



THE FIRST EUROPEAN ELECTIONS AFTER THE ADOPTION OF LISBON TREATY: ENSURING THE ELECTORAL RIGHTS OF CITIZENS IN THE EU

The Lisbon Treaty increased the powers of the European Parliament along with the visibility of the fundamental rights of EU citizens. Yet these legal improvements are not sufficient to render the upcoming European Parliament elections truly representative and to bridge the long-debated democratic gap. Lack of harmonisation of electoral laws, incoherent enfranchisement of non-nationals, different naturalisation regimes and multiple forms of minority inclusion deprives EU citizens and peoples of the EU from full enjoyment of their electoral rights, sometimes undermining the principle of equality and non-discrimination. Given the rise of eurosceptics and extremist parties, addressing this issue becomes even more pressing. Neither the Treaty nor the case law provides legal clarity and a clear cut division of competences as electoral rights are seen as a sensitive area and left at the discretion of Member States. As the failure to guarantee these fundamental rights for all citizens in the EU, including long-term residents and minority populations would put the substance of the EU project in danger, European representative democracy is in need of urgent solutions.

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INTRODUCTION

The 2014 EP elections will be the first elections after the adoption of Lisbon Treaty, which almost doubled the powers of the European Parliament; bringing around 50 new fields, including immigration and justice, under the co-decision procedure. More importantly, the Lisbon Treaty made the Charter of the Fundamental Rights of the European Union (EU) legally binding, incorporating it to the primary EU law through Article 6 (1) TEU-an important step to improve the visibility, centrality and weight of fundamental rights in the EU.

The past European Parliament (EP) elections were marked by a high number of absenteeism¹ and a rise of eurosceptic and extremist parties.² The parallel empowerment of the European Parliament and Union citizens can be therefore seen as an effort to bring European Union closer to its citizens by Europeanising elections³ and bridging a long-debated democracy gap.

Yet these legal improvements fall short of preparing the ground for truly democratic and representative elections as many restrictions are still in place which prevent EU citizens and peoples in the EU from fully enjoying their electoral rights. In fact, every two European out of three thinks that his/her voice doesn't count in the European Union.⁴

Monti and Goulard (2012)⁵ stress that “the people of Europe suffer during elections and referendums from a dis-tinction based on birth”, just as they did under the Ancien Régime; they do not vote on a ‘one man one vote’ basis but on an ordered basis enclosed within their nation of origin.” Perhaps, these limitations could be surmounted by the creation of “transnational lists”⁶ in the long run but there are pressing legal and practical challenges, which should be addressed as soon as possible.

¹ Du Réau, E. & Manigand, C. & Sandu, T. 2005, *Dynamiques et résistances politiques dans le nouvel espace européen*, Cahiers de la Nouvelle Europe, Paris

² MaNamara, S. 2009, “European Elections 2009: Rising Disillusionment with the EU”, *The Heritage Foundation*, 9 June

³ European Parliamentary Research Service, 2013, *Europeanization of the 2014 EP Elections* Poptcheva, E.

⁴ European Commission, Eurobarometer, 2013, Autumn, *Public Opinion in the European Union*,

⁵ Goulard, S.& Monti, M. 2012, *De la Démocratie en Europe. Voir plus loin*, Flammarion, Paris

⁶ Duff, A. 2011, *Federal Union Now*, Federal Trust for Education and Research, London, p.22

The Treaty forbids discrimination on the grounds of national citizenship and guarantees the equality of Union citizens.⁷ But if this is the case, then how can we explain the fact that Union citizens having a non-EU passport cannot stand for the European elections in Bulgaria or elsewhere while qualifying Commonwealth citizens can stand for the elections in the United Kingdom? Or how can we accept the fact that Irish citizens living in the Netherlands cannot vote for Irish Members of the European Parliament while Danish citizens can vote for a Danish candidate while residing in another Member State? Or how can we justify that French citizens living in the United States can vote in European elections and other Union citizens living in third countries can't?⁸

It is extremely difficult to guarantee the right to vote and stand as candidate for the European Parliament elections for Union citizens and peoples in line with the non-discrimination and equal treatment principle where Member States have inharmonious electoral laws, distinct citizenship legislation, different naturalisation criteria and contrasting minority protection regimes.

Eriksen and Fossum (2009) state that EU's democratic gap is justified by "insufficient institutionalisation of the main manifestations of constitutional democracy, inadequate entrenchment of citizen's rights, lack of a European public sphere and weak representation and representatives of the system."⁹

Hence, it is of vital importance to guarantee citizen's fundamental political rights regarding elections to the only directly elected body of the EU, be it through existing or new EU legislation, convergence of Member State laws, or active involvement of the European Court of Justice (ECJ). This is especially more so, in a time, when the European Parliament election turnout has been constantly decreasing since 1979 and the EU is being criticized of a democratic deficit¹⁰ and citizen alienation.

⁷Duff, A. 2012, *Second Report on a Proposal for a Modification of the Act concerning the election of the Members of the European Parliament by Direct Universal Suffrage of 20 September 1976*, European Parliament

⁸ Levanti, N.M, 2014, "Equal Voting Rights for All European Citizens", *European Voice*, 17 January

⁹ Eriksen, E.O. & Fossum, J. 2009, *The Unfinished Democratisation of Europe*, Oxford University Press, Oxford and New York, pp. 35-36

¹⁰Eriksen, E.O. & Fossum, J.2012, *Rethinking Democracy and the European Union*, Routledge, London and New York, p. 14

ELECTORAL RIGHTS of CITIZENS IN THE EU AND THEIR PROTECTION AFTER THE LISBON TREATY

Since the very beginning of the European Union, there have been many attempts to build a uniform electoral procedure. Yet, only the lowest common denominator was achieved with the Direct Elections Act of 1976, which established the principle of universal direct suffrage for the European elections. It was further amended in 2002, constraining Member States such as the United Kingdom to adopt a model of proportional representation, banning higher thresholds than 5%, and abolishing dual mandate.¹¹In addition, Directive 93/109/EC¹², as amended by Directive 2013/1/EU¹³, fixes the modalities of exercising the right to vote and clarifies certain conditions for eligibility.

With the entry of the Lisbon Treaty, EU citizenship gained more significance and its centrality for the Community policymaking was, *inter alia*, championed by 2010-2015 Stockholm programme. Established by the Maastricht Treaty in 1993 and reinforced by Amsterdam Treaty, Union citizenship had already been closely associated with important rights such as the right to move and reside freely within the Union and the right to vote and stand as candidate for the European Parliament elections. Yet, the Lisbon Treaty further extended the rights catalogue of the Union citizens by making the Charter of Fundamental Rights binding.

For many, this meant that EU citizens were no more seen as goods or services circulating freely within the Union but as citizens enjoying a supranational protection in the area of human rights. The expectation was that Lisbon Treaty would confirm the ultimate ambition of the EU project, which started with post-World War II reconciliation and economic integration; and gradually evolved towards a federalist structure, bounding the “imagined”¹⁴ community of Europeans closer together and further contributing to the construction of a European identity, based neither on religion nor on nation, but on a post-nation form, akin to a rights community. But, were these expectations met in reality?

¹¹ Council Decision 2002/772/EC, Euratom

¹² Directive 93/109/EC of 6 December 1993, OJ 1993 L329/34

¹³ Council Directive 2013/1/EU of 20 December 2012, Official Journal of the European Union L26/27, 26 January 2013

¹⁴ Anderson, B. 1991, *Imagined Communities*, rev.ed., Verso Books, London

Our study is primarily concerned with the implementation of two provisions of the Lisbon Treaty regarding EU citizen's rights: the right to vote and to stand as candidate for the European Parliament for every Union citizen and the principle of equality and non-discrimination when exercising electoral rights.

Article 20 TFEU and Article 39 of the Charter of Fundamental Rights guarantee the right to vote and stand for the European Parliament elections for EU citizens residing in a Member State different from their Member State.

Moreover, Article 18 TFEU and Article 21 of the Charter of Fundamental Rights clearly state that "All EU citizens shall enjoy the same treatment in law irrespective of their nationality respecting the principle of non-discrimination on the grounds of nationality."

Although the Lisbon Treaty doesn't enshrine the supremacy of the EU law over national legislation, an annexed Opinion of the Council Legal Service of 22 June 2007 clearly states "It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law."

A number of landmark rulings of the European Court of Justice deal with electoral rights of Union citizens or peoples. ECJ ruling *Spain vs. United Kingdom*¹⁵ found that UK's policy to enfranchise all qualifying Commonwealth citizens is in line with EU law and formally approved UK's creation of a constituency in Gibraltar linking it to a constituency in England during 2004 elections, notwithstanding the fact that the inhabitants of Gibraltar do not possess the nationality of a Member State or, therefore, the citizenship of the Union.

Similarly, in response to a complaint filed by Dutch Kingdom nationals Eman and Sevinger¹⁶ residing in Aruba and Antilles (Overseas Countries and Territories associated with the Union) with regards to their electoral rights, the Court found a violation of the principle of equality between Dutch nationals living on Aruba and

¹⁵ Judgment of the European Court of Justice (2006) in Case-C-145/04 *Spain v United Kingdom*, Strasbourg

¹⁶ Judgment of the European Court of Justice, 2006, Case C-300/04 *Eman and Sevinger v. College van Burgemeester en wethouders van Den Haag*, Strasbourg

Antilles deprived of the right to vote and Dutch nationals living abroad who can vote in embassies. Dutch nationals living on Aruba and the Antilles can participate in the European elections following this ruling¹⁷, which made territories outside of the EU relevant for the EP elections since 2006.¹⁸ Also, in other overseas parts of the Union, where French, Danish, Spanish and Portuguese reside, EU citizenship laws including European Parliament elections apply.¹⁹

Acknowledging that every Member State can enjoy a certain degree of discretion in defining the rules for voting in the European parliamentary elections, these two rulings confirmed that states are expected to respect the general principles of Union law and cannot treat different categories of Union citizens who are in the same circumstances in a discriminatory way.²⁰

At the same time, these rulings shed light to the limits of the EU legislation as the ECJ affirmed that “neither Articles 189 EC and 190 EC nor the Act concerning the election of representatives of the European Parliament by direct universal suffrage state expressly and precisely who are to be entitled to vote and to stand for election to the European Parliament”, as pre-Lisbon legislation referred to a European Parliament consisting of “representatives of the peoples of the Member States.” By contrast, the Treaty of Lisbon clearly states that “The European Parliament shall be composed of representatives of the Union’s citizens.” It is, hence, questionable whether the Court would judge the same way if the case was to be put on the table today.²¹

Furthermore, Article 14 (2) introduced by the Lisbon Treaty may be of restrictive nature regarding the inclusion of the peoples of the European Union, such as minority groups and long-term residents. Being non-Union citizens, these groups risk to be excluded from political life despite their historical, cultural and economic ties with the country of their residence, if rules on access to Union citizenship are exclusively set

¹⁷ EUDO Citizenship Observatory, 2013, *Access to Electoral Rights. The Netherlands*, Schrauwen, A. European University Institute, Florence

¹⁸ Kochenov, D. 2011, “A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe”, *Columbia Journal of European Law*, Vol. 18, pp. 56-106

¹⁹ Kochenov, D. 2012 “The Application of EU in the EU’s Overseas Regions, Countries, Territories after the Entry into Force of the Treaty of Lisbon”, *Michigan State International Law Review*, Vol.20, No.2, pp.669-743

²⁰ Judgment of the European Court of Justice, 2006, Case-C-145/04 *Spain v United Kingdom*

²¹ Kochenov, D. 2013, “The Right to Have What Right? EU Citizenship in Need of Clarification”, *European Law Journal*, Vol. 19, No.4

by Member States. Union citizenship right, derived from the EU legal order, should be, therefore, defined and regulated under Community jurisdiction.

The accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms through Article 6(2) TEU makes ECHR case equally relevant for this study.

The ECHR case constitutes a good example for transnational candidates as it punishes a Council of Europe Member State for violation of the right to stand as candidate in free elections. A Moldovan politician of ethnic Romanian origin won a case where the ECHR judged a measure banning dual citizen's participation in political life by the Moldovan government disproportionate and in violation of Article 3 of Protocol N. 1. Although the ECHR decided not to address the discrimination argument in consideration that it would involve an issue of interpretation of domestic legislation²²; it made it clear that this judgment is valid specifically for Moldova, which allows for dual citizenship and has a significant number of dual citizens; and introducing such a ban shortly before elections could lead to unfair competition.

However, even the pertinence of the Convention has been questioned as some scholars warned that "the sensitivity of the EU legal order for the variety of human rights standards in the Member States (Article 4(2) TEU) might collide with a uniform standard developed in the Convention." Moreover, questions arise regarding the level of protection to be exercised by the Union in the area of fundamental rights since the Convention is regarded by many as a minimum standard which "does not prevent EU law from providing more extensive protection".²³

Although the entry of the Lisbon Treaty and especially the Charter reinvigorated the role of the Court in controlling the European legislature's compliance with fundamental rights, we can still discern tensions in a multi-level legal structure.

Recent rulings reflect the Court's reticence to use a reference to the Charter of Fundamental Rights with an intention to avoid overemphasising the federal nature of

²² Judgement of the European Court of Human Rights, 2008, *Grand Chamber, Tanase and Chirtoaca v. Moldova*, Application No. 7/08, Strasbourg

²³ Weiss, W. 2011, "Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon", *European Constitutional Law Review*, Vol.7, No. 1, pp.64-95

monitoring Member States' compliance, which is seen as "a potential source of restraint or could "have a negative impact in the attitude of Member State courts and authorities."²⁴

In fact, the controversial judgements of the ECJ in Ruiz Zambrano, Mc Carthy, Rottmann and Dereci cases²⁵ demonstrate that ECJ is willing to protect the fundamental rights of the EU citizens only in "extreme cases", where national measures deprive EU citizens of "the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union", i.e. they are obliged to leave the Union territory²⁶ or face the threat of losing Union citizenship.²⁷

To sum, we are in a situation where the Court is blaming the EU legislation for not providing specific provisions on electoral law at the Union level. At the same time, the Court itself is criticised for "legal pluralism" and "giving up EU citizenship as a supranational legal status", by delegating issues belonging to the realm of EU Citizenship and Charter of Fundamental Rights to national courts.²⁸

As Union citizenship is independent from national citizenship and directly granted by the Union²⁹, the fundamental rights of EU citizens should be upheld independently from the national context, both in political and in legal terms. But this is far from being the case in practice, where Union citizenship and the fundamental rights associated with it are still constrained within national boundaries.

²⁴ Sanchez, S.I. 2012 "The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights", *Common Market Law Review*, Vol.49, pp.1565-1612

²⁵ Case C-34/09 *Ruiz Zambrano* (2011) ECR I-1177, Case C-135/08 *Rottmann* (2010) ECR I-1449, Case C-434/09 *Mc Carthy* (2011), Case C-256/11(2011) *Dereci*

²⁶ Lenaerts, K. 2013 "The Concept of EU Citizenship in the Case Law of the European Court of Justice", *ERA Forum* Vol. 13, pp. 569-583

²⁷ Judgement of the Court of Justice, 2010 in Case C-135/08 *Rottmann v. Freistaat Bayern* ECR I-1449

²⁸ Kochenov, D. 2013 "The Right to Have What Right? EU Citizenship in Need of Clarification", *European Law Journal*, Vol. 19, No.4

²⁹ Opinion of AG Poiares Maduro, Case C-135/09, *Rottmann* (2010), ECR I-1449, Para.23

CITIZENSHIP LAWS AND DEMOCRATIC INCLUSION OF MINORITIES AND LONG-TERM RESIDENTS INTO POLITICAL LIFE

Keeping in mind the complementarity principle between Union citizenship and national citizenship, a-national models based on territoriality (*ius soli*) would best fit to combine multiple identities with rights, especially within societies with asymmetric constitutional structures such as U.K and Belgium.³⁰

Nevertheless, legislation regarding citizenship differs in every Member State and involves variables such as place of birth, family ascendance, marital status and place of residence. Chart 1 illustrates inclusiveness based on territoriality at birth.

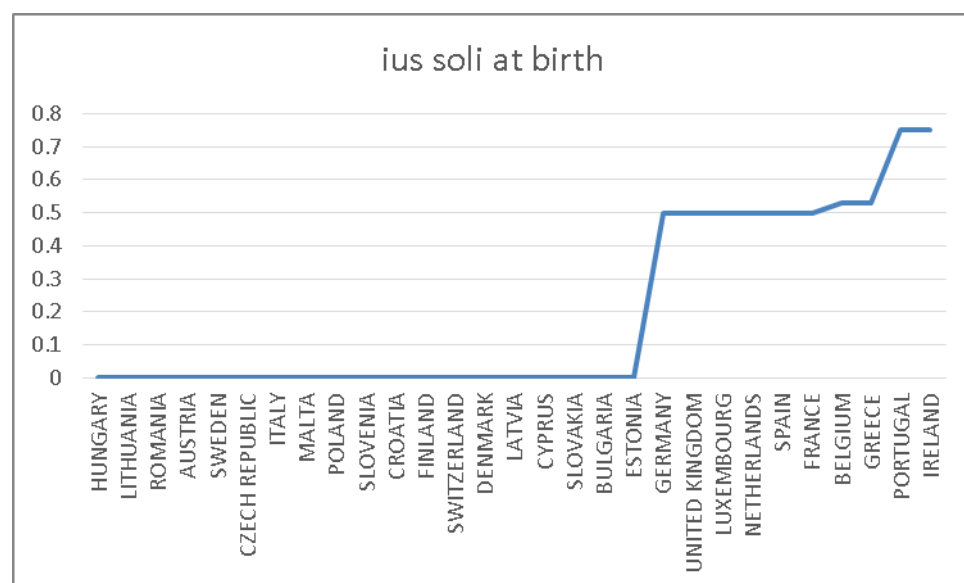


Chart 1: 2012 - 2014, European University Institute for EUDO CITIZENSHIP, www.eudo-citizenship.eu

Since the introduction of the European Union citizenship Member States made the necessary changes in their legislation to accommodate Union citizenship in line with Article 19 EC, yet this process was rather painful in countries understanding citizenship as belonging to a particular ethnic group, such as Germany and Austria.³¹

In general, democratic inclusion is rather weak in Member States such as Slovakia which, for example, excludes national minorities from “Slovak nation” in the preamble of the 1991 Slovak Constitution³²; as compared to other Member States

³⁰ Lansbergen, A. & Shaw, J. 2010 “National Membership Models in a Multilevel Europe, *International Journal of Constitutional Law*, Vol. 8, No. 1, pp. 50-71

³¹ *idem*

³² Pogany, I. 2004, Refashioning Rights in Central and Eastern Europe: Some Implications for the Region’s Roma”, *European Public Law*, Volume. 10, No. 1

which openly provide guarantees for minorities in their Constitution, namely Hungary. Article 68 of the Constitution stipulates “the national and ethnic minorities living in the Republic of Hungary share the power of the people; they are the constituent factors of the state” adding that Hungary “grants protection to national and ethnic minorities, it ensures the possibilities for their collective participation in public life...”

In Austria, Germany and Greece, which see citizenship based on ethnic origin, the Constitutional Court played an important role in objecting to voting rights of third country citizens.³³The constitution in Northern Ireland, by contrast, is of a rather national nature and gives the citizens the choice to identify themselves as Irish and/or British.

These distinctions also play an important role in determining attitudes towards naturalisation and tolerance towards dual citizenship. Even if the general tendency is to accept multiple citizenship, naturalisation laws remain very restrictive in some Member States. Dual citizenship became possible in 1949 in the United Kingdom, in 1973 in France, in 2010 in Belgium and in 2013 in Germany. Conversely, people have to renounce to their prior nationality in order to be naturalised in 9 Member States. (Czech Republic, Denmark, Estonia, Latvia, Lithuania, the Netherlands, Poland, Slovakia and Slovenia)

Despite the facilitation of dual citizenship for 52 countries, the contested citizenship law in Germany still obliges non-ethnic Germans to choose between German citizenship and citizenship of their origin at the age of 23.³⁴ For this reason, politicians such as Cem Özdemir had to renounce to their second citizenship in order to exercise their citizen’s and political rights in the EU whereas German nationals, Daniel Cohn-Bendit as an example, could be easily elected MEP from the French quota.

In Denmark and the Netherlands, dual citizenship is only tolerated for refugees or immigrants whose country of origin prohibits renouncing to nationality, i.e. Greece.

³³European Parliament, Directorate-General for Internal Policies, Policy Department, Citizen’s Rights and Constitutional Affairs, 2013“*Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Union Citizens Residing in Third Countries*”, pp.63-64

³⁴ Heinrich, D. 2013, “Dual Citizenship Plan Leaves Turks Disappointed”, *Deutsche Welle*, 28 November

Countries with low naturalisation rates (the proportion of stock of foreign residents in the country to the total number of citizenships granted) such as have Latvia, Estonia, Austria and Lithuania is an indicator of high barriers to access to citizenship.³⁵

Chart 2 summarises ordinary naturalisation residence conditions. The longer the residence requirement, the more restrictive is the naturalisation regime. Belgium, Malta, Ireland, Netherlands and the United Kingdom appear to have the longest waiting periods to acquire citizenship.

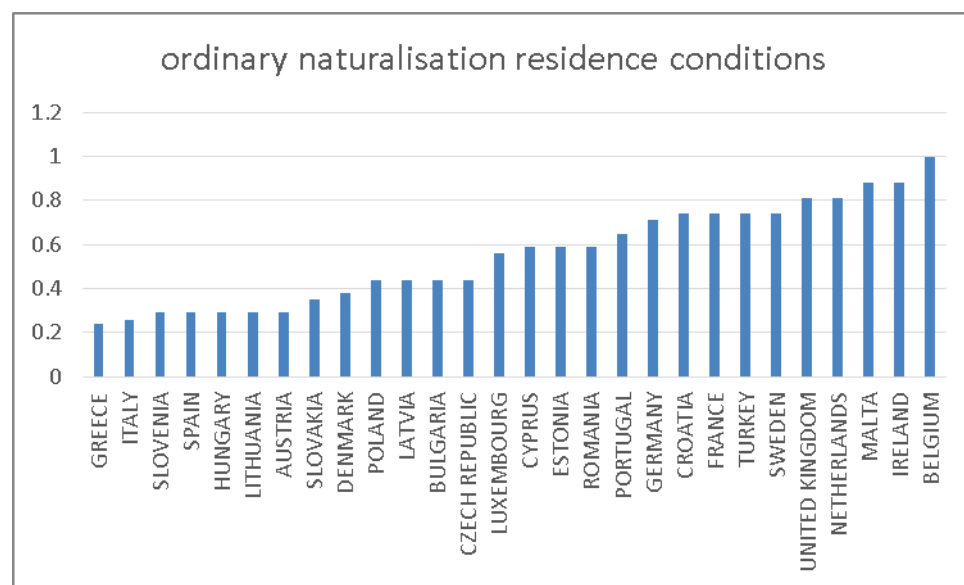


Chart 2: 2012-2014, European University Institute for EUDO Citizenship, www.eudo-citizenship.eu

Some Member States apply simplified naturalisation procedure to a nationality of preference. For instance, due to an agreement among Nordic Union members (Sweden, Denmark, Finland, Iceland, Norway), a Finnish citizen can acquire Danish nationality in 2 years whereas it takes 7 years for other nationals. Spain has special conditions for citizens of Latin American countries, Portugal, the Philippines and Andorra whereas France privileges the citizens of its ancient colonies.

It is interesting to note that about 600.000 people, including 100.000 Serbians applied for Hungarian citizenship since the simplification of procedures for ethnic Hungarians living outside the country in 2010. Similarly, the number of Moldovans who obtained

³⁵ Eurostat, 2013, *Acquisition of Citizenship Statistics*, March

Romanian citizenship reached 400.000.³⁶ Bulgaria is another country which applies a simplified procedure to ethnic Bulgarians in Macedonia.

It is also possible to obtain citizenship within 18 months by investing 4 million Euros in Austria.³⁷ In Malta, the conditions are even milder as the price goes down to 650.00 Euros without an obligation to reside in the country.³⁸ In Bulgaria, the waiting period for the permanent residence can be waived for those who invest more than 500.000 dollars in the economy. Moreover, an achievement-based naturalisation can facilitate granting of citizenship to athletes in an easy fashion.³⁹

The majority of citizenships granted to another EU member state are intra-EU in Luxembourg and Hungary.⁴⁰ Kochenov argues that the EU citizenship and citizenship rights deriving from it will render the concept of “one Member State having a better nationality” obsolete⁴¹, but the case of Hungarian minority in Romania massively acquiring Hungarian citizenship is somewhat alarming inasmuch as it points out to the limitations of minority protection at the EU level.

SNAPSHOT OF DISCRIMINATORY PRACTICES IN EU: GROUPS UNDER RISK OF NON-REPRESENTATION DURING 2014 EP ELECTIONS

EU CITIZENS RESIDING ABROAD

An increasing number of European citizens are enjoying their right to free movement in the EU. The number of EU citizens living in a Member State other than their country of origin is estimated at 13.6 million.⁴² On the other hand, as Strudel illustrates, the number of non-national candidates and elected Members in other Member States is extremely low. For example, in 1994 there was only one non-

³⁶ Thorpe, N. 2013, “Hungary Creating New Mess of EU Citizens”, *BBC*, 7 November

³⁷ Bréville, B. 2014, “L’Acquisition de la Nationalité à Travers Le Monde”, *Le Monde Diplomatique*, January

³⁸ Fanech, A. 2014, “We Have to Scrap Passport Scheme”, *Times of Malta*, 19 January

³⁹ EUDO Citizenship Observatory, 2013, *Country Report. Bulgaria*, Smilov, D. & Jileva E. 2013, European University Institute, Florence

⁴⁰ Eurostat, 2013, *Acquisition of Citizenship Statistics*, March

⁴¹ Kochenov, D. 2011, “Double Nationality in the EU: An Argument for Tolerance”, *European Law Journal*, Vol. 17, No.3, pp.323-343

⁴² Eurostat, 2013, *EU citizenship-statistics on cross-border activities*, April

national candidate throughout the EU who was elected whereas 0,005% of the candidates in France were non-nationals in 2009.⁴³

Vice-President of the European Commission Vivian Reding drew attention to this problem as follows: “EU citizens who are not entitled to vote or stand as candidate in either their MS of origin or in the country of residence, are not represented in the Council and are thus excluded from participation in the democratic life of the EU.”

Some believe that disenfranchisement violates the freedom of movement and residence (Art.19 TFEU and Art. 45 EU Charter) and associations such as Let Me Vote increasingly raise awareness about the issue in the EU. The right to vote for non-national EU citizens is also publicly endorsed as 67% of the Eurobarometer interviewees are of the view that non-national EU citizens residing in another Member State should be even given voting rights in the national elections of their country of residence.⁴⁴

However, when we look at the colourful spectrum of enfranchisement practices, we note with concern that some Member States completely disenfranchise their citizens living abroad as is the case of Hungary, Greece and the Netherlands. The United Kingdom deprives its citizens of voting rights if they have been living more than 15 years abroad.

Some Member States only allow their diplomats and military personnel to vote from abroad as is the case in Ireland, Denmark, Italy and Cyprus. Whereas in Ireland and Denmark citizens ought to have “ordinary residency” and permanent residency, respectively, in order to vote, in Cyprus and Malta they have to reside in the country at least 6 months prior to elections.⁴⁵ Slovakia authorises its citizens living abroad to vote only in a particular district of Bratislava.

In other Member States such as Austria Belgium, Denmark, Germany, Luxembourg, Portugal, voters living abroad are allowed to vote only by post- a practice which is limited in some Members for its incompatibility with the secrecy of the vote. Proxy

⁴³ Strudel, S.2009 “L’Europe, Un Nouvel Espace de Citoyenneté? Le Vote des Nan-Nationaux », *Revue Internationale de Politique Comparée*, Vol. 16, N.4, pp.559-581

⁴⁴ European Commission, 2013, Eurobarometer, *Electoral Rights*, March

⁴⁵ Library of the European Parliament 2013, *Disenfranchisement of EU Citizens* Poptcheva, E. Brussels

voting is only allowed in the United Kingdom, France and the Netherlands and the only country which enables e-voting is Estonia. (See Table 1)

Even in case when some mechanisms are in place for voting from abroad, another barrier for non-national residents could be the absence of automatic registration. Currently, except for France and the United Kingdom, all EU Member States automatically register for their voters in place. But when it comes to non-residents, this number drops from 25 to 9. In addition, UK citizens require an additional signature from a fellow citizen living abroad in order to register.⁴⁶

Last but not least, there are over 10 million EU citizens living outside of the EU. Their voting rights are being limited in certain cases not only because of national laws of their country of residence or country of origin, but due to lack of diplomatic representation.⁴⁷

THIRD COUNTRY NATIONALS LIVING IN THE EU

The Commission's Action Plan implementing the Stockholm programme endorsed by the European Council in December 2009 defined citizenship in a broad sense encompassing third country nationals as "vulnerable groups exercising their citizenship beyond nationality-based configurations and boundaries".⁴⁸

An EP Working document also highlighted the problem of denizen rights and non-citizens rights in the EU suggesting a Convention to reconsider the relationship between EU citizenship and electoral reform including a change of Article 14-2 which could be amended into "citizens in the Union"⁴⁹

The voting rights for third country nationals are also very limited in the EU as the Article 14-2 of the TEU states that "The European Parliament shall be composed of

⁴⁶ European Parliament, Directorate-General for Internal Policies, Policy Department, Citizen's Rights and Constitutional Affairs, 2013, *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Union Citizens Residing in Third Countries*, p.31

⁴⁷ European Parliament, Directorate-General for Internal Policies, Policy Department, Citizen's Rights and Constitutional Affairs, 2013, *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Union Citizens Residing in Third Countries*", p.44

⁴⁸ Carrera S.&Wiesbrock, E. 2010, "Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU", *European Journal of Migration and Law*, Vol. 12, pp. 337-359

⁴⁹ European Parliament Working Document, 2010, No.PE441.236v01-00

representatives of the Union's citizens." Schrauwen suggests that a civic citizenship model should be applied for long-term residents in the EU so that they can be granted voting rights, warning that extreme political right and xenophobic discourse could "underestimate the ability of disenfranchised groups to communicate their cause to voting members of society."⁵⁰

Combined with exclusive franchise, reserving the right to vote to citizens alone would work to the detriment of democracy in the EU. This is already the case in nine Member States: Austria, Latvia, Italy, Bulgaria, Poland, the Czech Republic, Cyprus, Romania and Malta.⁵¹

The United Kingdom is the only country granting voting rights to foreign residents of selected nationalities during the European Parliament elections. Other countries such as Portugal reserve this privilege to national elections. For instance, the Treaty of Friendship, Cooperation and Consultation signed between Portugal and Brazil allows Brazilian citizens to enjoy a status of political equality after 3 years of residence in national elections but not in European elections.

Although enfranchisement is more common in local elections, only ten countries (Denmark, Portugal, Sweden, Finland, Ireland, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia and the United Kingdom) grant candidacy rights to third country citizens depending on duration of residency, i.e. 3 years of residence requirement in Denmark and Sweden except for Nordic Union nationalities; 5 year residence requirement in Luxembourg and the Netherlands; permanent residency in Lithuania and Estonia.⁵² Luxembourg requires a minimum of 2 years residence from a notional from another Member State in order to stand for elections but there exists a derogation clause pertaining to minimum residency condition and composition of electoral lists, which applies to countries with more than 20% of non-national EU citizens.⁵³

⁵⁰ Schrauwen, A. 2013, "Granting the Right to Vote for the European Parliament to Resident Third-Country Nationals: Civic Citizenship Revisited", *European Law Journal*, Vol.19, No.2, pp. 201-218

⁵¹ European Parliament Directorate-General for Internal Policies, Policy Department, Citizen's Rights and Constitutional Affairs, 2013, *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Union Citizens Residing in Third Countries*, p.68

⁵² *idem*, p.56

⁵³ EUDO Citizenship Observatory, 2013, *Access to Electoral Rights. Luxembourg*, Scuto, D. European University Institute, Florence

MINORITY POPULATIONS

Given the alarming rise of populist, extremist and xenophobic parties such as French ‘Front National’, Dutch Freedom Party, Austrian Freedom Party, Belgium’s Vlaams Belang party, the Sweden Democrats, Lega Nord, Slovak National Party, the Danish People’s Party⁵⁴, ensuring the representation of minority populations throughout the EU becomes a pressing challenge, all the more so considering that parties defending minority rights are losing their advantage in European elections.⁵⁵ Furthermore, Castello, Thomassen and Rosema (2012)⁵⁶ warn that cultural dimension such as the place of ethnic minorities in society are not captured by the left/right cleavage, which constitutes a hurdle to political representation.

Steen (2010) argues that although political rights for minority groups were on the political agenda during the pre-accession period of the new Member States, especially through the mechanism of Copenhagen criteria, the lack of conditionality after membership would hamper the democratization process.⁵⁷ Other scholars warn against poor minority protection standards not only in new Member States but throughout the Union.⁵⁸ For example, France, Belgium and Greece are still not part of the Convention on Protection of National Minorities.

There is limited scope to be optimistic in a Union where European law faces constant difficulties caused by transposition of laws into national legislation, sometimes leading to biased interpretations and a highly accidental judicial landscape across the continent⁵⁹. Enforcement of the EU law is yet another big challenge. In the case of forced deportation of Roma minority from France and their fingerprinting in Italy between 2008 and 2010, an obvious discrimination on ethnic grounds against these EU citizens was countered by “minimal sanctions” by the Commission. A possibly

⁵⁴ Acheson, B. 2014, “Victory for Ukip is Meaningless for Europe”, *Huffington Post*, 6 January

⁵⁵ De Winter, L. & Gomez-Reino, M. 2009, “Les Partis Autonomistes: Vers La Disparition de l’Avantage des Elections Européennes”, *Revue Internationale de Politique Comparée*, Vol. 16, N.4, p.637

⁵⁶ Costello, R. & Thomassen, J. & Rosema, M. 2012 “European Parliament Elections and Political Representation: Policy Congruence between Voters and Parties”, *West European Politics*, Vol.35, No.6, pp.1226-1248

⁵⁷ Steen, A. 2010, “National Elites and the Russian Minority Issue. Does EU-NATO Integration Matter?”, *Journal of European Integration*, Vol.32, No.2, pp.193-212

⁵⁸ Johns, M. 2003 “Do As I Say, Not As I Do”: The European Union, Eastern Europe and Minority Rights, *East European Politics and Societies*, Vol. 17, pp.682-699

⁵⁹ Lamassoure, A. 2008, Rapport au Président de la République, *Le Citoyen et l’Application du Droit Communautaire*

intimidated Commission by big Member States⁶⁰ contented itself to warn France to duly transpose the safeguards⁶¹ aiming at protecting EU citizens from targeted removal on economic grounds or on the basis of public security.⁶²

The sheer possibility of targeting minority groups and depriving them of their fundamental right to free movement makes us doubt the universality and equality of EU citizenship. The Roma minority in question faces the same discrimination in the political field. Although it is the largest minority in Europe with 12 million people, it was only represented by one Hungarian MEP in 2009-2014,⁶³ in comparison to Greece, a country with a similar population size, which was represented by 22 MEPs during the same period.

We identified three case studies characterized by their discriminatory nature regarding political representation of disadvantaged groups in EU.

Dual Citizens in Bulgaria

Although citizenship law was originally based on *ius soli* to accommodate large historical minorities after the independence of Bulgaria from the Ottoman Empire, it became rather restrictive during the fascist and Communist regimes. The current constitution of Bulgaria dating back to 1991 was designed in the aftermath of the expulsion of over 300.000 ethnic Turks in 1989⁶⁴ from the country. This is the reason why its Article 25 prohibits depriving Bulgarian citizens by birth of their citizenship as well as extradition and expatriation of citizens.

Yet, “the Constitution remains fundamentally skeptical about minority rights” as “it expressly prohibits the establishment of political parties on an ethnic racial or religious basis (Article 11)”⁶⁵. The Bulgarian Constitutional Court banned the

⁶⁰ Gehring, J. S. 2013 “Free Movement for Some. The Treatment of the Roma after the European Union’s Eastern Expansion”, *European Journal of Migration and Law*, pp.7-28

⁶¹ European Commission, 2004, Directive on Free Movement

⁶² Parker, O. 2012 “Roma and the Politics of EU Citizenship in France: Everyday Security and Resistance”, *Journal of Common Market Studies*, Vol.50, No.3, pp. 475-491

⁶⁴ Özgür-Baklacıoğlu, N. 2006 “Dual Citizenship, Extraterritorial Elections and National Policies: Turkish Dual Citizens in the Bulgarian-Turkish Political Sphere”, in Osamu Ieda (ed.) *Beyond Sovereignty: From Status Law to Transnational Citizenship?*, Slavic Research Center, Hokkaido University, Tokyo

⁶⁵ EUDO Citizenship Observatory, 2013, *Country Report. Bulgaria*, Smilov, D. & Jileva E. 2013, European University Institute, Florence

Democratic Romany Union in 1990⁶⁶ and OMO-Ilinden in 2000, the former representing the Roma and the latter the Macedonian minority in Bulgaria.

Article 65 of the Bulgarian Constitution bans citizens with a dual passport from running for national and European elections. Given that most of the dual citizens in Bulgaria are those who were forced to leave the country on the basis of their ethnic origin during the repressive Communist regime in 1989, this provision especially targets them. The dual citizens with both Turkish and Bulgarian passports form a cross-border community of approximately 1.175.000 potential voters.⁶⁷

The Bulgarian election law also limits the voting rights of dual citizens. Although the first European elections in May 2007 enfranchised all citizens regardless of their place of residence, residency requirements were introduced for the 2009 EP elections depriving some 90.000 potential voters from their electoral right.⁶⁸

Todorov explains this phenomenon as follows: “Thanks to the mobilization of the voters all the parties obtained more votes in 2009 European elections as compared to elections in 2007, except for the Movement for Rights and Freedoms, which could not count on its electoral base of Turkish Bulgarians residing in Turkey due to the electoral law.” The author adds that this is objectively discriminatory not only for Bulgarian citizens in Turkey but also for other diaspora residing in the United States, Canada, Russia and elsewhere.”⁶⁹

The case of Bulgaria is quite particular as it is the only country in the EU, which, having accepted dual citizenship, doesn't allow dual citizens holding a non-EU passport to participate in the European elections. By virtue of the Directive 93/109/EC, as amended by Directive 2013/1/EU, specifically precluding a person who has been deprived of the right to stand as a candidate in one Member State from

⁶⁶ Vassilev, R. 2004, The Roma of Bulgaria: A Pariah Minority, *Global Review of Ethnopolitics*, pp.40-51

⁶⁷ Özgür-Baklacıoğlu, N. 2006 “Dual Citizenship, Extraterritorial Elections and National Policies: Turkish Dual Citizens in the Bulgarian-Turkish Political Sphere”, in Osamu Ieda (ed.) *Beyond Sovereignty: From Status Law to Transnational Citizenship?*, Slavic Research Center, Hokkaido University, Tokyo

⁶⁸ EUDO Citizenship Observatory, 2013, *Country Report. Bulgaria*, Smilov, D. & Jileva E. 2013, European University Institute, Florence

⁶⁹ Todorov, A. 2009 “Les Elections Européennes de Juin 2009 en Bulgarie: La Confirmation de l'Eclatement du Système Partisan”, *Revue Internationale de Politique Comparée*, Vol.16, N. 4, p. 697-708

standing as a candidate in another Member State, Union citizens with a dual passport are also denied the right to run for EU elections in other Member States.

Therefore, we face a situation where non-Union citizens are indeed authorised to vote and even to stand as a candidate for the European Parliament (Gibraltar), whereas Union citizens cannot fully enjoy their electoral rights.

Russian-Speaking Minority in Latvia and Estonia

The independence of the Baltic States from the Soviet Union in 1991 left them with a significant number of Russian speaking minorities, 40% in Latvia and 28% in Estonia during the accession of the two countries into the European Union in 2003. Whereas Lithuania granted automatically citizenship to all permanent residents, Estonia and Latvia limited the citizenship right to citizens of pre-war republics.

In 2012, non-citizens residing in Latvia and holding a Russian, Ukrainian, Belarussian and other non-Latvian passports was recorded as 14% of the population, while 3% of the population was reported to be foreigners, refugees or stateless persons. Taking into account that naturalization law in Latvia requires renunciation of other nationality⁷⁰, we can estimate that 17% of the population in Latvia consisting of long-term residents historically tied to Latvia doesn't have a voice in the political sphere, except for the local elections.

Even though their number is reportedly decreasing, in September 2012, the stateless persons in Estonia were estimated to be 92.351, representing 7% of the population. The total non-citizens (holding Russian, Ukrainian, Finnish and Latvian passports) are estimated at 16% of the population. This means that half of the 31% of non-ethnic citizens are not naturalized in Estonia. This is attributed to poor Estonian proficiency and demanding naturalization tests according to more than 80% of the ethnic minority.⁷¹ In parallel, the Estonian naturalization law which asks for the renunciation of previous nationalities is certainly not helping integrating historical minorities in the country and 23% of the population are, thus, denied their electoral rights.

⁷⁰ Kruma, K. 2013 “*Naturalisation Procedures for Immigrants in Latvia*”, European Union Democracy Observatory, European University Institute, Florence

⁷¹ EUDO Citizenship Observatory, 2013, *Naturalisation Procedures for Immigrants. Estonia*, Poleshchuk, V. European University Institute, Florence

Compared to the German speaking minority (75.000 people) who have one representative in the European Parliament, the Russian-speaking minority in the Baltic States is obviously disadvantaged. Tatjana Zdanoka is the only representative of the Russian-speaking community in the European Parliament. Peculiarly, she was only allowed to be a candidate for European elections in Latvia as the election law prohibits the candidacy of former Communist party members for national and local elections. The ECHR found no violation of Article 3 Protocol 1 of the European Convention in her case.⁷²

Turkish Cypriot Community in Cyprus

In 2004, referenda on the UN Plan for a comprehensive settlement of the Cyprus problem were held only 7 weeks before the European elections, where 65% of the Turkish Cypriots voted yes and 76% of the Greek Cypriots voted no. As a result, a de jure united but de facto divided Cyprus entered the European Union and Protocol No. 10 on Cyprus annexed to the Accession Treaty, suspended *acquis communautaire* in the northern part of the island while providing safeguards for full EU civic rights for all Cypriot citizens. As the failure of the UN plan also led to the establishment of a single constituency instead of two constituencies foreseen in the plan with one third of the seats reserved for the Turkish Cypriots, “special arrangements were made” for them “to vote in different polling stations in the capital.”⁷³ Although Turkish Cypriots represent one third of the population of the island, only one independent Turkish-Cypriot candidate, Mehmet Hassan, ran for the European elections but “had little chance of being elected”, as the electoral threshold was 16.6% at the time and he couldn’t secure backing from the political parties.⁷⁴

In 2009, no Turkish Cypriot candidate could stand for the European elections as the application of Ali Erel and Mustafa Damdelen was rejected by the Ministry of Interior of the Republic of Cyprus⁷⁵ due to residency status. The Parliamentary Assembly of

⁷² Judgement of the European Court of Human Rights, *Case of Zdanoka v. Latvia*, Application No. 58278/00

⁷³ Agapiou-Josephides, K. (2005) “The First European Parliament Elections in Cyprus: The Challenge of European Integration in a Society Striving for Reunification”, *South European Society and Politics*, Vol.10, No.1

⁷⁴ *idem.*

⁷⁵ US Department of State, 2010, 2009 Human Rights Reports: Cyprus, Bureau of Democracy, Human Rights and Labour

the Council of Europe in its Resolution 1376 (2004) “considers it unfair for the Turkish Cypriot community, which has expressed clear support for a reunited and European Cyprus, to continue to be denied representation in the European political debate.” Whereas Turkish Cypriots obtained an observer status with two representatives in the Council of Europe, the European Parliament only discussed this issue twice in its Conference of Presidents meetings in 2004 and 2007 and the problem of the representation of the Turkish Cypriot community seems to be put off the agenda.

In this context, it is worthwhile to note that holders of a Cypriot or Northern Cypriot passports are considered to be a Commonwealth citizen and are entitled to electoral rights under certain conditions in the United Kingdom.⁷⁶

ONE ELECTION: 28 SYSTEMS

Table 1 illustrates the colourful spectrum of electoral laws largely varying from one Member State to another and highlights conditions which can potentially constitute a barrier to representation.

The minimum age of candidacy for the European elections ranges between 18 and 25. The minimum age requirement of 25 is the highest in Greece, Italy and Cyprus. Other countries having introduced rather high minimum age conditions are Romania (23), and Slovakia, Poland, Latvia, Lithuania, Belgium, Bulgaria, Czech Republic, Ireland and Estonia. (21). The UK, for instance, recently changed the minimum age for candidacy from 21 to 18. On the other hand, the minimum age for voting is 18 throughout the EU except for Austria, where it is 16.

Another factor which could be a restrictive measure is the minimum threshold. Although the Article 3 of Direct Elections Act⁷⁷ allows for a minimum of a 5% threshold, a recent constitutional ruling in Germany⁷⁸ found the 5% hurdle unconstitutional. As a result, the threshold in Germany was lowered to 3%. Other Member States such as Croatia, Slovenia, Hungary, Austria, Lithuania, Latvia, Italy

⁷⁶ The Electoral Commission of the United Kingdom, 2010, Part B, Entitlement to Register

⁷⁷ Federal Law Gazette 2003 II, p.810; 2004 II, p.520

⁷⁸ <https://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-072en.html> (Accessed on 25 January 2014)

and Sweden continue to apply a 5% threshold. In France, each of the 8 constituencies should attain a 5% minimum threshold. Considering that many of the Member States applying a relatively high threshold include a significant number of minority populations, this practice is likely to put their due representation in danger. The threshold in Austria, Italy and Sweden is 4% whereas it goes down to 3% and less in other Member States.

Besides the minimum threshold, the size of constituencies plays a very important role on the proportionality. The less seats are allocated per constituency the more votes are necessary to obtain a seat. The idea of a unique constituency on the European level is often put forward as a factor of the Europeanization of the vote, yet it does not favour regional parties.⁷⁹

The use of an open ballot electoral system with a rather large district magnitude can also impede equal representation of different groups.⁸⁰ The Lisbon Treaty together with the accession of Croatia changed the allocation of seats within Member States for the 2014 EP elections. Taking these changes in consideration, we note that the magnitude (the ratio of seats per Member State to number of constituency) varies between 3,92 and 6,08 in Member States with multiple constituencies. (5,25 in Belgium, 9,25 in France, 11,6 in Italy, 3,92 in Poland and 6,08 in the U.K) In Poland, a high threshold of 5% combined with a rather small magnitude of 3,92 can present strong filters. Some Member States use mixed voting systems which allows them to combine proportionality with majority vote in order to strike a balance between territorial representation and political stability.

The voting system also varies from one country to another. The Article 1 of the Direct Elections Act introduced a rule that “the European Parliament shall be elected on the basis of proportional representation.” Yet, there are still voting systems which can be more restrictive than others. For instance, a closed list system allows the party administration to determine the candidates and gives no options to voters to alter the order of candidates; preferential voting (PV) asks the voters to change the lists and

⁷⁹ Dompnier, N. 2011, *Les Elections en Europe*, Presse Universitaire de Grenoble, Grenoble, p.70

⁸⁰ Walczak, A & Van Der Brug, W. 2013, “Representation in the European Parliament: Factors affecting the attitude congruence of voters and candidates in the EP Elections”, *European Union Politics*, Vol.14, No.3

place their favorite candidates on the top; and single transferrable vote (STV) enables voters to pronounce their candidate of second and third choice.

It would be preferable to do away with closed-listing of the systems. In this respect, open list systems, i.e. Finland and Italy or STV used in Ireland and Malta give us better alternatives to increase the quality of parliamentary representation in Europe. Also, regionalization of larger Member States would bring them closer to their citizens.⁸¹

The method for the allocation of seats also varies among Member States. According to Hare method a quotient is obtained by dividing the number of votes by the number of seats. The Droop method is the ratio of the votes to the number of the seats plus 1. Then the seats are allocated to each list by dividing the number of votes by the quotient. The Hare method is usually considered to yield more proportional results. D'Hondt method is applied by dividing the number of votes in each list by 1, 2, 3, 4, 5, 6...to determine the necessary mean to obtain the last seat. Sainte Lague method is similarly applied to each list by dividing the number of votes by impair numbers: 1, 3, 5, 7, 9...Although its proportionality in national terms is controversial, d'Hondt method allows regional parties to obtain seats.⁸²

Compulsory voting is a practice which can be seen only in four Member States: Belgium, Luxembourg, Cyprus and Greece. It is of symbolic nature in Cyprus and Greece as there are no real sanctions imposed.

⁸¹ Farrell, D.M. & Scully, R. 2007 *Representing Europe's Citizens? Electoral Institutions and The Failure of Parliamentary Representation*, Oxford University Press, Oxford and New York, p. 205

⁸² Dompnier, N. 2011, *Les Elections en Europe*, Presse Universitaire de Grenoble, Grenoble, p.72

Table 1: Rules for the 2014 European Elections in Each Member State

Country	Minimum Age of Candidates	Electoral Threshold	Voting System	Compulsory Voting	Voting from Abroad	Number of MEPs	Number of Constituency	Magnitude	Allocation of Seats
Austria	18	4%	Preferential voting		By post	18	1	18	D'Hondt
Belgium	21	X	Preferential voting	Yes	By post	21	4	5,25	D'Hondt
Bulgaria	21	X	Preferential voting		Embassy	17	1	17	Hare-Niemeyer
Croatia	18	5%	Preferential voting		Embassy	11	1	11	Hare
Cyprus	25	1,8%	Preferential voting	Yes	Embassy	6	1	6	D'Hondt-Droop
Czech Republic	21	5%	Preferential voting		Embassy	18	1	18	D'Hondt
Denmark	18	X	Preferential voting		By post, Embassy	13	1	13	D'Hondt
Estonia	21	X	Preferential voting		By Post, Embassy, E-voting	6	1	6	D'Hondt
Finland	18	X	Preferential voting		Embassy	13	1	13	D'Hondt
France	18	5%	Closed list		Embassy, Proxy	74	8	9,25	D'Hondt
Germany	18	3%	Closed list		By post	96	1	96	Sainte-Laguë
Greece	25	3%	Closed list, Compulsory voting	Yes	Embassy	21	1	21	Variant of Hare
Hungary	18	5%	Closed list		Embassy	21	1	21	D'Hondt
Ireland	21	X	Single Transferrable Vote		X	11	11	1	STV
Italy	25	4%	Preferential voting		Embassy	73	5	14,6	Hare
Latvia	21	5%	Preferential voting		By post	8	1	8	Sainte-Laguë
Lithuania	21	5%	Preferential voting		Embassy	11	1	11	Hare-Niemeyer
Luxembourg	18	X	Closed list, compulsory voting	Yes	By post	6	1	6	D'Hondt/Hagenbach-Bischoff
Malta	18	X	Single transferrable vote		X	6	1	6	STV
Netherlands	18	X	Preferential voting		By post, Proxy	26	1	26	D'Hondt
Poland	21	5%	Preferential voting, Multiple constituency		By post, Embassy	51	13	3,92	D'Hondt
Portugal	18	X	Closed list		By post	21	1	21	D'Hondt
Romania	23	5%	Closed list		Embassy	32	1	32	D'Hondt/Droop
Slovakia	21	5%	Preferential voting		X	21	1	21	D'Hondt
Slovenia	18	X	Preferential voting		By post, Embassy	8	1	8	D'Hondt
Spain	18	X	Closed list		By post, Embassy	54	1	54	D'Hondt
Sweden	18	4%	Preferential voting		By post, Embassy	20	1	20	D'Hondt
United Kingdom	18	X	Closed lists (Northern Ireland STV)		By post, Proxy	73	12	6,08	D'Hondt (STV in Northern Ireland)

Source: Author (Data assembled from www.elections.2014.eu)

Additional criteria such as criminal offence or mental disability can potentially restrict citizen's electoral rights. For instance, the ECHR case law⁸³ points out to the fact that imposing a blanket ban on voting of convicted prisoners is in violation of Article 3 of Protocol No. 1.

Apart from the factors enumerated in Table 1, passive rights can also act as barriers to representation. An example is the candidate selection which can be done in a more or less democratic way at the party level.

Research shows that the more decentralized the candidate selection, the more independent politicians are and follow the preferences of their electors instead of their party leaders.⁸⁴ One can observe a rather centralized structure within the EU party system: 48% of the candidate proposals come from party executives, whereas and only 32% of the party members believe that they are given a say during final decisions. Moreover, Italy and France appear to be the most exclusive polity with regards to proposals; whereas Bulgaria and Cyprus have top exclusivity rankings when it comes to the final decision phase. Party democracy appears to be more inclusive in Germany and the Netherlands.⁸⁵

In addition, electoral lists can be presented by parties, political associations, former Members with or without voter's support which can constitute a source of limitation. The Constitutional Court of Lithuania (Case No.06/07), which requires Lithuanian citizenship for party membership, for instance, found that inclusion of non-citizens only through party lists not allowing for other forms of competition was unconstitutional in case of municipal elections but not in European elections.

The variation of campaign funding schemes in Member States is yet another concern as it creates a form of inequality on national and European level.

⁸³ ECHR, *Grand Chamber, Hirst v. United Kingdom*, Application No. 74025/01-Decision No. 79

⁸⁴ European Parliament Directorate General for Internal Policies, Policy Department, Citizen's Rights and Constitutional Affairs, 2010, *How to Create a Transnational Party System*

⁸⁵ European Parliament Directorate General for Internal Policies, Policy Department, Citizen's Rights and Constitutional Affairs, 2010, *"How to Create a Transnational Party System"*, pp.42-45

According to Walczak and Van Der Brug (2013), other factors contributing to the inequalities in representation of various groups of citizens for the EP elections are “education level and political knowledge of voters; as well as ideological clarity of political parties.”⁸⁶ Taking into consideration that only 46% of the EU citizens are aware of what EU citizenship actually means and only 36% of them feel well-informed about their citizen rights⁸⁷, we can only assume that these inequalities are likely to persist. The lack of ideological clarity among European political parties may be counterbalanced during 2014 EP elections with the pre-announcement of the candidate for President of the European Commission by European political parties.⁸⁸

CONCLUSION

The first European elections after Lisbon Treaty in 2014 may not fulfill expectations regarding EU citizenship and the rights associated with it, especially the right to political representation for all citizens and peoples of the Union. Instead of clarifying “who” is entitled to vote and run for European elections, the Lisbon Treaty limited electoral rights to Union citizens, a narrow definition which may exclude minority populations and long-term residents.

Over 10 million EU citizens are being punished for exercising their right to move and reside in another Member State where EU citizenship laws regarding their electoral right don't apply.

EP's electoral system, which is a combination of democratic principle of equality and the international principle of equality among the states, makes it challenging to guarantee a “democratic minimum”.⁸⁹

The ECJ case law points out to a legal gap in the absence of a uniform electoral procedure and common principles to obtain Union citizenship. Recent case law is hinting to a de-responsabilisation of the European Court of Justice in the area of fundamental rights given the fact that the competences are vague in a multi-level legal

⁸⁶ Walczak, A & Van Der Brug, W. 2013, “Representation in the European Parliament: Factors affecting the attitude congruence of voters and candidates in the EP Elections”, *European Union Politics*, Vol.14, No.3

⁸⁷ European Commission, 2013, Eurobarometer, *European Union Citizenship*

⁸⁸ Vogel, T. 2013, *Presidential Ambitions*, European Voice, 10 October

⁸⁹ «Eriksen, E.O. 2009, *The Unfinished Democratisation of Europe*, Oxford University Press, Oxford and New York, p. 35-36

structure. EU's accession to ECHR doesn't improve the compliance of Member States with Union's fundamental rights catalogue as this area is seen as a 'sensitive' one and is left up to Member States' discretion.

If EU citizenship is the "fundamental status" of citizens and Community law prevails over national laws, Member States' compliance with common standards regarding electoral rights should be ensured at the Community level. This is even more pressing considering the rise of extremism in Europe and the existence of discriminatory practices against long-term residents and minority populations in some Member States.

As Gehring suggests, the Courts would be an appropriate tool to enforce fundamental rights of vulnerable minority groups but acknowledges its difficulty, which could be caused, inter alia, by the financial burden of such a procedure.⁹⁰ Even if these cases make it to the European Court of Justice, it will eventually have to weigh between the sensitivity of the issue for a given Member State and its potential to be the substance of EU citizenship right.

One thing is clear "political rather than legal institutions" should take the lead⁹¹ to clarify the scope and to define what fundamental rights are EU citizenship rights⁹² and constitute the substance of EU citizenship rights. If democracy does matter and electoral rights are part of those fundamental rights, a clear legal system with an effective oversight should be put in place.

Duff (2010) proposed to harmonise electoral systems in an effort to render elections more democratic and European. The proposal included important provisions such as a) Establishment of territorial constituencies in Member states with a population more than 20 million, b) Introduction of a preferential semi-open list system 3) Establishment of transnational lists with an addition of 25 MEPs to be elected from a single EU-wide constituency using Sainte Lague method) 4) The possibility for candidates with dual nationality to appear in more than one national list 5) Setting the

⁹⁰ Gehring, J.S. 2013 "Free Movement for Some. The Treatment of the Roma after the European Union's Eastern Expansion", *European Journal of Migration and Law*, pp.7-28

⁹¹ Schrauwen, A. 2013 "Granting the Right to Vote for the European Parliament to Resident Third-Country Nationals: Civic Citizenship Revisited", *European Law Journal*, Vol.19, No.2, pp. 201-218

⁹² Van Den Brink, M.J. 2012, "EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?", *Legal Issues of Economic Integration*, Vol. 39 , No.2

minimum age of voting to 16.⁹³ The fact that this report was sent back and forth to the Constitutional Affairs Committee due to national considerations in the European Parliament reflects the lack of political will to empower peoples of Europe with equal rights.

This proposal is worth reconsidering as rapprochement and homogenization of elections continue to be limited even though there is an increasing interpretation of political and judicial norms between national and European level and among different Member States.⁹⁴ The European Parliament could work in cooperation with the Venice Commission, in this respect, which put in place an online database in order to compare electoral legislation with the aim of defending the principle of trans-constitutionalism.

Moreover, European citizens can use other mechanisms such as European Citizen's Initiative to fight for equal electoral rights and representation for all. The Next Convention should put EU citizenship on the spotlight in view of defining and clarifying the Treaty provisions regarding fundamental rights, including electoral rights.

A fair competition throughout Europe should be guaranteed by making electoral systems as inclusive and as representative as possible and by tackling the existing barriers to representation. Otherwise, we cannot think about a legitimate European Parliament which represents "all" Europeans.

All EU citizens should be given the right to vote for the European elections in the Member State they reside. This could be facilitated by an EU Voter Register to prevent double voting. Also, there should be a standard residency requirement to be eligible for EP elections throughout the Union. EU citizens living abroad should be able to make more use of EU representation to exercise their right to vote.

⁹³ European Parliament's Committee on Constitutional Affairs, 2010, *Draft Report on Proposal for a Modification of the Act Concerning the Election of the Members of the European Parliament by Direct Universal Suffrage of 20 September 1976*, Duff, A.

⁹⁴ Nathalie Dompnier, "Les Elections en Europe", Presse Universitaire de Grenoble, Grenoble, p.184, 2011

All Member States should be encouraged to sign 1992 Convention on the Participation of Foreigners in Public Life at Local Level and give their long-term residents similar rights to be represented at the European level.

Common principles concerning EU citizenship shall be established to deal with obvious discriminatory practices at the Union level. In this regard, the ban on dual citizenship is a restrictive measure; since dual citizenship is destined to conquer the world with the increasing globalization.⁹⁵ The representations of minority populations at the Union level shall be guaranteed given the large number of minorities deprived of citizenship or are perceived as Union citizens without electoral rights.

The failure to ensure the equal treatment and non-discrimination of EU citizens while exercising their fundamental electoral rights derived from Union citizenship would threaten the credibility of the European project; risking further alienation of EU citizens, and undermining the role of the EU as promoter of democracy and human rights around the world.

⁹⁵ Sassen, S.2009, *Critique de l'Etat. Territoire, autorité et droits de l'époque médiévale à nos jours*, Demopolis, Paris