



# Right to Vote

## National Report – Portugal

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This Working Paper was written within the framework of Work Package 3 “Law as or against justice for all”

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## Acknowledgements



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## About ETHOS

*ETHOS - Towards a European Theory Of Justice and fairness*, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019.

## Executive summary

This working paper was written within the framework Work Package 3 (Law as or against justice for all?). It feeds into the fourth WP3 report: Theuns, Tom (2019) 'A comparative report on the legal rules and practices regulating the exercise of the right to vote (eligibility and representation) in local, national and EU elections of marginalised groups', ETHOS deliverable D3.4.

In the case of this specific report, the goal is to understand the legal rules and practices related to the exercise of the right to vote, including eligibility and representation aspects, which aims to explore the extent to which it enables the participation and representation of all community members. We will focus specifically on the voting rights of foreigners and persons with (mental) disabilities.

The report includes firstly an analysis of the Portuguese legal framework. The question "who can vote?" and "to which elections" were the main focus. There are also an analysis of specific rules regarding foreigners, citizens of Portuguese former colonies and persons with (mental disabilities). In the second part of the report, the analysis goes a little more global, and pretend to understand what was the impact of international/European law in the national rules. The third and last part of the report is a correlation with 'justice as representation' and the 'right to vote' and, also, the impact of the concept of 'vulnerability' on the defining who is entitled to vote.

During this research we identified some problems in the eligibility to vote in Portugal. Firstly, persons with (mental) disabilities cannot vote, neither alone or accompanied. Secondly, persons with physical disabilities can vote, but there are no alternative to the written ballot, a reality that can represent another barrier for the person. Regarding foreigners, the principles of reciprocity that define the citizens of which country can vote in Portugal guarantees the equality of treatment (for Portuguese abroad) but leave a great number of inhabitants aside of the elections. In sum, we cannot say that, at the moment, the Portuguese electoral system is either inclusive or truly representative.

On the other hand, the absence of cases in court challenging those rules or solely the lack of discussions surrounding the disenfranchisement of some individuals based on their nationality or disability have a broader meaning. It may not mean only that there aren't cases, but maybe that individuals don't have the capability to engage in court against the Portuguese State. Also, others claim for justice may be more important for those vulnerable groups in comparison to the right to vote. It would be important to explore in further research, the reasons for this absence of debate.

Justice as representation is focussed in ensuring the fairness of political processes and by this, a fair political representation need to exist to give voiceless people the opportunity to be politically heard. Generally, all adults can *have* a voice and therefore vote, but in some cases, for many reasons this voice can be withdrawn. The reasons can be because those persons committed a crime, or due to their nationality or because of their physical/mental condition. There are many arguments, which are not explored in this report, to disenfranchised foreigners and persons with mental disabilities but, in sum, we can say that being those people part of the population they should have an equal opportunity to vote in the persons who will make the claims for them at a higher level. In the case of those two vulnerable groups and since there are some exceptions especially for foreigners, we cannot say that the law function as justice (as representation) for all.

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## **List of abbreviations**

EU – European Union

ICCPR – International Covenant in Civil and Political Rights

CRPD – Convention on the Rights of Persons with Disabilities/Committee on the Rights of Persons with Disabilities

CNE – Commission for National Elections

NGO – Non-Governmental Organization(s)

## Introduction

The idea that voting is one of the most effective ways available to individuals to influence governmental decision-making is widely accepted. Voting is, by definition, the act through which a society express the preference for a candidate for office or for a proposed resolution of an issue.<sup>1</sup> The Universal Declaration of Human Rights, recognizes in Article 21 that: “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 ballot or by equivalent free voting procedures” defining the importance of transparent and open elections to ensure the fundamental right to participatory government.

The right to vote, the main topic of this report, is recognized as a fundamental human right. However, there are some groups of ‘non-citizens’ that are consistently disenfranchised – young people, minorities, those who have committed crimes, the homeless, disabled persons and many others who lose their right to vote due to poverty, illiteracy, intimidation, or because the legislation regulating elections decides that they cannot decide who, also, represents them.

The Constitution of the Portuguese Republic (1976),<sup>2</sup> grants the right to vote to “*every citizen who has attained the age of eighteen years (...)*” (Article 49 (1)). At first glance, this would mean that *all* citizens 18 years old or older would be able to vote in the Portuguese elections. However, this is not the case and this report analyses some of the cases in which groups of people are disenfranchised. Even if there are a few groups of people for which the right to vote is taken away, we will focus on two particular groups. The first one is persons living with disabilities and the second one is foreigners from EU member states and non-EU member states, living in Portugal.

Regarding persons living with disabilities, when we presented the Constitutional text that grants the right to vote to every citizen, the last part of the Article was deliberately left out to be introduced here. The Article 49 does grant the right to vote to every citizen, but also add that those citizens are “*(...) subject to the incapacities provided for in the general law*” (Article 49 (1)). Subsequent to this, the electoral law defines that “Persons who are clearly acknowledged to be demented, even if they are not barred by a sentence, when they are committed to a psychiatric establishment or are declared to be demented by a board of three doctors do not enjoy electoral capacity”. This only applies for mental disabilities, in the case of illness or clear physical disability, those citizens do enjoy active and passive electoral capacity – although, the conditions of the poll stations many times hinder the voting process and for the case of blindness no alternative ways of vote are proposed (Braille ballots or electronic voting). In conclusion, legally, mentally disabled persons cannot vote – neither accompanied or alone. Not allowing persons with disabilities to vote is a way of comparing them to minors, mirroring the notion of dependency and incapacity of making a decision. As Krzysztof Pater stated “the right to vote is not only a fundamental right but also an issue of dignity” and when a specific right (any right) is taken away from someone, the State is discriminating and in the case of the right to vote, the discrimination goes to the point of defining who has a voice in the choice of the person/party representing the population.

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<sup>1</sup> Scott Ferguson, ‘Study Guide: The Right to Vote’ (2003)  
<<http://hrlibrary.umn.edu/edumat/studyguides/votingrights.html>>.

<sup>2</sup> Constitution of the Portuguese Republic Seventh Revision [2005].

The second group we choose to look at for this report are foreigners living in Portugal. This is particularly important for the national context, once the country defines itself as a country of immigration and emigration, and this idea exists since before the revolution, in April 1974, that establish the democracy that exists until today. Thus, the idea of persons arriving and other leaving the country is traditionally accepted as a reality of the Portuguese society, but what are the political rights granted to those arriving? Granting voting rights to resident non-national (EU nationals and non-EU nationals) is a very important point for the European political agenda. There is a variety of perspective on this, on one side, the idea of giving to foreigners the right to elect representatives is difficult to accept since only nationals have the correct perception of the problems of the country. Also, immigrants are not seen as potential citizens, but more as temporary workers who do not need to be politically active. However, some may argue that considering that the foreigners contribute for the economy and they have to comply integrally with the rules and obligations defined by the law, if they can't vote, their right is not being secured at the same level of others. Their non-representation may, in extreme cases, justify the disobedience of the law and create a 'second-class' citizenship, with no equal rights between individuals.

On this matter, the position of Portugal is based mainly in reciprocity agreements. Foreigners living in Portugal can vote, but as we will see this does not apply for *all* foreigners precisely due to the inexistence of reciprocity agreements with some States and that leave 126470 individuals according to data from 2011. Theoretically reciprocity agreements may be a neutral approach to the problem of the right to vote of foreigners. Those agreements are inclusive, but lack efficacy since there are not that many bilateral agreements between Portugal and other countries. Once more, there is a big part of the population who is under-represented which creates situations of injustice and difficult changes in policies directed to the inclusion and life of foreigners' in Portugal, which is a problematic position for a country who defines itself as a country of migration.

We will analyse on the next section the Portuguese *hard law* on the matter of the right to vote. On the first part you'll find the 'national legal framework', with the revision of the legislation existing Portugal that grants the right to vote – for general citizens and the vulnerable groups choose for our study case: persons living with disability and foreigners living in Portugal. On the second part, we take a look on the 'impact of international/European law', with an analysis of the importance of the various international instruments and their impact on the right to vote in Portugal. On the third part, 'Right to vote, justice as representation and vulnerability', we try to understand how does voting rights help to ensure justice as representation and the importance of the concept of vulnerability to protect those rights. With this report we seek to add the Portuguese national context to the reflexion of WP3 "Law as or Against Justice for All?" and understand how the right to vote as justice with representation is expressed in formal law.

## PART I | NATIONAL LEGAL FRAMEWORK

### 1.1. Constitutional protection<sup>3</sup>

*Does national constitutional law protect the right to vote, and if so, in which terms (as elaborated through judicial interpretation, where relevant)? Please report on any corresponding state obligations to enable the exercise of the right to vote. If not protected under national constitutional law, which national legal framework (eg legislation, case law) grants protection to the right to vote and lay down any corresponding state positive obligations to enable the right to vote.*

The Portuguese Constitution guarantee the right to vote, in Article 49:

#### *Article 49 - Right to vote*

1. Every citizen who has attained the age of eighteen years has the right to vote, subject to the incapacities provided for in the general law.
2. The right to vote shall be exercised personally and constitute a civic duty.

Article 113 sets out the general principles of electoral law:

1. Direct, secret and periodic suffrage is the general rule for the appointment of the officeholders of the elected entities that exercise sovereignty, elected organs of autonomous regions and elected local governments organs
2. Without prejudice to the provisions of Articles 15(4) and 121(2) electoral registration is conducted at the initiative of the citizen and is compulsory and permanent, and there is a single registration system for all elections that are held by direct, universal suffrage.

Since then, there weren't any alteration on who could vote, at least, in the Constitution.

### 1.2. General national rules

*Please summarise the national legal framework determining who has the right to vote (franchise) in which local/state, national/federal (legislative, as well presidential if relevant), and European elections, as well as, where relevant, in referenda, according to national constitutional or legislative/executive/administrative provisions, and relevant judicial interpretation? Please also include any exclusion rules (e.g disenfranchisement, voting bans, etc).*

This section will set out the provisions of the Electoral Law for the different elections that could be held: Parliamentary Election; Election for President; Municipal Elections; Elections for the European Parliament and National Referendums.

Law nº14/79, of 16 May sets the rules for the Parliamentary Election:

#### Article 1 Active Electoral Capacity

1. Portuguese citizens older than 18 years' old

#### Article 3 Right to vote

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<sup>3</sup> See the texto of the Portuguese Constitution available at <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>, accessed in September 2018.

1. Citizens both in the national territory, Macao or abroad, registered, are electors of the Assembly of the Republic.

Law-Decree nº319-A/76, of 3 May defines the Electoral Law for the President:

#### Article 1 Active Electoral Capacity

1. Portuguese citizens in the national territory and Portuguese citizen's residents abroad registered, are elector of the President of the Republic

For Municipal Elections, active electoral capacity is regulated by the Organic Law nº1/2001, of 14 August and, once more, is granted to the Portuguese citizen over 18 years old. In Article 2 (1)(2) is also defined that: "*Citizens of EU members state, when Portuguese citizens enjoy legally the same rights in the origin State of the latter*" have also active electoral capacity and in Article 2(1)(c) is also considered that "*other citizens with legal residency in Portugal for more than 3 years, if they are citizens of countries in which conditions of reciprocity attribute active electoral capacity to Portuguese residents*" can vote for local elections.

Regarding elections of the Members of the European Parliament, those elections are regulated by the Law nº 14/87, of 29 April:

#### Article 3 Active electoral capacity

1.Active electoral capacity for the Election of members of the European Parliament in Portugal is given to:

- a) Portuguese Citizens registered in national territory;
- b) Portuguese citizens registered in the Portuguese electoral system resident abroad, that do not choose to vote in another EU member state
- c) European citizens, non-national of the Portuguese State, registered in Portugal.

And finally, National Referendums are regulated by the Law nº 15-A/98, of 3 April and the right to participate is given to:

#### Article 37

2.Citizens registered in the national territory can be call to pronounced themselves directly through referendum

#### Article 38

Citizens from other Portuguese speaking countries that inhabit in the national territory and have the benefice of the special status of equal political rights, in terms of international conventions and in conditions of reciprocity, enjoy the right to participate in the referendum, providing that they are registered as electors in the national territory.

### **1.3. Specific rules targeting selected groups**

*Provide details on any specific rules targeting our selected groups, namely refugees/asylum-seekers, foreign residents, citizens living abroad, persons living with disabilities (including mental disabilities), and criminals/prisoners. Does national law impose particular obligations on the state in order to guarantee the exercise of the right to vote to those who are entitled to vote? Pay particular attention*

to measures aiming at guaranteeing the exercise of the right to vote of disabled persons, citizens living abroad, prisoners, older persons, etc.

#### A. Persons living with disabilities

The Portuguese Constitution defines in Article 71 (1) that citizens with physical or mental disabilities “shall enjoy all the rights and be subject to all the duties contained in this Constitution”, which means that persons living with disabilities would have their right to vote fulfilled. However, in the Parliamentary Election Law (Law nº14/79, of 16 May), it’s defined that:

Article 2 Active Electoral Incapacities:

1. The following are not eligible to vote:

a) Persons who are barred by a sentence that has transited in *rem judicatam*;

b) Persons who are clearly acknowledged to be demented, even if they are not barred by a sentence, when they are committed to a psychiatric establishment or declared to be demented by a medical board composed of two doctors;

c) Those sentenced to imprisonment for felony, as long as they have not purge the respective sentence, and those who are judicially deprived of their political rights

The same applies for Municipal Elections (Organic Law nº1/2001, of 14 August. Article 30). For the election of the President of the Republic (Law-Decree nº319-A/76, of 3 May), there are some provisions to enable the vote of persons with physical disabilities:

Article 71 Vote of the Persons living with disabilities:

1. The elector affected by a disease or a notorious physical disability, that the board verifies not being able of practicing the acts described in Article 81, can vote accompanied by another elector chosen by him, that guarantee the fidelity of the expression of their vote and is obliged to absolute secrecy.

The same provision applies for Municipal Elections (Organic-Law nº1/2001, 14 August Article 116(1)). There are none provision about the vote of persons living with disabilities, neither disenfranchising them or making particular differentiation, in the law regulating elections for the European Parliament. Nonetheless, knowing that in cases that are not considered in Organic-Law nº1/2001, the Parliamentary Election is applied, we can say that persons living with mental disabilities and living in mental hospitals are also disenfranchised from voting in European Parliament elections (when voting in Portugal).

Although during our research we could not find any cases where these have been used, the Law nº 46/2006, of 26 August could be used to counter the discrimination of disabled voters. Article 1 presents the basic principles of the law:

Article 1 Object

1. The purpose of this law is to prevent and prohibit direct or indirect discrimination on the grounds of disability in all its forms and to penalize the practice of acts which violate any fundamental rights or refuse or condition the exercise of any economic, social, cultural or other rights by any person, due to any disability.

Though, there is no provisions on active political rights in the rest of the text. The provisions are more focussed in health, education, employment and general accessibility.

EU Council Directive 94/80/EC was transposed into Portuguese Law in 1996, by Law nº50/96, of 4 September, altering the Law on electoral registration (Law nº69/78, of 3 November) and the Law on Election of the Organs of the Local Authorities (Law nº701-B/76, of 29 September). Those alterations made possible for EU citizens residing in Portugal to vote in local elections, as long as Portuguese citizens enjoy the same rights in their origin country. Voter registration for local elections by second-country nationals is voluntary (Healy, 2013). In the Declaration nº30/2017, of 3 May, is defined in Article 1 Active electoral capacities, to whom Portugal recognized the right to vote for elections of the organs of local authorities. The right to vote was recognized to citizens from: a) European Union Member States; b) Brazil and Cabo Verde; c) Argentina, Chile, Colombia, Island, Norway, New Zealand, Peru, Uruguay and Venezuela. This recognition is made under the terms exposed in Article 2(2) and Article 5(2) of the Organic Law nº1/2001, of 14 August. Therefore, active electoral capacity for organs of local authorities is recognized for EU Member States (Article 1 (a)).

#### **B. Foreigners from non-EU member states**

Political rights of foreigners from other countries that are not a European Union Member State are regulated in diverse ways. In relation to active voting rights, having the citizenship of a Portuguese-speaking country (including all Portugal's former colonies) and legal residence in Portugal grants access to some of the elections, although always subjected to reciprocity and based on linguistic, cultural and historical ties.<sup>4</sup>

In the case of Brazilians citizens who reside in Portugal, they enjoy a status of equality of political rights and enjoy a form of internal 'quasi-citizenship'<sup>5</sup> based on the Treaty of Friendship, Cooperation and Consultation between the Portuguese Republic and the Federal Republic of Brazil dated from 2000 and approved by the Parliament Resolution 83/2000, of 14 December. Thus, Brazilians can vote in all elections and referenda in Portugal, if Portugal have been their official residence in the last three years. For the Elections of the President of the Republic (Decree-Law nº319-A/76, of 3 May) there are possible electoral rights for citizens of other Portuguese-speaking countries based in reciprocity but those, currently, only applies to Brazil.

As explained in the Declaration nº30/2017, in the local legislative elections, voting rights are granted to citizens of Portuguese speaking-countries based on reciprocity and if they have had legal residence in Portugal for at least four years.<sup>6</sup> At the moment, this only applies to Brazilians and Cape Verdeans. For other third-countries nationals, they are also subjected to the principle of reciprocity and can vote in Portuguese elections if they have had a legal residence for at least five years. This applies for Argentina, Chile, Iceland, Norway, Peru, Uruguay and Venezuela.

#### **1.4. Specific rules concerning citizens of former colonies**

*Are they any specific regimes for citizens of former colonies or current overseas territories?*

As explained in 1.4. C., political rights of citizens of former colonies are granted based in "reciprocity agreements" but are only applied to local elections, leaving behind elections to the

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<sup>4</sup> Claire Healy, 'Access to Electoral Rights – Portugal' [2013] EUDO Citizenship Observatory.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

President of Republic, President of the Assembly of the Republic, Prime Minister and President of Supreme Courts.<sup>7</sup> For example, for Mozambique, there are no conditions of reciprocity with Portugal due to the consequences of the war of independence. In Angola, it is defined that foreigner citizen can't carry out activities of political nature, nor interfere directly or indirectly in political affairs which, obviously deny any possible reciprocity agreement with Portugal. São Tomé e Príncipe considers the possibility to concede political rights to vote and be eligible in local elections for non-nationals. However, since there is no registration of non-nationals voting in São Tomé this has as consequence the non-attribution of the same right for São-Tomenses resident in Portugal.<sup>8</sup>

Political rights of Brazil citizens living in Portugal are completely different from those exposed previously. Under The Treaty of Friendship, Cooperation and Consultation established between the Portuguese Republic and the Federal Republic of Brazil (2000), Brazilians can vote in all Portuguese elections (see section 1.4.C. of this report), if they've been (officially) living in Portugal for three years. Therefore, Brazilians and Cape-Verdeans are the only citizens from former Portuguese colonies with the right to vote in Portugal.

### **1.5. Constitutional challenges**

*Have national/local rules set out in legislation, regulations or other binding legal measures been challenged for incompatibility with national constitutional norms? If so, which ones, and with what effect? [If information is easily accessible, can you also indicate who were the parties challenging those rules? Have certain national rules contested by societal actors but not challenged before courts?]*

There's no national/local rules incompatible with national constitutional norms.

### **1.6. Relevant institutional and procedural aspects**

*If certain institutional aspects (eg judicial review) or procedural rules (eg standing) are important in order to understand how the right to vote is protected under domestic law, please provide relevant details (200 words or a reference to accessible English language material presenting it in a relevant, synthetic and concise manner).*

Norms and principles of general or common international law are an integral part of the Portuguese law (Portuguese Constitution, Article 8 (1)). The norms come into force in Portuguese internal law once they have been officially published and remain so for as long as they are internationally binding on the Portuguese State (Article 8(2)).

## **Part II | Impact of international/european law**

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<sup>7</sup> Fernando Ruivo, *Acesso Formal Dos Imigrantes Aos Espaços Políticos : Eleitos e Eleitores Nos Municípios e Juntas de Freguesia Portuguesas*

<[http://webopac.sib.uc.pt/search~S30\\*por?/aRuivo/aruivo/1%2C11%2C48%2CE/frameset&FF=aruivo+fernando+1951&1%2C4%2C](http://webopac.sib.uc.pt/search~S30*por?/aRuivo/aruivo/1%2C11%2C48%2CE/frameset&FF=aruivo+fernando+1951&1%2C4%2C)> accessed 20 November 2018.

<sup>8</sup> *ibid.*

## 2.1. Challenges to national rules based on international instruments

*Have rules on the right to vote set out in national constitutional documents, legislation, regulations or other binding legal measures been challenged by reference to international instruments (notably the ICCPR and CRPD). With what effect? Please refer to background paper (Deliverable 3.3), Section **Error! eference source not found.** for relevant information.*

*Have international monitoring bodies adopted opinions/decision on the compatibility of those rules with international law? Did it result in changes in national law?*

During our research, we didn't find any case in which the rules on the right to vote have been challenged by reference to international instruments. However, it is easily recognizable that the current Constitution and respective electoral law infringes, for example Article 25 of the ICCPR in which is stated: "1. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: a) (...); b) To vote and to be elected (...)". As we've seen in section 1.4, in Portugal, persons with mental disabilities are not able to vote. For those with physical disabilities, neither accessibility of the polling stations is formally regulated in any electoral law, neither alternative forms of voting are considered – only through a third person, electronic voting or ballot in Braille is not available. The CNE recommends that all municipalities should promote accessibility to their polling station but there is no previous consultation with disabled persons or experts on disability with regards to the possible disadvantages of the polling station for disabled persons. Although disabled persons can, by law, be accompanied by a third persons and that there is no distinction with regard to whether disabled persons can have a companion with them between types of disabilities, when the disability is not 'visible' the person may be required a medical certification attesting his disability so that the presence of a third person is accepted. The choice of which companion is a matter of the disabled person choice, and there are no other criteria determining who may or may not accompanied the person. Mobile ballot boxes are not, at this moment, a possibility. Also, discussions for the secrecy of the ballot or the vulnerability of disabled persons in terms of liable of having their votes influenced or manipulated.

About this, the Committee on the Rights of People with Disabilities presented their concerns about the fact that in a State Party of the CRPD, disabled people are deprived of their legal capacity (CRPD, 2016). The Committee recommended Portugal to develop alternative forms of voting and create accessible informative material of the electoral campaigns, such as adapted pamphlets, audio-visual content and others. In point 56 of the report, they specifically recommend that:

"the State party, in cooperation with representative organizations of persons with disabilities, take the necessary measures to enable all persons with all types of disability, including those who are under guardianship or in psychiatric institutions, to exercise their right to vote and stand for election on an equal basis with others, by providing accessible facilities and means of communication".

This report was published in May 2016, after the elections for the President of the Republic (24 January 2016) and prior to the Local Elections that occurred on October 2017. For those elections, adapted informative pamphlets explaining the functioning of the electoral system were distributed, and also an informative video in Portuguese Sign Language was made available. We couldn't find online any kind of adapted informative material produced by the parties for their campaign. However, being those elections at the local level it's possible that those kinds of materials exist but are not available online. Regarding this, the CNE (Commission for National Elections) suggest to "ask help to someone

of your trust to understand what is written". Also, the Commission explained that there are not voting braille ballots in Portugal and, in case of physical disabilities that hinder the accessibility to the polling stations, they "recommend" to the City Council to promote the necessary measures to grant that all electors can access the voting assemblies. In sum, providing accessibility to polling stations is not mandatory. In conclusion, however Portugal is a State Party of both the CRPD and the ICCPR, since the publication and ratification of both there's was none alteration regarding the right to vote of persons living with disabilities. The next elections are for the European Parliament (May 2019) and none alterations are predicted to happen until then.

## **2.2. Challenges to national rules based on European (council of Europe instruments)?**

*Have national rules set out in national constitutional documents, legislation, regulations or other binding legal measures been challenged by reference to the Council of Europe's law, in particular ECHR Article 3 Protocol 1, but also other ECHR provisions.*

*There have been no cases against Portugal on Protocol 1 Article 3 of the ECHR (the right to free elections).*

## **2.3. Challenges to national rules based on EU law**

*Has EU law (in particular Article 24(3) TEU, Articles 20 and 22(b) TFEU, and Articles 39-40 EU CFR) been invoked before domestic courts to challenge national rules de lege or de facto disenfranchising certain categories of persons (disabled, criminals, prisoners, expats, foreign residents, etc).*

Has the right to vote in your country been subject to European Commission investigation under Article 268-269 TFEU procedure or a decision of the CJEU? With what effect? Please refer to background paper (Deliverable 3.3), section **Error! Reference source not found.** for relevant information.

During our research we didn't find any case in which EU law was been invoked before domestic courts to challenge national rules disenfranchising certain categories of persons, neither persons living with disabilities or foreigners living in Portugal.

## **2.4. Relevant institutional and procedural aspects**

*Please provide necessary information concerning the incorporation and position/authority of international law, Council of Europe's instruments, and EU law in your country, which is of relevant to understand the protection of the right to vote in your country? In particular, does you state follow a monist or dualist approach? Can national courts invalidate/set aside national laws against international, Council of Europe and EU instruments? To what extent are the relevant provisions of international law granted direct effect?*

In the case of Portugal, the state follows a monist approach regarding the primacy of international law. Therefore, the validity of the international law in the Portuguese legal system is accepted.<sup>9</sup> In Article 8 of the Portuguese Constitution is stated that "*The norms and principles of general or common international law form an integral part of Portuguese law*" (Article 8 (1)). Also, in the point number 2, 3 and 4 of the same article is defined that "*the norms contained in duly ratified or*

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<sup>9</sup> Rui Miguel de Sousa Simões Fernandes Marrana, 'A Articulação Entre o Direito Internacional e o Direito Interno: Enquadramento Teórico e Regime Nacional' (2015) *O Lusíada*. Direito (Porto) 117 <<http://revistas.lis.ulsiada.pt/index.php/ldp/article/view/2057/2172>> accessed 11 October 2018.

*approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so far as long as they are internationally binding on the Portuguese state” (Article 8 (2)); “The norms issued by the competent organs of international organisations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties” (Article 8 (3)); “The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competencies are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law” (Article 8 (4)).*

Regarding general international law, point 1 of Article 8 seems to recognize the supra-constitutionality of those norms<sup>10</sup>. Also, in the Article 16 (2) is defined that *“the constitutional precepts concerning fundamental rights must be interpreted and completed in harmony with the Universal Declaration of Human Rights”* which justify the availability of the constitutional legislator to recognize the superior hierarchic position of some international norms. In the case of customary law, they are in an infra constitutional position fundamentally due to the control mechanism of the constitutionality of the customary law.<sup>11</sup> In the case of law derived from international organizations, point 3 of Article 8 of the Portuguese Constitution recognize the supra-constitutional character of those norms but, based on community grounds. However, with new rules about the relationship with EU law, the direct application of the norms does not imply its primacy. As Marrana explain in its analysis, in cases that rules derived from the law of an international organization of which Portugal is member are applied, in the case of conflict with the constitutional regime the court will give primacy to the national law, forcing the political discussion that will lead to the adaptation of the national norms to avoid the same situation in the future.<sup>12</sup> Lastly, regarding EU Law, the situation is predicted in the point 4 of the Article 4 of the Portuguese Constitution, stating that *“The provisions of the treaties that govern the European Union and the norms issued by its institution in the exercise of their respective competences are applicable in Portuguese international law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law”*. The conclusion of this, is, once transferred the competence to the European level, the national legislator cannot contradict through internal acts the Europeans acts practised in the exercise of the transferred competences.<sup>13</sup>

### **Part III | Right to vote, justice as representation and vulnerability**

#### **3.1. Right to vote and justice as representation**

*When reviewing the national legal framework and, where relevant, the domestic engagement with international and European norms, could you identify arguments proposing different conceptions of justice as representation. Please specify whether these were part of court’s reasoning or parties’ arguments, and if the latter, provide any relevant information that could help evaluate who mobilized the law to achieve greater justice (eg NGOs, etc.).*

*Please refer to background paper (Deliverable 3.3), section 2) Subsection: **Error! Reference source not found.** for relevant information.*

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<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*

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

During our research we didn't find any argument proposing different conceptions of justice as representation. However, we've identified that in all the legislation regulating elections in Portugal, in the Articles about active electoral incapacities, the paragraph about the interdiction of individuals judicially disabled due to a sentence imposed by a court of law was revoked.

Regarding the right to vote of persons living with disabilities and foreigners living in Portugal, it seems that there have been none or little discussion about the disenfranchisement of certain persons. For persons living with disabilities, as we've said the Committee on the Rights of People Living with Disabilities recommend to Portugal to make changes in the legal framework to enable (mental) disabled persons to vote. However, at the moment there's no party who are proposing this. Nonetheless, it was recently announced by the State Secretary for the Inclusion of the Persons living with Disabilities that in the next elections for the European Parliament, blind persons will be able to vote by themselves through braille ballots that will be introduced in the voting system. This was approved by mostly all the parties represented in the Parliament. It should also be noted that in our research we didn't find any NGO's or Associations of disabled persons who were actively questioning the disenfranchising of mentally disabled persons. Regarding the right to vote, they attention was more focused in accessibility of the polling stations and alternatives forms of ballots, not directly the fact that mentally disabled persons being equated to minors and consequently being inhibited of voting.

In the case of foreigners, it also seems that, at the moment, the existing national legal framework is not being contested – either by parties or by foreigner's association. Apparently, the fact that all EU citizens are able to vote, plus citizens from Brazil and others countries with reciprocity agreements, it's a fairly accepted situation. However, the major problem seems to be the low participation of the non-nationals electors. In all EU member state, the representation of non-nationals is disproportional to their demographic concentrations. This is mainly due to the fear of disillusionment by the foreign electorate; damages produced by the political parties that seek vote without ensuring eligible places for the foreigners; the minimum length of residency and the non-automaticity of electoral registration – as it's the case of Portugal.<sup>14</sup> Between 1997 (the first electoral period in which immigrants could participate) and 2009 there weren't fundamental changes in the number of non-national registered to vote.<sup>15</sup> The low participation by immigrant's in Portugal is mainly due to the lack of information about their civil rights.

Therefore, as Salát<sup>16</sup> (2018) explains, if we consider that representative justice is that 'every voice gets potentially heard as has an equal weight' it's difficult to say that the Portugal electoral law is just since a part of the population is disenfranchised. In the case of non-nationals, and in the light of the absence of debate on the subject, this is a case of justice as representation but also justice as redistribution. This because, considering that the major part of the migrating persons belongs to a low-middle class, their interests and preoccupation are more focussed in finding/maintaining a job, being able to eat, afford a house, to apply to a permanent residency in some cases and not so much in having their political rights recognized. On another hand, even if an individual as the financial and emotional capacity to claim the right to vote and make an appeal to court it is expected that all cases will be

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<sup>14</sup> Ruivo (n 6).

<sup>15</sup> *ibid.*

<sup>16</sup> Orsolya Salát, 'Report on a theoretical review of the conceptualization and articulation of justice in legal theory' (2018)

observed under the scope of the reciprocity agreements. The existence or not of an agreement between Portugal and another country is more related with the history of the other country or the relationship between the two than it is related solely with the willingness of Portugal to attribute the right to vote to all non-nationals. The notion of 'reciprocity agreement' is problematic in the sense that the political involvement of a non-nationals depends, sometimes, on the choices of the Government of their countries of origin, who can possibly be undemocratic governments. Although is a form of the Portuguese government to protect Portuguese's rights in other countries, is also a form of discrimination based on nationality. Thus, perhaps, a new discussion about the existence of reciprocity agreements should be enhanced and this initiative has to start from the individuals themselves, in a bottom-up discussion and this could only be possible if other life conditions are fulfilled.

In the case of persons with disabilities, the discussion also seems to fall outside conceptions of law. First of all, the question of accessibility – law indeed provides that polling stations needs to be accessible but there is no obligation to either provide a portable voting booth in case the edifice is not accessible. Also, the absence of alternative forms of voting engendered the possibility to someone with a physical disability to vote in absolutely secrecy. However, once more, this discussion needs to be brought up from the bottom, persons with disabilities and their representatives in each municipality need to identify the difficulties and absences during the electoral period, such as issues in the dissemination of information in accessible formants; on the day of election, if accessibility is guaranteed to all, or not, and why.

### **3.2. Vulnerability and the right to vote**

*Does the concept of vulnerability play a role in protecting the right to vote or defining who is entitled to vote and how in your country? Please explain how, and provide some representative illustrations.*

*Please refer to background paper (Deliverable 3.3), section **Error! Reference source not found.** for relevant information.*

We could not find any representative example of how vulnerability plays a role in protecting the right to vote. On the contrary, especially regarding the right to vote of persons living with disabilities, it seems that when it's about mental disabilities the mechanisms function on the other sense. The vulnerability of those persons seems to be a reason for disenfranchising and to not recognize any capacity of them being able to make political decisions or to inform any guardian of their choice of their political opinions. Of course, it should be considered that this is a conclusion drawn from the absence of debate about altering the actual legal framework that disenfranchised those persons. The same happens with the right to vote of foreigners, the absence of discussion about the disenfranchisement of immigrants who are from countries who do not have reciprocities agreements with Portugal it's a sign of the vulnerability in which those persons live. Not only those people do not have the opportunity to have a say in all the policies and measures created by the government that impact directly their life, but also they do not have the opportunity to be represented in the government, since the right to vote is associated with the right to be elected. If we consider vulnerability as 'how people are positioned in society'<sup>17</sup> both persons with mental disabilities and immigrants from other countries that those defined by law to be able to vote are here in a worse, more vulnerable position to injustices in comparison with their fellow citizens.

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<sup>17</sup> Marie-Pierre Granger and others, 'Justice in Europe Institutionalized : Legal Complexity and the Rights of Vulnerable Persons' (2018) 26.

## Conclusion

There are, almost undoubtedly, a link between justice as representation and the right to vote. As explained in D3.3., the idea is of “ensuring the fairness of political processes used to determine which ends ought to be adopted (...). Political representation is about giving people a voice on the political stage”.<sup>18</sup> The political participation of vulnerable groups seems to be particularly important for them to be able of deciding who will decide for them and to bring their claims to discussion. Thus, the question behind this report was to know if the right to vote is granted to persons living with disabilities and foreigners in Portugal. Conclusions are that the active electoral participation of individuals belonging to those two groups it’s partly protected, but inside the groups itself there are differences between individuals.

In the case of foreigners, a report published in 2003 by the International Covenant on Civil and Political Rights it’s stated, about Portugal, that: “the Committee welcomes the granting to foreigners of the rights to vote and to be elected in local elections, as well as the recognition of broader political rights for citizens of Portuguese speaking countries, under condition of reciprocity”.<sup>19</sup> The idea that “political rights for citizens of Portuguese speaking countries” are granted is a little too broad when looking to the reality. Citizens from Angola, Mozambique, São Tome, Guinee Bissau are out of those agreements, and consequently a major part of the Portuguese inhabitants are left out of the electoral process – without mentioning immigrants from other countries that are not Portuguese speaking countries or from EU member states.

In the case of persons living with disabilities, a report of 2014 (CRPD, 2014), the Committee identified that: “Concerning citizens with intellectual disabilities, (...) do not enjoy electoral capacity”. And also: “However, citizens affected by illness or clear physical disability do enjoy active and passive electoral capacity”. Two years after that, the CPRD commented on the new report: “The Committee notes with deep concern that in the State party a large number of persons with disabilities are subjected to full or partial guardianship and therefore deprived of such rights as the right to vote (...). The Committee recommends that the State party take appropriate measures to ensure that all persons with disabilities who have been deprived of their legal capacity can exercise all the rights enshrined in the Convention, including the right to vote (...)” (CRPD,2016). It seems that, at least for now, the enfranchisement of persons with intellectual disabilities is out of question, independently of the recommendation of the Committee. In media and websites of disabled associations, the major problem regarding disabled persons and the right to vote is about the accessibility of polling station and the preparation of alternative ways to enable blind persons to vote (alone, since they can vote accompanied by someone of their trust). Maybe the intellectual disabled right to vote is the next claim on justice as representation by this vulnerable groups, although during our research it didn’t even seems to having been proposed to reflection.

Statistically there are 416.682 immigrants<sup>20</sup> with legal residence in Portugal. Of those, 182.694 are from UE countries, 85.887 from African countries and 53.552 from Asian countries. From the total of immigrants with legal residence, only 27.895 were registered to vote (14.194 from EU countries and

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<sup>18</sup> *ibid* 20.

<sup>19</sup> Human Rights Committee, ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding Observation of the Human Rights Committee Portugal (CCPR/CO/79/PRT).’

<sup>20</sup> Available at:

<https://www.pordata.pt/Portugal/Popula%C3%A7%C3%A3o+estrangeira+com+estatuto+legal+de+residente+total+e+por+algumas+nacionalidades-24>

13.701 from non-EU countries). This means that 388 787 didn't have the possibility to vote. In the absence of available data, we cannot know if they weren't registered because a) didn't want to, since the registration is voluntary; b) they cannot do it because they are not from one of the countries with reciprocity agreements with Portugal.

In 2001 (last data available<sup>21</sup>), there were 70.994 persons with mental disabilities in Portugal. All the 18 years old of those 70.994 didn't vote in the last elections for: President of the Republic (2001, 2006, 2011,2016); Local Elections (2001,2005,2009,2013,2017); Assembly of the Republic (2005,2009,2015) and European Parliament (2001,2006,2011,2016). It's fifteen elections in which a part of the population was disenfranchised and seventeen years without even having any discussion about the problem, even after the ratification of the Convention on the Rights of Persons with Disabilities and the recommendation of the Committee to work on that sense.

We can conclude from our research that Portugal have been putting some effort in the sense of guaranteeing that most of the citizen's does enjoy the right to vote. However, there are a considerable part of the Portuguese society who do not enjoy that right. Despite the fact that we couldn't find any cases in which the disenfranchisement of certain persons was bring to court, the lack of information about the claims of persons with disabilities and immigrants on this subject difficult to know the real impact that their disenfranchisement does have in their life's. Further research, in the future, may disclose more information and also, bring forward the discussion at a more individual level, since it seems that the demand for the right to vote is not a priority of the agenda of those vulnerable groups.

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<sup>21</sup> Available at:

[https://www.pordata.pt/Portugal/Popula%C3%A7%C3%A3o+residente+com+defici%C3%A7%C3%A3o+segundo+os+Censos+total+e+por+tipo+de+defici%C3%A7%C3%A3o+\(2001\)-1239](https://www.pordata.pt/Portugal/Popula%C3%A7%C3%A3o+residente+com+defici%C3%A7%C3%A3o+segundo+os+Censos+total+e+por+tipo+de+defici%C3%A7%C3%A3o+(2001)-1239)

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