



*Department of Political Science  
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**External voting and electoral rights.  
A comparative inquiry into an emerging  
constitutional trend**

**Supervisor:**

*Prof. Cristina Fasone*

**Candidate:**

*Oksana Didyk*

*Student Reg. No. 630782*

**Co-supervisor**

*Prof. Carmela Decaro*

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## Introduction

With the adoption of external voting laws, states confer to their citizens living abroad the right to participate in home-country elections.<sup>1</sup> The first provisions allowing the out-of-country voting (OCV) started to be implemented at the beginning of the 20<sup>th</sup> century. It was the case of Australia in 1902, Canada in 1915 and United Kingdom in 1918, just to name some of them.<sup>2</sup> Their external voting systems all shared the characteristic of restricting the external voting to specific occupational categories, namely armed forces and diplomats who were serving the nation from abroad. Such restrictions reflected a state system based on territorial sovereignty and nationality. Indeed, the very conception of the representative democracy was based on undisputable correspondence between citizenship, residence and governmental institutions.<sup>3</sup> However, such a status quo was substantially altered by progressive globalization of personal, professional and political life, that led to increased trans-national mobility of citizens. Nowadays, the demos of the state is no longer rigidly delimited by state boundaries: political participation is still based on the possession of the citizenship status, while the requirement of residing within state territory has been removed by majority of states.<sup>4</sup> Indeed, starting from the aftermath of World War II, external voting underwent significant qualitative and quantitative developments. Occupation-based restrictions were gradually removed and voting rights started to be granted to all citizens, irrespective of their residence and in accordance with

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<sup>1</sup> Grotz F. and Nohlen D., *The legal framework and an overview of electoral legislation*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 67.

<sup>2</sup> Sundberg A., *The history and politics of diaspora voting in home country elections*, based on "Voting from Abroad: The International IDEA Handbook", p. 2-5.

<sup>3</sup> Bauböck R., *Morphing the Demos into the right shape. Normative principles for enfranchising resident aliens and expatriate citizens*, *Democratization*, Vol. 22, No. 5, 2015, pp. 821-822.

<sup>4</sup> Caramani D. and Grotz F. *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, in *Democratization*, Vol. 22, no. 5, Routledge, 2015, p. 800-801.

the principle of universal suffrage.<sup>5</sup> In the past three decades, states including external voting provisions in their electoral laws and constitutions have increased enormously. Suffice it to say that out of 216 states and territories analysed by International IDEA, in 1991 there were only 31 countries with external voting systems, they increased to 115 in 2007, and they amount to 151 by now (2018).<sup>6</sup>

Given these premises, it may be argued that on the one hand, a growing number of states commit themselves to enfranchise their expatriates, in respect with the principle of a truly universal suffrage; on the other hand, external voting represents a challenge for the democracies of the 21<sup>st</sup> century, because it undermines the traditional conception of representative government based on citizenship and residence. As a matter of fact, while residence within the state is no longer a fundamental requirement for being granted political membership; citizenship still represents the primary precondition to exercise voting rights. The most relevant controversy with regard to citizenship consists in the following argumentation: (1) the status of citizenship implies civil, social and political duties and obligations; (2) expatriates are not subject to the laws of their country of origins, in most cases they are exempted from taxation and they are not compelled to fulfil civil and social duties in the same way as resident citizens;<sup>7</sup> (3) nevertheless, expatriates retain the voting rights that derive from the possession of citizenship and therefore are granted full membership in the political demos; (4) it derives that external voters have the right to elect a government, whose laws won't directly affect themselves, but rather those who live within the state boundaries;<sup>8</sup> (5) in conclusion, it may be

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<sup>5</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, Vol. 21., No. 5, Routledge Taylor & Francis Group, 2015, p. 840.

<sup>6</sup> Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, Vol. 75, No. 4, in *Fordham Law Review*, 2007, p. 2398-2399. International IDEA, Voting from Abroad Database, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>

<sup>7</sup> Bauböck R., *The rights and duties of external citizenship*, in *Citizenship Studies*, Vol. 13, No. 5, Routledge, 2009, pp. 485-486.

<sup>8</sup> Rehfeld A., *Towards a General Theory of Political Representation*, in *The Journal of Politics*, Vol. 68, No. 1, Cambridge University Press, 2006.

argued that external voting is in contrast with the theory of political representation, according to which only citizens who bear the consequences of their electoral choices should be granted the right to vote.<sup>9</sup>

All things considered, from one perspective, external voting can be presented as a question of principle, based on universal suffrage; moreover, it responds to the changing nature of de-territorialized and transnational states. At the same time, it may be argued that citizens residing *outside* the national territory should not have a decisive role in electing representative organs, whose decisions will only be binding on those individuals who reside *inside* the country.<sup>10</sup>

Based on these premises, we are going to consider to which extent external voting is justifiable from the point of view of legitimate political representation. With this intention, a comparative inquiry on external voting will be conducted, taking into consideration independent, dependent and intervening variables, and it will be based on a database comprehensive of 151 countries that have adopted external voting provisions.<sup>11</sup>

Our independent variable is represented by International laws, adopted within the framework of the United Nations, as well as at the regional levels, by the Council of Europe and by the European Union. A number of international declarations, treaties and charters have promoted the right to vote, the universal suffrage and the principle of free and fair elections, however none of them directly refers to the external voting rights of non-resident citizens. Given that there is no binding International norm on external voting, states can enjoy a wide margin of appreciation as to the inclusiveness of their OCV norms.<sup>12</sup>

Our dependent variables are represented by all those provisions that states can introduce in their external voting systems. To enumerate some of them,

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<sup>9</sup> See supra note.

<sup>10</sup> Grotz F. and Nohlen D., *The legal framework and an overview of electoral legislation*, op. cit., p. 72-73.

<sup>11</sup> International IDEA, Voting from Abroad Database, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>

<sup>12</sup> Pogonyi S., *Four Patterns of Non-resident Voting Rights*, in *Ethnopolitics*, Vol. 13, No. 2, Routledge, 2013, pp. 122-124.



we can mention: the eligibility criteria that expatriates have to meet before voting from abroad, the types of elections to which OCV applies, voting modalities and procedures, special or assimilated political representation of external citizens within domestic governments etc. All of them can play a determinant role and define the degree of accessibility of OCV or the political role of expatriates within domestic government.

Finally, a number of intervening variables can have a direct influence on external voting. For instance, an important role may be played by the interests of political parties, by the size of emigrant community and electoral turnout, by lobbying of some categories of citizens etc. These aspects can be determinant in the adoption of OCV, as will be shown through the case study of Italy.

In conclusion, the analysis of different variables will demonstrate that numerous factors can determine the degree of inclusiveness of external voting systems, there is no single model that could apply to all states and much depends on the socio-political context of each country. Given that there is no international norm that constraints states to grant voting rights to expatriates, each country can decide if limit the influence of external citizens within domestic politics, or rather give priority to the principle of universal suffrage.<sup>13</sup>

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<sup>13</sup>Fabbrini F., *The right to vote for non-citizens in the European multilevel system of fundamental rights*, Eric Stein Working Paper No 4, 2010, pp. 4-5.

# **1. Defining external voting: historical and legal perspectives**

## **1.1. Conceptualising external voting: definition, origins, basic concepts**

### **1.1.1. The concepts of universal suffrage and citizenship in external voting**

External voting can be understood as the right of citizens living abroad to take part in home-country elections. According to the definition used by the scholars of International Institute for Democracy and Electoral Assistance (International IDEA), the external voting rights encompass «provisions and procedures which enable some or all electors of a country who are temporarily or permanently abroad to exercise their voting rights from outside the national territory».<sup>14</sup> Essentially, with the adoption of external voting laws, states enfranchise their citizens living abroad. From one perspective, it is fundamental for modern democracies to adopt Out-of-Country Voting (OCV) in order to respect the human right principle of universal suffrage.<sup>15</sup> At the same time, the suffrage is directly interconnected with the citizenship status, as the basis for voting rights. In this respect, it is important to consider that persons may hold a formal citizenship of a State, without having any ties with the socio-political dimension of their country of origins (as may be the case of second or third generations of emigrants). Moreover, while enjoying the voting rights connected to citizenship, expatriates are not always subject to the same obligations as local citizens (for instance with regard to taxation).<sup>16</sup>

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<sup>14</sup>GrotzF. and Nohlen D., *The legal framework and an overview of electoral legislation*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 67.

<sup>15</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, Vol. 21., No. 5, Routledge Taylor & Francis Group, 2015, p. 840.

<sup>16</sup> Bauböck R., *The rights and duties of external citizenship*, in *Citizenship Studies*, Vol. 13, No. 5, Routledge, 2009, pp. 485-486.

In essence, external voting may be subject to different interpretations and it results to be a compound phenomenon, that is in turn based on the principles of universal suffrage and citizenship.

- The principle of universal suffrage

The logic in favour of expatriate voting is connected to the principle of universal suffrage and is very straightforward: the right to vote is granted to all adult citizens, expatriates are citizens, therefore they should be allowed to exercise their voting rights even if living outside the national territory. Fundamentally, extending voting franchise to emigrants is an important step in the promotion of universal suffrage and it reflects the commitment for political freedoms and civil rights. In this perspective, the enfranchisement of emigrant citizens, through the elimination of residency-based restrictions, can be considered as the most recent historical developments of electoral rights.<sup>17</sup> For certain, the claim for universal suffrage is one of the main arguments in favour of enfranchising citizens abroad.

In general, several phases can be identified in the long process of universal enfranchisement. Till the 18<sup>th</sup> century, the right to vote was mainly granted for males based on wealth and property requirements, meaning that only a restricted social category was allowed to participate in elections.<sup>18</sup> In some jurisdictions, voting restrictions were also based on religious belief and ethnicity. Starting with French Revolutions and evolving until the early 20<sup>th</sup> century, the suffrage was extended to the entire adult male population.<sup>19</sup>

The next phase of the extension of voting rights regarded women enfranchisement. At the beginning of the 1900s only few states, such as Australia, Finland, Denmark, Norway and some others, had allowed women

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<sup>17</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, in *Global Networks*, Vol. 11, No. 4, Blackwell Publishing Ltd & Global Networks Partnership, 2011.

<sup>18</sup> López-Guerra C., *Should Expatriates Vote?*, in *The Journal of Political Philosophy*, Vol. 13, No. 2, 2005, p. 222.

<sup>19</sup> Beckman L., *Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy*, in *Journal of Historical Sociology*, 2015, Vol. 28, No. 1, pp. 31-32.

to take part in the electoral process. It was mainly during the interwar period and after World War II that women's suffrage became nearly universal. It is interesting to note that even in some European states, women were enfranchised only a few decades ago; for instance, in Switzerland they were allowed to vote at federal level in 1971; while in Liechtenstein women were denied the right to vote until 1984.<sup>20</sup>

For a long time, another barrier to the right to vote has been the age. Indeed, in most countries, before World War II, the minimum voting age was of 21 years or higher. While nowadays, the majority of states have set 18 years as the legal age for exercising the voting right.<sup>21</sup>

Finally, the granting of external voting is to be considered as the current and still ongoing phase of the universal enfranchisement. Certainly, the process of universal suffrage is not ended yet and a further expansion of voting rights depends on the commitment of states to enfranchise their non-resident citizens.

- The concept of citizenship

As famously affirmed by Hanna Arendt, citizenship is «the right to have rights».<sup>22</sup> As a matter of fact, while most civil and social rights have been extended to all residents, regardless of their nationality, the right to vote still remains attached to the condition of citizenship.<sup>23</sup> As a consequence, while both nationals and aliens that reside in the state territory are subject to the obligations and benefits that derive from civil and social rights; only those who hold the status of citizenship are granted political participation in the self-government of the state. Some concerns in this regard arise when considering citizenship as a transnational institution, typical of modern de-territorialised

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<sup>20</sup> Fabbrini F., *The right to vote for non-citizens in the European multilevel system of fundamental rights*, Eric Stein Working Paper No 4, 2010, pp. 4-7.

<sup>21</sup> Trócsányi L., *The regulation of External Voting at National and International level*, edited by the European Commission for Democracy Through Law (CDL), Study No. 580, Strasbourg, 2011, p. 13-14.

<sup>22</sup> Arendt. H., *The Origins of Totalitarianism*, USA, Harcourt, Brace and Jovanovich 1951, p. 294.

<sup>23</sup> *International Covenant on Civil and Political Rights*, United Nations General Assembly, resolution 2200A, 23 March 1996, Art. 25 a., b.

states. In practical terms, we are referring to those citizens that don't reside in their country of origins, therefore they are not subject to its civil rights and duties, but still detain their political rights. Which in turn means that non-resident citizens have the right to elect a government, whose laws won't directly affect the non-residents themselves, but rather those who live within the state boundaries. The paradox of external voting consists exactly in the fact of granting the right of political representation to those who will be affected only marginally by the government decisions; while the laws passed by such an elected government will mostly affect in-country citizens and immigrants (the latter ones have no political rights).<sup>24</sup> In addition, expatriates are not subject to state's obligations in the same way as residents. The primary duty of citizenship is to obey the laws of the state. Nevertheless, according to the primacy of territorial jurisdiction, external citizens will rather obey the laws of the country of residence. In the same way, external citizens don't contribute to the payment of taxes in their home country, while domestic citizens and foreign residents have to complain with these duties. In any case, an argument in favour of enfranchising citizens abroad is based on their right to return. Indeed, it is a principle of international law that guarantees everyone the right to re-enter their country of origins.<sup>25</sup> Citizens are free to leave their country and to return it, without losing their citizenship status. From this point of view, it is obvious that states of origin cannot deprive citizens residing abroad of their political rights.

At this point, the question is: for how long should citizens be allowed to maintain their status of full-membership in the political life of the domestic polity, while living abroad? It seems legitimate to affirm that expatriates should be granted a life-long right to maintain their status of citizenship. But, some states seriously jeopardize this right, it is the case when they don't allow their expatriates to retain the citizenship if naturalizing abroad. Or said

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<sup>24</sup> Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, op. cit., pp. 2446-2447.

<sup>25</sup> *A Universal Declaration of Human Rights*, Resolution 217 (III), United Nations General Assembly, Paris, 10 December 1948, art. 13; *International Covenant on Civil and Political Rights*, United Nations General Assembly, resolution 2200A, 23 March 1996, Art. 12;

differently, some states don't allow dual or multiple citizenship, forcing their expatriates to choose only one political community of belonging, even if the first-generation emigrants may have strong ties both to the domestic state and the country of residence. In any case, citizenship by naturalization is usually subordinated to legitimated requirements, such as the prerequisite of a minimum legal residency.<sup>26</sup> In contrast, citizenship may be also transmitted automatically, even to those individuals who have never resided in the state. Indeed, accordingly to the international law principle of *ius sanguinis*, citizenship may be transmitted by descent to children born abroad if one of the parents holds the citizenship.<sup>27</sup> Even if there are various regulations concerning the right of citizenship by descent, a great number of states don't put any restrictions on the transmission of citizenship through *ius sanguinis* for non-residents. In this way, even third and later generation will have the right to hold the citizenship of their ancestors. Since many countries also allow multiple nationality among expatriates, the potential of having non-resident citizens that have no ties with the nation becomes enormous.<sup>28</sup>

On the whole, nationality laws are crucial in defining the degree of inclusion or exclusion of external citizens. Enfranchising expatriates is an important step towards the inclusion of migrants, whose voting rights has always been precarious. But at the same time, external voting represents a test case to the significance of citizenship and the legitimacy of political representation.

In conclusion, what emerges is that external voting can be considered as a question of principle, based on the universal, equal, free and secret suffrage and therefore to be applied also to citizens living abroad.

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<sup>26</sup> Green P., *Entitlement to vote*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p.92.

<sup>27</sup> De Groot G.R., Vink M.P., *Birthright Citizenship: Trends and Regulations in Europe*, Italy, EUDO Citizenship Observatory, 2010, pp. 9-12.

<sup>28</sup> Navarro C. *The political rights of migrant workers and external voting*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 193-194.

On the other hand, it is a complex phenomenon that is interconnected to citizenship laws and may raise issues of political participation and legitimacy.

External voting rights as part of International law and its socio-political implications will be further discussed in the following paragraphs, for now, let us consider the origins and the early definition of external voting, so to be able to understand some of its basic concepts.

#### 1.1.2. Origins of external voting: basic concepts

Similarly to what occurred with the expansion of universal suffrage, external voting rights also experienced different phases and were subject to restrictions. The first provisions allowing the OCV started to be implemented by some states at the beginning of the 20<sup>th</sup> century; their external voting systems all shared the characteristic of restricting the external voting to some categories of citizens, mostly based on the profession they exercised.<sup>29</sup> For instance, seafarers were the only ones allowed to vote from abroad by New Zealand in 1890 and by Australia in 1902.<sup>30</sup> The other categories that were traditionally allowed to participate in the domestic elections from outside the national territory were military and diplomatic personnel.

Basically, external voting rights were granted to citizens who were serving the nation from abroad. Such restrictions reflected the importance given to national sovereignty at that time and the attitude of states towards expatriates. As a matter of fact, states were not interested in maintaining links with emigrants, who were considered as impoverished citizens permanently residing overseas. Most importantly, the fact that emigrants could have developed allegiances to a foreign country was perceived as a threat.<sup>31</sup> This discourse obviously did not refer to citizens serving the state from abroad,

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<sup>29</sup> Bauböck R., *Morphing the Demos into the right shape. Normative principles for enfranchising resident aliens and expatriate citizens*, Democratization, Vol. 22, No. 5, 2015, pp. 821-822.

<sup>30</sup> Sundberg A., *The history and politics of diaspora voting in home country elections*, based on "Voting from Abroad: The International IDEA Handbook", p. 2-5.

<sup>31</sup> GrotzF. And Nohlen D., *The legal framework and an overview of electoral legislation*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 67.

such as diplomats and soldiers. The external electoral participation of specific professionals did not arise any political concerns; in addition, the organization of the voting procedure abroad was feasible because of the limited number of such external voters. Following this line of reasoning, Canada adopted external voting by mail for its military personnel in 1915; France allowed its administrators allocated in the occupied Rhineland to vote by post in 1924; and during World War II even more countries extended the right to vote for their military forces while outside the national territory.<sup>32</sup>

Given the restrictive nature of the first external voting provisions, its initial enactment appeared relatively simple. Such a process consisted in a three-step procedure: (1) registration of qualified citizens overseas, (2) the casting of ballots from abroad, (3) the counting of the votes and their allocation to a domestic constituency.

From a merely technical perspective, this early definition of external voting describes also its procedure as it happens today:

- First, registration designates the procedure through which qualified non-resident voters abroad are added to the electoral register. Registration may take two forms: passive or active. In the former case, voters are automatically added to the electoral roll, without having to explicitly express their will to participate in the elections (e.g. Italy). In the latter case, voters must request registration, which is the most common procedure.
- Second, there are different methods of casting votes abroad: «voting in person in consulates, embassies or polling stations abroad; voting by mail; voting by proxy; or voting electronically through information and communications technology».<sup>33</sup> States are free to choose one or more modalities for conducting elections abroad, however some of them rise

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<sup>32</sup> Sundberg A., *The history and politics of diaspora voting in home country elections*, based on "Voting from Abroad: The International IDEA Handbook", International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 1-2.

<sup>33</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, vol. XXI., no. V, Routledge Taylor & Francis Group, 2015, p. 842.



serious concerns of unconstitutionality. For instance, voting by mail or by proxy can jeopardize vote's secrecy and result in fraud concerns.<sup>34</sup>

- Third, counting and allocation of votes cast abroad. The opening and counting of ballot papers is usually carried out by electoral officers outside the national territory or in the home country. The votes can be either mixed with the domestic ones or counted separately. In the former case, the votes can be allocated to the constituency of last residence of the external voter or to a pre-determined constituency (for instance the capital city).<sup>35</sup> In the latter case, the votes casted abroad are allocated to a separate constituency, composed by the elected representatives of external voters. In other words, external voters elect their own representatives to the national government. Currently, only thirteen states allocate reserved seats for expatriates in their Parliaments or Senates. As an example, the Italian legislature has the most extensive expatriate representation: with twelve deputies and six senators directly elected by external voters.<sup>36</sup>

### 1.1.3. Evolution of external voting: main characteristics

The turning point in considering external voting no longer only as a set of electoral procedures but as a right occurred when the occupational-related restrictions for voting from abroad were removed. Especially in the period that followed World War II, characterized by decolonisation movements, more and more newly established states started adopting external voting procedures. As was the case of former French and British colonies. Exemplifying are the legislations adopted by Indonesia in 1953 and by Colombia in 1961, which

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<sup>34</sup> Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p. 877; International IDEA, *Voting from Abroad Database – Voting Method*, available at : <https://www.idea.int/data-tools/question-view/130352>;

<sup>35</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, Vol. 21., No. 5, Routledge Taylor & Francis Group, 2015, p. 846.

<sup>36</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor& Francis Group, 2013, p. 91.

aimed at enfranchising all the citizens residing abroad and not only diplomats or military personnel.<sup>37</sup> In general, the democratization process accelerated the international diffusion of the out-of-country voting, acknowledging that external voting rights are not subject to any profession-based restrictions. A strong diffusion of external voting as a right widely enfranchising citizens abroad also characterized the democratic transitions of the 1990s, being adopted in a growing number of countries since then. As a matter of fact, at present, 151 countries have passed external voting provisions (as to International IDEA Voting from Abroad database).

In the past two decades, external voting has been subject to qualitative and quantitative transformations and has now become a right, granting citizens abroad a formal membership in their home country polity.<sup>38</sup> As a result, it can no longer be defined as a set of solely technical and administrative procedures concerning the registration, the voting methods, and the counting and allocation of the ballots. Instead, a broader definition of external voting rights is needed and it can be formulated as follows:

«the active and passive voting rights of qualified individuals, independently of their professional status, to take part from outside the national territory in referenda or in supra-national, national, or sub-national elections held in a country of which they hold citizenship but where they permanently or temporarily do not reside».<sup>39</sup>

According to this definition, external voting can be further characterized by four essential elements:

- First of all, the fact that citizens residing abroad cast their votes from outside the home country. In this respect, external voting has to be differentiated from two other types of voting which may be easily confused with it. One of them refers to those electoral laws that allow

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<sup>37</sup> Ellis A., *The history and politics of external voting*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007.

<sup>38</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, Vol. 21., No. 5, Routledge Taylor & Francis Group, 2015, p. 843.

<sup>39</sup> Lafleur J.M., op. ult. cit., p. 845.

the non-resident citizens to vote, but under the requirement for them to return to the home country on the election day in order to cast their vote. For long time this provision was applied in Italy and is still in use in some Eastern European countries, such as Slovakia or Albania.<sup>40</sup> Though, the right of expatriates to vote back home, cannot be considered as part of external voting provisions, because the elections take place exclusively inside the national territory. The other type of voting which has to be distinguished from the out-of-country one, refers to the right of foreigners to participate in the host-country elections, known as alien voting rights. It takes into consideration the immigrants (namely the non-national residents), which is actually the opposite of external voting, that on the contrary refers to emigrants (non-resident citizens).<sup>41</sup>

- Second, in order to participate in the elections, expatriates have to respect some qualification criteria in addition to the general ones that are set by voting laws and apply to all the voters. For instance, some of traditional restrictions that apply to everybody, are the minimum age requirements or the possession of civic rights (that may be denied in case of criminal conviction).<sup>42</sup> However, the right to vote from abroad may be subordinated to additional criteria, such as: (1) the size of the emigrant community: some states limit the organization of external voting to countries where there is a minimum threshold of registered voters. It is the case of Bulgaria, Brazil, Senegal and others. They do so in order to reduce costs. (2) The place of residence abroad: some legislations allow access to the external voting only in a limited number of large destination countries. (3) Duration of residence abroad: in

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<sup>40</sup> Bauböck R., *Stakeholder Citizenship and Transnational Political Participation*, op. cit, p. 2423.

<sup>41</sup> Caramani D. and Grotz F. *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, in *Democratization*, Vol. 22, No. 5, Routledge, 2015, p. 800.

<sup>42</sup> Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, *Fordham Law Review*, 2007, p. 2432.

some countries, expatriates lose their right to participate in external voting after a certain number of years residing abroad.<sup>43</sup>

- Third, external voting can be applied to different types of elections. In particular to: legislative and presidential elections, referendums, sub-national elections or supra-national ones.<sup>44</sup> Most countries enfranchise citizens living abroad in legislative and presidential elections, granting them the right to elect organs of national representation. The sub-national elections refer to the regional level of government; while referendums may be held at different levels and external voting may apply also to constitutional referendums. With regard to supra-national elections, the most prominent example can be found within the European Union, with the elections of the European Parliament, where no distinction is made between residency and citizenship criteria for voting among EU citizens.<sup>45</sup> Based on financial, logistical or political factors, states may enable external voting for only one or all types of elections.
- Fourth, external voting may encompass both active and passive voting rights. While the former one gives the right to vote in home-country elections, the latter is the right to stand as candidates and be elected in the domestic elections. Only thirteen countries out of 151 that have external voting provision, allow the expatriates to stand as candidates and allocate them reserved seats in the parliaments. They are: Algeria, Angola, Cape Verde, Colombia, Croatia, Ecuador, France, Italy, Mozambique, Panama, Portugal, Romania and Tunisia.<sup>46</sup>

With the introduction of passive voting rights for non-resident citizens, expatriates gained the right to be directly represented in home-country

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<sup>43</sup> Grotz F. and Caramani D, *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, in *Democratization*, Vol. 22, no. 5, Routledge, 2015, p. 802-810.

<sup>44</sup> Fierro C.N. – Morales I. – Gratschew M., *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 15-16.

<sup>45</sup> *Report on Out-Of-Country Voting*, study no. 580 / 2010, section II, paragraph 7, Council for Democratic Elections and Venice Commission, Venice, 17-18 June 2011, p.14.

<sup>46</sup> Lafleur J.M., *The enfranchisement of citizens abroad*, cit. p. 845.

governments. It makes the distinction between the early external voting systems and contemporary legislation even more evident. At the beginning of the 20<sup>th</sup> century, the enfranchisement of non-resident citizens was seen as an exception and regarded only those who were serving the state from abroad. Gradually, occupation-based restrictions were reduced and all citizens living abroad gained the same political and juridical status as residents. Finally, the contemporary legislation on the OCV has recognized that residence abroad has not to be a discriminatory factor of exclusion from the domestic political arena, on the contrary it should represent a new ground for granting political rights.

Hereinbefore, through considering the origins and the evolution of external voting, its meaning has been defined and its basic notions outlined. However, a very last consideration about the terminology related to external voting is necessary, as to avoid any conceptual confusion.

#### 1.1.4. Terminology

Currently, there are many different terms that are used in reference to external voting, such as expatriate voting, absentee voting, out-of-country voting (OCV), extraterritorial voting or remote voting. These terms are often used as synonyms of external voting and indeed they define very similar phenomena but with some distinctions:

- Remote voting regards any type of voting procedure that occurs outside a regular polling station. For instance, we can talk about remote voting when mobile election teams organize voting procedure for persons with reduced mobility.
- Absentee voting occurs when the ballots are cast outside the electoral district of registration of the voter. Absentee voting may involve remote voting and be conducted inside the country or it may occur outside the national territory.
- Out-of-country voting (OCV) and extraterritorial voting refer to the same phenomenon. The main characteristic is that they both take place outside the home-country territory where the election is held.

- Expatriate voting refers to citizens who permanently reside abroad, with no permanent residence in the home-country where the election takes place. When expatriates are allowed to vote in home-country elections only if returning back on the election day, we talk about in-country voting (ICV). Otherwise, states grant voting rights to its expatriates through the OCV provisions.<sup>47</sup>

A further distinction should be made between the connotation of expatriates and the notion of diaspora. Expatriates are not to be considered as former citizens, but rather as citizens who reside for a long time or permanently in a foreign country. While diaspora refers to a more ideological notion of collective identity, that is usually associated with the narrative of future return to the homeland. Consequently, the concept of diaspora cannot characterize all expatriates and it would be inappropriate to talk about diaspora voting.<sup>48</sup>

All in all, according to the definitions so far considered, external voting refers only to expatriates who exercise their voting rights from abroad. Finally, it can be affirmed that out-of-country voting, extraterritorial voting and expatriate voting can all be used as synonyms of external voting.

## 1.2. A historical overview of external voting

When analysing the diffusion of external voting worldwide, it emerges that it cannot be characterized as a regional phenomenon, nor can it be reconducted to specific governmental regimes or electoral systems. If we mark on a time line the introduction of external voting in different countries, it will be hard to find a common characteristic that could explain the adoption of OCV provisions in various parts of the world. What is certain is that external

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<sup>47</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: a Normative Evaluation of External Voting*, vol. LXXV, art. IV, Fordham Law Review, 2007, p. 2398-2399.

<sup>48</sup>Sundberg A., *The history and politics of diaspora voting in home country elections*, based on "Voting from Abroad: The International IDEA Handbook", International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 3-4.

voting was rather an exceptional phenomenon until World War II, but its expansion greatly accelerated over the last decades. In any case, an overview of the historical developments of external voting will show some of the reasons that motivated legislatures to adopt such provisions.

The very first documented experience of extraterritorial voting can be traced back to the Roman emperor Augustus (63 BC – 14 AD), who allowed the senators of the newly established colonies to cast their votes and send them to Rome by mail. After that, there are no other historic evidences of the use of such provisions, until the 19<sup>th</sup> century.

In the modern era, the earliest known adoption of external voting can be found in 1862, when the US state of Wisconsin enacted procedures to permit the enfranchisement of its soldiers during the Civil War. Other US states followed this model and allowed the voting of their armed forces fighting in the Union Army. Since the beginning, the political competition was one of the factors influencing the adoption of external voting. In fact, Republicans backed such legislation because they believed that the military would support the Republican President Abraham Lincoln. This early case of external voting is exemplifying of two factors: the adoption of external voting because of political interests, and of the fact that initially the external voting was applied only to the armed forces. For instance, also New Zealand enfranchised all its soldiers (even those below of the then voting age of 21) during the war period of 1845-1872.<sup>49</sup>

A part of the military context, some states allowed the exercise of extraterritorial voting to other professional categories, too. For instance, New Zealand (1890) and Australia (1902) granted the extraterritorial voting to seafarers. More in general, early developments of external voting limited the enfranchisement to the citizens who were at the service of the home country from abroad. Soldiers, seafarers, but also diplomats traditionally represented those professional categories that were enfranchised long before all other non-

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<sup>49</sup>Ellis A., *The history and politics of external voting*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 41.

resident citizens. The main reason for such restrictions was the fact that states were concerned about sovereignty matters and were not interested in their emigrant population abroad.

During the World War I, the political demand of those serving the country in the military conflict grew exponentially and countries like Canada and the United Kingdom granted them the right to vote from abroad respectively in 1915 and 1918. In the case of Canada, the legislation on external voting was not based on merely ideological principles, but it rather followed political interests. As a point of fact, the Unionist government considered the soldiers as likely supporters. According to the Canadian legislation, the military elector could also choose the district to which allocate his vote; if the military elector failed to do so, the political party he has voted for could allocate that vote to the electoral district of its choice after the domestic votes were counted (greatly influencing the voting outcomes). The political interference in external voting was also very evident in the Canadian province of British Columbia. In 1916, the soldiers overseas were enabled to vote in referendums on the female suffrage and on the prohibition of alcohol. While the referendum on women's suffrage passed easily, the one on prohibition was very uncertain and the votes of the soldiers serving abroad were decisive for its rejection. The supporters of prohibition claimed allegations of malpractice and at the end the legislative commission of inquiry invalidated most of the out-of-country votes. It changed the results of the referendum and finally prohibition was enacted.<sup>50</sup>

In general, states have made major moves to extend external voting to the citizens serving the state in the context of war conflicts. It was also the case of France, that introduced the OCV by mail for French administrators located in the occupied Rhineland in 1924.

In the aftermath of World War II more countries adopted external voting provisions at different levels. For example, by 1951, France introduced proxy and postal voting for its citizens on government service or professional

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<sup>50</sup> Sundberg A., *The history and politics of diaspora voting in home country elections*, based on "Voting from Abroad: The International IDEA Handbook", cit., p. 2.



business abroad. However, in 1975 France abolished the voting by mail because of fraud episodes. For what concerns voting by proxy, it was maintained but the provision was modified in 1982. Before that, external voters could register in any electoral district, causing competition and manipulation of the votes. Since 1982, proxies can only be registered in a specific district with which they have a connection, as expressed by the French electoral law.<sup>51</sup>

After World War II, a lot of countries gained independence from the colonial domination, often adopting in their newly established states the electoral tradition of the previous colonizers. In this way external voting provisions were assimilated in many former French and British colonies. For instance, Malaysia maintained the external voting system it had under the British rule. Voting by mail was made available for national service personnel, for public servants overseas (and their spouses) and for students residing abroad. Another example is provided by India that gained independence from Great Britain in 1947. The newly established state elaborated its electoral legislation explicitly excluding proxy voting in favour of the postal method. But at present, both modalities of voting from abroad are accepted by Indian legislation.

Several former French colonies maintained its external voting system at independence, too. France has traditionally used proxy voting system or personal voting at diplomatic missions abroad, allowing its expatriates to take part at referendums and presidential elections. As a consequence, a number of former French colonies have similar OCV systems at present.

The turning point in the evolution of extraterritorial voting rights was marked by the adoption of electoral legislations in Indonesia (1953) and Colombia (1961). They eliminated the occupation-based restriction and introduced the principle of enfranchising all citizens abroad, including migrant workers and students. In particular, Indonesia used the personal voting system

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<sup>51</sup>Ellis A., *The history and politics of external voting*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 42.

at diplomatic missions abroad and was able to maintain this mechanism also during the elections of the authoritarian period, until the present day.

Another fundamental phase of the expansion of external voting can be reconducted to the democratic transitions that occurred at the end of the 20<sup>th</sup> century. Several countries introduced voting provisions for their citizens abroad during the period of democratic transition or its consolidation: in Southern Europe it was the case of Portugal and Spain; in Central and Eastern Europe – of Estonia, Lithuania, Poland and Russia among others; in Latin America – Argentina, Mexico, Brazil; in Northern Africa – Algeria, Morocco, Tunisia. Suffice it to say that in 1991 there were only 31 countries with external voting systems and they increased to 115 in 2007.<sup>52</sup>

In the cases of transitions to democracy, the inclusion of citizens living abroad was often considered as a key element in the nation-building process. Frequently, the international community played a major role in mediating transitions and even in organizing transitional elections. However, the external voting provisions contained in the transition agreements have been controversial sometimes. For example, the elections that were held in Palestine in 1996 had no provisions for external voting, despite of the pressure for its introduction by the Palestinian diaspora.

Similarly, the case of Bosnia-Herzegovina transition, that followed the 1995 Dayton Agreement, led to a very complex application of external voting. The major problem that regarded the elections of 1996, was to which extent acknowledge the ethnic cleansing that occurred during the conflict. Main questions were rather the refugees and displaced persons would be able to vote in the locality they were forced to leave, in the one they intended to return to or in the place where they were living at that moment. Some political forces in Bosnia supported those versions of external voting that were the most convenient for their political interests. At the end the organization of external voting in Bosnia and Herzegovina was entrusted to the International Organization for Migration (IOM). This example shows that in a transitional

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<sup>52</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation.*, *op. cit.*, p. 2400.

context, the implementation of external voting and the actors involved in its procedure, can play a very important political role.<sup>53</sup>

Finally, if considering external voting today what is outstanding is that at present there are 151 countries out of 193 UN Member States<sup>54</sup> that include OCV provisions in their electoral legislation. Since the very first law allowing external voting for overseas soldiers was adopted by the US State of Wisconsin, more than 150 years have passed and its practice evolved considerably. Gradually, the occupation-based restrictions were removed in favour of an inclusive approach towards external citizens. In particular, the globalization process and an increased transnational mobility of the last decades have pushed modern States to develop policies and discourses in favour of their emigrants. Since the beginning of 2000s external voting provisions have been passed in many countries in different geographical areas. For instance, 15 states in Latin America have implemented such provisions in the last 18 years; four of the five countries of the MENA Region that have adopted voting rights from abroad, have done so in the last 10 years;<sup>55</sup> the same goes for a number of European countries, too.

It is interesting to take into consideration the examples of Italy and Mexico, that both applied the OCV procedures for the first time in their elections of 2006. Despite many similarities that these two countries share in terms of migration history and size of their expatriate communities, they adopted completely different pieces of legislation. Indeed, Mexico introduced restrictive external voting laws, with a complicated registration procedure, that prevented the great majority of expatriates from participating in the 2006 presidential elections.<sup>56</sup> On the contrary, Italy adopted a very liberal external

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<sup>53</sup> Ellis A., *The history and politics of external voting*, op. cit., p. 45.

<sup>54</sup> In this respect United Nations official website, in section "Member States": <http://www.un.org/en/member-states/index.html>

<sup>55</sup> Lafleur J.M., *The enfranchisement of citizens abroad*, op. cit., p. 841.

<sup>56</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor & Francis Group, 2013, p.50

voting system, allowing its citizens from abroad to directly elect its representatives in the parliament.<sup>57</sup>

All in all, it is evident that even if states have eliminated the occupation-based restrictions, there still exist a series of institutional and administrative constraints that de facto limit the scope of the external voting. The ability of non-resident citizens to exercise their voting rights from abroad may be restricted depending on voting modalities, on the registration procedures, on the type of elections to which the OCV applies and on the different modes of representation of expatriates in the domestic legislation.

The historical evidence shows that external voting legislation became more inclusive through time and gradually the residence-based restriction was eliminated. In the last decades, a growing number of countries developed formal external voting legislation, however these policies may vary substantially from one state to another according to different administrative procedures involved. Indeed, there are many external voting systems in use today, and each country is free to apply a more restrictive or liberal policy, or to have no external voting provisions at all. This situation can be better understood if considering that there are no binding international norms on external voting. While the right to vote and the universal suffrage are fundamental human rights, there is no international provision that expressly grants these rights to citizens living abroad. Thus, the historical perspective will be complemented in the following paragraphs by considering the legal framework of the development of external voting at the international and European levels.

### 1.3. Legal developments of external voting rights

#### 1.3.1. International norms on the right to vote from abroad

After the end of World War II, a number of international declarations, treaties and charters have promoted the right to vote, the universal suffrage

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<sup>57</sup>Melchionni M.G., *Sul diritto di voto dei cittadini italiani residenti all'estero*, in *Rivista di Studi Politici Internazionali*, 2003, Vol. 70, No. 3 (279), pp. 461-488.

and the principle of free and fair elections. However, they rarely address directly the external voting rights of citizens residing abroad.

In the context of International Human Rights Law (IHRL), the right of political participation was addressed by the UN General Assembly in 1948. In its Declaration of Human Rights, the Article 21 establishes that:

«Everyone has the right to take part in the government of their country (...). The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures».<sup>58</sup>

The Declaration of Human rights has not the same binding powers as a treaty, but its universal acceptance attributes it a status of an international bill of fundamental rights.<sup>59</sup> Art. 21 establishes the right of political participation through free and equal suffrage. These are obviously also the principles on which external voting is grounded, however they cannot be directly reconducted to citizens that reside outside the national territory.

The International Covenant on Civil and Political Rights (ICCPR) adopted by the UN General Assembly in 1966, provides more details for what concerns voting rights. The ICCPR represents the predominant codification of political rights in the International Human Rights Legislation and currently it has been ratified by 172 parties.<sup>60</sup> Article 25 defines the political participation in terms of the voting rights:

«Every citizen shall have the right and the opportunity, (...) without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage

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<sup>58</sup> *A Universal Declaration of Human Rights*, United Nations General Assembly, Resolution 217 (III), Paris, 10 December 1948, Art. 21.

<sup>59</sup> *International Law Handbook*, United Nations, Book I, Chapter VIII, Paragraph 35, p. 349.

<sup>60</sup> Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p.861.

and shall be held by secret ballot, guaranteeing the free expression of the will of the electors».<sup>61</sup>

It is interesting to notice that the right to vote is the only right of the ICCPR that does not refer to all the individuals under State's jurisdiction but only to those who hold the status of citizen. Being the right to vote based on the citizenship requirement, it is necessary to consider its denotation according to International Law. However, there are no legal standards for citizenship in international treaties, indeed it is up to each State's constituency to define its legislation in this respect. The Hague Convention on Certain Questions Relating to the Conflict of Nationality of the 1930, states in its Article 1 that: «It is for each state to determine under its own law who are its nationals».<sup>62</sup>

It can be concluded that: in the first place, the right to vote is closely associated to the status of citizenship which reflects the full membership in a polity; in the second place, that each state defines citizenship criteria according to its own constitution; consequently, the precondition for voting rights depends on the norms of each states with regard to the acquisition and loss of the citizenship status.

Going back to the Art. 25 of the ICCPR, it is important to notice that it circumscribes the voting right to the citizenship status, but there is no notion of residency-based restriction that could be applied to expatriates. In this respect, the interpretation of the Art. 25, given by the Human Rights Committee through its General Comment 25, explicitly directs the issues of residency.

The General Comment 25 issued in 1996 is denominated "Participation in Public Affairs and the Right to Vote" and it deals with permissible restrictions that could apply to voting rights. Paragraph 15, regarding the right to stand for elections, explicitly affirms that residency cannot be cause of exclusion. While Paragraph 11, cites residency when considering registration procedures: «Where registration of voters is required, it should be facilitated and obstacles

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<sup>61</sup>*International Covenant on Civil and Political Rights*, United Nations General Assembly, resolution 2200A, 23 March 1996, Art. 25 a., b.

<sup>62</sup>*Convention on Certain Questions Relating to the Conflict of Nationality Laws*, League of Nations, Treaty Series, vol. 179, no. 4137, Hague, 13 April 1930, chapter 1, art. 1.

to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable».<sup>63</sup>

The General Comment 25 does not explicitly mention the citizens that held the official residency in a country but do not habitually live inside the national territory. Nevertheless, it clearly does not allow the residence-based restriction to vote or to be elected.

In addition, in different circumstances, the UN Special Rapporteurs have specifically referred to the voting rights of citizens from abroad. Recommending the guarantee of voting rights for citizens abroad to allow their participation in domestic public life; and to «make it possible for [citizens] living abroad to exercise their voting rights, at least in the countries where it has diplomatic representation, as done by many countries».<sup>64</sup> Even if these recommendations have no binding powers, they attribute a recognized international importance to non-resident citizens and to their voting rights.

When analysing international norms on the external voting, we have to mention the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW), that represented the first international convention to directly address the voting rights of expatriates. It was adopted by the UN General Assembly in 1990. As of October 2018, it has been ratified by 54 states. The Article 41 of the convention states:

«1. 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, in accordance with its legislation.

2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights».<sup>65</sup>

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<sup>63</sup> *The right to participate in public affairs, voting rights and the right of equal access to public service*, United Nations Human Rights Committee, CCPR General Comment No. 25, 12 July 1996, paragraph 11 and 15.

<sup>64</sup> *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, United Nations Human Rights Council, A/HRC/21/63, 16 July 2012, paragraph 81.

<sup>65</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, United Nations General Assembly, resolution 45/158 of 18 December 1990, art. 41.

In addition, in 2004 a Committee on Migrant Workers (CMW) established to monitor the implementation of the ICMW and reiterated that political and voting rights have to be extended to non-resident citizens. It has also affirmed that States do not have to burden their non-residents with any additional requirements, such as the requirement to sign an affidavit on the intention to return to their country of origins.<sup>66</sup>

For the first time, in international law, the ICMW granted electoral participation to expatriates, however its scope is very limited because it applies only to the 54 countries that ratified it. Consequently, the majority of states demonstrated to be reluctant to enfranchise their expatriates abroad.

### 1.3.2. Legal provisions for external voting in the context of the Council of Europe

From the previous analysis of international norms on voting rights and on external voting, it emerged that states are largely unconstrained in shaping their out-of-country policies. They are free to adopt more restrictive or liberal provisions on external voting for their citizens residing abroad depending on their will. Moreover, being the right to vote strictly interconnected to the citizenship status, states are once again autonomous and sovereign in defining who are their nationals.

For what concerns the regional level, all major regional treaties on human rights address the right to vote in accordance with the ICCPR. It is the case of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), that entered into force in 1953 and addresses the right to vote in Art. 3 of Protocol 1; of the American Convention on Human Rights of 1969 – Art. 23; of the African Charter on Human and Peoples Rights, adopted in 1981 – Art. 13; and of the Arab Charter on Human Rights, 2004 – Art. 23.2. All of them encompass non-discriminatory clauses; even if acknowledging that voting rights are not absolute, they do affirm that any limitation has to be based on reasonable and objective assumptions.

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<sup>66</sup> *Consideration of Reports Submitted by States Parties under Article 73 of The Convention*, UN Committee on Migrant Workers, CMW/C/PHL/1, 11 March 2018.



With regard to the European legal framework, there are a series of supranational norms and international bodies that regulate the voting right. (1) The abovementioned ECHR is a central document as to electoral procedures and the rulings of the European Court of Human Rights (ECtHR) have defined the guidelines for the out-of-country voting; (2) the Venice Commission within the Council of Europe have elaborated the Code of Good Practice in Electoral Matters in 2002 and published a report on the Out-of-Country Voting in 2011, expanding the discourse on external voting in Europe; (3) also the Parliamentary Assembly of the Council of Europe (PACE) has been active in the promotion of voting rights for non-resident citizens, producing a set of recommendations on the matter; (4) among other European treaties, it is worth citing the European Convention on Nationality (ECN) of 1997 that is important in its reference to citizenship normative at the level of the Council of Europe. refers to the citizenship normative.

1) ECHR – Protocol no. 1, Article 3

The European Convention on Human Rights was adopted in 1950 with the aim of protecting the fundamental human rights and the rule of law in the 47 states that belong to the Council of Europe. Its judicial authority is the ECtHR, that can be addressed directly by the individuals or states if the rights of the Convention are violated.<sup>67</sup>

The ECHR enunciates the right to free elections in the Art. 3 of Protocol 1: «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».<sup>68</sup> The Article does not directly refer to the voting rights of non-residents, however through a number of case-laws the ECtHR has defined its approach to the residency restrictions, therefore addressing the out-of-country voting.

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<sup>67</sup>Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p. 865-868.

<sup>68</sup>*Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, Council of Europe, Rome, 4 November 1950, Protocol no. 1, Art.3.

On the one hand, the ECtHR recognizes the principle of universal suffrage and the inclusive nature of the right to vote, in line with Art. 14 that prohibits any discrimination in the application of the ECHR.<sup>69</sup> The Court has also held that differentiations based on residence, can be denounced in cases of presumed discrimination.

On the other hand, the Court has acknowledged that voting rights are not absolute and may be subject to some limitations in accord with the electoral systems of each state. The role of the Court is to assure that such limitations are implemented for the realisation of a legitimate aim and in the respect of the rule of law. The ECtHR has traditionally ruled that minimum age, citizenship and residence are among the commonly accepted restrictions, as long as they do not interfere with the principle of free elections.<sup>70</sup>

The 1999 case of *Hilbe v. Liechtenstein* has been exemplary in confirming that: 1) the rights of Art. 3 Protocol no. 1 may be subject to restrictions; 2) Contracting States enjoy expansive appreciation in determining the conditions of the voting right; 3) accordingly to the ECHR, the residency requirement is not arbitrary or unreasonable, therefore it is not in contrast with the voting right of Art. 3 Protocol no.1. Moreover, in the case-law of *Hilbe v. Liechtenstein*, the ECtHR has identified four factors that may justify the residency restriction on franchise:

«firstly, the assumption that a non-resident citizen is less directly or less continually concerned with his country's day-to-day problems and has less knowledge of them; secondly, the fact that it is impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad and that non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the

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<sup>69</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, Council of Europe, Rome, 4 November 1950, Section I, Art.14.

<sup>70</sup> *Lukusch v. Germany*, ECtHR, application no. 35385/97, decision of 21 May 1997, pp. 175-177.

influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country»<sup>71</sup>.

In the 2005 case of *Py v. France*, the Court has referred to the time limitations that apply to the period of residency abroad. As a matter of fact, some States disenfranchise their expatriates after certain number of years they reside abroad (Germany after 25 years, Great Britain after 15 years). In the case of *Py v. France*, the applicant claimed the right to vote in the French overseas territory of New Caledonia, even if he was not residing there for more than 10 years. As general principles, the Court stated that States enjoy a great margin of appreciation in their electoral legislation, depending on socio-political and historical variables. Or as affirmed by the ECtHR: «for the purposes of applying Art.3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another».<sup>72</sup>In the end, the Court has found no violation of Art. 3 Protocol no. 1, it considered the residence requirement legitimate and proportionate given the transitional phase of New Caledonia at that time. Considering other case laws on the franchise limitations conditioned on the time that citizens spend abroad, the Court has reiterated that 4, 10 and 15-year residency restrictions may be justifiable.<sup>73</sup>

All in all, from the rulings of the ECtHR it clearly emerges that Member States of the Council of Europe are not obliged to guarantee unrestricted franchise to their non-resident citizens. However, the Court observed that the majority of the Member States have adopted provisions for external voting, acknowledging a clear tendency in favour of non-resident franchise. At the same time, there is no common European framework for the out-of-country voting and the states should address important issues and decide whether to

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<sup>71</sup>*Hilbe v. Liechtenstein*, ECtHR, application no. 31981/96, Strasbourg, decision of 7 September 1999.

<sup>72</sup>*Pyv. France*, ECtHR, application no. 66289/01, paragraph 46, Strasbourg, decision of 6 June 2005.

<sup>73</sup>*Polacco and Garofalo v. Italy*, ECtHR, application no 23450/94, Strasbourg, decision of 15 September 1997; *Shindler v. the United Kingdom*, application no. 19840/09, Strasbourg, decision of 7 May 2013.

promote the enfranchisement in the state of citizenship or of residence, or in both of them.

2) Venice Commission: “Code of Good Practice in Electoral Matters”

The Venice Commission is an independent advisory body of the Council of Europe, established in 1990 with the aim of monitoring electoral processes and delivering opinions. In 2002, the Venice Commission promulgated the Code of Good Practice in Electoral Matters, that contains the guidelines for democratic elections. According to the Code, the five fundamental pillars of the European electoral heritage, that are introduced in the constitutions of Member States, are: universal, free, equal, secret and direct suffrage. The principle of universal suffrage is one of the fundamental political rights, allowing people to participate in the elections, however accordingly to the Code of Good Practice, it may be subject to some restrictions. Similarly to the rulings of the ECtHR, the limitations refer to age, nationality and residence. In reference to residency, the Code of the Venice Commission states that: «a residence requirement may be imposed; residence in this case means habitual residence; (...) the right to vote and to be elected may be accorded to citizens residing abroad».<sup>74</sup>In conclusion, there is no positive obligation of granting voting rights to external citizens, while the residence-based restriction is accepted as one of the exceptions that may apply to the principle of universal suffrage. Moreover, the Venice Commission acknowledges the lack of international standards for implementing external voting measures affirming that «it is within the state’s own scope of sovereignty to decide whether they wish to grant the right to vote to their citizens residing abroad».<sup>75</sup>In any case, the restrictions of the universal suffrage and of the voting rights in general, are questionable from a human rights perspective. In this respect, the Parliamentary Assembly of the Council of Europe (PACE) strongly advocates to overcome such restrictions and to elaborate a common legal framework for the out-of-country voting within the Council of Europe parties. The

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<sup>74</sup>*Code of Good Practice in Electoral Matters*, opinion no. 190/2002, section I, paragraph 1.1., Council of Europe – Venice Commission, Venice, 18-19 October 2002.

<sup>75</sup>*Report on Out-Of-Country Voting*, study no. 580 / 2010, section II, paragraph 7, Council for Democratic Elections and Venice Commission, Venice, 17-18 June 2011.

recommendations issued by the PACE will be considered hereinafter.

3) Recommendations of the Parliamentary Assembly of the Council of Europe.

In its consultative function, the Parliamentary Assembly has repeatedly addressed the voting rights of non-resident citizens. The first recommendation directly addressing external voting dates back to the 1982. At that time, the PACE acknowledged that migrants, cannot participate in the elections of the country of residence because they don't hold the citizenship of that state; they can neither participate in the home-country elections because of the residence restrictions imposed in the electoral legislation of numerous countries; it concluded that in this way, millions of citizens of the Council of Europe are deprived of their civil rights. Therefore, the PACE recommended the Committee of Ministers to create a common legal framework for the promotion of the voting rights of the expatriates in national elections and referenda, through postal or in person voting at diplomatic missions. The recommendation has even envisaged «the drawing up of a protocol to the European Convention on Human Rights whereby member states would undertake to respect such voting rights for their nationals living in another member state and refrain from hindering the exercise thereof by any measure whatever».<sup>76</sup>

In 1999, the PACE issued the Recommendation no. 1410, entitled “Links between Europeans living abroad and their countries of origin”. It recommended that Member States institute parliamentary representation through consultative bodies for their expatriates or grant them unrestricted right to vote. In particular, according to PACE, the non-resident citizens should be granted «the right to vote in loco in the country of origin», «the right to vote in embassies and consulates in their host countries» and also «the right of expatriates to vote in local elections in the host country».<sup>77</sup>

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<sup>76</sup>*Voting rights of nationals of Council of Europe Member States, Parliamentary Assembly of the Council of Europe (PACE), recommendation 951 of 2 October 1982, paragraph 10 c.*

<sup>77</sup>*Links between Europeans living abroad and their countries of origin, PACE, recommendation 1410 of 26 May 1999, paragraph 5.5. d*

In 2005, the PACE issued two more resolutions on the abolition of restrictions of the right to vote, calling on Member States to «grant electoral rights to all their citizens (nationals), without imposing residency requirements»<sup>78</sup> and to promote external voting rights providing absentee provisions and voting by post, in person or by electronic means. The PACE also reaffirmed the need to review existing instruments as to enhance international cooperation and move towards a common European treaty on the out-of-country voting.

Since then on, PACE continued to advocate for enhanced external voting provisions; moreover, it focused not only on the rights of non-residents (expatriates), but also on voting rights of resident non-citizens (immigrants) in local elections. However, throughout its recommendations of 2007-2009, the PACE has also expressed its regret at the failure of Member States to provide a joined intergovernmental response to the issues connected with the OCV.<sup>79</sup>

In 2012, the Resolution 1897 aimed at «ensuring greater democracy in elections».<sup>80</sup> 10 years after the adoption of the Code of Good Practice published by the Venice Commission, there were still severe violations of the principle of free and fair elections, also in reference to the procedures of external voting. In this connection, PACE consented to the fact that the rights of non-residents may be limited, indicating that the OCV may be «subject to restrictions in accordance with the law, such as duration of residence abroad».<sup>81</sup>

#### 4) European Convention on Nationality

It is fundamental to refer to the question of citizenship when dealing with the voting rights. Indeed, as emerged from the IHRL analysis, the right to vote is

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<sup>78</sup>*Abolition of restrictions on the right to vote*, PACE, resolution 1459, of 24 June 2005, paragraph 11. b

<sup>79</sup>*Engaging European diasporas: the need for governmental and intergovernmental responses*, PACE, recommendation 1890 of 20 November 2009, paragraph 9.1.3., 10.2

<sup>80</sup>*Ensuring greater democracy in elections*, PACE, resolution 1897 of 3 October 2012, final version

<sup>81</sup>*Ensuring greater democracy in elections*, PACE, resolution 1897 of 3 October 2012, paragraph 8.1.12

subject to the precondition of citizenship, which in turn depends on each state's legislature. European norms for voting rights are strictly interconnected to the status of citizenship, too. With this regard, the European Convention on Nationality (ECN) of 1997 reaffirms that citizenship is determined by the laws of each state. Moreover, Art. 7.1. establishes that a State may provide for the loss of citizenship in the case of «lack of a genuine link between the State Party and a national habitually residing abroad».<sup>82</sup> Therefore, similarly to the International norms, the European legislature on citizenship and on external voting rights confers a wide margin of appreciation on these matters directly to the States' law-making.

### 1.3.3. Legal framework of external voting: conclusions

Considering the legal dimension of external voting rights at international and at regional levels, the following considerations may be done:

On the one hand, external voting can be considered as one of the constituent parts of the universal suffrage. The great diffusion of the OCV in the last decades demonstrates the necessity of extending voting right to the nationals living abroad, in favour of an inclusive vision of citizenship. Indeed, enfranchising citizens abroad can be interpreted as a necessary response of modern democracies to the needs of increased globalisation and migration flows. Moreover, granting voting rights to all the citizens, with no discrimination based on residency, is also a question of principle, based on the respect of fundamental human rights as proclaimed by the UN Declaration of Human Rights of 1948. When addressing the right of political participation, the UDHR refers to the universal and equal suffrage of all individuals. But, if we take into consideration the subsequent International Covenant on Civil and Political Rights (ICCPR) adopted by the UN General Assembly in 1966, we can note that the right to vote is the only right of the ICCPR that does not refer to all the individuals under State's jurisdiction but only to the citizens. It follows that external voting can be subject to the precondition of citizenship,

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<sup>82</sup>*European Convention on Nationality*, Council of Europe, European treaty series no. 166, Strasbourg, 6 November 1997, Art. 7.1.e.

that in turn is within the margin of sovereignty of each state. A part of the crucial distinction between individuals and citizens (that is found in the two main UN documents referring to the voting rights) what is certain is that none of them envisages any restriction based on residence. As a matter of fact, the UN Human Rights Committee and its Special Rapporteurs explicitly affirmed that residency is not a permissible restriction to vote or stand for elections.

On the other hand, external voting rights are not directly addressed by the IHRL and at the end States are largely unconstrained in shaping their electoral policies for non-residents. The lack of explicit and precise International norms as to the voting rights of expatriates and its consequences is very evident when considering the legislature on external voting rights at the European level. It is sufficient to say that the European Convention for the Protection of Human Rights, grants the right of free elections to all the citizens within the Council of Europe, but at the same time it recognizes that voting rights are not absolute and may be subject to some restrictions such as age, nationality and residence. The rulings of the ECtHR with respect to residency limitations have shown the complexity and ambiguity of the external voting provisions. Indeed, while advocating for the enfranchisement of citizens abroad, the ECtHR has ruled that residence requirement is not in contrast with the principles of the ECHR. As a result, States enjoy a wide margin of appreciation in determining their external voting legislature. Such a situation is rendered even more complicated by the fact that there is no common European framework that regulates the legislation on the OCV.

Under these circumstances, States may adopt more or less restrictive provisions to enfranchise their expatriates. For instance, States can allow non-residents to participate in legislative, presidential or local elections (or only in one of them); they can subject the electoral participation to registration procedures; as well as, choose different modalities of casting votes abroad (by post, in person, by electronic means etc). Depending on the external voting procedures implemented by the country, citizens residing abroad will be granted unlimited or restricted electoral participation. With this in mind,



different types of external voting systems and their repercussions will be further analysed in the following chapters.

## **2. Who can vote from abroad? Requirements, restrictions and limitations that apply on external voters**

When analysing external voting systems, the very first step should be that of understanding who is eligible to exercise the right to vote from abroad. Some countries enfranchise all their non-resident citizens, others grant the right to vote only to specific professional categories, impose time restrictions or require registration procedures, reducing the number of eligible electors. The requirements that expatriates have to meet to be entitled to vote greatly influence the degree of inclusiveness of external voting systems. A part of general qualifications that apply to every elector in the home-country, external voters may also be subject to some additional restrictions. Citizenship, age and residence are among the general requirements that are customarily imposed to every voter. In fact, states usually allow to vote those persons who hold the citizenship status, are residents of the country and are under the voting age.<sup>83</sup> However, for external voters, the qualification criteria of citizenship and residency already raise some complications and in addition, expatriates are usually subject to extra requirements. To understand how extensive a country's provisions for extraterritorial voting are, we could identify different degrees of inclusiveness. At one end, there would be those states that allow all expatriates to vote from abroad, attaching the voting right only to the status of citizenship. At the other end, there are states that permit their expatriates to vote only if physically present in the country on the election day. In between

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<sup>83</sup>Grotz F. and Caramani D, *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, in *Democratization*, Vol. 22, no. 5, Routledge, 2015, p. 802.

these two extremes, states may impose a number of residence requirements and time limitation on their expatriates, before allowing them to vote from abroad. Finally, several states still limit the right to vote from abroad only to specific occupation categories.<sup>84</sup> Moreover, external voters may be required to register to be entitled to cast their vote, which also defines the number of eligible electors. Considering that there is no international norm that unifies external voting systems, each state autonomously decides rather to enfranchise all its expatriates or only some of them.<sup>85</sup> The following paragraphs will consider the eligibility requirements for external voters, defining the degree of inclusiveness of expatriates in the domestic polity.

### 2.1. Primary requirement: citizenship

When considering the 216 countries and territories that are present in the International IDEA's Voting from Abroad database, it emerges that there is a tendency worldwide to consider citizenship as an essential component in the electoral systems.<sup>86</sup> In this section, citizenship is not to be considered in terms of nationalistic interpretation, but rather as a law's conception of legal citizenship. The legal status of citizen can be interpreted instrumentally: «it is used to grant full membership of the polity to individuals who comply with the rules on acquisition of the status».<sup>87</sup> In other words, legal citizens are all those who comply with the law norms for the acquisition of the citizenship. In this sense, legal citizenship represents the minimum requirement for the eligibility to vote from abroad.<sup>88</sup> Therefore, the degree of coverage of external voting will first of all depend on the citizenship law of the home-country. The citizenship laws determine the acquisition, transmission and loss of citizenship

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<sup>84</sup> Green P., *Entitlement to vote*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, , 2007, p. 89.

<sup>85</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, vol.XXI., no. V, Routledge Taylor & Francis Group, 2015, p. 846.

<sup>86</sup> International IDEA, Voting from Abroad Database – Election type, last updated on 7 August 2018, in <https://www.idea.int/data-tools/question-view/130351>

<sup>87</sup> Lardy H., *Citizenship and the Right to Vote*, in *Oxford Journal of Legal Studies*, Oxford University Press, Vol 17, No 1, 1997, p. 76.

<sup>88</sup> Green P., *Entitlement to vote*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 93.

and they greatly vary from one country to another. However, if considering the most widespread norms for the acquisition of citizenship, it emerges that they are mostly based on the principles of *ius sanguinis*, *ius soli* and *ius domicilii*. Let us briefly define these three models of acquiring legal citizenship as to understand the composition of potential external voters.

#### 2.1.1. *Ius sanguinis* – citizenship by descent

*Ius sanguinis* literally means “law of the blood” and it designates the transmission of citizenship by descent. It is an internationally recognized legal principle that determines citizenship at birth, conferring an individual the citizenship of one or both of his parents, independently of the country of birth.<sup>89</sup> *Ius sanguinis* citizenship laws are predominant in the majority of states worldwide in Europe, Asia, Africa and Oceania.<sup>90</sup> However, the transmission of citizenship by descent may be unconditional or subject to some limitations. In the first case, the citizenship can be passed across generations born abroad, without limits, creating potentially very large communities of non-resident citizens. In the second case, the transmission of citizenship may be limited only to first or second generations of born abroad. According to the Global Citizenship Observatory (GLOBALCIT), «in Africa 62% of states do not place any limit on extraterritorial *ius sanguinis*, in Europe this is the case for 43%, whereas in Asia/Oceania and the Americas the share is below 30%».<sup>91</sup>

Some states limit the transmission of citizenship through *ius sanguinis* to first or second generations of born abroad, however the majority of states allow the acquisition of citizenship without time limitations.<sup>92</sup>

#### 2.1.2. *Ius soli* – citizenship by birthplace

*Ius soli* is the “law of the soil”, according to this principle, a person acquires the citizenship of the country where he is born. Countries that adopt

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<sup>89</sup> Green P., *op. ult. Cit.*, p. 91-92.

<sup>90</sup> Bauböck R., *The rights and duties of external citizenship*, in *Citizenship Studies*, Vol. 13, No. 5, Routledge, 2009, p. 489.

<sup>91</sup> Bauböck R., Honohan I., Vink M., *How Citizenship Laws Differ: A Global Comparison*, DELMI and GLOBALCIT, Policy Brief, September 2018.

<sup>92</sup> Brown Scott J., *Nationality: Jus Soli or Jus Sanguinis*, in *The American Journal of International Law*, Cambridge University Press, Vol. 24, No. 1, 1930, p.62

citizenship laws based on the *ius soli* principle can be mainly found in the Western hemisphere, including the USA, Canada and nearly all countries from Central and Southern America. However, outside of the Americas unconditional *ius soli* policies are rare or subject to some restrictions.<sup>93</sup> For instance, no EU country grants unconditional and automatic citizenship at birth to children born to non-citizens; and only 10 out of 28 Member States have some form of conditional *ius soli* policies.<sup>94</sup>

What emerges is that the vast majority of states in Europe, Asia, Oceania and Africa grant citizenship by descent or some form of restricted *ius soli*. However, one policy does not necessarily exclude the other and most states mix norms of both rules. In particular, all states that have based their citizenship laws on *ius soli*, grant also birthright citizenship based on *ius sanguinis* at least to the first generation of individuals born abroad. Both the rules may give rise to dual or multiple citizenship, in the case states allow multiple-citizenship acquisition.

### 2.1.3. *Ius domicilii* – citizenship by naturalization

The principle of *ius domicilii* refers to the acquisition of citizenship after a specified period of residence in the country. A part of the length of residency, that usually varies between 5 and 10 years, states may impose a number of additional conditions in order to confer citizenship by naturalization. Referring to the database of GLOBALCIT, based on 174 countries, 48% of states impose a five-year requirement of regular residence to qualify for naturalization based on *ius domicilii*. However, there are also a number of citizenship policies that are much more restrictive: 34% of states require a residence of 10 years or more attaching other conditions such as the level of income or stable employment. Citizenship by naturalization may be also

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<sup>93</sup> *Global Database on Modes of Acquisition of Citizenship*, Global Citizenship Observatory, Robert Schuman Centre for Advanced Studies, European University Institute., GLOBALCIT, 2017, available at: <http://globalcit.eu/acquisition-citizenship/>

<sup>94</sup> Dumbrava C. and Mentzelopoulou M. M., *Acquisition and loss of citizenship in EU Member States: Key trends and issues*, European Parliamentary Research Service, 2018, in <https://epthinktank.eu/2018/07/11/acquisition-and-loss-of-citizenship-in-eu-member-states-key-trends-and-issues/>

conferred through marriage to a citizen, it is the case in 60% of states worldwide.<sup>95</sup>

In some cases, the acquisition of citizenship through naturalization implies the renouncing of any previous citizenship held. 42% of states around the world admit policies according to which the voluntary acquisition of another citizenship leads to the withdrawal of their previous citizenship. However, such an attitude has changed significantly during the second half of the 21<sup>st</sup> century, with a growing number of states allowing for dual citizenship among their expatriates. 58% of states around the world (among which two thirds of European states) adopt dual citizenship policies.<sup>96</sup> Among states that still maintain the principle of “one nationality only” we can find mostly Asian countries.

#### 2.1.4. Impact of citizenship laws on external voting rights

In conclusion, considering the different policies of accessing citizenship of a state and the possibility of holding dual or multiple citizenship, it emerges that states may have relatively large numbers of non-resident citizens and therefore of potential external voters.

Given that all citizens are equal and enjoy the same rights, it may be argued that external citizens should be granted the right to vote, with no distinction based on the fact that they live abroad. However, when considering the very meaning and purpose of the right to vote some discrepancies become evident. Through voting rights, citizens elect political representatives who will determine and pass laws on their behalf. In this terms, citizens are seen as part of a self-governing political community. Consequently, the right to vote should be granted to those who have a direct interest in the administration of those laws because they will be subject to the decisions taken by the government. If it is accepted that the franchise should be granted in the first place to those who are directly affected by governmental policies, then the

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<sup>95</sup> *Global Database on Modes of Acquisition of Citizenship*, Global Citizenship Observatory, Robert Schuman Centre for Advanced Studies, European University Institute., GLOBALCIT, 2017, available at: <http://globalcit.eu/acquisition-citizenship/>

<sup>96</sup> See supra note, *Global Database on Modes of Acquisition of Citizenship*.

following categories should not be granted external voting rights: 1) absent citizens who won't return to the home country; 2) dual citizens that permanently reside abroad and are granted voting rights in another country; 3) individuals who acquired citizenship through *ius sanguinis* by remote ancestors but have never been in the country of origins.

The situation appears even more paradoxical when considering that resident non-citizens (immigrants) who are stakeholders in the governmental policies, are precluded from voting rights. In this respect, citizenship laws are crucial in defining who can access the status of legal citizen and therefore be granted full political membership in a state. It is arguable that, in a modern world, characterized by transnationalism, citizenship qualification should no longer be determinant for the franchise. In future, countries may have to consider other criteria of eligibility for the franchise. But for the present, citizenship remains the primary prerequisite to be entitled to vote.

Despite the universal trend of attaching voting rights to legal citizenship, especially for what concerns external voting practices, an exception may be found for what concerns electoral rights within the EU. Indeed, EU citizens that reside in another EU country can exercise their voting rights at the same conditions that nationals of that country for the European Parliament and municipal elections. In this sense, EU has a very inclusive system of external voting rights among its member states. Moreover, the Council decision 2018/994 of 13 July 2018, that has amended the Electoral Act 1976, has introduced external voting for EU citizens that reside in third countries, other than EU member states.<sup>97</sup> EU norms for external voting will be further analysed in the case study section (paragraph 2.5).

## 2.2. Restrictions and limitations on the entitlement to vote from abroad

As shown in the previous paragraph, being the right to vote strictly interconnect to the possession of citizenship status, the minimum requirement for external voters is also represented by citizenship. When it is the only

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<sup>97</sup>*Council Decision 2018/994*, Council of the European Union, Official Journal of the European Union, 2018, Art. 3a.

requirement imposed on overseas voters, we are in the presence of the most inclusive external voting systems, that presume unconditional universal suffrage to all citizens living abroad. The majority of countries simply attach the out-of-country voting to the possession of citizenship status, without imposing other restrictive conditions.<sup>98</sup> However, according to different citizenship laws, the overseas population may be very numerous and heterogeneous; in some cases non-resident citizens have no direct links with the home-land beyond holding its citizenship and passport; in other cases, external votes may be influential for the overall outcome of the elections. In both the cases states may be willing to restrict the number of those eligible to cast a vote from abroad and impose some additional formal limitation on the eligibility of overseas voters. The most common restrictions refer to the length of stay abroad, minimum residency requirement in the country of citizenship, activity-related restrictions, registration procedures and other legal and administrative limitations.

Citizenship, minimum age and residence within the country have been the classic conditions of voting rights, included in electoral laws and national constitutions.<sup>99</sup> With the introduction of external voting provisions, citizenship remained a primary requirement, while residence within state boundaries is no longer a condition to be applied to expatriates and would be incompatible with the very same concept of the out-of-country-voting. Nevertheless, a number of states still impose different types of residence-based restrictions to those who vote from abroad. Not only they keep in place residence-based limitations, but some countries have also maintained profession-related restrictions, that characterized external voting systems during the early 20<sup>th</sup> century, but were dismissed by most states in favour of universal enfranchisement thereafter.<sup>100</sup>

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<sup>98</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, *Fordham Law Review*, 2007, p. 2423.

<sup>99</sup>Grotz F.-Nohlen D., *The legal framework and an overview of electoral legislation*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, Trydellstryckeri AB, 2007, p. 71.

<sup>100</sup>Sundberg A., *The history and politics of diaspora voting in home country elections*, based on "Voting from Abroad: The International IDEA Handbook", cit., p. 2.

### 2.2.1. Occupation-based restrictions and current-residence requirement

The most restrictive OCV policies require citizens to have a permanent current residence in the country, therefore only temporary absentees are granted the right to vote from abroad. The requirement of current residence leads to the enfranchisement of a limited group of citizens that are out of country for short-term periods. Usually, these qualifications are met by citizens who are abroad because of their professional activities. Not surprisingly, some countries restrict entitlement to external vote only to some specific professions, such as military personnel, diplomatic staff and other state servants. For example, within the EU, four countries adopt both the restrictions based on profession and on current residence. In the cases of Ireland and Malta only public servants and diplomats are allowed to cast a vote from abroad; while in the cases of Denmark and Cyprus other temporary non-residents are entitled to external vote.<sup>101</sup> For what concerns Denmark, it allows OCV for citizens abroad who intend to return within two years and in particular to the following categories: persons employed by the Danish State, to the employees of a Danish company or organization, to students and to those who temporarily reside abroad for health reasons.<sup>102</sup>

Outside the context of the EU, another interesting example of occupation-based restrictions is represented by South Africa. It introduced very extensive and comprehensive OCV provisions for its historical elections in 1994, but has been imposing restrictions on its external voting policy since then. Indeed, in the general elections of April 2004, only diplomatic personnel and those temporarily abroad were allowed to cast an external vote.<sup>103</sup> However, an unexpected change of course occurred only one month prior to the 2009

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<sup>101</sup>Arrighi J. T., Hutcheson D. S., *Keeping Pandora's (ballot) box half-shut: a comparative inquiry into the institutional limits of external voting in EU Member States*, in *Democratization*, Vol. 22, No. 5, Routledge Group, 2015, p. 891.

<sup>102</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: a Normative Evaluation of External Voting*, in *Fordham Law Review*, vol. LXXV, art. IV, 2007, p. 2398-2399

<sup>103</sup>Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 18-19.



elections, when the Constitutional Court of South Africa ruled that all expatriates had the constitutional right to participate and vote (O'Regan, 2009), but the decision was met with the opposition of the governing party.<sup>104</sup> The Electoral Act was finally amended in 2013, allowing all South African citizens to vote in national elections, previous registration.<sup>105</sup> The case of South Africa shows two policy reversals for the external voting rights. It is a good example of how government may make use of activity-related limitations in order to enfranchise only partially the population living abroad.

In any case, occupation-based requirements represent one of the most restrictive external voting policies, that are used by a number of states. They usually grant external voting only to specific categories employed by the government (public servants, diplomats, armed forces etc.) and sometimes extend voting rights from abroad also to temporary absentees (students, employees of international organization or persons abroad for health reasons etc.).

According to the International IDEA's Voting From Abroad Database, some examples of countries that restrict external voting, based on activity-related basis are shown in the following table:

Table 1: Countries and territories which restricted entitlement to an external vote according to activity abroad.<sup>106</sup>

<b>Country</b>	<b>Voters</b>
Bangladesh	Only government officers on official duty
Fiji	Only citizens abroad who are carrying out an official or military function, working for an international organization to which the country belongs, studying, or working for a company that it is registered in Fiji
Ghana	Only diplomats, employees of the United Nations and other international organizations, police and military

<sup>104</sup> *Richter v Minister of Home Affairs and Others*, Constitutional Court of South Africa, Case no. 4044/09, Heard on: 4 March 2009, Decided on: 12 March 2009.

<sup>105</sup> *Electoral Amendment Act no. 18 of 2013*, Parliament of the Republic of South Africa, published in Government Gazettes, Vol. 581, No. 37069, 26 November, 2013,

<sup>106</sup> Fierro C.N. – Morales I. – Gratschew M., *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook", cit., Table 1.4., p. 14.

	personnel on peacekeeping missions, and students on government scholarships
India	Only members of the armed forces and government servants deployed abroad
Israel	Only citizens carrying out official missions abroad of a diplomatic or military nature
Malaysia	Only diplomatic officers and students abroad
Mauritius	Only diplomatic staff
Singapore	Only for those employed by the government on fixed contracts
Zimbabwe	Only citizens carrying out official missions abroad of a diplomatic or military nature

Source: Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook" edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 19.

### 2.2.2. Past-residence requirement

States may allow access to external voting only to citizens that have previously resided in the country. Within the EU, past residency in the country of citizenship is requested in: a) Sweden – overseas citizens must have lived in the country during their lifetime; b) United Kingdom, where external voters must have lived in the country within the previous 15 years and have been enrolled in the electoral register before their departure; c) Germany requires a residence in the country of minimum 3 month, within the preceding 25 years.<sup>107</sup> Prior residency is also a condition for voting in federal elections in Norway and in the U.S.A. federal elections. Although, lots of U.S.A. states allow the electoral registrations of those citizens who have never lived in the country, at the condition that one of their parents resided there.<sup>108</sup>

### 2.2.3. Limits on the length of residence abroad

States may impose time limits on the maximum period of residence abroad. Within the EU, citizens of the UK lose their right to external vote after

<sup>107</sup>Arrighi J. T., Hutcheson D. S., *Keeping Pandora's (ballot) box half-shut: a comparative inquiry into the institutional limits of external voting in EU Member States*, in *Democratization*, Vol. 22, No. 5, Routledge Group, 2015, p. 892.

<sup>108</sup>Green P., *Entitlement to vote*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 94-95.

residing abroad for 15 years; in Germany, citizens residing outside the national territory are disenfranchised after 25 years, but these measure doesn't apply to those citizens who live in one of the 46 member states of the Council of Europe.<sup>109</sup> The rationale of German provisions on external voting is that citizens living in the countries of the Council of Europe are more closely linked to their country of citizenship because of cultural, geographical and political proximity.

Outside the context of the EU, time limits on the length of residence abroad are also imposed in (1) Australia, where a six-year limitation exists but can be extended indefinitely on annual basis; (2) New Zealand imposes a limit of three years of stay outside the country for citizens and 12 months for permanent residents. In the latter case it is interesting to notice that New Zealand is an exceptional example of a state that extends external voting not only to its citizens but also to residents, who are abroad on the day of the elections. This measure derives from the electoral law that grants the right to vote (but not to stand as a candidate) in national elections to non-citizens after one year of regular residence.<sup>110</sup> Consequently, OCV provisions also apply to non-citizens that can vote from abroad within their first year of residence outside New Zealand; while citizens retain the external voting right for three years.<sup>111</sup>

The limits on the time of residence abroad can also apply in the opposite way, meaning that expatriates have to meet a minimum period of residence abroad in order to be eligible as external voters. In this way, out-of-country voting is not provided for those citizens who are out of the country for short-term periods. For example, Mozambique allows external voting only to citizens that have resided abroad at least one year before the registration process for elections starts; in Chad, only citizens living abroad for six months can be registered as external electors. This type of restrictions is not common,

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<sup>109</sup> Bauböck R., *Stakeholder Citizenship and Transnational Political Participation*, op. cit., p. 2424.

<sup>110</sup> *Electoral Act 1993*, New Zealand Government, Public act no.87, date of assent 17 August 1993, section 74.

<sup>111</sup> Green P., *Entitlement to vote*, op. cit., p. 93.

and usually it is imposed for technical reasons. For example, Italian expatriates directly elect their representatives that will form the Overseas constituency in the Italian Parliament. Considering that Italian external voters have a direct representation in the Parliament, it would be controversial to allow temporary absentees to elect members of the Overseas constituency. Therefore, while having one of the most inclusive OCV systems, with special governmental representation for expatriates, Italy doesn't provide temporary absentee with the possibility to vote from abroad.<sup>112</sup>

#### 2.2.4. Affidavit of return

Some countries request an affidavit of return from their citizens abroad, before registering them as external voters. Fundamentally, citizens living overseas have to declare that they intend to resume their residence in the home-country. Canada still requests its external voters to confirm their intention to return, by providing the date on which they intend to come back to the country.<sup>113</sup> The Philippines has for long adopted very restrictive OCV provisions towards its emigrants and non-residents, who were requested to sign an affidavit of return within three years following the elections; in addition, those who held dual citizenship were automatically excluded. However, exactly two weeks after the 2013 Philippines general elections, the government adopted the Overseas Voting Act 2013, changing completely its approach towards Philippine emigrants and abolishing both the requirement for the affidavit and the restriction imposed on dual-citizens.<sup>114</sup>

#### 2.2.5. Geographic-based restrictions

Forth, some sort of geographic-based restrictions may occur with regard to access to external voting. For example, Senegal grants external voting only

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<sup>112</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, Routledge Taylor& Francis Group, 2013, p. 91-93.

<sup>113</sup>*Canada Elections Act S.C. 2000, c. 9*, Government of Canada, Assented to on 31 May 2000, Section 11, paragraph 222 c.

<sup>114</sup>*An Act Providing For A System Of Overseas Absentee Voting By Qualified Citizens Of The Philippines Abroad, Appropriating Funds Therefor And For Other Purposes*, Congress of the Philippines, Republic Act No. 10590, Assented to on 27 May 2013.

in countries with official diplomatic representations, and only if at least 500 external voters register. Even if this type of legal restriction is quite rare, it is adopted for pragmatic reasons, in order to reduce administrative costs, risking however to undermine electoral equality. However, another type of geographical restriction exists in all cases when external voters are requested to reach a particular location where to cast the ballot. For example, when external citizens can only vote in person, in consular and diplomatic offices abroad, they have to be able to reach that location (which is not taken for granted in states with vast territorial extension as Canada or Australia).

#### 2.2.6. In-country voting

Finally, there are also states that allow their expatriates to exercise their voting rights, but only on the condition that they travel back to the country of citizenship and are present in the national territory on the election day. For the purposes of the present dissertation, this form of enfranchisement is not considered as external voting, because it is not a form of voting from abroad. But it is to be acknowledged that this method is still in use for instance in Israel, Turkey and Greece, Italy was also among these states before amending its electoral law in 2001.<sup>115</sup>

#### 2.3. Registration procedures of external voters

Once an external elector meets all the above-mentioned conditions and is considered eligible to cast an external vote, there is an additional requirement to be met – the voter has to be included in the electoral register, that is a necessary step for the entitlement to vote for each voter. Registration thus is the second stage in the entitlement process, and according to the methodology adopted by states, it may limit the access to external voting.

States may adopt automatic registration (taking the data from national registers) or active registration procedures (that requires a personal application from the elector).

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<sup>115</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation*, op. cit, p. 2423.

Taking for instance the case of the EU 28 member states, the registration procedure is automatic for resident citizens in all the states, except of four countries that apply active registration (Cyprus, Ireland, France and the UK). It derives that in the majority of states, registration for local citizens demands no additional efforts from voters. Things are different for external voters, indeed most states (19 out of 28) require an active registration, imposing numerous bureaucratic hurdles on their expatriates in order to register. Differentiating registration procedures for in-country citizens and non-residents may be considered as a form of unequal treatment.<sup>116</sup>

Special registration requirements for external electorate apply all the times that external voters are differentiated from in-country electorate, in terms of eligibility requirements or types of elections in which they can vote. For instance, if expatriates can only vote in national elections and not at the municipal level, the electoral register must distinguish external electors. When citizens permanently reside abroad, they may be requested to register as external electors also for practical reasons, that is to indicate their new residency address. As a matter of fact, usually electoral registers are regularly reviewed, and those who are no longer resident at the registered address are removed. For what concerns external elector registers, in order to keep them updated, some states may remove the names of the voters if they don't vote for example in two consecutive national elections.<sup>117</sup>

Active registration for expatriates, usually implies the completion of a form and a documentary proof of eligibility (for instance citizenship and residence), that is then verified by the competent authority. In this phase, attention should be given to particular groups of overseas citizens, that might not possess the necessary documentation. If a country is facing civil instability, transition processes or has numerous refugees abroad, its citizens may have no valid IDs. Therefore, in some cases it would be more feasible for external electors to have simplified authentication requirements.

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<sup>116</sup>Arrighi J. T., Hutcheson D. S., *Keeping Pandora's (ballot) box half-shut*, op. cit., p. 893.

<sup>117</sup>Green P., *Entitlement to vote*, op. cit., p. 96-97.

#### 2.4. Passive voting rights: eligibility to stand as a candidate in elections

Voting rights are not to be interpreted only as the entitlement of citizens to vote (active voting rights), but also as the right to stand as a candidate in elections (passive voting rights). The requirements that external electors have to meet to be eligible to vote from abroad usually prevent them from the possibility to stand as candidates. The eligibility rules for exercising passive voting rights may be very restrictive and include only limited categories of external voters. For instance, holders of dual or multiple citizenship may be automatically excluded from the possibility to stand as candidates.

For instance, the Australian constitution states that a citizen of a foreign power cannot qualify as a member of national parliament.<sup>118</sup> The scope of such provisions, is to avoid the conflict of interest that may rise when a citizen hold multiple nationality. However, dual citizenship is very common nowadays

and it may be argued that it is not legitimate to disqualify a candidate because of something that in many cases is just a technicality.

In other cases, states may have very inclusive external voting provisions, allowing all their citizens to vote from abroad; but at the same time, they opt for having stricter eligibility rules for candidates that live abroad. In most cases, restrictions that apply to passive voting rights take the form of residence requirement.

Passive voting rights are not as inclusive as active voting rights, being mostly based on citizenship and residence requirements. However, there are also some states that expressly allow their overseas citizens to be elected from abroad. It is the case of those external voting policies that include direct representation of external voters in national legislatures, through reserved seats in the parliament. Such provisions give the right to citizens living abroad to stand as candidates and directly represent the overseas population in national parliaments. Currently, only thirteen states grant their expatriates the possibility to be elected from abroad and have reserved seats in domestic

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<sup>118</sup>*Australia's Constitution*, Australian Government Solicitor, 7<sup>th</sup> ed., 2010, p.13.

parliaments, they are: Tunisia, Romania, Portugal, Panama, Mozambique, Italy, France, Ecuador, Croatia, Colombia, Cape Verde, Angola and Algeria.<sup>119</sup>

### 2.5. Case study: external voting rights in the European Union

All Member States of the EU have external voting policies that allow at least some of their citizens to vote from abroad. However, the degree of inclusiveness of overseas voters greatly varies from country to country, depending on the requirements and qualifications that non-residents have to meet. On the one hand, the majority of the EU states attach external voting rights only to the possession of citizenship; on the other hand, OCV norms adopted by many states de facto greatly restrict the number of eligible electors from abroad. In order to have a comparative overview, Table 2 (see below) includes the eligibility criteria analysed in previous paragraphs, in reference to the 28 EU Member States. There are eight states that extend external voting only to some professional categories or impose time limitations, while most states allow all citizens to vote from abroad (even if requesting active registration procedures). A further distinction is to be made between the right to vote and the right to stand as a candidate in elections, indeed a number of states does not confer passive voting rights on their expatriates. In any case, the degree of inclusiveness of the OCV depends also on the type of elections to which it applies and on voting methods, that will be subject of analysis of the Chapter 3.

What is outstanding is that under EU law, Member States enjoy full competence as to voting rights of their citizens, whether they reside inside state territory or abroad. It means unlimited discretion as to residence requirements, time restrictions, voting modalities etc, that can be imposed on external voters. This is the status quo, explicitly confirmed in the Directive 93/109/EC (1) and Directive 94/80/EC (2), «which provide that nothing in those Directives affects each Member State's provisions concerning the right

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<sup>119</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, vol.XXI., no. V, Routledge Taylor & Francis Group, 2015, p. 845-846.



to vote or to stand as a candidate of its nationals who reside outside of its territory». <sup>120</sup>

Table 2: Eligibility criteria for external voting in the 28 EU Member States:

	All citizens enfranchised	In-country voting only	Profession-based restriction	Current - residence requirement	Past residence requirement	Max. period of residence abroad	Active registration	No passive voting rights
Austria	X						X	
Belgium	X						X	X
Bulgaria	X						X	X <sup>121</sup>
Croatia	X							
Cyprus			X				X	
Denmark			X	X				X <sup>122</sup>
Estonia	X							
Finland	X							
France	X						X	
Germany					X	X	X	X
Greece		X					X	
Hungary	X						X	
Ireland			X	X			X	
Italy	X							
Latvia	X							
Lithuania	X							X
Luxemb.	X						X	X
Malta			X	X				X
Netherl.	X						X	
Poland	X						X	
Portugal	X						X	
Romania	X							X
Slovakia	X						X	X
Slovenia	X							
Spain	X							
Sweden					X		X	
UK					X	X	X	

(Own elaboration)

While EU has no competences on the voting systems of its Member States taken singularly, it still has decision-making power for what concerns the voting rights of EU citizens within the Union. European citizens were granted direct political participation and the voting rights deriving therefrom, with the adoption of the Electoral Act of 1976.<sup>123</sup> As cited in full, the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976 laid the legal foundation for the first direct elections of the EP in 1979, granting universal suffrage to all the citizens of EU Member States.<sup>124</sup> The status of EU citizenship obtained legal recognition and was formally defined in the Maastricht Treaty of 1992 (also known as the Treaty on the Functioning of the European Union – TFEU). Art. 20 of the TFEU states that: «Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship».<sup>125</sup> Art. 22 of the TFEU attached to the legal status of EU citizenship the following political rights:

- 1) The right to vote and stand in elections to the European Parliament: «Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State».<sup>126</sup>

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<sup>120</sup>*Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections*, European Commission, 2002

<sup>121</sup> In Bulgaria, the right to stand as candidate in national elections is not allowed to the holders of dual-citizenship

<sup>122</sup> In Denmark, candidacy rights for external residents are granted to selected professional categories only

<sup>123</sup>*Act concerning the election of the representatives of the European Parliament by direct universal suffrage*, OJ L 278, 20 September 1976.

<sup>124</sup> Costa O., *The history of European electoral reform and the Electoral Act 1976*, *Historical Archives of the European Parliament*, Issues of democratisation and political legitimacy, EPRS European Parliamentary Research Service, October 2016, pp. 13-19.

<sup>125</sup> *Consolidated Version Of The Treaty On The Functioning Of The European Union*, European Union, Official Journal of the European Union, 2007, Art. 20

<sup>126</sup> *Supra note*, TFEU, Art. 22.1.

- 2) The right to vote in municipal elections: «Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State».<sup>127</sup>

The voting rights of the EU are very inclusive and innovative from the perspective of external voting. Indeed, Member States have to grant voting rights both at municipal level and for the elections of the EP, not only to their own national but also to citizens of any other MS that reside within its territory. In this way, every state of the EU has to allow external voting for its citizens residing abroad, derogating the implementation of voting rights to the country of residence. At the same time, the receiving country has to grant equal voting rights both to its nationals and to resident non-citizens, who however hold citizenship of any other Member State. From this perspective, voting right of the EU are based more on residence rather than on citizenship and represent a very comprehensive external voting policy within the EU. These rights benefit all those citizens of the MSs who reside in another EU country, other than that of their citizenship.

But what about the voting rights of those citizens who reside in a third country, outside the European Union? As outlined at the beginning of this paragraph, EU has no competence in defining external voting systems of its Member States; moreover, the EU citizenship is conditional on the possession of the citizenship of a Member State; therefore nationality laws that regulate the acquisition and loss of citizenship, will affect also the possession of the EU citizenship; finally, considered that the eligibility of external voters residing outside the EU is within state's sovereignty, it will be states' competence to enfranchise their expatriates in third countries for what concerns the elections of the European Parliament. In truth, until very recently, there was no mention in the European Electoral Act of voting rights of citizens residing in third countries. But, the Council decision 2018/994 of 13 July

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<sup>127</sup> Supra note, TFEU, Art. 22.2.

2018, has amended the Electoral Act 1976, recognizing external voting for EU citizens who reside in third countries, other than EU member states. Art. 9a of the Council decision 2018/994 states that: «In accordance with their national electoral procedures, Member States may take the measures necessary to allow those of their citizens residing in third countries to vote in elections to the European Parliament». <sup>128</sup> Art. 4a provides also for the possibility of using advance voting, postal, electronic and internet voting, in addition to traditional methods used in electoral procedures. All in all, the EU recognizes and allows the entitlement of EU citizens who reside outside the Union to participate in the elections of the EP, but their actual enfranchisement will depend on the electoral procedures of each state. For instance, for the European Parliament elections that will take place in May 2019, the majority of MSs allow their citizens to vote from third countries subject to pre-registration. The most common voting methods are by post or in person at diplomatic missions; four states offer proxy voting as well, namely Netherlands, France, UK and Poland; and only Estonia has also an e-voting procedure. In addition, special provisions for diplomats and military personnel serving abroad are adopted by majority of states. Several states, grant voting rights only to their citizens residing in another EU state but not in third countries, it is the case of Italy, Denmark, Greece, Cyprus and Bulgaria. Finally, external voting is not implemented for the European elections by Czech Republic, Ireland, Malta and Slovakia. <sup>129</sup>

## 2.6. Influence of external voters on domestic politics

Some states grant active and passive voting rights to all their citizens, regardless of whether they have ever resided in the home-country; others don't allow expatriates to cast their vote if not physically present in the country on the election day. In between these two extremes, there is a great variation of

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<sup>128</sup> *Council Decision 2018/994*, Council of the European Union, Official Journal of the European Union, 2018, Art. 9a.

<sup>129</sup> Data available at the European Union official website: [https://europa.eu/youreurope/citizens/residence/elections-abroad/european-elections/index\\_en.htm](https://europa.eu/youreurope/citizens/residence/elections-abroad/european-elections/index_en.htm)

external voting policies and states may choose to impose a number of conditions on overseas citizens before granting them voting rights. There is no single model of establishing eligibility criteria for external voters: the requirements that are legitimate in one country, may not be compatible with the polity of another, depending on the electoral laws and constitution of each country. In order to better understand why states adopt restrictive or expansive external voting policies, let us consider some examples.

#### 2.6.1. Introduction of external voting in Croatia – the role of political parties

When states introduce OCV norms in their electoral systems, they take into consideration the possible impact that overseas votes may have on domestic elections. In most cases, external voters account for a relatively small percentage of overall turnout. However, expatriates may also have an important influence on the outcomes of the elections, especially in states that have a considerable number of citizens entitled to vote from abroad. Consideration about the possible impact of external voters on domestic politics is a determinant factor in the adoption of OCV policies.<sup>130</sup>

At the initial stage of the introduction of external voting, political forces play an important role. Those political parties that estimate to gain political support among external voters would support the introduction of extensive OCV norms, while other political parties would oppose it.<sup>131</sup> If external voting is adopted for political purpose of a specific political formation, its legitimacy may be brought into question. It is exactly what occurred in Croatia during the 1990s (when the country was involved in the Yugoslavian wars). The government of the President Franjo Tudjman introduced external voting provisions, relying on nationalistic leaning of Croatians residing abroad. The government political parties amended the electoral law, introducing 12

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<sup>130</sup> Green P., *Entitlement to vote*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, Trydellstryckeri AB, 2007, p. 101-103.

<sup>131</sup> Arrighi J. T., Hutcheson D. S., *Keeping Pandora's (ballot) box half-shut: a comparative inquiry into the institutional limits of external voting in EU Member States*, in *Democratization*, Vol. 22, No. 5, Routledge Group, 2015, p. 892.

reserved seats out of 127 in the parliament to represent Croatian voters residing abroad.<sup>132</sup> As expected, in the parliamentary elections of 1995, all those 12 seats went to the Croat Democratic Union of Franjo Tudjman, that won the absolute majority. Following complaints from the opposition and public opinion, a new electoral law was passed in 1999, introducing a new formula for extraterritorial seats. The seats in the parliament were no longer fixed, but dependent on the ratio between the votes cast abroad and domestic votes, making the representation of expatriates proportional to that of in-country citizens.<sup>133</sup>

#### 2.6.2 Impact of external voting on the outcome of the elections in Italy

The example of external voting in Croatia shows the influence that political actors may have on the adoption of some specific forms of OCV. But sometimes, the same type of OCV provisions may lead to unexpected outcomes. For instance, Italy adopted its first external voting law in 2001, reserving twelve seats in the Chamber of Deputies and six in the Senate to the parliamentarians elected abroad.<sup>134</sup> In the Italian case, the creation of a foreign constituency, where expatriates directly elected their representatives to the parliament, was aimed at controlling the impact that external votes may have had on domestic political dynamics.<sup>135</sup> However, the votes of expatriates proved to have an important role in the Italian legislative elections of 2006. First of all, it is to take into account that the Italian electoral system allows a majority bonus to the coalition or party that obtains the highest number of votes. Second, during the 2006 elections, the counting of domestic votes showed a very narrow gap between the two main coalitions: The Union led by

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<sup>132</sup>GrotzF.,Nohlen D., *The legal framework and an overview of electoral legislation*, op. cit., p. 72-73.

<sup>133</sup> See supra note.

<sup>134</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, in *Global Networks* Vol. 11, no. 4, Blackwell Publishing Ltd & Global Networks Partnership, 2011, pp. 491-493.

<sup>135</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor& Francis Group, 2013, pp. 10-11.

Romano Prodi and the House of Freedoms coalition of Silvio Berlusconi. Third, external votes were last to be counted and therefore perceived by the public opinion as determinant for the overall outcome of the elections. The coalition of Romano Prodi had already obtained the majority of seats in the Chamber of Deputies on the grounds of in-country votes. While, initially, the coalition of Silvio Berlusconi was able to win 158 seats in the Senate, against 156 seats of The Union. Therefore, the results of the elections were uncertain until all external votes were counted. In the end, the votes cast abroad overturned the situation in the Senate, attributing 158 seats to The Union of Prodi. In this way, Prodi's coalition gained the highest number of votes and obtained the majority bonus, becoming the ruling party.<sup>136</sup>

The case of Italian legislative elections of 2006 cannot be considered as a common pattern in external voting. As a matter of fact, in most cases external voting turnout is quiet low and the impact of overseas votes is marginal with respect to domestic votes.<sup>137</sup> However, the Italian case study reflects the shared concerns of most states, in granting voting rights to external citizens who may have a considerable impact on the outcome of the elections. Moreover, governments may be concerned about conceding excessive political power to external electors, who will be less affected by the results of the elections than in-country residents. The issue of political representation will be further analysed through the example of external voting in Cook Islands, hereinafter.

### 2.6.3 Cook Islands – the issue of unequal political representation

The Cook Islands is a self-governing parliamentary democracy which is in free association with New Zealand. In the case of the Cook Islands more citizens live outside the national territory than inside the

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<sup>136</sup> Mascitelli B. and Battiston S., *The challenges to democracy and citizenship surrounding the vote to Italians overseas*, in *Modern Italy*, Vol. 13, issue no.13, 2008, pp. 271-278.

<sup>137</sup> Fierro C.N. – Morales I. – Gratschew M., *External voting: a comparative overview*, op. cit., p. 30.

country.<sup>138</sup> Considering that political consequences of legislative elections mainly affect in-country citizens than those residing abroad, external voting was largely perceived as illegitimate by the domestic population of the Cook Islands, and proved to be unsustainable at the end.

Before 1981, all expatriates were allowed to participate in national elections, provided that they were physically present in the country on the election day. Under these electoral framework, there was high political competition to gain the support of overseas voters, who could determine the outcome of the elections. For the 1978 general elections, the Cook Islands Party (CIP) have even flown in a decisive number of voters subsidizing their airplane tickets and as a result managed to gain the victory. However, the opposition party appealed the Supreme Court on the basis of unlawful conduct and the majority of expatriates' votes were disqualified. In addition, in 1981, the parliament amended the electoral law and introduced a separate electoral district for the Cook Islanders residing abroad. Since then, the influence of expatriates in domestic elections was greatly reduced, the political support for the overseas seat declined and the overseas electoral district was finally abolished in 2004.<sup>139</sup>

In the case of the Cook Islands the influence of non-resident citizens in domestic politics wasn't deemed to be legitimate by the government and led to the disenfranchisement of expatriates.

## 2.7 Conclusive remarks

In the final analysis, it may be concluded that states need to find a legitimate compromise between the political rights of citizens living inside the country and those residing abroad. It may be argued that citizens residing *outside* the national territory should not have a decisive role in electing representative organs, whose decisions will only be binding on those

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<sup>138</sup> Ellis A., *The history and politics of external voting*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 50.

<sup>139</sup> Ellis A., op. ult. cit., p. 52.



individuals who reside *inside* the country.<sup>140</sup> From this perspective, the requirements and restrictions that external citizens have to meet in order to be eligible to vote prove to be a necessary tool to permit equal political representation. Indeed, the right to representation implies that citizens elect the representatives in the government to administer the law on their behalf and only those who bear the consequences of their electoral decisions should have the right to vote.

### **3. Electoral systems: a comparative analysis of external voting practice**

#### **3.1. Types of elections in which external voters can participate**

Even when states adopt very comprehensive external voting policies and don't impose any time limits or residence requirements on citizens living abroad, they can still determine in which type of elections expatriates can participate. The decision of limiting external voting to specific types of elections is very important in defining which levels of government and which institutions can be influenced by overseas voters. Additionally, there may be institutional and technical considerations to take into account, they are mostly linked to specific electoral systems and to the procedures used for external voters.

##### **3.1.1. National elections vs. local elections**

External voting can apply to legislative and/or presidential elections, to referendums, to supra-national elections or to local elections (at regional or municipal level).<sup>141</sup> Most countries apply external voting to legislative elections, combined with one or more other types of elections (presidential

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<sup>140</sup> Grotz F., Nohlen D., *The legal framework and an overview of electoral legislation*, op. cit., p. 72-73.

<sup>141</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, vol. XXI., no. V, Routledge Taylor & Francis Group, 2015, p. 844.

elections or referendums); whereas the elections at local and regional level are usually accessible only by in-country citizens.<sup>142</sup> Depending on the form of government, the most significant types of elections for expatriates may be legislative or presidential ones. In addition, the participation in constitutional referendums permit expatriates to have an important influence on domestic politics. However, non-residents may also be particularly interested in regional elections, considering that they may be more familiar with the issues debated at local level.<sup>143</sup>

In any case, from the point of view of lawmakers, it may be argued that national elections are more suitable for external voters than local ones, because expatriates are less affected by political decisions taken at regional and local level.<sup>144</sup>

Another argument to differentiate between national and sub-national levels of government can be found when considering states as internal and external political communities.

Externally, in their international relation with other states but also with their citizens abroad, states appear as a unitary political community, represented by the national government or the president.

However, internally, the political community is formed by multiple institutions of self-government that enjoy different degrees of autonomy at regional or local level.

The right to vote in provincial or municipal elections is granted to citizens that reside within the region or municipality. Political membership is automatically conferred or lost with the change of residence. Taking for instance the example of the USA, a citizen of Alabama will lose his voting rights at the state level, when he moves to Florida. Following this reasoning, the right to participate in local elections should be automatically withdrawn from citizens who permanently reside abroad. According to this argument, the reasonable principle to confer local political membership should be that of *ius*

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<sup>142</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, Routledge Taylor& Francis Group, 2013, p. 27-29.

<sup>143</sup> Lafleur J.M., *The enfranchisement of citizens abroad*, cit, p. 845

<sup>144</sup> Green P., *Entitlement to vote*, op. cit., p. 90.

domicilii.<sup>145</sup> This principle is for example applied within the EU, where individuals who reside in a member state other than that of their citizenship have the right to vote and stand as candidates in local elections under the same conditions as the nationals of that country.<sup>146</sup>

All things considered, the choice to limit the participation of expatriates to local elections appears justifiable. At the same time, national citizenship (and the political rights that derive from it) does not depend on residence, and therefore expatriates cannot be deprived of the right to vote in elections held at national level. In any case, these conclusions may only pertain to permanent expatriates and not to temporary absentees who still maintain their residence in the municipality.<sup>147</sup>

### 3.1.2. Legislative and presidential elections

When expatriates are granted political membership at national level, they can be entitled to vote in legislative elections (voting for national parliament) or in presidential elections (for the head of state). According to the IDEA's Voting from Abroad Database based on 216 states and territories, most states apply external voting to legislative elections (58.3%), followed by the second most common type of elections to which external voting applies, that is presidential elections (41.2%), while elections at local level for expatriates are allowed only by 23 countries, amounting to 10.6% of the total number.<sup>148</sup>

States may choose to apply external voting to one type of elections only or to several of them. There are some countries that hold both legislative and presidential elections at national level, but allow external voters to participate only in one of them. For instance, in Azerbaijan voting from abroad is

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<sup>145</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, Fordham Law Review, 2007, p. 2428-2430.

<sup>146</sup>Arrighi J-T., Bauböck R., Collyer M., Hutcheson D., et. Al., *Franchise and electoral participation of third country citizens residing in the European Union and of EU citizens residing in third countries*, European Parliament's Committee on Constitutional Affairs, Brussels, 2013, p.23.

<sup>147</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation*, cit., p. 2430.

<sup>148</sup>International IDEA, Voting from Abroad Database – Election type, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>

permitted for legislative elections, and not for the presidency.<sup>149</sup> On the contrary, Afghanistan implemented external voting for presidential elections in 2004, but did not apply it for legislative elections in 2005.<sup>150</sup>

It therefore emerges, that not only states differentiate between national and local levels of representation, but also between presidential and legislative types of elections. Obviously, they may be guided by the intention of limiting the impact of external voters on representative bodies in home country, but some lawmakers have also argued that voting for presidency is more appropriate for expatriates than voting for legislative bodies.<sup>151</sup> The main argument in this respect may be that in presidential democracies, the head of state is responsible for external relations and foreign policy which are the most relevant domains of interest of external citizens.<sup>152</sup> However, this explanation does not necessarily respect the real interests of expatriates, who may be more concerned about domestic politics than about foreign policy.

Aside from different arguments that states may consider in favour or against the introduction of external voting for legislative or presidential elections, the impact that expatriates may have on national elections can depend on other factors, as well.

For what concerns the elections of legislative bodies, an important role may be played by the allocation of external votes in specific constituencies. There are two main options:

- The first option is that of allowing external voters to participate in the elections of the parliament or of the senate in ordinary constituencies. In this case, overseas votes can be allocated to: 1) the constituency with which the elector has some legal links, usually determined by

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<sup>149</sup>Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p. 861.

<sup>150</sup>Fischer J., *The political rights of refugees and displaced persons: enfranchisement and participation*, *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 158.

<sup>151</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, Routledge Taylor & Francis Group, 2013, p. 28.

<sup>152</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, *Fordham Law Review*, 2007, p. 2429.

former residence or place of birth; 2) a central constituency, usually that of the capital, where all external votes are allocated.<sup>153</sup> When external votes are allocated to small constituencies, they may have a considerable impact on the outcome of the elections (depending on the voter turnout); while, overseas votes are usually marginal in single constituencies or in those relatively large.

- The second option is that of the overseas constituency, that implies a special representation of expatriates in national legislature through reserved seats. While overseas constituency grants external voters with a direct representation, it also limits their impact to a pre-determinant number of seats.<sup>154</sup>

### 3.1.3. Referendums: the case study of the EU membership referendum hold in the UK

Legislative and presidential elections are the two main types of elections in which external voting is permitted. According to the International IDEA's database, there are 37 states that allow external voting only in legislative elections.<sup>155</sup> 11 states allow OCV exclusively in presidential elections.<sup>156</sup> In all other cases, states apply OCV to more than one type of elections. Among them, there are 72 states that allow external voters to participate in national referendums.<sup>157</sup> For the purposes of this research, only referendums hold at national level are taken into consideration, disregarding those that can take

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<sup>153</sup> *Report on Out-Of-Country Voting*, study no. 580 / 2010, section II, paragraph 7, Council for Democratic Elections and Venice Commission, Venice, 17-18 June 2011, p.13.

<sup>154</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor& Francis Group, 2013, p.28.

<sup>155</sup> International IDEA, *Voting from Abroad Database – Election type*, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>. Data refers to 37 countries out of 151 countries that currently have external voting provisions in place.

<sup>156</sup> See supra note. Data refers to 11 countries out of 151 countries that currently have external voting provisions in place.

<sup>157</sup> See supra note. Data refers to 72 countries out of 151 countries that currently have external voting provisions in place. There is no known case in which external voting applies to referendums only, meaning that it is always combined with some other type of elections.

place at federal or regional levels. All in all, referendums represent the third most common type of elections in external voting systems.

When citizens living abroad can participate in national referendums, it implies that they are given decision-making power on matters of major national importance. Indeed, referendums permit a direct vote of the electorate on relevant issues of public policy, as for instance constitutional amendments or adoption of international treaties.<sup>158</sup>

A demonstrative example in this sense is represented by the EU membership referendum that took place in the UK on 23 June 2016. In that occasion, the total electorate turnout represented 72.2 % of eligible voters, with 48.8 % of citizens (16,141,241 people) voting for UK to remain in the EU and 51.9 % of voters (17,410,742) opting to leave the EU.<sup>159</sup> Among overseas nationals, only those who have resided abroad for less than 15 years and had already been registered in the UK electoral rolls, were allowed to vote in the referendum.<sup>160</sup> The 15-year time limit did not permit the participation of a large portion of British citizens residing in the EU, even if their interests are supposed to be directly affected by the outcome of the referendum. In effect, according to the estimates of the United Nations (based on census data gathered from EU countries), in 2017 there were 1.3 million people born in the UK who resided in another EU country.<sup>161</sup> Moreover, according to the UK Electoral Commission, there is an overall estimated number of 5.5 million of British citizens living abroad.<sup>162</sup> However, anybody of them who has been outside the UK for more than 15 years was not enfranchised. Considering that

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<sup>158</sup> Bulmer E., *Direct Democracy*, Second edition, Stockholm, International Institute for Democracy and Electoral Assistance (International IDEA), 2017, pp- 6-7.

<sup>159</sup> *EU Referendum results*, the Electoral Commission, data available at: <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>

<sup>160</sup> *Political Parties, Elections and Referendums Act 2000*, Electoral Commission, 2000, Chapter IV, Part X, Paragraph 141.

<sup>161</sup> *Trends in International Migrant Stock: The 2017 Revision*, United Nations, Department of Economic and Social Affairs, Population Division, 2017, Data available at United Nations database, POP/DB/MIG/Stock/Rev.2017.

<sup>162</sup> Johnston N., *Overseas voters*, Briefing paper no. 5923, House of Commons Library, 10 December 2018, p.18.

in the EU referendum the difference between the “remain votes” and “leave votes” was of 3.1% (1.269.500 votes),<sup>163</sup> we can suppose that if long-term expatriates were enfranchised, they could have determined the outcome of the referendum. On this basis, «Harry Shindler, a British citizen who has lived in Italy since 1982, and Jacquelyn MacLennan, who has lived in Brussels since 1987, were not able to vote in the EU referendum and took a case to the High Court challenging the legality of the franchise for the referendum which excluded British citizens who have lived abroad for more than 15 years. Shindler and MacLennan claimed that the 15 year rule, as applied to eligibility to vote in the EU referendum, constituted a restriction on their rights of free movement». <sup>164</sup> The High Court rejected the claim on 28 April 2016, affirming that the UK electoral law does not unlawfully interfere with the EU right of freedom of movement and that the government is legitimated to set an arbitrary time limit for non-resident citizens.<sup>165</sup>

In conclusion, the case-study of the EU membership referendum in UK is an example of the determinant role that specific external voting provisions may have. Sometimes, the interests and the rights of expatriates are de facto restricted by external voting norms, other times OCV provisions may be over-inclusive. The point is that states enjoy a wide margin of appreciation as to their external voting systems and they have a number of instruments to confer more or less political power to overseas citizens.

#### 3.1.4. Sub-national and supra-national elections

In addition to legislative elections, presidential elections and referendums, there are two more types of elections to which external voting can apply, they are sub-national and supranational elections.

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<sup>163</sup>EU Referendum results, the Electoral Commission, data available at: <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>

<sup>164</sup>*Harry Shindler MBE, Jacquelyn MacLennan -v- Chancellor of the Duchy of Lancaster, Secretary of State for Foreign and Commonwealth Affairs*, Case No: CO/1431/2016, UK High Court of Justice, Judgment approved on 28 April 2016, London.

<sup>165</sup> Supra note

«The group of sub-national elections includes all elections to legislative or executive bodies at political–administrative levels of government lower than national level; however, this may vary from country to country according to the particular form of state or government». <sup>166</sup> This is the definition of sub-national elections adopted by the International IDEA and it refers to elections held at local regional or municipal levels. As underlined in paragraph 3.1.1., it is more common for states to allow external voting at national level (for legislative or presidential elections) rather than at local level. In fact, only 23 states permit their expatriates to vote at sub-national level of government. <sup>167</sup> In majority of cases, citizens lose their right to vote in local elections when they no longer reside there; under these circumstances, states tend to impose greater restrictions on external voters with regard to elections held at municipal or regional level. <sup>168</sup>

For what concerns supra-national elections, they are almost absent in external voting practice, actually, the most famous case is represented by the elections of the European Parliament.

For the EU parliamentary elections, each Member State has to grant the right to vote and to stand as a candidate both to its nationals and to residents of another EU country, under the same conditions. <sup>169</sup> In this way, EU citizens that reside in a country other than that of their citizenship are allowed to participate in EP elections from the country of their residence. Even if these provisions create a common framework of external voting system within the EU, each Member State can autonomously define the electoral procedures for EP elections (for instance registration or voting methods). Moreover, while all EU citizens living in one of the Member States are enfranchised and can vote in their state of residence, until very recently no such right was granted to

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<sup>166</sup> Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 16.

<sup>167</sup> International IDEA, *Voting from Abroad Database* – Election type, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>

<sup>168</sup> *Report on Out-Of-Country Voting*, study no. 580 / 2010, section II, paragraph 7, Council for Democratic Elections and Venice Commission, Venice, 17-18 June 2011, p.14.

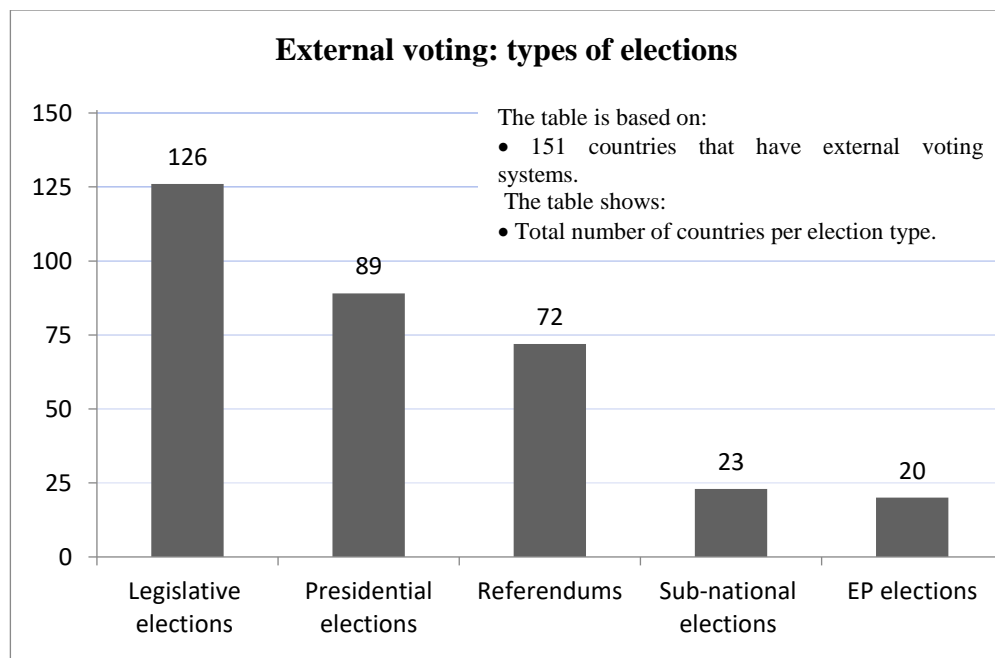
<sup>169</sup> *Consolidated Version Of The Treaty On The Functioning Of The European Union*, European Union, Official Journal of the European Union, 2007, Art. 22.1.



those EU citizens who resided in a country outside the EU. Fundamentally, each state remained free to decide whether or not to establish OCV mechanism for the EP elections in a third country other than EU Member State. However, the Council decision 2018/994 of 13 July 2018 (that has amended the Electoral Act 1976) officially recognized external voting for EU citizens who reside in third countries. Art. 9a of the Council decision 2018/994 states that: «In accordance with their national electoral procedures, Member States may take the measures necessary to allow those of their citizens residing in third countries to vote in elections to the European Parliament».<sup>170</sup>This decision recognizes and allows the entitlement of EU citizens who reside outside the Union to participate in the elections of the EP, but once again the actual enfranchisement is dependent on the electoral procedures and mechanisms used by each state (for more details see the case study on the external voting rights in the European Union in paragraph 2.5).

### 3.1.5. Comparative overview of different types of elections

Table 3. External voting: types of elections.



(Own elaboration)

<sup>170</sup>Council Decision 2018/994, Council of the European Union, Official Journal of the European Union, 2018, Art. 9a.

The International IDEA “Voting from Abroad Database” includes 216 countries and territories, 151 of them have external voting systems in place, and they are going to represent the basis for a comparative overview on different types of elections in which external voting can be implemented.<sup>171</sup>

As shown in Table 3, there are five main types of elections in which external voting is permitted. The table shows the total number of countries per election type, including countries that allow one type of elections only or combinations of different elections (that will be analysed below).

The main types of elections are:

- Legislative elections: 126 states
- Presidential elections: 89 states
- Referendums: 72 states
- Sub-national elections (at regional, municipal or local levels): 23 states
- Supra-national elections (European Parliament elections): 20 states
  - One type of elections only:

Out of 151 countries that have external voting systems, 46 states allow external voting in one type of elections only (legislative or presidential), in all other cases OCV is applied in two or more types of elections.

- Legislative elections only: 35 states.
- Presidential elections only: 11 states.
  - Combinations of different types of elections:
- Legislative and presidential elections: the most common combination of two types of elections is that of allowing OCV for both legislative and presidential elections, which is the case of 24 states.
- Referendums: 72 states have external voting provisions for referendums, always in combination with some other type of elections.
- Sub-national elections: are not common and only 23 states allow their expatriates to vote at local level.

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<sup>171</sup> The data used hereinafter is based on the International IDEA’s *Voting from Abroad Database* – Election type, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>.

- Supra-national elections: in this context, only the elections of the European Parliament have been considered. While external voting is implemented by all Member States within the EU, external voting in third countries is not applied by 8 states out of 28: Bulgaria, Czech Republic, Ireland, Greece, Italy, Malta and Slovakia.<sup>172</sup>

All in all, 50 states allow external voting in three or more types of elections. It may seem the most inclusive way of enfranchising expatriates, however it is always important to consider what specific types of elections may be relevant for external electors with respect to the system of government. For instance, if in presidential systems expatriates can vote for the elections of the president, or if they can elect the members of legislative bodies in parliamentary systems. Moreover, the real degree of inclusiveness of external voting also depends on eligibility criteria and restrictions, or on other technical and administrative arrangements (such as voting methods).

### 3.2. External voting procedures

States enjoy a wide margin of appreciation as to external voting procedures implemented abroad. There are four main types of voting modalities that states may adopt: personal voting at diplomatic missions or at other polling stations, postal voting, proxy voting and electronic voting.<sup>173</sup> State practice may depend by technical and financial considerations, indeed some procedures bear high costs, while others may not guarantee electoral integrity. States may offer their expatriates one or multiple external voting modalities, all of which have some weaknesses and strengths and have implications in terms of accessibility for expatriates to cast their votes.

#### 3.2.1. Personal voting

Personal voting is applied by the majority of states that have external voting systems and it implies that electors abroad cast their vote in person at

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<sup>172</sup>Dobрева A., Sabbati G., Sgueo C., *2019 European elections: National Rules*, European Parliamentary Research Service (EPRS), October 2018.

<sup>173</sup>Braun N., Gratschew M., *Introduction*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 6-7.

diplomatic missions or other official polling stations.<sup>174</sup> The main advantage of voting in person is that it reflects the same procedures used for in-country voters and ensures the secrecy and transparency of the vote. However, when external voting procedures are carried out in embassies or consulates, it may create issues of limited accessibility for those voters whose domicile is distant from diplomatic missions. It will also depend on the extent of diplomatic and consular network of different states. For instance, Russian diplomatic representation covers more than 140 states, while Peru has effective consular missions in about 55 states and the Central African Republic covers some 10 states.<sup>175</sup>

In order to overcome the limitations of voting at diplomatic missions, states can set up additional polling stations in locations that are hardly accessible by electors, or where there are high concentrations of potential voters. In some occasions, states have installed special voting stations in important USA cities with high numbers of expatriates, for instance it occurred during Russian presidential elections in 1996 or Dominican elections in 2004.<sup>176</sup> Indeed, states may set up special polling stations for some technical or logistical reasons, as for instance high numbers of potential voters in particular localities. However, polling stations imply higher costs than voting at embassies and require supplementary authorization from the host-country.

Financial or logistical motivations may also lead states to restrict the number of countries in which set up polling stations, limiting it only to those overseas areas where expatriates are mostly concentrated. Taking the previous example of the presidential elections held in the Dominican Republic in 2004, it organized external voting provisions in the biggest cities located in five countries (Venezuela, Puerto Rico, Spain, Canada and the USA).<sup>177</sup> The

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<sup>174</sup> Sundberg A., *The history and politics of diaspora voting in home country elections*, op. cit., p. 4-5.

<sup>175</sup> Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 24.

<sup>176</sup> Fierro C.N., Morales I., Gratschew M., *op. ult. cit.*, p. 28

<sup>177</sup> Núñez L. A., *The Dominican Republic: political agreement in response to demands for the right to vote from abroad*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 186-187.

restrictions operated by Honduras and Afghanistan where even more restrictive. Honduras first implemented external voting for its presidential elections in 2002, restricting the coverage of the OCV only to six cities in the USA where it had consular missions; the same restrictive procedures were also maintained for the 2006 elections.<sup>178</sup> While Afghanistan implemented OCV procedures only once, for its 2004 presidential elections, and extended it to two countries, Iran and Pakistan, where most of its displaced citizens were located.<sup>179</sup> Another interesting example is represented by Senegal that in 2000 allowed external voting in 15 countries; but polling station were actually set up only if a minimum threshold of 500 registered electors was met.<sup>180</sup>

### 3.2.2. Postal voting

Voting by post implies that ballot papers are distributed to the electors by mail, filled in by voters and sent back to the diplomatic mission, that in turn has to deliver the ballots to the home-country on the election day, for counting.<sup>181</sup> Due to this timelines, postal voting can be considered as a form of early voting, meaning that external electors won't be able to take account of the latest developments of the election campaign. A part of this, the main weakness of voting by mail is that it cannot assure the same transparency and security as voting at polling stations, raising concerns about secrecy of the ballot. Indeed, there is no guarantee that votes are cast in person by electors themselves or that ballot papers are not counterfeited. As a matter of fact, external voting by mail has often resulted in allegations of electoral fraud. An illustrative example in this sense is represented by the Italian external voting system, which adopts postal voting as the only modality to collect votes from

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<sup>178</sup> *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook", op., cit., p. 24-25

<sup>179</sup> Fierro C.N., Morales I., Gratschew M., *op. ult. cit.*, p. 16.

<sup>180</sup> Vengroff R., Senegal: a significant external electorate, in "Voting from Abroad: The International IDEA Handbook", cit., p. 104-107.

<sup>181</sup> Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p. 886-888.

abroad. Since the very first legislative elections in which OCV was introduced, in 2006, and up to the most recent general elections held in March 2018, there have been continuous accusations of fraudulent postal ballots. Political candidates and criminal organizations have been denounced for counterfeiting ballot papers and illegitimately collecting votes abroad.<sup>182</sup> A part of the Italian case, that will be object of analysis in the following chapter, general issues that may arise with postal voting concern the integrity of ballot papers and possible problems with postal services. In spite of the outlined weak points of voting by mail, it is still the second most used voting practice (after personal voting).<sup>183</sup> Its main advantage is that it can be implemented in all countries that have a reliable postal system, avoiding possible host-country objections about foreign elections being held on its territory. Moreover, voting by post can be extended to all external citizens, overcoming problems of access at polling stations, typical of voting in person at diplomatic mission. Furthermore, it is easier for states to organize postal voting than install polling stations in all diplomatic missions around the world. In addition, the cost of postal voting is generally lower than the expenses for personal voting procedures.<sup>184</sup>

### 3.2.3. Voting by proxy

Voting by proxy means that a citizen residing abroad can designate another authorized elector, who will cast the vote on his behalf at the polling station in the home country.<sup>185</sup> From the practical point of view, proxy voting is the less problematic of the voting modalities, because it does not involve any special arrangements and proxies are just considered as ordinary voters.

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<sup>182</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor& Francis Group, 2013, p.108-109.

<sup>183</sup>International IDEA, *Voting from Abroad Database* – Voting method, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130352>

<sup>184</sup> Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p. 886-887.

<sup>185</sup> Arrighi J-T., Bauböck R., Collyer M., Hutcheson D., et. Al., *Franchise and electoral participation of third country citizens residing in the European Union and of EU citizens residing in third countries*, European Parliament's Committee on Constitutional Affairs, Brussels, 2013, p.33.

Moreover, proxy voting is technically simple and it does not require high financial and administrative costs, as happens for voting in person and by post. In addition, this voting procedure appears to be inclusive and easily accessible by external voters, who simply need to appoint a proxy. External voters will probably choose proxies who will be able to vote in the same electoral district as they themselves would. In any case, the appointment of a proxy is the responsibility of the external voter.<sup>186</sup> However, problems in this respect may arise in the case that proxy voting is the only procedure available for expatriates and they encounter difficulties in identifying an eligible proxy (for instance it may happen with expatriates who have been residing abroad for a long time).

In any case, the most relevant disadvantages of proxy voting regard concerns about the equality and secrecy of the vote. As a matter of fact, there is no guarantee that the proxy will effectively vote as indicated by the voter who appointed him and won't use this voting procedure to cast an additional vote according to his own preferences (thus violating the principle of equal suffrage). All things considered, while proxy voting seems an advantageous procedure from the administrative and technical points of view, it may imply considerable irregularities as to vote's integrity. Probably, for these reasons, proxy voting is used by a minority of states (India, France, UK and Belgium among them).<sup>187</sup>

#### 3.2.4. Electronic voting

Electronic voting (e-voting) implies the use of Internet, of mobile phones, of personal digital assistants (PDAs) or similar electronic means to cast votes from abroad. Most commonly, through remote e-voting, electors are able to

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<sup>186</sup> Johnston N., *Overseas voters*, Briefing paper no. 5923, House of Commons Library, 10 December 2018, p.31-32.

<sup>187</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, Fordham Law Review, 2007, p. 2404-2405.

cast their votes using a personal computer and accessing the Internet or a specially designated intranet.<sup>188</sup>

This method has the advantage of being the most accessible and convenient for external citizens, therefore allowing a comprehensive participation of the electorate. Indeed, there is no need for external citizens to travel to the polling station as votes may be cast from any location directly on the election day. E-voting seems also more efficient than postal voting, because it eliminates the practical inconveniences related to timing and inefficient postal systems. In any case, similarly to what happens with voting by mail, e-voting takes place in an uncontrolled environment and it implies concerns about vote secrecy and integrity.<sup>189</sup>

Other disadvantages of e-voting mainly regard the risk of systems failure and data protection. From the point of view of security concerns and the use of Internet for the transmission of confidential information, there are fears of hacker attacks, «both by insiders (e.g. software programmers) and by outsiders (e.g. political parties, terrorists or other states)».<sup>190</sup> This is why, before introducing internet voting systems, several security challenges have to be solved. First of all, there is the need of specific technologies to verify voters' identity and authorization to vote, that may be achieved through personal identification numbers, digital signatures or biometric data authentication. Secondly, a highly secured server platform is essential to avoid possible risks of system failure, fraud or cases of stolen identity. Finally, the initial costs of implementing e-voting are very high, even if this method can minimize administrative costs in the long run.

At the present, very few countries have introduced e-voting procedure for their external voters and only in two countries it is the only external voting method in use. In particular, 10 states allow e-voting in combination with other voting methods, and they are: Bahrain, Bhutan, Estonia, France, Mexico,

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<sup>188</sup> Braun N., "E-voting" and external voting, in "Voting from Abroad: The International IDEA Handbook", cit., p. 217-218.

<sup>189</sup> Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p. 885.

<sup>190</sup> Braun N., "E-voting" and external voting, op. cit., p. 221.



Panama, Switzerland, Turkey, United States and India. While only Armenia and Pakistan have introduced electronic voting as the only voting modality for their expatriates.<sup>191</sup> However, the recent spread of new communication technologies may provide for further developments of e-voting procedures in the near future. In the meanwhile, electronic means are being more and more implemented in the intermediate phases of external voting procedures, as for voter registration or for the provision of information on political parties and candidates.

### 3.2.5. Comparative overview of external voting modalities

As emerged from the previous analysis, states can enjoy a wide margin of appreciation in defining both the type of elections and voting modality to implement in their external voting systems. On the one hand, states may be willing to facilitate out-of-country voting for their expatriates; on the other hand they need to preserve electoral security and avoid unreasonable costs. Obviously, these policy choices will have a direct impact on the degree of coverage of external electorate and on the effective accessibility to external voting. In order to grant absolute voting integrity and electoral transparency, external elections can be organized at consulates or embassies, under the supervision of diplomatic staff. But this modality may restrict the actual access of voters at the polling stations. Conversely, methods of remote voting (postal voting, e-voting or voting by proxy) can provide a greater inclusion of external electors, but they are not carried out in a controlled environment and can undermine vote secrecy and equality. Depending on logistical and financial considerations, some states may offer multiple alternatives of voting from abroad, while others adopt one type of procedure only.

Let us have a comparative overview of the voting modalities used in different countries and grouped in four categories: personal voting, postal

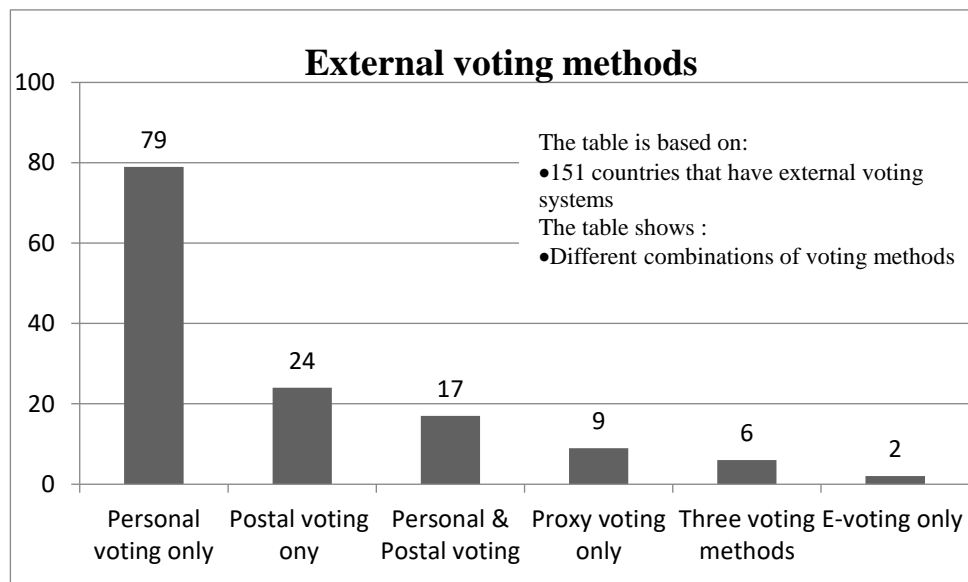
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<sup>191</sup>Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p. 877; International IDEA, *Voting from Abroad Database – Voting Method*, available at : <https://www.idea.int/data-tools/question-view/130352>;

voting, voting by proxy and e-voting. All the information and data on voting methods derives from the International IDEA “Voting from Abroad Database”.<sup>192</sup>

Table 4. shows the ways in which voting methods can be combined and that will be subject of analysis below. It does not show the total number of countries per voting method.

Table 4. Possible combinations of external voting methods



(Own elaboration)

- 114 states implement only one voting method

Most of the states adopt only one voting procedure for external voting, the vast majority of which recur to personal voting at diplomatic missions or other polling stations set abroad, it is the case of 79 countries out of 151 that have external voting systems. Even if voting in person may not always be easily accessible for citizens residing abroad, it is by far the most used method because it prevents electoral integrity. The second most common procedure is represented by postal voting, which is the only possible voting method in 24 states. Then, there are 9 states that use only voting by proxy. Finally, 2 states

<sup>192</sup> International IDEA, *Voting from Abroad Database* – Voting Method, available at :<https://www.idea.int/data-tools/question-view/130352>;

use e-voting as the only procedure available for expatriates. The adoption of only one voting modality may restrict the degree of coverage of external voters, however it may be reasonable considering the high financial and administrative costs that voting procedures imply.

- 32 states implement a combination of two voting methods

There are 32 cases of external voting systems that allow two voting options. The predominant combination is represented by postal and personal voting (adopted by 17 out of 32 countries). Some states chose to adopt multiple voting methods to compensate for limitations that can derive from the use of one system only. Certainly, two or three voting alternatives imply a better coverage of voters abroad. But, not always the electors can freely chose which voting method to use, in some locations they may be compelled to make use of one alternative only.

For instance, in Japan and Indonesia external electors can autonomously choose between personal or postal voting.<sup>193</sup>

On the contrary, the majority of states in Francophone Africa reserve proxy voting to specific categories of electors (such as diplomatic and military personnel), while personal voting is applied to other electors who have to be registered at consulates or embassies.<sup>194</sup> Similarly, France used to allow proxy voting only to public officials abroad and citizens who had a “justifiable reason” (professional obligations or health reasons); while personal voting was the only applicable procedure for all other voters who were registered at consulates and embassies; moreover personal voting was the only procedure used for presidential elections and referendums, whereas proxy voting was implemented for all other elections.<sup>195</sup> Nevertheless, since 2003, France has reviewed its external voting system, allowing voting by proxy to all external citizens without distinctions and extended this method also to presidential

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<sup>193</sup> Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, in “Voting from Abroad: The International IDEA Handbook”, cit., p. 27.

<sup>194</sup> Fierro C.N., Morales I., Gratschew M., op. ult. cit., p.28

<sup>195</sup> *Official report of debates: 2005 ordinary session (third part), 20-24 June 2005*, Council of Europe – Parliamentary Assembly, Vol. 3, p. 920-922.

elections and referendum.<sup>196</sup> It is also interesting to notice that in 2011 France has further amended its electoral law, introducing the possibility of e-voting for its expatriates, but the government has not applied this voting method for the 2017 legislative elections, because of extremely high risks of cyber attacks.<sup>197</sup>

- 6 states implement a combination of three voting methods

There are six countries that allow their expatriates three alternative options of voting from abroad, namely: Australia, Belgium, Estonia, New Zealand, Sweden and Switzerland. All these states allow their expats to freely choose the preferential voting method. Moreover, all of them with the exception of Australia (see below), have very inclusive external voting systems, with no restrictions based on the profession, on residence or in terms of time spent abroad.<sup>198</sup> It derives that these states have some of the most expansive external voting arrangements as to the coverage of the electorate abroad.

For what concerns Australia, it enfranchises only those expatriates who have spent maximum six years abroad,<sup>199</sup> but along with New Zealand it offers a singular voting method. Indeed, a part of personal and postal voting, they also permit voting by fax for those citizens who reside in inhospitable geographic areas that cannot be reached by conventional methods. However, voting by fax is used only if strictly necessary because it undermines ballot secrecy, even if allowing voters' inclusion.<sup>200</sup>

Sweden offers another interesting example of unconventional voting method, called voting by messenger. The elector has to fill in the ballot paper and insert it in a special outer envelope. Then a witness has to certify that the voting procedure was conducted correctly, sign the envelope and indicate his

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<sup>196</sup>Wood M., *Proxy voting in France*, The Law Library of Congress, available at: <https://loc.gov/law/2017/06/proxy-voting-in-france/>

<sup>197</sup>Courtade P. and Pinault T., *E-voting at Expatriates' MPs Elections in France*, Ministry of the Interior, Bureau des élections et des études politiques, Paris, p. 191.

<sup>198</sup> Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, op. cit., p. 26-28.

<sup>199</sup>Bauböck R., *The rights and duties of external citizenship*, in *Citizenship Studies*, Vol. 13, No. 5, Routledge, 2009, p. 491.

<sup>200</sup> Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, op. cit., p. 27.

personal identification number. Finally, a messenger can transport the envelope to a diplomatic mission abroad or to a polling station within the home-country. The messenger and the witness cannot be the same person. This procedure is much more elaborated than proxy voting because the elector marks the ballot paper himself.<sup>201</sup>

Estonia and Switzerland offer their expatriates the possibility to choose among three voting modalities: postal voting, personal voting or electronic voting. As a matter of fact, Estonia, Switzerland and France are the only European countries to have introduced e-voting in their external voting systems.<sup>202</sup> As mentioned above, French citizens have been able to vote electronically since 2012, but during the 2018 elections this method was not allowed because of cybersecurity concerns.<sup>203</sup> With regard to Switzerland, e-voting was used for the first time in the federal elections of 2011,<sup>204</sup> however the effective implementation has been making slow progress, mainly because of security matters. Since the elections are autonomously organized by each canton, currently e-voting is permitted only for citizens who are registered in the eight cantons that were able to implement e-voting procedures (8 out of 26 cantons).<sup>205</sup> However, Swiss government is taking steps to expand e-voting options, and make it available not only for expatriates but also to in-country citizens.<sup>206</sup>

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<sup>201</sup> Grabenwarter C., *On The Compatibility Of Remote Voting And Electronic Voting With The Standards Of The Council Of Europe*, European Commission for Democracy through Law (Venice Commission), Study no. 260 / 2003, Strasbourg, 2004, p.9.

<sup>202</sup> Arrighi J-T., Bauböck R., Collyer M., Hutcheson D., et. al., *Franchise and electoral participation of third country citizens residing in the European Union and of EU citizens residing in third countries*, European Parliament's Committee on Constitutional Affairs, Brussels, 2013, p.32.

<sup>203</sup> Courtade P. and Pinault T., op. cit., p. 191.

<sup>204</sup> Driza Aure A., Spycher O., Taglioni G., Weber A., *E-voting for Swiss abroad: A joint project between the Confederation and the Cantons*, 5<sup>th</sup> International Conference on Electronic Voting 2012 (EVOTE 2012), Austria, 2012, p. 181-182.

<sup>205</sup> Braun N., *E-Voting: Switzerland's Projects and their Legal Framework – in a European Context*, Swiss Federal Chancellery, Bern, p. 45.

<sup>206</sup> *Il Consiglio federale stabilisce le prossime tappe per l'estensione del voto elettronico*, Consiglio Federale del Governo Svizzero, available at: <https://www.admin.ch/gov/it/pagina-iniziale/documentazione/comunicati-stampa.msg-id-66273.html>

Finally, the case of Estonia deserves special attention because its e-voting model can be considered an electoral success and could serve as an example to other countries. Estonian online voting system is called “I-voting” and it applies to all citizens (residents and expatriates) allowing them to vote from any computer with an Internet connection.<sup>207</sup>

Estonia was the first country in the world to apply online voting for binding national elections (in 2005) and to extend it to the entire electorate. Up to the present day, «no nation uses Internet voting for binding political elections to a larger degree than Estonia».<sup>208</sup> Online voting is now provided in local, parliamentary, presidential and European elections (Estonia is the only country within the that uses e-voting for the European Parliament elections in third countries).<sup>209</sup> With regard to expatriates, they can have access to e-voting in the same way as in-country citizens, or in alternative they are free to make us of personal voting at diplomatic missions or postal voting.

Internet voting proved to be efficient, and had not encountered cyber security problems so far, furthermore since its introduction online voting has been used by an increasing number of electors and had a positive impact on voter turnout.

The three main strengths of the I-voting can be defined as follows:

- 1) The online voting system is based on the Estonian ID-card, which is a national identity document that has an incorporated smart card. The ID card permits a secure remote identification of electors and allows them to digitally sign their electronic ballots. In addition, since 2011 Estonia made available the option of using mobiles phones for the identification procedure. In this case, electors need to request a

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<sup>207</sup>Alvarez R. M., Hall T. E., Trechsel A. H., *Internet Voting in Comparative Perspective: The Case of Estonia*, in *Political Science and Politics*, Vol. 42, no. 3, American Political Science Association, 2009, p. 497.

<sup>208</sup> Durumeric Z., Finkenauer T., Halderman J.A., Hursti H., et. al., *Security Analysis of the Estonian Internet Voting System*, University of Michigan, Open Rights Group, United Kingdom, 2014, p. 1.

<sup>209</sup> Musiakarg M., *The use of e-voting as a new tool of e-participation in modern democracies*, *Przegląd Politologiczny – Political Science Review*, Poznan, 2014, p. 101.

specifically designated Mobile-ID SIM card, that will provide them with identification codes and digital signature.<sup>210</sup>

- 2) The possibility of casting multiple votes, which means that once an elector has cast his electronic vote, he can still change it and vote again an unlimited number of times (he can do so during the on-line voting period). The last vote nullifies the previous.<sup>211</sup> This option is made available to avoid potential fraud and protect voters' secrecy. For instance, if a voter was forced by external actors to vote in a certain way, he still will be able to change his vote consequently. This method can also be useful in the case that new information emerges and the voters prefers to vote differently.
- 3) The priority of traditional voting over electronic voting. It means that if an elector votes in person on the polling station, his previous internet votes will be nullified.<sup>212</sup> Indeed, I-voting is not meant to replace, but supplement postal voting or voting in person. It is also an extra guarantee for citizens in the case there was some irregularity with the on-line procedure.

In conclusion, the case of Estonia is exemplifying not only for its functional Internet voting, but also for the degree of inclusiveness of its electoral system. Fundamentally, the best possible voting options are offered both to in-country citizens and to expatriates, who are equally enfranchised.

### 3.2.6. Conclusions

At the present, 151 states have included external voting provisions in their electoral systems. It may lead us to conclude that they commit themselves to

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<sup>210</sup> Tsahkna A. G., *E-voting: lessons from Estonia*, Centre for European Studies, European View 12:59–66, Brussels, 2013, p. 60-63.

More information about the ID-Card and the Mobile-ID can be found on the official website of the Government of the Republic of Estonia: <https://www.valimised.ee/en/internet-voting/questions-about-id-card-and-mobile-id>

<sup>211</sup> Alvarez R. M., Hall T. E., Trechsel A. H., *Internet Voting in Comparative Perspective: The Case of Estonia*, in *Political Science and Politics*, Vol. 42, no. 3, American Political Science Association, 2009, p. 499-500.

<sup>212</sup> Tsahkna A. G., *E-voting: lessons from Estonia*, Centre for European Studies, European View 12:59 – 66, Brussels, 2013, p. 62.

extend universal suffrage to all citizens, irrespective of residence. Such a deduction is in line with the right of political participation through free and equal suffrage, as affirmed in the Declaration of Human Rights.<sup>213</sup> But at the same time, no international treaty explicitly requires states to adopt a specific electoral system, nor there are indications of universal standards for external voting. It derives that each state can enjoy a wide margin of appreciation in defining the procedures and modalities of its OCV. Moreover, states are given additional freedom of manoeuvre because they also have to ensure the security of the electoral process and preserve the integrity and secrecy of the vote. In addition, there are other technical and administrative matters to take into consideration, not least the willingness to avoid unreasonable costs. Given all these argumentations, it is not surprising that some states may opt for the adoption of more restrictive external voting provisions, while others may give priority to the principle of universal suffrage. In most cases, states won't recur to extreme measure but will still take into consideration their political, financial and administrative interests. Without doubts, there are multiple possibilities to restrict the influence or the degree of coverage of external voting systems. As shown in this chapter, the decision of limiting external voting to specific types of elections is very important in defining which levels of government and which institutions can be influenced by overseas voters. Similarly, states may offer their expatriates one or multiple external voting modalities, that will have direct consequences in terms of voting accessibility. In any case, there is no single external voting system that could fit all countries: in some cases inclusive OCV may seem more appropriate; in other cases, external voting procedures could damage electoral systems and turn out being illegitimate.

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<sup>213</sup>*A Universal Declaration of Human Rights*, United Nations General Assembly, Resolution 217 (III), Paris, 10 December 1948.



## **4. External voting system in Italy: pros and cons of special political representation**

### 4.1. Political representation of external voters

As emerged from the previous analysis, the main features of external voting systems regard the eligibility criteria of external voters (citizenship, residence, occupation-based restrictions etc), the access to the ballot (through different voting modalities) and the level of government in which expatriates can participate (determined by the types of elections). In addition to these areas of implementation of external voting, another important aspect concerns the political representation of expatriates, that will be subject of analysis of this chapter.

The political role of external citizens is determined by the way in which their votes are allocated in domestic constituencies. In most cases votes cast abroad are allocated to ordinary national districts, they are incorporated to domestic votes and contribute to the overall results of the elections; this system can be defined as general or assimilated representation.<sup>214</sup> The second option is that of allocating external votes to a separate overseas constituency, allowing expatriates to elect their own representatives to national governments. This system can be defined as discrete or special representation because external voters are granted reserved seats in the government of the home-country.<sup>215</sup>

#### 4.1.1. Assimilated representation

For what concerns the model of general representation, ballots are distributed within different electoral districts and assimilated into the voting totals. Usually, external votes are attributed to the electoral district with which

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<sup>214</sup>Caramani D., Grotz F., *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, in *Democratization*, Vol. 22, no. 5, Routledge, 2015, p. 812-813.

<sup>215</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, *Fordham Law Review*, 2007, p. 2432.

the elector has some legal link (former residence or place of birth).<sup>216</sup> In this way, the political power of expatriates is dispersed and will contribute to the overall results of the elections. However, the size of electoral districts and the voter turnout may also play a crucial role. Indeed, when external votes are allocated to small constituencies, they may have a considerable impact on the outcome of the results; while, relatively large districts or single constituencies are usually less affected by external votes, that generally play a minor role.<sup>217</sup> Besides, it is relevant to underline that in the majority of cases, the turnout rates of expatriates are lower than domestic ones and they don't have a significant impact on the outcome of the elections.<sup>218</sup> Low rates of participation may be attributed to a number of reasons, including institutional and administrative obstacles imposed by states, or little interest on the part of non-resident citizens to exercise their voting rights. In any case, states tend to show concerns about electoral influence of expatriates, when their external population is very numerous and may end up being decisive. Certainly, the assimilation of overseas votes and their attribution to municipal districts, serves as a mean of dispersing the collective political power of expatriates.<sup>219</sup> In like manner, states may adopt also other modalities to distribute votes cast abroad, for instance they can decide to allocate all overseas votes to the district of the capital city or add them to the national totals (e.g. Hungary, Bulgaria, Netherlands).<sup>220</sup> In other cases, external voters themselves may choose the municipality to which they want allocate their votes (e.g. in Belgium).<sup>221</sup> In the latter case, OCV provisions are more permissive, but they may lead to

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<sup>216</sup> *Report on Out-Of-Country Voting*, study no. 580 / 2010, section II, paragraph 7, Council for Democratic Elections and Venice Commission, Venice, 17-18 June 2011, p.13.

<sup>217</sup> *Report on Out-Of-Country Voting*, op. ult. cit., p.13-14.

<sup>218</sup> Bauböck R., *Stakeholder Citizenship and Transnational Political Participation*, op. cit. p. 2401

<sup>219</sup> Arrighi J. T., Hutcheson D. S., *Keeping Pandora's (ballot) box half-shut: a comparative inquiry into the institutional limits of external voting in EU Member States*, in *Democratization*, Vol. 22, No. 5, Routledge Group, 2015, p. 899.

<sup>220</sup> Arrighi J. T., op. ult. cit., p. 901.

<sup>221</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, in *Global Networks* Vol. 11, no. 4, Blackwell Publishing Ltd & Global Networks Partnership, 2011, pp. 492-493.

political manoeuvring and the outcome of the elections can result being compromised.

#### 4.1.2. Discrete representation

When states implement the model of discrete representation, overseas votes are allocated to a separate constituency, which means that expatriates are allowed to elect their own representatives in national legislative bodies. In other words, when states adopt the model of special representation, they assign reserved seats for the representatives of expatriates in their parliaments or senates.<sup>222</sup> Normally, it implies that external citizens not only are granted the right to vote (active voting rights) but also to stand as candidates in the elections (passive voting rights). Currently, only thirteen countries out of 151 that have external voting provision, allow their expatriates to stand as candidates and allocate them reserved seats in the parliaments. They are: Algeria, Angola, Cape Verde, Colombia, Croatia, Ecuador, France, Italy, Mozambique, Panama, Portugal, Romania and Tunisia.<sup>223</sup>

On the whole, special representation confers expatriates direct participation in national governments, ensuring that their specific interests are recognized. This system can also reduce unpredictable electoral outcomes, because all external votes are allocated to a specific constituency and will have a fixed number of extraterritorial seats assigned to them. In this way, votes cast abroad cannot have a decisive impact on the overall electoral outcome, because they are not assimilated to domestic ballots, but considered separately. At the same time, expatriates are recognized political participation and can intervene in domestic processes of decision-making. However, it is also important to consider that the weight of expatriates is also dependent on the number of legislative seats that they are assigned, which can lead to under-representation with respect to the domestic electorate. For instance, in Portugal only two parliamentary seats are attributed to citizens living abroad:

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<sup>222</sup> Caramani D. and Grotz F. *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, in *Democratization*, Vol. 22, no. 5, Routledge, 2015, p. 813-814.

<sup>223</sup> Lafleur J.M., *The enfranchisement of citizens abroad*, cit. p. 845.

one for European countries and the other for the rest of the world.<sup>224</sup> Similar institutional arrangements are also in place in some former Portuguese colonies. Indeed, Cape Verde assigns three extraterritorial districts to expatriates: one for Africa, another for the Americas and the last one for Europe. Similarly, in Mozambique, the Assembly of the Republic includes one seat reserved to the external electorate of African countries, and another to the rest of the world.<sup>225</sup> However, a limited number of reserved seats does not necessarily lead to under representation of external electors; considering the lower turnout rates abroad, the differences between out-of-country voters and in-country citizens appear reduced or even reversed.<sup>226</sup>

In contrast, the model of political representation introduced by Croatia in 1999 differs from the abovementioned examples. Indeed, external seats reserved to expatriates are not fixed a priori, but they depend on the proportion between external and domestic votes. In particular, parliamentary seats reserved to non-resident citizens are calculated «by dividing the total number of external votes by the number of votes cast nationwide to arrive at the Hare quota (...) this institutional framework is more sensitive to the actual levels of electoral participation and political competition».<sup>227</sup>

In the case of Colombia, there is a special district reserved to political minorities and ethnic groups, which corresponds to five seats in the House of Representatives. One of them is assigned to Colombians residing abroad.<sup>228</sup> The case of France is different from others because it allocates 12 seats to external voters in the Senate. However, they are not directly elected by French external voters, but rather appointed by the High Council of French Citizens Abroad (CSFE - Conseil Supérieur des Français de l'Étranger). The CSFE

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<sup>224</sup> Grotz F. and Nohlen D., *The legal framework and an overview of electoral legislation*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, Trydellstryckeri AB, 2007, p. 69.

<sup>225</sup> Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 29-30.

<sup>226</sup> Arrighi J. T., Hutcheson D. S., *Keeping Pandora's (ballot) box half-shut.*, op. cit., p. 898.

<sup>227</sup> Grotz F. and Nohlen D., *The legal framework and an overview of electoral legislation*, op. cit. p. 70.

<sup>228</sup> Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, op. cit., p. 29-30.

represents external citizens before the French government, and its 150 members are directly elected by French expatriates.

ion». <sup>229</sup>

For what concerns Algeria, it has eight parliamentarians that represent external voters, which corresponds to two percent of all Members of the Parliament. <sup>230</sup>

Finally, the Italian external voting system has the most expansive expatriate representation, allocating eighteen seats to its overseas constituency. Indeed, citizens residing abroad are represented in both chambers of the government: with six reserved seats in the Senate and twelve in the House of Representatives. <sup>231</sup> Despite a considerable number of parliamentarians and senators who represent expatriates, they still account only for two percent of the total members of government; while external voters account for seven percent of the total electorate. <sup>232</sup> From this perspective, it may be argued that non-resident citizens are under-represented, however it has to be kept in mind that external turnout is usually lower than domestic one. Moreover, given the potential impact that 3.5 million external voters may have had in national elections, the Italian government preferred to provide them with direct representation, therefore setting a fixed number of reserved seat. <sup>233</sup> In fact, the Italian example shows that states may introduce reserved seats in order to confine external votes in extraterritorial constituencies and reduce their impact on overall election results. In spite of this, votes cast abroad proved to be decisive in several occasions, notably in the Italian 2006

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<sup>229</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participatino*. op.cit., p. 2432-2433.

<sup>230</sup> Fierro C.N., Morales I., Gratschew M., *External voting: a comparative overview*, op. cit., p. 29.

<sup>231</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, in *Global Networks* Vol. 11, no. 4, Blackwell Publishing Ltd & Global Networks Partnership, 2011, pp. 491.

<sup>232</sup> Arrighi J. T., Hutcheson D. S., *Keeping Pandora's (ballot) box half-shut.*, op. cit., p. 898

<sup>233</sup> See supra note

legislative elections, when they were determinant in defining the governing coalition.<sup>234</sup>

In addition, it is interesting to underline that the Italian external voting system is very inclusive because of the following considerations:

1. The eligibility criteria of external voters are only based on the requirement of citizenship;<sup>235</sup> no occupation, residence or time-based restrictions are imposed; moreover, Italian citizenship is transmitted through *ius sanguinis* to all generations, leading to potentially very large numbers of citizens residing abroad.<sup>236</sup>
2. The registration procedure is automatic, therefore all non-resident citizens receive ballot papers by mail.<sup>237</sup>
3. Postal voting is the only option to cast votes. It has the advantage of covering a wide range of the electorate and it is considered to be more inclusive than voting at diplomatic missions. However, the main disadvantage of voting by correspondence is that it does not ensure electoral security.<sup>238</sup>
4. OCV applies to all national elections, namely legislative elections and referendums (but not to local elections, which is the common rule in majority of states).<sup>239</sup>
5. Italian external citizens are granted passive voting rights – they can vote and stand as candidates in the overseas constituency and be directly represented in the government.<sup>240</sup>

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<sup>234</sup>Mascitelli B. and Battiston S., *The challenges to democracy and citizenship surrounding the vote to Italians overseas*, in *Modern Italy*, Vol. 13, issue no.13, 2008, pp. 271-278.

<sup>235</sup>Melchionni M. G., *Sul Diritto Di Voto Dei Cittadini Italiani Residenti All'estero*, in *Rivista di Studi Politici Internazionali*, vol. 70, no. 3, 2003, p. 466-469.

<sup>236</sup> See *Legge 5 febbraio 1992, n. 91, Nuove norme sulla cittadinanza*.

<sup>237</sup>Sampugnaro R., *The Italian foreign constituency and its MPs*, in *Contemporary Italian Politics*, vol.9, no. 2, Routledge, 2017, p. 163

<sup>238</sup> Helbert M. and Mascitelli B., *Transnationalism and expatriate political engagement: the case of the Italian and French voting in Australia*, in *Australian Journal of International Affairs*, vol. 72, no. 4, Routledge, 2018, p. 333-334.

<sup>239</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor & Francis Group, 2013, p. 89-91.

<sup>240</sup> See supra note.

All in all, the Italian external voting system is exemplifying because it is very comprehensive and far reaching; at the same time it presents numerous weaknesses, not least the allegation of undermining the principle of equal, free and secret suffrage. In other words, the case-study of Italy is representative of the risks that unlimited enfranchisement of expatriates can implicate.

#### 4.2.Introduction and evolution of external voting debate in Italy

Among the few states that offer special political representation for their expatriates, Italy has the most expansive and far-reaching external voting provisions, but as such also the most controversial.<sup>241</sup> The OCV norms instituting the overseas constituency and reserved seats for expatriates were introduced in the Italian electoral system in 2001, after decades of political debate and unsuccessful legislative proposals. Indeed, in order to adopt «the Law no. 459 of 27 December 2001, establishing “Rules for the exercise of the right to vote by Italian nationals residing abroad”»,<sup>242</sup> two constitutional reforms were made necessary. What is important to note is that these legislative provisions did not introduce the voting rights for expatriates as such, but they rather defined the political representation of external citizens and voting modality. Indeed, citizens residing abroad were already granted the right to vote by the Constitution of the Italian Republic of 1948 (which made no mention of expatriates, but did not exclude them neither).<sup>243</sup> In fact, the Italian constitution defines as eligible electors all citizens who turned 18, without imposing residence as a necessary requirement.<sup>244</sup> It meant that Italians residing abroad were enfranchised even before the implementation

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<sup>241</sup>Helbert M. and Mascitelli B., *Transnationalism and expatriate political engagement: the case of the Italian and French voting in Australia*, in *Australian Journal of International Affairs*, vol. 72, no. 4, Routledge, 2018, p. 329-331.

<sup>242</sup>Pastore F., *A community out of balance: nationality law and migration politics in the history of post-unification Italy*, in *Journal of Modern Italian Studies*, vol. 9, no. 1, Routledge, 2004, p. 35.

<sup>243</sup>Sica G., *L'abolizione della Circostrizione Estero nelle Proposte dei «Saggi» Del Presidente Napolitano*, in *Rivista di Diritto Pubblico Italiano, Comunitario e Comparato*, no. 14, 2013, p. 2-3.

<sup>244</sup>*Constitution of the Italian Republic*, Senato della Repubblica, Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, Roma, Title IV, Art. 48.

law of 2001, but in order to vote, they had to return to Italy on the day of the elections. Consequently, external citizens were limited in the actual exercise of their voting rights. Based on this, Italian emigrant associations proved to be very influential in lobbying the government for obtaining the right to vote from abroad. At the same time, the national political parties were concerned about the possible impact that emigrates could have had on the outcome of legislative elections.<sup>245</sup> In fact, given the extensive nationality policies, based on the unrestricted transmission of citizenship through *ius sanguinis*, the potential number of external electors amounted to millions of citizens.<sup>246</sup> Trying to avoid unpredictable influence of emigrates, at the end, the legislature opted for the creation of an overseas constituency that would include all extraterritorial votes, establishing a fixed number of reserved seats. Through special representation, the Italian government sought to confine the political power to predetermined seats in the Parliament and the Senate. However, conversely to the provisions, the first legislative elections in which OCV was introduced, proved that expatriate votes could be decisive in the elections.

All things considered, the Italian case study is exemplifying of some typical features of external voting and it is also illustrative of some controversial aspects that will be examined in the following sections.

#### 4.2.1. Italian emigration

First of all, it is worth specifying that Italy has a long history of mass emigration, that can be traced back to the period known as the “Great Emigration” (1861-1915 ca.) which saw approximately 14 million Italians leaving the country; important emigration flows were also registered after World War II, with around 5.6 million citizens moving abroad.<sup>247</sup> It was only during the 1970s, that mass emigration attenuated and Italy progressively

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<sup>245</sup> Sampugnaro R., *The Italian foreign constituency and its MPs*, in *Contemporary Italian Politics*, vol. 9, no. 2, Routledge, 2017, p. 160-163.

<sup>246</sup> Sampugnaro R., *op. ult. cit.* p. 165.

<sup>247</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, Routledge Taylor & Francis Group, 2013, p. 74-77.



turned into a country of immigration.<sup>248</sup> While at the beginning emigrants were considered economically disadvantaged citizens requiring assistance from the country of origins; with the end of mass emigration, this negative approach changed and new inclusive discourses started to be adopted by the Italian government. Progressively, Italy turned into being one of the largest industrial powers and citizens felt no need of leaving the country. However, according to the estimates of the Italian National Institute of Statistics (ISTAT), Italian emigration intensified again after the 2008 economic crisis.<sup>249</sup> The report on migration published by OSCE (Organization for Security and Co-operation in Europe) in 2018, confirmed this data, placing Italy at the 8<sup>th</sup> position in a worldwide ranking, with an average emigration of 87,000 citizens per year (during the decade 2005-2014).<sup>250</sup> Finally, according to the Registry of Italians Resident Abroad, the emigration increased of 64.7% during the period that goes from 2006 to 2018. Considering that the registration at AIRE is a necessary step for Italian expatriates in order to vote from abroad, we can observe how the number of potential electors increased from 3,1 millions in 2006 to 5,1 millions in 2018. Which amounts to 8,5% of the 60,5 million citizens residing within Italy.<sup>251</sup>

The data on Italian emigration is worth considering as it leads to the following conclusions:

First, considerations about the vast external electorate and the possible political impact it could produce, were determinant in the choice of the external voting system. In fact, the creation of an overseas constituency and

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<sup>248</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, in *Global Networks*, Vol. 11, no. 4, Blackwell Publishing Ltd & Global Networks Partnership, 2011, pp. 489.

<sup>249</sup> *Rapporto Istat 2018: le emigrazioni degli italiani*, AISE – Agenzia Internazionale Stampa Estero, Roma, 18/05/2018, available at: <https://www.aise.it/modulo-pi%C3%B9-letti/rapporto-istat-2018-le-emigrazioni-degli-italiani/113617/2>

<sup>250</sup> *OSCE PA Ad Hoc Committee on Migration Report to the Standing Committee*, OSCE Parliamentary Assembly, 27 OSCE PA Annual Session, Copenhagen, 2018.

<sup>251</sup> Zanella G., *Gli italiani iscritti all'AIRE*, AISE – Agenzia Internazionale Stampa Estero, Roma, 24/10/2018, available at: <https://www.aise.it/modulo-pi%C3%B9-letti/5.114.469-gli-italiani-iscritti-allaire-/122333/2>

the allocation of reserved seats in the parliament were meant to confine the possible influence on the electoral outcome.

Second, the presence of emigrant associations and organizations exercised considerable lobbying on the government to have their external voting rights recognized.

Third, large numbers of non-resident citizens (that account to 8% of all electors) had significant organizational, administrative and political implications for the institution of the external voting system.

Finally, the presence of a considerable portion of population residing abroad may rise questions about the legitimacy of their direct political involvement in national decision-making process. Some scholars argue that only those who will be affected by the consequences of their political choices, and will be directly subject to the laws passed by the elected government, should be enfranchised.<sup>252</sup> Others sustain that given the changing nature of political membership and increased mobilisation of people, residence should no longer represent a restriction for voting rights.<sup>253</sup> In the case of Italy, mass migration and extensive citizenship laws have contributed to the creation of very vast presence of external citizens. Some of them are recent migrants (as shown by the data on emigration of the last decade), others may be third or even forth-generation descendants of Italians who have never resided in the country. According to the Italian OCV, all of them are granted voting rights and are directly represented both in the Parliament and in the Senate. The legitimacy of such political involvement and the numerous controversies that it raises will be addressed during the analysis of the Italian external voting system.

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<sup>252</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, Fordham Law Review, 2007.

<sup>253</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor& Francis Group, 2013, p. 13-32.

#### 4.2.2. Origins of external voting debate in Italy

In Italy, the very first debates on external voting took place at the beginning of the 20<sup>th</sup> century. In particular, issues of political participation of emigrants in the home country were addressed during the First Congresses of Italians Abroad in 1908; the Second Congress was held in 1911 and participants discussed about the possibility of creating reserved seats in the Parliament to represent emigrants.<sup>254</sup> Ultimately, this proposal was rejected, but still it was very innovative, considering that at that time not even the universal male suffrage had been introduced in Italy. From then on, the parliament has repeatedly considered the possibility of introducing external voting (namely in 1909, 1914, 1923), but political parties were concerned about the impact of external votes on the results of the elections.<sup>255</sup> During this period, the Congress of Italians Abroad pushed also for the institutionalization of a consultative body elected by emigrants. With the advent of the fascist regime, this project was set aside. Nevertheless, the idea of granting voting rights to Italian emigrants was considered by Mussolini (but not implemented), in order to prevent their assimilation in other countries and foster nationalistic ideology.<sup>256</sup> At the end of World War II, Italian emigrants had obtained no political representation, and during the following decades, the political parties maintained the idea that most Italian expatriates were rightwing nationalist. This stereotype favored the creation of two opposing alignments within the Italian government: the rightwing party Movimento Socialista Italiano - MSI (later substituted by Alleanza Nazionale – AN) was an eager supporter of external voting; notably, one of its parliamentarians, Mirco Tremaglia, managed to keep the issue of external voting on the political agenda for many decades.<sup>257</sup> On the contrary, leftwing parties opposed the enfranchisement of

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<sup>254</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor& Francis Group, 2013, p.76-77.

<sup>255</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, in *Global Networks* Vol. 11, no. 4, Blackwell Publishing Ltd & Global Networks Partnership, 2011, p. 489.

<sup>256</sup> See supra note, p. 489-490

<sup>257</sup> Sampugnaro R., *The Italian foreign constituency and its MPs*, in *Contemporary Italian Politics*, vol. 9, no. 2, Routledge, 2017, p. 165-167.

expatriates. Not surprisingly, between 1955 and 1971, none of the ten proposals on external voting were approved. From 1972 to 1982, other 29 proposals were made but failed to reach consensus.<sup>258</sup> During the political debate about external voting, different arguments were raised to oppose its adoption. It was argued that political involvement of expatriates lacked legitimacy, because they were considered to be permanent emigrants who would not return to Italy. Moreover descendants of emigrants born abroad were transmitted Italian citizenship and it was thought they had limited connections with Italy.<sup>259</sup> Another point of contention was represented by the organization of electoral operations, that were deemed to be financially and administratively costly. But most importantly, external voting provisions failed to pass because political parties were concerned about the impact that expatriates could have had on the results of the elections.<sup>260</sup> It is evident that a part of ideological or technical issues, the introduction of external voting always raises concerns of domestic political actors.

In any case, it is important to keep in mind that the Italian constitution of 1948 stated that all citizens had the right to vote, without making any differentiation as to residence. Which meant that emigrants were not prevented from voting, but in order to do so they had to be physically present in their electoral district on the day of the elections.<sup>261</sup> Therefore, in practical terms they were unable to cast their votes. Under this conditions, the vast external voting electorate was prevented from exercising any considerable influence on Italian politics.

The only improvements with regard to voting rights for emigrants were actualized through two reforms: «First, Presidential Decree No. 361 of 30

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<sup>258</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit. p. 77.

<sup>259</sup>Bauböck R., *The rights and duties of external citizenship*, in *Citizenship Studies*, Vol. 13, No. 5, Routledge, 2009, p. 481.

<sup>260</sup>Sampugnaro R., *The Italian foreign constituency and its MPs*, in *Contemporary Italian Politics*, vol. 9, no. 2, Routledge, 2017, p. 163.

<sup>261</sup>Sica G., *L'abolizione della Circostrizione Estero nelle Proposte dei «Saggi» Del Presidente Napolitano*, in *Rivista di Diritto Pubblico Italiano, Comunitario e Comparato*, no. 14, 2013, p. 2-3.

March 1957 granted free train tickets to emigrants willing to travel to Italy on Election Day to vote. Second, Act No. 40 of 7 February 1979 made it possible for citizens who left Italy to remain on the electoral roll without any time limit». <sup>262</sup> De facto, these reforms acknowledged that residence abroad should not constitute a discriminatory factor for the exclusion of expatriates from the political community.

#### 4.2.3. The role of emigrant associations in the evolution of external voting debate

As shown in the previous section, the introduction of external voting in Italy was mainly obstructed because of the fears that a large emigrant population could influence internal politics. Even if this stalemate was hard to overcome, important steps forward occurred during the 1980s and 1990s, when Italian authorities started adopting more inclusive discourses towards expatriates. In addition, an important role was played by Italian associations that lobbied the government for having their external voting rights recognized. <sup>263</sup> After the two national conferences on emigration that were held in 1975 and 1988, <sup>264</sup> the Italian government responded to the longtime demand of emigrants and created a representative body of Italians residing abroad. The General Council of Italians Abroad (CGIE) was established in 1989 as a consultative body that can issue recommendations to the Italian government on emigration-related issues. <sup>265</sup> The CGIE framework gathered together emigrant associations, trade unions, members of the press and representatives of political parties. It substantially contributed in the promotion of external voting and managed to exercise some leverage on domestic parties and ministries. First of all, it contributed to present expatriates no longer as poor emigrants in need of assistance, but rather as an asset for the country; focusing

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<sup>262</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor& Francis Group, 2013, p. 78.

<sup>263</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, op. cit. 489-490.

<sup>264</sup>See supra note.

<sup>265</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit. p. 83.

on the economic benefits that they could bring to Italy. Second, the CGIE and Italian political parties that supported external voting (in particular Alleanza Nazionale and its MP Tremaglia) adopted a new strategy to overcome the deadlock within the government.<sup>266</sup> What became clear from the previous debates, is that political parties needed first to be reassured that external voters won't negatively affect their political performance during future elections. A solution to solve this controversy was found in the creation of a foreign constituency. Indeed, if emigrants voted in ordinary electoral districts, they could have altered the results (especially in small districts). On the contrary, if external votes were convened in a foreign constituency and emigrants were allowed to elect their own political representatives, they would not influence the political performance of political parties. However, this proposal encountered one major obstacle: the introduction of foreign constituency required the amendment of three articles of the Italian constitution (Art. 48, Art. 56 and art. 57), which slowed down parliamentary proceedings.<sup>267</sup> In spite of these difficulties, during the 1990s, emigrant associations guided by the CGIE exercised considerable pressure on the government for the introduction of a foreign constituency. In 1995, during a conference on Italian emigration that saw the participation of emigrant associations and of Italian parliamentarians from major parties, a pact among expatriates and political representatives was finally reached. It is known as Basel Pact, and it resulted in the commitment of center-left and center-right parties not only to create the foreign constituency, but also to grant expatriates with passive voting rights.<sup>268</sup> This meeting represented the highest point of leverage that the CGIE and emigrant communities exercised on domestic political actors. Italian political parties committed themselves to adopt external voting provisions. However,

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<sup>266</sup> Galdi M., *Per l'effettività del diritto di voto degli Italiani all'estero*, in *Diritti Fondamentali*, Fascicolo 1/2019, p. 3-4.

<sup>267</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit., p.85

<sup>268</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, op. cit. 491.

before emigrants could vote from abroad, three articles of the Constitution were to be amended and a regular law had to be passed by the government.

#### 4.2.4. Introduction of external voting in Italy: constitutional amendments

After the Basel Pact, during the thirteenth legislature (1996-2001) the major Italian parties formulated their own proposals to introduce the foreign constituency. No less than 40 proposals were submitted during that period, but none of them obtained sufficient votes to pass.<sup>269</sup> Given the complexity of external voting, political parties still did not agree on some aspects. Only after further pressure from the CGIE, the government finally managed to implement the first constitutional reform, amending Art. 48. The Constitutional Law 1/2000 introduced a constituency of Italians abroad for elections of the Houses of Parliament and established that voting rights of citizens residing abroad had to be rendered effective.<sup>270</sup>

A second constitutional amendment regarded Art. 56 and 57, that were necessary to establish the number of parliamentarians elected abroad and to introduce the eligibility of senators on a non-regional level for expatriates.<sup>271</sup> Defining the number of parliamentarians and senators that were to be elected abroad was a controversial issue. On one side, a very limited number of reserved seats would have rendered emigrant political representation mostly symbolic. On the other side, some politicians argued that a larger number of reserved seats could give expatriates too much power in domestic politics. For instance, MPs Marco Boato and Giuseppe Calderisi warned the government that the creation of an overseas constituency could fail to prevent the influence of emigrants on electoral outcomes.<sup>272</sup> As a matter of

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<sup>269</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit., p. 85.

<sup>270</sup> See supra note, p. 86.

<sup>271</sup> Alberico G., *Il voto degli italiani all'estero tra discriminazioni e imperituri dubbi di costituzionalità: cosa è cambiato con la nuova legge elettorale*, in *Diritti Fondamentali*, Fascicolo 1/2018, p. 3.

<sup>272</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit., p. 86.

fact, they sustained that reserved seats may be decisive in the case that parliamentary majority depended on just few seats.

At the end, it was decided that the number of Senators elected abroad would correspond to 6 senators out of 315, and 12 parliamentarians out of 630.<sup>273</sup> Considering that Italians abroad amounted to 8% of the Italian electorate, and that they were given 2% of political seats in the government, emigrants were still underrepresented with respect to in-country voters and they were not seen as a potential determinant factor for domestic politics.<sup>274</sup> All things considered, on 23 January 2001, legislators introduced the second constitutional reform, passing the Constitutional Law 1/2001.<sup>275</sup>

The constitutional amendments created a foreign constituency and introduced a model of special political representation for expatriates through reserved seats. However, before expatriates could vote in the elections, the parliament had to pass a final implementation law that would establish administrative and technical modalities for the effective exercise of external voting.

#### 4.3. External voting design in Italy: characteristics, limits and questions of unconstitutionality

##### 4.3.1. Implementation Law no. 459 of 27 December 2001

After the constitutional amendments were passed, the Italian government had to adopt the implementation law that would define numerous administrative, technical and procedural aspects of external voting. During 2001, parliamentary debates regarded different possibilities of voting modality, registration procedure, formation of electoral colleges, types of

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<sup>273</sup>Seesupra note, p. 87.

<sup>274</sup>Zanella G., Gli italiani iscritti all'AIRE, AISE – Agenzia Internazionale Stampa Estero, Roma, 24/10/2018, available at: <https://www.aise.it/modulo-pi%C3%B9-letti/5.114.469-gli-italiani-iscritti-allaire-/122333/2>

<sup>275</sup>Legge Costituzionale 23 gennaio 2001, n.1, “Modifiche agli articoli 56 e 57 della Costituzione concernenti il numero di deputati e senatori in rappresentanza degli italiani all'estero”.



elections to which apply OCV etc. Various points of concerns were raised and numerous solutions were proposed, however no final law was passed before the end of the thirteenth legislature (1996-2001).<sup>276</sup> With the political elections of 13 May 2001, the center-right coalition guided by Silvio Berlusconi obtained the majority in both chambers. The MP of Allenza Nazionale, Mirco Tremaglia was nominated minister of Italians abroad and he rapidly submitted a law proposal on external voting to the parliament.<sup>277</sup> Even if the Prime Minister Berlusconi did not personally sustain external voting, in order to preserve his parliamentary majority, he had to accept the law proposal.<sup>278</sup> Under such favourable political circumstances and after a straightaway deliberation in the parliament, on 20 December 2001, Law no. 459, establishing «Rules for the exercise of the right to vote by Italian nationals residing abroad» was passed.<sup>279</sup> The minister Tremaglia tried to attribute the merits to the centre-right government, «by claiming that it was he who had really enfranchised Italians abroad».<sup>280</sup> Even if the agreement was mainly reached during the previous legislature and constitutional reforms were passed under the centre-left government. The declarations of Tremaglia pointed out that from that moment on, political parties became interested in gaining support of external electors.<sup>281</sup>

«With Law 459, Italy adopted one of the most liberal external voting processes worldwide, as it combines lax qualification criteria, automatic registration to vote from abroad, and significant emigrant representation through emigrant MPs and senators in parliament (...) The implementation of

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<sup>276</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit., p. 85.

<sup>277</sup>Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, op. cit., pp. 490-491.

<sup>278</sup>See supra note.

<sup>279</sup>Pastore F., *A community out of balance: nationality law and migration politics in the history of post-unification Italy*, in *Journal of Modern Italian Studies*, Vol. 9, no. 1, 2004, p. 35; Legge 27 dicembre 2001, n. 459, "Norme per l'esercizio del diritto di voto dei cittadini italiani residenti all' estero", Parlamento Italiano, pubblicata sulla Gazzetta Ufficiale n. 4 del 5 gennaio 2002.

<sup>280</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit., p. 89.

<sup>281</sup>See supra note.

this law indeed placed Italy among the countries with the largest number of citizens voting from abroad». <sup>282</sup> However, such an inclusive and far-reaching external voting system has also proved to be very controversial and has even raised doubts about its constitutionality. Let us analyse the main aspects and characteristics of Italian external voting provisions and underline what are their limits.

#### 4.3.2. Controversial aspects about overseas constituency and special political representation

The constitutional reforms of 2000 and 2001 introduced in the Italian legislation a foreign constituency and established special political representation for Italians residing abroad, granting them a total of 18 reserved seats in the House of Representatives and in the Senate. <sup>283</sup> At that moment, it was considered to be the best solution to avoid the stalemate in the parliamentary debate and avoid that expatriates could have a decisive influence on domestic elections. <sup>284</sup> However, the creation of a foreign constituency and of special political representation for emigrants presented soon after some structural problems and arose questions about its legitimacy. Moreover, the first legislative elections that saw the participation of expatriates reversed the expectation of Italian political actors and proved that external votes could have a decisive impact on the outcome of the elections. The very same structure and internal subdivision of the foreign constituency has arisen some concerns. The law 459/2001 has defined the distribution of reserved seats, subdividing the foreign constituency in four geographical districts: (1) Europe, (2) South America, (3) Northern and Central America,

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<sup>282</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit., p. 91.

<sup>283</sup> See Constitutional Law No. 1 of 17 January 2000, *Amendment to Article 48 of the Constitution regarding the creation of the overseas electoral district for the exercise of the right to vote of Italian citizens residing abroad*; and Constitutional Law No. 1 of 23 January 2001, *Amendment to Articles 56 and 57 of the Constitution regarding the number of deputies and senators representing Italians abroad*.

<sup>284</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, op. cit. 490-491.

(4) Africa, Asia, Oceania, Antarctica. The 18 reserved seats were distributed among these geographic areas as follows: each district is attributed one seat in the Parliament and one in the Senate; «the remaining seats are distributed proportionally, according to the size of the population abroad (Art. 6)».<sup>285</sup> On the one hand, this system of proportional representation prevented the risk that all reserved seats were occupied by representatives of those geographical areas that have the largest presence of Italian expatriates; on the other hand, areas with major presence of Italian citizens were privileged, leaving some districts underrepresented.<sup>286</sup>

A part of structural issues about the proportionality of the political representation, concerns were arisen about the legitimacy of reserved seats and special representation of emigrants within legislative bodies. On the one hand, the very same political participation of expatriates in domestic politics was out of the question, because Art. 48 of the Constitution granted voting rights to all citizens, irrespectively of the residence.<sup>287</sup> On the other hand the creation of a foreign constituency and of reserved seats seemed contradicting another principle of the Italian Constitution, namely Art. 67 that stated: «Each Member of Parliament shall represent the Nation and carry out their duties without a binding mandate».<sup>288</sup> Art. 67 affirmed the principle of unitary representation of the state, according to which parliamentarians have to defend the interest of the nation as a whole and not local interests. Therefore, Art. 67 doesn't allow any territorial representation or accountability to any specific

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<sup>285</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, op. cit. p. 90; Legge 27 dicembre 2001, n. 459, "Norme per l'esercizio del diritto di voto dei cittadini italiani residenti all'estero", Parlamento Italiano, pubblicata sulla Gazzetta Ufficiale n. 4 del 5 gennaio 2002, Art. 6.

<sup>286</sup> Helbert M. and Mascitelli B., *Transnationalism and expatriate political engagement: the case of the Italian and French voting in Australia*, in *Australian Journal of International Affairs*, vol. 72, no. 4, Routledge, 2018, p. 333.

<sup>287</sup> *Constitution of the Italian Republic*, Senato della Repubblica, Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, Roma, Title IV, Art. 48.

<sup>288</sup> *Constitution of the Italian Republic*, Senato della Repubblica, Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, Roma, Title IV, Art. 67.

group of the electorate (expatriates in this case).<sup>289</sup> Consequently, it can be supposed that this principle would have been respected if expatriates voted in ordinary electoral districts and not in a specially designated foreign constituency, that allowed them special representation.

Finally, special representation was designated with the aim of preventing emigrants from having a decisive impact on domestic elections. But, the first real testing of external voting in 2006 legislative elections, proved the contrary. In that occasion, the centre-right coalition of Silvio Berlusconi lost the election with a very small difference of votes.<sup>290</sup> The centre-left coalition of Romano Prodi, that had already obtained the majority of seats in the House of Representatives, and managed to gain majority also in the Senate thanks to the support of a senator elected abroad. Indeed, Senator Pallaro was elected on a right-wing list in the geographical district of South America and he was ideologically close to the coalition of Silvio Berlusconi. But after his elections he decided to support the left-wing coalition of Romano Prodi. This move granted Prodi with 158 seats in the senate, against 156 seats obtained by Berlusconi and allowed it to become the ruling party.<sup>291</sup> «Pallaro's subsequent reward was an amendment to the 2007 state budget that allocated €14 million to assistance programmes for Italians abroad».<sup>292</sup> The 2006 elections proved that political parties have underestimated the impact that external electors could have. Even if usually votes cast abroad are marginal with respect to domestic ones, in some circumstance they may also be decisive for domestic politics. Only after the elections of 2006, Italian political actors realized the consequence that external voting may have. However, because of the complex and lengthy process for introducing reserved seats and the foreign

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<sup>289</sup>Alberico G., *Il voto degli italiani all'estero tra discriminazioni e imperituri dubbi di costituzionalità: cosa è cambiato con la nuova legge elettorale*, in *Diritti Fondamentali*, Fascicolo 1/2018, p. 7-9.

<sup>290</sup>For more details, see paragraph 2.6.2. Impact of external voting on the outcome of the elections in Italy

<sup>291</sup>Mascitelli B. and Battiston S., *The challenges to democracy and citizenship surrounding the vote to Italians overseas*, in *Modern Italy*, Vol. 13, issue no.13, 2008, pp. 271-273.

<sup>292</sup>Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, op. cit., p. 492.

constituency, its hypothetical reversal would be correspondingly laborious, therefore improbable.<sup>293</sup>

#### 4.3.3. Passive voting rights: legislative amendments introduced by Law 165/2017

The controversies about the issue of special political representation appear much more accentuated when considering the matter of passive voting rights. When referring to the right of expatriates to stand as candidates in the elections, Law 459/2001 (Art. 8, section b) stated that: the candidates have to be resident and elected in respective geographical colleges.<sup>294</sup>In other words, only Italian citizens who resided abroad could become candidates and be elected in the foreign constituency. This aspect was one of the most contested and controversial in the Italian external voting. As a matter of fact, it represented a restriction of passive voting rights for in-country citizens. It is surprising to notice that in the case of Italy, restrictions of eligibility to stand as candidates regarded domestic citizens and not expatriates. In any case, Art. 8 of Law 459/2001 was in contrast with the principle of equality and in contradiction with Art. 51 of the Constitution, that stated: «Any citizen of either sex is eligible for public and elected offices on equal terms, according to the requirements established by law».<sup>295</sup>In addition, while external electors were able to vote and be elected abroad, they still maintained the possibility to vote in Italy if physically present in the country during the day of the election. It meant that they could also stand as candidates in ordinary electoral districts within the country. On the contrary, citizens residing in Italy were precluded to stand as candidates in the overseas constituency. On this basis,

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<sup>293</sup>Helbert M. and Mascitelli B., *Transnationalism and expatriate political engagement: the case of the Italian and French voting in Australia*, in *Australian Journal of International Affairs*, vol. 72, no. 4, Routledge, 2018, p. 333-335.

<sup>294</sup>Legge 27 dicembre 2001, n. 459, "Norme per l'esercizio del diritto di voto dei cittadini italiani residenti all'estero", Parlamento Italiano, pubblicata sulla Gazzetta Ufficiale n. 4 del 5 gennaio 2002, Art. 8 b: "I candidati devono essere residenti ed elettori nella relativa ripartizione".

<sup>295</sup>*Constitution of the Italian Republic*, Senato della Repubblica, Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, Roma, Title IV, Art. 51.

not even the principle of reciprocity between in-country and out-of-country citizens hold, creating discrimination.<sup>296</sup>

The limitation of passive voting rights with regard to in-country citizens was finally repealed with Law no. 165 of 4 November 2017, that modified Art. 8 of Law 459/2001, allowing all citizens, irrespective of their residence to be eligible as candidates in the foreign constituency.<sup>297</sup> However, while the new electoral law 165/2017 eliminated the restriction as to passive voting rights, it introduced a new criteria of eligibility for the candidates to the foreign constituency. In particular, Art. 8, section 4bis, precluded the candidacy of those individuals who have held governmental, political or judicial offices, or have been enrolled in the armed forces of a third country during the five years preceding the date of the elections.<sup>298</sup> Such a criteria of ineligibility is applicable only to candidates of the overseas constituency, while it does not apply to candidates who stand for elections within the national territory. As a consequence, it is paradoxical how a candidate can be eligible within national territory and at the same time be ineligible in the foreign constituency. For instance, an Italian citizen who has held political office in a third country, cannot stand as candidate in the overseas constituency, but can still present his candidacy within domestic electoral districts. Once again, the principle of equality and reciprocity of electors residing abroad and inside the country does not stand.<sup>299</sup>

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<sup>296</sup> Alberico G., *Il voto degli italiani all'estero tra discriminazioni e imperituri dubbi di costituzionalità: cosa è cambiato con la nuova legge elettorale*, in *Diritti Fondamentali*, Fascicolo 1/2018, p. 10-11.

<sup>297</sup> Legge 3 novembre 2017, n. 165, *Modifiche al sistema di elezione della Camera dei deputati e del Senato della Repubblica. Delega al Governo per la determinazione dei collegi elettorali uninominali e plurinominali*, pubblicata sulla Gazzetta Ufficiale, no. 264 del 11 novembre 2017, p. 14.

<sup>298</sup> Law no. 165 of 3 November 2017, amendment of Art. 8 of Law 459/2001, section 4 bis: «*Gli elettori che ricoprono o che hanno ricoperto nei cinque anni precedenti la data delle elezioni cariche di Governo o cariche politiche elettive a qualsiasi livello o incarichi nella magistratura o nelle Forze armate in uno Stato estero non possono essere candidati per le elezioni della Camera dei deputati o del Senato della Repubblica nella circoscrizione Estero*».

<sup>299</sup> Alberico G., *Il voto degli italiani all'estero tra discriminazioni e imperituri dubbi di costituzionalità: cosa è cambiato con la nuova legge elettorale*, in *Diritti Fondamentali*, Fascicolo 1/2018, p. 12-14.

In conclusion, Law 165/2017 gave the possibility to citizens residing in Italy to be elected from abroad, but at the same time it imposed a new restriction that is valid only for candidates in the foreign constituency. The controversies related to passive voting rights reflect the particularity of a special political representation that could result being discriminating both towards in-country citizens and expatriates.

#### 4.3.4. Voting by correspondence: doubts of unconstitutionality

Another aspect of Italian external voting system that has been subject of critics is represented by the practice of postal voting. Law 459/2001 established in Art. 1 that citizens residing abroad can vote by correspondence.<sup>300</sup>

On the one hand, the choice of postal voting responded to the demand of rendering the vote effective to expatriates, as indicated by Art. 48 of the Constitution: «The law shall lay down the requirements and modalities for citizens residing abroad to exercise their right to vote and shall ensure that this right be effective».<sup>301</sup> On this basis, postal voting was considered much more accessible to expatriates than other voting modalities. In particular, the option of personal voting would have limited the effective access to the ballot of Italians abroad, due to geographical distances from consulates or embassies in some areas. Parliamentary debates, that preceded the implementation Law 459/2001, reflected these considerations and privileged the most accessible and inclusive method, that of voting by post.<sup>302</sup> In addition, it is important to

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<sup>300</sup> Legge 27 dicembre 2001, n. 459, "Norme per l'esercizio del diritto di voto dei cittadini italiani residenti all'estero", Parlamento Italiano, pubblicata sulla Gazzetta Ufficiale n. 4 del 5 gennaio 2002, Art. 1, comma 2: b: "Gli elettori di cui al comma 1 votano per corrispondenza".

<sup>301</sup> *Constitution of the Italian Republic*, Senato della Repubblica, Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, Roma, Title IV, Art. 48.

<sup>302</sup> Alberico G., *Il voto degli italiani all'estero tra discriminazioni e imperituri dubbi di costituzionalità: cosa è cambiato con la nuova legge elettorale*, in *Diritti Fondamentali*, Fascicolo 1/2018, p. 13-14.

consider that Italian external voting system was rendered even more far-reaching by automatic registration.<sup>303</sup>

On the other hand, the choice of postal voting had significant negative implications in terms of transparency and security of the vote, raising questions of legitimacy, with allegations of not granting secrecy and personality of the vote.

For what concerns doubts of constitutionality of voting by correspondence, the issue has been recently brought to the attention of the Italian Constitutional Court. Indeed, on 21 February 2018, the Court was called upon to decide if Art. 1 of Law 459/2001, which establishes voting by correspondence, is compatible with Art. 48 of the Constitution, that affirms that «the vote is personal and equal, free and secret».<sup>304</sup> The issue was raised by the Ordinary Court of Venice, on the basis of an appeal presented by Antonio Guadagnini and Pier Michele Cellini. The applicants sustained that voting by correspondence lacked legitimacy because it occurs in an uncontrolled environment, therefore there is no guarantee that the vote is free and personal; the secrecy of the vote is not assured neither, because it can be undermined during the operations of printing, distribution and return of ballot papers.<sup>305</sup> When analysing the application, the Court of Venice referred to a precedent judgment of the Constitutional Court, no. 195 of 2003, in which for the first time it has delivered an opinion on Law 459/2001.<sup>306</sup> On that occasion, the Constitutional Court ascertained that if postal voting was judged unconstitutional, the accessibility of external voting would be considerably reduced. It also affirmed that the legislature exercises discretion on voting

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<sup>303</sup> Sampugnaro R., *The Italian foreign constituency and its MPs*, in *Contemporary Italian Politics*, vol. 9, no. 2, Routledge, 2017, p. 163.

<sup>304</sup> Armando M., *Il voto degli italiani all'estero e la riduzione degli spazi di accesso al giudizio di costituzionalità in materia elettorale*, in *Forum di Quaderni Costituzionali; Constitution of the Italian Republic*, Title IV, Art. 48; Ordinanza N. 63, 21 February 2018, Constitutional Court of Italy, available at: <http://www.giurcost.org/decisioni/2018/0063o-18.html>

<sup>305</sup> Ordinanza n. 11 del 5 gennaio 2018, Tribunale di Venezia, in *Gazzetta Ufficiale*, 1° Serie Speciale - Corte Costituzionale n.3 del 17-1-2018.

<sup>306</sup> Ordinanza no. 195 of 3 April 2003, Constitutional Court of Italy, available at: <http://www.giurcost.org/decisioni/2003/0195o-03.html>



modality to use for external voting.<sup>307</sup> On this basis, the Court of Venice asserted that Law 459/2001 gave priority to the effectiveness of external voting, opting for the maximum extension of the suffrage. As a consequence, the principles of secrecy, freedom and personality of the vote were affected.<sup>308</sup> Given these premises, the Constitutional Court delivered the Order no. 63 on 21 February 2018, stating that the question of constitutional legitimacy of Law 459/2001 was inadmissible. The case was dismissed because of a procedural error, that impeded the Court from delivering judgments on the substance of the matter. However, the Constitutional court has released a monitory order, in which it acknowledges the objectively critical issues of postal voting, affirming that the effectiveness of voting rights cannot undermine the constitutional requirement of secrecy, freedom and personality of the vote.<sup>309</sup>

#### 4.3.5. Final considerations: legislative proposals for the amendment of Law 459/2001

The Italian external voting system is very expansive, as it has truly extended the universal suffrage to all its citizens, irrespectively of their place of residence. In this regard, Italy has rendered the right to vote from abroad accessible and effective through the adoption of inclusive OCV provisions. As a matter of fact, there are no eligibility criteria for external voters, a part of holding Italian citizenship; the registration procedure is automatic; the voting method is one of the most far-reaching; expatriates are granted both active and passive voting rights; and most importantly, external citizens have a special political representation, with a total number of 18 reserved seats in the House of Representatives and in the Senate. Against this background, it can be affirmed that «with Law 459, Italy adopted one of the most liberal external voting processes worldwide»;<sup>310</sup> and as reaffirmed by estimable scholars of

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<sup>307</sup>Seesupra note.

<sup>308</sup>Ordinanza n. 11 del 5 gennaio 2018, Tribunale di Venezia, inGazzetta Ufficiale, 1° Serie Speciale - Corte Costituzionale n.3 del 17-1-2018.

<sup>309</sup>Galdi M., *Per l'effettività del diritto di voto degli Italiani all'estero*, in *Diritti Fondamentali*, Fascicolo 1/2019, p. 1-5..

<sup>310</sup>Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, RoutledgeTaylor& Francis Group, 2013, p. 91.

Italian external voting (namely Battiston and Mascitelli): «no other country in the world has developed such an elaborate political system of representation for its expatriates».<sup>311</sup>

As confirmation of such assertions, it is sufficient to consider that among 151 countries that have some OCV provisions in place, only 13 grant their external citizens special political representation.

Even so, the Italian case is demonstrative of the fact that reserved seats for expatriates may be introduced not only for purposes of inclusion, but rather for political reasons. Indeed, the implementation of voting from abroad has been an extremely long and complicated process, mainly caused by contrasting political interests. After numerous legislative proposals to enfranchise expatriates, the stalemate was only overcome through the decision of introducing a foreign constituency. At that time (during the 1990s), political parties thought that an overseas constituency and a limited number of reserved seats could contain the impact of expatriates on the overall outcome of the elections. Even if, the first legislative elections that saw the participation of expatriates proved that votes cast abroad could have a decisive role on the domestic government. What emerges, is that political interests and the desire of limiting the influence of overseas citizens is always cause for concerns for national governments.

Finally, the Italian case-study is exemplifying of considerable weaknesses of external voting.

First, the creation of a foreign constituency and the introduction of reserved seats for emigrants arises questions about its legitimacy. The very same concept of special political representation seems to be in contrast with Art. 67 of the Constitution: «Each Member of Parliament shall represent the Nation and carry out their duties without a binding mandate».<sup>312</sup> Art. 67

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<sup>311</sup>Helbert M. and Mascitelli B., *Transnationalism and expatriate political engagement: the case of the Italian and French voting in Australia*, in *Australian Journal of International Affairs*, vol. 72, no. 4, Routledge, 2018, p. 333.

<sup>312</sup>*Constitution of the Italian Republic*, SenatodellaRepubblica, Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, Roma, Title IV, Art. 67.

affirms the principle of unitary representation of the state, according to which parliamentarians have to defend the interest of the nation as a whole and not local interests. Therefore, Art. 67 doesn't allow any territorial representation or accountability to any specific group of the electorate (expatriates in this case).<sup>313</sup>

Second, the issue of special political representation was aggravated by the fact that only citizens who resided abroad could stand as candidates in the foreign constituency. This aspect was one of the most contested and controversial in the Italian external voting because it represented a restriction of passive voting rights for in-country citizens. It was a discriminating factor with respect to domestic electors. Such limitation was finally overcome with Law no. 165 of 4 November 2017, that modified Art. 8 of Law 459/2001, allowing all citizens, irrespective of their residence to be eligible as candidates in the foreign constituency.<sup>314</sup> But at the same time, Law 165/2017 introduced a new controversial criteria of eligibility for the candidates to the foreign constituency, which did not grant reciprocity and equality between in-country citizens and expatriates (see paragraph 4.3.3.).

Third, Italy adopted the most accessible and inclusive voting method, that of voting by post, but it undermines the fundamental principles of equal, free, secret and personal vote. In this regard, questions of constitutional legitimacy have been brought to the attention of the Italian Constitutional Court. Even if the case was dismissed because of a procedural error, the Constitutional court has released a monitory order, in which it acknowledged the objectively critical issues of postal voting, affirming that the effectiveness of voting rights cannot undermine other constitutional principles.

In conclusion, given the controversial aspects of the Italian external voting, there have been debates within the government as to eventual

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<sup>313</sup> Alberico G., *Il voto degli italiani all'estero tra discriminazioni e imperituri dubbi di costituzionalità: cosa è cambiato con la nuova legge elettorale*, in *Diritti Fondamentali*, Fascicolo 1/2018, p. 7-9.

<sup>314</sup> Legge 3 novembre 2017, n. 165, *Modifiche al sistema di elezione della Camera dei deputati e del Senato della Repubblica. Delega al Governo per la determinazione dei collegi elettorali uninominali e plurinominali*, pubblicata sulla Gazzetta Ufficiale, no. 264 del 11 novembre 2017, p. 14.

amendments of the implementation law (Law 459/2001). The most radical proposal suggested to abolish the foreign constituency, allowing expatriates to vote in ordinary electoral districts (assimilated representation).<sup>315</sup> However, it is important to bear in mind that the reversal of foreign constituency would request constitutional reforms and could end up being a very complicated process, therefore implausible.

Other legislative proposals have focused on the voting method. It was argued that voting by correspondence should be replaced by personal voting at diplomatic missions, which would guarantee the principles of personal, free and secret vote. Others proposed the introduction of e-voting. However, such proposals would imply administrative and financial costs, therefore the most feasible solution would be that of keeping postal voting but rendering it more transparent and secure.<sup>316</sup>

Finally, an interesting recommendation has been advanced by the CGIE at the end of the CGIE Plenary Assembly held in November 2018. It was suggested that citizens residing abroad are no longer automatically registered in electoral rolls, but are rather requested to register *una tantum* at consulates, as to manifest their willingness to participate in the elections. Otherwise, external voters would be excluded from electoral rolls, but will still keep the right to vote if physically present in Italy on the day of the elections.<sup>317</sup> The proposal of the CGIE would have the advantage of differentiating those expatriates who have no connections with Italy and those who chose to exercise their voting rights, being interested in domestic politics.

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<sup>315</sup>Sica G., *L'abolizione della Circostrizione Estero nelle Proposte dei «Saggi» Del Presidente Napolitano*, in *Rivista di Diritto Pubblico Italiano, Comunitario e Comparato*, no. 14, 2013, p. 2-3.

<sup>316</sup>Proposta di Legge d'iniziativa dei Deputati Speranza, Cuperlo, Garavini, Boschi, Fedi, et. al., presentata il 15 gennaio 2014.

<sup>317</sup>Galdi M., *Per l'effettività del diritto di voto degli Italiani all'estero*, in *Diritti Fondamentali*, Fascicolo 1/2019, p. 3-4.

## Conclusion

External voting is the practice dealing with the right of expatriates «to take part in the government of their country» from abroad.<sup>318</sup> The Out-of-Country Voting (OCV) encompasses «provisions and procedures which enable some or all electors of a country who are temporarily or permanently abroad to exercise their voting rights from outside the national territory».<sup>319</sup> Essentially, with the adoption of external voting laws, states enfranchise their citizens living abroad. On the one hand, it is fundamental for modern democracies to adopt OCV provisions in order to respect the human right principle of universal suffrage. On the other hand, it is important to consider that voting rights are directly interconnected to the citizenship status, which raises questions of legitimacy in the case of citizens who reside outside national territory. Indeed, external citizens may have no ties with the socio-political dimension of their country of origins (as may be the case of second or third generations of emigrants). Moreover, while enjoying the voting rights connected to citizenship, expatriates are not subject to the same civil and social obligations as local citizens.<sup>320</sup>

Given these premises, it may be argued that citizens residing *outside* the national territory should not have a decisive role in electing representative organs, whose decisions will only be binding on those individuals who reside *inside* the country.<sup>321</sup> In other words, according to the theory of political representation, only citizens who bear the consequences of their electoral choices should be granted the right to vote.<sup>322</sup> At the same time, it is important to consider that in a globalized world, characterized by migrations, citizens should not be a priori excluded from the political community exclusively

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<sup>318</sup> *A Universal Declaration of Human Rights*, United Nations General Assembly, Resolution 217 (III), Paris, 10 December 1948, Art. 21.

<sup>319</sup> Grotz F., Nohlen D., *The legal framework and an overview of electoral legislation*, op. cit., p. 67.

<sup>320</sup> Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, op. cit., 2408-2411

<sup>321</sup> Grotz F. and Nohlen D., *The legal framework and an overview of electoral legislation*, op. cit., p. 72-73.

<sup>322</sup> See supra note.

because of their residence. Consequently, the principle of universal external voting does not hold, but when subject to restrictions, they must be legitimate from the point of view of political representation.

Based on this thesis, we can identify a number of variables that can influence and justify the adoption of restrictive or expansive external voting systems.

- Independent variables

Our independent variable is represented by International laws, adopted within the framework of the United Nations, as well as at the regional levels, by the Council of Europe and by the European Union. A number of international declarations, treaties and charters have promoted the right to vote, the universal suffrage and the principle of free and fair elections, however they have rarely addressed directly external voting rights of expatriates. We have taken into consideration three legal frameworks in order to identify international laws on the right to vote from abroad:

1. In the context of International Human Rights Law adopted by the UN General Assembly, we have considered the Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). None of them directly refers to voting rights from abroad. While, Art. 21 of the Declaration of Human Rights establishes the right of political participation through free and equal suffrage to all individuals;<sup>323</sup> Art. 25 of the ICCPR establishes the right and the opportunity to vote, without unreasonable restrictions to all citizens.<sup>324</sup> Interestingly enough, ICCPR specifically attaches voting rights to citizens and not to all individuals under State's jurisdiction. In this respect, international practice confirms that almost all states (with the exception of New Zealand and some others) attach the right to vote to the status of citizenship.<sup>325</sup> Given that each state is sovereign in

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<sup>323</sup>*A Universal Declaration of Human Rights*, United Nations General Assembly, Resolution 217 (III), Paris, 10 December 1948, Art. 21.

<sup>324</sup>*International Covenant on Civil and Political Rights*, United Nations General Assembly, resolution 2200A, 23 March 1996, Art. 25 a., b.

<sup>325</sup>Green P., *Entitlement to vote*, op. cit., p. 93.

defining its citizenship law and that IHRL makes no mention of external voting, states have full powers in deciding if enfranchise expatriates or not.<sup>326</sup>

2. At regional level, we have examined external voting provisions within the context of the Council of Europe. Similarly to IHRL of the UN, the European Convention of Human Rights makes no direct reference to external voting.<sup>327</sup> However, through a number of case-laws the ECtHR has defined its approach as to voting rights of expatriates. On the one hand, it recognizes the principle of universal suffrage and the inclusive nature of the right to vote.<sup>328</sup> On the other hand, the Court has acknowledged that voting rights are not absolute and may be subject to some limitations in accord with the electoral systems of each state. In particular, the ECtHR has traditionally ruled that minimum age, citizenship and residence are among the commonly accepted restrictions.<sup>329</sup> If states are allowed to impose residence-based restrictions, then they could adopt restrictive external voting systems.

3. Finally, we have taken into consideration the out-of-country voting within the European Union. On the one hand, each state enjoys full sovereignty and autonomy as to its external voting; which demonstrates that not even a supranational political organization has competence in the electoral laws of the states.<sup>330</sup> On the other hand, the EU still has decision-making power for the voting rights of citizens who reside within the Union. Indeed, under EU law, states have to grant voting right both at municipal level and for

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<sup>326</sup>*Convention on Certain Questions Relating to the Conflict of Nationality Laws*, League of Nations, Treaty Series, vol. 179, no. 4137, Hague, 13 April 1930, chapter 1, art. 1: «It is for each state to determine under its own law who are its nationals»

<sup>327</sup>*Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, Council of Europe, Rome, 4 November 1950, Protocol no. 1, Art.3.

<sup>328</sup>*Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, Council of Europe, Rome, 4 November 1950, Section I, Art. 14.

<sup>329</sup>*Luksch v. Germany*, ECtHR, application no. 35385/97, decision of 21 May 1997, pp. 175-177; *Hilbe v. Liechtenstein*, ECtHR, application no. 31981/96, Strasbourg, decision of 7 September 1999; *Pyv. France*, ECtHR, application no. 66289/01, paragraph 46, Strasbourg, decision of 6 June 2005; *Polacco and Garofalo v. Italy*, ECtHR, application no 23450/94, Strasbourg, decision of 15 September 1997; *Shindler v. the United Kingdom*, application no. 19840/09, Strasbourg, decision of 7 May 2013.

<sup>330</sup>*Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections*, European Commission, 2002

the elections of the EP not only to their own nationals but also to citizens of any other MS who reside within their territory.<sup>331</sup>The external voting provisions that operate within the EU are exemplifying of an inclusive system, that enfranchises citizens not only for the elections of a supranational body but also at local level.

In conclusion, what emerges is that there is no international norm that directly refers to voting rights of expatriates, which implies that states can enjoy a wide margin of appreciation as to the inclusiveness of their external voting norms.<sup>332</sup>

- Dependent variables

Our dependent variables are represented by all those provisions that states can introduce in their external voting systems. To enumerate some of them, we can mention: the eligibility criteria that expatriates have to meet before voting from abroad, the types of elections to which OCV applies, voting modalities and procedures, special or assimilated political representation of external citizens within domestic governments etc. All of them can play a determinant role and define the degree of accessibility of OCV or the political role of expatriates within domestic government.

Given that there is no international norm that constraints states to grant voting rights to expatriates, each country can decide if limit the influence of external citizens within domestic politics, or rather give priority to the principle of universal suffrage.<sup>333</sup> While the impact of voting methods, of the type of elections and of the restrictions imposed on expatriates have been exhaustively analysed in chapter 2 and chapter 3, let us here consider the most relevant and controversial aspect of external voting, that of citizenship.

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<sup>331</sup>*Consolidated Version Of The Treaty On The Functioning Of The European Union*, European Union, Official Journal of the European Union, 2007, Art. 22, comma 1-2.

<sup>332</sup>Pogonyi S., *Four Patterns of Non-resident Voting Rights*, in *Ethnopolitics*, Vol. 13, No. 2, Routledge, 2013, pp. 122-124.

<sup>333</sup>Fabbrini F., *The right to vote for non-citizens in the European multilevel system of fundamental rights*, Eric Stein Working Paper No 4, 2010, pp. 4-5.



External voting is directly interconnected to citizenship, which represents the minimum requirement for the eligibility to vote from abroad.<sup>334</sup> The status of citizenship implies social, civil and political duties and obligations. However, external citizens are not subject to civil and social obligations, while still holding their voting rights. According to the primacy of territorial jurisdiction, expatriates are not even subject to the laws of the country of origins, but rather to the legislature of the country of residence.<sup>335</sup> In the same way, non-residents don't contribute to the payment of taxes, while domestic citizens and foreign residents have to complain with these duties. The paradox of external voting consists exactly in the fact that, expatriates have the right to elect a government, whose laws won't be binding on themselves, but will rather affect individuals who live within the states boundaries.<sup>336</sup> From this perspective, external voting appears in contrast with the principle of political representation, according to which the right to vote should be granted to those who bear the consequences of their electoral choice and will be subject to the laws passed by the elected government. The situation appears even more paradoxical when considering that resident non-citizens (immigrants) who are stakeholders in the governmental policies, are precluded from participating in the elections.<sup>337</sup> In this respect, citizenship laws are crucial in defining who is granted full political membership in a state. It is arguable that, in a modern world, characterized by trans-nationalism, citizenship qualification should no longer be determinant for the franchise. At the same time, if all expatriates are a priori disenfranchised, and they don't hold citizenship of the host country, they could be completely deprived of the right to vote.

Increased trans-border mobility of individuals who establish their residence abroad have led to a consistent growth of migrant communities

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<sup>334</sup>Green P., *Entitlement to vote*, op. cit., p. 93.

<sup>335</sup>Bauböck R., *The rights and duties of external citizenship*, in *Citizenship Studies*, Vol. 13, No. 5, Routledge, 2009, p. 488.

<sup>336</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, op. cit., pp. 2446-2447.

<sup>337</sup>Beckman L. *Citizenship and Voting Rights: Should Resident Aliens Vote?*, *Citizenship Studies*, Vol. 10, No. 2, 2006, pp. 153-154.

worldwide. Even if migration is not a recent phenomenon, democratization and globalization that characterized global developments during the 20<sup>th</sup> century have challenged the traditional requirements of universal suffrage, that were based on citizenship, residence and age. Indeed, if the requirement of residence was maintained, citizens living abroad would be factually disenfranchised, losing any kind of political membership.<sup>338</sup> At the same time, basing external voting rights exclusively on citizenship arises issues of illegitimate political interference within domestic politics. All things considered, a comprehensive solution could be that of granting expatriates external voting rights at national level in the country of origins and at local level in the country of residence. This assertion is derived from what normally happens within state boundaries, where citizens enjoy dual membership: «by birth right in their state and by residence in their municipality».<sup>339</sup> Such a condition should be reproduced at international level for external voting. If migrants are allowed to participate in local elections at their place of residence, and they can vote at national level in the country of citizenship, then the condition of equal political representation would be met. According to this argument, neither residence, nor citizenship should be determinant in enfranchising electors. However, it does not imply that the requirements of residence and citizenship have to be completely removed. As sustained previously, a middle ground should be found between the principle of universal suffrage and the necessary limitation of illegitimate interference of expatriates. It is interesting to note that empirical evidence shows a trend in this direction, namely states tend to grant external voting rights at national level (legislative and presidential elections) and restrict them for local elections (municipal or regional elections).<sup>340</sup>

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<sup>338</sup>Caramani D. and Grotz F. *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, op.cit., pp. 813-814

<sup>339</sup>Bauböck R., *Morphing the Demos into the right shape. Normative principles for enfranchising resident aliens and expatriate citizens*, *Democratization*, Vol. 22, No. 5, 2015, pp.834-835.

<sup>340</sup>Arrighi J-T., Bauböck R., Collyer M., Hutcheson D., et. Al., *Franchise and electoral participation of third country citizens residing in the European Union and of EU citizens residing in third countries*, European Parliament's Committee on Constitutional Affairs,

- Intervening variables

Finally, a number of intervening variables can have a direct influence on external voting. For instance, an important role may be played by the interests of political parties, by the size of emigrant community and electoral turnout, by lobbying of some categories of citizens etc. These aspects can be determinant in the adoption of OCV, as emerged from the case study of Italy.

With regard to the size of emigration community, an important role is once again played by citizenship laws, that determine the potential number of external voters and the degree of their affiliation to the home-country.<sup>341</sup> For instance, when citizenship is transmitted through unrestricted *ius sanguinis*, it can lead to potentially very large communities of external voters, that have no ties with the country of citizenship.<sup>342</sup> In this case, enfranchising indistinctively all non-resident citizens, could be equalized as enfranchising aliens. It is a paradox, given that in most cases, immigrants who live inside the country and are stakeholders in its government are not granted voting rights.<sup>343</sup> This is exactly the situation that exists in Italy, that has very expansive citizenship laws for its emigrants and very restrictive laws on the acquisition of citizenship by immigrants.<sup>344</sup> For this reason, a reasonable solution could be that of enfranchising emigrants for national elections, and conceding voting rights for immigrants at least at sub-national level.

In addition, the size of emigrant population may play an important role on the adoption of restrictive or expansive OCV. When external electors

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Brussels, 2013, p.23. See also: «23 states out of 151 that have external voting provisions permit their expatriates to vote at sub-national level of government», as confirmed by International IDEA, *Voting from Abroad Database* – Election type, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>.

<sup>341</sup> Caramani D. and Grotz F. *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, op.cit., pp. 809-810.

<sup>342</sup> De Groot G.R., Vink M.P., *Birthright Citizenship: Trends and Regulations in Europe*, Italy, EUDO Citizenship Observatory, 2010, pp. 9-12.

<sup>343</sup> Beckman L., *Citizenship and Voting Rights: Should Resident Aliens Vote?*, Citizenship Studies, op. cit., pp. 153-154.

<sup>344</sup> Pastore F., *A community out of balance: nationality law and migration politics in the history of post-unification Italy*, in *Journal of Modern Italian Studies*, Vol. 9, no. 1, 2004, p. 27-29.

represent a very large part of the population, states may be concerned about their influence on national elections, which consequently may determine the structure of external voting.<sup>345</sup> For instance, states may impose restrictive eligibility criteria, adopt limiting voting modalities or allow political representation in secondary levels of government. When these limitations on the external voting right are imposed only because of political reasons, they are not justifiable. Nevertheless, it is a fact that political actors can be determinant in the adoption of extensive or restricting external voting policies. As has been shown throughout numerous examples, political parties can play a decisive role in the introduction of OCV. However, they may be guided by self-interests rather than by ideological consideration.<sup>346</sup> Conversely, also emigrant associations and organization can play an important role and lobby the government to have their voting rights recognized.<sup>347</sup> Both these variables intervened in the adoption of external voting in Italy, where a middle ground was found in the adoption of an overseas constituency and reserved seats. The Italian case is demonstrative of the fact that reserved seats for expatriates may be introduced not so much for purposes of inclusion, but rather for political reasons.

In conclusion, the analysis of different variables shows that numerous factors can determine the degree of inclusiveness of external voting systems, there is no single model that could apply to all states and much depends on the socio-political context of each country. When implementing OCV, states are not constrained under international law, on the grounds that there is no universally recognized principle to enfranchise expatriates. Throughout this dissertation, we have considered different variables, arriving at the conclusion that: (1) citizens should not be a priori excluded from the political community

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<sup>345</sup>Caramani D. and Grotz F. *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, op. cit., pp. 809-810.

<sup>346</sup>López-Guerra C., *Should Expatriates Vote?*, *The Journal of Political Philosophy*, Vol. 13, No. 2, 2005, pp. 219-222.

<sup>347</sup>Sampugnaro R., *The Italian foreign constituency and its MPs*, in *Contemporary Italian Politics*, vol. 9, no. 2, Routledge, 2017, p. 160-163.

exclusively because of their residence; (2) based on the theory of political representation, only citizens who bear the consequences of their electoral choices should be granted the right to vote; (3) the principle of universal external voting does not hold, but restrictions must be justifiable from the perspective of legitimate political representation.

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## Summary

### 1. Defining external voting: historical and legal perspectives

#### 1.1. Definition of external voting

External voting can be understood as the right of citizens living abroad to take part in home-country elections. The Out-of-Country Voting (OCV) encompasses «provisions and procedures which enable some or all electors of a country who are temporarily or permanently abroad to exercise their voting rights from outside the national territory».<sup>348</sup> On the one hand, extending voting franchise to emigrants is an important step in the promotion of universal suffrage and it reflects the commitment for political freedoms and civil rights. On the other hand, OCV confers the right to expatriates to elect a government, whose laws won't directly affect themselves, but rather those who live within the state boundaries. From this perspective, external voting may raise questions of illegitimate political representation.

#### 1.2. Historical overview

The first provisions allowing the OCV started to be implemented by some states at the beginning of the 20<sup>th</sup> century; their external voting systems all shared the characteristic of restricting the external voting to some categories of citizens. Soldiers, seafarers, but also diplomats traditionally represented those professional categories that were enfranchised long before all other non-resident citizens. For instance, seafarers were the only ones allowed to vote from abroad by New Zealand in 1890 and by Australia in 1902. Canada adopted external voting by mail for its military personnel in 1915; France allowed its administrators allocated in the occupied Rhineland to vote by post in 1924.<sup>349</sup> Starting from the end of World War II, occupation-based

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<sup>348</sup> Grotz F., Nohlen D., *The legal framework and an overview of electoral legislation*, op. cit., p. 67.

<sup>349</sup> Sundberg A., *The history and politics of diaspora voting in home country elections*, based on "Voting from Abroad: The International IDEA Handbook", International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, 2007, p. 1-2.

restrictions were gradually removed. A strong diffusion of external voting as a right widely enfranchising citizens abroad also characterized the democratic transitions of the 1990s: in Southern Europe it was the case of Portugal and Spain; in Central and Eastern Europe – of Estonia, Lithuania, Poland and Russia among others; in Latin America – Argentina, Mexico, Brazil; in Northern Africa – Algeria, Morocco, Tunisia. Suffice it to say that in 1991 there were only 31 countries with external voting systems and they increased to 115 in 2007.<sup>350</sup> At present, 151 countries have passed external voting provisions (as to International IDEA Voting from Abroad database).<sup>351</sup>

### 1.3. Legal developments of external voting rights

A number of international declarations, treaties and charters have promoted the right to vote, the universal suffrage and the principle of free and fair elections, however they have rarely addressed directly external voting rights of expatriates.

1. In the context of International Human Rights Law adopted by the UN General Assembly, there is the Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). None of them directly refers to voting rights from abroad. While, Art. 21 of the Declaration of Human Rights establishes the right of political participation through free and equal suffrage to all individuals,<sup>352</sup> Art. 25 of the ICCPR establishes the right and the opportunity to vote, without unreasonable restrictions to all citizens.<sup>353</sup> Interestingly enough, ICCPR specifically attaches voting rights to citizens and not to all individuals under State's jurisdiction. Given that each state is sovereign in defining its citizenship law and that IHRL makes no

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<sup>350</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation*, *op. cit.*, p. 2400.

<sup>351</sup> International IDEA, *Voting from Abroad Database*, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>

<sup>352</sup>*A Universal Declaration of Human Rights*, United Nations General Assembly, Resolution 217 (III), Paris, 10 December 1948, Art. 21.

<sup>353</sup>*International Covenant on Civil and Political Rights*, United Nations General Assembly, resolution 2200A, 23 March 1996, Art. 25 a., b.



mention of external voting, states have full powers in deciding if enfranchise expatriates or not.<sup>354</sup>

2. At regional level, we have examined external voting provisions within the context of the Council of Europe. Similarly to IHRL of the UN, the European Convention of Human Rights makes no direct reference to external voting.<sup>355</sup> However, through a number of case-laws the ECtHR has defined its approach as to voting rights of expatriates. On the one hand, it recognizes the principle of universal suffrage and the inclusive nature of the right to vote.<sup>356</sup> On the other hand, the Court has acknowledged that voting rights are not absolute and may be subject to some limitations in accord with the electoral systems of each state. In particular, the ECtHR has traditionally ruled that minimum age, citizenship and residence are among the commonly accepted restrictions.<sup>357</sup> If states are allowed to impose residence-based restrictions, then they could adopt restrictive external voting systems.

3. For what concerns external voting provisions within the European Union, each state enjoys full sovereignty and autonomy as to its external voting. Which demonstrates that not even a supranational political organization has competence in the electoral laws of the states.<sup>358</sup> However, the EU still has decision-making power for the voting rights of citizens who reside within the Union. Indeed, under EU law, states have to grant voting right both at municipal level and for the elections of the EP not only to their

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<sup>354</sup>*Convention on Certain Questions Relating to the Conflict of Nationality Laws*, League of Nations, Treaty Series, vol. 179, no. 4137, Hague, 13 April 1930, chapter 1, art. 1: «It is for each state to determine under its own law who are its nationals»

<sup>355</sup>*Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, Council of Europe, Rome, 4 November 1950, Protocol no. 1, Art.3.

<sup>356</sup>*Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, Council of Europe, Rome, 4 November 1950, Section I, Art. 14.

<sup>357</sup>*Luksch v. Germany*, ECtHR, application no. 35385/97, decision of 21 May 1997, pp. 175-177; *Hilbe v. Liechtenstein*, ECtHR, application no. 31981/96, Strasbourg, decision of 7 September 1999; *Pyv. France*, ECtHR, application no. 66289/01, paragraph 46, Strasbourg, decision of 6 June 2005; *Polacco and Garofalo v. Italy*, ECtHR, application no 23450/94, Strasbourg, decision of 15 September 1997; *Shindler v. the United Kingdom*, application no. 19840/09, Strasbourg, decision of 7 May 2013.

<sup>358</sup>*Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections*, European Commission, 2002

own nationals but also to citizens of any other MS who reside within their territory.<sup>359</sup> The external voting provisions that operate within the EU are exemplifying of an inclusive system, that enfranchises citizens not only for the elections of a supranational body but also at local level.

In conclusion, what emerges is that there is no international norm that directly refers to voting rights of expatriates, which implies that states can enjoy a wide margin of appreciation as to the inclusiveness of their external voting norms.<sup>360</sup>

## 2. Who can vote from abroad? Requirements, restrictions and limitations that apply on external voters

States may impose a number of eligibility criteria on external voters before granting them voting rights.

- Citizenship represents the minimum requirement for the eligibility to vote from abroad.<sup>361</sup> The degree of coverage of external voting will first of all depend on the citizenship law of the home-country. When citizenship is acquired by descent (*ius sanguinis*) it can generate potentially very large communities of non-resident citizens, that have no ties with the home-country.

- Occupation-based restrictions represent one of the most restrictive external voting policies. Some countries restrict entitlement to external vote only to specific professions, such as military personnel, diplomatic staff and other state servants.

- Past residence requirement implies a previous residence within the country. Some examples are represented by: a) Sweden – overseas citizens must have lived in the country during their lifetime; b) United Kingdom, where external voters must have lived in the country within the previous 15 years and have been enrolled in the electoral register before their departure; c)

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<sup>359</sup>*Consolidated Version Of The Treaty On The Functioning Of The European Union*, European Union, Official Journal of the European Union, 2007, Art. 22, comma 1-2.

<sup>360</sup>Pogonyi S., *Four Patterns of Non-resident Voting Rights*, in *Ethnopolitics*, Vol. 13, No. 2, Routledge, 2013, pp. 122-124.

<sup>361</sup>Green P., *Entitlement to vote*, in "Voting from Abroad: The International IDEA Handbook", edited by International IDEA – Instituto Federal Electoral (IFE), AA.VV., Sweden, Trydellstryckeri AB, 2007, p. 93.

Germany requires a residence in the country of minimum 3 month, within the preceding 25 years.<sup>362</sup>

- Limits on the length of residence abroad imply that citizens are disenfranchised after certain period of time. For instance, citizens of the UK lose their right to external vote after residing abroad for 15 years; in Germany - after 25 years; in Australia, a six-year limitation exists but can be extended indefinitely on annual basis.<sup>363</sup>

- Affidavit of return: before having the right to vote, citizens living overseas have to declare that they intend to resume their residence in the home-country.

- In-country voting: some states that allow their expatriates to exercise their voting rights, but only on the condition that they travel back to the country of citizenship and are present in the national territory on the election day.

- Registration procedures may limit the accessibility to external vote. States may adopt automatic registration (taking the data from national registers) or active registration procedures (that requires a personal application from the elector). Active registration for expatriates, usually implies the completion of a form and a documentary proof of eligibility (for instance citizenship and residence), that is then verified by the competent authority.

- Passive voting rights: the eligibility rules for exercising passive voting rights may be very restrictive and include only limited categories of external voters. For instance, holders of dual or multiple citizenship may be automatically excluded from the possibility to stand as candidates.

Considering that there is no international norm that uniform external voting systems, each state autonomously decides rather to enfranchise all its expatriates or only some of them.<sup>364</sup>

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<sup>362</sup>Arrighi J. T., Hutcheson D. S., *Keeping Pandora's (ballot) box half-shut: a comparative inquiry into the institutional limits of external voting in EU Member States*, in *Democratization*, Vol. 22, No. 5, Routledge Group, 2015, p. 892.

<sup>363</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation*, op. cit, p. 24.

<sup>364</sup>Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, vol. XXI., no. V, Routledge Taylor & Francis Group, 2015, p. 846.

In conclusion, it may be argued that citizens residing outside the national territory should not have a decisive role in electing representative organs, whose decisions will only be binding on those individuals who reside inside the country.<sup>365</sup> From this perspective, the requirements and restrictions that external citizens have to meet in order to be eligible to vote prove to be a necessary tool to permit equal political representation.

Some states grant active and passive voting rights to all their citizens, regardless of whether they have ever resided in the home-country; others don't allow expatriates to cast their vote if not physically present in the country on the election day. In between these two extremes, there is a great variation of external voting policies and states may choose to impose a number of conditions on overseas citizens before granting them voting rights.

### 3. Electoral systems: a comparative analysis of external voting practice

#### 3.1. Types of elections

External voting can apply to legislative and/or presidential elections, to referendums, to supra-national elections or to local elections (at regional or municipal level).<sup>366</sup> The decision of limiting external voting to specific types of elections is very important in defining which levels of government and which institutions can be influenced by overseas voters.

- National elections vs. local elections: most countries apply external voting to legislative elections, combined with one or more other types of elections (presidential elections or referendums); whereas the elections at local and regional level are usually accessible only by in-country citizens.<sup>367</sup> Indeed, elections at local level for expatriates are allowed only by 23 countries, amounting to 10.6% of the total number.<sup>368</sup>

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<sup>365</sup>Grotz F-Nohlen D., *The legal framework and an overview of electoral legislation*, op. cit., p. 72-73.

<sup>366</sup> Lafleur J.M., *The enfranchisement of citizens abroad: variations and explanations*, vol. XXI., no. V, Routledge Taylor & Francis Group, 2015, p. 844.

<sup>367</sup> Lafleur J.M., *Transnational Politics and the State. The External Voting Rights of Diasporas*, New York, Routledge Taylor & Francis Group, 2013, p. 27-29.

<sup>368</sup> International IDEA, Voting from Abroad Database – Election type, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>

- Legislative and presidential elections: according to the IDEA's Voting from Abroad Database based on 216 states and territories, most states apply external voting to legislative elections (58.3%), followed by the second most common type of elections to which external voting applies, that is presidential elections (41.2%).<sup>369</sup>

- Referendums: the case study of the EU membership referendum held in the UK. Referendums represent the third most common type of elections in external voting systems. When citizens living abroad can participate in national referendums, they are given decision-making power on matters of major national importance.<sup>370</sup> A demonstrative example in this sense is represented by the EU membership referendum that took place in the UK on 23 June 2016. On that occasion, only those expatriates who have resided abroad for less than 15 years and had already been registered in the UK electoral rolls, were allowed to vote in the referendum.<sup>371</sup> The 15-year time limit did not permit the participation of a large portion of British citizens residing in the EU, even if their interests were directly affected by the outcome of the referendum.

- Supra-national elections are almost absent in external voting practice, actually, the most famous case is represented by the elections of the European Parliament. Under EU law, each Member State has to grant the right to vote and to stand as a candidate both to its nationals and to residents of another EU country, under the same conditions.<sup>372</sup> In this way, EU citizens that reside in a country other than that of their citizenship are allowed to participate in EP elections from the country of their residence. Even if these provisions create a common framework of external voting system within the EU, the actual

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<sup>369</sup>International IDEA, Voting from Abroad Database – Election type, last updated on 7 August 2018, available at: <https://www.idea.int/data-tools/question-view/130351>

<sup>370</sup> Bulmer E., *Direct Democracy*, Second edition, Stockholm, International Institute for Democracy and Electoral Assistance (International IDEA), 2017, pp- 6-7.

<sup>371</sup>*Political Parties, Elections and Referendums Act 2000*, Electoral Commission, 2000, Chapter IV, Part X, Paragraph 141.

<sup>372</sup>*Consolidated Version Of The Treaty On The Functioning Of The European Union*, European Union, Official Journal of the European Union, 2007, Art. 22.1.

enfranchisement is dependent on the electoral procedures and mechanisms used by each state.

### 3.2. External voting procedures

There are four main types of voting modalities that states may adopt: personal voting at diplomatic missions or at other polling stations, postal voting, proxy voting and electronic voting.<sup>373</sup>

- Personal voting is applied by the majority of states that have external voting systems and it implies that electors abroad cast their vote in person at diplomatic missions or other official polling stations.<sup>374</sup> The main advantage of voting in person is that it reflects the same procedures used for in-country voters and ensures the secrecy and transparency of the vote. However, it may create issues of limited accessibility for those voters whose domicile is distant from diplomatic missions.

- Postal voting implies that ballot papers are distributed to the electors by mail, filled in by voters and sent back to the diplomatic mission.<sup>375</sup> The main weakness of voting by mail is that it cannot assure the same transparency and security as voting at polling stations, raising concerns about secrecy of the ballot. The main advantage of voting by post is its inclusiveness in terms of the degree of coverage of the external electorate. Indeed, it can be extended to all external citizens, overcoming problems of access at polling stations, typical of voting in person at diplomatic mission.

- Voting by proxy means that a citizen residing abroad can designate another authorized elector, who will cast the vote on his behalf at the polling station in the home country.<sup>376</sup> This voting procedure appears to be inclusive and easily accessible by external voters. However, it may imply considerable

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<sup>373</sup>Braun N., Gratschew M., *Introduction*, in "Voting from Abroad: The International IDEA Handbook", cit., p. 6-7.

<sup>374</sup>Sundberg A., *The history and politics of diaspora voting in home country elections*, op. cit., p. 4-5.

<sup>375</sup>Lappin R., *The Right To Vote For Non-Resident Citizens In Europe*, in *International & Comparative Law Quarterly*, 2016, vol. 65, issue 4, p. 886-888.

<sup>376</sup>Arrighi J-T., Bauböck R., Collyer M., Hutcheson D., et. Al., *Franchise and electoral participation of third country citizens residing in the European Union and of EU citizens residing in third countries*, European Parliament's Committee on Constitutional Affairs, Brussels, 2013, p.33.

irregularities as to vote's integrity. Probably, for these reasons, proxy voting is used by a minority of states (India, France, UK and Belgium among them).<sup>377</sup>

- Electronic voting implies the use of Internet, of mobile phones, of personal digital assistants (PDAs) or similar electronic means to cast votes from abroad.<sup>378</sup> This method has the advantage of being the most accessible and convenient for external citizens, therefore allowing a comprehensive participation of the electorate. Main disadvantages of e-voting regard the risk of systems failure and data protection. The e-voting model implemented in Estonia can be considered an electoral success because of its efficiency and inclusiveness. Indeed, it applies to all citizens (residents and expatriates) allowing them to vote from any computer with an Internet connection.<sup>379</sup>

#### 4. External voting system in Italy: pros and cons of special political representation

The political role of external citizens is determined by the way in which their votes are allocated in domestic constituencies. In most cases, votes cast abroad are allocated to ordinary national districts and contribute to the overall results of the elections; this system can be defined as general or assimilated representation.<sup>380</sup> The second option is that of allocating external votes to a separate overseas constituency, allowing expatriates to elect their own representatives to national governments. This system can be defined as discrete or special representation because external voters are granted reserved seats in the government of the home-country.<sup>381</sup> Currently, only thirteen

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<sup>377</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, *Fordham Law Review*, 2007, p. 2404-2405.

<sup>378</sup>Braun N., "E-voting" and external voting, in "Voting from Abroad: The International IDEA Handbook", cit., p. 217-218.

<sup>379</sup>Alvarez R. M., Hall T. E., Trechsel A. H., *Internet Voting in Comparative Perspective: The Case of Estonia*, in *Political Science and Politics*, Vol. 42, no. 3, American Political Science Association, 2009, p. 497.

<sup>380</sup>Caramani D., Grotz F., *Beyond citizenship and residence? Exploring the extension of voting rights in the age of globalization*, in *Democratization*, Vol. 22, no. 5, Routledge, 2015, p. 812-813.

<sup>381</sup>Bauböck R., *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, vol. LXXV, art. IV, *Fordham Law Review*, 2007, p. 2432.

countries out of 151 that have external voting provision, allow their expatriates to stand as candidates and allocate them reserved seats in the parliaments. They are: Algeria, Angola, Cape Verde, Colombia, Croatia, Ecuador, France, Italy, Mozambique, Panama, Portugal, Romania and Tunisia.<sup>382</sup>

The Italian external voting system has the most expansive expatriate representation, allocating eighteen seats to its overseas constituency. Indeed, citizens residing abroad are represented in both chambers of the government: with six reserved seats in the Senate and twelve in the House of Representatives.<sup>383</sup> Italy has rendered the right to vote from abroad accessible and effective through the adoption of inclusive OCV provisions. As a matter of fact, there are no eligibility criteria for external voters, a part of holding Italian citizenship; the registration procedure is automatic; the voting method is one of the most far-reaching; expatriates are granted both active and passive voting rights; and most importantly, external citizens have a special political representation. Even so, the Italian case is demonstrative of the fact that reserved seats for expatriates may be introduced not only for purposes of inclusion, but rather for political interests. Indeed, the overseas constituency was introduced with the intention of limiting the influence of overseas citizens is always cause for concerns for national governments.

The Italian case-study is also exemplifying of considerable weaknesses of external voting.

First, the creation of a foreign constituency and the introduction of reserved seats for emigrants arises questions about its legitimacy. The very same concept of special political representation seems to be in contrast with Art. 67 of the Constitution: «Each Member of Parliament shall represent the Nation and carry out their duties without a binding mandate».<sup>384</sup> Art. 67 affirms the principle of unitary representation of the state, according to which

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<sup>382</sup> Lafleur J.M., *The enfranchisement of citizens abroad*, cit. p. 845.

<sup>383</sup> Lafleur J.M., *Why do states enfranchise citizens abroad? Comparative insights from Mexico, Italy and Belgium*, in *Global Networks* Vol. 11, no. 4, Blackwell Publishing Ltd & Global Networks Partnership, 2011, pp. 491.

<sup>384</sup> *Constitution of the Italian Republic*, Senato della Repubblica, Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, Roma, Title IV, Art. 67.



parliamentarians have to defend the interest of the nation as a whole and not local interests. Therefore, Art. 67 doesn't allow any territorial representation or accountability to any specific group of the electorate (expatriates in this case).<sup>385</sup>

Second, the issue of special political representation was aggravated by the fact that only citizens who resided abroad could stand as candidates in the foreign constituency. This aspect was one of the most contested and controversial in the Italian external voting because it represented a restriction of passive voting rights for in-country citizens. It was a discriminating factor with respect to domestic electors. Such limitation was finally overcome with Law no. 165 of 4 November 2017, that modified Art. 8 of Law 459/2001, allowing all citizens, irrespective of their residence to be eligible as candidates in the foreign constituency.<sup>386</sup> But at the same time, Law 165/2017 introduced a new controversial criteria of eligibility for the candidates to the foreign constituency, which did not grant reciprocity and equality between in-country citizens and expatriates.

Third, Italy adopted the most accessible and inclusive voting method, that of voting by post, but it undermines the fundamental principles of equal, free, secret and personal vote. In this regard, questions of constitutional legitimacy have been brought to the attention of the Italian Constitutional Court. Even if the case was dismissed because of a procedural error, the Constitutional court has released a monitory order, in which it acknowledged the objectively critical issues of postal voting, affirming that the effectiveness of voting rights cannot undermine other constitutional principles.

### Conclusion

In conclusion, the analysis of different variables shows that numerous factors can determine the degree of inclusiveness of external voting systems, there is

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<sup>385</sup> Alberico G., *Il voto degli italiani all'estero tra discriminazioni e imperituri dubbi di costituzionalità: cosa è cambiato con la nuova legge elettorale*, in *Diritti Fondamentali*, Fascicolo 1/2018, p. 7-9.

<sup>386</sup> Legge 3 novembre 2017, n. 165, *Modifiche al sistema di elezione della Camera dei deputati e del Senato della Repubblica. Delega al Governo per la determinazione dei collegi elettorali uninominali e plurinominali*, pubblicata sulla Gazzetta Ufficiale, no. 264 del 11 novembre 2017, p. 14.

no single model that could apply to all states and much depends on the socio-political context of each country. When implementing OCV, states are not constrained under international law, on the grounds that there is no universally recognized principle to enfranchise expatriates. Throughout this dissertation, we have considered different variables, arriving at the conclusion that: (1) citizens should not be a priori excluded from the political community exclusively because of their residence; (2) based on the theory of political representation, only citizens who bear the consequences of their electoral choices should be granted the right to vote; (3) the principle of universal external voting does not hold, but when subject to restrictions, they must be justifiable from the perspective of legitimate political representation.

