



The right to vote and participate in local elections: citizen's right or human right?

Ciara Smyth,¹
NUI, Galway.

NUI, Galway Faculty of Law.
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¹ Ciara Smyth, Lecturer in Law, National University of Ireland, Galway, Ireland;
Researcher and Guest Lecturer, Institute of Immigration Law, University of Leiden, The Netherlands.
Address: Law Faculty, National University of Ireland, Galway, Ireland.
Email: ciara.m.smyth@nuigalway.ie
Tel: 00 353 91 493362; Fax: 00 353 91 494506

Abstract

The right to vote and participate in elections has traditionally been considered a right reserved for citizens. The major human rights instruments reflect this position and contain express or implied personal limitations to the political rights they establish. However, like any other branch of law, human rights law is susceptible to progressive development. In this age of migration, it would seem to make sense for political, social and other pragmatic reasons to extend the franchise, at least at the local level, to non-citizen residents. The question is whether human rights law has progressively developed to reflect this common sense approach. This article examines the major international and regional human rights instruments and the jurisprudence of their courts or monitoring bodies with a view to establishing whether there is an emerging norm of customary international law towards granting non-citizens a right to vote and participate in local elections. The article also explores the role human rights law can play when States, on their own initiative and absent any specific human rights obligation to do so, grant local electoral rights to non-citizens. In particular, the article assesses how the non-discrimination or equality before the law norm can shape the scope and content of any such rights granted.

1. Introduction

There are various normative political arguments for extending limited voting rights to certain non-citizens, and in particular extending the right to vote and stand for election at the local government level to long-term residents. The principal argument is a liberal democratic one. Government is based on the consent of the governed and yet non-citizens constitute part of the governed without having given their consent. Classically, the idea of consent hinges on the idea of citizenship itself. Citizenship, in turn, is bound up in concepts of nationality and the nation-State. But as immigration becomes (if it was not already) a permanent feature of industrialised countries, and nations no longer coincide with States (if they ever did), territoriality is arguably supplementing nationality as the barometer of citizenship rights. Immigrants may not be citizens, *stricto sensu*, but their length of residence should entitle them to some equivalent rights.ⁱ A related argument is based on reciprocity. Long-term residents have the same duties as citizens at the local level. They pay taxes and contribute to the prosperity of the local community and to its social and cultural life generally. They have a legitimate aspiration to have a voice in local politics. *Quid pro quo*. Other arguments are more consequential, in the sense that extension of the local franchise to non-citizens is good, not primarily as an end in itself, but because it produces some other sort of benefit, or obviates some other dis-benefit. Political participation at the local level promotes integration of immigrants into the community. Integration fosters harmony and dissipates sectarian identity-based conflict. The lack of integration can be a source of social tension and discord.ⁱⁱ

Legal arguments for extending the right to participate in local politics to non-citizens are less plentiful.ⁱⁱⁱ The basic argument is that human rights have rendered the concept of citizenship redundant.^{iv} Whereas constitutional law might reserve civil liberties to citizens, human rights law is universal, and applies to everyone by virtue of their personhood rather than their citizenship. Human rights law now lays down minimum standards in relation to all the major areas of civil and political, economic, social and cultural life. Everyone within the jurisdiction of a State is entitled to these rights, irrespective of citizenship. However, a major stumbling block for proponents of this view lies in the fact that the right to vote is the one area of human rights law to be expressly reserved for citizens. And while the general universality of human rights may be invoked as a rhetorical argument for challenging the exclusion of non-citizens from the franchise, empirically, the stumbling block remains. This leads detractors to assert that human rights law, historically and still, is premised on citizenship.^v At the theoretical level it is clear that everyone has rights, but when it comes to respecting, protecting and fulfilling these rights, which invariably must be done at the national level, States tend to only want to do it for their own citizens. Thus citizenship has been described as the seminal right, or the "right to have rights".^{vi} According to advocates of this view, the exclusion of non-citizens from voting rights illustrates this basic truth.

The reality is probably more complex than either of these - admittedly caricaturised - positions suggest, and at the risk of forging an artificial consensus on the matter, it is submitted that the two positions are nearer to each other than might at first be imagined. The universality of human rights does not mean that citizens and non-citizens enjoy exactly

the same amplitude or measure of rights. Obviously, some rights are absolute and therefore enjoyed on a basis of complete equality by everyone. However, other rights are subject to limitation and derogation and so may apply differently to different groups of people. Thus, while discrimination on the basis of citizenship is generally prohibited, distinctions that serve legitimate State aims, pursuant to measures that are proportionately linked to a person's migration status, are permitted. For example, the prohibition of arbitrary arrest and detention does not preclude the administrative detention of non-citizens pending admission to the territory or deportation. Similarly, some rights are explicitly or implicitly reserved for citizens, such as the right to vote and the right of return to one's own country, while others are explicitly or implicitly reserved for non-citizens, such as freedom from collective expulsion or the right to an interpreter in criminal proceedings.

However, this differential enjoyment of rights is not an 'all or nothing' matter. Sometimes the human rights of non-citizens will be amplified, sometimes they will be diminished, but not always, or not always to the same extent. Even rights that are explicitly or implicitly reserved for citizens are subject to progressive development and can become more inclusive. A brief digression will illustrate this point.

The right of return, as set out in Article 12(4) of the International Covenant on Civil and Political Rights, provides that "no one shall be arbitrarily deprived of the right to enter his own country." Traditionally, the right bearer was considered to be a citizen of the country he sought to enter. However, the Human Rights Committee has developed the concept of 'his own country' to include long-term residents. Following the logic of a line of dissenting

opinions in a number of previous cases,^{vii} General Comment 27 provides that the scope of the term 'his own country' is broader than the formal concept of nationality, in that it recognises the *de facto* special relationship of a person to that country.^{viii} General Comment 27 casts new precedential value on that line of dissenting opinions, which are based on the idea that:

...there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.^{ix}

and that

...the notion of 'own country' does not fall within established legal categories such as nationality or temporary or permanent resident status; it is a term that refers not to the State but to a geographical place whose content and boundaries are less precise, and hence, in the absence of any reference to a specific legal concept, a case-by-case appreciation of the term required.^x

As an aside, it can be noted that the right to vote, as set out in the Universal Declaration on Human Rights, is phrased in similar terms.^{xi} However, the central point here is that where human rights law reserves (implicitly or explicitly) a particular right to a particular group, the boundaries of the group are flexible, not rigid. In the words of Oscar Schachter, "the Covenant on Political Rights does not grant aliens rights to political participation. On the

other hand, that does not mean that they should be denied such rights. It simply has not gone that far."^{xii} One might add "yet".

The question that this paper seeks to answer is whether there is a trend in human rights law towards granting non-citizens voting rights at the local level. The methodology is to draw up an inventory of relevant human rights instruments, jurisprudence and other initiatives at the universal and regional levels, and assess whether they point to the existence of such a trend. The focus, at the regional level, will be on the Council of Europe, although other regional initiatives will be canvassed where relevant.^{xiii} Even if a nascent trend emerges, a second question arises: is there a role for human rights in regulating State practice when States, in the exercise of their sovereignty and as a matter of domestic law, grant voting rights to non-citizens?

2. Does human rights law evince a trend towards granting non-citizens local electoral rights?

2.1 - The universal level

2.1.1 - The International Covenant on Civil and Political Rights (1966)

While Article 21 of the Universal Declaration of Human Rights appears to establish a right of universal suffrage, a more restrictive formulation was used when the right was

transformed into a legally binding entitlement in the International Covenant on Civil and Political Rights (ICCPR).

The general rule in relation to the rights contained in the ICCPR, as laid down in Article 2.1 of the covenant, is that they apply to all individuals within the territory and subject to the jurisdiction of a State Party. Discrimination in relation to the enjoyment of the rights on a broad range of grounds, including 'other status', which has been interpreted to cover nationality/citizenship, is prohibited.^{xiv} However, the striking exception to this general rule is in the area of voting rights. Article 25 limits a range of 'democracy' rights (to take part in the conduct of public affairs, to vote and be elected at genuine periodic elections, to have access to public service) to citizens. The rationale for this exception appears to have been based on a tacit assumption by the drafters that voting rights are citizens' rights.^{xv} There appears to be no discussion in the *travaux préparatoires* of the justification for this distinction or, on the other hand, to the omission of any similar distinction in relation to associated rights such as freedom of expression, assembly and association.^{xvi}

Given the explicit wording of Article 25, there is no legal basis for an individual communication challenging the restriction of voting rights to citizens, and therefore no opportunity for the Human Rights Committee to develop jurisprudence that might limit the restriction. Nevertheless, in its General Comment No. 25 on Article 25, the Human Rights Committee appears to bring non-citizens within the purview of Article 25:

...States reports should indicate whether any groups, such as permanent residents, enjoy these [Article 25] rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions..^{xvii}

In the same comment, the HRC states that any distinction between voting rights of birthright citizens and those of citizens who have naturalised may raise issues of discrimination contrary to Article 2.1:

...No distinctions are permitted between citizens in the enjoyment of these [Article 25] rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalisation may raise questions of compatibility with Article 25..^{xviii}

For this reason States Parties are asked to outline the legal provisions which define citizenship in the context of the rights protected by Article 25. The raising of naturalisation concerns in the context of voting rights indicates that the Committee is keen to include as many people as possible within the purview of the article. This suggests that the Committee does not fully accept the logic of excluding non-citizens from voting rights.

2.1.2 - Convention on the Elimination of Racial Discrimination (1966)

The list of substantive rights set out in Article 5 of the Convention on the Elimination of Racial Discrimination include:

political rights, in particular the rights to participate in elections - to vote and stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

However, in what has been described as an "unfortunate" ambiguity,^{xix} Article 1(2) states that the convention shall not apply to "distinctions, exclusions, restrictions or preferences" between citizens and non-citizens. Thus the Convention on the Elimination of Racial Discrimination is much more far-reaching than the ICCPR, in that it excludes discrimination between citizens and non-citizens *simpliciter*, not just in the area of voting rights. This leaves the Committee on the Elimination of Racial Discrimination in the unenviable position of trying to interpret Article 1(2), *pace* its explicit wording, in the light of other, less exclusionary human rights obligations. Thus in its General Recommendation 30, the Committee states:

Article 5 of the Convention incorporates the obligation of States Parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of those rights, such as the right to participate in elections, to vote and stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States Parties are under

an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights *to the extent recognised under international law*.^{xx}

Since putative voting rights of non-citizens are not recognised in international law, the Committee has little option but to reinforce the exclusion. Essentially, there is a central contradiction at the heart of the Convention i.e. elimination of racial discrimination, except in the area of citizenship, which itself is a source of contemporary racial discrimination recognised by the Committee.^{xxi}

2.1.3 - Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (1985)

This Declaration, which has been described as "rather compromised and limited",^{xxii} was an attempt to codify the rights of non-nationals. Although the declaration does mention, subject to a strict limitation clause, various political rights,^{xxiii} it stops short of advocating a right to vote or to participate in government or public service. The declaration, which, significantly, took ten years of preparatory work and five years for the General Assembly to adopt, was never transposed into a legally binding convention. It has had little influence on State practice.

2.1.4 - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

The Convention on Migrant Workers (CMW) is the first international convention to address the dilemma in which migrants find themselves in terms of the exercise of their right to vote: often denied a diasporic right to vote by the country of citizenship on the grounds of non-residence and excluded from the franchise in the country of residence on the grounds of non-citizenship. Part IV of the convention, which is restricted to migrant workers and members of their families who are documented or in a regular situation, provides a limited set of voting rights in the country of origin and the country of residence. Though not the focus of this paper, the grant of voting rights to emigrants is interesting because it constitutes a conceptual step away from the traditional State-centred view of sovereignty, according to which there is complete coincidence between the persons subject to the territorial jurisdiction of a State and the citizens of that State. Granting voting rights to citizens abroad, while perhaps motivated by different considerations than granting voting rights to non-citizens in their country of residence,^{xxiv} undermines the traditional concept of sovereignty that prevents the latter from voting.^{xxv} Unfortunately, the wording of the provisions that deal with emigrant and immigrant voting rights is rather compromised.

In relation to the country of origin, paragraph 1 of Article 41 asserts the right of migrant workers and their families "to participate in public affairs of their State of origin and to vote and be elected at elections of that State", while paragraph 2 provides that the country of origin shall "as appropriate and in accordance with their national legislation, facilitate the exercise of these rights". Clearly, there is a gap between the unqualified nature of the diasporic right to vote and the contingent nature of the State's obligation, which is merely to facilitate the exercise of the right if it is considered (by the State) to be appropriate and if it

is provided for in domestic legislation. This nuanced wording is likely to circumvent the usual rule of international law that the absence of domestic legislation is not a permissible justification for the breach of an international obligation.

In relation to the country of residence, Article 42(2) provides that migrants should be consulted on or participate in decisions concerning the life and administration of local communities. There is no mention of the right to vote. Again, the wording is qualified: the State's obligation is one of facilitation in accordance with its national legislation. In the absence of express wording, and in the light of Article 42(3) (analysis of which follows) it seems unlikely that this provision extends to a formal right of participation in local politics.

Article 42(3) provides:

Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

This circular statement is more a description of some (limited) contemporary State practice, than an assertion of a right. While the act of assuming an international human rights obligation may be conceived of as an exercise of sovereignty,^{xxvi} once a State has assumed the obligation, it cedes sovereignty in the sense that it no longer has discretion over whether to grant or deny the right. Therefore, the subjugation of the supposed right to the exercise of State sovereignty in Article 42(3) actually makes no legal sense, unless the intention is to

underscore that human rights has not penetrated this area of State sovereignty. It remains to be seen what the monitoring committee will make of this provision.

2.1.5 - The UN Special Rapporteur on the Human Rights of Migrants

In 1999, the Commission on Human Rights established the mandate of the Special Rapporteur on the Human Rights of Migrants for an initial three years. The mandate was extended for another three years by the Commission in 2002, and was further similarly extended in 2005. The Commission requested the Special Rapporteur, *inter alia*, to "examine ways and means to overcome obstacles existing to the full and effective protection of the human rights of migrants". The Special Rapporteur, on the basis of country visits and individual communications, has submitted seven annual reports,^{xxvii} which tend to deal with the more acute dimensions of the human rights situation of migrants.^{xxviii} Given the rapporteur's focus on gross violations of human rights and the fact that the mandate does not extend to the progressive development of the human rights of migrants, the area of voting rights has not been and is unlikely to be dealt with.

2.1.6 - Conclusion on universal human rights norms

The picture is rather discouraging from a universal human rights perspective. Traditionally, international human rights law has drawn a distinction between citizens and non-citizens in the area of voting rights. Although the monitoring committees of the major human rights instruments are now grappling with the distinction, there is little they can do in the face of

the explicit wording of the treaties. Latterly, human rights law has begun to narrow the distinction between citizens and non-citizens in the area of voting rights. This can be seen in the Convention on Migrant Workers. However, the highly qualified nature of the political rights in the Convention, coupled with the fact that the Convention only applies to migrant workers and their families (and not other categories of long-term legally resident migrants) and finally the fact that it has not been ratified by countries of net immigration,^{xxix} limits the potential of the Convention to develop the law in the area of voting rights of non-citizens. The conclusion must be that, at the universal level, there is no emerging norm of customary international law to the effect that non-citizens have the right to vote and participate in local elections.

2.2 - The regional level

2.2.1 - The European Convention on Human Rights, Protocol 3, Article 1

The European Convention on Human Rights did not originally provide for a right to vote or to participate in government. This right was added in 1952 in Protocol 1, Article 3 (P1-3), which provides:

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

Although worded in terms of a State's obligation, this article has been held to involve an individual right, embracing both the right to vote and the right to stand for election to the legislature..^{xxx} The legislature has been held to include not only the national parliament, but also the European Parliament^{xxxi} and state legislatures within a federation..^{xxxii} Whether it applies to local government elections depends on the constitutional structure of the State in question and the legislative remit of its local authorities..^{xxxiii}

Of immediate interest is the significance of use of the words 'the people' in lieu of 'citizens'. Could the article conceivably apply to non-citizens? There is no definitive answer to this question, as no cases under P1-3 have been taken by non-citizens challenging their exclusion from the franchise. But it seems highly unlikely that the article applies *in toto* to non-citizens. From the point of view of the drafting history, it is inconceivable that in 1952 when the Protocol was adopted, States parties were prepared to extend the local and national franchise to non-citizens. This is underscored by three issues that are dealt with later in this paper viz. 1) a harmonious interpretation of the convention requires P1-3 to be read in the light of other relevant provisions, such as Article 16 ECHR which reveals a very suspicious (and suspect) approach to non-citizens; 2) the tentative nature of today's movement towards granting local election rights to non-citizens; and 3) the need, on the part of the Council of Europe, to draft a separate convention granting local election rights to non-citizens..^{xxxiv} However, it is submitted that non-citizens may have some *qualified* rights under P1-3. This can be inferred from general principles the court has laid down in relation to P1-3, and to the court's analysis in a recent case involving the voting rights of prisoners.

The EctHR has repeatedly expressed the view that P1-3 implies recognition of universal suffrage.^{xxxv} Universal suffrage means in principle that all human beings have the right to vote and to stand for election. Of course the right is not absolute and may be subject to certain conditions and limitations, such as an age threshold, citizenship, a residence requirement or deprivation of the right, for example, in the case of prisoners.^{xxxvi} In its P1-3 jurisprudence, the court has stated that:

Although those [P1-3] rights are central to democracy and the rule of law, they are not absolute and may be subject to limitations. The Contracting States have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of [P1-3] have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.^{xxxvii}

In the recent case of *Hirst v UK (No. 2)*,^{xxxviii} which involved the deprivation of a convicted prisoner's right to vote, the Court modified Commission jurisprudence on prisoner voting rights. Previously, the Commission had found that depriving convicted prisoners of the right to vote did not violate the Convention.^{xxxix} Consistent with this position, the Court (somewhat reluctantly) accepted that the ban pursued a legitimate aim, namely to confer an additional punishment and give an incentive to citizen-like conduct. It also noted the divergences existing in law and practice within States on the issue, and reiterated its long-

held view that the margin of appreciation is wider when there is extensive variation in State practice. However, the Court linked the width of the margin of appreciation with the extent of domestic parliamentary and judicial scrutiny of the matter, observing that:

[T]here is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote...[and] it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of ... current human rights standards for maintaining such a general restriction...[and] the [domestic] court did not ...undertake any assessment of proportionality of the measure itself.^{x1}

In essence, by failing to carry out a proportionality test itself, the respondent State forfeited its margin of appreciation. In conducting its own proportionality test, the Strasbourg Court considered that the blanket ban on prisoner voting was disproportionate to the legitimate aim pursued. It was indiscriminate in that it applied to all sentenced prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence. For this reason the Court found a violation of P1-3.

Applying these principles to non-citizens, we can deduce that non-citizens do have a right of universal suffrage under P1-3, but that States may impose a citizenship criterion on the exercise of the right. In assessing the legality of the criterion, States will be afforded a wide margin of appreciation, especially because there is extensive variation in State

practice in the area non-citizen voting rights. Nevertheless the margin of appreciation may not justify an automatic statutory bar on voting by non-citizens, if this reflects historical tradition only and is not supported by a contemporary and full debate on the issue. The restriction of voting right to citizens must be in pursuance of a legitimate aim. In the light of the permanent nature of much contemporary immigration, an argument that non-citizens should be excluded in the *interests* of democracy might be difficult to sustain. The method of exclusion must be proportionate to the aim. A blanket restriction of the right to vote/stand for election, applied to all non-citizens, regardless of the duration of their residence, and to all manner of elections (local, national, European Parliament) could offend against the proportionality test.

2.2.2 - European Convention on Human Rights, Article 16

In addition to the right of universal suffrage, the European Convention on Human Rights establishes the corollary rights of freedom of expression (Article 10), assembly and association (Article 11) and the right of non-discrimination in relation to the enjoyment of these rights (Article 14). However, in a wide-ranging limitation clause, Article 16 provides:

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

This article, which dates from a time when it was regarded as legitimate to restrict the political activities of aliens generally in the interests of external relations, is widely regarded as antiquated.^{xli} Later international human rights instruments do not include a similar provision.^{xlii} Moreover, it is largely superfluous, given the scope for limitation that already exists in Articles 10(2) and 11(2).^{xliii} No doubt for these reasons, Article 16 has only once, unsuccessfully, been invoked.

In *Piermont v France*,^{xliv} the applicant was a citizen of one EU member State in the territory of another (albeit prior to the establishment of EU citizenship in the EC Treaty), and furthermore was a MEP acting in that capacity. The respondent State sought to justify restrictions on her freedom of expression on the basis of Article 16. The court held that the applicant's possession of the nationality of a member State of the EU and her status as a MEP meant that she was not an alien within the meaning of Article 16. The judgment is not particularly satisfactory because, whereas the court managed to limit the scope of Article 16, it did so in a way that avoided dealing with the substantive and problematic content of the article. As a result, Article 16 still poses a threat to the political activity of aliens who are not EU citizens. The dissenting opinion, however, gives some guidance on how the article should be interpreted. Finding the applicant to be an alien within the ambit of Article 16 because she was not a citizen of the respondent State under its domestic law, the dissenting opinion went on to hold:

It does not, however, follow that, even if Article 16 is relevant, any restriction at all, at the unfettered discretion of the host State, may justifiably be imposed on the political activity of an alien without the contravention of Article 10.^{xlv}

It advocated that the object and purpose of Article 16 be examined in the context of the limitation clause in Article 10(2), and in particular when the proportionality of the measure is being assessed. Under this approach, Article 16 becomes less a free standing limitation clause and more an element to be considered in the existing limitation clause in Article 10(2).

The Parliamentary Assembly has recommended that Article 16 be removed from the Convention.^{xlvi}

2.2.3 - Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level (1992)

This Convention both develops existing rights of non-citizens and provides for previously unarticulated rights. The substantive rights provisions are set out in a "template of incremental steps".^{xlvii} Chapter A deals with the "classical" rights of freedom of expression, assembly and association and the involvement of foreign residents in procedures for the consultation of the local population. This is the minimum obligation, since it deals with rights that already exist under Articles 10 and 11 of the ECHR. Chapter B concerns the creation of consultative bodies or other institutional arrangements to

represent foreign residents at local level. Chapter C covers the right of foreign residents to vote and stand as candidates in local authority elections, subject to a lawful and habitual residence requirement of 5 years, though States may opt for a shorter period of residence. In addition, States may opt to withhold the right to stand for election, if the view is taken that a candidate for elections need to be more fully integrated into the local community than a simple elector and therefore needs to have resided there for a longer period. Chapters B and C are optional, in the sense that a State party can reserve the right not to apply the provisions of either or both chapters. According to the Explanatory Report, the intention behind the incremental nature of the obligation is to facilitate "the gradual acceptance of the different chapters of the convention in line with the internal developments within each State".^{xlviii}

There are a number of positive aspects to the Convention. Firstly, Article 9(2) and (3) links the right of non-citizens to freedom of expression, and freedom of assembly and association in Chapter A with limitation clauses that repeat *verbatim* the wording of the limitation clauses in Articles 10(2) and 11(2) of the ECHR.^{xlix} In effect, this is an assertion that the proper legal basis for limiting the freedom of expression and freedom of assembly and association of foreign residents is the regular grounds for limitation that attach to these rights (and, implicitly, not Article 16 ECHR).

Secondly, and rather unusually, Article 9(4) provides that "[a]ny measure taken in accordance with the present article must be notified to the Secretary General of the Council of Europe, who shall inform the other Parties." This means that any use of the limitation

clauses in 9(2) and (3) must be notified to the Secretary General. There is no similar requirement in the ECHR. Under the ECHR, States apply the limitation clauses, subject to judicial review. However, this system appears to require States to report limitation measures even in the absence of judicial review. This may have been a drafting oversight. Article 9 also contains a standard derogation clause in paragraph 1 relating to states of emergency. A typical feature of derogation clauses in human rights treaties is a notification requirement. The intention may have been to link the notification requirement with the derogation clause.¹ In any event and for whatever reason, States parties must adhere to a rigorous notification requirement every time they limit the freedom of expression, assembly or association of foreign residents.

Thirdly, Chapter C asserts a right to vote and stand for local authority elections for legal and habitual foreign residents - the first unambiguous assertion of such a right in a human rights treaty. Although it was originally envisaged that the Parties would grant one another's nationals local electoral rights on the basis of reciprocity, this idea was abandoned in favour of a universal formulation. Thus there is no distinction between 2nd country (i.e. signatory States of the Council of Europe) and 3rd country nationals. According to the Explanatory Report, the rationale for avoiding this distinction is that:

The considerations adduced in the preamble concerning the participation of foreign residents in the life of the local community and the fact that they generally have the same duties as citizens at the local level apply to foreign residents of all

nationalities. To create a discrimination between those foreign nationals who enjoy voting rights and those who do not, would be politically problematical.^{li}

This reasoning is interesting in view of the distinction introduced at the EU level between EU citizens and 3rd country nationals for the purpose of voting in member state local elections.

In addition to the positive dimensions of the Convention, there are a number of noteworthy negative aspects. Firstly, the convention is a highly qualified document. Attention has already been drawn to the template of incremental steps introduced in Article 1, paragraph 1, under which a signatory State may opt not to apply Chapter B or C or both. Article 17 provides that this is the only permissible reservation.^{lii} However, on closer inspection, States can reserve the right of foreign residents to stand for local authority elections under Article 6.2 and can enter a geographical reservation under Article 15, limiting the categories of territorial authorities to which the Convention applies.^{liii}

Secondly, the provisions relating to implementation and monitoring are rather weak. Article 10 requires States parties to inform the Secretary General of any legislative provision or other measure adopted which relates to its commitments under the Convention. Thus States are expected to be pro-active in alerting the Secretary General of any positive measures adopted. However, if States fail to adopt measures at the national level, this omission does not have to be reported. The convention does not make provision for a specific body responsible for supervising its implementation, other than the Secretary

General, whose supervisory capacity is likely to be limited. The convention does not envisage any powers of enforcement. In this regard, it is to be regretted that the convention was not formulated as a protocol to the ECHR, thereby bringing its provisions within the purview of the court.^{liv}

Finally, at the time of writing, only eight out of forty six member States of the Council of Europe have ratified the convention.^{lv} This has led one commentator to conclude that "ratification is too limited to permit any general conclusions regarding an emerging norm against traditional preferences for nationals in the enjoyment of political rights."^{lvi}

It is worth noting that in 2001, the Parliamentary Assembly of the Council of Europe adopted a recommendation, *inter alia*, calling on the governments of member states to grant the right to vote and stand in local elections to all migrants legally established for a minimum period of three years.^{lvii} One of the factors motivating the recommendation was that "non-European Union citizens living as foreigners in a European Union country are granted fewer rights than European Union citizens in the same situation".^{lviii}

2.2.4 - OSCE Lund Recommendations on National Minorities

Occasionally in the literature, reference is made to the Lund Recommendations on National Minorities as providing support for the principles in the Convention on the Political Participation of Foreigners in Local Life.^{lix} The Lund Recommendations provide guidance on facilitating political participation of national minorities at local and national, as well as

formal and informal levels. Indeed there are some similarities between the situation of national minorities and resident foreigners. Both groups may face pressure to assimilate, both may be subject to racial discrimination, xenophobia and intolerance, both may have ties with two States (one or more co-ethnic States in the case of national minorities), and both are the beneficiaries of forth generation 'group' rights. However, despite these similarities, there remains an essential difference between national minorities and resident foreigners: the former tend to be citizens^{lx} and the latter not. Therefore, while imaginative approaches to facilitating the political participation of national minorities may be of inspiration at the stage of fostering *greater* political participation by immigrants, this is putting the cart before the horse. The *right* of immigrants to participate is not yet clearly established, and the instruments relating to national minorities are of no use here.

2.2.5 - Conclusion on regional human rights norms

Developments at the regional level provide more cause for optimism than at the universal level. Although the ECHR is a product of its time, as can be seen in the suspicious approach to foreigners evident in Article 16, the jurisprudence of the court helps to modernise (sometimes by minimising, sometimes by maximising the provisions of) the convention. The negative potential of Article 16 has been minimised. The positive potential of Article 3 of Protocol 1 has yet to be realised, and an appropriate test case is awaited. It is submitted that this article might well become a source of limited voting rights for non-citizens. The Convention on the Participation of Foreigners in Public Life at Local Level is the first human rights instrument to expressly establish local electoral rights for

non-residents. However, the qualified nature of the legal obligation and the limited number of ratifications weaken the convention's norm-creating potential as either treaty law or evidence of customary international law. Nonetheless, when considered cumulatively, the various developments at Council of Europe level may signal the emergence of an embryonic customary regional norm in favour of granting local electoral rights to non-citizens. At present, the status of that norm is likely to be no more than 'soft law'.

3. The potential of autonomous non-discrimination provisions when States grant a right to vote

While a trend towards granting non-citizens local electoral rights as a matter of human rights law is discernible at the regional, if not the international level, it is premature to assert the existence of a human right (for everyone) to vote and participate in local politics. In the absence of such a right, the *accessory* non-discrimination provisions (i.e. found in Article 2(1) ICCPR^{lxi} and 14 ECHR^{lxii}) cannot come into play. In other words non-citizens cannot argue they are being discriminated against in the enjoyment of their right to vote in or contest local elections on the grounds of nationality or any other ground, if they don't have this right in the first place. However, once governments, as a matter of domestic legislative fiat or of EU law, decide to grant local electoral rights to non-citizens or certain categories of non-citizens, such rights are subject to the *autonomous* non-discrimination provisions in human rights law i.e. the right to equality before the law (i.e. found in Art 26 ICCPR^{lxiii} and Protocol 12 ECHR,^{lxiv} which has just come into force).

Equality before the law, if raised in the context of non-citizen voting rights, could help to clarify the parameters and content of those rights. Where a State grants a certain category of non-citizens local electoral rights, excluded non-citizens could mount a challenge on the basis of equality before the law. This applies to exclusions based on nationality (e.g. EU citizenship) as well as exclusions based on non-fulfilment of qualifying criteria (e.g. length of residence). Where a State grants non-citizens local electoral rights on the basis of equality with nationals, non-citizens could conceivably argue that formal equality is not enough, and that due to issues such as difficulties in integrating, racism and xenophobia, positive measures are necessitated to ensure substantive equality. Where a State assumes an international legal obligation to grant voting rights to non-citizens and fails, as is so often the case, to give effect to that obligation in domestic law, equality before the law could potentially be used to bridge the gap. While these specific issues have not yet been litigated, guidance on how they might be resolved can be sought from the general principles on non-discrimination that the EctHR, in its Article 14 caselaw,^{lxv} and the HRC have developed over the years.

3.1 - Distinctions between non-citizens on grounds such as nationality, race and ethnicity

Imagine (it isn't hard to do) that a State grants citizens of one country, but not another, local electoral rights. This is a distinction on the grounds of nationality. Other factors, if they coincide with nationality, such as race or religion, could indirectly be at issue. Is this likely to be conceived of as discrimination? The first point to note is that the EctHR will only

consider a distinction to amount to discrimination if there is no objective and reasonable justification for the difference in treatment. This was first established in the *Belgian Linguistic Case* in 1968:

[T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification...assessed in relation to the aim and effects of the measure...A different of treatment...must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.^{lxvi}

A distinction between EU citizens and 3rd country nationals has been regarded by the court as having an objective and reasonable justification.^{lxvii} Similarly, a distinction between nationals of a country with which the State has some sort of connection (e.g. special trade, historical or co-ethnic relations) is unlikely to be considered as discriminatory.^{lxviii}

Whether the existence of an international agreement that confers preferential treatment to nationals of States parties on the basis of reciprocity will *per se* constitute an objective and reasonable justification is questionable. This issue has not come before the EctHR but the Human Rights Committee stated in the *Karakurt* case that the question cannot be answered in the abstract and every case must be judged on its own facts.^{lxix} This confirms the position articulated by the Human Rights Committee in General Comment 15, which provides that "[i]n general, the rights set forth in the Covenant [e.g. the autonomous non-discrimination provision in Article 26] apply to everyone, irrespective of reciprocity, and

irrespective of his or her nationality or statelessness."^{lxx} In *Karakurt*, the committee held that there was no reasonable grounds to justify the exclusion of non-EU nationals from being elected to work councils in firms over a certain size, whose function was to provide a forum for the expression of employees' interests.

Where there is no special relationship between countries that might justify preferential treatment by one, of nationals of the other, the EctHR is likely to be sceptical of distinctions based on nationality or race. This is because these grounds, notwithstanding that nationality is not listed in Article 14 (or Protocol 12, Article 1), are considered by the court as 'suspect' due to their typical or historical association with discrimination.^{lxxi} As a result, these grounds will be harder to justify than other, more innocuous grounds, and will require "very weighty reasons" or "particularly serious reasons" in order to escape being branded discriminatory.^{lxxii}

3.2 - Distinctions between non-citizens on the basis of length of residence or other criteria

State practice in countries that do provide local electoral right to non-citizens shows that a minimum habitual residence requirement is the norm. It is conceivable that States might also insist on other quasi-citizenship qualifications, such as passing a language or other 'integration' test. What guidance might the EctHR provide on whether these requirements are legitimate or discriminatory? The first point to note is that these grounds do not fall within the 'suspect' category of grounds, with the result that the court is more likely to agree

that they are justified. The second relevant point is that the court, in determining whether the distinction is justified or not, is likely to look for a common European standard on the issue. If many other European countries make a similar distinction or there are wide variations in State practice, the court is less likely to hold that it is discriminatory. Thus in *Petrovic v Austria* the court held:

[Member States] enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances...one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.^{lxxiii}

It may be rather too hopeful to adduce that in seeking a common European standard, the court would take guidance from the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level, which establishes a habitual residence requirement of five years, or even Recommendation 1500, which calls for a residence period of three years. Given the limited number of ratifications of the Convention, or the minimal impact which Recommendation 1500 has had on State practice, the court may be more likely to conclude that there is no common European standard. Nevertheless, residence or other requirements that are arbitrary or excessive are likely to be struck down.

3.3 - Substantive equality and positive discrimination

In countries where local electoral rights are granted to citizens, as well as countries with a large population of naturalised immigrants who are thereby entitled to vote at local and national level, there is a substantial body of research that indicates that immigrants may face particular barriers in exercising the franchise or running for local election.^{lxxiv} In such situations, informal participatory methods may need to be devised as a stepping stone to formal participation. This appears to be envisaged by the Convention on the Participation of Foreigners in Public Life at Local Level. Chapter B creates both a negative and positive obligation: States must ensure that there are no legal or other obstacles to prevent local authorities from setting up consultative bodies or other arrangements to liaise with foreign residents, provide a forum for discussion and foster integration; States are also obliged to encourage and facilitate the establishment of such consultative bodies.^{lxxv} International initiatives that deal with national minorities - who, in their exclusion from the majority community, face problems similar to non-citizens - go further. The Lund Recommendations, for example, recommend the reservation of a number of seats in the local authority for representatives of national minorities.^{lxxvi}

Could an argument be sustained that non-citizens who are eligible to vote are, in fact, unable to enjoy local electoral rights on the same basis as citizens, such that positive measures, like those described above, are necessitated to ensure equality? The preamble to Protocol 12 reaffirms:

that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective quality, provided that there is an objective and reasonable justification for those measures.

Concern has been expressed about the legal effect of the location of this principle in the preamble, as opposed to the operative provision of the Protocol.^{lxxvii} In addition, this articulation of the principle *permits* States to adopt positive measures, but does not *enjoin* them to do so in order to fulfil the equality guarantee. However, the Explanatory Report to Protocol 12 appears to link the principle of positive discrimination with operative Article 1 when it states that "it cannot be totally excluded that the duty to "secure" [any right set forth by law] under the first paragraph of Article 1 might entail positive obligations."^{lxxviii} Therefore, in principle, the court might impose a positive obligation to facilitate qualifying immigrants' participation in local politics. In practice, the court's case law on positive obligations in the context of other Convention rights reveals that positive obligations which entail significant resource expenditure are unlikely to succeed.^{lxxix} The fact that the positive obligations at issue here- establishing consultative bodies to liaise between local authorities and immigrant residents' groups and/or establishing quotas of seats on local authorities etc.- do not necessarily involve resource expenditure, may facilitate such a finding.

3.4 - Bridging the gap between international and domestic obligations

One of the reasons the United Kingdom has cited for refusing to sign Protocol 12 is that it "does not make clear whether 'rights set forth by law' include international as well as national law" such as "a right set out in an international agreement but not incorporated into United Kingdom law".^{lxxx} Professor Robert Wintemute argues that this objection is based on a "fundamental misunderstanding of the nature of anti-discrimination law" in the sense that if a discriminatory law is passed, the legislative entitlement need not be based on any independent right "as a matter of national, international or intergalactic law" in order to plead Protocol 12.^{lxxxi} While this is of course true, the argument relates only to acts and not omissions of government. What happens if the government signs but fails to incorporate an international agreement which would bring qualifying non-citizens into line with citizens in terms of local electoral rights (e.g. Convention on the Participation of Foreigners in Public Life at Local Level). Now, as a matter of international law, the two groups are treated equally. But at the domestic level there is inequality *and* no domestic legislative entitlement upon which to mount a Protocol 12 challenge. The explanatory report is rather ambiguous on this point. It states that Article 1 concerns cases where a person is discriminated against, *inter alia*, "by any...act or omission by a public authority."^{lxxxii} It also states that the word 'law' in Article 1 may cover international law as well as domestic law, but adds "but this does not mean that this provision entails jurisdiction for the European Court of Human Rights to examine compliance with rules of law in other international instruments."^{lxxxiii} This is a *non sequitur*. Ultimately the issue will have to be resolved by the court, but suffice to note at this stage that the potential exists for the EctHR to supply an enforcement mechanism for the Convention on the Participation of Foreigners in Public Life at Local Level.

4. Conclusion

A conclusive answer to the question posed in this paper regarding whether the right to vote is a citizen's right or a human right has proved elusive. At the universal level, the right appears to be exclusively a citizen's right. At the European level, the law is progressively developing towards recognition of a right of long-term residents to participate in local politics. But the right has not yet fully emerged and State practice in the coming years will be determinative. In the meantime, human rights law can contribute to the shaping of State practice through the application of the concept of equality before the law to non-citizen voting rights. At the beginning of this paper, it was asserted that the universality of human rights does not mean that distinctions between citizens and non-citizens (or non-citizens *inter se*) cannot be made. While technically correct, this does raise an underlying issue of justice that has not been discussed in this paper, but that could usefully be the focus of future research. The issue concerns the question of whether the development of a graduated system of human rights, according to which long-term residents are hierarchically superior to recently arrived or temporary immigrants, who in turn are hierarchically superior to irregular immigrants, is just. On an intuitive level, the concepts of citizen, denizen, legal alien and illegal alien with corresponding rights may make sense. But these concepts mask the prior processes that determine the acquisition of citizenship, whether an immigrant is legal or illegal, and who qualifies for long-term residence. As far as immigrants are concerned, the process is often portrayed as a choice exercised by the individual. But much larger forces are at play, not least the dynamics of forced

displacement (including economic hardship), the politics of immigrant selection and the economic interest in allowing the presence of undocumented workers in the State. There is a danger that human rights law may become co-opted into reinforcing the outcomes of these larger, and often unjust, forces.

ⁱ Thomas Hammar has suggested calling this hybrid legal status of settled immigrants "denizenship". Hammer, T. (1990) *Democracy and the Nation State. Aliens, Denizens and Citizens in a World of International Migration* (Avebury: Aldershot).

ⁱⁱ The 'reciprocity' and 'integration' arguments feature prominently in the preamble and explanatory report of the Council of Europe Convention on the Participation of Foreigners in Public Life at the Local Level, in various Parliamentary Assembly recommendations and other Council of Europe initiatives on the subject, in the recommendation of the Commissioner of the Council of the Baltic Sea States on voting rights of non-citizens, and in the Vienna Commission Code of Good Practice in Electoral Matters. See Part 2.B of this paper for further detail.

ⁱⁱⁱ The topic has not received as much attention in the legal literature as it has in the political literature. In fact, it is considered by some legal commentators as something of a non-issue. For example, Professor Louis Henkin has stated that "it seems to me that the right to vote is so peripheral to the whole human rights subject. It is one particular issue. It is not the issue which people talk about normally when they say that aliens do not have the same human rights [as citizens]." – Henkin, L. (2000) Protecting the World's Exiles: The Human Rights of Non-Citizens, 22 *Human Rights Quarterly* 1 pp. 282, 283.

^{iv} See for example, Soysal, Y. (1994) *Limits of Citizenship. Migrants and Postnational Membership in Europe* (Chicago University Press) and d'Oliveira, H. (1994) 'European Citizenship: Its Meaning, Its Potential' in Dehousse R. (Ed.), *Europe after Maastricht: An Ever Closer Union?* (Munich: Law Books in Europe) pp.126-148.

^v See Arndt, H. (1967) *The Origins of Totalitarianism* (revised ed.) (London: George Allen & Unwin).

^{vi} *Ibid.* at 296.

^{vii} Communication No. 538/1993, *Charles E. Stewart v Canada*, 16 December 1996; Communication No. 558/1993, *Canepa v Canada*, 20 June 1997.

^{viii} Human Rights Committee General Comment 27: Freedom of Movement (Art. 12): 02/11/99, CCPR/C/21/Rev.1/Add 9.

^{ix} Dissenting opinion of E.Evatt, C. Medina Quiroga and F.J. Aguilar in *Stewart v Canada*, *supra* n.vii at para. 6.

^x Dissenting opinion of C. Chanet in *Canepa v Canada*, *supra* n.vii.

^{xi} Article 21 of the Universal Declaration of Human Rights states, *inter alia*: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives."

^{xii} Henkin, *supra*, n. iii at 284.

^{xiii} The significance of the extension of the right to vote in local and European Parliament elections to EU citizens resident in another member State, and of the omission from the Long Term Residence Directive of equivalent rights for third country nationals is beyond the scope of this paper.

^{xiv} In fact, an earlier version of article 2.1 explicitly rejected any differentiation between beneficiaries on the basis of citizenship: "Every State is, by international law, under an obligation to ensure: a) that its law secure to all persons under its jurisdiction, whether citizens, persons of foreign nationality or stateless, the enjoyment of these human rights and fundamental freedoms;" Proposal E/CN.4/21, annex B, art 2 (GB), Drafting Committee, First Session (1947).

^{xv} It is stated in the *travaux préparatoires* that "[t]here was general agreement that, notwithstanding the provisions of article 2, paragraph 1, restrictions placed in certain substantive articles of Part III of the

Covenant such as [then] article 23 on political rights, which refers to 'every citizen', would apply." E/CN.4/SR.125, p.12 (SU) & (USA).

^{xvi} This inconsistency is probably more apparent now, with the growing insistence that human rights are indivisible, than it was in 1966 when the ICCPR was concluded.

^{xvii} Human Rights Committee, General Comment 25 (57), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 3.

^{xviii} *Ibid* para. 3.

^{xix} Cholewinski R. (1997) *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employers* (Oxford: Clarendon Press) pp. 375-376.

^{xx} CERD, General Recommendation 30, Discrimination against Non-Citizens, UN Doc. CERD/C/64/Misc.11/rev.3 (2004) at para 3. Emphasis added.

^{xxi} The preamble to General Recommendation 30 recalls "the Durban Declaration in which the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance recognised that xenophobia against non-nationals, particularly migrants, refugees and asylum seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices".

^{xxii} Fitzpatrick, J. (2003) 'The Human Rights of Migrants' in Alienikoff & Chetail (Eds.) *Migration and International Legal Norms* (The Hague: T.M.C. Asser Press) p. 170.

^{xxiii} Article 5(2).

^{xxiv} Ethnic nationalism in the case of the former, liberal democracy in the case of the latter.

^{xxv} For a fuller discussion of this point, see Bauböck, R.(1997) 'Citizenship and National Identities in the European Union', *Jean Monnet Working Paper Series*, No. 4, <http://www.jeanmonnetprogram.org/papers/97/97-04-.html>.

^{xxvi} Alienikoff makes this point in trying to challenge the dichotomous State sovereignty-human rights approach to the migration debate: Alienikoff T. A. (2003) 'International Legal Norms and Migration: A Report' in Alienikoff & Chetail (Eds.) *Migration and International Legal Norms* (The Hague: T.M.C. Asser Press) p.1.

^{xxvii} E/CN.4/2006/73, E/CN.4/2005/85, E/CN.4/2004/76, E/CN.4/2003/85, E/CN.4/2002/94, E/CN.4/2001/83, E/CN.4/2000/82.

^{xxviii} In 2006, the new Special Rapporteur, Jorge Bustamante, submitted a general report on his mandate and activities; In 2005, the former Special Rapporteur, Gabriela Rodriguez Pizarro, dealt in her report with detention, fair trial, consular protection, violence during arrest and deportation, forced repatriation of unaccompanied minors, deportation of immigrants and asylum seekers without the possibility of subjecting the deportation decision to appeal, impunity in cases of crimes committed against migrants and trafficking in women and children; In 2004 her report dealt with the human rights of migrant domestic workers; in 2003 her report dealt with the human rights of migrants deprived of their liberty; in 2002 her report dealt with trafficking in migrants, the connection between asylum and migration, the situation since September 11 and the situation of migrant women and unaccompanied minors; in 2001, her report dealt with irregular migration, the sale of fraudulent documents, the situation of migrant women and unaccompanied minors, broken families and racism, xenophobia and racial discrimination; in 2000 her report dealt with discrimination and intolerance, violence against women migrant workers, the situation of migrant children, vulnerability and access to full protection.

^{xxix} As of 1/4/2006, the following countries has ratified the Convention: Azerbaijan, Bosnia & Herzegovina, Cape Verde, Colombia, Egypt, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka and Uganda.

^{xxx} *Mathieu-Mohin and Clerfayt v Belgium*, Judgment of 2 March 1987, Series A, No.113 (1988), 10 EHRR 1.

^{xxxi} *Matthers v UK* (App. 24833/94), Judgment of 18 February 1999; (1999) 28 EHRR 361.

^{xxxii} *X. v Federal Republic of Germany*, 6 October 1967, (1967) 10 *Yearbook* 336.

^{xxxiii} In Italy, for example, regional councils which are competent to enact law in a number of pivotal areas in a democratic society such as administrative planning, local policy, public health care, education, town planning and agriculture, have been held to fall within the scope of Protocol 1, Article 3. In contrast, local elections in the United Kingdom have been held not to fall within its scope.

^{xxxiv} Convention on the Participation of Foreigners in Public Life at Local Level (1992).

^{xxxv} This principle was first established in *Mathieu-Mohin and Clerfayt v Belgium*, *supra* n. xxx.

^{xxxvi} The Code of Good Practice in Electoral Matters, drawn up by the European Commission for Democracy through Law (Venice Commission) and affirmed by the Parliamentary Assembly of the Council of Europe in

Recommendation 1595 (2003), notes that the right of universal suffrage may be subject to a nationality requirement but that "it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence."

^{xxxvii} *Mathieu-Mohin and Clerfayt v Belgium*, *supra* n.xxx; *Mathews v UK* [GC], (Application no. 24833/94), § 63, ECHR 1999-I; *Labita v Italy* [GC], (Application no. 26772/95), § 201, ECHR 2000-IV, and *Podkolzina v Latvia*, (Application no. 46726/00), § 33, ECHR 2002-II.

^{xxxviii} *Hirst v The United Kingdom (No. 2)* [GC], (Application no. 74025/01), 6 October 2005. The Grand Chamber upheld the decision of the Chamber Judgment delivered on 30 March 2004.

^{xxxix} App. 2728/66, *X v Federal Republic of Germany*, *supra* note xxxii.

^{xl} Paras 79 &80.

^{xli} See, for example, Kokott J. and Rudolf B. (1996) 'Commentary on *Piermont v France*', 90 *American Journal of International Law* 3, at p. 458.

^{xlii} The ICCPR, the American Convention on Human Rights and the African Charter of Human and Peoples' Rights are all without an analogous clause.

^{xliii} Art 10(2): "The exercise of [freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary."; Art 11(2) *inter alia*: "No restrictions shall be placed on the exercise [of freedom of assembly and association] other than such as are necessary in a democratic society, in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights and freedoms of others."

^{xliv} *Piermont v France*, 27 April 1995, 314 ECHR (series A).

^{xlv} Joint partly dissenting opinion of Judges Ryssdal, Matscher, Sir John Freeland and Jungwiert, *ibid*, para.5.

^{xlvi} Recommendation 799 (1977) on the political rights and position of aliens, 25 January 1977.

^{xlvii} Shaw, J.(2003) 'Sovereignty at the Boundaries of the Polity' in Walker (Ed.) *Sovereignty in Transition*, (Oxford-Portland Oregon: Hart Publishing) pp. 461-500.

^{xlviii} Para 21. Report available on <http://conventions.coe.int/Treaty/en/Reports/Html/144.htm>.

^{xlix} Article 9.3 of this convention mirrors Article 10(2) ECHR and Article 9(4) mirrors Article 11(2) ECHR.

^l No clarity can be gleaned from the Explanatory Report, since Paragraph 4 of Article 9 is the only paragraph in the article not to contain an explanation.

^{li} Para. 36 (iii).

^{lii} "No reservation may be made in respect of the provisions of this Convention, other than that mentioned in Article 1, paragraph 1."

^{liii} The usual territorial reservation is provided in Article 16(1) and, as been mentioned, a typical derogation provision is provided in Article 9(1).

^{liv} The Explanatory Report states that the convention is complementary to existing Council of Europe conventions, and in particular the ECHR (para. 13). Indeed the preamble to the Convention mentions Articles 10, 11, 16 and 60, but notably omits any reference to Protocol 1, Article 3.

^{lv} As of 1/4/2006, Albania, Denmark, Finland, Iceland, Italy, Netherlands, Norway and Sweden had ratified the Convention. It entered into force with four ratifications on 1/5/1997.

^{lvi} Fitzpatrick, *supra* n. xxii, at p.175.

^{lvii} Recommendation 1500 (2001). In a similar vein, the Commissioner of the Council of the Baltic Sea States has recommended that its member States grant non-citizens the right to vote and to stand for public office in local authority elections subject to a period of lawful and habitual residence not exceeding 2-3 years.

^{lviii} *Ibid* para. 5.

^{lix} Shaw, *supra* n. xlvii at p. 474. Shaw acknowledges that the Lund Recommendations "are aimed at 'national' minorities who can be expected to have national citizenship and so have limited relevance to the immigration scenario."

^{lx} Of course it can happen that members of a majority population might emigrate abroad to a country where their co-ethnics form a national minority (e.g. ethnic Russians in the Baltic States), or members of a national minority might emigrate abroad to a country where their co-ethnics also form a national minority (Roma in various Central European countries). In such cases, the immigrant national minority population are non-citizens.

^{lxi} Article 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the right contained in the present Covenant, without distinction of any kind, such as race, colour, sex, language, regional, political or other opinion, national or social origin, property, birth or other status."

^{lxii} Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

^{lxiii} Article 26: "All persons are equal before the law and are entitled, without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

^{lxiv} Protocol 12, Article 1: "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

^{lxv} The EctHR is likely to build its Protocol 12 jurisprudence on its existing Article 14 jurisprudence.

^{lxvi} *Belgian Linguistic Case (No.2)* (A/6): (1968) 1 E.H.R.R. 252 at [1.B.10].

^{lxvii} *Moustaquim v Belgium*, Series A, No. 193, para 49.

^{lxviii} *Abdulaziz, Cabales and Balkandli v UK*, Series A, No. 94, p.54, para. 113. The European Commission of Human Rights considered that preferential treatment of migrants from former colonies did not constitute discrimination.

^{lxix} Communication No. 965/2000, *Mümtaz Karakurt v Austria*, views adopted on 4 April 2002.

^{lxx} U.N. Doc. HRI\GEN\1\Rev.1 at 18 (1994), para. 1.

^{lxxi} On the court's approach to distinctions based on nationality, see *Gaygusuz v Austria* (1996) 23 E.H.R.R. 364; on its approach to distinctions based on race, see *Jersild v Denmark* (A/298): (1994) 19 E.H.R.R. 1; *Sander v UK* (2000) 31 E.H.R.R. 44; *Nachova v Bulgaria* (February 26, 2004).

^{lxxii} For a comparative analysis of the EctHR and Canadian and US constitutional approaches to suspect grounds, see Wintemute, R. (2004)., 'Filling the Article 14 "Gap": Government Ratification and judicial Control of Protocol No. 12 ECHR', 1 *E.H.R.L.R* 5, pp. 484-499.

^{lxxiii} *Petrovic v Austria* (1998) 33 E.H.R.R. 14 at para. 38.

^{lxxiv} See for example, Martiniello M. & Statham P. (Guest Eds.) (1999) *Ethnic Mobilisation and Political Participation in Europe*, 25 *Journal of Ethnic and Migration Studies* 4 (special issue).

^{lxxv} However, the Explanatory Report is ambiguous as to whether consultative bodies are needed as compensation for lack of local electoral rights, or additional to local electoral rights - a question it leaves to States parties to decide. It does provide that States who have granted local electoral rights to foreigners "...may consider the special circumstances and problems of foreign residents may nevertheless justify special consultative arrangements for ascertaining the views of the foreign resident community..." (para 25). In a similar vein, Article 42(2) of the Convention on Protection of Rights of Migrant Workers provides that "[s]tates of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities."

^{lxxvi} Section II.C. The Code of Good Practice in Electoral Matters provides that "[s]pecial rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage. Similarly, but stated at a broader level of generality, the Council of Europe Framework Convention for the Protection of National Minorities (1995) provides in Article 15 that "[t]he parties shall create the *conditions necessary for the effective participation* of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them." [Emphasis added].

^{lxxvii} This was one of the stated reasons why the UK has refused to sign Protocol 12. See *infra* n. lxxx.

^{lxxviii} Para. 26. Available on <http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm>.

^{lxxix} See for example, *Senges v Netherlands*, (App no. 27677/02) EctHR decision of July 8, 2003, The Law, in which the court held that the "margin of appreciation is even wider when...the issues involve an assessment of the priorities in the context of the allocation of limited State resources...".

^{lxxx} The UK Government set out its objections to Protocol 12 in a series of written answers by Home Office Minister Lord Bassam of Brighton to questions by Lord Lester of Herne Hill, Hansard, HL Vol. 617, cols WA37 (October 11, 2000), WA13-WA14 (October 23, 2000), WA45 (October 25, 2000).

^{lxxxii} Wintemute, *surpa* n. lxxii, at p. 488.

^{lxxxiii} At para. 22.

^{lxxxiii} At para. 29.

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