>160</sup> *Sitaropoulos and Giakoumopoulos* (n 37).

<sup>161</sup> Trócsányi (n 121) 23.

<sup>162</sup> See in agreement Spiro (n 23) 217.

<sup>163</sup> Venice Commission Report (n 40) para 75.

<sup>164</sup> *id.*

<sup>165</sup> States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. HR Committee, 'General Comment No 25' (n 28) paras 1 and 11.

<sup>166</sup> *Shindler* (n 34) para 95.

<sup>167</sup> *id.*

<sup>168</sup> *ibid* para 116.

<sup>169</sup> *ibid* para 105. See also *Py* (n 38) para 51.

<sup>170</sup> See eg *Hirst* (n 38) and *Scoppola* (n 84).

<sup>171</sup> In finding a violation of Article 3, the ECtHR found that the applicant was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he is a national and where he has always lived. *Aziz v Cyprus* (n 114) para 29.

in local and European elections on the basis of non-discrimination, it does not extend the franchise to regional/national elections.<sup>172</sup> Shaw notes the irony that while the EU exists in part to encourage mobility between the member States, it simultaneously creates a democratic and 'citizenship deficit'.<sup>173</sup> This is because persons who exercise their EU mobility rights are excluded from participating in national/regional elections in their State of residence unless they are eligible for and do take on citizenship of the that State.<sup>174</sup> As almost every State excludes resident non-citizens from national suffrage,<sup>175</sup> it would appear compelling for the ECtHR to find States that disenfranchise non-resident citizens—and thus disenfranchising them completely—to be in violation of Article 3. The Venice Commission noted this outcome, and urged States 'to find a solution more in keeping with the principle of proportionality by placing certain restrictions on voting rights of citizens residing aboard'.<sup>176</sup>

### ***E. Justifications for Disenfranchising Non-Resident Citizens: Legitimate and Proportionate?***

While the Court's jurisprudence and scholarship have offered several reasons to justify limitations on the voting rights of non-resident citizens, the above analysis indicates that few of these reasons remain compelling today. For example, technology has closed the gap between the non-resident citizen and their State of citizenship, allowing varied and frequent communication and travel, as well as facilitating voting from abroad. Furthermore, globalisation increases and sustains connections between people and places, weakening the claim that non-residents are not impacted by the political decisions of their State of citizenship. We no longer recognise emigrants today as the person cutting ties and travelling from their home with a one-way ticket to a far-away land. Around the world today we are interconnected, up-to-date, and interacting in ways we could not have anticipated even a short decade ago. In fact, the Venice Commission suggests that it is positive to allow non-resident citizens to vote as it guarantees them equality, maintains ties with them, and 'boosts their feeling of belonging to a nation'.<sup>177</sup>

Furthermore, for franchise restrictions on non-resident citizens to be permissible under the ECHR, they must pursue a legitimate aim and be proportionate. It is submitted that while there may be legitimate aims to be pursued, such as restricting the influence of a large diaspora, blanket disenfranchisement of non-resident citizens can be seen as a disproportionate measure. Other more proportional measures can be implemented that address the legitimate concern of the State without wholesale disenfranchisement of certain groups. States must balance their concerns and interests against the interference with the citizen's right to vote—a crucially important democratic human right. While some cases like *Py* may continue to present circumstances warranting limitations on non-resident citizens due to the special nature of the referendum, absent such conditions blanket disenfranchisement can be viewed as a disproportionate response. Arguably, *Shindler's* case and that of *Sitaropoulos* can be distinguished from *Py* and, as in normal electoral cycles, fail to justify disenfranchising connected, interested, and affected citizens who also happen to be non-residents.

The ECtHR's above jurisprudence on Article 3, particularly in relation to prisoners, indicates that restrictions on franchise must not be done in a general or automatic way, as blanket restrictions that apply indiscriminately violate the ECHR.<sup>178</sup> It is on the basis of this jurisprudence that automatic disenfranchisement of non-resident citizens should be held to violate Article 3. Such a law is a 'blunt instrument' that fails to consider the individual circumstances of the non-resident citizen and the impact of disenfranchisement upon them.<sup>179</sup> Individualised assessment would tailor the limitations to adequately distinguish those non-resident voters maintaining an interest and stake in the State of citizenship, from those who have emigrated permanently, cut ties, or warrant restriction for another reason. The third party intervener in *Sitaropoulos* argued for objective criterion by which to assess whether or not expats still had meaningful links to their State of citizenship or not, and therefore whether they could vote.<sup>180</sup> Of note, in cases including *Hilbe* and

<sup>172</sup> See TEEC, art 19 (now TFEU, art 22); Shaw (n 126) 2563.

<sup>173</sup> Shaw (n 126) 2553.

<sup>174</sup> *id.* Not all resident non-citizens will be eligible for citizenship in their State of residence, and some may choose not to. Rubio-Marín has argued that the State of residence is primarily responsible for the inclusion of its resident population, and as such the State of citizenship should arguably not bear the obligation of allowing emigrants and their descendants to vote from abroad. Rubio-Marín (n 6) 130–131.

<sup>175</sup> *ibid* 125–126.

<sup>176</sup> Venice Commission Report (n 40) para 71.

<sup>177</sup> *ibid* paras 65–66.

<sup>178</sup> See eg *Greens and MT* (n 90); *Scoppola* (n 84); *Hirst* (n 38); *Frodl* (n 91); *Alajos Kiss* (n 34).

<sup>179</sup> See *Hirst* (n 38) para 82.

<sup>180</sup> *Sitaropoulos and Giakoumopoulos* (n 37) para 62, referring to third party intervention in the case.

*Sitaropoulos*, the ECtHR submitted that the law cannot take account of every individual case and must lay down a general rule. However, the Court takes the opposite view in the felony disenfranchisement cases where it specifically requires the consideration of individual circumstances.<sup>181</sup> It is unclear why the Court takes such contrary positions on the issue of blanket restrictions on the same right. This is especially so in the face of the growing consensus permitting non-resident voting rights.

Consensus among ECHR member States is compelling for the ECtHR when determining a State's margin of appreciation on a given topic. Although some States still limit the franchise of non-resident citizens, the trend is toward allowing and facilitating greater electoral participation.<sup>182</sup> Blanket disenfranchisement of non-resident citizens appears to be increasingly rare.<sup>183</sup> Furthermore, the trend appears to be unidirectional towards inclusive franchise, with no State having moved to restrict the franchise once extended to non-resident citizens.<sup>184</sup> While previously finding that there was no uniform State practice on electoral participation by expatriate citizens,<sup>185</sup> the ECtHR noted that the great majority of States in 2010 permitted non-resident citizens to vote in parliamentary elections.<sup>186</sup> This would appear to indicate consensus around granting non-resident citizens franchise, therefore limiting the scope of the margin of appreciation enjoyed by States.<sup>187</sup> In *Sitaropoulos*, the Court reiterated that regard must be had to the changing conditions in the member States, and that it must respond to any 'emerging consensus as to the aims to be achieved'.<sup>188</sup> On the basis of these developments, plus changed circumstances due to technology and globalisation, it is open to the Court to revise and refine its jurisprudence on non-resident citizen franchise.

#### IV. Conclusions: Inclusive Democracy and the Future of European Franchise

The question of who should or should not have the right to vote is complex, and contemporary migration is presenting challenges for modern democracies, political communities, and citizenship models.<sup>189</sup> While Barry argues that a broader conception of citizenship is needed,<sup>190</sup> it is clear that citizen franchise as determined by residency also needs interrogation. This article has argued that under human rights law, non-resident citizens have the right to vote and to determine the political destiny of their State of citizenship. Due to developments in transportation and communication, citizens can easily stay in touch and are more affected even from abroad, rendering arguments of distance and impact less compelling as legitimate reasons for disenfranchisement. Furthermore, differentiation of citizens' franchise on the basis of residency can create a second, lower class, of citizen, and on occasion, even the complete disenfranchisement of an individual. The UK's 'Brexit' referendum on EU membership is a potent illustration of the impact on citizens abroad of political decisions taken at home.

This article critically assessed the limitations on the voting rights of non-resident citizens under Article 3 of Protocol No 1 ECHR, concluding that the current permissible limitations based on residence do not strike the right balance to protect human rights and democracy. The analysis indicated that some of the aims pursued by the franchise restrictions based on residency are not legitimate today, or that where a legitimate aim is pursued, blanket restrictions can be seen as disproportionate measures and unjustified interferences with an individual's human rights. According to its own case law, the ECtHR has held that voting is a right

<sup>181</sup> *Hilbe* (n 43); *Py* (n 38) para 51; *Hirst* (n 38); *Alajos Kiss* (n 34).

<sup>182</sup> The European Commission for Democracy through Law (the Venice Commission) has noted the growing recognition, since the 1980s, of external voting rights throughout the world and in particular in numerous new or emerging democracies in Europe. *Sitaropoulos and Giakoumopoulos* (n 37) para 45.

<sup>183</sup> *Spiro* (n 23) 211.

<sup>184</sup> *ibid* 217.

<sup>185</sup> *Melnychenko* (n 111) para 30. This case dealt with residence requirements regarding standing for election.

<sup>186</sup> In particular, 26 countries make provision, without restriction as to the persons concerned, for the right to vote from abroad. Three Member States impose certain restrictions on their nationals' right to vote from abroad, and four make no provision for their non-resident nationals to vote in parliamentary elections. *Sitaropoulos and Others* (n 59) 19.

<sup>187</sup> Ziegler has urged the ECtHR to 'refrain from deferring to national Parliaments on questions of voting eligibility'. He argues that:

(...) for those who advocate the ECtHR assuming a subsidiary supervisory role that pays due respect to divergent national practices, rigorous scrutiny of the franchise is essential in order to ensure that national policies represent the opinion of the people and are reached democratically. It is asserted that, even if one endorses the justifiability and utility of the margin of appreciation doctrine, the doctrine is premised on a functioning democracy as a valid rationale for an international court to give discretion.

Ziegler, *Voting Eligibility*' (n 23) 183–185.

<sup>188</sup> *Sitaropoulos and Others* (n 59) para 44.

<sup>189</sup> Rubio-Marín (n 6) 145.

<sup>190</sup> Barry (n 7) 58.

not a privilege, and that in ‘the twenty-first century, the presumption in a democratic State must be in favour of inclusion.’<sup>191</sup> Franchise can be seen as a societal recognition of human dignity, and an entitlement to participate in communal decision-making.<sup>192</sup> This article proposes that franchise is the goal, and that laws should err on the side of inclusion rather than exclusion for the furtherance of democracy. This view is also supported by the trend identified in European law and policy in support of franchise generally, as well as specifically for non-resident citizens.

The Council of Europe has regularly called for the enfranchisement of emigrants, advocating an ‘unrestricted right to vote’,<sup>193</sup> and inviting States to ‘grant electoral rights to all their citizens (nationals), without imposing residency requirements’.<sup>194</sup> The Council noted that electoral rights should be given ‘to the highest possible number of citizens’, and that based on ‘the importance of the right to vote in a democratic society, the member countries (...) should enable their citizens living abroad to vote during national elections’.<sup>195</sup> Support for extending voting rights in national elections to EU citizens, either in the State where they reside or in their State of origin, has also come from the European Parliament.<sup>196</sup> EU member States have also extended voting rights at the local level to non-nationals.<sup>197</sup> As such, there is a notable policy in Europe for States to expand, rather than restrict, franchise, which is also reflected internationally. Already in 2007, Collyer and Vathi concluded that extra-territorial voting is the norm and that residence has ‘lost its status as a universal requirement of the eligibility to vote’.<sup>198</sup> Blais, Massicotte and Yoshinaka concluded that ‘stronger’ democracies are less inclined to disfranchise non-resident citizens.<sup>199</sup>

As the Council of Europe has noted, tens of millions of Europeans are residing outside their States of origin and migration within Europe is constantly increasing.<sup>200</sup> Given that emigration is a growing phenomenon, the need to address related issues becomes all the more pressing.<sup>201</sup> Therefore, it is likely that the issue of disenfranchisement based on residency is likely to come before the ECtHR again. The Court is invited to continue to consider such cases in light of these changing circumstances. That the ECHR is a living instrument to be interpreted in the light of present-day conditions and the ideas prevailing in democratic States is firmly rooted in the Court’s case law.<sup>202</sup> The Council of Europe noted that electoral rights should ‘evolve to follow the progress of modern societies towards ever inclusive democracy’.<sup>203</sup> Previous restrictions on franchise were accepted,<sup>204</sup> which are now viewed as unacceptable in today’s world. Given the trajectory of globalisation, migration, human rights and democracy, it is likely that franchise restrictions on residency will share the same fate. Until then, it is clear that ‘the long journey of the extension of universal suffrage has not ended yet’.<sup>205</sup>

## Acknowledgements

I thank Mistale Taylor, the anonymous reviewers, and the Board of UJIEL for their comments on and improvements to the article. All errors remain mine.

<sup>191</sup> See *Hirst* (n 38) para 59; *Sitaropoulos and Giakoumopoulos* (n 37) para 67; *Shindler* (n 34) para 103.

<sup>192</sup> Ziegler, *Voting Eligibility* (n 23) 179–180.

<sup>193</sup> Council of Europe, Parliamentary Assembly Recommendation 1410 (1999) ‘Links between Europeans Living Abroad and Their Countries of Origin’ (26 May 1999).

<sup>194</sup> Council of Europe, Res 1459 (n 67) para 11(b).

<sup>195</sup> *ibid* para 7. See also Council of Europe, Parliamentary Assembly Resolution 1897 (2012) ‘Ensuring Greater Democracy in Elections’ (3 October 2012) para 8.1.12.

<sup>196</sup> Shaw (n 126) 2561 [56] and [57], citing the *Report of the Committee on Civil Liberties, Justice and Home Affairs on the Commission’s Fourth Report on Citizenship of the Union* (1 May 2001 – 30 April 2004), A6-0411/2005.

<sup>197</sup> Since 1993 and as a result of the Maastricht Treaty coming into force, local franchise has been introduced in EU countries, but only for EU citizens residing in other member states. See Rubio-Marín (n 6) 125, and [30] and [31]; Shaw (n 126) 2550–2551.

<sup>198</sup> Collyer and Vathi (n 12) 7.

<sup>199</sup> Andre Blais, Louis Massicotte and Antoine Yoshinaka, ‘Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws’ (2001) 20 *Electoral Studies* 41, 57.

<sup>200</sup> Council of Europe, Rec 1410 (n 193) para 2.

<sup>201</sup> Christina Binder, European Commission for Democracy through Law (Venice Commission), ‘Comments on Electoral Lists and Voters Residing De Facto Abroad’ (27 January 2015) Study No 748/2013 (CDL-EL (2015003) para 44.

<sup>202</sup> See, *inter alia*, *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, para 71; *Matthews* (n 47) para 39; *Bayatyan v Armenia* (2011) 54 EHRR 15, para 102.

<sup>203</sup> Council of Europe, Res 1459 (n 67) para 1.

<sup>204</sup> For a discussion on previous justifications for such restrictions see Rubio-Marín (n 6) 132.

<sup>205</sup> Trócsányi (n 121) 14.

## Competing Interests

The author serves as Senior Counsel at the Public International Law & Policy Group. The article, however, was written in a personal capacity and does not necessarily reflect the position of PILPG.

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**How to cite this article:** Julie Fraser, 'Inclusive Democracy: Franchise Limitations on Non-Resident Citizens as an Unjust Restriction of Rights under the European Convention on Human Rights' (2017) 33(84) Utrecht Journal of International and European Law pp. 23-43, DOI: <https://doi.org/10.5334/ujiel.367>

**Submitted:** 04 November 2016    **Accepted:** 08 March 2017    **Published:** 12 April 2017

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 Utrecht Journal of International and European Law is a peer-reviewed open access journal published by Ubiquity Press.

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