

Political rights of aliens: Articles 10, 11 and 16 of the ECHR and Article 3 of Additional Protocol I

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POLITICAL RIGHTS OF ALIENS: ARTICLES 10, 11 AND 16 OF THE ECHR AND ARTICLE 3 OF ADDITIONAL PROTOCOL I

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1. Introduction and context

The European Court of Human Rights (ECtHR) proclaims that '[d]emocracy is without doubt a fundamental feature of the European public order'.¹ The Preamble to the European Convention on Human Rights (ECHR) enunciates that 'the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights'.²

Democracy, however, does not exist in a vacuum. It is premised on the existence of a polity with members – the *demos* – by whom (and for whom?) democratic discourse with its many variants takes place.³ Hence, the determination that democracy is the only Convention-compatible system of governance does not in and of itself resolve the tension between, on the one hand, limitations of participation in democratic self-governance, deemed to be 'fundamental to the definition of a political community'⁴ and critical for newly created polities⁵ and, on the other hand, the demands of (universal) human rights.⁶ In turn, the ECHR is silent on citizenship criteria,⁷ reserving it to the state's domain,⁸ notwithstanding its profound implications for political participation.

¹ *United Communist Party of Turkey and Others v Turkey*, Application no. 19392/92 (ECtHR, 30 January 1998), para 45.

² Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS no. 5 (entered into force 3 September 1953).

³ WEILER, *To Be a European Citizen – Eros and Civilization* (1997) 4 *Journal of European Public Policy* 495, 503.

⁴ JOHNSTONE, *Outside Influence* (2014) 13 *Election Law Journal* 117, 120.

⁵ ZIEGLER, SHAW and BAUBÖCK (eds), *Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?* (Robert Schuman Centre for Advanced Studies EUI, 2014).

⁶ For a general discussion see PILDES, *Supranational Courts and the Law of Democracy: The European Court of Human Rights* (2017) *Journal of Dispute Settlement* 1.

⁷ But see Council of Europe, European Convention on Nationality, Strasbourg, 6 November 1997, ETS No 166, (entered into force 3 March 2000) esp. Art 6 (Acquisition of Nationality) (21 ratifications; 8 signatures).

⁸ DAY and SHAW, *European Union Electoral Rights and the Political Participation of Migrants in Host Polities* (2002) 8 *International Journal of Human Geography* 183, 187.

The tension presents itself in respect of two interdependent aspects of political participation in a self-governing polity: *political communication rights* (freedoms of expression, assembly, and association, enunciated in Articles 10 and 11 of the ECHR, respectively) and *electoral rights* (pursuant to Article 3 of Additional Protocol 1, A3P1).⁹ Member States' general undertaking in Article 1 of the ECHR to 'secure to everyone within their jurisdiction the [Convention] rights and freedoms' is linguistically qualified in respect of Articles 10 and 11 by Article 16 ('Restrictions on Political Activities of Aliens'), and in respect of A3P1 by the stipulation that elections should be held 'under conditions which ensure the free expression of the opinion of *the people...*' (emphasis added). Notably, despite its 'institutional' language, Convention organs have consistently held that A3P1 entails *individual* rights to vote and to be elected (the 'passive' and 'active' elements thereof, respectively).¹⁰

At the heart of this chapter's analysis lies the function of, and relationship between, political communication rights and electoral rights; through an appraisal of ECHR jurisprudence, it considers the extent to which resident aliens should enjoy access to their Member State of residence's Arendtian political space, where one's opinions are significant and actions effective.¹¹ If Council of Europe Member States may plausibly apply a citizenship qualification to participation in some or all of its electoral processes (predicated on a restrictive interpretation of 'the people' in A3P1), does that *weaken or strengthen* aliens' claim to enjoy without discrimination political communication rights which fall short of decision-making?

In Section 2, the chapter considers the potential effect (or lack thereof) of Article 16 of the ECHR as a 'stop-gap', permitting states to impose restrictions on aliens that are not mandated by Articles 10 and 11's limitation clauses. It is suggested that Article 16 has fallen into desuetude, absent a single case where Convention organs *applied* it, with states generally choosing no longer to invoke its application to justify restrictions on Articles 10 and 11. Nevertheless, the limited case law where the provision has been analysed suggests that citizens of the European Union (EU) residing in another EU Member State (referred to in EU law as Second Country Nationals) are differently situated than other resident aliens

⁹ Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No 9 (entered into force 18 May 1954). The undertaking to 'hold free elections at reasonable intervals by secret ballot' *ipso facto* imposes positive obligations on the state. See e.g. O'Connell, *Realising political equality: the European Court of Human Rights and positive obligations in a democracy* (2010) 61 *Northern Ireland Legal Quarterly* 263.

¹⁰ The leading case being *Mathieu-Mohin v Belgium*, Application no. 9267/81 (ECtHR, 2 March 1987), para 48–52.

¹¹ ARENDT, *The Origins of Totalitarianism* (Harcourt, 1950) 296.

as per their 'alien' designation, not least due to protection (pursuant to the EU legal order) of their electoral rights in local government (municipal) elections.

In Section 3, the chapter investigates the reference to 'the choice of the people' in A3P1, noting the terminological difference between its stipulation and references to electoral rights of citizen(s) in *international* human rights treaties. The ECtHR has held that clauses that permit interference with Convention rights must be interpreted restrictively.¹² However, in appraising electoral exclusions of citizens, the ECtHR has not applied rigorous scrutiny to the identification of legitimate aims, absent a prescribed list; the Court has also extended a wide 'margin of appreciation' to Member States on questions of electoral *eligibility*.¹³ Critically for the purposes of this chapter, hitherto, the ECtHR has neither heard challenges to the near-universal exclusion of aliens from participation in *national* elections¹⁴ (the United Kingdom and Portugal have *selective* nationality-based enfranchisement regimes) nor to widespread exclusion of aliens from participation in *sub-national* elections. Should such challenges arise, the rationale for selective enfranchisement will have to be properly scrutinised.

Finally, in Section 4, the chapter appraises aliens' political communication rights, pursuant to Articles 10 and 11 ECHR. In light of sections 2 and 3, above, it is contended that across the Council of Europe (a) *most* aliens are denied *most* electoral rights; (b) restrictions on 'political activities of aliens' which fall *short of electoral rights* require independent justifications that meet the proportionality tests under those provisions, rather than by reliance on Article 16; and (c) *prima facie* prescribed limitations in Articles 10 and 11 do not distinguish between citizens and aliens (or indeed between different aliens).¹⁵ Absent a

¹² See e.g. *Stoll v Switzerland*, Application no. 69698/01 (ECtHR, 10 December 2017), para 61. See also SCHABAS, *The European Convention on Human Rights: A Commentary* (OUP, 2015) 509, noting that the ancestor of the restrictions and limitations clauses appears to be Article 29(2) of the Universal Declaration on Human Rights, GA Res 217 A (III) (10 December 1948) (UDHR), which stipulates (in respect of the entire Declaration) that '[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

¹³ For critique of ECtHR jurisprudence regarding convicts and non-residents, see ZIEGLER, *Voting Eligibility: Strasbourg's Timidity* in ZIEGLER, WICKS and HODSON (eds), *The United Kingdom and European Human Rights: A Strained Relationship?* (Hart, 2015) 165. Cf; *Sejdić and Finci v Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06 (ECtHR, 22 December 2009), violation of A3P1 in conjunction with Article 14 ECHR in respect of Roma and Jewish BiH citizens who were not permitted to stand as candidate for the House of Peoples and the Presidency of BiH pursuant to the definition of the 'constituent peoples' of BiH.

¹⁴ BECKMAN, *Citizenship and Voting Rights: Should Resident Aliens Vote?* (2006) 10 *Citizenship Studies* 153, 153.

¹⁵ Similarly, the Human Rights Committee (HRC), notes in respect of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

vote, should aliens' *voice* be limited, too, given its (intended) effects on voters? it could be argued that those political communication rights that are 'related' to democratic self-governance should be subject to similar eligibility criteria.¹⁶ Conversely, for aliens, their exclusion from decision-making, coupled with their (non)security of residence, entails vulnerabilities which political communication rights *may* (partially) mitigate. It is also arguably important for citizens to be exposed to the full spectrum of views in order to facilitate informed decision-making.

2. Article 16: stop-gap?

ARTICLE 16

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.

2.1. The potential scope of Article 16

The *effet utile* (effectiveness) principle suggests that, Article 16 operates as an *additional* limitation to paragraph 2 of Articles 10 and 11; *a contrario*, it could serve to strengthen the claim that the latter clauses in and of themselves do not distinguish between citizens and aliens, *pace* Article 1 above. Article 16 refers to Article 14 (non-discrimination) without explicitly confining its imposition to restrictions imposed on aliens under Articles 10 and 11. Notably, Article 14 is not a free-standing right: for a discrimination claim to be invoked, an issue must fall within the ambit of a Convention right.

Article 16 was characterised by Schabas in his Commentary as an *admissibility* test, pursuant to which a CoE MS could object to an application on the grounds that the individual concerned is an 'alien'.¹⁷ The provision does not refer to A3P1, given its later adoption, notwithstanding the *a fortiori* logical extension thereto.

(ICCPR) that '*the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party*'. General Comment no. 31, *The nature of the general legal obligations imposed on states parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [10].

¹⁶ Compare: *Bluman v Federal Election Commission*, 800 F. Supp. 2d 281, 283 (D.C. Cir. 2011); 132 S. Ct. 1087 (2012).

¹⁷ Commentary (above no. 12) p. 606.

2.2. Are second-country nationals 'aliens' in their country of residence?

In *Piermont v France*,¹⁸ the majority *ratio* has effectively taken the view that Article 16 ECHR may *not* be invoked where a citizen of the Union seeks to exercise their rights under the Convention. France has prevented the applicant, Dorothee Piermont, a German national and a Member of the European Parliament (MEP), from re-entering French overseas territories in the South Pacific after she took part in demonstrations against the government in French Polynesia. France alleged that, the applicant was an alien within the meaning of Article 16 ECHR, and therefore could not rely on the protections of Article 10.

The Court considered that, while *citizenship of the Union* as such could not be relied on 'since the Community treaties did not at the time [1986] recognise any such citizenship', the 'possession of the nationality of a Member State of the EU and (...) her status as an MEP do not allow Article 16 (...) to be raised against her, especially as the people of the overseas territories take part in European Parliament elections'.¹⁹ Based on this reasoning, in 2018, post-Maastricht, SCNs are not considered 'aliens' for the purposes of Article 16.²⁰ Judges Ryssdal, Matscher, Sir John Freeland and Jungwiert, in a joint partly dissenting opinion, argued that Article 16 should have been regarded as having at least some relevance, since the applicant was clearly an alien in the eyes of French law, and therefore in the sense of Article 16.²¹

In accordance with the principle of non-discrimination in EU law,²² EU citizens should enjoy municipal electoral rights under the same conditions as nationals of the Member State where they reside.²³ Consequently, Second Country Nationals must be able to fully take part

¹⁸ *Piermont v France*, Application nos. 15773/89 and 15774/89 (ECtHR, 27 April 1995).

¹⁹ *Id* [64].

²⁰ See also *Perincek v Switzerland*, Application no. 27510/08 (ECtHR, 15 October 2015), noting *pace Piermont* that Article 16 could not be raised against a citizen of another EU Member State, but that it could not provide a justification for the interference in that case.

²¹ *Piermont v France*, *cit*, para 4. The dissenting judges proceed to clarify that, even if Article 16 is relevant, it does not entail unfettered discretion of the host state to restrict on the political activity of an alien without contravention of Article 10. *Id* [5].

²² Treaty of the Functioning of the European Union, OJ C 115/47 (29 May 2008) (TFEU) Article 18 (stipulating that '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited (...)')

²³ Treaty on the Functioning of the European Union, Article 20.2(b); Directive 93/109/EC of 6 December 1993, OJ L329/34 as amended by Council Directive 2013/1/EU of 20 December 2012, OJ L26/27; Directive 94/80/EC of 19 December 1994, OJ L368/38. See also Explanations relating to the Charter of Fundamental Rights OJ 303/17 (14 December 2007) (noting, regarding Article 52 thereof, that '[c]itizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.').

in the political life of their Member State of residence. Moreover, the nature of elections to the European Parliament means that, for effective democratic participation, political activities of Second Country Nationals both in their Member State of residence and in their Member State of nationality are critical on matters of common concern.²⁴ Notions of ‘us’ and ‘them’ in respect of Second Country Nationals are accordingly redefined.²⁵

Notably, the European Union’s Long-Term Residents Directive,²⁶ amended in 2011 to extend its scope to eligible Beneficiaries of International Protection (persons granted refugee or subsidiary protection status, previously excluded therefrom)²⁷ maintains the distinction between SCNs and Third Country Nationals regarding municipal electoral rights. A link was thus made between the EU ‘*demos*’ and the state of residence, not just for the purposes of citizen participation in the ‘democratic life of the Union’,²⁸ where its applicability seems mandated, but also for participation in municipal elections, wherever they reside in the Union.

2.3. Desuetude?

In *Piermont*, the Commission stated that ‘those who drafted [Article 16] were subscribing to a concept that was then prevalent in international law, under which a general, unlimited restriction of political activities of aliens was thought legitimate’.²⁹ Indeed, Article 16 dates to a time when it was considered legitimate to restrict the political activities of aliens generally. The underlying rationale was that these activities were apt to disrupt a state’s external relations. However, subsequent human rights treaties, such as the ICCPR,³⁰ to which all Council of Europe Member States are parties,³¹ the American Convention on

²⁴ *Cox v Turkey*, Application no. 2933/03 (ECtHR, 20 May 2010), where the court held that in questions of common European concern, the extent of political freedoms granted to a state’s own nationals and to other Europeans must be the same.

²⁵ FINCK, *Towards an Ever Closer Union between Residents and Citizens?* (2015) 11 *European Constitutional Law Review* 78, 86.

²⁶ Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents, OJ L 16 (23 January 2004).

²⁷ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011, OJ L132 (19 May 2011).

²⁸ Treaty on European Union, OJ C 326 (26 October 2012) Article 10(3).

²⁹ *Piermont v France*, cit, (citing Commission Report A 314 (20 March 1995), para 58).

³⁰ Above no. 15.

³¹ https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en

Human Rights,³² the African Charter of Human and Peoples' Rights,³³ and indeed the Charter of Fundamental Rights of the EU³⁴ do not include similar provisions.

It is also noteworthy that, Article 53 of the ECHR stipulates that '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'. Given the absence of an Article 16 equivalent in the ICCPR, it is hardly surprising that the provision has never been applied by the (former) Commission or the ECtHR and has arguably fallen into desuetude. Over four decades ago, the Parliamentary Assembly of the Council of Europe (PACE) called for proposals for repealing Article 16,³⁵ though to-date its repeal has not materialised.

It is instructive to consider cases where invocation of Article 16 could have been anticipated, such as the forced evacuation of the Saint-Bernard church in Paris 'occupied' by irregular migrants and their supporters;³⁶ or the confiscation by Swiss authorities of an Algerian national's means of communication in order to prevent him from spreading information about the pro-Algerian opposition party *Front Islamique du Salut*.³⁷ A Greek court interpreting Article 16 noted that, the establishment of aliens' associations should be allowed even if they relate to aliens' political activity.³⁸ In an English High Court case, an entry ban imposed by the Home Office on Louis Farrakhan, the American leader of the religious group 'Nation of Islam' was upheld as satisfying Article 10(2) proportionality between the aim of the prevention of disorder and freedom of expression. The Court dismissed Article 16 as 'something of an anachronism half a century after the agreement of the Convention'.³⁹ In *Cox v Turkey*, the ECtHR left a narrow window for future reference to Article 16. It held that, since the right to freedom of expression was guaranteed by Article 10(1) 'regardless of frontiers', no distinction could be drawn between its exercise by

³² 22 November 1969 (entered into force 18 July 1978).

³³ 27 June 1981, 21 ILM 58 (1982).

³⁴ OJ C 326 (26 October 2012).

³⁵ PACE, Recommendation No 799 (15 January 1977) on the Political Rights and Position of 'Aliens' [10]. It also advocated the '*the establishment, where appropriate, of consultative councils to represent the views of aliens at the level of local authorities*'.

³⁶ *Cissé v France*, Application no. 51346/99 (ECtHR, 9 April 2002).

³⁷ *Zaoui v Switzerland*, Application no. 41615/98 (ECtHR, 18 January 2001).

³⁸ MAVRODI, *The Impact of the European Convention of Human Rights and the European Court of Human Rights on the Rights of Third Country Nationals in Greece* (2008) 22 *Journal of Immigration Asylum and Nationality Law* 45, text next to notes 48–51.

³⁹ *R (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] EWHC Civ 606.

nationals and foreigners; hence, Article 16 should be construed as only capable of authorising restrictions on ‘activities’ that directly affect the ‘political’ process.⁴⁰

Given the above, *direct* reliance on Article 16 in future appears unlikely. However, this does not necessarily mean that the provision has lost its broader currency, as an implicit (background) consideration for states, facilitated by its retention in the Convention text and the inexact (open-ended?) nature of several limitation grounds in Articles 10(2) and 11(2).

3. Article 3 Additional Protocol I

ARTICLE 3

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.

3.1. ‘The opinion of the people’

Article 25 of the ICCPR proclaims that ‘every citizen’ shall have the ‘right to vote and to be elected by genuine periodic elections’,⁴¹ permitting (though by no means requiring) states to apply citizenship voting qualifications.⁴² In its General Comment No 25,⁴³ the Human Rights Committee (HRC) contrasted ‘the right to participate in public affairs’ with ‘other rights and freedoms recognised by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the state)’, noting the explicit reference to ‘citizen’.⁴⁴ As noted above, the Treaty on the Functioning of the EU similarly refers to citizens’ electoral rights regarding the European Parliament.

In contradistinction, the (earlier and non-binding) UDHR stipulates in Article 21 that ‘[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives’. The same terminology appears in the ICCPR in respect of ‘the

⁴⁰ *Cox v Turkey*, cit, para 31.

⁴¹ See also American Convention on Human Rights (22 November 1969) Article 2 African Charter on Human and Peoples’ Rights, 27 June 1981, 21 ILM 1982 (entered into force 21 October 1986) Article 12.

⁴² For discussion of citizenship voting qualifications, see ZIEGLER, *Voting Rights of Refugees* (Cambridge University Press, 2017) ch 2.

⁴³ General Comment no. 25: *The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)* (57th session, 12 July 1995).

⁴⁴ *Id* [3].

right to enter his own country',⁴⁵ which the HRC has interpreted as 'not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien'.⁴⁶

Could the reference in A3P1 to the 'the opinion of the people' rather than to citizens facilitate inquiry, in appropriate cases, into exclusion of (some or all) aliens from participation in (some or all) electoral processes? In respect of deportations, the court has accepted that the 'preferential treatment' of citizens of other EU Member States is based on an objective and reasonable justification, 'given that the Member States of the European Union form a special legal order, which has, in addition, established its own citizenship'.⁴⁷ Would the ECtHR accept a similar rationale in respect of the electoral exclusion of Third Country Nationals from electoral participation, were it be challenged on the basis that 'the people' in such Council of Europe Member States appear to include (some) non-citizens?

3.2. Enfranchisement of (some) aliens in sub-national (local) elections

In a resolution prior to the Maastricht treaty,⁴⁸ the European Parliament noted that '[t]he cornerstone of democracy is the right of voters to elect the decision-making bodies of political assemblies at regular intervals. If the right to vote is to be truly universal, it must be granted to all residents of the territory concerned (...) universality, in the original sense of the word, would imply that all residents irrespective of nationality are included in the electorate.'⁴⁹

In parallel to the enfranchisement of Second Country Nationals in municipal elections in their EU Member State of residence *pace* Maastricht, 1992 saw several Council of Europe Member States ratifying the Convention on Political Participation of Foreigners on the Local Level.⁵⁰ The professed aim of this treaty is 'to improve integration of foreign residents into

⁴⁵ ICCPR (above no. 15) art 12(4).

⁴⁶ General Comment Application no. 27: *Freedom of movement (Art. 12)* (2 November 1999), CCPR/C/21/Rev.1/Add.9 [20].

⁴⁷ *C. (Chorfi) v Belgium*, Application no. 21794/93 (ECtHR, 7 August 1996), para 38; see also *Moustaquim v Belgium*, Application no. 12313/86 (ECtHR, 18 February 1991), para 49.

⁴⁸ Treaty on European Union (Consolidated version), Treaty of Maastricht, 7 February 1992, OJ C 191 (29 July 1992).

⁴⁹ European Parliament, *Voting Rights in Local Elections for Community Nationals Residing in Member States other than their own*, COM(86)487 final at 11.

⁵⁰ Strasbourg, 5 February 1992, ETS no. 144 (entered into force 1 May 1997) Article 6(1).

the local community (...) by enhancing the possibilities for them to participate in local public affairs.⁵¹ Contracting Parties undertake to grant to 'every foreign resident' who has been a habitual and lawful resident for five years preceding the date of the election 'the right to vote and to stand in local authority elections'.⁵²

In 2001, PACE recommended that Council of Europe Member States 'grant the right to vote and stand in local elections to all migrants legally established for at least three years irrespective of their origin' as well 'promote the action of migrants' organisations and associations and encourage the networking of their activities'. It also called on them to ratify the abovementioned treaty.⁵³ A 2005 PACE resolution stipulated that '[t]he right to vote and to stand as candidates in local elections should therefore be granted to all legal residents having lived long enough in the country, regardless of their nationality or ethnic origin.'⁵⁴ Nevertheless, despite the passage of time, and notwithstanding the consequences of Maastricht, only a small minority of Council of Europe Member States have ratified the treaty,⁵⁵ and many EU Member States retain selective enfranchisement that meet (just) their EU law obligations.

It is instructive to compare the position under the Convention on the Rights of Migrant Workers and Members of their Families, which entered into force in 2002.⁵⁶ Migrant workers and members of their families 'shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State'.⁵⁷ In contradistinction, they 'may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights'.⁵⁸ The stipulation does not distinguish between levels of governance, emphasising whilst international human rights law does not generally require states to enfranchise aliens, they are permitted (perhaps even encouraged) to do so.

⁵¹ Id, Preamble.

⁵² Id Art. 6.0.

⁵³ See e.g. PACE Recommendation 1500 (26 January 2001), *Participation of immigrants and foreign residents in political life in the Council of Europe member states* [11].

⁵⁴ PACE, Resolution 1459 (2005) Abolition of restrictions on the right to vote [5].

⁵⁵ *Ratifications*: Albania, the Czech Republic, Denmark, Finland, Iceland, Italy, the Netherlands, Norway, Sweden. *Signatures*: Cyprus, Lithuania, Slovenia, and the United Kingdom.

⁵⁶ General Assembly resolution 45/158 of 18 December 1990 (entered into force 1 July 2003).

⁵⁷ Id Art. 41.

⁵⁸ Id Art. 42(3).

3.3. Can electoral exclusion of aliens be challenged in future ECtHR case law?

In addition to national elections, the ECtHR has considered elections to the devolved administrations in the United Kingdom (the Scottish Parliament, the Welsh Assembly, and the Northern Irish Assembly) to fall within the ambit of A3P1 *qua* 'the choice of the legislature',⁵⁹ given their law-making powers. The ECtHR has similarly applied A3P1 scrutiny to the franchise in EP elections.⁶⁰ In contrast, referendums generally fall outside of the ambit of the provision.⁶¹

Given that the UK left the EU on 31 January 2020, EU Member States are not longer required by EU law to enfranchise their resident United Kingdom citizens *qua* their 'relegation' to Third Country Nationals status. Nevertheless, persons who have been exercising both 'passive' and 'active' electoral rights prior to the UK's departure may challenge their disenfranchisement, given that exclusion and non-inclusion are distinguishable.⁶² Such challenges may be reviewed subject to the general standard that the ECtHR has applied to restrictions or limitations on the right to vote, namely that they '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'.⁶³

4. Articles 10 & 11: political communication rights

ARTICLE 10

⁵⁹ See e.g. *McHugh and others v the United Kingdom*, Application no. 51987/08 (ECtHR, 10 February 2015).

⁶⁰ See e.g. *Matthews v the United Kingdom*, Application no. 24833/94 (ECtHR, 18 February 1999) [52–54] (describing the European Parliament as '*represent[ing] the principal form of democratic, political accountability in the Community system*', deriving '*democratic legitimation from the direct elections by universal suffrage*').

⁶¹ *Mclean and Cole v the United Kingdom*, Application nos. 12626/13 and 2522/12 (ECtHR, 26 June 2013).

⁶² See ZIEGLER, *Written evidence* (UK House of Lords' EU (Justice) sub-committee 'Brexit: citizens' rights inquiry', 24 November 2017); available at: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/inquiries/parliament-2017/brexit-citizens-rights/>. See also *Mini-symposium on EU Citizenship in the Shadow of Brexit* (European Law Blog, 19 December 2018); available at: <https://europeanlawblog.eu/2018/12/19/part-iii-mini-symposium-on-eu-citizenship-in-the-shadow-of-brexit-the-right-of-uk-nationals-to-vote-in-european-parliament-elections-in-the-eu-27/>.

⁶³ *Hirst (Application no. 2) v the United Kingdom*, Application no. 74025/01 (ECtHR, 6 October 2005), para 62.

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

ARTICLE 11

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and 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 or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

4.1. The mutually reinforcing political dimension of Articles 10 and 11

The ECtHR has held that ‘freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment’.⁶⁴ In turn, protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention is one of the objectives of the freedoms of assembly and association enshrined in Article 11.⁶⁵ Article 11 protects peaceful assembly and association, which share the objective of allowing individuals to come together for the expression and protection of their common interests. The ECtHR held that ‘participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives

⁶⁴ *Rekvényi v Hungary*, Application no. 25390/94 (ECtHR, 20 May 1999), para 42.

⁶⁵ e.g. *Parti Nationaliste Basque– Organisation Regionale D’Iparralde v France*, Application no. 71251/01 (ECtHR, 7 June 2007), para 33.

collectively'.⁶⁶ Therefore, the function of Article 11 freedoms is central to the effective working of the democratic system. It is hardly surprising that Article 11 has been interpreted in conjunction with Article 10,⁶⁷ and vice versa.⁶⁸

The court has interpreted political rights to include positive obligations to 'guarantee rights that are not theoretical or illusory, but practical and effective'⁶⁹ not least given the observation that the rights enshrined in Articles 10 and 11 are essential for effective exercise of electoral rights. Such positive obligations are 'of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation'.⁷⁰

As per the ECtHR's jurisprudential practice, it places the initial onus on the applicant to demonstrate that one or more of the rights in Articles 10 and 11 has been infringed. It then proceeds to query the State's justifications, namely whether the limitation is pursuant to one or more of the prescribed grounds, and whether it is 'necessary in a democratic society'. The ECtHR held that, in determining necessity in respect of political activities (generally), Council of Europe Member States have a limited margin of appreciation,⁷¹ which goes hand in hand with rigorous European supervision,⁷² and narrow scope for subsidiarity.⁷³

None of the prescribed grounds in both provisions address themselves specifically to aliens. Indeed, notably, Articles 10 and 11 do not distinguish between transient non-citizens, long-term residents, and permanent residents; or between asylum-seekers, recognised refugees, and other migrants. Hence, distinctions *between* non-citizens must be objectively justified, rather than assumed.⁷⁴ Would the distinction drawn above between

⁶⁶ *Alekseyev et al v Russia*, Application nos. 4916/07, 25924/08, and 14599/09 (ECtHR, 21 October 2010), para 62.

⁶⁷ e.g. in respect of political parties, where the ECtHR held that '*the protection of opinions and the freedom to express them is one of the objectives of the freedom of association as enshrined in Article 11*'. *Ouranio Toxo and Ors v Greece*, Application no. 74989/01 (ECtHR, 20 October 2005), para 35 (concerning a party constituted to defend the interests of the Macedonian minority living in Greece).

⁶⁸ See e.g. *Szima v Hungary*, Application no. 29723/11 (ECtHR, 9 October 2012), para 13.

⁶⁹ *United Communist Party of Turkey and Ors v Turkey*, cit, para 33.

⁷⁰ See e.g. *Bączkowski and ors v Poland*, Application no. 1543/06 (ECtHR, 3 May 2007), para 64.

⁷¹ Cf *Plattform 'Ärzte für das Leben' v Austria*, Application no. 10126/82 (ECtHR, 21 June 1988), para 34 (wide discretion in the exercise of reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully).

⁷² Id [46].

⁷³ MAHONEY, *Universality v Diversity in the Strasbourg case law on free speech: explaining some recent judgments* (1997) *European Human Rights Law Review* 364, 379 (contrasting it with cultural or artistic speech).

⁷⁴ See 'Aliens' right not to be discriminated against', ch 10 in this volume.

SCNs and other aliens in those Council of Europe Member States that are also EU Member States also justify differential treatment in respect of Articles 10 and 11 rights? Does the (political) predicament of recognised refugees uniquely situate them as persons requiring (political communication) remedies?

The HRC's approach in General Comment Application no. 15⁷⁵ provides a helpful context. The HRC asserts that '[a]liens (...) have the right to (...) hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association (...) [t]here shall be no discrimination between aliens and citizens in the application of these rights.'⁷⁶ The following sections query the applicability of this (unqualified) statement.

4.2. A (political) voice without a vote?

The right to vote plays both expressive (manifestation of non-domination and self-governance) and instrumental (as a means for protecting individual interests and expressing preferences) roles.⁷⁷ If aliens are excluded from electoral participation, the question is whether the state may restrict their engagement in *other* political activities to try to persuade citizens how to use *their* voting power, given that such restrictions aggravate the expressive effects of disenfranchisement. As the HRC states in its General Comment no. 34, '[f]reedom of opinion and freedom of expression are indispensable conditions for the full development of the person and constitute the foundation stone for every free and democratic society.'⁷⁸

Lardy argues that the restriction on the free speech of 'aliens' is related to the goal of limiting the active participation of non-citizens in political life, the same aim which underlies the denial of the right to vote.⁷⁹ In the United States, Congress banned 'a contribution or donation of money or other thing of value in connection with a Federal,

⁷⁵ HRC, General Comment No 15: *The Position of Aliens under the Covenant* (27th session, 11 April 1986).

⁷⁶ Id [7]

⁷⁷ For discussion, see ZIEGLER, *Voting Rights of Refugees*, ch 3 (considering four grounds for regarding the right to vote as fundamental for individuals: enhancement of human agency and autonomy; the expressive character of voting; human dignity; and enjoyment of equal worth, concern and respect. Regarding aliens' participation, see ZAPATA-BARRERO, *The Political Participation of Immigrants in Host Countries* (MPC EUI, 2013).

⁷⁸ HRC, General Comment Application no. 34: *Article 19: Freedom of Opinion and Expression* (102nd session, 12 September 2011) [1].

⁷⁹ LARDY, *Is there a right not to vote?* (2004) 24(2) *Oxford Journal of Legal Studies* 303, 310

State, or local election' to election campaigns by non-citizens⁸⁰ except when made by lawful permanent residents.⁸¹ The ban was upheld by the Federal District Court in Washington D.C., which analogised participation in electoral campaigns to other activities that may be limited to American citizens, such as voting, serving on a jury, working as a police officer, or being a teacher in a public (state-maintained) school.⁸² The Court held that, while the U.S. 'does not bar foreign nationals from issue advocacy'⁸³ it 'has a compelling (...) in limiting the participation of foreign citizens in activities of American democratic self-government'.⁸⁴

In contrast, it could be argued that freedoms of expression, assembly, and association function within liberal democracies to address deficiencies within the functioning of the democratic processes. Those rights serve to protect the political freedoms of individuals against the potential incursions of electoral majorities and their chosen governors. They mitigate those features of the electoral system which tend to place certain groups – and the corresponding electoral minorities – under threat. If aliens are denied a vote, at least they can try to persuade voters. As Aleinikoff puts it, '[A]re not those in the outer rings of membership arguably in need of greater protection because they are not permitted to participate in the political process and traditionally have been the subjects of discriminatory legislation?'⁸⁵ While other voters can advocate on their behalf, such advocacy is more abstract and reinforces a power hierarchy, privileging one person while stripping the person who is directly affected of his or her voice.⁸⁶

Council of Europe Member States that are signatories to the Convention on Participation of Foreigners undertake to guarantee the right to freedom of expression and the right to freedom of peaceful assembly and to freedom of association with others to foreigners *on the same terms as to nationals*.⁸⁷ Aliens also have the right to form local

⁸⁰ 2 U.S.C. para 441(a).

⁸¹ *Id.* para 441e(b).

⁸² *Bluman v Federal Election Commission*, 800 F. Supp. 2d. 281, 283 (D.D.C. 2011); 132 S.Ct. 1087 (2012) (without decision (referring to *United States v Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) stipulating that '[T]he people in the U.S. Constitution refers to 'a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community'.

⁸³ *Id.* 284.

⁸⁴ *Id.* 288.

⁸⁵ ALEINIKOFF, *Aliens, Due Process and 'Community Ties'* (1983) 44 *University of Pittsburgh Law Review* 237, 264. An analogy may be made with the reference in *United States v Caroline Products Co*, 304 US 144, 152 n 4 (1938) to 'discrete and insular minorities' in respect of judicial review.

⁸⁶ KAGAN, *When Immigrants Speak* (2015) 6 *California Law Review* 84, 96.

⁸⁷ Above no. 50 Art. 3.

associations of their own for purposes of mutual assistance, maintenance and expression of their cultural identity or defence of their interests. Consider the role performed by EU27 citizens in the United Kingdom in discussions concerning the protection of their rights following the outcome of the 23rd June 2016 referendum on the United Kingdom's EU membership, notwithstanding the fact that most EU27 citizens were excluded from the referendum franchise and, indeed, are excluded from the general election franchise.⁸⁸ Such political activities involve establishing pressure groups,⁸⁹ documenting anxiety and uncertainty with a view to influencing decision-makers,⁹⁰ and making appearances in Parliamentary committees.⁹¹

The ECtHR found a violation of the right to peaceful assembly in Article 11 arising from repeated denial of travel authorisation to a Turkish Cypriot wishing to cross into southern Cyprus, impeding his participation in bi-communal meetings with Greek Cypriots, and 'preventing him from engaging in peaceful assembly with people from both communities'.⁹²

4.3. The effect of aliens' political activities on citizens qua voters

It could be argued that, 'voters must be free to obtain information from diverse sources in order to determine how to cast their votes'⁹³ Seen from this perspective, political communication rights of aliens are instrumental – *for citizens*. Indeed, the abovementioned activities of EU27 citizens (and of the TRNC national) arguably serve a dual function. In a democracy, it is essential that voters hear directly from (all) those affected by a public policy.

Compare *Bluman* with French legislation prohibiting the French 'branch' of the Basque party from receiving funding from its Spanish counterpart, The ECtHR held that, prohibition

⁸⁸ EU24 citizens (citizens of EU Member States other than Malta, Cyprus, and Ireland, resident in the United Kingdom) were excluded from participation in the 23 June 2016 referendum. For analysis, see ZIEGLER, *The Referendum of the UK's EU Membership: No Legal Salve for its Disenfranchised Non-resident Citizens*, *Verfassungsblog on Matters Constitutional* (21 June 2016); ZIEGLER, *The 'Brexit' Referendum: We Need to Talk about the (General Election) Franchise*, *Verfassungsblog on Matters Constitutional* (7 October 2015).

⁸⁹ See e.g. <https://www.the3million.org.uk/>

⁹⁰ See e.g. *In Limbo* (Byline Books, 2017).

⁹¹ See e.g. *Brexit: reciprocal healthcare* Oral Evidence session, EU (Home Affairs) Committee (18 October 2017); available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-reciprocal-healthcare/oral/71903.html>.

⁹² *Djavit An v Turkey*, Application no. 20652/92 (ECtHR, 20 February 2003), para 61.

⁹³ *Citizens United v Federal Elections Commission*, 1558 U.S. 310 (2010).

on the funding of political parties by foreign political parties may have a significant impact on an association's financial resources and hence *its* ability to engage fully *in its political activities*.⁹⁴ On the merits, the ECtHR noted that, the Committee of Ministers of the Council of Europe⁹⁵ had expressed support for prohibitions on funding of political parties by foreign sources, and that there was no European consensus on this matter; hence, it held that the prohibition was not in and of itself incompatible with Article 11.⁹⁶ It noted that 'a certain degree of "intrusion" by such parties into the political life of other EU Member States may appear consistent with the logic of European integration...' but held that 'it is not for the Court to interfere in matters relating to the compatibility of a member State's domestic law with the EU project.'⁹⁷

4.4. Voice and exit

Typically, concern about free speech focuses on forms of prior restraint before speech or criminal punishment or civil liability after expressive activity. But, as Kagan notes, aliens have a unique vulnerability that does not affect citizens: they lack permanent security of residence. Ultimately, the state reserves itself the right to control the entry, residence and expulsion of aliens.⁹⁸ The potential threat of deportation may have a chilling effect on aliens' speech, especially when it critiques state authorities, even when, *prima facie*, the law does not limit their political communication rights.⁹⁹

Elsewhere,¹⁰⁰ I argue that recognised refugees¹⁰¹ are a special category of non-citizen residents in need of (full) membership in a political community for an indeterminate *ex ante* unknown period of time; and that it is therefore desirable (*de lege ferenda*) that they be treated by their countries of asylum as if they were their citizens in respect of entitlements

⁹⁴ *Parti Nationaliste Basque*, cit.

⁹⁵ Rec (2003)4 of 8 April 2003 Art. 7.

⁹⁶ Id [47].

⁹⁷ Id [48]. Judge Rozakis, dissenting, would have considered funding from elsewhere in the EU differently.

⁹⁸ See e.g. *Moustaquim v Belgium*, cit, para 43.

⁹⁹ KAGAN, cit, 90.

¹⁰⁰ ZIEGLER, *Voting Rights of Refugees*, cit, ch 8. See also BEHRMAN, *Legal subjectivity and the refugee* (2014) 26(1) *International Journal of Refugee Law* 1, 15 (arguing that the right to mobilise and agitate would allow the refugee to reclaim some of their political subjectivity lost in their flight from their home country).

¹⁰¹ Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

which, under international law, *may* be subject to a citizenship qualification – including the right to vote.

The normative case that I make for enfranchisement applies *a fortiori* to other political activities of refugees.¹⁰² It may be hoped that, in 2021, Arendt's dim observation that refugees 'never banded together, as the minorities had done temporarily, to defend common interests'¹⁰³ requires qualification. Yet, the practical challenges for refugees wanting to undertake political activities in their state of asylum are considerable. Even though 'recognition of (...) refugee status does not (...) make [a person] a refugee but declares him to be one',¹⁰⁴ the decision on which persons come within the ambit of international protection is made by a state, not the refugee – and so is the decision to cease refugee status.¹⁰⁵

Refugees may be deterred from voicing their grievances, fearing backlash or vindication of local population fears. Indeed, while in terms of vulnerability caused by high 'exit' costs, the predicament of refugees is far greater than that of, for instance, a citizen of one EU member State residing in another EU Member State, the ability of the latter to make use of political communication rights is facilitated by security of residence.

5. Conclusion

This chapter explored how Article 16 of the ECHR, designed in post-war Europe to facilitate restrictions on political communication rights of 'aliens', has fallen into desuetude. While the Court has decided voting eligibility cases regarding, *inter alia*, convicts, non-resident citizens, and persons with mental disabilities, it has not considered the (arguable) anomalies arising from divergent eligibility practices in respect of aliens across the Council of Europe and their (in)compatibility with the phrase 'the people' in A3P1. Meanwhile, in Article 16's jurisprudential absence, the Court does not appear to have explicitly dealt with

¹⁰² See also ZIEGLER, *Voting Rights of Refugees*, cit, ch 2, where I consider the ramifications of Article 15 ('[a]s regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances') in light of Article 7(1), according to which the default position under the Convention is the treatment accorded to aliens generally in the same circumstances. Critically, Article 5 stipulates that '[n]othing...shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention' (including the ECHR and, indeed, the ICCPR).

¹⁰³ ARENDT, *The Origins of Totalitarianism* (Harcourt 1950) p. 282.

¹⁰⁴ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (revised 2011) [28].

¹⁰⁵ 1951 Refugee Convention (above no. 101) Article 1C.

two substantive queries regarding the application of Articles 10 and 11: first, the extent to which it would be justified to *distinguish between different political communication rights*, based on the extent to which they affect and/or are related to democratic self-governance. Second, the extent to which it would be justified to *distinguish between aliens* based on their immigration status. It is hoped that further exploration of such questions will be undertaken.

