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Author post-print (accepted) deposited by Coventry University's Repository

Original citation & hyperlink:

Stanford, B 2018, 'Compulsory Voter Identification, Disenfranchisement and Human Rights: Electoral Reform in Great Britain' *European Human Rights Law Review*, vol. 23, no. 1.

ISSN 1361-1526

Publisher: Sweet and Maxwell

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Compulsory Voter Identification, Disenfranchisement and Human Rights: Electoral Reform in Great Britain

Ben Stanford*

Abstract

This article examines the human rights implications of the British Government's proposals to reform the electoral process in Great Britain, with a particular focus upon the Conservative Party's 2017 manifesto pledge to introduce compulsory identification requirements in UK elections. Moreover, this article addresses the issue of voter identification laws in light of the recent announcement that voters in a pilot study will be required to produce some form of identification before voting in the May 2018 English local elections. Bearing in mind the experiences of compulsory voter identification laws in other countries, most notably the United States of America, and the requirements of Article 3 of the First Protocol to the ECHR, this article argues that the British Government must not impose requirements that may risk disenfranchising a large proportion of the electorate.

(1) Introduction

In September 2017 the British Government announced that a pilot scheme to combat electoral fraud would be trialled in the May 2018 local elections in England which would require individuals in five areas to present some form of identification before voting in polling stations.¹ Whilst this requirement is now familiar practice in Northern Ireland,² voters in the rest of the United Kingdom (UK) have historically been able to cast their votes in person simply by confirming their name and address. Despite being routinely practiced in many countries throughout the world, placing a legal obligation upon members of the electorate to produce identification before voting has often been criticised for dissuading voters as well as, more troublingly, disenfranchising poor, minority and elderly citizens due to the fact that procuring approved forms of identification can be costly and burdensome.³

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¹ Cabinet Office, "Voter ID Pilot to Launch in Local Elections", Press Release (16 September 2017) <https://www.gov.uk/government/news/voter-id-pilot-to-launch-in-local-elections> [Accessed December 18, 2017].

² See the Electoral Office for Northern Ireland www.eoni.org.uk/Home [Accessed December 18, 2017].

³ Although not addressed in this article, another criticism relates to the administration of vast quantities of personal data which raises concerns about the right to respect for privacy.

This article will discuss the recent UK proposals from a human rights perspective, primarily the European Convention on Human Rights (ECHR) which guarantees a number of rights essential to political participation, not least of all Article 3 of the First Protocol to the Convention,⁴ but also other international sources when relevant.⁵ Should the pilot scheme be deemed a success and compulsory voter identification is implemented across the entire country, this article argues that the UK Government should be mindful of its human rights obligations and the experiences in other countries that impose similar identification requirements. At the same time, the article may be of interest to stakeholders in other European countries which have similar practices.

Following this Introduction, section two discusses the rationale and the logistics of the pilot scheme that will be trialled in the 2018 local elections in England, before analysing how compulsory voter identification has been received elsewhere, in particular the United States of America (USA), to identify what lessons could be learned and what mistakes could be avoided. In light of this discussion, section three outlines and applies the human rights framework concerning the 'right to vote' before section four concludes and evaluates the UK proposals.

(2) The Introduction of Compulsory Voter Identification and the Dangers of Disenfranchisement

In 2014 the Electoral Commission recommended that voters in Great Britain should be required to prove their identity when casting their vote, suggesting that voting in person "remains vulnerable to personation fraud" due to the "few checks" in place to prevent impersonation, which could be even more of a risk if electoral registration and other voting methods become more secure.⁶ The Electoral Commission followed up these suggestions in 2015 with a proposed proof of identity scheme that could be applied in elections in Great Britain, drawing upon the experiences of Northern Ireland and Canada, and taking into account concerns about compulsory identification.⁷ The Commission suggested that only the following forms of identification should be allowed

⁴ Article 3 of the First Protocol to the ECHR states: "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".

⁵ See for example the EU Charter of Fundamental Rights Arts. 39-40 and the International Covenant on Civil and Political Rights 1966 Art. 25, which go further than the ECHR in several ways.

⁶ Electoral Commission, "Electoral Fraud in the UK: Final Report and Recommendations" (January 2014) https://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/164609/Electoral-fraud-review-final-report.pdf [Accessed December 18, 2017].

⁷ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain" (December 2015) https://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/194719/Proof-of-identity-scheme-updated-March-2016.pdf [Accessed December 18, 2017].

when voting in person due to certain security features and the verification process when obtaining the document: a photographic driving licence, passport, Proof of Age Standards Scheme (PASS) card, military identification card, police identification card, a firearms licence, and certain photographic public transport passes.⁸

Proposals to reform electoral practice did not feature in the Conservative Party 2015 manifesto but, amongst other electoral reforms, the 2017 Conservative Party manifesto pledged to “legislate to ensure that a form of identification must be presented before voting”.⁹ Following up on that pledge, the Cabinet Office revealed in September 2017 that a pilot study requiring eligible voters to present identification would be conducted in the next round of local elections in May 2018 in five areas of England: Woking, Gosport, Bromley, Watford and Slough.¹⁰ According to Chris Skidmore, the Minister for the Constitution:

For people to have confidence in our democratic processes we need to ensure that our elections are safeguarded against any threat or perception of electoral fraud. The current situation of people simply pointing out their name without having to prove who they are feels out of date when considering other safeguards to protect people’s identity. It is harder to take out a library book or collect a parcel at a post office than it is to vote in someone’s name.¹¹

According to the announcement, the pilot study will test a variety of means of identification which will be set by each respective council, but the trial will involve “both photo ID and non-photo ID to see what is most effective and efficient”.¹² The Electoral Commission has pledged to publish their own research on the issue of compulsory voter identification following the pilot scheme in the English local elections in May 2018.¹³

The proposals have attracted a great deal of media attention,¹⁴ some strong opposition from campaigning groups,¹⁵ and considerable political opposition, primarily from the Labour Party whose supporters argue that it

⁸ Electoral Commission, “Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain” (December 2015), para. 4.7.

⁹ Conservative Party Manifesto 2017, p. 43.

¹⁰ Cabinet Office, “Voter ID Pilot to Launch in Local Elections”, Press Release (16 September 2017).

¹¹ Cabinet Office, “Voter ID Pilot to Launch in Local Elections”, Press Release (16 September 2017).

¹² Cabinet Office, “Voter ID Pilot to Launch in Local Elections”, Press Release (16 September 2017).

¹³ The Chief Executive of the Electoral Commission confirmed that “an independent, statutory evaluation of the pilot schemes” will be published in summer 2018.

¹⁴ See for example J. Elgot, “Voters to be Asked for ID in Trials of System to Combat Electoral Fraud” (September 16, 2017), *The Guardian*, <https://www.theguardian.com/politics/2017/sep/16/voters-to-be-asked-for-id-in-trials-of-system-to-combat-electoral> [Accessed December 18, 2017]; T. Peck, “Government to Trial Photo ID at Polling Stations to Combat Voter Fraud” (September 15, 2017), *The Independent*, <http://www.independent.co.uk/news/uk/politics/photo-id-identification-voter-fraud-pickles-review-a7949396.html> [Accessed December 18, 2017].

¹⁵ Electoral Reform Society, “Opposing Voter ID” <https://www.electoral-reform.org.uk/campaigns/upgrading-our-democracy/voter-id/> [Accessed December 18, 2017].

will be their traditional voter demographic that will be most affected.¹⁶ To date however, there has been little academic commentary on the proposals, or similar European practices, from a legal or human rights perspective.

One possible explanation for this is that compulsory voter identification is not a wholly novel concept to the UK, as voters in Northern Ireland have been required to submit some form of identification since 1985. At the same time, many European countries require (or can request) voters to produce some form of identification when voting in polling stations, for example, France,¹⁷ Germany,¹⁸ Norway,¹⁹ and Spain.²⁰ Whilst the issue has attracted considerable attention in some regions where discrimination has been a widespread problem in the past, in particular Africa and Latin America,²¹ and the USA,²² there has been a considerable lack of scrutiny in Europe. This divergence is, to some extent, understandable, given the blatant racial discrimination that has shaped much of the political history of the USA and the turbulent political climates that still exist in many parts of the world, but one must not forget that it took many centuries in the UK for the franchise to expand beyond the narrow circle of wealthy middle and upper class men to also include women, the young, and the working class.²³

At this stage, the experiences in Northern Ireland and the USA warrant closer examination; the first due to its obvious cultural, legal and political connection to England and the European human rights framework, and the latter due to the significant legal challenges that have played out in various US states which expose how controversial compulsory identification can be when fundamental rights are at stake. The legal challenges that have arisen in the USA will provide some clues as to the possible rights-based complaints that may arise in England if the proposals are implemented across the country. Furthermore, in contrast to the experience in Northern Ireland, the fierce opposition to strict compulsory identification laws in some US states demonstrates

¹⁶ See for example S. Bush, "Is the Government's Plan for Voter ID an Attack on Labour Voters?" (May 18, 2017), *New Statesman*, <https://www.newstatesman.com/politics/staggers/2017/05/government-s-plan-voter-id-attack-labour-voters> [Accessed December 18, 2017]; B. Kentish, "Government Plans to Force Voters to Show ID Roundly Condemned" (December 27, 2016), *The Independent*, <http://www.independent.co.uk/news/uk/politics/government-plans-voter-id-checks-condemned-eric-pickles-tower-hamlets-ken-livingstone-a7497501.html> [Accessed December 18, 2017].

¹⁷ Code Électorale (Electoral Code) Article L62.

¹⁸ Bundeswahlordnung (Federal Election Code) s. 56.

¹⁹ Representation of the People Act (the Election Act) (Act No. 57 of 28 June 2002 relating to parliamentary and local government elections) s. 8(4).

²⁰ Ley Orgánica (Organic Law) 5/1985 (19 June) of the General Electoral Regime Art. 85.

²¹ The Carter Center, *Voter Identification Requirements and Public International Law: An Examination of Africa and Latin America* (2013) <https://www.cartercenter.org/resources/pdfs/peace/democracy/des/voter-identification-requirements.pdf> [Accessed December 18, 2017].

²² See for example R. K. Scher, *The Politics of Disenfranchisement: Why is it so Hard to Vote in America?* (Routledge, 2011); D. J. Hopkins, M. Meredith, M. Morse, S. Smith & J. Yoder, "Voting but for the Law: Evidence from Virginia on Photo Identification Requirements" (2017) 14 *Journal of Empirical Legal Studies* 79; P. Aschenbrenner, "United States: Voter Identification 'ID' Cases" (2013) *Public Law* 184; C. Watts, "Road to the Poll: How the Wisconsin Voter ID Law of 2011 is Disenfranchising its Poor, Minority, and Elderly Citizens" (2013) 3(1) *Columbia Journal of Race and Law* 119.

²³ It was not until the Representation of the People Act 1928 when equal suffrage was finally established in the UK.

how varied the political and legal responses to compulsory identification have been, which should provide the UK authorities with plenty of food for thought.

In Northern Ireland eligible voters have been required to present identification when voting in person in polling stations since 1985, with photographic identification being needed since 2003.²⁴ Voters are required to produce one of seven forms of photographic identification when voting in person.²⁵ Specifically for this purpose the Electoral Office in Northern Ireland established the Electoral Identity Card (EIC) to serve as one of the acceptable forms of identification, which individuals can apply for by post or in person if they do not hold one of the other forms of identification. If applying for an EIC in person, the individual merely has to be on the electoral register and provide their National Insurance Number.²⁶ Crucially, no direct cost is incurred when registering for the EIC in this way.

In contrast to the relatively smooth and uncontentious practice of compulsory voter identification in Northern Ireland, similar requirements in some US states have proven much more controversial due to the perceived detrimental impact upon the ability of black and other minorities to vote,²⁷ as well as the burdens imposed on elderly or disabled members of the electorate. Between 1965 and 2013, several states in the USA had to seek Federal approval before amending their electoral rules, due to the historic racial discrimination in those states.²⁸ However, following the US Supreme Court decision in *Shelby County v Holder* in 2013 which determined that the formula used to identify which states were to be subject to federal oversight was unconstitutional,²⁹ states are now able to amend their electoral rules more freely.

In that regard, 34 US states currently impose or will soon impose voter identification laws of some kind.³⁰ There have been many significant legal challenges to some of these laws which have generally been dealt with by the respective state's own judicial system, but the US Supreme Court has occasionally intervened, demonstrating how seriously the issue of compulsory voter identification is treated. In recent years, some of

²⁴ The Electoral Fraud (Northern Ireland) Act 2002. The first election that took place with this new requirement in force was the November 2003 Northern Ireland Assembly elections.

²⁵ Voters may use a UK, Irish or EEA driving licence; a UK, Irish or EU passport; a Translink Senior SmartPass; a Translink 60+ SmartPass; a Translink War Disabled SmartPass; or a Translink Blind Person's SmartPass.

²⁶ Electoral Office for Northern Ireland, Electoral Identity Card: How to apply <http://www.eoni.org.uk/Electoral-Identity-Card/How-to-apply> [Accessed December 18, 2017].

²⁷ In addition to the literature already cited, see American Civil Liberties Union, Oppose Voter ID Legislation: Fact Sheet <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> (last updated May 2017) [Accessed December 18, 2017].

²⁸ The Voting Rights Act of 1965.

²⁹ *Shelby County v Holder* 570 US 2 (2013).

³⁰ W. Underhill, Voter Identification Requirements: Voter ID Laws (National Conference of State Legislatures) <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (last updated 5/6/2017) [Accessed December 18, 2017].

the strictest voter identification laws have been challenged in several states, for example, Pennsylvania,³¹ South Carolina,³² North Carolina,³³ Georgia,³⁴ Missouri,³⁵ and perhaps most importantly due to the intervention of the US Supreme Court, Indiana.³⁶

Of these states, the changes to the electoral rules in Georgia in 2005 imposed arguably the strictest compulsory identification rules of all. Following these reforms, voters were required to present photographic identification.³⁷ No State-issued photographic identification was available free of charge, and provisional voting (i.e. allowing an elector to vote subject to a later identification check) was not allowed. Following a civil action complaint, the District Court found that these requirements placed an undue burden on citizens, mostly due to the inconvenience of having to travel to registrar offices to acquire a voter identification card, which was particularly problematic for elderly and disabled electors due to the long queuing periods.³⁸ In response, the Georgian legislature reformed these requirements and now provide free photographic identification, allow other non-photographic forms of identification in polling stations, and provide provisional ballots.³⁹

In Missouri, which also implemented strict identification requirements in 2006, a free form of photographic identification was provided by the state but the Missouri Supreme Court struck down the law due to the unreasonable hidden costs incurred when individuals applied for this document.⁴⁰ The law was subsequently reformed and voters can now cast their vote if they have photographic identification, a non-photographic form of identification such as a utility bill, or if they possess no form of identification, a provisional ballot may be issued subject to verification.⁴¹

Lastly, in Indiana, which was the first state to have its compulsory voter identification laws challenged before the US Supreme Court, voters are required to present a form of photographic identification issued by the US government or the state itself, which may be provided for free if necessary.⁴² Voters without identification can

³¹ *Viviette Applewhite et al v The Commonwealth of Pennsylvania; Thomas W. Corbett (Governor); Carole Aichele (Secretary of the Commonwealth)* 330 MD (2012).

³² *South Carolina v United States of America and Eric Himpton Holder (Attorney General of the United States) and James Dubose et al* 898 F. Supp. 2d 30 (DDC, 2012).

³³ *North Carolina State Conference of the NAACP v McCrory*, 831 F. 3d 204 (4th Cir. 2016).

³⁴ *Common Cause / Georgia League of Women v Billups* 439 F. Supp. 2d 1294 (N. D. Ga. 2006).

³⁵ *Weinschenk v State of Missouri* 203 S. W. 3d 201 (Mo. banc 2006).

³⁶ *Crawford v Marion County* 553 US 181 (2008).

³⁷ *Common Cause / Georgia League of Women v Billups* 439 F. Supp. 2d 1294 (N. D. Ga. 2006). Individuals challenged the 2005 Amendment to the Official Code of Georgia (OCGA) (Act. No. 53) ("The 2005 Photo ID Act").

³⁸ *Common Cause / Georgia League of Women v Billups* 439 F. Supp. 2d 1294 (N. D. Ga. 2006).

³⁹ OCGA § 21-2-417, § 21-2-417.1 and § 21-2-418 (2016).

⁴⁰ *Weinschenk v State of Missouri* 203 S. W. 3d 201 (Mo. banc 2006). Individuals challenged Senate Bill 1014, which was subsequently enacted as MO Rev Stat §115.427, 2006 Mo. Laws 728-32.

⁴¹ MO Rev Stat § 115.427 (2016).

⁴² *Crawford v Marion County* 553 US 181 (2008).

be provided with a provisional ballot, but they must present valid identification afterwards. The US Supreme Court upheld the Indianan identification law, finding that the Indianan legislature had legitimate reasons to require identification and the burdens imposed on the electorate affected a minimal amount of people.⁴³

Demonstrating how current the issue of compulsory identification still is in the USA, a recent bid by the North Carolina state legislature to have its strict identification law reinstated was considered by the US Supreme Court, but ultimately rejected.⁴⁴ Clearly, the response to compulsory voter identification laws in some US states in recent years paints a considerably different picture to the experience in Northern Ireland. In contrast to the relatively smooth practice of voter identification laws in Northern Ireland, the legal challenges raised in some US states provides the UK, and Europe in general, with some stark warning signs about what kinds of requirements can engage fundamental civil rights and, if unreasonably burdensome, violate them.

(3) Compulsory Voter Identification and the European Convention on Human Rights

(a) The Human Rights Framework

In matters of democracy and political rights, the most significant international obligations that bind almost all European States stem from (or are complemented by) the ECHR. The European Court of Human Rights has repeatedly stressed how fundamental democracy is to the ECHR despite the fact that no universal legal definition of democracy exists.⁴⁵ On a general level, the broad concept of “democracy” and a “democratic society” underpins much of the content of the ECHR.⁴⁶ Most significantly, the Court has stated that democracy “is the only political model contemplated in the Convention and the only one compatible with it”.⁴⁷

⁴³ *Crawford v Marion County* 553 US 181 (2008).

⁴⁴ C. Mindock, “Supreme Court Thwarts Voter ID Law that Targeted Black Voters with ‘Almost Surgical Precision’” (May 15, 2017), *The Independent*, <http://www.independent.co.uk/news/world/americas/us-politics/north-carolina-voter-id-law-black-voters-supreme-courts-struck-down-dismissed-a7737036.html> [Accessed December 18, 2017].

⁴⁵ J. Vidmar, “Judicial Interpretations of Democracy in Human Rights Treaties” (2014) 3(2) *Cambridge Journal of International and Comparative Law* 532.

⁴⁶ The Preamble of the ECHR states that signatories are “Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend”. Certain rights may be restricted when, *inter alia*, a restriction is “necessary in a democratic society”. See also Arts 6(1), 8(2), 9(2), 10(2), 11(2), Protocol 4 Arts. 2(2)-(3) to the ECHR.

⁴⁷ See for example *Alekseyev v Russia* (App. Nos4916/07, 25924/08 & 14599/09), judgment of 21 October 2010 at [70]; *Church of Scientology Moscow v Russia* (2008) 46 E.H.R.R. 16 at [74]; *Christian Democrat People’s Party v Moldova* (2007) 45 E.H.R.R. 13 at [63]. For analysis see H.-M. T. Napel, “The European Court of Human Rights and Political Rights: The Need for More Guidance” (2009) 5(3) *European Constitutional Law Review* 464.

The ability of individuals to participate in the political life of the community is guaranteed in a number of ways, not least of all the freedom of thought conscience and religion under Article 9, the freedom of expression under Article 10 and the freedom of assembly and association under Article 11. However, for the purposes of this article, Article 3 of the First Protocol to the ECHR requires contracting parties 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”.⁴⁸

Despite the fact that Article 3 of the First Protocol is phrased in general terms, which requires States to “hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom”,⁴⁹ the Court has confirmed that Article 3 includes the implied rights to vote and to stand for election,⁵⁰ and to sit as a member of the legislature if elected.⁵¹ Such is the importance of these rights that the Court has stressed that they are “crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law”.⁵²

The European Court has had to deal with a whole variety of issues concerning Article 3 of the First Protocol and disenfranchisement. For example, the Court has found a violation of Article 3 of the First Protocol in the following circumstances: the banning of all individuals placed under protection on psychiatric grounds from voting without taking into account the actual mental faculties of individuals;⁵³ the barring of individuals facing bankruptcy proceedings from voting when the ban served no purpose other than to belittle them;⁵⁴ and, in the context of Cyprus, the banning of Turkish Cypriots from voting in national elections.⁵⁵ On the other hand, the Court has accepted that placing restrictions upon who can vote may be necessary, for example, when imposing a minimum age in order to ensure the maturity of the electorate,⁵⁶ or when restricting voter eligibility to individuals with continuous or close links to the country concerned.⁵⁷

⁴⁸ See also ICCPR Art. 25(b).

⁴⁹ See for example *Yumak & Sadak v Turkey* (2009) 48 E.H.R.R. 4 at [109]; *Hirst v United Kingdom (No. 2)* (2006) 42 E.H.R.R. 41 at [56]; *Grosaru v Romania* (2015) 61 E.H.R.R. 1 at [42].

⁵⁰ *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 E.H.R.R. 1 at [46-51]; *Sitaropoulos & Giakoumopoulos v Greece* (2013) 56 E.H.R.R. 9 at [63]; *Scoppola v Italy* (No. 3) (2013) 56 E.H.R.R. 19 at [81]; *Hirst* (2006) 42 E.H.R.R. 41 at [57]. See also EU Charter of Fundamental Rights Arts 39-40; ICCPR Art. 25(b).

⁵¹ *Yumak & Sadak* (2009) 48 E.H.R.R. 4 at [33].

⁵² *Hirst* (2006) 42 E.H.R.R. 41 at [58]; *Scoppola* (2013) 56 E.H.R.R. 19 at [82].

⁵³ *Alajos Kiss v Hungary* (2013) 56 E.H.R.R. 38.

⁵⁴ *Albanese v Italy* (App. No.77924/01), judgment of 23 March 2006.

⁵⁵ *Aziz v Cyprus* (2005) 41 E.H.R.R. 11.

⁵⁶ *Melnychenko v Ukraine* (2006) 42 E.H.R.R. 39; *Luksch v Germany* (App. No.35385/97), decision of 21 May 1997.

⁵⁷ *Py v France* (2006) 42 E.H.R.R. 26; *Luksch* (App. No.35385/97), decision of 21 May 1997; *Hilbe v Liechtenstein* (App. No.31981/96), decision of 7 September 1996. See also R. Lappin, “The Right to Vote for Non-Resident Citizens in Europe” (2016) 65(4) *International & Comparative Law Quarterly* 859.

In the UK, the most contentious issue that raises persistent moral and legal questions about disenfranchisement stems from the blanket ban on prisoners being able to vote. In this respect the UK is one of the few countries in Europe to operate a blanket ban and completely prohibit prisoners from casting their vote in elections, drawing repeated criticism from the European Court of Human Rights.⁵⁸ However, it appears that the UK's hard-line approach may be eased somewhat in the near future, following the announcement that a limited number of prisoners may be able to vote, namely, those sentenced to less than one year of imprisonment and who are on day release on the day of an election.⁵⁹

When dealing with the issue of disenfranchisement the Court has noted that the right to vote is not a privilege,⁶⁰ and that the presumption in democratic States "must be in favour of inclusion" which has been illustrated by European history where the franchise has been gradually extended well beyond narrow circles defined by wealth and gender.⁶¹ Inherent to the ECHR, but also stressed in other sources of international law, the basic principle in democracies is one of universal suffrage.⁶²

Nevertheless, as with many other human rights, the European Court of Human Rights has made it clear that the right to vote is not absolute, but rather, that it contains implied limitations.⁶³ States are granted a wide margin of appreciation when it comes to organising and running electoral systems which reflects the historical development, cultural diversity and varied political thought that exists throughout Europe.⁶⁴ Even so, the Court has stressed that it determines whether States have met the requirements of Article 3 of the First Protocol.⁶⁵ Crucially, the Court has emphasised that the conditions imposed by a State must not curtail the rights in question in a way that impairs their very essence and effectiveness, and that the conditions must be proportionate and pursue a legitimate aim.⁶⁶

⁵⁸ See for example *Hirst* (2006) 42 E.H.R.R. 41; *Greens and MT v United Kingdom* (2011) 53 E.H.R.R. 21; *McHugh and Others v United Kingdom* (App. Nos.51987/08 and 1014 others), judgment of 10 February 2015. The issue has also arisen in the context of the European Charter of Fundamental Rights and the European Court of Justice has dealt with the issue in respect of elections to the European Parliament. See *H. v. Eijken & J. W. v. Rossem*, "Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship?" (2016) 12(1) *European Constitutional Law Review* 114.

⁵⁹ S. Foster, "Prisoner Voting: The Right to Vote: But is it Enough?" (2017) 181(41) *Criminal Law and Justice Weekly* 736.

⁶⁰ *Hirst* (2006) 42 E.H.R.R. 41 at [59].

⁶¹ *Hirst* (2006) 42 E.H.R.R. 41 at [59].

⁶² *Hirst* (2006) 42 E.H.R.R. 41 at [59]. See also EU Charter of Fundamental Rights Art. 39(2); ICCPR Art. 25(b).

⁶³ *Hirst* (2006) 42 E.H.R.R. 41 at [60]; *Sitaropoulos & Giakoumopoulos* (2013) 56 E.H.R.R. 9 at [64].

⁶⁴ *Mathieu-Mohin and Clerfayt* (1988) 10 E.H.R.R. 1 at [52]; *Labita v Italy* (2008) 46 E.H.R.R. 50 at [201]; *Hirst* (2006) 42 E.H.R.R. 41 at [60-61].

⁶⁵ *Mathieu-Mohin and Clerfayt* (1988) 10 E.H.R.R. 1 at [52]; *Hirst* (2006) 42 E.H.R.R. 41 at [62]; *Sitaropoulos & Giakoumopoulos* (2013) 56 E.H.R.R. 9 at [64].

⁶⁶ *Mathieu-Mohin and Clerfayt* (1988) 10 E.H.R.R. 1 at [52]; *Hirst* (2006) 42 E.H.R.R. 41 at [62]; *Sitaropoulos & Giakoumopoulos* (2013) 56 E.H.R.R. 9 at [64].

Moreover, the Court has stressed that the free expression of the people must not be thwarted by the conditions imposed by a State, in the sense that the conditions “must reflect, or not run counter to, the concern to maintain the integrity and effectiveness” of the election process.⁶⁷ Lastly, the Court has stressed that the exclusion of any group of the public must be reconcilable with the purpose of Article 3 of the First Protocol.⁶⁸

At this stage it may also be pertinent to consider the impact of Article 14 of the ECHR and the prohibition of non-discrimination when it comes to the right to the right to vote.⁶⁹ Whilst compulsory voter identification laws that impact *all* members of the electorate obviously do not demonstrate direct discrimination against any particular group or groups of the electorate, the next section argues that strict identification laws which impose considerable burdens upon some groups may inadvertently verge upon indirect discrimination. In that regard the European Court of Human Rights has made it clear that “a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group”.⁷⁰ Thus, if a neutral rule or practice is significantly more negative in its effects upon a protected group, as compulsory identification laws have proven to be in some US states, there may be a credible complaint of indirect discrimination against the authorities.

(b) *The English Local Elections 2018 and Electoral Reform in Great Britain*

In light of the legal framework just outlined and the experience in other countries discussed earlier, this section assesses the UK’s proposals and attempts to identify what issues concerning the right to vote under Article 3 of the First Protocol to the ECHR are likely to arise. Clearly, for compulsory voter identification to comply with the requirements of the ECHR, a number of issues need to be carefully considered. Crucially, such a requirement must not curtail the right to vote in a way that impairs its essence and effectiveness; the conditions imposed must be proportionate and pursue a legitimate aim; the free expression of the people must not be thwarted; the requirement must be concerned with the integrity and effectiveness of the election process; and,

⁶⁷ *Yumak & Sadak* (2009) 48 E.H.R.R. 4 at [109]; *Hirst* (2006) 42 E.H.R.R. 41 at [62]; *Scoppola* (2013) 56 E.H.R.R. 19 at [84].

⁶⁸ *Aziz* (2005) 41 E.H.R.R. 11 at [28]. See also EU Charter of Fundamental Rights Arts. 39-40 which requires Member States of the European Union to allow European citizens to vote and stand as candidates in European and municipal elections under the same conditions as nationals of that State.

⁶⁹ Article 14 of the ECHR provides that the enjoyment of human rights must be secured “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. The ICCPR also prohibits any restrictions upon the right to vote which are discriminatory and any restrictions that are “unreasonable”. See ICCPR Art. 25.

⁷⁰ *Biao v Denmark* (2017) 64 E.H.R.R. 1 at [103]; *D.H. and Others v the Czech Republic* (2008) 47 E.H.R.R. 3 at [184]; *Zarb Adami v Malta* (2007) 44 E.H.R.R. 3 at [80].

if relevant, the exclusion of any group of the public must be reconcilable with the purpose of Article 3 of the First Protocol.

When considering voter identification laws several of these important principles can be considered together. Firstly, requiring voters to produce some form of identification when voting in person undoubtedly pursues a legitimate aim. As already discussed, the Cabinet Office has justified the pilot scheme and the overarching proposals for reform on the grounds of combatting electoral fraud,⁷¹ which is essential to the task of maintaining the integrity and effectiveness of the electoral process in Great Britain. Even if conducted on a relatively low scale with little or no bearing upon the results of elections, electoral fraud unquestionably has the potential to reduce the confidence that the general public will place in the democratic process. In this regard, evidence has suggested that voters in Northern Ireland, where photographic identification is required, are generally more confident that the election process is well-ran than the rest of the UK.⁷²

However, a much more challenging question concerns the proportionality of compulsory voter identification and, consequently, the need to determine whether such a requirement will impair the essence and effectiveness of the right to vote. Ultimately, as the European Court of Human Rights has made clear, the free expression of the people must not be thwarted by the imposition of any conditions.

Dealing with these issues together, a number of general observations can be made. First, of the 51.4 million votes cast in the various elections in 2015 in the entire UK, there were 481 allegations of electoral fraud, of which only 123 concerned the actual voting process, which includes not just personification but also breaches of secrecy requirements, tampering with ballot papers, bribery, and treating or undue influence.⁷³ Second, whilst there are obviously a variety of factors to consider when analysing voter turnout, the turnout in Northern Ireland has been the lowest of the four UK regions in the three most recent General Elections (2010, 2015, 2017) that have taken place since the introduction of compulsory photographic identification in Northern Ireland in 2003.⁷⁴ As such, it might be immediately questioned whether personification is sufficiently serious to justify

⁷¹ Cabinet Office, "Voter ID Pilot to Launch in Local Elections", Press Release (16 September 2017).

⁷² Electoral Commission, "Voting in 2017: Understanding Public Attitudes Towards Elections and Voting" (October 2017) https://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/234893/Voting-in-2017-Final.pdf Chart 4.1 [Accessed December 18, 2017].

⁷³ Electoral Commission, "Analysis of Cases of Alleged Electoral Fraud in the UK in 2015" (March 2016) http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/198533/Fraud-allegations-data-report-2015.pdf ps. 3-5 [Accessed December 18, 2017].

⁷⁴ In the 2005 General Election, voter turnout in Northern Ireland was the highest of the UK's four regions. This might be explained, to some extent, by the considerable publicity drive which followed the introduction of compulsory photographic identification in 2003. See Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para. 2.18. For the statistics see Electoral Commission, "Voting in 2017: Understanding Public Attitudes Towards Elections and Voting" Table 2.1.

such a considerable overhaul of the voting process that will place a burden, however minimal that may be, upon the entire electorate.

Bearing this in mind, according to the Electoral Commission's own estimates of the electorate in 2013, approximately 3.5 million electors (7.5% of the electorate) in Great Britain do not own one of the forms of photographic identification that the Commission recommended should be required to vote in polling stations.⁷⁵ In other words, only 92.5% of electors in Great Britain would already have at least one form of acceptable photo identification. If only passports, photographic driving licences and Oyster Photocards were to be accepted this would leave 6 million electors (13% of the electorate) unable to vote.⁷⁶ Even more troubling, if this was limited to just passports and photographic driving licences, the Commission estimated that 11 million electors (24% of the electorate) would be unable to vote.

However, in light of the experience in some US states, a much more complex and problematic issue from the perspective of Article 3 of the First Protocol and Article 14 of the ECHR concerns the impact of compulsory voter identification laws upon certain communities, especially poor, minority and elderly citizens. In this regard, the Electoral Commission has revealed that, according to the 2011 Census, only 66% of individuals who identify as White (Gypsy or Irish Travellers) hold eligible passports, compared to 83% of White (English/Welsh/Scottish/Northern Irish/British) and just under 85% of Mixed/Multiple Ethnic Groups (White and Black Caribbean).⁷⁷ Compulsory identification may also have a detrimental impact upon women, the young and the elderly, who are far less likely to possess a driving licence than middle-aged males. Recent statistics compiled by the Department of Transport in 2016 reveal that in England, 91% of males aged 50-59 own driving licences in comparison to just 29% of females aged 17-20.⁷⁸ Lastly, whilst being a distinct issue in itself, there is also a significant difference in the proportion of certain ethnicities being registered to vote. In 2014, approximately 85.9% people identifying as White were registered to vote, in comparison to 83.7% of the Asian community, 76% of the Black community, 73.4% who identified as Mixed, and just 62.9% who identified as Other.⁷⁹

⁷⁵ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para. 4.10. As noted above, these are: a photographic driving licence, passport, Proof of Age Standards Scheme (PASS) card, military identification card, police identification card, a firearms licence, and certain photographic public transport passes.

⁷⁶ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para. 4.10.

⁷⁷ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para. 4.12.

⁷⁸ Department for Transport, Full Car Driving Licence Holders by Age and Gender: England, 1975/1976 to 2016 (Table NTS0201).

⁷⁹ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para. 4.13.

Although these statistics only paint part of the picture, they reveal that millions of citizens could potentially be disenfranchised if the UK Government decides to implement strict identification laws in the UK. If the Government envisaged a new voting process whereby only passports or driving licences would be deemed acceptable forms of identification, there would be a genuine risk of indirect discrimination against ethnic minorities, women, the young and the elderly. Equally, if a freely available form of photographic identification was established but the individual had to provide expensive forms of Government-issued identification to prove their identity and acquire such a document, the problem would not dissipate.

Acknowledging these issues to some extent, Chris Skidmore, the Minister for the Constitution, has confirmed that whilst participating councils will trial different forms of identification in the pilot scheme in May 2018, no one will have to purchase identification.⁸⁰ Looking further ahead, the Electoral Commission has already recommended that a photographic identity card similar to that offered in Northern Ireland should be made freely available to voters in Great Britain, should photographic identification become compulsory in elections, so as to not disenfranchise the estimated 7.5% of the electorate in Great Britain who do not already possess one of the proposed forms of acceptable identification.⁸¹ Nevertheless, experience in the USA has shown that there can be considerable hidden costs when it comes to attaining freely provided photographic identification, not least of all travel expenditure and the costs incurred when acquiring the necessary evidentiary documents. In contrast, and arguably demonstrating the best solution to this problem, to attain the EIC in Northern Ireland voters can either apply by post by providing a form of photographic identification or a form signed by an elected official, or if applying in person, they must present a national insurance number and be registered on the Electoral Register.⁸²

(4) Conclusions

This article has examined the human rights implications of the British Government's proposals to reform the electoral process in Great Britain and, in particular, the announcement that a pilot study will be carried out in the May 2018 local elections in England, which will require eligible voters to produce some form of identification when voting in polling stations. Whilst the European Court of Human Rights has granted a wide margin of

⁸⁰ C. Skidmore, Minister for the Constitution (26 October 2017) Written Answer No. 108103.

⁸¹ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para. 4.17.

⁸² Electoral Office for Northern Ireland, Electoral Identity Card: How to Apply <http://www.eoni.org.uk/Electoral-Identity-Card/How-to-apply> [Accessed December 18, 2017].

appreciation to States when it comes to the organising and running of electoral systems,⁸³ the Court has made it clear that any conditions that restrict the right to vote must satisfy a number of requirements, not least of that the free expression of the people to choose the legislature must not be thwarted.⁸⁴ In contrast to compulsory identification laws in Northern Ireland which have been received relatively well, recent disputes in several US states indicate to some extent what complaints in respect of civil rights may arise in England and the UK as a whole if the proposals are implemented. These issues should be taken into consideration when the pilot study is carried out, and when assessing whether the UK proposals for electoral reform will comply with the requirements of Article 3 of the First Protocol to the ECHR.

For example, should photographic identification be required in polling stations, it is crucial that the British Government provides a freely available form of photographic identification for voters who do not already possess an acceptable form of identification. Furthermore, the process of applying for this document should not impose any unreasonable burdens, for example, by requiring voters to produce expensive forms of Government-issued identification such as a passport or a driving licence. It is also important that voters in Great Britain should be allowed to cast a provisional vote, subject to verification, should they forget to bring an acceptable form of identification on the day of the election. Ultimately, at a time when voter apathy amongst the electorate is consistently highlighted as a real cause for concern, it might be argued that the Government should not be considering such fundamental reforms, however well-intentioned the rationale may be, in response to what is a relatively insignificant problem and in a way that may in fact discourage or even thwart the free expression of the people to choose the legislature.

⁸³ *Mathieu-Mohin and Clerfayt* (1988) 10 E.H.R.R. 1 at [52]; *Labita* (2008) 46 E.H.R.R. 50 at [201]; *Hirst* (2006) 42 E.H.R.R. 41 at [60-61].

⁸⁴ *Yumak & Sadak* (2009) 48 E.H.R.R. 4 at [109]; *Hirst* (2006) 42 E.H.R.R. 41 at [62]; *Scoppola* (2013) 56 E.H.R.R. 19 at [84].