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**The Infringement of Prisoners' Right to Vote: An Analysis of Intentions  
and General Principles in Due Consideration of Recent Judgements**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of Master of Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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**Florian Seitz**

**10 January 2012**

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# THE INFRINGEMENT OF PRISONERS' RIGHT TO VOTE: AN ANALYSIS OF INTENTIONS AND GENERAL PRINCIPLES IN DUE CONSIDERATION OF RECENT JUDGEMENTS

## INTRODUCTION

### A. General Outline of the Subject in Question

The right to vote is the most important and often even the only possibility of citizens to participate in a democracy's governance. Generally accepted democratic principles like the electoral equality and the objective to include all citizens who have acquired their full age and are of sound mind in the decision-making process demand that disenfranchisement may – if at all – only occur in very exceptional cases. However, laws infringing prisoners' right to vote are widespread and differ greatly among established democracies: While some states do not impose any restrictions on the right of prisoners to vote, others (like many states in the USA) exclude most or all of their detainees from taking part in elections, sometimes even after their release.<sup>1</sup> Even though this phenomenon pertains to core issues of democratic principles as well as central human rights aspects, it has not been subject to noteworthy public debate for a long time. Due to several decisions of national constitutional courts and the European Court of Human Rights (ECtHR) within the last decade, felony disenfranchisement has gained more attention among legal academics. Still, most of this literature is limited to the specific arguments which have been brought forward in the particular court procedures. From my point of view, a holistic analysis which seeks to give a general recommendation whether or not to grant prisoners the right to vote – and if so, what restrictions may still be feasible – must not only focus on a national context, but has to consider legal philosophic and political issues, too. The long grinding debate which is going on in the British Parliament about the amendments demanded by Strasbourg's European Court of Human Rights<sup>2</sup> (ECtHR) emphasises the practical necessity of such a study.<sup>3</sup>

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<sup>1</sup> See C Uggen et al 'Punishment and Social Exclusions: National Differences in Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 59 at 61-63.

<sup>2</sup> *Hirst v. United Kingdom* (No 2), App. No. 74025/01 6 October 2005 (Grand Chamber Decision), available at <http://www.echr.coe.int/eng> [last accessed on 15 October 2011].

## **B. Approach to the Topic**

The thesis at hand analyses in what way and to what extent general principles of democracy and human rights are affected by restrictive disenfranchisement laws. Recent court decisions will provide a basis to outline critical aspects of disenfranchisement among legal provisions in different countries. Still, the objective is neither to give a (comparative) analysis of these rulings nor to deal comprehensively with special rules of national legislation. Rather, the intention is to distil related aspects from case law as well as from academic literature in order to give a general recommendation how to reconcile prisoners' democratic and human rights as well as society's interest in the legitimacy of democratic representation with the purpose of punishment and the extraordinary conditions connected with imprisonment.

Chapter I will briefly overview the history of felony disenfranchisement as some historical background is required to understand the development of prisoners' rights and especially the advancing separation of disenfranchisement and the purposes of punishment.

Chapter II seeks to define the nature of the right to vote. The question, whether the right to vote is (only) a democratic right, also a protected human right or even part of the human dignity determines the scope of possible limitations. Thus, the distinction is not only an academic question but also had a direct impact on recent court decisions.

On the basis of these fundamental considerations, the minor dissertation seeks to analyse the impact of felony disenfranchisement: Chapter III focuses on the individual (ie penal) context centred on the question whether the infringement of criminals' right to vote may serve as an adequate form of additional punishment. In contrast, Chapter IV discusses the measurement's impact on society and democracy as a whole. As the exclusion of a certain group of citizens may undermine the legitimacy of the whole electoral procedures, this issue will form the core of the work at hand which aims to focus rather on democratic theory than on criminal law.

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<sup>3</sup> For an overview of the debate see eg D Hannan 'Does Parliament have the courage to defy this man?' Daily Mail (6 February 2011), available at <http://www.dailymail.co.uk/debate/article-1354084/Prisoner-vote-ban-Does-Parliament-courage-defy-John-Hirst.html> [last accessed on 15 October 2011].

Having discussed the impacts of disenfranchisement, Chapter V will deal with practical problems which are connected with prisoners' franchise such as a fair allocation of votes, proper administration of the electoral process and the provision of sufficient objective information. Suggestions how to handle these difficulties will show that they are by no means unsolvable.

To round up the analysis, Chapter VI will outline reasonable differentiations of restrictions. This is of particular relevance for the practice because most of the recent judgements which declared restrictions invalid did so because the legislative basis lacked the necessary balance and proportionality, ie mostly contained a 'blanket ban'. Legislative authorities that do not generally want to refrain from the imposition of electoral sanctions on criminals ought to consider these issues in order to pass legislation which is in line with constitutional requirements.

Finally, a recapitulatory conclusion will assemble the results from the individual chapters and suggest coherent ways how to shape and design legislation without violating constitutional or human rights principles.

## **CHAPTER I: HISTORY AND DEVELOPMENT OF FELONY DISENFRANCHISEMENT**

The exclusion of certain groups of individuals from the electoral participation process has a long tradition and even today there is no universal definition of the 'elector'.<sup>4</sup> While modern democracies, nevertheless, have found comparable standards for quasi all regulations of suffrage, felony disenfranchisement laws today are the most – or maybe even the only – noteworthy field of disparate embodiment.<sup>5</sup> A view back in history may help to understand the accrue-ment of the current heterogeneity.

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<sup>4</sup> C Gallagher, 'The Captive Vote: Prisoners' Suffrage in Ireland', (2001) 1 *University College Dublin LR* 1.

<sup>5</sup> However, it is worth to recall that the definition of suffrage has been in progress for most of the time since democratic systems were established: Women's suffrage which is today seen as a matter of course was only established after longsome struggles, see eg SD O'Connor 'History of the Women's Suffrage Movement' (1996) 49 *Vanderbilt LR* 657. In terms of demeny voting, democracies' current rules are indeed similar (see eg L Massicotte et al 'Establishing the Rules of the Game: Election Laws in Democracy' (2004) 15-24), but lively discussions in several countries illustrate that regulations of franchise are still on the move (see WC Sanderson and S Scherbov 'A Near Electoral Majority of Pensioners: Prospects and Policies' (2007) 33 *Population and Development Review* 543 at 548).



Taking into account that penalties for crimes tended to be much harsher in former times while electoral equality and inclusion have not been considered to be as important as today, it is little surprising that prisoners have already been disenfranchised in the antiquity. In ancient Greece for example, prison inmates as well as former detainees were stigmatised as ‘infamous’ and lasting sanctions infringed a large number of personal freedoms, such as freedom of speech, freedom of assembly as well as the access to civil service and the right to vote.<sup>6</sup> Penalties affecting the culprits’ rights in society were even severer in ancient Rome: There, felons lost their ‘honour’ and consequently also their position as fully-fledged citizens.<sup>7</sup> Among today’s common law countries, early criminal law took a similar approach to the continental jurisdictions: In Anglo-Saxon Britain criminals were deprived of central public and private rights – not only did they lose their right to legal protection; they were also deprived of the right to hold property and other important civil rights.<sup>8</sup> Due to the influence of British settlers, the early disenfranchisement laws of the United States of America have mostly been based on the same British legal principles.<sup>9</sup> Still, felony disenfranchisement in the US only became a practical issue after the American Civil War when the right to vote was no longer limited to white male property owners.<sup>10</sup> Thenceforward restrictions of prisoners’ voting rights served as an instrument to design universal suffrage in a seemingly race-neutral way while factually the limitations were tailored to disadvantage the black population.<sup>11</sup> Among the southern states – which particularly adopted a racially influenced categorization of offenses – Mississippi shows an extreme example: there, the commitment of ‘furtive offenses’ such as theft usually led to the perpetrator’s disenfranchisement, while ‘robust crimes’ like murder did not necessarily result in an in-

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<sup>6</sup> AS Johnson-Parris ‘Felon Disenfranchisement: The Unconscionable Social Contract Breached’ (2003) 89 *Virginia LR* 109 at 114.

<sup>7</sup> NV Demleitner, ‘Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative’ (1999/2000) 84 *Minnesota LR* 753 at 757.

<sup>8</sup> J Fellner and M Mauer, ‘Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States’ (1998) 2, available at <http://www.hrw.org/reports98/vote> [last accessed on 16 October 2011].

<sup>9</sup> EA Hull, ‘*The Disenfranchisement of Ex-Felons*’ (2006) 17; WW Liles, ‘Challenges to Felony Disenfranchisement Laws: Past, Present, and Future’ (2006-2007) 58 *Alabama LR* 615 at 617; RA Lenhardt ‘Understanding the Mark: Race, Stigma, and Equality’ (2004) 79 *NYU LR* 803 at 917.

<sup>10</sup> J Fellner / M Mauer, ‘Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States’ (1998) 3, available at <http://www.hrw.org/reports98/vote> [last accessed on 16 October 2011]; RL Nunn, ‘Lock them up and Throw away the Vote’ (2004-2005) 5 *Chicago J Int’l Law* 763 at 765.

<sup>11</sup> JM Kousser, ‘*The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*’ (1974) 45-54.

fringement of suffrage.<sup>12</sup> Since property crimes were mainly ascribed to black people while violent crimes were rather associated with Caucasians, this distinction was obviously determined by racial motives.<sup>13</sup>

While disenfranchisement provisions in the United States did not succumb to noteworthy alterations until the middle of the 20<sup>th</sup> century,<sup>14</sup> franchise policies in continental Europe underwent more changes: Already among the Teutons more differentiated practices were developed and felons' rights of participation were no longer linked to the individual's relation to the state and/or the state's authorities but rather dependent on the person's standing in society.<sup>15</sup> Thus, not every crime but only 'dishonourable' ones led to a forfeiture of certain civil rights.<sup>16</sup> In the early modern age, an intensive thought-process which had its source in the era of enlightenment continuously fuelled the debate about penology in general and felony franchise in particular: *Cum grano salis*, the role of the individual in society as a whole gained more and more significance and thus, punitive measurements received a more individual shape.<sup>17</sup> Especially in France, the *mort civile* – a form of public humiliation emanating from old roman penology – was increasingly considered to be undifferentiated and unjust.<sup>18</sup> The hitherto prevailing purpose of deterrence was more and more replaced by the idea of reintegration. Therefore, the catalogue of penalties was revised and measurements of public humiliation were widely abolished.<sup>19</sup> In the same process, felony disenfranchisement laws were scrutinised und publicly discussed. It was at this time around the middle of the 19<sup>th</sup> century that the infringement of prisoners' right to vote was no longer discussed only in terms of penology

<sup>12</sup> AL Shapiro, 'Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy' (1993-1994) 103 *Yale LJ* 537 at 541.

<sup>13</sup> RK Scher, 'The politics of disenfranchisement: Why is it so hard to vote in America?' (2011) 53; M Mauer, 'Felon Voting Disenfranchisement: a Growing Collateral Consequence of Mass Incarceration' (2000) 12 *Fed Sentencing Rep* 1 at 3.

<sup>14</sup> JM Kousser, '*The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*' (1974) 8.

<sup>15</sup> E Kühne, '*Die Ehrenstrafen - Insbesondere auch Rechtsvergleichend und Rechtsgeschichtlich Dargestellt*' (1931) 11-12.

<sup>16</sup> See *ibid.* During the middle ages the importance of the culprit's standing in society became even more visible as the punishment of 'dishonourable crimes' was carried out publicly and was based on naming and shaming methods, see O Schwarz, '*Die Strafgerichtliche Aberkennung der Amtsfähigkeit und des Wahlrechts: Eine rechtsvergleichende Untersuchung aus der Sicht der Bundesrepublik Deutschland und der Vereinigten Staaten*' (1991) 22-26.

<sup>17</sup> F Weithase, '*Über den Bürgerlichen Tod als Straffolge*' (1966) 91.

<sup>18</sup> A Esser, '*Die Ehrenstrafe*' (1956) 89.

<sup>19</sup> NV Demleitner, 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (1999/2000) 84 *Minnesota LR* 753 at 757.

but also attracted attention from democratic theorists.<sup>20</sup> On the substantiated basis of moral and political philosophers' ideas, the classic dispute whether felony disenfranchisement was a justified measurement to 'keep the ballot box clean' or if it rather undermined democratic legitimacy emerged.<sup>21</sup> Depending on the political affiliation of the particular nations, a patchwork of felony franchise legislation unfolded on the continent.<sup>22</sup>

After a short epoch dominated by conservatism and nationalism in the forefront of World War I when individual interests were rolled back and hence disenfranchisement regulations were tightened,<sup>23</sup> suffrage legislation in Western Europe was increasingly questioned and widely liberalised: in Germany, for example, a major overhaul of the German Criminal Code (*Strafgesetzbuch*) in the 1960s gave greater weight to reintegration and limited the possibility of prisoners' disenfranchisement to exceptional cases: according to the new section 45 para 5 of the revised Criminal Code, disenfranchisement may only be imposed as an incidental consequence (*Nebenfolge*) in conjunction with certain crimes<sup>24</sup> and is limited to a limited period (no longer than five years).<sup>25</sup> The limitation to specific crimes (in practice crimes which are related to the election process, like election fraud, bribery of voters or similar offenses)<sup>26</sup> ensures that restrictions of franchise are only implemented when they are part of a coherent penalisation. Due to these strict prerequisites, the scope of disenfranchisement's application is very limited: in practice, the number of annual impositions averages around ten cases and most people in Germany do not even know that the sanction exists.<sup>27</sup>

In the United States however, prisoner's disenfranchisement today is a broadly discussed mass phenomenon. The Civil Rights movement in the 1960s led to several

<sup>20</sup> MK Dhimi, 'Prisoner Disenfranchisement Policy: A Threat to Democracy?' (2005) *Analyses of Social Issues and Public Policy* 235 at 239.

<sup>21</sup> This controversy, which is still current, will be holistically discussed in Chapter IV.

<sup>22</sup> G Brooks, 'Felon Disenfranchisement: Law, History, Policy, and Politics' (2004-2005) 32 *Fordham Urban LJ* 851 at 852.

<sup>23</sup> C Roxin, '*Strafrecht Allgemeiner Teil Band I: Grundlagen - Der Aufbau der Verbrechenslehre*' 4ed (2005) 87.

<sup>24</sup> That means, there is an exclusive catalogue of criminal offences, according to which the right to vote may be restricted.

<sup>25</sup> A Schönke and H Schröder, '*Strafgesetzbuch: Kommentar*' 28ed (2010) Section 45 para 5 mn 1.

<sup>26</sup> O Schwarz, '*Die Straferichtliche Aberkennung der Amtsfähigkeit und des Wahlrechts: Eine rechtsvergleichende Untersuchung aus der Sicht der Bundesrepublik Deutschland und der Vereinigten Staaten*' (1991) 50-54.

<sup>27</sup> NV Demleitner, 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (1999/2000) 84 *Minnesota LR* 753 at 761.

amendments of statutes: especially most of the former distinctions between different crimes have been replaced in order to avoid a race-discriminatory interrelation between certain offences and the loss of franchise.<sup>28</sup> Therefore, a ‘blanket ban’ of prisoners’ voting rights today is very common among most American states: the majority of states infringe culprits’ franchise ‘only’ during the period of incarceration, but eleven states even disenfranchise ex-felons.<sup>29</sup> Only Maine and Vermont do not deprive any offenders of the right to vote.<sup>30</sup>

Although this historical overview helps to understand the development of felony franchise laws and reveals the most important influencing factors, it does not off-handedly display structural conditions that show *why* some states are strict on prisoner voting while others prefer a rather liberal approach.

One possible explanation has been discussed by *Blais et al* and refers to the ‘strength’ of a democracy: According to the authors’ study, ‘strong’ democracies are less likely to disenfranchise prison inmates. This thesis is substantiated by the assumption, that ‘stable’ democracies’ authorities were less scared that the influence of prison inmates might undermine the democratic system as a whole as felons are suspected to be less supportive for moderate democratic governments.<sup>31</sup> However the authors point out, that even among ‘strong’ democracies, about one third has strict disenfranchisement laws in practice.<sup>32</sup> Hence, the observations of *Blais et al* give a worthy tendency but cannot provide a fully coherent explanation.

Another factor that may influence a country’s disenfranchisement laws is the level of the incarceration rate. According to data, collected and analysed by *Uggen et al*, a higher incarceration rate correlates with more restrictive felony franchise laws.<sup>33</sup> Again, the above stated argument that prisoners might have a more critical attitude towards the democratic system is put forward as a possible explanation: Different to

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<sup>28</sup> G Brooks, ‘Felon Disenfranchisement: Law, History, Policy, and Politics’ (2004-2005) 32 *Fordham Urban LJ* 851 at 859.

<sup>29</sup> TJ Miles, ‘Felon Disenfranchisement and Voter Turnout’ (2004) 33 *J Legal Stud* 85.

<sup>30</sup> *Ibid.*

<sup>31</sup> A Blais et al ‘*Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws*’ Paper prepared for delivery at the annual meeting of the American Political Science Association Atlanta (1999) available at <http://www.sciencedirect.com/science/article/pii/S0261379499000621> [last accessed on 20 October 2011].

<sup>32</sup> *Ibid.*

<sup>33</sup> See C Uggen et al ‘Punishment and Social Exclusions: National Differences in Prisoner Disenfranchisement’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 59 at 69-74.

new or unstable democracies, in this context it is the sheer mass of potential criminal electors which causes fear and leads to a restrictive legislation.<sup>34</sup>

A different approach of classification which has not been discussed so far is to analyse a nation's attitude towards the responsibility and freedom of the individual citizens. From on the middle of the 20<sup>th</sup> century franchise rules can be mapped in a quite structured way: In the course of the world's division according to the ideological spheres of communism and capitalism in the aftermath of World War II, the Eastern European countries developed rather restrictive policies in terms of prisoners' franchise,<sup>35</sup> while most of the Western-oriented countries implemented more liberal franchise regulations. Interestingly, after the fall of the Iron Curtain, many of the Eastern European countries adjusted their legislation and implemented more balanced and liberal felony franchise laws.<sup>36</sup> From my point of view, this development for the first time in history reveals a coherent conjunction of a society's self-conception and its exposure to felony vote: generally speaking, societies which focus on the individual person are more willing to grant general participation rights notwithstanding the individual's misconduct. In contrast, social systems that (over)emphasise the collective tend to protect their model by excluding potentially deviating opinions. Although I consider this approach to be more convincing than any of the above stated attempts of categorisation, one has to admit that again counterexamples can be found – the United States being the most obvious one – and that the definition of a society's self-conception is difficult and often remains vague.

This chapter has shown that the development of felony franchise laws was far from linear and change is still in progress. Due to the change of values, former laws and conditions may only help to better conceive current debates; by no means, they may serve as an example for today's modern legal order. Still, it would be too trivial to stigmatise criminal disenfranchisement laws as outdated or reactionary. Rather, the historic overview has highlighted that the issue has always been a highly political one and very much dependent on the self-image of a state's society. Therefore, it is impossible to define fully coherent criteria according to which one could categorize

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<sup>34</sup> Ibid.

<sup>35</sup> No attention shall be paid to the democratic quality of these elections for now.

<sup>36</sup> See '*European Prisoner Disenfranchisement Regimes*', a table compiled from information gathered by the UK Foreign and Commonwealth Office in January 2011 and from research conducted by lawyers at the UK Ministry of Justice in 2010, available at <http://bit.ly/uGGzP9> [last accessed on 29 October 2011].

states' felony franchise legislation. Nevertheless, the discussed grouping may serve as a viable indication for the analysis of political goals.

## CHAPTER II: THE NATURE OF THE RIGHT TO VOTE

The question under which preconditions the right to vote may – if at all – be suspended is closely linked to its nature: Is the right to vote rather a privilege granted by the state to its citizens, ie an ordinary democratic right or is it also an acknowledged human right or maybe even part of the human dignity? While this work's Chapter IV will deal with the impact of prisoners' disenfranchisement on a democratic society (ie the effects and possible justifications of the measure), the aim of the chapter at hand is to analyse which restrictions may generally be licit and which boundaries of limitation can be derived from the nature of universal suffrage.

### A) The Right to Vote as a Democratic Right

The classification of the right to vote as a democratic – or in other words: constitutional right is quite obvious.<sup>37</sup> But does this categorisation itself help to identify boundaries for possible limitations? As democratic rights are not of an absolute nature<sup>38</sup>, their concrete shape depends – to a certain extent – on the design of a state's national constitution.<sup>39</sup> Due to the great variety of specific national characteristics, constitutional courts in different states have come to different results regarding the constitutionality of felony disenfranchisement in different countries. The evaluation at hand does not seek to go into details of national constitutional legislation. It rather aims to detect universally accepted appreciations of values and seeks to explain their impact on the limitation of felony franchise laws.

It is generally acknowledged, that within the liberal democratic constitutional model, elections can be structured in quite different ways without the democratic

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<sup>37</sup> See eg A Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2009) at 287-290.

<sup>38</sup> See eg JS Schacter, 'Unenumerated Democracy: Lessons from the Right to Vote' (2006-2007) 9 *University of Pennsylvania Journal of Constitutional Law* 457 at 460.

<sup>39</sup> For example, Section 2 of the Fourteenth Amendment of the US Constitution explicitly allows the disenfranchisement of prisoners when it prohibits the denial of franchise 'except for participation in rebellion, or other crime'.

character itself being affected.<sup>40</sup> However, restrictions on the electorate may only be implemented in exceptional cases and must be justified properly. Otherwise, grant and execution of power get out of balance and governmental legitimacy is undermined.<sup>41</sup> While there seems to be a broad consensus on the existence of some objective prerequisites for franchise such as citizenship, age or mental competency, the extent to which ‘unfavoured’ members of a society are granted participation rights differs greatly.<sup>42</sup>

With regard to legal aspects, there are two main approaches, how to define possible limitations of the right to vote as a democratic right: The first one focuses on the origins of democratic participation while the second one gives greater weight to the principle of equality and the legitimacy of the election result.

### **I) The Right to Vote as a Reward for Rendered Sovereignty**

John Locke, a precursor of the first approach, understood the right to vote as a reward for transferred sovereignty according to the Hobbesian ‘social contract’<sup>43</sup> in connection with the foundation of states. According to his view, individuals who break this contract – like prisoners have done – do no longer deserve compensation: their right to participation forfeits.<sup>44</sup> A recent statement by Ted Morten, a respected professor for political science at the University of Calgary, reveals that Locke’s justification is still part of the current debate. Morten outlined that

‘Those who break th[e] first responsibility of good citizenship [the obedience of the law] thus forfeit (temporarily) its first privilege – voting for the law-makers. To allow those who break the law to make the law is an insult to all law-abiding citizens and devalues the meaning of citizenship.’<sup>45</sup>

At first glance, this argumentation may seem to be coherent. However, a more detailed look reveals various inconsistencies: The idea that citizens do actively agree

<sup>40</sup> For instance, electoral laws among democracies differ greatly although their shape (majority voting system, proportional representation or mixed system) pretty much determines the composition of parliaments.

<sup>41</sup> A Ewald and B Rottinghaus ‘Introduction’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 1 at 2.

<sup>42</sup> See WA Powers, ‘Hirst v United Kingdom (No 2): A First Look at Prisoner Disenfranchisement by the European Court of Human Rights’ (2005-2006) 21 *Connecticut J Int’l Law* 243.

<sup>43</sup> Thomas Hobbes, ‘*Leviathan*’ (1651).

<sup>44</sup> See eg the remarks in G Brooks, ‘Felon Disenfranchisement: Law, History, Policy, and Politics’ (2004-2005) 32 *Fordham Urban LJ* 851 at 853-854.

<sup>45</sup> T Morten, ‘No Pros to Cons’ Vote’ *Calgary Sun* 25 September 1998.

to some kind of contract is a very theoretical one. Although the laws and rules of a state have to be respected by everyone, there is no formal act of acknowledgement by the citizens. Just like nobody can publicly (and effectually) declare, he or she does not adhere to certain laws, the act of becoming a politically mature citizen cannot be interpreted as an implied acknowledgement of a state's whole legal system. Just as little can one single felonious breach be put on one level with the repudiation of the entire 'social contract'.<sup>46</sup> Moreover, the legal consequences of a breach of the law are already put down in a country's national criminal code. There, the quality of a specific misbehaviour is thoroughly balanced and degrees of penalty are stipulated. Hence, there is no need to refer to the vague instrument of a 'social contract', especially since legal consequences which limit certain of the 'contract rights', may well be adopted in the national criminal code itself.

## **II) Universal Suffrage as a Pillar of Legitimate Representation in a Democratic Society**

The second (and more modern) approach considers the right to vote no longer as a privilege granted as a compensation for the transfer of personal sovereignty but as a part of the foundation of a free and democratic society.<sup>47</sup> The important practical difference of this perception is that franchise laws are no longer examined exclusively in an individual context; rather it is acknowledged that limitations of the principle of universal suffrage tend to undermine democratic validity of the legislature and the laws which it promulgates.<sup>48</sup> In *Sauvé v Canada* the Canadian Constitutional Court has made a universally valid statement when it said 'because the government takes its authority from the vote, it cannot pick and choose who is entitled to vote'.<sup>49</sup> The exclusion of a particular group of citizens must therefore be reconcilable with the underlying purposes of the right to vote. Additionally, the regulation of franchise must not diminish the effectiveness and integrity of the electoral

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<sup>46</sup> AS Johnson-Parris, 'Felon Disenfranchisement: The Unconscionable Social Contract Breached' (2003) 89 *Virginia LR* 109 at 131.

<sup>47</sup> WA Powers, 'Hirst v United Kingdom (No 2): A First Look at Prisoner Disenfranchisement by the European Court of Human Rights' (2005-2006) 21 *Connecticut J Int'l Law* 243 at 294-295.

<sup>48</sup> D Guttman, 'Before the High Court – Roach v Commonwealth: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?' (2007) 29 *Sydney LR* 297 at 310.

<sup>49</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 13.



process – maybe one could even demand that restrictions have to be an explicit requisite to *uphold* these principles.

But in which cases may limitations really be appropriate or necessary to uphold democratic principles – or put differently with regard to criminals: can one really assume that citizens who have broken the law are less qualified to decide about the governance of a country?

### **1) Aristotle: Criminal Offense as a Disqualifying Proof of Selfishness**

Citizenship is indeed the most common indicator of membership in a political community. According to some legal academics, however, this criterion alone is not sufficient to define the electorate because it cannot ensure an adequate ‘nexus to the community’ which is required for the exercise of full membership rights.<sup>50</sup> The question is how to define this additional ‘nexus to the community’? Already in the antiquity, Aristotle has demanded, democracy required morally virtuous citizens who would rule for the common good rather than for their own self-interest.<sup>51</sup> Accordingly, one could argue that individuals who break the law *for their personal gain* by harming other persons or the society as a whole (like eg thieves or tax dodgers) do no longer fulfil Aristotle’s criteria and should thus be excluded from the participation process.

Although Aristotle’s altruistic approach is evidence of high moral standards, it appears to be a bit out of touch with today’s actualities: as many people silently cast their vote according to their (potential) personal gain, certain criminals have ‘only’ displayed their attitude through a visible act. However, this act of manifestation alone does not reveal that criminals’ general attitude is worse than others’.

### **2) Mill and the Interrelating Qualities of Electorate and Governance**

According to John Stuart Mill, the qualities of government are directly dependent on ‘the qualities of the human being composing the society over which the govern-

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<sup>50</sup> CP Manfredi, ‘In Defence of Prisoner Disenfranchisement’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 259 at 270.

<sup>51</sup> Aristotle, ‘*Politics*’ (around 350 BC).

ment is exercised'.<sup>52</sup> Defendants of limitation of felony franchise use this assumption to justify infringements as compliant with democratic maxims.<sup>53</sup> The crucial point in this conjunction is that the underlying reasoning, criminals were morally deteriorated seems to be a very broad generalisation. Additionally, defining certain 'qualities' of citizens is a way too vague distinction that could easily be (ab)used to justify almost any kind of limitation (and discrimination) and would thus undermine the principle of electoral equality.

### **3) The Need for a Closer Connection between Offence and Disenfranchisement**

Due to the shortcomings of the outlined approaches, I suggest to interpret the boundaries of possible limitations in a narrower way:

When we acknowledge real universal suffrage, the unworthiness to participate in elections cannot simply arise from the general fact that the individual has broken the law; rather the measurement must be rationally connected with the offence, ie the concrete felonious breach itself must evidence a lack of respect for democratic institutions or elections. If not otherwise regulated by the constitution, felony disenfranchisement should therefore only be imposed when the crime affects the election process itself. Indeed, this interpretation significantly reduces the scope of application as only crimes like election fraud, bribery of voters and similar offences could readily lead to disenfranchisement. In addition to that, suffrage might also be restricted in conjunction with criminal actions against the state or its institutions like eg espionage, sabotage or treason. The listing is not necessarily exclusive, but gives an impression of the required character of the offences. Besides, this approach does not only obviate inappropriate restrictions that undermine the legitimacy of democratic elections; rather it pursues a clear and legitimate penologic objective as disenfranchisement as an additional sanction is linked to the committed offence.

Recent court decisions confirm, that often a more individual appraisal of the committed offence is required to meet constitutional requirements: In the *Sauvé* decisions, the Canadian Constitutional Court first struck down a 'blanket ban' on prisoners' vote (*Sauvé* No 1) saying the underlying law was drawn too broadly and

<sup>52</sup> JS Mill, '*Considerations on Representative Government*' (1861) at 11.

<sup>53</sup> CP Manfredi, 'In Defence of Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 259 at 271-273.

failed to meet the proportionality test.<sup>54</sup> After Canada had amended its legislation and thenceforward only disenfranchised prisoners who served a sentence of two years or more, the Court in *Sauvé No 2* also declared the new legislation unconstitutional. Referring critically to the variety of offences and offenders covered by the new prohibition it concluded the regulation still did not reveal a sufficient rationale connection between the imposed limitation and governmental objectives.<sup>55</sup>

In any case, these guidelines only apply when national constitutions do not explicitly address and allow felony disenfranchisement. Hence, in the United States, challenges of felony franchise limitations remained mostly unsuccessful. For example, in the case of *Richardson v Ramirez* the Supreme Court referred to Section 2 of the Fourteenth Amendment of the US Constitution and accordingly ruled that prisoner disenfranchisement is an explicit constitutional exception to the right to vote which is guaranteed elsewhere in the constitution. For this reason the court concluded that limitation clauses were appropriate as long as they did not contain discriminatory differentiations.<sup>56</sup>

## **B) The Right to Vote as a Human Right**

Unlike the categorisation as a democratic right, the question whether the right to vote is also a human right cannot be answered as easily. The difficulties already start with the definition of human rights since there is a long standing controversy whether human rights are universal or culturally relative.<sup>57</sup> For the following analysis it is sufficient to take the most commonly accepted definition as a basis, according to which human rights are ‘inalienable fundamental rights to which a person is inherently entitled simply because he or she is a human being’.<sup>58</sup>

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<sup>54</sup> *Sauvé v Canada (No 1)*, 2 SCR (1993) 43853 at 913.

<sup>55</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 39.

<sup>56</sup> *Richardson v Ramirez*, 418 US 24 (1974) at 56, 85-86.

<sup>57</sup> For an introduction to this controversy see eg J Donnerly ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 400.

<sup>58</sup> See M Sepúlveda et al, *Human Rights Reference Handbook* 3rd (2004).

## I) Different Scopes of Human Rights

Even on the basis of this definition, human rights can be interpreted in a narrower or in a wider way. This depends mostly on the question, whether one considers only ‘direct’ human rights issues or also acknowledges rights that arise out of undisputed principles. For instance, John Rawls adheres to a narrow definition and limits ‘human rights’ to only very few fundamental rights, namely the right to life, to liberty, to property and to formal equality as defined by the rules of natural justice.<sup>59</sup> Due to this restricted view, Rawls does not acknowledge the right to vote as a human right.<sup>60</sup>

Although the right to vote does not arise from ‘simply being a human individual’ but in addition requires membership to a specific society,<sup>61</sup> most legal academics today derive the nature of the right to vote as a quasi human right from other acknowledged human rights principles like the freedom of (political) expression and the right to be held equal before the law.<sup>62</sup>

## II) Concretion of the Right to Vote according to International Human Rights Treaties

The mere fact that the right to vote is also protected as a human right in the broader sense does not reveal much about the right’s scope of limitation because human rights are not absolute, too. However, human rights conventions, like the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR) may help to define the range of protection.

### 1) The International Covenant on Civil and Political Rights

According to Article 25 of the ICCPR,

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<sup>59</sup> J Rawls, *The Law of Peoples* (1999) 65.

<sup>60</sup> See *ibid* as well as the analysis of T Campbell, ‘Workplace Free Speech as a Human Right’ Working Paper Number 2002/10 Centre for Applied Philosophy and Public Ethics (Melbourne / Canberra) at 8-9, available at <http://www.cappe.edu.au/docs/working-papers/Campbell1.pdf> [last accessed on 03 November 2011].

<sup>61</sup> Otherwise, in which election(s) should stateless persons be allowed to participate?

<sup>62</sup> N Mbodla, ‘Should Prisoners have a Right to Vote?’ (2002) 46 *Journal of African Law* 92 at 98.

‘[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: [...] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.’

Although the Covenant generally guarantees ‘universal and equal suffrage’, the expression ‘without unreasonable restrictions’ implies that reasonable restrictions are permissible.<sup>63</sup> The legislative history of the ICCPR’s Article 25 reveals that residency, mental capacity but also serving of a sentence were considered to be rational reasons for restrictions at the time of drafting.<sup>64</sup> However, these standards are subject to ongoing debates: With regard to prisoners’ disenfranchisement, the UN Human Rights Committee (UNHRC), the monitoring body of the ICCPR, has demanded that in cases of suspensions of the right to vote, the time span of the suspension had to be proportionate to the sentence and the offence.<sup>65</sup> More recently, the UNHRC has even criticized the existing blanket ban on felony voting in the United Kingdom:

‘The Committee is concerned at the State party’s maintenance of an old law that convicted prisoners may not exercise their right to vote. The Committee fails to discern the justification for such a practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner’s reformation and social rehabilitation, contrary to article 10, paragraph 3<sup>66</sup>, in conjunction with article 25 of the Covenant. The State party should reconsider its law depriving convicted prisoners of the right to vote.’<sup>67</sup>

The statements of the UNHRC clearly illustrate the change of values regarding felony franchise. Although the avowal is still a bit vague, the newly demanded standards reveal that the ICCPR may well serve as a legal framework to challenge disproportionately strict disenfranchisement laws in the near future<sup>68</sup> and thus stipulate

<sup>63</sup> RL Nunn, ‘Lock them up and Throw away the Vote’ (2004-2005) 5 *Chicago J Int’l Law* 763 at 775.

<sup>64</sup> See 138 Cong Rec S4781-01 (02 April 1992), available at <http://www1.umn.edu/humanrts/usdocs/civilres.html> [last accessed on 04. November 2011].

<sup>65</sup> United Nations, Comment by the Human Rights Committee, No 25(57) Annex V(1), UN Document CCPR/C/21/Rev.1/Add.7 at 5 (para 14).

<sup>66</sup> Article 10, paragraph 3 of the ICCPR states: ‘The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’.

<sup>67</sup> United Nations, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*. CCPR/CO/73/UK; CCPR/CO/73/UKOT, 6 December 2001, para 10, available at <http://www.humanrights.ky/pls/portal/docs/PAGE/HRCHOME/YOURRIGHTS/INTERNATIONAL/CIVILANDPOLITICALRIGHTS/OBSERVATIONS4.PDF> [Last accessed on 04 November 2011].

<sup>68</sup> The First Optional Protocol to the ICCPR has established an individual complaints mechanism which may be a viable tool for prisoners to challenge such kind of legislation.

concrete boundaries of limitation from an international and human rights perspective.

## 2) The European Convention on Human Rights

Even more detailed standards than from the ICCPR can be derived from the ECHR. The Convention and its additional protocols, which set out the core principles and objectives of the Council of Europe (CoE), obligate the state parties to ‘hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.’<sup>69</sup>

At first glance, this wording seems to be rather vague and one could doubt whether the article can serve as a viable basis to concretise rules for restrictions of felony franchise. However, the ECHR is effectively supervised by the ECtHR and the Court quite freely interprets the CoE’s basic documents. Thus, the court held that Article 3 of the First Protocol gives greater solemnity to the state parties’ commitment to free elections and contained an obligation to take positive measures in order to ensure and guarantee a proper shape of universal suffrage.<sup>70</sup> Again, individuals whose right to vote has been unduly limited by one of the state parties can address the Court in order to have reviewed the design of franchise laws.

The possibility to exclude a certain range of criminal offenders from the electorate in order to protect the election process as a whole has been generally accepted by the ECtHR.<sup>71</sup> However, in the case of *Hirst v United Kingdom (No 2)*, the Court for the first time ruled on general and automatic disenfranchisement of convicted prisoners and established concrete guidelines for the reconcilability of disenfranchisement laws and human rights:<sup>72</sup>

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<sup>69</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm> [last accessed 05. November 2011].

<sup>70</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (6 October 2005) European Court of Human Rights (Grand Chamber) at 57. The Principle of ‘universal suffrage’ is simply derived from the protocol’s wording ‘the people’.

<sup>71</sup> See eg *Labita v Italy*, (Application No 26772/95) (6 April 2000).

<sup>72</sup> Prisoners’ disenfranchisement has been codified in section 3 and 3A of the United Kingdom’s Representation of the People Act 1983, available at <http://www.legislation.gov.uk/ukpga/1983/2/section/3> [last accessed 05. November 2011].

Analysing the relevancy of franchise, the ECtHR pointed out that the right to vote was not a privilege.<sup>73</sup> Considering the history of franchise, the court demanded that presumptions in a democratic state had to be a favour of inclusion. As universal suffrage has become the basic principle, exceptions had to be well founded and balanced.<sup>74</sup>

With regard to the UK's legislation, the Court recognised that the restrictions on felony franchise were shaped in an indiscriminate way as each and every prisoner was affected, notwithstanding the nature or gravity of the committed offence, the length of the sentence or any other criterion. However, the Court criticised the scope of disenfranchisement laws in place as they excluded more than 48,000 citizens and thus potentially undermined the legitimacy of the electoral process.<sup>75</sup>

The Chamber further pointed out that certain limitations may generally be implemented as long as they are reasonably and appropriately adapted to a legitimate government aim.<sup>76</sup> The UK's government put forward that prisoners' disenfranchisement served a number of such legitimate aims as it helped to prevent crime, enhance civil responsibility and deepen respect for the rule of law.<sup>77</sup> Although the ECtHR did not consider these aims as fully coherent, it conceded a certain 'manoeuvring room' to the legislator and did not strike down the government's reasoning as per se incompatible with Article 3 of the First Protocol.<sup>78</sup> Still it has been emphasised that restrictive felony franchise laws cannot be justified by any other goals stated in the Convention itself. Especially, it cannot be argued that prisoners' disenfranchisement was required to uphold public safety or could serve as a viable tool to prevent crime.<sup>79</sup>

All in all, the Court gave great weight to the principle of proportionality: According to its argumentation, any additional infringement of basic human rights guaranteed in the Convention must take into account the circumstances of the individual case

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<sup>73</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (6 October 2005) European Court of Human Rights (Grand Chamber) at 59.

<sup>74</sup> *Ibid* at 51-62.

<sup>75</sup> *Ibid* at 45.

<sup>76</sup> *Ibid* at 62.

<sup>77</sup> *Ibid* at 74.

<sup>78</sup> *Ibid* at 47.

<sup>79</sup> S Foster 'Automatic Forfeiture of Fundamental Rights: Prisoners, Freedom of Expression and the Right to Vote' (2007) 16 *Nottingham LJ* 1 at 20.

and weigh them carefully.<sup>80</sup> Yet, there was no evidence that UK's parliament had even tried to balance the competing interests and to assess the proportionality of the restrictions. To illustrate this fact, the Court pointed out that there were several equally anti-social crimes which would not entail disenfranchisement since no incarceration applied.<sup>81</sup> Moreover, the UK's blanket ban excluded the national courts from any proportionality analysis in the individual case. Implicitly, the Court's reasoning shows that decisions about the limitation of prisoners' franchise must be subject to a review by a judicial body in order to ensure that the legitimacy of elections is not undermined and that the single-case decision is proportionate.<sup>82</sup> For the given reasons, the ECtHR did not confirm that the legislator's choice to impose a blanket ban on felons' franchise fell within the accepted margin of appreciation and consequently ruled that the UK's legislation violated the Convention.

The case of *Hirst (No 2)* illustrates very well that limitations of the right to vote may be acceptable as long as the actual implementation is based on an individual decision which weighs the gravity of the specific case and demonstrates a rational connection between the committed offence and the additional legal consequence.<sup>83</sup> Although it is the legislator's duty to constitute a legal framework, the individual decision must be made or reviewed by the particular criminal court in order to ensure a proper proportionality analysis.<sup>84</sup>

### C) The Right to Vote as Part of the Human Dignity

Apart from the influence of constitutional law and human rights law, the human dignity might be a third parameter to determine the shape of franchise laws. The human dignity can be described as somewhat like the most core human right. It is held by *any* human being and cannot at all be legally curtailed as no limitation can be justified.<sup>85</sup>

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<sup>80</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (2005) European Court of Human Rights (Grand Chamber) at 71.

<sup>81</sup> *Ibid* at 37.

<sup>82</sup> S Foster 'Automatic Forfeiture of Fundamental Rights: Prisoners, Freedom of Expression and the Right to Vote' (2007) 16 *Nottingham LJ* 1 at 20.

<sup>83</sup> *Ibid* at 21.

<sup>84</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (2005) European Court of Human Rights (Grand Chamber) at 45.

<sup>85</sup> For an overview about the term's development see eg D Richter, 'Die Würde der Kreatur - Rechtsvergleichende Betrachtungen' *ZaöRV* 2007, 319.



Some constitution's basic rights charters are built on, ie centred around the human dignity. According to the German *Grundgesetz* for example, every 'ordinary' basic right contains a core which is reflective of the human dignity and makes this core indefeasible.<sup>86</sup> Some legal academics have picked up this formation and argued, the right to vote likewise contained an indefeasible core which may not be legally curtailed – however an exclusion of electors would not leave a single part of their franchise behind and would thus violate the human dignity. The idea has mostly been developed in conjunction with demerit voting; however the arguments for the most part can analogously be considered in terms of felony disenfranchisement.

The assertors of the human-dignity argument somehow adopt the idea of the social contract but put different emphasis on the rights and obligations: according to their view, the duties arising from this contract (ie to respect the law) can only be valid when each and everyone who is subordinated may also participate in the decision-making process.<sup>87</sup> Otherwise, the individual is only inflicted with duties without receiving compensating rights and thus becomes an 'object of state action' which in turn results in an infringement of the human dignity.<sup>88</sup>

Although the right to vote is without any doubt an important expression of free self-development and individual autonomy, the classification as part of the human dignity is only a minority opinion. Most legal scholars instead hold that the participation in elections is not an essential prerequisite to compensate the duty to adhere to a state's laws. Rather, the human dignity is effectively protected by the guarantee of remedies which allows every citizen who is subject to binding legal obligations to challenge them in court.<sup>89</sup> Since recourse may be had by any citizen, including prisoners, disenfranchisement does not make prisoners an 'object of state action'.

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<sup>86</sup> M Herdegen, 'Der Menschenwürdegehalt anderer Grundrechtsgarantien' in T Maunz and G Dürig (eds) *Grundgesetz* 61ed (2011) Art 1 mn 26-27.

<sup>87</sup> M Zuleeg, *AusländerR und Ausländerpolitik in Europa* (1987) 153-154.

<sup>88</sup> <http://www.national-coalition.de/pdf/stellungnahmen/Diskussionspapier%20NC%20Wahlrecht.pdf> at 3 [last accessed on 11 November 2011].

<sup>89</sup> K Nopper, *Minderjährigenwahlrecht - Hirngespinnst oder Verfassungsrechtliches Gebot in einer Grundlegend Gewandelten Gesellschaft?* (1999) 109; C Knödler, 'Wahlrecht für Minderjährige – eine gute Wahl?' *ZParl* 27 (1996), 553 at 559-561.

## **D) Conclusion**

This chapter has illustrated some requirements which felony franchise laws have to meet in order to conform to standards of constitutional and human rights law. In a broad sense, constitutional and human rights principles alone can hardly define concrete boundaries for limitations of prisoners' right to vote. However, the analysis has shown that in conjunction with concretising legislation, be it national constitutions or international human rights treaties, the principles may well determine concrete preconditions for restrictions of franchise law. In concrete, constitutional requirements for democratic elections mostly demand a rationale connection between the concrete felonious breach and the legal consequence of disenfranchisement.

Human rights treaties generally focus rather on the upholding of democratic principles in order to ensure the equality of the election process. The plurality of sources is important as human rights treaties are not exclusively subject to national freedom of scope and thus may guarantee electoral rights on a broader fundament. In any case, the concrete permissibility of franchise limitations cannot be evaluated without considering the impact of these regulations on the individual as well as on society as a whole.

## **CHAPTER III: DISENFRANCHISEMENT IN AN INDIVIDUAL CONTEXT**

Having depicted the frame of the democratic electoral process, historically as well as in terms of constitutional and human rights principles, the following chapter seeks to analyse the effects of disenfranchisement on the individual person ie the prisoner. Thereafter, Chapter IV will highlight the influence on the democratic system and society as a whole. This differentiation between individual and social impact is useful since the measurement pursues independent goals among each sphere. Thus, the classification helps to develop a better structured argumentation and a more focused analysis. Some aspects (like eg the inclusive function of franchise) affect both spheres and have to be considered according to their main focus or subdivided into more specific aspects. However, I am convinced that the analytic perception of this approach by far outbalances the drawbacks.

When one seeks to evaluate the individual impact of a measurement, it is best to start with the objectives. Therefore, the initial question will be whether disenfran-

chisement aims to be an additional form of punishment or if it is rather a merely regulatory measurement. Next, four rationales which are generally named in conjunction with disenfranchisement will be critically analysed. Finally I will conclude if franchise limitations may generally – or at least in specific cases – help to achieve the intended goals.

### **A) Restrictions on Felony Franchise: Really a Form of Additional Punishment or Simply a Regulatory Measurement?**

The question whether disenfranchisement is of a predominantly punitive or regulatory character has been discussed long and excessively.<sup>90</sup> In the US, disenfranchisement is only one of numerous ‘collateral sanctions’ or ‘collateral consequences’ that are imposed on offenders. Other measures – depending on the particular state – may be the exclusion from civil service, restrictions on the possession of firearms or registration and notification requirements. Although all these actions contain burdens for the offender, they are often not considered to be an additional form of punishment because their ostensible goals are of civil and regulatory nature. As the accompanying punitive character is qualified rather as a side effect, eg the US judiciary does not apply the same high standards regarding proportionality and justification.<sup>91</sup>

Although the US are generally a ‘tough-on-crime country’, many of these ‘collateral consequences’ – and especially the practice of disenfranchisement – do not fit properly into the system of existing penal sanctions.<sup>92</sup> The act of imposition is legally separated from the actual criminal sentence, even though it is factually attached to it:<sup>93</sup> Different to a prison sentence or a fine, disenfranchisement is not explicitly imposed, ie mentioned in the verdict; it rather is an automatic consequence from the

<sup>90</sup> See A Ewald and B Rottinghaus ‘Introduction’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 1 at 12-13.

<sup>91</sup> *Simmons v Galvin*, USDC Mass, 30 August 2007, 12, 37 available at [http://www.leagle.com/xmlResult.aspx?page=1&xmlDoc=2007735652kfsupp2d83\\_1725.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7](http://www.leagle.com/xmlResult.aspx?page=1&xmlDoc=2007735652kfsupp2d83_1725.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7) [last accessed on 21 November 2011].

<sup>92</sup> NV Demleitner, ‘Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative’ (1999/2000) 84 *Minnesota LR*, 753 at 755.

<sup>93</sup> M Pinard, ‘Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defence Lawyering’ (2004) 31 *Fordham Urban LJ* 1067 at 1074.

prison sentence.<sup>94</sup> This is somehow crucial, as many defendants, prosecutors and even judges do not even know about the additional legal consequence.<sup>95</sup> Anyway, the peculiar separation allows asserters of disenfranchisement to avoid the categorisation of the measure as a form of punishment, although the punitive effects are hardly deniable.<sup>96</sup>

Among many other legal cultures, especially those based on civil law, restrictions on felony franchise are an acknowledged punitive measurement. In Germany, for example, it can already be derived from the statutory position of Art 45 para 5 of the *Strafgesetzbuch* (as part of ‘Erster Titel – Strafen’<sup>97</sup>) that the deprivation of franchise is a punitive measurement.<sup>98</sup>

Although the nature of disenfranchisement is defined unequally among different legal cultures, this merely terminological issue should not impair the requirements which a restrictive public measurement – whatever its name may be – must achieve. Otherwise, national governments could easily avoid requirements defined by the judiciary (eg national constitutional courts) by redefining the imposed measurement. Since name and nature of franchise limitation are not of specific importance for the individual addressee, it is reasonable to apply universal standards. At the most, disenfranchisement must be considered to be of ‘potential[ly] hybrid nature’<sup>99</sup> and thus has to meet the objectives of punitive measures.

## **B) Disenfranchisement and the Objectives of Punitive Measures**

The purposes ascribed to punitive measures are manifold, partly in flux and dependent on a society’s legal culture. Still, four more or less universal objectives are

<sup>94</sup> NV Demleitner, ‘U.S. Felon disenfranchisement: Parting Ways with Western Europe’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 82.

<sup>95</sup> American Bar Association, ‘Standards for Criminal Justice, Collateral Sanctions and Discriminatory Disqualification of Convicted Persons’ 3ed (2004).

<sup>96</sup> A Ewald, ‘The Ideological Paradox of Criminal Disenfranchisement Law in the United States’ (2002) 5 *Wisconsin LR* 1045 at 1057; NV Demleitner, ‘Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative’ (1999/2000) 84 *Minnesota LR*, 753.

<sup>97</sup> Chapter One - Punitive Measures.

<sup>98</sup> See also NV Demleitner, ‘Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative’ (1999/2000) 84 *Minnesota LR*, 753 at 757.

<sup>99</sup> *Simmons v Galvin*, USDC Mass, 30 August 2007, available at [http://www.leagle.com/xmlResult.aspx?page=1&xmlDoc=2007735652kfsupp2d83\\_1725.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7](http://www.leagle.com/xmlResult.aspx?page=1&xmlDoc=2007735652kfsupp2d83_1725.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7) [last accessed on 21 November 2011].

frequently cited, in general as well as in conjunction with prisoners' disenfranchisement: retribution, deterrence, incapacitation and rehabilitation, the last one often named is conjunction with reintegration and education.<sup>100</sup>

## I) Retribution

The basic idea of retribution is that the criminal offender has executed power of mastery over the victim and law has to assert something in response in order to express society's moral disapproval and to 'equalise' the offence.<sup>101</sup> While this principle has already been outlined in the Bible ('an eye for an eye, a tooth for a tooth')<sup>102</sup> and was widely practiced throughout the Middle Ages (see Chapter I above), modern democracies usually refrain from 'violent sanctions'. Instead, fines and incarceration have become the standard forms of retribution, but they are by no means the only options. Generally, retribution can be achieved by any reaction which puts a sanction on the culprit and is socially acknowledged as an adequate measurement. The nature of the punitive measure does not have to be akin to the felonious offence – and in many cases it even must not be akin to it.<sup>103</sup>

In terms of franchise restrictions, the criminal offence is often considered to be a breach of the social contract which may justify the exclusion of the offender from the participation process – permanently or at least for a certain period of time. This reasoning is particularly demonstrative during the actual time of incarceration: the removal from society goes hand in hand with the removal from the privileges of society.<sup>104</sup> However, this idea is closely related to the outdated concept of 'civil death'<sup>105</sup> and especially the continuing disenfranchisement after release (which is widespread in the US) illustrates the shaming character of the measurement which

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<sup>100</sup> TJ Miles, 'Felon Disenfranchisement and Voter Turnout' (2004) 33 *J Legal Stud* 84 at 118.

<sup>101</sup> CP Manfredi, 'In Defence of Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 259 at 274.

<sup>102</sup> Exodus 21 : 23-25.

<sup>103</sup> Having eg a rapist raped on behalf of public penal authorities would gravely violate the culprit's human dignity.

<sup>104</sup> See NV Demleitner, 'U.S. Felon disenfranchisement: Parting Ways with Western Europe' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 100.

<sup>105</sup> S Easton, 'Electing the Electorate: The Problem of Prisoner Disenfranchisement' (2006) 69 *Modern LR* 443 at 449. For details about the concept see the historical outline above (Chapter I).

permanently disallows criminals to gain back their full standing in society.<sup>106</sup> Due to these drawbacks and in order to better achieve penologic goals, recent court decisions have demanded for a ‘close connection’ between the actual offence and the retributive measure: The Supreme Court of Canada in its *Sauvé* (No 2) decision adopted<sup>107</sup> a definition, according to which:

[r]etribution in a criminal context [...] represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the *moral culpability* of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct.<sup>108</sup>

On the basis of this definition, the court found that disenfranchisement had to be shaped much more individually in order to meet the requirements of denunciatory, retributive punishment. Therefore, a ‘blanket ban’ that does not consider the character and effect of the committed crime – just like repetitively demanded by asserters, who imprecisely refer to a breach of the social contract – cannot meet the penologic requirements of retribution and was thus declared unconstitutional under Canadian law.<sup>109</sup>

To sum up, felony disenfranchisement is not generally uneligible to fulfil the purpose of retribution but has to be rationally connected to the concrete offence and proportional.

## II) Deterrence

The penological goal of deterrence is twofold: firstly, deterrence may preventively encourage any potential offender to adhere to the law (general prevention). Secondly, it may discipline a convicted offender in order to obviate future misconduct (specific deterrence).

Effective general prevention requires the threat with a punitive measure which is severe enough to deter the individual from a contemplated offence. It is already

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<sup>106</sup> See NV Demleitner, ‘U.S. Felon disenfranchisement: Parting Ways with Western Europe’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 82.

<sup>107</sup> Originally given by JAC Lamer in *R. v. M. (C.A.)*, 1 SCR (1996) 500 at 80.

<sup>108</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 50.

<sup>109</sup> *Ibid* at 51.

doubtful, whether franchise restrictions may constitute such a threat because the sanction is – as outlined above – widely unknown. But even if the measurement was well-known, its prospects of successful prevention were probably limited: Criminal offences are typically punished with fines or imprisonment. It is quite unlikely that (potential) criminals give more weight to the right to vote than to other benefits like liberty or money, which are already endangered through the commitment of a crime.<sup>110</sup>

Also in terms of specific deterrence, it is questionable whether the franchise is of sufficient importance for prisoners to create a significant effect. The issues of complaints received by human rights organisations from prisoners show that the right to vote is not among prisoners' most pressing concerns.<sup>111</sup> This is probably different with prisoners whose felonious breach is connected with the electoral process, because the nature of the offence gives an indication for the importance, these persons ascribe to political participation. If disenfranchisement is used as a measurement of (additional) punishment, it should therefore be tagged to specific election-related crimes in order to emphasise the context with the violation.<sup>112</sup> Especially with regard to politically interested criminals, the symbolic effect, ie that prisoners feel ashamed and excluded from society, must not be underestimated: this effect can even be amplified when the promulgation is publicly declared in conjunction with the sentence.<sup>113</sup>

In any case, specific deterrence can only be successful when prisoners retrieve their right to vote after release or after a fixed period of time: If culprits know that they will not be able to regain their franchise anyway, the measure may not serve as an incentive for future law-obedience.<sup>114</sup> Except from the temporary imposition regard-

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<sup>110</sup> See NV Demleitner, 'U.S. Felon disenfranchisement: Parting Ways with Western Europe' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 100.

<sup>111</sup> R Redman et al, 'The Politics and Legality of Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 167 at 182.

<sup>112</sup> NV Demleitner, 'U.S. Felon disenfranchisement: Parting Ways with Western Europe' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 104.

<sup>113</sup> Ibid at 100.

<sup>114</sup> P Gendreau et al, 'The Effect of Prison Sentences on Recidivism' (1999) *Public Works and Government Services*, Canada.

ing election-related offences it is very unlikely that disenfranchisement may deter offenders, anyway.<sup>115</sup>

### III) Incapacitation

The idea of incapacitation is of great importance for penology and especially in terms of violent crimes often considered to be most effective in order to protect society from future crimes. However, incapacitation is for the most part achieved through incarceration and disenfranchisement can only contribute little to support the effect. In fact, restrictions of felony franchise can only incapacitate future offences which are directly related to the electoral process and connected with the felon's *own vote*. Ultimately, the only criminal offence which may be prevented is the 'selling of votes'.<sup>116</sup> During the actual incarceration, this goal is already achieved through the controlled election process in prison. Hence, incapacitation through disenfranchisement can only be achieved when it is imposed after release.

### IV) Rehabilitation, Reintegration and Education

While in former times, punishment served primarily the purpose of retribution, deterrence and – in cases of imprisonment or capital punishment – incapacitation, modern correctional law gives greater weight to rehabilitation, reintegration and education.<sup>117</sup> Throughout the last decades, several judicial bodies have declared that capital punishment and/or lifelong imprisonment violates principles of constitutional or human rights law.<sup>118</sup> Quite literally they stated: Everyone deserves a second chance. This new prevailing case law encouraged many legislators to initiate a paradigm shift in the field of penologic goals. In Germany, for instance, the adjustment of penal provisions took place in the late 1960s and the 1970s. At that time, the retributive *Zuchthaus* was abolished and replaced by a more reintegrative prison

<sup>115</sup> C Hamilton and R Lines, 'The Campaign for Prisoner Voting Rights in Ireland' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 205 at 213.

<sup>116</sup> This offence is likely to happen with postal votes and criminalised in many countries, see eg Art 108e para 1 of the German Criminal Code.

<sup>117</sup> Cf the historical outline in this work's Chapter I.

<sup>118</sup> For example, the German *Bundesverfassungsgericht* stated in 1977 that the human dignity guaranteed a second chance even after the commitment of most serious crimes like murder (BVerfGE 45, 187).



regime.<sup>119</sup> Today, rehabilitation and reintegration have become the primary objectives of penalisation. Still, they must not always prevail, as they may have a counterproductive effect on other objectives: in order to be retributive and deterrent, incarceration must also be unpleasant – an effect that first and foremost is caused by exclusion. Therefore, penological goals must be weight carefully in due consideration of the individual offence.

### 1) The Momentousness of Exclusion

The treatment of offenders during and in the aftermath of their incarceration has great influence on the individual's attitude towards society. As outlines above in conjunction with the goal of retribution, the most ostensible effect of disenfranchisement is its symbolic demonstration of exclusion. Critics argue the measurement signaled that whatever the prisoners say was not of interest to 'those at the top' and that society had lost any interest in prisoners' destiny: as soon as culprits were out of sight, they were out of ordinary people's mind.<sup>120</sup> Moreover, it makes it impossible for offenders to demonstrate their democratic credibility. These arguments cannot be dismissed, as the right to vote is the only remaining possibility for prisoners to execute political rights – due to their incarceration, they are already stripped of the right to attend demonstrations (freedom of assembly) or to implement and participate in associations. Since the casting of one's vote is also an important way of self-expression, disenfranchisement does not only affect the democratic decision making process; felons are also personally excluded from political dialogue and deprived of their political voice.<sup>121</sup>

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<sup>119</sup> C Roxin, *Strafrecht Allgemeiner Teil Band I: Grundlagen - Der Aufbau der Verbrechenslehre* 4ed (2005) 87.

<sup>120</sup> See B Collins, Justice Action, Evidence in the Finance and Public Administration Legislation Committee: Electoral and Referendum Amendment (Electoral Integrity and other Measures) Bill 2005, 7 March 2006, 4 available at <http://parlinfoweb.aph.gov.au> [last accessed on 16. November 2011].

<sup>121</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 60.

## 2) Participation Encouraging Prisoners to Mend their Ways?

Among legal academics, there is broad consensus that disenfranchisement does not foster the rehabilitation of offenders.<sup>122</sup> Rather, the opposite is true: disenfranchisement seems to inhibit reintegration and may even lead to an increase in recidivism among excluded offenders after release: Studies of US sociologists have revealed that citizens who participate in elections are less likely to commit criminal offences and to be arrested and sentenced to imprisonment.<sup>123</sup> Since the result might also be caused by different factors (like eg a correlation between education or social background and law-abidance) the finding does not necessarily prove that political participation is a cause of desistance from crime. However, experiences in countries that do not disenfranchise prisoners show that felons who actually participate in elections are more likely to reintegrate successfully into their communities.<sup>124</sup> Uggen and Manza could even prove in a study, published in 2004,<sup>125</sup> that active voters in the 1996 election were significantly less likely to be rearrested than nonvoters: while only 5 per cent of voters were rearrested, the relapse rate among nonvoters was more than three times as high (16 per cent).<sup>126</sup>

This shows that political interest and participation are generally connected with a law-abiding entity and that it is worth to teach felons social responsibility and democratic values.<sup>127</sup> Already the opportunity to vote contributes to prisoners' rehabilitation, notwithstanding if the right is finally used or not: The mere act of inviting prisoners to participate is of important symbolic value.<sup>128</sup> Anyway, practical experiences with elections in prisons show that once the opportunity to vote is granted it is frequently used: According to a Danish prison report,<sup>129</sup> 61 per cent of the prison

<sup>122</sup> NV Demleitner 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (1999/2000) 84 *Minnesota LR*, 753 at 785.

<sup>123</sup> CA Visher and J Travis, 'Transition from Prison to Community: Understanding Individual Pathways' (2003) 29 *Annual Review of Sociology* 89-113.

<sup>124</sup> *Ibid.*

<sup>125</sup> The time from 1997 to 2000 being the observation period.

<sup>126</sup> C Uggen and J Manza, 'Voting and Subsequent Crime and Arrest: Evidence from a Community Sample' (2004) 36 *Columbia Human Rights LR* 193.

<sup>127</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (6 October 2005) European Court of Human Rights (Grand Chamber) at 26, 42-43, 46.

<sup>128</sup> This gain is eg not acknowledged by TJ Miles, who states, the right to vote was meaningless for non-voters and could therefore not enhance the rehabilitation of politically indifferent ex-felons, see 'Felon Disenfranchisement and Voter Turnout' (2004) 33 *J Legal Stud* 85 at 119.

<sup>129</sup> According to Danish law, no additional sanctions affecting participation rights may be imposed on offenders during sanction enforcement, ie prisoners have an unlimited right to vote.

inmates participated in national elections.<sup>130</sup> The great acceptance might arise from the convenience of voting – prisoners’ polling place is literally in front of their cell door – and the fact that the electoral act itself is a welcome break from routine.<sup>131</sup>

### 3) International Law and Recent Court Decisions

The negative impact of disenfranchisement on the individual’s reintegration is also crucial with regard to international law: according to the UN Standard Minimum Rules for the Treatment of Prisoners, imprisonment should not emphasise the culprits’ exclusion but rather ensure participation in the community.<sup>132</sup> Additionally, the UN Basic Principles for the Treatment of Prisoners demand the creation of favourable conditions for the reintegration into society after release.<sup>133</sup>

Recent court decisions have emphasised the importance of inclusion, too: In *Sauvé (No 2)*, the Canadian Constitutional Court criticised, disenfranchisement did not state a clear lesson and the educative message was, at best, a mixed and diffuse one.<sup>134</sup> Instead, the exclusion clearly undermined the goal of rehabilitation and reintegration and thus was ‘bad pedagogy’.<sup>135</sup>

The ECtHR also addressed the question of education in its *Hirst (No 2)* decision and demanded a tighter connection between the individual circumstances of the felonious breach and the imposed sanction in order to fulfil the requirements of proportionality and to deliver a clearer message.<sup>136</sup> The Court concluded that if this ‘rational connection’ was established, the limitations of franchise might generally comply with the requirements of the ECHR and its additional protocols.<sup>137</sup>

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<sup>130</sup> See A Storgaard, ‘The Right to Vote in Danish Prisons’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 244 at 253.

<sup>131</sup> C Gallagher, ‘The Captive Vote: Prisoners’ Suffrage in Ireland’, (2001) 1 *University College Dublin LR* 1 at 19.

<sup>132</sup> Rule Nr. 61, available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm> [last accessed on 18 November 2011].

<sup>133</sup> See Principle 10, available at <http://www2.ohchr.org/english/law/basicprinciples.htm> [last accessed on 18 November 2011].

<sup>134</sup> *Ibid.*

<sup>135</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 39.

<sup>136</sup> *Ibid* at 30.

<sup>137</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (6 October 2005) European Court of Human Rights (Grand Chamber) at 36-37.

<sup>138</sup> *Ibid* at 51.

### **C) Conclusion**

This chapter has shown that the classical principles of penology should also serve as a rule for the promulgation of franchise limitations. Although the impact of disenfranchisement on the individual is predominantly of symbolic nature as it emphasises the convict's exclusion from society, the measurement is nonetheless a severe sanction.

Disenfranchisement sends out a strong signal, but its benefits remain small: from the classical penological goals, it can at best achieve some additional retribution. With regard to deterrence and incapacitation a blanket ban on prisoners' franchise has only limited effects; in terms of rehabilitation, reintegration and education the measurement even proves to be counterproductive.

The evaluation is different, when the committed felony is linked to the election process: in these cases, disenfranchisement may serve as a coherent measurement to deter offenders preventively or to provide an educative message after the offence. This is somehow parallel to the revocation of a driving licence in conjunction with serious traffic offences – a measure that is also not used without connectivity.

## **CHAPTER IV: THE IMPACT OF DISENFRANCHISEMENT ON SOCIETY AND DEMOCRACY AS A WHOLE**

Different to most other penal sanctions, the effects of disenfranchisement are not limited to the individual addressee. First and foremost, franchise limitations of prisoners and ex-offenders may sway the result of elections. Moreover, the outcome of political debates and decisions may be influenced since there is usually paid less attention to the interests of those who are excluded from participation anyway. For these reasons, the ECtHR has recently warned in its *Hirst (No 2)* decision that extensive franchise restrictions affect the equality and fairness of elections and threaten to undermine the democratic system as a whole.<sup>138</sup>

In the following, I will try to analyse whether, and if so to what extent, disenfranchisement causes a distortion of the election result. In this regard, racial and social-

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<sup>138</sup> Ibid at 36.

economic characteristics of prisoners will be evaluated and compared to those of specific voting blocs' supporters.

Thereafter, the analysis will focus on the measure's effects on political contents: Citizens who have been in touch with the criminal code generally have more knowledge about the field of criminal law. Also in terms of prison regime, the participation of persons who are actually affected may help to advance public discourse. With the exclusion of prisoners from political participation and discussion, does society not deprive itself of valuable first-hand input?

Finally, I will also consider the arguments brought forward by defendants of felony disenfranchisement. From their point of view, elections are not only a functional instrument but also a democracy's sanctuary and the perpetuation of the ritual's reputation may well require the exclusion of dishonourable citizens. Furthermore, it is worth to discuss, whether a sovereign community should not have an opportunity to define its own identity by limiting some people's participation rights.

#### **A) Disenfranchisement as a Distortion of the Election Result**

Any regulation of franchise may potentially influence the composition of the elected government: An adjustment of the general voting age will affect the influence of juveniles or young adults; granting permanent residents without citizenship the right to vote may have an impact on integration policy, etc. While there do exist comparable standards for almost all common restrictions of franchise, disenfranchisement of prisoners is regulated in a very diverging way and sometimes laws are even different among one and the same country. The wide margin of discretion makes the issue prone to political self-serving interests: whoever expects advantages from stricter restrictions, personally or in terms of the own party, may feel encouraged to tighten disenfranchisement laws.

The presidential election of 2000 in the United States is frequently cited to demonstrate the practical impact of disenfranchisement: At the end of the day, this election was decided by only 527 votes in Florida while at the same time about 500,000 Flo-

ridians were excluded due to post-sentence disenfranchisement.<sup>139</sup> The widespread blanket disenfranchisement of (ex-) offenders in the US affects approximately two per cent of the whole mature population.<sup>140</sup> Due to this huge number of persons concerned, the automatic implementation, like in the US is much more problematic than the purposefully and narrowly targeted practice among some of the (continental) European countries.<sup>141</sup> Not only does the sheer number of exclusions pose a threat to the legitimacy of democratic elections. The problem is rather that prisoners are not drawn randomly from among the entire population: some categories of citizens are significantly over-, others underrepresented.<sup>142</sup>

In any case, countries which practice disenfranchisement in an excessive way must be aware of legal jeopardy: In the aftermath of the ECtHR's Hirst (No 2) decision, which struck down the British franchise limitation laws, commentators warned the United Kingdom, a future election could be invalid under European law if the electoral law was not adjusted in time according to the Court's demands.<sup>143</sup>

## **I) Disproportionate Racial Origins and the Ramifications on the Outcome of Elections**

### **1) Disenfranchisement Disproportionately affecting Racial and Ethnic Minorities**

A 1998 study by Human Rights Watch outlined the heavy impact of felony franchise limitations on ethnic and racial minority groups in countries with a mixed ethnicity.<sup>144</sup> In the United States, for example, African Americans and Latinos today make up about 50 per cent of the convicted offenders who are stripped off the right

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<sup>139</sup> J Manza and C Uggen, 'Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States' (2004) 2 *Perspectives on Politics* 491 at 498.

<sup>140</sup> RL Nunn, 'Lock them up and Throw away the Vote' (2004-2005) 5 *Chicago J Int'l Law* 763 at 764.

<sup>141</sup> L Ispahani, 'Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 32.

<sup>142</sup> J Manza, 'Foreword: Waves of Democracy and Criminal Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) xi at xii.

<sup>143</sup> J Doward, 'Ban on Votes for Prisoners is Illegal, says Parliamentary Committee' *The Guardian* 9 November 2008, 5.

<sup>144</sup> J Fellner and M Mauer, 'Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States' (1998) 2, available at <http://www.hrw.org/reports98/vote> [last accessed on 16 October 2011].

to vote.<sup>145</sup> In some US states like Alabama or Florida the quota of mature black males that has already lost franchise is about one third of the total share with a tendency to rise even further.<sup>146</sup> Throughout the whole United States, and also among most other nations,<sup>147</sup> racial minorities are disproportionately affected by felony disenfranchisement.<sup>148</sup> This is especially crucial as many racial minorities consist of immigrants and individuals often had a long way to go until they ultimately got the right to vote. Moreover, those individuals who have finally been granted franchise mostly represent a disproportionately big share of the total minority residents and thus are of particular importance for these groups' articulation.

## 2) The Electorate's Ethnic Composition Determining the Outcome of Elections

Damian J Martinez has analysed in 2004 that not only Blacks but also Latinos are disproportionately disadvantaged by franchise limitations, since this group is significantly overrepresented among the incarcerated population (18,1 per cent) in comparison to a rate of 13 per cent among the national population.<sup>149</sup> Moreover, Martinez has done detailed research on the voting preferences of Latino subgroups in the US and found out that most of the Mexican and Puerto Rican immigrants have a clear preference for the Democrats, while among the Latinos from Cuban decent there is a preference for the Republican Party.<sup>150</sup> In sum, however, Latinos – just like black Americans – tend to vote rather for the Democratic Party and thus, disenfranchisement factually puts this camp on a disadvantage. This distortive effect was one of the core criticisms with regard to the narrow election result in Florida, 2000. Anyway, parallel observations can also be made among many other nations: racial minorities, immigrants and indigenous groups alike, generally tend to vote for a left

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<sup>145</sup> RL Nunn, 'Lock them up and Throw away the Vote' (2004-2005) 5 *Chicago J Int'l Law* 763 at 768.

<sup>146</sup> J Fellner and M Mauer, 'Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States' (1998) 1, available at <http://www.hrw.org/reports98/vote> [last accessed on 16 October 2011].

<sup>147</sup> Similar problems exist(ed) especially in countries with an aboriginal population, such as Australia or Canada.

<sup>148</sup> T Dugree-Pearson, 'Disenfranchisement: A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?' (2002) 23 *Hamline Journal of Public Law & Policy*, 359 at 364.

<sup>149</sup> DJ Martinez, 'Felony Disenfranchisement and Voting Participation: Considerations in Latino Ex-Prisoner Reentry' (2004/2005) 36 *Columbia Human Rights LR* 217 at 221.

<sup>150</sup> *Ibid* at 236.

wing government.<sup>151</sup> Therefore, disenfranchisement can by no means be seen as a symbolic act; rather the practical consequences are significant and may, like the US presidential election 2000 exemplifies, even decide about the final results of elections.

### 3) Racial Imbalance: an Unintended Side-effect or Purposeful Discrimination?

Politicians in defence of disenfranchisement have repetitively pointed out that the cluster of ethnic minorities affected was not the result of a racist policy but simply of the individual felonious convictions and that the measurement by no means intended to put minorities at a disadvantage. Recalling the history of felony franchise laws, one has to admit that former discriminatory differentiations (see this work's Chapter I) have widely been eliminated and that a blanket ban or the linkage to a certain term of imprisonment per se does not reveal discriminatory purposes.

In 2001, however, the UN Committee on the Elimination of Racial Discrimination (CERD) expressed its concerns about the design and the extent of disenfranchisement laws in the United States. In concrete, the Committee addressed the 'large segment of the ethnic minority population' and criticised the permanence of the measure which 'prevent[s felons] from voting even after the completion of their sentences'.<sup>152</sup> From an objective point of view, this statement is quite surprising because it is acknowledged that the CERD does not encompass indirect discrimination: When a law chooses criteria for the diverging treatment of an issue and these criteria are not readily related to race, colour of skin or ethnicity, a successful challenge of the particular regulation requires the proof that discrimination was in reality the *underlying purpose*. An adverse impact on a specific minority group is generally not considered to be sufficient.<sup>153</sup>

Also in terms of national law, intentional racial discrimination would be unconstitutional under quasi all jurisdictions. In the United States, for instance, the Equal Pro-

<sup>151</sup> See eg A Harell and D Panagos, 'Locating the Aboriginal Gender Gap: The Political Preferences and Participation of Aboriginal Women in Canada' available at <http://www.cpsa-acsp.ca/papers-2010/Harell-Panagos.pdf> [last accessed on 01 December 2012] at 13.

<sup>152</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 14 August 2001, para 397, available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/A.56.18,paras.380-407.En?Opendocument> [last accessed on 25 November 2011].

<sup>153</sup> See eg *Western Australia v Ward* (2002) HCA, 191 ALR 1 at para 659.



tection Clause, a part of the Fourteenth Amendment to the US Constitution, has already been used several times as a basis to challenge felony franchise laws in terms of their disproportionate racial effects.<sup>154</sup> Yet, whenever trial courts acknowledged a discriminatory shape of laws, follow-up rulings by the courts of appeals struck down these findings.<sup>155</sup>

The Canadian Supreme Court, in contrast, explicitly considered the disproportionately high number of prisoners from aboriginal descent in its second *Sauvé* decision: Although the Court did not raise the question whether the racial imbalance was caused purposefully, it emphasised that the factual pattern sent out a silent message which can deepen the racial conflicts already smouldering in the country.<sup>156</sup> Some commentators even reason, this was one major motive for the court to declare the franchise legislation unconstitutional.<sup>157</sup>

Taking everything into account, one must acknowledge that disenfranchisement most seriously affects ethnic minorities. Although this imbalance is – under prevailing opinion – not established or upheld purposefully, it is nonetheless problematic in terms of the protection of minority rights and the overall goal of inclusion. Due to these findings, it is incomprehensible when eg Manfredi claims, disenfranchisement was not used to exclude significant sections of the population.<sup>158</sup> Especially with regard to the US (but also in terms of the UK), the number of disenfranchised felons is big enough to be decisive for the election result.

## II) The Influence of Social Class on Voting Behaviour

For a long time, the right to vote was only granted to property-owners or required other proof of wealth.<sup>159</sup> Therefore, the implementation of equal suffrage was one of the biggest achievements in the history of democracy.<sup>160</sup> Due to this long and ardu-

<sup>154</sup> WW Liles, 'Challenges to Felony Disenfranchisement Laws: Past, Present, and Future' (2006-2007) 58 *Alabama LR* 615 at 620.

<sup>155</sup> See eg *Williams v. Taylor* 677 F2d 510 (5th Circuit 1982).

<sup>156</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 60.

<sup>157</sup> *Ibid* at 14, 15, 60 and 68.

<sup>158</sup> CP Manfredi, 'In Defence of Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 259 at 273.

<sup>159</sup> See eg R Briffault, 'The Contested Right to Vote' (2002) 100 *Michigan LR* 1506 at 1509.

<sup>160</sup> See also this work's Chapter I (History and Development) above.

ous development, legal theorists today call for high vigilance whenever franchise restrictions may affect social equality.

Felony disenfranchisement is one of very few measurements that may potentially endanger the equality of suffrage and put the lower class at a disadvantage. It is a general truism that a large amount of crimes is caused or advanced by the precarious environment of the offenders. This, of course, applies to offences against property, but is also a prevalent motive for many violent crimes, drug offences, etc. Therefore, socially underprivileged persons are significantly overrepresented among prison inmates.<sup>161</sup> In countries which practice disenfranchisement of ex-offenders, this effect is even increased: Most offences against property are punished less severely than capital crimes. Although the commitment of 'petty offences' like eg shoplifting, usually 'only' results in a fine or a short term of incarceration, the offenders are often banned from voting for their whole life. Thus, the share of underprivileged persons among prisoners does not even mirror the share among disenfranchised people.

Additionally, less severe offences against property are often committed in younger days. In these cases, the lifelong limitation of suffrage does not only thwart reintegration; it also has a deeper and more lasting impact as the disenfranchisement of young culprits has an effect on a greater number of elections.

On the basis of the finding that disenfranchisement disproportionately affects socially underprivileged citizens, it is worth analysing if this imbalance also has an effect on the outcome of elections. Stripping a socially underprivileged group of their right to vote is a highly symbolic act as it extends the already existing exclusion due to financial restraints to participation in issues of the community. This is especially crucial since it may cause the feeling of being dominated by 'the establishment'. This would especially be the case if poorer people had a different voting preference than average citizens.

On the one hand, poor people are much more dependent on the welfare system than wealthy people are. On the other hand, they usually do not care as much about issues like taxation, because their low income often does not make them liable to tax

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<sup>161</sup> A holistic analysis of this phenomenon is presented by U Spiegel and A Templeman, 'Economics of Discriminatory Sentencing' (1989) 5 *Journal of Quantitative Criminology* 317.

anyway. Thus, socially disadvantaged people, just like many ethnic minorities, tend to vote rather for a left-wing government.

In the United States, for instance, prisoners tend to share many of the socio-economic characteristics of Democratic Party voters.<sup>162</sup> This fact has even been admitted by some conservative politicians: One justified the resistance to a reduction of franchise limitations with the reasoning ‘prisoners simply do not tend to vote Republican’.<sup>163</sup> Although this might be an individual opinion which does not give evidence for a purposeful exclusion, it is crucial that the side-effect is obviously appreciated by some representatives or parties who benefit from the regulations in place.

In sum, the disproportionate social structure of offenders has a similar impact on the voting behaviour of felons like their racial and ethnic composition. Although there are obviously sociological overlaps, ie many persons that belong to minorities are also socially underprivileged, the cumulation of party-preferences deepens the effect on the outcome of elections and thus increases the caused distortion.

### **B) Felony Vote Fostering Pluralism and Contributing to a better Legislation**

Criminal policy and prison regime are topics which are often – if at all – not discussed in an objective and unbiased way. Rather, public debates, ie debates that are not limited to a certain group of criminologists, tend to become emotional, soon. From a political perspective, the whole field of criminal law offers little to gain but much to lose: Even though a more balanced view has emerged throughout the last decades, the majority of the population still blames the legislator for being too lax on crime.<sup>164</sup> Surveys in many nations have shown that people demand for a stricter punishment and for a prompter and more consequent course of action.<sup>165</sup>

From my point of view, it is doubtful whether the public opinion is based on properly reflected facts. The vast majority of citizens have very limited knowledge about

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<sup>162</sup> A Ewald and B Rottinghaus ‘Introduction’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 1 at 10.

<sup>163</sup> K Chandler, ‘Felon Voting Bill Ensnares Riley’ *Birmingham News* 22 June 2003.

<sup>164</sup> See eg KH Reuband, ‘Konstanz und Wandel in der „Strafphilosophie“ der Deutschen – Ausdruck stabiler Verhältnisse oder steigender Punitivität? Ergebnisse eines Langzeitvergleichs (1970-2003)’ (2007) 18 *Soziale Probleme - Zeitschrift für soziale Probleme und soziale Kontrolle* 187 at 192.

<sup>165</sup> Ibid.

the principles of penology.<sup>166</sup> Broad debates about criminal law are mostly superficial and especially the knowledge about prison regime is marginal. From my point of view, this lack of insight and interest is – among other factors – also caused by the limited voice criminals (and prisoners in particular) have in society and the political decision process. Whenever issues of criminal law are discussed in the media, the opinions of legal scholars, judges or victims receive more attention than those of the persons actually affected by penologic measurements. In order to achieve more substantiated debates about criminal law and prison regime, felons should be encouraged and enabled to participate more actively in these debates.

### **I) Criminal Law and the Impact of Legal Policy**

Criminal law is (at least in parts) a highly political matter. On the one hand, many conducts which have been severely punished in former times are socially accepted today;<sup>167</sup> on the other hand, several courses of action, especially in conjunction with new technologies, have only been made punishable in recent years.<sup>168</sup> Moreover, penal laws vary greatly among different countries and are subject to cultural influences.<sup>169</sup> Drug policy shows a good example: the prohibition of certain substances is indeed determined by their harmfulness and addictiveness; at the same time, however, traditions and political considerations play an important role, too. The prohibition of alcohol in the United States during the early 20<sup>th</sup> century was simply based on a political appreciation of values, which neither proved to be capable of winning a majority nor enforceable. If at that time, all persons who had not adhered to the ban in the past were excluded from the ongoing political debate and the decision making process, the unsuccessful experiment had probably continued much longer.

Criminals with personal experience usually have more knowledge and concern about the field of criminal law – they are in a way ‘experts’ on the particular field of

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<sup>166</sup> See H Sutter, cited in ‘Erziehen statt Strafen’, *Tink* 05 March 2007, available at <http://www.tink.ch/new/article/2007/03/05/erziehen-statt-strafen/> [last accessed on 05 December 2011].

<sup>167</sup> Especially sexual offences have been subject to noteworthy legal changes.

<sup>168</sup> For example, the so-called cyber-crimes.

<sup>169</sup> See eg religiously determined penal laws in Islamic countries.

crime and their interest in crime policy is quite distinct.<sup>170</sup> At the same time a huge amount of incarcerations is based on prohibitions which are at least partly political. For example, in the US, the amount of prisoners sentenced for drug offences makes up about one fourth of the whole prison inmates.<sup>171</sup> Disenfranchisement leads to the questionable consequence that those who support the liberalisation of drug laws (and demonstrated this attitude by their behaviour) are excluded from the decision making process for exactly the same reason.<sup>172</sup>

Moreover, the (above discussed) racial disparity is most pronounced among this group: It is estimated that almost three quarter of incarcerated drug offenders in the US are black.<sup>173</sup> This combination of political issues and disproportional exclusion of a minority group is especially crucial because it complicates the control whether some statutes' underlying purpose in reality is not a discriminatory one.<sup>174</sup>

Some legal scholars have expressed the fear that voting patterns of felons might be subversive to the goals and interests of average citizens. As data on prisoners' electoral behaviour is limited, this statement appears to be quite speculative.<sup>175</sup> In any case, it cannot serve as a justification for exclusion: In a democracy, minority opinions must be considered appropriately – sometimes, they even require special protection. Although it demands more efforts to convince certain people of a way that is advantageous for society as a whole, this often grinding process is important in order to uphold democratic principles and to foster pluralism.<sup>176</sup>

This would be different, however, if ex-offenders and felons, who are entitled to vote, would raise support for corrupt candidates or would try to annul an effective criminal code. Although this fear is sometimes stated in defence of disenfranchisement,<sup>177</sup> the assumption is based on the unproved theory, criminals would somehow

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<sup>170</sup> D Parkes, 'Ballot Boxes behind Bars: Towards the Repeal of Prisoner Disenfranchisement Laws' (2003-2004) 13 *The Temple Political & Civil Rights LR* 71 at 96.

<sup>171</sup> EA Hull, 'Our "crooked Timber": Why is American Punishment so Harsh?' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 136 at 149.

<sup>172</sup> *Richardson v Ramirez*, 418 US 24 (1974) dissenting vote of J Marshall at 82-83.

<sup>173</sup> RL Nunn, 'Lock them up and Throw away the Vote' (2004-2005) 5 *Chicago J Int'l Law* 763 at 768.

<sup>174</sup> See above Chapter IV A I.

<sup>175</sup> E Eckholm, 'States Are Growing More Lenient in Allowing Felons to Vote' *The New York Times* 12 October 2006, available at <http://www.nytimes.com/2006/10/12/us/12felons.html> [last accessed on 05 December 2011].

<sup>176</sup> *Richardson v Ramirez*, 418 US 24 (1974), dissenting vote of J Marshall at 81.

<sup>177</sup> Argumentation outlined by TJ Miles, 'Felon Disenfranchisement and Voter Turnout' (2004) 33 *J Legal Stud* 85 at 120.

form a voting bloc in order to pursue similar interests. From an objective point of view, this hypothesis seems to be mostly determined by vague fears of infiltration.<sup>178</sup> In reality, prisoners do not form a homogenous group and their interests and objectives differ just as much as those of average citizens. Moreover, the relatively small proportion of felons among the overall population illustrates the irrationality of these misgivings. Especially in stable democracies it is very unlikely that granting franchise to (ex-) offenders would cause noteworthy anti-democratic movements or attacks.<sup>179</sup> If at all, prisoners' voting behaviour is rather comparable to the one of non-delinquents of a similar racial, ethnic and social composition.<sup>180</sup> If one really wants to safeguard the democratic system from (ex-) offenders it would be far more adequate and promising to limit the access to key positions in civil service or government.<sup>181</sup>

## II) Participation Encouraging Political Debate about Prison Regime

Different to any other social group which is excluded from elections (like eg minors or people of unsound mind), prisoners do not have a proper lobby advocating their rights. Therefore, felons are especially dependent on the representatives – those who constantly point out, they represented *all* people: the parliamentarians. This principle of universal representativeness<sup>182</sup> (in conjunction with the goals of inclusion, equality and cohesion) demands for the paramount consideration of those people who already stand at the edge of society. Unfortunately, in terms of prisoners this noble ambition only reflects a small part of the reality. The big amount of (often successful) constitutional complaints against inhuman conditions in prisons, even in countries of the so-called first world, highlights that the attention which prison regime receives from the government, is still insufficient.<sup>183</sup>

<sup>178</sup> TJ Miles, 'Felon Disenfranchisement and Voter Turnout' (2004) 33 *J Legal Stud* 85 at 120-121.

<sup>179</sup> NV Demleitner 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (1999/2000) 84 *Minnesota LR*, 753 at 793.

<sup>180</sup> P Street, 'Race, Prison, and Poverty – The Race To Incarcerate In The Age Of Correctional Keynesianism' available at <http://www.historyisaweapon.com/defcon1/streeracripov.html> [last accessed on 05 December 2011].

<sup>181</sup> TJ Miles, 'Felon Disenfranchisement and Voter Turnout' (2004) 33 *J Legal Stud* 85 at 121.

<sup>182</sup> This idea is quite universal among democratic states and specified in many constitutions, see eg Art. 38 para. 1 of the German Basic Law.

<sup>183</sup> In Germany, for example, the number recently raised to 400 individual complaints in only one year, see H Kistenfeger interviewing G Lübbe-Wolff, 'Brutalisiert statt Resozialisiert' *Focus* 12 March 2007.

Granting prisoners the right to vote may raise prisoners' interest in politics and vice versa: According to Danish reports, upcoming elections do influence the debates among prison inmates.<sup>184</sup> It has been observed that debates circle more around national criminal policy and similar matters which are of particular importance for prisoners and affect their daily life.<sup>185</sup> These debates do not necessarily stay locked behind prison walls: especially election campaigns are a suitable occasion for politicians to get in touch with often neglected minorities. Due to the electoral equality, meetings in connection with election campaigns are predestined to breathe life into J Sachs claim that 'everybody counts'.<sup>186</sup>

While a survey among Danish prisons has revealed that politicians have not arranged any meetings or other events in the run-up of elections in prisons<sup>187</sup> this is different in other countries: for example in Quebec, where provincial laws allow all felons to vote, candidates have also visited prisons and discussed with inmates.<sup>188</sup> Unfortunately, there is hardly any information or feedback about these get-togethers. Yet, the example illustrates, that election campaigns can show a good reason for politicians to minister prisoners' interests which in turn may raise the level of debate about penal policy.<sup>189</sup> In any case, it is a first important step that delivers valuable insight into practical aspects of prison regime to politicians and at the same time shows inmates that they do matter and that reintegration is not just a meaningless phrase.

### **III) Inclusion as a Prerequisite to Uphold and Improve Democratic Standards and Values**

The inclusive function of democratic participation does not only fulfil an important penological goal with regard to the individual prisoner.<sup>190</sup> Participation is also im-

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<sup>184</sup> See A Storgaard, 'The Right to Vote in Danish Prisons' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 244 at 253.

<sup>185</sup> Ibid.

<sup>186</sup> *August and Another v Electoral Commission and Others*, 1999 (3) SA 1 (CC) para 17-18.

<sup>187</sup> See A Storgaard, 'The Right to Vote in Danish Prisons' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 244 at 253.

<sup>188</sup> D Ritter, 'Election Night in Lock-up: Polling Offenders as the Votes are Tallied' *Montreal Mirror*, 3 December 1998.

<sup>189</sup> The Prison Reform Trust, quoted in *The Daily Telegraph*, 28 October 2000.

<sup>190</sup> See Chapter III, Section B IV – 'Rehabilitation, Reintegration and Education'.

portant in order to uphold peaceful co-existence in society, to maintain public safety and it even seems to reduce the relapse rate of felons.<sup>191</sup>

It is a trivial finding, of course, that participation is best effected through the electoral and legislative process, rather than through rebellion, rioting or back-room influence.<sup>192</sup> However, disenfranchisement may abet exactly these undesirable practices. Offenders have already demonstrated that they do not flinch from finding ‘alternative ways’ in order to achieve their goals. Of course, this fact may not serve as an argument for granting people influence which they might – in a different form – gain anyway. Still, the example illustrates the importance of inclusion for equality among citizens and the maintenance of the basic rules of democracy.

Moreover, the outlined negative effects are not limited to the actual decision making process. Rather, prisoners who are excluded from participation in the law-making process are also less likely to identify with the passed legislation. This may on the one hand erode the basis for convictive and punitive measurements;<sup>193</sup> on the other hand, criminals might not feel fully bound by the enacted statutes after their release.<sup>194</sup> Although from a legal perspective this is of course completely irrelevant, the psychological effect of allegiance must not be underestimated.

For the given reasons, encouraging offenders to consider themselves as fully-fledged members of society – which in particular requires granting them the right to vote – helps to create a more homogenous society with universally acknowledged values.<sup>195</sup>

### **C) Justifications of Felony Disenfranchisement**

After the elaborate outline of disenfranchisement’s shortcomings, a holistic analysis must also consider the arguments brought forward by the asserters of the measure. It has already been found above that disenfranchisement may only serve as a viable

<sup>191</sup> L Ispahani, ‘Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 32.

<sup>192</sup> D Parkes, ‘Ballot Boxes behind Bars: Towards the Repeal of Prisoner Disenfranchisement Laws’ (2003-2004) 13 *The Temple Political & Civil Rights LR* 71 at 94.

<sup>193</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 30-34.

<sup>194</sup> *Ibid* at 37.

<sup>195</sup> J Manza, ‘Foreword: Waves of Democracy and Criminal Disenfranchisement’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) xi at xiii.



punitive measurement in very few cases where there is a rational connection between the felonious breach and the election process.<sup>196</sup> Still, some arguments are frequently used in order to defend franchise limitations as an important instrument to uphold ultimate democratic principles:

### **I) The ‘Purity of the Ballot Box’**

Especially from a traditional and conservative perspective, elections are considered to be a democracy’s most important sanctuary.<sup>197</sup> To uphold the specific dignity, some legal scholars and politicians argue, the participants in elections had to fulfil certain criteria that prove them to be fully-fledged citizens. Otherwise, the participation of ‘unworthy electors’ would ‘pollute’ the election process and the electoral result.

The language used in connection with this reasoning shows that the idea has a long history. The catch-phrase which is typically used to describe the argumentation - ‘The Purity of the Ballot Box’ – goes back to a ruling of the Alabama Supreme Court from 1884.<sup>198</sup> From a historical perspective, the argumentation seems clear and coherent. At that time, the democratic system was by far not as established and stable as it is today. People were especially concerned, that offenders would not act in the best interest of the community but vote ‘in concert’ in order to weaken restrictions of criminal law and thus threaten the established achievements.<sup>199</sup> Therefore, the moral uprightness of the population – often paraphrased with the key words ‘moral citizens’ – was of great importance.<sup>200</sup>

As already discussed above, these arguments have lost a lot of their conclusiveness with regard to modern democracies which have established alternative ways to pro-

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<sup>196</sup> See Chapter III above.

<sup>197</sup> Remember, how many people, especially in rural areas, dress up on election day when they go to the polling station in order to cast their vote.

<sup>198</sup> *Washington v State* 1884, 585.

<sup>199</sup> A Ewald, ‘An "Agenda For Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony’ (2004) 36 *Columbia Human Rights LR* 109, 111; SE Marquardt, ‘Deprivation of a Felon’s Right to Vote: Constitutional Concerns, Policy Issues and Suggested Reforms for Felony Disenfranchisement Laws’ (2005) 82 *University of Detroit Mercy LR* 279 at 285.

<sup>200</sup> NV Demleitner, ‘U.S. Felon disenfranchisement: Parting Ways with Western Europe’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 81.

tect their core principles.<sup>201</sup> At the same time, the extension of public competences and responsibilities has increased the average citizen's contacts with the state and its institutions. Different to former times, citizens have to obey much more rules which affect – and sometimes even determine – their everyday life. This higher level of dependency has raised the importance of participation and equal suffrage in order to balance the growing judicialisation.

Yet, it is important for the democratic system as a whole to raise or uphold the level of acceptance of elections. According to some critics, the impression might arise that democratic participation rights are worth less, when they are granted to everyone: 'the substance of citizenship becomes weaker'.<sup>202</sup> However, the argument of 'purity' is not only raised in connection with the democratic system but also used personally by politicians who claim, the legitimacy of their voter mandate was diluted by the participation of felons in elections. But may representatives demand to be authorised by a law-abiding electorate only? Shortly before the *Sauvé* decisions, Canadian members of government have indeed stated that they did not like the idea of elections decided by prisoners.<sup>203</sup> The Canadian Constitutional Court addressed this issue with a quite technical explanation in its *Sauvé* (No 2) judgement: As it is generally acknowledged, that power in a democracy flows from *the people* the court noted it was difficult to explain, how this power can be used to disenfranchise a part of those citizens, who have actually empowered the representatives.<sup>204</sup> If any politician would talk about desirable and undesirable votes in conjunction with elector's ethnic background, this would easily be called racist. So why should a distinction in terms of felons not be called discriminatory?

A slightly different approach to justify disenfranchisement is taken by legal academics that draw a parallel between minors and criminal offenders: they argue, the felonious breach revealed a lack of character and self-control as average adults usu-

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<sup>201</sup> For example, the German Basic Law outlines many aspects of such a 'wehrhafte[r] Demokratie' when it allows for the prohibition of anticonstitutional parties or grants citizens a right to resist in case the democratic order is substantially endangered.

<sup>202</sup> WJ Booth, 'Foreigners: Insiders, Outsiders and the Ethnics of Membership' (1997) 57 *The Review of Politics* 271 at 280.

<sup>203</sup> L Ispahani, 'Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 47.

<sup>204</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 31-32.

ally adhere to the law.<sup>205</sup> Therefore, offenders had demonstrated that they lack characteristics which are generally developed during a citizen's maturing process. In order to uphold the quality of elections, one should not grant them the same rights that law-abiding citizens may enjoy.<sup>206</sup> This approach, however, neglects an important difference between immaturity and partial law-abidance: a felonious breach can happen purposefully and in a reflected way, just as imprisonment can also be the consequence of gravely negligent behaviour. In any case, one cannot automatically conclude that a criminal act is determined by a lack of maturity. Apart from this, the decision to restrict young people's franchise affects every social group equally and does not cause a distortion of electoral equality. For these reasons, the two phenomena are not really comparable.<sup>207</sup>

To sum up, the 'Purity of the ballot box' argument is – if at all – only convincing at first sight. A closer examination reveals that it does not account for the development that democracy and statehood have undergone. In any case, it is difficult to justify how measurements which limit participation rights – and thus, as stated above, exclude minorities in a disproportional way – may enhance the 'integrity' of the election process.<sup>208</sup>

## **II) The Community and its Right to Define its own Identity**

Some legal scholars argue that it is an indefeasible right of every community to define its own identity. This process also needs to include the sovereignty to decide about the scope of franchise as it must be possible to exclude persons, who – according to the view of the majority of this community – do not have a sufficient nexus.<sup>209</sup> It is also raised, this argumentation was acknowledged in terms of foreigners who want to join a (different) community: the regulation of the right of residence, citizenship and the right of foreigners to vote are noncontroversially issues of national legal policy. With regard to prisoners, however, the situation is slightly

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<sup>205</sup> CP Manfredi, 'In Defence of Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 259 at 275.

<sup>206</sup> Ibid.

<sup>207</sup> *Sauvé v Canada (No 2)*, 3 SCR (2002) 519 at 37.

<sup>208</sup> R Redman et al, 'The Politics and Legality of Prisoner Disenfranchisement' in Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 167 at 177.

<sup>209</sup> LH Tribe *'American Constitutional Law'* 2ed (1988) 1084.

different. Unlike foreigners, felons have already been part of the community. Moreover, foreigners are already part of a different community, the one in their home country, and only want to change their belonging; hardly ever, they are excluded from any community.<sup>210</sup>

The definition of a community's own identity is a crucial step which often takes place in a highly emotional atmosphere.<sup>211</sup> Especially in the media, discussions about disenfranchisement easily tend to become lurid and sensational: 'Killers go Get the Vote'<sup>212</sup> was only one recent headline illustrating the shallowness of the public debate.<sup>213</sup> It is indeed quite likely, that felony disenfranchisement is supported by the majority of citizens in many countries.<sup>214</sup> For this reason, politicians tend to refrain from the liberalisation of disenfranchisement laws. Rather, they leave unpopular decisions to the courts and blame them for the 'undesirable' outcome(s) afterwards.<sup>215</sup> Recent decisions of constitutional courts around the world have revealed a lack of governmental action in this field of law. The judgements have outlined detailed criteria and requirements which franchise legislation has to meet. These guidelines now make it much more challenging for governments to develop coherent justifications of disenfranchisement.<sup>216</sup>

One of the justifications, which is still used by governments to defend disenfranchisement laws in court, is that granting the right to vote to individuals who have gravely violated the law would make the government appear soft on crime.<sup>217</sup> This argumentation also reflects a popular view among many societies. Even the South African Constitutional Court conceded in its first decision on felony franchise legislation, that 'in a country like [South Africa] the idea that murderers, rapists and

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<sup>210</sup> A parallel example can be found in the field of citizenship law: there, it is an important maxim to avoid statelessness of individuals and deprivation of citizenship is generally deplored under international law.

<sup>211</sup> See eg the long and ongoing debates about migration in many countries, especially in the 'first world'.

<sup>212</sup> *The Sunday Mail*, Brisbane, 9 July 1995 at 1.

<sup>213</sup> C Hamilton and R Lines, 'The Campaign for Prisoner Voting Rights in Ireland' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 205 at 216.

<sup>214</sup> R Redman et al, 'The Politics and Legality of Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 167 at 178.

<sup>215</sup> A Ewald and B Rottinghaus 'Introduction' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 1 at 8.

<sup>216</sup> L Ispahani, 'Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 33.

<sup>217</sup> See eg Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others, 2005 (3) SA 280 (CC) at para 46, 55.

armed robbers should be entitled to vote will offend many people.’<sup>218</sup> In the United Kingdom, political discussions in the aftermath of the ECtHR’s *Hirst (No 2)* decision even revealed that popularity among the electorate was apparently considered to be more important than the implementation of judicial demands: the UK’s government and parliament have postponed the adoption of a bill which ought to adjust UK’s electoral law according to the standards of the ECHR’s Article 3 for more than six years now and it is still not clear whether the judgement’s demands will ever be transformed.

The protection of minority rights demands from law-makers in a representative democracy to seek for more tolerance and to calm down emotions. In any case, minority rights cannot be safeguarded by majority decisions only. The maintenance of democratic standards also demands for control and supervision. The German constitutional lawyer Christoph Möllers has once put it bluntly: ‘In a democracy, parliaments have the first, but courts the final say’.<sup>219</sup> From my point of view, it would be favourable to leave not only the final decision about the scope of disenfranchisement laws to a neutral body. Rather, courts should also be entitled to decide about every individual implementation of disenfranchisement. Such a proceeding would ensure a balanced and well-reasoned imposition. As criminal courts have to come to an individual decision about the degree of penalty, anyway, the imposition of disenfranchisement could easily be an annex decision with may consider the specific crime and the overall circumstances. This approach would ensure the repetitively demanded proportionality and individual connectivity<sup>220</sup> – principles which cannot be guaranteed by a simple ‘decision of the people’.

### **III) Prevention of Voter Fraud**

People who have already broken the law are commonly considered to be more prone to commit further felonious breaches. Therefore, another justification which is frequently brought forward in defence of disenfranchisement is that ex-felons were more likely to commit voter fraud and thus pose a threat to proper election

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<sup>218</sup> *August and Another v Electoral Commission and Others*, 1999 (3) SA 1 (CC) para 31.

<sup>219</sup> C Möllers, ‘*Demokratie – Zumutungen und Versprechen*’ (2008).

<sup>220</sup> RL Nunn, ‘Lock them up and Throw away the Vote’ (2004-2005) 5 *Chicago J Int’l Law* 763 at 769.

proceedings.<sup>221</sup> However, this assumption is a way too broad generalisation as most criminal offenders have never been involved in any election related crimes.<sup>222</sup> Moreover, these kinds of crimes have a very different character to most of the common breaches of law. Also, the electoral process is neither extraordinarily susceptible to criminal infiltration nor would related criminal incidents threaten objects of legal protection in a concrete way – like it would eg be the case with the issuing of a gun license. Therefore, the fear of an irregular election process is not a convincing argument against offenders' franchise.

#### **D) Conclusion**

This chapter has shown that felony disenfranchisement severely affects electoral equality and puts ethnic and social minorities at a disadvantage. Due to the diverging voting behaviour of prisoners (compared to the total electorate), the measure also distorts the final outcome of elections and thus affects the democratic process as a whole. Moreover, the exclusion of felons from political debates inhibits pluralism and deprives society from valuable insight.

Of course, the intensity of these effects very much depends on the concrete design of disenfranchisement laws: while the imposition in some rationally connected cases seems to be reasonable, blanket bans and especially permanent deprivation of the right to vote pose a serious threat to the universality of elections. Therefore, the limitation of disenfranchisement to specific crimes is also preferable from a democratic theory perspective: restrictions of franchise are rather a matter for the criminal code than for an electoral act.<sup>223</sup> In any case, if one takes electoral equality seriously, the fact that the votes of prisoners may have a (deciding) influence on the outcome of elections has to be acknowledged as an argument in favour of unlimited franchise rather than against it.<sup>224</sup>

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<sup>221</sup> See the outline in NV Demleitner 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (1999/2000) 84 *Minnesota LR*, 753 at 773.

<sup>222</sup> NV Demleitner 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (1999/2000) 84 *Minnesota LR*, 753 at 773.

<sup>223</sup> R Redman et al, 'The Politics and Legality of Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 167 at 179.

<sup>224</sup> D Parkes, 'Ballot Boxes behind Bars: Towards the Repeal of Prisoner Disenfranchisement Laws' (2003-2004) 13 *The Temple Political & Civil Rights LR* 71 at 76.

## CHAPTER V: PRACTICAL PROBLEMS CONNECTED WITH PRISONERS' RIGHT TO VOTE

In conjunction with the NICRO case, the Republic of South Africa has tried to defend prisoners' disenfranchisement inter alia with practical difficulties caused by prisoner voting, namely high costs for the administration and logistical problems.<sup>225</sup> Although this argument was easily dismissed by the Constitutional Court, it is worth to analyse which challenges countries that implement felony franchise might have to master and how countries that already allow prisoners to vote deal with these issues.

### A) Challenges of Electoral Administration in Prison

To effectively grant prisoners the right to vote, words alone are not enough: Until recently, a number of states did not explicitly limit felony franchise but prison walls posed a practical obstacle to the execution of the right: In Denmark, for instance, prisoners until the 1970s could only cast their votes if they coincidentally had permission to leave prison for other reasons on election day;<sup>226</sup> in Ireland, prisoners for a long time did not fall within any of the groups that were eligible for postal vote.<sup>227</sup> These examples show that franchise was – and sometimes still is – limited 'not by legislation but by logistics'.<sup>228</sup>

Without doubt, the exceptional conditions in penitentiaries require some adjustments of usual election proceedings. Especially the perpetuation of prison safety and the guarantee of a well-ordered voting process are frequently considered to be sensitive areas.<sup>229</sup> For example, the separation of offenders who are not allowed to contact each other – a measure which is quite often imposed on culprits in detention while awaiting trial – may demand some logistical efforts. As prison authorities,

<sup>225</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*, 2005 (3) SA 280 (CC) at para 49.

<sup>226</sup> A Storgaard, 'The Right to Vote in Danish Prisons' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 244 at 251.

<sup>227</sup> C Gallagher, 'The Captive Vote: Prisoners' Suffrage in Ireland', (2001) 1 *University College Dublin LR* 1 at 2.

<sup>228</sup> L Muntingh and J Sloth-Nielsen, 'The Ballot as a Bulwark: Prisoners' Rights to Vote in South Africa' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 221 at 233.

<sup>229</sup> J Manza, 'Foreword: Waves of Democracy and Criminal Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) xi at xiii.

however, can model the voting process both temporally and spatially, it is not too difficult to obviate undesirable contacts. Generally, the avoidance of mass gatherings may also ensure a well-ordered voting process, ie particularly guarantee the secrecy of the ballot and prevent attempts of unwanted influence. Practical experiences among countries where felons are already allowed to vote confirm these assumptions: According to a survey by Laleh Ispahani, none of the observed countries has experienced any disruptions of prison security in connection with elections.<sup>230</sup> Moreover, concerns about additional burdens for prison staff did not prove true as the procedure became routine, soon.<sup>231</sup>

The examination of different approaches around the world shows that there are various options for prison authorities to enable prison inmates to cast their vote. South Africa, for instance, sets up extra polling stations inside the prisons.<sup>232</sup> Several European countries use mobile polling stations which are temporarily brought to the penitentiaries. Contrary to initial fears, the creation of such facilities proved to be comparatively cheap and easy: As the inmates are permanently supervised the establishment of administrative control in order to ensure fair elections is actually less challenging than outside of prisons.<sup>233</sup> Apart from physical polling places in prison, absentee ballots are also a common way to enable felony vote.<sup>234</sup> This form of organisation keeps the additional efforts to a minimum as prisoners do not even have to leave their cells.

In some of the small European states like Luxembourg and Malta, prisoners are even allowed to leave the prison on election day – some accompanied by an escort, others on their own – in order to cast their vote in their ordinary polling station.<sup>235</sup> This, of course, is a highly symbolic gesture that may foster the reintegration of felons: For one day, they are part of the ‘usual people’ again and may even participate

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<sup>230</sup> L Ispahani, ‘Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 51.

<sup>231</sup> J Manza, ‘Foreword: Waves of Democracy and Criminal Disenfranchisement’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) xi at xiii.

<sup>232</sup> A Ewald and B Rottinghaus ‘Introduction’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 1 at 17.

<sup>233</sup> L Ispahani, ‘Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 51.

<sup>234</sup> This mechanism is used eg in Switzerland, Slovenia and Lithuania, cf. L Ispahani, ‘Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 51.

<sup>235</sup> See *ibid* at 30, 52.



in an important decision. However, due to the fact that prisoners have to vote in the constituency of their home domicile, this option is limited to small states only.

### **B) The Allocation of Prisoners' Votes to a Specific Constituency**

As outlined above, prisoners do not represent a cross section of the overall population. Therefore, a disproportional gathering of this group in the constituency where the penitentiary is located could easily distort the election result. This would be especially problematic in majority vote systems as these systems tend to reward regional strengths more than a constantly mediocre result in the whole country. Consequently, the success of one party in a specific constituency is not compensated in terms of the nationwide result. To avoid such distortions, it is common to assign prisoners' votes to their constituency of residence before their incarceration (home district) or to the constituency where they were convicted.<sup>236</sup> This is also reasonable, as prisoners only have a political stake in this region, while they have not been in contact with the community at the place of incarceration.<sup>237</sup> Moreover, prisoners do not gain disproportional influence in local elections, ie in the municipality where the prison is located.<sup>238</sup> In terms of reintegration, elections might thus be a good opportunity for felons to catch up on the recent events in their home constituency.

While this approach is straightforward and convincing, the practical implementation might cause some difficulties: If physical polling stations are set up in prisons, the votes cannot be gathered jointly as the individual ballots have to be allocated to the prisoners' home district afterwards. Thus, ballots have to be individualised, a measure which may erode the principle of secret ballot.<sup>239</sup> However, this difficulty also exists with postal vote: In order to prevent the selling and buying of votes, postal voters in many countries have to sign a personal declaration, filed together with the

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<sup>236</sup> Ibid at 47.

<sup>237</sup> NV Demleitner, 'U.S. Felon disenfranchisement: Parting Ways with Western Europe' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 95.

<sup>238</sup> L Ispahani, 'Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 51.

<sup>239</sup> A 'partial individualisation' according to the constituencies would generally be sufficient, although, in turn, this would disproportionately affect those prisoners who are the only inmate from their home district.

actual ballot in one envelope.<sup>240</sup> However, the fact that the voter's name is not displayed on the ballot itself guarantees a sufficient level of data protection. There is no reason why one could not implement a similar system for prison votes.

### **C) How to Guarantee an Appropriate Minimum Standard of Objective Information?**

Article 19 of the ICCPR states that the proper execution of the right of freedom of expression requires to 'seek, receive and impart information [...] regardless of frontiers, either orally, in written or in print [...]'. In a similar way, the UNHRC in conjunction with Art 25 of the ICCPR demanded for conditions that guaranteed 'an informed right to vote'.<sup>241</sup>

With regard to the isolated situation of prisoners, the adequate provision of information is of particular importance. Of course, direct contact with candidates who visit prisons as part of their election campaign (like this is frequently the case in Quebec, see above) are an ideal way of opinion making. As this face to face contact, however, is neither common among many countries nor an opportunity to provide a holistic overview of all candidates and programmes, the responsible authorities have mostly attended to the issue of voter education: state institutions and NGOs usually provide information in the forefront of elections.<sup>242</sup> Furthermore, political parties are allowed and encouraged to distribute written campaign material among prisoners.<sup>243</sup> Finally, modern technique facilitates the flow of information, too: most prisoners have access to radio and television and can follow news, reports and election speeches.<sup>244</sup> Still, prisoners are mostly excluded from the internet based election campaign, a type of information search that is getting more and more important.

<sup>240</sup> See eg Art 36 para 1a of the German Bundeswahlgesetz.

<sup>241</sup> R Redman et al, 'The Politics and Legality of Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 167 at 189-190.

<sup>242</sup> L Ispahani, 'Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 25 at 27.

<sup>243</sup> A Storgaard, 'The Right to Vote in Danish Prisons' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 244 at 253.

<sup>244</sup> Ibid.

Taking everything into account, prisoners do not have precisely the same opportunities to actively gather information. However, the provided information is generally sufficient and well-balanced enough to ensure a reflected and unswayed decision.

#### **D) Conclusion**

As Tulkens and Zagrebelsky have stated in their joint concurring opinion in the case of *Hirst (No 2)*, there are no practical problems connected with prisoners' right to vote that cannot be solved without any great difficulty.<sup>245</sup> Instead, the proper implementation of disenfranchisement faces practical problems, too: due to a laxity of enforcement in some US States, ex-felons who ought to be excluded in practice often have little troubles to register and cast their vote.<sup>246</sup> Especially the relocation of permanently disenfranchised ex-felons from one state to another overburdens the administration in a country without registration.<sup>247</sup> In any case, this leads to a big inequity which is unacceptable in a rule of law democracy.<sup>248</sup>

### **CHAPTER VI: REASONABLE DIFFERENTIATIONS AND POSSIBILITIES OF EMBODIMENT IN CONNECTION WITH THE IMPOSITION OF DISENFRANCHISEMENT**

As outlined throughout the whole work so far, disenfranchisement may only be an appropriate measure in exceptional cases when it helps to achieve clearly defined penologic goals without undermining the legitimacy of democratic elections. Even when one acknowledges this limitation, a number of other issues remain which should be considered in order to achieve a well-balanced sentence. Such kind of viable distinguishing criteria may eg be the status of incarceration, extraordinary reasons for the imprisonment or time and duration of the imposition.

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<sup>245</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (6 October 2005) European Court of Human Rights (Grand Chamber), Joint Concurring Opinions of Judges Tulkens and Zagrebelsky at 5.

<sup>246</sup> TJ Miles, 'Felon Disenfranchisement and Voter Turnout' (2004) 33 *J Legal Stud* 85 at 116.

<sup>247</sup> *Ibid* at 117.

<sup>248</sup> *Ibid* at 116.

## **A) Differentiations Considering the Status of the Prisoner - Circumstances as a Result of which Disenfranchisement is not Applicable**

### **I) Detention while Awaiting Trial vs Imprisonment as a Sanction**

In the *August* case, the South African Constitutional Court outlined that more than one third of the incarcerated persons (about 54,000 out of 146,000) were unsentenced prisoners awaiting trial.<sup>249</sup> Although the share of remand prisoners is significantly lower among many other states, there are important differences between sentenced and unsentenced prisoners which demand for a disparate treatment of both groups.<sup>250</sup> Firstly, the presumption of innocence is one of the most important legal rights of the accused in a criminal trial. Therefore, only the imposition of measures which are essential to ensure the regularity of the upcoming criminal trial or to protect society from violent suspects can be justified.<sup>251</sup> Secondly, the decision whether an accused is kept in pre-trial custody or temporarily released on bail is not only determined by characteristics of the alleged offender or the offence itself. Rather, the risk of absconding is mostly assessed on the basis of the accused's social background, his or her financial situation and similar characteristics. If detainees awaiting trial were deprived of their franchise, such factors which are outside the influence of the individual suspected persons would define the scope of suffrage. In other words: The consideration of personal circumstances may be reasonable and acceptable with regard to the decision about pre-trial custody, but would distort the social equality of elections if it also affected the culprit's franchise. Finally, such a practice would put those individuals who are later acquitted at an incomparable disadvantage. Due to these manifold problems, also the UNHRC has demanded that '[p]ersons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote'.<sup>252</sup>

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<sup>249</sup> *August and Another v Electoral Commission and Others*, 1999 (3) SA 1 (CC) para 12.

<sup>250</sup> N Mbodla, 'Should Prisoners have a Right to Vote?' (2002) 46 *Journal of African Law* 92 at 96.

<sup>251</sup> Requirements for the detention of a suspect are eg outlined in the German Criminal Procedure Code (Art 112 para 2 StPO).

<sup>252</sup> Human Rights Committee, *Gorji-Dinka v. Cameroon*, CCPR/C/83/D/1134/2002, 10 May 2005 at para 5.6.

## II) Imprisonment as a Penalty vs Extended Term of Imprisonment

In the case of *Hirst (No 2)*, the actual prison sentence of the inmate had already ended and the incarceration of John Hirst, who had been found guilty for manslaughter, was only extended in order to protect society.<sup>253</sup> Generally, perpetrators in preventive detention have already served their sentence. Thus, any further measures which are aimed at the protection of society must be essential for the achievement of this goal.<sup>254</sup> Disenfranchisement, however, is at least to a certain extent a form of additional punishment.<sup>255</sup> In contrast, the measure is not necessary to protect society even if the committed offence is rationally connected with the election process because the perpetrators are sufficiently controlled in order to prevent repeat offences.

## III) Incarceration due to the Inability to Pay a Fine

Some prisoners who have only been sentenced to a fine are later sent to prison because they are unable to pay this penalty. To disenfranchise those offenders who are only incarcerated because of their financial situation would put underprivileged people at a disadvantage. The disproportional influence of wealth on the right to vote would violate important democratic and human rights principles and again run contrary to the principle of electoral equality.<sup>256</sup> Therefore, disenfranchisement should not be imposed on prisoners in subsidiary detention.<sup>257</sup>

<sup>253</sup> WA Powers, 'Hirst v United Kingdom (No 2): A First Look at Prisoner Disenfranchisement by the European Court of Human Rights' (2005-2006) 21 *Connecticut J Int'l Law* 269.

<sup>254</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (6 October 2005) European Court of Human Rights (Grand Chamber Decision) at 49.

<sup>255</sup> See Chapter III A above.

<sup>256</sup> See Chapter II A and B above.

<sup>257</sup> This exception had also been made in South Africa, before the Constitutional Court struck down the franchise limitations, see C Uggen et al 'Punishment and Social Exclusions: National Differences in Prisoner Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 59 at 73; RJ Wilson 'The Right to Universal, Equal and Non-discriminatory Suffrage as a Norm of Customary International Law: Protecting the Prisoner's Right to Vote' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 109 at 130.

## **B) Disenfranchisement for Certain Offences: Decision, Duration and Time of Imposition**

The most important distinction in terms of felony disenfranchisement is to consider the individual felonious breach and to restrict franchise limitations to rationally connected offences only.<sup>258</sup> For the reasons given in Chapter III and IV, most of the Western European countries today only implement franchise limitations when the offence aimed to undermine democratic rights or institutions like this is the case with voting fraud, vote rigging, abuse of office or similar offences.<sup>259</sup> As the ECtHR in its *Hirst (No 2)* decision has demanded for a ‘more limited restriction’ which must comply with the principle of proportionality, this approach is also more likely to meet the requirements of international human rights law.<sup>260</sup> However, the way of implementation has to take into account several other factors in order to best achieve the penological goals and to obtain a coherent and proportional decision:

### **I) Individual Decision by the Criminal Court vs Automatic Implementation**

In its *Sauvé (No 2)* judgement, the Canadian Supreme Court suggested that the decision about franchise limitations should be made on a case-by-case basis by the responsible criminal court. In this way, it could be evaluated whether the offender really warrants the additional sanction.<sup>261</sup> On the long run, individual decisions of the ruling criminal courts could evolve a sophisticated case law which could better take account of individual peculiarities than any parliamentary statute could do. Several legal scholars are also convinced that such an approach would best ensure objectivity, independence and consistency.<sup>262</sup>

Practical experiences also prove the feasibility of this approach: In Germany, for example, the ruling court has to give a rationale for the imposition of disenfran-

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<sup>258</sup> See the detailed outline in Chapter III and IV above.

<sup>259</sup> NV Demleitner, ‘U.S. Felon disenfranchisement: Parting Ways with Western Europe’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 80.

<sup>260</sup> WA Powers, ‘Hirst v United Kingdom (No 2): A First Look at Prisoner Disenfranchisement by the European Court of Human Rights’ (2005-2006) 21 *Connecticut J Int'l Law* 243 at 287.

<sup>261</sup> See the summarising statement by CP Manfredi, ‘In Defence of Prisoner Disenfranchisement’ in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 259 at 261.

<sup>262</sup> See S Foster, ‘Automatic Forfeiture of Fundamental Rights: Prisoners, Freedom of Expression and the Right to Vote’ (2007) 16 *Nottingham LJ* 1 at 21.

chisement in every single case.<sup>263</sup> Such an individual decision in open court emphasises the sanction's penal character and shows the offender plainly that it is the severity and seriousness of the committed offence which leads to disenfranchisement and that the measure is not just an administrative automatism. A focussed imposition thus emphasises the exceptional character of the measure and sustains the retributive function.

A problematic side-effect, however, is that the imposition of franchise limitations by the judiciary might narrow the separation of powers because the ruling courts directly influence the legislative branch when they decide about the electorate.<sup>264</sup> To reduce this effect, the court decision could be limited to the general imposition of disenfranchisement while the length of the measure could be pegged to the length of the prison sentence.

## **II) Duration and Time of Imposition of Disenfranchisement**

### **1) Disenfranchisement During the Time of Incarceration or after Release**

As outlined above in Chapter III, successful reintegration of the offender demands for a full rehabilitation when the individual has served its sentence. A lifelong ban from voting like it is common among many states in the US thwarts this goal.

However, strictly pegging disenfranchisement to the period of incarceration has shortcomings, too: Firstly, the penologic goal of incapacitation cannot be achieved since the election process in prison is very much controlled and little prone to illegal influences, anyway. Therefore, disenfranchisement may only help to reduce election related offences when it is imposed for a temporary period after release. Secondly, if felony disenfranchisement is simply limited to the time of incarceration, fortuitousness would be abetted as the fact if a prisoner is released shortly before or after an upcoming election day would gain great relevance: Given that the legislative period in a country is eg four years, a culprit sentenced to three and a half years might not miss a single election, while another one sentenced to four and a half years might even miss two. Therefore, it would be fairer to impose franchise limitations

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<sup>263</sup> NV Demleitner, 'Continuing *Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*' (1999/2000) 84 *Minnesota LR* 753 at 764.

<sup>264</sup> N Mbodla, 'Should Prisoners have a Right to Vote?' (2002) 46 *Journal of African Law* 92 at 101.

for a specific number of elections.<sup>265</sup> In order to achieve the goal of incapacitation, it is worth considering whether this fixed period should only start to run when the prisoner is released. Moreover, this approach would ensure that all prison inmates have the same rights - an issue which should not be underestimated as inequality is already quite pronounced due to the usually existing prison hierarchy. In Germany, for instance, disenfranchisement may be imposed for a limited period of time for certain offences (two to five years, irrespective of the length of the prison sentence), and this period of time only begins to run after the offender has been released from prison.<sup>266</sup> Apart from the outlined advantages, this form of downstream punishment has shortcomings, too: Most notably, full reintegration is retarded since disenfranchisement only becomes effective after the prison sentence has been served. While there are good arguments for either way of timing, it is beyond dispute that a limitation to a certain period of time is required in order to achieve the penologic goals of reintegration and special prevention and to meet the requirements of proportionality.

## 2) Differentiations Considering the Period of Incarceration

Recent judgements have shown that, if imposed at all, disenfranchisement must be proportionate to the offence and the sentence.<sup>267</sup> As already outlined above, a blanket ban does not meet the requirements of human rights law and also collides with core principles of most states' constitutions ie their Charters of Fundamental Rights. According to the ECtHR, for instance, blanket bans are 'disproportionate, arbitrary and impair the essence of the right to vote'.<sup>268</sup> A simple and widespread approach that accounts for the graveness of the offence is to link voting rights to the length of the imposed prison sentence.<sup>269</sup> There are generally two possibilities to consider the graveness of the felony: either according to the actual sentence or on the basis of the

<sup>265</sup> C Gallagher, 'The Captive Vote: Prisoners' Suffrage in Ireland', (2001) 1 *University College Dublin LR* 1 at 6; D Guttman, 'Before the High Court – Roach v Commonwealth: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?' (2007) 29 *Sydney LR* 297 at 318.

<sup>266</sup> NV Demleitner 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (1999/2000) 84 *Minnesota LR*, 753 at 760.

<sup>267</sup> Human Rights Committee, *Gorji-Dinka v. Cameroon*, CCPR/C/83/D/1134/2002, 10 May 2005 at para 5.6.

<sup>268</sup> *Hirst v United Kingdom (No 2)* (Application No 74025/01) (6 October 2005) European Court of Human Rights (Grand Chamber) at 45.

<sup>269</sup> N Mbodla, 'Should Prisoners have a Right to Vote?' (2002) 46 *Journal of African Law* 92 at 98.



potential, ie maximum sentence for the committed offence.<sup>270</sup> Allotting disenfranchisement on the basis of the potential sentence, however, has two shortcomings: in practical terms, prison authorities usually only know about the actually imposed sentence and especially among common law countries it is often difficult to evaluate what maximum sentence would be applicable for the concrete offence.<sup>271</sup> Moreover, only the actually imposed sentence accounts for the individual characteristics of the concrete felony. Thus, this parameter allows a more balanced penalisation and is preferable if the time of imposition is not codified by the legislative branch, anyway. A viable additional criterion has been raised by the Australian Constitutional Court in its judgement *Roach v. Electoral Commission*: the Court acknowledged the general seriousness of disenfranchisement and demanded for a threshold that is geared to the length of the prison sentence in order to distinguish between serious lawlessness and less grave but still reprehensible conduct.<sup>272</sup>

## CONCLUSION

Just like the shape of suffrage in general, the design of prisoners' franchise regulations has undergone various changes since the emergence of democracies. At any stage, however, development was far from linear and even today, democracies have not found universal standards in terms of prisoners' right to vote. While the diversity is somehow surprising, it also provides many experiences and allows an evaluation on a broad factual basis: After all, almost any approach has already been tried out.

Different to the early years of democracies, franchise laws today can no longer be designed arbitrarily but have to be in line with principles of constitutional law and human rights treaties – important conventions which may not be stopped at the prison gate. The drawback of constitutional principles as a protective mechanism for felony franchise is that standards differ greatly among nations with different legal traditions and allow much room for individual exceptions: For example in the

<sup>270</sup> The second option had been chosen by South Africa before the Commonwealth Electoral (Amendment) Act 1995, cf. the outline by C Gallagher, 'The Captive Vote: Prisoners' Suffrage in Ireland', (2001) 1 *University College Dublin LR* 1 at 24.

<sup>271</sup> R Redman et al, 'The Politics and Legality of Prisoner Disenfranchisement' in Disenfranchisement' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 167 at 171.

<sup>272</sup> *Roach v Electoral Commissioner* (2007) HCA 43 at para 12.

United States, recent challenges of disenfranchisement laws which were mostly based on either the Fourteenth Amendment or the Voting Rights Act from 1965 have failed and no final decision of any US Court has abolished or even adjusted a state's practice in terms of felony disenfranchisement.<sup>273</sup> Rather, the US Supreme Court has explicitly stated that felony disenfranchisement laws do not violate the Constitution and its Amendments as long as they are not enacted purposefully in order to disadvantage minorities.<sup>274</sup> In contrast, multi-national human rights treaties offer a more promising chance to unify the legal status quo. Firstly, the negotiation of these treaties demands a heightened sense of consensus from the state parties and international pressure may encourage the responsible leaders to guarantee basic rights, which other states grant their citizens, also to their own population. Secondly, international monitoring bodies tend to interpret treaties in a quite dynamic way. With the ECtHR's seminal decision of *Hirst (No 2)*, an international court for the first time has sustained prisoners' right to vote.

However, the issue in general is rather a political than a legal one: As the concrete shape of suffrage pertains to core issues of a democracy, interference from outside should be kept to a minimum. Although *Hirst (No 2)* without doubt is a well-balanced and well-thought-out decision, the caused discontentment in the UK is also understandable: when court decisions 'impose' a specific shape of franchise laws on a sovereign state, they interfere with fundamental issues of state organisation and foreclose an appropriate public discourse. Such a debate, however, is important in order to achieve the necessary acceptance among the people. In terms of felony franchise, the main critical issue is that general principles considered by the courts on the one hand and the public opinion in countries which still disenfranchise prisoners on the other hand, seem to be irreconcilable: in the United States, for example, there is no majority for a liberalisation of the relevant statutes: A national bill, which aims to grant voting rights to all ex-felons in federal elections after re-

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<sup>273</sup> See NV Demleitner 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (1999/2000) 84 *Minnesota LR*, 753 at 777; RL Nunn, 'Lock them up and Throw away the Vote' (2004-2005) 5 *Chicago J Int'l Law* 763 at 773.

<sup>274</sup> See *Hunter v Underwood*, 471 US 222 (1985) 227.

lease failed in the mid of the 1990s.<sup>275</sup> Due to public pressure, some jurisdictions in the meanwhile have even tightened disenfranchisement laws.<sup>276</sup>

At the same time, practically every unbiased analysis of the issue reveals that a broad and undifferentiated practice of disenfranchisement does not fulfil penologic goals and – what is even more important – significantly distorts election results. Considering current developments, these effects are likely to increase in the future, as many of the countries that practice disenfranchisement expect a growing share of prison inmates and a more diverse social structure with growing class distinctions and increasing migration. The suggested reduction of the scope of application of disenfranchisement to rationally connected offences only would help to achieve penologic goals and, at the same time, reduce the negative effect on the legitimacy of elections.

In any case, more political courage is required in order to initiate change: Although at first, a liberalisation of felony franchise might face a lot of resistance and lack of understanding from the electorate, it would be an important step towards integration and equality which would enable culprits to demonstrate their democratic credibility.

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<sup>275</sup> Voting Rights of Former Offenders Act, H.R. 3028, 104th Cong. (1996) and H.R. 568, 105th Cong. (1997).

<sup>276</sup> See NV Demleitner, 'U.S. Felon disenfranchisement: Parting Ways with Western Europe' in A Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 79 at 83.

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