



Marshall, Pablo (2015) *Criminal disenfranchisement: a debate on punishment, citizenship and democracy*. PhD thesis.

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**University of Glasgow**

**CRIMINAL**

**DISENFRANCHISEMENT**

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**A DEBATE ON PUNISHMENT**

**CITIZENSHIP**

**AND DEMOCRACY**

**Pablo Marshall**

To be submitted in fulfilment of the requirement for the degree of Philosophy Doctor,  
School of Law, College of Social Science, University of Glasgow, January 2015

# ABSTRACT

Many convicted offenders around the world do not vote in elections because they have been disenfranchised, which is the legal deprivation of their voting rights as a consequence of their convictions. Addressing this practice from the perspective of legal and constitutional theory, this dissertation deals with the question of how modern democracies should understand the connection between the right to vote and the commission of a criminal offence. After careful analysis of issues related to the democratic importance of the right to vote, the civic virtue of offenders and the requirements of a democratic punishment, the dissertation argues that disenfranchisement is a practice that constitutes an unjustified exception to the general principle of universal suffrage. However, it may also critically express and shape some of our general ideas about democracy and citizenship. In particular, it is argued that the exclusionary and degrading aspects of disenfranchisement can illuminate inclusionary aspects associated to the right to vote. In making this argument, it is suggested that the right to vote not only works as a right of participation but also embodies a mechanism of democratic recognition. Addressing the current common law jurisprudential trends on disenfranchisement, it formulates a case for a strong judicial review of legislation in cases in which voting eligibility is at stake.

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# ACKNOWLEDGEMENTS

I am grateful towards the School of Law of Glasgow University for the help provided during the more than three years that I spent in Glasgow. This dissertation was supervised by Prof. Emilios Christodoulidis as first supervisor and the Prof. Adam Tomkins as second supervisor. Some other members of the community at the School of Law helped me in different ways: particular gratitude goes to Dr. Awol Allo, Su Bian, Steve Collins, Dr. Marco Goldoni, Prof. Lindsay Farmer, Érika Fontáñez-Torres, Susan Holmes, Prof. George Pavlakos and Nikolas Vagdoutis. I received generous comments from scholars who read some of the chapters. Special thanks to Prof. Antony Duff, Guillermo Jimenez, Paz Irarrazabal and Prof. Peter Ramsay. Thomas Younger and Beth Pearson did not only help me with to correct the style and my English, but were also very good motivators. Dr. Claudio López-Guerra, Dr. Adem Abebe, and Dr. Cormac Behan provided me with very useful unpublished material. I also received feedback during the presentation of some ideas from the dissertation in seminars held in the Universities of Aberdeen, Antwerp, Edinburgh and Glasgow.

Financially, this research was funded by the Government of Chile through the *Programa de Formación de Capital Humano Avanzado* of CONICYT (2012-14), the *Altona Foundation for Philosophical Research* (2011-12), and the *Modern Law Review* (2012-14). I also benefited from a leave granted by the Universidad Austral de Chile (2011-2014).

The support of my parents was essential to my undertaking this research. My friends in Glasgow, most of them without awareness, were very important in keeping me going and concluding this research on time.

# DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Printed Name:

“Once a people begins to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether. That is one of the most invariable rules of social behaviour. The further the limit of voting rights is extended, the stronger is the need felt to spread them still wider, for after each new concession the forces of democracy are strengthened, and its demands increase with the augmented power. The ambition of those left below the qualifying limit increases in proportion to the number of those above it. Finally the exception becomes the rule; concessions follow one another without interruption, and there is no halting place until universal suffrage has been attained”.

Tocqueville, 1835

# INTRODUCTION

**M**any convicted offenders around the world do not vote in elections because they have been legally deprived of their voting rights as a consequence of their convictions. Most countries restrict this measure to those serving prison sentences. Others disenfranchise broader groups of offenders, sometimes covering all those ever convicted for a serious offence.<sup>1</sup> This kind of practice also commonly involves the denial of the right to stand as a candidate in public elections and the right to hold public office, thereby configuring a constellation of exclusions from the public sphere; or in other words, a cancellation of democratic citizenship. It is perhaps for this reason that this practice is important for legal and constitutional theory, which in recent years has focused on the concept of citizenship. However, the relevance of this practice can be extended far beyond.

This work is concerned with the relationship between democracy and disenfranchisement. One could say it has two centres of gravity. It is about the right to vote and its immense but perhaps under-theorised significance for democratic communities. As such, it explores some of the mutual legal and theoretical implications between this right and democracy as a normative ideal. However, it is

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1. See, generally, Ispahani, 2009.

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not a work concerned solely with the right to vote. It seeks to investigate the nature and importance of the right to vote under the influence of disenfranchisement, which may show up aspects that are, in general, “unnoticed and untouched”.<sup>2</sup> In this way, it is also a work about the idea of crime and the figure of the offender or criminal as a relevant subject for analysis in the discourses of law and politics. The connection between these two themes, the right to vote and the offender, informs an inquiry about a practice that constitutes an exception to the general principle of universal suffrage, and so may critically express and shape our general ideas about democracy and citizenship.

The legal practice of criminal disenfranchisement embodies a tension between the idea of democratic participation and the exclusion experienced by those who break the rules prescribed by the community. For example, according to Kant, “no human being in a state can be without any dignity, since he at least has the dignity of a citizen. The *exception* is someone who has lost it by his own *crime*”.<sup>3</sup> Agamben, on the other hand, suggests that the exclusion from citizenship of those condemned to a punishment cannot be seen “as a simple *restriction* of the democratic and equalitarian principle” but as part of a modern “need to redefine the threshold in life that distinguishes and separates what is inside from what is outside”.<sup>4</sup> Kant presents the crime and its consequences as an exception that can be justified according to a rational argument, while Agamben, in contrast, presents it as something that is deeply revelatory about the meaning of the general regime of equality and citizenship. The tensions between explaining the general rule in terms of the exception and vice versa is perhaps an immanent element of the debate on criminal disenfranchisement.<sup>5</sup>

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2. Christodoulidis, 2004:183.

3. Kant, 1996:471-2 (emphasis added).

4. Agamben, 1998:126 (emphasis added).

5. The relationship between citizenship and the crime as clearly expressed in the practice of criminal disenfranchisement has been the concern of numerous and important political philosophers (e.g. Aristotle, Beccaria, Locke, Hobbes, Mill, Montesquieu, Rousseau.). For a review, see Planinc, 1987. See also Ewald, 2002; Manza & Ugger, 2006:24-6.

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The exceptional exclusion of criminal offenders from the general rule of the universal franchise expresses a tension between two of the main democratic aspirations of modernity in which the right to vote can be codified, namely democratic participation and political inclusion. The argument of this dissertation is grounded in that tension.

The importance of participation in democracy can be identified as the driving force of any deprivation of participatory rights, among which voting seems to hold a special place. Democratic participation contributes to how we understand disenfranchisement partly because it expresses the significance of voting deprivation but also because it contains a metric according to which it can be curtailed under certain parameters. Claiming criminal disenfranchisement as a legitimate democratic practice involves the aim of limiting participation without producing a disruption of the general democratic principles. This claim is defended by arguing that disenfranchisement is a democratically justified exception to universal suffrage grounded in a demand of civic virtue or as an expression of democratic condemnation.

The *first* major claim of this dissertation is that this defence of disenfranchisement codified in terms of participation cannot be sustained. This is because, it is argued, democratic participation must be grounded in the presumption that everyone who is regarded as bearing the capacity to follow the law must also be legally equipped with the capacity to participate in the process of law-making and in particular in decisions about what is to be considered criminal conduct. However, this argument cannot be drawn so simply. As Foucault did when he asked “Can we not see here a consequence rather than a contradiction?”<sup>6</sup> one may ask: “What is served by disenfranchisement?”<sup>7</sup>

If criminal disenfranchisement cannot be democratically justified in the metric of participation, and there are numerous signals to indicate that as a practice it embodies punitive degradation and political exclusion, perhaps this practice is revelatory of

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6. Foucault, 1995:272. See also Dilts, 2014:4.

7. Dilts, 2014:17.

another relevant aspect of the right to vote; an aspect of democracy that is irreducible to the logic of participation in the legitimacy of the state power: the political dynamic of inclusion and exclusion within the boundaries of the political community. This informs the practice of disenfranchisement in a more obvious way than the legally codified discourse of participation.

When codified in terms of inclusion (and exclusion), and this is the *second* major claim of this dissertation, the right to vote and in particular the entitlement to vote, perhaps differently from other rights of participation, expresses the recognition of subjects as citizens in contrast to those disenfranchised. The exclusion of the disenfranchised from the sphere of those considered equal members of the community constitutes a practice of disrespect.

The articulation of this tension between participation and inclusion, and the claim of the importance of the right to vote as a mechanism of recognition, may not only be useful in understanding competing conceptions of democracy, citizenship and the right to vote and in making visible the exclusionary and degrading logics currently operating in certain jurisdictions. It might also guide and illuminate, as a more concrete objective, the current jurisprudence on the right to vote in cases dealing with criminal disenfranchisement.

This is the context in which the *third* and final major claim of this dissertation emerges. The treatment of disenfranchisement by those courts that have reviewed its compatibility with fundamental rights has, on one hand, been negatively affected by the method used by the courts blocking the development of powerful democratic arguments and, on the other, has not properly acknowledged the importance of the value of the right to vote as a mechanism of recognition.



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The remainder of this introduction is structured as follows. *Section I* presents a working definition of criminal disenfranchisement. *Section II* presents a brief outline of the legal, political and scholarly context with which this research engages. Finally, *Section III* offers some methodological notes.

## I CONCEPTS: WHAT IS DISENFRANCHISEMENT?

This legal practice, which is in a curious intersection between criminal and electoral law, has various names and adopt different forms, depending on the jurisdiction in question.<sup>8</sup> This dissertation uses the generic concept of criminal disenfranchisement (hereinafter CD) to refer to all those cases in which a convicted criminal offender (hereinafter offender) is legally dispossessed, permanently or temporarily, of the right to vote. This assumes that the offender was eligible regarding citizenship and age and that conviction is the reason of disenfranchisement.

This section is dedicated to describing CD and its various characteristics, observing some tendencies, offering conceptualizations and showing the similarities and differences between different institutional models of CD.

### 1 Starting point

As CD adopts many names and forms, and depends on several features that change from country to country, it is important to give an account that is cognizant of those

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8. In the US, it is known as ‘felony disenfranchisement’ in reference to the kind of crime committed by those to whom it is applied. In Australia and the United Kingdom, it is known as ‘prisoner disenfranchisement’, regarding its restriction to some of those persons currently serving prison sentences. German Criminal Code calls it an ‘ancillary measure’ (*Nebenfolgen*). Most Latin American countries, following Spanish codification, establish it as an “accessory punishment of incapacitation” (*pena accessoria de inhabilitacion*). Some other countries have gone further, including this institution in their constitutions and adopting it as a cause leading to the loss of citizenship (e.g. Chile: *pérdida de la ciudadanía*). All of the above are just different names for the same legal practice. On the necessary awareness of this issue, see Damaska, 1968a:350.

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differences, whilst not losing sight of the common features that enable referring to those different national practices in theoretical terms as a common practice. For these purposes, it could be useful to start looking at one particular case. A standard academic description of the British regime of CD, which has concentrated great attention since *Hirst v The United Kingdom No. 2* (2005), states:

“The current law in the UK is that convicted prisoners (with few exceptions) are denied the right to vote in national or local elections while they are incarcerated. Remand prisoners, and sentenced prisoners imprisoned for contempt of court and for non-payment of fines, are allowed to vote”.<sup>9</sup>

Following this definition, CD can provisionally be described as *the deprivation of the right to vote affecting some offenders during the time they are serving a prison sentence*. This description gives a reference point against which we can analyse the different national particularities and variations of CD based on a specific number of key institutional features.

These features address different questions explicitly or implicitly present in the legal description.<sup>10</sup> Firstly, who are the subjects affected by the ban? This is the question about the scope of CD. In the UK case, the *scope* involves convicted prisoners, with some exceptions. Secondly, for how long are the offenders deprived of their rights? This is the question about the *length* of CD. The British case seems to affect offenders only during the time of their imprisonment. Thirdly, how can the affected subjects recover their rights? This is the question addressing the existence and modalities of *re-enfranchisement methods*, for which the presented quotations of the British model of CD do not offer an explicit answer. Fourthly, what are the rights that

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9. Easton, 2009:224. The main British legal provision regarding CD, Section 3 of the Representation of the People Act 1983, prescribes: “A convicted person during the time that he is detained in a penal institution in pursuance of his sentence [or unlawfully at large when he would otherwise be so detained] is legally incapable of voting at any parliamentary or local government election”.

10. A similar catalogue in Kleinig & Murtagh, 2005:217.

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are denied to the affected subject? This is the *content* of the CD question, which seems to receive an explicit answer in the mentioned by the legal provision: the right to vote. Finally, what are the legal *sources* that stipulate CD? Do these include the constitution, direct parliamentary legislation, delegated legislation or a judicial judgment? These features are reviewed in this section.

## 2 Institutional elements

*Who are the subjects affected by CD?* Taking a comparative overview, there are two main variables on which the scope of CD depends: the fact of the imprisonment of the offenders and the kinds of offences that warrant its application. The first element is the imprisonment. Based on this variable, two models of CD can be considered. The *prison-based model* links CD to the imprisonment of the offender, independent of the character or status of this imprisonment. This might include inmates serving a sentence or those being held on remand. The *crime-based model*, on the other hand, considers CD independently of imprisonment. Here, CD could affect inmates, but can also affect ex-prisoners, including those who have already served a prison sentence or who are on parole. It also can affect those who have never been imprisoned, including those who are being prosecuted but not imprisoned, or those who are on probation.<sup>11</sup>

The second important consideration is the kind of crime to which CD is linked. Here two other models can be drawn, depending on whether or not it affects all prisoners. First, the *blanket ban model* affects all imprisoned offenders without further considerations. The UK model of CD is usually referred to as a blanket ban, even when technically it is not, due to the exclusion of some categories of prisoners. The *targeted model* can disenfranchise prisoners serving sentences for (i) serious offences, (ii) special and narrowly selected crimes, or (iii) a combination of both

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11. On this this difference, see Fitzgerald, 2007.

criteria.<sup>12</sup> In the first category, a standard of seriousness can be prescribed for a class of crimes (e.g. ‘felonies’, ‘infamous crimes’) or a length of imprisonment (e.g. 3 years or more).<sup>13</sup> In this later case, the application of CD depends on factors different from the kind or seriousness of the crime but the seriousness of the punishment. In the second category, the special nature of the crime can be based on such categories as moral turpitude, offences against the public, or even precise offences related to the public sphere such as abuse of office, election offences or terrorism, or completely unrelated crimes, such as bribery, larceny, duelling or bigamy.<sup>14</sup> These variables coexist in every legal system that features CD. However, the configuration of the models in practice usually adheres to the logic of combination in *mixed or hybrid models*.<sup>15</sup>

*For how long are the offenders deprived of their rights?* Based on the previous distinction between the *prison-based* and the *crime-based* models, the length of CD may or may not be connected to the length of imprisonment. The *prison-based* model tends to re-enfranchise prisoners immediately after they have served their prison sentence, allowing re-inscription on the electoral register or eliminating the ban *ipso*

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12. The ‘targeted’ concept is from Geddis, 2011:451.

13. In some cases deprivation is applied based in the actual sentence length (e.g. Australia) and in other cases is applied based in the potential sentence length (e.g. Chile).

14. See Itzkowitz & Oldak, 1973:727-8.

15. The British system of CD may be considered as a *mixed* system in which the general rule is the *prison-based* model under a *blanket ban* basis (Section 3, Representation of the People Act 1983). This means that as a general rule, nobody outside the prison is disenfranchised and everybody in prison are excluded from elections. However, this general rule incorporates two groups of exceptions. The first group comprises a group of offences that undermine the integrity of the electoral process, which involve CD regardless of whether the sentence involves imprisonment for the offender (Sections 158-60 and 168-74, Representation of the People Act 1983). The second group of exception is constituted by cases of imprisonment where offenders retain their right to vote. These cases include subjects detained on remand, for contempt of court or default in payment of fines, since they are not included in the concept of a “convicted person” under section 3: “but not including a person dealt with by committal or other summary process for contempt of court” (Section 3.2, Representation of the People Act 1983). However, the right to stand as a Parliamentary candidate is not withdrawn by that provision, but is rather rescinded permanently in the case of those offenders who have been imprisoned for more than one year (section 1, Representation of the People Act 1981). In the event of the election of a candidate affected by this disqualification, his or her election shall be void and the seat shall be vacated (Section 2, Representation of the People Act 1981).

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*iure*. This means that the duration of CD corresponds strictly with the duration of imprisonment. In the *crime-based* model, however, CD can continue after inmates leave prison and can affect offenders who have never been to prison. In the first case, CD may expire a certain amount of time after the prison sentence has been served or may affect ex-prisoners permanently, in a lifetime disenfranchisement. In the second case, prisoners under probation are disenfranchised, effectively being treated as prisoners in this regard and may recover their rights according to the general rules affecting prisoners. Finally, some jurisdictions apply CD to those offenders on parole.

*How can the affected subjects recover their rights?* Some forms of CD entail the permanent loss of rights. Those affected by form of temporary CD can either be rehabilitated *ipso iure*, which can be immediately after an offender has served their sentence or a variable period after this,<sup>16</sup> or require an *additional process* to be re-enfranchised. In this second case, CD becomes permanent if the rehabilitative procedure is not executed or is failed.<sup>17</sup> Therefore, the difficulties involved in the access to this procedure and being successful could conceal the intention of a definitive and perpetual form of CD.<sup>18</sup> In the US, due to CD commonly affects

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16. See Itzkowitz & Oldak, 1973:728. When an additional process is required, this can consist of a mere re-inscription in the electoral register; a more complex administrative procedure, such as clemency boards (e.g. Florida); a judicial decision (e.g. Italy); or a process under a political authority, such as Governor pardon (e.g. Delaware, Kentucky) or a Senate agreement (e.g. Chile) which will probably exert a discretionary power for the rehabilitation of the offender's voting rights. A mixture of these procedures is also possible, such as administrative recommendation before a political decision.

17. See von Hirsch & Wasik, 1997:604.

18. The rehabilitation process may consider various elements. Especially relevant are the gravity of the crime and the number of times the person has been criminally sentenced; rehabilitation may be difficult or impossible when the offender has been imprisoned more than once, particularly where the offence is part of a group of serious, violent or political crimes. Additionally, the negative proof of good behaviour and the positive proof of a reinsertion in the community life can be elements that determine the reincorporation of the offender. However, the probability of an affirmative answer depends largely upon the discretion of the officers in charge. Even if mechanisms to regain voting rights are provided, the difficulty to fulfil the demanding requirements or complicated and expensive procedures may become a *de facto* permanent disenfranchisement (see Manza & Uggen, 2006:83-90). Allen (2011) demonstrates how the demand of unobtainable eligibility document may end in a model of 'documentary disenfranchisement'. The bizarre requirement of the payment of all carceral

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released offenders, an important part of the debate is focused on the difficulties that some states present in the process to regain the suspended rights.<sup>19</sup>

*What are the rights that are denied to the affected subject?* The rights or status affected by CD is one of the least addressed of its features in the literature. The right to vote is the one usually affected and the one that consequently receives most attention in the debate, and on which this work is focused. Even though the more common modality deprives prisoners of the right to participate in any electoral process, it is interesting to note that some jurisdictions allow prisoners to vote in general or federal elections but not in local elections.<sup>20</sup> It is important to note that the right to vote is usually subject to limitations in two respects. First, a person can be prevented from voting. Second, a legal provision can preclude a person from registering as voter. However, the right to vote is not the only political right affected by a criminal conviction. Also grouped under the deprivation of political rights is the right to stand as a candidate for election.<sup>21</sup> Those rights can also be denied indirectly by excluding offenders from the legal status of citizenship.<sup>22</sup>

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debts in order to resume voting rights in some states of US is explored in Cammett, 2012. For a survey of the restoration processes in the US (and their problems), see Mauer & Kinsal, 2005.

19. For instance, many of the constitutional arguments put forward for academics are directed to challenge only ex-felons disenfranchisement and not the exclusion of current prisoners. See, for an overview of the debate, Manza & Uggen, 2006:81ff. See also Dilts, 2014:10-1.
20. That can be attributed, in some cases, to an attempt to mitigate the hypothetical impact of the population of prisoners in the constituency of the prison's locality. In other cases, it is because the franchise is divided between federal and state levels, each of which can regulate CD with autonomy (e.g. Australia) (see Rottinghaus & Baldwin, 2007:693). CD is sometimes extended also to the right to participate in referendums (See *Priscilla Nyokabi Kanyua v Attorney General* (2010) and *McLean and Cole v United Kingdom* (2013)).
21. See Damaska, 1968a:357-9. This can be established explicitly by statutory provision or implicitly, both by interpreting the right to vote as both passive and active, and by making a requirement for standing as a candidate the bearing of the right to vote. Additional effects may implicitly be provided by the deprivation of these rights when statutory provision requires the right to vote for the exercise of another right or public function such as holding office in the judiciary or the civil service. Additional exclusionary effects – for instance, to be part of a court's jury – can also be grouped under the deprivation of political rights.
22. In this way, the deprivation affects (ambiguously) all legal positions attached to this status. These legal positions can include current or prospective positions in the press, trade unions, political parties, and the competence to form a political party (see Damaska, 1968a:356-7).

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*What are the sources that stipulate CD?* It can be determined by different legal sources. Four methods can be observed in the comparative law.<sup>23</sup> The most common way is by a *legislative* statutory act, which can be the output of a relatively recent deliberative process or the maintenance of historical and traditional rules. CD can also be set by *administrative* rules; that is, by rules that lack deliberative inputs. It may be provided for in a *constitutional* rule, either by an express authorisation to a legal arrangement (e.g. Italy, Kenya, US) or by a direct constitutional CD rule (e.g. Chile).<sup>24</sup> Finally, CD can be applied without any statutory or constitutional legal basis, simply by the absence of a mechanism allowing prisoners to vote. In this case, offenders while in prison formally maintain the right to vote.<sup>25</sup>

*Does CD require judicial intervention?* The concrete application of CD may just follow a general statutory provision (*'by operation of law'*) or, alternatively, can follow a particular *judicial* or *administrative* decision that declares the particular instance of CD. In this latter case, even though CD is based on a statutory rule, which allows its application to a particular case, it is the judicial or administrative decision that is its direct source. This could be based on the particular circumstances of the offender or the crime that is to be judged by a courts (a discretionary power) or just in the legal requirement of determining this effect in the judicial decision (a mandatory intervention).<sup>26</sup> Some judicial decisions and academic articles consider that judicial

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23. The importance of the legal sources involved in CD resides in the fact that the kind or normative hierarchy of rules by which CD were settled can influence the process of modifying or challenging that legislation, the powers involved in its reformation, the quorums of reform and the judicial review strategies in domestic and international legal *fora*. This works in two directions. Firstly, depending on the hierarchy of the rule, the procedure to change or challenge it will vary. Second, the greater the legitimacy of the legal instrument (e.g. due to the deliberation involved in a democratically-formed sources), the more difficult it is to challenge by judicial procedures and the less weight can be given to arguments from human rights or democratic illegitimacy. Nevertheless, not only these strategic consequences directed towards challenging the legislation follow from these factors. The symbolic importance of CD can also depend on its legal source.

24. See Damaska, 1968a:348-9.

25. This was the case in *August v Electoral Commission* (1999). See below *Chapter 2*, Section I.3.1.

26. See Damaska, 1968a:349. Von Hirsch & Wasik classify disqualification measures in three categories: those that follow automatically the conviction; those imposed at the sentencing

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intervention is convenient due to its contribution to the legitimacy of CD. The reasons presented are chiefly related to the judicial control of arbitrariness and the publicity of its effects for penological functions.<sup>27</sup>

### 3 A working definition of criminal disenfranchisement

In relation to the *scope*, it has been observed that CD can include not only prisoners but also other subjects criminally prosecuted who remain outside the prison system and even ex-convicts that have served their sentences. The *length* of the CD also varies considerably, reaching even a lifetime, while *rehabilitation methods* range from the legally regulated automatic restitution of rights to the discretionary political decision. The *content* of CD affects primarily the right to vote, but can equally affect the right to stand as a candidate and other public-standing rights and positions. Finally, the *source* of CD is not only statutory, but can be a constitutional or administrative regulation, and may even be the product of the inaction of the rule-making process.

These institutional characteristics permit a broad new definition of CD as *the removal of the right to vote and other political rights from a person who is subject of the punitive power of the state*. This definition is considerable broader than the old definition based in the British model mentioned before, *the deprivation of the right to vote affecting some offenders during the time they are serving a prison sentence*. The new definition has the advantage that is relatively abstract and unencumbered by technical legalisms and therefore it allows engagement with a more theoretical reflection, and therefore, it can adequately cover the legal practice of CD in different jurisdictions. Such broad definition may be subject to criticisms regarding two aspects.

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stage; and those imposed by a regulatory authority, being this one public or private (1997:601-3).

27. See Demleitner, 2000. See also *Frodl* [31-4]. cf Marquardt, 2005.



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Regarding the element of *scope*, it could be suggested that CD does not depend on imprisonment but mainly on the criminal sentence. In the UK, however, the measure only applies to offenders that are serving sentences in prison. It should be considered if this is a question of terminology or, in contrary, it involves deeper controversies. There are reasons to stick to the new definition. First, CD not always follows imprisonment. There are cases in which non-incarcerated offenders are affected by the ban (e.g. affecting the right to stand for elections). There are also cases in which incarcerated subjects are able to vote (e.g. prisoners on remand<sup>28</sup>). The exceptions to the prison-based model are considerable more numerous in comparative law (e.g. Germany, US, Chile, Turkey). Second, from a theoretical perspective, when the discourses of the justification of CD are examined, almost every argument for CD is based on the criminal conduct of the offender rather than his status as an inmate.<sup>29</sup> If this is accepted, it is easy to see that the fact that prisoners are the more commonly subjected to CD is a regulative rather than an essential characteristic of CD, being an element to decide the scope of CD (above was described as a prison-based model).

Regarding the element of *content*, the definition expands the coverage to other political rights. The broader category of political rights, as the rights that allow the participation of the citizens in the decision-making process, may at first glance appear in an arbitrary way to speak about a practice commonly known by its effects in the right to vote. When it is suggested that CD involves the deprivation of the broader category of *political rights*, it is delineated in terms of affecting those rights that enable the person to participate, passively or actively, in the process of political decision-making, therefore excluding other measures related to civil liberties or social welfare. The more important of these other rights covered by this extensive definition

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28. This conceptualization faces a problem in the case of those legally disenfranchised while detained awaiting conviction (e.g. article 16, Chilean Constitution). They are in a different situation of those that still formally enfranchised but are deprived from a mechanism to exercise the vote from prison. The better explanation for this variable, which considers the application of CD to non-sentenced inmates and non-incarcerated prosecuted subjects, comes from the general idea of anticipation of the effects of a likely criminal conviction (see Mañalich, 2011a:138-45).

29. See below *Chapter 4*, *Chapter 5* and *Chapter 6*.

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is the right to stand as a candidate or run for public office. It is a right that corresponds completely and exclusively to democratic citizenship, which would make sensible a joint analysis along with the right to vote, as a mark of exclusion from formal political participation. Notwithstanding the good existing reason for a joint analysis, the right to vote and the right to stand as a candidate present important differences that make a joint analysis more complex and inconvenient.<sup>30</sup> First, to expand the analysis would unnecessarily weaken the position of advocated of inclusion because, for example, it is commonly argued that the exercise of public authority demands standards of virtue and capacity higher than the required to exercise the right to vote.<sup>31</sup> Second, and perhaps more important as an argument, is that the duties of public officers are especially incompatible with the fact of imprisonment – elected officials must perform their duties outside the prison –, thus adding a practical dimension to the strategic circumspection.<sup>32</sup> This work does not deal with the additional complexity required to give an account of both rights. That is why in what follows it limits CD to the deprivation of the right to vote, leaving other political rights to further research.

## II CONTEXT: WHAT IS HAPPENING WITH DISENFRANCHISEMENT?

The context of the analysis of CD is given by: (1) the increasing jurisprudence on the right to vote and the political tension that have produced in those countries in which the issue has been discussed, and (2) the recent raise of academic works that deal with CD coming from different disciplines.

The first and perhaps most important element of the momentum that CD is experiencing is given by a set of relatively recent judicial decisions that considered

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30. See, about the relationship of these two rights in US constitutional law, Steinacker, 2003.

31. This has been argued, for example, to establish the incoherence rule that deprive of the right to vote to those that still can run for office or serve as members of parliament. See Joint committee, 2013:58. See also Orr & Williams, 2009:134.

32. See Lippke, 2007:221-2. cf Ramsay, 2013b:431.

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CD as a significant problem from a constitutional and human rights (hereinafter also fundamental rights) perspective. In several jurisdictions during the last 20 years, in which could be called ‘a judicial trend’, courts have struck down legislation regarding CD as a violation of the right to vote.<sup>33</sup> These judgments have not categorically proscribed CD as an undemocratic and impermissible practice but, in contrast, have accepted, with some reservations, that representative institutions can pursue legitimate aims through this kind of legislation. In the opinion of most of the Courts, the problems with CD have therefore been associated not necessarily with its motives, aims or reasons, but mostly with the lack of a proportional relation between the aim being pursued and the measure employed.<sup>34</sup>

This recent trend in judicial analysis is a pale reflection of the idea, consolidated and acknowledged even by its advocates, that CD “run[s] counter to the modern trend of extending voting and other fundamental rights”.<sup>35</sup> In a re-assessment initiated forty years ago in the US, scholars had nearly reached consensus upon the harmful effects of CD. This consensus is such that some have argued that critics of “disenfranchisement may feel a bit like a boxer entering the ring only to discover that there is no opponent to fight”.<sup>36</sup> Various arguments are offered by scholars from diverse disciplines such as constitutional and criminal law, criminology, sociology and political science. For instance: (1) there has been an affirmation of the negative effects of CD on the process of the reintegration of offenders;<sup>37</sup> (2) critics have pointed out the degrading effect that CD carries with it, transforming offenders into second-class citizens;<sup>38</sup> (3) it is applied in terms of producing a racially

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33. See e.g. Behan, 2014: Ch. 2.

34. See below *Chapter 2*.

35. Sigler, 2013:1.

36. Manza & Ugger, 2006:12.

37. See e.g. Demleitner, 2000; Dhami, 2005.

38. See e.g. Fletcher, 1999; Behrens, 2004; Easton, 2006.

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discriminatory impact;<sup>39</sup> (4) it is held that offenders are exposed to unfair treatment by impeding them to express their interests in the rule-making process.<sup>40</sup>

This overwhelming academic consensus, coupled with a judicial trend, contrasts with the high rates of support for CD in some of the jurisdictions in which the issue has been raised, amongst both the political class and the public. This is not a coincidence; the reluctance of politicians to support the inclusion of offenders in the franchise may in turn be based upon the opposition of the public opinion.<sup>41</sup> The concerns of politicians are usually expressed by arguing that the correct performance of their representative function consists in listening to their constituency, and that what they have heard regarding this issue is clear opposition to giving offenders access to the right to vote. Public opinion, in its turn, might be shaped by a populist political discourse on being tough on crime, leading to a vicious circle of penal populism.<sup>42</sup>

The reasons offered by governments in defence of CD have varied according to the different contexts in which they are expressed. In the courtroom, when governments have been compelled to explain the rationale of CD, the arguments have been short and consistent: CD serves as an additional punishment of offenders, promoting civic responsibility and respect for the rule of law.<sup>43</sup> However, politicians addressing the issue in parliamentary debates or in the media have been less restrained, and arguments have occasionally become an exercise in wedge politics as evidenced by the statement of one British Prime Minister who claimed: “It makes me physically ill even to contemplate having to give the vote to anyone who is in prison”.<sup>44</sup> They have also offered arguments that are more intuitive such as “when you break the law, you

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39. See e.g. Fletcher, 1999; Mauer, 2004.

40. See e.g. Easton, 2006; Demleitner, 2000; Behrens, 2004; Dhami, 2005.

41. For example, according to Yougov (2012), conducted in November 2012, 63% of Great Britain rejected the idea of prisoners voting.

42. See e.g. Manza & Uggen, 2006: Ch. 9 (US); Easton, 2006:452 (UK).

43. See e.g. *Hirst* [74-5]. For a detailed discussion about the justification offered in other cases, see below *Chapter 2*.

44. David Cameron, PM. See *Hansard*, HC Deb 517 col 921, 3 November 2010.

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cannot make the law”;<sup>45</sup> or that “convicts are incapable of running their own lives and should not be allowed to run ours”.<sup>46</sup>

In an attempt to give more solid theoretical foundations to this defence of CD, some voices within the scholarship have risen up against the academic consensus and provided important insights into this debate. Those who defend some form of CD have sustained one or more of the following arguments: (1) that CD is an expression of democratic will and must be respected as such;<sup>47</sup> (2) it expresses the importance of people’s self-determination within a democracy;<sup>48</sup> (3) it sets forth an element of civic virtue as a requirement for participation in elections;<sup>49</sup> (4) and it constitutes an expressive form of punishment, in the context of the commission of serious crimes or crimes against democratic values.<sup>50</sup>

Beside the scholarly debate, the popular and political support for CD against the judicial trend on CD has led to the emergence of a conflict that can be described as paradoxical. On the one hand, the courts striking down legislation passed by representative institutions following a democratic procedure may generate criticism from the perspective of democracy, especially for its contra-majoritarian implications. On the other hand, the action of the courts can also be seen as protecting democracy against abusive majoritarian decisions. In the first case, democracy is seen as a procedure of decision-making. In contrast, in the second case, democracy is taken as normative ideal in which everybody should have an equal right to participate

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45. David Davis, MP. See *Hansard*, HC Deb 523 col 493, 10 February 2011.

46. Francis Marini, Massachusetts legislator, cited in Ewald, 2004:116.

47. See Altman, 2005; Latimer, 2006. For a critical assessment, see below *Chapter 7*.

48. See Ramsay, 2013a; Ramsay, 2013b.

49. See Manfredi, 2009:268-77; Clegg, 2002; Latimer, 2006; Sigler, 2013. For a critical assessment, see below *Chapter 4*.

50. See Hampton, 1998; Lippke, 2007:203; Manfredi, 2009:274-7; Re & Re, 2012; Bennett, 2012. For a critical assessment, see below *Chapter 5*.

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in the processes of decision-making.<sup>51</sup> This paradoxical conflict of interpretations of the relation of CD and democracy make this debate even more complex.

In sum, these arguments have opened a legal, political and theoretical debate about the meaning of the exclusion of offenders from certain rights; the scope, importance and role of voting rights; the constitutional structure of the right to vote; and so forth. In fact, it would not be an exaggeration to state that the main issue in relation to which the right to vote is currently discussed, at least in legal circles, is the case of CD. This debate poses questions that strike at the some of the contradictions underlying modern representative democracy and exposes fragilities on which our legal and political institutions, practices and discourses are sustained and, therefore, invites us to revisit the importance and validity of ideas such as universal suffrage or the claim that the right to vote is a fundamental democratic right.

### **III METHOD: HOW TO THINK ABOUT DISENFRANCHISEMENT?**

The several registers in which these debates have been couched and are still being developed require the construction of a narrative that excludes certain relevant aspects of the problem while reducing complexity in a way which allows us to deal with it in intelligible and productive terms. Some brief methodological notes are therefore necessary.

In the context of the judicial trend, political opposition and ongoing academic debate about CD, the *general objectives* of this dissertation are: (1) to investigate the substantive reasons concerning why an adult citizen ought to be disenfranchised when criminally convicted; and (2) to analyse this mechanism of political exclusion in relation to the importance attached to the right to vote in a democratic political community.

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51. See below *Chapter 3*, Section I.

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To pursue these general objectives, this work adopts the *method* and perspective of *legal* and *constitutional theory*. Therefore, this work does not constitute a causal explanation (as in political science or sociology) that contributes to explain the why, where and when of CD,<sup>52</sup> neither it is a historical reconstruction (as in history or legal history) of CD.<sup>53</sup> Nor is it a doctrinal analysis of the legislation and the jurisprudence (as in constitutional law or human rights law) regarding CD. However, judicial decisions are analysed and some observations are made in *Chapter 2* and *Chapter 8*.

From the perspective of legal and constitutional theory, there are two main competing perspectives from which CD has been critically analysed. The first proceeds on the basis that CD is consequence and manifestation of a more comprehensive system of social, political and legal oppression. The second sees CD as institution that can be examined in its particularity and therefore can be abstracted from the question about the society in which this practice is found.

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52. When dealing with CD, political scientists have tried to explain its existence or survival in certain jurisdictions during certain periods of time in causal terms; that is, by examining several structural features and trying to identify patterns (e.g. political and criminal culture or institutional heritage) to explain why it exists in some countries and not in others. They have, in general, concluded that “there is no single variable that explains why or how countries allow or disallow prisoners to vote [, and therefore] political cultural explanations matter as much as structural allowances” (Rottinghaus & Baldwin, 2007:697). They have commonly called for “case studies that examine specific political context, social norms, sentencing guidelines and cultural treatment of offenders” (Rottinghaus & Baldwin, 2007:697). On this line of enquiry, see also Behrens, 2004; Ewald & Rottinghaus, 2009b; Demleitner, 2009; Ispahani, 2009; Uggen *et al*, 2009. On causal explanation of the difference of regulation within the US, see Fellner & Mauer, 1998; Preuhs, 2001; Murphy *et al*, 2010.
53. The standard academic works on CD are full of references to its historical origins and many of those suggest that CD constitutes the contemporary legacy of pre-modern exclusionary practices such as *infamia* or civil death (See e.g. Damaska, 1968a:352-4; Demleitner, 2000:765-6). Most of them make ambiguous, indirect and superficial references. Few of them give an account of the ways in which these practices can be historically connected (See e.g. Damaska, 1968a and Damaska, 1968b). In this line, the alleged heritage of CD poses the question of explaining its rationale in terms of its traditional function, which is antithetic to the suppression of the other aspects of practices such as civil death. Some go even further and structure normative criticisms based on historical arguments. In particular, see Pettus, 2013: Ch. 1 and the brief discussion bellow *Chapter 6*, Section I.

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## 1 Racial disenfranchisement

Assuming the first perspective, CD has been investigated as fully embedded in practices of structural violence, for example, the racism and “systematic institutional biases”<sup>54</sup> that diminish the position of vulnerable members of society, leading them to be the natural ‘clients’ of the criminal system. From this starting point, CD is not an exception but part of a continuous system of measures that target and diminish the position of those persons and groups; as such, CD is not understood as any more nor less than other mechanisms designed to disempower those minorities.

This perspective has received extensive study in the US, in particular, attaching to CD the potential to continue in the electoral field the discrimination that racial minorities experience in other spheres.<sup>55</sup> For example, what may be called the *demographic* effect of CD has been documented – the fact that a disproportionate number of the disenfranchised are non-white –, which constitutes one of the core elements of the claim that, at least in the US, CD is a structurally determined and racially motivated practice.<sup>56</sup> According to this perspective, CD works not only by denying the vote to particular individuals that belong to those vulnerable communities but also by diluting the electoral strength of minority groups, thereby

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54. Munn, 2011:231-7.

55. About the debate about disenfranchisement as an instrument of racial discrimination, and about its demographic impact, see Harvey, 1994; Shapiro, 1993; Hench, 1998; Fellner & Mauer, 1998; Fletcher, 1999; Mondesire, 2001; Dugree-Pearson, 2001; Preuhs, 2001; Ewald, 2002; Thompson, 2002; Taormina, 2003; Karlan, 2004; Ispahani & Williams, 2004; Mauer, 2004; Martinez, 2005; Miles, 2004; Behrens, 2004; Goldman, 2005; Ewald, 2004; Ewald, 2005; Figler, 2005; Manza & Uggen, 2006: Ch. 2-3; Krousser, 2007; Crutchfield, 2007; Bowers & Preuhs, 2009; Pinard, 2010; Katzenstein *et al*, 2010; Tylor, 2012; Cammett, 2012; Chin, 2012; Schaefer & Kraska, 2012; Uggen *et al*, 2012; Nelson, 2013; Richard, 2013.

56. This approach is adopted by all the US monographic books. See, from a historical perspective, Holloway, 2014; from post-colonial theory perspective, Pettus, 2013; a Foucauldian reading of the practice in Dilts, 2014; in sociological perspective, Manza & Uggen, 2006. For a journalistic report of the same reality, with interviews to ex-prisoners, politicians, and voting rights activists, see Abramsky, 2006. Finally, other US monographic titles are: Brown-Dean, 2004; Hull, 2006 (a rather superficial summary of the US debate); Pinkard, 2013.



affecting election outcomes and legislative policy choices.<sup>57</sup> These ideas have solid factual foundations, both historically<sup>58</sup> and currently,<sup>59</sup> and have been strongly documented in the US literature.<sup>60</sup>

Two examples are particularly demonstrative. First, during the close 2000 US presidential election in Florida – defined by a margin of 537 votes – approximately 827,000 persons were affected by CD in that state (more than 5 million in the whole country), counting a significant percentage (10.5%) of the black population of the state. According to expert analysis, had ex-prisoners been permitted to vote (27.2

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57. See e.g. Karlan, 2004:1149. See also Manza & Uggen, 2006: Ch. 7-8. About vote dilution, which is the manufactured devaluation of the political impact of some individuals' votes, who nevertheless maintain their formal status as voters, see e.g. Karlan, 1989; Karlan, 1992; Gerken, 2001; Karlan, 2004; Pettus, 2013.

58. Historically, this claim is supported by extensive scholarship that has demonstrated that the activation of use of CD after the Reconstruction Era was motivated by the aim of disempowering the newly enfranchised black population. This broader aim, which also motivated measures such as poll taxes and literacy tests, was effective until the civil rights movements arose (See e.g. Manza & Uggen, 2006: Ch. 2). Katherine Pettus' (2013) suggestion is that, emptied of its original political significance in the context of the US post-slavery regime, CD adopted the form of a political weapon, which once captured by the partisan-motivated white supremacists, was aimed at the political exclusion of a racial group – the formerly enslaved African Americans – rather than at particular individuals who showed themselves undeserving of political participation. Pettus' core argument is that the injustice of CD is given by its *racially-motivated abuse* and manipulation (Ch. 5). In contrast with the interpretation of Pettus, CD was marked, for Holloway (2014) by ambivalence. It served to tactically reproduce structural power relations based on traditional social hierarchies, while simultaneously existing in tension and even opposition with other aspects of the electoral practice. On the one hand, the use of a traditional framework of social morality associated with infamy constrained the possibilities of abuse of legislative and judicial means through the formality of a legal discourse; on the other hand, the aims of racial disempowerment were inscribed within a broader ongoing practice of partisan politics (see also Wang, 2012), in which winning an election no longer depended upon persuading the electorate, but instead on the manufacture of a favourable constituency. An example of how those tensions and contradictions were expressed but also accommodated can be found in the ambiguity of the usage of the concept of infamy, linked not only to the commission of the crime (*infamia facti*) and therefore affecting certain criminals but also as an effect of certain types of punishment (*infamia iuris*), with the consequence, for example, of disenfranchising all those locked up in state prisons (wearing striped uniforms) but not in county jails.

59. Currently, this claim is based on two factors: first, US disenfranchisement laws clearly arise as the harshest and most restrictive of the western world, affecting prisoners, ex-prisoners, parolees and probationers; second, that the rates of incarceration and conviction in the US are also the highest in the world, mainly due to political assumptions related to ideas such as the war on drugs initiated by conservative governments in the 1970s (See e.g. Manza & Uggen, 2006: Ch. 3-4).

60. On the historical and current practices of vote suppression, see, generally, Wang, 2012.

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percent would vote), Al Gore would have carried the state (due to an estimated 68.9 democratic preference) and the election by more than 30,000 votes.<sup>61</sup> Second, “the Census Bureau counts incarcerated individuals as residents of the jurisdiction in which they are incarcerated”. This has serious implications in many states, resulting “in largely white, rural communities having their population increased at the expense of the heavily urban, overwhelmingly minority communities from which most inmate come”.<sup>62</sup> This has repercussions in apportioning representation, redrawing of political boundaries and allocation of funding to state and local governments.<sup>63</sup>

Notwithstanding its massive impact in the US debate, the link between structural injustice and CD may not be only limited to the American case<sup>64</sup>. For societies in which, unlike the US, the racial factor is not preponderant, this perspective can assume other forms such as class oppression and xenophobia as forms of violence, intolerance and exploitation.<sup>65</sup>

## **2 Abstract normative democratic theory**

A second perspective seeks to investigate theoretical and normative possibilities of a legitimate practice of CD. In doing so, it proceeds on the hypothesis that the criminal system is not *per se* unjust and is not necessarily captured by practices of domination and exploitation. For example, it ignores whether or not rates of incarceration are relevant enough to influence the results of any electoral result, or if the criminal justice system and incarceration policies have a disproportionate impact on the representation of minorities. It requires the assumption that even if problems such as

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61. See Manza & Uggen, 2006:191-3; generally about the influence of CD in US electoral results see Manza & Uggen, 2006: Ch. 8

62. Karlan, 2004:1159.

63. See also Pettus, 2013:106-119; Manza & Uggen, 2006:201-2.

64. It has also received some attention in other jurisdictions, see e.g. Winder, 2010. See also Orr, 1998:74-82; Easton, 2006:451-2; Prison Reform Trust, 2013:573.

65. cf Pettus, 2013:151-3.

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the demographic effect of CD are compelling, they do not prove that CD is wrong in itself, but only that it is wrong under determinate circumstances.<sup>66</sup>

This dissertation adopts this second perspective, developing its analysis with some degree of abstraction from those aspects and focussing instead on the normative principles underlying democratic and constitutional institutions and practices, and analysing the compatibility of those principles with the practice of CD. From this perspective, CD is normally criticised due to its lack of commitment to democratic principles, appealing to a contradiction between publicly pronounced values affirmed as a normative horizon of punitive and electoral democratic practices and the implicit standards that are present in the current practice of exclusion of offenders from the franchise.<sup>67</sup>

As rightly mentioned by Andrew Dilts,<sup>68</sup> this approach is an incomplete picture of the importance of CD. Scholars that have adopted this perspective in the study of CD rarely investigate and explore ‘the reality of citizenship’<sup>69</sup> expressed in these tensions and contradictions located in the intersection between punishment and citizenship.<sup>70</sup> The second stage of this research, therefore, starts from such contradictions. Exploring the meanings, functions and effects of CD does not necessarily lead only to an un-democratic or illegitimate institutional practice but can contribute positively in terms of what such practice can tell us about the relations of power that underlie it and the principles according to which those relations are organised<sup>71</sup>. The interplay of the exclusionary principles and logics underlying CD with democratic institutions and constitutional principles may contribute to reveal productive constitutional dissonances and uncovering the actual logic of disenfranchisement. It might also

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66. See e.g. Beckman, 2009:122.

67. See, similarly, Shklar, 1991:14-15.

68. See Dilts, 2014:15.

69. See Shklar, 1991:15.

70. See Note, 1989. See also Shklar, 1991; Pettus, 2013; Dilts, 2014.

71. This is the approach adopted by Andrew Dilts (2014) in a book that this dissertation could not take into account, except in the introduction (1-26).

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invite us to think about modern democracy in different and more complex terms; terms that are based on the recognition of the exclusionary logic of CD and may therefore lead to the creation of spaces of denunciation and resistance against the practice.<sup>72</sup>

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72. In that sense this project has a different aim from that of Dilts (2014), Katzenstein *et al* (2010) or Furman (1997) which look to find in CD a diagnosis of the general exclusionary logic of the liberal tradition in the US.

# 2

## JUDICIAL TRENDS ON DISENFRANCHISEMENT

In recent years, the debate on criminal disenfranchisement has achieved renewed momentum particularly due to a tension between courts and parliaments in the context of the judicial review of legislation. For the purposes of this work, the judgments that review the constitutionality or compatibility of CD with Human Rights instruments are organized, according to their outcomes, into two main categories. The first group of judgments are those allowing a total ban on offenders' right to vote. This does not mean that the jurisdictions in question actually deprive all offenders of their right to vote, but that the courts have not made any argument that would impede such a policy, either at present or in the future. The better-known judgment of this group is the US Supreme Court's *Richardson v Ramirez* (1973) that continues to be the leading case of CD in US Law.<sup>1</sup>

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1. In *Ramirez*, the Supreme Court of California ruled the unconstitutionality of CD of ex-prisoners whose terms of incarceration and parole had expired by applying the strict scrutiny standard of review, based on the idea of the right to vote as a fundamental interest of the potential voter. The Supreme Court reversed that decision declaring that the member states could pass legislation depriving former prisoner of their voting rights without violating the equal protection clause of the (Section 1 of the) Fourteenth Amendment. In arguing this, the Court exempted the case of criminal conviction from the group of electoral qualifications that, according to the case-law of the Court are subject to strict scrutiny, therefore requiring the states to show a compelling interest. This exemption was based on a historical and judicial interpretation, which indicates that Section 2 explicitly sanctions the exclusion of felons from

Generally, US case-law has constructed a protection of the right to vote in negative terms, by prohibiting discrimination in the allocation of the right to vote based on race, sex and age.<sup>2</sup> Regarding CD, however, the Court blocked the possibilities of review based on the disputable constitutional authorization of CD in Section 2 of the Fourteenth Amendment that limits challenges to the legislation based on arguments of equality and discrimination.<sup>3</sup> This blockage has led to locating hopes for liberalization of CD in the political arena, especially in State legislatures. This has achieved some degree of success.<sup>4</sup> For this reason, the US debate, which currently feeds the most vibrant theoretical discussions on CD, is very different from the way other western jurisdictions deal with this issue.<sup>5</sup> The United States is not, however,

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the franchise. This constitutional sanction is not present in other restrictions to the right to vote invalidated in previous cases by the Court, such as poll tax or residential requirements. Accordingly, the Court argued that if this section expressly exempts the case of criminals from the reduction of representation, this could not be a restriction prohibited by Section 1. The core of the reasoning of the Court was: “[T]hose who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [Section] 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by [Section] 2 of the Amendment. This argument seems to us a persuasive one unless it can be shown that the language of [Section] 2, “except for participation in rebellion, or other crime,” was intended to have a different meaning than would appear from its face” [43]. The question that follows from such reasoning is what is the standard of rationality to which the state action must be subjected according with the Court, if any? The Court did not answer this question in *Ramirez*. Discussing the judgment, see e.g. Issacharof *et al*, 2007:25-37. For a disclaimer about the exclusion of US case-law from this research, see above *Chapter 1*, Section III.

2. See e.g. Karlan, 2013:88. One must add to that problem that the franchise is determined by state legislatures (see Pettus, 2013: Ch. 2). For perhaps the more interesting analysis of the US case-law on voting rights, see Michelman, 1989.
3. About the systematic and historical interpretation of Section 2 of the Fourteenth Amendment, see Fletcher, 1999; Chin, 2004; Brooks, 2005; Morgan-Foster, 2006; Bourne, 2007; Liles, 2007; Varnum, 2008; Tolson, 2014; Re & Re, 2012; Ewald, 2013; Nelson, 2013.
4. About recent legislative and judicial (specially under the Voting Rights Act) enfranchisement trends in the US, see Shapiro, 1993; Person, 2002; Prince, 2003; Behrens, 2004; Hasen, 2004; Brooks, 2005; Handelsman, 2005; Newman, 2005; Wilkins, 2005; Hull, 2006; Morgan-Foster, 2006; King, 2006; Manza & Ugger, 2006:28-34, 221-5; Ordway, 2007; Ramirez, 2008; Ewald, 2009a; Porter, 2010; Eisenberg, 2012.
5. About these differences, see Ziegler, 2011:210-38. About the general constitutional debate about CD in the US, see du Fresne & du Fresne, 1969; Reback, 1973; Itzkowitz & Oldak, 1973; Note, 1974; Tims, 1975; Vile, 1981; Note, 1989; Shapiro, 1993; Hench, 1998; Fletcher, 1999; Demleitner, 2000; Hamilton-Smith & Vogel, 2001; Note, 2002; Clegg, 2002; Ewald, 2002; Thompson, 2002b; Person, 2002; Bennett, 2003; Stainacker, 2003; Behrens, 2004; Karlan, 2004; Cosgrove, 2004; Behrens, 2004; Ewald, 2004; Ewald, 2005; Marquardt, 2005; Miller, 2005; Wilkins, 2005; Nunn, 2005; Latimer, 2006; Clegg *et al*, 2006; Askin, 2007; Bourne, 2007; Demleitner, 2009; Ghaelian, 2013; Grady, 2012; Nelson, 2013.

the only jurisdiction that has decided to permit some form of CD.<sup>6</sup> Recent cases addressing CD issued by courts from Botswana,<sup>7</sup> Chile,<sup>8</sup> India,<sup>9</sup> Ireland,<sup>10</sup> Mexico,<sup>11</sup> and New Zealand<sup>12</sup> have also resorted to constitutional provisions to block challenges to CD.

A second group contains judgments in which the courts have explicitly prohibited or limited CD, the better known of which is perhaps *Hirst v The United Kingdom No. 2* (2005). Within this group of judgments, one can distinguish additionally, on the one hand, judgments that explicitly allowed the government some margin, albeit limited, for disenfranchising offenders under certain conditions. This is the case with the judgments of the European Court of Human Rights (hereinafter ECtHR) and those from Australia and Hong-Kong. On the other hand, there are some judgments in which the courts have struck down the ban completely, which includes cases from Canada, South Africa, Israel and Ghana. In some of these latter cases, it is uncertain whether new legislation with a different scope would be compatible with constitutional protection of the right to vote.

Not surprisingly, there is an important coincidence between the outcome of the two main groups of judgments and the standards of scrutiny applied by the courts. All the cases within the first group, those allowing CD, were resolved without any strict

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6. See *Hunter v Underwood* (1985). In this case, the last addressed at the higher level, the Supreme Court affirmed that Fourteenth Amendment of the Constitution prohibits explicit CD discriminatory clauses or explicit discriminatory motivations but not CD discriminatory results.
  7. See *Thomas Sibanda v the Attorney General* (2009). About this case and CD in Botswana, see Abebe, 2013:438-40.
  8. See, about the case-law and CD in Chile, Mañalich, 2011a; Marshall, 2011a; Marshall, 2011b.
  9. See *Chief Election Commissioner v Jan Chaukidar* (2013). About this case and CD in India, see Singh, 2008; Chandrachud, 2013.
  10. See *Breathnach v Ireland and the Attorney General* (2001). About this case and CD in Ireland, see Behan & O'Donnell, 2008; Hamilton & Lines, 2009; Behan, 2011; Behan, 2012; Behan, 2014.
  11. See article 38 II, Mexican Constitution and the case-law analysed in García, 2009.
  12. See *Re Bennett* (1993). About this case and CD in New Zealand, see Robins, 2006; Geddis, 2011.

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constitutional examination, on the basis that either CD is expressly authorised by the constitution (USA, Chile, Mexico and Botswana), the Court had no powers of review (New Zealand), or there was no constitutional conflict to solve (Ireland). It has been observed that under a different standard of review, those judgments would reach a similar solution to those of the second group of judgments.<sup>13</sup>

The second group of judgments, those that prohibited or limited CD, have in common the fact that they undertook a substantive constitutional review of the legislation. This chapter will focus on this group, and in particular, on those judgments that have applied a similar legal methodology to deal with CD, one mainly based upon the doctrine of proportionality. In this scenario, when the courts struck down the ban completely or partially, they did so as a consequence of a rational analysis of the legislation as a device for limiting the fundamental right to vote. It will be observed that amongst the courts engaged with proportionality, none rejected CD in terms of its radical incompatibility with democratic principles.<sup>14</sup>

The structure of this chapter is as follows. *Section I* summarises and contextualises the main cases that have prohibited or limited CD using the legal method of proportionality. Section II develops a descriptive analysis of the judgments. Finally, *Section II* examines critically the outcome of the judgments and indicates some of its shortcomings.

## **I JUDICIAL TRENDS ON DISENFRANCHISEMENT**

During the last decade, CD has begun to be understood as a significant problem in some jurisdictions and, accordingly, laws have begun to be examined under democratic and human rights standards. In particular, activists challenging legislation

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13. See Morgan-Foster, 2006:314-8.

14. See a brief of these cases below *Chapter 7*, Section III.1.



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on judicial review cases based on its violation of fundamental rights have started to gain success, pointing out a formula to challenge CD that could eventually be exported to other jurisdictions to pursue a worldwide progressive agenda.

Five cases in which the courts have followed a similar path are salient in this respect.<sup>15</sup> All those decisions dealt with cases in which CD affected offenders serving prison sentences. The judicial decision of the Supreme Court of Canada in the case *Sauvé v Canada No. 2* (2002) (hereinafter *Sauvé*) is probably the most influential of all these challenges, having been expressly and authoritatively cited by all the other courts. It found the legal provision that deprived all prisoners serving sentences of more than two years unconstitutional and authorised the suffrage of all Canadian inmates within the prison system. Shortly after *Sauvé*, the Constitutional Court of South Africa handed down *Minister of Home Affairs v NICRO* (2004) (hereinafter *NICRO*), in which express references are made to the Canadian judgment. In *NICRO*, the legislation that excluded all prisoners from voting was considered unconstitutional. A year after this sentence, the ECtHR analysed whether the electoral exclusion of prisoners in the United Kingdom was in accordance with the *European Convention on Human Rights* (hereinafter ECHR) in *Hirst v The United Kingdom No. 2* (2005) (hereinafter *Hirst*). It found the general ban of prisoners' voting incompatible with the convention. The Court also drew its judgment with explicit references to *Sauvé*. Two years later, discussing for the most part *Hirst* and *Sauvé*, the Australian High Court's *Roach v Electoral Commissioner* (2007) (hereinafter *Roach*) confirmed the constitutionality of the legal provision that bans those prisoners serving sentences of three years or longer. At the same time, however, it ruled that the amendment that introduced a general ban affecting all inmates was unconstitutional. Finally, and just a year later, the High Court of Hong Kong handed down *Chan Kin Sum v Secretary for Justice* (2008) (hereinafter *Chan Kin Sum*). The judgment affirmed that the general ban of prisoners' voting rights was

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15. The literature on the comparative analysis of these judgments includes Ewald & Rottinghaus, 2009a; Plaxton & Lardy, 2010; Ziegler, 2011; Beckman, 2013; Behan, 2014: Ch. 2.

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disproportionate and discriminatory based on arguments previously discussed in *Sauvé, NICRO, Hirst and Roach*.

Perhaps an introductory note on proportionality is necessary to understand the structure of the forthcoming analysis. Proportionality is the legal method to which the main cases on CD have resorted. Proportionality is a “set of rules determining the necessary and sufficient conditions for a limitation for a constitutionally protected right by a law to be constitutionally permissible”.<sup>16</sup> Proportionality is not the same as mere reasonableness; it has a more precise and detailed content devised to expose judicial reasoning as a rational legal exercise.<sup>17</sup> Proportionality permits, once the fact of the limitation of a right been agreed, an assessment of whether such a limitation is constitutionally justified. The proportionality analysis involves, and this varies depending of different formulations, three main steps. First, the method of proportionality depends on the previous identification of the right affected, the standards for the restriction of that right, and the limitative legislation that is examined. The right need to be affected by the legislation. Second, it focuses on an analysis of the legitimacy or constitutionality of the aim or purpose pursued by the legislature. It examines if the purpose of the limitative legislation is constitutionally permitted. Third, the proportionality test in itself is applied, on the one hand, assessing if the limitative legislation is rationally connected with the purpose and it is necessary, in what is a means-end assessment, and, on the other hand, assessing whether the gain in the satisfaction of the legislative aim is proportionate to the limitation of the right.<sup>18</sup>

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16. Barak, 2012:3.

17. See Barak, 2012:371-8.

18. The bibliography on proportionality is quickly growing. See e.g. Huscroft *et al*, 2014.

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## 1 ECtHR: *Hirst v United Kingdom No. 2* (2005)

In 2005, ECtHR handed down its judgment on *Hirst*, the first case in which the Court analysed CD in detail,<sup>19</sup> ruling that the British legislation violated the ECHR. The provision in question was Section 3(I) of the Representation of the People Act 1983 (hereinafter RPA 1983) that allegedly institutes a blanket ban of prisoners' voting rights.<sup>20</sup> It affirms that “[a] convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election”.<sup>21</sup> The legal debate around CD in *Hirst*

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19. *Hirst* is the first case in which CD is analysed substantively and in detail by the ECtHR. Before *Hirst* and prior to the enactment of the Protocol 11 of the ECHR, the European Commission of Human Rights had considered the question of CD three times. In *X v the Netherlands* (1974), *H v The Netherlands* (1983) and *Holland v Ireland* (1998), the Commission ruled inadmissible the complaints because they were manifestly ill-founded. In the two later judgments, the Commission considered the total disenfranchisement of sentenced prisoners against the provision of Article 3 of the First Protocol (hereinafter A3P1) of the ECHR. In both cases, *Labita v Italy* (2000) and *Vito Sante Santoro v Italy* (2004), the judgment was based upon the wide MOA awarded to the domestic authorities to decide on this issue. However, those cases were related to the case of those who were being investigated as they were suspected of belonging to criminal organisations and, therefore, were not cases in which the Court dealt with a general hypothesis of CD (*Hirst* [68]).
  20. The UK has a long history of CD. The Forfeiture Act 1870, the first statutory prohibition of prisoners' voting, liberalised the previous common law system of attainder, excluding from voting those sentenced to an imprisonment of more than 12 months. Cheney suggests that considering the limited number of people able to vote at that time, the provision of the Forfeiture Act had the purpose of sanctioning elected representatives who had abused their functions (2008:134). Those prisoners remained, however, unable to vote due to the absence of mechanisms for absence voting and registering. In the Representation of the People Act 1918, no statutory provision was contemplated, however, neither were any means to access the ballot box. The result was a *de facto* blanket ban affecting all prisoners. The introduction of the postal ballot in 1948, after the adoption of the principle of universal suffrage (Representation of the People Act 1928), raised the question of whether or not prisoners could use this alternative. From 1967 all prisoners were able to participate in elections following the enactment of the Criminal Law Act 1967, until a blanket ban was prescribed by Representation of the People Act 1969; this would also be the last time a CD provision was discussed in Parliament. This general ban was modified by the Representation of the People Act 2000, enabling remand prisoners to exercise the right to vote. About the historical development of CD in the UK, see Murray, 2012:3-11. See also Joint Committee, 2013:7-11.
  21. Section 3 RPA 1983 excludes two classes of inmates: “persons dealt with by committal or other summary process for contempt of court” ((2)(a)) and those imprisoned for non-payment of fines ((2)(c)). Additionally, defendants remanded in custody retain their right to vote.

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was focused on whether Section 3(I) violates human rights, specifically the rights that follow the state obligation to hold free elections under A3P1 of the ECHR.<sup>22</sup>

The ECtHR was not the first court to apply proportionality to analyse the compatibility of CD and the right to vote; Canada (1993 and 2002) and South Africa (1999 and 2004) both handed down judgments before *Hirst*. Nor does the ECtHR boast the clearest jurisprudence about what makes CD incompatible with the right to vote on these grounds.<sup>23</sup> However, the ECtHR, due to its jurisdiction over all countries of the Council of Europe, provided a set of cases in which the jurisprudence of the Court can be judged carefully.<sup>24</sup> *Hirst* and the decisions that follow it have generated a substantial discussion, especially in the UK,<sup>25</sup> regarding the intervention of the Court in sensitive national affairs.

Before the submission to the ECtHR, the *Hirst* case was considered at the domestic level. *R v Secretary of State for Home Department, Ex parte Pearson and Martinez, Hirst v Attorney General* (2001)<sup>26</sup> was the first time the issue of CD had been judicially considered since the enactment of the current legislation in 1983.<sup>27</sup> In this

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22. For commentaries of the judgment of the Grand Chamber, see Foster, 2009:497-8; Power, 2006:288-93; Easton, 2006; Thomson, 2011.

23. There is an agreement in the literature about the doctrinal influence of *Sauvé* over the further judgments, based on the sophistication of both the majority and the minority judgments (Plaxton & Lardy, 2010:102).

24. The legal literature on *Hirst* and the judgments of the ECtHR is extensive. See Foster, 2004; Easton, 2006; Lewis, 2006; Powers, 2006; Jago & Marriot, 2007; Cheney, 2008; Pérez-Moneo, 2009; Plaxton & Lardy, 2010; Foster, 2009; Briant, 2011a; Briant, 2011b; Murray, 2011b; Murray, 2011a; Joint Committee, 2013:14-7.

25. Regarding the political repercussions of these judgments, especially the tensions between the British Government and Parliament and the ECtHR after *Hirst*, see, generally, Bates, 2014. The bibliography is, however, constantly growing, most of which has been directed to analyse the institutional tension in terms of a judicial dialogue and a problem for parliamentary sovereignty; see Lewis, 2006; Foster, 2009; Briant, 2011a; Briant, 2011b; Nicol, 2011; Murray, 2011a; Murray, 2011b; Thomson, 2011; Davis, 2012; O’Cinneide, 2012; Bates, 2012: 408-9; Bellamy, 2012; Fenwick, 2013; Hiebert, 2013; Young, 2013; Joint Committee, 2013:22-33. About the influence of the press, see Rozenberg & Wagner, 2013; McNulty, 2014. See also Peroni & Burbergs, 2010; Raab, 2011; Leconte, 2013.

26. For commentaries of this case, see Foster, 2001; Powers, 2006:276-80; Foster, 2009.

27. For previous judicial decisions, see Murray, 2012.

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judgment, the Divisional Court dismissed the application that sought a declaration of incompatibility of Section 3 under the Human Rights Act 1998.<sup>28</sup> After failing in its attempt at the domestic level, the *Hirst* case was taken to the European level, where it was considered first by the Fourth Section of the ECtHR before the UK government appealed for it to be considered by the Grand Chamber.<sup>29</sup>

The main issues addressed by the Court were, firstly, the margin of appreciation (hereinafter MOA) enjoyed by member states to set CD measures that relates the current case with the previous case-law in relation to electoral issues. Secondly, the Court addressed the proportionality of the legal provision. Generally, the Court concluded that the wide MOA of domestic legislatures could not cover the provision of a “general, automatic and indiscriminate” [82] ban, such as Section 3(I).

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28. In order to do so, the Court first argued that the right to vote is subject to limitations and conditions, for which it referred to the ECtHR jurisprudence [4, 16]. Secondly, it argued that domestic legislations have a wide MOA to exclude prisoners from the right to vote, in accordance with the doctrine of the abovementioned European Commission [14-6]. Where that line of exclusion should be traced, then, corresponds exactly to where Parliament deems the coordinates to be [20]. Thirdly, though it is difficult to articulate a defence of CD legitimacy based upon its aim, there are elements of electoral regulation and punishment articulated by the Parliament, which is the legitimate actor to adopt these kinds of decisions [40]. The domestic cases after *Hirst* have not changed the *status quo* established by these cases. In *Smith v Scott* (2007), the Scottish Court of Appeal recognized the incompatibility of Section 3 (regarding this case, see Kesby, 2007; Foster, 2009:501). After this case, domestic courts have refused to make such kind of declarations. In 2013 two cases were heard by the Supreme Court: *R (on the application of Chester) v Secretary of State for Justice* and *McGeoch v The Lord President of the Council* (2013) (hereinafter *Chester and McGeoch*). In these cases the Court refused to do any declaration of incompatibility but also “declined the Attorney General’s invitation not to apply the principles of *Hirst*” (Joint Committee, 2013:21) (regarding these cases, see Wagner, 2013; Ziegler, 2013; Tomkins, 2013; Tickell, 2014; Lansbergen, 2014). For analysis of the UK’s domestic court attitude after *Hirst*, see Briant, 2011a; Murray, 2011b; Joint Committee, 2013:20-1.
29. In the Chamber judgment, the framework of review was similar to that considered by the UK court: *Mathieu-Mohin* as standard of review of A3P1 [36-38] and the recognition of the right to vote as an essential component of a democratic society *vis-a-vis* the wide MOA of the contracting states [40-1]. Despite heavily criticising the legitimate aims argued by the UK Government, the Chamber left open the question of legitimacy [42-7] to focus instead on the proportionality of Section 3. The Chamber considered the provision of Section 3 disproportionate because it disenfranchises “a large category of person” indiscriminately, automatically, “irrespective of the nature or gravity of their offence” and producing an arbitrary general effect [49]. By this means, the Chamber introduces the proportionality test as that upon which the Grand Chamber would assess CD. For commentaries of the judgment of the Chamber, see Foster, 2004; Power, 2006:280-288; Foster, 2009:493-7.

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### 1.1 *The margin of appreciation*

This is the only judgment of the analysed that was handed down by an international court. However, as the analysis carried out here focus in the legal reasoning of the courts, this does not seem a problem for a join analysis. It is important to pay attention, however, to the doctrine to which the ECtHR has traditionally appealed to incorporate into his reasoning its position as an international court.

The doctrine of the MOA has been used by the Court “to take account of the room for manoeuvre that national authorities may be allowed in fulfilling some of their main obligations under the Convention”.<sup>30</sup> The ECtHR’s analysis of MOA in *Hirst* confronted directly the previous evaluation made by the British court, which stated that CD should remain completely within the competence of the legislature. The Court, in *Hirst*, considered the requirements for applying MOA to the case of CD [79] and determined that for this to be granted a decision must be preceded by a substantial discussion before being settled and not merely display passive adherence to a historic tradition. This substantial discussion can be demonstrated not only by legislative debate, but also when the issue has been considered by the judicial instances of the country [48]. The Court further specified that this discussion must consider competing interests or assess the proportionality of CD in relation to voting rights. The Court considered that such discussion was absent in this case [22], and condemned the UK for not satisfying these requirements [78-82].

After affirming this, the Court added that if it is true that the MOA is wide, it is not all-embracing [82], and called for an irreducible limit to the MOA, based on the proportionality test itself.<sup>31</sup> It is, at the very least, strange that the Court made an

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30. Joint Committee, 2013:13. The MOA doctrine was first fully articulated in *Handyside v United Kingdom* (1976). See Lang, 2013:841-3.

31. This was the main disagreement raised by the dissenting opinion of judges Wildhaber, Costa, Lorenzen, Kovler and Jebens [4].

effort to express that the UK did not satisfy some alleged requirements to be granted a MOA, and then consider that Section 3 fell outwith it as a consequence of its lack of proportionality.<sup>32</sup> This raises the question of whether the satisfaction of these standards should warrant the widening of a state's MOA, that is, whether or not different deliberative processes should be granted different margins.<sup>33</sup>

## 1.2 *The right to vote and the source of the scrutiny test*

In *Hirst*, the standard of the review was the obligation 'to hold free elections' of the A3P1.<sup>34</sup> The right to vote is not expressly stipulated and has been attributed to the creative activity of the Court under the 'living instrument' doctrine.<sup>35</sup> Under this premise, the right to vote was recognised by the ECtHR in *Mathieu-Mohin and Clerfayt v Belgium* (1988) arguing that the text of the protocol entails individual rights to vote and to stand as a candidate for national election and not only inter-state obligations. This idea has been ratified in later judgments<sup>36</sup> and applied in *Hirst* [57].<sup>37</sup>

The Court affirmed substantive ideas regarding the right to vote. It affirmed that the vote is a right and "not a privilege", and that in a democratic state, universal suffrage "has become the basic principle", which demands a "presumption [...] in favour of inclusion" [59]. On the other hand, however, the Court acknowledged that the right to

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32. cf dissenting opinion of Judge Björgvinsson in *Scoppola* [26-8].

33. This is an interesting issue that must be considered for further research.

34. A3P1 ECHR: "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".

35. In *Tyrer v The United Kingdom* (1978) the Court established that "the convention is a living instrument which [...] must be interpreted in the light of present-day conditions [15]". See Powers, 2006:260-2. See also Lang, 2013:839-41; Joint Committee, 2013:13.

36. See *Matthews v The United Kingdom* (1999); *Labita v Italy* (2000).

37. The fact that the A3P1 does not state that there is a subjective right to vote, and the allegation of the British government that this case law ignores the intentions of the original drafter, have formed the object of a series of arguments in the UK debate about the legitimacy of the creative activity of the Court. See Joint Committee, 2013:13-4.

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vote is not absolute, and in the absence of an express limitation clause, it is nonetheless the object of implied limitations. Due to the fact that the ECHR lacks a general clause of limitation of fundamental rights,<sup>38</sup> it corresponds to the contracting parties setting those limitations, which ought to be accorded a wide MOA due to the “numerous ways of organizing and running electoral systems” [60-1]. Starting on the basis of a presumption of universal suffrage [59], these limitations must respect some requirements implicit in A3P1, that the Court inaugurated in *Mathieu-Mohin* [52], and which have been confirmed in subsequent judgments. The standard considers three elements: first, “it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness”; second, the limitation must pursue a legitimate aim or proper purpose; and third, the means employed must not be disproportionate [62].<sup>39</sup>

### 1.3 *The purpose*

The UK government sought to justify Section 3 RPA 1983 by appealing to the following abstract purposes:

“preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country” [50].

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38. Some provisions have explicit limitation clauses, which is not so in the case of the A3P1 (Barak, 2012:135, 141). Powers (2006:254-8) is wrong when he considers the standard of limitation of the right to vote is that of “necessary in a democratic society”, which is the specific standard of limitation of the right to respect for private and family life.

39. See also *Scoppola* [104]. See a detailed analysis of the case law of the ECtHR in the analysis of these elements in Powers, 2006:262-7.



In a decision essential to understanding the criticism articulated in following chapters, as a consequence of the application of the MOA doctrine, the Court did not undertake an examination of the legitimacy of the governmental aims.<sup>40</sup> This was considered a question of particular flexibility in the context of the broader variations within the European democratic models.<sup>41</sup> Despite the reservations expressed, the Court did not find the aims “*per se* incompatible with the right” [75].

#### **1.4 The proportionality judgment**

Having satisfied the requirement of a legitimate purpose, the Court’s ruling regarding Section 3 was based on a proportionality analysis. However, the Court did not proceed to examine the measure in terms of the traditional formulation of the proportionality test, this is, in terms of its rational connection and minimal impairment and the balancing or proportionality in a strict sense, or at least not explicitly. It did so with reference to an *ad-hoc* and specific test, currently known as the *Hirst* test.

In the core of the test, the Court considered that the “general, automatic and indiscriminate” [82] deprivation of prisoners’ right to vote is incompatible with the Convention, appealing to the necessity of a certain graduation or proportionality between the measure of Section 3 and the circumstances of the incarceration of prisoners. The Court followed closely the Chamber’s judgment, which affirmed that CD was *general* because it stripped a “large group of people of the vote”; it is *automatic* because it applies “irrespective of length of sentence of the gravity of the offence”; and it is *arbitrary* because its results depend “on the timing of elections” [41]. In the central paragraph of its judgment, the Court stated that

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40. See below *Chapter 7*, Section II.

41. This is an argument that is repeated in other judgments.

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“while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. [...] section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a *general, automatic and indiscriminate* restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1 [82]”.

The ECtHR concluded that Section 3 RPA 1983 violates the right to free elections because it does not take into account the nature of the offence and the duration of the imprisonment in determining the application of CD. In other words, the Court suggested that CD depends on nothing more than the mere fact of imprisonment [77]. Affirming this, the Court left open the possibility of a proportionate application of CD, when the legislation considers those factors. However, the Court was cautious in saying that it is for the legislative authorities at the domestic level that must determine the “means for the securing the rights guaranteed by the Article 3 of the Protocol 1” [84]. The use of proportionality did not consider the elements of the proportionality test traditionally outlined by the doctrine but concentrated on an *ad-hoc* proportionality examination. However, it can be argued that the proportionality test was implicit to that *ad-hoc* test.<sup>42</sup>

Three other judgments followed *Hirst*. The three of them confirmed the reasoning of *Hirst*, including the wide MOA,<sup>43</sup> the legitimacy of the aim of punishment and the enhancement of civic responsibility and respect for the rule of law,<sup>44</sup> and

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42. It is however not unusual that the ECtHR did not explicitly apply proportionality in terms of a structured test. An overview of the case law of the Court shows that the terms of the proportionality evaluation are made *ad-hoc* to the cases. See Legg, 2012:178-81.

43. See *Frodl* [23]; *Greens* [110]; *Scoppola* [83].

44. See *Frodl* [30]; *Scoppola* [90-2].

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proportionality as the test to be applied.<sup>45</sup> They partially differed, however, in the concrete formulation of the demands of the proportionality test.<sup>46</sup>

In *Frodl v Austria* (2010) (hereinafter *Frodl*) the First Section of the Court analysed a challenge against Austrian legislation, which disenfranchises those imprisoned for more than one year, affirming that it was incompatible with A3P1. According to the Court:

“Disenfranchisement may only be envisaged for a rather narrowly defined group of offenders serving a lengthy term of imprisonment [28]. [...] Under the *Hirst* test, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions” [34].<sup>47</sup>

*Frodl* was considerably more stringent than *Hirst*, demanding very specific requirements, and therefore narrowing the MOA “almost to vanishing point”.<sup>48</sup> The confessed purpose of the Court was to “establish disenfranchisement as an exception even in the case of convicted prisoners” [35].<sup>49</sup> With this interpretation of the *Hirst* ruling, the standard of the Court became stricter, narrowing the options for European governments to produce a reform in accordance with expectations of the Court.

Just after *Frodl*, the Fourth Section of the Court decided *Greens and M.T. v United Kingdom* (2010) (hereinafter *Greens*), finding a violation of the right to free elections due to the UK government’s delay in implementing *Hirst*. However, on this occasion

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45. See *Frodl* [24]; *Scoppola* [93-6].

46. See Joint Committee, 2013:17-9.

47. This was also the reasoning of the Second Section’s Chamber judgment in *Scoppola*.

48. Joint Committee, 2013:17.

49. This exceptional character can be linked to the doctrine that prisoners retain all their rights and freedoms save for the right to liberty, insofar as these are compatible with the fact of incarceration, as well as the democratic idea that limitations on the franchise are exceptional based on the democratic principle of universal suffrage.

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the Court returned to the idea of not giving any guidance for the required legislative proposal [113] – not even in relation to the judicial intervention and anti-democratic and electoral offences demanded in *Frodl*. The Court emphasised that the definition of the policy, within the wide range of alternatives available, rests with the government [114]. Additionally, it gave the UK government a six-month deadline to introduce an amendment to Section 3 into Parliament [115].<sup>50</sup>

With *Scoppola v Italy No. 3* (2012) (hereinafter *Scoppola*) the issue of CD returned to the Grand Chamber six years after *Hirst*.<sup>51</sup> It was expected for this judgment to provide a final clarification of how the ECtHR addresses CD. The Court made an effort to make its judgment compatible with its previous decision while analysing the compatibility of the Italian regime of CD. The judgment claims to be consistent with the ruling of *Hirst* [82] but it clearly seemed to be saying that *Frodl* [34, 71] went too far.

At the core of its argumentation, the Court used a comparison between CD in the UK and its Italian counterpart, arguing that Italian CD does not fall within the category of “general, automatic and indiscriminate” proposed by the *Hirst* test but within the Italian government’s MOA. This effort considered three aspects of the legislation. Firstly, under the Italian system, CD is applied only to some prisoners, so is not *general* as the UK ban is [108]. Secondly, it considers material elements, namely the length of the prison sentence (offences resulting in a sentence of three or more years’ imprisonment) and the nature of the crime committed (even lesser imprisonment terms when the act involves an offence against the state), so it is not *indiscriminate* as the UK approach is [105]. Accordingly, what seems to be important for the Court is

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50. *Greens* thus returned with strict textualism to the *Hirst* ruling, first, by considering the judicial declaration of CD desirable but not obligatory. Second, by finding that there should be a link between the conduct and the sanction, which cannot necessarily be restricted to electoral and democratic offences, but may consider factors such as the length of sentence and the nature and gravity of the offence as relevant variables for attaining proportionality (See Briant, 2011b:281).

51. For commentaries of the judgment, see Pitea, 2012; Foster, 2012; Lang, 2013; Jaramillo, 2014.

that the Italian legislation provides a targeted-ban rather than as a blanket-ban.<sup>52</sup> Thirdly, the duration of the CD depends on the prison sentence length, so it is not *automatic* because it shows “the legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender” [106].<sup>53</sup> With this qualification, the Grand Chamber expressly distanced itself from both *Frodl* and the chamber judgment in *Scoppola*, conceding that not only a court but the legislator can determine and consider the particular circumstances of the application of CD. Therefore, confirming *Greens*, an intervention by a judge is desirable but not necessary [97-102]. In addition, no mention was made of the requirement in *Frodl* of links between the offence with democratic and electoral values.<sup>54</sup>

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52. See above *Chapter 1*, Section I.2.1.

53. The element of *arbitrariness* it is not mentioned in this case.

54. To understand better what seems to be the last word of the ECtHR on the issue of CD, *Scoppola* must be situated within a broader legal framework. CD can affect the right to vote in several dimensions: the only one in which Italian legislation is less restrictive of the right to vote than its UK counterpart is the scope of the measure; that is, the determination of which offenders are subjected to the suspension of their voting rights. The Court focused on this aspect, paying scant attention to other aspects, such as the duration, modalities of application, sources, and method of rehabilitation of the Italian legislation. Regarding *duration*, Italian CD bans serious offenders for much longer whilst the UK system does not. Every UK prisoner that is released from prison, independently of the seriousness or nature of the offence and the length of the imprisonment, returns to their community being able to exercise the right to vote, while in Italy some ex-prisoners remain disenfranchised temporarily or permanently. The *modes of application* are relatively similar because the judge’s participation does not affect the applicability of the measure – which as noted by the dissenting opinion is also automatic – but determines the gravity of the punishment (the length of the prison sentence) with which CD is associated. Regarding the *sources*, while the UK legislation is an Act of Parliament (RPA 1983), in Italy the administrative norm that extends the forfeiture for holding public office to the right to vote (Presidential Decree No. 223/1967) lacks the democratic deliberative input of a legislative norm. Finally, while UK law permits automatic *rehabilitation* after release, permanently banned Italian citizens must apply to a procedure that depends upon the ex-prisoner displaying “consistent and genuine display of good conduct” [109]. This comparison leads to the conclusion that in the *Scoppola* judgment, the Court reduced the *Hirst* test and therefore the proportionality of CD in relation to the ECHR to the concrete aspect of the *scope* of CD, and particularly in relation to the length of the prison sentences to which it is applied. None of the other aspects of CD seem to be considered or, at least, sufficiently considered (See e.g. Ziegler, 2013; Jaramillo, 2014:43). If the emphasis were placed on other aspects, for

The Court placed great value on the political participation of offenders serving prison sentences shorter than three years, explicitly affirming that the key factor for this decision was the finding that “there is no disenfranchisement in connection with minor offences” or those which “do not attract sentences of three years’ imprisonment or more” [108]. The key aspect to satisfy the ECtHR in this regard seems to be to “discriminate between less serious and more serious offences”.<sup>55</sup> This might be considered a reversal for prisoners’ rights in relation to previous judgments,<sup>56</sup> or at least a sign of an inconsistent jurisprudence on the right to vote.<sup>57</sup> In sum, “the extent to which convicted criminals are entitled to participate in the electoral process remains unclear”<sup>58</sup> and the development in recent years has been unpredictable in the case-law of the ECtHR.<sup>59</sup>

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example, the temporary duration of the measure and the difficulties of the process of rehabilitation (which has informed, for instance, the US debate), the results might be different.

55. Joint Committee, 2013:20. See also Gardner, 2012.

56. See e.g. Ziegler, 2012.

57. See the dissenting opinion of Judge Björgvinsson [26-8]. He argues that the *Hirst* and *Scoppola* rulings are inconsistent because the latter drops two of the requirements established by the former, Italian legislation being as “automatic” as UK legislation. He also notes that there is no examination of the circumstances under which the MOA is to be conceded to the Italian Government, as there was in *Hirst* (see also Lang, 2013). Pitea (2012) puts great emphasis on the fact that the ECtHR in *Hirst* examines British legislation *in abstracto*, whilst in *Scoppola* the Court proceeds “without examining whether the solution adopted would lead to respect of proportionality in each and every case”. The inconsistency between the cases, according to him, can be explained in terms of an “Unsolved Tension between “Individual” and “Constitutional” Justice”. Yet more sceptical is Milanovic (2013), who suggests that *Scoppola* is a case of strategic judgment, “hardly a decision born out of principle”, in which the ECtHR “has no desire to diminish its own authority by overruling *Hirst*”, but concedes that its demands went too far, therefore granting the United Kingdom the possibility to comply with *Hirst* by passing “essentially cosmetic changes” to the corresponding legislation.

58. Jaramillo, 2014:41. After *Scoppola*, two chamber judgments have contributed to confirm *Hirst* as the leading case on CD before the ECtHR. They have, however, continued casting doubts on the consistency of the Court case-law. In the arguably more important *Söyler v Turkey* (2013), the Second Section of the ECtHR applied the *Hirst* test to the case of suspended sentences. In this case a prisoner was released from prison on probation but was still affected by CD until the end of the period of the original sentence [36]. The Turkish government argued that the aim of CD was “encouraging citizen-like conduct” and rehabilitation, and the Court following *Hirst* affirmed that such an aim was not *per se* incompatible with A3P1 [37]. In relation to the proportionality of the measure, the Court confirmed that judicial intervention is not essential but “in principle, likely to guarantee the proportionality of restrictions on prisoners’ voting rights” [39]. The Court also confirmed that a blanket ban, such as that affecting prisoners in Turkey, is indiscriminate because it “does not take into account the nature or gravity of the

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## 2 Canada: *Sauvé v Canada No. 2* (2002)

The Supreme Court of Canada dealt with CD in 1993, striking down a blanket ban on prisoners voting in *Sauvé v Canada No. 1* (1993).<sup>60</sup> The Court briefly stated that the contravention of Section 3 of the Canadian Charter of Rights and Freedoms by the Canada Election Act 1985 was not justified according to the limitation clause of Section 1 but had been “drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test”. After *Sauvé v Canada No. 1* (1993), the Parliament responded by enacting a new provision, this time narrowly tailored. This became the subject of a new case, *Sauvé*, in which the Court considered the constitutionality of the new CD provision of Section 51(e) of the Canada Election Act 2000, which denied the right to vote to “every person who is imprisoned in a correctional institution serving a sentence of two years or more”. The Court, in a judgment of extraordinary depth and quality, ruled that the provision was

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offence, the length of the prison sentence [...] or the individual circumstances of the convicted person” [41]. However, the Court in *Söyler* does not explicitly condemn the disenfranchisement of convicts with suspended prison sentences, but makes references to the non-serious character of the committed offence [44] and its insufficient link with the sanction of CD [45]. In *Anchugov and Gladkov v Russia* (2013), the First Section of the Court sustained that the fact that CD is laid down in the Constitution (article 32.3) rather than in an act of Parliament is not an impediment to declaring the incompatibility of the Russian blanket ban affecting all prisoners with the A3P1 applying the *Hirst* test. Interestingly, according to the Court, the compliance with the ruling “can be achieved through some form of political process or by interpreting the Russian Constitution by the competent authorities” [111]. In a third case, *McLean and Cole v United Kingdom* (2013), the Fourth Section of the Court confirmed that the protection of the right to vote of the A3P1 does not extend to referendums [31-33] and local elections [26-30] but only those elections “concerning the choice of the legislature” [32], hence, only parliamentary elections. It dismissed, with that argument, the claim against the exclusion of those in prison from be part in the Scottish independence referendum (see Section 3, Scottish Independence Referendum (Franchise) Act 2013). Tickell (2014) notes that the nature of an independence referendum could be interpreted as determining “which legislature Scots will be governed by in future. It may not be a choice about the individuals who will constitute the legislature but [...] a referendum on independence has a much closer connection to the issues attracting protection of A3P1” (293).

59. See Joint Committee, 2013:20.

60. Previous cases anticipated that the prisoners’ right to vote would eventually be asserted by the Supreme Court of Canada. In *Sauvé v Attorney-General of Canada* (1991) (Ontario Court of Appeal) and *Belczowski v The Queen* (1991) (Federal Court), the courts ruled that the blanket ban affecting all prisoners was unconstitutional. Both decisions were appealed before the Supreme Court, which confirmed that the legislation was unconstitutional.

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unconstitutional because the limitation of the right to vote was not justified under Section 1 of the Charter.<sup>61</sup>

## **2.1 Deference**

The main disagreement between the majority and the dissenting vote in *Sauvé* was concerned with the margin of deference that the Court must grant to the parliament to decide on this kind of issue.

The majority vote affirmed that “[t]he right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require no deference” [9]. This is true, the Court affirm, even for the legislative regulation of issues in which social and political philosophies can reasonably disagree, as was pointed by the influential dissenting vote in the case of CD. Accepting this argument would lead to “reverse the constitutionally imposed burden of justification” [10], whose function is to require justification for the limitation of those rights, and more so when the right is the “cornerstone of democracy” and has been exempt from the notwithstanding clause of Section 33 [12-4]. It is precisely in these cases, in which the legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that the courts must be vigilant” [15].

## **2.2 The right to vote and the source of the proportionality test**

The legal basis of the plaintiff claim in this case was that CD infringed the right to vote expressly laid down in Section 3 of the Charter: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein”.

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61. The bibliography regarding *Sauvé v Canada No. 1* (1993) and *Sauvé*, and the Canadian legal debate on CD includes Manfredi, 1998; Hampton, 1998:23-6; Schafer, 1999; Brown, 2003; Parkes, 2003; Manfredi, 2007; Manfredi, 2009:260-8; Plaxton & Lardy, 2010.



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The standard of scrutiny for the limitation of fundamental rights has been built upon Section 1 of the Charter, which states that rights are only subject “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The standard test was settled in *R v Oakes* (1986), and recalled in *Sauvé*, where the Court ruled that the government must show both a pressing and substantial objective (proper purpose) and the proportionality of the measure, in particular, that the measure is “rationally connected [with the objective], causes minimal impairment, and is proportionate to the benefit achieved” [7]. The fact that the government conceded that the CD provision violated the right to vote [6] increased the burden of proof borne by the government, which had to demonstrate (“to satisfy the reasonable person” [18]) that the limitation was justified under the test [10].

Especially regarding the element of a proper purpose element, the Court set a high standard of justification. The purpose of CD cannot be “trivial” and cannot be “discordant with the principles integral to a free and democratic society”. Therefore, the purpose must satisfy a standard of importance that “a simple majoritarian preference to abolish a right” would not satisfy and that would be satisfied when what is sought is the protection of other competing rights [20]. The required purpose must therefore be “pressing and substantial”.

### **2.3 The purpose**

In the absence of a specific problem that CD was held to resolve, the government stated that CD pursues two broad objectives: first, “to enhance civic responsibility and respect for the rule of law”, and second, “to provide additional punishment or ‘enhanc[e] the general purposes of the criminal sanction’” [21].

The Court expressed its concern regarding the offered purposes. First, it noted that there were doubts regarding “how much these goals actually motivated Parliament”,

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however, it proceeded to analyse the government's proposal [21]. Second, the Court conceded the legitimacy of the purposes, notwithstanding that such "[v]ague and symbolic objectives [...] almost guarantee a positive answer to this question" [22] and that the purposes had not been "precisely defined so as to provide a clear framework for evaluating its importance" [23].<sup>62</sup> The Court emphasised that it did not straightforwardly dismiss the government objectives merely for prudential considerations [27].

The Court in *Sauvé* rejected the government's argument at a later stage, at the level of the rational connection, but from the analysis of the aims offered, it can be concluded that the Court did not consider any of the purposes outlined by the government as 'pressing and substantial'.

#### **2.4 The proportionality judgment**

The Court analysed the proportionality of CD in relation to each of the alleged purposes, concluding that they lacked a *rational connection* with the legal provision of the Election Act 2000. The government claimed that depriving prisoners of the right to vote advanced the first purpose, respect for the law held by both the inmate and the community in general, by arguing: first, that it sends an "educative message about the importance of respect for the law"; and second, that it avoids demeaning the political system. CD advances the second purpose in that it imposes a legitimate punishment "regardless of the specific nature of the offence or the circumstances of the individual offender" [29].

The answer of the Court went so far in philosophical argument as to label strange the empirical issue that the government put forward. Regarding the first argument, the

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62. Regarding the argument of the Court in relation to the possibility of offering abstract values for the purpose of the limitation of rights, see Brown, 2003:309-14.

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Court reasoned by explaining that the premises on which respect for the law in a democratic society such as Canada are built cannot be used to argue that depriving suffrage reinforces that same respect for the law. In fact, the opposite is the case, according to the Court. A “[b]ad pedagogy”, which is “more likely to harm than to help respect for the law” [30], “anti-democratic and internally self-contradictory” [32] and running against the Canada commitment to “the inherent worth and dignity of every individual” [35] were the categorical terms in which the Court referred to the argument. Similar categorical statements were used to dismiss the complementary arguments about enhancing civic responsibility [37]. The failure of the argument of respect for the law, therefore, was based on the likelihood that CD will “send messages that undermine respect for the law and democracy than messages that enhance those values” [41].<sup>63</sup>

In regard to the argument that “allowing penitentiary inmates to vote ‘demeans’ the political system”, the rational connection between that purpose and the provision, according to the Court, is based upon the inadmissible, “ancient and obsolete” premise that prisoners are in a sense unworthy of the respect or dignity deserved by every citizen able to participate in the elections [37, 44]. In this way, both justifications failed the rational connection test. Finally, the Court considered the diverse penological functions that CD can perform, concluding that the ‘additional’ punishment effect claimed by the government was not convincing.<sup>64</sup> All punishment functions were already either covered by imprisonment or could not be rationally expected to be performed by CD [48-50]. Thus, again, the measure fails the test of rational connection.

Even when the Court found the failure of the proportionality test at the first stage, it evaluated the provision under the other elements of the test *a fortiori*, also concluding that it would fail to pass them. Regarding the minimal impairment test (necessity), the

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63. See the analysis of the argument in Plaxton & Lardy, 2010:106-12.

64. For a complete analysis of this functions, see below *Chapter 5*.

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Court considered that the provision was not only over-inclusive but that there was no clear standard by which to assess the measure. Even if it is taken for granted that the purpose of the measure is to affect only serious offenders, there is a lack of justification regarding necessity. The Court questioned what ‘serious’ offender might be taken to mean and how a line that separates these offenders from ‘minor’ offenders can be rationally drawn, and, second, what makes the category of serious offender different from minors offenders in such a way as to restrict their right to vote [54-5].

Finally, assessing proportionality in the strict sense, the Court, pointing out problems affecting democratic legitimacy [31, 58], the rehabilitative function of prisons [59] and a disproportionate impact on the aboriginal population [60], concluded that “the negative effects of denying citizens the rights to vote would greatly outweigh the tenuous benefits that might ensue” [57].

*Sauvé* is an important judgment maybe because it set an argumentative standard relatively high. It is full of arguments relative to the protection of democracy and fundamental rights, which frame its progressive outcome in a reasoned and principled way. Finally, the substantive arguments offered by the Court are organized in terms of the proportionality legal method.

### **3 South Africa: Minister of Home Affairs v NICRO (2004)**

The South African Constitutional Court handed down judgments in 1999 and 2004 striking down CD legislation. The Court first considered the issue in *August v Electoral Commission* (1999) (hereinafter *August*), in which the absence of a prisoners’ voting system was imputed as an unconstitutional inaction. Five years later, the issue was revisited in the NICRO judgment where the new legislation,

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which deprived all prisoners with the exception of those who had a right to fine, was considered unconstitutional.<sup>65</sup>

The Interim Constitution of 1993, in transition from the apartheid regime,<sup>66</sup> did not disenfranchise prisoners, but Section 16(d) of the Electoral Act of 1993 prescribes CD for those sentenced without option of a fine for the crimes of murder, robbery and rape. This disposition was rapidly amended in 1994 to allow all prisoners to vote. The final Constitution of 1996 did not settle any specific provision in relation to CD. The Electoral Act of 1998 stipulates a number of categories of persons disqualified from voting, among which prisoners were not included. This is the legislative scenario in which the first case was analysed by the recently established Constitutional Court.<sup>67</sup>

### **3.1 *August v Electoral Commission (1999)***

The Court in *August* dealt with the inaction of the Electoral Commission, the administrative service in charge of implementing the elections, in providing a mechanism of voting for prisoners. The defence of the Commission was mainly based on the argument that prisoners are allowed to vote but they cannot physically do it due to a fact (the imprisonment) that depends on their own misconduct and not on some action of the Commission [20]. In order to explain why it had not provided a system of voting and registration for prisoners, the Commission argued: first, that to

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65. On *August* and *NICRO* judgments, and the South African legal debate on CD, see Muntinogh & Sloth Nielsen, 2009; Plaxton & Lardy, 2010; Abebe, 2013.

66. Muntinogh and Sloth Nielsen (2009) explains that the discussion about CD was carried out in the context of the transition from the apartheid regime, with the first democratic election taking place in 1994 under the framework of the Interim Constitution (succeeded by a final Constitution in 1996). Three general considerations must therefore be taken into account. First, imprisonment was one of the apartheid regime's main tools of social control. Second, many of the anti-apartheid political prisoners later became important politicians and were actively involved in the negotiations around the drafting of the Constitution (224-5). Third, criminality has been described as one of the main social problems for the post-apartheid governments (238-41). Consideration of these three factors makes it easier to understand the evolution of the ambivalent public attitude towards prisoners' voting in South Africa.

67. See Muntinogh & Sloth Nielsen, 2009:229-31.

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do so would involve “immense logistical, financial and administrative difficulties” [13], and second, that this kind of special voting mechanism should be reserved or preferably implemented to help other categories of persons physically deprived of their vote (such as expatriates, poor inhabitants of remote areas) [8, 30].<sup>68</sup>

The Court answered these arguments peremptorily by stating the general principles that “the vote of each and every citizen is a badge of dignity and of personhood” [17],<sup>69</sup> prisoners retain all those rights not expressly deprived by the legislature [18], and therefore the Commission had breached the Constitution by failing to protect the right to vote whose “very nature imposes positive obligations upon the legislature and the executive” [16].<sup>70</sup> It stated clearly that “[t]he question whether legislation disqualifying prisoners, or categories of prisoners, from voting could be justified [...] was not raised”, but also that the judgments “should not be read [...] as suggesting that Parliament is prevented from disenfranchising certain categories of prisoners” [31].

Just four years after *August*, the government passed the Electoral Law Amendment Act 2003 that banned from voting all those prisoners without the option of a fine. The Court analysed that amendment in *NICRO*. The Court closely followed *Sauvé* when dealing this time with the provision explicitly disenfranchising prisoners.

### **3.2 The right to vote and the source of the proportionality test**

The legal basis of the constitutionality judgment in the case of South Africa was relatively simple to demonstrate. The Constitution expressly laid down the right to vote and conferred it universality in Section 19(3)(a): “Every adult citizen has the right [...] to vote in elections for any legislative body established in terms of the

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68. Regarding this arguments, see below *Chapter 3*, Section IV.2

69. See below *Chapter 6*, Section III.

70. Regarding these aspects of the right to vote, see below *Chapter 6*, Section III.2.

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Constitution, and to do so in secret”. Additionally, the principle of “universal adult suffrage” is part of the fundamental values of the Constitution prescribed in Section 1(d).

The right to vote lacks a special limitation clause. This is not seen by the Court as an indication that it is an absolute right, but rather that it is governed by the general limitation clause of Section 36 [25]. This section stipulates a complex standard of limitation in which the limitation has to be both “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” and proportional. The detailed account of proportionality implies that any limitation should consider all relevant factors in “a balancing of means and ends” [37], the guidelines for which are in Section 36 and include “the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose”.

### **3.3 The purpose**

The Government offered an argument for the purpose of the legislation based purely upon instrumental reasons that tended to repeat the argument of *August*.<sup>71</sup> That is, it argued on the grounds of logistical and financial inconvenience and the need to prioritize other citizens unable to exercise the right to vote in accessing additional resources, adding, however, the threat that prisoners’ voting poses for the integrity of the process [45]. The government also mentioned that allowing prisoners to vote would suggest that it was being soft on crime, whereas the message sent by government policy should be “one of denouncing the crime” [139].

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71. See below *Chapter 3*, Section IV.2.

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The Court refused to accept the logistical argument due to the absence of evidence [49]. It also argued that existing alternative methods of voting could be used to provide prisoners the opportunity to exercise their rights. The additional argument about being seen to be soft on crime was addressed with irony by the Court: “It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor [...] in order to correct a public misconception as to its true attitude to crime and criminals” [56].<sup>72</sup> However, the Court viewed the government’s aim in a better light when it recognised that

“at the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens. Such a purpose would be legitimate and consistent with the provisions of Section 3 of the Constitution” [57].<sup>73</sup>

However, the Court pointed out the omission of any development of such an argument and the lack of information to support it in the submission of the government. At the end, the Court decided the case, asserting that the government failed to provide “sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve” [65]. It did so after recognising that Section 36 of the Constitution (and here it followed *Sauvé*) is compromised by a high standard for the limitation of rights that requires, on the one hand, considering the importance of the infringed right and, on the other hand, the “importance and effect of the infringing provision” [37]. Considering the blanket ban of all prisoners without the option of a fine, the Court expressed the impossibility of balancing the impact of the intended purpose upon the right because of the lack of empirical information [67].

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72. See below *Chapter 7*, Section I.3.

73. See below *Chapter 5*, Section II.



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The Court therefore did not apply the rest of the proportionality test in this case. However, it is important to note that the government argued that the law was passed in accordance with the ruling of *August* that required a parliamentary provision for CD. In addition, the fact that the new provision disenfranchised only those prisoners without the option of a fine was an exercise in forging commensurability between the seriousness of the offense and the measure applied, as the dissent vote pointed out [125].

The judgment reiterates the importance of the right to vote, the survival of the fundamental rights of prisoners during their incarceration and the requirement that limitations must be rationally motivated and met the standard of proportionality. However, the ruling did not exclude the possibility that a future legislative attempt to disenfranchise prisoners could be found constitutional by the Court.<sup>74</sup>

#### **4 Australia: Roach v Commonwealth (2007)**

In 2007, the High Court of Australia handed down *Roach*, declaring the Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006 contrary to the Constitution.<sup>75</sup> This legislation had introduced a complete ban on prisoners' voting for the first time in Australian history.<sup>76</sup> The previous legislation, the Electoral and

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74. See Muntin & Sloth Nielsen, 2009:235.

75. This legislation only affects voting rights in federal elections. The legislative power of each state has the competence to determine the franchise in state elections (See Redman *et al*, 2009:168-9; 175-6).

76. CD was introduced in Australia by the Uniform Franchise Act 1902, which denied the right to vote to those sentenced to a year of imprisonment or longer (Section 4). Since CD was limited to the period of imprisonment; it did not affect those who had already served their sentences (See Orr, 2003:1-2. See also Redman *et al*, 2009:168-9). In practice, however, inmates actual voting was an unusual phenomenon due to the broader absence of mechanisms that enabled such a practice (See Redman *et al*, 2009:175). It was only in 1984 that a reform to the current Commonwealth Electoral Act 1918 re-drew the boundary for federal elections (Australia has a federal constitution) to disenfranchise those serving a sentence of five years or more.

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Referendum Amendment (Prisoners Voting and Other Measures) Act 2004, deprived only those serving sentences of three years or more.<sup>77</sup>

In *Roach*, a revolutionary decision for Australian standards of judicial review, the Court argued that the complete ban of prisoners voting (of the Electoral Act 2006) was incompatible with Sections 7 and 24 of the Australian Constitution, which implicitly enshrine the right to vote and universal suffrage. The argument was constructed on the basis of the lack of a substantial reason for total exclusion, and complemented by an *ad-hoc* standard based on the seriousness of the offence. However, the Court ascribed considerable importance to the right of the legislative power to limit the franchise and, therefore, upheld the previous legislation, which only deprived those prisoners serving sentences for serious offences, although the plaintiff's argument maintained that both legislations were unconstitutional.<sup>78</sup>

#### **4.1 The right to vote and the source of the scrutiny test**

The legal basis of the right to vote and the principle of universal suffrage has been one of the most problematic issues of Australian constitutional history, because neither is explicitly stipulated in the Constitution and Australia has no charter of rights.<sup>79</sup> Section 7 and 24 of the Constitution prescribe that the members of Parliament are “directly chosen by the people”, but do not explicitly recognise any protection of the right to vote or determine who is able to participate in elections.

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77. Section 93(8)(b), in which that general rule is established, is complemented by Section 93(8)(c) that ban permanently those who have been convicted of treason or treachery. See Redman *et al*, 2009:169-71. See also Orr & Williams, 2009:127.

78. The bibliography about *Roach*, and the Australian legal debate on CD includes Orr, 1998; Ridley-Smith & Redman, 2002; Orr, 2003; Davison, 2004; Fitzgerald, 2007; Guttman, 2007; Orr, 2007; Brown, 2007; Redman *et al*, 2009; Orr & Williams, 2009; Edgely, 2010; Plaxton & Lardy, 2010; Hill & Koch, 2011.

79. See Redman *et al*, 2009:171-5. See also, Orr, 2007; Davison, 2004:7-8; Hill & Koch, 2011:214. For more detailed analysis of the doctrine and case law on the legal basis of the right to vote in the Australian Constitution, see Guttman, 2007:300-310. See also Orr & Williams, 2009:124-7.

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Therefore, any challenge to CD “would involve the High Court determining who constitutes ‘the people’”<sup>80</sup> under those constitutional provisions.

The Court in *Roach* defended the perspective of a historical constitution in which the right to vote has been stipulated and linked to the aforementioned sections as an implicit right, attached to the structure and the text of the Constitution through historical circumstances that include, fundamentally, the legislative development of the electoral system [5]. The legislative power that has contributed towards delineating and guaranteeing the right to vote in the Constitution is, on the one hand, limited by the implicit constitutional right and, on the other hand, is (and has been) entitled to define exceptions to it [7].<sup>81</sup>

Those exceptions, however, cannot be arbitrary; they should be rooted in some “substantial reason” [8], “compatible with the maintenance of the constitutionally prescribed system of representative government” [85]. The Court devoted considerable effort to affirming that the standard of review in this case cannot be equated to that applied by foreign jurisdictions [15, 17]. In the case of Australia, the judicial review is limited to assessing the rational connection between a substantial reason and the actual legislative intervention in the infringed right, leaving aside a minimal impairment requirement and therefore deferring to the Parliament to greater extent.<sup>82</sup>

## **4.2 The purpose**

The proper purpose, or ‘substantial reason’ in the words of the Court, can be located in the argument that “serious offending represents such a form of civic

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80. Redman *et al*, 2009:174.

81. This ambivalence is based on the absence of a charter of rights, and on the Australian majoritarian culture that attributes great respect to decisions of the legislator on the basis of parliamentary sovereignty (Hill & Koch, 2011:214, 217).

82. See Hill & Koch, 2011:215.

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irresponsibility that it is appropriate for parliament to mark such behaviour as anti-social and to direct that physical separation in the form of loss of a fundamental political right” [12]. This is closer to a punitive rationale and therefore constitutes a move away from the idea of ‘electoral integrity’ suggested by the title of the challenged amendment (Electoral Integrity). The Court’s reasons for moving away from the idea that CD is an additional punishment are contextual to the federal structure of the country: federal law cannot punish state crimes. The Court, after weighing up these elements, stated that censure of serious offences can be considered a substantial reason, thereby opening up the question of the rational connection of the measure in relation to the aim.<sup>83</sup>

### **4.3 The proportionality judgment**

Given that the notion of seriousness was present already in the legislative purpose, the rational connection test was constructed in such terms that it was limited to express the defective distinction between minor and serious offenders. Following *Hirst*, the Australian High Court asked Parliament to show regard for “the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender” [84]. The blanket ban of the 2006 Act did not satisfy such a test, in contrast to the previous provision that banned only those offenders sentenced to three years of imprisonment or more.

If it is true that the outcome of the judgment is somehow positive, as an open critic of CD states, “[t]he result of the Roach case is therefore that the Commonwealth

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83. According to Redman *et al* (2009), the legislative debate of the amendment was marked by a punitive atmosphere but no argument “beyond the ‘of course, it is bizarre they can vote’ (178) was offered. In their analysis of the legislative debate they conclude that no serious argument about electoral integrity are made; no weight is given to the values of citizenship, human rights, participation or democracy; no attention is paid to the international law obligations of the country or to the comparative law; or the rehabilitative effect of the measure (177-83). Finally, they observe that the enactment of this provision “might be seen as a form of wedge politics” (184).

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Parliament is only subject to relatively minor constitutional restrictions when limiting the franchise particularly when compared to overseas legal systems”.<sup>84</sup>

## 5 Hong Kong: *Chan Kin Sum v Secretary for Justice* (2008)

The case of Hong Kong can be used as a proof that the transnational judicial discourse in analysis is advancing in other jurisdictions. Moreover, it is also useful in that it demonstrates how as the trend advances, it also reproduces underlying principles and outcomes but also shortcomings.

In *Chan Kin Sum*, handed down in 2008, the High Court of Hong Kong decided a case of judicial review on CD.<sup>85</sup> The legal provision in question, Section 31(1)(a) and 53(5)(a) and (b) of the LegCo Ordinance, denied the right to vote and to register as a voter to all those serving a prison sentence, and those who have received a suspended sentence. Remand prisoners, not affected by the law in question, were unable to vote due to the lack of mechanisms.

The right to vote is clearly entrenched in Article 26 of Hong Kong Basic Law and reiterated in Article 21 of the Hong Kong Bill of Rights. According to the Court, it is not an absolute right [55-61] but can be the object of limitations if its restriction is justified by the Government [79-81] in accordance with the proportionality test [63-74]. Regarding the legitimate aim element, the Court found that “prevention of crime, incentive to citizen-like conduct and enhancing civil responsibility and respect for the rule of law” could be considered a legitimate aim [88, 95-7].

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84. Hill & Koch, 2010:216. See also Orr & Williams, 2009:124.

85. See Chan, 2010. For an account of the situation pre-*Chan Kin Sum*, see Chui, 2007.

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When moving to the rational connection and proportionality element, the Court in *Chan Kin Sum* relied heavily upon the *Hirst* test advanced by the ECtHR.<sup>86</sup> It sustained as a key aspect of the proportionality analysis that “the nature and gravity of the offence and sentence in question as well as the culpability and individual circumstances of the prisoner must be relevant considerations” to assess if CD can achieve the declared purpose; “a blanket ban and total disenfranchisement simply does not take into account those matters” [116]. Later, the Court emphasised how the exclusion of short-term prisoners may be considered arbitrary [120-8], concluding that “the general, automatic and indiscriminate restriction of the right to vote and the right to register as an elector cannot be justified under the proportionality test” [164].

The Court however, taking elements from *Sauvé* and *NICRO*, also focused on the potentiality of CD to prevent crime [139] and incentivize citizen-like conduct and respect for law [140-1], concluding that it cannot be affirmed simply “using common sense and experience in life”, due to the absence of concrete evidence in that direction [145]. Recalling *August*, the Court concluded by affirming that it “is not suggesting that some form of restrictions on voting cannot be imposed by the legislature against those in jail”, but those restrictions must be “compatible with the constitutional rights of prisoners to vote” [165].

## II ANALYSIS

### 1 The claim of a judicial trend

In commenting upon these judgments, some literature has suggested that they form part of a transnational trend on CD, which is pulling national legislations towards a position that is more democratic and respectful of fundamental rights.<sup>87</sup> In the words

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86. See above, Section II.1.4.

87. See Morgan-Foster, 2006; Ispahani, 2009; Plaxton & Lardy, 2010; Ziegler, 2011. See also Nunn, 2005:776-81; ACLU, 2006; Macdonald, 2009:1390; Mauer, 2011; Munn, 2011:224.

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of Ruvi Ziegler, for instance, there is “an emerging global jurisprudential trend that increasingly views disenfranchisement as a suspect practice and subjects it to searching judicial review”.<sup>88</sup> Notwithstanding the particularities of the judgments, this view identifies “a clear trajectory emerges towards expanding convicts’ suffrage”.<sup>89</sup> They do this facing the same kind of problem and motivated by the same class of premises, leading to a rationalisation of national legislations according to democratic and fundamental rights standards.<sup>90</sup> Ludvig Beckman adds that “is tempting to infer [from those rulings] that a new consensus on the importance of the right to vote is emerging among the courts”.<sup>91</sup> This trend has been acknowledged by the courts. In *Chan Kin Sum*, the latest of the judgments, the Court self-consciously refers to this discourse, explicitly sustaining that “the modern trend is against disenfranchisement” [110].<sup>92</sup>

Different authors elaborate the particularities of this trend. Substantive, formal and consequential elements can be distinguished.<sup>93</sup> Plaxton and Lardy have pointed to some similarities between the judgments that could support the claim of a judicial trend.<sup>94</sup> First, all of the judgments struck down CD legislation. That is, each judgment scrutinized the legislation and concluded that such practice was being exercised in terms incompatible with fundamental rights. In doing so, the courts led the way towards the configuration of a more lenient CD regulation.<sup>95</sup> Therefore, at least *prima*

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88. Ziegler, 2011:202.

89. Ziegler, 2011:212.

90. See Ziegler, 2011:222-3. See also Beckman, 2013:64.

91. Beckman, 2013:64.

92. See also *Scoppola* [95].

93. See Plaxton & Lardy, 2010:104-30. See also Ziegler, 2011:227-33. An exhaustive analysis of all the arguments offered by governments in terms of proportionality is carried out by Robins, 2006:179-94.

94. See Plaxton & Lardy, 2010. They limit their aspirations, but there is still an underlying common discourse when they “show that, although the above decisions reflect different modes of reasoning when confronted with legislation disenfranchising prisoners, several common themes run through them” (102).

95. See also Ziegler, 2011. For an analysis of the implementation of the courts’ decisions, see Ispahani, 2009:46-50. Every government and parliament, with the exception of the UK has implemented the ruling of the Courts.

*facie*, the respect for fundamental rights and democratic principles does not only constitute the political background of the judgments but also the goal pursued and to a certain extent achieved by the action of the courts.<sup>96</sup>

Second, the argumentations and opinions of the courts contain similar themes, and governments appeal to the same group of objectives when trying to justify the *status quo* against the constitutional challenge.<sup>97</sup> Related to this, it is observed that the Court makes frequent references to international documents<sup>98</sup> and comparative sources, especially to other courts addressing the same problem.<sup>99</sup> In this regard, and going further, Ziegler identifies certain substantial qualities that allow one to speak of a unity in the courts' treatment of these cases. What he terms a transnational discourse on the legality of CD appeals to two background elements which informed the courts' decisions: "The democratic paradigm plays a significantly greater part in these

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96. In addition to the direct effect of striking down legislation in the jurisdiction in which it has been successfully applied, a transnational discourse may also operate by means of producing an influence in other jurisdictions, such as the US, in which a reluctance to analyse this issue predominates and radical versions of CD continue to be practised. According to the estimation of Morgan-Foster, those forms of radical CD could not be allowed by the standards settled by the judicial trend. This is the main argument of Morgan-Foster (2006) and the implicit argument in Ziegler (2011), when he notes, on the one hand, that the judicial trend has led to a rationalisation of CD and, on the other hand, that "American participation in this 'common enterprise' is noticeably absent" (222). See also Ispahani, 2009:34-5.

97. See also Ispahani, 2009:35. This idea may just be related to the common cultural and legal background of those countries in which the arguments have been used and themes considered.

98. This dissertation does not develop any argument based on general international law instruments. See Ziegler, 2011. See also Nunn, 2005; Macdonald, 2009; Lang, 2013; Redman *et al*, 2009:186-95; Wilson, 2009; Ghaelian, 2013; Abebe, 2013. See also *Universal Declaration of Human Right* (1948), article 21 *vis-a-vis* article 2; *International Covenant on Civil and Political Rights* (1966), article 25 *vis-a-vis* article 2; *The African Charter on Human and Peoples' Rights* (1981), article 13; *American Convention on Human Rights* (1969), article 23; *European Convention on Human Rights* (1950) and the *First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (1954), article 3. Especially interesting in this regard are the reports of the Human Rights Committee about the *International Covenant on Civil and Political Rights* (1966). For a detailed review of the reports about these international instruments features, see Ziegler, 2011:245-7.

99. See Ziegler, 2011:233-5. See also Ispahani, 2009:35. The cross-references between the Courts' judgements are interesting to note. In *Sauvé*, there are references to *August* [35, 44, 58]; in *NICRO*, there are references to *Sauvé* [61-3, 66, 115, 149]; in *Hirst*, there are references to *Sauvé* [24-7, 43]; in *Roach*, there are references to *Hirst* [15-17, 100, 163], *Sauvé* [13-7, 18-9, 100], and *NICRO* [163]; in *Chan Kin Sum*, there are references to *Hirst* [75, 88, 90, 96, 99-108, 150-1, 165], *Sauvé* [35, 91, 96, 141-2, 158-62], *NICRO* [146, 180], and *Roach* [88, 118, 135].



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judgments than in parallel American CD jurisprudence, as does the notion of convicts as rights-holders”.<sup>100</sup> The first element engages with a democratic thinking in which the right to vote is inserted as a central component. The judicial trend is premised by the idea that universal suffrage guarantees all citizens a voice in the democratic process and the right to vote is the ‘cornerstone’ of participation in a representative democracy that aspires to the ideal of the self-government of the people. The vote, therefore, should not be treated as a privilege but rather as a fundamental right.<sup>101</sup> The second element is referred specifically to the case of CD, and it supports the idea that prisoners are and must remain included in the sphere of the right holders. According to this perspective, the prisoners are in principle only deprived of the right to liberty. The deprivation of any other right, when demanded by prison security or other consideration, must be equally justified in terms of right standards.<sup>102</sup> The consequence of this doctrine is that CD is seen as a prima facie violation of the right to vote and therefore must be subjected to constitutional review, and it is the government who must demonstrate that this prima facie violation is justified.<sup>103</sup>

Third, all of the courts solved the case by applying a judicial review test related to the notions of proportionality when judging whether the CD statute is compatible with the constitution or human rights instruments. This legal methodology involves two aspects. On the one hand, the starting point in all these cases has been that CD is a case of the ‘limitation’ of a constitutional or human, and therefore must be subject to

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100. Ziegler, 2011:222. See also Ispahani, 2009:35.

101. See Ziegler, 2011:223-6. See also Orr, 1998:55-7; Easton, 2006:449; Guttman, 2007:310.

102. See Ziegler, 2011:204, 226-7. Also, Cholbi, 2002:548-9; Foster, 2004:14-5; Easton, 2006:449; Guttman, 2007:310. British jurisdiction recognizes this principle in *Raymond v Honey* (1980), while it was held that “prisoners retained all civil rights that are not taken away either expressly or by implication” (Foster, 2004:14-5).

103. See Ziegler, 2011:202. An example of this doctrine can be observed when in *Roach* the Court affirmed: “[p]risoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration” [84]; or in *Hirst* when the Court affirmed: “prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty” [69].

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judicial review applying a scrutiny test.<sup>104</sup> On the other hand, they apply proportionality, or a similar mean-ends form of scrutiny test, to assess the constitutionality or compatibility of legislative interventions in voting rights.

## 2 Differences and similarities of the judgments

Having elements in common, the judgments also display important differences that can contribute to a better understanding of their outcomes and their future perspectives. On the one hand, they differ in the entrenchment of the right to vote, the standards of scrutiny applied and the engagement with value-based reasoning. On the other hand, they present similarities in the level of the aim accepted as a legitimate and of the concrete standards that they have set to consider CD as proportionate.

Regarding the differences, first, despite the fact that each decision upheld the *right to vote*, there are considerable differences regarding the circumstances of this aspect. *Roach* is the only judgment that does not appeal to an expressly stipulated right to vote, but to an *emergent* implicit right. This can contribute to explain the ‘progressive’ political character that some commentators have ascribed to this judgment. In a middle ground, *Hirst* relies on the affirmed doctrinal construction of the right to vote in the A3P1, which has been emphatically challenged by the UK government. Finally, Canadian, South African and Hong Kong Constitutions have a clearly constitutionally entrenched right to vote. All cases, however, considered the right to vote as the right under limitation by CD.<sup>105</sup> This might be an implicit factor to understand some differences in the outcome of the judgments. The minor specific weight of an implicit right *versus* and explicit right may explain the lack of

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104. About the existence of a general transnational discourse on human and constitutional rights, see e.g. McCrudden, 2000.

105. Even when it was argued that CD also violated the right to equal protection, these claims were left unattended by the courts’ judgments.

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radicalism in *Hirst* and *Roach*, considering that “legal systems operating under a charter of rights” allow “less parliamentary intrusion into civil rights”.<sup>106</sup>

Second, the *standard of scrutiny* also varies from country to country, though these different standards reflect a similar attempt to rationalise legislation under ideas implicit in the doctrine of proportionality. All jurisdictions require the government to demonstrate a proper purpose for the legislation: a ‘substantial reason’ (*Roach*), a ‘legitimate aim’ (*Hirst*), a ‘legitimate aim reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’ (*NICRO*), ‘legitimate objective’ (*Chan Kin Sum*) or a ‘pressing and substantial objective’ (*Sauvé*). The qualification of the standard of urgency of the purpose, while important in theory, is left mostly unattended in these judgments.<sup>107</sup> The difference between the standard of scrutiny may only indicate the quality of the assessment of the relation between the means and the purpose. The lowest standard is found in *Roach*, in which the Court required only a ‘rational connection’ between the measure and the reason. Again, in the middle ground, the proportionality of standards of the ECtHR is tempered by the doctrine of MOA. The use of an *ad-hoc* test of proportionality makes difficult the inquiry in the application of proportionality by the Court. The Hong Kong High Court follows this doctrine. Finally, the most detailed and exigent are the test of the South African and Canadian courts, which apparently do not give any deference to the legislation and expressly setting the criteria for making it operative the proportionality assessment: ‘rational connection’, ‘minimal impairment’ (necessity), and proportionality in a strict sense. The *results of the scrutiny* also varied. *NICRO* fails in the ‘legitimate aim’. In *Roach* and *Sauvé*, the government failed to demonstrate the ‘rational connection’ and in *Hirst* and *Chan Kin Sum* due to the claims of over-inclusiveness, it may be presumed that the legislation failed to pass the rational connection test.

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106. See Hill & Koch, 2011:214. See also Manfredi, 2009:269.

107. The exception is the discussion between the majority and minority vote in *Sauvé*. On the other hand, the claim of *Roach* of being applying a standard of scrutiny different than that applied overseas is not referred to the assessment of the reasons offered by the government.

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Regarding the similarities, first, the *reasons (purposes, aims)* used by governments in the five cases display a high degree of coincidence. The idea that CD is a form of punishment and that it encourages civic responsibility and respect for the rule of law was offered in all four of governments' submissions, though the degree of sophistication offered and the regard shown by the Court for the arguments varied considerably. Other arguments, related to practical, economic and administrative concerns, were put forward only in *NICRO*. It is crucial to note that the governmental purpose was accepted as legitimate, with different degree of engagement in its analysis,<sup>108</sup> in *Hirst, Sauvé, Roach* and *Chan Kin Sum*; being *Sauvé* the only that substantially objected that legitimacy. However, even the Canadian Supreme Court in *Sauvé* was ready to accept the arguments for CD offered by the government in a signal of deference. Legislation failed to pass the 'legitimate aim' test in *NICRO*, only due to the lack of Government argumentation.

Second, with regards to the *standards* that the judgments have settled upon for CD, it can be affirmed that the judgments coincide in that CD can be acceptable only under certain and qualified circumstances. On the one hand, it cannot affect those offenders who have already served their prison sentences (as happens in some jurisdictions, such as the United States). On the other hand, and more importantly, CD cannot operate on a blanket basis that disenfranchises all prisoners without any reference to the nature or seriousness of the offence: it cannot rely on the bare fact of imprisonment. This implies that it could target serious offences and offences that relate with democratic procedures. Summing up, and according to the common conclusion of those judgments, CD should be restricted so as to affect only serious offenders and only for the duration of their prison sentences.<sup>109</sup>

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108. See Plaxton & Lardy, 2010:133.

109. See Morgan-Foster, 2006:310-4. See also Nunn, 2005:781; Banfield, 2008:5; Ispahani, 2009:33; Macdonald, 2009:1389; Orr & Williams, 2009:133; Abebe, 2013:425.

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### III CRITICAL EVALUATION

#### 1 Scrutinizing the outcomes

In relation with the outcome of the judgments, Plaxton and Lardy offer an interesting and critical analysis of these judgments.<sup>110</sup> They all ruled that CD legislation limits the right to vote and that such a limitation is not justified under the constitutional standards of scrutiny. Three judgments ruled statutes unconstitutional and the ECtHR have ruled the British, Austrian, Turkish and Russian legislation incompatible with the ECHR and urged a legislative modification. However, none of the judgments expressly held that CD was *tout court* constitutionally or conventionally problematic. Although the courts embraced the ideas of prisoners as right holders and the right to vote as a fundamental right in the democratic system, none of them affirmed explicitly that to disenfranchise an offender was inherently incompatible with democracy.<sup>111</sup> A detailed examination of this aspect is necessary.

The Australian High Court in *Roach*, while striking down the blanket ban, upheld the previous legislation that disenfranchised prisoners sentenced to an imprisonment of 2 years or more, and according to the Chief Justice's opinion, "appeared unwilling to say that the statute could not have gone even further without offending the Constitution".<sup>112</sup> It is symptomatic of this tendency that the majority opinion relied "specifically in parts of the *minority*, rather than majority, judgment in *Sauvé*"<sup>113</sup> to affirm the right of Parliament to exclude serious offenders. Commenters of the judgment argue that a ban affecting those serving sentences of two years would

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110. They do not include *Chan Kin Sum* in their analysis.

111. See Plaxton & Lardy, 2010:130. See also Duff, 2005a:211; Hill & Koch, 2011:226; Beckman, 2013:77.

112. Plaxton & Lardy, 2010:131.

113. Orr & Williams, 2009:132.

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survive constitutional scrutiny in the Australian Court but a six-month rule would not.<sup>114</sup>

In the *Hirst* judgment, the ECtHR declared the incompatibility of the legislation with the ECHR. The Court did not affirm this incompatibility in categorical terms but as a question of over-inclusiveness and therefore, showing reluctance to give precise directives, suggested that a *targeted ban*, instead of a *blanket ban*, would pass the proportionality exam. The terms of the Court's expectations became clear and precise in *Scoppola*, where the demands of the *Hirst* test were reduced to the exclusion of minor offenders (those sentenced to fewer than 3 years of imprisonment). The case of the Hong Kong High Court is similar due to it follows closely the *Hirst* test. These cases, therefore, express clearly the limitations on the right to vote that are constitutionally or conventionally permissible.

It is more difficult to extrapolate this point from *NICRO* and *Sauvé* because they struck down the provision and thereby allowed all inmates in the prisons of Canada and South Africa access to the ballot box. However, with careful analysis, it can be detected that these judgments also present a limited case against CD that may allow the government to re-enact the ban in a more restricted version passing the test presented in the judgements and, therefore, cannot be interpreted as abolishing CD outright. This is particularly so if they are interpreted in the light of the previous judgments in those jurisdictions.

The case of *NICRO* is easier to argue than *Sauvé*. The Court referred to the poor argumentation of the government's submissions and linked this factor to a failure of the defence of the legislation. The Court recognised the value of the purpose of communicating an aggressive attitude towards crime as a legitimate aim of importance [57-8], though the government did not make a strong case for that purpose

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114. See Orr & Williams, 2009:134.

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and did not provide detailed data and analysis of the factors involved. However, by recognising the importance of that purpose the Court remained close to the dictum of *August*: “This judgment should not be read, however, as suggesting that Parliament is prevented from disenfranchising certain categories of prisoners” [31].

To some extent, all these cases contain a recognition that the various governments’ attempts to disenfranchise prisoners have value and legitimacy and that a more limited form of CD could be justified. However, this is difficult to discern in *Sauvé*, in which the majority of the Court presented an outright negative assessment of CD in all the components of the proportionality test. Especially important in this respect, the Court show considerable reluctance to admit the aim pursued by the government as legitimate. It finally conceded that aspect. Nevertheless, from another angle, when it is observed that the case was decided by a narrow 5:4 majority and this is compared to unanimity of *Sauvé v Canada No. 1* (1993), it appears that the Canadian Supreme Court’s opposition to CD is dependent upon the scope of the ban, this is, the universe of those affected by it. In *Sauvé v Canada No. 1* (1993), the decision was handed down unanimously and the arguments of the Appeal Court were regarded as so compelling that the Court confirmed its reasoning in one short paragraph. Observing this evolution, Morgan-Foster observes,

“[t]aking the two cases together, it would appear that the Canadian Justices are interested in the length of sentence when considering the disenfranchisement issue. There may well be some better place to draw the line, something longer than a two year sentence, where a majority of the Justices would agree that disenfranchisement is appropriate”.<sup>115</sup>

The dissent in *Sauvé* was favourable to maintaining the two year limit for disenfranchising offenders, a limit that coincides with the majority vote of *Roach* and presumably the ECtHR would consider acceptable. If one adds to this the fact that the Royal Commission on Electoral Reform and Party Financing proposed a limit of 10

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115. Morgan-Foster, 2006:311.

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years for CD,<sup>116</sup> it can be concluded that Canada is not exempt from the ongoing negotiation of the duration of a sentence required to constitute a legitimate application of CD.

The previous observations point to the fact that, all things considered, all judgments present an explicit or implicit acknowledgement that CD might be acceptable when it is applied only to serious offenders.<sup>117</sup> In this regard, in analysing the judgments, it has been suggested that the more important aspect of them, beside the general rejection of the blanket ban, is the significant disagreement “among justices over whether less sweeping disenfranchisement passes constitutional muster”.<sup>118</sup>

## 2 Pyrrhic victories?

Echoing these observations, it is possible to read the judgments, perhaps with the exception of *Sauvé*, affirming a *right to disenfranchise* (proportionally) serious offenders rather than protecting the right to vote and advancing the cause of democracy and fundamental rights. The judgments can be regarded as *pyrrhic victories*: triumphs that must be considered as a defeat when the long-term objective of the human right protection and democratic promotion is integrated in the assessment of the judgments’ outcomes.

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116. See Royal Commission, 1991.

117. See Morgan-Foster, 2006:310-4. See also Easton, 2006:452; Plaxton & Lardy, 2010:130.

118. Banfield, 2008:2. He argues that the political disagreement affecting the debate about CD may also explain the political compromise that the judgments implement. The variation between the more progressive decision (*Sauvé*) and the more conservative (*Roach*) can be explained by, on the one hand, the distance between *status quo*’s legislation (all prisoners’ suffrage in Canada versus 3 years or more ban in Australia) and the policy attempted by the government (2 years or more ban in Canada versus blanket ban in Australia) and, on the other hand, the stronger bargaining power of the Canadian Court due the coverage of the Charter of Rights in relationship to its Australian similar. Though *Sauvé* is the more disputed of all judgments analysed. The majority in *Hirst* was 12-5 (in *Scoppola* 17-1); in *NICRO* was 9-2 (*August* was 9-0); in *Roach* was 4-2.



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Following Beckman, it can be said that, with the exception of *Sauvé* and perhaps of some aspects of *NICRO*, the judgments of the trend cannot be regarded as part of a trend of ‘democratization jurisprudence’ or “a new emphasis on the interests in democratic participation”.<sup>119</sup> In contrast, they must be read solely as incorporating the offender within an electoral regulation that is subjected to “rigorously applied standards of rule of law”.<sup>120</sup> In other words, simply affirming that “the legislatures cannot have *unlimited* authority to tinker with voting rolls”.<sup>121</sup> This later claim can be link with the obsession of the courts with the ‘arbitrary nature’ of the blanket ban, or other arbitrariness-like arguments, reflecting ‘rule of law’ standards of review. In contrast with this emphasis, the only judgment that engages actively in the “value of democracy” and “the significance of the individual interests protected by democratic rights” is *Sauvé*.<sup>122</sup> Arguments against arbitrariness are not sufficient to envision the judicial trend as being protective of the fundamental right to vote and promoting democratic principles. They are perfectly compatible, for instance, with non-democratic regimes and in this case with the exclusion of serious offenders.

On the other hand, the democratic arguments offered by the majority in *Sauvé* coincide with the reasons to consider CD completely impermissible, as it will be argued in the following chapters.<sup>123</sup> In that case, the use of proportionality is the reason because the judgment did not rule a complete proscription of CD. The same, but even more critically, can be predicated of the remaining judgments, in which democratic arguments do not play relevant roles in the judicial reasoning or are mere *obiter dicta*.

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119. Beckman, 2013:64.

120. Beckman, 2013:64. See also Ispahani, 2009:33; Plaxton & Lardy, 2010:131-3.

121. Plaxton & Lardy, 2010:131.

122. Beckman, 2013:68-9. Beckman seems to suggest that these standards (‘rule of law’ *vis-à-vis* ‘democratic’) appeared within the structure of proportionality itself.

123. See Plaxton & Lardy, 2010:129.

In this scenario, the assessment of the legal method of proportionality is critical. On the one hand, proportionality can be seen as a positive factor – an enabling one – in relation to the progressive aim of expanding the franchise among those sentenced for a criminal offence. In contrast with the judicial decision above analysed, challenges to CD in the US have failed mainly due to a constitutional blocking that impede a substantive scrutiny equivalent to proportionality to operate in that jurisdiction.<sup>124</sup> However, on the other hand, the limited outcome achieved by those judgments is not coincidental. Legalising the question and converting it into a question of legal proportionality (and so into a measure that should be assessed according to its social benefits), has introduced CD into a sphere of rational calculus and policy-making with a tendency to be framed as exclusion of arbitrariness rather than supporting substantive values, in this case democratic values.

Summing up the findings of this chapter, which are not surprising but nevertheless important for the argument that follows, the courts engaged in a judicial review of CD committed to the application of proportionality instead of going into the substantive arguments to defend the policy against presumptive unconstitutionality. By doing this, the courts were also predominantly concerned with ideas closer to the rule of law, rather than democratic principles. It must be stressed that the right to exclude serious offenders endorsed implicitly or explicitly by this jurisprudential trend is difficult to justify without assumptions that are not present in the reasoning of the courts.

In this context, this dissertation seeks to put forward some ideas that may, on the one hand, impede the legal analysis of CD from being captured by the limitations of proportionality and therefore enable closer scrutiny. On the other hand, it may allow for a judicial review of CD engaged with democratic principles. Going further, it

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124. See Morgan-Foster, 2006: 314-8.

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seeks to propose an interpretation of the right to vote that, in certain respects, is immune to certain forms of limitation.<sup>125</sup>

However, the trajectory required to arrive at that conclusion must first pass through some prior stages. Understanding how proportionality contributes to avoiding or circumventing the fact that CD and the protection of democracy and the fundamental right to vote are incompatible requires an analysis of this latter claim. The following four chapters advance the claim that CD is affected by an inescapable democratic problem. The analysis of the judicial discourse and its use of proportionality is taken up again in the last chapter.

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125. See below *Chapter 7*.

# 3

## RIGHT TO VOTE, UNIVERSAL SUFFRAGE AND THE PROBLEM OF DISENFRANCHISEMENT

**H**ow can the disenfranchisement of offenders be assessed according to a substantive conception of democracy without restraints determined by proportionality? This chapter presents a theoretical framework within which the democratic analysis of CD can be carried out. The framework proposed consists in explaining the principle that makes the democratic legitimacy of representative government dependent on the participation of the people, in particular of that form of participation exercised through the right to vote. This framework coincides to a great extent with the democratic principles, on which the cases of the judicial trend are premised and to which they refer. The courts generally upheld the idea that the right to vote is a fundamental democratic right ('the

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cornerstone of democracy’)<sup>1</sup> and that the universal distribution of such a right is a ‘basic principle’.<sup>2</sup>

These premises can work in two registers. On the one hand, they can be seen as a *description* of the legal systems in which these cases are dealt with. On this register, the right to vote is a fundamental right in the sense that it is entrenched in the constitution or in a Human Rights instrument limiting the legislative decisions. Formally remaining national citizens, offenders enjoy the rights that those legal documents guarantee. In this register, however, these principles are perfectly compatible with the proportional limitation of the right to vote.

However, these principles can also be seen, more deeply, as the crystallization of the adoption of a normative conception of democracy; a conception that lies behind the mentioned premises and that can be observed in some of the arguments offered, mainly, in *Sauvé* (but also in some aspects in *August* and *NICRO*). In a fine passage, the Canadian Supreme Court presents its conception of democracy and the value of the right to vote:

“Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens’ proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country’s boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it [...] [31].”

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1. See e.g. *Sauvé* [9, 14]; *NICRO* [47]; *Hirst* [48-9].

2. See e.g. *Hirst* [59].

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Under such a conception, democracy is not seen only as a form of government in which representatives elected by the people take decisions by majority rule, but it also embraces the idea that democracy has a richer normative content. The principle according to which all those subjected to the law must have rights to participate equally in the law-making process is the core of that normative conception of democracy. In this register, citizenship is understood as a substantive democratic notion that includes the notions of membership and participation. In reconstructing these ideas, I closely follow Jürgen Habermas' work on constitutional theory.<sup>3</sup>

Explaining the theoretical assumptions of these premises, in turn, may illuminate the substantive problem proposed by the electoral exclusion of offenders, tracing an argument about the function, importance and scope that the right to vote has and must have in modern democratic regimes. This chapter, therefore, unpacks the idea that the right to vote is fundamental for democracy in this normative dimension not because it is entrenched in a constitutional document but because it constitutes a very important moment in the democratic legitimation of the law, and concludes preliminarily that under the principle of universal suffrage, offenders must remain, as paradigmatic subjects of the law, able to enjoy their voting rights if no democratic reason can be offered to the contrary. This conception places a very high burden of argumentation with those who seek to justify the disenfranchisement of an entire class of persons.

This conception of democracy has two advantages. On the one hand, it is *critical*, in that it includes a systematic view of the practices of representative democracy, presenting a theoretical proposal with normative implications to drive such practices towards a regulative ideal. It refuses the argument of pure realism. On the other hand, it is to a certain extent *realistic*. It is able to present a conception of democracy and the right to vote that tie together institutions and discourses with an explanatory

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3. See Habermas, 1996a.

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potential for the current practices of democracy as a process of decision-making. It does not capitulate to pure normativism.

This is not to say though that these ideas are the only possible conception of democracy and the right to vote. These ideas are obviously contestable, and yet they present the best reconstruction of the ideas of voting as a fundamental right and universal suffrage. The objection to any of these ideas is not something that is discussed at the level of the principles at this stage of the work, notwithstanding references to competing conceptions of democracy that are made throughout the text. Further chapters, however, discuss in detail the significance of CD in relation to these principles: the conception of the right to vote and the position of the offender in the political community.

The structure of this chapter goes as follows. *Section I* introduces the idea of democratic legitimacy and, following Habermas, formulates the way in which such a notion may work in modern societies, conceding special attention to rights of participation and to the right to vote as a fundamental right of participation. *Section II* develops the distinction between input and output legitimacy. Thereafter it presents three models of democracy (aggregative, deliberative and contestatory) that emphasise different forms of production of democratic legitimacy and focuses on clarifying the circumstances in which the legitimating role of voting can fit with a normative democratic project. *Section III* turns to an analysis of the principle of universal suffrage as the principle that governs the distribution of the franchise. It is claimed that a democratic conception of this principle must grant voting rights, as a way to participate in the creation of law, to all those permanently subjected to the law. Finally, it formulates the democratic problem of CD that follows acceptance of the premises developed.

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## I DEMOCRATIC LEGITIMACY OF THE LAW

### 1 Democratic legitimacy in modern society

It is commonly affirmed that the prestige of modern representative democracy rests on the participation of people through elections. Behind this assertion lies the intuition that elections are a source of democratic legitimacy.<sup>4</sup> Elections are a representation of political freedom and equality among citizens and of the idea that political power belongs to the people. They permit the identification of representative democracy with classic democratic forms. This identification did not inform all the original designs of representative institutions, some of which were meant to protect the republic against incompetence of ‘the mob’, and therefore embraced the idea of ‘government for the people’. However, to highlight the importance of participation, and hence of the ‘government by the people’, seems an inescapable facet of the spirit of the democratic ideals of our time.<sup>5</sup>

Democratic legitimacy, therefore, is an effort to reconcile the idea of representative institutions with the idea of a democratic form of government. This task is currently undertaken by means of a normative justification of the *government authority* to adopt collectively-binding decisions, mainly in the form of law, and to enforce those decisions with legitimate coercion. More ambitious projects of legitimacy require, in

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4. This is true both for those who consider that the priority of democracy over other regimes resides merely in the possibility of government’s accountability and for those who contend - more ambitiously - that elections are an instantiation of the people’s right to self-government. For all of them, without elections, it may yet be possible to talk about some kind of legitimacy, but it becomes impossible to talk about the democratic legitimacy of such governments.

5. About the relation of the principles of representative democracy with classic democracy and with the non-democratic principles of representation, see Manin, 1997. cf Schmitt, 2008:235-307.



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addition, prescribing an *obligation* to obey the law for reasons distinct from the threat of coercion or the moral identification with the content of those decisions.<sup>6</sup>

The strong intuition that voting can contribute importantly to the justification of government authority and eventually to the peoples duty to obey the law directs the inquiry of exploring how democracy can generate legitimacy, and what the significance of voting is for democracy. The starting point to sustain this intuition is that democratic legitimacy relies upon a circle of legitimation in which: (1) the legitimacy of the law derives from (2) a law-making process conducted by representatives of the people, whose right to participate in that process is derived from (3) their election by the people through the exercise of their right to vote in free elections.

At the outset, it must be observed that the particular circumstances in which democratic legitimacy might serve to explain the democratic legitimacy of the law are conditioned by the circumstances of modernity. Following Habermas, there are two mayor aspects that must be taken into account. The first is the *plurality* of ethical ways of being and understanding society that is paradigmatic of modern societies. Pre-modern societies were based on a common set of background assumptions that made social integration possible. Those common views and values have been undermined and fragmented by modernity.<sup>7</sup> Second, modern society has become more and more complex in that every sphere of society has developed its own functions and rationalities. The term associated with this process is *functional differentiation* of social systems, and accordingly economy, law, and politics present at least a relative functional autonomy in relation to each other.<sup>8</sup> In this context, an adequate account of democratic legitimacy must, on the one hand, be responsive to the need for a modality of social integration independent of shared values and visions of the world.

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6. See Habermas, 1996a:28-34. See also Scharpf, 1998:2; Peter, 2011:56-74.

7. See Habermas, 1996a:25-7. See also Rawls, 1996:35-40; Mouffe, 2000:17-35.

8. See Habermas, 1996a: Ch. 1.

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On the other hand, such an account must incorporate this social differentiation and therefore must be understood as belonging to the discrete sphere of politics (government authority) and the legal system (the obligation to obey the collectively-binding norms). Therefore, it attempts “to show how the old promise of a self-organizing community of free and equal citizens can be reconceived under the conditions of complex societies”.<sup>9</sup>

## 2 Democratic legitimacy between law and democracy

Habermas’s conception of constitutional democracy, including his theory of the relation between law and democracy as a legitimation procedure, and its methodological presuppositions of pluralism and social differentiation, plays a pivotal role for the argument of this dissertation.

In modern societies social interaction requires the manufacture of a mechanism to stabilize social expectations. This need follows from the fact that we now live in a society in which the levels of dissent have grown, due to having been let “loose from the ties of sacred authorities” and the liberation “from the bonds of archaic institutions”.<sup>10</sup> Pluralism and social differentiation, therefore, present a tendency to produce strategic interactions to face increasing disagreement. The mechanism capable of fulfilling that task is positive law,<sup>11</sup> to which individuals *qua* ‘legal persons’ are unconditionally subjected. Social integration requires that the reasons to follow a rule not be of permanent discussion, and therefore the subjects of the law “cannot call into question the validity of the norms they are supposed to follow”.<sup>12</sup>

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9. Habermas, 1996a:7.

10. Habermas, 1996a:27.

11. See Kindhäuser, 2011a:89.

12. Habermas, 1996a:37.

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The recourse to positive law circumvents the problems of dissent whilst avoiding the problem of the immanent coercion. The way out of the dilemma between social disintegration and coercion is that “the actors themselves come to some understanding about the normative regulation of strategic interactions”.<sup>13</sup> Subsequently, the law, in order to avoid being a mere instrument for the reproduction of relations of power, must be the outcome of a democratic procedure wherein the individuals *qua* ‘citizens’ are able to participate. This introduces into the legality of the positive law a demand for legitimacy, and particularly for democratic legitimacy.<sup>14</sup>

The Kantian idea of an identity between ‘legal persons’ and ‘citizens’ is what constitutes the fundamental element of democratic legitimacy:

“the coercive law tailored for the self-interested use of individual rights can preserve its socially integrating force only insofar as the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational authors of those norms”.<sup>15</sup>

However, the entire matter is not resolved quite so easily. That would be the case, for instance, if a single citizen were to rule just himself, but legal democratic decisions are the outcome of a collective decision-making process in which individual influence alone is insignificant. This is where the idea of functional differentiation shows to be compelling.

At the level of the political system, deliberative democracy is a process of decision-making open to reason and in which decisions are preceded by a discussion open to the participation.<sup>16</sup> This is what makes plausible the conclusion that the decisions made by the political system are, to a certain extent, common. This model depends on

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13. Habermas, 1996a:27.

14. See Kindhäuser, 2011a:90-91.

15. Habermas, 1996a:33.

16. See below Section II.1.2.

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the existence of what Klaus Günther, elaborating Habermas' concept of communicative autonomy,<sup>17</sup> has called *deliberative personality*;<sup>18</sup> that is, someone who has the ability to evaluate actions according to reasons and act according to the reasons he or she accepts.<sup>19</sup> This deliberative ability has a constitutive role for democracy because, as citizens, deliberative persons substantiate the process of deliberation with their critical engagement, dropping the role of self-interested subjects and assuming the "perspective of members of freely associated legal community".<sup>20</sup>

At the level of the *legal system*, because law must deal with social expectations, the reasons for which a deliberative person follows the law are irrelevant. That is the importance of positive law: "[l]egal norms are valid even for those persons who did not, or not exhaustively, participate in the democratic process".<sup>21</sup> Legal validity correlatively implies that it is not necessary for the legal person to follow the norm for the official reasons (those reasons offered in the deliberative process) because he or she can reasonably disagree with the norm. Legal validity, due to the formality of the legal code and its internal relation with the notion of legal person, liberates the person from communicative constraints and therefore guarantees individual freedom within the spheres of autonomy legally guaranteed; the legal person can internally disagree with the norm. In this sense, a legal person, invited to follow the norm by the legitimacy of the democratic process, can act according to the expectations "that the legal community has rationally agreed on" or, on the other hand, can act strategically towards the law.<sup>22</sup> However, "the law obliges her not to violate through

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17. See also Kindhäuser, 2011a:95-8.

18. See Günther, 1996.

19. This deliberative ability is an expression of communicative rationality, which is based on the capacity to recognize the illocutionary dimension of language, a capacity that is inscribed in the very notion of linguistic interaction and therefore must be understood as an 'internal connection' between reason and society. Regarding the notion of communicative rationality, see, generally, Habermas, 1984: Ch. 3.

20. Habermas, 1996a:32. See also Rawls, 1996: Ch.2.

21. Günther, 2001:10.

22. See Habermas, 1996a:31

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her actions the norm which she rejects”.<sup>23</sup> The infraction to the law is understood as a disappointment of a normative expectation of the legal community rooted in the inclusion of that legal person *qua* citizen in the democratic process. This is fundamental, for example, to understand the meaning of a democratic punishment, as a response to those that have “failed to distinguish between fora”,<sup>24</sup> and the possibility to understand CD as a punishment.<sup>25</sup>

In this context, it is not the factual acceptance of the norm by the legal person but the citizen’s acceptance of the procedures through which the norm is democratically produced which sustain the claim of the law’s legitimacy. This deliberative process, which occurs under conditions of pluralism, must also appeal to the guarantee of legal regulation.<sup>26</sup> Democratic procedures are legally codified in terms of legal rights, powers and competences. This legal regulation is also extended to citizens’ rights of political participation that guarantee the autonomy of the citizens and the flow of communicative power into the political system from the public sphere and elections

Summing up, the deliberative process of decision-making constitutes the possibility of adherence to legal norms for the independent reason of their *legitimacy*, in addition to (and separate from) the *facticity* of the threat of sanctions. However, facticity can never be completely excluded from a democracy governed by the law.<sup>27</sup> These elements are proportionally related: “the less a legal order is legitimate, or is at least considered such, the more other factors, such as intimidation, the force of circumstances, custom, and sheer habit, must step in the reinforce it”.<sup>28</sup>

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23. Günther, 2001:10.

24. Christodoulidis, 2004:195.

25. See below *Chapter 5*, Section III.

26. See Habermas, 1996a:126-7.

27. See, for a criticism of this idea, Christodoulidis, 2004.

28. Habermas, 1996a:30.

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### 3 The conditions of democratic legitimacy

Affirming the democratic legitimacy of the law in these terms formulates two demands: the law must be neutral and must be the fruit of a participatory process, in which those subjected to the law have rights to participate in the law-making.<sup>29</sup>

A demand of *neutrality* in relation to the reasons for law's abidance is related to the plurality of ethical ways of living in modern democratic societies.<sup>30</sup> As previously seen, society can only deal with this pluralism by appealing to positive law as an unconditional set of reasons for action backed by coercion. However, positive law receives its legitimation from a deliberative democratic process that is oriented to decision-making rather than to consensus. Democratic decisions are adopted by majority rule, and therefore it is perfectly possible for a person to disagree substantially with the content of a legal norm or with the reasons for its adoption. Positive law, in this sense, cannot demand substantive agreement of the addressee but only adequate external conduct and conformity to the norms that coordinate life in complex societies. Accordingly, the law is neutral insofar as it respects the sphere of one's reasons for following or breaking the law as a space of *autonomy*. This implies, on the one hand, that nobody can be punished for following the law, even when the law was followed for reasons that are self-interested, wrong or even immoral, and on the other hand, that positive law is immune to the distinction between criminal action and civil disobedience. The consequences entailed by this notion of neutrality are crucial to the adoption of a democratic conception of punishment. An offender cannot be punished because his conduct was a moral wrong but may only be punished because he committed an offence described in a legal norm.<sup>31</sup>

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29. See Kindhäuser, 2011a:68-83, 93-102.

30. See Kindhäuser, 2011a:75.

31. See Kindhäuser, 2011b:221-2.

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However, pluralism presents further problems for the justification of legal coercion and punishment, because it contests societal commitment to any *one* set of values. If the law cannot be understood as the expression of a substantive conception of the good, pluralism leads to great uncertainty regarding the justification of coercion and punishment. Under these conditions, in which not every person would have the same reasons to follow the law – some would follow it only because of its moral content, others only due to the threat of punishment – it is simple to conceive the law as the coercive imposition of a heteronomous will.<sup>32</sup> To avoid that conclusion, what pluralist societies require is a reason to follow the law that is binding for every person for the same reasons.<sup>33</sup>

Here is where the second demand of democratic legitimacy must be introduced. The law must be the consequence of a process of democratic law-making in which the subjects of the law are granted *participatory rights*, therefore adopting the role of citizens. In this role, a person may assume a critical position towards the legal norms and advocate for their modification or cancelation. Participatory rights constitute the mechanism according to which one, as a citizen, can express one's rejection of the norm with which one disagrees, through participation in the deliberative process. A democratic public sphere constitutes the field in which deliberative persons, as citizens, can express the critical disagreement that positive law denies to them as 'legal persons'. Participatory rights can contribute to resituating the subjects of the law, so that they also assume a position as part-author of the law. The consequence of equipping them with participatory rights is that "citizens are politically responsible for their law" and "they recognize each other as being politically competent".<sup>34</sup>

It cannot be concluded, however, that participation in the law-making process grounds a duty to obey the law without questioning it. Due to the limitations of the

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32. See Kindhäuser, 2011a:76-9.

33. See Kindhäuser, 2011b:220-1; Kindhäuser, 2011a:83.

34. Günther, 1996:1057.

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democratic process of law-making, the legal norm may only claim provisional validity and must therefore remain open to discussion and disagreement. This is a powerful reason to embrace the principle of neutrality under democratic rule, especially from the perspective of those that reject the substantive content of the norm. A patriotic commitment to the law would be incompatible with a critical position regarding the norm, and therefore incompatible with the role of citizens as authors of the law in a democracy. However, democratic legitimacy of the law can demand a weaker commitment. This weaker commitment is based on the two roles that correspond to a person within a democratic community. The role of a legal person, as a subject of the law, has its counterpart in the role of citizen, as author of the law. The counterpart of the ascription of participatory rights to citizens is the duty to present their disagreement with the legal norm only by exercising those rights in the public sphere, and consequentially the *duty*, acting in the role of legal persons, to adapt their external behaviour to the norm with which he disagrees as a citizen.<sup>35</sup> This can be concluded from the fact that nobody can be legally forced to follow the law for heteronomous considerations. However, from this is not followed “a right to harm unfairly the communicative autonomy of others”.<sup>36</sup> This allows the legal person, following the legal norms for reasons that are not the substantive identification with the norm or the threat of coercion, but out of loyalty to the outcome of a democratic process in which the person – in his role as citizen – is entitled to take part. Just under these conditions – neutrality and participation – is that the coercion can be imposed against a horizon of respect for individual autonomy and democracy.

These two positions in which a person can be situated play a fundamental role for the structure of the constitutional state. The autonomy of legal persons and citizens are in a relation of co-originality and mutual reinforcement. Habermas presents it as follows:

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35. See Kindhäuser, 2011b:227. See also Mañalich, 2011a:122-3.

36. Kindhäuser, 2011a:105.



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“[T]he only legitimate law is one that emerges from the discursive opinion- and will-formation of equally enfranchised citizens. The latter can in turn adequately exercise their public autonomy, guaranteed by rights of communication and participation, only insofar as their private autonomy is guaranteed. A well-secured private autonomy helps ‘secure the conditions’ of public autonomy just as much as, conversely the appropriate exercise of public autonomy helps ‘secure the conditions’ of private autonomy”.<sup>37</sup>

This relation of mutual reinforcement and co-originality between fundamental right and democratic decisions supposes the dissolution or transformation of this paradox into a fruitful core aspect of the manufacture of democratic legitimacy.<sup>38</sup> The model of co-originality therefore concedes equal importance to the protection of rights of private autonomy and rights of public autonomy, both being legally guaranteed in terms of rights of autonomy.

Summing up, it has been argued that the normative expectation of law-abidance conduct is based on the democratic legitimacy that is generated through democratic institutions and procedures. This means that a chance of a genuine motivation to follow the law for democratic reasons depends on the guarantee of equal political influence for every citizen and therefore “the right to exercise communicative freedom equally”.<sup>39</sup>

According to this account, democratic rights of participation and, in particular, the right to vote has an important role in the realization of the democratic promise of being governed by our own laws. The conception of democratic legitimacy defended in this section lacks a detailed conception of the right to vote, maybe since their emphasis on deliberation draws a parallel with an emphasis on the right to have *a voice* over the right to have *a vote*. The following section seeks to position the right

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37. Habermas, 1996a:408.

38. See Habermas, 2001. For a criticism, see Christodoulidis, 1998; Christodoulidis, 2006.

39. Günther, 1996:1055.

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to vote in a broader democratic framework briefly elaborating the role that may correspond to other democratic rights of participation.

## **II VOTING AND DEMOCRATIC LEGITIMACY**

The democratic legitimacy of the law is achieved by the exercise of rights of democratic participation by citizens that are subjects to the law. Affirming this, however, does not say much about the central importance of elections and the right to vote as cornerstone of democracy.

### **1 Input and output legitimacy**

The role and the importance that voting plays in a given democratic account tends to differ considerably depending on the level of importance conceded to the idea that citizens have a right to participate in the self-government of the community. To illustrate this difference, it is useful to draw in the distinction between input and output legitimacy.<sup>40</sup> At one end of the spectrum, ‘input legitimacy’ evaluates a government based on its connection to the people’s will and relies on the rhetoric of participation, according to which the bigger the distance between the persons affected by the decision and those who take the decision, the lower the level of input legitimacy.<sup>41</sup> This implies that the law “should originate from the authentic expression of the preferences of the constituency in question”.<sup>42</sup>

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40. See Scharpf, 1998:2.

41. See Scharpf, 1999:7.

42. Scharpf, 1998:2. For this account, democracy is an intrinsic value that need not depend on any other goal or outcome because what brings legitimacy into the scene is precisely the participation of those affected by the law in a process of law-making. For input legitimacy, therefore, rights of political participation, and in particular the right to vote, have a fundamental legitimating role.

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At the other end, ‘output legitimacy’ evaluates the performance of the government in terms of the satisfaction of the common interest of the constituency, typically in accordance with factors such as stability, development, respect for fundamental rights, etc. A democracy that finds legitimacy in outputs is desirable for two instrumental reasons. First, it has a *positive* ability to achieve effectively some determinate outcomes and particularly profits from a great “problem-solving efficiency”.<sup>43</sup> Democracy allows collective decision-making in a sphere that cannot be addressed by individual action, market exchanges or voluntary cooperation.<sup>44</sup> Second, it is desirable for its *negative* capacity to protect against the abuses of the majority and to assure that government power will not be used to further “the particular interest of the office holders”.<sup>45</sup>

These kinds of legitimacy highlight the values and advantages of different aspects of representative democracy. On the one hand, its representative nature and the possibility of modulating the results of the democratic process by institutional design are linked with output legitimacy. On the other hand, its democratic nature and especially the importance of people’s participation are linked to input legitimacy. The inquiry that follows recognizes the wide disagreement regarding what constitutes the adequate balance of input and output legitimacy, but nonetheless rests on the argument of the importance of electoral participation and the right to vote as necessary elements of any conception of democratic legitimacy. In other terms, it affirms an idea of democracy that is committed to a high level of input legitimacy.<sup>46</sup>

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43. Scharpf, 1998:3.

44. See Scharpf, 1999:11.

45. Scharpf, 1998:4. In this sense, output legitimacy involves substantive elements that do not, however, exhaust it. An output perspective “allow[s] for the consideration of a much wider variety of legitimizing mechanisms” than input legitimacy; the force of this legitimacy tends to be however “more contingent and more limited” (Scharpf, 1999:11). cf Ramsay, 2013b; López-Guerra, 2014a:124-9.

46. When it comes to participation; even when it is clear that the recognition of the right to vote is important; to hold free, periodic and competitive elections is not sufficient to achieve this end. The catalogue of elements that are deemed necessary to achieve input legitimacy include -

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## 2 Aggregation, deliberation and contestation

If it is agreed that representative democracy achieves an important quota of its democratic legitimacy through the input of elections, it must be recognized that this is not the only instance in which democratic legitimacy can be produced, but in different moments of the democratic process, in which the interests, values, reasons and preferences of citizens are channelled into the process of public decision-making.<sup>47</sup> Related with these different moments, three different conceptions of democracy may be identified, which emphasise elections, deliberation and contestation as core registers of democratic practice.<sup>48</sup> These conceptions of democracy might also provide an account of a right balance and relation between input and output legitimacy, and an understanding of the role that elections might play in the legitimation of law.

### 2.1 *Aggregative democracy*

For an aggregative model of democracy, the democratic legitimacy is produced when the particular interests and preferences of electors are transmitted into the legislative process and give content to the law assuming to pursue an aggregation or tabulation. The fundamental moment of this process of transmission is elections, by means of

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besides the right to vote - other democratic institutions such as other political rights - in particular rights of political participation, association and communication; a system of party competition, mechanisms of accountability of the representatives (see, e.g. Scharpf, 1999:14), as well as elements that cannot be automatically manufactured through institutional design but require a democratic practice and a democratic culture (see e.g. Hiley, 2006. See also Habermas, 1996a:461). Moreover, it can be argued that this catalogue of elements directly related with elections is too narrow; that it should be complemented with other voting-unrelated institutional and cultural elements that work as resources and preconditions of electoral democracy. Examples would include the protection of individual rights, a certain degree of economic welfare and some sources of collective identity (Benhabib, 1996:67-8). Neither can social and economic equality be absent. This could lead to the problem of the circularity of the input/output distinction, or furthermore contribute to highlight the importance of a balance between inputs and outputs - in a relation of reinforcement, complementation and supplementation (Scharpf, 1999:12) - to stabilise a conception of representative democracy.

47. See Hayward, 2009:114-24.

48. See Hayward, 2009.

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which the agenda of the representatives is influenced by the interest of the electors. Elections claim to be, on this model, the fundamental moment in which the democratic authorities become responsive to the interest of the people.<sup>49</sup>

The value of voting in this context is determined by the aggregated influence that electors can exert upon the government by voting.<sup>50</sup> By voting for representatives that have a similar political opinion, electors protect their own interests because the governmental elites will act according to those opinions and preferences if they wish to remain in power. This identity between those interests and representatives' political discourses may be considered the crucial element in securing the importance of voting in the enhancement of democratic legitimacy. Other participatory rights, such as free speech, association and assembly tend to play a marginal role in the generation of democratic legitimacy in this model, which sees them as no more than enabling conditions of free and informed voting.

The aggregative model is attractive because it concedes great importance to input legitimacy, and great importance to the right to vote as a legitimacy device. It also seems compatible with pluralist societies. However, when carefully analysed, it becomes apparent that the aggregative model is methodologically incapable of providing an adequate account of how those inputs are channelled and processed in a practice of a collective, and the nature of public participation. In relation to this first aspect, it encounters difficulties in explaining the nature of political participation as a public practice in which ideas should be defended with arguments that can be offered in public; as a practice of the "institutionalization of public use of reason",<sup>51</sup> that make possible contestability if "no link is made between decision and justification".<sup>52</sup> On the other hand, aggregation of interests has difficulties providing solid explanation of output legitimacy, because democratic politics is more than just the

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49. See e.g. Przeworski, 2010a.

50. See Habermas, 1996b:22.

51. Habermas, 1996b:23. See also Rawls, 1996: Ch. 6.

52. Cheneval, 2006:164. See also Habermas, 1996a:302-8.

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articulation of private interests, being rather a practice in which our common interest plays a fundamental role.<sup>53</sup> In these two senses, aggregative democracy cannot explain how elections and politics in a democracy differ from individual participation as consumers in the market.<sup>54</sup> In addition to these shortcomings, aggregative democracy faces an even greater problem in relation to its outcomes. The problem is commonly identified as the tyranny of the majority. The aggregation of votes and decisions based on majority rule may entail a situation where the interests of the majority are taken into account whilst the interests of the minority are ignored in the law-making process.<sup>55</sup>

For these reasons, Fritz Scharpf is right when he says that “[o]n the standard premises of normative individualism [...] plausible legitimacy arguments cannot be based on purely input-oriented notions of democracy”.<sup>56</sup> Aggregation abandons the search for an answer to the question regarding how elections enable the practice of self-government, and accepts as unavoidable a conception of the political process as the individual’s approval of the elite competition trying to maintain positions of power.<sup>57</sup>

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53. See Habermas, 1996b:22. See also Pettit, 2000:108-11. Regarding this second aspect, for example, it struggles to explain the necessity of the provision of public goods and redistributive measures, as expressions of social solidarity (see Peter, 2011:20-5).

54. See Elster, 1989:4-12.

55. This criticism does not necessarily constitute a case against majority decisions - democracy is unimaginable without them - but rather a case against the mere aggregation of interests as the promise of those decisions (see Pettit, 1999:173-8). Indeed, there are some differences between a process that does not take one’s interest into account at all and a process in which your interests are considered but the process “may deliver a result – for reasons you can understand - that favours those others more than you” (Spitz, cited in Pettit, 1999:179).

56. Scharpf, 1999:7.

57. See Habermas, 1996b:22-3. In this respect, the seeming importance of input legitimacy could be limited by the elitism of certain plebiscitary features of a model in which democracy in itself has a limited legitimating potential. That could also be read as a self-defeat of the promise of input legitimacy in aggregative democracy and consequentially the strengthening of output legitimacy. In this reading, however, output legitimacy would be built completely in terms of the satisfaction of private interests, which is easily conciliated with the Hayekian concept of *catalaxis* which sees democracy as an imperfect substitute of rationally transparent market interactions. The concept was originally introduced by Hayek, 1979 (see also diZerega, 1989). The distance between such a diagnosis and the suppression of democracy is very short. In this sense, aggregative models necessarily tend to oscillate between an elitist conception of

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## 2.2 *Deliberative democracy*

A second candidate is deliberative democracy. The concept of deliberation refers to the exercise of a form of collective decision-making, different to aggregation, which is carried out, first, illuminated by the public and impartial use of reason, and second, by recognising everybody involved in the process as having equal worth and equal rights to take part.<sup>58</sup> The moment of insertion of democratic legitimacy is therefore the moment in which these ideal conditions are most easily accomplished: the process of discussion developed in parliamentary *fora* during a law-making process that is influenced by an also deliberative public sphere. In that moment, representatives and citizens reflect collectively upon what are and what ought to be the common interests that should motivate their decisions, which, in addition, contribute to shape individual interests and make them compatible with the interest of everybody else. This debate is procedurally organized towards a rational agreement, only after the points of view of everybody have been duly considered.<sup>59</sup> The legitimacy of collectively binding decisions therefore depends on the institutionalization of a process of communication whose conditions could “meet the agreement of all those possibly affected”.<sup>60</sup> Ideally, therefore, and against the methodological individualism of aggregative democracy, deliberation does not understand negotiation and bargaining as adequate terms on which the process of decision-making is carried out.<sup>61</sup>

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democracy (see Schumpeter, 1976), which avoids the problem of the rational choice theory about the impossibility of aggregation, and a democracy normatively restricted to reproduce market-minded decisions, highly motivated to grant veto powers to avoid the tyranny of the majority (see Buchanan & Tullock, 1999).

58. Habermas, 1996a: 118-132, Ch. 7. See also Benhabib, 1996; Cohen, 1996.

59. See Benhabib, 1996:69-74.

60. Habermas, 1996a:104.

61. See Besson & Marti, 2006b: xvi.

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To some extent, deliberative democracy responds to the deficits observed in aggregative democracy.<sup>62</sup> On the one hand, the common interests of the people vary from their particular interests. The former are discovered when the latter are submitted into a process of public and critical exchange of opinions and arguments.<sup>63</sup> On the other hand, the articulation of more complex discourses and reasoning are necessary to satisfy those public interests that are absent when merely the aggregation of particular interests is taken into account. Finally, its orientation to consensus and the modification of the interest of the constituency within the deliberative process tend to impede decisions that can be seen as an abuse of the majority rule.

The previous aspects are clearly linked to the discursive nature of the deliberative process, which makes that the right of participation with discursive potential, eminently between them the right to free speech, acquire preponderance over other means of participation. The relation of enhancement between voice and vote in the aggregative model mutates quite radically, and the right to vote is transformed in the democratic mechanism to palliate harm caused by the demand of decision-making that limit ongoing political discourses. Voting assumes as the second best to a consensual solution achieved in a rational conversation guided by the principles of publicity and transparency and enabled by freedom of speech, association and press.

Deliberative democracy, nevertheless, has been criticised for being unrealistic and blind to differences proper of a pluralist society. Firstly, it is said that deliberation is too far away from the reality of political practices, especially those practices that are mainly governed by strategic bargaining and negotiation. In a similar vein, the manner in which legitimacy is produced disregards the core democratic institution of voting and deciding according to majority rule.<sup>64</sup> In response, it can be argued that

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62. Deliberative democracy arises as a response to the democratic deficit of those minimal, elitist and aggregative conceptions of democracy, predominant after the Second World War (Besson & Martí, 2006b: xii).

63. On the aspect of shaping interests, see Michelman, 1989:451.

64. See e.g. Elster, 1998; Besson & Martí, 2006a.



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deliberation is a regulative ideal according to which political institutions can be organized to achieve political legitimacy and “does not aim to describe how they actually are”.<sup>65</sup> The fact that deliberative democracy relies mainly on communicative action does not deny the necessity for strategic action in the certain moments, in the public sphere by social movements and in the parliamentary fora by both government and opposition, especially in order to stage conflicts. Additionally, a realistic deliberative democracy account must also consider voting and deciding by majority rule, and must give them a place in the deliberative process in which these notions are not considered as “a necessary evil, but as a fair procedural institution”.<sup>66</sup> However, to consider voting as a conclusive moment of deliberation is substantially different to a model of ‘pure voting’ “which remain[s] indifferent to any interaction or communication among voters”.<sup>67</sup>

Secondly, some have pointed out the exclusionary aspects of the deliberative model. It focuses “in a particular kind of supposedly reasonable political interaction” that is not neutral but excludes a variety of voices and forms of participation.<sup>68</sup> This problem of participation may rest, and this will be discussed with some detail later in this work, in a deeper problem of social and political recognition.<sup>69</sup> In asking for consensual decisions, deliberative democracy is necessarily undermining the irreducible plurality of views present in society;<sup>70</sup> in particular by mean of excluding those conceptions of good that are rendered unreasonable,<sup>71</sup> and silencing those considered unacceptable to take part of the “constitutional sanctioning of the public sphere”.<sup>72</sup> In relation to this second criticism, deliberative democracy is more vulnerable. An adequate answer must start by recognising the irreducible

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65. Besson & Martí, 2006b: xv-xvi.

66. Besson & Martí, 2006b: xvii.

67. Besson & Martí, 2006b: xvii.

68. See e.g. Young, 1990: Ch. 4; Dryzek, 2000: Ch. 3.

69. See below *Chapter 6*, Section III.

70. See e.g. Mouffe, 2000: 36-59.

71. See Furman, 1997.

72. Christodoulidis, 2004:198. See also Christodoulidis, 2006.

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exclusionary dimension of democracy in general and deliberative democracy in particular. However, some attention must be paid to attempts to incorporate those different voices within the framework of deliberative democracy, by recognizing other forms of non-coercive communication as acceptable,<sup>73</sup> particularly where these are supplemented with procedures that generate conditions for deliberation, agreement and compromise in cases of deep disagreement.

In relation to the distinction between input/output legitimacy, *prima facie* deliberative democracy tends to collapse it. It “may be understood as a concept that builds a bridge between input and output oriented legitimating arguments by insisting on specific input procedures that will favour qualitatively acceptable outputs”.<sup>74</sup> The input introduced by the individual electors is of marginal importance and it can be considered simply as the starting point of the law-making process. Although democratic outputs cannot be determined in advance because they are the rational consequence of a procedure structured to take collective decisions respecting certain procedural preconditions, it can be concluded that deliberative democracy, particularly in comparison with aggregative democracy, is an output-oriented model of legitimacy.

Both models considered so far, in that they highlight elections and deliberation, share in common the key role that representative institutions play in the injection of democratic legitimacy. Against the argument that democratic legitimacy rests on elections and public deliberation, some critics have opposed a diagnostic based on the necessity of other forms of democratic legitimacy to supply the deficit of representative institutions due to the tendency of these institutions to stand for major social interests and exclude the disagreement.<sup>75</sup> Contrary to elections and ruled

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73. Dryzek argues in favour of storytelling, testimony, greeting, rhetoric and argument (2000:62-74).

74. Scharpf, 1998:3 in reference to Habermas, 1996a:301.

75. See e.g. Mouffe, 1993:99.

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deliberations, they see in the possibility of contesting the institutionally mediated law-making the very possibility to express a democratic voice.

### **2.3 Democracy as contestation**

Democratic legitimacy could therefore adopt a third modality, based on contestatory democracy. For those that endorse this model, the more relevant aspect of democratic institutions is to produce opportunities for decisions to be challenged. This requirement can be based, depending on various versions of the idea, on different political conceptions of how legitimacy is generated. For conceptions such as Philip Pettit's *republicanism*, the goal of contestation arises from the necessity to limit the discretionary authority of the representative institutions and therefore to create freedom for the people. The authority of the government is legitimate insofar as the possibility of contesting its decisions is always open.<sup>76</sup> For more radical conceptions, such as Chantal Mouffe's *agonism*, the ambition of contestation is to challenge the hegemonic and contingent articulation of power-relations in society; government and law both being particular agents of power. The authority of representative institutions is never democratically legitimate because democracy is about staging conflict between those who have the power and those who contest the exercise of such power.<sup>77</sup>

Contestation is therefore a practice of injecting legitimacy into democracy by means of challenges to decisions that are traced back to the majority of the representatives elected in turn by the majority of electors. This anti-majoritarian feature can make contestatory democracy very attractive; however it does not necessarily imply a

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76. See Pettit, 1997:185. See also Tomkins, 2005.

77. See Mouffe, 2013. See also Honig, 1993a. However, in these later accounts, one must distinguish the value of the transgression of the institutional forms itself, according to a view in which institutional politics is an attenuated form of democracy, from the democratic value of contestation to review and question the current relations of power supported by the institutional system. Just emphasising the second aspect, contestation can be seen as a mechanism of democratic legitimacy in the sense it is discussed here.

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strong support for judicial review or other forms of limitations on politics by legal mechanisms. The essential element of contestation is the possibility of uncovering and making contentious what a representative process of democratic law-making has concealed. This is because, contrary to any subordination of politics to law, and antagonistic with the deliberative tendency to consensus, contestation is about maintaining the democratic process always open; in sum, questioning that law can assume a representative role.<sup>78</sup>

In terms of the distinction *input/output*, similar to deliberative democracy, contestation places greater emphasis on output. This is so because it focuses on the negative outputs of the democratic process. Contestation, however, does not seek to produce a determinate result; instead, by means of questioning the output it forces the reassessment of the decisions under conditions of confrontation which might illuminate hidden aspects of the issue at stake. However, even if seen as output-focused, contestation might also be seen as a practice of input legitimacy, particularly when it is performed directly by citizens and civil society organizations. In other terms, contestation is a form of participation, which may bring decisions closer to those affected by them.

The major problem with a conception of democracy which lays emphasis on contestation is the scant attention paid to the process of law-making, including elections and parliamentary debate. This disregard may reveal a tendency to standardise all kind of government exercise of power as equally vicious or, in a better light, to obscure how elections and representative institutions can manufacture democratic legitimacy. In contrast, participatory rights that have the potential to drive manoeuvres of contestation obtain great democratic relevance. The right to free speech is important in this regard but also the right to judicial protection and crucially

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78. See Christodoulidis, 2006:4-9.

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the right to assembly, all of which enable the staging of conflict in different forum and in different forms.

### **3 The importance of voting for democratic legitimacy**

These three models express different understandings of the principles on which democracy is grounded; further, they also express distinctive ways, commonly thought of as antagonistic and incompatible, in which democracy can be understood. However, each one of them highlights the importance of different modalities of legitimacy and certain practices that can contribute to produce it. Elections, parliamentary and civil society deliberation, political and legal contestation and social struggle – in sum consent and dissent – provide important elements whose significance any ambitious account of democracy cannot pass over.

Regarding the importance of voting, aggregative democracy is the model that relies importantly in electoral practices but in the context of a considerably poor account of democratic legitimacy. Deliberative democracy, in contrast, is a more attractive normative model because it simultaneously permits an explanation of the current democratic institutions and practices of representative democracy, while subjecting them to critical scrutiny. However, at least at the core of its theory of legitimacy, deliberative democracy provides a relatively poor account of the value of voting.<sup>79</sup> A model of deliberative democracy focused on the rationality of outputs can be considerably reinforced if it can also highlight the importance of input legitimacy. This injection of input legitimacy could adopt two main forms. First, it needs to highlight the importance of elections for the deliberative process. Second, it must highlight the aspects of democratic practices related with contestation.

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79. See Hiley, 2006:56-7. See also Beckman, 2009:22.

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### 3.1 *Deliberative purity and input legitimacy*

Regarding the importance of electoral inputs in a deliberative model, Habermas suggestion is that elections inject ‘communicative power’ into the political system. In real democracies, people elect representatives who take decisions in their name. Representatives, however, need to engage in a political practice in which decisions do not correspond necessarily with the interest, values or preferences of the electors. To what extent those interests change during the law-making process, or to put it in other terms, what is the importance of the input channelled into the political system through elections, forms the object of considerable debate between those who hold deliberative accounts. This is important because there is a direct relation with the extent to which interest, values or preferences are blocked by the normative aspirations of deliberation, therefore limiting the responsiveness of representatives, a consequence which forms the basis for criticism of the elitism and unrealism of the deliberative model.<sup>80</sup>

A *pure-deliberative* position set a very demanding goal for deliberation, bringing it closer to the notion of consensus, with all the exclusionary problems that entails. The deliberative ideal demands the recognition of the force of the better reason from all participants. As the better argument is objectively better, the deliberative ideal asks for a consensus over such reason. On this model, the inputs brought by elections into democracy are systematically filtered and purged by the use of public reasoning and the recognition of the force of the better argument. It must be said that the institutional design of representative democracy make this ideal considerably unlikely in practice.<sup>81</sup>

The work of Habermas on constitutional democracy, on the other hand, maintains consensus as a regulative ideal while introduces a *decision-oriented deliberative*

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80. See e.g. Levy, 2013:362-5.

81. See e.g. Habermas, 1984; Habermas, 1999. cf Cohen, 1998.

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style.<sup>82</sup> In a law-making process legally regulated it is reasonable to aim for an outcome consensus rather than argumentative consensus.<sup>83</sup> This difference is due to the fact that in his model, the commitment of democracy to communicative action is weaker than in a pure deliberative model, more adequate for the moral deliberation than for the institutional deliberation in pluralist societies. Deliberation in this model is committed in the task to reach “some understanding about the normative regulations of strategic interactions”,<sup>84</sup> and not the justification of morally objective norms. In conditions of pluralism, he recognises a natural tendency to shift to strategic action within a law-making process and therefore the need to acknowledge, first, the importance of bargaining “where participants agree to a particular norm for different reasons through a negotiated consensus”,<sup>85</sup> and second, the limited scope of deliberative principles as they regulate the political process, admitting that sometimes they are merely laying down the conditions of the bargaining processes in terms of a legal regulation that can be followed for strategic reasons.<sup>86</sup> Thus, the deliberative ideal is reduced to the more modest ideal of favouring “those institutional settings that promote deliberation and in which the weight of negotiation and voting is reduced”.<sup>87</sup>

This moderated optimism about the possibilities of consensus brings important consequences for the understanding of voting in democracy, because the importance of the inputs brought into the process is augmented and expectations of a purge on the inputs during the process of deliberation are attenuated. The ‘discursive dilemma’<sup>88</sup>

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82. See Habermas, 1996a:306-7.

83. See Kindhäuser, 2011a:102.

84. Habermas, 1996a:26-7.

85. Habermas, 1996a:166.

86. According to Habermas “‘rational discourse’ should include any attempt to reach an understanding over problematic validity claims insofar as this takes place under conditions of communications that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations. The expression also refers indirectly to bargaining processes as these are regulated by discursive grounded procedures” (1996a:107-8).

87. Besson & Marti, 2006b: xvii. See also Mansbridge, 2006.

88. See Pettit, 2008.

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based in a tension between participation and deliberation is certainly attenuated.<sup>89</sup> Voting conserves its decision-making character, selecting candidates that would not be neutral in the discussion and defence of the interests, values and preferences of their electorate.<sup>90</sup> This can be justified in deliberative terms, first, because democracy is understood as an ongoing process of will-formation in which even when it arrives at temporary agreements regarding norms that coordinate interaction in society, this does not imply an ethical agreement that dissolves the commitment to pluralism. Secondly and consequentially, the possibility of contesting and reviewing such agreements by those who disagree, as a fundamental element of democracy, recognizes great importance to the responsiveness of the political system and therefore to the input legitimacy of elections.

### **3.2 *Two-track democracy and deliberative elections***

The second way in which elections might have room in a deliberative model depends on the fact that elections can be influenced by a broader process of deliberation in the public sphere. Habermas, driven by the idea of functional differentiation, highlights a model of *two-track* deliberative democracy' in which citizens' participation is not carried out only by voting but also through the activities of civil society associations, political parties and mass media all of which generate an informal deliberation 'track', a diagnosis of social problems, influencing the political system, and eventually causing struggle.<sup>91</sup> In fact, Habermas dissolves formal and informal participation by appealing to the idea of "'subjectless' forms of communication", which flow from the citizens and the public sphere deliberative forums into the

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89. See e.g. Levi, 2013:355-7.

90. See Habermas, 1996a:487-8.

91. See Habermas, 1996a: Ch. 5.



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political system's deliberation which in turn converts this into administrative – and purely strategically-oriented – power.<sup>92</sup>

Individually considered, people have limited possibilities to influence public decisions. However, civil society organizations may enjoy considerable strength and the ability to evaluate, question and influence the political agenda 'from the periphery to the centre'.<sup>93</sup> They can operate directly within the government decision-making process, for instance, by means of government consultation mechanisms through which civil society is heard. Furthermore, they can operate indirectly through their influence on the public sphere's debate, which shapes public opinion on certain issues. Even more, "in a perceived crisis situation" when the political system is particularly irresponsive to the demands of civil society, "the actors in civil society thus far neglected in our scenario can assume a surprisingly active and momentous role".<sup>94</sup> The spontaneous actions of members of civil society through protest, civil disobedience and radical forms of political antagonism might permeate the political system reconnecting society and politics.<sup>95</sup>

Deliberation, therefore, is not an activity that occurs just within institutions. At the same time that this might diminish the importance of elections as the main participatory channel, it also opens up a new viewpoint from which to see a relation of reinforcement between deliberation and elections.<sup>96</sup> Elections, from a deliberative point of view, are moments of decision-making that to be valuable must be preceded and followed by a process of discussion and the interchange of opinions and information, which result in that decision being the conclusion of a procedure oriented by reason.

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92. "[...]. Only in this anonymous form can its communicatively fluid power bind the administrative power of the state apparatus to the will of the citizens" (Habermas, 1996a:136).

93. See Habermas, 1996a:359ff.

94. Habermas, 1996a:380.

95. See Habermas, 1996a:379-87.

96. See Levy, 2013.

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Probably the more important example in which democratic elections are tied with public sphere deliberation is in electoral campaigns, which are prospective-oriented discourses and are directed to address electors. Electoral campaigns are just the central moment of a constant, ongoing reflection and awareness occurring within the public sphere about the importance of the elections and what is at stake in them. Whether campaigns are made for persuading, informing or mobilizing electors, they are part of the general process in which people formulate their opinions, shape their values and take their decisions.<sup>97</sup> That deliberative process of will-formation and decision-making in the public sphere resonates in the electoral outcomes. Consequentially, that deliberative process affects the way in which those outcomes influence the representative institutions.

### **3.3 A Family Quarrel?**

Frank Michelman has suggested that any possible disagreement between Habermas' deliberative model and democratic republicanism is a family quarrel due to their general similarities.<sup>98</sup> Similar judgement could be made about the law-making process of certain contestatory theorists that favours a view of representative practices not very different from Habermas' decision-oriented deliberative model. In the worst case scenario, these approaches to democracy are not identical nor opposed, but complementary.<sup>99</sup>

Some theories of contestation, such as Mouffe's, commonly manifest their strong opposition to a deliberative model of law-making, considering it harmful for democracy because its demand for rational agreements has a propensity for neutralizing conflict, depoliticizing society and avoiding the development of forms of

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97. On democratic theory and electoral campaigns, see Gardner, 2008.

98. See Michelman, 1996a.

99. See e.g. Markell, 1997.

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contestation against the hegemonic dimension of consensus.<sup>100</sup> Even if it is correct, this is a criticism that can be directed only against pure-deliberative democrats; regarding Habermas, such a criticism only stands if it is focussed on his philosophical presuppositions, but disregards the realist concern underlying his proposals to regulate democratic practices.<sup>101</sup> Habermas' theory of deliberative democracy seems equipped to avoid those criticisms: first of all, as a result of his emphasis on the "institutionalization of the corresponding procedures and conditions of communications", rather than with the achievement of a factual consensus.<sup>102</sup> One expression of this is the admission of instrumental rationality as being indicative of political plurality, which can play a role in the generation of spaces of dissent and resistance.<sup>103</sup> Secondly, he recognizes the importance of contestation as a fundamental element of democracy, which is expressed, for example, in his theory of the public sphere or in his demand for broader public participation, which play an important role that eventually takes the form of a "struggle over needs",<sup>104</sup> and therefore might limit the hegemonic closure of the political system.<sup>105</sup> The opposition between accord and struggle can be dissipated if it is conceived the possibility to think about accord as part of a more complex kind of struggle.<sup>106</sup>

Others explicitly recognize their similarities, deeming deliberation as one of the basic requirements of contestatory practices. Pettit, for instance, believes that contestation requires, first, that the "decision-making [be] conducted in such a way that there is a

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100. See Mouffe, 2000: Ch. 4. See also Meckstroth, 2009.

101. See Khan, 2013:2. See also Markell, 1997.

102. Habermas, 1996a:298..

103. See e.g. Meckstroth, 2009:419.

104. Habermas, 1996a:314.

105. See Markell, 1997: 391-5. The agonistic theory of contestation, as noticed by Kahn (2013), in fact shows some convergence with Habermasian democracy: first, by highlighting the importance of civic accord as a framework of recognition; second, through the recognition of conflict and disagreement as a legitimate political element; and third, the value it accords to collective self-government as a democratic ideal. Others have also noticed some common points and relations between deliberative and agonistic democracy. See also Shaap, 2006; Knops, 2007; and Gürsözlü, 2009.

106. See Meckstroth, 2009:419.

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potential basis for contestation”.<sup>107</sup> Even recognizing that a bargain-style of decision-making can also become effectively an object of practice for contestation, he argues that a decision-making process wherein decisions are supported by reasons and those reasons are subjected to public debate provides more and better opportunities for contestation.<sup>108</sup> Well-structured decision-making procedures “allow statement[s] to be supported and contradicted in ways that may catch [the] attention of unspecified non-elites”.<sup>109</sup> In particular, publicity and visibility of procedures, discussions and decisions permit the instantiation of a controlled and moderated political conflict that is productive for democracy.<sup>110</sup>

### **3.4 Contestatory elections**

Democracy as contestation emphasises the shortcomings of electoral and parliamentary practice to express the existent plurality of interests, values and subjectivities. Its defendants are driven by a suspicion “of attempts to determine in advance what is to count as legitimate political action because this too often becomes a way of coopting radical challenges to the dominant interests within a society”.<sup>111</sup> Elections, in particular, embrace the “permanent possibility that this or that minority – stable or issue based – will be overlooked in the electoral process” and consequentially in the representative practices.<sup>112</sup>

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107. Pettit, 1997:187.

108. Pettit, 1997:187; Pettit, 2008:151-3. The failure of the deliberative process to reach consensus is not seen as problematic, from this point of view, because deliberation is seen as instrumental to contestation practices (Pettit, 1997:199).

109. Sharpf, 1998:13. He continues: “Publicness works as powerful censorship mechanism [...]. That does not rule out self-serving communications. In public debates, however, self-interest is forced to masquerade as public interest - at which point the possibility of contestation allows competing interest or public-interested critics to challenge such claims” (Sharpf, 1998:13).

110. See, generally, Goldoni, 2013a.

111. Shaap, 2006:257. See also Pettit, 1997:183-4.

112. See Pettit, 2000:126.

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However, contestation is a reactive activity that must be performed under adversarial conditions. The alternative – to give protection to the interests of the minority – would be to grant them veto powers,<sup>113</sup> which are deeply incompatible with even the expression of the majority and highly unconvincing as democratic model.<sup>114</sup> Challenging domination requires a target, and the outcomes of a process of elections and representative law-making are the logical target of any action of contestation. Moreover, this is not just logical but also democratically necessary. Democratic elections are not an arbitrary means to decide about who the authorities will be and which kind of decisions they will take. In this line, Bonnie Honig recognizes that the politics of decision-making (“the politics of settlement”) and the politics of contestation (“the politics of unsettlement”) represent “two impulses of political life, the impulses to keep the contest going and the impulse to be finally freed of the burdens of contest”.<sup>115</sup>

Elections may have the potential to select and introduce interests into the law-making process. Even from the perspective of suspicion, the fact that “[t]hose who stand for political office will have an incentive to enhance their chances of election and re-election by promoting any cause that can attract general support”,<sup>116</sup> augments the chances of a “generous supply of candidates for consideration as matter of common, recognisable interests”.<sup>117</sup> Pettit’s metaphor clarifies this in arguing that elections play the *authorial* dimension of democratic control over the government while contestation plays an *editorial* role.<sup>118</sup>

Finally, there is another aspect where contestation and elections are compatible and even mutually dependent: elections may assume a contestatory role as contestation

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113. See e.g. Buchanan & Tullock, 1999; Tsebelis, 2002.

114. See Pettit, 2000:118-9.

115. Honig, 1993a:14.

116. Pettit, 2000:125.

117. Pettit, 2000:116.

118. See Pettit, 2000:114-8.

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forums. According to Scharpf, elections are “important as the infrastructure of political accountability which institutionalizes and reinforces the normative orientation of office holders toward the public interest”.<sup>119</sup> This contestatory potential, however, requires very demanding circumstances to be fruitful, which shows strong similarities with the requirements of deliberative processes. The rule of law, political participation, strong and plural civil society, competitive political parties, and credible media demonstrate that “conditions are in place, public power is exercised in the shadow of public attention and of public debates that have the potential of affecting the outcome of upcoming elections”.<sup>120</sup> It is contexts such as these that it becomes possible and can be expected from citizens “to make sense of what it is happening and to respond to specific policy choices by approval, unconcern, or active opposition”.<sup>121</sup>

### III UNIVERSAL SUFFRAGE

The previous observation can contribute to affirm the value of voting, due its potential to generate democratic legitimacy, as a fundamental right in a democratic state. This section deals with universal suffrage, the other principle involved in the claim that democracy may assume the role of a normative ideal. However, the idea of universal suffrage as a normative principle must also be, as with the right to vote, developed and framed in constitutional language. To sustain that universal suffrage can adopt such a form, one must avoid an understanding of the franchise as fully contingent, inherently particularistic and dependent upon historical conditions.<sup>122</sup> The

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119. Scharpf, 1999:14.

120. Scharpf, 1999:14. See the proposal of Gardner (2008) in which he argues that electoral campaigns have a general contestatory potential, becoming “a forum not just for peasant, voluntary, reinforcing encounters with like-minded, but also unwanted, destabilizing, and perhaps unpleasant encounters with those who hold different or even contrary views” (160).

121. Scharpf, 1998:13 (1999?). See also Goldoni, 2013b:1074.

122. Dahl, 1989:120-1. See below *Chapter 6*, Section III.1.

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conclusion that there is no rational explanation available to the problem of inclusion must also be avoided.<sup>123</sup>

## 1 The problem of boundaries

The answer to the question about *who* should be entitled to vote in a democracy is not self-evident. This question has been highlighted by political theorists such as Robert Dahl and Frederick Whelan as the problem of inclusion in democracy or the problem of ‘the boundaries’.<sup>124</sup> The answers to the question of the boundaries are complex, generate considerable debate and are marked by ambiguities.<sup>125</sup> It is surprising, given the depth of the discussion about who must be included, and how the line must be drawn, how little attention has been paid to the indicators which demonstrate that somebody is included, being commonly assumed that being part of the political community is associated to/can be reduced to the legal entitlement to vote in elections.

While admitting the danger of oversimplification, it may be said that there are two main kinds of reasoning used to answer the question of boundaries. The first starts from the premise that inclusion/exclusion proceeds according to some substantive principle or standard. The second follows the idea that it must be settled according to some legitimate procedural mechanism.<sup>126</sup> Both propose a basis from which to determine who is included or excluded. Two examples of these kinds of reasoning

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123. See Näsström, 2007:631-4. The boundaries problem has been usually framed in terms of complex and indeterminate questions about who are ‘the people’, how ‘the demos’ can be legitimately constituted, or who participate in its initial founding decision. See Näsström, 2007. See also Whelan, 1983; Scherz, 2013.

124. See Whelan, 1983; Dahl, 1989:119. The literature has grown recently. For an overview of the literature, see López-Guerra, 2005; Arrhenious, 2005; Cheneval, 2006; Goodin, 2007; Näsström, 2007; Weale, 2007:207-226; Beckman, 2009; Miller, 2009; Näsström, 2011; Saunders, 2012; Song, 2012; Scherz, 2013; López-Guerra, 2014a.

125. See Dahl, 1989:120-1.

126. The framing of these answers to the question of the franchise between principles and procedures has been taken from Note, 1987.

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can be useful in highlighting some of the problems that a successful answer to the boundaries question must overcome.

### **1.1 A human right to vote**

A first answer to the problem of the boundaries can be associated with a principled version of the franchise and has as its main tenets the idea of the right to vote as a *human right* and the claim of universal suffrage as its natural consequence. Every human being *qua* human being should be entitled to vote and the role of government must be limited to facilitating and protecting such a right.<sup>127</sup>

This answer is difficult to defend in practice. At least two reasons support a strong intuition that undermines the above approach, both of which are associated with the participatory nature of the vote as a political right. First, those who will not be affected by a decision which issues from the process of decision-making can hardly claim to be included.<sup>128</sup> Second, to engage in democratic process demands some kind of capacity: for instance, a baby cannot personally participate in democratic practices as a matter of fact.<sup>129</sup>

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127. There are common presuppositions and strong ties between a conception of the right to vote as a human right grounded in the rational natural law, a conception of the political society based on a rational contract which articulates plural pre-political interests, and an aggregative conception of democracy. See Michelman, 1989:445-7. Miller (2009) assumes part of these premises when he argues that it “is going to appear anomalous if there are people not currently included in the demos whose interests are nonetheless impacted by the decision [democracy] takes” (214).

128. Transient foreigners are the core case in which the attribution of the right to vote would be arbitrarily granted, especially when the working hypothesis is the nation-state franchise. See Beckman, 2009: 80-8.

129. See Dahl, 1989:126-8. See also Saunders, 2011: 286. See also above *Chapter 4*, Section III.



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The problem of grounding enfranchisement in humanity<sup>130</sup> is not just its counterintuitive consequences, but that it is democratically problematic. Some critics of this idea suggest that this conception of the franchise is hardly compatible with the foundations of democracy as self-government. This is so, because democracy as a process of decision-making requires, as a matter of operation, the previous *determination* of those who are going to participate in the process.<sup>131</sup> The problem, therefore, is that “an unbounded *demos* is not a performative *demos* because it cannot act”.<sup>132</sup> At least, it cannot act in terms of a process that involves the institutions to which current democratic practices are tied: voting, discussion in the public sphere and parliament-producing decisions, the contestation of such decisions, and so on. Therefore, it cannot achieve the democratic ideal of the production of outcomes that can be recognized as common. In this sense, the openness of the franchise undermines the possibilities for not just democratic deliberation, but also social justice and solidarity through democracy.<sup>133</sup>

## **1.2 Democratic self-definition**

If the universalistic principle of inclusion failed due not only to its disconnection from reality, but more especially owing to the lack of closure demanded by democracy, a second and different answer can proceed from the very negation of the premises of the first. There is no principle to which one might appeal in this matter because there exists no such thing as a human right to vote. This right is a political right – not a human right<sup>134</sup> – and as such, it corresponds to the polity to decide who is

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130. Must be noted that the reference to humanity is already exclusionary and is premised in the problematic question of who is to be counted as member of these group (see Beckman, 2014:2).

131. An unbounded franchise would imply that everybody that is enfranchised is at the same time free to enter into the country to exercise his or her suffrage (a policy of open borders).

132. Scherz, 2013:6. See also Cheneval, 2006; Lindahl, 2007.

133. See Song, 2012.

134. Regarding the distinction between the right(s) of man and rights of citizen, see Marx, 1844.

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entitled to it.<sup>135</sup> In a democracy, people must be entitled to take decisions, especially the more important decisions. Firstly, these decisions cannot be imposed externally, and secondly, between the several options available to regulate some aspect of people's lives, the people should be able to choose freely the best according to their own preferences and their own sense of identity.<sup>136</sup> However, such a simple democratic principle becomes considerably more problematic when the decision that must be taken concerns who will be entitled to take part in those decisions, that is, the definition of the rules of membership.<sup>137</sup>

Defenders of self-definition argue that statutes passed by a parliament make membership rules an outcome of a democratic decision that must be respected as such, insofar as some basic deliberative standards have been followed and everybody has been listened. This would hold, for instance, if these decisions are the outcome of procedures that include long and detailed public debate in which the arguments of all sectors of society are considered, and they are carried out by the representatives of the people from diverse political tendencies.<sup>138</sup> These may be, some argue, 'democratic exclusions' or exclusions from the franchise that are democratically justified.<sup>139</sup>

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135. This answer, instead of principles or standards, places an emphasis upon procedures or processes. Here again, there are common presuppositions and ties between a conception of the right to vote as a politically manufactured right, grounded in "determinations of the prevailing political will", a conception of political society based on a common good, and democracy as a process of self-government (Michelman, 1989:445-6).

136. See Altman, 2005:264.

137. For a discussion of this problem in the case of CD, see below *Chapter 7*, Section I.

138. See Altman, 2005:267-9.

139. See Beckman, 2009:4. The belief that there is no democratic principle that orders the inclusion or the exclusion of anybody is compatible both with the *minimalist* claim according to which democratic procedures are the only important factor in determining self-definition to be democratic (Schumpeter, 1976:243-5) and with the strong *republican* idea that "the establishment and endurance of a constitutional right is strictly a matter of resolution on the part of the people politically engaged; the right has no grounding beyond actual human determination and therefore can exert no claims against the political resolutions that alone give it existence" (Michelman, 1989:446).

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When it is observed that this merely procedural solution is compatible with a regime of apartheid, such as that which affected South Africa for many years, the problem that underlies self-definition becomes apparent. Even when the decisions are taken by majority-rule and with respect for other democratic procedures, the exclusion of part of the population from the franchise scarcely allows such a regime to be called democratic. Dahl rightly points out that under such a conception, “democracy is conceptually, morally, and empirically indistinguishable from autocracy”.<sup>140</sup> This is not, to be sure, a quantitative question. The problem exists in a different form when those excluded from the franchise constitute the majority or a minority of the population, as was seen in the segregation policies affecting the US. In this case, self-definition is in addition a paradigmatic case of the tyranny of the majority. This strong intuition about the arbitrariness of assessing inclusion just in terms of democratic procedures highlights the importance of the problem of the ‘legitimacy of the people’ as a distinct and separate problem from the ‘legitimacy of the government’;<sup>141</sup> while both are problems of democratic legitimacy, the latter concerns the circumstances of the decision-making process, whilst the former is related to the subject that makes such decisions.

Democratic self-definition faces, therefore, a problem of circularity when it is the case that the community decides on its own membership: “The people cannot decide until someone decides who are the people”,<sup>142</sup> because the “criteria or bounds of the citizen body [...] is a matter that is logically prior to the operation of the majority principle, and cannot be solved by it”.<sup>143</sup> The decision concerning the boundaries of the franchise is always conditioned by its own basis, and unless this basis – the current members of the franchise – is presupposed to be democratically

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140. Dahl, 1989:121. See also Scherz, 2013:2.

141. See, generally, Näsström, 2007.

142. Jennings, cited in Scherz, 2013:1.

143. Whelan, 1983:16.

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legitimated,<sup>144</sup> there is an infinite regress. The question of the boundaries seems to refuse democratic theorization in terms of procedures of decision-making.<sup>145</sup>

The answers to the question of the boundaries offered by universalism and proceduralism have been demonstrated to be inadequate. This does not mean that any principled or procedural solution, or a compromise between them, will necessarily fail to give rational grounds for the boundaries of democratic citizenship. The problems of closure and arbitrariness highlight the difficulties that such an enterprise must overcome to be successful.

## **2 The principle of ‘all those subjected to the law’**

In the literature, a general idea that has become prominent for determining inclusion within the franchise is the ‘all affected’ principle. According to this principle, all the people affected by a decision in a relevant manner should have a right to be involved in the process of decision-making.<sup>146</sup> Its prestige resides in the supposition that it is a principle that answers the question of the boundaries democratically.<sup>147</sup> It does so by stipulating a ground for inclusion that, firstly, avoids the arbitrariness of a definition that does the legitimacy to decide on the franchise as a granted power of the institutions of the state, therefore avoiding a conception of democracy as a form of decision-making but by adopting democracy as a normative ideal. Secondly, it is very attractive in the sense that apparently closes the circle of electors, thus avoiding the democratic problems of universalism, according to which everyone has the right to be included.<sup>148</sup>

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144. See e.g. Rawls, 1996:12. cf Cheneval, 2006; Näsström, 2007:628-9.

145. See e.g. López-Guerra, 2014b.

146. See Dahl, 1989:119-31. Detailed treatment and literature review in Beckman, 2009. See also Goodin, 2007.

147. See Arrhenious, 2005:5.

148. See Arrhenious, 2005:8.

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The principle of ‘all affected’ presents a strong relation with normative conception of democracy sketched in *Section I*, which in turn is based in the general idea that legitimate law only can be produced by a process in which all those whose interests are at stake are granted equal chances to influence the decisions. If linked to the idea that the right to vote is a fundamental mechanism of participation offered in *Section II*, this principle could be regarded as the adequate distributive principle of the franchise.

The problems afflicting the ‘all affected’ principle, however, are important. Firstly, it is a proposal that would lead to a constantly fluctuating franchise, because those affected by one decision would not necessarily be affected by another. Each decision would demand a different composition of the franchise, presenting a problem of indeterminacy that resonates in the functionality of democracy. However, the problems do not stop there. Secondly, those affected by a decision are affected in differing proportions or degree, and therefore to be responsive to this principle some people affected greatly should be entitled to greater participation in those decisions. This is problematic since it is impossible or very difficult to assess degrees of affectedness. It is also problematic in that this would prove incompatible with our current arrangements based on an *equal* distribution of rights of participation. Thirdly, to determine who is going to be affected by a decision, it is necessary to know the outcome of the decision in which people are entitled to participate, something which cannot, of course, be determined in advance. There is, therefore, a problem of circularity in the ‘all affected’ principle.<sup>149</sup> Some have tried to avoid this circularity, reframing the terms of the principle as ‘all those potentially affected’.<sup>150</sup> However, that necessarily leads to the inclusion of the whole of humanity as members of the franchise (eventually including future generations).<sup>151</sup>

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149. See Whelan, 1983:17. See also Cheneval, 2006:163; Miller, 2009:214-8.

150. See, generally, Goodin, 2007.

151. See e.g. the proposals of Beckman, 2009: Ch. 7.

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If a framework comprising an existing nation-state with a territorial jurisdiction is assumed, the problem of universality can be avoided by readapting the ‘all affected’ principle to the more modest principle of inclusion of all those ‘subjected to the law’ of the nation-state in question.<sup>152</sup> This principle calls for the inclusion within the franchise of all of those permanent residents of the state, independently of their national citizenship.<sup>153</sup> This limited version of the principle does not necessarily constitute a criterion for the constitution of the people as a collective agent, and it does not provide an exhaustive standard to distribute all entitlement to participate, but it can be adequate to “determine a right to participation in deliberation, decision-making or compensation for negative effects” in the context of the national jurisdictions.<sup>154</sup>

The assumption of this principle is critical for a polity that is meant to be composed of equal members, because it assigns equal influence in the political space to each of them. Distribution of electoral power is, therefore, based on *political equality*, which renders all opinions and interests held by individuals of equal value and therefore deserving of the same influence in the process of decision-making.<sup>155</sup> It is also central in a society which recognises that equality corresponds to the plurality of conceptions of life, that in turn are related to both the pursuit of individual interests, but also to an idea of the common interest through a practice of public participation; that plurality must be translated into free and equal participation and influence. Finally, the idea of ‘all subjected to the law’ is central to the aspiration, based upon the recognition of our equality and plurality, that we can be self-governed.

The principle according to which all those subjected to the law of the territorial state must be granted a right to participation in the process of decision-making is, however,

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152. See Näsström, 2011:117.

153. See Dahl, 1989:93-5, 119-31. In similar terms and with same consequences, Miller (2009) defends a principle that includes all those coerced by the government (219-25).

154. Scherz, 2013:6.

155. See Sadurski, 2008.

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prone to the criticism that regards the admission of such a normative principle as the normalization of the boundaries of the nation-state as the terrain of exclusion, marginalization and exploitation.<sup>156</sup> If a given state must grant unconditional democratic citizenship to all its residents, this will create important incentives to adopt a policy of closed borders, increasing the incidence of illegal immigration and the consequent social and legal fragility of those without papers. Even if this is the case, the dilemma between full democratic citizenship and closed borders falls outside of the scope of this work, whose working hypothesis is the determination of the franchise of the nation-state. This in turn permits to focus on the complexity of the cases and reasons of exclusion within the territorial jurisdiction.

### **3 A constitutional conception of universal suffrage**

The normative principle of ‘all subject to the law’ can be linked to the legal principle of universal suffrage that has been upheld by the courts of the judicial trend as a basic constitutional principle in a democracy. However, *prima facie*, the concept of universal suffrage contains an ambiguity because there is no country that allows all its inhabitants to vote, therefore, it is never strictly universal.<sup>157</sup> If universal suffrage is not universal in a strict sense, what is the nature of its universality?

A democracy that embraces the principle of universal suffrage must be an *inclusive* democracy.<sup>158</sup> This implies that the right to vote is granted in principle to all subjects

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156. Näsström, 2007:625-6. cf Song, 2012.

157. Most of the literature, however, tends to indicate that voting is as widespread as it can be and therefore it is not wrong to say that most of the countries of the world provide universal suffrage. See Beckman, 2008:29-32. The answer, from an empirical point of view, would depend on the formulation of democratic inclusion as either: minimalist (which only requires competitive elections), conventionalist (which requires the participation of everybody usually not excluded) and maximalist (taking into account the number of residents of the country without distinction and then considering those excluded as a democratic deficit). See Beckman, 2008:34-40.

158. Against the idea of an *exclusive democracy* in which the inclusion of new subjects in the category of those entitled to vote must be justified by arguments about the contribution that those new voters could imply for democracy. From this perspective, the inclusion of the poor,

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and the exclusion of a subject or group of subjects from the circle of the vote-holders must be duly justified. On this model, the principle of universal suffrage is not a description of the electoral universe but a rule of the burden of proof required to decide which subjects can vote.<sup>159</sup> Here, the exclusion of certain groups of voters, for example children, can perfectly compatible with the principle of universal suffrage, provided that such exclusion is properly justified.<sup>160</sup> Such notion was clearly uphold by the ECtHR in *Hirst*: “In the twenty-first century, the presumption in a democratic State must be in favour of inclusion [...]. Universal suffrage has become the basic principle” [59]. It was also uphold by the national courts of the judicial trend.<sup>161</sup>

This is the idea presented and developed by Beckman in *The Frontiers of Democracy*. He argues that the delimitation of the political community, which provides the prima facie scope of the universal suffrage, must be given by the ‘all subjected’ principle. Then, the exceptions to the enfranchisement of permanent residents members must be justified in terms of equality and not discrimination: “anyone affected by a government should be recognised as a member of the democratic community” (universe of analysis); “vote is democratic to the extent that it embraces as many members of the community as possible” (burden of proof); and “restrictions should be evaluated in terms of their reasonableness” (standard of proof).<sup>162</sup> The only limit of the justificatory reasoning is that it cannot seek to replace the general rule that in principle ‘all subjected to the law’ should be able to vote with, for instance, a rule of meritocracy (competence or responsibility), in which by principle only some are

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ethnic minorities and women, historically, can be seen as the fruit of a desire for social legitimacy and political and social stability. For example, an important part of political science literature on that topic evaluates the inclusion of children in terms of their impact on overall political participation. If the inclusion of children can provide an input of legitimation based on higher voter turnout, their inclusion is justified. If, however, it is found to decrease participation, children should not be included (see Wagner *et al*, 2012:372-83; Wang, 2012: Ch. 1. cf López-Guerra, 2010:123-4).

159. See Hamilton, 2012:1478-84.

160. See Beckman, 2009:5.

161. See *August* [17]; *Sauvé* [33]; *Roach* [83].

162. Beckman, 2009:61.



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allowed to vote.<sup>163</sup> Beckman, finally, recognizes that there are two understandings of what can count as an acceptable reason for a restriction to universal suffrage. He contrasts conceptions that need to justify exclusion on democratic principles and conceptions that justify exclusion in terms of democracy's competing principles, arguing that this later approach is preferable; in fact his own work shows how he can found exemption to the universal suffrage on a plurality of arguments, keeping in mind that they are not arbitrary.<sup>164</sup>

The problem with such a conception was already observed in relation to the judgments of the judicial trend.<sup>165</sup> It demand only the absence of arbitrariness and redirect the democratic problem of exclusion from democracy to the discrete spaces in which exclusions occur and are consolidated; spaces in which democratic principles lose their specific force. On the one hand, this develops multiple categories of exclusion, which can be based on multiple, different and flexible reasons, impacting in that people are divested of their democratic citizenship. Additionally, it weakens and fragments their effectiveness of their democratic claims for inclusion. On the other hand, it considers the suffrage not as a fundamental right but as a right that is essentially revocable if a non-arbitrary reason can be offered and balanced against the value of voting. In these terms, it implicitly authorizes the institutional manufacture and reproduction of social and political inequality.

A more attractively democratic conception of the principle of universal suffrage, which takes into consideration the importance of considering the right to vote as a fundamental right in a democracy, must start from the opposite approach. A stronger democratic conception of the principle of universal suffrage must consider that any exception to the 'all subjected principle' is illegitimate unless is compatible with, or the implementation of, democratic principles and reasons. This approach has the

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163. See e.g. Olsson, 2008:58.

164. See Beckman, 2009:54. See also López-Guerra, 2014a: Ch. 1.

165. See above *Chapter 2*, Section II.2.

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advantage of presenting a stronger support *against* the proliferation of exceptions to universal suffrage, setting the threshold for exclusion in categorical democratic terms.

This idea, despite of its appearance of radicalism, can give coverage to most of the current rules that govern the franchise in the majority of modern democracies. It allows to regulate membership on the basis of the principle of universal suffrage and articulating two principles of exclusion that secure the demands, first, of closure of the franchise, necessary for democracy work as a decision-making procedure and, second, the guarantee of equal participation of its members.

The first aspect, the need for *democratic closure*, has been traditionally expressed by the exclusion of the foreigner from democratic participation. In this regard, the *national citizenship*<sup>166</sup> principle allows the exclusion from the franchise of those who are citizens from a foreign country whilst, at the same time, according to the principle of universal suffrage, it demands the enfranchisement of all national citizens. This exclusion rests on the argued necessity of external boundaries in order for the political community to engage in democratic practice.<sup>167</sup> Citizenship is the instrument of this closure in order to distribute rights and privileges. Despite the function that national citizenship can claim to perform, as a presumption of ties, relations and interests that are required for a meaningful participation in common affairs, the arbitrary nature of nationality based in *ius soli* and *ius sanguini* requirements has led to several criticisms of national citizenship as the decisive element of the franchise.<sup>168</sup> This debate has grown fundamentally due to the increment of immigration and the

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166. *National citizenship* “is the legal recognition, both domestic and international, that a person is a member [...] of a state” (Shklar, 1991:4).

167. The national closure of the franchise assumes the distinction between internal and external boundaries. Internal boundaries, currently affecting children, people with mental disabilities and offenders can be differentiated thus from the external exclusion of the foreign.

168. See e.g. Arrhenious, 2005:5.

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consequential asymmetry between those who are simply residents in a country and those who are considered full members of the community.<sup>169</sup>

The constitution of a franchise based on permanent residence, as application and concretion of the principle of all those subjected to the law, overcomes to some extent the arbitrary aspects of the demands for a closure of the franchise.<sup>170</sup> It does so, however, reaffirming the idea of a democratic exclusion and eventually a democratic right to the exclusion of those who are not subject of the law.<sup>171</sup> Additionally, considering that political participation is not restricted to the exercise of voting, a broader idea of participation in deliberative democracy necessarily renders the boundaries of participation more fluid, allowing the inclusion within the public sphere of the political claims of those that are not formally included and have no right to participate.<sup>172</sup> Distributing the right to vote based on permanent residence recognizes the possibility of exercising a right to formal political participation for those residents who, as human beings, are in the position of engaging in political communication.

There is, however, a second democratic demand that may justify exclusion of the franchise from those subjected to the law. According to this second aspect, the internal boundaries of the franchise (as opposed to the external boundaries of the political community) compatible with the principle of universal suffrage can only be

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169. The debate has been extended to the related problems of the justification of open or closed national borders, the right to immigrate/emigrate and the status of immigrants, asylum seekers, refugees and those without papers. Additionally, recent economic and demographic changes have put into question the traditional association between democracy and the nation-state as its natural domain. These changes call for new interpretations of democratic principles and institutions, through new forms of accommodation of sovereignty and human rights claims. See e.g. Benhabib, 2005.

170. Owen (2013), for example, postulates that a solution can be articulated in terms of conferring a right to naturalization under reasonable basis. See e.g. in the context of UK voting requirements, Lardy, 1997. For a critical comparison between non-citizens and offenders as excluded from the franchise, see Plaxton & Lardy, 2010:109-113.

171. See Beckman, 2014.

172. For the distinction between the decision-making and the deliberative demos, see Cheneval, 2006.

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based on efforts to guarantee the democratic participation of the members of the political community. These efforts are currently expressed in the rules for the exclusion of the children and some mentally disabled people from the franchise. Democracy, as a practice of collective agency “can only include agents, since others are simply incapable of participation”.<sup>173</sup> These *capacity* rules allow the exclusion of those who are not capable of participating in democratic terms in the political process, but at the same time require the enfranchisement of all those who are capable of it. This idea, that affects children and people with mental disabilities, is developed in greater detail in the following chapter.<sup>174</sup>

Summing up, according to the modern practice in western democracies, universal suffrage means the universal franchise of capable citizens (or residents). For those capable citizens (or residents) the right to vote constitutes a fundamental right, which cannot be taken away based on considerations other than citizenship (or residence) and capacity.

## **IV FRAMING THE PROBLEM OF DISENFRANCHISEMENT**

### **1 The democratic problem of disenfranchisement**

Even though at first appearance it may sound exaggerated, to consider that “the right to vote is a vehicle for social, economic and political change, as it provides all the members of the community with roughly equal opportunity to affect the future direction of society”,<sup>175</sup> can correlate with a normative theory of democracy. Elections have a fundamental value in the process of building democratic legitimacy, because they constitute one of the limited moments in which democratic inputs are introduced into the decision-making process. According to this understanding of

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173. See Saunders, 2011:287.

174. See below *Chapter 4*.

175. Beckman, 2009:1.

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elections and the right to vote, democracy is not conceived only as a form of decision-making, which has been defended for its epistemological advantages in adopting better collective decisions, but is instead a form of government vested by normative principles that aim at both individual and collective self-government.<sup>176</sup> The right to vote plays a fundamental role in making that those that are subjects to the law can also be able to understand themselves as joint-authors of the law. Concerning this aspect is that universal suffrage assumes a critical function.

In this context, offenders, especially when serving prison sentences, are obviously subjected to the law; they also are arguably “more clearly affected by the legal system than anyone else”.<sup>177</sup> From this fact it follows that the offenders are natural candidates to have the right to vote under the principle of ‘all affected by the law’.<sup>178</sup> Even when accepting this principle in general terms, some authors have argued that imprisonment constitutes a clear case of somebody being removed from society and therefore not being affected or being affected to a lesser extent by the laws that regulate the life of law-abiding citizens.<sup>179</sup> This is clearly mistaken. First, because prisoners are still affected by most of the laws even when in prison. Second, because the idea of being subjected to the law must be interpreted in jurisdictional and not in causal terms.<sup>180</sup> That is why is not wrong to assume, at least provisionally, that to exclude offenders from the franchise violates the principle of ‘all subjected to the law’,<sup>181</sup> and therefore the principle of universal suffrage. This violation can be referred as ‘the democratic problem of CD’, what in turn lead to a strong presumption against CD.<sup>182</sup>

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176. See e.g. Sadurski, 2008: Ch. 1.

177. Beckman, 2009:123.

178. See Beckman, 2009:123.

179. See e.g. Clegg, 2002:162. See also Sigler, 2013.

180. See Beckman, 2009:124-5.

181. See Hill and Koch, 2011:219.

182. See Duff, 2005a:215.

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The Canadian Supreme Court in *Sauvé* has formulated the democratic problem of CD in very precise terms:

“Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government’s power flows” [32].

And the necessary conclusion of the view is that

“A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy” [34].

It can be observed that the Court vest its claim that democracy is more than mere form of decision-making with theoretical assumptions similar to those offered along this chapter. The right to vote is seen as a channel of democratic legitimacy, the legitimacy of the government powers is seen as resting in input arising from the citizenry and the restriction of the right to vote generate a problem for democratic legitimacy.<sup>183</sup> This is so because democracy as a form of self-government demands a certain coherent treatment of people in every aspect of their personalities.<sup>184</sup> As a result of their exclusion from the franchise, offenders are regarded as autonomous persons in the private sphere, according to which they can be held legally accountable, but they are not considered autonomous in the public sphere.<sup>185</sup> This

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183. See e.g. Joint Committee, 2013:38.

184. cf Cholbi, 2002:561.

185. This “is incoherent, if not perverse”, as is observed by Hill & Koch (2011), who observe the same problem using a contractarian language: “One a person’s power to consent [...] is extinguished it no longer make sense to insist that s/he is still under obligation to submit to the rule of the state. This is precisely what prisoners are expected to do, however, ant to a degree not required of those in liberty” (221).

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provokes a serious democratic problem. Those affected by CD are not in the position of understanding their duty to follow the law as a result of a process of production of democratic legitimacy, and therefore of self-government, but their reasons are reduced to threat of punishment. They are reduced to mere subjects of domination.

As Frank Michelman have suggested, “[i]nsofar as engagement in political self-government is deemed constitutive of personal freedom, a given person is political disfranchisement is *prima facie* highly suspect, demanding justification”.<sup>186</sup> That justification must be “robust and principled”.<sup>187</sup> The following two chapters are devoted to the reconstruction of the main arguments that have been offered to justify CD in terms compatible with democracy. *Chapter 4* investigates the argument of the lack of political capacity, while *Chapter 5* the idea of CD as a democratic form of punishment.

Before the analysis of those principled justifications, the remaining of the chapter briefly reviews some policy arguments offered to exclude from the franchise those offenders that are serving prison sentences.<sup>188</sup>

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186. Michelman, 1989:457.

187. Joint Committee, 2013:38.

188. Also limiting its scope to prisoners but arguing from different premises, Peter Ramsay argues that CD is the natural consequence of a conception of democracy committed to the idea of self-government. Those offenders who are currently serving their sentences in prison are paradigmatically deprived of civil liberties, and therefore, according to Ramsay, enfranchising them would subvert the democratic idea of a self-governing community composed of subjects who are considered equally free. CD is, thus, the logical consequence of imprisonment because prisoners are deprived of the possibility of the political freedom necessary for being a meaningful part of the democratic community. Otherwise, he sustains, the right to vote is depoliticised and civil liberties are not regarded ‘essential’ for democracy. A defence of CD is, in his terms, a defence of a particular conception of democracy as the self-government of free and equal citizens. See Ramsay, 2013a; Ramsay, 2013b; Ramsay, 2013d). On the democratic foundation of his account, see Ramsay, 2013c. This argument is extraordinarily interesting but for reasons of space and structure it was not possible to address it in this dissertation.

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## 2 Excluding pragmatic arguments against voting from prison

In a very recent book, López-Guerra presented a fundamental idea for understanding the restrictions that can affect the right to vote. He argues that the right to vote includes two dimensions that must be distinguished for an adequate assessment of such restrictions: first, the right to enfranchisement and, second, the right to have the opportunity to vote. Restrictions to the first dimension are or must be strictly reasons of principle. The people excluded from the franchise do not deserve to be entitled to vote. In contrast, restrictions to the second dimension are pragmatic and related to the consequences of developing mechanisms for people in special circumstances to be able to exercise the right to vote.<sup>189</sup> In the case of prisoners, concretely, these pragmatic arguments are connected with the problems surrounding a *vote from prison* and not necessarily with a problem of *prisoners voting*.<sup>190</sup>

### 2.1 ‘Their choices have put them in that position’

To start with, it has been suggested that the state should not develop a special mechanism which would enable prisoners to vote from prison, since these prisoners, through their own actions, have placed themselves in a position in which they are impeded to exercise the right to vote.<sup>191</sup> The position of the prisoners might be such, under this hypothesis, that even if in principle they are entitled to cast the ballot, they are in fact impeded from doing so.<sup>192</sup> According to this argument, they are in a position similar to that of somebody who freely chooses to climb a mountain the day of the election, rather than that of somebody who must be hospitalised due to a

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189. See López-Guerra, 2014a:118-124.

190. These two categories of limitation usually overlap in practice, especially in those countries that have developed alternative voting devices for people with special needs, such as postal voting, and only apply CD to those offenders currently in prison. In these cases, the distinction has more analytical value than actual practical implications.

191. See *August* [8, 13].

192. This is, therefore, a different argument from the argument of punishment that implies arguments of principle to justify disenfranchisement.



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serious disease and who, lacking any special mechanism, would be impeded from voting.<sup>193</sup> This involves a highly contentious assumption: prisoners have voluntarily chosen to be in prison and, therefore, do not deserve the benefit of special mechanisms for voting.

This argument was put forward by the South African Government in both *August* and *NICRO*, arguing that “the categories of persons for whom special arrangements should be made had to be limited” [*NICRO*, 41] and that law-abiding citizens must have priority over offenders for the provision of facilities to register and vote. The Court produced a clear and strong response that questioned both of the aforementioned assumptions. In *August*, the Court sustained that “when people are imprisoned, they are forced to leave their homes and to reside in prison. They have no choice” [27]. A few years later, *NICRO*, the Court added: “Prisoners are prevented from voting by the provisions of the Electoral Act and by the action that the state has taken against them” [53]. Other categories of persons could encounter difficulties in exercising their right to vote (“citizens abroad, pilots, long-distance truck drivers”), but prisoners are in a position in which they do not face any “difficulty”; rather, they suffer from the “impossibility” of enjoying their rights [*August*, 30]. The Court in *Chan Kin Sum* was even clearer: “he is prevented by the authorities, against his wishes, from physically attending a polling station to vote” [179].

This argument also depends on the question of why the vote is not facilitated for everybody, even those who consciously decide to climb a mountain on election day. Reasons to deny access to the vote to people that have voluntarily put themselves in that situation might be of two types. The first kind of reason is related to considering elections as a sacred civic ceremony. This vision is likely to embrace ideas of voting as a civic duty that requires some degree of seriousness. According to this view, there are important symbolic motives for avoiding the proliferation of alternative

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193. See López-Guerra, 2014a:126.

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mechanisms of voting. This view does not offer powerful reasons to exclude prisoners: first, it constitutes a reason for the elimination of alternative mechanisms of voting in all cases, not simply that of prisoners; second, it only points towards a preference for the installation of a ballot box in the prison over systems of, for instance, postal-voting. Another kind of reason for excluding every kind of absent elector consists in that creating a mechanism for them to vote can prove both costly and difficult.

## **2.2 ‘It is costly and involves logistical complications’**

In *August*, the Court considered the argument of the cost of enfranchising prisoners. The Court rejected the argument of the “insurmountable logistical, financial and administrative complications” of prisoners’ voting [8]. There are two interconnected aspect of this argument: economic and logistic. Creating a mechanism for voting from prison implies an economic cost that must be assumed by the government and which poses the question of why the community must assume this additional cost. However, this argument lacks power if it is assumed that the right to vote is a fundamental right and prisoners are, in principle, entitled to it. The argument is self-defeating: “a government could always save money by not holding elections”.<sup>194</sup> Beneath the surface of this argument, especially when it is claimed that other categories of persons who could experience difficulties in exercising their right to vote must be prioritized when assigning scarce resources, lies the unacceptable notion that prisoners are unworthy citizens, who the electoral costs policy views as being of bottom priority.

However, this issue cannot be reduced merely to an economic perspective. Allowing imprisoned offenders to vote would bring about a series of inconvenient *logistical*

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<sup>194</sup> Plaxton & Lardy, 2010:132.

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problems.<sup>195</sup> First, a decision is required concerning whether to allow them to vote by post or proxy, or to locate a ballot box inside the prison. Second, it would be necessary to extend the system of registration, when necessary, to make it available for prisoners.<sup>196</sup> Third, it would be necessary to decide where they are going to vote. Finally, aspects of security of the prison must be considered. The complexity involved in a programme to answer adequately these questions could threaten electoral integrity.

All of these concerns are easily answered once – as a question of principle – the vote is granted to prisoners. These are not strong reasons in themselves to deny prisoners the right to vote and prison voting is implemented without incident in numerous jurisdictions. First, both the installation of a ballot box inside the prison and voting by post or proxy are used in those countries which allow prisoners to vote with no cost for electoral integrity.<sup>197</sup> Whilst voting inside the prison “increases the likelihood of elector participation and enables prisoners to feel more a part of the electoral process”,<sup>198</sup> voting by post or proxy allows more flexibility in the decision about where the prisoners’ votes are to be counted. Second, systems of registration, when necessary, would be simpler in the context of the prison.<sup>199</sup> Third, both the prison locality and a pre-imprisonment residence have been used as residences to inscribe prisoners.<sup>200</sup> In South Africa, for example, prisoners vote in the constituency in which the prison is located, while in Canada and Ireland prisoners vote in an ‘elsewhere’ residence (previous residence, family residence, place of one’s arrest, last court of sentencing’s constituency).<sup>201</sup> Finally, with regards the security of the prison, a survey asked prison authorities in countries with prison voting about threats of

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195. See the government submission in *August* [13]. See also Clegg, 2002:172; Brenner & Caste, 2003:140.

196. See Lardy, 2002:532.

197. See *August* [28]. See also Parkes, 2003:107; Easton, 2006:449; Ispahani, 2009:51.

198. Fitzgerald & Zdenkowsky, cited in Parkes, 2003:107.

199. See Ispahani, 2009:52.

200. See Parkes, 2003:102-7. See also Ispahani, 2009:51.

201. See Parkes, 2003:103.

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security in the context of elections. They answer was that they “had ever experienced a single instance in which prison discipline was disrupted by the electoral process”.<sup>202</sup> In sum, prison voting is “relatively cheap and easy to administer”.<sup>203</sup>

### **2.3 *‘It subjects the local community to an unfair influence’***

Regarding the constituency in which prisoners are to vote, critics have argued that the impact of prisoners voting is unfair for the local community in which the prison is located because, given certain circumstances, prisoners could define the election. This problem becomes more complex when a big prison is located in a low-populated area. In those cases, it is more plausible that the prisoners’ vote could effectively determine the electoral result. The alternative is the enfranchisement in an ‘elsewhere’ residence. However, to enfranchise prisoners in a constituency in which they do not currently live, even if it can be demonstrated that they have lived there in the past, would not be fair towards that locality because this would include non-resident voters.

This argument, it must be assumed, applies only to local elections but not to national elections.<sup>204</sup> It cannot therefore be taken as a general argument against prisoners voting.<sup>205</sup> However, even in the case of local elections this is not an inescapable problem. First, the problem of prisoners voting must be clearly discerned from the problem of voting from prison. Once the enfranchisement of prisoners is assumed to be legitimate, the argument of the unfair influence tends to be banished. A similar problem has occurred in the US, where local communities have opposed the participation of soldiers in the constituencies in which their military base was located.

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202. Ispahani, 2009:51.

203. Ispahani, 2009:51. See, about the diagnosis of the material conditions to implement voting from prison, Electoral Commission, 2013; UK Government, 2013.

204. See e.g. *August* [29]. The Court in this case also mentioned that the influence in majoritarian and proportional electoral systems would be notoriously different.

205. See Brettschneider, 2007a:107.

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The US Supreme Court considered the disenfranchisement of military forces to be against the constitution.<sup>206</sup> The way to equilibrate the interests of the local community with the interests of these groups of unusual residents must assume other forms than CD. Second, there are other alternatives available to circumvent the problem, especially when a prison population can decide a local election. Prisoners can be enfranchised in the constituencies in which they resided previously or, if their previous residence is not known, in the constituency in which they were born.<sup>207</sup> However, when employing these alternatives, it may prove important to determine whether short-time prisoners and long-time prisoners could have different interests at the time of being enfranchised. Whereas short-term prisoners could be interested in maintaining their home districts, especially if they have family residing there, long-term prisoners are likely to be interested in participating in the elections of the constituency in which the prison is located because these may impact upon their lives in longer term.<sup>208</sup>

#### **2.4 Public authority and electoral influence**

It must be acknowledged that if the voters become the object of coercion, there could well be, in principle, good reasons to restrict voting from prison. This may demand a preventive measure: to respect democracy as the self-government of citizens, prisoners must be disenfranchised with the purpose of avoiding the government's utilization of its influence over the prisoners in the elections. This affirmation leads to the question of how the "integrity and effectiveness of an electoral procedure" may be "undermined by allowing citizens in the wholly dependent condition of prisoners to vote".<sup>209</sup>

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206. See Michelman, 1989:469-472, especially commenting *Carrington v Rash* (1965).

207. See Easton, 2009:231.

208. See Parkes, 2003:103-4.

209. Ramsay, 2013b:430.

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The relation of dependence between authority and prisoners has been thoughtfully analysed by Beckman. He explains this relation as a conflict between, on the one hand, the positive democratic value of the inclusion of prisoners and, on the other hand, the need to guarantee the value of political equality that would be undermined in those cases in which “public authorities coerce or induce prisoners to vote in specific ways”.<sup>210</sup> Under certain conditions, CD could effectively help to guarantee political equality and electoral integrity but at the cost of limiting the inclusion of prisoners within the franchise.

Beckman’s analysis starts by distinguishing two kinds of abuse involved in electoral coercion by executive authorities. On the one hand, this action attacks the value of political equality by illegally granting more votes to an electoral option. It can affect the integrity of the election and in certain cases even its final result. However, that is not the only problem with such an action. In a scenario in which prisoners are allowed to vote, coercion also attacks the autonomy of the prisoners by forcing them to vote for reasons that they cannot form themselves in a critical exercise. They are not voting in the relevant sense of freely and equally expressing their political views but only physically casting ballots according to someone else’s preferences. This position might be similar to that in which children are under the parental control.<sup>211</sup> Disenfranchising prisoners makes the abuse of authority against electoral integrity impossible, but only at the cost of committing the second abuse of authority against the prisoner’s political autonomy. A questionable conception of the principle of political equality is protected at the expense of the prisoners’ political freedom of autonomy. However, if it is acknowledged that it is not the prisoners’ right to vote that causes the problem but the fraudulent conduct of the authorities, the solution must involve acting against the fraud rather than against the victims of the fraud.<sup>212</sup>

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210. Beckman, 2009:129.

211. See below *Chapter 4*, Section III.

212. See Beckman, 2009:129.

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An understandable objection to this conclusion rightly highlights that “with the exception of some developed countries, the condition in many prisons around the world are such that the risk of coerced voting is very high”.<sup>213</sup> This would depend on the particular conditions of the prison system and should be decided on a case-by-case basis. In some cases, the electoral fraud may be committed directly by the prison authorities under the control of the government, in other cases a lack of control over conditions inside the prison may allow criminal organizations operating inside the prison to sell prisoners’ votes to the highest bidder. A realistic view of such cases cannot trust that prison conditions would be improved by governments whose sole intention was allowing prisoners’ voting. There is a case for CD in those contexts in which prison conditions are unlikely to change, which holds until such time as they change. López-Guerra, who sustains this view, emphasises that this is not a justification for excluding prisoners from the franchise but simply a justification for not adopting a device to allow voting from prison. The first, he maintains, sends the message that prisoners deserve political exclusion, whereas the second “is an indicator of unacceptable life conditions [...which] does not speak negatively of inmates, but of the society where they live”.<sup>214</sup>

This objection must be considered carefully. To start with, it must be emphasised that it is far from constituting a general objection to prisoners voting; rather, it applies as an objection under certain circumstances. It is also very important to distinguish carefully, (1) those countries in which electoral coercion or electoral fraud are widespread from (2) those countries in which this situation affects only certain groups, such as prisoners. In the first case, arguments based on equality and electoral integrity are redundant because to exclude prisoners in those countries does not help to guarantee electoral integrity whatsoever. In the second case, however, the prospects for prisoners voting are not as dismal as López-Guerra claims. The case in which problems of coercion affect the prison system but not the electoral system as a

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213. López-Guerra, 2014a:128.

214. López-Guerra, 2014a:129.

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whole does indeed present a challenge for the electoral inclusion of prisoners, but not an insurmountable one. The protection of autonomous suffrage can overcome the problems of coercion by means of an adequate institutional design that does not necessarily compromise on complete prison reform. Three directions that this design might assume can be suggested. First, the development of stricter security measures is necessary to avoid coercion in the moment of casting the vote,<sup>215</sup> for instance, by the strong institutional warranty of a secret ballot. Second, the electoral act should be administered by an institution totally independent of prison services, and elections within the prison must admit impartial observers. Third, it is highly advisable that the results of the election within the prison not be made available for prisoners or the inmates themselves because this could lead to undesirable retaliations. These plausibly achievable conditions would limit considerably the possibilities of electoral coercion by the prison authorities and the executive branch.

In conclusion, it can be said that the pragmatic arguments for denying the vote to prisoners are not conclusive and, what is more, they imply preconceptions about prisoners as less worthy members of the community.

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215. Easton, 2006:451.



# 4

## THE ARGUMENT OF CIVIC VIRTUE

**T**he legal nature of CD poses a difficult question: some consider it as *regulative* as opposed to *punitive*, while the right answer is probably that “there is an element of punishment, and also an element of electoral law”,<sup>1</sup> thus it should be considered as both punitive and regulative. This chapter engages with the regulative dimension in which those affected by CD are considered as electors or potential electors. The punitive dimension, in which those disenfranchised are considered as offenders, forms the subject of the next chapter.<sup>2</sup>

For those who support a regulative CD, its role is negatively to determine the scope of the franchise. One of the recurrent arguments supporting CD is based on the idea that offenders might vote *disruptively*, with the purpose of undermining the core values and institutions of liberal democracy. But it is considerably problematic for a democratic government to exclude some citizens from the franchise based on an assumption about how they are going to vote because democratic legitimacy depends at least partially on the people’s freedom to decide. However, it might be permissible to exclude certain individuals from the franchise for reasons grounded in their

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1. *R v Secretary of State for Home Department, Ex parte Pearson and Martinez, Hirst v Attorney General* (2001) [40].  
2. See below *Chapter 5*.

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political capacity if their exclusion regards their inputs in the political process rather than outputs. In that case, it would adhere to a reasoning supported by an institutional practice that allows the electoral exclusion of children and people with mental disabilities.<sup>3</sup> Tracking the similarities with the exclusion of children can sustain a line of argument usually implied in the discourses supporting CD. Structuring this argument in a rational discourse compatible with democratic principles requires the elaboration of a concept of political capacity sufficiently thin to avoid the suspicion of an ‘abuse of the franchise’ but thick enough to include elements linked to the ‘character’ of offenders.

The argument is developed as follows. *Section I* analyses the classical argument of disruptive voting. *Section II* presents the case for CD based on offenders’ lack of political capacity. A deficit of this capacity would justify CD as it does with the electoral exclusion of children. Political capacity is constructed in terms of including a degree of civic virtue, with the help of Rawls’ concept of ‘sense of justice’. *Section III* subjects this proposal to a critical analysis, by arguing that the exclusion of children is based on different premises, and concluding that the argument faces insoluble democratic problems.

## **I DISRUPTIVE VOTING**

One of the historically most important reasons for the justification of CD argues that there is a right of the community to maintain ‘the purity of the ballot box’.<sup>4</sup> This notion of purity involves the belief that elections and the general democratic process is an extremely important aspect of community life, and therefore must not be contaminated by the lack of responsibility of unworthy or morally unsuitable

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3. The case of people with mental disabilities is not discussed here. See Beckman, 2009: Ch. 6.

4. See *Washington v Alabama* (1884).

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elements of society.<sup>5</sup> The popularity of this argument is based upon the expressive force of the metaphor of the rotten apple in the barrel, which understands offenders as an infectious social disease that must be extirpated before it ruins the democratic process, which ought to be carried out by honest and virtuous citizens.<sup>6</sup> It is important to call this argument to mind mainly because its influence on public opinion has not been diminished, being a central pivot of the political rhetoric of CD. In *Sauvé*, for instance, the government submitted that a prisoner's voting "'demeans' the political system" [29] without explaining in how.

### 1 Three forms of the purity of the ballot box

Expressive metaphorical force, however, is not sufficient to exclude individuals from a right that is considered fundamental. A rational application of this argument should explain the nature of the alleged 'purity of the ballot box' and how it can be affected by the participation of offenders. There are available in the literature at least three different formulations of the argument. All of them are linked to the idea of the moral unfitness or perverse character of offenders.<sup>7</sup> The first formulation considers it as synonymous with the integrity of the election,<sup>8</sup> which is protected by means of preventing the commission of electoral fraud or other kinds of electoral crimes.<sup>9</sup> A second formulation conceives that 'the purity of the ballot box' is affected when offenders can influence directly and improperly the outcome of the election of public authorities such as police chiefs, prosecutors and judges.<sup>10</sup> In its best light, this

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5. See Reiman, 2005:6.

6. See Kleinig & Murtagh, 2005:225-6.

7. See e.g. Note, 1974:587.

8. On the concept of electoral integrity, see e.g. Norris, 2013.

9. See e.g. Manza & Ugger, 2006:13. The ability of CD to prevent the commission of crimes is discussed below *Chapter 5*, Section I.2.

10. Such influence implies the possibility of a conflict of interests for these authorities; between the common interest and the particular interest of those convicted criminals who supported them in the elections, whom in turn these authorities could favour. This argument was used by the US Supreme Court when it upheld CD legislation by arguing for the importance of avoiding the election of district attorneys or judges by convicted Mafiosi. See *Green v Board*

argument could only explain the exclusion of offenders from elections of a reduced number of authorities: namely, those local authorities that have a decisive voice in the criminal and prison policies within a local community.<sup>11</sup> In addition, it is based on the unlikely ideas that offenders can influence the decisions of authorities only by voting for them,<sup>12</sup> and that their vote would not be diluted within the vote of the rest of the population.

In the third and most serious formulation of this argument, ‘the purity of the ballot box’ is associated simply with the way in which offenders might vote. It is an argument that appeals to the impact of offenders voting on the outcomes of the electoral process based on the expression of their political preferences. This version of the argument is commonly known as the ‘disruptive voting’ or the ‘subversive voting’ argument, since it is founded on the fear that “offenders would vote in a way subversive of the interest of an orderly society”.<sup>13</sup> CD thus seeks to avoid disruptive voting, excluding those elements of the electorate that could erode and damage the current institutional configuration of the common good. They are the natural candidates to be excluded because the way in which they are going to vote is presumed to be against the rule of law and democracy,<sup>14</sup> selfish and factional,<sup>15</sup> or with the aim of altering and weakening the content and administration of criminal law.<sup>16</sup> It is also claimed that offenders would be diluting the vote of those law-abiding citizens,<sup>17</sup> cheapening the franchise,<sup>18</sup> and it might even question the moral authority

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*of Elections* (1967) and the Latvian Government intervention in *Hirst* [55]. See also du Fresne & du Fresne, 1969; Note, 1974:584; Ewald, 2004:117-8; Ewald, 2009b:13.

11. See Ewald, 2004:118. See also Brettschneider, 2007a:107.
12. Against this idea, it seems considerably more relevant to protect the public from the conflict of interests that originates in financial participation in electoral campaigns (Demleitner, 2000:773). The appropriate measures to approach a conflict of interests for elected authorities should be transparency of the electoral funding and not CD.
13. Ewald, 2004:111.
14. See Kleinig and Murtagh, 2005:226-7. See also Lardy, 2002:537; Sigler, 2013:7.
15. See Brenner & Caste, 2003:237.
16. See Clegg, 2002:177. See also Note, 1989:1302; Cholbi, 2002:555; Bennett, 2003: par. 25; Brenner & Caste, 2003:236; Parkes, 2003:92-3; Ewald, 2004:114-116; Levine, 2009:215.
17. See US Senator McConnell, cited in Levine, 2009:212.
18. See López-Guerra, 2014a:114.

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of the electoral outcome.<sup>19</sup> The disruptive voting argument does not present solid theoretical foundations but rather it is limited to shaping a democratic aspiration for the sanctity of the electoral process.<sup>20</sup>

## 2 The weakness of disruptive voting

Disruptive voting is based on the premises that offenders seek to implement a particular political agenda and want to use democratic means to weaken the rule of law.<sup>21</sup> Based on those premises, CD would be a measure against the *abuse* of democracy, with the objective of protecting the rule of law in a similar fashion to militant democracy's discourse on limiting political pluralism.<sup>22</sup> The limitation of the access of certain ideologies to democratic representation, the ban of social movements that endorse violent actions or the criminalization of political or racial hate expressions can be understood as just a few examples of how liberal democracies protect themselves from internal enemies.<sup>23</sup>

This argument depends, however, on assumptions that are unlikely to be demonstrated. For example, the feasibility of rational, self-interested and instrumental political behaviour of offender must be demonstrated, and further it must be shown how offenders can pursue an agenda collectively around candidates and parties that are supportive of their interests.<sup>24</sup> The available evidence points strongly in the opposite direction. Prisoners and offenders vote similarly to the rest of the

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19. See Kleinig & Murtagh, 2005:224.

20. See Ewald, 2004:112.

21. See Ewald, 2002:1079-81, 1099-102. See also Manza & Uggen, 2006:12.

22. Militant democracy is "a term coined by Karl Lowenstein in 1937 in a lament on the inability of democracy to contain fascism, refers to a form of constitutional democracy authorized to protect civil and political freedom by preemptively restricting the exercise of such freedoms" (Macklem, 2006:488).

23. See generally Macklem, 2006.

24. See Ewald, 2004:124-6. See also Demleitner, 2000:772; Ewald, 2002:1079, 1099; Bennett, 2003: par. 25-26; Schall, 2006:82; Mauer, 2011:558. The current empirical evidence shows that none of these is the case, see Manza & Ugger, 2006: Ch. 5-8; Behan, 2014: Ch. 4.

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population, and what is more, they “are far more likely to endorse the laws they’ve broken [...] than to join together and lobby for abolition of the criminal code”.<sup>25</sup> Additionally, as with any other elector, they do not vote on a single issue, in this case criminal policies, but by considering a wider range of elements.<sup>26</sup> Even if all these assumptions are met, they are not sufficient to make a case for CD. The observation of Claudio López-Guerra in this regard is compelling: “if certain parties or candidates are so clearly unacceptable, there is a stronger case to prohibit them from appearing on the ballot than to disenfranchise those who would presumably vote for them”.<sup>27</sup>

Beyond this difficulty, there are arguments of principle against disruptive voting. The first is related to the political significance of voting. As Alec Ewald has suggested, given the current political circumstances, in which apathy is the major democratic illness, casting the ballot has a deeply conservative meaning. This is the case because it contributes to renewing the commitment of the individual to the legitimacy of the whole political system. With these ideas in mind, the exercise of the right to vote cannot be disruptive but can only contribute to guaranteeing the legitimacy of the law and therefore it essentially works in the opposite direction to disruption; voting is always building legitimacy.<sup>28</sup>

The second argument is associated with the fact that the vote assumes the form of a subjective right, and therefore it guarantees a space of freedom from the interference of the community. In the USA, the scholarship and the jurisprudence recognizes the prerogative of the electors to select the relevant reasons to vote for the option of their preference, therefore “[p]eople who might vote instrumentally in their own interest

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25. Ewald, 2004:125-6. See also Manza & Uggen, 2006: Ch. 6; Behan, 2014: Ch. 4.

26. See Ewald, 2004:127-8. See also Schall, 2006:82; Levine, 2009:216; Hill & Koch, 2011:218; Behan, 2014: Ch. 4.

27. López-Guerra, 2014a:113. For example, militant democracy’s restrictions to freedom of association of Nazi parties in Germany are differently shaped and have different impact than restrictions to the right to vote. While freedom of association is restricted partially (citizens are able to support other political options), the right to vote is restricted absolutely. This different impact must be considered when the legitimacy of each modality is assessed.

28. See Ewald, 2004:128-31.

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may not be excluded from the franchise for that reason”.<sup>29</sup> More generally, there is a wide agreement about the way in which a potential elector vote cannot determine his participation in the political process.<sup>30</sup>

This prerogative can be reconstructed as a consequence of the legal nature of the right to vote. The participation of individuals in the law-making process is structured in terms of rights of participation. As legal rights, right of participation are spaces of autonomy for the legal person. What characterises the legal code, in Habermas’ words, is “that [they] merely make lawful behaviour a duty, and hence *leave open* the motives for conforming to norms”.<sup>31</sup> The legal person can exercise a legal right instrumentally without facing any demand for explanations regarding intentions or reasons. Legal rights are a space free of communicative obligations, because “[u]nlike morality, law cannot obligate its addressees to use individual rights in ways oriented to reaching understanding, even if political rights call for precisely this kind of public use”.<sup>32</sup> This is not necessarily opposed to the perspective that voting must be oriented by the use of public reason,<sup>33</sup> Habermas suggests that “these entitlements encourage one to make use of them in an other-regarding attitude”<sup>34</sup> but restricts the implementation of that objective in schemes of political incentives compatible with the understanding of individual rights rather than the legally enforced eligibility requirement.<sup>35</sup>

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29. Ewald, 2004:132. See also Cholbi, 2002:556.

30. See *Dunn v Blumstein* (1972). See also Ewald, 2002:1099-102. Also, Itzkowitz & Oldak, 1973:737-8; Note, 1989:1309; Fletcher, 1999:1906; Brenner & Caste, 2003:137-8; Bennett, 2003: par. 28; Parkes, 2003:94-6.

31. Habermas, 1996a:83.

32. Habermas, 1996a:130.

33. Rawls, for example, sees voting as a practice that must be oriented by the use of public reason (1996:215, 219).

34. Habermas, 1996a:130.

35. See also Schafer (1999), whose argument is that even if it is agreed that liberal democratic societies should promote an active and educated citizenry, CD cannot be explained in those terms, and even more, can have counter-productive arguments. See also Brennan, 2011a:5.

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We recognize a *right* to vote as belonging to our fellow citizens because one of the most important premises of democracy is that people disagree about the way in which we should organise society. The Court in *Sauvé*, for instance, affirmed that “[t]he *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good” [15]. Elections are mechanisms designed to contribute to settle such disagreements, and voting is “supposed to be the expression of biases, loyalties, commitments and personal values”.<sup>36</sup> For example, John Rawls sustains that “whereas a citizen may be bound to comply with the policies enacted, other things equal, he is not required to think that these policies are just, and it would be mistaken of him to submit his judgment to the vote”.<sup>37</sup> Nobody should be excluded from the franchise because he holds different opinions, even in the unlikely case of disruptive voting.<sup>38</sup> This reasoning would entitle the government to deny the right to vote to other groups based on the way in which they are going to vote.<sup>39</sup> In the past, when voting was restricted based on property, race, gender and other considerations, this kind of consideration played an important role.<sup>40</sup> Such reasoning depends on a view of politics that does not recognise that there are several different conceptions of social order that are competing for hegemony and that democracy is the space for that disagreement to be expressed.<sup>41</sup>

Additionally, excluding offenders the unique experiences of those affected by the prison system are not able to influence the law-making process.<sup>42</sup> Their exclusion

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36. See Fletcher, 1999:1906.

37. Rawls 1999:360.

38. Shapiro’s opinion is categorical: “A state may not try to secure uniformity of opinion by limiting the franchise to those who share a common interest in the issues being voted upon. A group cannot be excluded because it might vote differently from the majority, or because it might ‘take over’ the government or try to control its policy” (Note, 1974:585). See also, Ewald, 2004:131-2; Hill & Koch, 2011:219.

39. See Note, 1974:587.

40. See Ewald, 2004:119-24.

41. See the minority of *Richardson v Ramirez* [82]. Demleitner, 2000:772; Ewald, 2002:1099-102; Beckman, 2009:141.

42. See Demleitner, 2000:772.



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diminishes the plurality of interest and views that are considered acceptable rather than being epistemologically “open to different perspectives and standpoints, particularly those of the oppressed”,<sup>43</sup> therefore impoverishing the input of deliberation. Those who have experienced imprisonment can provide “knowledge of and probably insight into a major governmental activity whose operations are frequently hidden from others members of society”.<sup>44</sup>

An example of this argument is evidenced in the US debate where enfranchisement attempts are sometimes seen as partisan motivated.<sup>45</sup> There is some agreement that incorporating ex-prisoners into the franchise is going to benefit left-wing parties, in this case the Democratic Party. Enfranchisement initiatives face considerable criticism for *this* reason; it is a partisan motivated policy that does not take the general interest into consideration and gives unfair benefits to Democrats. It is obvious that the opposite is the case. In the current scenario of US politics, CD affords an unfair electoral advantage to the right-wing parties, Republican in this case, and that is one of the reasons why right-wing parties resist changing the law on this issue.<sup>46</sup> The flaws of the reasoning are also obvious. First, the probability of a radical change in policies regarding the administration of criminal law, as well as the conceptions of rule of law and democracy, is very low considering that left-wing parties in government tend to be moderate.<sup>47</sup> Second, supporting left-wing parties cannot be considered wrong in itself because they are legitimate actors in the political system. Finally, even if left-wing parties adopted weak policies on crime, and even if it were demonstrated that this was at least partially as a result of offenders’ support, this cannot be seen as illegitimate.

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43. Pettus, 2013:67.

44. Kleinig & Murtagh, 2005:223.

45. See Clegg *et al*, 2006:23. See also Kleinig & Murtagh, 2005:226; Manza & Ugger, 2006:14.

46. See Ewald, 2004:141. See also Hill & Koch, 2011:218.

47. See Bennett, 2003: par 27.

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## II CIVIC VIRTUE AND INCAPACITATION

### 1 Disenfranchisement and the lack of political capacity

The electoral exclusion of children and people with mental disabilities follows the rationale of excluding people with a deficit in their political capacity. The exclusion of these groups of people mainly focuses on their input to the electoral process rather than on any output.<sup>48</sup> In other words, they are not excluded because of the way in which they are going to vote but because they do not count with the capacity to vote correctly. Evidently this raises the question about what is that capacity. The exclusion of the children, for example, is based, albeit in an ambiguous manner, on the idea that to claim the right to vote, people must show some degree of understanding of politics, electoral practices and some degree of independence in expressing their political preferences. This involves common references to the lack of a minimal degree of rationality and to the absence of the ability to overcome interference from third parties. Without further discussion of these notions, it must be noted that the tendency in the literature is to see the exclusion of children, and therefore the concept of political capacity used to justify it, as resting upon the lack of some *cognitive* ability that is underdeveloped or in the process of being fully developed.<sup>49</sup> That is a considerably thin concept of political capacity if compared with former exclusionary requirements associated with character and social status.

In a defence of CD, it could be argued that offenders are also affected by this kind of incapacity. However, there is no empirical evidence that offenders are unable to act as rationally and autonomously as others adult individuals.<sup>50</sup> To be completely sure in discarding this argument, it is illuminating to consider the comparison between the

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48. See Blais *et al*, 2001:43. See also Olsson, 2008:62; Cowden, 2012:362-7; Munn, 2012:141; Wagner *et al*, 2012:373; Hamilton, 2012:1450.

49. See Lau, 2012:862. There are also argument that claim the exclusion of the children for reasons of knowledge rather than cognitive capacity.

50. See Note, 1974:586. See also Kleinig and Murtagh, 2005:225.

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electoral capability rules and the criminal liability rules. One of the conditions of the justification of the punishment rests in the capacity of the adults to avoid committing criminal offences. This capacity is absent (or attenuated) in the case of children, which in turn explains their lack (or attenuation) of criminal liability. Whilst it may be affirmed that a lack of understanding of what is at stake in their conduct underlies electoral and criminal incapacitation of children, this is evidently not the case with regards adult offenders. There is or there must be some symmetry regarding these capacities.<sup>51</sup> They have been convicted precisely because it was demonstrated in a trial that they *did* understand the consequences of what they were doing; they were acting rationally and autonomously. If offenders were not rational and autonomous “it would be irrational for us to hold them responsible for their criminal conduct in the first place”.<sup>52</sup> The same comparison can be made between offenders and people with mental disabilities.<sup>53</sup> This analysis should lead one to discard a lack of *cognitive* ability as the standard of exclusion from the franchise for offender.

Another route available to explaining CD in terms of political capacity is to formulate a thicker concept of political capacity. However, unlike the political capacity of children, and provided that offenders are as rational and autonomous as other adults, this thicker version has received poor treatment in the literature.<sup>54</sup> The moral turpitude or unworthiness of offenders has been invoked in several instances, with the common assumption being that it is a matter of fact that does not require further argumentation or proof. If a thicker conception of political capacity must be offered in order to justify the exclusion of offenders from the franchise, it must satisfy certain

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51. See e.g. Munn, 2012.

52. Cholbi, 2002:563. cf bellow *Chapter 5*, Section 3.3.1.

53. See Kleinig & Murtagh, 2005:223, 225.

54. Clegg, for example, transforms the political capacity requirement into a test of ‘trustworthiness and loyalty’. Talking about the exclusion from elections of children, “the insane”, criminals and foreign citizens, he concludes that “[t]hese exceptions ensure that those casting ballots pass a minimum threshold of trustworthiness and common civic commitment and demonstrate a willingness to abide by the laws they would require others to follow” (2002:178). However, his account does not explain how we can be sure of, and what exactly would count as, convicted criminals’ lack of ‘trustworthiness and loyalty’. See also Kleinig & Murtagh, 2005:221-3; Clegg *et al*, 2006:22-5.

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standards. First, the evaluation of any deficit related to their capacity to vote should be theoretically argued on a different basis than that related to the public belief that offenders are unworthy elements of society.<sup>55</sup> Secondly, it must disregard cognitive demands associated to children exclusion and instead focus on moral standards.<sup>56</sup> Thirdly, it must also avoid the argument of disruptive voting. In sum, the problem with offenders voting is not the imminent threat to the established order but the subversion of a relatively virtuous electorate, whose political power to decide over the most important aspects of the communal life must be grounded in some degree of civic virtue.

## 2 Political capacity and civic virtue

The natural candidate to develop a broader concept of political capacity is the notion of civic virtue. This concept could be linked to the republican concept of the virtuous citizen. From a civic republican perspective, participation in public affairs is one of the most important responsibilities of citizens. The common concern for the *res publica* is what permits the maintenance of liberty and pursuit of the common good.<sup>57</sup> In these terms, the importance of politics also has a correlation with the requirements to engage in it. This is the basis on which the conception of public participation is conceived, not as (or not only as) *rights* but as a *privilege* which is attached to the satisfaction of the correlative and necessary *responsibility*. Incorporating such a demanding idea within the concept of political capacity would be considerably problematic to justify because it would require the disenfranchisement of a broader group of citizens who have shown to lack the due degree of responsibility.<sup>58</sup> Moreover, in the past this republican conception was predisposed to justify an ideological abuse of the franchise. A civic republican concept of civic virtue was associated “with the exclusion of blacks, women and the poor from the political

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55. See Beckman, 2009:137; Hill & Koch, 2011:217-8.

56. See Note, 1974:586.

57. See e.g. Sandel, 1996:25.

58. See the notion of good and ideal citizen in Shklar, 1991:5-13, 34-.

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process. In each of these cases, ascriptions of political incompetence rationalized the lines that were drawn”.<sup>59</sup>

The exclusionary tendency of civic republicanism may be overcome if the working conception of civic virtue is thin or minimal in contrast with a thick republican conception. Consequently such a conception does not need to demand a strong commitment to public affairs, but only that citizens act according to a degree of consideration for others’ rights and interests, typically associated with law-abiding behaviour.<sup>60</sup>

## **2.1 Civic virtue and criminal character**

In an effort to justify CD, a more substantial conception of political capacity is offered by Christopher Manfredi who articulates a link between the character of offenders and some personality traits considered to display a lack of virtue. He argues that offenders have a character that is predominantly self-regarding, oriented towards the present moment and impulsive, and on the whole less empathetic than would be typical of other citizens. Criminal behaviour is associated with “1) rapid time discounting; 2) minimal internal verbal mediation; and 3) shallowly ingrained standards of behaviour”.<sup>61</sup> This supposed character outline contrasts with the idea that political capacity involves a minimal civic virtue element as a component, which consists in “empathy (‘a willingness to take importantly into account the rights, needs, and feelings of others’) and self-control (‘a willingness to take importantly into account the more distant consequences of present actions’)”.<sup>62</sup> The inability to

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59. Note, 1989:1308. See also Shklar, 1991:7-10; Ewald, 2002:1082-8.

60. See e.g. Manfredi, 1998:295ff. A similar argument for a thin conception of political virtue as law abidance can be found in the radical republicans’ debates of US reconstruction amendments, see Re & Re, 2012:1584.

61. Manfredi, 2009:274-5.

62. Manfredi, 2009:274.

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develop behaviour displaying minimal civic virtue is, therefore, attributed to a psychological cause.

From a systematic perspective, this account gives shape to a twofold concept of political capacity, including a cognitive and a moral element. The first, the incapacity to understand politics and act autonomously in elections, operates in the exclusion of children and people with severe mental disabilities. The second, related to civic virtue, might operate in the exclusion of adolescents and offenders. According to Manfredi, “both groups generally exhibit unusually impulsive and self-centred behaviour that renders them temporarily unfit to exercise the political rights and responsibilities of citizenship”.<sup>63</sup> Adolescents, however, display similar levels of rationality and autonomy to the adult population. In addition to explaining CD, therefore, this two-fold conception of political capacity has the additional advantage of articulating an argument to explain the denial of the right to vote to adolescents.<sup>64</sup>

This proposal might sound unconvincing, especially insofar as it relies in an intuitive conception of psychological profiling of offenders as integral to explaining their lack of civic virtue. A claim of this kind must be, at least, supported with empirical arguments. It has, however, two qualities. First, it distinguishes between the cognitive and moral aspects of the concept of political capacity. Second, it points out the need to avoid the civic republican thickness in the construction of this later standard of capacity.

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63. Manfredi, 2009:275.

64. See e.g. Hart & Atkins, 2011.

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## 2.2 *The lack of a sense of justice*

A more solid philosophical foundation for this idea can be found within liberal ranks, in particular, in the Rawlsian concept of a sense of justice. He describes this notion as:

“the capacity to understand, to apply, and to act from the public conception of justice which characterizes the fair terms of social cooperation. [...] also express a willingness, if not the desire, to act in relation to others on terms that they also can publicly endorse”.<sup>65</sup>

This capacity is what defines the status of an individual as a moral being and consequentially it grounds a duty of mutual respect.<sup>66</sup> Rawls clearly maintains that different individuals might have varying capacities for a sense of justice and “this fact is not a reason for depriving those with a lesser capacity of the full protection of justice”.<sup>67</sup> But what happens to those who do not qualify for that minimum? Thus Rawls observes the anomaly of crime and punishment in a just society:

“It is true that in a reasonable well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of the criminal law is to uphold basic natural duties [...] and punishments are to serve this end”.<sup>68</sup>

When these cases of dissonance arise, Rawls insists upon approaching them as individual deviations rather than social problems: “a propensity to commit such [criminal] acts is a mark of bad character”.<sup>69</sup> The contempt that some crimes express for the basic values of mutual respect upon which democratic societies are based calls for the evaluation of the moral status of those engaged in such behaviour. Rawls

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65. Rawls, 1996:19.

66. See Rawls, 1999:337.

67. Rawls, 1999:443.

68. Rawls, 1999:276.

69. Rawls, 1999:277. cf Honig, 1993b; Mañalich, 2013.

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insists that the absence of a sense of justice would struggle to be compatible with certain fundamental attitudes and capacities included under the notion of humanity.<sup>70</sup> This is an statement with solid exclusionary implication when is link to his acknowledgment that certain individuals act in a manner that is not compatible with principles of reciprocity that reasonable people can easily identify. The conclusion that Rawls offers in relation to those who are not willing to act according to the principles of justice is revealing in this respect:

“It is, of course, true that in their case just arrangements do not fully answer to their *nature*, and therefore, other things equal, they will be less happy than they would be if they could affirm their sense of justice. But here one can only say: their nature is their *misfortune*”.<sup>71</sup>

In sum, the commission of an offence shows that offenders lack the sense of justice normally associated to reasonable people. This is not, however, conclusive to justify CD. Evidently, Rawls himself never endorsed it. Moreover, he shows an explicit commitment to a concept of participation that has the role of enhancing the self-esteem and sense of political competence of citizens.<sup>72</sup> However, what is at stake is not whether Rawls himself endorsed CD but rather how his ideas are supportive of it.<sup>73</sup>

Jesse Furman has associated this attribution of bad character with Rawls’ express commitment to participation and civic virtue, to sketch critically a Rawlsian case for CD. Rawls agreed that “if the citizens of a democratic society are to preserve their basic rights and liberties [...] they must also have to a sufficient degree the ‘political virtues’ [...] and be willing to take part in the public life”.<sup>74</sup> Furman’s move consists in contrasting a commitment to the civic virtues of citizens in a democracy with an

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70. Rawls, 1999:488.

71. Rawls, 1999:504 (emphasis added).

72. See Rawls, 1999:203-6.

73. See e.g. Sigler, 2013.

74. Rawls, 1996:205.



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understanding of the offender as a defectively motivated subject. He suggests that disenfranchising those who have openly shown themselves to lack a sense of justice and the motivation to respect their fellow citizens would not be a suppressive measure. It would be a step towards democratic self-protection, or in Rawlsian terminology, towards “the stability and welfare of a just order”.<sup>75</sup>

In a recent article, Mary Sigler formulates what could be fairly called a Rawlsian defence of CD, hence escaping from Manfredi’s psychological profiling. In her view, electoral eligibility demands a minimal degree of civic virtue, less demanding than classic republicanism but more demanding than the most individualist versions of liberalism.<sup>76</sup> Her proposal falls ambiguously between a demand for civic virtue and a punitive explanation. She suggests that CD is imposed as a mark of the loss of *trust* that citizens recognize one another in a democracy and that is necessary to make democracy possible.<sup>77</sup>

Sigler builds upon the idea of a minimal degree of civic virtue in Rawls’ political liberalism to argue that

“citizenship mounts to something more than the self-regarding pursuit of individual interests unconstrained by anything but a rudimentary duty to obey the law [...] citizens share a commitment to the public values that constitute the political community”.<sup>78</sup>

She recognizes that that civic virtue cannot be enforced, especially when it informs the exercise of suffrage, but it is nonetheless accompanied by an expectation that it is

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75. Furman, 1997:1225. See also Cholbi, 2002:550-1; Beckman, 2009:139-42.

76. See Sigler, 2013:12.

77. See Sigler, 2013:3. Sigler departs from Deigh’s idea that the office of citizenship entails not just a set of rights but also a set of responsibilities. Deigh argues that “a serious breach of law - specifically a criminal offense because it shows that the citizen is unwilling to abide by the laws in the enactment of which he can participate - disqualifies him from being a legislator or elector. It shows him to be unfit for assuming the responsibilities of either office, and for this reason he forfeits its essential right” (1988:158). cf Cholbi, 2002:559-64.

78. Sigler, 2013:14.

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subjected to public reason. That expectation resembles the expectation that citizens are fulfilling the responsibilities of their office, including following the law.<sup>79</sup> A criminal offence constitutes a breach of the civic trust in which those expectations are grounded. There is therefore a claim of *correspondence* between the disappointment of the civic trust in the level of the duties of a person as subject of the law, and the prediction of disappointment of his duties as democratic citizen. This is followed by a measure (CD) that “does not require a particularized assessment of the offender’s trustworthiness”,<sup>80</sup> because the breach of civic trust is something not related to the offender’s cognitive capacity but with the civic virtue expressed by his actions.<sup>81</sup>

This Rawlsian argument can give more solid foundation to the idea described by Manfredi about the self-regarding, impulsive, less empathetic psychological profile of offenders. Regardless of the different formulations, a connection can be traced between these ideas: those who have committed a criminal offence are understood as defective and that deficit is related to their (in)capacity to understand social relations in just terms, a deficit of motivation for the respect of fellow citizens and their rights.

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79. See Sigler, 2013:14. A similar argument is offered by Waldron, 2013b.

80. Sigler, 2013:15. See also Lavi, 2011:796-.

81. It is difficult, however, to understand why this would not be a punitive reaction. Sigler responds to this question by saying that “[o]ffenders deserve punishment for violating the criminal law, but citizens are liable to disenfranchisement for violating civic trust” (25). Sigler’s defence of her account as regulative rather than punitive is tremendously weak. She argues: “Although [CD] is triggered by a criminal conviction, it is justified by the breach of civic trust that serious criminals misconduct represents. And while punishment for serious crime typically involves imprisonment and the separation of the offender from his geographical community, the loss of voting rights signifies his separation from the political community” (15-6). The assumption that CD cannot by definition act as a punishment because punishment has the nature of imprisonment discards *ex-ante* any punitive dimension of this measure. If the distinction between regulative and punitive measures is elaborated on the basis of their prospective and retrospective rationalities the results are quite different and the breach of the civic trust appears eminently punitive. On this distinction, see below *Chapter 5*, Section I.1.

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### 3 Disenfranchisement as (electoral) incapacitation

This minimal concept of civic virtue might avoid: (i) an expansive concept of cognitive capacity, assimilating offenders and children; (ii) the problems of output regarding issues presented by disruptive voting; and (iii) a thicker concept of republican civic responsibility, proven prone to an ideological abuse of the franchise.<sup>82</sup>

A defence of this concept of political capacity that includes a minimal degree of civic virtue must be legal codified in terms of a regulative measure of incapacitation, as opposed to a kind of punishment. This understanding transforms CD into a prospective-oriented measure that aims to prevent the political participation of those incapable of it. It “rests not upon what a criminal has done, but upon whom he has shown himself to be”.<sup>83</sup> The crime and the criminal sentence are meant to work as a discovery test and not as causes of exclusion.<sup>84</sup> The exclusion is based on an abstract and universal standard of political capacity applied to everybody; law-abiding citizens have passed the test that offenders have failed. That is why it would be incorrect to criticise this conception of CD on the basis that it prescribes good behaviour as a condition for voting rights; that argument may misunderstands the purpose of CD and the burden of the proof that it *does* satisfy.<sup>85</sup>

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82. Lardy’s account of justifications of CD moves between the idea of ‘moral unfitnes’, which could be assimilated into a demanding republican civil responsibility, and the idea of ‘incompetence’, that can be understood as a cognitive problem associated with the exclusion of the mentally impaired and children (2002:531-4).

83. Note, 1989:1307.

84. Accordingly, this account attributes to the criminal convictions the role of a negative test of civic virtue, in contrast with judgments of moral character which secure access to the ballot, which would constitute a positive test, a demonstration, of civic virtue (cf Bennet, 2012:2; Mauer, 2011:557). Criminal sentences as a test cannot be compared with literacy tests because they do not alter the burden of the proof set by the universal suffrage principle.

85. See above *Chapter 3*, Section III. See also Manfredi, 2009:272; Sigler, 2013:12. cf Easton, 2009:226-7.

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Incapacitation in the terms outlined here is something considerably different from incapacitation as a tool of crime prevention.<sup>86</sup> They share prospective rationality and a disregard for the relation between crime and (retrospective) punishment. However, while criminal incapacitation aims to avoid the commission of new crimes, electoral incapacitation merely seeks to prevent the participation of a subject with a lack of political capacity in the elections. CD is directed, in the same manner as exclusion of minors, towards the maintenance of a competent electoral body with a demonstrable capacity to engage responsibly in public affairs.

If the rationale is purely regulative, the institutional characteristics of CD might be importantly influenced by that fact. First, the lack of civic virtue can be more easily argued by appealing to a general unwillingness to respect the law rather than to the commission of a single crime,<sup>87</sup> and therefore, it would be advisable to limit its application only to convicted recidivists. It would be also more easily argued regarding those who have found guilty of serious crimes symptomatic of a lack of sense of justice.<sup>88</sup> Second, it seems easier to argue the lack of civic virtue in cases involving those more serious crimes, those that “cast greater doubt on an offender’s commitment to a community’s public values”,<sup>89</sup> as opposed to more common and minor crimes.<sup>90</sup> These two elements might make CD completely independent of the fact of imprisonment, which gestures towards a model that partially disregards the fact of imprisonment.<sup>91</sup> Third, regarding the restoration process, this should not be automatic after a certain period of time. As CD performs an incapacitating role, the political capacity which originally justified exclusion from the franchise must be

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86. See below *Chapter 5*, Section I.

87. See Lippke, 2001:564. See also Beckman, 2009:143.

88. See Beckman, 2009:142.

89. Sigler, 2013:20. Sigler suggests restrict CD to “the traditional common law felony designations” (2013:21).

90. See Beckman, 2009:139. See also below *Chapter 5*, Section II.

91. cf Sigler, 2013:21-2.

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proven to exist “by an affirmative effort on the part of offenders”,<sup>92</sup> for example, “by conforming their conduct to the law for a period of time”.<sup>93</sup>

Considering the current institutional regulation of CD in the jurisdictions in which it is applied, it must be accepted that political capacity is overall a fairly poor candidate to explain the rationale of CD. However, some of the problems it faces could be overcome by undertaking a legal redesign and narrowing its application. For example, CD could be reconceived to affect offenders only when they have shown permanent and serious disregard for their civic obligation to respect the law, and by committing offences that permit judgement of their ‘bad character’.<sup>94</sup>

### III THE PROBLEMS OF INCAPACITATION

In a previous chapter, it was suggested that CD present a democratic problem. It was argued that the right to vote plays a fundamental role in the process of legitimation of the law. In *Section I*, the argument of disruptive voting was discarded because, as was mentioned, it is impermissible for a government to exclude somebody for the way he or she is going to vote. The argument pertaining to the political capacity of offenders is not different: they are excluded for the way in which they are going to vote not because they cannot vote in an adequate way. For exposing the problems affecting this line of argument, it may be illustrative to start with a comparison with the electoral exclusion of children.

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92. Sigler, 2013:24.

93. Sigler, 2013:22. In this way, the question about “how does a prison sentence improve their moral fitness?” (Plaxton & Lardy, 2010:134) would be answered.

94. For example, Beckman (2009) despite being generally against CD, concedes that those clearly unreasonable persons may be a good case for “preserving the ‘just character’ of the electorate” (142). These are people that have shown general unwillingness to respect fundamental norms of justice that “could not reasonably be rejected” (143).

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## 1 The electoral exclusion of children

The Canadian Government in *Sauvé* offered the argument of civic responsibility that was supported with the analogy between offenders and children, as two cases in which the legislation can exclude people from the franchise for similar reasons. Court in *Sauvé* argued that

“The analogy between youth voting restrictions and inmate disenfranchisement breaks down because the type of judgment Parliament is making in the two scenarios is very different. In the first case, Parliament is making a decision based on the experiential situation of all citizens when they are young. It is not saying that the excluded class is unworthy to vote, but regulating a modality of the universal franchise. In the second case, the government is making a decision that some people, whatever their abilities, are not morally worthy to vote — that they do not “deserve” to be considered members of the community and hence may be deprived of the most basic of their constitutional rights” [37].

The Court reasoning is unconvincing in its main claim.<sup>95</sup> The mere fact that children are excluded equally from the franchise and that their exclusion is only transitory does not constitute a successful justification for their exclusion.<sup>96</sup> Their exclusion expresses a judgment regarding the unworthiness of children as a category of people in reference to adult population. Minors can be regarded as a group that is discriminated if not additional justification is provided.

The widely-held idea that children must be excluded from the franchise due to their lack of political capacity has been challenged by the literature in recent years, producing an exhaustive analysis. The exclusion of children can be approached from two perspectives. First, by questioning the universality of the standard by which children are excluded. The presumption of capacity for adults and incapacity for minors evidently leads to the inclusion of people that do not satisfy those standards

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95. cf minority vot *Sauvé* [89].

96. cf Rawls, 1996:196.

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and the exclusion of people fully prepared to carry out electoral tasks.<sup>97</sup> As well as in the case of offenders, problems of under and over-inclusiveness are especially in evidence.<sup>98</sup>

A second perspective, observes that when other rules concerning the legal capacity of children are implemented, it is apparent that their incapacity only becomes relevant when the children themselves or a third party is in danger of being harmed by the children's conduct. Legal capacity rules are protective measures. From this perspective, the argument concerning the political capacity of children, as for that of offenders, tends to be obscure about what kind of harm must be prevented by electoral exclusion, instead focusing on other aspects of their incapacities.

### **1.1 Capacity and harm**

Children's electoral capacity rules set out two questions. Firstly, can children understand what is at stake in elections? Secondly, what is protected by the exclusion of people that do not understand what is at stake in an election? The first question can lead to endless inquiry if considered in empirical terms. The experts have not reached an agreement regarding the political capacity of children.<sup>99</sup>

Conceiving capacity in empirical terms implies that the *fairness* of the requirements is achieved if they apply equally to the entire universe of subjects that 'empirically' show similar levels of relevant understanding. It seeks to avoid over and under-inclusiveness. It is evident that a 2-year-old baby does not hold the cognitive capacity

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97. See e.g. Lau, 2012.

98. See e.g. Lardy, 2002:532.

99. For example, some suggest that it is not clear that adults have a rational capacity superior to that of children, especially adolescents, or that the cognitive development of children concludes at age 16; others suggest that the differences between adolescents and adults consist in discrete spheres such as pair relations and risky activities but that does not allow one to justify differences in political capacity, or that children can identify principles of justice as early as 6 years old (See Hamilton, 2012; Hart & Atkins, 2011).

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to, for example, understand politics and what is at stake in elections. However, nothing exceptional happens in relation to knowledge and reasoning when people turn 18 and therefore are qualified to vote. The cognitive capacity to understand voting is acquired at some point during young people's course of development and it is acquired differently and in different times by different subjects. To be sure, there is a huge disagreement about exactly *when* this happens, to a great extent due to the fact that there is also significant disagreement about *what* is being investigated. However, this is not the only way to approach capacity requirements.

In normative terms, capacity requirements are a way of setting expectations and distributing responsibilities by recognizing legal personality. When approached normatively, the *fairness* of the regulation is not achieved by demonstrating the coincidence of people's empirical and normative status but through the coherent treatment of people in all aspects of their legal personality. Somebody cannot be treated as capable of some affairs and incapable of other affairs which involve similar skills, degrees of understanding or the exercise of similar kinds of mental processes.<sup>100</sup> From that perspective, if the lack of recognition of political capacity is tied to the lack of recognition of other aspects of deliberative personality, the exclusion of children from elections might be coherent with their position within the legal system. Accordingly, it seems that the main argument supporting the reduction of the voting age is not based on empirical studies but on the corresponding attribution of legal responsibilities to minors, a fact that can be observed in private law and criminal and labour spheres.<sup>101</sup> To put it briefly, the expectation of morally autonomous behaviour cannot be directed solely at the constitution of minors as subjects of the law, but must also have a correlation in the construction of minors as responsible individuals, capable of understanding themselves as legal persons and

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100. For example, it is completely anomalous that subjects who are fully criminally liable, that is, whose conduct can form the object of condemnation, do not also possess the legal capacity to conduct their private business or to get married. It is also anomalous that somebody who is allowed to work and earn a salary cannot be granted the right to financial independence.

101. See Munn, 2012.



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citizens. Private and public spheres of autonomy are based on the same moral status and therefore cannot be radically dissociated.<sup>102</sup>

## **1.2 What is the problem with children voting?**

Nevertheless, the question remains surrounding the reason behind the exclusion of children from the political process. Even if they are not recognized as capable, their exclusion can only be justified on the basis of a potential harm. Arguments that just point out their incapacity miss this point. For example, to sustain that “children and insane adults ought not in general have voting rights”, because “they are not able, through participation, to advance [their] interests”,<sup>103</sup> fail to explain the problem generated by their participation. Three responses have been offered to explain this problem.

First, it has been argued that children’s electoral exclusion is for their own benefit: the best interests of the child require electoral exclusion because political participation would be harmful for them. The right to vote would involve the need to assume important responsibilities, which could in turn bring about stress and psychological costs that it is in their best interests to avoid. If the converse were true, they would be able to develop activities proper to their age, such as play and study.<sup>104</sup> This argument seems unconvincing unless the right to vote is conceived of as a legal obligation or the electoral practices to convince voters change radically.<sup>105</sup>

A second line of reasoning suggests that children’s exclusion protects the public from the political incompetence of children. The participation of incompetent electors

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102. Mañalich, 2011a:124-5.

103. Christiano, 2008:129 (n 33).

104. See Beckman, 2009:114-9.

105. See López-Guerra, 2010:130-1.

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would ruin the electoral outcome and therefore it must be avoided.<sup>106</sup> This is also unconvincing: on the one hand, because the rationality of elections is given by the electoral offer, and not by the electoral demand. An incompetent electorate would not necessarily harm the outcome of elections through arbitrarily affecting a political option because this would presuppose a consistent vote from those regarded incompetent and whose exclusion is defensible solely on the basis that they lack a rational capacity to be consistent.<sup>107</sup> Hence, it is a self-defeating reason. On the other hand, even if children are assumed to vote randomly, their participation would not alter the outcome of a real election in a relevant manner unless the majority of the voters were also incompetent.<sup>108</sup> Summing up, even including people with little or no political knowledge, a precarious rationality or impulsive behaviour does not affect electoral results in any way which is relevant.<sup>109</sup>

The third reason for excluding children from elections is somehow more abstract. Excluding children is a requirement for protecting political equality, as expressed through the equal value of the vote. López-Guerra has suggested this idea by affirming that the exclusion of children is not demanded by the *justice of allocation* of the right to vote, according to which “all members of the polity who have the capacity to enjoy the benefits of enfranchisement (or experience the harm of disenfranchisement) should have the right to an equal vote”, and “the exclusion of those who lack the said capacity is *permitted but not necessary*”.<sup>110</sup> Instead, the necessity of their exclusion is a demand of the *operation* of the electoral process. Children, whose participation is not necessary but not prohibited, could damage the integrity of the elections and the principle of political equality, because they can be

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106. See e.g. Brennan, 2011b.

107. See Olsson, 2008:62-8.

108. See Goodin & Lau, 2011.

109. See López-Guerra, 2010:117-23.

110. López-Guerra, 2010:124 (emphasis added).

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*instructed* by a third party, and therefore, like buying a vote, their vote could grant somebody more votes than their due share.<sup>111</sup>

The previous observations allow an understanding of the relevance of the exclusion of children, albeit *only* to some of them, not as a guarantee of good quality in the outcome of elections but as a way of maintaining the integrity of the election. These observations, at the same time, will contribute to an appreciation of the specific position of the demands of civic virtue as a justification for offenders' exclusion.

## **2 Civic virtue under examination**

The argument of disruptive voting analysed in *Section I* must be regarded as a case of ideological abuse of the franchise's requirements. What remains from it is the construction of a power-relation. Whereas the disruptive voting argument is concerned with the outcomes of the electoral process, and the inputs are considered important in consequential terms, the civic virtue argument is purely input-oriented, focusing on the maintenance of a virtuous electorate. The demand for civic virtue as an eligibility requirement suffers from similar problems. When its premises are examined carefully, what is found is the same kind of argument. To expose that fact, the scheme of analysis for the exclusion of children can be used to analyse CD. The first question is therefore related to capacity, while the second is related to the harm that could be caused.

### **2.1 Do offenders lack political capacity?**

In relation to capacity, it has already been noted that advocates of this argument accept that offenders possess the cognitive capacity to understand what is at stake in elections and therefore are in a different position to children. It was also claimed that

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111. See López-Guerra, 2010:131-3.

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someone's political intentions, the way in which he or she is going to vote, belongs to a sphere of autonomy protected by a subjective right and therefore cannot be used as a reason for exclusion. Contrary to these cases, what is alleged by the civic virtue advocates is not that the vote is rationally outcome-motivated, in the sense of being aimed at furthering criminal interests, but that the vote, following the offender, is morally defective. For example, Mary Sigler's argument of *correspondence* is based on the presumption that by the commission of a serious offence, offenders unveil their lack of compromise with the "public values that constitute the political community".<sup>112</sup> It serves as a test to connect the moral wrong of the crime and the expectation that such person would not vote in a morally-motivated way according to 'a public use of reason'. Thus, in a society that values virtuous participation, a offender must be excluded from voting because her vote "is somehow impure".<sup>113</sup>

At first appearance, the most important weakness of this argument seems to be the clear inconsistency between the affirmation of legal capacity implied by the punishment and the attribution of a lack of political capacity in relation to elections. If the criminal conviction implies an act of condemnation, the subject to which the crime is attributed must be recognized as holding the powers of a deliberative person. This responsibility constitutes recognition of the expectation of law-abidingness on the person's part, rooted in the inclusion of that person *qua* citizen in the democratic process. A criminal offence is constitutive of a disappointment of this normative expectation. Can follow the criminal conviction an extinction of the deliberative personality of the offender?

The answer should be negative. If what is expressed through a criminal conviction is condemnation, it must be acknowledged that offenders possess the moral capacity to be rationally challenged by such act. Offenders still recognized by the legal system, as equipped with these kinds of deliberative powers. Even during the time an offender

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112. Sigler, 2013:14.

113. du Fresne & du Fresne, 1969:123.

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is serving a prison sentence, the legal system continues to consider him a legal person, maintaining its expectations that the subject will conform his behaviour to the law. An offence inside the prison still constitutes an offence. In fact, there are offences that can only be committed when people are in prison. Offenders are recognized and treated, in their dimension as legal persons, as deliberative persons. Otherwise, total incapacitation, isolation or surveillance would be the only response to the commission of a criminal offence.<sup>114</sup> Notice the contrast with those individuals who have been rendered lacking some *cognitive* capacities, in which case the commission of a serious offence is followed not by a punishment but by incapacitation measures.<sup>115</sup>

However, civic virtue demands more than mere deliberative personality. Given that an offender is deemed responsible for not acting according to a sense of justice for which he is cognitively and morally equipped, it follows that he must be deemed cognitively and morally equipped to make political choices. Therefore, the requirement set out by CD does not demand to be capable to respect the law, because if somebody does not have the capacity to respect the law, does not have the capacity to breach the law either. Therefore, the requirement of civic virtue set out by CD is better formulated not as a question of capacity but as a *commitment* with the law. This is seen as the correlative attitude of somebody that adopts ‘public reason’ as a standard of electoral behaviour. Civic virtue, even when minimally formulated, adds to the deliberative powers of the person a demand for the adoption of an ethical commitment with the outcome of the democratic process.

This commitment presents two problems to be considered an adequate explanation of CD as a form of electoral incapacitation. The first is related with a failure in the justification of the commitment in relation to disenfranchised offenders. This can

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114. Hill & Koch (2011) observe similar incoherence. This incoherence is accentuated in the case of those regimes of CD in which the offender is expected to behave as especially virtuous citizen to regain voting rights (Manza & Ugger, 2006:9).

115. See e.g. von Hirsch & Wasik, 1997. See also below *Chapter 5*, Section I.

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only be based in a democratic and pluralist society in the adscription of right of participation to those whose commitment is expected, rights of which offenders affected by CD are dispossessed. The second is related with the structure of the response to the failure to act according the expectations set by the law in democracy. The infraction of such a commitment, the breach of the law, is normally codified in legal terms as implying condemnation for the fact that, cognitive and morally equipped to act otherwise, the person has committed the offence. This condemnation in the case of criminal offences assumes the form of punishment.

## **2.2 What is the problem with offenders voting?**

Arguing on the grounds of their lack of political capacity is not sufficient to exclude offenders, even if it is accepted that civic virtue is a requirement to vote that sets standards of participation different to those which apply to persons exercising their right of autonomy. It must be demonstrated that there is a harm to be avoided by their exclusion.<sup>116</sup> Now, due their similarities, it might be convenient to compare the presumptive harm of offenders voting with the reasons offered for excluding children. Firstly, to be sure, there is nothing in CD that can further the interests of offenders by excluding them from the franchise, even when some people claim that it could facilitate their process of rehabilitation.<sup>117</sup>

Secondly, the putative damage to the outcome of the election must be also discarded.<sup>118</sup> Offenders are not incompetent voters, and even if they are considered as such, that would not justify their exclusion, according to the rationality of the electoral offer and the statistical irrelevance of arbitrary voting. The remaining option is that the outcome might be ruined because offenders will vote consistently supporting some of the electoral offers. In that case, there are two possibilities: first,

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116. See Easton, 2006:451.

117. See below *Chapter 5*, Section I.2.3.

118. See López-Guerra, 2014a:112; Beckman, 2009:139-41.

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they vote rationally and self-interestedly, which leads us back to the problems facing disruptive voting; and, second, their morally defective vote must be linked to the political options they support. This, again, is difficult to defend; it cannot be argued that allowing offenders to vote would transmit, for example, the contempt they have shown for the victims, to the law-making process: “votes simply cannot be interpreted as an endorsement of [such] principle”.<sup>119</sup> In this way it can be seen how, on the one hand, rights of autonomy are erected as firewalls against intervention directed against the way in which offenders might vote, and on the other hand, pre-determined conceptions of the common good need to compete for the political hegemony, which only popular support can offer in a democracy.

Thirdly, it could be affirmed that the offenders’ voting might affect the integrity of the elections or the principle of political equality. This would lead back to ‘primitive’ versions of the ‘purity of the ballot box’ in which CD is justified as preventive of the commission of electoral offences or conflicts of interests between elected authorities and organized crime structures.<sup>120</sup> Indeed, the opposite seems to be the case. Political equality is affected not by offenders voting but by the practice of CD.

### **3 Is voting a privilege?**

Some critics argue that CD transforms the right to vote in a privilege.<sup>121</sup> Along the same lines, others have argued that “voting is a basic right, one that does not depend on possessing some requisite degree of virtue”.<sup>122</sup> The claim that the right to be enfranchised is not a human right or a basic right but a privilege is not necessarily contradictory. It expresses, however, a powerful exclusionary project that is able to

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119. López-Guerra, 2014a:114.

120. See above *Section I*.

121. See e.g. Easton, 2009:226.

122. Cholbi, 2002:556.

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organized in the context of the modern representative institutions but reproduce the exclusionary ideological structures of the past. This was expressed clearly in *Sauvé*:

“The idea that certain classes of people are not morally fit nor morally worthy to vote and to participate in the law-making process is ancient and obsolete. [...]. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or ‘worthy’ of voting — whether by reason of class, race, gender or conduct — played a large role in this exclusion. We should reject the retrograde notion that ‘worthiness’ qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law” [43].

This is so because in a democracy, the political capacity to engage in the process of law-making cannot be substantially dissociated from the capacity to act as a subject of the law and therefore be responsible for its breach. This is clear in the case of the children. They are excluded from political participation in a way that correlates to the exclusion of their legal responsibility for a legal breach. In contrast, the mark of legal responsibility involved in a criminal conviction should be sufficient to demonstrate the capacity of the offender to engage in the process of law-making.

In conclusion, the argument of civic virtue cannot be rendered regulative of some condition present in the person but constitutive of certain circumstances that are attributed to the offenders. They are not excluded *because* they lack some requirement but in itself their exclusion articulates a difference with those citizens able to vote; “[i]t is the very negation of their civic capacity, a message of mandatory disengagement, and of revoked social status”.<sup>123</sup> In other words, whilst democratic citizens are recognized because they can exercise the right to vote, which constitutes a mark of equality and membership, exclusion from the franchise reduces offenders to a lesser status, the status of those who cannot govern themselves. Therefore, CD may not be seen just as an ideological intervention in the sphere of the public autonomy of

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123. King, 2011.



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offenders, it may also be seen as a denial of such a political aspect of their subjectivities. However, it is better not to jump to any conclusion and rather pay attention and follow the advice of Pamela Karlan:

“If neither good character nor intelligent use of the ballot nor support for existing criminal laws are generally permissible prerequisites for voting, then it would be perverse to rely on criminal convictions as evidence that individuals lack qualities that voters are not required to have. The justification for disenfranchisement of offenders must rest not on concerns about the effect their participation will have on the political process but elsewhere. The obvious alternative is to conclude that disenfranchisement is indeed punitive [...]”<sup>124</sup>

This is the kind of justification that will be explored in the next chapter.

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124. Karlan, 2004:1155.

## THE ARGUMENT OF PUNISHMENT

**T**he phrase “if you break the laws, you can no longer make the laws”<sup>1</sup> is repeated to express one of the most persuasive punitive intuitions about why offenders must lose the right to vote. It is, however, highly indeterminate. In another formulation, it is suggested that “[t]hose prepared to act in ways that deprive others of realization of the interest served by democratic political participation cannot consistently demand [...the] exercise of the franchise”;<sup>2</sup> or “When felons demand a right to vote, they demand the right to govern others while rejecting the right of others to govern them”.<sup>3</sup>

These statements are powerfully rhetorical; however, they are not a complete explanation of the relation between the fact of breaking the law and the disenfranchisement of the offender. Similar difficulties are faced by those who propose that CD is a consequence of a breach of the social contract.<sup>4</sup> The metaphor of the social contract can contribute to explaining how institutions such as democracy, punishment, responsibility and equality can be justified. In all these cases, the social contract might have some role to play. Whatever their limitations, contractarian

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1. Cholbi, 2002:550, discussing Morris, 1991.  
2. Lippke, 2001:562.  
3. Silver cited in Reiman, 2005:13. See also Lippke, 2001:561.  
4. See Ewald, 2002:1073-9.

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arguments are deeply connected with another kind of justification. Lying behind these arguments is the claim that the commission of an offence must be followed by a sanction, that in the case of a criminal offence adopts the form of a punishment. However, social contract arguments do not provide any reason to justify why such a sanction must adopt the form of CD.<sup>5</sup> In a democratic society, especially when this kind of sanction involves the limitation of a fundamental right, such sanctions must adopt the form of a legal punishment and therefore should be governed by the logic of criminal law.<sup>6</sup>

The previous chapter was concerned with the idea that CD is based on the lack of certain elements of political capacity in those convicted for a criminal offence. This idea was discarded for being incompatible with the democratic principles that must guide the composition of the franchise. In a line of reasoning that will be continued in this chapter, it was held that a criminal conviction must be regarded as an affirmation of the capacity of the offender to take autonomous decisions. In other words, being capable is a requirement for someone to be considered responsible. If the capacity that is required to follow rules is not substantially different from the capacity to be part of the process of making those rules – which is a key democratic idea – offenders should be considered capable electors. It is argued further that holding somebody criminally responsible in a democracy must be premised on the fact that she had been granted participatory rights in the law-making process.

As a punishment, it is claimed that CD is unable to perform deterrence, rehabilitation or incapacitation, the three functions of punishment oriented to social protection.

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5. See Reiman, 2005. About contractarian arguments for CD with references to Locke, Hobbes and Rousseau, see also Planinc, 1987; Note, 1989:1304-7; Lippke, 2001:561; Ewald, 2002:1072-9; Johnson-Parris, 2003; Brenner & Caste, 2003:238-40; Reiman, 2005; Kleinig & Murtagh, 2005:219-222; Schall, 2006:68-83; Easton, 2009:228; Levine, 2009; Bennett, 2012:4; Plaxton & Lardy, 2010:135-7; Joint Committee, 2013:34-6; Behan, 2014:9-10; Lopez Guerra, 2014a:110-2. Contractarian arguments can be also found in the judgments. See e.g. *Sauvé* [31, 101-2]; *NICRO* [117].

6. See Brenner & Caste, 2003:231.

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Consequently, this chapter mainly engages with the claim of those who defend it more plausibly using retributive language and highlighting its expressive potential. The argument adopts the following structure. *Section I* starts by making a conceptual and normative distinction between the punishment and the collateral consequences of criminal conviction. At this stage, social protection rationales of punishment are discarded as justifications of CD. In *Section II*, the idea of a retributive CD is analysed in detail. This retributive argument is formulated highlighting the claim that CD might serve as an expressive form of democratic punishment. Finally, *Section III* shows that this justification does not satisfy the conditions for punishment to be compatible with democracy. It is argued that, even when conceptually CD can be considered a retributive punishment, it is a modality of punishment that is incompatible with the recognition of democratic citizens.

## **I UNDERSTANDING DISENFRANCHISEMENT AS PUNISHMENT**

### **1 Legal nature of disenfranchisement**

The relation of CD with the commission of a criminal offence means that would make sense to consider it a *punishment*. This is the common understanding of CD in Europe. However, there is also a considerably widespread idea, prevalent especially in the United States, which considers it as a *collateral consequence* of the criminal conviction; this means a legal effect that is attached to but separate from the punishment itself. Its purpose, in this latter case, is to determine the scope of the franchise rather than punish offenders for their wrongdoings.<sup>7</sup>

The importance of this distinction transcends rhetoric. Considering CD as a punishment involves the assumption that it must be designed and evaluated under a punitive logic, which involves legal, constitutional and theoretical restrictions framed

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7. See e.g. Demleitner, 2000:753; Ewald, 2002:1057; Ispahani, 2009:31-2.

in specific terms. On the other hand, considering CD as a collateral consequence of criminal conviction may allow the adoption of a more flexible approach,<sup>8</sup> in which the ‘regulatory aim’ of determining the franchise and protecting the electoral process could be subjected to less strict standards of control than the system of guarantees of criminal law.<sup>9</sup> For example, a non-punitive measure would not be reached by the protection of the principle of prohibition of retroactive (*ex post facto*) criminal law.<sup>10</sup>

Speaking about the collateral consequences of criminal conviction, however, is especially confusing. When examined more carefully, some distinguishing criteria may be found. Beside ideas that collateral consequences are named as such in the legislation<sup>11</sup> and they are not under control of the judge but determined directly by the law,<sup>12</sup> a third criterion pays attention to the *aim* or *function* of the measure. This

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8. See von Hirsch & Wasik, 1997:611-5. See also Siegler, 2013:22-3.

9. See Ewald, 2009b:12.

10. See Feinberg, 1970:106-9. The more important example in the US, where the judicial decisions have considered CD as a collateral consequence, is that CD has not been examined under the ‘cruel and unusual’ treatment standard of the Eighth Amendment of the Constitution. See Reback, 1973. See also Note, 1974:598-9; Tims, 1975; Fletcher, 1999; Thompson, 2002b; Karlan, 2004; Wilkins, 2005; Grady, 2012.

11. The first idea sustains that these should not be considered as a class of punishment, in the sense of a *direct* consequence of the conviction, but as a regulatory or *indirect* consequence. This point of view considers the conviction as the fact that activates the application of a regulatory norm. This conceptualization, however, is not very helpful considering that the term ‘collateral’ recognizes that the imposition of the punishment is also a consequence, the main consequence, of the criminal conviction. The fundamental aspect becomes, therefore, what counts as central and what as collateral. There is no clear operative standard to judge this beyond nominal statutory identification. This fact is aggravated by the equivocal terminology in which regulation is usually expressed and by the lack of awareness of the doctrinal categories by the legislative activity. Damaska is clear in rejecting a conceptually-based distinction between punishment and other consequences of criminal conviction. He considers that “the same adverse effects of conviction would have to appear under different headings depending upon the more or less arbitrary decision of the lawmaker” (1968a:349). The legal source on which the measure is established can be relevant to, at least superficially, the own country-subjective conception of the measures. When this is constitutionally imposed or regulated in the electoral law, it is more likely to be understood as a regulative collateral consequence. When it is settled in the criminal legislation, such as a criminal code, it seems to be more likely to be understood as a punishment.

12. When the court has the prerogative to impose or limit a measure with some degree of discretion, it should be considered a ‘direct’ consequence. On the other hand, when a consequence does not depend on the court but is legally determined, it is ‘collateral’ (See Love, 2011:95-7). For example, a public and judicially-declared measure can be connected with a punishment rationale, while the implicit character of a measure that does not require

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suggests that a measure that is “an appropriate kind to perform the function of public condemnation” must be regarded a punishment; on the other hand, if it lacks such “reprobative symbolism”, it must be considered a non-punitive, regulative measure<sup>13</sup>. For example, while imprisonment is evidently punitive, the registration of sex offenders is essentially preventative and therefore should be considered a collateral consequence. This functional difference therefore entails a proposal that seeks to assimilate collateral consequence with the broad category of ‘disqualifications’ in order to distinguish it from punishment.<sup>14</sup>

In developing this functional scheme, von Hirsch and Wasik sustain that disqualifications and punishment should be clearly distinguished because they correspond to two different legal *functions*, even though both normally follow a criminal conviction. Disqualification corresponds to a measure to deal with risk, and therefore operates prospectively. For example, it can be directed to avoid that a driver that has been demonstrated to be unable to respect traffic rule be allowed to drive. Punishment, in contrast, corresponds to a measure for expressing censure or condemnation of criminal conduct, and therefore operates retrospectively.<sup>15</sup> For example, it is directed to express to the driver that killing a pedestrian when speeding was wrong. While disqualifications are not subject to the stricter restrictions of criminal law, they cannot, on the other hand, be exempt from every rational control, and must be the subject matter of restrictions on purpose, duration and scope.<sup>16</sup>

Understanding disqualifications as risk-oriented measures leads to the formulation of a series of restrictions on their use. Firstly, they require a specified vulnerable

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judicial decision or mention and flows automatically from the conviction is more likely to be considered a ‘collateral’ consequence (See Demleitner, 2009:82. See also Ispahani, 2009:31). Though this structural criterion can be relevant for some legal aspects, and can even settle the debate about the ‘collateral’ nature of CD, it evades the substantive discussion about whether CD is a punishment or not.

13. Feinberg, 1970:108-10.

14. See Itzkowitz & Oldak, 1973:729-30. See also López-Guerra, 2014a: 130-2.

15. See von Hirsch & Wasik, 1997:601.

16. See von Hirsch & Wasik, 1997:605.

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activity or occupation through which the risk can be expressed (e.g. driving a car). Secondly, they require the safeguarding of an interest from the alleged source of risk (e.g. the public).<sup>17</sup> In accordance with these features, disqualification should be determined by a prediction of the likelihood that the subject will commit an offence or produce some harm. However, for this purpose, disqualifications should not consider the current capacities of the subject to develop the activity correctly, but rather the expectation of future misconduct in the field of those activities. In these terms, an equilibrated regulation of disqualifications should involve a proportional relation between the restriction of the person's autonomy and the avoidance of risk.<sup>18</sup>

On the other hand, punishment expresses censure of an offender's past criminal conduct, and it is governed by other principles. Primary among these are the ideas of desert and the principle of proportionality. According to these ideas, only those who have been proved guilty of committing an offence can be punished, and the punishment "should be proportionate in its severity to the seriousness of the criminal conduct".<sup>19</sup> However, in contrast with disqualification, punishment is normally deemed necessary even in the absence of any risk of a future offence or harm. This description of the aim of the punishment, it must be noticed, coincides with a retributive account of punishment that it is just one of its accepted functions. On that basis, prospective risk and retrospective condemnation are the principles that govern the application of disqualifications and punishments, respectively.<sup>20</sup>

This scheme not only allows classification of the consequences of criminal conviction in terms of disqualification and punishment, but it also allows the identification of those consequences that do not perform any of these functions. Demonstrating the critical dimension of the scheme, it allows for rational scrutiny to be applied to

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17. They work in the same logic than capacity rules affecting children. See above *Chapter 4*, Section III.

18. See von Hirsch & Wasik, 1997:606-11.

19. von Hirsch & Ashworth, 1992:182.

20. See von Hirsch & Wasik, 1997:615-20.

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criminal regulation insofar as its indiscriminate use can lead to offenders being treated as second-class citizens. Therefore, when a consequence does not follow the parameters of culpability and proportionality, it cannot be catalogued as a punishment. On the other hand, when it cannot be linked with the prevention of future risk posed by a dangerous subject, it cannot be seen as a disqualification. What remains, according to von Hirsch and Wasik, is just the political aim of *degrading* certain subjects and activities, which is not covered by the reputed legitimising blanket of a rationalized criminal system.<sup>21</sup>

## **2 Incapacitation and social protection**

### **2.1 *Disenfranchisement as (criminal) incapacitation***

The idea that CD can work as an incapacitation measure was considered in the previous chapter.<sup>22</sup> On that occasion, however, incapacitation was understood not as a measure based on the risk of the commission of a criminal offence, but on the protection of elections from the influence of those who lack the necessary civic virtue to participate in them. Thus the distinction between ‘(electoral) incapacitation’ and ‘(criminal) incapacitation’ becomes salient. In addition to this previous understanding, incapacitation is usually regarded as one of the aims of punishment. According to this view, punishment works when it directly impedes the commission of new crimes by the offender.<sup>23</sup> It is based on a prediction of the offender’s likelihood of reoffending. In the functional scheme, however, incapacitation (or disqualification) is distinguished from punishment as a different kind of measure governed by other principles, oriented towards the prevention of future criminal offences.

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21. See von Hirsch & Wasik, 1997:619. See also Damaska, 1968a:349.

22. See above *Chapter 4*, Section II.

23. See Fletcher, 1998:31.



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Considered in these terms, the incapacitating potential of CD is probably very weak, having little impact on the prevention of new crimes. Its potential to produce general incapacitation (this is the capacity to prevent any kind of crime) is relatively narrow because it cannot prevent the commission of crimes other than electoral offences, unlike, for example, imprisonment, which has high incapacitating potential.<sup>24</sup> On the other hand, it is difficult to judge the preventative aspect of CD regarding electoral crimes. For that purpose, the effect of CD must be carefully distinguished from that of imprisonment where these overlap. Inmates cannot commit electoral crimes if the electoral process exists only outside of the prison. As would appear obvious, this is an effect of imprisonment and not of CD.

On the one hand, CD could have the effect of preventing electoral fraud inside the prison. However, neither empirical studies nor common sense reveals that prisoners are no more likely to commit electoral fraud or other electoral crimes than the rest of the population.<sup>25</sup> Those who commit electoral frauds are not normally sentenced for other kinds of crimes, because the rationale for electoral criminality is different from other forms of criminality. For example, somebody convicted for drug dealing is unlikely to be convicted for an electoral offence. The cost of maintaining the distance between former electoral offenders and the ballot box is high if this is achieved by excluding all inmates. In conclusion, when the ban affects all prisoners under this premise, it is evidently over-inclusive.<sup>26</sup> It also argued that the social control exercised in the prison environment is sufficient reason for arguing that the state's capacity for controlling electoral processes inside prisons must be sufficient to overcome the possibility of electoral fraud or other related offences.<sup>27</sup>

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24. See Reiman, 2005:9. See also Manza & Uggen, 2006:36.

25. See Note, 1989:1303. See also Ewald, 2002:1088-9; Manza & Ugger, 2006:13.

26. See *Richardson v Ramirez* (1973) minority vote [79]. See also Vile, 1981; Bennett, 2003: par. 19; Kleinig & Murtagh, 2005:227; Manza & Ugger, 2006:13.

27. See Easton, 2009:230. See also bellow *Chapter 3*, Section IV.2.4

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On the other hand, when CD affects ex-prisoners it is more likely to serve the purpose of preventing electoral fraud.<sup>28</sup> Yet, the scope for this argument is limited. There is a lack of rational connection between CD and the prevention of electoral fraud because the commission of electoral fraud does not generally require enfranchisement.<sup>29</sup> However, several distinctions can be traced here. Some electoral crimes might require that the criminal be a qualified voter (e.g. vote selling), whilst others do not (e.g. bribery). Thus, it might be justified to disenfranchise a person who has received repeated convictions for selling her vote, in order to impede her from selling it again.<sup>30</sup> Another problem for this approach is that of under-inclusiveness, given that sometimes, electoral offences are not considered as serious crimes and therefore CD is not imposed on electoral offenders.<sup>31</sup>

Accordingly, it is difficult to argue that CD can incapacitate offenders to commit any kind of crime, perhaps with the exception of vote selling.<sup>32</sup> It is time to turn to examine its punitive potential. The very fact that CD is the consequence of a criminal sentence, and that it is retrospectively oriented, may be an indicator of its punitive nature. Traditionally, the aims performed by punishment are classified in three categories: deterrence, rehabilitation and retribution. The first two functions are guided by the general purpose of social protection, whilst retribution is inspired by the pursuit of the abstract normative goal that offenders must receive their just deserts. In the functional scheme, however, deterrence and rehabilitation must be considered with incapacitation as preventive opposed therefore to punitive. These aspects of punishment are not retrospectively oriented but look to prevent the commission of new crimes, and as such cannot qualify as truly punitive. At most they

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28. See Bennett, 2003: par. 18.

29. See Manza & Uggen, 2006:36.

30. See López-Guerra, 2014a:115.

31. See Lardy, 2002:526. See also Note, 1989:1303; Kleinig & Murtagh, 2005:220.

32. Other conceptualizations of the incapacitation can be even more restrictive and be specifically directed at impeding the commission of the same kind of crime for which the sentence was imposed (in this case, electoral offences). This is an interesting point of view from which to evaluate CD when it is observed that some of the electoral offences do not necessarily incur this measure. See von Hirsch & Wasik, 1997:606; Demleitner, 2000:792-3.

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could serve as a collateral goal of the execution of the punishment (e.g. rehabilitation), or as a justification of the criminal system as a whole (e.g. deterrence).<sup>33</sup> The following exposition, however, does not seek to question theoretically the generally accepted aim and social functions of punishment but to analyse CD in the light of standardised versions of them.<sup>34</sup>

## **2.2 Deterrence**

The aim of deterrence has two aspects, general and special: “General deterrence is based on the prediction that punishing one criminal will influence others not to commit the same crime. Special deterrence means that the punished offender will be deterred from future offences after his release”.<sup>35</sup> The basic claim of deterrence is that prospective offenders are dissuaded from committing a crime based on the fear of the penalty whose imposition they risk. It is difficult to separate the negative preventive dimension of deterrence from the positive preventive dimension of punishment, such as moral education, social integration and reinforcement of the law. As it has been seen, these later aspects play a fundamental role in efforts to characterise CD as an adequate form of punishment, being frequently invoked by government and courts.<sup>36</sup>

The deterrent potential of CD depends upon how much importance offenders attach to the right to vote, so that they are dissuaded from committing crimes because of the fear of losing it. Moreover, deterrence requires that the subject know about the punishment, if this is expected to influence his conduct.<sup>37</sup> In this sense, the deterrent effect of CD would require its public imposition (unlike in the majority of cases

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33. Regarding hybrid sentencing, see von Hirsch & Ashworth, 1992:181-7, 241-53. See also von Hirsch, 1993: Ch. 6.

34. For an overview and discussion of these objectives, see von Hirsch & Ashworth, 1992.

35. Fletcher, 1998:31.

36. See below *Chapter 2*.

37. See *Sauvé*, dissenting vote [119-21]; *NICRO*, dissenting vote [116].

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observed in comparative law) and even in that case, the imperceptible physical effect of CD limits its deterrent potential.<sup>38</sup>

The deterrent function of CD is difficult to demonstrate. The basis of the deterrent logic resides in the assumption that it is possible to motivate prospectively a person's conduct. Besides the general empirical problems which complicate probing deterrence in general, it is difficult to imagine a case in which a potential offender would be dissuaded from committing a crime based on the *additional* punishment of CD. It is more engaging to think that, as a rational agent, the person would be already dissuaded by a severer and better-known punitive measure such as imprisonment.<sup>39</sup> This position is supported by empirical studies confirming the premises of a due scepticism regarding deterrence. Firstly, they have confirmed widespread public ignorance about the existence of CD, even extending to justice professionals including judges and criminal lawyers.<sup>40</sup> Secondly, studies have shown that many offenders are not dissuaded from committing a crime by the punishment of imprisonment but are usually more importantly influenced by situational factors.<sup>41</sup> Thirdly, on a personal level, offenders tend to value other things considerably more than the political rights they might lose.<sup>42</sup> If all this is true, it is hard to sustain that adding CD to their primary punishment could avoid the commission of crimes.<sup>43</sup> This evidence shows that deterrence does not work for CD.

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38. See Demleitner, 2000:788. See also Cholbi, 2002:557; Hill & Koch, 2011:224.

39. See Itzkowitz & Oldak, 1973:734-9. See also Tims, 1975:157; Note, 1989:1303; Ewald, 2002:1106; Bennett, 2003: par. 20, 33-5; Brenner & Caste, 2003:233; Reiman, 2005:9; Manza & Ugger, 2006:36; Easton, 2006:450; Levine, 2009:220-1.

40. See Manza & Ugger, 2006:36. See also Easton, 2009:229-30.

41. See von Hirsch & Ashworth, 1992:57.

42. See e.g. Joint Committee, 2013:40.

43. See Cholbi, 2002:557-8.

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### 2.3 *Rehabilitation and reintegration*

The other function of punishment directed to social protection is rehabilitation. It consists of a therapeutic interpretation of the punishment, which treats offenders as ‘patients’ and therefore leads to the cure or change of their criminal tendencies.<sup>44</sup> Its expected outcome is the prevention of future offences on the part of rehabilitated offenders, and therefore it is not primarily concerned with the cure of the criminal, who is meant to be separated from the community if rehabilitation is not achieved.<sup>45</sup> The modern terminology has shifted to the language of reintegration, due to the ethical problems that are imbricated with the rehabilitative ideal, such as the need to limit permissible state actions and the disrespect that its assumptions imply towards the person of the offender.<sup>46</sup> In the new paradigm, the emphasis is placed less on changing the offender’s personality than on enhancing his ability to function normally in society.<sup>47</sup>

In this way, as a rehabilitative or re-integrative measure CD may play a role in transforming offenders into law-abiding citizens. Conceiving of re-enfranchisement as a reward could motivate the good behaviour of the offenders, promoting “reintegration by making salient the rights and responsibilities of citizenship”.<sup>48</sup> This account of re-integrative punishment would be compatible with the idea that offenders are disenfranchised for their lack of civic virtue.<sup>49</sup> This potential outcome is foregone or hindered if CD continues for a long time or a lifetime after release, or where the process of re-enfranchisement is too difficult or complicated.<sup>50</sup> In fact, a permanent or excessive length of CD is irreconcilable with any rehabilitative goal,

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44. See Fletcher, 1998:31.

45. See von Hirsch & Ashworth, 1992:1.

46. See von Hirsch & Ashworth, 1992:3.

47. See van Zyl Smit & Snacken, 2009:83.

48. Sigler, 2013:18-9.

49. See above *Chapter 4*, Section II.

50. See Manza & Ugger, 2006:37. See also Levine, 2009:223.

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and it is more likely that it stigmatizes offenders.<sup>51</sup> Thus, the rehabilitation function may only operate where the restoration of rights quickly or automatically follows release.<sup>52</sup>

However, it can also be argued that CD is incompatible with the re-educational commitment of rehabilitative theories. The stigmatisation and degradation that CD involves cannot contribute to these rehabilitative aims. This was the view of the Canadian Supreme Court in *Sauvé* when affirmed that the attempt to send an ‘educative message’ by disenfranchising offenders is a “bad pedagogy” [30] and that CD implies “loosing and important means of teaching them democratic values and social responsibility” [38]. The empirical evidence available indicates in that direction: “for a significant number of ex-offender the loss of voting rights poses an obstacle to successful reintegration”,<sup>53</sup> even affecting the wider community to which those disenfranchised belong.<sup>54</sup>

By contrast, inclusive and participative rehabilitative strategies may generate the desired awareness about the importance of political participation, respect for the law and the value of a communal life. Letting offenders vote could contribute to building a sense of membership towards the community and even contribute to positively transforming ‘criminal identities’.<sup>55</sup> Going further, from the standpoint of a rehabilitative ideal, it would be more reasonable to encourage inmates to participate in election,<sup>56</sup> and even to impose compulsory voting for inmates, rather than

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51. See Demleitner, 2000:775, 785-6.

52. See Demleitner, 2009:101.

53. Miller & Spillane, 2012:402. See also the party interveners in *Hirst* [53]. Hamilton-Smith & Vogel (2001) demonstrate the connection between CD and recidivism. See also the inconclusive data analysis on Manza & Uggen, 2006:124-135.

54. See Bowers & Preuhs, 2009.

55. See Manza & Uggen, 2006: Ch. 6. See also Itzkowitz & Oldak, 1973:732; Tims, 1975:156; Cholbi, 2002:558-9; Bennett, 2003: par. 43-5; Kleinig & Murtagh, 2005:229-30; Reiman, 2005:9, 13-4; Joint Committee, 2013:41-2. See also the party interveners [54] and concurrent opinion of Judge Caflich [5] in *Hirst*.

56. See Demleitner, 2009:94. See also Behan, 2014: Ch. 7.

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excluding them from it. This could signal a more effective and coherent method of challenging deviant behaviours and identities.<sup>57</sup>

## **II DISENFRANCHISEMENT AS PUNISHMENT**

The social function of punishment associated with deterrence, rehabilitation and incapacitation depends heavily on the satisfaction of a protective goal. It has been seen how, independently of empirical demonstration, these functions are poor candidates for explaining CD. The success of retribution, in contrast, does not depend on the empirical verification of such a goal but on an adequate configuration of the legal framework for a retrospective punitive reaction. However, retribution generally faces other kind of problems, importantly among them, the problem of explaining why a form of punishment is adequate in relation to a particular offence. This section examines how the retributive theory of punishment can be applied to CD, ultimately presenting a conception of retributive CD that explains why it would be an admissible and adequate form of punishment.

### **1 Disenfranchisement as a retributive punishment**

It was mentioned that, according to the functional scheme, punishment corresponds to a measure for expressing condemnation of a criminal conduct which occurred in the past. This corresponds to great extent to the idea of retribution. In contrast with deterrence and rehabilitation, retribution is commonly characterised by its purely abstract justification and by its unnecessary empirical proof. It also marked by its retrospective orientation. The main demand of retributive punishment, and what ensures its popularity in current times, is that the offender be treated as an

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57. See Ewald, 2002:1110-1. See also Brenner & Caste, 2003:232; Manza & Ugger, 2006:37. See, critically, Ramsay (2013b), who argues that use enfranchisement as a rehabilitative tool is transform the vote (a political right) into a social right, and the value of self-determination is reduced to a mere end of policing (424, 430-1).

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autonomous moral agent. This is achieved by setting rational limitations on the punitive power of the state. First, the punishment must be imposed and may only be imposed upon those found guilty of the commission of a crime. Second, the relation between the *quantum* of the punishment and the seriousness of the crime must be proportional.<sup>58</sup> A retributive punishment is not necessarily incompatible with the other preventive goals, such as deterrence and rehabilitation; nonetheless, these notions play secondary parts in the scheme governed by the logic of desert.<sup>59</sup>

Disenfranchising those who have committed a criminal offence as a punishment does not present a problem of empirical proof because there is nothing to be demonstrated. If causing the offender harm is justified, and this harm is expressing condemnation, then CD seems perfectly retributive. The fact that offenders do not value the right to vote, or at least not to the same extent as other rights, does not constitute an objection to the punitive potential of CD.<sup>60</sup> The retributive dimension of a measure does not depend on subjective appreciations, it is reasonable that offenders are more concerned about “getting decent housing or a job [...] than they are about the vote”,<sup>61</sup> but rather the fact that a fundamental right is limited, suspended or removed from a subject following a criminal conviction and, when basic “political rights are denied, proof of additional harm is not required”.<sup>62</sup>

The more common and serious criticism that affects CD is not related with its retributive performance but with the *lack of proportionality* between the nature and seriousness of the crime and the form and *quantum* of the punishment. However, it is not clear what the critics mean when, for example, they highlight that “[disenfranchisement] is hard to justify as it not clearly linked to desert, to the degree

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58. See von Hirsch & Ashworth, 1992:181.

59. See von Hirsch & Ashworth, 1992:182.

60. See Joint Committee, 2013:40. See also Demleitner, 2009:94.

61. Lacey, 2013b:107.

62. *Sauvé* [59].



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of harm caused, the seriousness of the offence, or the culpability of the offender”.<sup>63</sup> This may be true in some cases but it does not affect CD conceptually and generally.

The clearest case of a disproportionate CD is when it is imposed permanently or continues affecting subjects even after they have served their prison sentences.<sup>64</sup> In such cases, the lack of proportionality is evidenced by contrast to the proportionality of imprisonment. If imprisonment, generally considered a more serious punishment, is imposed for a limited amount of time, proportionally to the seriousness of the crime, CD must also follow this limitation. The case of permanent CD, by showing that it may not be governed by proportionality, becomes difficult to explain, especially when CD is conceived of as a form of punishment.<sup>65</sup> In fact, the opposite seem to be the case; CD can be seen a diagnosis of the need for a measure of permanent exclusion: “these sanctions are justified because offenders cannot be fully rehabilitated and therefore can never recapture their moral standing in the community”.<sup>66</sup> The institutional configuration of permanent CD tends to be better explained by degrading and stigmatizing purposes.<sup>67</sup>

When the ban only affects prisoners during the time they are serving their prison sentences, the question of proportionality seems to be satisfied by linking the length of CD to the length of imprisonment.<sup>68</sup> Inasmuch as prison sentences are ‘proportional’ to the seriousness of the offence and some other characteristics of the offenders, considering any other factor appears simply arbitrary. Nevertheless, its applicability to all classes of crimes has raised criticism anyway. Three issues have been particularly problematic in the justification of CD as a punishment: (1) the lack of a *material connection* between the right suspended and the offence committed (e.g.

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63. Easton, 2009:229.

64. See Fletcher, 1999:1896. See also Ewald, 2002:1103; Schall, 2006:75.

65. See Fletcher, 1999:1896. See also Bennett, 2003: par 30-2; Kleinig & Murtagh, 2005:221; Levine, 2009:220.

66. Demleitner, 2009:82.

67. See below *Chapter 6*.

68. See Reiman, 2005:9. See also Schall, 2006:75.

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whether electoral fraud or drug trafficking); (2) the disregard for the *seriousness of the crime* (e.g. whether thieving or mass murder); and (3) the disregard for the *length of incarceration* of the offender (e.g. whether somebody is incarcerated for 10 days or for 10 years). These aspects reproduce, to some extent, the criticism highlighted by the “general, automatic and indiscriminate” nature of British legislation under the *Hirst* test.<sup>69</sup>

### 1.1 *Material connection*

The first concern is not related with proportionality but with the *material connection* between the crime and the punishment. Sometimes this argument is sustained against the retributive nature of CD. The imposition of CD in response to crimes with electoral content (fraud), or even with relation to the democratic process (abuse of office), can be reasonable, according to some critics.<sup>70</sup> However, its indiscriminate application to all kinds of offences dispenses with any attempt to link it to the content of the crime (‘to *fit* the crime’), and only affirms an additional harm for the offenders.<sup>71</sup> The number of declared critics of CD ready to concede that electoral offenders are an exception to the claim of criminals’ enfranchisement is considerably high, but their position is never articulated in unambiguous terms.<sup>72</sup> For example, the minority vote in *Hirst* articulates the following argument:

“It is perfectly conceivable, for example, that a person who has been convicted of electoral fraud [...] should be deprived for a time of his or her rights to vote and to stand for election. The reason for this is that there exists a logical and perhaps even a natural connection between the impugned act and the aim of the penalty (which, though ancillary, is important) that serves as punishment for such acts and as a deterrent to others. The same does not hold true [...] for *any* offence that leads to a prison sentence” [3].

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69. See above *Chapter 2*, Section I.1.

70. See Cholbi, 2002:546. See also Bennett, 2003: par 32; López-Guerra, 2014a:116.

71. See Demleitner, 2000:791. See also Brenner & Caste, 2003:235; Levine, 2009:217-8.

72. See *Hirst* [71]. See also Beckman, 2009:130-1.

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The answer to this alleged problem must underline the fact that this sense of material correspondence is not necessarily related to a retributive theory of punishment. Retribution does not necessarily mean *lex talionis*,<sup>73</sup> but it may also adopt the form of ‘cardinal proportionality’, meaning that “the overall levels of the penalty scale be kept in some reasonable relation to the gravity of the offending behaviours”.<sup>74</sup> This is evident when it is observed that crimes such as robbery or rape are typically punished by imprisonment. Against our intuitions, imprisonment, according to such a claim, would be called upon to punish only those crimes against liberty, such as kidnapping. The absence of a material connection therefore cannot be an argument against the retributive use of CD. It must be noted, nonetheless, that the fact that CD is not an inadequate punishment does not imply its necessary adequacy. Additional reasons must be given for that. This argument cannot be used either to justify, without additional reasons, a targeted ban affecting only those who have committed electoral or political crimes. Reasons of this kind are explored in following pages under the idea of expressive CD.

## 1.2 *Seriousness*

The second concern of the critics of CD is its application regardless of the seriousness of the crime. The claim that the application of CD must distinguish between serious and minor offenders is explicit and central in *Hirst* and *Scoppola*, as conclusion of a proportionality test, and *Roach* embraces it as very purpose of CD, conceptualised in terms of punishing serious offenders. It is also implicitly recognised in *NICRO* [67] and it received significant attention in the dissenting vote of *Sauvé* [119].<sup>75</sup>

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73. See e.g. Waldron, 1992.

74. von Hirsch & Ashworth, 1992:182-3. See also Cholbi, 2002:544.

75. See below *Chapter 2*, Section III.1.

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This argument seems to be the counterpart of the idea that the right to vote is fundamental to the democratic system, and therefore that CD should be selective and intended to affect a narrow group of serious offenders.<sup>76</sup> The conclusion of this argument is that a blanket-ban disenfranchising all those in prison is over-inclusive. A murderer, a rapist and a terrorist will be deprived of their right to vote in exactly the same way as someone who has committed a minor offence, such as driving under the influence of alcohol or a petty theft.<sup>77</sup>

However, why the seriousness of the offence must be a requirement for the application of retributive CD is not clearly justified. It could be that a distinction can be made between those crimes that ‘break the civil contract’,<sup>78</sup> understanding for these “a set of rules without which a democratic political order would not be possible”.<sup>79</sup> In that scenario, one can honestly ask why people that have not committed such crimes are in prison, but that would not answer the question about how, under current conditions, it can be found a difference between a minor and a serious crime.

The Court highlighted this cavil in *Sauvé*. First, it argued that any limit drawn between ‘minor’ and ‘serious’ offences is arbitrary, and second, it observed the lack of a “correlation between the distinction [between minor and serious] and the entitlement to vote” [55].<sup>80</sup> Small offences deserve punishment and they are violations of the law to the same extent as serious offences and they both are indeed

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76. Cholbi develops this argument but, strangely, concludes that given the fundamental nature of the right to vote as an expression of self-determination retribution cannot validate CD (2002:548-50).

77. This seems to be one of the main concerns of the debate in the US where CD applies to a significantly number of minor offences. See Manza & Ugger, 2006:8.

78. That is the idea presented by concurring opinion of judge Caflisch in *Hirst*, who argues that CD must be restricted to major crimes because [i]t cannot simply be assumed that whoever serves a sentence has breached the social contract” [7.b]. See also *Sauvé* [54].

79. Ramsay, 2013b:424.

79. Ramsay, 2013b:424.

80. See also Lippke, 2001:563; Plaxton & Lardy, 2010:134; Ramsay 2013a:6; Hugh & Roberts, 2013.

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punished proportionally. Why CD may only apply to serious offences? The distinction is deeply guided by feeling and fails to reflect the demand for rationalization of punishment. The conclusion of the Court is that “[t]he only real answer the government provides to the question ‘why two years?’ is because it affects a smaller class than would a blanket disenfranchisement” [55].<sup>81</sup>

Affirming that there is no rational distinction between minor and serious crimes is not necessarily an argument for general enfranchisement, as was concluded in *Sauvé*. It can help also to support a blanket ban. The best example of this line is the argument of the UK Government in *Hirst*. It was argued, first, that given that a “line must be drawn somewhere” [52], the Parliament is the better positioned to do so in a democracy. Second, that imprisonment is the last resource a society has for dealing with crime, which should be limited to those who have committed the most serious offences;<sup>82</sup> those whose offences are not punished by a prison sentence have already been excluded from the category of the offenders that must be disenfranchised.<sup>83</sup>

Those who defend a targeted ban applied only to those most serious offenders serving prison sentences have not explained how that line can be rationally drawn. The criticism against *Hirst* and *Scoppola* of the minority vote in *Chester and McGeoch* is very clear in this regard:

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81. The court noticed the political nature of the compromise solution that the government was seeking, and openly refused to engage with it. *Chapter 7* explores this issue further, suggesting that some of the sentences that have followed CD cases have been the result of this kind of process of political negotiation. See also Easton, 2006:452; Schall, 2006: 80; Orr & Williams, 2009:133.

82. See Bennett, 2012:5. See also, more generally, Husak, 2004; van Zyl Smit & Snaken, 2009:86-97.

83. See e.g. Ramsay, 2013b:423. However, as already noticed in *Hirst* [77] (and empathised in the concurring opinion of judges Tulkens and Zagrebelsky) there is a factor of arbitrariness in substituting seriousness with imprisonment for the application of CD. The case of the suspended sentences or parole is paradigmatic; it does not attribute CD based solely on desert but on other social elements as well. The arbitrariness operates by considering the offender’s personal characteristics (Davison, 2004:11). Examples of this include the possibility for some offenders to make financial reparations for the offence, or “the support structures that an offender has around him or her, and whether these permit a less restrictive sentencing outcome than imprisonment” (Geddis, 2011:449). See also Munn, 2011:225.

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“[ECtHR] has arrived at a very curious position. [...] Wherever the threshold for imprisonment is placed, it seems to have been their view that there must always be some offences which are serious enough to warrant imprisonment but not serious enough to warrant disenfranchisement. Yet the basis of this view is nowhere articulated” [135].<sup>84</sup>

### **1.3 Duration of incarceration**

Finally, in what appears to be the more reasoned criticism, it is sustained that the problem of the imposition of CD stems from a failure to take into account the length and the moment of the incarceration. This factor is extraordinarily relevant because, unlike for example liberty, the right to vote is only exercised during the days of the elections and therefore the punishment is only experienced if the offender is imprisoned during that day. It is perfectly possible that, as a result, an offender sentenced to 4 years, legally disenfranchised during that time, does not experience exclusion from the franchise because no elections occur during the time of the imprisonment. On the other hand, somebody sentenced to one day of prison might be deprived of the possibility to participate in the electoral process if the election happens to fall on that day.<sup>85</sup> This element produces “very strange results”,<sup>86</sup> and the problem that “whether (and how often) a person is actually disenfranchised is dependent on when they serve their sentence”, meaning that CD is not effectively dependent on the length of the imprisonment or the seriousness of the crime.<sup>87</sup>

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84. It continue: “It might perhaps have been justified by a careful examination of the principles of sentencing in the United Kingdom, with a view to demonstrating that they involve the imprisonment of some categories of people for offences so trivial that one could not rationally suppose them to warrant disenfranchisement. That would be an indictment not just of the principle of disenfranchisement but of the sentencing principles themselves. However, no such exercise appears to have been carried out” [135].

85. See Orr, 1998:81. See also Easton, 2006:450; Lacey, 2013a.

86. *Chan Kin Sum* [122].

87. Munn, 2011:225.

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To overcome this problem of arbitrariness and ensure that “[c]riminals sentenced to terms of the same length ought to be subjected to the same exclusion from voting”,<sup>88</sup> the imposition of CD should consider the electoral terms. For example, a proposal to disenfranchise only those serving sentences of the same extension as the electoral term, and independently of the moment in which they start to serve the sentence, points in that direction. The proportionality of CD would be determined in relation to the elections that the offender has missed and not in relation to the time served in prison.<sup>89</sup> Other alternatives in this direction would include the complete autonomy of CD from imprisonment. Its direct imposition as an independent punishment would allow targeting precisely the elections in which an offender ought to be impeded from voting.

Some conclusions can be drawn from this analysis. Recognizing the immanent limitations of a retributive punishment, CD can be defended as a proportionate punitive response to those who have committed a criminal offence. The institutional conditions that it must assume are threefold. First, it cannot be applied permanently or for extraordinarily long periods after the release of the offender. Second, though irrelevant if CD applies only to serious crimes, it must be applied with reference to cardinal proportionality; that is, it must affect more seriously those who have committed more serious crimes and vice versa. Finally, it cannot depend upon the arbitrary relation between the day of the conviction and the day of the election, therefore, the unit for assessing the proportionality of the response must be the number of elections missed rather than a given period. Additionally, and echoing the discussion about the differences between punishment and collateral consequences of

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88. Munn, 2011:227.

89. Munn, 2011:226-229.

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criminal conviction, it can be sustained that CD must be imposed in the judicial sentence.<sup>90</sup>

Respecting these terms, CD can be regarded as a proportional punishment. A question that remains open, however, is whether CD can be an adequate *form* of punishment. Retributive theory is considerably unresponsive to the question of the form that punishment assume, and normally give for granted that this is the form of imprisonment. This presents difficulties at the time of assessing other forms of punishment. This is important because CD usually assume the role of an ‘additional’ punishment that is added to imprisonment. The question of why we need this additional punishment is not trivial.

## **2 Expressive disenfranchisement as democratic punishment**

Assuming that the retributive logic neither requires nor prohibits CD as a form of punishment, some theorists have offered a defence of CD as an acceptable form of punishment. They have argued that CD is desirable because perform an exceptional expressive task of condemnation against serious offences in a democratic society. This notion of *expressive CD* is especially concerned to avoid the criticisms related with degradation and exclusion that are directed against it.

### **2.1 Disenfranchisement and condemnation**

A proposal in this direction can be found in the work of Jean Hampton, who argues that to exclude certain offenders from the franchise is to *express* a commitment to democratic values without degrading the offenders.<sup>91</sup> Hampton develops a conception

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90. See Demleitner, 2000:795-804. The dissenting opinion in *Scoppola* point out that judicial imposition is not required necessarily by consideration of proportionality but the claimed nature of CD as the exercise of a punitive reaction [25].

91. See Hampton, 1998. See a criticism of her proposal in Rothchild, 2011:62-4.



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of punishment that integrates retribution and other expressive aspects, following closely Joel Feinberg's idea that punishment can be distinguished from other sanctions (penalties) as "a device for the *expression* of attitudes of resentment and indignation, and of judgments of disapproval and reprobation".<sup>92</sup> That expressive function of public condemnation is essential to the institution that we know as punishment.<sup>93</sup>

Hampton is aware of the democratic problem of CD. This is probably why she starts her defence of CD by affirming the internal link between retribution and equality. An offender attacks the idea of equality by damaging the "interests of another individual to further his own purposes [...] saying to that individual 'I am up here, and you are down there; so I can use you for my purposes'".<sup>94</sup> Criminal offences are unjust actions because they diminish the value of their victims. Punishment, in his account, is demanded as a way to defend the equal value and worth of the victim and deny the offender's claim. The proportionality of the punishment, in this context, expresses the equal value of the victim that has been contested by the offence. But this goal cannot be pursued or accomplished by degrading the offender, with a "treatment that represents him as inferior, or less than fully human".<sup>95</sup> It is important, for these purposes, to maintain that the punishment's condemnation not be directed at the offender himself, but only to his conduct; that is what distinguishes punishment from revenge.<sup>96</sup> If CD is applied by targeting the offenders rather than their conduct, Hampton claims, it "would be a way of condemning them as outlaws – people who are outside the state and the community as a whole".<sup>97</sup> In contrast, Hampton claims

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92. Feinberg, 1970:98 (emphasis added).

93. See Hampton, 1992:17-23. This function may help or hinder other aims (e.g. deterrence, rehabilitation) but this need not necessarily be the case. Hampton generally is committed to the idea that punishment captures two particular functions: the expressive function of condemnation and the preventive function of moral education.

94. Hampton, 1998:38-9.

95. Hampton, 1998:39.

96. See generally Hampton, 1992. cf Whitman, 2003:21.

97. Hampton, 1998:39. She continues, in a way that could be read as a response to the idea of criminals' bad character as follows: "I regard this way of understanding prisoner

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that CD can be respectful to the equal status of the offenders.<sup>98</sup> To successfully do that, it must serve the function of *kolasis*, consistent with putting the offender in his place rather than degrading him.<sup>99</sup>

Her argument develops arguing the relevance of the material connection between the offence and the punishment, on the one hand, by acknowledging the democratic importance of the right to vote, and, on the other hand, insisting on the need to identify certain crimes that are “destructive of the values and functioning of a democratic society”.<sup>100</sup> Crimes against the state and democratic institutions, crimes of racial hatred and crimes against women are candidates for this category. CD is an adequate response to these kinds of crimes in ways that are not covered by imprisonment, she claims, because it expresses condemnation of the *political dimension of the act*, which undermines the values which must be protected. Symbolically, disenfranchising those offenders, and only them, *expresses* the message that whoever does not embrace or show contempt for the values of democratic equality cannot take part in the important decisions of the community.<sup>101</sup> It produces a morally educative effect: on the one hand, by *linking* “the exercise of freedom with responsibility”, and on the other hand, *affirming* the values that “make our society possible”.<sup>102</sup> This expressive connection between the offence and the form of

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disenfranchisement as abusive, degrading, and unjust: abusive because of its message of hate, degrading because of what is said to be his ‘bad’ nature (so that its message makes it akin to banishment) and unjust because of its unresponsiveness to possible systemic forces that can provoke criminal conduct” (36). See also Sigler, 2013:16-7 and above *Chapter 4* Section II.

98. cf Lippke, 2001:564.

99. See Whitman, 2003:21-2.

100. Hampton, 1998:41. See also Lippke, 2001:562; Lavi, 2011:800.

101. In the words of Hampton: “What political message is sent if we let him vote? I would submit a very bad one is sent: i.e., that despite the fact that he tried to destroy our government and showed contempt for the values animating it, we will nonetheless let him participate in running it. This is no way to stand up for those values, or to support a democratic form of government” (1998:41). See also López-Guerra, 2014a:114. Beckman initially caricatures, unfairly, the position of Hampton as one which renders CD dependent upon the people’s beliefs regarding the moral corruptness of offenders (2009:137), while on the following page he recognizes the expressive dimension of CD in Hampton’s argument (138).

102. Hampton, 1998:43. The above reveals certain similarities between this idea and the argument of disruptive voting, analysed above in *Chapter 4*, Section I. Both of them embrace CD as a

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punishment constitute a reason for demanding a material connection that was dismissed above.

The ECtHR, in *Hirst*, echoed this theory sustaining that democratic society can “protect itself against activities intended to destroy the rights or freedoms” using for this effects “restrictions on electoral rights [...] imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations” [71]. The dissidence in *Sauvé* adopts this view, and explicitly cites Hampton when affirms:

“Incarceration alone signals a denunciation of the offender’s anti-societal behaviour and indicates society’s hope for rehabilitation through separation from the community. Incarceration by itself, however, leaves those convicted of serious crimes free to exercise all the levers of electoral power open to all law-abiding citizens. This maintains a political parity between those convicted of society’s worst crimes and their victims. Disqualification from voting, however, signals a denunciation of the criminal’s anti-societal behaviour *and* sends the message that those people convicted of causing the worst forms of indignity to others will be deprived of one aspect of the political equality of citizens — the right to vote. It can be said that, in this context, “kindness toward the criminal can be an act of cruelty toward his victims, and the larger community” [181].<sup>103</sup>

## 2.2 *Disenfranchisement and accountability*

Hampton’s argument affirms the pertinence of CD in relation to crimes against democratic values but she does not endorse it for all kinds of offences. However, as other commenters have highlighted, the commission of every offence expresses contempt for the results of the democratic process and as such, every crime,

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form of defence of the values of a liberal and democratic community. The difference resides in the fact that, whilst disruptive voting understands CD as a way of disempowering the offender, expressive punishment understands it as a kind of condemnation of the crime, which is communicated both to the offender and to the general public.

103. See also *Sauvé* [119].

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independently of its anti-democratic *material* identity, is an offence against the democratic values.<sup>104</sup> This would be the case especially in the case of “those offenders whose sufficiently long and diverse histories of criminal conviction show that they are generally unwilling to comply with the laws enacted by democratic governments”.<sup>105</sup> In this regard, the proposal of Christopher Bennett shares some of the Hampton’s premises, while remaining different insofar as it extends the applicability of CD to all kinds of offences.

Bennett sustains – along with others such as Duff – that punishing the offender is a way to hold a person accountable for his offence.<sup>106</sup> Accountability, however, only makes sense in the context of a community and, simultaneously, for offenders to be treated as members of the community, they must be indeed held accountable for their actions. Bennett suggests that accountability counts as part of what it means to form part of the community, to the same extent as does the right to take part in its decisions (for instance, by voting), concluding, in that direction, that “only someone who is ‘in’ can be held to account”.<sup>107</sup> Punishment, generally speaking, has the effect of including the offender within the community rather than excluding him. This affirmation, however, can be predicated for any form of punishment, not just CD alone.

Bennett continues – in what is arguably the most questionable part of his argument – by sustaining that the suspension of voting rights is a good candidate for this accountability. This is so because “the symbol that we use to express condemnation must have some satisfying connection with the behaviour that symbolically separates us from wrongdoing”.<sup>108</sup> He then concludes that “[v]oting rights might be temporarily

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104. See e.g. Lippke, 2001:546-7.

105. Lippke, 2001:566.

106. See e.g. Duff, 2003.

107. Bennett, 2012:6. His theory of punishment is fully developed in Bennett, 2008.

108. Bennett, 2012:7. Similarly, Sigler sustains that CD “is uniquely suited to affirm the values of liberal democratic citizenship. Precisely because the right to vote is a powerful symbol of the

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removed to express the seriousness of wrongdoing without citizenship being denied”.<sup>109</sup> The crime exposes a breach in the relationship between the offender and the community and the meaningful way to reaffirm such a relationship is to deprive the offender of the vote, owing to its meaningful connection with this membership.

Bennett, however, holds that the seriousness of the offence must be a trigger factor to limit the application of CD under considerations of proportionality of the punishment. As the right to vote is a very important right, CD “should be reserved for those most serious crimes that are in danger of undermining a person’s status as a continuing member of the polity”.<sup>110</sup> He seems to suggest that citizenship is maintained by the fact that the offender is communicatively included through the punishment, and this is even more the case with CD, which is reserved only for serious crimes.

It is interesting to note that somebody who sketches a similar conception of criminal law – holding that the authority to impose such punishment is grounded in membership to a normative community and being punishment as a form of accountability and responsibility for a crime – arrives at exactly the opposite conclusions in the case of CD. Unambiguously, Anthony Duff considers CD as a resort to ‘enemy criminal law’, a practice which, far from respecting and addressing citizens as members of the community.<sup>111</sup> To hold somebody to account, he continues with remarkable similarity to Bennett, aims to repair “our civic relationship with our fellow citizens: but it holds us to account precisely as citizens whose full membership of the polity is not in doubt – which is why the right to vote in prison is symbolically important”.<sup>112</sup>

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office of citizen, its denial forcefully expresses the political significance of a breach of civil trust” (2013:18).

109. Bennett, 2012:7.

110. Bennett, 2012:8.

111. Duff, 2011:14. See also Mañalich, 2011a: 135-8.

112. Duff, 2011:15.

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### 2.3 *Disenfranchisement as an expressive punishment*

The justification of CD as an adequate form of punishment is marked by its potential to express condemnation of the political dimension of the crime. In Hampton's case, it is also highlighted the strictly non-degrading character of CD. In the case of Bennett, CD is connected with the offenders' belonging to the community. The expressive advantage of CD in relation to other forms of punishment, such as imprisonment, is not however entirely clear.

The problem of justifying a *form* of punishment is, to a certain extent, similar to the general problem of the justification of 'hard treatment' in criminal law theory. Within the framework of a retributive theory of punishment, the selection of the form of punishment is not given by its potential to prevent the crime. In such a context, the demand for the infliction of suffering as the way in which condemnation for the crime becomes manifest can be called into question. If punishment is condemnation for a crime, the communication of the condemnatory sentence might render unnecessary the infliction of the suffering. This will be so, in any case, if it is assumed that 'hard treatment' is a necessary evil, which follows the fact that we have not developed a "less painful symbolic machinery" to express condemnation.<sup>113</sup>

The answers to this problem – why do we need to mistreat fellow citizens? – have produced an important debate. The social protection aims of punishment, in particular its deterrent effect, have been posited as an important answer to the question of why the expressive condemnatory act of the sentence must be followed by 'hard treatment'.<sup>114</sup> According to this reasoning, if it is clear that CD does not deter would-

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113. See Feinberg, 1970:114-6. This question is evidently alien to conceptions of degrading punishment, in which 'hard treatment' is authorised and even demanded by the offender's loss of moral standing. See e.g. Morris, 1991.

114. See von Hirsch, 1999:69-70. See generally Matravers, 1999.

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be offenders, or have any such consequence, how can the deprivation of the right to vote be justified? The answer must be found in the discussion above: it cannot.

However, on an alternative justification of ‘hard treatment’, the condemnatory expression *depends on* the infliction of suffering to be truly condemnatory. A neutral observation of the occurrence of the offence cannot express censure in itself. The imposition of suffering, in this perspective, performs the expression of condemnation, and limits the role of the sentence to being seen as a procedural step to set the punitive consequence that the convict must suffer as retribution.<sup>115</sup>

Hampton and Bennett seem to suggest that the expressive potential of CD is more potent than other forms of punishment, which may be considered, at least in these aspects, as deficient. A correct understanding of proportionality is essential here. The proportionality of a retributive punishment does not require the infliction of the same amount of suffering as that produced by the crime, but instead it requires a correspondence should be determined with “the condemnatory aspect of the punishment”.<sup>116</sup> This implies that “more serious crimes should receive stronger disapproval”, but not necessarily harsher forms of punishment.<sup>117</sup> CD, according to these premises, might be presented as an ideal form of expressive punishment. It presents a deficit of other punitive aspects, as manifested by the reduced amount of suffering that it inflicts on the offender, but this could be irrelevant for an expressive-oriented retributive theory of punishment. This reduced functionality in other dimensions, which makes maintaining imprisonment necessary, can be compensated

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115. See Mañalich, 2011b:171.

116. Feinberg, 1970:118.

117. Feinberg, 1970:118.

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for by its extraordinary performance in what is, after all, the central aspect of punishment; it offers a *surplus of expressiveness*.<sup>118</sup>

In that sense CD is not entirely independent of the punishment of imprisonment. The role of CD, under an expressive theory of retributive punishment might be that of *reinforcing* “the general moral signals communicated by the prisoner’s sanctions”.<sup>119</sup> The minority vote in *Sauvé*, perhaps present the argument is its more clear formulation:

“The commission of serious crimes gives rise to a temporary suspension of this nexus [between the offender and the community]: on the physical level, this is reflected in incarceration and the deprivation of a range of liberties normally exercised by citizens and, at the symbolic level, this is reflected in temporary disenfranchisement. The symbolic dimension is thus a further manifestation of community disapproval of the serious criminal conduct” [119].<sup>120</sup>

The conclusions of the report of *Joint Committee on the Draft Voting Eligibility (Prisoners) Bill*, appointed to discuss further the issue of CD in order to conduct pre-legislative scrutiny of the UK legislation, assume a similar position. Following the idea that the right to vote implies an exercise of power of the offender over the rest of the citizens,<sup>121</sup> the Committee affirmed that CD is a “symbolic act”<sup>122</sup> based in the “*intuitive* connection between exercising the vote and having [a minuscule] power

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118. See Bennett & Viehoff, 2013a. The government submission in *Chan Kin Sum* articulates this idea as follow: “Punishment consists of at least two constituent elements: (1) the censure or blaming element; and (2) the deprivation or hard treatment element. Disenfranchisement serves primarily the aim of censure, while physical imprisonment serves the aim of deprivation. Disenfranchisement is a form of disapprobation that conveys society’s disapproval of the offender’s criminal conduct” [84].

119. Manfredi, 2009:274. See also Manfredi, 1998:299.

120. See also *NICRO*, where the Court affirmed “[t]hat at the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens. Such a purpose would be legitimate and consistent with the provisions of section 3 of the Constitution” [57].

121. See Waldron, 2013b.

122. Joint Committee, 2013:44.



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over how society is governed”,<sup>123</sup> and that can be explained in the following terms: “if a member has grossly violated the basic rules, it would seem *self-evidently* appropriate to take away that member’s partial control of the affairs of the association”.<sup>124</sup>

Summing up, expressive CD depends on the potential of this form of punishment of expressing degrees of condemnation that are symbolically not available in the case of imprisonment. In a retributive framework that respect culpability and proportionality, CD works: (1) by reaffirming the value of the outcome of the democratic process that offenders have infringed; (2) by expressing the importance of the exercise of democratic rights that have been suspended; and (3) by expressing contempt for those who have denigrated the democratic process or its foundational principles. It cannot work, however, as an independent punishment because is difficultly seen as ‘hard treatment’. This may explain why CD is typically applied only to those offenders that are serving prison sentences and only to them.

### III THE LIMITS OF DEMOCRATIC PUNISHMENT

Expressive CD claims to be a democratic form of punishment. It envisions itself as protecting democratic values and respecting the public standing of offenders as equal members within the boundaries of the political community. This section critically examines that claim, suggesting that expressive CD is bad democratic symbolism but also that CD is incompatible with any conception of democratic criminal law.

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123. Joint Committee, 2013:42.

124. Joint Committee, 2013:43.

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## 1 Inclusion by exclusion and inclusion by inclusion

The core of the argument of expressive CD is that it condemns the offence but treat the offender with respect, without degrading or excluding them. The importance of this is that express our commitment with the democratic values that have been violated by the crime. However, it is unclear and difficult to explain how the political exclusion of the offenders embodied in CD communicates symbolically their inclusion or the respect that it is due to them, even if it is agreed that imprisonment do not express sufficient condemnation to the offence.<sup>125</sup> It is also difficult to understand how this form of punishment would honour the values of democracy.<sup>126</sup> This could well be based on the belief that there is a hidden or paradoxical symbolic link between exclusion and inclusion. However, thus far such a link has not been explained in a convincing manner. Moreover, CD lack of publicity and its absence in the courtroom make unlikely to think on it as an expressive punishment because without speaking and sending a message to the public and to the offender CD hardly can express anything.<sup>127</sup> In this light, for example, Heather Green sustains that CD “works as a punishment precisely because it imposes upon the prisoner a politically unequal status [...]. Society purchases [the] symbolism [associated to CD] at expense of its commitment to the principle of political equality”.<sup>128</sup>

But the problem of expressive CD is not only that do not achieve its goal, but that undermines seriously important democratic values. The Canadian Supreme Court was clear when sustained that

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125. See Easton, 2006:450.

126. See Beckman, 2009:138.

127. See Ewald, 2002:1117-9.

128. Lardy, 2002:528.

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“The government gets this connection [between “the legitimacy of the law and the obligation to obey the law” and “the right of every citizen to vote” [31]] exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The “educative message” that the government purports to send by disenfranchising inmates is both anti-democratic and internally *self-contradictory*. Denying a citizen the right to vote denies the basis of democratic legitimacy [...]” [Sauvé, 32 (emphasis added)].

CD as a bearer of a democratic message is self-contradictory. If an expressive theory of punishment claims democratic credentials, the enfranchisement of the offenders, rather than their exclusion, would be more natural as an affirmation of democratic values in general and the symbolic inclusion of the offender within the community in particular. This could be better understood as a democratic and inclusive sign by both the offender and the general community. It would also be a more resonant way to affirm democratic values as a symbolic form of opposition to antidemocratic forces, impulses and conducts. If CD is a symbol, “it is the wrong sort of symbol to legitimate in law. It is a symbol of rejection, not reconciliation; a symbol of difference, rather than communality; a symbol of domination instead of equality”.<sup>129</sup> Expressive CD just runs in the wrong direction

According to a more democratically intuitive understanding of expressive retributivism, the signal of inclusion of the offenders within the political community is performed by the maintenance of his political rights during the time he suffers the imposition of the punishment of prison. Symbolic political inclusion is achieved, in this way, not by actual political exclusion but by actual political inclusion. Duff is a committed supporter of this view:

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129. Note, 1989:1317.

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“The right to vote [...] is central to our identity as citizens [...]: the removal of that right [...] is a symbolically serious matter, as marking ones’ temporary or permanent exclusion from the rank of full citizen, and thus from full membership of the polity. The law [...] purports to protect us and to bind us as citizens; in a democracy, it presents itself as ‘our’ law – as the common law of a polity that speaks to its members not in the voice of a separate sovereign who demands their obedience, but in the voice of citizens who speak to themselves and to each other [...]. But when a citizen loses the right to vote, she loses her share in that voice: the law cannot now present itself, or address her, as the law of an ‘us’ to which she unqualifiedly belongs; it addresses her instead in the voice of a ‘we’ from whom she is at least temporarily excluded”.<sup>130</sup>

However, it must be emphasised that this is not just a symbolic problem. Sustaining that expressive CD is bad democratic symbolism is an argument against the use of CD as punishment. Disenfranchising offenders is bad criminal policy because does not achieve democratic expressive goals and does not deter, incapacitate or rehabilitate. It only may serve as a retributive punishment with no advantages over other forms of punishment. However, the fact that CD is bad democratic symbolism is relevant beyond affect its particular punitive performance. Not only because produces the effect of degrading, excluding and stigmatizing offenders, but because damage the legitimation of the imposition of the punishment as a form of democratic response to crime. As the Canadian Court put it, “[a] government that restricts the franchise to a select portion of citizens is a government that [...] erodes the basis of its right to convict and punish law-breakers” [*Sauvé*, 34]. CD denies the recognition of offenders as authors of the law. This constitutes a problem, since the legitimacy of the condemnation expressed in the punishment presupposes a recognition of the offender as a member of the political community, and to take part in the life of a democratic political community implies that one both be subject to law but also be author of the law. If the condemnation involved in the punishment’s imposition can only be justified retrospectively in relation to the deficit of loyalty to the democratically-produced law, then an exclusionary punitive practice as CD is shown to be

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130. Duff, 2005a:213. See also Mañalich, 2011a:127; Ziegler, 2011:208; *Sauvé* [38-40].

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incompatible with the inclusion manifested in condemnation,<sup>131</sup> and “obscure the exercise of power that punishment represents”.<sup>132</sup> What is at stake may well be portrayed as a decision of between whether to embrace the democratic criminal law or a ‘war on crime’.

The next two sections are focused in explain the problem that CD posits to a democratic conception of criminal law and punishment. The next chapter explores the idea of CD being a degrading and exclusionary practice and related it to the importance of the right to vote as a mechanism of recognition.<sup>133</sup>

## **2 Can punishment be democratic?**

The efforts to develop a democratic theory of criminal law and punishment are not easy to find. Normally criminal theorists focus on questions of under what circumstances the punishment must be imposed, but are less concerned with the question of who administers the power to do so and under which conditions that punitive power can be legitimate.<sup>134</sup> Two account of democratic punishment emphasises some of these dimensions. The first considers that democracy and democratic rights must be protected not only against crime but also importantly against a disproportionate use of the punitive power by the state. The seconds claim that for punishment to be democratic it must come from a community from which the punished is member.

Firstly, to answer the question concerning the legitimacy of punishment, Brettschneider proposes the use of Rawls’ contractualism.<sup>135</sup> In his conception of ‘democratic contractualism’, democratic rights include not just rights to participate in

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131. See Mañalich, 2011a:116.

132. Note, 1989:1316.

133. See below *Chapter 6*.

134. See de Greiff, 2002:373-5. See also Brettschneider, 2007b:175.

135. See Brettschneider, 2007b. See also Brettschneider, 2007a.

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the process of law-making, but also rights to limit state coercion.<sup>136</sup> In this context, he claims, to be legitimate, punishment must be acceptable to reasonable subjects acting under the principle of reciprocity. To be sure, he does not claim that an offender must factually accept the punishment that is imposed but that a punishment is legitimate when the offender “might reasonably accept [it] where she motivated to find universal agreement about how to balance her interests with the interest of others”.<sup>137</sup>

This idea, he holds, would rule out conceptions which suggest that offenders have no rights, as well as unreasonable retributivist accounts. On the contrary, under a contractarian framework, offenders have a right to be punished reasonably, a right only compatible with their permanence in the community of citizens, which would be a right of citizens as “addressees of the law”, in Brettschneider’s terms. This implies, for example, the prohibition of unnecessary violence against prisoners and measures that cannot be understood to be in the interests of society. Simultaneously, this idea would demand respect of all those rights sometimes superfluously affected by imprisonment, such as political free speech and, crucially, the right to vote.<sup>138</sup> This follows from the fact that reasonable subjects would join in condemning about the unnecessary limitation of these democratic rights.<sup>139</sup>

A second account that is important to mention is that of Anthony Duff, who has been committed to the enterprise of justifying a democratic kind of criminal law and punishment. His main concern is to explain how punishment can work as an inclusive response to crime.<sup>140</sup> Criminal law, it cannot be denied, is by definition an

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136. See Brettschneider, 2007a: Ch. 2.

137. Brettschneider, 2007b:179.

138. See Brettschneider, 2007b:187-90.

139. Despite its virtues, consisting in respect for the autonomy of those subjected to the punitive power of the state and the protection of their democratic rights, the specifically democratic aspect of the legitimacy of punishment in this account is developed only in its negative side, probably due to the contractualist methodology used. The main emphasis is upon the protection of the democratic rights of the offender, with little concern for the broader, positive democratic demands of criminal law.

140. See Duff, 2003:702-3.

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exclusionary practice.<sup>141</sup> It is not difficult, for example, to notice the dramatically exclusionary aspects of imprisonment. Imprisonment constitutes physical exclusion from normal life in the community, carrying the message that prisoners “do not belong in the ordinary community of citizens”.<sup>142</sup> Such a message is reinforced when prisoners lose – in addition to their liberty – the rights of political participation, in particular the right to vote. How can a punitive response be inclusive? How can we develop a way to fight the exclusionary tendencies of criminal law and construct a model of punishment that provides an inclusionary response to crime?<sup>143</sup>

Duff’s proposal, as mentioned above when compared with Bennett’s, conceives punishment as a form of accountability grounded in membership to a normative community. Offenders are called upon to answer for a breach of the law, “by a law that claims to be their law”.<sup>144</sup> The way in which this is achieved is by means of restricting punishment in accordance with a demanding set of inclusionary factors which go to make up somebody’s membership within the community (political, material, normative and linguistic). When punishment affects the offender by excluding him from any of these dimensions of community life, or by treating him in ways that are incompatible with this membership, the claims of the abolitionist school are persuasive: “punishment is unjustifiable, since it is inconsistent with true community”.<sup>145</sup> If the condition for the application of the punishment is therefore membership in the community and the subjection to the law is a fundamental democratic aspect of it:

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141. See Duff, 2011:77. See also Duff, 2003:705-7.

142. Duff, 2003:708.

143. See e.g. Duff, 2001:75-82.

144. Duff, 2001:75.

145. Duff, 2001:77.

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“this should not be subjection to a law that is imposed on us by another, separate power distinct from us: the law that binds us should be our law—a law to and by which we bind ourselves, not a law that is imposed on us by a sovereign; it should be in that sense a ‘common’ law”.<sup>146</sup>

This ‘common law’ must take everybody into consideration as addressees of the law, “whether offenders or not, as people who are protected as well as bound by its demands: the ‘we’ who are to be protected against crime, in whose name the wrongdoer is to be called to account, include the wrongdoer”.<sup>147</sup> Inclusion, therefore, is crucial, especially for the communicative dimension of punishment. Without inclusion, punishment cannot involve condemnation but becomes “a matter of mere control”.<sup>148</sup>

### **3 Democratic law and democratic punishment**

The two conceptions of criminal law reviewed show interesting connections between democracy and punishment. Brettschnider focuses on the protection of democratic rights against the punitive power of the state. Duff shows concern for the justification of criminal law and punishment. However, his account does not accord importance to democratic rights, instead adopting a conception of democracy centred on membership. Both present a theory of democratic punishment that is in open conflict with the practice of CD. In one case, because it affects democratic rights without justification constituting an arbitrary use of the punitive power; on the other case, because it undermines the inclusion required for the punishment to be legitimate in a democracy.

A third theory of democratic punishment is presented by Kindhäuser and Mañalich which following Habermas articulate a connection between the democratic production

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146. Duff, 2007:45.

147. Duff, 2008:7.

148. Duff, 2008:7.



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of the law and the legitimacy of the punishment. Punishment, they sustain, is only legitimate in a “constitutional democracy because only in such a context is it possible to understand the subject of the law whose intentional breach is considered a crime, simultaneously, as author of the norm; and only then is it possible to punish him for an objective deficit of normative loyalty”.<sup>149</sup> This is the basic premise of a theory of democratic criminal law and punishment according to a model of democracy in which the legitimacy of the law is based upon the public autonomy of citizens.<sup>150</sup>

In the context of a representative democracy, the importance of the right to vote, in this regard, is crucial. Karlan, summarise the argument in the following terms:

“the legitimacy of criminal punishment [...] depends on the legitimacy of political processes that produce and enforce criminal law which. The legitimacy of that process in turn depend on the ability of citizens to participate equally in choosing the officials who represent them in deciding what behaviour to outlaw, which individuals to prosecute and how to punish persons connected of a crime”.<sup>151</sup>

Criminal law and punishment, in order to be compatible with democracy, must satisfy certain conditions. These conditions, to be sure, are not substantially different from those which any democratic law must satisfy: as seen in a previous chapter, democratic criminal law must be neutral and be produced through a democratic process. Democratic *neutrality* implies that nobody can be punished for following the law, even when the law was followed for the wrong reasons. As mentioned before, the offender cannot be punished because his conduct was a moral wrong but may only be punished because he committed an offence described in a legal norm. In addition, criminal law must be the consequence of a process of democratic law-making in which the subjects of the law are granted participatory rights, therefore adopting the

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149. Kindhäuser & Mañalich, 2011:1 [translation of the author].

150. See above *Chapter 3*, Section I.

151. Karlan, 2004:1169. See also Manza & Ugger, 2006:7; Ziegler, 2012.

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role of citizens. In this role, a person may assume a critical position towards the legal norms and advocate for their modification or cancelation.<sup>152</sup>

### **3.1 Culpability as deficit of democratic loyalty**

The previously described requirements have fundamental implications for the notion of criminal culpability which require attention. Culpability, for a conception of law premised on the deliberative power of the person, does not imply the *positive* attribution of responsibility for a conduct to the person but is solely concerned with *negatively* determining the conditions under which such an attribution is to be ruled out. Typically, the conditions that exclude the culpability of someone's conduct are threefold. First, a lack of the cognitive capacity needed to understand the legal implications of one's actions (defences); second, a lack of knowledge of the law which transforms one's action into a crime (*error iuris* even when generally *ignorantia iuris nocet*), and third, a concurrence of circumstances which makes respect for the law an unendurable burden (excuses).<sup>153</sup>

The reasons for this negative construction of culpability are, firstly, the attribution of criminal responsibility is inserted into a legal system that is already based on a conception of deliberative persons. Rights and responsibilities are attributed *by default* due to the general *recognition* of persons' capacity to evaluate norms and actions critically. The abovementioned causes of the exclusion of culpability are cases in which such deliberative power is deficient or absent.<sup>154</sup> In contrast, when these causes are absent is that it can be concluded that the person could decide to act lawfully but have decided to act unlawfully.<sup>155</sup>

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152. See above *Chapter 3*, Section I.3.

153. See Günther, 2001:8-9. See also Kindhäuser, 2011b.

154. See Kindhäuser, 2011b:211-8.

155. Mañalich, 2011a: 118.

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Secondly, there is a normative expectation of lawful conduct which applies to persons living in a society organized democratically. By giving rights of participation to those subjected to the law, disagreement is expected to be reproduced within the political process. This is a condition to transform a violation of a democratically-produced norm into a conduct that deserves condemnation. That conduct cannot count as an expression of legitimate disagreement but only as disloyalty toward democratically-reached agreement that, even if provisionally, distributes spheres of personal autonomy in the form of positive law.<sup>156</sup> The attribution of right of participation in the law-making process is, therefore, a precondition of the criminal liability of the offender in a democratic society.<sup>157</sup> Without those rights, the punishment cannot be imposed as a consequence of a disloyalty toward the democratic process because “the infringed norm [cannot] be seen as the norm of the offender”. This is why in a democratic model of criminal law the punishment only can be imposed in those that are treated as citizens. But, on the other hand, “the fact of the offence cannot impede that the infringed norm continues being a norm of the offender, that the offender continues being a citizen”.<sup>158</sup> That is the reason why, the punishment cannot imply the exclusion of a person from the circle of those that are treated as citizens. In sum, the condemnation involved in the punishment and the consequences that follow from it must be adapted to the democratic framework.

### **3.2 *What counts as democratic punishment?***

The requirements of neutrality and democratic production of the law, and the negative conditions under which culpability can be attributed to the offender set parameters under which the imposition of the punishment can be compatible with democracy. Punishment will not be able to claim democratic legitimacy under those circumstances in which the criminal law itself cannot claim such legitimacy. Two

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156. See Kindhäuser, 2011a:102-5. See also Mañalich, 2010:59-61.

157. See Mañalich, 2010:60.

158. Mañalich, 2011a:125 [translation of the author].

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cases, which relate with the two requirements abovementioned, are particularly clear. First, the criminalization of conducts that cannot be fully determined in advance is forbidden under the principle of neutrality. The subject must be able to plan rationally according to a set of rules that constrain his conduct, in such a way that he can avoid being punished by adapting his behaviour to the law. The principles of *lex praevia, stricta, scripta et certa* perform the role of restraining the punitive power of the State in balance with the need for certainty and individual freedom. Secondly, the criminalization of formal expressions of dissent cannot be justified democratically. In a democracy, citizens should be able to express disagreement; otherwise the basis for the democratic process of ‘challenge and response’ is destroyed.<sup>159</sup> Under those kinds of conditions, the principle of neutrality is dismantled because it is not able to claim protection for the different conceptions of good existent in a pluralist society. Criminalizing dissent is a clear case of non-democratic criminal law.

However, it is not only a process of legal criminalization of conduct that can be in conflict with democracy. The rules of *attribution of responsibility* and regulation of punishment must also conform to democratic principles. This implies, regarding the first aspect, that punishment cannot be imposed upon those who are not recognized as capable of following legal norms. In this sense, for example, the attribution of criminal responsibility to children is in open tension with the idea of democratic culpability. Based on the attribution of a deficit of legal capacity in other areas of life and especially in their exclusion from the exercise of political rights, it is clear that society does not expect the exercise of deliberative power from children. The imposition of a punishment, therefore, is in those cases unjustified.<sup>160</sup>

The *legal aim* pursued by a punishment must be premised on the same grounds, that of a democratic formulation of the criminal condemnation; more specifically, on the

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159. See e.g. the case of disruptive voting, above *Chapter 4*, Section I.

160. See above *Chapter 4*, Section III.1. This view is adopted in *Sauvé*: “Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society’s acceptance of the criminal as a person with rights and responsibilities” [47].

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autonomy of the offenders grounded in their deliberative character. Consequentially, the punishment cannot be directed to the instrumentalization of the offender. The only aim of punishment that is not affected by this kind of problem is retribution. This is not to say that punishment cannot, additionally, perform other goals, such as deterrence, but that these other goals cannot assume a primary role in the imposition of the punishment. Rehabilitation and incapacitation, in this perspective, are especially problematic with relation to democratic criminal law. The first presents an intromission in the autonomous sphere of the subject that is incompatible with due respect for their autonomy. The second does not consider the subject as a legal agent but only as a danger that must be prevented.

Finally, the *form* adopted by the punitive response must be consistent with the requirements of democratic criminal law. The legal punishment cannot obliterate the basis on which the normative expectation of lawful conduct of persons is grounded in democratic societies.<sup>161</sup> If what makes possible the condemnation of criminal conduct (as a deficit of democratic loyalty) is the possibility that the offender, as a citizen, may question the law within the political process, then the denial of rights of democratic participation constitutes the destruction of the very basis on which the subject may be held criminally responsible in a democracy. This is the sense in which CD is antithetical to democratic criminal responsibility. The loss of rights of participation as a consequence of a criminal conviction makes explicit that punishment works, in the society in which this is the case, as a practice of degradation and exclusion.

As a summary of the findings of this chapter, it can be said that CD cannot be justified as a democratic punishment, fails to overcome the democratic problem of CD and therefore cannot constitute a legitimate exception to the principle of universal suffrage. This is entailed by the fact that, on the one hand, CD cannot be explained in

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161. See Mañalich, 2011a:127-33.

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terms of incapacitation, rehabilitation or deterrence. On the other hand, when it is argued that CD may perform a retributive function, it is found that there are no strong reasons to prefer CD to other forms of punishment. The argument to justify the need for CD that appealed to the performance of a particular democratic expressive form of condemnation ultimately appeared counterintuitive and unconvincing. There are good reasons to think, on the contrary, that CD is an impermissible form of punishment in a democracy because it withdraws rights that are fundamental to the claim of culpability of those who commit a criminal offence.

# 6

## DEGRADATION, EXCLUSION AND RECOGNITION

**T**he starting point of this inquiry was the democratic problem of CD: in the light of core democratic principles, CD is *prima facie* undemocratic because it excludes subjects of the law from a fundamental right of participation in the law-making process without democratic justification. The previous two chapters explored two different justifications of the practice of CD on democratic grounds: (1) CD might embody the regulation of a franchise requirement of civic virtue, or (2) it might work as a form of democratic and expressive punishment. Both reconstructions, it was argued, fail to do justice to democracy. First, civic virtue cannot be seen as a requirement of the franchise. In a democracy, the franchise is based upon the reciprocal recognition of ‘deliberative personality’, which involves both the capacity to follow the law and the capacity to adopt a critical position in relation to the law as a democratic citizen. Civic virtue may qualify as a desirable attribute of the citizenry but cannot, without considerable undemocratic impact, be adopted as a requirement for participation. Second, the legitimate imposition of a punishment in complex, pluralist and democratic societies depends on the possibility of the offender, as a subject of the law, being in a position to participate in the process of law-making. In this latter regard, CD is not only seen

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as a problematic form of punishment but also as a measure which endangers the legitimacy of the whole punitive apparatus.

The problem of democratic justification of CD, therefore, must be regarded as genuine, and the inquiry into it must be redirected towards the powerful signals which indicate that CD is a constitutive practice of degradation and exclusion. This, to be clear, is not to say that CD does not work as an electoral requirement of civic virtue or that it cannot be conceptualized as an expressive form of punishment but that, in light of the previous analysis, the above constitute ways of thinking about CD that as such embody forms of abuse and oppression that tend in an undemocratic direction. They cannot serve as a justification but “follow from, rather than explain, a pre-existing sense that [offenders] cannot be members of the community”.<sup>1</sup>

This chapter, in contrast with the previous two, seeks to investigate the logics and principles underlying CD: the politics of CD. It draws upon the assumption that CD is a device that serves the goals of degradation and exclusion. This exploration seeks to conceptualize the exclusionary dimension of CD<sup>2</sup> and to exploit it to support the idea that the importance of the right to vote is not exhausted as a mechanism of democratic participation. The evident exclusionary logic underlying CD may paradoxically contribute to highlighting the right to vote as a core mechanism of social and political recognition in modern societies.

This chapter duly considers the widespread idea among critics of CD that, whatever the alleged justification and legal nature of the measure, when offenders are deprived of the right to vote they are being excluded from some of the most important forms of public participation and therefore are relegated to being second class-citizens.<sup>3</sup> The

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1. Note, 1989:1310.

2. See, generally, Dilts, 2014.

3. See Parkes, 2003:92. The US literature has agreed that the case of CD of ex-prisoners falls under this interpretation, but strangely does not extend that conclusion to the inmates. See e.g. Demleitner, 1999; Pettus, 2013.



argument of the chapter is developed as follows. *Section I* develops the idea that CD is the expression of a political conception that does not consider degradation as problematic. *Section II* presents the exclusionary aspect of this practice, therefore linking the ideas of punishment and membership.<sup>4</sup> Finally, *Section III* helps to ground a dimension of the right to vote that can serve the aims of the politics of CD but which may also serve as an instrument of political recognition of membership and equal dignity.

## I DISENFRANCHISEMENT AS A DEGRADING PUNISHMENT

A brief remark about history may help to introduce these ideas. As it is frequently remarked upon, the historical background of CD is marked by the idea of degradation and exclusion. For example, a comment about this kind of practice amongst the early American settlers tells us that:

“[T]he stigma of the loss of civil rights in the small communities of those times increased the humiliation and isolation suffered by the offender and his family and served as a warning to the rest of the community, all of whom probably knew the offender”.<sup>5</sup>

The literature on CD usually refers to its historical development, indicating that contemporary expressions of CD are fed by pre-modern practices.<sup>6</sup> Greek *atimia*,<sup>7</sup> Roman *infamia*<sup>8</sup> and Germanic practices of ‘civil death’ perpetuated during the medieval age as ‘civil death’, ‘outlawry’, ‘attainder’ or ‘infamy’.<sup>9</sup> There are common

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4. See e.g. Dilts, 2014:4.

5. Itzkowitz & Oldak, 1973:726-7. See also Manza & Ugger, 2006:23-4.

6. See e.g. Ewald, 2002:1059-66; Easton, 2006:443.

7. See, generally, Manville, 1990; Allen, 2000; Pettus, 2013:21-6; Christ, 2006.

8. See, generally, Goudy, 1897; Greenidge, 1894; Mommsen, 1976; Pettus, 2013:26-8.

9. See, generally, Pollock & Maitland, 1968; Rowe, 1976; Freiberg & Fox, 2000; Calisse, 2001; Pettus, 2013:28-35.

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themes that cross these historical practices, which can aid an understanding of CD.<sup>10</sup> Firstly, they are an expression of a pre-modern conception of membership and standing in the community based in civic virtue.<sup>11</sup> Secondly, as punitive reactions they work by excluding individuals from membership and degrading them to the status of outcasts.<sup>12</sup> This ambivalence between incapacitation and punishment belonged to the historical antecedents of CD, contributing to represent societies in which one's public standing depends and is based upon some membership standards usually linked to cultural and racial alliances of power, but expressed in institutions in which the virtuous character of some (citizenship, *dignitas*, religious and feudal loyalty) permitted the exclusion of many. Thirdly, the exclusion of current members, maybe in a scapegoating role, performed a ritual of confirmation of those alliances,

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10. According to Demleitner, the main difference between these two traditions consists in the nature of "the loss" in question. The classical tradition consisted in the loss of the citizen's honour. In contrast, Germanic law did not consider solely the public status, but linked civil death with the notion of honour as mutual recognition within a more complex net of social relations (2000:757).
  11. From the collective perspective, *atimia* performed the task of giving shape to the community's identity by means of conserving the collective civic virtue, which the offender was demonstrated to lack. Moreover, the act of excluding the offender from the *polis* constituted in itself a joint, virtuous public practice (see Melville, 1990:148). That exclusionary character fitted with a model of membership whose emphasis was placed upon the relation between rights and duties. The fact that this punishment was reserved for citizens alone allowed it to express the importance of the link between membership within the circle of citizens and the need for involvement in public life as a higher form of life from which *atimos* was excluded. Something similar happened with *infamia*, which expressed moral and civic unfitnes to carry out public business which involved communal affairs, and *outlawry*, which excluded the offender from all social relations, constituting him as an undesirable character, unworthy of membership in a religious community. These three practices were mechanisms of membership, which expressed a marked opposition to the notion of an ideal citizen of the community and worked by expelling those members who demonstrated their corruption.
  12. The loss of public standing in a society organized around certain statuses naturally also involves a loss of the social respect that allows citizens the enjoyment of communal relations. Linked to exceptional causes, deviant behaviours and the more serious offences against the community itself, this degradation and the loss of the privileges of membership appear as natural results of exclusive membership and hierarchical political and social structures. The rationalization of criminal law, under which the minimisation of these practices takes place, translates the modernization of political structures (universal rights, democracy and citizenship) into a system of criminal law that does not operate in terms of statuses, but rather in homogenous terms. By a slow process, initiated at the beginning of the nineteenth century, most of the elements of the civil death were gradually suppressed (e.g. the US Constitution expressly prohibited bill of attainder, forfeiture for treason and corruption of the blood in article III), although they are currently experiencing an important revival. It is not by chance that this kind of criminal response was substituted by the institutionally narrow, limited and measurable punishment of imprisonment.

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adopted the form of an *internal exclusion*. The offenders physically remain within the community but are legally and politically marginalized.<sup>13</sup>

Today, however, affirming that CD produces second-class citizens<sup>14</sup> is not as easy as it seems. On the one hand, other social practices also can be seen as producing this effect. Remaining within the field of criminal justice, the imprisonment of certain persons, it can be argued, constitutes them as a second class of citizens because they do not enjoy the liberty guaranteed to the rest of the population.<sup>15</sup> On the other hand, the mere exclusion from the franchise, according to some “a petty form of degradation”,<sup>16</sup> would not be sufficient to configure such a situation, as those who were disenfranchised would still be able to exercise many of their other rights.<sup>17</sup> The affirmation that CD is a degrading mechanism must be clearly articulated to demonstrate (1) what is particularly degrading about it, and (2) why that degradation is of such magnitude that constitutes a second-class of citizenship.

An initial way to do so would be, following von Hirsch and Wasik, to affirm that CD as a consequence of a criminal conviction can neither be *functionally* attached to a punishment nor to an incapacitation, and therefore it necessarily *becomes* a form of degrading or stigmatizing the offender and, consequently, of creating second-class citizens. When CD is imposed indefinitely or for a disproportionate length of time, this argument is useful due to the lack of correspondence to the formal structure of a

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13. Interpreters read an expressive meaning into the practice of *atimia* that can, as a punishment, be extrapolated to *infamia* and outlawry. It is a punishment that involved the criminal's presence, instead of their absence – in contrast to exile or the death penalty. This presence, however paradoxically, is intended to express, in an analogous manner to exile or death, the need for the community to forget the offender's existence (see Allen, 2002:203-4). This symbolic function is expressed in the ban upon taking part in any activity in the public life of the community. As Allen mentions, “[t]he *atimos* became an invisible man who had lost whatever control he might once have had over the city's networks of social knowledge. His safety depended on his total disappearance from the mind's eye of the citizenry” (Allen, 2002:204).

14. Easton, 2006:451.

15. See Ramsay, 2013b.

16. Orr, 1998:70.

17. See Lippke, 2007: 203.

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punishment.<sup>18</sup> However, this argument it excludes degrading effect of those measures calibrated to the structure of punishment.

A second way to identify the degrading aspect of CD would be via the recourse to a variable that is ignored by this functional scheme and unlike it, it might explain the degrading character of CD in any event. International and constitutional standards for the legitimacy of punishments tend to be built around concepts such as ‘cruel and unusual’<sup>19</sup> or ‘inhuman or degrading’,<sup>20</sup> distinguishing acceptable *forms* or modalities of punishments from those that are not. These standards do not just demand a proportional application of punishment and the elimination of those treatments that cannot pursue a legitimate incapacitation, but instead go further, embracing the idea that there are some treatments and forms of punishment that are not considered legitimate in any event. In these cases, what is assessed and rationalised is not the functional justification for the imposition of the measure or the degree of harm caused to the offender, but “the denial of moral standing or fellowship that they essentially involve”.<sup>21</sup> In other words, some forms of punishment are wrong not insofar as they are disproportionate – as seen above, under certain circumstances CD can be proportionate – but because they are “intrinsically inappropriate as a way for a state to treat its citizens”.<sup>22</sup> This has been the case of, for example, capital punishment, as well as all those forms of treatment that involve torture in the international law of human rights.<sup>23</sup> The question that is posed by this additional variable is whether CD can be regarded as a degrading *form* of treatment or

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18. See von Hirsch & Wasik, 1997:605-6. See also Demleitner, 1999:158-60; Fletcher, 1999:1906-7. See above *Chapter 5*, Section II.1.

19. See e.g. English Bill of Rights 1689; Eighth Amendment, US Constitution; British Slavery Amelioration Act 1798.

20. See e.g. Article 5, Universal Declaration of Human Rights (1948); Article 16, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Article 3, Charter of Fundamental Rights of the European Union (2000).

21. Duff, 2005a:149.

22. Duff, 2005a:149. Contrarily, Bennett (2012:5) suggests that the degrading element can also be reconstructed in terms of proportionality. A degrading punishment is disproportionate because the right that is affected is of such importance that no offence can justify its suppression. In a similar vein is the position of the ECHR concerning degradation, according to Vorhaus (2002).

23. See e.g. Schabas, 1993; Nagan & Atkins, 2001.

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punishment and whether it must be deemed – for that reason – as illegitimate, irrespective of other considerations. This argument for the proscription of CD based on its degrading character has not been clearly articulated in the jurisdictions of the judicial trend on CD.<sup>24</sup>

To draw conclusions regarding prohibition and illegitimacy from the idea that CD is degrading would be overly hasty. A rational discussion of CD as a degrading punishment requires, firstly, a substantive concept of degradation and, secondly, a critical position about the legitimacy of degradation.

## 1 The meanings of ‘to degrade’

It is useful to start with some idea of what degradation means. According to James Q. Whitman, “[t]he literal meaning of ‘to degrade’ is to reduce another person in status, to treat another person as inferior”.<sup>25</sup> Degradation is conceptually distinct from violence or torture – which are, however, usually regarded as degrading treatment – because it is possible to think of degrading treatments that do not involve physical or psychological suffering.<sup>26</sup> Whitman distinguishes two senses in which a punishment can be degrading: (1) ‘reduction of rank’, when a punishment *reduces* the offender from a high status to a low status, usually applied to those who fail to live according to the standards of their rank; and (2) ‘status abuses’, which are the kind of punishments that deliberately *express* the low status rank of whoever is subjected to them.<sup>27</sup> Refining these ideas, Duff distinguishes four forms of degradation. Firstly, *performative* degradation is the action that formally reduces a person to a lower rank or status. This form of degradation “is possible only in contexts in which there are

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24. See below *Chapter 7*, Section III.2.

25. Whitman, 2003:8.

26. See Whitman, 2003:20.

27. See Whitman, 2003:25-32.

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recognized grades or ranks down which people can move, or be moved”.<sup>28</sup> Secondly, *consequential* degradation is understood as a treatment, not designed especially to degrade but that has the effect of reducing his or her status. Thirdly, *expressive* degradation is what is involved in the treatment of a person *as if* that person was of lower status than he or she actually is, without producing a reduction of status. Finally, *psychological* degradation is the subjective feeling of a person about being treated as lower in status. The first two, which coincide with Whitman’s ‘reduction of rank’, have a transformative character and their degrading success depends on the possibilities of effectively determining the status of the addressee. The final variety, ignored in Whitman’s analysis, is a parasitical form, according to Duff, because its legal, political and moral relevance depends on the concurrence of other forms of ‘objectively observed’ degradation.<sup>29</sup>

The modern democratic concept of equality supposes the negation of formal privileges and the public treatment of every person as being of equal worth.<sup>30</sup> It means the abolition of higher and lower ranks. Degradation, on this view, seems to be a pre-modern idea; an idea whose implementation depends on the existence of at least two different groups of subjects, namely the privileged and unprivileged. This implies that somebody cannot be reduced to a lower rank or treated as such if those ranks do not exist anymore and the particularity of degradation must be differentiated from other forms of disrespect compatible with the formal recognition of equal worth. The problem in understanding degrading treatment arises when degradation loses its reference point due to the abolition of privileges and their subsequent replacement by the universalistic categories of ‘human’ and ‘citizen’.

The only conceptual alternative to degrading treatment in a modern democratic society adopts the form of punishments that ‘lower down’ these universal

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28. Duff, 2005a:149.

29. See Duff, 2005a:150-1. See also Vorhaus, 2003:86-8.

30. See e.g. Dahl, 1989: Ch. 6; Christiano, 2008: Ch. 1.

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conceptions.<sup>31</sup> A treatment or punishment degrading a person in his *humanity* “will involve spelling out a substantive conception of what [it] is to be a human being”.<sup>32</sup> The core cases of degradation in the practice of human rights law are cases of *expressive* degradation, in which ‘treatments and punishments’ are associated with ‘humiliating practices’ and their effects upon ‘human dignity’.<sup>33</sup>

On the other hand, to degrade a *citizen*, a treatment or punishment must deprive him of the distinctive element that characterise citizenship, especially those rights related to participation in a democracy. This might well be the case of CD if it can be demonstrated that without the right to vote citizens cannot be recognized as such. Even if some of its critics see CD as an instance of *consequential* degradation, it may also – and more clearly – be described as a legally-regulated action of *performative* degradation, by which an offender is dispossessed of one of the rights that comprise his status of citizenship. CD can be rightly regarded, in these terms, as a degrading practice.

## 2 The philosophy of formal equality

Understanding how CD can be regarded as degrading is not the end of the story. It was mentioned previously that the rise of ideas about equality contributed to abolishing privileges, and therefore to constraining widespread degradation practices. There is an implicit critical claim there concerning the wrongness of degradation as a form of response towards the offending actions of our fellow citizens; one that sees degradation as intrinsically harmful. However, another view about the relation between punishment and degradation can be found in the so-called philosophy of ‘formal equality’, revisited by Whitman, which illustrates how a tendency to think of

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31. See Duff, 2005a:152.

32. Duff, 2005a:153.

33. See Vorhaus, 2003.

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degradation as problematic depends on equality's presupposition and consequences.<sup>34</sup> Formal equality offers a view in which degradation is seen as less problematic; one that actually reconciles the demands for equality and the subsistence of certain practices of degradation.

Formal equality basically involves a denial of the idea that everybody must be treated equally. Treating people differently is perfectly acceptable. This different treatment, however, cannot be on the basis of their *status* (class, race, sex) but is only admissible if it rests upon the basis of people's *conduct*. Formal equality demands civil and political equality for all subjects without distinction, in contrast to a system of privileges, for example, of status-based qualifications for voting. However, it does not require equality at any cost. This is because, as noted by Michael Walzer, under the new regime of modern political equality, "no one has a fixed place" and everybody is an "equal competitor for honour and reputation".<sup>35</sup> In these terms, equality is not equality of outcomes but is instead equality of opportunities.

According to formal equality, if the starting point is that of equality of rights, the crucial standard for treating people differently is that of some objective standard of *desert*. This involves in turn a conception of personal *autonomy* that permits the attribution of performance to a responsible individual. Unequal treatment, therefore, is still present in modern society, which singles out persons with prizes (or electing them as officers), while subjecting others, those who have acted unlawfully, to the powerful stigma of punishment for what they have done.<sup>36</sup> In words of Judith Shklar, "The claim that citizens of a democracy are entitled to respect unless they forfeit it by their own unacceptable action is not a triviality. On the contrary, it is a deeply

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34. See, generally, Whitman, 2003.

35. Walzer, 1983:253.

36. See Walzer, 1983:256-70. To be sure, Walzer himself does not subscribe to the idea of formal equality as an underlying logic of degrading punishment. See critically above *Chapter 5*, Section III.



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cherished belief”.<sup>37</sup> According to this account, formal equality might not just admit degradation but it may even demand it. The punishment of criminal conduct would be the way in which that mandate is imposed upon the offender: in a complex tension with the idea of punitive condemnation, it may affirmed that punishment *is* degradation.

According to Whitman, whose focus of analysis concerns the differences between US and European styles of punishment, the philosophy of formal equality assists in explaining the US tradition of harshness in relation to the milder European penal systems. He elaborates two aspects of the influence of formal equality. Firstly, distinctions in favour of people with higher social or personal statuses were forbidden very early in US law; formal equality demanded that all must be treated as equals before the law. Secondly, there was no need to treat offenders with the respect due to the rest of the people; formal equality, in its negative dimension, permits those differences when based on people’s conduct.<sup>38</sup> In Europe, in contrast, the traditional criminal justice of pre-modern times was one that applied different punishments for people separated by status. With the rise of the horizontal integration of citizenship, the reforms were directed towards a process of ‘levelling up’, abolishing the low-status forms of punishment associated with cruelty and shame and applying high-status modes of punishment, previously reserved for the aristocracy and the wealthy, to everyone. The European tradition of respect for offenders can be tracked back, according to this explanation, to a reaction against a history of hierarchical social structures.<sup>39</sup> The United States, according to Whitman, lacking such heavily hierarchical structures, had no room for respect towards the offenders.<sup>40</sup>

Following Whitman, the phrase “the irony of equalitarian disenfranchisement” has been used by Re and Re to explain the way in which contemporary versions of CD

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37. Shklar, 1991:3.

38. See Whitman, 2003:43.

39. See Whitman, 2003: Ch. 4.

40. See Whitman, 2003: Ch. 5.

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have been profoundly influenced by the philosophy of formal equality. It has been suggested, for example, that formal equality underlines and explains, in an important manner, the historical “expansion of constitutional voting rights without regard to race” carried out by radical Republicans after the US Civil War. It also explains, however, “the constitutional entrenchment of punitive disenfranchisement” as its counterpart.<sup>41</sup> “if the philosophy of formal equality had the egalitarian power to liberate”, as it did with the slaves, which were formally transformed in citizens with equal rights to participate, “it also had the retributive potential to degrade” as it did and still does with offenders, which were excluded from the franchise.<sup>42</sup>

### 3 Punishment, degradation and disenfranchisement

Even when it is used for different purposes – by Whitman to explain the harshness of the US style of punishment<sup>43</sup> and by Re and Re to explain the historical context and ideas that motivated the constitutional entrenchment of CD in the US<sup>44</sup> – and to present ideas that are contentious, the argument from formal equality reveals an alternative conception of equality in relation to degradation; one that may contribute to expose an understanding of CD as a legitimate response to a criminal offence. This

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41. Re & Re, 2012:1590. See also Shklar, 1991:2-3. It makes reference to the enactment of the Fourteenth Amendment of the US Constitution, whose first section considers the equal protection clause, and whose second section explicitly protects the right to vote against (racial) discrimination threats. However, the second section, probably the legal provision more frequently referenced in the literature about CD, also establishes a reference to CD as an exception to this protection: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State [...]. But when the right to vote at any election [...] is denied to any of the male inhabitants of such State [...], *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced [proportionally]” (Emphasis added). The historical interpretation of the Reconstruction amendments, and of Section II of the 15th Amendment in particular, has generated an important literature in US scholarship. See e.g. Morgan-Foster, 2006:286-93, 314-8; Holloway, 2014.

42. Re & Re, 2012:1596. See also Holloway, 2014:5-16.

43. In relation to the explanation for harsh punishment in America, see e.g. Zimring & Johnson, 2006. About its relation to CD, Demleitner, 2009:81-2.

44. For a disputation of the idea that formal equality, as the historical explanation of the entrenchment of CD in the Fourteenth Amendment, is something relevant for current constitutional practice, see Ewald, 2013. For a discussion of the historical accuracy of their account, see Holloway, 2014:159.

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is not, to be clear, a purely theoretical or historical notion. The prestige of the notion of formal equality, intrinsically linked to the discourse of *just deserts* in the US, and increasingly everywhere, can be pointed to as the main reason for the way in which the evidence presented by *racial* CD has been disregarded. For example, a standard response to those who claim that CD is being used as an instrument of racial abuse is: “If it’s blacks losing the right to vote, they have to quit committing crimes. We are not punishing the criminal. We are punishing conduct”.<sup>45</sup> What is key about this conception of punishment, is the negative of the community to assume any responsibility for the criminal conduct.

Acknowledging that certain commitment with degradation is part of modern discourses on crime and punishment should not be difficult. What is indeed difficult is to argue that certain degrading aspects do not belong to the very concept of punishment, even when these have been consistently neglected and rationalized by philosophical accounts of punishment.<sup>46</sup> For example, the very expression ‘degrading punishment’ suggests that there is such a thing as non-degrading punishment.<sup>47</sup> Degradation, however, “often plays a significant role in punishment [and] part of what makes punishments effective is their power to degrade”.<sup>48</sup> This is an obvious conclusion when the historical forms of punishment are examined but also holds true in current times. It is difficult to argue, for example that imprisonment is not degrading.<sup>49</sup> In the best of the scenarios, one can attempt to downplay the degrading dimension of punishment, as shown by the work of Jean Hampton referred to above,<sup>50</sup>

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45. Warren Wise, South Carolina legislator, cited in Manza & Ugger, 2006:43. See also Clegg, 2002:169. cf Note, 1989:1310-1. It is interesting to note how the emphasis in these arguments is always located in the triggering element (the crime that deserves punishment) and not in the consequential element (degrading punishment).

46. See above *Chapter 5*, Section III.3.

47. See Vorhaus, 2003:67.

48. Whitman, 2003:8.

49. In the background to this idea may be found the ‘doctrine of less eligibility’: “the assumption that a disjuncture must exist between the living condition of prisoner and free citizens, with the former necessarily inferior to the condition encountered by the most marginalized social groups” (Czajka, 2005:118).

50. See above *Chapter 5*, Section II.2.1.

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but neglecting it entirely exposes one to great danger. In the context of a community that embraces the philosophy of formal equality, degradation is naturally regarded as a core aspect of punishment, which often creates a gap between penal theorization and popular feelings and beliefs regarding criminal justice. As George Fletcher suggest, the practice of criminal law “suggests that in fact the system often pursue goals other than the ones conventionally articulated”.<sup>51</sup>

Especially if the degrading aspects of our punitive practice are not acknowledged publicly, and are conducted somewhere else out of sight,<sup>52</sup> treating people as inferiors can be, according to Whitman, intoxicating. It can bring out the worst in us, even leading to a certain acceptance of penal sadism.<sup>53</sup> In such a context, degradation proliferates and comes to be seen not as an undesired but necessary consequence of condemnation but, on the contrary, as a legitimate belief and a public value. Its defenders might “think, talk and act as if those who commit crimes [...] should not be seen and treated as our fellow citizens and fellow human beings, but form a distinct and lower class or category of being” from whom they must distinguish themselves and protect against<sup>54</sup>. According to this view, punishment functions by degrading the offender.

This form of understanding punishment shares some of the premises and the problems of the shaming sanctions. It has been sustained that “[s]haming penalties might even more accurately be described as degradation penalties”.<sup>55</sup> It symbolizes the loss of social status within the community that affects the offender,<sup>56</sup> are imposed by an authority, denouncing the wrongdoing and separating ritualistically the wrongdoer

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51. Fletcher, 1999:1896.

52. See Mañalich, 2011b:167-9.

53. See Whitman, 2003:21-3.

54. Duff, 2005b:154.

55. See Kahan, 1996:636.

56. See Bennett, 2003: par 36-9.

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from the community.<sup>57</sup> What is fundamental in them is not the *psychological* degradation of the offenders – even when it is not unreasonable to think that stigma may be a coherent justification –<sup>58</sup> but the public *expressive* dimension of the imposition of the treatment or punishment,<sup>59</sup> as correctly suggested by the theorist of expressive CD, which it must be possible for other members of the community to understand.<sup>60</sup>

In the context of this discourse, the particularity of CD in relation to other forms of degrading practices derives from its performative character, by *legally transforming* offenders into second-class citizens. Therefore, the effectiveness of CD depends in turn not just upon the symbolic importance of the right to vote,<sup>61</sup> but also the function that the right to vote performs in society as a mark of dignity and membership as the starting point granted by formal equality. According to those premises, CD can perform the function of punishing, degrading and excluding those members of the community that deserve it.

Besides the negative punitive function and its degrading effect, CD can work positively by contributing to *elevate* democratic politics in the eyes of the law-abiding citizens through the marginalization of those who lack the necessary value, moral authority or worthiness.<sup>62</sup> This might enact the “image of the electorate as a

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57. See Kahan, 1996.

58. See Austin, 2004.

59. That is why Bennett (2003) is wrong in sustaining that shaming in the case of CD is not only public but can be experienced internally and in the private circle of those disenfranchised (par 39). From this premise follows his observation that this kind of rationale would work only with middle-class offenders, those who care about the loss of social status (par 37).

60. Publicity, therefore, is a fundamental aspect of shaming punishment, and CD is affected by a deficit of visibility and, therefore, of the ability to produce the desired public stigma. See Demleitner, 2000:786. It is essential to draw attention to the fact that degradation on this account is to a certain extent autonomous, and its value does not necessarily depend on its deterrent effect, as it does in some accounts of shaming punishment. See Kahan, 1996:637-44.

61. Deimleitner, 2009:94.

62. See Ewald, 2002:1117.

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closed community of well-behaved democrats”<sup>63</sup> that look to “distinguish themselves from their inferiors”,<sup>64</sup> or configure a regime comprising “‘Citizens proper’ and a periphery of subjects”.<sup>65</sup> In this imaginary, CD may express and remind the value of the activity of exercising one’s democratic rights – a dimension of the franchise that is hidden by the universalization of political rights – by serving as a reminder of the dignity and ‘the moral character’ involved in democratic activities.<sup>66</sup> Accordingly, conceding the right to vote to *criminal* (offenders) would be disrespectful towards (law-abiding) *citizens* because doing so would be to treat them with a respect they have lost as a consequence of their own deeds, diluting the vote of law-abiding citizens.<sup>67</sup>

## II BOUNDARIES AND EXCLUSION

The characterisation of the practice of CD as a degrading punishment talks only partially about its political significance because CD is not only a punitive practice. It also responds to the question of the boundaries of the political community in a way that makes the exclusion from elections of those who have committed a criminal offence an essential part of the answer.

### 1 Exclusionary tendencies of democracy

Liberal authors agree with the demand of closure made by the performative aspects of democracy. For example, David Miller has pointed out that the question of whether a constituency can be expanded or contracted in the name of democracy implies a trade-off between two sets of conflicting principles. A highly inclusive democracy must be ready to admit a relatively thin form of democracy, based mostly in terms of

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63. Plaxton & Lardy, 2010:121.

64. Shklar, 1991:15.

65. Pettus, 2013:8.

66. See Mills, cited in Planinc, 1987. See also Schall, 2006:91.

67. See e.g. Clegg, 2001:177. cf Shklar, 1991:34.

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output democratic legitimacy. On the other hand, the more demanding the conditions that a normative conception of democracy sets for participation and social cohesion, the more value should be accorded to closure; consequently, this would be translated into a push for exclusion.<sup>68</sup> The practice of democratic decision-making requires not just closure but “some degree of social unity” to function adequately.<sup>69</sup> The degree of unity can vary depending on the democratic models and the kinds and levels of performance expected from them. For example, at one extreme is found a republican demand for social cohesion in terms of ethical agreement, trust and stability. At the other extreme lies the proposal for a liberal instrumental identification of mutual interest with the aim of subjecting the government to an effective control.<sup>70</sup> In either of these forms, the degree of social unity that a group of people can develop is at odds with the premises of universal inclusion.<sup>71</sup>

Echoing arguments of social cohesion, Charles Taylor has argued that contemporary liberal democracy has an *unseen tendency* to include individuals in politics, at the same time as it embraces a dynamic that pushes “towards exclusion”.<sup>72</sup> He expounds this paradoxical feature in very simple terms:

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68. Miller, 2009:226. This argument tends to coincide with the classical idea that ‘citizens’ effectiveness’, that is, the real involvement of people in decision-making, is only attainable in relatively small units with strong social cohesion. In contrast, large units offer comparatively greater ‘system capacity’ to control the significant agenda and to act effectively (Dahl & Tufte, cited in Whelan, 1983a:38).

69. Miller, 2009:211. See also Manfredi, 1998:293-4.

70. Miller, 2009:207-12.

71. In contraposition to this participatory reading of social cohesion stands a reading driven by the requirement of political unity. Famously, Carl Schmitt developed his concept of political or democratic equality based on a very demanding pre-political homogeneity that the State must protect as the precondition of its subsistence (Schmitt, 2008:255-63). However, in principle, Schmitt sustains the same criticism towards universalism. Human equality, he maintains, is essentially non-political because it does not admit of any political distinction between members and non-members of a democratic community, rendering equality superfluous, and impeding the development of democracy as a political and egalitarian practice.

72. Taylor, 1998:143.

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“Democracy is inclusive because it is the government of all the people; put paradoxically, this is also the reason that democracy tends towards exclusion. The exclusion is a by-product of the need, in self-governing societies, of a high degree of cohesion. Democratic states need something like a common identity”.<sup>73</sup>

He unpacks the paradox in the following terms. Those engaged in the deliberative democratic practice must “know one another, listen to one another and understand one another”,<sup>74</sup> otherwise the practice is impossible or a mere appearance. Therefore, only a collective identity based on strong commitment is able to “create the confidence on the part of the various subgroups that they will indeed be heard”.<sup>75</sup> This mutual trust is threatened when some citizens do not behave according to the expectations established. This element of cohesion produces, on the other hand, a tendency to exclude those who do not belong to the defined collective identity. The obvious case is that of immigrants, but this phenomenon is not confined to them. In its more “rigorous and uncompromising” versions, it can be turned against all other ways of being that do not subordinate themselves to the proposed common identity: “ideological enemies, slackers and, when the case arises, immigrants”.<sup>76</sup> Taylor acknowledges that this type of cohesion can lead to what he calls “inner exclusion”, that is, “the creation of a common identity based upon a rigid formula of politics and citizenship, one that refuses to accommodate any alternatives and imperiously demands the subordination of other aspects of citizens’ identities”.<sup>77</sup> Notwithstanding the fact that Taylor’s idea is more directly related to cultural differences, immigration and multicultural societies, the concept of ‘inner exclusion’ is appealing for developing an understanding of the dynamic of exclusion affecting offenders.

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73. Taylor, 1998:143.

74. Taylor, 1998:143.

75. Taylor, 1998:145.

76. Taylor, 1998:147.

77. Taylor, 1998:148.



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The exclusionary tendencies of democracy are produced and articulated toward the idea of the stranger, most perfectly embodied in the foreigner.<sup>78</sup> However, *strangeness* is nothing natural and therefore is not stable but mobile and fluid.<sup>79</sup> The increasing complexity of modern societies make the identification of lineages and traditional cultural identities more difficult to capture. Under a public philosophy that treats persons according to their actions and not according to their status, as is the case in liberal states committed to the protection of the rule of law, it may be right to affirm that once the stranger is admitted to live within the community, he must be treated as a member and respected as such. This should neutralize the aversion to the strangeness.

These exclusionary tendencies, though, do not seem to disappear. They are expressed, indubitably, in the informal interactions in society, and reformulated and codified to be, again, formally channelled through the legal system. If the stranger acts in line with the community's values, he will be protected by the law. He might become *de facto* and *de jure* a citizen; otherwise, he will be probably *criminalized*.<sup>80</sup> Criminalization is one of the main ways in which a liberal state under the influence of the rule of law doctrine formally expresses the exclusionary tendencies of democracy. This model is intrinsically linked to the philosophy of formal equality that, however, admitting the inclusion of the foreigner also admits the reverse process through which those persons formerly regarded as citizens become strangers through conviction for a criminal offence.<sup>81</sup>

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78. The external exclusion of the strangers has been largely protected by immigration law and border controls (See e.g. Bosniak, 2006:31-6). The exclusion of the stranger who lives within the territory of the national state is performed by the criminal justice system.

79. See e.g. Balibar, 2006.

80. It is no coincidence that besides *Hirst*, the only other judgment of the ECtHR that has produced local opposition in the UK is *Othman (Abu Qatada) v UK* (2012)]. See, about this case, Michaelsen, 2012.

81. Several rules express this connection. First, normally the requirements for naturalization, or even those which apply to claims for refugee status, exclude (or make it difficult for) those convicted for a criminal offence (see e.g. Lapp, 2012). Second, the procedures for the

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This reverse process is central to the politics of CD, a practice in which a citizen is divested of the more important rights of citizenship, label them as “irredeemably different and dangerous”,<sup>82</sup> to be located, in this respect, with other strangers. There are strong links between the figure of the stranger and the figure of the criminal. In *Discipline and Punishment*, for example, Michael Foucault affirms that imprisonment involves a subjectification of the offender. From the perspective of the criminal law, which addresses the *offender* as a subject of the law, he is held responsible for his actions as an autonomous subject and is made the object of the condemnation. However, he is transformed by his conviction, principally by means of his incarceration, into a *delinquent*, somebody who must be reformed by the application of the techniques of discipline.<sup>83</sup> This transformation is described as “curious substitution”:

“from the hands of justice, it certainly receives convicted person; but what it must apply itself to is not, of course, the offence, nor even exactly the offender, but a rather different object, one defined by variables which at the outset at least were not taken into account in the sentence, for they were relevant only for a corrective technology. This other character, whom the penitentiary apparatus substitutes for the convicted offender, is the *delinquent*”.<sup>84</sup>

In the terms outlined above, the punishment is a consequence of his wrongdoing in the realm of formal equality. His imprisonment reflects, on the other hand, his exclusion from such terrain; the confirmation of his strangeness, and the transformation of the offender into a criminal. His exclusion is not, however, completed with his incarceration. What is uncomfortably implied by the prison logics mentioned by Foucault is made explicit and adopted publicly, formalizing the

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deportation of non-citizens (Edgely, 2010:411) and the application for refugee status pay considerable attention to the commission of any criminal offences (see e.g. Abriel, 1996). Finally, and even more dramatically, the revocation of (national) citizenship as a consequence of a criminal offence is a sanction that has been implemented in several jurisdictions (see e.g. Lavi, 2011).

82. Note, 1989:1311.

83. Foucault, 1995.

84. Foucault, 1995:251.

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substitution of the citizen by a criminal, and completing the physical, legal and political exclusion of the offender.

## 2 The internal exclusion

Not only Taylor has used the ideas of internal exclusion to describe the pathologies of liberal democracy. Critical theorists such as Agamben have used the idea of *internal exclusion* to describe a political situation necessarily implied by structural injustice in advanced capitalist societies. Those who *belong* or are members of society are all the individuals recognized as such. However, not all those who belong are *included* but only those who are *represented* by the state, which advance their interests. This situation creates a dissonance between those who belong and those who are included, typically those individuals levelled as electors.<sup>85</sup> Disregarding the complex and radical political implications that can be drawn from this scheme,<sup>86</sup> which have usually been employed to describe the position of illegal immigrants,<sup>87</sup> the terminology can be borrowed to illustrate the situation of internal exclusion of those disenfranchised by the commission of a crime.

The key aspect of the offender' internal exclusion is that those who were once regarded as citizens are now excluded. This is make their case different from those that were born and remain outside of the political community as it is the case of a temporary resident. They become alien in their "own country, and worse".<sup>88</sup>

In the best of lights, it can be said that offenders are incorporated not as complete but as 'conditional citizens', whose reincorporation depends on their unlikely

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85. See Agamben, 1998:15-29, who follows Badiou, 2007:81-111.

86. The implication of this dissonance is that, for Badiou and Ranciere (in contrast to Agamben), it opens the space for the occurrence of a true political moment that questions the situation in which some are included but do not belong. See, generally, van den Hemel, 2008.

87. See e.g. Balibar, 2008; Ranciere, 2010.

88. Note, 1989:1311.

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normalization, but who – in the case that this condition is not met – are destined to be permanently segregated.<sup>89</sup> However, this exclusion expresses but transcends the idea that there are tight differences between the ‘good’ members of the community and ‘the others’, as an idea that strongly underpins social validation of the state’s punitive apparatus.<sup>90</sup> This is because offenders are “never utterly irrelevant or absolutely useless”, and that is perhaps the reason why they are not simply exterminated or deported, because their existence “comprises the antithetical other in relation to which the abjector self is defined”.<sup>91</sup> Their superfluity as members of the community of honest citizens from which they are expelled is transformed paradoxically into “utility and necessity precisely because of their expulsion. Superfluous and redundant on the ‘inside’, their utility is wholly dependent on their abjection from society”.<sup>92</sup> They are expelled because they are a threat, but the threat they pose to the cohesion and purity of the community is transformed into part of the community’s cohesion and purity.<sup>93</sup> The community is both transformed and reinforced through the exclusion of the undeserving. The criminal offender is not (or not always) expelled beyond borders or executed but “imprisoned, disfranchised, immobilized, and stored away, out of sight, out of mind”.<sup>94</sup>

The modalities of the internal exclusion of the offenders is something that can be described more broadly by drawing upon several aspects of the expansive exclusionary dynamic of the criminal justice system in countries such as the US and the UK. A first and more obvious aspect is the fact that imprisonment isolates offenders from society. Imprisonment is literally an internal exclusion in contrast with, for example, transportation. In opposition to punitive mechanisms that publicly expose the punishment, imprisonment makes the punishment invisible to the public,

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89. Vaughan, 2000:23-6. See also Duff, 2005a:215; Pettus, 2013:125.

90. See e.g. Drake & Henley, 2014:6.

91. Czajka, 2005:112.

92. Czajka, 2005:112.

93. See Note, 1989:1312.

94. Czajka, 2005:114 (emphasis added). Czajka refers her analysis only to certain prisoners, but the sections used here are of a generality that does not distort her position.

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therefore meaning that “[w]e don’t have to bear witness to the regime of brutality and dehumanization that is imposed in our name”.<sup>95</sup> The public becomes immune to the suffering. It involves, as Foucault points out, “lowering at least the threshold of tolerance to penalty”.<sup>96</sup> In these terms, “a dormant social function of the prison is guaranteeing, ‘to the outside’, the invisibility of the inmates”,<sup>97</sup> which “is the flipside of the intensive surveillance they face inside prisons”.<sup>98</sup>

However, the internal exclusion suffered by the offender is not limited to the particular conditions of their (usually) temporary imprisonment. In a second respect, their exclusion can be perpetuated by the permanent or temporary removal of prisoners and former prisoners from ‘respectable society’, a process often referred to as ‘invisible punishment’, effectively resembling the ancient practices of ‘civil death’.<sup>99</sup> These measures, which “emerge silently from diverse, scattered statutes and government and private sector policies, and descend on the criminal under the cover of darkness”,<sup>100</sup> and which are not motivated by an incapacitate rationale,<sup>101</sup> but mostly oriented towards the perfection of the expressive and symbolic exclusion from the circle of the deserving members,<sup>102</sup> including the loss of welfare benefits (e.g. public housing) or the ban from certain forms of employment (e.g. public service). As some of the more acute observers of these practices affirm:

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95. Edgely, 2010:415. See also Vaughan, 2000:26-8.

96. Foucault, 1995:301. See also Note, 1989:1316.

97. Mañalich, 2011b:169 [translation of the author].

98. Edgely, 2010:415.

99. See Demleiter, 2000:775. See, generally, the collections by Mauer & Chensney-Lind, 2002 and Brown & Wilkie, 2002. These effects are sharpened by the extension of CD to a permanent status (Demleitner, 2000:775), as has been empirically demonstrated (Manza & Ugger, 2006:151-163).

100. Edgely, 2010:404.

101. See above *Chapter 5*, Section I.

102. See Demleitner, 1999:159.

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“the full range of civil penalties and informal stigmas that are imposed with a criminal conviction effectively deny individuals the rights of citizenship. This denial, in turn, makes performing the duties of citizenship difficult”.<sup>103</sup>

The idea of internal exclusion can be used, finally, in a third and very specific way to describe the importance of CD, as the necessary expression that those affected by the criminal system are indeed strangers and not citizens. For that, they are excluded from the exercise of the most fundamental expression of citizenship.<sup>104</sup> This is crystallized by the widely accepted terminology in which the political discourse on crime and punishment is framed: criminal justice is a case of protecting the rights of the *citizens* and the victims against the crime and the *criminals*.<sup>105</sup> Such a distinction, which is commonly linked to discourses of penal populism, is however encrypted in the very institutions of the criminal law system, commonly internalized by the offenders,<sup>106</sup> and provided with a political meaning and a constitutional character by CD.

Offenders are deprived of the right to vote as a *demonstration* that they are no longer citizens, but politically invisible<sup>107</sup> or worse, enemies.<sup>108</sup> From the moment of the conviction, they started to be treated as criminals, not because of what they have done, but because of what they have become. They are no longer subjects of the law,

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103. Manza & Uggen, 2006:127. See also Demleitner, 1999. The collateral legal consequences of criminal conviction or imprisonment constitute a considerably broad category. They can affect other formal aspects of social life, depriving offenders of an immense amount of freedom and opportunity. For example, the right to divorce, the exercise of parental rights, the right to hold a licence to drive vehicles, the right to possess a firearm and the obligation of belonging to a public criminal register are the most common traditional issues resulting from a criminal conviction in the US. The scope of rights and benefits affected by collateral consequences has been dramatically expanded due to the success of ‘tough on crime’ policies, affecting housing, employment and public benefits. The seminal legal work on this is Damaska, 1968a and Damaska, 1968b. For the evolution of collateral consequences in the US, see Grant *et al*, 1970; Burton *et al*, 1987 (cf Olivares *et al*, 1996). For a comparative study of this expansion, see Pinard, 2010.

104. Edgely, 2010:417. See also Fletcher, 1999:1989-90.

105. See Duff, 2005a:214. See also Gómez-Jara, 2008.

106. See Omar Little, in “The Wire: One Arrest (#1.7)” (2002).

107. Pettus, 2013:98.

108. See, about the idea of an ‘Enemy criminal law’, Gómez-Jara, 2008.

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which addresses them as deliberative persons, but are regarded as dangerous strangers “against which only continues the possibility of a cognitive approach”.<sup>109</sup> Stripped of citizenship they must be controlled by mechanisms and technologies that consequentially reduce their position to the state of ‘bare life’, expelling them from the realm of human dignity,<sup>110</sup> or, at best, returned to a ‘state of nature’ in which the offenders, divested of their citizenship rights, are treated as ‘naked human beings’.<sup>111</sup>

### 3 The subversion of the boundaries

The idea of internal exclusion runs against the democratic framework presented above, which suggested that a normative conception of democracy is highly committed to the principle of ‘all those subjected to the law’ must be granted rights of participation.<sup>112</sup> However, as should be clear now, CD evidences that such a principle is not valid. In those jurisdiction that embrace CD, the boundaries of the franchise are determined under other sets of parameters, which may be the imperceptible consequence of the denied exclusionary tendencies of democracy and the invisibility of the degrading aspects of the punishment that subtly intersect with the question of the boundaries. Firstly, CD implements the closure of the boundaries in a way almost entirely opposed to that of the ‘all affected principle’, that is, by excluding those who are included because they *have been* subjected to the law. Secondly, CD helps to affirm positively, by this ‘internal exclusion’, the identity of the community of law-abiding citizens by opposition to the symbolic figure of the criminal.<sup>113</sup>

On the one hand, *law abidance* as the definitive rule of distributing the right to vote subverts the idea underlying the universal franchise, transforming the principle of ‘all

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109. Mañalich, 2011a: 139.

110. Czajka, 2005:133.

111. Mañalich, 2011b:175-6.

112. See above *Chapter 3*, Section III.

113. The thesis of Beckman (2014) according to which the included may have a right to exclusion of the no-included could be explored to grant an analytical framework to this principle.

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those subjected to the law' into the principle of 'only those law-abiding'. This is clearly prevented by the Court in *Sauvé*:

“The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen’s continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order [...]” [47].

This idea stands against the extended conception of citizenship as constitutive of the basic status that relates individuals and the State, being attached to those who are full members of society, bearers of rights (civil, political and social) and share their status in equality.<sup>114</sup> In the conception of citizenship defined in opposition to the criminal offender, the duty of law-abidance precedes the enjoyment of rights and formal equality is privileged over any notion of substantive equality.

Three elements can be distinguished from this change of paradigm. Firstly, it affects the entire population on the basis of the denial of the basic premise of Marshall’s idea of citizenship, which holds that rights are necessary for full participation in society. Instead, it replaces it with a model of governmentality,<sup>115</sup> this is, a demand of internalization of a standard of conduct that “define[s] a person as a competent member of society”, contingent upon which rights of citizenship “may be granted or rescinded”.<sup>116</sup> Secondly, it subsequently unleashes an exclusionary dynamic over some of the members of the community that is well explained by the paradoxical relation between prison and recidivism, but also has been empirically documented in terms of an inbreeding relation between crime and several forms of social disadvantage.<sup>117</sup> Finally, it affects the political system. The fundamental kinds of political antagonism (e.g. between the privileged and the unprivileged, between the

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114. Marshall, 1998:102-4.

115. See, generally, Foucault, 2008.

116. Vaughan, 2000:25.

117. Edgely, 2010:408-12; 425-8.



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liberal and conservative and between the defenders of the state and the defenders of the market) are usurped, and replaced by the unbalanced opposition between the citizen, represented by the State, and offenders, in what is usually described as a “war against the criminal class”.<sup>118</sup> A war, however, that never ends.<sup>119</sup> This movement towards the use of strategic violence, the use of prison as tactical intervention<sup>120</sup> and the exploitation of fear, which indicate necessarily the end of deliberative politics,<sup>121</sup> “express an unacknowledged recognition of the precariousness of our own conformity and therefore of the need to guard against influences that would push us over the edge”.<sup>122</sup> In sum, if it clearly expresses a sense of superiority, as incarnated in the politics of degradation, paradoxically it may also “reflect feelings of vulnerability”.<sup>123</sup>

This attitude of hostility, that “has the unique advantage of uniting all members of the community in the emotional solidarity of aggression”,<sup>124</sup> can be seen, on the other hand, as part of a decision to reaffirm a commitment to a certain *community identity*, which appraises values such as mutual respect and the rule of law. If it is accepted that CD can be pursued legitimately as a punishment under the coverage of formal equality, excluding temporarily from the franchise those subjects that have violated an important norm of mutual respect,<sup>125</sup> it can also be affirmed that CD constitutes a legitimate practice that contributes to determining the communal boundaries,<sup>126</sup> and the nature and identity of a political community.<sup>127</sup> In the words of Robert Altman, who put forward this idea, “how the citizens of a state collectively decide to respond to the violation of important normative constraints embodied in their laws constitutes

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118. See Fletcher, 1999:1897.

119. See Ellis Carver, in “The Wire: The Target (#1.1)” (2002).

120. See Mañalich, 2011a: 139.

121. See Arendt, 1970.

122. Kleinig & Murtagh, 2005:224.

123. Kleinig & Murtagh, 2005:224.

124. Mead cited in Note, 1989:1312.

125. Altman, 2005:264-7.

126. See Kleinig & Murtagh, 2005:224.

127. Altman, 2005:267-9.

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an important part of the identity of their political community”.<sup>128</sup> This argument is grounded, first, in the existence and legitimacy of cultural and historical differences among communities<sup>129</sup> and, second, in the fact that “a collective right to self-determination would have little, if any, meaning if the citizens of a state operated under the obligation to always choose the morally optimal policy”.<sup>130</sup> It is presupposed by this claim that communities that disenfranchise offenders have a different political identity to communities that do not. The remaining question then becomes what is the cost of protecting this values for the identity of the political community?

The answer can be easily envisaged at this stage. CD *confuses* the authority to punish with the power to determine its own membership.<sup>131</sup> This confusion expresses punitiveness and not urgent democratic concerns. In relation to the punitive element, for example, the Court in *Roach* does not have any qualms to acknowledge and endorse CD as a way to “stigmatise” offenders [89].<sup>132</sup> The same idea is captured, however in a critical light, in *Sauvé*:

“Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order. If modern democratic history has one lesson to teach it is this: enforced conformity to the law should not come at the cost of our core democratic values” [40].

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128. Altman, 2005:269. It is perhaps relevant to note that Altman is not defending CD as a necessary response to crime; in fact, he considers that certain circumstances must be met in order for CD to be legitimately applied. See also Manfredi, 1998:294.

129. Altman, 2005:269. See also the discussion on the MOA above *Chapter 2*, Section I.1.1.

130. Altman, 2005:264.

131. cf Lardy, 2002:528.

132. See also *NICRO* [54-6].

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On the other hand, that CD affirms a model of government that shows no concerns for democratic legitimacy is the necessary conclusion from the Hobbesian presupposition that the state authority is not granted in participation but in the protection that the citizen receive from the law. Starting from that paradigm, effectively the right to vote assume the role of privilege “granted to citizens in the sense that the law would retain its authority with or without citizen participation in elections”.<sup>133</sup> The authority of the law is not that created by democratic legitimacy but the kind of authority that also authoritarian governments may also enjoy.<sup>134</sup> In this model, the right to vote do not present itself as a mechanism of participation and generation of democratic legitimacy but primarily as mark of distinction and separation of those who have the privilege of citizens against those who have not.

The exclusionary tendencies of democracy and the dynamics of internal exclusion constitute invitation to rethink the problem of the boundaries in political rather than in normative terms. A conclusion that might be drawn from the aforementioned problems is that the definition of the boundaries – e.g. the determination of the franchise – forms the paradigmatic case in which the normative solutions expose themselves as an exercise of the political power to distinguish between ‘us’ and ‘them’, which cannot be subjected to substantive, nor to procedural rules. Mouffe, for instance, recognises, following Schmitt, that “democracy always entails a relation of inclusion-exclusion”.<sup>135</sup> She continues,

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133. Plaxton & Lardy, 2010:107.

134. This point is well developed in Plaxton & Lardy, 2010:107-8, 135-7. See also Pettus, 2013:126-135.

135. Mouffe, 1999:43.

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“[t]he logic of democracy does indeed imply a moment of closure which is required by the very process of constituting the ‘people’. This cannot be avoided, even in a liberal-democratic model; it can only be negotiated differently. But this in turn can be done only if the closure, and the paradox it implies, are acknowledged”.<sup>136</sup>

CD has the potential to expose the contradictions and fragilities of the democratic constitution of the boundaries of the political community, throwing into relief what can be termed an exclusionary tendency of liberal democracies.<sup>137</sup>

### III THE RIGHT TO VOTE AS RECOGNITION

Against a hasty conclusion, such as that voting is not quite a fundamental right,<sup>138</sup> the previous ideas regarding the logic of CD as a degrading punishment and an exclusionary practice could contribute to highlighting that the right to vote performs a fundamental political function when it determines those who are part of the community and those who are not; who are included and who are excluded.

This section claims that in light of these findings, the right to vote may be also understood, and perhaps primarily, as a mechanism of recognition of “membership of a community of deserving citizens [...] rather than as a purely legal entitlement to participate in periodic elections”.<sup>139</sup> This is clear in the historical trajectory of the extension of the franchise, but has nonetheless been obscured by the modern emphasis on participation. These ideas about what is at stake in the politics of CD can contribute to a rediscovery of the importance of this aspect that is inscribed in the very core of the right to vote. Moreover, the retrieval of this notion may enable the emergence of possibilities for contesting the discourse that intertwines crime and citizenship.

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136. Mouffe, 1999:43.

137. See also Näsström, 2007; Näsström, 2011.

138. See Behrens, 2004:255.

139. Plaxton & Lardy, 2010: 138.

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## 1 The franchise as a terrain of exclusion and recognition

The idea of the extension of the vague idea of citizenship and, therefore, the recognition of people as members of a community of equals has been strongly linked to the historical extension of the right to vote. In past times, exclusionary electoral rules were complicated and multiple, excluding numerous groups within society from political participation, thus configuring a system of privileges. The original constellation of exclusions from early modern democratic arrangements generally included women, workers, the poor and the propertyless.<sup>140</sup> At present, just a few cases of exclusions remain generally in force,<sup>141</sup> and this evolution can be understood in terms of a development from an early regime of limited voting to a tendency to embrace the principle of universal suffrage.

In the ancient regime, political participation was restricted to that select group whose lineage was transmitted through hereditary privileges. The hierarchies and the integration into intermediate associations were the fundamental pillar of pre-democratic political regimes. The break from the ancient regime initiated a new era governed by the rising principle of political equality.<sup>142</sup> By this process, political rights were slowly transformed, by means of their extension to everybody, from particular privileges into fundamental rights.<sup>143</sup> Three elements coincided to generate the scenario in which this transition emerged.

The first was paradoxically the form of the *nation-state*. Taylor links the break with the ancient regime with the emergence and consolidation of a new paradigm of

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140. For a complete analysis of the rationale of those exclusions from the perspective of class-based and capitalist rationality, omitted in the following passages, see Macpherson, 1977.

141. See Blais *et al*, 2001; Massicotte *et al*, 2004: Ch. 1. Other important exceptions are some local residence requirements. In those cases, somebody is impeded from voting in a determined place, but is still considered as an elector. On how this factor can intersect with CD, specially producing a detrimental demographic effect, see Taormina, 2003.

142. See e.g. Brubaker, 1989.

143. For a critique of this inclusive view of the transition from pre-modern to modern orders, see Minow, 1990:121-136.

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modern political organisation. Two central ideas show that the ideal of democratic inclusion was already latent, albeit in embryonic form, in the formative stages of the nation state: first, through a direct association of membership between citizens and the state; and second, by the fact that this association was immediate and horizontal, in contrast to pre-modern forms of organization in which the bonds were mediate and hierarchical.<sup>144</sup> The nation-state made possible the formation of democratic participation, yet at the same time it contributed to its limitation under the framework of the national model of citizenship, according to which only *national citizens* were entitled to rights of participation. This constituted the external boundaries of the political community.<sup>145</sup>

The second element is the emergence of the *public sphere*. In Habermas' description, the transition to modernity implied that public affairs ceased to be synonymous with government affairs and instead diverged into an autonomous space from the government apparatus and a private sphere in which subjects *qua* citizens could join, discuss and influence government decision-making. Participation in the public sphere was opened up to formerly-excluded actors (the bourgeoisie) and dominated by principles of rationality with which anybody could engage.<sup>146</sup> At the same time, however, those participatory standards were crystallized into barriers that excluded those arguably unable to engage in a rational and impartial dialogue, or "capable of a well-informed and reasonable judgement",<sup>147</sup> about the common affairs of the community. Importantly, the emergence of the public sphere potentially left behind those people associated with the spheres considered as private by setting up mechanisms of exclusion, which came to be legally codified in terms of *political*

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144. See Taylor, 1997. The horizontality of membership gave citizens direct access to the public sphere; simultaneously, this was associated with the individualisation, uniformity and equality of the subjects. See also, Habermas, 1996a:494-5. Notwithstanding their agreement on the historically democratic importance of nation-state for democracy, Taylor and Habermas disagree upon the role that national identity should play in the idea of social integration in modern democracies.

145. See above *Chapter 3*, Section III.3.

146. See Habermas, 1989; Taylor, 2004: Ch. 6.

147. Cheneval, 2006:162.

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*capacity* to participate meaningfully in rational political discussion.<sup>148</sup> However, when the public sphere adopts the form of a deliberative space in which socialization is discursively mediated, it has the potentiality to open the external boundaries of the community to the participation of those who lack formal membership.<sup>149</sup> The ideas of public sphere and capacity requirements constituted and still constituting the internal and deliberative boundaries of the political community.<sup>150</sup>

The third and driving element can be described as the embrace of the doctrine of *natural rights*. The idea of natural rights was the most powerful discursive tool of those who made a claim for inclusion as equal citizens in the public sphere of the nation-state. The idea of the universal and natural freedom and equality of all individuals is still used as the more incisive argument in struggles for recognition. The universality and, therefore, the openness of the concepts of the public, citizenry and people are in a tense conceptual relationship with the tendency towards closure of both the nation state's membership and the public sphere's capacity requirements.<sup>151</sup> The language of the rights is used for certain groups to further their interests and to demand justifications. In that context, as Marta Minow put it, "no one claimed that these new ideas [individual self-determination and equal justice] would apply to everyone [...] the range of status categories diminished, but legal incapacities and regulated relationships of dependency still supplied reasons for excepting certain groups from various legal and economic activities".<sup>152</sup> Notwithstanding these shortcomings, the language of universalism "allows us constantly to challenge – through reference to 'humanity' and the polemical use of 'human rights' – the forms of exclusion that are necessarily inscribed in the political practice of installing those

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148. The demand of political capacity is easily identified with the political theory of republicanism and its discourse of civic virtue (see e.g. Dagger, 1997:13-7). Critically, see Minow, 1990:121-45.

149. See Cheneval, 2006.

150. For a critical account of the public sphere, see Fraser, 1990.

151. See e.g. Note, 1987.

152. Minow, 1990:124.

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rights and defining ‘the people’”.<sup>153</sup> This antagonism between the legal categories used to incorporate the difference within the law and the language of the universal is what permits an understanding of the process of setting the boundaries of democracy as an ongoing process of political contestation.

Once it is generally observed that the franchise was one of the terrains marked by the tensions between exclusion and the recognition of free and equal persons, there is a need to explore the circumstances of the transition from a regime of limited voting to one of universal suffrage. Behind this progression lies a complex process of struggle against two interconnected ideological structures – in the sense that sustain relations of domination appealing to representation.<sup>154</sup> On the one hand, there is the republican construction of requirements of responsibility, virtue and capacity offered by the new dominant bourgeoisie against the working-class, by men against women, by the Europeans against other ethnic groups. On the other hand, there is what remains of the aristocratic conceptions that understand political power as a *privilege*. The historical sum of these structures was the construction of the rights of democratic participation as a question depending on the satisfaction of certain requirements.<sup>155</sup> The rhetoric built around concepts such as responsibility and virtue worked by disempowering those groups of the population targeted as dangerous to the interests of the privileged class, as well as those groups considered inferior, marginal, or different.<sup>156</sup> They provided the method by which, using legally-enacted competency requirements, the powerful members of society constructed a formal difference that permitted the ‘harmonious exclusion’ of the underprivileged class from positions of political power, thereby maintaining a relationship of political domination.<sup>157</sup>

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153. Mouffe, 1999:43-4. See also Balibar, 2004:59-60.

154. Christodoulidis, 2004:190.

155. See e.g. Pettus, 2013:54-9.

156. See Minow, 1990:10.

157. See Note, 1987:1126. See also Minow, 1990:8-9. The example of exclusions related to *wealth* and *property* can illustrate how these kinds of arguments worked. Whilst in an aristocratic



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Against this kind of construction, the process of enfranchisement of the general population was produced by an ambivalent process of *struggle for recognition*, “fulfilling the demands of the excluded to share power on an equal basis with people they recognize as their natural equals, but who do not recognize them as such”.<sup>158</sup> Structures of production massively affected by modern warfare and the civil rights movements gradually yielded the right to vote for all those who claimed it.<sup>159</sup> While elite governments sought social legitimacy, in order to maintain the order that favoured them and to avoid revolt and instability, those excluded sought recognition and empowerment.<sup>160</sup>

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model, the idea of public standing as privilege was linked to birth-right and belonging to a particular social group or family, with the rise of republican principles, suffrage became formally independent of circumstances of birth; however, the idea of public standing as privilege survived, this time linked to the status of landowner or taxpayer to accommodate the emergence of the new bourgeois class. At this stage, a link between political rights and virtue and capacity, in this case with an emphasis on *responsibility*, was explicit. The requirement of property was rationally explained as constituting the necessary guarantee for citizens’ commitment to the common good. Because property-owners are committed to the destiny of the society upon which they depend, they deserve to be enfranchised, whereas those with nothing to risk and therefore only egoistically concerned with their own advantage – their own survival – could not engage with a common perspective; therefore, they must be excluded. A similar rationale was offered regarding *autonomy*: the integrity of the owner’s character as responsible and competent was cited in contrast with those without property, who were thought to be weak and accustomed to relying upon others (see Ewald, 2004:119. see also Beckman, 2009:7). This autonomy-based argument particularly affected the exclusion of wage labourers, who were considered as dependent upon the will of the employer, and therefore prone to be “manipulated and induced to act politically in the interest of others” (Beckman, 2007:15. See also Macpherson, 1977).

158. Pettus, 2013:69.

159. It is possible to view this process from the perspective of the change that it produced in the composition of the electorate. The percentage of the population permitted to vote during the nineteenth century was minimal. From the time of the establishment of modern elections to current times, the number of citizens eligible to cast their ballots has gradually increased (see Przeworski, 2008). For example, according to Katz (1997), in the United Kingdom just 3.7% of the population was eligible to vote in 1850, while in France the number rose to 25%. One hundred years later, the UK permitted 68% of its population to vote and France 61% (236-7). This can be attributed to the gradual elimination, during the course of the nineteenth and twentieth centuries, of property, contributory and literacy requirements associated with the privileges of the upper classes. Patterns of exclusion based on religion, ethnicity, race and sex were also eliminated.

160. See Acemoglu & Robinson, 2000. Lizzeri & Persico (2004), in contrast, view the extension of suffrage to the masses as also part of a political process internal to the ruling-elite’s economic affairs. See also Przeworski, 2010b. The ambivalence between strategic reasoning to face relations of oppression, on the one hand, and the use of moral universal principles to unveil

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Notwithstanding progress in the consolidation of a more inclusive franchise,<sup>161</sup> present exclusionary rules can be subjected to the same kind of critique against their abuse, because “the arguments employed in relation to contemporary exclusions owe much to the structure of the arguments of the past”.<sup>162</sup> To a certain extent, this was the purpose of *Chapter 4* and *Chapter 5* of this dissertation.

## 2 A conception of the right to vote as recognition

The previous historical remarks help initiate an exploration of the recourse to the language of recognition to address what is at stake in the current practices of exclusion from the franchise. Echoing this historical trajectory, it has been argued that the “denial of the right to vote constitutes an unacceptable form of exclusion from a validating social practice. Exclusion from voting is, in effect, a mark of inferiority, a consignment to a degrading form of second-class citizenship”.<sup>163</sup> Acceptance of this vision may well be based on the affirmation that the principal reasons which have driven struggles for the vote are more closely related to the question of inclusion within the circle of those considered equals, within the

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their ideological exclusion, on the other, was a background condition of the struggle for the right to vote. This ambiguity becomes salient when it is noticed that the rhetoric of virtue and capacity was not only present in the exclusionary competency requirements, which were combated by the integrationist demands, but that it was sometimes present in their contestation (See e.g. Karlan, 2003:1346-62). They did not assume purely the form of the claim for inclusion and the elimination of requirements, but regularly affirmed, maybe for strategic reasons, the legitimacy of the exclusionary rules (see Ewald, 2013:329-32).

161. See e.g. *Hirst*: “In the twenty-first century, the presumption in a democratic State must be in favour of inclusion [...]. Universal suffrage has become the basic principle” [59]. See, for an historical account of the case of the US, Keyssar, 2000.

162. Beckman, 2009:8. See also Ewald, 2004:119; Wang, 2012: xv. The assumption that electoral inclusion has been a process of constant expansion is misguided. Keyssar (2013) describes it more accurately as a process of experiencing by turn moments of expansion and moments of contraction. The massive disenfranchisement affecting an ever-increasing population of prisoners and, on the other hand, the problem affecting those for whom it is difficult to provide government-issued photo identification at the polls, are both cases of contraction of the franchise, under new indirect and sophisticated formulas.

163. Gardner, 1997:901.

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boundaries, than with some alleged increasing and deepening participation of the people in public affairs.<sup>164</sup>

The conception of the franchise as *recognition*, notably advocated by Judith Shklar, points to the identification of citizens as free and equal members within their political community. More important than a participatory function in a democratic community,<sup>165</sup> citizenship can be understood as a form of social standing, and the right to vote as its mark of recognition.<sup>166</sup> The value of political rights, she notes, is that which distinguishes the free man:

“The vote has always been a certified full member status in society and its value depends primarily on its ability to confer a minimum of *social dignity*”.<sup>167</sup>

Notwithstanding the fact that it may displace the gravity of voting from a strong or thick model of democracy,<sup>168</sup> this conception is connected to a vision of political participation as something constitutively valuable. This does not necessarily imply that the experience of participation itself is portrayed as an enlightening or educative practice.<sup>169</sup> This may well be the case but it is not what the idea of recognition emphasises. When Shklar contrasts citizenship as *standing* against citizenship as *participation*, she seems to be marking an important difference between her account and a conception of political participation that also confers intrinsic value to political rights but for different reasons. Her point is even more essential: participation expresses citizen’s membership and inclusion in society;<sup>170</sup> and what is fundamental is the unconditional right to participate, freely and equally, rather than the actual

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164. See Shklar, 1991:18-9.

165. See above *Chapter 3*, Section II.

166. See Shklar, 1991:1-3, 14-9.

167. Shklar, 1991:2 (emphasis added).

168. See above Section II.1.

169. See Michelman, 1989:451.

170. See also Gardner, 1997:903-6.

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participation itself.<sup>171</sup> Her claim is not about democratic performance, agency and empowerment, but about the inclusion in democracy. In these terms, it can be appreciated as a conception of the importance of the status of voters rather than of the practice of voting *per se*.

This account provides a particularly enriching meaning for exclusion from the franchise. Those who are denied the vote are denied much more than the opportunity to participate in the democratic process, they are denied the transcendental possibility of becoming a part of the polity.<sup>172</sup> The ideas developed before work as a context for use of the mechanism of disenfranchisement as a mechanism of punitive degradation and the exclusion of those on the boundaries of a political community comprising equal members.<sup>173</sup> The denial of the right to vote, in these terms, may claim to be one of the more perfect forms in which degradation and the exclusionary tendency of democratic politics can operate: “standing as a place in one the higher or lower social strata and the egalitarian demands of respect are not easily reconciled”.<sup>174</sup>

This idea is illustrated powerfully by the contradistinction between citizenship, those who can vote and earn, and slavery, those who can neither vote nor earn. In her portrayal, the birth of democratic citizenship in the United States is seen as a contradictory moment. On the one hand, citizenship was built against the institutional background of hereditary privileges, which constituted a system of social hierarchies that were subsequently transformed by the universalistic tendency of the struggles for recognition. On the other, the new citizenship coexisted with its very denial, due to the continuation of slavery in the new republic. Slavery played a significant role in the construction of citizenship in America. This conception of citizenship, which integrates two main elements that signify the equal status and dignity of citizens, was important in determining both the openness and closure of the democratic process in

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171. See Shklar, 1991:3, 27. See also Pettus, 2013:67.

172. See Shklar, 1991.

173. See Shklar, 1991:2-3.

174. Shklar, 1991:2.

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America, and worked as the engine of the struggle for recognition: firstly, the right to vote signified the public standing of a full member of the community<sup>175</sup> and, secondly, the right to earn and therefore the right to work freely.<sup>176</sup> The affirmation of these rights stood as a sign of citizenship's recognition and their denial the sign of some form of slavery.

This opposition between citizen and slave, in the context of the US, further illuminates the more general idea of the right to vote as a mark of inclusion and exclusion from the citizens' equal membership. Its value depends on its denial. It highlights, on the one hand, the vote as an element of recognition; as "the most basic expression of the principle of equality, a recognition that each person has basic, equal and presumptively irrevocable civic status in the society".<sup>177</sup> It is the "public affirmation of the status of equal citizenship for all", and those possessing them retain their self-respect and self-confidence".<sup>178</sup> Its denial, this is CD, is, on the other hand, as a form of *disrespect*: "people who are not granted these marks of civic dignity feel dishonored, not just powerless and poor".<sup>179</sup> Therefore, it is not, or not only, a balance of political power or the articulation of an adequate set of rights that permit a more or less perfect expression and participation what is at stake when CD is discussed. From the perspective of recognition, it points to something more crucial. It is the very admission of the other into the terrain of *dignity*.

This conception is assumed by the Court in *Sauvé*, when it is affirmed that "rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy [...]" [14]. This point is taken even further when it is asserted, later, following *August*, that "denying citizens the right to vote runs counter

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175. See Shklar, 1991: Ch. 1. See also Holloway, 2014: Ch. 1.

176. See Shklar, 1991: Ch. 2.

177. King, 2011. See also Pettus, 2013:69; Bennett & Viehoff, 2013b:97.

178. Ziegler, 2011:255.

179. See Shklar, 1991:3.

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to our constitutional commitment to the inherent worth and dignity of every individual” [35].<sup>180</sup> The original formulation, from the South African Constitutional Court, must be regarded as a landmark in the jurisprudence on the right to vote:

“Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement” [August, 17].<sup>181</sup>

### 3 On equal dignity and citizenship

Charles Taylor’s celebrated essay about the politics of recognition distinguishes between two meanings of recognition.<sup>182</sup> The celebrity of his essay is due to his affirmation of the existence of a *politics of difference*, highlighting the importance of admitting as socially relevant respect for each group or each person’s distinctness from others. In contrast to this kind of recognition, Taylor identifies a historically prior form of recognition that focuses instead on those characteristics that all human beings have in common, which he describes as the *politics of equal dignity*.<sup>183</sup> He argues:

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180. See also *Sauvé* [44].

181. See also *NICRO* [28].

182. See Taylor, 1994.

183. See, critical to this distinction, e.g. Cooke, 2009.

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“With the move from honor to dignity has come a politics of universalism, emphasizing the equal dignity of all citizens, and the content of this politics has been the equalization of rights and entitlements. What is to be avoided at all costs is the existence of ‘first-class’ and ‘second-class’ citizens”.<sup>184</sup>

Taylor associates the demands of equal dignity with those claims that are related to personal and political autonomy, that is, the capacity to autonomously form and develop a conception of the good and be treated accordingly. This aspect of his work overlaps with the Kantian account of moral autonomy, which in turn is profoundly linked to Habermas’ ideas about democratic legitimacy, as unpacked above. That is why it is not wrong to say that demands for recognition of the politics of equal dignity coincide at a normative level with the mutual recognition of human beings as deliberative persons, and therefore with their admission into the group of those individuals responsibly subjected to the law as potentially critically engaged democratic citizens.<sup>185</sup>

This is even clearer in the language of another theorist of recognition. Axel Honneth argues that what is at stake in exclusions from the domain of rights is a form of cognitive respect. He argues, following T.S. Marshall, that the rights of citizenship involve a particular kind of legal recognition that is grounded with respect to the person as morally responsible.<sup>186</sup> The recognition of somebody as a legal person expresses a form of respect that is directed to consider every human, and everyone to the same degree, as being an *end in itself*.<sup>187</sup> The more radical ramification of this idea is that the recognition of legal personality may assume the function of a test for the determination of the circle of human subjects.<sup>188</sup> However, for the discussion of CD, perhaps more pertinent would be the idea that legal recognition, assuming the

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184. Taylor, 1994:37.

185. See above *Chapter 3*, Section I.

186. Honneth, 1995:110. See also above *Chapter 4*, Section III.

187. Honneth, 1995:110-2.

188. Honneth, 1995:113-8.

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form of the entitlement of rights and associated with the capacity to “raise socially accepted claims”,

“with a legitimate way of making clear to oneself that one is respected by everyone else. [...] the individual now has available a symbolic means of expression whose social effectiveness can demonstrate to him, each time anew, that he or she is universally recognized as a morally responsible person. [...] a person who shares with all other members of one’s community the qualities that make participation in discursive will-formation possible”.<sup>189</sup>

The consequences of this idea are that for the individual member of society “to live without individual rights means to have no chance of developing self-respect”,<sup>190</sup> because for the individual, “having socially valid rights-claims denied signifies a violation of the intersubjective expectation to be recognized as a subject capable of forming moral judgments”.<sup>191</sup> In this sense, the language of recognition has the particular capacity to include elements of social life associated with universal claims and in particular with the attributes of moral and legal personality, and citizenship.<sup>192</sup>

It must be noted that the practice of punishment may be seen as challenging the very core of the politics of recognition. However, the disrespect involved in the denial of the right to vote is not just opposed to the idea of recognition but even to the paradoxical idea of *negative* recognition necessarily involved in a democratic punitive practice. This, as argued above, is crucial to understanding why CD is irreconcilable with such a practice.<sup>193</sup> Negative recognition is what a democratic criminal law demands as a punitive response in the case of a commission of a criminal offence: a response that expresses condemnation towards the offence by recognizing the offender as a fellow citizen, and maintaining that recognition after the

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189. Honneth, 1995:120.

190. Honneth, 1995:119.

191. Honneth, 1995:134. See also Habermas, 1996a: Ch. 2.

192. cf Plaxton & Lardy, 2010:140-1.

193. See Walzer, 1983:256-70; Mañalich, 2011a: 134-5; and above Section I.2.



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conviction, during the execution of the sentence and beyond.<sup>194</sup> In contrast with the practice of democratic punishment, CD cannot be understood in such terms but, as the expression of a demand of degradation and a tendency to exclusion, can only be codified as a form of *denial* of recognition.

The codification of CD in the terminology of recognition is, to a certain extent, unusual and can lead to reasonable objections. First, and under the premise that the analysis is conducted without evidence of racial motivation or impact,<sup>195</sup> the discussion of CD could be conducted, misguidedly, towards the terrain of minorities' rights. What is at stake in CD is not the social esteem demanded for certain people's cultural way of life. As the minority vote in *Chester and McGeoch* correctly intuits, "[p]risoners belong to a minority only in the banal and legally irrelevant sense that most people do not do the things which warrant imprisonment by due process of law" [112]. However, the claim that prisoners are indeed a minority can be codified in terms of the recognition of equal dignity. Their position as a minority is constituted by the mistreatment involved in the punitive response of the State and not in a presumptive cultural identity. In other words, they are not a minority because they share a distinctively criminal history but because they are subjected to imprisonment as a particular form of human experience that deprives them of numerous rights, considered fundamental for forming and developing a conception of the good. Summing up, they constitute a minority because they are denied those rights to which everybody else has access due to their human dignity.

Second, the idea of recognition in the terrain of equal dignity still requires elaboration in the more limited language of citizenship. That is why the objector would sustain that the exclusion from the exercise of political rights is not, or is not necessarily, a wholesale exclusion from humanity and, therefore, cannot be explained as a denial of human dignity. In other words, the right to vote, as a political right of

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194. See above *Chapter 5*, Section III.2-3.

195. See above *Chapter 1*, Section III.

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citizens, is not a human right. There are two alternative ways to address this objection. On the one hand, it can be said, as Jeremy Waldron has recently argued, that citizenship is a particular form of dignity. Following Kant, he assumes that “citizenship is a certain sort of dignity”, and as well as human dignity it is a “status that is cherished as special notwithstanding the fact that [it] is widely spread”.<sup>196</sup> However, the dignity of citizenship does not merge – for that reason alone – with human dignity: “[e]ven when it applies to all humans in a given country, the dignity of the citizens remains specific and relational”.<sup>197</sup> It is specific in the way that it relates to membership in a particular community of equals. It is relational because it constitutes a link between a closed group of citizens and the democratic governmental structure. In this way, citizenship “represents one possible *realization* of human dignity”.<sup>198</sup>

On the other hand, the connection of the recognition of equal dignity to the concept of autonomy contributes to create a link that may have been missing between dignity and citizenship. Recognition of autonomy is what is involved in the capacity to follow rules, the capacity to be held accountable for a criminal action, the capacity to examine critically the actions of the political authorities and the capacity to vote. Habermas’ notion of deliberative personality, which grounds the attribution of legally-guaranteed spheres of private and public autonomy, can be regarded as the expression of this link between dignity and citizenship.<sup>199</sup>

As a final remark, it is necessary to make explicit the claim that as a degrading punishment, CD emphasises the idea of the right to vote as recognition. The use of the idea of recognition may seem contradictory when placed alongside what was previously described as the politics of CD. Degradation and exclusion are precisely

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196. Waldron, 2013a:9-10.

197. Waldron, 2013a:13 (emphasis added).

198. Waldron, 2013a:14.

199. See Habermas, 1996a:426-7. See also above *Chapter 3*, Section I.

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the forces against which struggles for recognition have been historically directed. How can these ideas be reconciled and, what is more, be said to contribute to the emergence or revival of the right to vote as a mechanism of recognition? Equal dignity and formal equality present a similar framework by which to understand the importance of the right to vote. Both demand that persons be treated according to their rational capacity. The difference consists in that *formal equality* departs from the premise of inclusion and uses mechanisms of recognition to produce a dynamic of exclusion and inclusion depending on the social performance of the actor. The identity of the community is built upon victimization, and

“[t]he community that result is, of course, a simulacrum of community; a phantasm that speaks of a nostalgic desire for oneness and unity, while at the same time structuring itself around its dependence upon fear, alienation [...] Recognition is not based on shared friendship but on shared risk and danger [...]”.<sup>200</sup>

In contrast, *equal dignity* demands the peremptory inclusion of every human being in the domain of the rights of citizenship, including the right to vote, because the social performance that is expected from them is largely dependent on such inclusion.

Despite this deep philosophical and political antagonism, degradation and recognition indicate a common understanding of the value of the right to vote. Codified in the language of Honneth, this manifests, from the perspective of the politics of degradation, a mechanism for expressing *disrespect*, whilst the opposing perspective sees the right to vote as a mechanism of *recognition*. In other terms, CD can be characterised in terms of *inclusion* and *exclusion* from the political community. This understanding of the right to vote contrasts with other notions that overemphasise its *participatory* potential to create democratic legitimacy.

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200. Alison Young, cited in Pettus, 2013:138.

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#### IV BETWEEN PARTICIPATION AND RECOGNITION

The foregoing observations about the recognition dimension of the right to vote are not directed to undermine its value as a fundamental mechanism of democratic participation. Even when “voting is a power symbol of political equality”, that symbol is given by the fact that “each vote counts the same, and each voter gets one, and only one, vote”.<sup>201</sup> The mere recognition of the status of voters supplies an incomplete picture of the importance of voting.<sup>202</sup> The affirmation of political equality represented in the vote as recognition therefore needs to be equilibrated by an account of the practice of political equality in which everybody’s vote has an equal impact on the electoral outcome, and consequently upon the law-making process. These observations are intended to underscore the importance of embracing a constitutional conception of the right to vote, capable of providing a harmonious account of the right to vote which not only expresses its function of public participation but also acts as a sign of membership and equality. This last section seeks to articulate the tense relation between participation and recognition inherent to the right to vote.

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201. Manza & Ugger, 2006:18.

202. See Gardner, 1997:979ff. Arguably there are more elements to consider in the practice of voting. See e.g. Michelman, 1989 (distinguishing liberal from republican aspects); Winkler, 1993 (distinguishing instrumental and communicative aspects); Karlan, 1993 (distinguishing participatory, aggregative and governance aspects); Gardner, 1997:900-6 (distinguishing between protective and communitarian accounts); Parkes, 2003 (distinguishing between instrumental and constitutive).

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## 1 The right to vote as participation

Some ideas have been mentioned regarding the participatory nature of the right to vote in *Chapter 3*, mostly regarding it as a key mechanism to produce input democratic legitimacy.<sup>203</sup>

The case of a *liberal* conception of the vote as participation coincides with an instrumental dimension of political participation that enables the protection of those inalienable rights of individuals against others and in particular against the government of the majority.<sup>204</sup> This involves assessing politics' goal of the "optimal compromise between given, and reducibly opposed, private interests"<sup>205</sup> and political participation "as a means to defend or further interests formed and defined outside of politics".<sup>206</sup> For example, in a classic judgment, the US Supreme Court said that voting "is a fundamental right because it is *preservative* of all rights".<sup>207</sup> Voting, according to this account, can also contribute to identify those interests worthy of defence:

"exclusion in some form or another from the franchise leaves them with an inadequate ability to influence the outcomes of governmental decision-making processes. That is, their inability to vote, or to vote effectively, leaves them politically naked and at the mercy of processes over which they exercise no control".<sup>208</sup>

In short, it coincides with the ideological presuppositions of aggregative democracy. Even when this approach to voting may highlight the liberal and more individualistic

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203. See *Chapter 3*, Section II.

204. See Levison, 1989:550. See also Habermas, 1996b:22; Gardner, 1997:902; Parkes, 2003:88-91.

205. Elster, 1989:3.

206. Michelman, 1989:451.

207. *Yick Wo v Hopkins* (1886) [371]. See also the recent *Bush v Gore* (2000) [104]. Similarly, those who consider suffrage as a form of *influence* believe that the community has a duty to confer voting rights on those who have individual interests to protect against others and especially against the community itself (See Dahl, 1989:93-6).

208. Gardner, 1997:901.

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dimension of voting, it devotes substantial attention to the question of the practice of voting and therefore is substantially linked to the question of democratic participation.

A *democratic* conception of the right to vote as participation can also admit an instrumental form, in this case to the process of collective self-government. Voting is a valuable practice to the extent that it allows the control of the representatives by the citizens. In this version, voting performs a markedly important role in which citizens, through the programming of the government in accordance with the interests of society, are relieved of the task of conducting government themselves.<sup>209</sup> Voting rights are recognized as the first and most important accountability measure in the hands of electors against potential corruption and abuse of the government.<sup>210</sup> The democratic version is attractive also because it understands that the influence or control that each citizen can exercise independently within the electoral processes is almost insignificant and important decisions are not made by a person or group of persons but by all those who are involved in a collective practice of government.<sup>211</sup>

For example, Habermas' account of the democratic legitimacy of the law grounded in citizens' political participation illuminates importantly a conception of the right to vote that moves towards these requirements: both inclusion and participation are present. Although he does not develop specifically the role played by different rights of participation and the concrete role that the right to vote plays, nonetheless some general lines can be sketched on the basis that, for him, participation in the law-

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209. See Habermas, 1996b:21.

210. See Gardner, 1997:904.

211. See Ackerman, 1991:239. See also Thompson, 2002a:5-6.

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making process is codified in terms of autonomy and communication, and therefore the right to vote should be understood with regards these key aspects.<sup>212</sup>

For Habermas, the participation of citizens in a democracy must be legally guaranteed in terms of rights of participation. Equal rights of participation are, therefore, a fundamental element of a procedural account of democracy. Such rights “result from the symmetrical juridification of the communicative freedom of all citizens”.<sup>213</sup> At this point, it is important to revisit some basic ideas. The communicative freedom of agreeing and disagreeing with others is institutionalized in terms of rights, giving a voice to everybody in the democratic process.<sup>214</sup> The autonomously motivated agreement of citizens produces the communicative power that feeds the process of law-making with legitimacy, and finally justifies the authority of the law. Following the idea of a two-track model of democracy, political power might be communicatively manufactured in both the public sphere and the parliamentary *fora*. However, as representative institutions monopolize decision-making competencies, the power generated in the public sphere must be transferred into the political system to be effective in what is a procedural paradigm of law-making based on communicative power: “Passing through the channels of general election and various forms of participation, public opinions are converted into a communicative power that authorizes the legislature”.<sup>215</sup> Considering the right to vote as a right to participation implies, according to the previous description, firstly, that voting can be understood as a form of communication generated among the citizenry and directed toward the public authorities. Elections, as the collective action of voting, may play a

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212. The precise role of voting and elections as channels and generators of communicative power remains obscure and underdeveloped in Habermas’ work. It is thus identified as a line of further research that cannot be pursued here. Habermas recognizes, however, that voting plays a fundamental role in his account of the generation of communicative power. See Flynn, 2004:454 (n52).

213. Habermas, 1996a:127.

214. In this respect, Habermas (1996a:146-7) follows Hannah Arendt’s idea of political power as what is produced by individuals acting in concert. See Arendt, 1970.

215. Habermas, 1996a:442. As rightly noted by Flynn (2004), there is an ambiguity in the use of communicative power that is not clear if it is generated just in the institutional track or also in the informal public sphere. Here, what Flynn calls a wide reading of the concept is adhered to.

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fundamental role in channelling and generating communication and therefore actualizing the democratic promise of self-government.

In this model, however, the right to vote is a poor example of the communicative exercise of power when compared with, for instance, free speech. Even when voting “does communicate a preference, [it] is not a good example of political communication given its lack of discursivity”.<sup>216</sup> Voting has a limited capacity to articulate the plurality of interests, values and ideas that citizens might be concerned with introducing into the decision-making process. Rights of communication and expression involved in electoral campaigns, for instance, have much more important communicative potential. This claim, however, requires qualification. Voting is only a partial account of what the citizens do when they engage in elections. The interests they put forward are only visible to the community inside a more complex web of communication that includes the construction of a common discursive landscape in which those interests can be located, balanced and eventually postponed in a practice of public dialogue and decision-making that precedes and follows elections. An understanding of voting as communicative action offers an account for that complexity and permits understanding of the vote as a key part of the democratic process.<sup>217</sup>

The very fact of its *low intensity* might contribute to making the right to vote an important right of participation in a modern democracy; indeed, a fundamental one. Correlative to its poor or limited discursive performance, the fact that voting is not a very demanding activity and imposes a limited burden on citizens can be seen as an institutional virtue in complex societies.<sup>218</sup> Compared with the exercise of other political activities, voting has a temporally limited character,<sup>219</sup> demands a limited

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216. Flynn, 2004:447.

217. See above *Chapter 3*, Section II.

218. The right not to engage in politics as a virtuous enterprise. The right to become a stranger is a demand of social pluralism. This point is well presented in Ackerman, 1991: Ch. 9.

219. See Ackerman, 1991:238-9.



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amount of knowledge and it can be open to every kind of personal character, style of life and conception of the good life. It does not inscribe in its institutional structure the exclusionary tendencies of discursive participation in the public sphere. This quality of voting is what makes it possible for everybody to assume some responsibility in common affairs. In other words, the right to vote matters because it ‘is a low-cost way of making a civil contribution’.<sup>220</sup> The vote is an inclusive device that, even when at a low-incidence rate, expands the potential of political communication across society, eventually including everybody.

## **2 Recognition and the legal structure of the right to vote**

In contrast with the character of communicative action, the advantages that the right to vote has over other participatory rights, and therefore its importance, lie in its aspect of recognition. The right to vote is a right that embodies auspicious conditions to assume the function of recognition of individuals as free and equal members of a democratic political community. Conversely, these very conditions also make it the perfect mechanism to manifest disrespect in a democratic context. This advantage can be observed when the legal structure of the right to vote is dissected and its different aspects are distinguished.

All of these normative positions should play an important role in the constitutional reconstruction of the right to vote. However, the right to be entitled to vote (or right to enfranchisement) is of a fundamental, yet sometimes unnoticed or underrated, importance in that it is linked to the idea of recognition. For example, in analysing the legal structure of the right to vote, Jeremy Waldron defends that idea that the core of the normative positions associated to the right to vote is that of a power rather than a liberty: “to exercise the right to vote is to exercise a Hohfeldian *power*: it is to perform an action which alters the assignment of rights and duties in the political

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220. Manza & Ugger, 2006:18.

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community”.<sup>221</sup> This is not to say that this power is not connected with other elements that assume the form of liberties, but rather to suggest that those elements – and this is the argument about the core and the periphery of the right to vote – are meant to protect the value attached to the exercise of the power.<sup>222</sup> On other terms, while the power is associated to the authority the liberty is associated to the discretion in the exercise of that authority.<sup>223</sup> Despite the sharpness of his claim, Waldron’s distinction between power and liberty misses something fundamental about the normative positions involved in the right to vote that can only be illuminated by the hypothesis of a violation of rights.

The infraction of liberty involved in the right to vote is the clearest case. When State agents threaten a citizen to vote for a certain candidate, the right to vote freely is violated. But the power to vote remains. The power to vote has limited value without the right to vote freely. This case can be generalized to say that a violation of the power to vote is always constituted indirectly by a violation of the State’s obligation to do or abstain from doing something.

However, what we usually describe as a violation of the right to vote includes another kind of situation. This sort of case arises when somebody is excluded from the elections by law, as is the case with CD. In those cases, the excluded people are not in the position to exercise the vote as power; not because of an infraction of a peripheral right, but because those people are – more radically – excluded from the group of those entitled to the vote as power. The violation of which those people are victims is analytically prior to the entitlement to a power; it is a violation of the right to be entitled to a power. It is a violation of the right to be included in the franchise.

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221. Waldron, 2000:48. This power is, as results evident, shared with others and jointly exercised in elections (Waldron, 2000:50-8).

222. Waldron, 2000:48-50.

223. Beckman, 2014:5.

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The way in which Waldron addresses the right to vote as a power includes some ideas that may reveal that he considers the right to be enfranchised as part of the content of the power. For example, he emphasises the fact that the importance of voting as power is given by “the *equality* of one’s power with the power of each of one’s fellow-citizens”.<sup>224</sup> He also refers to the notion of ‘comparative justice’ as an underlying value of the vote whose main goal is to avoid “arbitrariness and insult that unequal or disproportionate treatment involves”.<sup>225</sup> Both of these features imply a reference to the deeper narrative of recognition and are only exposed by the exclusion of somebody from the franchise.

It may be important to distinguish therefore, on the one hand, the right to vote as power as a description of the practice of voting and part of the democratic form of government from, on the other hand, the right to be included in the franchise that can claim the position of a mechanism of recognition of public autonomy of persons *qua* citizens. The right to vote as power, the right to cast the vote, considered the core of the right to vote, is the realization of that prior right.

Being analytically precise, it can be seen that there are *at least* three kinds of normative positions involved in the constitutional discussion about the right to vote. First, the right to vote as a fundamental right can be described as a right to be entitled to vote. This right is not a power but a “right to powers” that the citizens hold against the State, because “voting without some form of organization is impossible”,<sup>226</sup> and this organization is something that the State owes to the citizens. Second, the right to vote is usually described as a legal power of the individual that is exercised by voting. In reference to this aspect, Robert Alexy highlights that “[o]n the basis of the power to vote, the possessor of this power is, albeit in an indirect way, a participant

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224. Waldron, 2000:58.

225. Waldron, 2000:58.

226. Alexy, 2002:320-1.

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in legislation”.<sup>227</sup> Finally, the right to vote includes a set of negative liberties. It can be described primarily, following Alexy’s terminology, as the right to a negative State action, which must abstain from coercing the elector or impeding him from casting the vote, and secondly, as a right to a positive State action, which demands protection against coercion coming from other citizens.<sup>228</sup>

The institutional and constitutive aspects of the vote highlighted by the above clarifications is what makes the right to vote *irreplaceable* for expressing the idea of democratic recognition.<sup>229</sup> On the one hand, in its dimension of power, it is a right that cannot be reconverted or confused with an exercise of private aspects of autonomy. It is different, in this respect, from other legal rights that guarantee the existence of liberty of action. It is because the individual actions protected by, for example, freedom of speech fall in a grey terrain, that the liberty covered by it can be used to advance private interests or even be abusively exercised (especially when it is used to silence other voices<sup>230</sup>). In contrast, the institutional character and communicative simplicity of the right to vote, even when it is meant to be exercised in an instrumental, self-interested way by the electors, entails that its exercise cannot be confused with an exercise of private autonomy, nor can it be abused.<sup>231</sup> The institutional aspect of the right to vote is, therefore, intrinsically linked to the importance of being entitled to participate, affirming at the same time equality and membership.

On the other hand, its institutional character is what leads to an understanding of the denial of the right to vote as distinct from the restrictions of freedom of speech or association. Limitations on a person’s freedom of action can be based on protection

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227. Alexy, 2002:334. See also Waldron, 2000.

228. This would include e.g. freedom from intimidation, the privilege to vote as the citizen pleases, freedom from being asked how he voted (Waldron, 2000:59).

229. Those that adscript, wrongly, the idea of power to every participatory right cannot identify this particularity. See e.g. Beckman, 2014:4-6.

230. See e.g. Fiss, 2009.

231. See above *Chapter 4*, Section I.

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against the harm that such an action can cause. That is the entire logic of proportionality as a way to accommodate conflicting interests and rights. Disenfranchisement, in contrast, can never be interpreted as a legitimate limitation of private autonomy based on the protection of a private or public interest, because there is no harming action whatsoever to be protected from.<sup>232</sup> The exercise of the right to vote always consists in a minimal and then harmless exercise of liberty. Therefore, the reasons for which people are disenfranchised are of another nature. When somebody is disenfranchised, this always implies an act of denial of his or her status as a valid interlocutor, his character as a deliberative person, his status as an equal fellow member of the community. This is evident in the judgments examined above. The reasons offered for CD never involve the protection of another person's fundamental rights, or a public interest whose protection can be concretely advanced by a measure such as this. In contrast, the motives offered to justify disenfranchisement are always symbolic and abstract.

The notion of the right to vote as recognition highlights not just an egalitarian dimension of voting, devoting considerable attention to the question of the status of elector as a mark of membership to the political community, but also the emancipatory potential and social importance of the recognition of a person as a competent legal and political person, and it proves an adequate account for understanding the importance of *obtaining* and *being able to exercise* the right to vote.

This is not the constructivist affirmation of a very demanding conception of the right to vote. Firstly, it is not an unrealistic explanation of the value of electoral participation, but a limitation of its importance and its preconditions. Second, as a discrete form of recognition within the political sphere, this conception leaves to one side those other spheres of recognition in which other mechanisms are better situated.

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232. See above *Chapter 4*, Sections I and III.

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Finally, it gives a critical account of current democratic practice in western democracies.

### **3 Tensions between participation and recognition**

The general democratic tension between participation and recognition, it can be said, is also the tension between two ways of grounding the democratic value of the right to vote. This tension is naturally expressed in a competition to acquire the hegemonic position in democratic discourse.

A first aspect is that, this competition, commonly framed in a different language (e.g. between the idea of democracy as a decision-making process and democracy as a normative ideal) is indissoluble in modern complex societies. At this stage, one might come back to the ideas of input and output legitimacy presented above.<sup>233</sup> Based on these ideas, one may suggest that those who trust in a political community's democratic performance, and therefore expect a high degree of input legitimacy, may be more inclined to defend a highly participatory and relatively exclusionary democratic process. This exclusionary trend, however, may ground the value of the right to vote, for example, in the actual freedom of the elector<sup>234</sup> or in demands of social cohesion.<sup>235</sup> On the contrary, those who are more concerned with output legitimacy might defend an expansion of participation as a mechanism of inclusion at a lower cost for an outcomes-oriented process. It might be the case that CD is a landmark of the rise of an historical period in which democracy must conform to the achievement of some degree of peace and development. In such a post-democratic regime, CD does not present a problem different from any other legal limitation of rights because democratic rights cannot claim a special status. In short, the right to vote is not fundamental for participation therefore we can use it as a symbolic tool to

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233. See above *Chapter 3*, Section II.1.

234. See Ramsay, 2013a.

235. See above Section II.

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further majoritarian social policies. In the case of prisoners, this dichotomy would involve either excluding or including those currently serving prison sentences within the circle of electors.

A second aspect of this tension can be framed in terms of ideological discourses. From left wing positions, it is argued that claims for inclusion, respect and justice, as has been demonstrated, cannot be captured by representative institutions and are increasingly channelled into the public sphere by direct and disruptive actions of contestation. In the current scenario, elections and the right to vote in consequence seem to have lost the potential to play an emancipatory role in the politics of western democracies. It means to play an inclusionary role, against marginalization and exclusion. From right wing positions, in contrast, the defence of the status quo, and therefore the maintenance of schemes of social, political and economic exclusion, are framed in arguments based on the rule of law, which are usually coupled with the performance of representative institutions.

Having this tension on mind, what role remains for the participatory aspect of right to vote? It has been argued that it can play an important role of political recognition, which, in turn, may have an influence in social and economic spheres. However, even a successful political inclusion cannot guarantee the survival of what remains of representative democratic structures. The blockage of the channels of communication between the citizenry and the administrative power cannot be overcome except through political participation both formal and informal. The threat of inclusion within a neoliberal, post-democratic model of government, that is, the inclusion of the marginalized underclass into the exploited classes, is something of which the left, in its claims for inclusion, must be aware. Peter Ramsay explicitly identifies this point when he defends disenfranchisement as a risk of normalize a neoliberal model of democracy:

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“It may be true that ‘retaining the right to participate as a citizen in the life of the community is symbolized in democratic societies by the right to vote [...]. But without civil liberty, voting citizens (whether prisoners or not) retain the symbol but not the substance of self-government’.”<sup>236</sup>

For this conception of the vote as recognition adopts the form of a progressive argument, the value of the right to vote as a mechanism of participation must be also rescued.

This examination of the case of CD has shown, however, that this democratic tension between inclusion and participation is vulnerable to be confused with discourses of degradation and exclusion.<sup>237</sup> In the case of prisoners, it does not seem necessary to balance and accommodate these factors in ways that produce exclusionary outcomes or less participatory mechanisms of decision-making. Enfranchising prisoners does not damage the performance of the democratic process and it does not necessarily endanger the process of prisoners’ social inclusion but the practice of CD produces, as seen in this chapter, dangerous legal, social and political dynamics.

It is perhaps convenient to conclude by summing up the argument of this chapter. First, a view was introduced which presents the concept of degradation as an objective in a community that considers equality only as a ‘starting point’. The philosophy of formal equality, which may demand the constitution of second class-citizens, can serve to explain the permanence of CD in the context of modern societies as part of a historical lineage of ‘inner exclusion’; not necessarily as a “cultural hangover from times when attainder [or *atimia*, or *infamia*] seemed penologically appropriated”,<sup>238</sup> but as a practice that achieves a certain harmony with

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236. Ramsay, 2013b:435. However, he goes further by affirming that prisoners’ voting may transform the right to vote from a political right into a social right. He sustains that social inclusion is a means to the end of political self-determination and that by granting the right to vote to prisoners “the value of democracy is turned inside out”, as democracy is reduced to a means of policing (Ramsay, 2013b:430).

237. See e.g. Shklar, 1991:28-30.

238. Edgely, 2010:407. See also Note, 1937; Note, 1974:596.



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autonomy and equality as regulative principles of modernity. On this hypothesis, it could be suggested that CD is capable of simultaneously punishing the crime and degrading the offender.

Second, the exclusion of offenders may be an important determinant for the maintenance of the social cohesion of the community. These two ideas can be conjoined by the broader idea that CD may be correctly described as a powerful symbolic form of inner exclusion. This understanding of CD might have severe implications for democratic legitimacy because, under these premises, the use of state coercion involved in the punitive response no longer depends upon the practice of self-government.

Third, in order to articulate fully the relation between CD and the decline of the demand for democratic legitimacy, another notion of the importance of the right to vote is needed. The idea that the enfranchisement of people can contribute to their recognition and that disenfranchisement can contribute to their degradation and exclusion is a fundamental step toward understanding the practice of CD. The distinctiveness of CD resides in the central position that the right to vote plays in discourses of legitimacy of the law in representative democracies but tends to be obscured when this is presented primarily as a mechanism of democratic participation. No other deprivation of a right can crystallize the degradation and exclusion involved in CD in such a clean and perfect manner. This, in turn, helps to illumine the inclusive dimension of the right to vote, according to which it is conceived primarily as a mark of equality, membership and dignity. Elections, accordingly, can be understood as civic ritual, in which those who vote today celebrate “the civic estate for which so many generations of excluded men and women have fought so energetically”.<sup>239</sup>

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239. Shklar, 1991:28.



## DEFENDING THE RIGHT TO VOTE

**I**t is perhaps pertinent to begin this concluding chapter with a brief recall of the main arguments offered in the previous chapters. The bulk of this dissertation has been devoted to demonstrating the tension between CD and a normative conception of democracy in which those who are addressees of the law must also be seen as its authors. This conception is partially crystallized in the ideas that a right to vote is a fundamental right and that the suffrage is universal. Those who advocate democratic versions of CD, as a form of democratic electoral incapacitation or a democratic form of punishment, cannot overcome the democratic problem of CD, even in its more restrictive forms. Claiming that CD is justified necessarily implies disregard for the idea that the law's legitimacy derives from the democratic participation of those who are subjected to it. This led to the affirmation of three main propositions. First, the justification of CD may be better understood as a mechanism that implements degradation and exclusion. Second, this shows how the right to vote is important not only as a mechanism of participation, but also as a form of recognition of equal membership in the community. Third, in societies that embrace the practice of CD, the relation between the community and those subjected to its punitive power may not be possible to understand as democratically codified.

It is time to return to where this inquiry started; that is, with the observation concerning the rise of a judicial trend on CD. The analysis of this trend shows that

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the judgments from a selected set of legislations have advanced the cause of enfranchisement, declaring the unconstitutionality or incompatibility of certain legislation with the right to vote. This has been achieved, however, at the cost of consolidating the right of the legislature to exclude serious offenders from the circle of democratic citizenship and consolidate “a hierarchy of voting qualifications”.<sup>1</sup> In the last section of *Chapter 2*, it was suggested that this latter consequence could be due to a lack of engagement on the part of the Courts, with the exception of *Sauvé*, with a substantive conception of democracy. It was also suggested that the legal methodology employed by the courts, the principle of proportionality, could stand behind this, as a contributing factor that helps explain why, in the opinion of the courts, serious offenders are legitimately disenfranchised.

In an excellent article that examines the main cases of the judicial trend on CD, Plaxton and Lardy point out the courts’ poor argumentation and their “unsatisfactory exploration” concerning frameworks of reasoning that includes various levels of constitutional law and political philosophy. They conclude, “[l]egislatures may be better-suited to addressing these practical and theoretical questions, but vested interests, limited parliamentary time, and other political pressures make that unlikely”.<sup>2</sup>

This final chapter seeks to discuss these assertions and their pertinence to CD cases, on the one hand, attempting to avoid mounting a defence of a certain model of rights adjudication, while at the same time sustaining that CD can perhaps assume the role of an exception that permits an exploration of the limits of general discourses about fundamental rights. *Section I* argues that there are good reasons to avoid redirecting the issue of CD towards parliaments. *Section II* analyses the legal method of proportionality, identifying how its use in the case of CD is likely to lead to conclusions that arbitrarily accept some forms of CD. However, these are not reasons

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1. Easton, 2006:452.  
2. Plaxton & Lardy, 2010:140.

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to abandon the judicial review of CD. *Section III* presents an alternative method, affirming that cases dealing with the constitutionality of CD can be rationally addressed by the Courts.

## I WHO DECIDES?

### 1 The dilemma of rights adjudication

The case of CD may illustrate what has been called “the basic dilemma of constitutional rights adjudication”.<sup>3</sup> Given that a democratic parliament has the political power to violate citizens’ fundamental rights, who should have the last word regarding those rights? Some, in an argument based mainly on democratic legitimacy but also on its institutional design, maintain that a sovereign parliament must decide. Advocates of this position are traditionally associated with what is called *political constitutionalism*.<sup>4</sup> Others argue that ‘you cannot leave the fox guarding the hen house’; that is, they defend the idea of judicial supremacy in rights adjudication, inspired by a model of *legal constitutionalism*. In this case, the constitutional courts have the last word on fundamental rights.<sup>5</sup>

However, these strong, idealised and polarised positions have been tempered by proposals that seek intermediate solutions. Among these, two are of particular interest. The first is a moderate version of legal constitutionalism, which argues that courts must grant *deference* to parliaments that are better technically equipped and have greater democratic legitimacy to assess policies, and therefore should only

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3. See Fredman, 2013.

4. Even though the expression is linked to Richard Bellamy (see e.g. Bellamy, 2007; Bellamy, 2011) it probably has its most famous defence in Waldron, 2006. See also Tomkins, 2005. For an assessment, see Gee & Webber, 2010.

5. The advocates of legal constitutionalism are considerable in number, especially in the US, and include Habermas, 1996a; Dworkin, 1996; Michelman, 1999. See particularly, Fallon, 2008 engaging in an argument with Waldron, 2006.

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intervene when the rights violation falls outwith this space for deference on the basis of its disproportionality.<sup>6</sup>

The second approach is a moderate version of political constitutionalism, which has sometimes been called *institutional dialogue*, in which the courts can make representations about the violation of fundamental rights to Parliament, but it is Parliament that has the last word on the matter.<sup>7</sup> This approach attempts to instantiate the collaboration between parliaments and courts, adding deliberation to the decision-making process. By means of this dialogue, the parliament can understand the problems that it has overlooked in previous legislative attempts, thus drawing on the courts' expertise in dealing with problems of rights in concrete situations. The success of this model depends on two conditions. First, the institutional configuration of the relation between legislative body and the courts, as parliament is required to have the last word.<sup>8</sup> Second, the deliberative input. Its differentiation from a mere claim of parliamentary sovereignty is determined by the capacity of parliament to take a deliberative approach to fundamental rights rather than just take interest-bargain decisions.<sup>9</sup>

To adopt a collaborative attitude and deliberative approach, scholars have suggested that parliament must explain and justify its decisions in a convincing way, stimulated by the courts in the manner of a deliberative catalyst “insisting on deliberative

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6. See, e.g. Brady, 2012. There are of course diverse classes of deference [ECtHR, UK, US], and the deference of an international court operates by different standards than that in the domestic system.

7. The concept was introduced by Hogg & Bushell (1997). See, generally, Tushnet, 2009 and Yap, 2012. Regarding the British case, see Young, 2011; Davis, 2012; and Fredman, 2013.

8. In the UK, this is instantiated due to the Supreme Court finding a breach of fundamental rights caused by the legislation, and declaring its incompatibility, a declaration that requires further legislative action. The Parliament, in this case, retains the last word regarding remedial legislation (Human Rights Act, Sections 4 and 19). Similarly, the Canadian Charter of Rights and Freedoms establishes a “notwithstanding clause” (article 33), which allows certain rights be limited by Parliament, even against the opinion of the Supreme Court. See, generally, Gardbaum, 2013.

9. Fredman, 2013.

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justification for the interpretation or limitation of rights”.<sup>10</sup> David Dyzenhaus’ recent contribution to this debate has tried to overcome the differences between the approaches of deference and institutional dialogue, arguing that the important question is not who has the last word but whether that final decision is duly justified in terms of fundamental rights. He calls for a third way between legal and political constitutionalism, appealing to a ‘culture of justification’.<sup>11</sup> Under this paradigm, judicial review is an instance in which courts ask “governments to justify their action on substantive grounds”<sup>12</sup> rather than appeal to their authority to exercise political power. Under a culture of justification, the authority to act is “a necessary but insufficient condition for legitimacy and legality”,<sup>13</sup> it need additionally, be justified in rational and reasonable terms.

## **2 A case for judicial review of disenfranchisement**

Even if powerful reasons can be found to argue that parliaments are in general better situated than the courts to decide about the content of rights, for instance, because they are more legitimate and better institutionally equipped,<sup>14</sup> when the general discussion is abandoned and the particular case of CD is addressed, the strength of those reasons tends to disappear.<sup>15</sup> General arguments of democratic legitimacy and deliberative institutional advantages, which generally support the cause of Parliaments to decide questions of rights, tend to be weakened in the case of political rights, and in the particular case of the right to vote this is even clearer.<sup>16</sup> In this sense, the case of an act of Parliament disenfranchising a general category of citizens

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10. Fredman, 2013:297. Commenting on the application of this approach, Sandra Fredman suggests: “The State must also be capable of convincing the court [...]. At the same time, the court should not dictate the result” (299).

11. See Dyzenhaus, 2013. The original formulation is from Mureinik, 1994.

12. Cohen-Eliya & Porat, 2013:112.

13. Cohen-Eliya & Porat, 2013:112.

14. See Bellamy, 2011:91.

15. It is not suggested, to be clear, that this is the case every time that the courts address “contestable, watershed rights issues” (see Young, 2011:795-7).

16. See Goldoni, 2013b:1070.

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might be considered a paradigmatic case in which judicial intervention is justified to protect the right to vote in the sense that, if this case is excluded from judicial review it is difficult to conceive of a case that *would* be covered by it. In this vein, the Court in *Sauvé* formulated a strong defence for its intervention as a constitutional actor:

“The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. [...] it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system” [15].

Subsequently, it grounded its intervention in the attack constituted by CD against the substantive conception of democracy that has been discussed throughout this dissertation:

“But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government’s power flows” [32].

The particularities of the case of CD undermine not only the general claim that Parliament must decide on questions of rights, but also the assertion that courts must defer on this kind of issue to parliament. The reasons for this are that, on the one hand, the right to vote holds a special place in the democratic structure, being the basis on which Parliament can claim democratic legitimacy over the courts. On the other hand, those affected by CD are unlikely to be treated with justice by a representative institution, given a context that can be characterised as penal populism.

The first argument can be generally formulated in the following terms. To the extent that Parliament excludes citizens from the right to vote, it diminishes the basis upon which it can claim democratic legitimacy and which justifies the claim of



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*parliamentary sovereignty*.<sup>17</sup> Put simply, if the parliament derives its democratic legitimacy from citizens' political participation, in particular through elections in which the idea of the right to vote as participation is central, to exclude a group of citizens from the franchise is only formally a democratic decision, or, using the terms of the Canadian Court, a "simple majoritarian political preference" [20]. However, substantively it is an un-democratic decision, that is, a decision that undermines its own democratic legitimacy.<sup>18</sup> Accordingly, to claim democratic superiority over the courts in the case of CD is, at the very least, problematic.

From a democratic perspective, however, two problems of representation can be observed. On the one hand, there is a clear conflict of interests in leaving the parliament to choose who can vote in the parliamentary election. Such conflicting interests can turn very easily into an *abuse* of power.<sup>19</sup> For example, "a temporary political majority may seek to extend its hold on power into the future" using disenfranchisement as a strategy of "legislative entrenchment".<sup>20</sup> The "inherent self-interest [...] can never escape doubts about whether these rules [...] were adopted to reproduce previous outcomes that benefit incumbents, entrench benefits for established parties and marginalize dissenting perspectives".<sup>21</sup> This is a democratic defence of the judicial review in cases in which voting rights are involved. On the other hand, through exclusion from the electorate, the possibility that the interests of those disenfranchised be taken into account within the law-making process is reduced even further.<sup>22</sup> To this, one must add that when imprisoned, offenders are normally limited in their possibilities of political influence owing to the restriction of their

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17. See Goldoni, 2013b:1068. See also Waldron, 2011.

18. The observation of this democratic contradiction is made in Ramsay, 2013c:214, this time, however, regarding the relation between preventive criminal law and civil liberties as the foundation of democracy. See the extraordinary discussion in Note, 1987.

19. See Goldoni, 2013b:1068. See also Behrens, 2004:273-4; Ziegler, 2011:241.

20. Klarman, 1996:498. See also Bennett & Viehoff, 2013b:97.

21. Hiebert, 2013:2271.

22. See Fredman, 2013:299.

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liberty. The parliament can combine disenfranchisement and imprisonment as the perfect political weapon against dissenting voices.

The primacy of the courts over parliament in this case is not a question of choosing them because they are more likely to be right regarding competing interpretations of rights, but is instead a question of protecting the entitlement to participate in the democratic process of law-making, particularly when a decision of the legislature is actually weakening the political process. The case for parliamentary sovereignty of political constitutionalism simply does not “consider the existence of disenfranchised minorities”,<sup>23</sup> mainly because does not answer the question “what happens when representation fails”.<sup>24</sup> Cases of CD constitute the quintessential instance of triggering a judicial response that John Hart Ely called a ‘representation-reinforcing approach to judicial review’.<sup>25</sup> He strongly claim that in cases involving voter qualifications the ‘ins’ cannot be trusted “to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one”.<sup>26</sup> Marco Goldoni commenting on *Hirst* adopts a similar perspective: “[i]f those who are affected by democratic decisions are denied a voice in the process by the same institution which is the seat of the process, then it is difficult to imagine which other institution may hear their grievances but courts”.<sup>27</sup>

### **3 The optimism of the justification in disenfranchisement**

It is dubious whether parliaments are entitled to claim democratic legitimacy against the judicial review of disenfranchisement legislation. The second argument for the parliament’s priority in deciding is that it is better equipped to decide on certain

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23. Benton, 2010: 406.

24. Pettus, 2013:94.

25. See Ely, 1980: Ch. 4. See also Klarman, 1996.

26. Ely, 1980:120.

27. Goldoni, 2013b:1070. See also Fredman, 2013:299.

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issues given its deliberative potential, that is, its capacity to take the interests of all those affected into due consideration.<sup>28</sup> The case of CD shows how parliaments have a systematic tendency to answer questions about who should be included in the electorate by excluding offenders. They have done so without engaging in a deliberative dialogue in which the offenders' right to vote has been properly considered. The courts have demonstrated, in contrast, that they are likely to modify these measures, at least according to some rule of law standards and sometimes according to democratic values.<sup>29</sup> The institutional deliberative advantages of parliaments, at least in this case, seem to constitute a weak basis to claim for the parliaments' last word.

Observing this scenario, some have suggested that CD is a good case to test ideas surrounding institutional dialogue and the culture of justification.<sup>30</sup> Sandra Fredman, for example, has suggested that the Court must be guided to assist in the resolution of issues involving human rights through a deliberative style of decision-making.<sup>31</sup> The role of the courts is that of augmenting democratic participation "by functioning as a forum for deliberation"<sup>32</sup> and steering the legislative "decision-making away from interest bargaining and towards deliberation",<sup>33</sup> in concrete, "insisting on a deliberative justification for the interpretation or limitation of rights"<sup>34</sup> rather than exercising "a conclusive veto or to prescribe authoritative interpretation".<sup>35</sup> In the case of CD, Fredman sets out two requirements for the collaboration between courts and parliaments: on the one hand, the government must demonstrate that CD is consistent with the background value of the right to vote, "including that all should

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28. See above *Chapter 3*, Section II.2.2.

29. See above *Chapter 2*, Section III.2.

30. See, about the idea of a dialog in cases of CD, Fredman, 2013; Dyzenhaus, 2013.

31. A similar approach can be found in Dyzenhaus (2013) who, similarly to Fredman, argues that the limitation of rights must be justified in terms of democratic values. The best relation between courts and parliaments is established by "an institutional structure that makes possible appropriate processes of justification" (2-3).

32. Fredman, 2013:295.

33. Fredman, 2013:296.

34. Fredman, 2013:297.

35. Fredman, 2013:298.

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be treated with equal concern and respect, and that all should have a right to participate in the political decision-making”.<sup>36</sup> On the other hand, the courts “should not dictate the result”;<sup>37</sup> rather, Fredman insists upon a decision coming from the parliament with substantive reasoning.

When examining the South African cases, Fredman concludes that the Supreme Court adopted this style by urging major justifications for CD from the Parliament, something that finally closed the dialogue in *NICRO*. Very important for this characterization is the Court’s statement, which does not foreclose the possibility that in the future, having satisfied the burden of proof and of argumentation, the Parliament could pass limitative legislation on the right to vote, excluding some offenders from the franchise.<sup>38</sup> On the other hand, examining the case of ECtHR in relation to the UK Parliament, Fredman claims that arguably the Court adopted a deferential approach rather than a deliberative one,<sup>39</sup> ruling that, first, the blanket ban is unacceptable but, second, that the final decision lies within the competence of the UK Parliament. The Parliament, in turn, proceeded to hold a debate which fell far short of engaging in a deliberation which addressed the normative questions involved in the democratic problem of CD.<sup>40</sup>

It is true that whereas a difference can be observed in the argumentative attitude of the Courts, no difference can be positively *observed* in the argumentative attitude of the Parliaments. The South African Parliament did not even attempt to satisfy the demands for a better justification, likewise in the cases of the Canadian Parliament after *Sauvé* and the Australian Parliament after *Roach*, and the UK Parliament did not engage with the call of the ECtHR to discuss the substantive problem.

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36. Fredman, 2013:299.

37. Fredman, 2013:299.

38. See above *Chapter 2*, Section I.3.

39. In contrast, Murray (2012) suggests that the ECtHR’s “most serious concerns, in *Hirst*, were with the inadequacy of the UK Parliament’s procedures for protecting human rights” (13). See also Lewis, 2006:212.

40. See e.g. Nicol, 2011.

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There are two reasons that cast serious doubts about the ability of parliaments to engage in discourses of justification of CD, and that could contribute to explain why parliaments have not addressed the alleged ‘dialogic call’ of the courts. The first argument has been developed along the main corpus of this dissertation, and it is an answer to the question about whether it would ever be possible to justify a limit on the right to vote.<sup>41</sup> The conclusion is that engaging with a normative conception of democracy rules out the possibility of justifying CD. The alternative option is adopting values that are incompatible with democracy. The fact that CD cannot be justified in a democratic framework makes redundant the calls for a dialogue or a deliberative approach: “strong deliberative process cannot ‘neutralise’ a clear rights violation”.<sup>42</sup> What is unjustifiable under democratic principles cannot be object of a culture of justification.

The second argument concerns the particularity of the group that is being excluded from the franchise and sustains that, even in a widely embraced culture of justification, the issues related to the symbolic status of the offenders tend to fall outside of such a culture when addressed by representative authorities, and this is reflected in the quality of the debate. To advocate for the right of those convicted offenders may be seen as unpopular,<sup>43</sup> and “displays of liberal progressiveness towards disliked minorities [is] highly risky, even for otherwise sympathetically minded politicians”.<sup>44</sup> This can be generally referred to as *penal populism* and it is likely to affect those jurisdictions in the debate about CD.<sup>45</sup> The main idea associated with penal populism is that the electoral dimension of policy takes precedence over its penal effectiveness: “In short, penal populism consists of the pursuit of a set of penal policies to win votes rather than to reduce crime or to promote justice”.<sup>46</sup> This dynamic is indubitably more complex. First, in which could be call a rhetorical

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41. Dyzenhaud, 2013:12.

42. Lazarus & Simonsen, 2014.

43. See Berhens, 2005:273-4.

44. Gearty, 2007:65.

45. See e.g. Murray, 2012:15-17. See also above *Chapter 6*, Section II.3.

46. Pratt, 2007:3.

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challenge to a deliberative culture,<sup>47</sup> the content of the penal discourse that is offered as in tune with the public mood is importantly influenced and manipulated by the establishment, groups and organizations, which claim to speak on behalf of the people. Second, it is also linked to a certain atmosphere of a crisis of authority and therefore the elites seek to offer simple, understandable solutions to crime that are more likely to be endorsed by ordinary individuals who comprise the electorate. This can be explicitly associated with new forms of punitiveness, and with the proliferation of penal symbolism, the frame of penal discourses in an emotive language ('three strikes' or 'zero tolerance').<sup>48</sup> Finally, populist responses to crime are premised on a distinction between the citizens and the victims, on the one hand, and "a group of criminals that seem utterly different from the rest of the population",<sup>49</sup> on the other hand. The wishes of this 'moral majority' are easily offended when offenders exploit fundamental rights as a mechanism to protect their interests,<sup>50</sup> because "the public can so easily imagine these criminals as seriously threatening society when any prisoners' rights question comes up".<sup>51</sup> In this context, no rational politician will champion this cause.<sup>52</sup>

When considering possible reasons why the elected authorities are unlikely to assume a deliberative approach towards issues related with offenders' rights, it becomes salient to note that the representatives are not only interested in effectively tuning in with their electorate, but more concretely they assume that pursuing policies which implement popular punitive attitudes will guarantee that the political establishment stays in power.<sup>53</sup> The extreme case of this sad spectacle occurs when political parties not only do not want to be seen as soft in their treatment of offenders, but actually

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47. Levy, 2013:366.

48. See, generally, Pratt *et al*, 2013.

49. Pratt, 2007:5. See also Drake & Henley, 2014:4.

50. Elliot, 2013:147. This idea triggered an express declaration of the ECtHR in *Hirst*: "there is any place under the Convention system [...] for automatic disenfranchisement based purely on what might offend public opinions" [70].

51. Demleitner, 2009:91.

52. See Pettus, 2013:122.

53. See e.g. Pettus, 2013:90-99.

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compete electorally in terms of being “tough on crime”.<sup>54</sup> In this context, public opinion and attitudes towards CD can be seen as a determining factor in the adoption, following Fredman’s terminology, of an aggressively punitive interest-bargain style of decision-making.<sup>55</sup>

In conclusion, there are important reasons to think that in the case of CD, the parliaments do not enjoy the legitimacy (because the right to vote is involved) and institutional position (because offenders are involved) that constitute an advantage over the courts when facing other controversies. This is not to say that the parliaments are not the appropriate forum to deal with CD,<sup>56</sup> or that courts are more legitimate or better placed, but the more limited claim that there are important reasons for a judicial review of a legislation enacting CD.

## II THE QUESTION OF THE LEGAL METHOD

The protection of offenders’ right to vote call for the courts intervention and there are good reasons to doubt that they would engage in a deliberative relationship with parliaments. There is, therefore, a democratic case for the use of the courts as fora for contestation.<sup>57</sup> The cases of the judicial trend on CD have exhibited, however, a hesitant attitude towards these tasks: on the one hand, declaring the unconstitutionality or incompatibility of certain legislation but, on the other hand, consolidating a right of the legislature to exclude serious offenders over and against the demands of democratic principles.

The reason why some courts cannot deal adequately with the issue of CD may not be related to the fact that they are more poorly-situated than the legislatures, but to the

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54. See Pratt & Clark, 2005.

55. On the analysis of public opinion on CD and how it can contribute to shape policy-making, see Pinaire *et al*, 2002; Dawson-Edwards, 2008 (US case); Dhimi & Cruise, 2013 (UK case).

56. See Behrens, 2004:274.

57. See above *Chapter 3*, Section II.2.3.

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legal method which the courts have deployed when solving these cases. Generally, these cases are not addressed by asking why we, as a democratic political community, should exclude offenders from political participation, but instead by asking whether the law that disenfranchises prisoners presents a constitutionally legitimate limit to the right to vote. The use of the legal method of proportionality as a substitution for engagement with the substantive principles at stake may explain the outcomes of the cases. Even in *Sauvé*, as rightly noticed by Dyzenhaus, the Canadian Supreme Court, despite its great engagement with a normative conception of democracy, seems “undecided between the proposition that no limit on the right to vote of inmates could be justified and the proposition that Parliament and/or the government’s lawyers had failed to show that this particular limit was justified”.<sup>58</sup> If there is a link between proportionality and a presupposed right to disenfranchise serious offenders is correct, this method seems to stand as an obstacle for the protection of the right to vote.

Despite the fact that proportionality has been the subject of controversy and criticisms, it may nonetheless be acknowledged that it enjoys increasing acceptance within judicial review discourses as a mechanism that legitimatises judicial intervention in legislative decisions, by means of presenting itself as a rational way to control the political activity intended by the legislative and executive branches.<sup>59</sup> Proportionality is however under crossfire. On the one hand, from the perspective of democracy, proportionality is accused of being a facade for the political intervention of the courts into the sphere of other state powers, affecting the separation of powers and democratic legitimacy of public decision-making. Even if this is generally true, it was argued above that there are good reasons to favour judicial review of legislation in the particular case of CD. On the other hand, proportionality has also been criticised from the perspective of the protection of rights, this time because it diminishes the very deontological character of fundamental rights, making them

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58. Dyzenhaus, 2013:12. See also Plaxton & Lardy, 2010:129-30.

59. See, generally about an expansive discourse on judicial review and proportionality, Sweet & Mathews, 2008.



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negotiable and accepting their limitation under conditions of apparent rationality.<sup>60</sup> This criticism is particularly acute in cases of CD, especially due to reiterated references to the idea of deference or the MOA that courts have granted to parliaments in determining the concrete terms of CD. The courts, by adopting these notions, have responded to the democratic criticism; they have done so, however, while leaving their judgments even more exposed to the rights criticism.

This section seeks to explain how the idea of deference has influenced the legal method of proportionality, leading the courts to provide an unsatisfactory answer to the problem of CD.

## **1 The importance of deference**

The strongest position that judicial review can achieve, which grants great protection against the democratic critics, is one based on an adequate account of the standard of review applied by the courts in relation to the doctrine of deference. This ‘equilibrium’ stands as a limitation on the intervention of the courts in spheres that belong to the political and administrative domains, but also, and crucially, shapes proportionality, transforming it into an even more limited mechanism of constitutional control.

A scheme that accommodates proportionality and deference starts from the basis of a distinction of functions in the process of limiting a fundamental right by legislation. A primary question is both formulated and answered by the decision-making authority. The legislature has to deal with social problems and offer solutions which integrate technical, economic and political considerations. A secondary question regarding the choice made by the decision-maker is “a *supervisory* question which addresses the legitimacy (but not the accuracy) of the answer to the primary

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60. See e.g. Webber, 2009.

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question”.<sup>61</sup> This secondary question concerns the compatibility of the legislation adopted with fundamental rights and does not deal with a diagnosis of the social problem or with the political strategy selected by the decision-maker. Proportionality therefore asks the question: “Was this decision a disproportionate intrusion on human rights?” and reserves for the decision-maker the primary question concerning ‘What is the best solution available for dealing with this problem?’<sup>62</sup>

In this context, proportionality is a method that helps the courts with this secondary question. The restraint assumed by proportionality can be illustrated by the distinction between *reasonableness* and *correctness*. Depending on the concrete matter to be addressed, a range of measures resulting from the primary decision-making would be considered proportionate. Proportionality, it is said, does not provide the only correct answer or an ‘optimal answer’, but constitutes a negative standard by which to exclude those policies that are unreasonable invasions of fundamental rights, with no gains for the interest pursued by the legislation. In sum, proportionality is “focused on what it *is not* rather than what it *is*”.<sup>63</sup> The concern with reasonableness rather than correctness therefore necessarily implies that courts applying proportionality must defer to the primary decision-maker in certain respects. All of this becomes, certainly, much more complex in practice.

Deference can assume various forms. Two are of particular interest, as they have impacted upon CD cases. They might be referred to as substantive and structural deference.<sup>64</sup> *Substantive deference* is the spectrum of governmental actions from which the intervention of the courts and therefore the proportionality test are excluded. This account of deference is limitative of the precedence of judicial review

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61. Brady, 2012:11 (emphasis added).

62. Brady, 2012:11. Pettit’s distinction between *authorial* and *editorial* roles can also be applied here (Pettit, 2000:114-8).

63. Brady, 2012:10-1.

64. This is not the distinction offered by Letsas (2006) who also talk about substantive and structural dimensions, in this case, of the MOA doctrine.

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and it has an exclusionary relation with the application of the proportionality test. When courts identify certain areas that fall substantively within the spectrum of deference, they are restricted to adopting a passive attitude: a constitutional *laissez faire*. The perfect example of this form of deference is the US doctrine of political questions.<sup>65</sup>

This is also the account of deference widely upheld by the ECtHR in its doctrine of the MOA, to which the British government emphatically referred in its claim that the issue of prisoners voting was something that corresponded to the British Parliament to decide.<sup>66</sup> In the case of the MOA doctrine, the substantive difference is based in the international character of the ECtHR. In *Hirst*, however, the ECtHR restricted the scope of this doctrine. In what seems to be one of the more confusing aspects of its reasoning, the Court sustained that the MOA *depends* on the limitative legislation achieving a certain degree of proportionality.

*Structural deference*, in contrast, assumes the form of a restriction upon the Court in several aspects of the assessment of the legislation, based on the functional role of the courts and the recognition of parliaments as the primary decision-makers. This encompasses proportionality and deference in a relation of structural complementarity based on three factors: “(1) the decision-maker’s freedom to choose its own objectives”; (2) “the range of options available to the decision-maker”; and 3) “the scope of the decision”.<sup>67</sup> These are matters on which the Court must necessarily defer to the Parliament, and that may have a far-reaching significant on the review’s overall effectiveness. For example, the courts cannot question the degree of satisfaction of the objective pursued by the legislature. This kind of structural deference is embedded within the proportionality, integrating instances of deference within the

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65. See e.g. Sullivan & Gunther, 2004:31-48.

66. See *Hirst* [47-8].

67. Brady, 2012:85. See also Rivers, 2007.

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test judicial application. This second form of deference has played an inadvertent, though fundamental, role in the judicial decisions regarding CD.

It is crucial to notice that normatively structural deference is grounded, unlike the substantive deference of the MOA doctrine, on the same arguments for parliamentary sovereignty analysed in the previous section; that is, democratic legitimacy and the particular institutional advantages of parliament. This is relevant because some of the courts seem to be aware of this only partially. In a controversial aspect of its judgment on *Hirst*, the ECtHR withdrew the substantive deference on electoral issues traditionally granted to signatory states of the ECHR based in the poor deliberative performance of the UK Parliament. Something similar happened with the Australian Court in *Roach*, this time considering the nature of the right involved. However, none of the courts of the judicial trend seemed to limit or modified their conceptions of structural deference. They conducted a ‘business as usual’ proportionality analysis.

## **2 The deference of proportionality**

Structural deference embedded in the legal discourse of proportionality may explain why the judgments of the judicial trend recognise a right of the legislature to exclude serious offenders from the franchise. This kind of deference can be expressed in all the stages of the proportionality test.<sup>68</sup> However, the most critical moment in which the proportionality test defers to the legislature in the CD cases is in the assessment of the purpose of the limitation, because this introduces an additional interest into the scene, which competes with the protection of the right to vote, assuming from the beginning that the optimal solution would be the consequence of the due consideration of both interests.

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68. See e.g. the analysis of *Hirst* in Plaxton & Lardy, 2010:121-3.

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## 2.1 *Proper purpose*

The proper purpose stage of proportionality seeks the determination of the constitutionality (or legitimacy) of the purpose advanced by the limitative legislation. It is therefore a normative rather than means-ends assessment. This stage normally examines the constitutionality of the purpose in itself, without consideration of the intervention in a fundamental right. Only once the purpose itself has been admitted as legitimate, the analysis turns to the means that the legislation uses to advance that purpose.<sup>69</sup>

The main problems affecting this assessment are those linked with the identification of the purpose.<sup>70</sup> At least two elements of this identification might prove contentious, and are crucial in CD cases: first, the question of who must decide what the purpose is; and, second, how much concrete explication and precision the purpose requires. *Who* should determine the purpose is problematic because it remains unclear whether it is the objective purpose of the law or the subjective purpose of the legislators that the courts must consider.<sup>71</sup> This relates to the second question, which is fundamental to understanding the burden of proof, of whether the purpose must be judicially

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69. Three analytical steps can be followed for judging whether the purpose of the limitation law is constitutional: firstly, determine whether the constitution requires the limitation of the constitutional right to be restricted to a special purpose or, on the contrary, if it allows discretion to determine it (see Barak, 2012:260-77); secondly, evaluate whether the purpose of the legislation is compatible with a general (implicit or explicit) limitation clause, such as an ‘open, free and democratic society’ (See Barak, 2012:257-59); thirdly, the proper purpose should also meet the proper degree of urgency considered by the standard of review. Some purposes can be argued to be urgent or very important whilst others are just desirable or legitimate. Different jurisdictions can set unified or differentiated standards of urgency to evaluate when a purpose can constitutionally limit a constitutional right. The standard of urgency can be, therefore, unified and high (“pressing and substantial”) as in Canada, unified and low (“legitimate”) as in Germany or differentiated between high (“compelling”), intermediate (“important”) and low (“legitimate”), depending on the rights involved, as in the US (see Barak, 2012:277-85).

70. Barak, 2012:285-302.

71. The idea of objective purpose necessarily turns the attention of the assessment of the Court to the impact that the limitative legislation has in the real world, taking it far from the express purpose of the parties involved.

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determined (subjectively or objectively) or if the government can articulate it according to some degree of deference.<sup>72</sup>

In this respect, all the courts of the judicial trend on CD not only deferred to the government concerning the decision of identifying the purpose, but they also paid scant attention to the relation between the arguments offered by the government officers and the legislative discussion of CD in the parliament. This is problematic because if what is under exam in the judicial review is a concern for the public justification of the limitation of a fundamental right, it cannot be assumed that the motives are proper and focus the inquiry only in the way in which those motives are implemented.<sup>73</sup>

The formulation of the purpose also implies certain questions. They can be presented in very *abstract* and *general* terms or in terms that are more *concrete* and *precise*. The second alternative allows a better judgment of both the constitutionality of the purpose and the causal relation which obtains between the purpose and the limitative legislation. In contrast, more abstract and general purposes should generate suspicion, as the “triviality of the goal is a reason to believe that it is merely a pretext for an action de facto motivated on grounds which are not publicly citeable”.<sup>74</sup> All the judgments, with the exception of *NICRO* in which the Court discarded it for problems of proof and argumentation, accepted as valid the *abstract* and *diffuse* idea that CD is a form of punishment and that it enhances civic responsibility and respect for the rule of law. The ECtHR in *Hirst* even defend the idea that “abstract or symbolic purposes could be valid of their own and should not be downplayed simply for being symbolic” [37]. Only the Court in *Sauvé* [22] objected to this purpose as problematic, notwithstanding that it finally accepted it in a signal of deference.

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72. See Sadurski, 2014:2-3.

73. See Sadurski, 2014:5.

74. Sadurski, 2014:6. See also Cohen-Eliya & Porat, 2013: Ch. 4.

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When the government is given discretion to define the purpose and subsequently does so in abstract and diffuse terms as in the cases under analysis, there are reasons to suspect that it may assume a *purely rhetorical* role,<sup>75</sup> “susceptible [...] to distortion and manipulation”<sup>76</sup> or that “the public value justification is a façade”.<sup>77</sup> First, even though these purposes may be fair in abstract terms, it is difficult to conceive of how they could be otherwise.<sup>78</sup> Under this parameters, it is only when the purpose is evidently or explicitly discriminatory that its constitutional analysis is useful.<sup>79</sup> This approach limits the possibility to include within the proportionality test the notion of “excluded reasons” as part of the protection of rights.<sup>80</sup> The government has incentives to act strategically and to avoid articulating a purpose that could be affected by those flaws. Second, once the purpose of the legitimate legislation has been accepted, it assumes, with all its abstraction, the role of the competing interest that faces the right to vote in the proportionality analysis, transforming the limitation of the offender’s vote into a conflict of interests that must be solved following the ideal of optimization of both of the interests at stake. Third, by accepting deferentially a general and abstract purpose freely formulated by the government the Court limits its own possibilities to question the rational connection and the necessity of the measure.<sup>81</sup>

## **2.2 Rational connection and necessity**

Structural deference can appear also in the means-end assessment. *Rational connection* (or suitability or appropriateness) requires that the means used by the

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75. See Frankfurt & Wilson, 2005.

76. *Sauvé* [22].

77. Sunstein, cited in Sadurski, 2014:6.

78. *Sauvé* [22].

79. That could be argued based, for example, on the categories of the US judicial history, in (i) the use of traditionally-banned discriminatory classifications such as race, sex or religion; or (ii) the positive and historically demonstrable attempt to discriminate or incite prejudice against some group or class. See Kumm, 2007:147.

80. See Kumm, 2007:142-8.

81. Plaxton & Lardy, 2010:121.

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limitative device must be capable of advancing that purpose; that is, they must lead to the fulfilment of that purpose. The rational connection test is therefore a minimal requirement of rationality that only excludes as disproportionate those means rationally disconnected from the purpose that the law or the administrative act attempts to advance. In these terms, it does not require the use of the most efficient means (to a higher degree, more economically or with a lesser cost to the fundamental rights involved). The only way to fail the rational connection test is where the means selected do not have *any* effect upon the advancement of the purpose that the law pursues.<sup>82</sup> The major problem facing rational connection is that of factual uncertainty. In order to evaluate the rational connection, a certain degree of certainty about the consequences of the limitative law is needed because this test assesses a factual relation. courts do not count with mechanisms to obtain this information independently, therefore, what is expected is a certain degree of technical deference based on the ability of the government to process information, with the Court conserving the competence to examine the probability by recurring to data provided for the branches that have designed the policy and that have the burden of proof and must be able to demonstrate such a connection.<sup>83</sup>

In contrast, the *necessity test* (or minimal impairment) requires the use of the means that are least restrictive to the right in question, within the range of those available to advance the purpose of the limiting device. This test assesses if the purpose of the legislative devise can be advanced to the same extent by other means that limit the fundamental right to a lesser degree. The test, therefore, demands the selection of the most efficient means in terms of the limitation of rights. This requires, first, the existence of a hypothetical alternative means, which *equally* advances the law's purpose, and second, that such hypothetical means limit the fundamental right to a *lesser* extent.<sup>84</sup> This is not a test of balance; therefore, it is not about improving

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82. See Barak, 2012:303-7.

83. Barak, 2012:308-15.

84. See Barak, 2012:317-333.



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respect for fundamental rights at the expense of moderating other objectives of governmental policy, such as financial expedience or the degree of compliance with its purpose. It only attempts to exclude the existence of alternative means that could affect fundamental rights to a lesser extent while maintaining all the other variables. Where the alternative means are less limiting but advance the purpose to a lesser extent, this cannot be considered an infraction of the necessity test.<sup>85</sup> At the level of necessity a degree of deference is also present. On the one hand, it correspond to the legislator to set the level of intensity of the satisfaction of the proper purpose, which is done by selecting a devise that satisfy the purpose to a high, medium or low level. On the other hand, the process of assessing the extent to which fundamental rights can be affected involves analysing several factors that require technical deference: the scope of the limitation, its effects, its duration and the likelihood of its occurrence, etc.<sup>86</sup>

In the judgment of the judicial trend the analysis of the mean-ends relationship produced little controversy. The Court in *NICRO* did not arrive to this stage. In *Roach* and *Sauvé* the courts did engage explicitly in an assessment of the means-ends relation, concluding that the government failed to demonstrate a rational connection. The Canadian Court affirmed this ill-relation affected every case of CD. The Australian High Court, in contrast, argued that this problem affected only the blanket ban and a targeted ban affecting only serious offenders would pass the rational connection test. In this later case, this is due to the Court grant great discretion to the government to define the purpose that finally was accepted by the Court in terms of censuring serious offences.

The decision of the ECtHR is curious in this respect (as it was *Chan Kin Sum*), as it did not formally carried out an assessment of the means-ends relation. There is no reference in the Court reasoning to the ways in which CD can advance the purpose

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85. See Barak, 2012:323-6.

86. Barak, 2012:326-37.

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offered. It seems that the Court went directly to the proportionality in a strict sense in its analysis. However, as Plaxton and Lardy rightly point out, disregarding the legislative aim of CD, as did the court, made it impossible to assess its application of the rational connection and necessity tests, and “made its proportionality analysis inherently suspect”.<sup>87</sup> Perhaps this is the key reason of why the Court “did not explain why some people might be disenfranchised but not others”.<sup>88</sup> This casts great doubts regarding whether the Court was actually applying a proportionality test, because if the proportionality of the measure is judged only in relation to the characteristics of the crime committed or the duration of the imprisonment, it is not unreasonable to think that the Court was effectively carrying out a criminal proportionality judgement (art. 49 ECHR), without, however, showing the other element of the balancing test, which in this case must be the criminal desert of the offenders or the seriousness of their misconduct.<sup>89</sup>

### **2.3 Proportionality in a strict sense**

Finally, the core and most important element of the proportionality test is *proportionality in a strict sense*. This test assesses the existence of a proper relation between the benefits gained by the fulfilment of the purpose and the harm caused to the fundamental rights by advancing the purpose.<sup>90</sup> It is a balancing test, in which the situation to be avoided is a disproportionate relation between the limitation of the right and the success of the limitative policy. This would be the case, for example, when an important limitation of a right is based on a minimal satisfaction of the legislative purpose. The proportionality in a strict sense test assumes a constitutional purpose and a satisfactory means-ends relation, which are excluded from its analysis.

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87. See Plaxton & Lardy, 2010:103, 121-3.

88. See Plaxton & Lardy, 2010:123.

89. This is the understanding, for example, of the Joint Committee, 2013: 53-60.

90. See Barak, 2012:340.

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Factors that must be considered pertinent to balancing, because they influence the weight the courts assigns to the limitation or fulfilment, include, for example, the probability of the fulfilment of purpose and the limitation; the social importance of the limited right and the urgency of the purpose; and the scope, duration and intensity of the limitation.<sup>91</sup> The object of the balancing test is to create a response to the problem of different, contradictory demands in which the content is not the ‘all-or-nothing’ traditional judicial decision-making output. The balancing is sensitive to the fact that what the courts are facing are political decisions and that political decisions must consider the interests of all those involved.

There are good reasons to think the ECtHR was engaging in a different kind of reasoning and all the other courts did not arrive to the proportionality in strict sense stage because found problems in earlier stages. The idea of balancing, which is what is at stake in the last stage on the proportionality test, is fundamental to understand what the courts are doing when applying this legal method.

Even if proportionality is understood as the protection of fundamental rights by means of the rationalization of legislation and these fundamental rights are designed as the “standard to which all governmental action must conform”, these standards however “are not absolute and so can be limited in certain circumstances”.<sup>92</sup> Thus within the very notion of proportionality is already encrypted an acceptance of the idea of the right’s limitation, to a certain extent inverting the terms set out by the traditional conception of fundamental rights as fire walls against the state intervention.

In other words, proportionality also performs the function of acknowledging, first, the legal authority of the government to restrict fundamental rights and therefore to regulate specific spheres of the citizens’ lives that are *prima facie* protected from

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91. See Barak, 2012:357-63.

92. Brady, 2012:3-4. See also Kumm, 2007:140.

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intervention by a fundamental right. The role of judicial review under the proportionality paradigm is relegated to the task of determining whether the government has violated a right or not and is confined to acting as a “standard test for determining whether a limitation of a [...] right goes too far”;<sup>93</sup> it is no longer a test to determine whether intrusions have occurred or not, but is charged with “assessing intrusions by government onto [...] rights” that are, in an inversion of the protection of rights discourse, *prima facie* authorised.<sup>94</sup>

### 3 Against proportionality

This idea of structural deference highlights, as was mentioned, another group of criticisms against proportionality; those which point out that proportionality affords no substantive protection to fundamental rights. The deference that proportionality shows to the primary decision-makers enables CD, albeit in a restricted form, to pass the legal test even when substantively its compatibility with democratic principles may be questioned.

Firstly, the use of proportionality has helped to *mask* the concrete political reasons behind excluding offenders and the particularities of the genuine political problem of CD. This problem is related mainly with the terms in which the courts deal with the purpose of CD. This may be observed in the transformation from the transparency of the UK Prime Minister’s opinion, when he claimed that prisoner voting makes him feel physically ill,<sup>95</sup> inspired by the rhetoric of law and order, into the invariably milder, general and abstract versions concerned with enhancing civic responsibility and the rule of law given in the courtroom. However, this obviously transcends a problem of the use of public reason. The legal question of the compatibility of CD with the constitution or human rights instruments when framed in terms of

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93. Brady, 2012:4.

94. Brady, 2012:8.

95. David Cameron, PM. See *Hansard*, HC Deb 517 col 921, 3 November 2010.

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proportionality has obscured the genuine political question at stake. The genuine political question of *why* we must exclude citizens who have committed a criminal offence from political participation still go unaddressed, or at least unsatisfactory so.

Secondly, proportionality has tended to produce *compromise solutions*. This tendency stems from how it seeks to render compatible what are in fact two antagonistic principles, employing the economic language of optimization. This is a consequence that is immanent to the use of the idea of proportionality. Under this scheme, which promises to compensate the loss of fundamental rights protections with efficient public policy making, the limitation of fundamental rights is not seen as an exceptional event but as normal. Even when this cannot fully explain the tolerance of the courts towards CD, it permits us to understand the frequent recourse to the over-inclusiveness argument based on the ‘rule of law’, which works as a discursive mechanism to give the reason to the human right defenders, saying the government cannot arbitrarily apply CD. On the other hand, it also supplies reasons to the governments that want to advance policies which make them appear ‘tough on crime’. The claims from either side, it is convenient to keep in mind, argued that CD was unconstitutional *tout court*, independently of its scope, and that a *blanket ban* was constitutional. The compromise idea of make a difference between minor and serious offenders was, in the majority of cases, an idea put forward by the courts, which may be explained as an effort to produce a distributive decision.

It is also important to highlight the role of deference in the identification of the proper purpose. If the measure is correctly advancing a legitimate purpose, all the rest is a process of bargaining and accommodation between the interests at stake. The fundamental right in question can be affected massively if the satisfaction of the public interest is also of great magnitude. With the good institutional design of a measure and a cogent argumentative apparatus, human rights can be reduced considerably on the basis of efficient governmental activity. The problem is that “citizenship and humanity of prisoners, must somehow be weighed against” other

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interest, and there are not “symbolic scales on which to perform such comparison”.<sup>96</sup> This criticism, which points to the lack of deontological reasoning which is proper to the language of the fundamental rights, and also the lack of a deliberative effort to accommodate interests rather than meet them half way,<sup>97</sup> will be discussed briefly in the last section of this chapter.

Thirdly, a diachronic view of these judgements may indicate that they will neutralize the future political strength of the prisoners’ claim for inclusion. Before the cases and the struggle produced by them, CD was an uncomfortable practice whose nature was complicated to explain; it was evaluated within the group of those practices that constitute a pre-modern legacy, affecting elections and offenders. Now, after the judgments, it can be argued that CD, in its limited version, has received considerable legitimacy. This legitimacy is provided by an impartial mechanism of the judicial review of legislation. The doctrine of proportionality “identifies the importance of the State action [...] against the importance of the infringement of the right”.<sup>98</sup> In so doing, it highlights the importance of democracy and fundamental rights and creates a solution that looks for equilibrium within the two by tapping into both traditional legitimacy sources in modern democracy. Consequently, procedural legitimacy is transmitted to the norms which approve the proportionality test or to those norms that the courts consider would approve it. This legitimacy affects directly the cause for inclusion by silencing the political claims for a more complete inclusion of all prisoners. On the other hand, it could lead to a reactivation of the aim of exclude serious criminals in those countries such as Canada and South Africa whose courts have not completely proscribe CD.

Summing up, the important degree of deference that proportionality show to the legislator makes it vulnerable to the objections of those that criticise proportionality

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96. Orr, 1998:72.

97. See Levy, 2013:361-7.

98. Gunn, 2005:470.

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as a poor protection of rights against the demands made by the legislator. What you have in virtue of having a right to vote is weak protection against the arbitrary intervention of the legislator, and a conception of fundamental right does not capture the priority of the right to vote in a democratic society, at least in certain aspects, must be considered as deficient in some way.

### **III AN ALTERNATIVE TO PROPORTIONALITY**

Under the assumption that there are good reasons for a judicial review of CD legislation, and considering the problems which beset proportionality as a legal method able to protect effectively offenders' right to vote, fundamentally because the legislative still has a determinant influence in the process, an alternative proposal must be considered. The idea of the right to vote as configured by an assembly and a balance of elements of participation and recognition can be extremely relevant for this task. First, however, it is shown that, besides cases such as those in the US, where there is a constitutional blockage of the judicial review of CD, alternatives to proportionality are available.

#### **1 Israel (1996), Ghana (2010) and Kenya (2010)**

In contrast to those courts that have adopted the proportionality method to deal with cases of CD, another group of courts have decided to avoid proportionality in their reasoning and have assumed the strongest conception of the right to vote. Their peripheral legal and cultural position may explain why not enough attention has been focused on them.

The first and most celebrated judgment was handed down by the Israeli Supreme Court, which faced a complicated moment when deciding *Alrai v Minister of the Interior et al* (1996). The case originated when a third party petitioned the Court to

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review a decision of the Minister of the Interior denying the attempt to deprive a prisoner of his citizenship. The prisoner was Yigal Amir, the assassin of the Prime Minister of Israel, Yitzak Rabin. Citing *Trop v Dulles* (1958), the Court refused to disenfranchise Amir based on the fundamental role assumed by the right to vote as a “prerequisite of democracy”.<sup>99</sup> The Court considered that “the revocation of citizenship, because it included the right to vote and to be elected, was drastic and extreme step” [, saying] “that the contempt for this act [assassination] must be separated from respect for his right” [to vote].<sup>100</sup>

A second judgment in this line is *Ahumah Ocansey v The Electoral Commission* (2010), in which the Supreme Court of Ghana decided that the Electoral Law, which disenfranchised all those prisoners serving sentences longer than six months, was unconstitutional. It argued that limitation of fundamental rights must be strictly constructed and should be expressly provided for. Section 42 of the Constitution guarantees the right to vote to all adult Ghanaians of sound mind, and it does not cede “any of its authority to either the EC [Electoral Commission] or some other authority to add further to the list of who shall not have the right to vote”.<sup>101</sup> The Court concluded that prisoners were included within the electorate:

“that the drafters of the Constitution would have been explicit if they intended to debar those in legal custody from voting. The fact that the Constitution was clear in excluding those who have been convicted of a crime from eligibility to stand for election to the office of the President and as a member of parliament implied, according to the court, that the drafters of the Constitution did not intend to exclude prisoners from voting”.<sup>102</sup>

The Court was receptive, nevertheless, to the idea that fundamental rights can form the object of limitations, but insisted that, in the case under analysis, “it was

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99. Ispahani, 2009:45.

100. Ispahani, 2009:45.

101. [18] cited in Abebe, 2013:434.

102. Abebe, 2013:434.



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extremely difficult ‘to understand what constitutionally legitimate interest is served’ by the exclusion of prisoners from voting registration.<sup>103</sup>

Finally, other African experience is also illuminating. Before the 2010 referendum set to approve the new Constitution, in *Priscilla Nyokabi Kanyua v Attorney General* (2010) the Kenyan High Court upheld prisoners’ right to vote in that process. This was done despite the general ban entrenched in the Constitution, which impeded them from participating in both parliamentary and presidential elections. The Court affirmed that the referendum was distinct from elections and that Section 43 of the Constitution did not exclude prisoners from voting in it. On arriving at this conclusion, the Court affirmed

“On the balance of proportionality we hold that there is no legitimate governmental objective or purpose that would be served by denying the inmates the right to vote in a referendum. The *Njoya Case* has demonstrated that the people’s constituent rights to vote in a referendum is a basic human right. A right that ushers in or refuses to usher in a new Constitution. A constituent power higher than the Constitution and the National Assembly and Presidential Election Act. Can the Constitution and the National Assembly and Presidential Act Cap 7 prevent inmates from taking part in a referendum if the prisoners are deemed to be part of the people? In our view they cannot” [22].<sup>104</sup>

The new Constitution has not laid down a ban on prisoners’ right to vote in any election or referendums. At the same time, Section 38(3)(a) guarantees the right to vote to every adult citizen, stipulating the narrow exception of those convicted of electoral offences for a period of 5 years. In *Kituo Cha Sheria v Independent Electoral and Boundaries Commission* (2013), the Court affirmed, “The Constitution [...] does not exclude prisoners from being registered to vote and consequently voting in an election” [2]. It seems unlikely that the High Court will allow the Kenyan

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103. [31] cited in Abebe, 2013:435.

104. cf *McLean and Cole v United Kingdom* (2013).

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Parliament to restrict the right to vote of some prisoners.<sup>105</sup> In such a case, however, the Court would encounter the dilemma of whether to apply categorical legal reasoning, as in the cases examined above, or to engage in proportionality.

These three cases do not contain perhaps the most sophisticated theoretical argumentation available in opposition to CD. In that regard, *Sauvé* must be considered as the strongest and more sophisticated compendium of arguments.<sup>106</sup> However, they show something that is absent from *Sauvé*: a path that can be taken up, presenting the right to vote as something that should not be subject to negotiations and calculus; a conception of the right to vote that does not need to compete with other interests and whose limitation does not follow immediately from the fact of a parliamentary intent. Indeed, they take seriously the ideas that the right to vote is a cornerstone of democracy and the universal suffrage is a basic principle.

But why the method need to be replaced and a case for enfranchisement must be offered, one may ask, if *Sauvé* offered strong reasoning, engaged with democratic principles and stroke down the CD provision completely using the proportionality test. This question demand comments in two levels. In a first level the answer does not imply a criticism to *Sauvé* but the opposite. *Sauvé* is an extraordinary judgment. A judgment unlikely to be repeated and difficult to be emulated. In fact, all the remaining four cases of the judicial trend cite the authority of *Sauvé*, and notwithstanding recognize implicitly or explicitly a legislature right to exclude serious offenders. One may add that it is complicated, and may generate suspicion, to think about constitutional courts as fora of philosophical questions to be discussed. In a second level, however, *Sauvé* presents an unresolved tension between upholding democratic principles and the dogmatic use of a legal method that do not close the door to the rise of new undemocratic claims of exclusion.

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105. See Abebe, 2013:435-8.

106. See Plaxton & Lardy, 2010:102.

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## 2 A case for enfranchisement

The tendency of these courts can be articulated in a constitutional argument that opposes CD in terms that do not reproduce the arbitrary distinction between minor and serious offenders and, therefore, is able to protect the right to vote in more categorical terms.

### 2.1 *The proscription of disenfranchisement*

Ziegler suggests that the current trend on the rationalization of CD under constitutional standards, which, as a consequence of the application of the principle of proportionality, restricts its application only to serious offenders and only during the time they are serving their prison sentences, mirrors the standards developed in international law. The current general international law standards on the issue do not proscribe CD *tout court* but, for reasons similar to those of the national courts and the ECtHR, only condemn a blanket ban and the disenfranchisement of those offenders who have served their prison sentences.<sup>107</sup> He advocates, with the aim of the total proscription of CD, for the adoption of an optional protocol to the International Convention of Civil and Political Rights (ICCPR), in a similar fashion to how it was adopted in the case of the death penalty with important results.<sup>108</sup> Despite the particularities of this strategy, it is important to bring forward the premises on which he bases his argument for the proscription of CD, which can inform other concrete strategies to defend the right to vote. In particular, it can inform legal reasoning in the context of national jurisdictions and regional human rights courts such as the ECtHR or the Inter American Court of Human Rights (IACHR).<sup>109</sup> Ziegler's case for CD proscription is based on the following argument. First and somehow grounding the following points, the right to vote is conceived of as a defining element in a

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107. See Ziegler, 2011:234-53.

108. See Ziegler, 2011:253-64.

109. About an argument against CD in the Inter American context, see Barrientos, 2011.

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democratic political identity and its deprivation or suspension as an indicator of the inequality and the lower social status into which the offender is transmuted, eventually resulting in individual and collective effects of alienation and disempowerment.<sup>110</sup> Second, CD is a degrading punishment, even if it can presumably perform a punitive goal, due to the particularity of its mentioned effects.<sup>111</sup> Third, the essence of the right to vote is voting eligibility. The essence of the right is that content of the right that cannot be eliminated by a limitative legislation; therefore, questions regarding one's eligibility to vote must be judged differently to questions regarding voting regulation.<sup>112</sup>

Importantly, the first and second arguments of Ziegler have been largely developed in previous chapters as the ideas of the right to vote as recognition<sup>113</sup> and CD as a form of degradation.<sup>114</sup> The third idea must be analysed in more detail because it can guide constructively the aforementioned suspicion about the legal method in CD cases and in this way could be critical to the project of extending the right to vote to every prisoner. In this regard, some useful analytical distinctions were already made. I previously expounded upon López-Guerra's distinction between a right to enfranchisement, whose attribution is entirely determined by considerations of principle, and the right to have the opportunity to vote, which can be guided by pragmatic considerations depending on competing interests.<sup>115</sup> Close to this distinction, Ziegler argues that there is a difference between, on the one hand, voting *regulations*, consisting in "registration or procedural requirements" that may cause inconvenience or "impose technical difficulties" and, on the other hand, voting *eligibility*, consisting in the determination of "whether one has a right to vote".<sup>116</sup>

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110. See Ziegler, 2011:254-7.

111. See Ziegler, 2011:254-5.

112. See Ziegler, 2011:257-9.

113. See above *Chapter 6*, Section III.

114. See above *Chapter 6*, Section I.

115. See López-Guerra, 2014a:118-124. This distinction is arguably also presented in *Sauvé* [55] according to Plaxton & Lardy, 2010:111.

116. See Ziegler, 2011:257.

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According to the argument of Ziegler, questions of regulation and questions of eligibility must be addressed differently, since the latter comprises the *essence* of the fundamental right to vote that is immune to interference from the legislature, whilst the former remains in the zone of penumbra that can be legitimately limited by a parliamentary act.

This argument articulates correctly the intuition that legislative intervention in two distinguishable normative positions involved in the right to vote requires different solutions, but is too hasty to conclude that voting eligibility belongs to the essence of the right that is immune to legislative intervention. There are two problems here. The first is methodological. To say that something is the essence of a right is not equivalent to saying that the limitations of the right cannot be subjected to proportionality analysis. The core of the right is, as noted by Alexy,<sup>117</sup> the aspects of the right that always triumph in the proportionality test. The distinction between essence and penumbra does not present a case against proportionality. This is related to a second problem. To say that the right to be entitled to vote is immune to legislative regulation, because it is a right that always triumphs in the proportionality test is to assume that other claimants, for instance, children and non-citizens, could have also claimed a presumptive right to vote in a judicial review procedure. The distinction between regulation and eligibility can still be helpful if the language of the penumbra (regulation) and the essence (eligibility) of the right is abandoned, but the emphasis on categorical or deontological reasoning is maintained.

## **2.2 Questioning the method**

There are no reasons to think that proportionality is the legal method appropriate to resolve every kind of dispute about rights. It was argued above that more than one

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117. See Alexy, 2002: 192-6.

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normative position could be ascribed to the right to vote.<sup>118</sup> Of special relevance to the argument of the differentiated judicial review, one can distinguish, for example, between a right to be entitled to vote, or as Ziegler described it, a right to be eligible to vote, and a set of negative liberties that protect the right to vote freely.<sup>119</sup> Different normative positions may be protected differently. This can be according to (1) different standards of scrutiny,<sup>120</sup> or (2) appealing to different legal methods to assess the legitimacy of the legislative intervention.

There are at least two arguments to prefer a completely different methodology rather than merely a different standard of review in the case of CD. First, as seen in the previous section, proportionality systematically defers elements of judgment to the primary decision-taker, which in the case of CD can lead to arbitrary decisions, guided by the aim of political compromise. The cases examined in *Chapter 2* were arguably implementing different standards of review, and a certain reading of the judgment could attribute the different outcomes to this factor. However, what is interesting here is that even when applying a demanding scrutiny standard when employing the proportionality method, the Court was not able to achieve the proscription of CD.

Second, and essentially, CD operates with a binary code – that of inclusion/exclusion from the electorate – that makes the idea of a ‘proportional limitation’ of the right to vote an impossible operation. This is relevant because disenfranchisement has a quite

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118. See also above *Chapter 6*, Section III.4.2.

119. See above *Chapter 6*, Section IV.

120. An example of a claim for different standards of scrutiny, even if not strictly coincident with Ziegler’s distinction, is put forward by Judge Björgvinsson in his *Scoppola*’s minority opinion: “In the context of this case Article 3 of Protocol No.1 has two important aspects to it. One relates to the organisation of the electoral system in a given country, that is, the organisation of the electoral process, division into constituencies, the number of representatives for each constituency, and so on. The other relates to the rights of individuals to vote in general elections. As regards the former, the Contracting States have, and should have, wide discretion or a wide margin of appreciation [...]. However, as to the latter point [...] the margin is much narrower. It follows that the necessity of limitations on the rights of citizens in a democratic society to vote in the election of the legislative body must be subject to close scrutiny by the Court” [ p. 25].

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radical consequence in the right to vote: it involves its total suppression. Considering the disenfranchisement that affects only serious offenders but excludes those offenders completely from the franchise as a proportional limitation of the right to vote is to disregard the right to vote as a right of the citizen or a human right. The citizen, in this case, is completely deprived of the right, even when the electorate as a collective is affected only marginally.<sup>121</sup> Taking the right to vote as an individual right implies an acknowledgement of the fact that CD implements a binary code.

The distinction between voting eligibility and other aspect of the right to vote can be framed in terms of recognition and participation. While the recognition aspect of the right to vote is strongly linked to the idea that a person is accepted as an equal member of the community, and therefore is enfranchised, the participatory aspect of the right to vote must concern the circumstances under which the electoral practice can perform the function of controlling the government and channel communicative power from the people to the representative authorities.

Under these conditions and bearing in mind the different normative functions of the normative position associated to the right to vote, it is possible to think that for cases of voting eligibility, that is, cases about the scope of CD, a deontological method of adjudication is better situated. Here is where the argument concerning degrading punishment proves relevant, not only as a legal framework in which CD legislation can be judged as unconstitutional or incompatible with human rights, but also, and perhaps more importantly, because it illustrates how a deontological method of the adjudication of rights works. A punishment that is considered degrading is not subjected to an examination of its aim, or an analysis of its means and the relation to its ends, and finally is not subjected to a process of balancing the interests at stake. In sum, there is no proportionality analysis. A punishment that is considered degrading is considered simply wrong, unconstitutional and impermissible. Other interests -

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121. See *Sauvé* [55].

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which it might be argued could call for the application of such a punishment - are simply not considered as relevant reasons to a limitation of the right to not be subjected to degrading treatments, even when they can be legitimate in abstract terms. In contrast, a punishment that is considered non-degrading could be submitted to an analysis of proportionality.<sup>122</sup>

### **2.3 Voting eligibility as a deontological constraint**

The deontological method of adjudications of rights assumes that a right is a deontological constraint or, in other terms, a fire wall<sup>123</sup> or a trump<sup>124</sup> that, where appropriate, rules out completely the intent of legislative intervention, acknowledging that “constitutional rights exists principally to protect against such selective [...] distribution of the franchise”.<sup>125</sup> As Habermas argues, when “the deontological character of basic rights is taken seriously, they are withdrawn from such a [proportionality] cost-benefit analysis”,<sup>126</sup> constituting “‘threshold weights’ against political policies and collective goods”.<sup>127</sup> As Mattias Kumm adds that “[t]he idea of deontological constrains cannot be appropriately captured within the proportionality structure”, because proportionality filter relationships that are “often morally decisive features of the situation”.<sup>128</sup>

Understanding voting eligibility as an aspect of the right to vote, assumed to be a fire wall or a trump, does not necessarily entail that it is a normative position immune to limitations because it is the more important aspect – the essence – of the right, as Ziegler sustain. It simply acknowledges that voting eligibility is a binary question about whether somebody should be included in the electoral body and therefore is

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122. See above *Chapter 6*, Section 1.

123. See Habermas, 1996a:258.

124. See Dworkin, 1978:430-3.

125. Plaxton & Lardy, 2010:138.

126. Habermas, 1996a:260.

127. Habermas, 1996a:204.

128. Kumm, 2007:162-3. cf Cohen-Eliya & Porat, 2013:118-9.



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entitled to vote, or should be excluded and therefore does not have such a right. Voting eligibility cannot be proportionally limited because it is an all-or-nothing question.

Admitting this distinction may lead one to confirm the hypothesis of Ziegler and López-Guerra that questions of voting eligibility and other normative aspects of the right to vote must be addressed differently. While questions of eligibility must be resolved using a deontological method due to its binary nature, other questions may be arguably balanced against competing interests to produce regulations of compromise. Adopting a more adequate method of adjudication would allow for the expression and discussion of the relevant arguments for questions of eligibility.

A deontological method implies two aspects. Firstly, these cases would be argued in terms of substantive discussion that proportionality tends to cover. The question of why a democratic political community should exclude offenders from the franchise may be properly addressed. Arguments about a normative conception of democracy, such as those articulated in *Sauvé* within the proportionality argumentation, would be possibly conclusively expressed. Secondly, understanding that voting eligibility is a binary question implies that the process of judicial argumentation and decision is directly oriented to resolve the question about whether or not the subject or group of subjects are entitled with the right to vote. Such an instance would be a moment to a community to express its democratic commitments but it would also present a moment in which the tensions between participation and exclusion can be rearticulated and expressed without ambiguities.

This conclusion, however, has a limited scope affecting only to the right to vote. The projection of this defence of the democratic value encapsulated in the right to vote towards other rights is a task that must satisfy different standards of argumentation. This is due to the structure of power of the right to vote, as opposite to the structure

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of liberties of other rights of democratic participation, discussed above that make possible to associate it, without ambiguities, to the idea of recognition of democratic citizenship.<sup>129</sup>

Summing up the argument of this chapter, there are several reasons to consider that the case for a legislative ‘last word’ in fundamental rights adjudication is seriously debilitated in the case of CD. However, this cannot lead to the immediate conclusion that courts are, without qualification, better situated for the task. The analysis of the judicial trend on CD and its use of the proportionality test as a method to adjudicate cases of CD shows that constitutional courts tend to operate with a legal reasoning, led by the proportionality paradigm, which is inadequate given the nature of the right at stake. Rooted in a reflective reading of the normative structure of the right premised in the acceptance of the right to vote as a mechanism of recognition, there are good reasons to think that cases of CD, as the paradigmatic case of voting eligibility, must be adjudicated considering the right to vote as a fire wall.

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129. See above *Chapter 6*, Section III.4.

## CONCLUDING REMARKS

The work started from the observation in *Chapter 2* that the judgments of the judicial trend on CD have, to some extent, avoided engaging with substantive justifications for excluding offenders from the electoral process. It was affirmed that they have focused instead on the legal question of the *proportionality* of such a measure in terms of its compatibility with fundamental rights. The very question of *why* offenders must be excluded from political participation, which could help to explain the official significance of CD, has therefore been circumvented by the majority of such judgments, or has played only a marginal role in judicial arguments. This finding led, in turn, to scepticism regarding those claims that assert the success and the progressive effect of this judicial trend. As was sustained subsequently, even when the judgments reduced the scope of those affected by CD, they may have contributed nonetheless to the normalisation of the political exclusion of serious offenders.

The conclusions of this legal analysis contrast with those that follow from an examination of CD from the perspective of democratic theory. This second direction of enquiry began in *Chapter 3*, by developing the premises on which the courts grounded their legal decisions. It argued that recognizing the fundamental democratic role of the right to vote being distributed universally amongst all members of the political community, necessarily leads to the conclusion that CD presents a serious

democratic problem; it conflicts with the central democratic claim according to which all those subject to the law must have rights to *participate* in the process of law-making.

That claim necessarily rests on an assumption about the role that the right to vote plays. This assumption is that political rights in general and the right to vote in particular perform a fundamental function necessary for democratic communities. In general, they work as a mechanism of participation, and, in that sense, they are strongly connected to the building of democratic legitimacy, by means of enabling the circulation of political power and subjecting power relations to actions of contestation. In this sense, the right to vote is a mechanism for building the legitimacy of the structures of authority.

The democratic problem of CD acted as a starting point from which to explore the role that CD can adopt within a democratic political community. This exploration was carried out in the dissertation by searching for the points of tension and the possibilities of reconciliation between CD and democracy. *Chapter 4* discussed the argument regarding the *civic virtue* of offenders, that is, the idea that CD, as with the exclusion of children, can be based on a certain conception of political capacity. From this perspective, CD is presented as the consequence of a demand for civic virtue that, inspired by the tradition of republican citizenship, is equated with a deficit affecting one's sense of justice. However, as was argued, in a democracy, the capacity to engage in the process of law-making cannot be substantially dissociated from the capacity to act as subject of the law and therefore to accept responsibility for its breach. This is clear in the case of children. They are excluded from political participation in a way that proportionally correlates with their exclusion or the restriction of their legal responsibility. *Chapter 5*, in turn, analysed the justification of CD as a form of punishment, and in particular as a democratic form of punishment. After considering, analysing and discarding the arguments of deterrence,

rehabilitation and incapacitation, it was argued that the more important defence of CD as punishment must emphasise its expressive function within a retributive framework. However, it was highlighted that when this expressive function assumes the form of CD, it becomes unavoidably incompatible with democratic punishment because it affects the preconditions of its own imposition. On the one hand, it fails to constitute a form of symbolically *inclusive* punishment; on the other hand, it conflicts with the premise of the imposition of punishment in democratic societies, that is, that the offender must be able to understand the legal norm whose breach demands the punishment as his own norm. The absence of such conditions not only excludes the possibility of democratic punishment, but also leads one to conceive of the practice of imprisonment as a form of risk-management and CD as a form of *symbolic degradation*.

At this stage, it was demonstrated that the analysis of CD understood in terms of participation in the process of the generation of democratic legitimacy leads to confirmation of the democratic problem. However, this is just a negative affirmation: the existence of CD erodes democratic legitimacy. The question concerning what might be the positive role of CD in societies that claim to be democratic was yet to be answered. This was the point where notions of degradation and exclusion were to be incorporated meaningfully into an explanation of CD.

This diagnosis was developed in *Chapter 6* by articulating how the ideas of punitive degradation and the political exclusion of offenders can be seen as a reaffirmation of the commitment to the certain community values, helping to strengthen the identity of community articulated by the fundamental political distinction between *citizens* and *criminals* as shaping the boundaries of what is understood as political community. Once this is acknowledged, another aspect of the right to vote acquires importance. It was argued that the notion of participation does not extinguish the meaning and importance of being entitled to vote. Political rights in general and the right to vote in

particular may function, mirroring the degradation and exclusion experienced by those disenfranchised, as mechanisms of political recognition and, in that sense, they are strongly linked to the attribution of membership, and functionally embody principles of political equality and mutual respect. In this sense, the right to vote is a mechanism used not only to demarcate, but also to contest the legitimacy of the boundaries of the political community. This function of the right to vote is likened to the notion of a *right to be included*, that has an institutional expression in the right to be enfranchised in electoral registers.

At this stage, the main claim of the dissertation appeared clearly: the recognition aspect of the right to vote is a key factor for understanding CD, and, in turn, CD is a key factor for understanding the right to vote as a mechanism of recognition in democratic communities. However, this is not only the case in a theoretical context. This approach may cast new light with which to examine the judicial cases of CD, producing critical awareness of how the courts have dealt with these cases. Specifically, it was observed that those courts that have conferred some importance upon the idea of recognition have developed a stronger standard of review for legislation that enacts CD provisions.

The final *Chapter 7* was grounded in the belief that the debate on CD can be seen also as an opportunity for using the legal fora to resist and contest the politics of degradation and exclusion which underlies the disenfranchisement of serious criminals endorsed by the courts of the judicial trend. It was argued, on the one hand, that if democratic self-government is to be pursued and defended, then offenders' right to vote must be safeguarded from the majoritarian and exclusionary tendencies usually pursued by Parliaments when dealing with criminal problems. On the other hand, it was argued that the structure of the legal method of proportionality is an inadequate tool for dealing with the case of CD, and must be abandoned, paving the way for a legal method compatible with a more robust conception of the right to vote,

which when adequately grounded in the idea of the right to vote as recognition, permits the distinction between the question of voting eligibility and the question of voting regulation.

This must be seen as an opportunity for building a democratic project not only based on the participation of citizens, but also on the recognition of everyone as a valuable and respectable member of the community, thereby guaranteeing the right to vote for even the most serious offenders as an essential element of a democracy that is both inclusive and participatory.

To conclude, some aspects requiring further research may be identified. There is a group of cases that present similarities with CD but that require further assessment, such as the case of the right to stand for election and the prohibition against standing or being elected as a candidate which affects those convicted of a criminal offence,<sup>1</sup> or the case of the use of denationalization as a punitive response compatible with democratic principles.<sup>2</sup> There is another group of cases in which CD itself adopts particularities that must be explored in greater detail. For example, when it affects those convicted for terrorist offences,<sup>3</sup> or those sentenced to the death penalty while waiting for it (waiting for what?).<sup>4</sup>

However, possibly the major shortcoming of the present analysis of CD is that it leaves untouched the massive exclusion performed by the very fact of imprisonment.<sup>5</sup> There are several issues that must be discussed concerning prison reform in the direction towards a more democratic model of imprisonment; however, the recognition of prisoners as citizens is an urgent affair. In contrast with other rights of

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1. See e.g. Grant *et al*, 1970:987-1000, 1175-7.

2. See e.g. Grant *et al*, 1970:966-74; Aleinikoff, 1986; Kingston, 2005; Waldrauch, 2005; Lavi, 2010; Lavi, 2011.

3. See e.g. Duff, 2008; Lavi, 2011.

4. See e.g. Hugh & Roberts, 2013.

5. See Ramsay, 2013a; Ramsay, 2013b. See also López-Guerra, 2014a:128-9.

participation, the right to vote is particularly propitious to expressing recognition in the context of the prison. This is mainly because it does not depend on a demanding notion of participation. Even prisoners in conditions of serious deprivations of liberty and whose possibilities to exercise other participatory rights are usually curtailed can be included within the members of the democratic community by their enfranchisement. If something such as a compensatory relation between mechanisms of participation and forms of citizenship recognition can be imagined, the right to vote is certainly an essential formula for this recognition. The subjection of prisoners to a legal regime in which other rights of participation are massively affected makes the continuation of the recognition as citizens a serious problem, to which their right to vote constitutes an adequate response.<sup>6</sup> The crucial importance of this compensation can be highlighted by appealing to the meaning of democratic citizenship. According to Etienne Balibar, democratic citizenship has two sides that configure it as an antinomic concept. It is institutional and disruptive at the same time. While, democracy is a process of questioning the political conformation of oligarchy, citizenship is an activity of struggle for recognition, equality, of claiming rights by those who have no rights. But democratic citizenship has an institutional side incarnated in elections.<sup>7</sup> According to this description, CD is the way in which a group that lacks the capacity to produce non-institutional struggles, thus lacking democratic citizenship in its disruptive sense, is also deprived of the rights to

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6. It is interesting to note that this seems to be the logic of the German model of CD. In Germany, CD does not affect prisoners, but only ex-prisoners. According to the Criminal Code “[t]he duration of the loss of ability or of a right shall be calculated from the day the term of imprisonment has been served”. Section 45a, German Criminal Code 1975. In addition to that, the German model (1) depends on special provisions of the substantive criminal law that target those crimes in which the conduct attempts to “undermine the foundation of the state” or constitutes “tampering with elections” (Demleitner, 2000:761); (2) judicial intervention in the case of the right to vote is not just required but essential; (3) the length of the ban can fluctuate between a period of two to five years; (4) the restoration proceeds *ipso iure*, without any additional requirement. About the German model, see Demleitner, 2000.

7. See Balibar, 2007; Balibar, 2008.



institutionalised participation in the public sphere.<sup>8</sup> When this is the case, it is not exaggerated to say that they lack ‘the right to have rights’.<sup>9</sup>

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8. See also Lippke, 2007:203.

9. See Arendt, 1966: Ch. 9 (esp. 296-7). See also Michelman, 1996b; Passerin d’Entreves, 2001:139-66; Gundougdu, 2006; Shaap, 2011.

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