DISENFRANCHISEMENT OF CONVICTED ADULT CITIZENS: COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS PERSPECTIVES

Reuven (Ruvi) Ziegler
Lincoln College

Master of Philosophy
Trinity Term 2009

Approximately 30,000 words

ABSTRACT

DISENFRANCHISEMENT OF CONVICTED ADULT CITIZENS: COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS PERSPECTIVES

Reuven (Ruvi) Ziegler, Lincoln College
Master of Philosophy, Trinity Term 2009

This thesis analyses the appropriateness of disenfranchising convicted adult citizens from comparative and international human rights perspectives.

Chapter One explores the transition from direct democracy to representative government, and the subsequent increased importance of elections. It highlights the paradigm shift that the perception of voting has undergone, from being seen as a privilege, granted to a handful of society members, to being viewed as an entitlement. Today, electoral systems are commonly based on universal suffrage, and voting eligibility is normally qualified by (only) two criteria: *community membership* and *competence*. It is suggested that these criteria should be used for scrutinising convicts' disenfranchisement.

Chapter Two traces the transformation that the treatment of convicts underwent, with notions of forfeiture of rights and 'civil death' gradually giving way to ideas of 'residual liberty' and of convicts as rights-holders. Subsequently, regulatory and penal justifications for convicts' disenfranchisement are assessed. The analysis concludes that disenfranchisement should be classified as a form of punishment, and that, due to its adverse effects on individuals as well as collectives disenfranchisement should cease to be imposed.

Chapter Three offers comparative perspectives on current challenges to disenfranchisement legislation. It examines American disenfranchisement jurisprudence alongside recent judgments from Canada, South Africa, the European Court of Human Rights and Australia. It is concluded that the non-American judgments exhibit an identifiable global trend towards enfranchising (some) convicts which can be partially attributed to a transnational judicial discourse.

Chapter Four examines the human rights treaty regime's perspective. Interpreting Article 25 of the International Covenant on Civil and Political Rights which guarantees the right-to-vote, it is posited that the provision does not proscribe disenfranchisement *as such.* Rather, disenfranchisement is subjected to balancing/proportionality analysis. Building on Chapter Two's normative contentions, and on the notion that voting eligibility constitutes the *essence* of the right-to-vote, the thesis advocates the adoption of an *optional protocol* to the ICCPR proscribing disenfranchisement. It is submitted that the facilitative nature of the right-to-vote makes it less vulnerable to *cultural relativity*, *deference* and *margin of appreciation* objections. Analogies are drawn between the proposed protocol and the Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty.

TABLE OF CONTENTS

Table of Abbreviations v
Table of Cases vi
Table of Statutes viii
Table of Treaties ix

Chapter One: Introduction to Convicts' Disenfranchisement - Democracy, Elections and the Right-to-Vote in Historical Perspective 1
a. Convicts' Disenfranchisement in Context 1
b. From Direct Democracy to Representative Government 6
c. The Hurdled Road to Suffrage Expansion 8

Chapter Two: Convicts' Disenfranchisement - Normative Appraisal 17
a. Introduction 17
b. Convicts' Rights: From 'Civil Death' to Residual Liberty' 20
c. Regulatory Justifications (Liberal and Republican) 23
1. Liberal Justifications 23
(a) The 'Social Contract' 23
(b) Fear of 'Subversive Voting' 26
2. Republican Justifications 28
(a) Fear of Electoral Fraud 28
(b) 'Contamination' of the Ballot Box 29
(c) Responsible Voting 30
d. Disassembling Regulatory Justifications 31
e. Penal Justifications 33
1. Introduction 33
2. Consequentialism 34
(a) Deterrence 34
(b) Incapacitation 35
(c) Rehabilitation 35
3. Retribution 36
4. 'Punishment as Communication' 39
f. The Harms of Disenfranchisement 40
1. Voting as an individual and Collective Act 40
2. Harms to Individuals 41
3. Harms to Collectives 43
g. Concluding Remarks 45

Chapter Three: Disenfranchisement Policies in Comparative Perspective - 'American Exceptionalism' in light of an Emerging Transnational Judicial Discourse 46
a. Introduction 46
b. 'American Exceptionalism' 48
1. Voting Eligibility and the Absence of a Constitutional Right-to-Vote 48
2. The Limited Constitutional Challenges to Convicts' Disenfranchisement 50
3. Historical and Social Contexts of Disenfranchisement and the Voting Rights Act 55
c. Emerging Transnational Judicial Discourse on Convicts' Disenfranchisement 60
1. The Concept of a Transnational Judicial Discourse 60
2. Analysing the Transnational Discourse on Convicts' Disenfranchisement 63
(a) The Democratic Paradigm 63
(b) Convicts as Rights-holders 67
(c) Balancing/Proportionality Analysis 69
(d) References to External Sources 75
3. Reactions to the Judgments 78
d. Concluding Remarks 79

Chapter Four: Convicts' Disenfranchisement and the Human Rights Treaty Regime 81
a. Introduction 81
b. The Right-to-Vote under the International Covenant on Civil and Political Rights: Deconstructing 'Without Unreasonable Restrictions' 85
1. Article 25 and Principles of Treaty Interpretation 85
2. *Travaux Préparatoires* 87
3. The View of the Human Rights Committee 88
4. Reservations to Article 25 91
5. The Emerging 'Right to Democratic Governance' and Dynamic Interpretation 92
6. Harmonised Interpretation 96
7. Interim Observations 98
c. The Plausibility of a Protocol Proscribing Convicts' Disenfranchisement 99
1. Opening Remarks 99
2. Voting Eligibility as the Essence of the Right-to-Vote 100
3. The Special Nature of the Right-to-Vote 104
(a) The Facilitative Role of the Right-to-Vote 104
(b) Cultural Relativity 105
(c) Deference and Margin of Appreciation 107
4. Trend-Setting Agendas of Human Rights Treaties: Learning from the Struggle to Abolish the Death Penalty 108

Conclusion 112
Bibliography 116

TABLE OF ABBREVIATIONS

BCE	Before the Common Era
CHR	The United Nations Commission on Human Rights
Death Penalty Protocol	Optional Protocol (to the ICCPR) Aiming at the Abolition of the Death Penalty
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe)
ECtHR	The European Court of Human Rights
First Additional Protocol to the ECHR	Protocol 1: Enforcement of Certain Rights and Freedoms not included in Section I of the Convention (referring to the ECHR)
GC	Grand Chamber (of the European Court of Human Rights)
HRC	Human Rights Committee (of the ICCPR)
ICCPR	International Covenant on Civil and Political Rights
NAWSA	National American Woman Suffrage Association
RPA	Representation of the People Act (UK)
RUDs	Reservations, Understandings and Declarations
SC	Supreme Court
UDHR	The Universal Declaration of Human Rights
UK	The United Kingdom of Great Britain and Northern Ireland
UN	The United Nations
US	The United States of America
VCLT or Vienna Convention	Vienna Convention on the Law of Treaties
Vienna Declaration	Vienna Declaration and Programme of Action
VRA	The Voting Rights Act 1965 (US)

TABLE OF CASES

Australia

Roach v Electoral Commissioner [2007] HCA 43	48,67,68,75,77

Canada

R v Oakes [1986] 1 SCR 103	71
Sauvé v Canada (Attorney General) [1993] 2 SCR 438	26,64,70
Sauvé (No. 2) *v Canada (Chief Electoral Officer)* [2002] 3 SCR 519	25,39,41,47,59,60,65,67 68,70,71,76,108
Solsky v The Queen [1980] 1 SCR 821	22

England and Wales

Fothergill v Monarch Airlines [1981] AC 251	87
R v Board of Visitors of Hull Prison, ex p St Germain [1978] 1 QB (CA) 425	21
R (Pearson and Martinez) v *Home Secretary* [2001] EWHC 239 (Admin)	65,102
R v Secretary of State, ex p Simms [2000] 2 AC 115	18,22
Raymond v Honey [1983] 1 AC 1	21

European Commission of Human Rights Decisions and European Court of Human Rights Judgments

Gitonas v Greece (1998) 26 EHRR 691	102
Golder v UK (1975) 1 EHRR 524	
Handyside v UK (1976) Eur. Ct. H. R. Ser A, No. 24	107
Hirst (No. 2) *v United Kingdom* (2004) 38 EHRR 40 (Chamber); (2006) 42 EHRR 41 (Grand Chamber)	48,66,68,72,73,74,76,78 108
Loizidou v Turkey (23 March 1995) Ser A, No. 310	95
M.D.U. v Italy (App no 58540/00) (28 January 2003)	46
Mathieu-Mohin and Clerfayt v Belgium (1987) 10 EHRR 20	74
Soering v UK (1989) 11 EHRR 439	69,95
Tyrer v UK (1979-80) 2 EHRR 1	41
X v Federal Republic of Germany (6 October 1966) op cit vol 18 p 244	66

Hong Kong

HCAL 82/2008 *Chan Kin Sum v Secretary of State for Justice and the Electoral Affairs commission* (8 December 2008)	74

Human Rights Committee Decisions

Pietraroia v Uruguay Comm No 44/1979 CCPR/C/OP/1 at 76 (1984)	89

Israel

HCJ 2757/96 *Alrai v Minister of the interior* PD 50(2) 18	46
HCJ 337/84 *Hokama et al v Minister of the Interior* PD 38(2) 826	46

Scotland

Smith v Electoral Registration Officer [2007] CSIH 9	79

South Africa

CCT 08/99 *August and another v Electoral Commission and others* (1999) (3) SA 1	48,64,67,75,101
CCT 03/04 *Minister of Home Affairs v National Institute for Crime Prevention* (2005) (3) SA 280	48,64,69,70,75,76
CCT 03/94 *State v Makwanyane* (1995) (3) SA 391	111

United States

Afroyim v Rusk 387 US 253 (1967)	17,54
Baker v Pataki 449 F.3d 305 (2nd Cir 2006)	59
Bush v Gore 531 US 98 (2000)	16
Carrington v Rash 380 US 89 (1965)	27
Crawford v Marion County Election Bd 128 S Ct 1610 (2008)	57
Dred Scott v Sandford 60 US 393 (1857)	11
Farrakhan v Washington 338 F.3d 1009 (9th Cir 2003)	59
Furman v Georgia 408 US 238 (1972)	37
Harper v Virginia Bd. of Elections 383 US 663 (1966)	15,16,52
Hunter v Underwood 471 US 222 (1985)	56,57
Green v Bd of Elections 380 F.2d 445 (2nd Cir 1978)	24
Gregg v Georgia 428 US 153 (1976)	111
Johnson v Bush 377 F.3d 1163 (11th Cir 2004)	59
Kramer v Union Free School District No. 15 395 US 621 (1969)	45
Legal Services v Bowen No. A120220 (Cal CA 22 January 2009)	54
McLaughlin v City of Canton 947 F. Supp. 954 (SD Miss 1995)	54
Minor v Happersett 88 US 162 (1874)	12,49
Murphy v Ramsey 114 US 15 (1885)	12
O'Brien v Skinner 414 US 524 (1973)	69
Oregon v Mitchell 400 US 112 (1970)	15
Otsuka v Hite 64 Cal.2d 596 (1966)	50
Ramirez v Brown 9 Cal.3d 199 (1973)	52
Ratliff v Beale 74 Miss 247 (1896)	55
Regents of University of California v Bakke 38 US 265 (1978)	50
Reynolds v Sims 377 US 533 (1964)	15,49,54
Richardson v Ramirez 418 US 24 (1974)	26,27,28,47,51,52
Roper v Simmons 543 US 551 (2005)	52,62
Ruffin v The Commonwealth of Virginia 62 VA (21 Gratt) 790 (1871)	21
Shepherd v Trevino 575 F.2d 1110 (5th Cir 1978)	30,54
Simmons v Galvin No 08-1569 (31 July 2009)	49
Skinner v Oklahoma 316 US 535 (1942)	50
Thornburg v Gingles 478 US 30 (1986)	58
Trop v Dulles 356 US 86 (1958)	14,15,31,32
US v Carolene Products 304 US 144 (1938)	19,53
US v Duarte-Acero 296 F.3d 1277 (11th Cir 2002)	92
Washington v State 75 Ala 582 (1884)	29
Wesberry v Sanders 376 US 1 (1964)	1
Wesley v Collins 605 F.Supp 802 [MD Tenn 1985]	58
Williams v Mississippi 170 US 213 (1898)	13
Wolff v McDonnell 418 US 539 (1974)	21

TABLE OF STATUTES

Australia

Commonwealth of Australia Constitution Act 1900	9,67
Commonwealth Electoral Act 1918	66
Commonwealth Franchise Act 1902	9

Canada

Canadian Charter of Rights and Freedoms 1982	60,64,104
Canada Elections Act 1985	64

Germany

Basic Law 1949	17,102

Iraq

Constitution of Iraq 2005	47

South Africa

Constitution of the Republic of South Africa 1996	63,69,104
Electoral Laws Amendment Act 2003	64

United Kingdom

Forfeiture Act 1870	65
Human Rights Act 1998	65
Representation of the People Act 1983	65

United States

Constitution of Alabama 1901	56
Constitution of California 1879	50
Constitution of the United States of America 1789	9,12,13,21,31,43,48,49 50,53
The National Voting Rights Act 1965	15,47
The National Voting Rights Act 1982	58
The Unanimous Declaration of the Thirteen United States of America 1776	8

TABLE OF TREATIES

Charter of the United Nations, 59 Stat 1031, UNTS 993, 3 Bevans 1153 (26 June 1945)	92
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	22,66,72
International Convention on the Elimination of All Forms of Racial Discrimination, 5 ILM 352 (opened for signature 7 March 1966, entered into force 4 January 1969)	97
International Covenant on Civil and Political Rights, 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976)	19,81,85
Optional Protocol aiming at the Abolition of the Death Penalty GA/RES/44/128 (opened for signature 15 December 1989, entered into force 11 July 1991)	83
Protocol I: Enforcement of Certain Rights and Freedoms not included in Section 1 of the Convention (Paris, 20 March 1952)	65
Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force on 1 July 2002)	84
United Nations Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990)	52
Vienna Convention on the Law of Treaties, 8 ILM 1969 (opened for signature 23 May 1969, entered into force 27 Jan 1980)	81,86,91

CHAPTER ONE:
INTRODUCTION TO CONVICTS' DISENFRANCHISEMENT - DEMOCRACY, ELECTIONS, AND THE RIGHT-TO-VOTE IN HISTORICAL PERSPECTIVE

> No right is more precious in a free society than that of having a voice in the election of those who make the laws under which as good citizens we must live. Other rights, even the most basic, are illusory if the right to vote is undermined[1]

A. Convicts' Disenfranchisement in Context

This thesis examines the appropriateness of disenfranchising convicted adult citizens from comparative and international human rights perspectives.

This chapter offers a brief historical account of democracy, elections and the right-to-vote. It explores the transition from (self-proclaimed) direct democracies, where exclusionary polity membership was employed, to (elected) representative governments,[2] and the subsequent increased importance of voting eligibility criteria. Notably, like in direct democracies, suffrage in early representative democracies was limited, based, *inter alia*, on race, gender, property, financial status, and literacy qualifications.

As the perception of voting has changed from *privilege* to *entitlement*, such qualifications were gradually removed. Today, they are no longer considered acceptable, and universal suffrage has become, to a large extent, the 'democratic ideal'.[3] Voting eligibility is commonly qualified by (only) two criteria: *community membership*

---

1 *Wesberry v Sanders* 376 US 1, 17 (1964) (Black J).

2 John Stuart Mill, *Representative Government* (1861) Ch 3 <http://eserver.org/philosophy/mill-representative-govt.txt> accessed 30 September 2009.

3 Louis Massicotte, Andre Blais and Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (University of Toronto Press, Toronto 2004) 15.

and *competence*.[4] The community membership criterion affects non-citizen residents, while competence precludes children and the mentally impaired. Considering their widespread acceptance, it is suggested that these criteria be used to scrutinise the disenfranchisement of convicts.[5]

In exploring developments in suffrage expansion, the chapter follows major events in America since its establishment. Arguably, the American case-study exhibits gradual expansion of suffrage, as well as the occasional introduction of new voting qualifications, aimed at effectively disenfranchising members of newly enfranchised groups (predominantly blacks). These included, allegedly, certain convicts' disenfranchisement policies, especially in Southern States.

Chapter Two appraises historical and contemporary justifications for the disenfranchisement of convicts. It points to a paradigm shift in the treatment of offenders, from 'civil death' to 'residual liberty': 'residual liberty' principles suggest that convicts retain all rights which are *not* taken away as an inevitable consequence of their punishment, and that infringing additional rights requires independent

---

[4] Richard Katz, *Democracy and Elections* (OUP, Oxford 1997) 232 suggests a possible third qualification, *autonomy*, namely the ability to make an independent, pressure-free decision, but notes that, in practice, it 'collapses' into competence.

[5] In the interest of perspicuity, and for lack of space, the thesis does not question the general appropriateness of these qualifications. For a survey of election laws discussing, *inter alia*, denizens and the mentally impaired, see Andre Blais, Louis Massicotte and Antoine Yoshinaka 'Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws' (2001) 20 Electoral Studies 41.

Theodora Kostakopoulou, *The Future Governance of Citizenship* (CUP, Cambridge 2008) 201 points out that some States in the Seventeenth and Eighteenth Centuries allowed 'aliens' to vote.

Beckam suggests leaving the normative issue of how inclusive the franchise should be, and employing instead a descriptive definition of democratic inclusion. He argues that his approach does not evade controversial normative issues by introducing skewed definitions, as other approaches do. According to Beckman, convicts' disenfranchisement makes suffrage less inclusive, but so does disenfranchisement of children, whether or not we approve of either. Ludvig Beckman, 'Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy' (2007) 15(1) Democratization 29, 42.

justifications. Suggesting that disenfranchisement is *not* an inevitable consequence of punishment, the thesis assesses the two types of justifications most commonly offered: *regulatory* and *penal*.

Advocates of regulatory justifications argue that temporary or permanent disenfranchisement of convicts does not undermine universal suffrage, because convicts do not meet either or both community and competence qualifications.[6] However, convicts remain citizens, arguably an indication of community membership,[7] and society considers them competent to be held criminally responsible for their actions, possibly an indication that they are also competent enough to vote. Moreover, since disenfranchisement is a direct consequence of conviction, it is questionable whether it may be viewed as non-penal.

Advocates of penal justifications suggest that disenfranchisement fulfils at least partially one or more of the commonly advocated goals of punishment, being *consequential* (deterrence, incapacitation and rehabilitation), *deontological* (retribution) or *punishment as communication*. The analysis concludes that disenfranchisement does *not* advance consequential goals, and that it may even inhibit rehabilitation. Retribution, in contradistinction, may provide a limited conceptual basis for disenfranchisement regarding offences that are directly related to democratic processes.

---

6 See eg Zdravko Planinc, 'Should Imprisoned Criminals Have a Constitutional Right to Vote' (1987) 2 Canadian J of L & Soc 153.

7 TH Marshall, *Citizenship and Social Class* (CUP, Cambridge 1950) 34 posited that citizenship is 'a status bestowed on those who are full members of a community. All those who possess the status are equal with respect to the rights and duties with which the status is endowed'.

Katz (n4) 216 argues that citizenship is the quintessential mark of community membership at the national level, and asserts that in a modern democracy, the right-to-vote is usually conterminous with citizenship.

The appropriateness of punishments depends, however, not only on their social utility, but also on their adverse effects. Hence, the harms that disenfranchisement causes individuals, the (frequently marginalised) social groups to which convicts belong, and general society, are explored. It is concluded that these harms outweigh the (retributive) justifications for imposing disenfranchisement as punishment.

Chapter Three offers comparative perspectives on contemporary challenges to disenfranchising legislation. It suggests that an identifiable global trend towards limiting or prohibiting disenfranchisement of convicts emerges, attributable, to some extent, to a transnational judicial discourse.

The chapter first explores disenfranchisement in America, where, due to unique constitutional stipulations which inhibit challenges to disenfranchisement legislation *as such*, efforts to advance enfranchisement are focused instead on the disproportionate effects disenfranchisement has on marginalised groups. The historical roots and current ramifications of mass disenfranchisement in America are explored.

Next, judgments from South Africa, Canada, Australia, and the European Court of Human Rights are examined, marking American disenfranchisement jurisprudence as a legal outlier. The non-American judgments assess the *legitimacy* of disenfranchisement. Their analysis relies on universal suffrage and residual liberty paradigms. Mirroring the conceptual framework in Chapter Two, they reject non-penal justifications as either too symbolic or inapplicable in modern democracies. The judgments assess penal justifications, applying balancing/proportionality to weigh the social benefits resulting from disenfranchisement against the harms that it causes.

Chapter Four commences by examining the human rights treaty regime's perspective. The analysis focuses on the right-to-vote under Article 25 of the International Covenant on Civil and Political Rights (ICCPR). Using interpretive methods, it is concluded that the ICCPR does not proscribe disenfranchisement policies *in toto*. Rather, like the non-American judgments, it subjects disenfranchisement policies to balancing/proportionality.

In view of the normative contentions of Chapter Two, the need to remain faithful to Article 25's stipulation, and the lack of current international consensus, the adoption of an *optional protocol* to the ICCPR proscribing convicts' disenfranchisement is advocated. Such a protocol may emulate the Optional Protocol Aiming at the Abolition of the Death Penalty.

This proposition is supported by the idea that voting eligibility constitutes the *essence* (or core) of the right-to-vote, and that, like other past punishments which are no longer considered legitimate, disenfranchisement, which infringes convicts' right-to-vote, should not be imposed under any circumstances,. Moreover, it is argued that because of the facilitative nature of the right-to-vote, heightened international standardisation thereof does not lend itself easily to cultural relativity objections which are frequently voiced regarding the universality of rights. Furthermore, notions of *deference* or *margin of appreciation* appear inapposite when the right at stake is to participate in future decision-making. Finally, analogies are drawn between the proposed protocol and the Death Penalty Protocol.

B. From Direct Democracy to Representative Government

Direct democracy developed in some Greek City-States around 500 BCE. The Assembly (*Ecclesia* in Greek) functioned as the sovereign body and as a forum for decision-making by the citizenry.[8]

Community membership was exclusive, though it was more inclusive than in other concurrent regimes. Exclusivity was both internal and external. Internally, within City-States, most adults (women, long-term resident aliens and slaves) were denied political participation. Externally, democracy did not exist among Greeks *as such* but, rather, among members of each particular polis.[9]

Democracy was criticised by Plato and Aristotle for being dysfunctional. Plato argued that some people are more intelligent and moral than others, and they ought to rule.[10] Aristotle considered *democracy* as a deviant form of rule by the many, terming the 'correct' form *polity*.[11] He asserted that, man is a 'political animal', and that to fulfill their potential, individuals must live together in political associations; that a good man must be also a good citizen; that a good polity is an association constituted by good citizens; that a good citizen possesses the quality of civic virtue; that virtue is the predisposition to seek the good of all in public matters; and that a good polity is,

---

8 Robert Sinclair, *Democracy and Participation in Athens* (CUP, Cambridge 1988) 1.

9 Robert Dahl, *Democracy and its Critics* (YUP, New haven 1989) 21-4.

10 Plato, *The Republic*, Desmond Lee (tr) (2nd edn Penguin Books, Harmondsworth 1987) Book VI.

11 Aristotle, *Politics* (350 BCE) Book III Ch 6-7 <http://classics.mit.edu/Aristotle/politics.html> accessed 30 September 2009.

Aristotle distinguished between three systems of governance without ranking them: the rule by one, the rule of a few, and the rule of the many. He suggested that each system has a 'correct' and a 'deviant' form.

therefore, one which not only reflects, but also promotes the virtues of its citizens.[12] Aristotle doubted people's nature; hence, under his model, even though the many ought to have an important role in government, their role was to be limited, and they were to be feared more than trusted to govern properly.[13]

Until the end of the Middle Ages, Western political thought assumed that, for society to be democratically run, both the State's territory and the citizen-body must be small.[14] Moreover**,** the notion of legislatures consisting of elected representatives rather than of the entire citizenry was rejected. Rousseau asserted that '[s]overeignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation.'[15]

The shift to representative government came into being as a consequence of the rise of nation-states, and the realisation that governance has to accommodate increases in population and territory sizes.[16] Modern manifestations of direct democracy, such as referenda, are unsuitable as daily governing tools.[17] Montesquieu maintained that, in a democracy, the people are sovereign, and ought to have 'the management of everything within their reach'. However, 'that which exceeds their abilities must be conducted by

---

12 Ibid Book VII.

13 Ibid.

14 Dahl (n9) 214.

15 Jean-Jacques Rousseau, *On the Social Contract*, Judith Masters (tr) (St. Martin's Press, New York 1978) Book III Chapter 15.

16 Dahl (n9) 214.

17 Katz (n4) 24.

their ministers', whom they shall choose.[18] Representative government thus requires elections, which became a defining institution of modern democracy.[19]

C. The Hurdled Road to Suffrage Expansion

Much like in Greek City-States, and despite the transition from direct democracy to representative government, political participation in the Eighteenth century was considered a privilege granted to (few) society members.[20] The United States, established in 1776, serves as a pertinent example.[21] Its Declaration of Independence ceremoniously proclaims:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed[22]

Alas, when the American Constitution was drafted, there were no universal suffrage models to draw on.[23] Consequently, despite commencing with '[w]e the People of the

---

18 Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, Thomas Nugent (tr) (Printed for J. Collingwood, London 1823) Book II Ch 2.

19 *The Federalist Papers* No 10 <http://www.foundingfathers.info/federalistpapers> accessed 30 September 2009.

The paper's author, James Madison, distinguishes between *pure* democracy, in which citizens jointly administer the State, and a *republic*, based on government by representatives, to which he refers as 'a government in which the scheme of representation takes place…a small number of citizens [are] elected by the rest; [the second difference is] the greater number of citizens and greater sphere of country over which the [republic] may be extended…'

20 Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books, New York 2000) Introduction: p XVIII.

21 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP, Cambridge, MA 1980) 90.

22 *The Unanimous Declaration of the Thirteen United States of America* (4 July 1776) <http://www.ushistory.org/declaration/document/index.htm> accessed 30 September 2009.

23 Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (OUP, Oxford 2006) 20.

United States', the Constitution did *not* guarantee a right-to-vote[24] (and does not to this day[25]). In fact, until 1868, it did not even define an American citizen.[26]

Hence, the aphorism 'the People' referred at that time to a limited part of the American people: (most) blacks, native Americans, women and property-less white males were ineligible to vote.[27] In 1790, property qualifications, which were in place in ten of the former thirteen colonies,[28] were justified on two main grounds: *first*, property owners had unique stakes in society and personal interests in State policies, especially regarding taxation. *Second*, property ownership was the best way to be freed from dependence, and have a voice in governance; the property-less could be too easily manipulated or controlled.[29] It was argued that the interests of the property-less, like those of women and of children, could be effectively represented by wise, fair minded,

---

[24] Elizabeth Hull, *The Disenfranchisement of Ex-felons* (Temple University Press, Philadelphia 2006) 81.

The Australian Constitution lacks an explicit right-to-vote as well. Interestingly, while Australia was one of the first countries to enfranchise women, the Commonwealth Franchise Act 1902 (Cth) stated that '[n]o aboriginal native of Australia, Asia, Africa or the Islands of the Pacific, except New Zealand, shall be entitled to have his name placed on an Electoral Roll.' The provision remained in force until 1961. Andrew Geddis, '"For We Are Young and Free': Australia's Electoral Law' (2004) 3(2) Election LJ 385, 387-8.

[25] Jamin Raskin, 'A Right-To-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit' (2004) 3(3) Election LJ 559.

[26] US Const Amend XIV: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside'.

American Suffrage was gradually expanded by the following amendments: Amend XV (Race and Colour); Amend XIX (Gender); Amend XXIV (Poll tax); Amend XXVI (eligibility of over 18 year-olds).

[27] Keyssar (n20) 2.

[28] Richard Bensel, *The American Ballot Box in the Mid-Nineteenth Century* (CUP, Cambridge 2004).

[29] Keyssar (n20) 5.

endowed white men.[30] Women, aside from their (economic) dependence on men, were considered too delicate for the worldly experiences necessary for engagements in politics. Often, it was argued that women were not inferior, but *different,* and hence suited to separate spheres of life.[31] Non-whites were excluded due to their alleged intellectual 'inferiority', which supposedly rendered them incompetent to vote.[32] Paupers (recipients of public relief from their communities or from the State) were thought to have surrendered their independence.[33] Keyssar suggests that such qualifications were often veiled excuses to purge the electoral rolls of particular groups, based on their supposed political preferences, since voting, unlike other legal acts, cannot be exercised by guardians.[34] This agenda was made evident, to some extent, by the contradictory arguments that were made against enfranchising the poor, suggesting simultaneously that they lack independence, and that they will vote to hurt the interests of property owners and advance their own.[35]

Some argued that the right-to-vote has to be 'earned' by paying taxes, serving in the military, or labouring on public roads: '[t]hose who bear the burdens of the state should choose those that rule it'.[36] However, Keyssar points to inconsistency in the application of the 'stakeholder principle', since women were excluded from the franchise

30 Michael Levin, *The Spectre of Democracy: The Rise of Modern Democracy as Seen by its Critics* (Macmillan, Basingstoke 1992) 45.

31 *Keyssar* (n20) 175.

32 Eric Foner, *Reconstruction, America's Unfinished Revolution 1863-1877* (Harper & Row, New York 1988) 278.

33 Keyssar (n20) 54.

34 Katz (n4) 232.

35 Keyssar (n20) 11.

36 Ibid 44.

despite paying taxes.[37] The reluctance to extend suffrage was evidenced by the fact that from 1819 until the American Civil War, every new American State precluded non-whites from voting; only five States, where four percent of the (free) black population resided permitted blacks to vote.[38] Moreover, between 1840 and 1865, all sixteen States which adopted statutes disenfranchising convicts did so *after* eliminating property qualifications, thereby circumscribing the effects of enfranchisement.[39]

The notion that community membership does not guarantee a right-to-vote was endorsed by the American Supreme Court (SC) in its infamous *Dred Scott*[40] judgment:

> [a] person may be a citizen and entitled to that character although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote…undoubtedly, a person may be a citizen, that is a member of the community which forms the sovereignty, although he exercises no share of the political power...Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote….those who have not the necessary qualification cannot vote….yet they are citizens[41]

The Civil War reshaped the suffrage debate. In the North, blacks fought and died to preserve the Union. In the South, abolition of slavery freed four million men and women. Southern and Northern blacks saw enfranchisement not only as self-protection, but also as a symbol and an expression of their new standing in American society.[42]

---

37 Ibid.

38 Roger Smith, *Civic Ideals: Conflicting Visions of Citizenship in United States History* (YUP, New Haven 1997) 263.

39 Locked Out (n23) 53.

40 *Dred Scott v Sandford* 60 US 393 (1857).

41 Ibid 405-6 (Taney CJ).

42 Foner (n32) 60.

Alas, successful efforts to enfranchise blacks, culminating in the passage of the Fifteenth Amendment,[43] turned into a double-edged sword for female enfranchisement efforts,[44] since the word 'male' was used to qualify the amendment's scope, arguably to enable its adoption.[45] The SC rejected claims that as equal citizens, women have a right-to-vote under the Fourteenth Amendment, just like their male counterparts, holding that:

> The right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that amendment does not add to these privileges and immunities. It simply furnishes additional guaranty for the protection of such as the citizen already had…[a]t the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the States; nor was it at the time of the adoption of the Constitution[46]

Indeed, as late as 1885, the SC held that '[i]t would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote'.[47] Keyssar suggests that, at that time, treating suffrage as a right was considered opening up a Pandora's Box, since 'once it was acknowledged that people had a right to vote, it would be difficult to deny suffrage to anyone'.[48]

Thus, an unsuccessful attempt in 1887 to pass an amendment enfranchising women led female suffragists to change their tactics and argue that it was morally and practically wrong to enfranchise 'ignorant' blacks while barring 'educated' white

---

43 US Const Amend XV.

44 Keyssar (n20) 101. The American women suffrage movement was initiated in 1848 at the Woman's Rights Convention in Seneca Falls, New York. Linda Kirk, 'Exclusion to Emancipation: A comparative analysis of Women's Citizenship in Australia and the United States 1869-1921' (1995) 97 WVa L Rev 725.

45 Foner (n32) 241-42.

46 *Minor v Happersett* 88 US 21 Wall 162, 171 (1874).

47 *Murphy v Ramsey* 114 US 15, 43 (1885).

48 Keyssar (n20) 13.

women. The 1903 National American Woman Suffrage Association (NAWSA) meeting saw suggestions that 'Anglo-Saxon women' were 'the medium through which to retain the supremacy of the white race over the African'.[49] However, the failure of six referenda on female suffrage led the NAWSA in 1909 to formally reverse its endorsement of literacy tests.[50]

Meanwhile, in some Southern States, literacy tests (requiring voters to demonstrate they could understand and interpret the Constitution), a two-dollar poll tax (prohibitively high at the time), and lengthened residency requirements were adopted, allegedly, to effectively disenfranchise black voters. That may have also been the motive behind alteration of convicts' disenfranchisement laws (a phenomenon that will be explored in Chapter Three).[51] The SC dismissed constitutional challenges to such practices, holding that such provisions are not facially discriminatory.[52]

Calls for female enfranchisement regained popularity during the First World War as a consequence of the role women played on the home front. The then President Woodrow Wilson supported female suffrage and, in January 1918, the House of Representatives passed the Nineteenth Amendment. It came into force in August 1920 after Senate ratification.[53]

---

[49] Ibid 126.

[50] Ibid 197-9.

[51] Andrew Shapiro, 'Challenging Disenfranchisement under the Voting Rights Act: a New Strategy' (1993) 103 Yale LJ 537.

[52] See eg *Williams v Mississippi* 170 US 213 (1898).

In 1920, there were nearly five million illiterate Americans, making up roughly eight percent of the voting age population. The impact of literacy tests bans was hence significant. Keyssar (n20) 144.

[53] US Const Amend XIX.

Between the two world wars, there was no significant pressure for further suffrage expansion. The Second World War's goals (outlined in the Atlantic Charter[54]), including restoration of European democracy, along with the fact that one million blacks fought in American forces spawned popular embrace of democratic values.[55] In 1946, the then President Harry Truman established a National Committee on Civil Rights which published a report proposing to abolish poll taxes, protect the right of 'qualified persons' to participate in federal elections, and bar discrimination based on race, colour or any other unreasonable classification in State and Federal elections.[56] Nevertheless, for a decade following the report, the federal government did little to end racial discrimination in voting.[57]

Meanwhile, *legal* perceptions of citizenship and voting have ostensibly changed. The SC revisited its *Dred Scott* and *Minor* judgments, holding in *Trop v Dulles*[58] that citizenship

> [i]s not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and wellbeing of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But...[C]itizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its

54 <http://avalon.law.yale.edu/wwii/atlantic.asp> accessed 30 September 2009.

55 Keyssar (n20) 215 points to the significant role wars have played in extending suffrage: substantial expansions followed America's War of Independence, the Civil War and the two World Wars.

56 <http://www.trumanlibrary.org/hstpaper/pccr.htm> accessed 30 September 2009.

57 Steven Lawson, *Running for Freedom*: *Civil Rights and Black Politics in White America, 1941-1988* (Temple University Press, Philadelphia 1991) 33-39.

58 356 US 86 (1958).

> displeasure at a citizen's conduct, however reprehensible that conduct may be[59]

Voting was now considered 'fundamental':

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized[60]

On the legislative level, while attempts to pass a constitutional amendment 'to establish a free and universal franchise throughout the United States'[61] failed, in 1965 Congress passed the Voting Rights Act (VRA).[62] The VRA suspended State literacy tests and 'good character' qualifications in States and counties where fewer than fifty percent of adults voted in the 1964 elections. Consequently, within a few years, roughly one million new voters registered in the American South, with black registration reaching a record sixty-two percent.[63]

Remnants of resistance to notions of inclusive suffrage were present in the dissenting opinion in *Harper v Virginia*,[64] where the SC declared unconstitutional the Virginia poll tax. Stewart J posited that:

> property qualifications and poll taxes have been a traditional part of our political structure…over the years these and other restrictions were

---

59 Ibid 92-3.

60 *Reynolds v Sims* 377 US 533, 561-2 (1964).

61 Ely (n21) 74.

62 The National Voting Rights Act of 1965, 42 USC §1973–1973aa-6.

63 Lawson (n57) 115-6.

When the VRA, initially in force for five years, was renewed in 1970, the literacy test ban was extended to all States, and upheld in *Oregon v Mitchell* 400 US 112 (1970).

64 383 US 663 (1966).

> gradually lifted, primarily because popular theories of political representation had changed…whether one agrees or not, arguments have been and still can be made in favor of them[65]

Nevertheless, it is suggested that from the 1960s onwards, the pendulum swung towards universal suffrage, notwithstanding the fact that the American Constitution still lacks an explicit right-to-vote.[66]

The American case-study demonstrates that the road to universal suffrage was paved with resistance to further enfranchisement, as well as with occasional attempts to counter its effects by introducing new voting qualifications. Horwitz suggests that we should not view democracy as a static condition or as a fixed set of rules and institutions but, rather, 'as a project'.[67] At the beginning of the Twenty-First Century, it looks like the project has almost reached its successful completion: race, gender, financial, literacy and similar qualifications are no longer considered acceptable barriers to suffrage. Democracy and elections are globally practised, premised on the maxim that 'ordinary' people are, in general, qualified to govern themselves.[68] Consequently, almost all mentally competent adult citizens are legally entitled to vote in elections.

Almost, that is, since in some States, adult citizens convicted of (certain) criminal offences are disenfranchised, for periods ranging from months to *life*. Against the backdrop of a modern-day view of democracy premised on universal suffrage, the thesis examines the appropriateness of convicts' disenfranchisement.

---

65 Ibid 684.

66 Affirmed in *Bush v Gore* 531 US 98, 104 (2000).

67 Mortion Horwitz, *The Transformation of American Law, 1870-1960* (OUP, Oxford 1992) 255-58, as quoted by *Keyssar* (n20) 323.

68 Dahl (n9) 97.

CHAPTER TWO:
CONVICTS' DISENFRANCHISEMENT – NORMATIVE APPRAISAL

A. Introduction

The first chapter followed the transformation from direct democracy to representative government, and the change in perception that voting has undergone from being seen as *privilege,* granted to a handful (so-called 'virtuous') community members, to being viewed as an *entitlement,* guaranteed to almost all mentally competent adult citizens. The disenfranchisement of convicted[1] adult citizens is appraised against this background. Two assumptions are made in the sequel: First, that convicts remain *citizens*.[2] Second, that *conviction* is the basis for convicts' disenfranchisement; they would otherwise remain eligible voters.

The analysis commences by exploring 'civil death' and similar notions of forfeiture of rights which were commonly employed until relatively recently to justify civil implications of convictions for some offences, including disenfranchisement.

---

[1] Disenfranchisement takes different forms across jurisdictions, but is most commonly linked to incarceration. Incarcerated convicts are housed either in secure facilities such as jails, prisons or penitentiaries or in community facilities that they must return to every evening. Less frequently, disenfranchisement is imposed on individuals on probation (court-imposed criminal sentences that, subject to conditions, release convicted persons instead of sentencing them to incarceration), on parole (the release of prisoners before their full sentence has been served) or on persons who have completed their sentence (the latter for periods ranging from years to *life*). David Mitchell, 'Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community' (2007) 34 Fordham Urban LJ 833, 835.

Most scholars and judgments address only the disenfranchisement of *incarcerated* convicts; indeed, some common justifications for the practice are applicable *only* to incarceration. Nevertheless, in the interest of comprehensiveness, this chapter assesses also arguments which are not contingent on incarceration.

[2] Many States proscribe involuntary revocation of citizenship. In *Afroyim v Rusk* 387 US 253 (1967), the American Supreme Court held that Congress has no general power to involuntarily revoke citizenship. Most other States allow involuntary revocation of citizenship only in very rare cases, and condition it upon not rendering the person Stateless. See eg Article 16 of the German Basic Law 1949.

It is contended that theories of forfeiture of convicts' rights are no longer defensible considering current perceptions of universal suffrage and of convicts as rights-holders. Applying Lazarus' 'key distinction' between *personal* and *residual* liberty (particularly pertinent regarding incarcerated convicts), it is submitted that since disenfranchisement is not an 'inevitable consequence of lawful detention'[3] (unlike, for example, freedom of movement), its imposition, even in cases of incarceration, requires independent justifications of either *regulatory* or *penal* nature.

Regulatory justifications treat disenfranchisement as a voting eligibility issue, and maintain that excluding convicts is done in the interest of the democratic process. Penal justifications, in contradistinction, suggest that disenfranchisement serves one or more of the goals of punishment.[4] The analysis that follows concludes that, like 'civil death', regulatory justifications are inapplicable in modern-day democracies, and that disenfranchisement ought to be classified as a form of punishment. As such, it does not fulfill any of the consequentialist goals of punishment nor does it achieve the purposes of the 'punishment as communication' theory. Moreover, while in principle, any punishment can be potentially considered as retributive, it seems that commonly practised threshold-based disenfranchisement policies fail to satisfy two main retributive sentencing requirements, individualisation and proportionality. Retribution can, at best, provide a conceptual basis for disenfranchising individuals convicted of either electoral offences or of offences against the democratic process.[5]

---

3 *R v Secretary of State, ex p Simms* [2000] AC 115 (Lord Stein).

4 Bonnin argues that there is no satisfactory solution to 'the problem of punishment' and advocates imposing instead compulsory victim restitution. David Bonnin, *The Problem of Punishment* (CUP, Cambridge 2008) 17. The thesis examines the compatibility of disenfranchisement with common goals of punishment without questioning their general appropriateness.

5 Ironically, in many States where disenfranchisement is practised, electoral-related offences such as buying votes, fraud, vote tampering, or electioneering are considered misdemeanours, and are

However, even in such cases when disenfranchisement arguably satisfies retributive goals, it is widely accepted that imposition of punishments should be subject to limitations: certain punishments cause grave harms which justify proscribing their use. For instance, even if it can be shown that torture satisfies deterrence or other penal goals, its infliction is almost universally prohibited.[6]

It is argued below that depriving citizens of the right-to-vote, a fundamental right they previously possessed, degrades them to a lower status than fellow citizens, making them politically unequal. Moreover, due to the nature of voting, disenfranchisement harms not only individuals but also marginalised groups which are over-represented amongst the disenfranchised. Disenfranchising individuals from such groups potentially exacerbates their existing feelings of alienation and distrust of governing institutions.

Collectively, disenfranchisement may skew political processes by distorting group representation. It also ignores the fact that convicts have stakes in penal policies. *Prisoners* are a particularly unpopular 'discrete and insular'[7] minority for whom political participation is pertinent, since their interests are unlikely to be advanced by others. Moreover, disenfranchisement appears to be paradigmatic of the 'ins' excluding the 'outs' from the political game. Chapter Three demonstrates how disenfranchisement was, allegedly, used to reduce the political influence of groups.[8]

---

hence non-disenfranchising. Keesha Middlemass, 'Rehabilitated But Not Fit to Vote: A Comparative Racial Analysis of Disenfranchisement Laws' (2006) 8(2) Souls 22, 27-8.

[6] Article 7 of the International Covenant on Civil and Political Rights states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) (16 December 1966).

[7] *United States v Carolene Products* 304 US 144, 152 n4 (1938)

[8] John Hart Ely, *Democracy and Distrust*: *A Theory of Judicial Review* (HUP, Cambridge MA 1980) 121.

It is thus concluded that the tangible and symbolic harms that disenfranchisement causes outweigh its contestable social benefits.

B. Convicts' Rights: From 'Civil Death' to 'Residual Liberty'

In Athens and Rome, disenfranchising convicts was considered to be political banishment. It could have been exerted only on individuals who, as the (few) honourable members of the polity, possessed political rights prior to their conviction; individuals who were not considered honourable could not have been dishonoured.[9] In Greece, *Atimia* carried loss of many citizenship rights, including voting. In Rome, the principal penalties attached to *Infamia* were loss of suffrage and the right to serve in legions.[10]

In medieval European societies, individuals were considered as subjects, rather than citizens, and did not possess political rights. For them, conviction for 'infamous crimes' or crimes of 'moral turpitude'[11] meant being declared 'civilly dead',[12] namely losing their civil rights, expelled from the community, and deprived of society's protection, since anyone could kill them with impunity.[13] In England, a *bill of attainder* was imposed on those convicted of felony or treason, carrying three penalties: forfeiture (confiscation of goods), corruption of the blood (rendering the

[9] Katherine Pettus, *Felony Disenfranchisement in the Contemporary United States: An Ancient Practice in a Modern Polity* (PhD thesis Columbia University, New York 2002) 35.

[10] Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (OUP, Oxford 2006) 22.

[11] Alec Ewald, '"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States' (2002) 2002 Wisconsin L Rev 1045.

[12] Howard Itzkovitz and Lauren Oldak, 'Restoring the Ex-Offender's Right to Vote: Background and Developments' (1972-1973) 11 Am Crim L Rev 721, 723 n11.

[13] Pettus (n9) 51.

convict unfit to inherit, possess or divide his estate), and 'civil death'.[14] The American Constitution prohibited forfeiture and corruption of the blood but did not proscribe 'civil death'.[15] By 1821, eleven US State Constitutions disenfranchised convicted felons or authorised their legislatures to do so.

In 1871, the Virginia Supreme Court held that '[t]he Bill of Rights is a declaration of general principles to govern a society of freemen…convicted felons and men civilly dead…are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land.'[16] Conversely, in 1974, the American Supreme Court (SC) held that there is 'no iron curtain drawn between the Constitution and the prisons of this country', and that although prisoners lose some rights, they retain all rights which do not conflict with legitimate penological goals.[17] Concurrent changes in perception occurred in Britain, where Lord Shaw stated that '[t]he prisoner's rights are retained except when taken away expressly or by necessary implication of the fact of imprisonment',[18] and Lord Wilberforce maintained that '[u]nder English law, a convicted prisoner, in spite of his imprisonment, retains all the civil rights which are not taken away expressly or by necessary implication'.[19]

---

14 Bailey Figler, 'A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement' (2006) 61 NYU Ann Survey of Intl L 723, 728.

15 US Const Art III §3.

16 *Ruffin v Commonwealth of Virginia* 62 VA (21 Gratt) 790, 796 (1871).

17 *Wolff v McDonnell* 418 US 539,555-6 (1974).

18 *R v Board of Visitors of Hull Prison, ex p St Germain* [1978] 1 QB (CA) 425,455.

19 *Raymond v Honey* [1983] 1 AC 1,10.

Similarly, the Canadian SC held that '[a] person confined to prison retains all of his civil rights other than those expressly or impliedly taken from him in law',[20] and the European Court of Human Rights ruled that restricting prisoners' rights had to withstand the European Convention's[21] proportionality requirements.[22]

These judgments reflect an acknowledgement that the deprivation of liberty does not entail revocation of all (other) rights.[23] According to Lazarus, we should reject the view that offenders' liberty, along with the rest of their rights, is removed in its entirety when the custodial sentence is passed, since such an approach contradicts fundamental principles of human rights, legality and proportionality. Quoting Paterson's dictum that 'prisoners are sent to prisons as punishment and not for punishment',[24] she offers a 'key distinction' between limitations on *personal* liberty and on rights which result from custodial sanction, or are an inevitable consequence thereof,[25] and limitations on *residual* liberty and on rights which result from the administration of prisons.[26]

It is thus suggested that 'civil death' has given way to 'residual liberty'. Moreover, disenfranchisement is *not* an inevitable consequence of custodial sentences

---

20 *Solsky v The Queen* [1980] 1 SCR 821, 839 (Dickson J).

21 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (ECHR).

22 Liora Lazarus, *Contrasting Prisoners Rights: A Comparative Examination of England and Germany* (OUP, Oxford 2004) 194, referring to *Golder v UK* (1975) 1 EHRR 524 para 45.

23 David Garland, 'Forward' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens*: *Human Rights in Australian Prisons* (The Federation Press, Sydney 2002).

24 Liora Lazarus, 'Conceptions of Liberty Deprivation' (2006) 69(5) MLR 738, 742 n28.

25 *Simms* (n3).

26 Lazarus (n24) 744.

or *a fortiori* of non-custodial ones. Since incarcerated convicts can vote by postal ballots or mobile booths, their enfranchisement does not adversely affect prison authorities, guards or other prisoners.[27] Britain's head of prison service stated that allowing prisoners to vote 'poses no problems at all',[28] and evidence from Maine and Vermont, the only American States which enfranchise prisoners, supports this contention.[29] Consequently, it is submitted that disenfranchisement requires independent justifications of either regulatory or penal nature.

C. Regulatory Justifications (Liberal and Republican)

(1) Liberal Justifications

The liberal view of politics sees the State as a facilitative institution that ought to leave individuals enough latitude to choose their own ends.[30] Voting allows individuals and social groups to express preferences. Liberal advocates of disenfranchisement see it as society's reaction to breaches of the 'social contract' and as a way to confront fear of 'subversive voting'.

(a) The 'Social Contract'

Rousseau argued that the 'social compact...tacitly includes the undertaking...that whoever refuses to obey the general will shall be compelled to do so by the whole

---

27 Rudolph Alexander, 'A Curious Legal Anomaly: Female Inmates Could Have the Right to Vote - But Not Male Inmates' (1991) 5(4) Crim Justice Pol Rev 335, 343.

28 <http://www.prisonrefromtrust.org.U.K./news-pr12.html> accessed 30 September 2009.

29 Locked Out (n10) 231.

30 Ewald (n11) 1050.

body'.[31] He claimed that '[e]very offender…becomes through his crimes a rebel and a traitor to his homeland; he ceases to be one of its members by violating its laws.'[32] In contradistinction, most modern-day liberal advocates of disenfranchisement do not suggest that convicts are no longer members of society. Rather, they claim that '[a] man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.'[33]

Nonetheless, Locke famously maintained that '[a] man...cannot...enslave himself to anyone nor put himself under the absolute, arbitrary power of another'.[34] Arguably, in modern terminology, this assertion implies that prior to entering the social contract individuals possess fundamental rights and liberties which allow them to bargain freely, while they cannot be freely bargained away.[35] One such right may be thought to be participation in public affairs.

It is also contestable whether, under a Rawlsian 'veil of ignorance', individuals would choose a principle of justice according to which violations of the social contract would result in wholesale nullification of their standing in society.[36] Guttman

---

31 Jean-Jacques Rousseau, *On the Social Contract*, Judith Masters (tr) (St. Martin's Press, New York 1978) Ch I.7, 55.

32 Ibid Ch II.5, 65.

33 *Green v Bd of Elections* 380 F.2d 445 para 9 (Friendly J).

34 John Locke, *The Second Treatise of Civil Government* (Blackwell, Oxford 1946) Section 23.

35 Lawrence Tribe, 'The Disenfranchisement of Ex-Felons: Citizenship, Criminality and the Purity of the Ballot Box' (1998-9) 102 Harv L Rev 1300, 1304.

36 Michael Cholbi, 'A Felon's Right to Vote' (2002) 21 L and Phil 543, 552-3.

maintains that by enduring punishment, convicts 'pay damages' for breaching the contract, thereby retaining, rather than severing, their societal membership.[37]

Contractarian justifications often seem arbitrary when they are used to support disenfranchisement of some, rather than all, law breakers. For instance, even if the type and gravity of crime are relevant factors for determining appropriate punishments,[38] it is questionable why, if law-abidance is a voting qualification, traffic law violators should be exempt from disenfranchisement due to the pettiness of their crime or the non-imposition of incarceration as punishment.[39]

Fundamentally, the legitimacy of punishments depends on the legitimacy of political processes that produce and enforce criminal law which, in turn, depends on citizens' ability to participate equally in choosing representatives who decide which behaviour to outlaw, which individuals to prosecute, and which punishments to impose.[40] Indeed, '[i]f we accept that governmental power in a democracy flows from citizens, it is difficult to see how that power can be used to disenfranchise the very citizens from whom the government's power flows.'[41]

---

37 Daniel Guttman, 'Before the High Court' (2007) 29 Sydney L Rev 297, 318.

38 Jason Schall, 'Consistency of Felon Disenfranchisement with Citizenship Theory' (2006) 22 Harv Blackletter LJ 53, 80.

39 Heather Lardy, 'Prisoner Disenfranchisement: Constitutional Rights and Wrongs' [2002] PL 524, 530.

40 Pamela Karlan, 'Convictions and Doubts: Retribution, Representation and the Debate over Felon Disenfranchisement' (2003-2004) 56 Stan L Rev 1147, 1169; John Rawls, *A Theory of Justice* (Belknap Press, Cambridge MA 2005) 221-2.

41 *Sauvé* (No 2) *v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 544 (McLaghlin CJ).

While it could be argued that transients are also subject to society's laws without being able to influence them, there is a qualitative difference: transients are (in most cases) part of another social contract elsewhere, in which they can partake if they wish, whereas disenfranchised convicts are deprived of their only source of political participation.

(b) Fear of 'Subversive Voting'

The second common liberal justification of disenfranchisement is a fear that convicts might vote in a manner 'subversive of the interests of an orderly society'.[42] According to Hampton, since we would not allow someone who wishes to destroy the State or undermine its values to participate in its governing process, we should not allow convicts to vote.[43] Lippke offers a slightly softer version of the argument, suggesting that *certain* crimes are direct assaults on democratic forms of political organisations, and those who commit them should be denied opportunities to determine who occupies official roles in such organisations.[44]

However, arguably, only negligible number of convicts hope to bring about the State's demise by voting, and '[i]t is fair to assume that we abandoned the notion that the electorate should be restricted to a "decent and responsible citizenry"...in favour of a pluralistic electorate which could well include enemies of the State."[45]

---

42 *Richardson v Ramirez* 418 US 24, 81 (Marshall J, dissenting).

43 Jean Hampton, 'Punishment, Feminism and Political Identity' (1998) 11 Can JL & Juris 23, 41.

44 Richard Lippke, 'Toward a Theory of Prisoners' Rights' (2002) 15(2) Ratio Juris 122, 123.

45 *Sauvé v Canada* (Attorney General) [1992] 89 DLR (4th) 644, 650-51.

Disenfranchisement advocates also posit that convicts could vote *en bloc* for 'soft on crime' candidates. However, convicts do not necessarily vote based on candidates' position on penal issues, and if they do, their views are not necessarily laxer than those of the general population.[46] Moreover, even if convicts back lenient candidates, such candidates still have to muster enough general support, since convicts' votes are unlikely to suffice.[47]

More fundamentally, if convicts wish to initiate penal reform, for example repeal a prohibition on recreational use of drugs, disenfranchising them on these grounds allows '[a] temporal majority [to] use...power to preserve its view of the social order simply by disenfranchising those with different views.'[48] The American SC invalidated legislation which disenfranchised military personnel because of their projected voting patterns, holding that '[f]encing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.'[49] While the State is justified in protecting road users by suspending or revoking licences of dangerous drivers, its neutrality suggests it should refrain from 'protecting' the public from those who allegedly hold 'subversive' views by disenfranchising them.[50]

---

46 Tribe (n35) 1302-3.

47 Saul Brenner and Nicholas Caste, 'Granting the Suffrage to Felons in Prison' (2003) 34(2) J of Soc Phil 228, 237.

48 *Richardson* (n42) 82-3 (Marshall J, dissenting).

49 *Carrington v Rash* 380 US 89, 94 (1965).

50 ACLU, *Out of Step with the World: An Analysis of Felony Disfranchisement in the United States and Other Democracies* (Washington DC 2006).

It is submitted that these liberal justifications for disenfranchisement are incompatible with two principles of liberal democracy, political equality in decision-making and State neutrality.

(2) Republican Justifications

Republicans believe that in addition to expressing preferences, voting is also about protecting the body politic from corruption, immorality, and untrustworthy behaviour.[51] Hence, voters should be *morally* competent and desire the common good.[52] Disenfranchisement supporters fear that convicts are more likely to commit electoral fraud, that their votes may 'contaminate' the ballot box, and that they are not responsible voters.

(a) Fear of Electoral Fraud

Disenfranchisement advocates contend that convicts exhibit a higher propensity to commit electoral fraud and should thus be prevented from voting. However, no correlation has been proven between committing non-electoral offences and having a propensity to commit electoral offences.[53] Moreover, electoral fraud can be prevented by less restrictive means like better surveillance.[54] In fact, due to heightened surveillance, prisons may be one of the *least* likely places for commission of electoral offences.

---

51 Ewald (n11) 1088.

52 Schall (n38) 86.

53 Mandeep Dhami, 'Prisoner Disenfranchisement Policy: A Threat to Democracy?' (2005) 5(1) Analyses of Social Issues and Public Policy 235, 239.

54 *Richardson* (n42) 80 (Marshall J, dissenting).

(b) ‘Contamination’ of the Ballot Box

In 1884, the Alabama Supreme Court held that it is the State's responsibility to 'preserve the purity of the ballot box, which is the only sure foundation against the invasion of corruption, just as much as against that of ignorance, incapacity or tyranny.'[55] Manfredi asserts that there is a correlation between criminal behaviour and negative character traits (impulsiveness and lack of empathy) which undermine democracy's health and justify disenfranchisement.[56] In contradistinction, Reiman argues that those concerned about convicts’ civic virtue should *encourage* convicts to vote in order to enhance it.[57]

Fundamentally, the ‘contamination’ argument appears contestable against the backdrop of universal suffrage. Voters have diverse personal traits, and their right-to-vote is premised on political equality rather than on particular moral virtues.[58] It can also be questioned whether *all* convicts are less virtuous that *all* non-convicts, as republican justifications imply. Tribe argues that to project criminality as an evil which, if not rooted out, will ‘contaminate’ the entire body politic, is to advance an exaggerated notion of how different convicts really are from fellow citizens.[59]

---

55 *Washington v State* 75 Ala 582,585 (1884).

56 Christopher Manfredi, 'Judicial Review and Criminal Disenfranchisement in the United States and Canada' (1998) 60(2) The Review of Politics 302.

57 See generally Jeffrey Reiman, 'Liberal and Republican Arguments against Felon Disenfranchisement' (2005) Criminal Justice Ethics 3.

58 Lardy (n39) 532-3.

59 Tribe (n35) 1313.

(c) Responsible Voting

Deigh argues that when citizens vote, they act as legislators. By committing crimes, they fail to fulfill the responsibilities attached to their being legislators, and they are hence unfit to remain ones.[60] However, it is unclear why incompetence in one aspect of citizenship, obeying the law, implies incompetence in other aspects, like voting or legislating.[61]

More candidly, some suggest that convicts 'like insane persons have raised questions about their ability to vote responsibly'[62] or that 'criminals who break laws cannot govern themselves and hence are not fit to govern others'.[63] However, other competence-based restrictions on minors and the mentally impaired assume that such persons lack the minimal level of maturity and ability that is necessary to comprehend *the act of voting*.[64] Conviction does not imply that convicts lack maturity or ability to understand what *voting* means.[65]

Moreover, while determining the precise voting age is inevitably arbitrary, minors will *automatically* gain voting rights when they reach that age. Until then, they have guardians who are responsible for their wellbeing and perform acts on their

60 John Deigh, 'On Rights and Responsibilities' (1988) 7 Law and Philosophy 147, 158.

61 Cholbi (n36) 561.

62 *Shepherd v Trevino* 575 F.2d 1110, 1115 (5th Cir 1978).

63 Zdravko Planinc, 'Should Imprisoned Criminals Have a Right to Vote' (1987) 2 Can JL & Society 153, 160.

64 Reiman (n57) 9.

65 Greame Orr, 'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners' (1998) 26 Fed L Rev 55, 59.

behalf. They are hence regarded as provisional members of the political community.[66] Contrarily, convicts are full members of their political communities prior to conviction who are assumed to be competent enough to be held criminally responsible. Convicts are not assigned guardians even if they are imprisoned. It seems that society assumes that convicts do *not* lack competence.

It is submitted that since in modern societies, the qualifications for suffrage are community membership and competence, rather than moral virtuousness, republican justifications are implausible.

D. Disassembling Regulatory Justifications

It is argued below that regulatory justifications can be seen as a form of benign 'civil death', and that disenfranchisement, resulting from criminal conviction, should not be seen merely as a voting qualification, but also as a State-imposed punishment.

The American SC in *Trop v Dulles*[67] invalidated a statute stripping some convicts of their citizenship, treating it as a 'cruel and unusual punishment'.[68] It maintained that the 'evident purpose of the legislature' will determine whether a provision is regulatory or penal: the provision is regulatory if it 'imposes a disability not to punish but to accomplish other legitimate governmental purpose'.[69]

---

66 Lardy (n39) 527-8

67 356 US 86 (1958), referring to US Const Amend VIII: '[N]or cruel and unusual punishments inflicted.'

68 Ibid 92.

69 Ibid 96.

In *obiter,* the SC posited that because the purpose of disenfranchisement provisions is to designate reasonable grounds of eligibility for voting, such laws are regulatory.[70]

Indeed, in States like the US and the UK, disenfranchisement technically forms part of electoral rather than penal law. It is imposed as an automatic consequence of conviction for certain offences rather than prescribed in sentences.[71] By contrast, in European States where individualised disenfranchisement is sanctioned, courts treat disenfranchisement as a punishment.[72]

Nonetheless, it is submitted that legislative choice of form should not determine whether disenfranchisement is regulatory or penal. Indeed, '[h]ow simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them'.[73]

Cholbi defines punishment as loss, deprivation, or suffering directly imposed by the State or judicial authority as a consequence of criminally unlawful behaviour,[74] and Karlan asserts that if good character, intelligent use of the ballot, and support for existing laws are not generally permissible prerequisites for voting but invoked only to disenfranchise convicts, disenfranchisement is punitive.[75] It is posited that

---

70 Ibid 96-7.

71 Afi Johnson-Parri, 'Felon Disenfranchisement: The Unconscionable Social Contract Breached' (2003) 89 Va L Rev 109,132.

72 Lardy (n39) 525-6.

73 Trop (n67) 94.

74 Cholbi (n36) 544.

75 Karlan (n40) 1154.

disenfranchisement *is* an (additional) punishment imposed on convicts, and that the concurrent determinations by the American SC that revocation of an individual's citizenship is punitive, while the deprivation of voting, a fundamental right attached to citizenship, is regulatory, when both result from criminal conviction, seem unpersuasive.

Deigh seems to treat disenfranchisement as a regulatory measure in order to address the otherwise unequal treatment eligible (citizens) and ineligible (non-citizens) receive for similar offences: only the former are disenfranchised.[76] However, rather than support the classification of disenfranchisement as regulatory, unequal treatment by the criminal justice system may raise doubts as to the appropriateness of disenfranchisement as a punishment, to which this chapter now turns.

E. Penal Justifications

(1) Introduction

Penal justifications treat disenfranchisement as a form of punishment. Lardy argues that, imposing disenfranchisement confuses the moral authority of communities to punish with their authority to determine communal membership. She suggests that convicts' community membership is what subjects them to the community's moral authority to punish and that by expelling them from the community for their misdeeds, disenfranchisement places convicts outside the community's moral authority.[77] The following analysis assesses the compatibility of disenfranchisement

[76] Deigh (n60) n17.

[77] Lardy (n39) 527-8.

with penal justifications assuming, *arguendo*, that Lardy's principled objection has been addressed.

(2) Consequentialism

Consequentialist, forward-looking justifications view punishment as cost-effective means to achieving a public good, the prevention of crime, by deterrence, incapacitation or rehabilitation.[78] While, under consequentialism, the 'general justifying aim' of punishment lies in its beneficial societal effects,[79] the generally accepted *side-constrained* consequentialism bars deliberate punishment of innocents, as well as excessive punishment of the guilty beyond the level required to bring them into conformity with the law.[80]

(a) Deterrence

The individual (inhibiting convicts from repeating their offences) and collective (inhibiting potential criminals from committing similar offences) deterring forces of disenfranchisement are questionable, considering that statistics show that jurisdictions which disenfranchise convicts do not have lower crime rates than jurisdictions which do not.[81] This may be partially attributable to the fact, discussed earlier, that it is

---

Support for Lardy's argument can be drawn from the fact that some States (Cyprus, Russia, Slovakia, Slovenia, Armenia, Uzbekistan, Austria, and Belarus) prohibit the *voluntary* rescinding of citizenship by individuals charged or convicted for criminal offences. United States State Department, *Citizenship Laws of the World* (Washington DC 2001).

78 Anthony Duff, *Punishment, Communication, and Community* (OUP, Oxford 2001) 4.

79 HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP, Oxford 1968) 8.

80 Jeffrie Murphy (ed), *Punishment and Rehabilitation* (Wadsworth, Belmont CA 1995) 29.

81 Cholbi (n36) 557.

unlikely that convicts, as well as the public at large, are aware of disenfranchisement when it is not pronounced as part of the sentence.[82] Further, in light of more immediate and visible punitive measures imposed, like incarceration or fines, disenfranchisement appears remote and secondary, decreasing potential deterrence. Disenfranchisement may tilt the balance for individuals who would be otherwise *partially* deterred; however, it is difficult to separate these rare cases from (most) other cases, and so basing disenfranchisement policies on deterrence is over-inclusive.

(b) Incapacitation

Incapacitation aims to prevent individuals from committing further similar offences. However, as noted above, convicts who committed non-electoral offences are not necessarily more likely to commit electoral offences. Moreover, the conditions under which incarcerated convicts vote may actually *decrease* the likelihood that they will commit such offences.

(c) Rehabilitation

Rehabilitation is championed by the UN[83] and the Council of Europe[84] as (the) goal of punishment. It rejects the idea that convicts are inherently corrupt. Disenfranchisement, which emphasises the convict's 'otherness',[85] and is likely to

---

82 Pettus (n9) 209.

83 *Standard Minimum Rules for the Treatment of Prisoners*, ECOSOC Res 663 (31 July 1957) Rule 11: 'The treatment of prisoners should be such as will encourage their self respect and develop their sense of responsibility' <http://www.unhcr.org/refworld/docid/3ae6b36e8.html> accessed 30 September 2009.

84 Council of Europe, *European Prison Rules* (2006) Rule 102: 'The treatment of prisoners shall be designed to enable them to lead a responsible and crime-free life.'

85 Itzkovitch and Oldak (n12) 733.

exacerbate feelings of marginalisation, seems incompatible with rehabilitation's emphasis on reconciliation and commonality.[86]

The American National Advisory Commission on Criminal Justice Standards and Goals suggested that an ex-offender's 'respect for law and the legal system may well depend, in some measure, on his ability to participate in the system.'[87] Uggen and Manza found that in periods during which rehabilitation was a dominant goal of punishment, many American States either repealed or relaxed disenfranchisement legislation.[88] Echoing Mill's assertion that engagement in the political process discourages recidivism,[89] they suggest that voting is negatively correlated with subsequent crime among those both with and without prior criminal history.[90]

It is submitted that basing disenfranchisement on consequentialist justifications is untenable, especially with regard to rehabilitation.

(3) Retribution

'The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.'[91] Nevertheless, it seems that modern society

---

86 Tribe (n35) 1316.

87 *Corrections Standard 16.17* (Washington DC 1973) 592-3, quoted in Elizabeth Hull, *The Disenfranchisement of Ex-Felons* (Temple University Press, Philadelphia 2006) 44 n8.

88 Locked Out (n10) 26.

89 John Stuart Mill, 'Thoughts on Parliamentary Reform' in John Robson (ed), *The Collected Works of John Stuart Mill* (Liberty Fund, Indianapolis 2006).

90 Locked Out (n10) 133.

91 *Furman v Georgia* 408 US 238, 309 (1972) (Stewart J).

no longer looks for *direct* linkage between offence and punishment. Punishment is considered retributive if convicts are deprived of something they previously possessed as a result of their crime.

Retributive justifications come in several forms. Morris argues that punishment seeks to counter *unfair advantages* that crimes give their perpetrators over fellow citizens, namely their not having to bear the burden of law abidance while reaping the benefits of others' compliance.[92] However, murder, rape, theft and the like are arguably wrongs owing to the harms they cause, rather than to a supposed unfair advantage.[93] Such a justification, therefore, seems inapposite regarding offences against the person, as well as non-electoral offences. Kant's *just deserts* theory suggests that criminals deserve punishment in direct proportion to wrongs they commit.[94] However, while this may justify imposition of punishment in general, it does not justify imposition of disenfranchisement in particular.[95]

Waldron's version of *lex talionis* ('eye for an eye') suggests that punishments should possess at least some characteristics of the wrongs committed.[96] In this light, some retributivists argue that all crimes are political, since they cause insecurity, threaten public order, and prevent democratic societies from functioning properly. However, it could be argued that since most crimes are directed against persons or property, rather than against the State, they do not have tangible effects on political

92 David Dolinko, 'Morris on Paternalism and Punishment' (1999) 18 Law and Philosophy 345.

93 Pettus (n9) 255.

94 Murphy (n80) 18.

95 Hampton (n43) 139.

96 Jeremy Waldron, 'Lex Talionis' (1992) 34 Ariz L Rev 25.

systems.[97] While strict retributivists argue that the motivations behind the acts matter, rather than their (non-political) consequences, Cholbi responds that most crimes are committed for opportunistic rather than ideological reasons.[98] It thus seems that disenfranchisement satisfies *Lex Talionis* only when applied to crimes against political institutions or voting processes.

All retributivists insist on proportionality between the gravity of the act, the personal circumstances of the offender, and the punishment's harshness. They are thus likely to treat *indefinite* disenfranchisement as disproportionate. They may also struggle with arbitrariness of fixed thresholds, above which disenfranchisement applies. For instance, if disenfranchisement is imposed on those serving sentences of one year or more, those sentenced to one year who happen to be incarcerated during an election period may be affected, while those sentenced to three years during which no election takes place may be effectively exempt.

It is suggested that faithful application of retributive theory can, at best, provide a conceptual basis for disenfranchisement in limited cases of electoral offences and of offences against democratic processes. In Germany, judges are authorised, though not required, to temporarily disenfranchise convicts whose crimes undermine the foundation of the State or tamper with elections. All other convicts remain enfranchised.[99]

Alas, while disenfranchisement can be logically linked to such offences, it was noted earlier that similar linkages between crime and punishment are no longer

---

97 Cholbi (n36) 545.

98 Ibid.

99 Nora Demleitner, 'Continuing Payment on One's Debt to Society: the German Model of Felon Disenfranchisement as an Alternative' (2001) 84 Minn L Rev 753, 761. The constitutionality of the law has not been challenged to-date, arguably due to scant disenfranchisement incidents.

sought. Despite the direct link between stealing televisions and cutting off thieves' hands, most modern criminal justice systems proscribe mutilation. Fundamentally, retributive punishments should not be without limitations but, rather, juxtaposed against the harms they cause. Disenfranchisement's harms will be discussed below.

(4) 'Punishment as Communication'

'Punishment as communication' theory links wrongdoing with censure, and addresses censured individuals as rational and responsible agents.[100] It differs, however, from retributive theories by ascribing forward-looking purposes to punishment.[101]

Due to its non-physical nature, disenfranchisement arguably serves a communicative agenda by expressing disapproval of convicts' behaviour and suggesting that revocation of political rights results from convicts' wrongdoing. Nevertheless, it is asserted that the main message disenfranchisement sends is that 'democratic values are less important than punitive measures ostensibly designed to promote order'.[102]

Indeed, Duff, the main proponent of the theory, argues that censure should be proportionate, non-humiliating and non-traumatising. He opposes disenfranchisement because it does not express concern for convicts as (recalcitrant) community members.[103] Moreover, where disenfranchisement is not pronounced in judgments, its

100 Punishment, Communication, and Community (n78) XVII.

101 Anthony Duff, *Trials and Punishments* (CUP, Cambridge 1986) 233.

102 *Sauvé* (no 2) (n41) para 46.

103 Trials and Punishments (n101) 255.

silent and automatic nature arguably fails to communicate *any* message.[104] The nature of the messages that disenfranchisement communicates to convicts is thus incompatible with this theory's purposes.

F. The Harms of Disenfranchisement

(1) Voting as an Individual and Collective Act

The previous section questioned whether penal theories can justify disenfranchisement, concluding that it may serve retributive purposes in limited situations. However, benefits derived from punishments should be weighed against their adverse effects, in order to determine whether they should be employed.

Scholars observe different functions of voting, since it is both an individual and a collective enterprise. Cholbi posits that for individuals, the right-to-vote stems from a pre-political right to self-determination.[105] Winkler asserts that participation gives individuals an opportunity to develop and express civic identity,[106] and Douglas argues that voting is, perhaps, our most important expressive activity.[107] Collectively, Waldron suggests that one has a right-to-vote if one's vote is counted and is given effect as part of collective decision-making, leadership and authority in which others participate.[108] According to Karlan, the features of voting include participation (casting ballots and having them counted), aggregation (joining like-minded voters to

---

104 Ewald (n11) 1118.

105 Cholbi (n36) 549.

106 Adam Winkler, 'Expressive Voting' (1993) 68 NYU L Rev 330.

107 Joshua Douglas, 'Is the Right to Vote Really Fundamental?' <http://works.bepress.com/joshua_douglas/1> accessed 30 September 2009.

108 Jeremy Waldron, *Law and Disagreement* (Clarendon Press, Oxford 1999) 233.

achieve the election of one's preferred candidates) and governance (pursuing policy preferences in representative decision-making).[109] The harms which disenfranchisement causes to individuals and collectives are explored below.

(2) Harms to Individuals

Punishments inevitable entail deprivation of certain rights and freedoms of convicts, including, when incarceration is imposed, the temporary deprivation of their liberty.[110] It does not follow, however, that punishments must degrade individuals. Degrading literally means reducing in status and treating as inferior. Is degradation an inevitable, necessary or justifiable aspect of punishment?

Fitzmaurice suggested that 'it is obvious that all punishment is degrading, at least if it involves imprisonment and the (mostly unpleasant and often humiliating) incidents of prison life and discipline.'[111] Hampton argues that punishment *ought to* degrade or demean convicts[112] and Planinc believes that by shaming convicts into feeling less dignified, society shows its disapproval of their deeds.[113] In contradistinction, the dissenting opinion in *Sauvé* (No. 2), supporting disenfranchisement, maintained that disenfranchising convicts *respects* their dignity by acknowledging them as 'rational, autonomous individuals'.[114]

---

109 Karlan (n40) 1156.

110 Mark Carter, 'Retributive Sentencing and the Charter: The Implications of Sauvé v. Canada (Chief Electoral Officer)' (2005) 10 Can Crim L Rev 43, 50.

111 *Tyrer v UK* (1979-80) 2 EHRR 1, 17-18.

112 Hampton (n43) 201.

113 Planinc (n63) 162.

114 *Sauvé* (No 2) (n41) para 90 (Gonthier J, dissenting).

The American SC described revocation of citizenship as 'a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development'.[115] It may be argued that denying the right-to-vote, possibly the most expressive symbol of political existence carries similar effects.

Duff posits that denying citizens the right-to-vote degrades them. Rejecting claims that such degradation is warranted as punishment or that convicts have degraded themselves by committing crimes,[116] he asserts that penal systems which display disrespect, indignity or degradation are objectionable because these are intrinsically inappropriate ways for States to treat their citizens.[117]

Political liberties are 'public affirmation of the status of equal citizenship for all'[118] and those possessing them retain their self-respect and self-confidence.[119] It is submitted that disenfranchisement degrades convicts by intentionally denying them political rights that they previously possessed and that all other mentally competent adult citizens retain.

Pettus posits that disenfranchisement institutionalises a double polity: the first, consisting of fully enfranchised, politically equal citizens, ruling over the second, consisting of the disenfranchised.[120] Indeed, '[t]hough the sovereignty is in the people,

---

115 *Trop* (n67) 94.

116 Punishment, Communication, and Community (n78) 14-16.

117 Anthony Duff, 'Punishment, Dignity and Degradation' (2005) 25(1) OJLS 141.

118 Rawls (n40) 545.

119 Jesse Furman, 'Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalence of Rawlsian Justice' (1997) 106 Yale LJ 1197, 1217.

120 Pettus (n9) 21-2.

as a practical fact it resides in those persons who by the Constitution of the state are permitted to exercise the elective franchise'.[121]

More broadly, the disenfranchisement discourse appears to mirror a conceptual divide between America and continental Europe, regarding the status and treatment of convicts.[122] For instance, while contemporary European penal policy aims to avoid *status* degradation of convicts, the American Constitution still formally allows reducing convicts to the status of slaves.[123]

(3) Harms to Collectives

Like other citizens, convicts hold views on policy issues and wish to express them by voting.[124] Society benefits from having convicts' insights since making sound public decisions requires assembling diverse perspectives and experiences.[125] Moreover, since minorities and marginalised groups are disproportionately represented among convicts, their disenfranchisement may skew election results.[126]

---

[121] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic books, New York 2000) 168.

[122] James Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (OUP, Oxford 2003) 7.

See also Genevra Richardson, 'The Case for Prisoners' Rights' in Mike Maguire, Jon Vagg and Rod Morgan (eds) *Accountability and Prisons: Opening up a Closed World* (Tavistock, London 1985) 21-3, where Richardson suggests that 'normalization requires that conditions within prison approximate as closely as possible to those outside and would encourage the retention of the rights and duties normally pertaining to free individuals'.

[123] US Const Amend XIII: '[N]either slavery not involuntary servitude except as punishment for a crime whereof the party shall have been duly convicted.'

[124] See eg the 2006 Irish general elections when arrangements were made for the first time for prisoners to register to vote. 71.4 percent of registered prisoners voted. Cormac Behan and Ian O'Donnell, 'Prisoners, Politics, and the Polls' (2008) 48(3) British Journal of Criminology 319, 330.

[125] Jeremy Waldron, 'A Rights Based Critique of Constitutional Rights' (1993) 13(1) OJLS 23, 36.

[126] Daniel Murphy, Adam Newmark and Phillip Ardoin, 'Felon Disenfranchisement Policies in the States' (Annual State Politics and Policy Conference, East Lansing 13-14 May 2005) 4.

Convicts are arguably the group most adversely affected by the State's most intrusive powers. Hence, according to Dahl's strong principle of equality,[127] States should seek convicts' continued authorisation for exercising these powers. Moreover, because penal policies directly affect them, it is particularly significant for convicts to be able to initiate reforms.[128] Denying convicts voting rights *because* they have a stake in the criminal justice system is *non sequitur*: as noted above, States, not voters, should remain neutral.[129] Voting is all about expressing biases, loyalties, commitments, and values.[130]

Among convicts, disenfranchisement particularly affects *prisoners* due to their physical isolation from the outside world and lack of public and political sympathy.[131] Prisoners are no politician's constituents, and are unlikely to have other groups vouch for them. Prison authorities will often have other interests in mind.[132]

It also seems that disenfranchisement is paradigmatic of, using Ely's terminology, the 'ins' (parliamentary majorities) keeping the 'outs' outside of the

---

Chapter Three explores the political ramifications of American disenfranchisement.

127 See generally Robert Dahl, *Democracy and its Critics* (YUP, New Haven 1989).

128 Mitchell (n1) 856.

129 Frank Emmert, Christopher Page and Antony Page, 'Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries' (2008) 41 Creighton L Rev 3.

130 George Fletcher, 'Disenfranchisement as Punishment: Reflections on the Radical Uses of Infamia' (1999) 46 UCLA L Rev 1895, 1906.

Austin posits that we are all self-interested, and emphasising the impact convicts' franchise will have on the criminal justice system thus *exacerbates* the stigma. Regina Austin, 'The Shame of it all: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons' (2004-2005) 36 Colum Hum Rts L Rev 173, 183.

131 Steve Foster, *Human Rights and Civil Liberties* (OUP, Oxford 2006) 288.

132 John Kleining and Kevin Murtagh, 'Disenfranchising Felons' (2005) 22(3) Journal of Applied Philosophy 207, 229.

decision-making pool.[133] The American SC held that 'deference usually given to judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials.'[134]

G. Concluding remarks

This chapter appraised historical and contemporary justifications for convicts' disenfranchisement. It was first suggested that it is no longer plausible to justify disenfranchisement based on notions of forfeiture of rights. Consequently, its use requires independent justifications. Regarding regulatory justifications, liberal arguments appear incompatible with maxims of political equality and State neutrality, and republican accounts are inapposite since electoral laws are premised on universal suffrage. The notion of treating disenfranchisement as non-penal was contested, concluding that the better view is to treat disenfranchisement as a form of punishment and seek penal justifications for its imposition. Consequentialist approaches to disenfranchisement appear, at best, unconvincing, whereas, alongside censure, disenfranchisement sends convicts messages of degradation and exclusion from society. Retributive theories may be applicable to disenfranchisement of individuals convicted of electoral offences and offences against the democratic process. However, considering the adverse effects of disenfranchisement on convicts, their (often marginalised) social groups, and general society, it was concluded that disenfranchisement should cease to be imposed.

---

133 Ely (n8) 121.

134 *Kramer v Union Free School District No 15* 395 US 621,627-8 (1969). In contradistinction, the SC held in *Richardson* (n42) that 'the people' (in that case, of California) should decide whether to retain ex-felons' disenfranchisement. The latter judgment will be analysed in Chapter Three.

CHAPTER THREE:
DISENFRANCHISEMENT POLICIES IN COMPARATIVE PERSPECTIVE - 'AMERICAN EXCEPTIONALISM' IN LIGHT OF AN EMERGING TRANSNATIONAL JUDICIAL DISCOURSE

A. Introduction

Chapter Two presented a normative framework for assessing historical and current justifications for disenfranchisement, as well as its adverse effects on individuals and collectives. This chapter analyses recent legal challenges to disenfranchising legislation. Drawing on judgments from four continents, it is suggested that an identifiable global trajectory towards enfranchising some convicts emerges[1] notwithstanding diverging American discourse, referred to in other contexts as 'American exceptionalism'.[2] These judgments assessed the *legality* of disenfranchising legislation. In contradistinction, in jurisdictions where disenfranchisement resulted from individual sentences, its *application* to these particular cases was challenged.[3]

Section B analyses the legal status of disenfranchisement in America, which merits special attention due to three features which differentiate it from other jurisdictions discussed thereafter. *First*, the absence of a Constitutional right-to-vote,

---

1 Arguably analogous to the concurrent adoption of 'residual liberty' discussed in Chapter Two.

2 Coined by Alexis de Tocqueville in 1831. Harold Koh, 'On American Exceptionalism' (2003) 56(5) Stan L Rev 1479, 1481 n4.

3 See eg *MDU v Italy* (decision) (App no 58540/00) (28 January 2003) where a claim by an Italian prisoner whose sentence for a fiscal offence included disenfranchisement was dismissed.

In jurisdictions where neither general nor individualised disenfranchisement is practised, the practicalities of convicts' voting are often challenged. In Israel, the High Court of Justice (HCJ) ordered the State in 1983 to establish arrangements enabling prisoners to vote, after none existed for 35 years. In 1996, a petition demanding the disenfranchisement of Yigal Amir, the convicted murderer of PM Yitzhak Rabin, was summarily rejected. The HCJ held that, absent disenfranchising legislation, general principles of universal suffrage apply. HCJ 337/84 *Hokama v Minister of the Interior* PD 38(2) 826 and HCJ 2757/96 *Alrai v Minister of the interior* PD 50(2) 18, respectively.

coupled with implicit Constitutional sanction of disenfranchisement, led the American Supreme Court (SC) to effectively block challenges to facially-neutral disenfranchising legislation.[4] *Second*, the mass incarceration phenomenon, resulting in mass disenfranchisement. America is home to less than five percent of the world's population, yet with the highest global incarceration rate (702 of every 100,000 persons) it incarcerates a quarter of the world's prisoners. In contradistinction, in England and Wales, 139 of every 100,000 are incarcerated.[5] Consequently, several million otherwise eligible voters are disenfranchised due to current or previous incarceration.[6] *Third*, due to the historical and social contexts in which American disenfranchisement laws were enacted, disenfranchisement disproportionately affects marginalised groups, especially blacks. Contemporary challenges to disenfranchising legislation are thus funneled through the Voting Rights Act (VRA)[7] which the American Congress enacted to tackle racially discriminatory voting restrictions.

Section C examines recent judgments from Canada [*Sauvé* (No. 2)[8]], South Africa [*August*[9] and *NICRO*[10]], Australia [*Roach*[11]], and the European Court of

---

4 *Richardson v Ramirez* 418 US 24, 54 (1973).

5 Mary King, 'Imprisoning America: The Social Effects of Mass Incarceration' (2005) The Review of Black Political Economy 41, 42 (Book Review).

6 Christopher Uggen and Jeff Manza, 'Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States' (2002) 67(6) American sociological review 777, Appendix Table A: Estimates of Number of Disenfranchised Felons by State: December 31, 2000.

American prison population has grown six-fold in thirty years. Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (OUP, Oxford 2006) 90.

Perhaps ironically, Article 20 of the new Iraqi Constitution, adopted by a referendum on 15 October 2005 with the support of the US and the UK, guarantees voting rights to *all* citizens, with no exception regarding convicts <www.uniraq.org/documents/iraqi_constitution.pdf> accessed 30 September 2009.

7 The National Voting Rights Act 42 USC §1973–1973aa-6.

8 *Sauvé* (No 2) *v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

Human Rights (ECtHR) [*Hirst* (No. 2)[12]]. These judgments assess the *legality* of disenfranchising legislation. They exhibit a transnational judicial discourse premised on shared paradigms of universal suffrage and of convicts as rights-holders, under which disenfranchisement is considered an *ab initio* infringement of convicts' right-to-vote. Using balancing/proportionality analysis, these judgments weigh the policy justifications offered by governments against disenfranchisement's adverse effects, frequently referring (in succession) to the other judgments. Consequently, while outcomes vary, the general path towards enfranchisement in these societies is clear, marking US jurisprudence as a legal outlier.

B. 'American Exceptionalism'

(1) Voting Eligibility and the Absence of a Constitutional Right-to-Vote

The American Constitution states that the individual States shall determine voting eligibility, including for *federal* elections, as part of determining '[t]he Times, Places and Manner of holding Elections for Senators and Representatives'.[13] Consequently, disenfranchising laws governing the same rights and privileges 'vary widely from State to State, making something of a crazy-quilt of disqualifications and restoration procedures'.[14] Currently, only Vermont and Maine do not disenfranchise any convicts.

---

9 CCT 08/99 *August v Electoral Commission* (1999) (3) SA 1.

10 CCT 03/04 *Minister of Home Affairs* v *National Institute of Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280.

11 *Roach v Electoral Commissioner* [2007] HCA 43 (Australia).

12 *Hirst* (No 2) *v UK* (2004) 38 EHRR 40 (Chamber); (2006) 42 EHRR 41 (Grand Chamber).

13 US Const Art I §4(1).

14 Alec Ewald, *A 'Crazy-Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law* (The Sentencing Project, Washington DC 2005).

On the other extreme, thirteen States disenfranchise prisoners as well as ex-prisoners (two of them for life, unless individually pardoned). Thirty-five States disenfranchise current convicts, including, in some States, parolees and/or convicts on probation.[15]

The Constitution's Fourteenth Amendment states that '[a]ll persons born or naturalized in the United States…are citizens of the United States and of the State wherein they reside'.[16] It further stipulates that '[n]o State...shall deny to any person within its jurisdiction the equal protection of the laws'.[17]

Interestingly, while in 1874, the American SC held in *Minor v Happersett*[18] that if suffrage was one of the privileges and immunities, then the Fifteenth Amendment[19] would have been redundant, in 1964 it held that '[t]he right of suffrage is a fundamental matter in a free and democratic society' and 'any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized'.[20] Since 1964, voting restrictions, arguably violating equal protection, have been generally subjected to the most searching standard of American judicial

---

15 In a 2000 referendum, Massachusetts *reinstated* disenfranchisement. The Federal Court of Appeals for the First Circuit dismissed (by 2 to 1) a VRA-based challenge to the legislation. *Simmons v Galvin* No 08-1569 (31 July 2009) 13 (not yet published).

In America, divergent disenfranchisement policies result in unequal treatment, since individuals who commit the same offence may or may not be disenfranchised, depending on their State. Further, votes of voters in non-disenfranchising States are diluted compared with votes of voters in disenfranchising States. However, such ramifications will not be discussed further, since this thesis does not address internal American constitutional matters *as such*.

16 US Const Amend XIV §(1).

17 Ibid (known as the Equal Protection clause).

18 88 US 162 (1874).

19 US Const Amend XV prohibiting the denial or abridgment of voting on grounds of race and colour.

20 *Reynolds v Sims* 377 US 533, 561-562 (1964).

review, *strict scrutiny*,[21] famously referred to as 'strict in theory and fatal in fact'.[22] The fate of convicts' disenfranchisement legislation has nonetheless been different.

(2) The Limited Constitutional Challenges to Convicts' Disenfranchisement

Section Two of the Fourteenth Amendment states that 'when the right to vote...is denied to any of the male inhabitants of [a] State, being twenty-one years of age and citizens of the United States...the basis of representation [of the State] shall be reduced in the proportion'.[23] Section Two was enacted, arguably, to deter Southern States from disenfranchising newly emancipated Blacks.[24] Crucially, the basis of representation is *not* reduced when disenfranchisement follows '*participation in rebellion, or other crime*'.[25]

Nevertheless, disenfranchisement of conscientious objectors was invalidated by the California SC which, following *Reynolds*' dicta, applied *strict scrutiny*, and ruled that the offence is not an 'infamous crime', the criterion for disenfranchisement under California's Constitution.[26] Subsequently, the same SC invalidated provisions

21 The SC first used *strict scrutiny* in *Skinner v Oklahoma* 316 US 535 (1942). Invalidating a sterilisation penalty, it held that 'strict scrutiny...is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.' Ibid 541.

22 *Regents of University of California v Bakke* 438 US 265, 361-2 (1978).

23 US Const Amend XIV §(2).

24 Courtney Artzneer, 'Check Marks the Spot: Evaluating the Fundamental Right to Vote and Prisoners Disenfranchisement in the United States and Canada' (2007) 13 Southwestern JL & Trade Am 423, 425.

25 US Const Amend XIV §(2).

26 *Otsuka v Hite* 64 Cal 2d 596, 602 (1966), referring to Cal Const Art II §1.

that disenfranchised ex-felons.[27] The Federal SC reversed the latter judgment (by 6 to 3). It applied the least demanding judicial review standard, *rational basis*, and held that 'the exclusion of felons from the vote has an affirmative sanction in [Section] 2 [of the Fourteenth Amendment] which distinguishes felon disenfranchisement from other State limitations on the franchise...[Section] 1...could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which [Section] 2 imposed for other forms of disenfranchisement'.[28]

The SC noted that in the Congressional debate on the Fourteenth Amendment, dropping the felon disenfranchisement clause was not considered. Moreover, at the time of this Amendment's passage, twenty-nine State Constitutions included disenfranchising provisions, and Southern States explicitly mentioned felon disenfranchisement in their statements of readmission to the Union.[29]

Marshall J's dissent, joined by Brennan and Douglas JJ, maintained that Section Two was enacted to provide a remedy for black disenfranchisement before the passage of the Fifteenth Amendment, rather than to cast convicts out of Section One's Equal Protection clause's purview.[30] Conceding that convicts' disenfranchisement was common at the time of the Fourteenth Amendment, Marshall posited that '[t]he Equal Protection Clause is not shackled to the political theory of a particular era'.[31]

---

27 *Ramirez v Brown* 9 Cal.3d 199, 205-11 (1973).

28 *Richardson* (n4) 54.

29 Ibid 59.

30 Ibid 73-4 and 77.

31 Ibid 76-7, quoting *Harper v Virginia Board of Elections* 383 US 663, 669 (1966).

Applying *strict scrutiny*, while recognising the protection of the integrity of voting as a 'compelling State interest',[32] Marshall maintained that the provision is both over and under-inclusive, hence failing the 'narrowly tailored' test.

Interestingly, neither opinion mentions convicts' rights or makes references to foreign sources.[33] The majority even refrained from contextualising the discussion within a democratic paradigm, and confined its equality analysis to justifying the non-applicability of the Equal Protection clause.

Scholarly critiques of the judgment range from doubting the validity of Section Two of the Fourteenth Amendment in view of later Constitutional amendments, to disputing Section Two's applicability to *ex-felons*, to offering independent justifications for applying *strict scrutiny* analysis to ex-felons, to questioning the judgment's compatibility with other SC judgments.

Chin asserts that the Fifteenth Amendment, stating that the right-to-vote 'shall not be denied or abridged by…any State on account of…[an individual's] previous

---

[32] Ibid 77-81. For Marshall's rejection of the second State justification (fear of 'subversive voting') see Chapter Two.

[33] Contrarily, see *Roper v Simmons* 543 US 551, 576 (2005) (Kennedy J), where the SC quotes the United Nations Convention on the Rights of the Child, despite the fact that America has *not* ratified it. 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (20 November 1989).

Scalia J dissented, contending that '[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States I cannot see how this evidence favors, rather than refutes, its position.' Ibid 582.

condition of servitude'[34] implicitly repealed Section Two, since the latter tolerated disenfranchisement of blacks, while the former explicitly prohibited it.[35]

Ewald posits that the Fifteenth Amendment, read in conjunction with the Thirteenth Amendment,[36] proscribes *ex-felons* disenfranchisement.[37] The Thirteenth amendment bars 'slavery [and] involuntary servitude… except as a punishment for crime whereof the party shall have been duly convicted'. If incarceration is interpreted as 'servitude', disenfranchising ex-felons is incompatible with the Fifteenth Amendment, since *ex*-felons are no longer in their 'previous condition of servitude'.

Hull suggests that because ex-felons are a 'discrete and insular minority'[38] their disenfranchisement must satisfy *strict scrutiny*.[39]

Furman argues that the right-to-vote is 'a central component, if not *the* central component, of democratic citizenship'.[40] *Richardson*'s dicta that voting is not an inalienable right of ex-felons appears to her to be inconsistent with the judgments in *Afroyim*, where the SC maintained that citizenship is an inalienable right that cannot

---

34 US Const Amend XV.

35 Gabriel Chin, 'Felon Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?' (2004) 92 Geo LJ 259.

36 US Const Amend XIII.

37 Ewald (n14) 1131.

38 Coined in *United States v Carolene Products* 304 US 144 n4 (1938).

39 Elizabeth Hull, *The Disenfranchisement of Ex-Felons* (Temple University Press, Philadelphia 2006) 104.

40 Jesse Furman, 'Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice' (1996-1997) 106 Yale LJ 1197, 1216.

be involuntarily taken away,[41] and *Reynolds*, where it held that 'to the extent that a citizen's right to vote is debased he is that much less a citizen'.[42]

Based on *Richardson*'s dicta, the Second Circuit in *Sheperd v Trevino*[43] applied *rational basis* review to New York's legislation disenfranchising felons and ex-felons[44] and upheld it. The Court held that '[a] state properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the State or of the nation…[w]hile such a theoretical State interest might not rise to the level of a compelling State interest, it is forceful enough to constitute a legitimate state interest.'[45] The low threshold set by *Richardson* thus seems to effectively block constitutional challenges to disenfranchisement as such.

---

41 *Afroyim v Rusk* 387 US 253 (1967).

42 *Reynolds* (n20) 567 (1964).

43 575 F.2d 1110 (5th Cir 1978).

44 Cf *McLaughlin v City of Canton* 947 F Supp 954, 974-5 (SD Miss 1995), holding that *strict scrutiny* review should be applied to legislation disenfranchising individuals convicted of misdemeanours.

Cosgrove suggests that even under *Richardson*'s interpretation, Section Two of the Fourteenth Amendment cannot shield offences such as drug use which were not classified as common law felonies when it was adopted,. John Cosgrove, 'Four New Arguments Against the Constitutionality of Disenfranchisement' (2003-4) 26 T Jefferson L Rev 157, 158.

However, similar arguments were rejected by the California Court of Appeals in *Legal Services for Prisoners with Children v Bowen*, No A120220 (judgment of 22 January 2009) noting, *inter alia*, that one of the respondents in *Richardson* was convicted of drug possession. Ibid 10.

45 Sheperd (n43) 1111-1112 and 1115-6 respectively.

(3) Historical and Social Contexts of Disenfranchisement and the Voting Rights Act

Following the passage of the Fifteenth Amendment, some States 'tailored' their criminal disenfranchisement laws to cover crimes they considered more likely to be committed by black offenders,[46] excluding crimes thought to be equally committed by both races.[47] Special Constitutional Conventions were assembled.[48] For instance, Mississippi amended its Constitution in 1890 to disenfranchise individuals convicted of burglary, theft and arson, but not of robbery or murder.[49] The State SC, upholding the amendment, maintained that '[r]estrained by the [Federal] Constitution from discriminating against the Negro race, the [Mississippi] Convention discriminated against its characteristics and the offenses to which its weaker members were prone'.[50]

A significant rise in black incarceration and a steep decline in registered voters ensued: In Alabama, the percentage of blacks in the prison population rose from two

---

46 Angela Behrens, Christopher Uggen and Jeff Manza, 'Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States 1850–2002' (2003) 109(3) American Journal of Sociology 559.

Uggen and Manza note that the number of offences defined as felonies significantly increased and presently includes offences which were previously considered minor. Locked Out (n6) 8. Between 1865 and 1900, nineteen States adopted or amended disenfranchising legislation. Ibid 55.

47 Andrew Shapiro, 'Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy' (1993) 103 Yale LJ 537, 541.

However, see Roger Clegg, George Conway and Kenneth Lee, 'The Bullet *and* the Ballot? The Case for Felon Disenfranchisement Statutes' (2006) 14 Am UJ Gender Soc Pol'y & L 1, 7 claiming that the fact that twenty-nine States had felon disenfranchisement laws prior to the passage of the Fourteenth Amendment indicates that such provisions were legislated for race-neutral reasons.

48 Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (Harper and Row, New York 1988) 253-62.

49 Jeffrey Reiman, 'Liberal and Republican Arguments Against the Disenfranchisement of Felons' (2005) Criminal Justice Ethics 3, 7.

50 *Ratliff v Beale* 74 Miss 247, 266-7 (1896).

percent in 1850 to seventy-four percent by 1870.[51] In Louisiana, after the Civil War, forty-four percent of registered voters were blacks, whereas they made up less than one percent in 1920.[52] Crutchfield, perhaps cynically, suggests that economic disincentives to incarcerate blacks before the Civil War, depriving slave-owners of labour, ceased to exist thereafter, leading to higher incarceration rate.[53]

In 1985, the SC invalidated an amendment to Alabama's Constitution dating from 1901[54] which disenfranchised individuals convicted of 'all crimes of moral turpitude'. Basing its judgment on the Alabama Constitutional Convention's proceedings, where explicit reference was made to 'the menace of Negro domination',[55] the SC held that '[the law's] original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect'.[56] Distinguishing *Richardson*, it maintained that 'we are confident that §2 [of the Fourteenth Amendment] was not designed to permit the

---

51 Locked Out (n6) 59-60.

52 Carl Frazier, 'Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them' (2006-2007) 95 Kentucky LJ 481, 484.

53 Robert Crutchfield, 'Abandon Felon Disenfranchisement Policy' (2007) 6(4) Crim & Pub Pol 707, 708.

54 Ala Const Art VIII §177.

55 *Journal of the Proceedings of the Constitutional Convention of the State of Alabama* (Brown Printing Co, Montgomery 1901) 12, quoted in Ballot Manipulation (n46) 598.

Interestingly, one research suggests that the Alabama proceedings disclose the only racial animus-based statement in 114 convention debates surveyed. John Dinan, 'The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates' (2007) 19(3) Journal of Policy History 282, 295.

56 *Hunter v Underwood* 471 US 222, 233 (1985).

purposeful racial discrimination attending the enactment and operation of §182 [the Alabama provision] which otherwise violates §1 [of the Fourteenth Amendment].'[57]

The judgment enabled challenges to *invidious* disenfranchisement provisions. Alas, such provisions are usually *facially-neutral*.[58] Their implications, however, are not. Blacks make up twelve percent of America's population, but thirty-six percent of its disenfranchised convicts.[59] The Sentencing Project suggests this cannot be explained solely by divergent crime rates since, for example, blacks make up thirteen percent of drug users, but fifty-six percent of drug-related felons.[60] Fletcher, analysing this phenomenon, asserts that authorities do not target, arrest and convict drug users on university campuses as often as they target their counterparts in inner cities.[61] Interestingly, States with greater black prison populations have historically been more likely to disenfranchise convicts.[62]

---

[57] Ibid.

[58] Recently, the SC held that a State's interest in preventing 'persons who…were not eligible to vote because they had been convicted of felonies' from voting is a 'neutral and nondiscriminatory reason' for enacting voter identification legislation. *Crawford v Marion County Election Bd* 128 S Ct 1610, 1619-20 (2008).

[59] Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws* (HRW, New York 1998) 1.

[60] Ryan King and Marc Mauer, *Distorted Priorities: Drug Offenders in State Prisons* (The Sentencing Project, Washington DC 2002) 11. <http://sentencingproject.org/Admin/Documents/publications/dp_distortedpriorities.pdf> accessed 30 September 2009.

Drug offences account for about a third of American felony convictions. Locked Out (n6) 70.

[61] George Fletcher, 'Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia' (1999) 46 UCLA L Rev 1895, 1897 n4.

[62] Locked Out (n6) 192. Uggen and Manza note that more than one in seven black men is currently denied the right-to-vote, more than one in four in States like Florida. Ibid 10.

According to a survey, eighty percent of Americans generally support re-enfranchisement of ex felons, sixty percent support enfranchising convicts on parole, and a significant minority, thirty-one percent,

Disenfranchisement's political ramifications have been significant. In the 2000 Presidential Elections, George Bush won Florida by 537 votes. Considering voting patterns, had convicts been allowed to vote, Al Gore would have likely won Florida by over 80,000 votes; if only ex-felons were re-enfranchised, the margin would have been 30,000 votes. Either way, Al Gore would have probably become president.[63]

In 1965, Congress enacted the VRA to tackle invidious voting restrictions. However, prevalence of facially-neutral legislation with disproportionate racial effects led to the VRA's amendment in 1982. The SC held that the amendment was designed to tackle 'electoral law, practice, or structure [which] interacts with social and historic conditions to cause an inequality in [electoral] opportunities enjoyed by black and white voters.'[64] Nonetheless, in *Wesley v Collins*,[65] the Tennessee SC rejected a VRA-based challenge to Tennessee's disenfranchisement legislation. Claimants argued that blacks have a significantly higher than average rate of felony convictions and consequent disenfranchisement, resulting from historic discrimination and debilitating socioeconomic inequities. The Court held that disenfranchisement results from 'the conscious decision to commit an act for which they assume the risks of detection and punishment'.[66]

---

support full re-enfranchisement. Jeff Manza, Clem Brookers and Christopher Uggen, 'Public Attitudes Towards Felon Disenfranchisement in the United States' (2004) 68(2) Public Opinion Quarterly 275, 283.

63 Ballot Manipulation (n46) 596.

64 *Thornburg v Gingles* 478 US 30, 47 (1986) referring to the Voting Rights Act of 1982.

65 605 F Supp 802 [MD Tenn 1985].

66 Ibid 813.

Recent Federal Circuits judgments exhibit contrasting views regarding the VRA's *applicability* to disenfranchisement provisions. In *Baker v Pataki*,[67] the Second Circuit refused (by 8 to 5) to hear a VRA challenge. The newly appointed Federal SC Justice Sotomayor, dissenting, maintained that '[s]ection 2 of the [VRA] by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.'[68] In contradistinction, the Ninth Circuit in *Farrakhan v Washington*[69] held that '[w]hen felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress'.[70] In *Johnson v Bush*,[71] the Eleventh Circuit refused to hear a VRA challenge; following *Richardson* and *Hunter*'s dicta, it dismissed the case based on the determination that the impugned legislation is not invidious. It seems that invoking the VRA when disenfranchisement disproportionately affects racial minorities faces considerable obstacles.[72] Absent Constitutional amendment, the

---

67 449 F.3d 305 (2nd Cir 2006).

68 Ibid 367.

69 338 F.3d 1009 (9th Cir 2003).

70 Ibid 1016.

71 377 F.3d 1163 (2004), reversing *Johnson v Bush* 353 F.3d 1287 (11th Cir 2003).

72 In contradistinction, the *legality* of disenfranchisement stands at the heart of the judgments discussed in the next section. Consequently, the disproportionate effect disenfranchisement may have on minorities is treated as secondary, and courts suggest that it is not worthy of separate discussion.

For instance, in *Sauvé* (No 2) (n8), a provision disenfranchising convicts sentenced to three or more years of incarceration was scrutinised by the Canadian SC. Claimants argued that the legislation infringes the constitutional right to equality, because of overrepresentation of Aboriginal Canadians among convicts, resulting from systemic discrimination in the criminal justice system. The argument was made in addition to challenging the legislation's compatibility with the right-to-vote.

The Canadian Charter, Part I of the Constitution Act 1982 being Schedule B to the Canada Act 1982 c 11 (UK), sections 15 (equality) and 3 (democratic rights).

American legal discourse is unlikely to be amenable to significant alteration of disenfranchisement policies.

C. **Emerging Transnational Judicial Discourse on Convicts' Disenfranchisement**

(1) The Concept of a Transnational Judicial Discourse

It is argued below that the appropriateness of disenfranchising convicts is currently the subject of a transnational judicial discourse, taking place across four continents (in Canada, South Africa, Australia, and the ECtHR), premised on shared paradigms of democracy and of convicts as rights-holders. Disenfranchisement is hence considered *ab initio* an infringement of convicts' right-to-vote and affront to universal suffrage. Employing balancing/proportionality analysis, these judgments refer frequently to foreign law, both as evidence of practice and to support legal arguments.

An identifiable trajectory towards enfranchising some convicts emerges from the discourse which, arguably, forms part of an increasingly prevalent phenomenon of formal and informal contacts between judiciaries regarding human rights adjudication.[73] McCrudden offers two explanations: the first, which he rejects, is the attraction of 'discovering already laid down meanings' in the form of 'new natural law'. The second (which, in his opinion, reflects the judges' motivations) is that judges believe they participate in 'a common enterprise'.[74]

The SC, while mentioning the legislation's 'disproportionate impact on Canada's already disadvantaged Aboriginal population', nonetheless invalidated the legislation based on an infringement of the right-to-vote and found it 'unnecessary' to consider equality claims separately. Ibid para 60.

[73] Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Human Rights' (2000) 20 OJLS 499, 510-11.

[74] McCrudden also rejects a (cynical) explanation that judges are merely results-driven. Ibid 527.

Exploring references to *dignity* in death penalty adjudication, Carozza maintains that judgments across jurisdictions are borrowing from, responding to, or otherwise interacting substantially with external sources.[75] He suggests that, unlike in other areas of law, the human rights discourse is not merely functional. Rather, there is 'tendency of courts…to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity…[d]espite differences in positive law, in historic and political context, in religious and cultural heritage'.[76] Despite its implicit natural law premises, McCrudden distinguishes Carozza's argument from that of natural law advocates, interpreting it instead as suggesting that judges are searching for a universal meaning of dignity which is not simply *found*, but is rather *constructed* by the discourse.[77]

McCrudden, however, remains unconvinced that the transnational discourse produces such common meaning. He points to two diverging contemporary comparativist approaches: The first, the *functionalist* approach, which, he suggests, dominated throughout the second half of the Twentieth Century, is focused on problem-solving. The second, the *dialogic* approach, does not look for identical 'solutions', representing emerging universal norms. Rather, it emphasises the judicial

---

[75] Paolo Carozza, 'My Friend is a Stranger: The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 Texas L Rev 1031, 1045.

Reference to foreign law is normally not required. The South African Constitution outstands in that it explicitly *allows* judges to consider foreign law, while in other jurisdictions such reference is judge-initiated. Common Law (n73) 527.

[76] Ibid 1078-81.

[77] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655, 696.

interaction.[78] For McCrudden, comparativism aims to establish a recognisably workable *system* of judicial interpretation and application of human rights which does not guarantee uniform interpretation[79] and, regarding dignity, has arguably not produced one to-date.[80]

Some scholars and jurists reject making *any* judicial reference to foreign sources. Scalia J suggested that what the American SC has done by referring to foreign law in *Roper* was to 'look over the heads of the crowd and pick out its friends'.[81] Unlike Carozza's, McCrudden's account, while not negating such objections, lessens their (feared) ramifications: if comparativism does not necessarily result in adoption of universal understanding of, for instance, *dignity*, the 'danger' of referring to foreign sources seems minimal.

It is submitted that, whatever view one holds regarding the reasonableness of referring to foreign sources, the discourse on convicts' disenfranchisement is presently replete with such references which are, arguably, influential and hence worth exploring.

---

78 Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örücü & David Nelken (eds), *Comparative Law: A Handbook* (Hart, Oxford 2007) 371, 374-5.

79 Human Dignity (n77) 713.

80 Ibid 695.

81 *Roper* (n33) 1223.

McCrudden questions whether the American reluctance to refer to foreign law and their common usage of the term *civil rights* instead of *human rights*, indicate that American judges do not feel part of the 'common enterprise'. Common Law (n73) 530.

(2) Analysing the Transnational Discourse on Convicts' Disenfranchisement

This subsection analyses the following components which feature in the disenfranchisement transnational judicial discourse: the democratic paradigm; convicts as rights-holders; balancing/proportionality analysis; and references to external sources. Each component is explored, jurisdiction by jurisdiction, following the judgments' chronology: The 2002 Canadian *Sauvé* (No. 2) judgment[82] featured the first comprehensive judicial analysis, followed by the 2004 South African *NICRO* judgment, the 2004-5 ECtHR's *Hirst* (No. 2) judgment, and the 2007 Australian *Roach* judgment. Due, perhaps, to the inconclusive position of the treaty regime (explored in Chapter Four), references to *international* sources are less frequent.

(a) The Democratic Paradigm

South Africa: In *August*, the Constitutional Court unanimously ordered that the government make arrangements for registration and voting in prisons. The Constitution states that '[t]he Republic...is one, sovereign, democratic state founded on...(d)[u]niversal adult suffrage',[83] and that '[e]very adult citizen has the right…to vote in elections for any legislative body established in terms of the Constitution.'[84] The Court held that 'universal adult suffrage is one of the fundamental values of the

82 The absence of disenfranchising legislation in *August* (n9) led to a limited discussion of disenfranchisement's justifications and harms.

83 The Constitution of the Republic of South Africa (No 108 of 1996) Section 1.

84 Ibid Section 19.

constitutional order',[85] and that '[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, [the vote] says that everybody counts.'[86]

Subsequent disenfranchising legislation[87] was invalidated in *NICRO* (by 9 to 2), where the Court made reference to its analysis in *August*[88] as well as to Section Three of the Constitution's[89] enunciation of equal citizenship of all South Africans.[90]

Canada: In the first *Sauvé* case,[91] the SC unanimously invalidated *blanket* disenfranchisement legislation.[92] It based its judgment on the Charter's stipulation that '[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.'[93]

Subsequently, in *Sauvé* (No. 2), the SC (by 5 to 4) invalidated an amended provision, disenfranchising (only) individuals 'imprisoned in a correctional institution serving a sentence of two years or more'.[94] The court held that '[t]he right of every

---

85 *August* (n9) para 17.

86 Ibid para 31.

87 Sections 24B(2) and 8(2)(f) of the Electoral Laws Amendment Act 2003 (SA).

88 *NICRO* (n10) para 27.

89 Ibid para 24.

90 Like the Canadian Court (n72), The South African Constitutional Court deemed it unnecessary to determine whether the legislation breaches Section 9 (equality), in addition to breaching Section 19 (the right-to-vote).

91 *Sauvé v Canada* (Attorney General) [1993] 2 SCR 438.

92 Canada Elections Act, RSC 1985 c E-2 s 51(e).

93 Canadian Charter, Section 3.

94 RSC 1993 c 19 s 23.

citizen to vote…lies at the heart of Canadian democracy'.[95] It observed that '[u]niversal franchise has become...an essential part of democracy', and that 'the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote'.[96]

ECtHR: In April 2001, the High Court of England & Wales dismissed[97] claims that Section 3 of the Representation of the People Act (RPA)[98] is incompatible with Article 3 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms,[99] which was incorporated into British law by the Human Rights Act.[100] Article 3 states that '[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' Section 3 of the RPA states that '[a] convicted person during the time that he is detained in a penal institution in pursuance of his sentence...is legally incapable of voting at any parliamentary or local government election.'

---

95 *Sauvé* (No 2) (n8) para 1.

96 Ibid paras 31, 33.

97 *R (Pearson and Martinez)* v *Home Secretary* [2001] EWHC 239 (Admin).

98 1983 c 2. Section 3 echoes Section 2 of the Forfeiture Act 1870 c 23.

99 Protocol 1: Enforcement of Certain Rights and Freedoms not included in Section I of the Convention (Paris, 20 March 1952) (First Additional Protocol to the ECHR).

100 1998 c 42. Section 4 mandates British courts to issue a 'Declaration of Incompatibility' of legislation with the ECHR.

Section 19 requires the issuance of a 'Statement of Compatibility' by the British government when new legislation is introduced. Indeed, when the RPA was amended in 2000, Lord Bassam of Brighton made such statement. Hansard HL col WA8 (20 March 2000).

In June 2001, request for permission to appeal was refused by Brown LJ after oral argument.[101] One of the claimants, John Hirst, applied to the ECtHR. In 2004, the Fourth Section Chamber unanimously held that Section 3 of the RPA violates Hirst's right-to-vote, effectively reversing a 1966 European Commission on Human Rights judgment.[102] The Chamber maintained that 'the right to vote...[is]...the indispensable foundation of a democratic system', and 'any devaluation or weakening of that right threatens to undermine that [democratic] system'.[103]

The Grand Chamber (GC) affirmed the judgment (by 12 to 5), holding that 'the right to vote is not a privilege. In the Twenty-First Century, the presumption in a democratic State must be in favour of inclusion...any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates'.[104]

Australia: In *Roach*, the High Court invalidated (by 4 to 2) *blanket* disenfranchisement legislation which replaced previous legislation disenfranchising (only) individuals serving sentences of three or more years.[105] Australia's Constitution, like America's, lacks an enunciated right-to-vote. Nevertheless, the High

---

101 *Hirst* (No 2) (Chamber) (n12) para 16.

102 *X v Federal Republic of Germany* (App no 2728/66) (6 October 1966) op cit vol 18 p 244, decided before *Golder v UK* (1975) 1 EHRR 524.

103 *Hirst* (No 2) (Chamber) (n12) para 41.

Like the Canadian and South African judgments (n72 and n90, respectively), the Chamber held that 'no separate issue' arose regarding nondiscrimination under Article 14 of the ECHR. Ibid para 54.

104 *Hirst* (No 2) (Grand Chamber) (n12) paras 59, 62.

105 Sections 93(8AA) 208(2)(c) and 221(3) of the Commonwealth Electoral Act 1918 (Cth) (Australia).

Court adopted dynamic interpretation of the Constitution,[106] ruling that democracy in contemporary Australia is premised on universal suffrage[107] and that 'the definition of…[an] excluded class or group [from suffrage] would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice.'[108] Writing separately, Gleeson CJ noted that '[c]itizens, being people who have been recognized as formal members of the community, would, if deprived temporarily of the right to vote, be excluded from the right to participate in the political life of the community in a most basic way....'[109]

(b) Convicts as Rights-Holders

In *August*, the South African Court held that convicts are entitled to all their personal rights and dignity not temporarily taken away by law or otherwise inconsistent with circumstances in which they have been placed.[110]

In *Sauvé* (No. 2), the Canadian SC maintained that 'the right…to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities.'[111] The dissent accepted that

---

106 Commonwealth of Australia Constitution Act 1900 (63 & 64 Vict) (UK).

Section 7: 'The Senate shall be composed of senators for each State, directly chosen by the people of the State'. Section 24: 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth'.

107 Case Comment, 'Australia: Denying Vote to Citizens Serving Custodial Sentences Unconstitutional, Inconsistent with Representative Government [2008] PL 383, 383-4.

108 *Roach* (n11) para 8.

109 Ibid.

110 *August* (n9) para 18.

111 *Sauvé* (No 2) (n8) para 47.

convicts should be seen as rights-holders. However, it argued that by disenfranchising convicts, society respects them, since it treats them as autonomous individuals who are paying prices for their choices.[112]

In *Hirst* (No. 2), the Chamber held that 'the fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights in the Convention'.[113] The GC reiterated that 'prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty'.[114]

In *Roach*, Gleeson CJ held that 'there is nothing inherently inconsistent between being in custody and voting'.[115] The other three majority judges maintained that '[p]risoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration'.[116]

---

112 Ibid para 75.

113 *Hirst* (No 2) (Chamber) (n12) para 44.

114 Ibid (Grand Chamber) para 69.

115 *Roach* (n11) para 11.

116 Ibid para 85 (Gummow, Kirby and Crennan JJ).

(c) Balancing/Proportionality Analysis[117]

In *August*, the South African Court referred to an American judgment when holding that 'parliament cannot by its silence deprive any prisoner of the right to vote'.[118] However, based on the Constitutional limitation clause in Section 36,[119] it noted that '[t]his judgment should not be read...as suggesting that Parliament is prevented from disenfranchising certain categories of prisoners'.[120]

In *NICRO*, following the enactment of disenfranchising legislation, the Court stressed that legitimate legislative objectives are required to justify rights infringement.[121] The government presented two objectives. The *first* objective was sending a public message that the government is 'tough on crime'. Rejecting this argument, the Court held that '[i]t could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor could it reasonably be argued that the government is entitled to deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true

---

117 The similarities and differences between *balancing* and *proportionality* are widely debated by scholars and judiciaries worldwide. For this thesis's purposes, suffice it is to illustrate that *some* form of balancing/proportionality is taking place, namely that, across jurisdictions, when disenfranchisement is prescribed by law, legislative aims are assessed in view of their importance and necessity, and, if courts find the aims to be suitable, the benefits brought by the impugned legislation are balanced against the harms that it causes.

Interestingly, despite the absence of an applicable limitation clause in the Australian Constitution and the ECHR, courts 'read' implicit limitations into the respective provisions. In *Soering v UK* (1989) 11 EHRR 439, the ECtHR held that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights'. Ibid para 89.

118 *August* (n9) para 33, referring to *O'Brien v Skinner* 414 US 524 (1973).

119 South African Constitution Section 7: 'The rights in the Bill of Rights are subject to the limitations...in Section 36'.

120 Ibid para 31.

121 *NICRO* (n10) para 23.

attitude towards crime and criminals.'[122] The *second* objective was refraining from investing 'scarce resources'. The Court noted that 'arrangements for registering voters were made at all prisons to accommodate unsentenced inmates and those serving sentences because they had not paid the fines imposed on them'.[123] Since both governmental objectives were rejected, the majority deemed it unnecessary to conduct balancing/proportionality analysis.[124]

Contrarily, the dissenting judges accepted the first legislative objective. Mandla J asserted that government objectives must be treated 'holistically', and that in a State 'plagued by the scourge of crime', disenfranchisement is a legitimate measure.[125] Ngcobo J posited that denouncing crime is a legitimate policy objective, and that disenfranchisement is part of a necessary effort to fight crime and emphasise the duties and responsibilities of citizens.[126]

In *Sauvé* (No. 2), two legislative objectives were presented: promotion of civic responsibility as well as respect for the rule of law, and enhancement of the general purposes of criminal sanctions.[127] The SC held both objectives to be too symbolic and

---

122 Ibid para 56.

123 Ibid para 49.

124 Ibid para 51.

125 Ibid paras 113, 117.

126 Ibid paras 140-146.

127 *Sauvé* (No 2) (n8) para 21.

In the first *Sauvé* case, the government posited additionally a 'republican' justification, that disenfranchisement promotes a 'decent and responsible electorate'. Debra Parkes, 'Ballot Boxes Behind Bars' (2003-4) 13 Temp Policy & Civil Rights Law Review 71, 81-3.

abstract.[128] However, unlike the South African court, it conducted proportionality analysis, as Section 1 of the Canadian Charter mandates when legislative objectives are found to be adequate. The provision states that '[r]ights and freedoms…[are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

Based on the *Oakes*[129] formula, three requirements have to be met for rights-infringing legislation to be upheld: First, an established *rational connection* between the measure taken and the objective to be achieved. The SC held that disenfranchisement as prescribed by the provision is not rationally connected to the legislative objectives.[130] While such determination is normally sufficient to invalidate legislation, the SC proceeded to the *minimal impairment* test, requiring that the measure should restrict as little as possible the right in question. Rejecting the claim that the legislation satisfies the test by disenfranchising only those serving a sentence of two years or above, the SC held that 'even one person whose Charter rights are unjustifiably limited is entitled to seek redress under the Charter.[131] Finally, in what is often referred to as proportionality *stricto senso,* the SC found that the legislation's benefits fail to surpass the detrimental effects of the right-to-vote's infringement.[132]

---

128 Ibid para 46.

129 *R v Oakes* [1986] 1 SCR 103.

130 *Sauvé* (No 2) (n8) para 51.

131 Ibid para 55.

132 Ibid para 60.

Contrarily, the dissent accepted the legislative objectives, and hailed the fact that disenfranchisement was restricted to those incarcerated for over two years.[133] Unlike the majority, Gonthier J refused to reject symbolic or abstract arguments,[134] suggesting that deference should be had to legislative policy choices 'based on reasonable social or political philosophy'.[135]

In *Hirst* (No. 2), the UK presented two legislative aims: enhancing civic responsibility and respect for the rule of law. The Chamber held that 'there is no clear, logical link between the loss of vote and the imposition of a prison sentence, where no bar applies to a person guilty of crimes which may be equally anti-social or "un-citizen-like" but whose crime is not met by such a consequence.' Nevertheless, it refrained from ruling 'that these aims cannot be regarded as legitimate'.[136] 'Reading' proportionality requirements into Article 3,[137] the Chamber noted that while a wide margin of appreciation should be granted to the legislature, there is no evidence that the UK legislature has ever sought to weigh the competing interests'.[138] Moreover, the Chamber stressed that it 'cannot accept...that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation'.[139]

---

133 Ibid para 71.

134 Ibid para 99.

135 Ibid para 68.

136 *Hirst* (No 2) (Chamber) (n12) paras 46-7. It did not however rule that the aims *are* legitimate.

137 Unlike Articles 8-11 of the ECHR, which include limitation clauses, Article 3 is silent.

138 *Hirst* (No 2) (Chamber) (n12) para 51.

139 Ibid.

The GC maintained, without discussion, that 'the rights bestowed by Article 3...are not absolute. There is room for implied limitations', and did not preclude restrictions 'on an individual who had, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.'[140] However, the GC held that restrictions must further a legitimate aim, and the means used should be proportionate to that aim, maintaining the integrity of the electoral procedure.[141] Addressing legitimate aims, the GC maintained that Article 3 does not include a list of aims. Consequently, States have wide discretion, and the UK's aims are not 'untenable or *per se* incompatible'.[142]

The UK submitted that the impugned legislation is proportionate, since it is only applicable during incarceration, and does not apply to those imprisoned for contempt of court, to detainees before conviction or to those imprisoned for failing to pay fines.[143] Nevertheless, the GC held the provision to be a 'blunt instrument', indiscriminate and disproportionate to the aims pursued, since it applies irrespective of the length of sentence and of the nature or gravity of the offence.[144] The GC held that Contracting States adopted 'different ways of addressing the issue [of disenfranchisement]'[145] and that it was up to the UK parliament to choose the means

---

140 *Hirst* (No 2) (Grand Chamber) (n12) para 60.

141 Ibid paras 61-2.

142 Ibid paras 74-5.

143 *Further Observations on Behalf of the Government of the United Kingdom* (submitted to the Grand Chamber on 20 January 2005) Sections 28-32.

144 *Hirst* (No 2) (Grand Chamber) (n12) para 82.

145 The GC quoted a British government survey which suggested that sixteen States in the Council of Europe enfranchise all convicts, in thirteen States some convicts are disenfranchised, and in thirteen other States, all incarcerated individuals are disenfranchised. Ibid para 33.

for securing the right-to-vote.[146] It hence accepted, in principle, the UK's demand for a wide margin of appreciation.[147] However, it rejected the UK's claim that the 2000 amendment of the RPA which enfranchised individuals on remand shows that Westminster has given the issue due consideration.[148]

In their Joint Dissenting Opinion, Wildhaber, Costa, Lorenzen, Kovler and Jebens JJ maintained that, in the case at hand, applying wide 'margin of appreciation' requires allowing Contracting States to adopt diverging voting eligibility criteria.[149] Unlike the majority, the dissenting judges, instead of engaging in balancing/proportionality, deferred to the legislature, positing that their 'own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little', and that they 'are not able to accept that it is for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent'.[150]

According to a report issued by the British Parliament's Human Rights Joint Committee on 27 January 2009, Ireland and Cyprus have enfranchised all their convicts since Hirst (No 2) was decided. In Hong Kong, where under British rule incarcerated convicts were disenfranchised, the High Court ordered the Government to make arrangements to enable all convicts to vote. HCAL 82/2008 *Chan Kin Sum v Secretary of State for Justice and the Electoral Affairs Commission* (8 December 2008).

146 *Hirst* (No 2) Grand Chamber) (n12) para 80.

147 Further Observations (n143) Sections 23-4 referring to *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 20.

148 Ibid section 10.

149 *Hirst* (No 2) Grand Chamber) para 5.

150 Ibid para 8.

In *Roach*, the Australian Court held that limits on the right-to-vote have to be 'reasonably appropriate'.[151] Three of the four majority judges suggested that 'there is little difference between [reasonably appropriate]...and "proportionality"'.[152] Invalidating the impugned legislation, they maintained that the previous legislation, disenfranchising individuals serving sentences of three or more years, would have been upheld, since it operated 'to deny the exercise of the franchise during one normal electoral cycle...[not] without regard to the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process'.[153]

(d) References to External Sources

In *August*, the South African Court referred to Canadian and American judgments[154] to support the claim that convicts remain rights-holders. In *NICRO*, it relied on the reasoning of the majority in *Sauvé* (No. 2),[155] *inter alia*, to argue that appeasing public opinion is not a justifiable aim. Further, while the government argued that *Sauvé* (No. 2) was narrowly decided and hence should not be relied on, the Court held that in *Sauvé* (No. 2) the legislation affected convicts serving sentences of two or more years. Faced with *blanket* disenfranchisement legislation, similar to the South African provision, the Canadian SC unanimously invalidated it.[156] A dissenting judge, Mandla

---

151 *Roach* (n11) para 88. The fourth majority judge, Gleeson CJ, posited that proportionality is a different legal standard from 'reasonably appropriate', the latter being less searching.

152 Ibid.

153 Ibid paras 102-3.

154 *August* (n9) n18 and n21, respectively.

155 *NICRO* (n10) para 61-3.

156 Ibid para 66.

J, referred to America, Australia, New Zealand, Europe (and the UK, separately) to demonstrate that democracies practise disenfranchisement.[157]

The majority in *Sauvé* (No. 2) referred to *August*, quoting the reference to voting as a 'badge of dignity'.[158] Gonthier J, dissenting, like Mandla J in *NICRO*, referred extensively to global practices to substantiate the legislation's reasonableness.[159]

In *Hirst* (No. 2), the Chamber referred to external sources in two contexts: Under the heading 'Relevant International Materials', followed by a separate section titled 'The Law', it quoted, without discussion, provisions of the International Covenant on Civil and Political Rights, the European Prison Rules, and the Code of Good Practice in Elections, as well as parts of the majority and dissenting opinions in *Sauvé* (No. 2).[160] However, in its discussion of legislative aims, the Chamber described the majority's judgment in *Sauvé* (No. 2) as a 'detailed and helpful examination of the purposes pursued by prisoners disenfranchisement' and noted that '[t]aking due account of the difference in text and structure of the Canadian Charter, the...substance of the reasoning may be regarded as apposite in the present case.'[161] Like the South African government in *NICRO*, the UK contended that since *Sauvé* (No. 2) was narrowly decided and concerned provisions of the Canadian Charter, it should not have featured so prominently in the Chamber's judgment.[162]

---

157 Ibid paras 118-122.

158 *Sauvé* (No 2) (n8) para 35.

159 Ibid paras 124-132. Like the ECtHR, it details European disenfranchisement policies.

160 *Hirst* (No 2) (Chamber) (n12) paras 24-26.

161 Ibid para 43.

162 Further Observations (n143) sections 18-9.

In *Roach*, Gleeson CJ distinguished *Sauvé* (No. 2) and *Hirst* (No. 2), arguing that these judgments used different legal standards in their respective analyses than those required by the Australian Constitution. Wary of 'uncritical translation of the concept of proportionality' leading to 'application in this country of a constitutionally inappropriate standard of judicial review',[163] he suggested that '[t]he difference between the majority and minority opinions in both *Sauvé* and *Hirst* turned largely upon the margin of appreciation...courts thought proper to allow the legislature.'[164] Perhaps inconsistently, and despite invalidating the impugned legislation, he referred to the *dissent* in *Sauvé* (No. 2) to support his argument that disenfranchisement of some convicts is justified since they 'suffered a temporary suspension of their connection with the community'.[165]

In contradistinction, Hayne J, dissenting, flatly rejected *any* reference to external sources, supporting instead the application of 'generally accepted Australian standards'.[166] He suggested 'there is no similarity' between the Australian and foreign cases save 'in the statement of the problem as an issue about the validity of legislative provisions excluding prisoners from voting'.[167] Heydon J, also dissenting, presented an originalist position, maintaining that '[t]hese instruments [foreign and international law] did not influence the framers of the Constitution for they all postdate it'.[168]

---

163 *Roach* (n11) paras 13-7.

164 Ibid para 18.

165 Ibid para 19.

166 Ibid paras 163-4.

167 Ibid para 167.

168 Ibid para 182.

(3) Reactions to the Judgments

Due to their employment of balancing/proportionality analysis, the judgments in *NICRO* and *Sauvé* (No. 2) left room, in principle, for narrowly tailored disenfranchisement legislation. Nevertheless, to-date, the South African and Canadian legislatures refrained from passing any such legislation. In contradistinction, *Roach* has led to the reinstatement of previous legislation disenfranchising individuals serving sentences of three or more years.

The UK is still struggling with the ramifications of *Hirst* (No. 2): Following the judgment, the government initiated public consultation. The Consultation paper's First Phase was prefaced by the Lord Chancellor, postulating, despite determination to the contrary in *Hirst* (No. 2),[169] that '[t]he right-to-vote in the UK is considered by many to be a privilege as well as an entitlement', and that the government's position remains that disenfranchisement 'reflected in the current law, is a proper and proportionate punishment'.[170] Notably, one of the options that the government included in the paper was *retaining* the status quo.[171] The Second Phase Consultation paper precludes both blanket disenfranchisement and full enfranchisement from the consultation's purview.[172]

---

169 *Hirst* (No 2) (Grand Chamber) (n12) para 69.

170 Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer of Thoroton, *Written Ministerial Statement* (14 December 2006) <http://www.dca.gov.uk/pubs/statements/2006/st061214.htm> accessed 30 September 2009.

171 Ministry of Justice, *Voting Rights of Convicted Prisoners Detained within the United Kingdom*, CP 29/06 First Phase Consultation (December 2006) <http://www.justice.gov.uk/consultations/prisoners-voting-rights.htm> accessed 30 September 2009.

172 Ibid CP 6/09 Second Phase Consultation (April 2009).

D. Concluding Remarks

Chapter Two's normative appraisal was not confined to particular jurisdictions. Rather, it was suggested that since elections take place and criminal laws exist in most societies, the question whether conviction should lead to disenfranchisement is one which may be globally addressed.

This chapter highlighted parts of the global debate, featuring similar arguments to those presented in Chapter Two. Moreover, it was suggested that a transnational judicial discourse currently takes place. Judges base their analyses on determinations made by colleagues many miles away, resulting in an identifiable trajectory towards enfranchisement of some convicts. It was argued that the divergent approach taken by American jurisprudence results from the absence of a Constitutional right-to-vote, from an implicit Constitutional sanction of convicts'

The government posits that those sentenced for over four years will not be enfranchised under any circumstances; neither will those convicted of electoral offences, regardless of the length of their sentence. Ibid p 22.

The government offers four options for consideration, entailing *enfranchisement*, respectively, of those convicted for less than four, two or one year, with an intermediate position suggesting the exercise of judicial discretion regarding those sentenced to between two and four years. It announces its inclination to adopt the *lowest* threshold. Notably, *no* respondent to the First Phase Consultation suggested setting *a* threshold. Instead, it was recommended either to fully enfranchise convicts or to retain *blanket* prohibition. Ibid p 24.

Interestingly, the paper refutes the claim that prisoners will not have access to sufficient campaign material to be able to make an informed choice, comparing their situation to that of overseas soldiers. Ibid p 34.

In *Smith v Scott* [2007] CSIH, the Registration Appeal Court of Scotland refused to 'read down' Section 3(1) of the RPA as providing for full or partial enfranchisement, and found the Section's language to be clearly mandating *blanket* disenfranchisement, in contravention of the ECtHR's judgment. It thus issued a declaration of incompatibility, under Section 4 of the HRA. Ibid para 26.

The case was heard shortly before the 2007 Scottish elections, and the Court criticised the government's 'sluggish' reaction to *Hirst* (No 2) (n12), maintaining that the consultation timetable ignored the elections date. Ibid para 41.

disenfranchisement, as well as from a general reluctance to partake in transnational discourse.

Taking note of the arguments presented in Chapter Two for disenfranchisement's proscription and of the outcome of the transnational discourse presented in this chapter, the following chapter focuses on the human rights treaty regime's perspective.

CHAPTER FOUR:
CONVICTS' DISENFRANCHISEMENT AND THE HUMAN RIGHTS TREATY REGIME

A. Introduction

Chapter Two appraised justifications for policies sanctioning convicts' disenfranchisement and the harms they cause to individuals and collectives while Chapter Three offered comparative perspectives, identifying an emerging global trend towards enfranchisement of some convicts.

This chapter offers international human rights perspectives[1] by analysing Article 25 of the International Covenant on Civil and Political Rights (ICCPR), arguably the leading international treaty provision enunciating a right-to-vote. Article 25 guarantees *every citizen* the right and opportunity to vote in elections *without unreasonable restrictions*.[2]

Section B examines this rather ambiguous stipulation, using the following 'supplementary means' of interpretation:[3] Article 25's preparatory work (*Travaux Préparatoires*); the Human Rights Committee's view; reservations to Article 25;

---

[1] The thesis examines convicts' disenfranchisement in *treaty* law. For the possible emergence of *customary* international law proscribing disenfranchisement of *ex*-convicts, see Elizabeth Hull, *The Disenfranchisement of Ex-Felons* (Temple University Press, Philadelphia 2006) 118.

[2] GA/Res/2200 (XXI), 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) (16 December 1966).

There are currently 164 States parties to the ICCPR. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 30 September 2009.

[3] Vienna Convention on the Law of Treaties, 8 ILM 1969 (opened for signature 23 May 1969, entered into force 27 Jan 1980) Article 32 (VCLT or Vienna Convention).

dynamic treaty interpretation, premised on an 'emerging right to democratic governance'[4] which has become nearly universally accepted[5] and permeates core international documents, including the Universal Declaration of Human Rights (UDHR);[6] and harmonised treaty interpretation, involving the assessment of disenfranchisement in light of other treaty provisions. The analysis shows that Article 25 does *not* prohibit disenfranchisement of convicts, while some interpretations, applying balancing/proportionality considerations suggest that disenfranchisement of ex-convicts and *blanket* disenfranchisement of convicts may be treaty-incompatible.

In Chapter Two, it was submitted that adverse effects of disenfranchisement justify its prohibition, not least due to the significance of voting as a defining element of individuals' political identity. Section C explores the notion that voting eligibility, as a legal construct,[7] constitutes the *essence* of the right-to-vote. While non-invidious regulatory requirements potentially limit accessibility of voters to the polls, disenfranchisement intentionally abrogates convicts' right-to-vote. It is thus suggested that since disenfranchisement infringes the essence of convicts' right-to-vote, it should be proscribed rather than circumscribed. Yet, as noted above, Article 25 cannot be plausibly interpreted to support such contention.

Instead of subverting the intentions and current views of (some) State parties by altering the interpretation of Article 25, or attempting to amend Article 25 (which

---

4 Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46.

5 Christine Cerna, 'Universal Democracy: An International Legal Right or a Pipe Dream of the West?' (1995) 27 NYU J intl L & Pol 289, 295.

6 GA/Res/217A (III), UN Doc A/810 at 71 (10 December 1948).

7 Robert Alexy, *A Theory of Constitutional Rights* (OUP, Oxford 2002) 122.

seems virtually impossible),[8] it is proposed that an *optional protocol* to the ICCPR, proscribing disenfranchisement, be adopted. Such a protocol, emulating the ICCPR's Optional Protocol aiming at the Abolition of the Death Penalty (the Death Penalty Protocol),[9] will set a higher threshold and may, as often happens with human rights treaties, be trend-setting.[10]

In support of the proposed protocol, it is argued that the facilitative and inclusive nature of the right-to-vote, famously coined 'the right of rights',[11] makes it less vulnerable to 'cultural relativity' critiques which are frequently voiced against the international standardisation of rights. Moreover, as noted in Chapter Two, notions of deference and 'margin of appreciation' seem inapposite when scrutinising restrictions on the right-to-vote, since they legitimise majority decisions to cast parts of the citizenry out of decision-making. The chapter concludes by drawing analogies between the proposed protocol and the relatively successful Death Penalty protocol.

In today's world, States remain the main guarantors of individual rights, not least the right-to-vote, which requires State apparati for its implementation. Concurrently, international standardisation in the field of human rights is flourishing.[12] Admittedly, treaties have limited effect: they normally bind only

---

8 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Arlington VA 1993) 640.

9 UN DOC A/RES/44/128 (opened for signature 15 December 1989, entered into force 11 July 1991).

10 Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP, Oxford 2007) 159 suggest that certain matters, including human rights, may be unsuitable for consensus-based negotiating processes, since they don't readily lend themselves to package-deal approaches.

11 Jeremy Waldron, *Law and Disagreement* (Clarendon Press, Oxford 1999) 282.

12 <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> accessed 30 September 2009.

signatories;[13] sometimes, they are not directly applicable in domestic law due to the legal system's 'dualist' nature;[14] and they rarely include an effective enforcement mechanism.[15] However, unambiguous treaty stipulations may improve treaty compliance[16] as well as serve to provide clarity and certainty.[17] Furthermore, the proposed protocol's expressive nature[18] may signal desired behaviour[19] and carry *persuasion* and *acculturation* effects.[20]

---

[13] Menno Kamminga and Martin Scheinin (eds), *The Impact of International Human Rights Law on General International Law* (OUP, Oxford 2009) 64.

The Rome Statute of the International Criminal Court (opened for ratification 17 July 1998, entered into force on 1 July 2002) may be considered an exception. <http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm> accessed 30 September 2009.

[14] Louis Henkin, 'International Law as Law in the United States' (1984) 82 Mich L Rev 1555, 1565 n34.

[15] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn Columbia University Press, New York 1979) 47 famously noted that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'. Alas, since a violation by a State of the rights of its own inhabitants does not ordinarily infringe the national interests of other parties to the agreement they have no compelling interest to scrutinise the violating behaviour and call it to account. Ibid 232.

[16] Curtis Bradley and Jack Goldsmith, 'Treaties, Human Rights and Conditional Consent' (2000) 149 Penn L Rev 1 contend that the central problem for international human rights law has not been selective consent to treaty terms but, rather, failure by nations to adhere to treaties they have consented to. Ibid 55.

Oona Hathaway, 'Do Human Rights Treaties Make a Difference? (2002) 111(8) Yale LJ 1938 argues that treaty ratification is not infrequently associated with *worse* human rights record, though for fully democratic nations it is associated with better human rights practices. She suggests that, due to the dual character of treaties, States can reap the (expressive) benefits of treaty ratification, communicating commitment to human rights, without having to actually follow the treaty standards. Ibid 2005. Hathaway accepts that treaties may have positive effects on ratifying countries, but argues that the process may take decades to achieve tangible results. Rejecting 'shallow' treaty ratifications, she proposes conditioning treaty membership on undertaking assessable commitments. Ibid 2021.

[17] Kenneth Abbott and others, 'The Concept of Legitimization' (2000) 54 Intl Org 401 suggest that, in treaties, precise rules specify clearly and unambiguously what is expected of States, both in terms of intended objectives, and regarding the means of achieving it in particular sets of circumstances.

[18] Alex Geisinger and Michael Stein, 'A Theory of Expressive International Law' (2007) Vanderbilt L Rev 6 suggest that ratification of treaties can influence domestic norms, which, in turn can affect both citizens' behaviour and domestic policy. They assert that Hathaway's account (n16) only applies where a State can act in derogation of a treaty without serious consequences to its reputation.

The human rights discourse is of recent vintage, established largely by treaty rather than custom, reflecting steady drift toward enhanced protection of rights.[21] The time is ripe for the global community to take another step forward.

B. The Right-to-Vote under the International Covenant on Civil and Political Rights: Deconstructing 'Without Unreasonable Restrictions'

(1) Article 25 and Principles of Treaty Interpretation

The rights and freedoms enunciated in the ICCPR are generally guaranteed to all individuals present in the territory and subject to the jurisdiction of State parties.[22]

Contrarily, rights under Article 25 are guaranteed only to *citizens*, who shall have the right 'to vote…at…elections which shall be by universal and equal suffrage'.[23] The preamble makes reference to the generally applicable prohibition in Article 2 on distinctions made on the basis of '...race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. However, unlike, for instance, the *absolute* prohibition on torture in Article 7, Article 25 prohibits 'unreasonable restrictions' of rights, effectively *permitting* reasonable restrictions.

---

19 David Moore, 'A Signalling Theory of Human Rights Compliance' 97 Northwestern U L Rev 883 posits that compliance with human rights treaties is a particularly powerful sign sent by States because of costs incurred by ratification, and due to historic events leading to their drafting. Ibid 894.

20 Ryan Goodman and Derek Jinks, 'How to Influence States: Socialisation and International Human Rights Law' (2004) 54(3) Duke LJ 621 suggest that, in the international community, social influence is characterised by three phenomena: coercion, persuasion and acculturation.

21 Louis Henkin, 'Human Rights and State Sovereignty' (1995/6) 25 (1/2) Georgia J of Comp & Intl L 31, 36.

22 ICCPR (n2) Art 2(1).

23 Ibid Art 25(b). These rights *can* be granted to non-citizens as well.

States that ratified a treaty are bound by it[24] and must perform their obligations in good faith (*Pacta Sunt Servanda).*[25] State parties may not invoke internal law to justify failure to perform a treaty.[26] In federal States, like America, the federal government is responsible for ensuring treaty compliance.[27]

Article 31 of the Vienna Convention stipulates that in interpreting treaty provisions, the ordinary meaning should be sought in light of the treaty's *object* and *purpose*. Article 32 allows for supplementary means, including the treaty's preparatory work (*Travaux Préparatoires*), to be used in case of ambiguity, obscurity, or an interpretive result which is manifestly absurd or unreasonable.[28] It seems that the ambiguous nature of the phrase 'without unreasonable restrictions' in Article 25 merits recourse to supplementary means.

---

[24] VCLT (n3) Art 14.

[25] Ibid Art 26.

[26] Ibid Art 27. The rule is without prejudice to Article 46 which discusses provisions of internal law regarding competence to conclude treaties.

[27] American Law Institute, *Restatement (3d) of Foreign Relations Law of the United States* (1986) §207(b): 'A State is responsible for any violation of its obligations under international law resulting from action or inaction by...authorities of any political subdivision of the State'.

[28] Gardiner notes that it is difficult to detect among States which are not parties to the VCLT a distinctive and comprehensive approach to treaty interpretation that differs radically from the VCLT. Richard Gardiner, *Treaty Interpretation* (OUP, Oxford 2008) 133.

As early as 1971, the US State Department maintained that 'although not yet in force, the VCLT is already generally recognised as the authoritative guide to current treaty law and practice'. Exec Doc L 92nd Congress 1st Session (1971) p 1.

(2) *Travaux Préparatoires*

The House of Lords in *Fothergill v Monarch Airlines* held that 'an agreed conference minute [sic] of the understanding on the basis of which the draft or an article of the [Warsaw] Convention was accepted may well be of great value.'[29]

In the drafting process of Article 25, the question of whether political rights under the ICCPR should be formulated as individual rights or, like in Article 3 of the First Additional Protocol to the ECHR, as State obligations, was vigorously debated.[30] Eventually, a joint Yugoslav-French (YF) proposal was adopted, guaranteeing citizens the right and opportunity to take part in conduct of public affairs.[31]

The phrase 'universal and equal suffrage' in subsection (2) of Article 25 was included due to the concept's fundamental nature though some delegates saw it as redundant in light of Article 25's guarantee of rights to *every* citizen.[32]

The phrase 'without unreasonable restrictions' was absent from the original draft. It was included in the YF draft,[33] after a Soviet proposal[34] to include a specific list of prohibited grounds (property, education or other qualifications) in addition to the prohibited distinctions in Article 2, was rejected.‘ While a minimum voting age

---

29 [1981] AC 251, 294.

30 Marc Bossuyt, *A Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Kluwer, Boston 1987) 473.

31 Nowak (n8) 439, referring to E/CN.4/L.224/Rev 1m Rev 4 (1953) (YF draft).

32 Ibid.

33 UNCHR, 9th session (1953) E/CN.4/L.224/Rev. 4 (F) & (YU).

34 Ibid E/CN.4/SR.363 P. 6 (SU).

and the exclusion of mentally ill persons were considered 'reasonable restrictions', convicts' disenfranchisement was not mentioned.[35] Nonetheless, Gardiner asserts that the absence from the preparatory work of reference to an issue is unlikely to be dispositive.[36]

(3) The View of the Human Rights Committee

The Human Rights Committee (HRC), set up in Article 28 of the ICCPR, is comprised of eighteen independent experts, and charged with three main functions: issuing General Comments, examining State reports, and assessing individual complaints involving State parties which have ratified the additional protocol.

General Comments present the HRC's views on issues arising out of treaty provisions.[37] Nowak suggests that since they are adopted by consensus, General Comments should be considered highly in treaty interpretation, despite their non-binding nature.[38]

Regarding the right-to-vote, the General Comment on Article 25 asserts that it 'lies at the core of democratic government, based on the consent of the people', and suggests that it is related to the rights of peoples to self-determination under Article

35 ICCPR E/CN. 4/SR 364, p 14. See also Annotation by the Secretary-General of the Draft International Covenants on Human Rights UN GAOR, 10th Sess Supp No 19, UN Doc A/2929 (1955).

36 Gardiner (n28) 336.

37 Philipp Alston, 'The Historical Origins of the Concept of General Comments' in Laurence Boisson de-Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System: In Quest of Equality and Universality* (Martinus Nijhoff, The Hague 2001) 763, 764.

38 Nowak (n8) Introduction p XXIII.

1(1).[39] However, the HRC notes that the right-to-vote under the ICCPR is *not* absolute, and limitations are acceptable, as long as no distinction is made on grounds prohibited in Article 2(1), no unreasonable restrictions are imposed, and rights 'are not suspended or excluded, except on grounds which are established by law and which are objective and reasonable'.[40]

It reiterates that established mental incapacity and setting a minimum age limit for the right-to-vote are examples of reasonable restrictions while it is unreasonable to restrict the right-to-vote on grounds of physical disability or to impose literacy, educational or property requirements.[41]

Regarding convicts, the HRC suggests that the period of suspension of the right-to-vote 'should be proportionate to the offence and the sentence'.[42] In a 1984 decision, it maintained that deprivation of all political rights for fifteen years could only be justified in exceptional circumstances.[43]

More recently, the HRC expressed concern regarding *blanket* disenfranchisement, and seemed generally uneasy with disenfranchisement policies. In its 1993 observations on Luxembourg, it noted that 'the practice of including a suspension of voting rights as part of sentencing raises a number of problems

---

39 General Comment No 25 (57) on the Right to Take Part in the Conduct of Public Affairs, Voting Rights and the Right of Equal Access to Public Service, adopted at the 57th session (27 August 1996) paras 1-2.

40 Ibid paras 4-6.

41 Ibid para 10.

42 Ibid para 14.

43 *Pietraroia v Uruguay* Comm No 44/1979 CCPR/C/OP/1 at 76 (1984) para 16.

under….the Covenant', and recommended that 'the State party should consider abolishing the deprivation of the right to vote as part of legitimate punishment'.[44] In 2003, the HRC 'remained concerned' that 'for a large number of offences, the systematic deprivation of the right to vote is an additional penalty in criminal cases.'[45]

In its 2006 observations on America, the HRC noted that 'general deprivation of the right [to] vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not [sic] meet the requirements of Articles 25 [and] 26...nor serves the rehabilitation goals of Article 10(3).'[46]

While the UK submitted in *Hirst* (No. 2) that its disenfranchisement policy is compatible with Article 25,[47] in 2008, the HRC expressed concern at the maintenance of *blanket* disenfranchisement despite the European Court of Human Right's (ECtHR) judgment, concluding that 'the Committee is of the view that general deprivation of the right to vote for convicted prisoners may not meet the requirements of article 10, paragraph 3, read in conjunction with article 25 of the Covenant'.[48]

---

44 CCPR A/48/40 vol 1 (1993) 30 para 133.

45 CCPR A/58/40 vol 1 (2003) 45 para 80(8).

46 CCPR/C/USA/CO/3/Rev 1 (2006) para 35.

47 *Further Observations on Behalf of the Government of the United Kingdom* [submitted in *Hirst v UK* (No 2) (2006) 42 EHRR 41] Section 13.

48 CCPR/C/GBR/CO/6 (2008) para 28.

Notably, in 2002, the HRC made a stronger statement, noting that '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, in conjunction with article 25 of the Covenant.' CCPR/A/57/40 vol 1 (2002) 36 paras 75(10).

(4) Reservations to Article 25

Reservation to a treaty is 'a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.'[49] States cannot enter reservations which are incompatible with the object and purpose of the treaty.[50]

The HRC deemed it desirable that State parties accept the full range of obligations under the ICCPR,[51] noting that domestic laws may have to be altered to facilitate treaty compliance[52] and that the Committee is competent to determine the compatibility of reservations with the ICCPR's object and purpose.[53]

When the US ratified the ICCPR in 1992,[54] it entered more Reservations, Understandings, and Declarations (RUDs) than any other State Party.[55] Scholars

---

49 VCLT (n3) Art 2(d).

50 Ibid Art 19(3).

51 General Comment No 24 on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto or in relation to Declarations under Article 41 of the Covenant, adopted at the 52nd session (4 November 1994), reproduced in (1995) 2 IHRR 10 para 4.

52 Ibid para 12.

53 Ibid paras 17-8.

Some States have disputed the HRC's competence determination. Separate Observations of the US, UK and France on the General Comment reproduced in (1996) 3 IHRR 261, 265 and (1997) 4 IHRR 6 respectively.

54 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 30 September 2009.

55 Lawyers' Committee for Human Rights, *Critical Assessment of the United States Commitment to Civil and Political Rights* (Washington DC 2006) 62.

doubted whether these are compatible with the object and purpose of the treaty.[56]

Yet, none of its RUDs addressed Article 25 in general or convicts' disenfranchisement in particular.[57] In fact, only three reservations were entered regarding Article 25:[58] by Kuwait, referring to restrictions on women's right-to-vote and stand for elections; by Switzerland, referring to elections held by means other than secret ballot; and by the UK, regarding voting in Hong Kong (the reservation is irrelevant since Hong Kong is no longer under British rule). Considering that many State Parties disenfranchised convicts at the time of their ICCPR ratification, it seems that they believed convicts' disenfranchisement is treaty-compatible.

(5) The Emerging 'Right to Democratic Governance' and Dynamic Interpretation

The Charter of the UN requires all members to promote 'universal respect for, and observance of, human rights and fundamental freedoms'.[59] In accordance with Article 68 of the Charter, The Economic and Social Council established the Commission on Human Rights (CHR).[60]

---

56 William Schabas, 'Invalid Reservations to the ICCPR: Is the United States Still a Party?' (1995) 21 Brooklyn J Intl L 277, 278.

57 Importantly, the US declared that 'the provisions of Articles 1 through 27 of the Covenant are not self-executing'. In *US v Duarte-Acero* 296 F.3d 1277 (11th Cir 2002). The Eleventh Circuit held that '[t]he ICCPR does not create judicially-enforceable rights.'

Nonetheless, in its first report to the ICCPR, the US posited that the 'fundamental rights' in the ICCPR 'are already guaranteed as a matter of US law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases.' CCPR/C/81/Add.4 (1994).

58 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec> accessed 30 September 2009.

59 59 Stat 1031, UNTS 993, 3 Bevans 1153 (26 June 1945) Article 55.

60 The CHR was replaced by the Human Rights Council in 2006. GA/Res/60/251 (15 March 2006).

In 1948, the UDHR was unanimously adopted by the UN General Assembly. Article 21 proclaims that '[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives'. It states that '[t]he will of the people shall be the basis of the authority of government', which 'shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.' Robinson suggests that Article 21 is the 'democratic credo'[61] without which none of the other rights and freedoms have real substance, as they depend on the basic right of the citizen to be the sole determining factor, either directly or through his elected representatives, in shaping the destiny of his country.

In 1993, the World Conference on Human Rights unanimously adopted the Vienna Declaration and Programme of Action (Vienna Declaration), which reaffirms the UDHR, and proclaims that '[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.'[62]

Following this, in 1999, the CHR adopted a resolution entitled 'promotion of the right to democracy', noting 'the large body of international law and instruments….which confirm the right to full participation and other fundamental democratic rights and freedoms inherent in any democratic society', and affirming that 'democracy fosters the full realization or all human rights'.[63] The CHR's 2004 resolution entitled 'Strengthening of Popular Participation' reaffirms that 'the will of

---

61 Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application, and Interpretation* (Institute of Jewish Affairs, New York 1958) 131-2.

62 UN Doc A/CONF 157/24 (Part 1) at 20 (1993). Article 26 calls upon all States to accede to international human rights instruments.

63 UN Doc E/CN.4/RES/1999/57 (27 April 1999). Adopted by 51 votes to 0, with China and Cuba abstaining.

the people shall be the basis of the authority of government...expressed in periodic and genuine elections, which shall be by universal and equal suffrage'.[64]

Katz suggests that elections are 'the defining institutions of modern democracy', and that nearly every State claims to be democratic or at least to be laying the foundations for an eventual democracy.[65] A 2003 survey notes that in the preceding three decades, every new State Constitution enunciated a citizen's right-to-vote.[66] Goodwin-Gill suggests that the principle that the will of the people, as expressed in elections conducted on the basis of universal suffrage, is the sole basis for governmental authority is uncontested.[67] Fox believes that a universal right to political participation, not contingent on treaty arrangements, has emerged.[68]

How should such consistent and continuous reference to democracy and elections affect the interpretation of Article 25? Jennings and Watts refer to Oppenheim's restrictive principle (*in dubio mitius*), stipulating that, among possible interpretations, the one less onerous on the State assuming an obligation should be chosen.[69]

---

64 Res/31/2004, 55th meeting (19 April 2004) Section 9. Adopted by 28 votes to 14, with 11 abstentions. A similar resolution was adopted at the 61st meeting (13 April 2005).

65 Richard Katz, *Democracy and Elections* (OUP, Oxford 1997) 4.

66 Alexander Kirshner, *The International Status of the Right to Vote* <http://www.demcoalition.org/pdf/International_Status_of_the_Right_to_Vote.pdf> accessed 30 September 2009.

67 Guy Goodwin-Gill, *Free and Fair Elections* (Inter-Parliamentary Union, Geneva 2006) 75.

68 Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 Yale J of Intl L 539, 541

69 Robert Jennings and A Watts (eds) *Oppenheim's International Law* (9th edn Longman, London 1992) Vol 1 p 1278.

However, Orakhelashvili questions whether this principle is applicable to human rights treaties.[70] Nowak asserts that human rights treaties should be interpreted liberally (*in dubio pro libertate*) and *dynamically*.[71] The ECtHR held that the ECHR, an international treaty, is a 'living instrument' which must be interpreted in light of present-day conditions.[72] It noted that, by its very nature, interpretation of international human rights law must be dynamic, adapting, and evolving to keep pace with changes in social thought and attitudes.[73] As was mentioned in Chapter Three, in *Hirst* (No. 2), the ECtHR reversed an earlier decision regarding convicts' disenfranchisement and adopted a rights-enhancing interpretation. It seems that the trajectory evidenced by the transnational discourse has had an effect.

Further guidance is provided by the UN Basic Principles for the Treatment of Prisoners, stipulating that '[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain…human rights and fundamental freedoms'.[74] According to the UN Standard Minimum Rules for the Treatment of Prisoners, '[t]he period of imprisonment [should be] used to ensure, so far as possible, that upon his return to society, the offender is not only willing but able to lead a law-abiding and self-supporting life.'[75] The former document applies a

---

70 Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 EJIL 529.

71 Nowak (n8) Introduction p XXIII.

72 *Soering v UK* (1989) 11 EHRR 439 para 89.

73 *Loizidou v Turkey* (Preliminary Objections) (23 March 1995) Ser A No 310 paras 71-2.

74 GA/RES/45/111 (14 December 1990) Principle 6. <http://www.un.org/documents/ga/res/45/a45r111.htm> accessed 30 September 2009.

75 ECOSOC Res 663 (31 July 1957) Rule 58. <http://www.unhcr.org/refworld/docid/3ae6b36e8.html> accessed 30 September 2009.

residual liberty paradigm to disenfranchisement, while the latter document advocates rehabilitation which, as suggested in Chapter Two, is arguably incompatible with disenfranchisement.

The European Code of Good Practice in Electoral Matters defines universal suffrage as its guiding electoral principle. While tolerating convicts' disenfranchisement, it requires that disenfranchisement be provided for by law, and imposed by an express judgment of a court as punishment for a serious offence and in observance of proportionality.[76]

(6) Harmonised Interpretation

Article 25 is not a free-standing provision but, rather, part of the ICCPR, which, in turn, is part of the human rights treaty regime. Thus, it ought to be interpreted in light of other provisions.

Article 10(1) of the ICCPR states that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person', and Article 10(3) provides that the 'penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation'. According to the HRC, a penitentiary system should not only be retributory but should also seek the reformation and social rehabilitation of prisoners.[77]

---

[76] European Commission for Democracy through Law, Opinion 190/2002, Venice Commission, 51st and 52nd Sessions (Venice 5-6 July and 18-19 October 2002) Section 1.1.d.

[77] General Comment No 21 replacing General Comment No 9 Concerning Humane Treatment of Persons Deprived of Liberty, adopted at the 44th session (10 April 1992) para 10.

The HRC reports on US and UK practices, mentioned earlier, indicate that the rehabilitative requirement of Article 10(3) is significant for assessing disenfranchisement policies.[78]

Alongside the reference to Article 2(1) in Article 25, Article 26 requires States to prohibit discrimination and guarantee equal and effective protection against discrimination. The HRC opined that the term *discrimination* implies any distinction, exclusion, restriction or preference based on grounds such as the ones enumerated or on other status (a similar construction to Article 2(1)'s) which have the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[79]

However, differentiation will not constitute discrimination if it aims to achieve a legitimate purpose and the criteria are reasonable and objective.[80] Notably, under Article 26, the possible disproportionate *effects* of disenfranchisement are challenged. Hence, in its report on US practices mentioned above, the HRC noted that disenfranchisement disproportionately affects minorities yet stopped short of holding that disenfranchising legislation *as such* is treaty-incompatible on these grounds.

The International Convention on the Elimination of All Forms of Racial Discrimination[81] also sets a results-based test for racial discrimination.[82] Article 5(c)

---

78 See n46 and n48, respectively.

79 General Comment No 18 on Non Discrimination, adopted at the 37th session (1989) para 7.

80 Ibid para 13.

81 GA/RES/2106 (XX), 5 ILM 352 (opened for signature 7 March 1966, entered into force 4 January 1969) (21 December 1965).

82 Ibid Art 1(1).

proclaims that State Parties undertake to 'prohibit and to eliminate racial discrimination in all its forms and to guarantee…the enjoyment of…[p]olitical rights, in particular the right…to vote…on the basis of universal and equal suffrage'. The treaty committee report on American practices expressed concern regarding the disproportionate effect disenfranchisement has on blacks, and called on the US to only deny voting rights to persons convicted of the most serious crimes, and to restore the right-to-vote automatically upon completion of the criminal sentence.[83]

(7) Interim Observations

Article 25 of the ICCPR was drafted in light of Article 21 of the UDHR, cementing universal suffrage. Nevertheless, the phrase 'without unreasonable restrictions' qualified the application of universal suffrage, leaving State Parties substantial discretion. According to the *Travaux Préparatoires,* such was the intention of the drafters, though it remains unclear whether it was intended to apply to convicts' disenfranchisement. The HRC's jurisprudence indicates that convicts' disenfranchisement is not prohibited by Article 25. The absence of relevant reservations is also significant, considering the plethora of reservations regarding other ICCPR provisions.

Nonetheless, recent developments in the human rights discourse, including the adoption of the Vienna Declaration, of UN resolutions regarding prisoners, and of the European guidelines regarding elections, coupled with an interpretation that takes into account other treaty provisions, suggest that disenfranchisement of *ex*-convicts, as well as *blanket* disenfranchisement policies, may be treaty- incompatible.

---

83 CERD/C/USA/CO/6 (2008) para 27.

C. The Plausibility of a Protocol Proscribing Convicts' Disenfranchisement

(1) Opening Remarks

Chapter Two concluded that, in view of universal suffrage and residual liberty paradigms, neither 'civil death' nor regulatory justifications can legitimise convicts' disenfranchisement. It was contended that disenfranchisement should be seen as a *punishment* and, as such, does not satisfy the goals of punishment save retribution for specific offences. Considering the harms disenfranchisement causes to individuals and collectives, it was submitted that there are grounds for proscribing the practice.

In this section, it is suggested that voting eligibility forms the *essence* of the right-to-vote, and that disenfranchisement abrogates convicts' right-to-vote. In view of Chapter Two's normative appraisal, and following the German Constitutional law distinction between the core or *essence* of rights and their *penumbra*, it is submitted that disenfranchisement should be proscribed by the human rights treaty regime. Since Article 25 of the ICCPR does not proscribe disenfranchisement, the adoption of an *optional protocol* is advocated.

In view of possible objections to international standardisation of rights, it is argued that, due to the facilitative role the right-to-vote plays in participatory democracy, it is less vulnerable to *cultural relativity* objections as well as to invocation of *deference* or *margin of appreciation* contentions.

Lastly, analogies are drawn between the proposed protocol and the Death Penalty Protocol.

(2) Voting Eligibility as the Essence of the Right-to-Vote

While it may be true that 'in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity...[and that] a community should be empowered to exclude from its elections persons with no real nexus to the community as such',[84] this contention begs the question of whether an individual's current community membership may be rescinded at the community's will.

Without a right-to-vote, individuals are, arguably, not simply unrecognised members of the political community, but not its members at all since the right-to-vote is not only means of publicly declaring membership but means of defining it.[85] It was submitted in Chapter Two that, for individuals, voting is possibly the most expressive act of citizenship, a powerful symbol of political equality[86] and of normative status.[87] Disenfranchisement, in contrast, marks convicts as societal outcasts.[88]

Chapter Two explored occurrences of disenfranchisement in Greek City-States. However, there, disenfranchisement was limited to few individuals who were previously enfranchised. Moreover, individuals could then, arguably, leave society whereas today boundaries between States are contiguous, and individuals deprived of their right-to-vote cannot exchange their defunct societal membership for another.[89]

---

84 Lawrence Tribe, *American Constitutional Law* (2nd edn Foundation Press, Mineola NY 1988) 1084.

85 Heather Lardy, 'Citizenship and the Right to Vote' (1997) 17(1) OJLS 76, 85.

86 Jeff Manza and Christopher Uggen, *Locked Out*: *Felon Disenfranchisement and American Democracy* (OUP, Oxford 2006) 18.

87 James Bohman, *Democracy across Borders: From Demos to Demoi* (MIT Press, Cambridge MA 2007) 111-2.

88 Ronald Dworkin, 'What is Equality?' (1987) 22 USFLR 1,4.

89 Adam Brink, 'The Prisoner's Right to Vote' [1995] Responsa Meridiana 422, 430.

Moreover, even if individuals choose and are allowed[90] to leave society by renouncing their citizenship, only in exceptional circumstances is another society obliged to admit them. Denying individuals their right-to-vote thus amounts to excluding them, temporarily or permanently, from their political communities, while they are unable to join an alternative social contract.

It is submitted that disenfranchisement, affecting voting *eligibility*, is qualitatively different than voting *regulation*: the latter limits the exercise of the right-to-vote, while the former abrogates the right, temporarily or permanently. Non-invidious registration or other procedural requirements may cause voters inconveniences, yet they ordinarily should not lead to disenfranchisement. For instance, in all electoral systems, even those based on proportional representation, political parties need to pass an effective percentage bar, due to the limited number of seats in the legislature(s). Consequently, individuals supporting extreme parties may have to 'settle' for less radical parties. Other regulations, like prior registration, are discretionary. Nevertheless, as long as regulations are benign, they do not intentionally *deny* individuals their right-to-vote, unlike disenfranchisement.

The South African Constitutional Court rejected an analogy made between citizens abroad, pilots or long-distance lorry drivers, and prisoners, holding that the former 'could point to difficulty rather than impossibility of enjoyment of rights', whereas the latter are 'physically prevented from exercising their voting rights'.[91]

---

90 Tomas Hamar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Aldreshot, Avebury 1989) 30.

91 CCT 08/99 *August v Electoral Commission* (1999) (3) SA 1 para 30.

Notably, this judgment addressed the denial of *physical* access to voting in the absence of disenfranchising legislation. The other judgments in Chapter Three as well as the thesis generally assess disenfranchisement, namely *legal* denial of the right-to-vote. In this context, German Constitutional law distinguishes between the *essence* of basic rights, which legislation may not infringe under any circumstances, and their *penumbra,* which may be restricted pursuant to generally applicable laws.[92]

In the British disenfranchisement judgment discussed in Chapter Three, which was set aside by *Hirst* (No. 2), Kennedy LJ held that:

> [o]f course as far as an individual prisoner is concerned, disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and 'the free expression of the opinion of the people in the choice of the legislature[93]

The ruling may be reflective of Article 3's unique stipulation, but it may reflect a more general perception that, in principle, all aspects of the right-to-vote can be potentially infringed by the State subject to balancing/proportionality. Such a contention could potentially follow from the distinction Alexy draws between *rules* and *principles*. Alexy suggests that rules are definitive, non-balanceable norms, whereas principles are competing optimisation requirements, which should be implemented to the 'greatest possible extent', applying proportionality.[94] He rejects the idea of an inviolable 'core' content of rights, advanced by the 'absolute theory', and

---

92 Basic Law 1949 Art 19(2) (Germany).

93 *R (Pearson and Martinez)* v *Home Secretary; Hirst v Attorney General* [2001] EWHC 239 (Admin) (Kennedy LJ). The ECtHR discussed the notion of the right-to-vote's 'very essence' in *Gitonas and others v Greece* (1998) EHRR 691 para 39.

94 Alexy (n7) 192. For critique of proportionality, see generally Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) Intl J Const L 468.

favours instead the 'relative' theory, which defines the 'core' of a right as what is left from the right *after* balancing has taken place.[95]

However, according to Alexy's theory, whether rights should be considered (non-balanceable) rules or (balanceable) principles does not depend on their *content*, but, rather, on their formulation. Consequently, the right-to-vote could be either a rule *or* a principle, depending on its stipulation. Contrarily, Möller suggests that normative judgment, rather than linguistic formulae, ought to be dispositive. The significance of a right or an interest should determine whether it should generally take precedence over other right or interests.[96]

Applying Möller's formulation can imply that when the voting eligibility of mentally competent adult citizens, which constitutes the *essence* of their right-to-vote, conflicts with legitimate social interests, which are advanced by disenfranchisement, voting eligibility may take normative precedence. Hence, rather than subjecting disenfranchisement to balancing/proportionality analysis, disenfranchisement should be proscribed.

The latter contention does not reflect general practice. Admittedly, the non-American judgments discussed in Chapter Three rejected regulatory justifications for disenfranchisement, assessing instead its legitimacy as a form of *punishment* and invalidating provisions deemed to be disproportionate. However, by weighing voting eligibility against societal interests, these judgments accepted, in principle, that

---

95 Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174, 180 suggests that courts use proportionality to denote an inviolable 'core' of the right at issue which they define without reference to public interest.

96 Kai Möller, 'Balancing and the Structure of Constitutional Rights' (2007) 5(3) ICON 453, 465.

narrowly tailored convicts' disenfranchisement provisions are legitimate. Consequently, even the *essence* or core of the right-to-vote may be infringed by the State. In Canada and South Africa, conducting balancing/proportionality was arguably required by Constitutional limitations clauses[97] whereas the ECtHR 'read' implicit limitations into the treaty provision.

It is submitted that in light of disenfranchisement's tangible and symbolic harms, explored in Chapter Two, and considering the fact that voting eligibility constitutes the *essence* of the right-to-vote, disenfranchisement should not be imposed as a punishment even in extraordinary circumstances. Rather, it should be banned, like State-sanctioned executions are proscribed under the Death Penalty Protocol.

(3) The Special Nature of the Right-to-Vote

(a) The Facilitative Role of the Right-to-Vote

The right-to-vote may be considered facilitative since by voting individuals take part in decision-making regarding ways in which their societies intend to achieve their common goals, including protection of other rights. Voting is thus a necessary, though not sufficient, condition for guaranteeing other rights.[98] Rather than ensure predetermined substantive outcomes, elections are means of obtaining the consent of the governed,[99] since what defines a people in a sovereign state is that it can elect the

97 Section 1 of the Canadian Charter [Part I of the Constitution Act 1982 being Schedule B to the Canada Act 1982 c 11 (UK)], and Section 36 of the Constitution of the Republic of South Africa (no 108 of 1996).

98 Fox (n68) 595.

99 Samuel Issacharof, 'Fragile Democracies' (2006-2007) 120(6) Harv L Rev 1465, 1470.

government of its choice.[100] Democratic rights are emancipatory in that they prevent individuals from being potentially subjected to the arbitrary will of others.[101] Indeed, Habermas argues that legitimation of political authority in associations of free equal legal persons requires democratic modes of decision-making.[102]

The facilitative nature of the right-to-vote suggests, firstly, that it is less vulnerable to cultural relativity objections, which are frequently voiced against international standardisation of rights and, secondly, that deference or margin of appreciation doctrines are inapposite in disenfranchisement cases.

(b) Cultural Relativity

States frequently pronounce their commitment to the universality of rights.[103] Indeed, the Vienna Declaration unanimously proclaims that 'while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind....it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms.'[104] Nevertheless, the ability and desirability of agreeing on the content of rights is contested. For instance, prohibitions on Muslim head-coverings are

---

100 Antonio Cassese (ed), *UN Law/Fundamental Rights*: *Two Topics in International Law* (Sijthoff & Noordhoff, 1979) 137. Cassese argues that Article 1 of the ICCPR should be read as enunciating an *individual* right to participate in national affairs.

101 Michael Goodheart, *Democracy as Human Rights: Freedom and Equality in the Age of Globalisation* (Routledge, London 2005) 147.

102 Jorgen Habermas, *The Postnational Constellation* (Polity, Oxford 2001) 65.

103 Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press, London 2003) 157.

104 Vienna Declaration (n62) Art 8.

considered an infringement of freedom of religion in some jurisdictions, while in others they embody protection of the right to gender equality.[105]

Supporters of cultural relativity argue that, in social terms, there are no natural universal norms or standards, and the international system's claim to universal cultural legitimacy can be based only on a moral and political 'overlapping consensus' among major world cultural traditions.[106] Contrarily, universalists suggest that 'cultural relativity' is a contradiction in terms, since it is premised on the *universality* of the principle that everyone should follow and be defined by their culture; they further suggest that universality does not mean uniformity; rather, it embraces cultural diversity.[107]

It is submitted that the facilitative nature of the right-to-vote weakens possible critiques of the proposed protocol by cultural relativity supporters. Borrowing an Aristotelian term, enfranchisement does not entail taking a particular position on what constitutes 'the good life'. Rather, it sets conditions which make 'the good life' possible.[108] Waldron argues that participatory rights are particularly apposite when reasonable rights-bearers disagree about which rights society should guarantee.[109] Interestingly, McGinnis and Somin suggest that international law should not regulate

---

105 See eg Reuven (Ruvi) Ziegler, 'The French Headscarves Ban: Intolerance or Necessity?' (2006) 40(1) John Marshall Law Review 235.

106 Abdullahi An-Naim, 'State Responsibility Under International Human Rights Law to Change Religious and Customary Laws' in Rebecca Cook (ed) *Human Rights of Women: National and International Perspective* (University of Pennsylvania Press, Philadelphia 1994) 167, 171.

107 James Sweeney, 'Margin of Appreciation Cultural Relativity and the European Court of Human Rights in the Post Cold-War Era' (2004) 54 ICLQ 459, 461.

108 Goodheart (n101) 138.

109 Waldron (n11) 282.

issues involving ‘controversial substantive rights’ which, they argue, are better decided by domestic democratic processes. It should focus instead on establishing norms facilitating democracy which ensure that citizens can hold governments to account.[110]

(c) Deference and Margin of Appreciation

Deference and margin of appreciation doctrines share the view that ordinarily unelected judiciaries should refrain from second-guessing decisions regarding contestable moral issues that are made by democratically accountable legislatures.[111]

Deference is normally invoked in domestic courts[112] while the margin of appreciation doctrine was developed by the ECtHR. The Court maintained that since 'requirements of morals varies from time to time and from place to place...State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements’.[113]

Critics argue that employing ‘margin of appreciation’ amounts to recoginsing, in principle, cultural relativity and is thus incompatible with universality of rights.[114]

---

110 John McGinnis and Ilya Somin, 'Democracy and International Human Rights Law' (2009) 84(4) Notre Dame L Rev 1739, 1742-7.

111 See generally TRS Allan 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65(3) CLJ 671.

112 See generally Richard Edwards, ‘Judicial Deference under the Human Rights Act’ (2002) 65 MLR 859.

113 *Handyside v UK*, 24 Eur Ct H R (ser A) (1976) para 48.

114 See eg Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 NYU J of Intl L 843.

Others lament the excessive application of a margin of appreciation.[115] Contrarily, Ostrovsky suggests that the 'margin of appreciation' strikes a balance between cultural diversity and the protection of core rights.[116]

It is submitted that even if there are circumstances when deference or margin of appreciation should be applied, such doctrines are inapposite when the scrutinised legislation concerns voting eligibility. As previously noted, unlike rights which result from decision-making processes, the right-to-vote concerns the ability to partake in decision-making itself. Thus, questions of diverging moral values across jurisdictions should not arise. Furthermore, mirroring the arguments advanced in Chapter Two, the Canadian SC held that 'it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy…that courts must be vigilant'.[117]

(4) Trend-Setting Agendas of Human Rights Treaties: Learning from the Struggle to Abolish the Death Penalty

This thesis aims to establish that, against the backdrop of universal suffrage and residual liberty paradigms, persuasive arguments can be made for proscribing convicts' disenfranchisement. Nevertheless, Article 25 of the ICCPR cannot be plausibly interpreted to support such view. It is hence suggested that, in the absence of a global consensus on prohibition, interested States should assume trend-setting roles

---

115 Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: A Threat to the Rule of Law' (2004) 11(1) Columbia J of Eur L notes that the ECtHR applied a 'Margin of Appreciation' in over 700 judgments.

116 See eg Aaron Ostrovsky, What's so funny about peace, love and understanding? (2005) 1(1) Hanse L Rev 47

117 *Sauvé* (No 2) *v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 paras 14-5.

Cf *Hirst* (No 2) (n47) para 33, where the ECtHR held that legislatures should be afforded a wide margin of appreciation when deciding how to secure the right-to-vote.

by adopting an optional protocol to the ICCPR since the alternative, amending the ICCPR, is likely to fail.[118]

Several analogies can be drawn between the proposed protocol and the Death Penalty Protocol. *Firstly*, a conceptual link arguably exists between proscribing the death penalty and proscribing disenfranchisement, not least because, as noted above, the latter ought to be considered as a form of punishment. Burt maintains that the 'democratic principle' properly understood is inherently inconsistent with State-sanctioned executions, since the death penalty rejects the democratic principle of equal citizenship.[119] Similar notions were advanced in the thesis regarding convicts' disenfranchisement.

Secondly, like the Death Penalty Protocol, the proposed protocol will be self-executing. Hence, it will not require implementing legislation in domestic law save for repealing existing disenfranchising provisions.[120]

Thirdly, shirking, arguably commonplace regarding human rights treaties,[121] can hardly occur under the Death Penalty Protocol, since it is relatively easy to

---

[118] An amendment of the ICCPR requires the convening of an amendment conference upon the request of at least one-third of the State parties, following a proposed amendment; a majority vote at the resulting conference; a General Assembly approval of the proposed amendments; and ratification by a two-thirds majority of State parties. Crucially, amendments only bind States which have accepted them. Stephen Gardbaum, 'Human Rights as International Constitutional Rights' 2008 19(4) EJIL 749.

[119] Robert Burt, 'Democracy, Equality, and the Death Penalty' in Ian Shapiro (ed) *The Rule of Law* (NYU Press, New York 1994) 80, 90.

[120] William Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn CUP, Cambridge 2002) 182.

[121] See generally Hathaway (n16).

observe whether or not a State applies the death penalty.[122] The same applies, *mutatis mutandis*, to proscribing disenfranchisement.

Fourthly, the proposed protocol's stipulation can potentially be made as clear and certain as that of the Death Penalty Protocol. Hence, while the US, for instance, disputes the interpretation given by the HRC to the ICCPR's territorial scope provision,[123] it is unlikely that a conclusive, unambiguous stipulation proscribing disenfranchisement will raise similar contentions.

Lastly, the need for the Death Penalty Protocol arose because Article 6 of the ICCPR ('the right to life') explicitly authorised the death penalty's application, albeit for serious crimes.[124] Article 25's 'without unreasonable restrictions' clause arguably creates a similar need for separate proscription.

The trajectory towards suffrage expansion, described in previous chapters, may also be equated with the rise in the number of 'abolitionist' States. In 1965, there were only 25 such States, yet by 2001, the number grew to 89, 41 of which acceded to the Death Penalty Protocol.[125] As of September 2009, 117 States are abolitionist in law or in practice, and the Death Penalty Protocol currently has 71 signatories.[126]

---

122 Eric Neumayer, 'Death Penalty Abolition and the Ratification of the Second Additional Protocol' (2008) 12(1) Intl J of HR 3, 6-7.

123 The US argued that 'we must accept the Convention the way it was written, not the way the Committee wishes it to be'. US Mission to the UN in Geneva, *Statement by the United States Mission to the UN on behalf of the United States Delegation to the UN Human Rights Committee* (28 July 2006) <www.usmission.ch/Press2006/0728ICCPR.html> accessed 30 September 2009.

124 Schabas (n120) 47.

125 Roger Hood, *The Death Penalty: A Worldwide Perspective* (3rd edn OUP, Oxford 2002) 10.

126 Oko Elechi and others, 'Does the Rest of the World Matter? Sovereignty, International Human Rights Law, and the American Death Penalty' (2004) 30(1) Queens LJ 260, 262.

Interestingly, States do not necessarily follow their public opinion on this issue.[127] Moreover, the death penalty cannot be imposed by any of the international criminal courts which were set up after the protocol was adopted, including the International Criminal Court.[128]

Though not all abolitionist States acceded to the Death Penalty Protocol, it conceivably had an acculturation effect, albeit partial.[129] For instance, a higher percentage of abolitionist States in a region raises the likelihood that 'retentionist' States in the same region will change their policy.[130] Goldsmith, by contrast, argues that States rarely increase protection of their citizens' rights because of international law.[131]

An optional protocol to the ICCPR may open the topic for discussion in 'retentionist' States, though it is unlikely to change long-standing disenfranchisement traditions in America. Moreover, States which rarely practise disenfranchisement may be prone to repeal it altogether. Like the Death Penalty Protocol, the proposed optional protocol may, gradually, alter the legal landscape.

---

127 See eg South Africa, where the Constitutional Court acknowledged that 'the majority of South Africans agree that the death penalty should be imposed in extreme cases of murder', but held that 'if public opinion were to be decisive, there would be no need for constitutional adjudication'. CCT 03/94 *State v Makwanyane* (1995) (3) SA 391 para 88.

Contrast with the US, where the Supreme Court referred to public opinion, *inter alia*, in *Gregg v Georgia* 428 US 153, 173 (1976) as one of the parameters for deciding whether the death penalty violates 'evolving standards of decency'.

128 Schabas (n120) 199.

129 Goodman and Jinks (n20).

130 Eric Neumayer, 'Death Penalty: The Political Foundations of the Global Trend toward Abolition' (2008) 9(2) HRR 241.

131 Jack Goldsmith, 'Should International Human Rights Law Trump US Law' (2000) 1 Chi J of Intl L 327, 337.

CONCLUSION

Had this thesis been written a hundred years ago, it would have probably offered perspectives on the disenfranchisement of women. By 1909, States like Australia and New Zealand have enfranchised women. In others, like America, lively debate was taking place. Many other States were not even considering female suffrage.

Times have changed. Today, as a result of the successful struggles for suffrage expansion that were explored in Chapter One, almost all mentally competent adult citizens are guaranteed a right-to-vote. Notions of what constitutes *community membership,* as well as what defines *competence,* are, by and large, shared. For reasons outlined earlier, this thesis neither endorses nor challenges these criteria for suffrage. Rather, it examines the appropriateness of disenfranchisement of convicts in their light.

Chapter Two noted how the transition from exclusionary to universal suffrage altered the way in which voters are perceived by States. In the Twenty-First Century, political equality, rather than moral virtuousness, guides States in determining suffrage. It is no longer considered acceptable to fear that voters will express 'subversive' views, 'contaminate' the ballot box, or vote 'irresponsibly'. The character of national communities is determined by their members, and community membership is not contingent on good behaviour. Both Liberals and Republicans acknowledge that voting is about expressing preferences. Universal suffrage means that voters are a heterogeneous lot, and their preferences – whether virtuous or not – vary accordingly. Regulatory bases for disenfranchisement of any individual or of any group have thus become anachronistic.

Concomitantly, the perception of convicts as societal outcasts and notions of forfeiture of rights have largely given way to a vision of convicts as rights-holders. Societies still reserve the authority, and bear the duty, to protect their members from unlawful acts, and to impose punishments for breaches of criminal law. Yet, the paradigm shift from 'civil death' to 'residual liberty' requires States to justify infringements of convicts' rights rather than assume that convicts automatically lose their rights upon conviction. Concurrently, generally applicable principles of humane and dignified treatment of convicts mandate that certain punishments, such as torture, should never be inflicted, even if they advance legitimate societal interests.

Disenfranchising convicts seems incompatible with treating them as politically equal (albeit recalcitrant) members of society, in light of universal suffrage, residual liberty and humane punishment requirements. Moreover, since voting eligibility constitutes the *essence* of the right-to-vote of *all* society members, disenfranchising convicts, even in extraordinary circumstances, infringes the essence of their right-to-vote. The adverse effects of disenfranchisement on both individuals and collectives justify that the imposition of disenfranchisement cease.

Today, unlike in 1909, judiciaries are able and willing to engage in transnational discourse, in which ideas are exchanged, and cross-referencing is frequent. Chapter Three highlighted the fact that American jurisprudence is absent from the ongoing international discourse on disenfranchisement. This may be due to its unique Constitutional arrangements, as well as to hesitations of some American jurists to engage in such discourse. Nonetheless, a clear trajectory emerges from the non-American discourse toward heightened scrutiny of convicts' disenfranchisement. Paradigm shifts in perceptions of democracy, the status of convicts, and the concept of

punishment appear to underlie the transnational disenfranchisement discourse, and the seeds for proscription of convicts' disenfranchisement have been planted. At this stage, however, the judgments analysed in this thesis weighed the costs and benefits of disenfranchisement, treating it as a controversial but not as an illegitimate form of *punishment*.

It seems apposite to offer an international perspective on the appropriateness of disenfranchisement, considering that the question of convicts' disenfranchisement arises wherever elections are held and punishments are imposed. A century ago, a binding international human rights treaty regime did not exist, whereas today almost all States are parties to at least one human rights treaty. The right-to-vote is enunciated in Article 25 the ICCPR, one of the most widely ratified treaties. Sometimes treaties reflect existing practice, yet often, especially on matters of human rights, they play trend-setting roles. In this light, an interpretation of Article 25 was offered in Chapter Four. It was concluded that the ambiguous stipulation in Article 25 does not prohibit convicts' disenfranchisement. Rather, it subjects disenfranchisement to balancing/proportionality analysis.

Convicts' disenfranchisement has of late become a suspect practice. A considerable number of States proscribe it. Others circumscribe its application. A global consensus, however, has not emerged, as reflected by interpretations of Article 25 of the ICCPR. Under these circumstances, it is unlikely that the *optional protocol* proscribing convicts' disenfranchisement that is proposed in this thesis will be ratified by all State parties to the ICCPR, some of which strongly oppose enfranchisement. Nevertheless, the proposed protocol will set a higher threshold for guaranteeing the

right-to-vote of convicts. With time, more States may decide to meet that standard, as has happened in recent years with the Death Penalty Protocol.

Defending the rights of convicts is hardly a popular task. Yet, defending the right-to-vote of convicts entails defending democratic processes that label individuals as convicts by proscribing their acts and permit States to inflict punishments. Convicts' disenfranchisement is a hurdle on the path towards the democratic project's successful completion. It can and should be removed.

BIBLIOGRAPHY

Books and Articles

Abbott, Kenneth and others	'The Concept of Legitimization' (2000) 54 Intl Org 401
Alexander, Rudolph	'A Curious Legal Anomaly: Female Inmates Could Have the Right to Vote - But Not Male Inmates' (1991) 5(4) Crim Justice Pol Rev 335
Alexy, Robert	*A Theory of Constitutional Rights* (OUP, Oxford 2002)
Allan, TRS	'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65(3) CLJ 671
Alston, Philipp	'The Historical Origins of the Concept of General Comments' in Laurence Boisson de-Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System: In Quest of Equality and Universality* (Martinus Nijhoff, The Hague 2001) 763
Altman, Andrew	'Democratic Self-Determination and the Disenfranchisement of Felons' (2005) 22(3) Journal of Applied Philosophy 263
American Civil Liberties Union	*Out of Step with the World: An Analysis of Felony Disfranchisement in the United States and Other Democracies* (Washington DC 2006)
American Law Institute	*Restatement (3d) of Foreign Relations Law of the United States* (1987)
An-Naim, Abdullahi	'State Responsibility Under International Human Rights Law to Change Religious and Customary Laws' in Rebecca Cook (ed) *Human Rights of Women: National and International Perspective* (University of Pennsylvania Press, Philadelphia 1994) 167
Anon	'Australia: Denying Vote to Citizens Serving Custodial Sentences Unconstitutional, Inconsistent with Representative Government [2008] PL 383
Anon	'The Equal Protection Clause as a Limitation on the States' Power to Disenfranchise Those Convicted of a Crime' 21(1967) Rutgers L Rev 297
Aristotle	*Politics* (350 BCE) <http://classics.mit.edu/Aristotle/politics.html>
Artzneer, Courtney	'Check Marks the Spot: Evaluating the Fundamental Right to Vote and Prisoners Disenfranchisement in the United States and Canada' (2007) 13 Southwestern J L & Trade Am 423
Austin, Regina	'The Shame of it all: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons' (2004-2005) 36 Colum Hum Rts L Rev 173
Beckman, Ludvig	'Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy' (2007) 15(1) Democratization 29
Behan, Cormac and O'Donnell, Ian	'Prisoners, Politics, and the Polls' (2008) 48(3) British J of Crim 319
Behrens, Angela, Uggen, Christopher and Manza, Jeff	'Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States 1850–2002' (2003) 109(3) Am J of Soc 559
Bensel, Richard	*The American Ballot Box in the Mid-Nineteenth Century* (CUP, Cambridge 2004)
Benvenisti, Eyal	'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 NYU J of Intl L 843
Blais, Andre, Massicotte, Louis and Yoshinaka, Antoine	'Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws' (2001) 20 Electoral Studies 41
Bohman, James	*Democracy across Borders: From Demos to Demoi* (MIT Press, Cambridge MA 2007)
Bonnin, David	*The Problem of Punishment* (CUP, Cambridge 2008)
Bossuyt, Marc	*A Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Kluwer, Boston 1987)
Boyle, Alan and Chinkin, Christine	*The Making of International Law* (OUP, Oxford 2007)
Bradley, Curtis and Goldsmith, Jack	'Treaties, Human Rights and Conditional Consent' (2000) 149 Penn L Rev 1

Brauch, Jeffrey	'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: A Threat to the Rule of Law' (2004) 11(1) Columbia J of Eur L
Brenner, Saul and Caste, Nicholas	'Granting the Suffrage to Felons in Prison' (2003) 34(2) Journal of Social Philosophy 228
Brink, Adam	'The Prisoner's Right to Vote' [1995] Responsa Meridiana 422
Burgenthal, Thomas	*International Human Rights in a Nutshell* (2nd edn West Publishing Co, St Paul MN 1995)
Burt, Robert	'Democracy, Equality, and the Death Penalty' in Ian Shapiro (ed) *The Rule of Law* (NYU Press, New York 1994) 80
Carozza, Paolo	'My Friend is a Stranger: The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 Texas L Rev 1031
Carter, Mark	'Retributive Sentencing and the Charter: The Implications of Sauvé v. Canada (Chief Electoral Officer)' (2005) 10 Can Crim L Rev 43
Cassese, Antonio (ed)	*UN Law/Fundamental Rights*: *Two Topics in International Law* (Sijthoff & Noordhoff, 1979)
Cerna, Christine	'Universal Democracy: An International Legal Right or a Pipe Dream of the West?' (1995) 27 NYU J intl L & Pol 289
Chin, Gabriel	'Felon Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?' (2004) 92 Geo LJ 259
Cholbi, Michael	'A Felon's Right to Vote' (2002) 21 Law and Philosophy 543
Clegg, Roger , Conway, George and Lee, Kenneth	'The bullet *and* the Ballot? The Case for Felon Disenfranchisement Statutes' (2006) 14 Am UJ Gender Soc Pol'y & L 1
Cosgrove, John	'Four New Arguments against the Constitutionality of Disenfranchisement' (2003-4) 26 T Jefferson L Rev 157
Crutchfield, Robert	'Abandon Felon disenfranchisement policy' (2007) 6(4) Criminology & Public Policy 707
Dahl, Robert	*Democracy and its Critics* (Yale University Press, New haven 1989)
Deigh, John	'On Rights and Responsibilities' (1988) 7 Law and Philosophy 147
Demleitner, Nora	Continuing Payment on One's Debt to Society: the German Model *of* Felon Disenfranchisement as an Alternative' (2001) 84 Minn L Rev 753
Dhami, Mandeep	'Prisoner Disenfranchisement Policy: A Threat to Democracy?' (2005) 5(1) Analyses of Social Issues and Public Policy 235
Dinan, John	'The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates' (2007) *19(3)* Journal of Policy History 282
Dolinko, David	'Morris on Paternalism and Punishment' (1999) 18 Law and Philosophy 345
Donnelly, Jack	*Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press, London 2003)
Douglas, Joshua	'Is the Right to Vote Really Fundamental?' <http://works.bepress.com/joshua_douglas/1>
Duff, Anthony	'Punishment, communication and community' in Matt Matravers (ed), *Punishment and Political Theory* (Hart, Oxford 1999) 'Punishment, Dignity and Degradation' (2005) 25(1) OJLS 141 *Punishment, Communication, and Community* (OUP, Oxford 2001) *Trials and Punishments* (CUP, Cambridge 1986)
Dworkin, Ronald	'What is Equality?' (1987) 22 USFLR 1
Edwards, Richard	Judicial Deference under the Human Rights Act' (2002) 65 MLR 859
Elechi, Oko and others	'Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty' (2004) 30(1) Queens LJ 260
Ely, John Hart	*Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, Massachusetts 1980)

Emmert, Frank Page, Christopher and Page, Antony	'Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries' (2008) 41 Creighton L Rev 3
Ewald, Alec	'"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States' (2002) 2002 Wisconsin L Rev 1045
	A 'Crazy-Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law (The Sentencing Project, Washington DC 2005)
Figler, Bailey	'A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement' (2006) 61 NYU Annual Survey of Intl L 723
Fletcher, George	'Disenfranchisement as Punishment: Reflections on the Radical Uses of Infamia' (1999) 46 UCLA L Rev 1895
	'The Nature and Function of Criminal Theory' (2000) 88 Cal L Rev 687
Fellner, Jamie and Mauer, Marc	*Losing the Vote: The Impact of Felony Disenfranchisement Laws* (Human Rights Watch, New York 1998)
Foner, Eric	*Reconstruction, America's Unfinished Revolution 1863-1877* (Harper & Row, New York 1988)
Foster, Steve	*Human Rights and Civil Liberties* (OUP, Oxford 2006)
Fox, Gregory	'The Right to Political Participation in International Law' (1992) 17 Yale J of Intl L 539
Franck, Thomas	*Fairness in International Law and Institutions* (Clarendon Press, Oxford 1995)
	'The Emerging Right to Democratic Governance' (1992) 86 AMJIL 46
Frazier, Carl	'Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them' (2006-2007) 95 Kentucky LJ 481
Furman, Jesse	'Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice' (1996-1997) 106 Yale LJ 1197
Gardiner, Richard	*Treaty Interpretation* (OUP, Oxford 2008)
Gardbaum, Stephen	'Human Rights as International Constitutional Rights' 2008 19(4) EJIL 749
Garland, David	'Forward' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens*: *Human Rights in Australian Prisons* (The Federation Press, Sydney 2002).
Geddis, Andrew	'"For We Are Young and Free": Australia's Electoral Law' 3(2) (2004) Election LJ 385
Geisinger, Alex and Stein, Michael	'A Theory of Expressive International Law' (2007) Vanderbilt L Rev 6
Goldsmith, Jack	'Should International Human Rights Law Trump US Law' (2000) 1 Chi J of Intl L 327
Goodman, Ryan and Jinks, Derek	'How to Influence States: Socialisation and International Human Rights Law' (2004) 54(3) Duke LJ 621
Goodheart, Michael	*Democracy as Human Rights: Freedom and Equality in the Age of Globalisation* (Routledge, London 2005)
Goodwin-Gill, Guy	*Free and Fair Elections* (Inter-Parliamentary Union, Geneva 2006)
Guttman, Daniel	'Before the High Court' (2007) 29 Sydney L Rev 297
Habermas, Jorgen	*The Postnational Constellation* (Polity, Oxford 2001)
Hamar, Tomas	*Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Aldreshot, Avebury 1989)
Hampton, Jean	'Punishment, Feminism and Political Identity' (1998) 11 Can J L & Juris 23
Hart, HLA	*Punishment and Responsibility: Essays in the Philosophy of Law* (OUP, Oxford 1968)
Hathaway, Oona	'Do Human Rights Treaties Make a Difference? (2002) 111(8) Yale LJ 1938

Henkin, Louis	'International Law as Law in the United States' (1984) 82 Mich L Rev 1555
	'Human Rights and State Sovereignty' (1995/6) 25 (1/2) Georgia J of Comp & Intl L 31
	'US Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89 AMJIL 341
	How Nations Behave: *Law and Foreign Policy* (2nd edn Columbia University Press, New York 1979)
Hood, Roger	*The Death Penalty: A Worldwide Perspective* (3rd edn OUP, Oxford 2002)
Horwitz, Mortion	*The Transformation of American Law, 1870-1960* (OUP, Oxford 1992)
Hull, Elizabeth	*The Disenfranchisement of Ex-felons* (Temple University Press, Philadelphia 2006)
Issacharof, Samuel	'Fragile Democracies' (2006-2007) 120(6) Harv L Rev 1465
Itzkovitz, Howard and Oldak, Lauren	'Restoring the Ex-Offender's Right to Vote: Background and Developments' (1972-1973) 11 Am Crim L Rev 721
Issacharoff, Samuel, Karlan, Pamela and Pildes, Richard	*The Law of Democracy: Legal Structure of the Political Process* (Foundation Press, Westbury, New York 1998)
Jennings, Robert and Watts, A (eds)	*Oppenheim's International Law* (9th edn Longman, London 1992)
Jinks, Derek and Goodman, Ryan	'Measuring the Effects of Human Rights Treaties' (2003) 14(1) EJIL 171
Johnson-Parri, Afi	'Felon Disenfranchisement: The Unconscionable Social Contract Breached' 89 (2003) Va L Rev 109
Kamminga, Menno and Scheinin, Martin (eds)	*The Impact of International Human Rights Law on General International Law* (OUP, Oxford 2009)
Karlan, Pamela	'Convictions and Doubts: Retribution representation and the debate over felon disenfranchisement' (2003-2004) 56 Stan L Rev 1147
Katz, Richard	*Democracy and Elections* (OUP, Oxford 1997)
Keyssar, Alexander	*The Right to Vote: the Contested History of Democracy in the United States* (Basic Books, New York 2000)
King, Mary	'Imprisoning America: The Social Effects of Mass Incarceration' (2005) The Review of Black Political Economy 41 (Book Review)
King, Ryan and Mauer, Marc	*Distorted Priorities: Drug Offenders in State Prisons* (The Sentencing Project, Washington DC 2002)
Kirk, Linda	'Exclusion to Emancipation: A comparative analysis of Women's Citizenship in Australia and the United States 1869-1921' (1995) 97 WVa L Rev 725
Kirshner, Alexander	The International Status of the Right to Vote <www. demcoalition.org/pdf/International_Status_of_the_Right_to_Vote.pdf>
Kleining, John and Murtagh, Kevin	'Disenfranchising Felons' (2005) 22(3) Journal of Applied Philosophy 207
Koh, Harold	'On American Exceptionalism' (2003) 56(5) Stan L Rev 1479
Kostakopoulou. Theodora	*The Future Governance of Citizenship* (CUP, Cambridge 2008)
Lardy, Heather	'Citizenship and the Right to Vote' (1997) 17(1) OJLS 76
	'Prisoner Disenfranchisement: Constitutional Rights and Wrongs' [2002] PL 524
Lawson, Steven	*Running for freedom*: *Civil Rights and Black Politics in White America, 1941-1988* (Temple University Press, Philadelphia 1991)
Lawyers' Committee for Human Rights	*A Critical Assessment of the United States Commitment to Civil and Political Rights* (Washington DC 2006)
Lazarus, Liora	*Contrasting Prisoners Rights: A Comparative Examination of England and Germany* (OUP, Oxford 2004)
	'Conceptions of Liberty Deprivation' (2006) 69(5) MLR 738
Levin, Michael	*The Spectre of Democracy: The Rise of Modern Democracy as Seen by its Critics* (Macmillan, Basingstoke 1992)
Lippke, Richard	'Toward a Theory of Prisoners' Rights' (2002) 15(2) Ratio Juris 122

Locke, John	*The Second Treatise of Civil Government* (Blackwell, Oxford 1946)
Madison, James	*The Federalist Papers* No. 10 <*http://thomas.loc.gov/home/histdox/fedpapers.html*>
Manfredi, Christopher	'Judicial Review and Criminal Disenfranchisement in the United States and Canada' (Spring 1998) 60(2) The Review of Politics 302
Manza, Jeff, Brookers, Clem and Uggen, Christopher	'Public attitudes towards felon disenfranchisement in the United States (2004) 68(2) Public Opinion Quarterly 275
Manza, Jeff and Uggen, Christopher	*Locked Out: Felon Disenfranchisement and American Democracy* (OUP, Oxford 2006)
Marshall, TH	'Citizenship and Social Class' in Gershon Shafir (ed), *The Citizenship Debates: A Reader* (University of Minnesota Press, Minneapolis 1998)
Massicotte, Louis, Blais, Andre and Yoshinaka, Antoine	*Establishing the Rules of the Game: Election Laws in Democracies* (University of Toronto Press, Toronto 2004)
McCrudden, Christopher	'A Common Law of Human Rights? Transnational Judicial Conversations on Human Rights' (2000) 20 OJLS 499
	'Judicial Comparativism and Human Rights' *in* Esin Örücü & David Nelken (eds), *Comparative Law: A Handbook* (Hart, Oxford 2007) 371
	'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655
McGinnis, John and Somin, Ilya	'Democracy and International Human Rights Law' (2009) 84(4) Notre Dame L Rev 1739
Middlemass, Keesha	'Rehabilitated But Not Fit to Vote: A Comparative Racial Analysis of Disenfranchisement Laws' (2006) 8(2) Souls 22
Mill, John Stuart	*Representative Government* (1861) <http://eserver.org/philosophy/mill-representative-govt.txt>
	'Thoughts on parliamentary Reform' in John Robson (ed), *The Collected Works of John Stuart Mill* (Liberty Fund, Indianapolis 2006).
Mitchell, David	'Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community' (2007) 34 Fordham Urban LJ 833
Möller, Kai	'Balancing and the Structure of Constitutional Rights' (2007) 5(3) ICON 453
Montesquieu, Baron de	*The Spirit of Laws*, Thomas Nugent (tr) (Printed for J Collingwood, London 1823)
Moore, David	'A Signalling Theory of Human Rights Compliance' 97 Northwestern UL Rev 883
Murakawa, Naomi	'Book reviews: American Politics' (2007) 5(3) Perspectives on Politics 629
Murphy, Daniel, Newmark, Adam and Ardoin, Phillip	'Felon Disenfranchisement Policies in the States' (Annual State Politics and Policy Conference, East Lansing 13-14 May 2005)
Murphy, Jeffrie (ed)	*Punishment and Rehabilitation* (Wadsworth, Belmont CA 1995)
Mutua, Makau	'Standards Setting in Human Rights: Critique and Prognosis' (2007) 29(3) HRQ 547
Neumayer, Eric	'Death Penalty: The Political Foundations of the Global Trend toward Abolition' (2008) 9(2) HRR 241
	'Death Penalty Abolition and the Ratification of the Second Additional Protocol' (2008) 12(1) Intl J of HR 3
Nowak, Manfred	*U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Arlington VA 1993)
Orakhelashvili, Alexander	'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 EJIL 529
Orr, Greame	'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners' (1998) 26 Fed L Rev 55
	'The Nitty-Gritty of Electoral Integrity' (2007) 6(3) Election LJ 299

Parkes, Debra	'Ballot Boxes Behind Bars' (2003-4) 13 Temp Policy & Civil Rights L Rev 71
Pettus, Katherine	*Felony Disenfranchisement in the Contemporary United States: An Ancient Practice in a Modern Polity* (PhD thesis, Columbia University, 2002)
Plato	*The Republic*, Desmond Lee (tr) (2nd edn Penguin Books, Harmondsworth 1987)
Planinc, Zdravko	'Should Imprisoned Criminals Have a Constitutional Right to Vote' (1987) 2 Canadian Journal of Law and Society 153
Raskin, Jamin	'A Right-To-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit' (2004) 3(3) Election LJ 559
Rawls, John	*A Theory of Justice* (OUP, Oxford 1999)
Reiman, Jeffrey	'Liberal and Republican Arguments Against Felon Disenfranchisement' (2005) Criminal Justice Ethics 3
Rehman, Javaid	*International Human Rights Law: A Practical Approach* (Longman, Harlow 2003)
Reisman, Michael	'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AMJIL 866
Richardson, Genevra	'The Case for Prisoners' Rights' in Mike Maguire, Jon Vagg and Rod Morgan (eds) *Accountability and Prisons: Opening up a Closed World* (Tavistock, London 1985)
Rivers, Julian	'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174
Robinson, Nehemiah	*The Universal Declaration of Human Rights: Its Origin, Significance, Application, and Interpretation* (Institute of Jewish Affairs, New York 1958)
Rodley, Nigel	*The Treatment of Prisoners under International Law* (2nd edn Clarendon Press, Oxford 1999)
Rousseau, Jean-Jacques	*On the Social Contract*, Judith Masters (tr) (St. Martin's Press, New York 1978)
Schabas, William	*The Abolition of the Death Penalty in International Law* (3rd edn CUP, Cambridge 2002)
	'Invalid Reservations to the ICCPR: Is the United States Still a Party?' (1995) 21 Brooklyn J Intl L 277
Schall, Jason	'Consistency of Felon Disenfranchisement with Citizenship Theory' (2006) 22 Harv Blackletter LJ 53
Sinclair, Robert	*Democracy and Participation in Athens* (CUP, Cambridge 1988)
Smith, Roger	*Civic ideals: Conflicting Visions of Citizenship in United States History* (YUP, New Haven 1997)
Steiner, Henry and Alston, Philip	*International Human Rights in Context* (OUP, Oxford 2008)
Shapiro, Andrew	'Challenging Disenfranchisement under the Voting Rights Act: a New Strategy' (1993) 103 Yale LJ 537
Sweeney, James	'Margin of Appreciation Cultural Relativity and the European Court of Human Rights in the Post Cold-War Era' (2004) 54 ICLQ 459
Tribe, Lawrence	*American Constitutional Law* (2nd edn Foundation Press, Mineola NY 1988)
	'The Disenfranchisement of Ex-Felons: Citizenship, Criminality and the Purity of the Ballot Box' (1998-9) 102 Harvard L Rev 1300
Tsakyrakis, Stavros	'Proportionality: An Assault on Human Rights?' (2009) 7(3) Intl J Const L
Uggen, Christopher and Manza, Jeff	'Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States' (2002) 67(6) American Sociological Review 777
	'Voting and Subsequent Crime and Arrest: Evidence from a Community Sample' (2004) 36 Colum Hum Rts L Rev 193
Waldron, Jeremy	*Law and Disagreement* (Clarendon Press, Oxford 1999)
	'Lex Talionis' (1992) 34 Ariz L Rev 25
	'A Rights Based Critique of Constitutional Rights' (1993)13(1) OJLS 23

Waltzer, Michael	*Spheres of Justice*: *a Defence of Pluralism and Equality* (Robertson, Oxford 1983)
Watt, Bob	*UK Elections Law: A Critical Examination* (Glasshouse Press, London 2006)
Whitman, James	*Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (OUP, Oxford 2003)
Winkler, Adam	'Expressive Voting' (1993) 68 NYULR 330
Ziegler, Reuven (Ruvi)	'The French Headscarves Ban: Intolerance or Necessity?' (2006) 40(1) John Marshall Law Review 235.

Other Sources

Committee on the Elimination of Racial Discrimination	Concluding Observations (USA) CERD/C/USA/CO/6 (2008)
Council of Europe	European Prison Rules (2006)
Human Rights Committee	Concluding Observations (Great Britain) CCPR/C/GBR/CO/6 (2008) Concluding Observations (Luxembourg) CCPR A/48/40 vol 1 (1993) 30; CCPR A/58/40 vol 1 (2003) 45 Concluding Observations (USA) CCPR/C/USA/CO/3/Rev 1 (2006) General Comment No 18 on Non Discrimination adopted at the 37th session (10 November 1989) General Comment No 21 on Humane Treatment of Persons Deprived of Liberty replacing General Comment No 9 on Humane Treatment of Persons Deprived of Liberty, adopted at the 44th session (10 April 1992) General Comment No 24 on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto or in relation to Declarations under Article 41 of the Covenant, adopted at the 52nd session (4 November 1994) General Comment No 25 (57) on the Right to Take Part in the Conduct of Public Affairs, Voting Rights and the Right of Equal Access to Public Service, adopted at the 57th session (27 August 1996) State Party Report, United States of America, CCPR/C/81/Add.4 (24 August 1994) Statement by the United States Mission to the United Nations on behalf of the United States Delegation (28 July 2006)
European Commission for Democracy through Law	European Code of Good Practice in Electoral Matters, Opinion 190/2002, Venice Commission, adopted at the 51st and 52nd Sessions (5-6 July and 18-19 October 2002)
National Committee on Civil Rights	Report <http://www.trumanlibrary.org/hstpaper/pccr.htm>
Prison Reform Trust	News Release <http://www.prisonrefromtrust.org.U.K./news-pr12.html>
State of Alabama	*Journal of the Proceedings of the Constitutional Convention of the State of Alabama* (Brown Printing Co, Montgomery 1901)
The Atlantic Charter	< http://usinfo.org/docs/democracy/53.htm> (14 August 1941)
United Kingdom	Ministry of Justice, Further Observations on Behalf of the Government of the United Kingdom, submitted in *Hirst v UK* (No 2) Ministry of Justice, Consultation Paper, Voting Rights of Convicted Prisoners Detained within the United Kingdom, CP29/06 First Phase Consultation (December 2006); CP 6/09 Second Phase Consultation (April 2009) Secretary of State for Constitutional Affairs and Lord Chancellor, Written Ministerial Statement (14 December 2006)
United Nations Commission on Human Rights	International Covenant on Civil and Political Rights, 9th meeting E/CN.4/L.224/Rev.4 (F) & (YU)**;** E/CN.4/SR.363 p 6 (SU) (1953) Promotion of the Right to Democracy, 55th meeting E/CN.4/RES/1999/57 (27 April 1999)

	Strengthening of Popular Participation, 57th meeting E/CN.4/2003/L.11/Add.4 (23 April 2003)
United Nations Economic and Social Council	Standard Minimum Rules for the Treatment of Prisoners A/CONF/611 annex I (30 August 1955), ESC/Res/663C (1957)
United Nations General Assembly	Universal Declaration of Human Rights, GA/Res/217A (III) UN Doc A/810 at 71 (10 December 1948)
	UN Basic Principles for the Treatment of Prisoners, GA/Res/45/111 (14 December 1990)
	Human Rights Council, GA/Res/60/251 (15 March 2006)
United Nations Secretary General	Annotation, GAOR 10th Session Supp No 19 UN Doc A/2929 (1955)
United States State Department	Citizenship Laws of the World (Washington DC 2001)
	Statement regarding the Vienna Convention on the Law of Treaties, Exec Doc L 92nd Congress 1st Session (1971)
World Conference on Human Rights	Vienna Declaration and Programme of Action, UN Doc A/CONF 157/24 (Part 1) at 20 (1993)