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# The Inter-American System of Human Rights and the Right to Vote for Convicts:

The Case of Felony Disenfranchisement as a Social Conflicting Application  
and its Full Impropriety under International Human Rights Law

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## ABSTRACT

This thesis evaluates whether the Inter-American System for Protection of Human Rights should allow all criminal convicts to take vote or not. The objective is to highlight the clear need for change and the outdated and social troubling standing regarding felony disenfranchisement in Latin America. For this purpose, the research relies on a multidisciplinary investigation to analyse felony disenfranchisement policies and its operation in the region under the scrutiny of the America Convention on Human Rights. While Latin American countries should ungently be engaged in policies to promote inclusion and social rehabilitation of prisoners, criminal disenfranchisement, as a mere punitive measure, is openly embraced by the America Convention on Human Rights (Article 23.2). Once is clear the social impacts of felony disenfranchisement and its critical and contradictory establishment under the Inter-America System for Protection of Human Rights, the research uncovers the impropriety of the denial of prisoners ‘voting rights under international human rights law. Even though criminal disenfranchisement policies seem to be a countermeasure to develop human rights’ protection, the Inter-American System does not review the matter.

Keywords: Felony disenfranchisement; International human rights law; Unreasonable restrictions; Discriminatory policies; Inter-American System for Protection of Human Rights.

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American Convention : American Convention on Human Rights -----	23
ECtHR: European Court of Human Rights-----	62
I/A Court H. R : Inter-American Court of Human Rights-----	31
IACHR : Inter-American Commission of Human Rights -----	31
ICCPR : International Covenant on Civil and Political Rights -----	38
Inter-American System : Inter-American System for Protection of Human Rights -----	30
OAS : Organisation of the America States -----	31

## 1. INTRODUCTION

Within a multidisciplinary field of studies, this research uses a distinctive approach of sociology law interconnected with international human rights law. The core idea driving this work is the association of the right to vote and disenfranchisement policies with social life. This association is valid because law is developed from a synergic relationship with society and is a strategic tool for social change. For that reason, this study spanned sociology, political thought, social psychology, law, criminology, and international human rights law to conduct a complete investigation of the dilemma at issue.

With this in mind, the struggle of international systems for protection of human rights to recognise the right to vote for convicts as a relevant matter in the agenda of international human rights law represents a vital process in current development. Felony disenfranchisement is still very common, but, it seems not to reflect the social reality anymore. Backed by the customary international law regarding both the concept of 'reasonable restrictions' and 'indirect discrimination', it is no wonder criminal disenfranchisement does not fit the Inter-American System for the Protection of Human Rights.

In this context, the Inter-American System is outdated and contradictory regarding the right to vote for convicts. Although the social significance of the addressed right seems to be clear and the awareness about prisoners' rights is increasing, it is still a problematic issue to talk about felony disenfranchisement at a regional level in Latin America.

In this respect, this research argues with the unsatisfactory social value of felony disenfranchisement and critically analyses the current application of the blanket ban in Latin American. In particular, it argues that an amendment is needed in Article 23.2 of the American Convention on Human Rights, as well as enhanced case laws of the Inter-American Commission on Human Rights and Inter-American Court of Human Rights, on this matter. While the Article 23, paragraph 2, affords unlimited restrictions on the right to vote based on criminal sentence, the Commission and the Inter-American Court seems



to neglect the pertinency of enfranchising convicts, committing to protect the right to vote for provisional prisoners only.

In other words, there is a green light for blanket ban under the American Convention. Both the quasi-judicial and judicial organs of the system seem to be lenient about it.

Felony disenfranchisement is generally based on the argument that prisoners have violated the social contract and lack liability, as well as the assumption that prisoners are qualitatively different in contrast to the rest of the population<sup>1</sup>. However, as will be clarified, losing the right to vote because supposed moral failings, is far from being a consistent and reasonable rationale. It does not take into consideration grounds of proportionality, besides essentially being discriminatory. For the purpose of human rights protection, denying the right to vote on the basis of being a prisoner should not succeed in democratic societies at any level.

In this context, Latin American states under the Inter-American System largely enforce a blanket ban on the right of convicts to vote. From 17 members states of the American Convention on Human Rights, approximately 14 states openly deny convicts voting rights due to their criminal verdict. Thus, this research involves only Latin American countries parties of the American Convention on Human Rights. Taking into account any state party of the American Convention on Human Rights, those who have ratified it, has pledged to follow legally binding decisions of the Inter-American Court of Human Rights and binding provisions from the American Convention on Human Rights, the current research is focused only on these countries more prone to abide by directions of the Inter-American System.

Moreover, it is worth noting that the large majority signatory countries of the American Convention on Human Rights are Latin American countries, and therefore, almost all Latin American countries recognise the competence of the Inter-American Court of

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<sup>1</sup> See footnote (n 22).

Human Rights. The United States, Canada, and most of the Caribbean have not ratified the American Convention.

In this context, the use of prison as the root of political thoughts is an additional path to improve the resocialisation process, besides being a matter of inclusion itself. It is possible to promote the rehabilitation of convicts and protect minorities' participation from behind bars, by addressing the right to vote as an expression of the human political feature, an essential element for the sake of certain social groups, and an important aspect of the recognition of citizenship<sup>2</sup>.

Meanwhile, promoting rehabilitation is a way to further public security and the region and to consolidate democratic values supported by the Organisation of American States' ethical standards. The ability to vote can assert citizenship for those who have been limitedly visible in society and often suffer from a lack of human protection. By addressing the inherent civic equality aspect of the right to vote, it can be the reason to raise recognition of personhood and equal extension of citizenship. Once enfranchisement achieved, the side effects of the isolation of the prison system may be minimized, making the re-entry process back into society easier<sup>3</sup>.

However, it is worth mentioning that this thesis does not consider the acceptance of right to vote as the recognition of citizenship itself, but an important element of it only. For that reason, the scope of the research is focused on the recognition of the right to vote for convicts. Citizenship may be promoted by members' states, or not, once the right to vote is recognized. The idea is that prisoners are part of political life, and, as such, deserve voting rights, as any resident.

Moreover, felony disenfranchisement has a larger impact on minorities, either because they perform the wide majority of detainees, or because their small and disadvantaged communities strongly feel side effects of the disenfranchisement. This situation can be

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<sup>2</sup> See footnote (n 45).

<sup>3</sup> See footnote (n 32).

reported all of the world and is remarkable in Latin America regarding indigenous people and Afro-descendant communities.

Criminal disenfranchisement strips the voice of not only the felons but also their whole community. Afro-descendants and indigenous people, which are already underrepresented in decision-making processes, are overrepresented in the prison systems. This overrepresentation is due to an already existent systematic discrimination, through which social and economic disadvantaged minorities become the targets of the criminal justice and penal control policies.

Furthermore, considering the right to vote is mandatory in most of the countries in the region, a large majority of the convict population are a potential electorate. Any change in disenfranchisement policies is expected to provide a huge electoral impact in Latin America. It means it is not required to investigate whether inmates are prone to take vote or not. Once they are enfranchised, the simple entitlement, apart from positive measures from each member state to provide necessary concrete possibilities, is a full guarantee of relevant results.

To accurately understand this dilemma, the different categories of minorities in Latin America must be defined. Indigenous and Afro-descendants are the most notable minorities in the region. The Inter-American System itself recognises both as minorities, but they receive a different sort of protection by the existence of singular vulnerabilities and specific cultural disparity, which explains their particular minority legal concepts.

For example, indigenous people are minorities who can be protected by agreements for protection of minorities. However, because of their particularities, they need a particular concept, as well as particular instrument for their full protection. For this reason, the reports and conventions distinguish indigenous as a category apart from the general concept of minority.

Moreover, the methodological framework mixes both quantitative and qualitative approaches. These approaches include checking and mapping data, distinguishing patterns, and making rational conclusion and judgements about the impact of felony disenfranchisement of convicts on the rehabilitation process and the minorities' participation behind bars. In addition, this path intends to provide in-depth analysis on case laws, binding sources of international law, and non-binding sources of soft law related to cases of criminal disenfranchisement, the concept of 'reasonable restrictions' and the concept of 'indirect discrimination' in cases connected to political participation and right to vote.

For the purpose of this research, the first chapter describes the historical, theoretical, and philosophical assumptions of the right to vote, as well as the definition of felony disenfranchisement and its association with the investigated right. In addition, the social implication for the resocialisation process, the improvement of the prison system, and the guarantee of minorities' participation is analysed, and the argument of the disenfranchisement's defenders is evaluated. Well-known names, such as Samuel von Pufendorf, John Locke, Jean-Jacques Rousseau, Thomas Hobbes, and Aristotle are placed alongside current sociological, criminological and legal theorists, such as Eugenio Raul Zaffaroni, Edmundo Oliveira, Easton Susan, Jeff Manza, and Malcolm N. Shaw.

In the second chapter, the regional overview regarding the right to vote for convicts is provided. The Inter-American system and the situation regarding the Latin American prison system itself, the failures of the rehabilitation process in the region, and minority populations behind bars is scrutinized. Subsequently, the position of domestic laws of each member state in regard to felony disenfranchisement are provided for analysis and drawing conclusions.

Finally, the third chapter focuses on discussing the compatibility of felony disenfranchisement under international human rights law, taking into account the relationships between social impacts, the right to vote's theory, the current situation of Latin American prison system and, needless to say, the international law. Sources from

United Nations System, Council of Europe System and Inter-American System are stressed. First, the legal concept of ‘reasonable restriction’ in relation to criminal disenfranchisement is emphasised. Second, the concept of ‘discriminatory policies’ in connection with the side effects of criminal disenfranchisement on the stereotype of prisoners and ethnic-racial disparities are highlighted. These two concepts are believed to represent the core incompatibility of denying the right to vote under international legal standards.

More specifically, the third chapter considers customary international law, regarding those highlighted concepts, that provides legally binding understandings for the Inter American Court of Human Rights and the Inter-American Commission. In that sense, these organs should take advantage in the need to review the situation of prisoners’ disenfranchisement and be the pioneer in affording the right for every convict of criminal offence, by improving their case law or even supporting the amendment of the American Convention on Human Rights.

Therefore, besides substantiating the social impacts of criminal disenfranchisement policies, this research sought to raise awareness about the evidence that disenfranchisement of convicts is an unreasonable practice for every type of prisoner and discriminatory towards minority communities behind bars in Latin America. That is to expose the outdated standing of the Inter-American System under International Human Rights Law, and shows that a new standing is required on the sense of allowing every convict the right to vote.

## **2. FELONY DISENFRANCHISEMENT AND ITS SOCIAL IMPACTS**

### **2.1. HISTORICAL ASSUMPTIONS, DEFINITIONS AND ORIGINS**

Above all, human beings are political animals and deserve to be recognised as such<sup>4</sup>. According to Samuel Pufendorf, humans are naturally sociable to maintain their own preservation. Mankind cannot be preserved without associations, he says. As humans are social beings, the right to vote seems to be essential for their survival. In this sense, Pufendorf asserts law as the result of a human creation to force sociability, as long as it is fundamental for social security<sup>5</sup>.

The right to vote as part of the Aristotelian sense of *zoon politikon* represents the participation in judging and ruling the *polis*. Using this line of thinking, the term “politics” indicates citizens acting as part of their whole community rather than their own interests<sup>6</sup>. Since Aristotle, the right to vote has been the subject of debates and discussions about the inclusion of excluded groups in the *polis*<sup>7</sup>. This discussion on citizenship and participation has always been a fundamental element of society integration<sup>8</sup>.

Indeed, the right to vote for every citizen did not appear overnight. It was a result of progressive struggle from each undermined group across human history. Some centuries ago, a person had to be a man who was white and wealthy in order to be trusted to vote. Only white men with a remarkable amount of property could participate in political elections. The concession of the right to vote has always been and will always be a powerful tool and a result of social conflict<sup>9</sup>. Conceding political rights means power sharing and the pulverisation of the structure of power which permeates the society<sup>10</sup>.

Notwithstanding, such restrictions throughout history have blocked most adults from the right to vote. Women, slaves, free black man, and foreign people have been examples of non-citizens that have at some point been unreasonably removed from the electoral

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4 Aristotle, *Politics* (Benjamin Jowett tr, book 1, pt 5, Kitchener 1999) 5.

5 Samuel Pufendorf, *On the Duty of Man and Citizen* (1682) 16-26.

6 Aristotle (n 4) 5.

7 Susan Easton, *The Politics of the Prison and the Prisoner: Zoon Politikon* (Kindle edn, New York, Routledge 2018) ch 1, text above n 2.

8 Alfred Marshall, *Citizenship and Social Class* in T. H. Marshall (ed), *Citizenship and Social Class and other Essays* (New York, Cambridge University Press 1950) 40.

9 Michael Waldman, *The Fight to Vote* (New York, Simon & Schuster 2016) 5- 6.

10 Yash Ghai, *Report Public Participation and Minorities* (Minority Rights Group International 2003) 19.

process, while a narrow elite took part in political decisions. In the ancient Rome, for instance, only adult male citizens had the right to vote to choose the annual magistrates, laws, and policies<sup>11</sup>.

Considering this history, it is not surprising that felony disenfranchisement has widely been normalised since ancient Greece's penalty of *atimia*. In ancient Rome, a similar practice was upheld, the penalty of *infamia*. These two practices are the cornerstones of restrictions to the right to vote in ancient society. They represented one of the most severe punishments of the time in those moments, as they could imply not only the loss of the right to vote but also other rights related to citizenship<sup>12</sup>.

In Athens, for instance, *atimia* could be a result of a criminal offence. It was considered a status that took away many rights of citizenship, such as the right to participation in the *polis*. As regards Rome, *infamia* could result from a felony offence, and the main consequences were the loss of suffrage and the duty of integrating the Roman Legions.<sup>13</sup>

These restrictions were also impressive in the Middle Ages. As Waldman noted, a British law in 1430 restricted the right to vote to only those who were property owners and produced a certain annual income. Thus, only man with "economic interest" in society could be trusted to have the right to vote. African slaves, woman, indentured servants, tenant farmers, and indebted artisans were all disenfranchised faces without a voice<sup>14</sup>.

William Blackstone once supported this limitation as property tends "to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own". This argument was based on the assumption that poor people do not have will because

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<sup>11</sup> Jeremy James Paterson, 'How the Greeks and Romans Did Them and Why lots Can Be Better than Votes' (2015) University of St Andrews Ancient and Modern Rhetoric <<https://arts.st-andrews.ac.uk/rhetoric/elections-how-the-greeks-and-romans-did-them-and-why-lots-can-be-better-than-votes/>> Accessed 28 April 2019.

<sup>12</sup> Jeff Manza and Christopher Uggen, *Locked Out : Felon Disenfranchisement and American Democracy* (Kindle edn, Oxford University Press 2006) ch 1, text above n 41.

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

<sup>14</sup> Waldman, (n 9) 7.

they would sell their votes and literally dispose of them. Consequently, poor people would logically be harmful for the society if they had the right to vote<sup>15</sup>.

Likewise, it is no surprise that throughout the Middle Ages, criminal disenfranchisement was common, resulting in total loss of citizenship. Those guilty of treason or felony were subject to lose all civil rights<sup>16</sup>. This practice is well-known as civil death, which means the death of the citizen before the law<sup>17</sup>.

Civil death was also a common practice in the European colonies in the Americas. It was used as an instrument of dominance to exclude racial minorities from society and control the political scenario<sup>18</sup>.

Meanwhile, political rights have been claimed as a result of two historical revolutions: The American and French Revolutions, from 17 and 18 centuries respectively. In that context, the right to vote became the heart of democratic societies. These were great historical moments marked by the resistance to oppression and the origin of political rights as individual rights in the modern democratic society.<sup>19</sup>

Nonetheless, it is noteworthy that even during late 19th century, women did not have a say in society. There were no equal rights for women, as a powerless group. They have faced a long journey to gain power to influence their national government, with some results by the 20th century but short of equal rights. Men, on the other hand, as a dominant class, have restricted women's right to participate by supporting the same rationale against voting rights used to disenfranchise poor people. They used to say "women voting wasn't natural"; could be dangerous for the family life, and would be a risk for society<sup>20</sup>.

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<sup>15</sup> Waldman (n 9) 7.

<sup>16</sup> Easton (n 7) ch 4, text above n 2.

<sup>17</sup> Manza and Uggen (n 12) ch 1, text above n 42.

<sup>18</sup> Jamie Fellner and Marc Mauer, 'Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States' (1998) The Sentencing Project and Human Rights Watch <<https://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf>> accessed 14 April 2019.

<sup>19</sup> Malcolm N Shaw, *International Law* (New York, 8<sup>th</sup> edn, Cambridge University Press 2017) 19.

<sup>20</sup> Waldman (n 9) 54-55.



In this vein, *mutatis mutandis*, by using an identical excuse, men have stripped convicts of their right to vote. Hypotheses based on the remote possibility of social damage, have been used to discard the rights of this forgotten social category. According to felony disenfranchisement supporters, a criminal conviction shall cause restrictions in a person's the right to vote. The social status of being prisoner makes them supposedly untrustworthy to participate in the elections because they have committed crimes, then they are rhetorically harmful for the society and cannot be given the power to decide on behalf of the population.<sup>21</sup>

On the other hand, convict enfranchisement represents the idea of allowing prisoners with a final criminal guilty verdict to take vote. By this idea, convicts either inside or outside of the prisons should be trusted to participate in elections by means of voting. There is no modern convincing rationale able to support criminal disenfranchisement in the current 21th century. As this thesis shows, felony disenfranchisement defenders, such as Nicholas William Peter Clegg and Todd F. Gaziano<sup>22</sup>, set forth a logic based on stereotypes and old assumptions which are no longer able to explain the current complex society and its social issues<sup>23</sup>.

## 2.2. SOCIAL IMPACTS OF FELONY DISENFRANCHISEMENT: AN ANTI-SOCIAL ISSUE

Across history, felony disenfranchisement has been generally based on the assumption that prisoners are qualitatively different from the rest of the society. However, upon closer

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<sup>21</sup> Nora V Demleitner, 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (2000) 84 Minnesota Law Review 753, 771.

<sup>22</sup> See Roger Clegg and others, 'The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes' (2006) 14 American University Journal of Gender, Social Policy & the Law 1; Todd F. Gaziano, 'Election Reform' (Testimony Election Integrity, March 2001) <<https://www.heritage.org/testimony/election-reform>> Accessed 12 April 2019.

<sup>23</sup> Manza and Uggen (n 12) ch 1, text above n 5.

analysis, these assumptions clearly use defective logic and troubling conclusions, as long as it is premised on a sceptical and common sense<sup>24</sup>.

First, criminal conviction should not change formal entitlement to vote. If it is expected that prisoners should conform the rules of the society and comply citizens' obligations, there is no reason to deny every element of citizenship because of criminal conviction. As this research supports, they should be given the opportunity to act as citizens, thinking in political proposals and social situation, even paying taxes<sup>25</sup>.

As Mauer says, "felony disenfranchisement policies are inherently undemocratic no matter how applied". It is no wonder giving the right to vote to convicts would serve democratic ends and progressive development of the society<sup>26</sup>.

In 2004, the South African Constitutional Court ruled a case of two inmates regarding the Electoral Laws Amendment Act number 34 of 2003, which denies inmates serving sentence to vote. The African Court held that the right to vote is absolutely fundamental in a democracy. As a result of that decision, all convicts were allowed to vote in April 2004<sup>27</sup>.

In that context, it is worth mentioning the Constitutional Court of South Africa also established the ability to vote as the civic equality of all people. This was established on the basis that "voting" is an identification of dignity and personhood, by which a society can recognise rights' bearers and the bearers can recognise themselves as part of the society. The right to vote as an expression of the human political nature enhances the full

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24 Marc Mauer, 'Voting Behind Bars: An Argument for Voting by Prisoners' (2011) 54 *Howard Law Journal* 549, 554.

25 Easton (n 7) ch 4, text above n 36.

26 Mauer (n 24) 550.

27 *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (2004) Case CCT 03/04 ZACC 10 (South African Constitutional Court) <<http://hdl.handle.net/20.500.12144/2233>> [111].

quality of humanity for everyone, especially in democratic societies, even for those inside the prison system<sup>28</sup>.

For that reason, it is believed that the right to vote for convicts can afford the improvement of resocialisation process and, therefore, the improvement of conditions inside of the prison system itself, in addition to protecting the participation of minorities behind bars.

### **2.2.1. Impact of Felony Disenfranchisement on the Resocialisation Process**

According to Jeff Manza, a professor of sociology at New York University, among individuals who have been previously arrested, 27 percent of the group of non-voters have been rearrested. Unlikely, only 12 percent of the group of voters have been rearrested<sup>29</sup>. That is to say, where criminal disenfranchisement takes place around the world, the more prisoners gain a criminal conviction, the more incarceration levels rise<sup>30</sup>. This suggests that felony disenfranchisement is directly linked to the rehabilitation of inmates. It is nothing more than the Aristotelian pattern through which participation strengthens the sense of community obligation<sup>31</sup>.

This sort of right is part of a package of pro-social behaviour that is linked to desistance from crime. Voting rights in today's complex societies appears to be an important tool for promoting social reformation and setting forth improvements in the whole prison system around the world.<sup>32</sup> That's why restoring the right to vote for convicts could aid their transition back into community life and minimize the isolation and side effects of incarceration.

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<sup>28</sup> Minister of Home Affairs (n 27) [111].

<sup>29</sup> Manza and Uggen (n 12) ch 3, text above n 11.

<sup>30</sup> Mauer (n 24) 562.

<sup>31</sup> Easton (n 7) ch 4, text above n 38.

<sup>32</sup> Jean Chung, 'Felony Disenfranchisement: A Primer' (2019) Sentencing Project, 6/2019, 4 <<https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>> accessed 03 June 2019.

Following this line of thinking, the right to vote is inversely proportional to recidivism rates. The more people are entitled to vote inside the prison system, the less recidivisms are prone to happen. Contact with the outside world is one of the key elements of a successful resettlement. According to the United Nations Office on Drugs and Crime, meaningful activities by which prisoners' energy are channelling into constructive occupations and the re-entry process create a positive educational environment. It is not surprising that civic participation is unambiguous linked with lower recidivism and, therefore, right to vote is linked with rehabilitation rates<sup>33</sup>.

In this spirit, Mauer supposes that engagement in the electoral process will make a successful re-entry into the community from prison easier<sup>34</sup>. By contrast, the transition from the prison to the society is made more difficult by isolating detainees. In general, today's prison system makes prisoners worse than they have ever been before, as a result of "negative pedagogical effects"<sup>35</sup>. Without a social trigger to involve the prisoner in responsible public thinking, no true rehabilitation is possible. That is to say, there is no social benefit in isolating prisoners other than the political strategy of a populist punitiveness of governments' vote seekers<sup>36</sup>.

According to Susan Easton, "reflecting on the political process in the period leading up to an election would encourage prisoners to reflect on what is best for the community and on both the burdens and benefits of citizenship"<sup>37</sup>.

The right to vote makes prisoners to think about legal and moral rules, apart from the needs of his community and family. It acts as a social bridge between the person, who is socially damaged by the prison system, and the life in community. The right to vote is

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<sup>33</sup> United Nations Office on Drugs and Crime (UNODC), *Handbook on Strategies to Reduce Overcrowding: Criminal Justice Handbook series* (Vienna, United Nations Office 2013) 13.

<sup>34</sup> Mauer (24) 562.

<sup>35</sup> Eugenio Raul Zaffaroni and Edmundo Oliveira, *Criminology and Criminal Policy Movements* (Kindle edn, University Press of America 2013). ch 13, Text above n 55.

<sup>36</sup> Easton (n 7) ch 7, text above n 2.

<sup>37</sup> *ibid* ch 4, Text above n 38.

nothing more than a window through which the society may project social thoughts into detainees' mindset.

The Supreme Court of Canada made the following ruling in the case *Sauvé v. Canada*:

“[...] denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny inmates the right to vote is to lose an important means of teaching them democratic values and social responsibility”<sup>38</sup>.

That is to say, the lack of right to vote removes a path to social development and undermines correctional strategies and policies elaborated towards rehabilitation and integration<sup>39</sup>.

Moreover, Dr. Henry Brady, a professor of the Goldman School of Public Policy at the University of California, “suggests that when parents in prison are disenfranchised, their children” might be intensely affected. This rationale is based on the assumption that the right to vote while the person is incarcerated helps to maintain a constant communication between the inmate and his or her family or community. The comparative study of prison populations by United Nations Development Programme postulates that imprisonment may “damage and break up the family”<sup>40</sup>. Thus, children whose parents are disenfranchised and do not engage in civic activity are even more unlikely to find value in taking part in the democratic process<sup>41</sup>.

Creating links between detainees and communities affords the promotion of new prisoners' values by which prisoners will come to consider the rewards of the connections. That is the rehabilitation process in itself. It needs to begin as early as possible, even

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38 *Sauvé v. Canada* (Chief Electoral Officer 2002) 3 SCR 519, 522.

39 *Ibid*, 522.

40 United Nations Development Programme (UNDP), *Citizen Security with a Human Face: Evidence and Proposals for Latin America* (United Nations Development Programme 2013) 8.

41 Jean Chung, ‘Felony Disenfranchisement: A Primer’ (2019) *Sentencing Project*, 6/2019, 4 <<https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>> accessed 03 June 2019.

during incarceration. According to Nance La Vigne, re-entry planning needs to begin not on the day of release to the community but ideally on the day of admission to prison. This different approach has the potential to enlarge the resocialisation result<sup>42</sup>.

#### 2.2.1.1. Impact of Felony Disenfranchisement on Improvement of Prisons

Notwithstanding, besides promoting social responsibility and community engagement, voting rights give a voice for those who are imprisoned under terrible conditions. This right promotes the connection between politicians and prisoners. It is a driving force to push policies targeted at the improvement of the humiliating conditions of prisons. Again, this is an important tool with double effect: reintegration of the incarcerated and also a successful improvement of the prisons.

As law professor Debra Parkes evidences, one of the outcomes of felony enfranchisement is to promote public debate between candidates and prisoners. This right, as it has been seen before in Canada, encourages the dialogue inside prisons. At Cowansville Penitentiary in Quebec, 1998, for instance, Parti Qu'eb'ecois candidate Raou'el Duguay met with inmates who had the right to vote. "With 92 prisoners having registered to vote at the prison, Duguay considered these numbers sufficient enough to warrant a meeting with them", the Professor says, and discuss about his proposals<sup>43</sup>.

On this line, therefore, felony disenfranchisement is seen as a counterproductive measure for Public Safety<sup>44</sup>. It cuts efforts to promote public security, once the prison systems are just making professional criminals which will enforce crimes inside and outside of the prison during and after their time in incarcerated. The lack of political participation inside of the prison directly influences at the improvement of the prison system and as final result of, similar to a domino effect, security and development of societies.

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<sup>42</sup> Nancy La Vigne and others, *Release Planning for Successful Reentry: A Guide for Corrections, Service Providers, and Community Groups* (The Urban Institute 2008) 2.

<sup>43</sup> Mauer (n 24) 558.

<sup>44</sup> *ibid* 565.

At that point it is starting getting clearer the voting rights for prisoners should have never been taken away in any moment. By addressing the right to vote as expression of the human political feature, it is possible to deal with prisoners as full human beings, especially in democratic societies' ethical standards. At the end, the right to vote can afford the improvement of resocialisation process and the advancement of conditions inside of the prison system itself at the same time<sup>45</sup>.

### **2.2.2. Felony Disenfranchisement and the Impact on Minorities Communities**

In this sense, apart from the implications on the prison system, the right to vote would also be expected to affect minority communities. The disenfranchisement rates vary tremendously across racial and ethnic groups across the world. For instance, such felony disenfranchisement provisions have an outsized impact on Afro-Americans. In the US, felony disenfranchisement reduces the scale of the black electorate and its political impact, including those who have never been convicted of a felony, for the reason of indirect effects<sup>46</sup>.

As the discussion about democracy arises, the leading question is whether the representative system really works based on the representation of individuals and their social group. By this debate, the legitimacy of the electoral process and minority groups have been a grave concern. The matter is also about the opportunity to elect racial and ethnic minorities' representatives at the polls<sup>47</sup>.

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<sup>45</sup> Emmett Sanders, 'Full Human Beings: An Argument for Incarcerated Voter Enfranchisement' (2018) Peoples Policy Project <<https://www.peoplespolicyproject.org/projects/prisoner-voting/>> 15 March 2019.

<sup>46</sup> Christopher Uggen and others, '6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement' (2016) Sentencing Project, 08/2019, 10 <<https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>> 12 March 2019.

<sup>47</sup> Manza and Uggen (n 12) ch 8, text above n 4.

Felony disenfranchisement has always had an extra impact on minorities. The size of minority electoral power is undermined by the indirect effects of criminal disenfranchisement. In this way, denying the right to vote is a practical way to cripple the political organisation of certain groups and to strengthen the established social structure<sup>48</sup>.

As Ronald Pierce put, “Felony disenfranchisement not only strips the voice of the felon, but it strips the collective voice of the community and limits the community’s efficacy”. The political impact of the unprecedented disenfranchisement rates in recent years is not insignificant. As it has already been seen before, elections are often won by a modest amount of votes, meaning the enfranchisement of felons can, under no doubts, trigger changes.<sup>49</sup>

For instance, in México, the 2006 elections which chose Felipe Calderon as president was settled by a slim margin of 243,934 votes. At that moment México had over 210,140 people disenfranchised because of felony trial and conviction<sup>50</sup>.

The matter is the right to assembly, participation and expression of minority groups. According to the United Nations Guide for Minorities, the right to vote is among the rights of greatest interest to minorities, recognised by the Article 23 of the American Convention on Human Rights (American Convention) and central principle in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. This is because the right to vote has the power to help Latin American countries face an endless cycle of abuses and marginalisation<sup>51</sup>.

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<sup>48</sup> Manza and Uggen (n 12) ch 2, text above n 58.

<sup>49</sup> Uggen (n 46) 10.

<sup>50</sup> Cristina Muñoz, ‘Elecciones desde la cárcel: Los Votos que no Cuentan’ (2018) Proyecto Justicia, 06/2018 < <http://proyectojusticia.org/elecciones-carcel-votos/> > 18 May 2019.

<sup>51</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Declaration on Minorities), UN General Assembly (UNGA) RES 47/135 (18 December 1992) ; American Convention on Human Rights (Organization of American States [OAS]) OAS No 36, 1144 UNTS 123, B-32, OEA/Ser.L.V/II.82 doc.6 rev.1, 25 (American Convention).



Ensuring the right of minorities behind bars to participation is essential not only for the minorities themselves but also for the society as a whole. Indigenous and Afro-descendant taken as convicted in most of the Latin American countries party of the American Convention on Human Rights are automatically deprived from their right to participation. Hence, they are excluded from political, social, and economic decisions that have important repercussions in their life, which are investigated in Chapter II. In the end, society pays the price of social conflict and instability in several areas<sup>52</sup>.

### 2.3. SUPPOSED DOWNSIDES: JUSTIFICATIONS AND CRITICISM

#### 2.3.1. Untrustworthiness: The Anti-Law Enforcement

Notwithstanding, there are many voices which defend that people who break legal rules are by definition untrustworthy and, therefore, should not be allowed to vote and decide the future of countries. These supporters believe detainees will subvert the interests of the society and cause troubles in their daily lives<sup>53</sup>. However, it is not really likely to be truth.

As previously described, the right to vote is more likely to influence a prisoner's life than life out of the prison system itself. The right to vote in fact it is not a hazardous threat by which the prisoner will somehow hurt the society. It is, on the contrary, a conduit by which the society enforce its thoughts and moral rules on the detainees' mindset. The detainees will be allowed to vote and think on proposals by candidates selected by the society, who will be running the electoral process under the democracy's rules and consolidated principles.

Furthermore, it is worth saying that one proposal would never be chosen by prisoners alone. It would be chosen only by the society's majority. Detainees have no power to decide by themselves the future of the population, but they can support part of the society

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<sup>52</sup> Ghai (n 10) 4.

<sup>53</sup>Mauer (n 24) 557.

who supported policies in favour of the protection of their families and their community, which in general are minorities and marginalised people<sup>54</sup>.

According to Mauers, “as one who has visited and corresponded with many prisoners over the years, it is not at all clear that people in prison have markedly different perspectives on key national concerns—economic issues, national defence, social policy—than the voting public in the free world.” That is to say, it is not true at all that prisoners would enforce terrorism by using the right to vote. If by chance there is some outdated candidate supporting slavery or terrorism in his proposals, it would never become public policy without the endorsement of the majority of society<sup>55</sup>.

Moreover, not allowing people, whatever their social categories, to vote due to the fear that this group would vote for someone who is not desirable is not what democracy should be. That is not a position democratic institutions should support<sup>56</sup>.

In other words, that is the myth of an anti-law enforcement: The notion that prisoners would fraud election and the society is nothing more than a fallacy, very implausible and improbable to take effect. There is no social scientific study suggesting convicts would ever try to rewrite legal rules. Conversely, in a study that interviewed prisoners in the US, when asked what would happen in the society without the rule that they had broken, prisoners were much more likely to endorse the laws than to abolish them. This study’s results suggest that prisoners are prone to accept the rules as the desirable social behavioural patterns<sup>57</sup>.

Even so, it has been argued that at least persons convicted of electoral offences, or really abominable crimes, should be barred from voting in the electoral process. However, the majority in prison have not been convicted of electoral offences. In addition, only a

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<sup>54</sup>Eli L. Levine, ‘Does the Social Contract Justify Felony Disenfranchisement?’ (2009) 1 Washington University Jurisprudence Review 193, 51.

<sup>55</sup> Mauer (n 24) 557.

<sup>56</sup> Sanders (n 45).

<sup>57</sup>Alec C. Ewald, ‘An “Agenda for Demolition”: The Fallacy and the Danger of the “Subversive Voting” Argument For Felony Disenfranchisement’ (2004) 36 Columbia Human Rights Law Review 109, 124-126.

minority of detainees have been convicted of rape or terrorism, as most of them are charged with petty and non-violent offences. This once more shows that these votes would hardly have any serious, important and eloquent impact on the makeup of the electorate<sup>58</sup>.

On the same line Marshall argues. Any sense of loyalty to the society is much more likely to come from a man already treated as a citizen with rights protected by law<sup>59</sup>.

As Susan Easton addressed, citizen's duties grant inmates the ability to perform the supposed required liability that makes them more trustworthy for the life going back into society. The right to vote, therefore, may be a driving force for overcoming the lack of credibility<sup>60</sup>.

In that sense, there is no reason to take away the right to vote from just some sort of criminals. There is no risk of side effects and, therefore, there is no harm to be protected against. Felony disenfranchisement is a perilous measure which adorns a bad stereotype of convicts and put at risk their citizen's activity.

### **2.3.2. A Violation of the Social Contract**

Moreover, it is said, after all, criminal disenfranchisement is justified by the social contract, which is a philosophical explanation of the formation of the society. By this theory, a convict is incapable of respecting society's law and, therefore, does not deserve take part in its social life. However, does the social contract really justify felony disenfranchisement in its theory? How does incapacitation, retribution, deterrence, and rehabilitation justify restrictions on the right to vote for convicts?

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<sup>58</sup>Mauer (n 24) 557; UNODC (n 33) 25.

<sup>59</sup> Marshall (n 8) 40.

<sup>60</sup> Easton (n 7) ch 4, text above n 36.

Incapacitation, retribution, deterrence, and rehabilitation are the four aspects of punishment implied from the social contract of John Locke<sup>61</sup>, Jean-Jacques Rousseau<sup>62</sup> and Thomas Hobbes<sup>63</sup>. For the purposes of this thesis, the ideas of these three men will be the framework of the social contract, thanks to their historical academic relevance on the matter.

After analysing each one of them, it is surprising that none of the four aspects of punishment can be found in practice or legitimately justify the current policies of criminal disenfranchisement<sup>64</sup>. From the modern democratic constitutions and modern criminal justice system, the central problem became the rehabilitation, not simply punitive measures of criminal offenders<sup>65</sup>.

According to Locke<sup>66</sup>, incapacitation means removing criminals from society in order to prevent the crime to happen again. To comply with the aim of incapacitation, the delinquent should be taken away from the society. Rousseau<sup>67</sup> went further: those who breaks the law should perish in spite of the state, since this person would no longer be considered a citizen. Hobbes<sup>68</sup> has a similar thought by defending the idea criminals should be removed from activities in society and banished<sup>69</sup>.

Nevertheless, denying right to vote for convicts does not mean an incapacitation of the criminal, but a incapacitation of the society towards the criminal. As above mentioned, the right to vote is nothing more than a window through which the society may project social thoughts onto a detainee's mindset. The state could not stop criminals from harming

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<sup>61</sup> John Locke, *Two Treatises of Government In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government* (London 1823) 108.

<sup>62</sup> Jean-Jacques Rousseau, *The Social Contract* (First published 1762, Jonathan Bennett 2017) 72.

<sup>63</sup> Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* ( London 1651) 192-196.

<sup>64</sup> Levine (n 54) 215.

<sup>65</sup> Manza and Uggen (n 12) ch 1, text above n 55.

<sup>66</sup> Locke (n 61) 109.

<sup>67</sup> Rousseau (n 62) 3.

<sup>68</sup> Hobbes (n 63) 194.

<sup>69</sup> Levine (n 54) 215.

the society by blocking criminals from voting. As above stated, there is no real potential harm by allowing prisoners to take vote, and therefore, there is no real incapacitation throughout felony disenfranchisement.

With respect to deterrence, it is important to establish there are two types of deterrence: specific and general. While specific deterrence intends to limit recidivism towards ex-felons, general deterrence tends to discourage others from carrying out the same crime. However, nowadays, it is not simple to imagine that disenfranchisement will dissuade someone from committing some crime. As Susan Easton says, “the prospect of losing the vote would seem to be less compelling than the risk of a prison sentence”<sup>70</sup>. Moreover, deterrence only works if the person is aware of the burden of losing some right, and it is not clear young people, apart from low education level (average of arrested people), would be aware of the consequences of losing the right to vote<sup>71</sup>.

Based on the idea of social contract, Cesare Beccaria held that any punishment which goes beyond of the purpose of prevention is cruel, superfluous, and tyrannical. Punishment, he says, has to make the exact proportion between the offence and the illegal act. If laws are too inhuman, they must be amended, otherwise impunity and anarchy might succeed<sup>72</sup>.

In regards to rehabilitation, disenfranchisement does not educate or provide job-training. Instead, it isolates detainees from the society and makes the re-entry process into community life worse. Disenfranchisement does not have any positive impact on rehabilitation, since it impedes the formation of a public morality and furthers prisoners’ alienation from the community<sup>73</sup>. The ban on voting rights can only promote social death and social indifference<sup>74</sup>.

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<sup>70</sup> Easton (n 7) ch 4, text above n 37.

<sup>71</sup> Levine (n 54) 215.

<sup>72</sup> Cesare Beccaria, ‘Of Crimes and Punishments’ (first published 1764, Blackmask Online 2001) 4, 23 – 24 <<http://www.baskent.edu.tr/~zekih/ogrenci/crimpun.pdf>>

<sup>73</sup> Levine (n 54) 223.

<sup>74</sup> Easton (n 7) ch 4, text above n 37.

In short, the rehabilitative approach rejects the assumption that criminals are inherently corrupted and supports that penal control should seek full conditions to protect citizenship as much as possible<sup>75</sup>.

Moreover, criminal disenfranchisement could be considered retribution in itself. However, because society has developed, it is not able to justify a punishment by itself anymore. The right to punish, based only on the violation of the social rule<sup>76</sup>, turns out as too medieval to be supported by itself. Retribution does not solve the social issue. It seems to be a flawed rationale and helps to support the argument that the social contract should be rewrite<sup>77</sup>.

On the other hand, criminal sentence should go beyond retribution in itself. Even though it was the earliest system of punishment, the aim of criminal justice cannot be justified by pure retributive measures. Penal sanction of any legislative structure has the main purpose of focusing on the preventive scope, as long as the current legal standards of prison system are aiming at detainee's reintegration into society<sup>78</sup>, as is shown in the next chapter.

Therefore, there is no reason to justify felony disenfranchisement by the theory of social contract, as long as these rationales do not fit the idea of taking away one's right to vote as punishment. It is an outdated issue and not even the international systems for protection of human rights affords such an outrage.

### **3. FELONY DISENFRANCHISEMENT IN LATIN AMERICA: A REGIONAL OVERVIEW**

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<sup>75</sup> Zaffaroni and Oliveira (n 35) ch 18.

<sup>76</sup> Rousseau (62) 72.

<sup>77</sup> Peter A Corning, 'The Fair Society: It's Time to Re-Write the Social Contract' (2012) 11 Seattle Journal for Social Justice 191, 211.

<sup>78</sup> Zaffaroni and Oliveira (n 35) ch 18.

Despite being a vital apparatus for the resocialisation of detainees and the protection of the political rights of minorities groups, felony enfranchisement is a matter far from being one of the most discussed subjects under the Inter-American System for Protection of Human Rights (Inter-American System) at a regional level. There is a massive national recognition of the blanket ban on convicts among the Latin-American countries. It appears to be a critical mechanism of social change that is not receiving its deserved value.

Even in a context of a flawed prison system which desperately needs criminal policies aiming at the rehabilitation of inmates and the inclusion of minorities, members states of the American Convention are not taking further steps on enfranchisement policies for convicts. Although the criminal disenfranchisement of convicts seems to be a counter-efforts measure to public security and to social inclusion of minority communities, it is a completely neglected issue under the Inter-American System. There are no resolutions, reports, judgements, advisory opinions, or protocols specifically regarding convict disenfranchisement.

Against this background, it is believed the Inter-American System of human rights can play an important role in the consolidation of prisoners' rights in Latin America and, therefore, overcoming shortcomings regarding prison system and minority inclusion. On this path, in order to truly understand the necessity of a new standing and the effective role that could be played by the Inter-American System in the region, the following are briefly examined: its structure of the system, the situation of Latin American prisons, and the national application of felony disenfranchisement by members states of the American Convention on Human Rights.

### 3.1. THE INTER-AMERICAN SYSTEM FOR PROTECTION OF HUMAN RIGHTS

The Organisation of the America States (OAS) is an international organisation created by the American states which seeks to promote peace and security in the Americas. Since its

creation, the American states have developed several important documents that built the regional system for the promotion and protection of human rights by recognizing human rights, establishing obligations, and creating instruments oversee the observance of human rights<sup>79</sup>.

In this context, OAS members states have the duty to protect and promote human rights before the charter of the OAS, as well as before the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights. While the charter gave birth to the OAS, the American Declaration on the Rights and Duties of Man, created in May of 1948, is the first comprehensive and general international human rights instrument; the American Convention is the first legally binding treaty on the protection of human rights in the region<sup>80</sup>.

With this in mind, the current Inter-American System has two main organs to exercise the preservation of human rights: the Inter-American Commission on Human Rights (IACHR), a quasi-judicial organ; and the Inter-American Court of Human Rights (I/A Court H. R.), a judicial organ. Both are pledged to promote the observance of and guard human rights. The IACHR and the I/A Court H. R. are important tools to protect and influence states parties' policies on human rights, apart from, needless mentioning, the American Convention on Human Rights<sup>81</sup>.

The IACHR can examine information and make non-binding recommendations, after the exhaustion of domestic remedies. It can be a charter organ, tied only to the OAS Charter,

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<sup>79</sup> Inter-American Democratic Charter (OAS OEA Ser G/CP-1 ) ( OAS Charter) article 2.

<sup>80</sup> Inter-American Commission on Human Rights (IACHR), 'Indigenous Peoples, Afro-Descendent communities and Natural Resources: Human Right Protection in the Context of Extraction, Exploitation, and Development Activities' (OEA Ser L V II, Doc 47/15, Washington DC 31 December 2015) 27.

<sup>81</sup> Ludovic Hennebel, 'The Inter-American System for Human Rights: Operations and Achievements' in Felipe Gomez Isa and Koen de Feyter (eds) *International Human Rights Law in a Global Context* (Bilbao, University of Deusto 2009) 806.



for those who have not ratified the Convention, and a conventional organ for those who have ratified the Convention<sup>82</sup>.

On the other hand, the I/A Court H. R. analyses cases referred by the Commission and other members states who have ratified the Convention. This judicial organ carries out a significant influence in the state parties by applying resolution, reports, advisory opinions, and judgements, which have legally binding effects<sup>83</sup>.

By addressing these documents, members states shall effectively exercise the defence and observance of human rights under their jurisdiction, especially the rights of persons deprived of liberty in the prisons system.

### **3.1.1. Inter-American System and the Current Theoretical Mainstream of Punishment**

First of all, it is important to understand that the prison system and punishment are not a terror apparatus. In the contemporary world, the purpose of punishment goes beyond retribution of an unjust act. In any legislative structure, there is a paramount work stressing the preventive and rehabilitative scope of punishment, in order to intimidate wrongdoers and strengthening judicial conscious of the society<sup>84</sup>.

In this context, according to the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted by the Inter-America Commission on Human Rights through its Resolution No. 1/08, “deprivation of liberty” has wide range of possible meanings. “Any form of detention, imprisonment, institutionalisation, or custody of a person in a public or private institution which that person is not permitted to leave at”. This concept includes not only criminals or those accused by criminal offences,

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<sup>82</sup> IACHR, Statute of the Inter-American Commission on Human Rights (OEA Ser G WI/C-sa 373(3) article 12, 19c; American Convention art 44 , 63(2); IACHR, Rules of procedure (Approved by the Commission at its 109<sup>o</sup> special session, 8 December 2000, amended at its 116th regular period of sessions, held from 25 October 2002) article 74.

<sup>83</sup> Hennebel (n 81) 814-815.

<sup>84</sup>Zaffaroni and Oliveira (n 35) ch 18.

but also persons with physical, mental, or sensory disabilities, and children, among others<sup>85</sup>.

For this research, the concept of a person deprived of liberty referred to those deprived of their liberty because of crimes, whether provisional or definitive detention. This analysis gives the necessary background to figure out the limits of punishment of persons deprived of their liberty serving criminal sentences.

In this vein, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas recognises punishment consistent with the privation of liberty with social resocialisation and personal rehabilitation as two essential aims. Therefore, it is enforced that humane treatment, measures against overcrowding, maintenance of contact with the outside world and also protection of the same rights every other person bears under domestic law and international human rights law should be granted.<sup>86</sup>

According to the case of *Vélez Loor v. Panama* and the case of *Yvon Neptune v. Haiti*, punishment for the Inter-American Court of Human Rights must be a criminal sanction directly related to the severity of the crime and should not exceed the inherent burdens to being locked up<sup>87</sup>. Even though the estate has the punitive power and legitimate competence to enforce liberty's deprivation, the state has limits and cannot be beyond the legal standards, such as held in the cases *García Asto and Ramírez Rojas v. Peru* and *Lori Berenson Mejía v. Peru*<sup>88</sup>.

In that sense, the IACHR has already stated that “no suffering should be added to the deprivation of liberty than what it already represents”. In other words, prisoners should

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<sup>85</sup> IACHR, ‘Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas’ (OEA/Ser/L/V/II.131 doc. 26, 13 March 2008).

<sup>86</sup> *Ibid.*

<sup>87</sup> Inter-American Court of Human Rights (I/A Court H R), Case of *Vélez Loor V Panama* (I/A Court H R Series C No 218, Judgment 23 November 2010) [198]; I/A Court H R, Case of *Yvon Neptune V. Haiti* (I/A Court H R Series C No 180 Judgment of 6 May 2008) [130].

<sup>88</sup> I/A Court H R, Case of *García Asto and Ramírez Rojas V Peru* (I/A Court H R Series C No 137, Judgment of 25 November 2005) [223]; I/A Court H R, Case of *Lori Berenson Mejía V Peru* (I/A Court H R Series C No 119, Judgment of 25 November 2004) [101].

not suffer more than necessary, but rather they should only experience suffering inherent of the imprisonment sentence<sup>89</sup>.

If one is convicted, the punishment is the deprivation of liberty itself. It does not need to go beyond this to ensure the protection of both the victims and society. Conversely, it is important to promote rehabilitation policies<sup>90</sup>. According to the IACHR, all of the countries should be focused on measures to prevent violence and crime, not only retribute the evil of the crime<sup>91</sup>.

If reforming individuals is the guiding goal of the prison system, the justification of denying offenders the right to vote begins to crumble<sup>92</sup>.

#### 3.1.1.1. Latin American Prisons: Failures in Discussion

Prison is as old as human memory. The idea of prison system has been present since ancient Greece. However, prison system in current societies still have a lot of work to be done in order to promote the required legal standards and avoid destroying the personalities of inmates or creating a career of crime<sup>93</sup>.

In that context, as well-known, considering Inter-American standards of punishment, the governments in Latin America are not in a position of denying rights but rather developing them. Prisons in the region have become infamous for being found in a state of general decline.<sup>94</sup> Massacres, riots, and violent incidents have been reported in many

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<sup>89</sup> IACHR, Annual Report 2002, Chapter IV, Cuba (OEA/Ser.L/V/II.117, Doc 1 Rev 1, adopted on 7 March 2003) para. 73

<sup>90</sup> Adam Blackwell, 'Third Meeting of Officials Responsible for Penitentiary and Prison Policies of the OAS Member States' (Opening Remarks for Multidimensional Security, Washington DC, 17 September 2012) <[http://www.oas.org/es/ssm/docs/speeches/ab-III\\_PrisonMeeting\\_2012\\_09\\_14.pdf](http://www.oas.org/es/ssm/docs/speeches/ab-III_PrisonMeeting_2012_09_14.pdf)> Accessed 16 June 2019

<sup>91</sup> IACHR, 'Report on the Human Rights of Persons Deprived of Liberty in the Americas' (OEA/Ser.L/V/II Doc 64, adopted on 31 December 2011) [10]; IACHR, Report on Citizen Security and Human Rights (OEA/Ser.L/V/II. Doc. 57, adopted 31 December 2009) [155].

<sup>92</sup> Manza and Uggen (n 12) ch 1, text above n 58.

<sup>93</sup> Zaffaroni and Oliveira (n 35) ch 17, text above n 3.

<sup>94</sup> Elias Carranza, 'Crime, Criminal Justice, and Prisons in Latin America and the Caribbean: The United Nations Model based on Rights and Obligations, and the Need for Comprehensive Social and Criminal

prisons repeatedly. Such evidence makes clear the failure of the Latin America prisons and their flawed operation<sup>95</sup>. It is a regionalised phenomenon<sup>96</sup>.

Historical and structural incapacities of states to adequately deal with security issues are totally related to the lack of quality of their prison systems. For a very long time, the penitentiary system has been in crisis in Latin America, demonstrating a concrete overpopulation within a process where rehabilitation is far from being achieved<sup>97</sup>.

Human rights violations, criminal networks, violence, and reiterated recidivism are the components of the prisons in Latin America. They are said to be one of the most unsafe places to stay. The majority of prisoners claim to feel more safe in the place where they have been living before getting arrested than inside the prison under the protection of the state. There are several reports regarding violence towards prisoners made by other inmates or even perpetrated by prison staff<sup>98</sup>.

In this context, overcrowding is very common and has a massive negative impact on the human development and every citizen's security<sup>99</sup>. The imprisonment rates in Latin America is one the highest in the world, which suggests the ineffectiveness of the prison system<sup>100</sup>.

As the graphic below shows, of the 17 Latin American countries parties of the American Convention on Human Rights, 16 have the total number of prisoners far beyond the

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Justice Polices' in Elias Carranza (ed) *Crime, Criminal Justice and Prison in Latin America and the Caribbean: How to implement the united nations' rights and duties model* (ILANUD, Raul Wallenberg Institute of Human Rights and Humanitarian Law) 59.

<sup>95</sup> Human Rights Watch, 'Prisons in Latin America and the Caribbean' (1997) Human Rights Watch, <<https://www.hrw.org/legacy/advocacy/prisons/americas.htm>. Accessed on 22/05/2019> 25 April 2019.

<sup>96</sup> UNDP, *Citizen Security with a Human Face: Evidence and Proposals for Latin America* (40) 1.

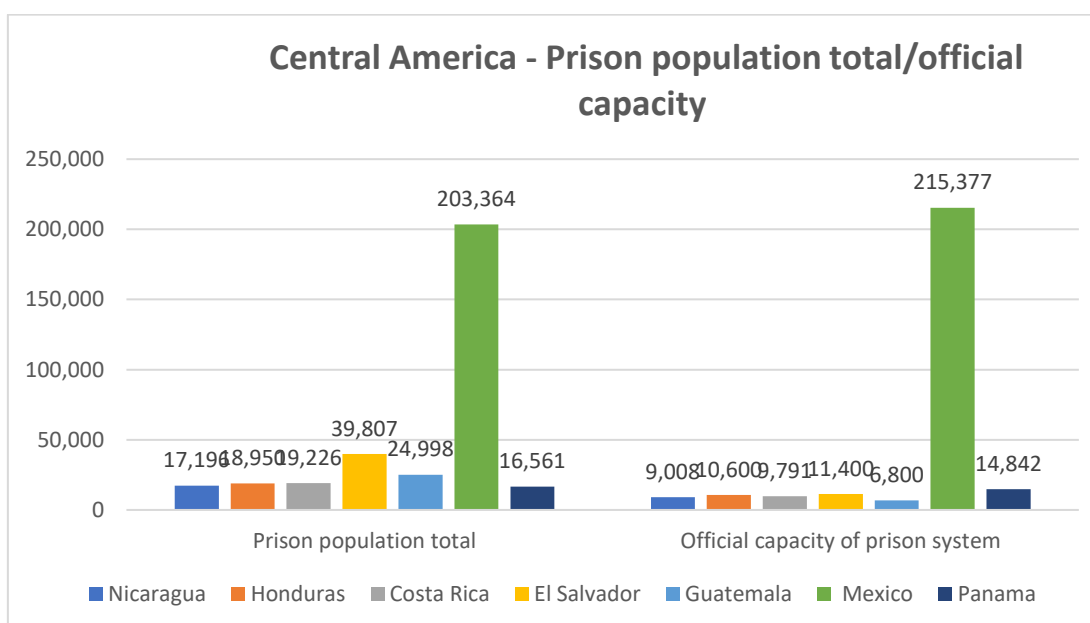
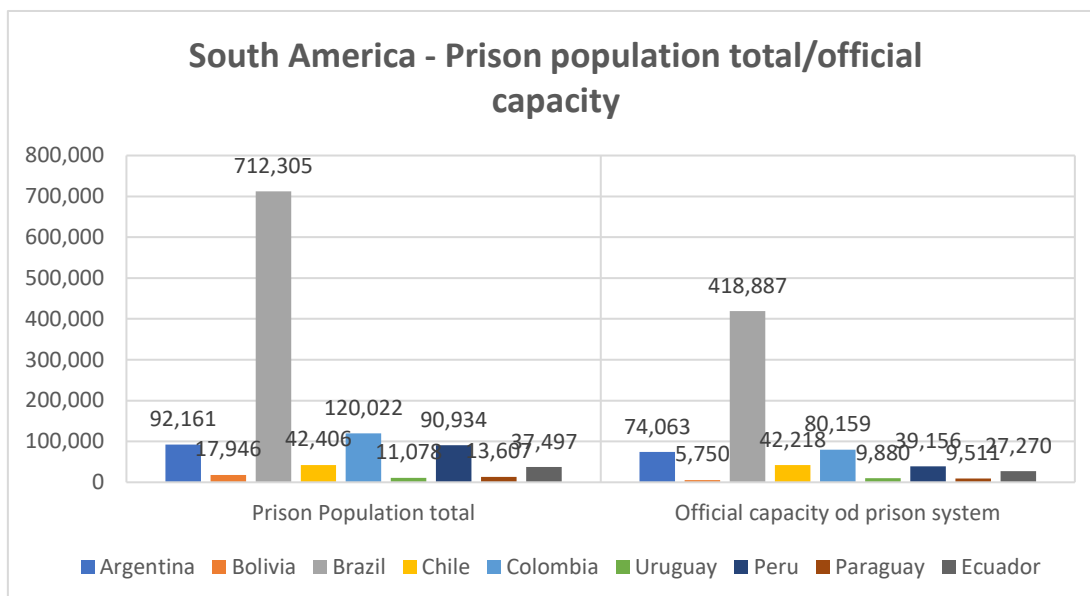
<sup>97</sup> UNDP, *Citizen Security with a Human Face: Evidence and Proposals for Latin America* (n 40) 11.

<sup>98</sup> *ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> UNODC, *Handbook on Strategies to Reduce Overcrowding* (n 33) 13.

official capacity of the respective prison systems<sup>101</sup>.



It is clear Latin American countries are under an ever-increasing rate regarding imprisonment. The majority of the countries in the region show high level of incarceration

<sup>101</sup> World Prison Brief, 'Highest to Lowest - Prison Population Rate', (Data on total Prison population, including pre-trial detainees and remand prisoners, World Prison Brief Argentina 2017, Bolivia 2016, Brazil 2016, Uruguay 2017, Peru 2018, Ecuador 2018, Panama 2018, Nicaragua 2017, Honduras 2017, Costa Rica, El Salvador 2019, Guatemala 2019, Mexico 2018, Paraguay 2017, Chile 2019, Colombia 2019) <[http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=17](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=17)> Accessed 10 May 2019.

rates and overcrowded prisons under humiliating conditions<sup>102</sup>. In that situation, official guards cannot control the prisons which are most of the time ruled by the authority of gangs made by inmates<sup>103</sup>. Prison systems seem to worsen the problem of insecurity in Latin America, instead of trying to solve it<sup>104</sup>.

With this in mind, it is not surprising that the correctional systems of the region are not working. The main problem includes failures on the attempt to promote adequate programmes of rehabilitation and social reintegration<sup>105</sup>. New penitentiary policies are still required to be implemented in the whole region, and enfranchisement of convicts appears in the front line to be one of the alternatives.

There are a lot of work to be done on social rehabilitation and the creation of dignified prison conditions<sup>106</sup>. As mentioned in the Chapter II, felony enfranchisement emerges as one of the options to reduce recidivism rates and minimize the side effects of super overpopulation. Therefore, as a strategic public security tool, enfranchisement of criminals is needed in the whole region.

### **3.1.2. Inter-American System and the Minorities Behind Bars: Afro-descendants and Indigenous**

First, it is important to recognise that prisons are small units that reflect and reproduce the society around them. If there are violent societies with inequalities and discrimination, it is hard to expect something different in their prisons. They will be also an expression of racist and discriminatory policies<sup>107</sup>, which are extremely harmful, especially in the multicultural societies of Latin America<sup>108</sup>.

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<sup>102</sup> Transnational Institute (TNI) and the Washington Office on Latin America (WOLA), *Systems overload: Drug Laws and Prisons in Latin America* (Washington, Transnational Institute 2011 ) 12.

<sup>103</sup> Ibid 13.

<sup>104</sup> Blackwell (n 90).

<sup>105</sup> ibid

<sup>106</sup> UNDP, *Citizen Security with a Human Face: Evidence and Proposals for Latin America* (n 37) 17.

<sup>107</sup> Carranza (n 94) 52.

<sup>108</sup> Alberto Binder and others, *Defesa criminal efetiva na América Latina* ( São Paulo, Conectas 2015) 6.

Moreover, it is noteworthy that no universal definition exists on what composes a minority group. There is no definition that would be well-accepted by every and each type of minority group worldwide<sup>109</sup>. However, it is possible to find a global standard on the concept of minorities provided by Article 27 of the International Covenant on Civil and Political Rights (ICCPR)<sup>110</sup>.

In this respect, the report on the Situation of People of Afro Descendant in the Americas has pointed out different mechanisms that have been applied to identify Afro-descendants as a minority group. The report highlighted the following aspects of ethnicity: “(i) the ‘voluntary’ nature of the question, (ii) the impression of the person who fills out the survey form, (iii) the self-identification of the person surveyed, and (iv) identification by cultural or ethnic group”<sup>111</sup>. In addition, the IACHR try to analyse the self-identification jointly with elements of cultural and ethnic relevance.

As regards the concept of indigenous, the IACHR has endorsed the mainstream international law of Article 1.1 of the International Labour Organization, Convention 169, “which outlines objective elements relating to the historical continuity, territorial connection, and presence wholly or partially of distinctive policies and their own specific social, economic, and cultural institutions”. Furthermore, another key criterion regarding the concept and identification of indigenous groups for the IACHR is the subjective self-identification that determines that someone is part of an indigenous group<sup>112</sup>.

Moreover, it is important to mention, indigenous people in the region are deemed to be minorities. However, the traditional approach to consider indigenous only as a minority

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<sup>109</sup> Francesco Capotorti, ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities’ (1979) UN Doc E/CN.4/Sub.3/84/Rev.1, para 20.

<sup>110</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 27.

<sup>111</sup> IACHR, ‘The Situation of People of African Descent in the Americas’ (IACHR, OEA/Ser.L/V/II. Doc. 62, Washington DC 5 December 2011) 8.

<sup>112</sup> IACHR, ‘Indigenous Peoples, Afro-Descendent communities and Natural Resources: Human Right Protection in the Context of Extraction, Exploitation, and Development Activities’ (n 80) 18.

group has appeared to be insufficient. They are much more complex because their historical and traditional diversity linked to their different individual rights and collective rights make them even more vulnerable. Thus, regional instruments recognise them as indigenous, apart from the general concept of minorities, while incomplete and reductionist<sup>113</sup>.

This indigenous identification is very important, as Article 3(1) of the Convention No. 169 of the International Labour Organisation concerning Indigenous and Tribal Peoples in Independent Countries (1989) states the following: “Indigenous and tribal peoples shall enjoy full human rights and fundamental freedoms without hindrance or discrimination. The provisions of this Convention shall apply without discrimination to male and female members of these peoples”. In opposite direction, without identification there is no protection<sup>114</sup>.

In this connection, the principle of non-discrimination of minorities and indigenous is not entirely developed, according to Minority Groups International. However, the Inter-American Commission has done impressive advancements in its case laws to develop the idea that states should take positive measures in order to fully grant the right of political participation for minorities and indigenous. Measures that have the effect of impairing their participation, without any purpose or relevant reason, should be taken away<sup>115</sup>.

Any restriction to the participation of minorities and indigenous can result in a violation of Article 23 of the American Convention on Human Rights. This article is further analysed in the next topic.

### 3.1.2.1. Minorities in the Latin American Prison System

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<sup>113</sup> IACHR, ‘Situation of the Human Rights of Indigenous Persons and Peoples in the Americas’ (IACHR, OEA/Ser L/V/II.108 Doc 62, 20 October 2000).

<sup>114</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169), (72 ILO Official Bull 59, 28 ILM 1382 1989) article 3.1.

<sup>115</sup> Mauro Barelli and others, *Minority groups and litigation: A review of developments in international and regional jurisprudence* (Minority Group International, 2011) 18.



There are many prisons with high density in the region where there is a well-known presence of minorities and marginalised groups that are on the front lines of the prison system and/or experience more side effects of disenfranchisement than other groups<sup>116</sup>. It is grave concern there are more than 10.2 million detainees around the world, and this number continues to rise. Among them, a large majority identify as part of a minority and marginalised groups<sup>117</sup>.

In that sense, it is worth mentioning that According to the United Nations, in Latin America as a whole, there are 150 million Afro-descendants. Afro-descendants' organisations estimate that 200 million people are living in the region. As regards indigenous people, it is estimated there are at least a considerable amount of 44.8 million inhabitants in the region, however badly distinguished by discrimination and stigmas based on race or ethnic origin<sup>118</sup>.

Indigenous and Afro-descendants have historically suffered strong negative outcomes from racial favouritism and inequality, which directly influence their political participation in the process of decision-making. These groups have often been reported as the victims of murders, sexual exploitation, lack of health care, and forced displacement, among other social disadvantages<sup>119</sup>.

Those groups are mostly characterised by poverty issues<sup>120</sup>. These minorities strongly occupy rates of low-income people in Latin America and several studies has shown

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<sup>116</sup> IACHR, 'The Situation of People of African Descent in the Americas' (n 111) para 19.

<sup>117</sup> Roy Walmsley, 'World Prison Population List' (Twelfth edn, World Prison Brief 2018) <<http://www.prisonstudies.org/news/more-102-million-prisoners-world-new-icps-report-shows>> accessed 02 June 2019.

<sup>118</sup> IACHR, 'Indigenous Peoples, Afro-Descendent communities and Natural Resources: Human Right Protection in the Context of Extraction, Exploitation, and Development Activities' (n 80) 20; UNDP, *Multidimensional progress: well-being beyond income, Regional Human Development Report for Latin America and the Caribbean* (United Nations Development Programme 2016) 21.

<sup>119</sup> The UN Refugee Agency (UNHCR), 'Indigenas Colombia Situation: Colombia, Costa Rica, Ecuador, Panamá y Venezuela' (The UN Refugee Agency n 4) <[https://www.acnur.org/fileadmin/Documentos/RefugiadosAmericas/Colombia/Situacion\\_Colombia\\_-\\_Pueblos\\_indigenas\\_2011.pdf](https://www.acnur.org/fileadmin/Documentos/RefugiadosAmericas/Colombia/Situacion_Colombia_-_Pueblos_indigenas_2011.pdf)> Accessed 12 June 2019.

<sup>120</sup> TNI and WOLA (n 102) 6.

imprisonment rates disproportionately affect those who are from economically and socially disadvantaged backgrounds<sup>121</sup>.

Indigenous people in México, for example, occupy a position of extreme poverty, exclusion, marginalisation and violence. According to Elena Azaola, Professor-Researcher at the Centre for Research and Higher Studies in Social Anthropology, they conform to the preferential recruitment of the Mexican prison system, which is much more focused on poor and needy people. The statistics evidence an overrepresented amount of incarcerated indigenous people in México, which is directly linked to the social and economic vulnerability of this group.<sup>122</sup>

In Peru where there are about 8 million self-identified indigenous, from 20 million non-indigenous, most of the communities in 2000 have been living in extreme poverty. 79% of Peruvian indigenous people are reported to be poor and to suffer from lack of right to participation<sup>123</sup>. In that context, for the drug-related offences, for instance, indigenous people are one of the most significant targets of the Peruvian prison system<sup>124</sup>.

Moreover, in Colombia indigenous have historically been reported to suffer a hard impact of crime and violence. Trafficking activities often take place in indigenous' land. This situation creates a extreme vulnerability of the communities, who find themselves into a war scenario created by the harsh policies against drug by the Colombian government. In that context, indigenous are frequently accused to collaborate to the Colombian armed groups, while the large majority of them are just being brutally threaten by the illegal activities.<sup>125</sup>

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<sup>121</sup> UNODC, Handbook on Strategies to Reduce Overcrowding (n 33) 15.

<sup>122</sup> Instituto Nacional de Estadística y Geografía, 'En Numeros: Documentos de Analisis y Estadísticas' (vol 1, n 11, Intituto Nacional de Estadística 2017) 11.

<sup>123</sup> IACHR, 'Second Report on the Situation of Human Rights in Peru: The Rights of Indigenous Communities' (IACHR, OEA/Ser L/V/II.106 Doc 59 rev. 2 June 2000) ch 10.

<sup>124</sup> Binder (n 108) 242, 397; TNI and WOLA (n 102) 44, 71, 96.

<sup>125</sup> IACHR, 'Third Report on the Human Rights Situation in Colombia: The Rights of Indigenous Communities' (IACHR OEA/Ser L/V/II.102 Doc. 9 rev. 1 26 February 1999) [53].

In Chile, the situation regarding the Mapuche people (87.3% of the indigenous people in the country) is even worse<sup>126</sup>. They are 47.6% of the indigenous arrested population<sup>127</sup>, in a context of a flawed judicial system through which gross discriminations against indigenous people are historically enforced by European descents. They are the largest minority within Chilean society and victims of a legal systematic discrimination, which makes easier the imprisonment of people from indigenous community<sup>128</sup>.

In Brazil the first indigenous woman deputy just got elected in 2018. Her name is Joênia Wapichana, She was elected with 8.267 votes got the 2018 United Nations Human Rights Prize because of her work on indigenous issues. She is a big reference for dealing with indigenous issues in the whole country<sup>129</sup>. Although lack of representation is still an issue in Brazil for indigenous, disenfranchisement policies keep enforcing more obstacles for overcoming this social dilemma and elect other indigenous activists.

Nevertheless, there is still a significant lack of information about indigenous arrests and, therefore, a noteworthy invisibility of indigenous identity inside of the prison systems in Latin America. Many indigenous people are arrested and are not identified as indigenous by the national prisons' offices. In general, there is no interest of the public authorities to enforce acts to identify and protect these minorities behind bars, besides the fact that many indigenous avoid their own identification as minorities because of fear of discriminatory retaliation. NGOs in Latin America point out that there must be more defenceless indigenous arrested in vulnerable situations than currently estimated<sup>130</sup>. Nevertheless,

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<sup>126</sup> Instituto Nacional De Estadística, *Estadísticas Sociales de Los Pueblos Indígenas em Chile senso 2002* (Ministerio de Planificación Nacional 2005) 11.

<sup>127</sup> Gendarmeria, 'Compendio Estadístico Penitenciario' (Gendarmería 2017) 17.

<sup>128</sup> Ministerio del Interior, Ley 18314 (Ley Chile Biblioteca del Congreso Nacional 17 May 1984) <<https://www.leychile.cl/Navegar?idNorma=29731>> Accessed April 25 June 2019; Tobias Fontecilla, 'Chile's biased Counter-terrorist laws: the Luchsinger-Mackay Case' ( Council on Hemispheric Affairs 2017) <<http://www.coha.org/chiles-biased-counter-terrorist-laws-the-luchsinger-mackay-case/>> Accessed 25 June 2019.

<sup>129</sup> Fundação Nacional do Índio, 'Aldeias indígenas se mobilizam para Eleições 2018' ( Fundação Nacional do Índio 2018) <<http://www.funai.gov.br/index.php/comunicacao/noticias/5066-aldeias-indigenas-se-mobilizam-para-eleicoes-2018>> Accessed 28 May 2019; Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Joenia Wapixana, winner, 2018 UN Human Rights Prize' (OHCHR News 2018) <<https://www.ohchr.org/EN/NewsEvents/Pages/JoeniaWapixana.aspx>> 28 May 2019.

<sup>130</sup> Michael Mary Nolan and others, 'Mulheres Indígenas e o Sistema Prisional: Invisibilidade Etnica e Sobrecargas de Gênero' (Rede Justiça Criminal, 2018)

despite the lack of identification, the definition or even the identification cannot be an obstacle for the protection of their rights<sup>131</sup>.

As regards Afro-descendant populations, the percentage varies tremendously across countries of the region, from 0.1%, 0.45%, 1.9%, 5%, 9.1%, 10.62%, 50% up to 80% of the total population. However, everywhere, they have been often reported to suffer exclusion, racism, and racial discrimination. They are without a shadow of a doubt victims of a structural discrimination and the most vulnerable group to crime and violence: they are mostly located in the poorest areas and suffer high scale of discrimination from employers<sup>132</sup>.

Afro-descendants in Latin America are mostly found in Brazil, Colombia, Ecuador, México, and Venezuela. Roughly 10 million Africans were brought from Africa to the colonies in Latin America throughout the slave trade from the 16<sup>th</sup> to the 19<sup>th</sup> centuries<sup>133</sup>.

For example, 63% of Brazil's inmates identify as Afro-descendants out of more than 700.000 prisoners<sup>134</sup>.

Indeed, according to the IACHR, Afro-descendant populations are underrepresented in politics in Latin America. They face impediments to access to political power structures due in part to policies designed to permeate structural discrimination and undermine their participation in society<sup>135</sup>, such as felony disenfranchisement. For that reason, there is no

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<<https://redejusticacriminal.org/pt/portfolio/mulheres-indigenas-e-sistema-penal-invisibilidade-etnica-e-sobrecargas-de-genero/>> Accessed 13 June 2019.

<sup>131</sup> IACHR, 'Indigenous Peoples, Afro-Descendent communities and Natural Resources: Human Right Protection in the Context of Extraction, Exploitation, and Development Activities' (n 80) [27].

<sup>132</sup> IACHR, 'The Situation of People of African Descent in the Americas' (n 111) executive summary, [45], [48].

<sup>133</sup> Lex Justi and Minorities Right Group International, 'Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights: Comments on Zero Draft' ( Human Rights Council 2018) 7.

<sup>134</sup> Departamento Penitenciário Nacional, *Levantamento Nacional de Informações Penitenciárias* (Ministério da Justiça e Segurança 2017) 9, 32.

<sup>135</sup> IACHR, 'The Situation of People of African Descent in the Americas' (n 111) executive summary, 7.

wonder that major obstacles for these minorities to exercise their civil and political contrast with the rest of the society<sup>136</sup>.

In order to eradicate the historical disadvantage of minorities' groups in Latin America, more effort is required to fill evident gaps and prevent side effects of non-declared racist policies, which still have a remarkable effect upon minorities<sup>137</sup>.

In Latin America, it is needed to enforce the collective participation of minorities by means of affirmative actions, promotion of rights and empowerment and enforcement of active participation in decision-making by every racial and ethnical community<sup>138</sup>.

### **3.1.3. Inter-American System and the Right to Vote for Convicts**

In this section, the right to vote itself is analysed to understand the application of felony disenfranchisement in the region, keeping in mind the context of prisons and minorities already discussed.

#### **3.1.3.1. Right to Vote and General Legal Assumptions**

The right to vote is analysed here as a variation of the right to participate. According to the Inter-American Court of Human Rights, in the case of *Yátama v. Nicaragua*, there are various forms of political participation. Democratic elections throughout the right to vote is one of them<sup>139</sup>.

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<sup>136</sup> *ibid* executive summary.

<sup>137</sup> UNDP, *Multidimensional progress: well-being beyond income, Regional Human Development Report for Latin America and the Caribbean* (n 118) 70, 165

<sup>138</sup> *ibid* 183.

<sup>139</sup> I/A Court H R, *Case of Yátama v Nicaragua* (I/A Court H R Series C No 187, Judgment 23 June 2005) [196].

The Human Rights Committee, once quoted by the Inter-American Court in the above-mentioned case<sup>140</sup>, has held that the right to vote is a right of individuals to take part in those processes that constitute the conduct of public affairs and entail a right to have one's vote counted. Although the right to vote can be deemed to be collective, each and every person has certain political rights. The right to vote is a political right made viable by ensuring freedom of expression, assembly, and association<sup>141</sup> it is also a driving force for exchanges and development of opinions, which are fundamental for human dignity<sup>142</sup>.

In this sense, Article 6 of the Democratic Charter of the Organisation of States that the right to vote is a necessary condition for the full and effective exercise of democracy<sup>143</sup>.

Moreover, it is possible to find the right to vote recognised in Article 25 of the ICCPR, Article 21 of the Universal Declaration, Article 2(b) of the OAS Charter, Article 23 of the American Convention on Human Rights, Article 20 of the American Declaration of the Rights and Duties of Man, Article 13 of the African Charter on Human and Peoples' Rights, Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 29 of the United Nations Convention on the Rights of Persons with Disabilities, and Article 3 of the First Protocol to the European Convention on Human Rights and Fundamental, among others. Easily recognised as fundamental for humans as the expression of their full personhood, in all of those documents, the right to vote should be granted either directly or by freely chosen representatives. In addition, this right is not supposed to suffer unreasonable differentiation among the bearers' rights. Furthermore, it is not an absolute right, which means each country can restrain this right, as long as it is not deemed as disproportionate restriction under the basic principles of democratic values<sup>144</sup>.

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<sup>140</sup> Yatama (n 139) [173].

<sup>141</sup> UN Human Rights Committee, 'General Comment 25 Article 25: The right to participate in public affairs, voting rights and the right of equal access to public service' (1996) CCPR/C/21/Rev.1/Add.7 (General Comments 25) [6]-[8].

<sup>142</sup> UN Human Rights Committee, 'General Comment 34 Article 19: Freedoms of Opinion and Expression' (2011) CCPR/C/GC/34GE.11-45331 (General Comments 34) [2]-[8].

<sup>143</sup> OAS Charter, art 6.

<sup>144</sup> Convention on the Elimination of All Forms of Discrimination against Women (Adopted 17 December 1979, entered into force on 3 September 198) UNGA resolution 34/180 (CEDAW) art 71; United Nations

Meanwhile, other two well-known requirements of the right to vote are the universal and equal suffrage. While “universal suffrage” is a terminology that takes into consideration those who should have the right to vote in the elections, “equal suffrage” is related to the maxim “one right one person”. As it is not an absolute right, the universality of the right to vote it is not really universal, but still it has to be defined as inclusive as possible, under the principle of equality among the electorate; however, some requirement, as minimum age, and mental health, can be established<sup>145</sup>.

It is also worth noting right to vote is a strong element of the recognition of citizenship. As such, the right to vote is an emblem of dignity. As long as voting rights are supposed to be universal, they cannot be limited on basis of one’s virtue, irrespective of unworthiness<sup>146</sup>.

In that sense, states are supposed to adopt legal rules to grant the right to vote and so apply every available measure to make the enjoyment of this right concrete. States need to take into consideration the impact of the right on the ground and its concrete enjoyment<sup>147</sup>. This means states also need to take effective measures regarding specific difficulties such as illiteracy, language, and poverty to protect this right<sup>148</sup>.

### **3.1.3.1.1. Prisoners’ right to Vote under the Inter-American System**

There is a significant difference between Article 25 (ICCPR) and Article 23 (American Convention): the severe limitation clause on subsection 2. This paragraph states that the States in the Americas may create limitations “on the basis of age, nationality, residence,

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Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) 61/295 art 5 art 18; United Nations Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force on 3 May 2008) UNGA A/RES/61/106 art 29; First Protocol to the European Convention on Human Rights and Fundamental Freedoms (adopted 20 March 1952) art 3.

<sup>145</sup> European Commission, *Compendium of International Standards for Elections* ( 3 edn, European Commission 2018) 29.

<sup>146</sup> Easton (n 7) ch 4, text above n 36.

<sup>147</sup> General Comments 25 [1].

<sup>148</sup> *ibid* [12].

language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings”<sup>149</sup>.

This clause allows states to legally deny the right to vote, even in an arbitrary way, without proportionality sense. When the American Convention simply allows restrictions on the basis of “sentencing by a competent court in criminal proceedings”, the Convention grants permission to the blanket ban of convicts’ voting rights and, therefore, mass violations of human rights.

The IACHR so far recognises the right to vote only for provisional prisoners, according to the Report about the Use of Pretrial Detention. The IACHR finds that states must provide for required conditions to grant the right to vote for prisoners, but only for those who are in pretrial detention. The quasi-judicial organ says Articles 23 and 8.2 (presumption of innocence) expressly grants the right to vote for those who are arrested in State custody as a precautionary measure, not as a convict<sup>150</sup>.

Furthermore, the IACHR even held that persons who had been convicted, as whole, are not protected under subsection 1 of Article 23 of the American Convention. The restrictions of subsection 2 evidently provide reasons for restrictions over convicts<sup>151</sup>.

In other words, the restrictions under the Inter-American System are reasonable if it is found under the lack of innocence of any person regarding any crime. It means retractions over the right to vote are regarded as another type of punishment, which can legally be general, automatic, and universal.

### 3.1.3.2. Right to Vote for Prisoners in Latin American Members States of the American Convention on Human Rights: A Regional Overview.

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<sup>149</sup> American Convention, art 23

<sup>150</sup> IACHR, Rapporteurship on the Rights of Persons Deprived of Liberty (OAS Official records, OEA/Ser.L. . Doc.46/13) 273.

<sup>151</sup> *ibid* 274.



Because felony disenfranchisement and the blanket ban are in fact allowed under the Inter-American System, it was necessary to carry out personal research among the countries, in order to find the current practice of disenfranchisement in Latin America. Due to the lack of deeper protections by the Inter-America System, disenfranchisement of convicts seems to be a common situation in Latin America. Governments automatically and arbitrarily cast aside the right to vote for convicts after a criminal sentence.

In that context, the goal of this study was to discover how felony disenfranchisement is practiced and enforced in the region. Understanding the legal framework of each country was a fundamental step to criticise the standing of the Inter-American System for Protection of Human Rights.

Finally, the study sought to answer whether Latin American state parties of the American Convention on Human Rights apply to the blanket ban on convicts.

#### ***3.1.3.2.1. Definition of the term***

A blanket ban for convicts in this research might happen when the states create legal possibility to deny convicts their vote without a proper justification correlating the facts of each case. Whenever this happened, this was considered an automatic and arbitrary disenfranchisement of group of prisoners, regardless their crimes, the circumstances of the crimes, and the severity of the crimes committed.

#### ***3.1.3.2.2. Research methodology***

This personal research was carried out in June 2019 as a study over domestic laws, such as electoral codes and the national constitutions of 17 Latin American countries that are member states of the American Convention Human Rights. The research aimed to analyse the extent of disenfranchised persons under the jurisdiction of each country.

Based on the legal framework of each country, it was possible to set out the general practice of a blanket ban in the region. The majority of the countries have in their constitutions or electoral code specific norms regarding the suspension of political rights, including the rights of participation and the right to vote. For cases where the constitution did not provide the terms of the restriction but gave the role for parliament throughout laws, it was necessary to go deeper in the national legal framework in order to obtain the level of restrictions over the right to vote in the country.

Furthermore, the justifications sustained in each country were analysed. The basis of denying the right to vote gives the required understanding to determine the existence of a supposed proportionality sense. In that sense, the countries have been separated in four categories according to their justifications and length of restrictions.

Some states disenfranchise some categories, but not all. Others disenfranchise all convicts, without differentiation. There are those who targeted convicts only for an imprisonment sentence. And there is also the case of disenfranchising everyone in prison, convicts, and provisional detainees.

To read, search, and compare the constitutions, the well-known website of the world's constitutions managed by the Constitute Project was used<sup>152</sup>. This mean is called the world's constitution to read, search and compare. It is a data base with over two hundred constitutions, translated in English, "developed by the authors of the Comparative Constitutions Project at the University of Texas at Austin", Google Ideas, and with important investments from the National Science Foundation, Cline Centre for Advanced Social Research, University of Texas, the University of Chicago, and the Constitution Unit at University College London<sup>153</sup>.

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<sup>152</sup> Constitute Project, 'Constitute: The World's Constitutions to Read, Search and Compare' <<https://www.constituteproject.org/>> 20 April 2019.

<sup>153</sup> Constitute Project, 'Why Constitute?' <<https://www.constituteproject.org/content/about?lang=en>> 20 April 2019.

### 3.1.3.2.3. *Results*

In this regard, over 83% of the Latin American countries parties of the American Convention of Human Rights apply a formal blanket ban on convicts' voting rights. The remaining countries (17%) allow a sort of convicts to vote by using a doubtful sense of proportionality, which might also be considered a blanket ban. Most of these states who allow some convicts to take part in the elections do not provide a clear sense of limitations.

It can be said, the rationale used by the countries who allow some sort of convicts to vote was still weak in providing certainty. There are three countries in this list: Bolivia, Costa Rica and Chile. Bolivia supports disenfranchisement of those who committed a crime of treason against the country; Chile, of those crimes deserve afflictive punishment; and Costa Rica allowed any sentence imposing the penalty of suspension of the exercise of political rights to deny the right to vote<sup>154</sup>.

On the other hand, out of 17 countries analysed, 14 countries do enforce laws which either support a total blanket ban of any kind of convicts or support blanket ban of convicts who had a sentence with imprisonment penalty. Brazil, Argentina, Republic Dominican, Guatemala, and Colombia are the five countries which suspend the right to vote by a sentence of conviction. For these countries, a criminal conviction is enough to justify the loss of the right to vote<sup>155</sup>.

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<sup>154</sup> Bolivia, Constitución Política del Estado de Plurinacional de Bolivia (2009) art. 28 <http://www.sepdavi.gob.bo/cs/doc/159Bolivia%20Constitucion.pdf>> 21 April 2019; Costa Rica, Constitución Política de la Republica de Costa Rica (1949) art. 91 (Constitución de Costa Rica) <<https://www.wipo.int/edocs/lexdocs/laws/es/cr/cr039es.pdf>> 20 April 2019; Chile, Constitución Política de La Republica de Chile (2005) art.16 <[https://www.camara.cl/camara/media/docs/constitucion\\_politica.pdf](https://www.camara.cl/camara/media/docs/constitucion_politica.pdf)>.

<sup>155</sup> Brasil, Constituição da Republica Federativa do Brasil (1988) art.15 (Constituição do Brasil) <[http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm)> 20 April 2019; Argentina, ley 25.858 ( Decretal 1291/06) art 4 (Constitución de la Argentina) <[https://www.argentina.gob.ar/sites/default/files/ley\\_25.858\\_electores\\_privados\\_de\\_la\\_libertad.pdf](https://www.argentina.gob.ar/sites/default/files/ley_25.858_electores_privados_de_la_libertad.pdf)> 20 April 2019; Republica Dominicana, Constitución de la Republica Dominicana, (2015) art 24 (Constitución de la Republica Dominicana) <<https://www.one.gob.do/Multimedia/Download?ObjId=75805>> 20 April 2019, Guatemala, La Ley Electoral y de Partidos Políticos (1986) art 4 (Ley Electoral de Guatemala) <

Peru, Ecuador, Panama, Nicaragua, Honduras, El Salvador, Uruguay, and Paraguay are the other group of countries that enforce a blanket ban of convicts with a sentence of imprisonment. For them, a final judgement sentencing a person to incarceration is enough to justify the loss of political rights. In these countries, the prison decreed is an automatic rationale, which allow for the denial of the right to vote until the sentence is over<sup>156</sup>.

A fourth category was occupied by México, which was the only country to disenfranchise both provisional prisoners and convicts. Mexican prisoners cannot vote even if they are not found guilty for some criminal offence. This means anyone can lose the right to vote as all that is required is a criminal accusation, even if false<sup>157</sup>.

In other words, it is clear the large majority of the scope of the study applies a blanket ban, either by definition of national legal rule, as the electoral code, or by their own constitution. The countries are mostly supporting a direct and literal blanket ban or blanket ban for imprisonment sentences. Even when it seems to not be a total ban, there is a flawed proportionality sense, such as when they defend the idea that every crime of treason is a reason for disenfranchisement in Bolivia, or when an “afflictive crime” should

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<https://www.tse.org.gt/images/LEPP.pdf>> 21 April 2019; Colombia, La ley 65 Por la cual se expide el Código Penitenciario y Carcelario (1993) <[http://www.secretariasenado.gov.co/senado/basedoc/ley\\_0065\\_1993.html](http://www.secretariasenado.gov.co/senado/basedoc/ley_0065_1993.html)> 22 April 2019.  
<sup>156</sup> Perú, Constitución Política del Perú (1993) art 33 <<http://www.congreso.gob.pe/Docs/files/documentos/constitucionparte1993-12-09-2017.pdf>> 20 April 2019; Ecuador, Constitución de la República del Ecuador (2008) art 64 <<http://www.ecuanex.apc.org/constitucion/indice.html>> 21 April 2019; Panamá, Ley 55/03 (2012) Art 13(7) (Constitución del Panamá) < <https://docs.panama.justia.com/federales/leyes/55-de-2002-dec-6-2002.pdf>> 22 April 2019; Nicaragua, Constitución Política de la Republica de Nicaragua (1987) art 47 < <https://www.wipo.int/edocs/lexdocs/laws/es/ni/ni033es.pdf>> 23 April 2019; Honduras, Constitución de la Republica de Honduras (1982) Art 41 (Constitución de Honduras) < [https://www.oas.org/dil/esp/Constitucion\\_de\\_Honduras.pdf](https://www.oas.org/dil/esp/Constitucion_de_Honduras.pdf)> 23 April 2019; El Salvador, Constitución de la Republica de EL Salvador (1983) art 74 < [http://www.oas.org/dil/esp/constitucion\\_de\\_la\\_republica\\_del\\_salvador\\_1983.pdf](http://www.oas.org/dil/esp/constitucion_de_la_republica_del_salvador_1983.pdf)> 23 April 2019; Uruguay, Constitución de la Republica Oriental del Uruguay (1967) art. 80 (Constitución del Uruguay) < <https://parlamento.gub.uy/documentosyleyes/constitucion>> 23 April 2019; Paraguay, Constitución Nacional del Paraguay (1992) art 153 (Constitución del Paraguay) < [https://www.oas.org/juridico/spanish/par\\_res3.htm](https://www.oas.org/juridico/spanish/par_res3.htm)> 24 April 2019.

<sup>157</sup> México, Constitución de los Estados Unidos Mexicanos (1917) art 38 (Constitución del México) < <http://www.ordenjuridico.gob.mx/Constitucion/cn16.pdf>> 24 April 2019.

block voting rights in Chile, or even when disenfranchisement is given to the will of the judicial judge.

A closer look at these rules affords the conclusion that these countries support an open, subjective, and abstract legal conditions of disenfranchisement. Even though there is no formal blanket ban, there is a lack of reasonableness sense and solid parameters to find the limits of restrictions. Just stating that some crimes are afflictive without providing the list of crimes, the length of the penalty and the direct correlation between the disenfranchisement and the specific context, is a blanket ban itself for some category of convicts.

As is clarified in the next chapter, if the legal rule affords restrictions on every convict or on certain categories of crime, both can be taken as a blanket ban. Total prohibitions, either in certain categories of convicts or over all of them, are still too excessive.

#### **3.1.3.2.4. Conclusion**

As a conclusion the region under the protection of the American Convention on Human Rights applies a blanket ban; when it does not formally happen, there is no hint of a consolidate sense of legal proportionality or balance in the application of felony disenfranchisement. Although the clear blanket ban happens when the law itself does not allow the right to vote for every convict or arrested convicts, the lack of clear and defined limitations can also implicate a blanket ban.

Absence of defined guidelines to disenfranchise any type of convicts clearly turns out as a permission to arbitrary disenfranchisement. If there is the possibility to disenfranchise by using no clear relation to the details of the criminal case, it is therefore a blanket ban<sup>158</sup>.

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<sup>158</sup>See footnote 190.

Finally, Latin American countries seem to be far from progressing on the protection of prisoners' rights: The region largely apply blanket ban. All countries in the region have legal facilitations for the existence of total criminal disenfranchisement. This situation, combined with the existence of only negative effects regarding felony disenfranchisement, has not showed up as a relevant fact for the Inter-American System for Protection of Human Rights.

The last recommendation of the Inter-American System embraces the right to vote for provisional prisoners only. As a result, the large majority of provisional prisoners in Latin America have been entitle to vote in the recent years. However, convicts remain forgotten.

#### **3.1.4. Role of The Inter-American System: Effectiveness and Need for Changing in the Dock**

First and foremost, it is worth noting that the vote is mostly mandatory in the region of Latin American countries <sup>159</sup>. Among all Latin American states party to the American Convention on Human Rights, only Dominican Republic and Colombia, between all Latin American states party of the American Convention on Human Rights, lack a mandatory right to vote as an obligation. Apart from a right, it is also a duty, meaning that a large majority of the inmate population in the region are deemed to be potential voters. In other words, the enfranchisement of convicts can, without a shadow of a doubt, cause a significant impact at the polls.

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<sup>159</sup> Constituição do Brasil art 14; Bolivia, Ley N° 1246 (1991) art 3 <<https://www.lexivox.org/norms/BO-L-857.html>> 01 July 2019; Chile, Ley N°14.853 (1962) art 22 <[https://www.bcn.cl/historiapolitica/elecciones/detalle\\_eleccion?handle=10221.1/63071&periodo=1925-1973](https://www.bcn.cl/historiapolitica/elecciones/detalle_eleccion?handle=10221.1/63071&periodo=1925-1973)> 01 July 2019; Constitución de Costa Rica art 93; Constitución de la Argentina, Art. 1, 22, 37; Ley Electoral de Guatemala art 3; Constitución de Honduras, art. 111; El Salvador: Código Electoral (1992) art 3 <<http://www7.mh.gob.sv/downloads/pdf/PMHDC9522.pdf>> 01 July 2019. Constitución del Perú art 31; Ecuador, Código de la Democracia (2009) art 11 <<https://docs.ecuador.justia.com/nacionales/leyes/ley-electoral.pdf>> 01 July 2019; Constitución del Panamá, art 129; Constitución del Uruguay, art 77; Constitución del Paraguay, art 118; Constitución del México, art. 36; Constitución de la Republica Dominicana, art 208; Constitución Política de Colombia (1991) art 40 <<http://www.corteconstitucional.gov.co/inicio/Constitucion%20politica%20de%20Colombia.pdf>> 01 July 2019.

In that sense, Article 2 of the American Convention sets up that members states have a general obligation to adopt domestic legislation agreeable with its provisions <sup>160</sup>. Furthermore, any domestic norm shall safeguard rights and guarantees of person deprived of liberty, such as those expressed in the international law, as held in the case *Almonacid Arellano v. Chile* by the Inter-American Court of Human Rights,<sup>161</sup> and also stated in principle IV of the Basic Principles of Best Practices for Protection of persons deprived of liberty in Americas<sup>162</sup>.

Moreover, it is worth mentioning that a large majority of signatory countries of the American Convention on Human Rights are Latin American countries. Mostly only Latin American countries recognise the competence of the Inter-American Court of Human Rights. Indeed, not even all of the countries party of the OAS have ratified or adopted the American Convention on Human Rights. These states are the United States, Canada, and most of the Anglophone Caribbean, which remain only under the reach of the American Declaration<sup>163</sup>.

It is believed the situation in these countries could be hardly influenced by the binding instruments of the Inter-American System for the Protection of Human Rights and its quasi-judicial and judicial organs. The IACHR and the I/A Court H. R. may, indeed, change the reality by jointly changing their interpretation, or by supporting necessary amendments in the American Convention<sup>164</sup>.

The IACHR itself has already recognised the need for further advancements on the matter, as shown in the following statement: “...inmates’ right to vote in general is a complex issue and calls for a much broader examination taking into account the latest

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<sup>160</sup> American Convention, art 2.

<sup>161</sup> I/A Court H R, case of *Almonacid Arellano vs Chile* (Preliminary Objections, Merits, Reparations and Costs, Series C No 154, Judgment 26 September 2006,) (Expert Opinion of Mr. Cristián Maturana-Miquel); Veronica Gomez, ‘The Inter-American Commission and Court of Human Rights’ (G Oberleitner (ed), *The Inter-American Commission and Court of Human Rights* 2018) 13.

<sup>162</sup> IACHR, ‘Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas’ (n 85) Principle IV.

<sup>163</sup> Hennebel (n 81) 821.

<sup>164</sup> American Convention, art 2.

developments in international law and the legislative progress achieved by some States on this matter”. That is to say, despite the important advancements made to protect human rights in the last few decades, violations are persistent and new challenges have grown<sup>165</sup>.

A new interpretation, or amendment, is urgently requested at the regional level and could settle the perfect field to improving the status of the right to vote for convicts in Latin American. However, the Article 23.2 of the American Convention is a colossal obstacle to further protect every convict denied their right to vote.

For that reason, the international practice on delimitating reasonable restrictions over felony disenfranchisement and discriminatory policies on minorities is the subject of the next chapter. The aim was to investigate the compatibility of felony disenfranchisement and human rights international law and the legal potential enfranchisement of all convicts. If combined with evidences of illegality from international general practice, the need for changing becomes even more clear and persuasive.

#### **4. SUITABLE OR NOT?: THE INCOMPATIBILITY OF CRIMINAL DISENFRANCHISEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW**

Because the objective was to highlight general international practice, this analysis of the international law was focused on not only the Inter-American System but also other systems. In addition, both the IACHR and the I/A Court H. R. have consistently relied on provisions from the United Nations System and other regional systems for the protection of human rights as guidelines for the interpretation of the American Convention on Human Rights. Thus, this third chapter analyses the whole international human rights

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<sup>165</sup> IACHR, Rapporteurship on the Rights of Persons Deprived of Liberty (n 150) 274; Antonio Augusto Cançado Trindade, ‘Desafios e Conquisatas dos Direitos Internacionais dos Direitos Humanos no sec 21’ (2016) OAS 407, 470.



law, even though more emphasis is placed on the Inter-American System, subject of this research.

In general, the right to vote for people deprived of their liberty by a criminal sentence may vary from country to country. In some countries, convicts are automatically disenfranchised; in others, the restriction depends on the imprisonment sentence. In addition, in some countries, convicts are disenfranchised even after they have served their time of parole or before being convicted<sup>166</sup>.

In that chaotic context, taking into account that the right to vote is not an absolute right and affords limitations and restrictions <sup>167</sup>, it appears the question on what is the legal limit of felony disenfranchisement. In advance, for this research, it was believed that every type of restriction over the right to vote for convicts is deemed to be incompatible with international human rights law, no matter how it is applied, for represents unreasonable restriction and discriminatory policy.

However, before reaching the conclusion, it was necessary to analyse the limits of restrictions under the international law. The aim was to clarify the incompatibility of felony disenfranchisement with a current practice of international law related to the concept of “unreasonable restriction” and “discriminatory policies”. Because the denial of prisoners’ right to vote is far from being a legal pacified debate, it is noteworthy the importance of revealing its legal compatibility in order to advocate changes in the Inter-American System.

#### 4.1. UNREASONABLE RESTRICTION: A CASE OF PROPORTIONALITY

Traditionally, right to vote is denied to prisoners as loss of their citizenship. However, as it will be discussed, it is far beyond being a consistent reasonable restriction. Nowadays,

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<sup>166</sup> Penal Reforming International, ‘The right of prisoners to vote: A Global Overview’ (Penal Reform International 2016 ) 2-5.

<sup>167</sup> See footnote 144.

it is possible to say, the international human rights law does not allow limitations towards convicts' voting rights anymore, taking into account the pursued rationale of reasonability<sup>168</sup>.

Furthermore, it is worth noting, legally binding covenants on the right to vote will not be addressed in this chapter, as it has already been addressed in the previous chapter.

#### **4.1.1. Non-binding provisions**

Even though there is no specific provision regarding the right to vote for convicts, the United Nations General Assembly, by the Basic Principles for the Treatment of Prisoners, has adopted the following statement:

“except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants”<sup>169</sup>

Assuming that the General Assembly takes a step ahead on the sense that restrictions over prisoners cannot be illimited, as mentioned previously, restrictions must be necessary and should be considered only in the case of absolute need.

In accordance with Rule 60 of the Standard Minimum Rules, the following is applicable to convicted prisoners: “The regime of the institution should seek to minimise any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings”<sup>170</sup>. Only necessary restrictions for upholding the aims from Article 19 to Article 22 of the ICCPR should be

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<sup>168</sup> Ghai, (n 10) 10.

<sup>169</sup> UNGA Res 45/111 (28 March 1991) UN Doc A/RES/45/111 [5].

<sup>170</sup> Economic and Social Council (ECOSOC), ‘Standard Minimum Rules for the Treatment of Prisoners’ Res 663 C (XXIV) (31 July 1957) and Res 2076 (LXII) (13 May 1977) Rule 60 [1].

applied over convicts' relative rights of participation. In principle, Article 25 does not afford limitations on convicts' right to vote.<sup>171</sup>

In that sense, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has held that while some restrictions are completely understandable and necessary for the reasons of prison security, such as those regarding the right of privacy, prison authorities must consider whether certain restrictions are really necessary. Due to their powerless condition, detainees must have their relative rights protected as effectively as possible. This is the reason why the special rapporteur considers the permanence of the right to vote and other forms of participation over detainees' entitlement<sup>172</sup>.

In a related move, the European Prison Rules stipulates restrictions on prisoners shall be the minimum necessary and proportionate to the aim of the prison. The life in prison must be as similar as possible to aspects of community's life. That is also to say the loss of the right of liberty that prisoners suffer does not mean automatically restriction over other liberties, such as political rights. Restriction should be bare minimum <sup>173</sup>, not an additional and degrading suffering as felony disenfranchisement.

For the same purpose, the Principles and Best Practices on the Protection of Persons Deprived of Liberty and The Report on the Use of Pretrial Detention in the Americas mentions that restrictions should follow the reasons inherent to the condition of being a person deprived of liberty. However, it cannot be limitless and should not exceed the fact of being locked up. For that purpose, considering the principle of legality, necessity and proportionality are paramount <sup>174</sup>.

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<sup>171</sup> UN Human Rights Council 'Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2009) UM Doc A/64/215 [54].

<sup>172</sup> *ibid* [51]-[54].

<sup>173</sup> Council of Europe, *European Prison Rules* (Council of Europe June 2006) pt I rule 3, 5 pt II rule 2.

<sup>174</sup> IACHR, 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas' (n 85) Principle II; IACHR, 'Rapporteurship on the Rights of Persons Deprived of Liberty' (n 150) [17a], [230]; IACHR, 'Report on the Human Rights of Persons Deprived of Liberty in the Americas' (n 91) [241].

#### 4.1.1.1. The Human Rights Committee: Case Law and General Comments on Unreasonable Restrictions

On this basis, two Russian prisoners brought a complaint before the United Nations Human Rights Committee in 2001, by which the Russian State has been guilty for enforcing blanket ban on prisoners' voting rights. Russia, however, alleged reasonable restrictions before the HRC<sup>175</sup>.

As it was expressed in the case *Shin v. Republic of Korea* (United Nations System), at the time when a State party has invoked a legitimate ground for restriction, it should clarify and demonstrate in a specific and individualised fashion the precise nature of the threat and the necessity and proportionality of the restriction<sup>176</sup>.

The General Comment number 25, about the right to participate in public affairs, voting rights and the right of equal access to public service, is clear on the need to provide objective and reasonable justifications, because any restriction towards the right to vote must take into account objective and reasonable criteria. It is not enough being to just be objective or just be reasonable. It is required to be reasonable and objective jointly<sup>177</sup>.

In that sense, the General Comment number 34 of the Human Rights Council went deeper on the investigation of the concept of reasonable restriction, analysing three different requirements of international human rights law, according to consideration of Article 12.3 (ICCPR): (1) The first ground of a legitimate restriction is the existence of respect for the rights or reputation of the other; (2) The second, the protection of national security or public order and on the basis maintenance of the moral order; and (3) The third, the relevance or need and proportionality<sup>178</sup>.

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<sup>175</sup>Yevdokimov & Rezanov v Russian Federation (2005) CCPR/C/101/D/1410/ Human Rights Committee [7.5].

<sup>176</sup> *Shin v. Republic of Korea* (2000) CCPR/C/926/D/2000 Human Rights Committee [7.2].

<sup>177</sup> General Comment No. 25 [14]-[15].

<sup>178</sup> UN Human Rights Committee 'General Comment 34: Article 19, Freedoms of opinion and expression' (2011) CCPR/C/GC/34GE.11-45331 [39]-[47]; *Ballantyne, Davidson, McIntyre v. Canada* (1993)

- (1) The first ground means that it would be legitimate to restrict some rights in order to protect another one. In that sense, “rights” includes human rights as recognised in the Covenant and more generally in international human rights law. However, it is not found a third right that justifies the restriction of right to vote in felony disenfranchisement, because it is a punishment itself, which is not even able to fulfil the ends of a legitimate punishment (deterrence, incapacitation, rehabilitation), as it has been said previously.
- (2) The second criteria would be the protection of security and public order. However, it has been shown the denial of prisoners’ rights is flawed, as long as prisoners do not feel a real loss regarding losing the right to vote and disenfranchisement policies end up contributing to the increase in recidivism rates.
- (3) Finally, restriction should take into consideration the principle of proportionality. As the Committee observed in General Comment No. 27, they must be “appropriate to achieve their protective function” and must be the least intrusive possible instrument and must be proportionate to the interest protected<sup>179</sup>.

By those non-binding documents, considering sociological, political, psychological, and criminological aspects already approached, it is clear felony disenfranchisement is far from being proportional, the least intrusive measure and, at the very end, effective. However, it is also necessary to investigate the judicial practice of regional courts, as the source of binding decisions over the concept of unreasonable restrictions to understand more of the new trend of disenfranchisement policies and their incompatibility with international human rights law, besides revealing a contradictory outdated standing of the Inter-American Court of Human Rights.

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CCPR/C/47/D/359/1989 and 385/1989/Rev Human Rights Committee [11.4]

<sup>179</sup> Marques v. Angola (2003) 1157/2003 Human Rights Committee [6.8]

## 4.1.2. Regional Case Law

### 4.1.2.1. European Court of Human Rights

The first international tribunal that judged a case about the unreasonable arbitrary rules covering the right of prisoners to vote in a contentious proceeding was the European Court of Human Rights (ECtHR)<sup>180</sup>. This is a good example of judicial legislation by the court<sup>181</sup>.

The leading case dealt with a conviction of manslaughter. In 1980, John Hirst was convicted to 15 years for killing his landlady and hence lost his right to vote. The landlady was killed when she was asking for the payment of the rent. By using an axe, Hirst killed her. He was charged, convicted, and sentenced to an initial 15 years. He then got more 10 years for the reasons of offences during time in prison. In 2004, Hirst was released<sup>182</sup>.

After his release, Hirst argued his right to vote before the national High Court under the Article 3 of Protocol 1 to the European Convention on Human Rights, which does not contain the right to vote but the right to free elections. Considering the denial of the national Court, Hirst acted before the ECtHR, through which the United Kingdom was given a guilty sentence on the basis of maintenance of disproportionate restriction for criminal justice. As long as there was no justification for the disenfranchisement, there is no hint that the national court has tried to achieve this legitimate goal.<sup>183</sup>

In the case *Hirst v. the United Kingdom*, 2005, a blanket ban was successfully challenged. The ECtHR held that “[p]risoners in general continue to enjoy all fundamental rights and freedoms guaranteed under the Convention save for the right to liberty”. In that sense “any restrictions on these rights must be justified”. It means the ECtHR introduced a

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<sup>180</sup> Adem Kassie Abebe, ‘In Pursuit of Universal Suffrage: The Right of Prisoners in Africa to Vote’ (2013) 46 *Comparative and International Law Journal of Southern Africa* 410, 418.

<sup>181</sup> Dominic Raab, *Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy* (Civitas: Institute for the Study of Civil Society London 2011) Summary.

<sup>182</sup> *ibid* 1.

<sup>183</sup> Raab (n 181) 2-5.

proportionality sense by supporting that “the severe measure of disenfranchisement must not [...] be resorted to lightly”, in that sense “a discernible and sufficient link between the sanction and the conduct and the circumstances of the individual concerned”, is required. However, the United Kingdom has ignored this ruling.<sup>184</sup>

In a similar way, was judged the last case by the European Court of Human Rights on the direction to recognise prisoners’ right to vote in 2016. The case *Kulinski and Sabev v. Bulgaria* showed a general, automatic, and indiscriminate constitutional restriction ban. The Court made the lack of proportionality remarkable in the case.<sup>185</sup>

The next judgement to consider is the case *Ramishvili v Georgia*. This case is still on trial and is about a conviction on conspiracy. As a convicted prisoner, *Ramishvili* has been denied to participate in any elections based on the domestic Electoral Code and in national Constitution<sup>186</sup>. That’s a great opportunity for the ECtHR to take a step ahead and further the protection of prisoners’ right to vote, as long as the case is not exactly about a blanket ban, but conversely, it is about a ban on some sort of crimes, as similarly has already happened to the case of *Frodl v. Austria*, where unreasonable was found in a case without total disenfranchisement of all convicts<sup>187</sup>.

So far, the ECtHR (Fifth Section Committee) unanimously held “the ban on the prisoners’ voting rights contained in Article 28 § 2 of the Constitution of Georgia was of a general, automatic, and indiscriminate character, affecting all persons convicted of a crime”<sup>188</sup>. This ruling means, not only blanket ban is reason for unreasonable restriction but also supposed justifiable for sort of bans. In other words, one can say the interpretation and application of what is seen as reasonable and/or proportional may further the protection of prisoners’ right to vote; it is required just a whole analysis on the circumstances that evolve the general convicts’ life

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<sup>184</sup> *Hirst v the United Kingdom* App 74025/01 (ECtHR, 6 October 2005) [681].

<sup>185</sup> *Kulinski and Sabev v Bulgaria* App 63849/09 (ECtHR, 21 July 2016) [257].

<sup>186</sup> *Ramishvili v Georgia* App 48099/08 (ECtHR, 31 May 2018) [5].

<sup>187</sup> *Frodl v. Austria* App 20201/04 (ECtHR, 8 April 2010) [35].

<sup>188</sup> *Ibid* [25].

On the other hand, the ECtHR found in the case of *Scoppola v. Italy* that Italy hadn't been violating voting rights under of Article 3 of Protocol No. 1. at the time when it applied a ban on voting rights. No excessive rigidity restrictions were found. The Italian system has put limitations only over certain sort of crimes by specific amount of time and according to the features of the case. However, in this case, there was even the possibility some convicts taking the right to vote back while still in prison<sup>189</sup>.

According to the member of parliament in the United Kingdom, for Esher and Walton since 2010, Dominic Raab, also author of the book “The Assault on Liberty—What Went Wrong with Rights” and former adviser in the House of Commons on crime, policing, immigration, counter-terrorism, human rights, and constitutional reform, the shifting on the aim of the Strasbourg case laws suggests the real intention of the European Court of Human Rights is in the direction of enfranchising all prisoners, as a matter of judicial policy<sup>190</sup>. This means the ECtHR seeks total enfranchisement of prisoners by applying a more extensive interpretation on the concept of unreasonable restriction regarding felony disenfranchisement, as supported by this research.

#### 4.1.2.2. Inter-American Court of Human Rights

With respect to the Inter-American Court of Human Rights, at that moment, it is surprising the Court has judged one case regarding felony disenfranchisement of convicts. Notwithstanding, it was achievable to find case laws in which the I/A Court H. R. addresses the concept and limitations of “unreasonable restrictions” over political or similar rights.

In this spirit, in the leading case of *Yátama v. Nicaragua*, the I/A Court H. R. analysed the limits of restrictions over the right to vote of some politicians. The case is about some candidates who had been notified by the Supreme Electoral Council that they would be

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<sup>189</sup> *Scoppola v Italy* App 126/05 (ECtHR, 22 May 2012) [108, 109].

<sup>190</sup> Raab (n 181) 26.



excluded from participating in the municipal elections for the reason that candidate registration was missing some requirements<sup>191</sup>.

In line with this, the I/A Court H. R. analysed the nature of the restriction imposed by Article 23.2 of the American Convention on Human Rights over the right to vote. It has been said the right to vote is not absolute and therefore can be subject to restrictions. However, the court also recognised that limitations should be taken into consideration alongside the principles of legality, necessity, and proportionality in a democratic society<sup>192</sup>.

That is to say, even the I/A Court H. R. held restrictions on voting rights have clear limit, as follows:

“The restriction should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose. When there are several options to achieve this end, the one that is less restrictive of the protected right and more proportionate to the purpose sought should be chosen.”<sup>193</sup>

Surprising, the I/A Court H. R. itself has quoted the ECtHR as regards the case *Hirst v. United Kingdom* to uphold the limitations of restrictions over the right to vote. The same rationale of undue restriction and legitimate purpose has been supported to interpret the limitations allowed by the American Convention on Human Rights in the case of *Yátama v. Nicaragua*<sup>194</sup>. However, conversely, the Inter-American Court still recognises that states can establish, what this research considers unreasonable, the automatic, and arbitrary limitations over the right to vote for convicts<sup>195</sup>.

In addition, *Mutatis mutandis*, in the case of *Ricardo Canese v. Paraguay*, the judgement from August 2004 contained a detailed analysis on the supposed concept of

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191 YATAMA (n 139) [2].

192 Ibid [206].

193 *ibid.*

194 YATAMA (n 139) [206]-[207].

195 American Convention, art 23.2.

proportionality by the Inter-American Court of Human Rights. The case was about a “sentence and prohibition to leave the country imposed on Ricardo Canese, engineer, [...] as a result of statements made while he was a presidential candidate”<sup>196</sup>. For the reason that freedom of expression is one of the elements to fully exercise the right to vote<sup>197</sup>, this case is completely suitable to the analysis of the concept at issue regarding the right to vote.

In that respect, proportionality in a democratic society, according to the I/A Court would represent the following statement:

“[...] Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. 15. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.”<sup>198</sup>

Moreover, in the case of *Kimel v. Argentina*, the I/A Court H. R. explained how to examine a restriction. First, the degree of prejudice of the right at stake would need to be analysed to investigate whether the impairment was fair or not. Second, the relevance of the opposing right would need to be investigated. Third, it would be necessary to analyse whether the relevance of the opposing right can justify the restriction which is taking place<sup>199</sup>.

Likewise, in the cases of *Tristán Donoso v. Panama* and *Atala Riffo and daughters v. Chile*, the I/A Court H, R, once more recognised the need to “meet the requirements of

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<sup>196</sup> I/A Court H R, Case of Ricardo Canese v. Paraguay ( I/A Court H R Series C No. 111, Judgment of 31 August 2004) [2]-[5].

<sup>197</sup> General comment No 34 [4].

<sup>198</sup> Ricardo Canese (n 193) [129], [132].

<sup>199</sup> I/A Court H R, case of *Kimel v. Argentina* (I/A Court H R Series C no 177, Judgment of 2 May 2008) [84].

suitability, necessity, and proportionality which render it necessary in a democratic society”.<sup>200</sup>

Following this line of thinking, in the case *Castañeda Gutman v. México*, the I/A Court H. R. remembered that even though the state may have the competence to elaborate restrictions, this ability is limited by international law and by the interpretation of the American Convention. Both international law and the American Convention create conditions and limitations for the restrictions, such as legitimate aim and proportionality. The American Convention, however, does not provide basis to find a legitimate aim of the restrictions; only general basis is needed for restriction<sup>201</sup>.

Finally, in 2014, the I/A Court H. R. ended up investigating a case related to political rights and restriction based on criminal sanction. In the case *Argüelles and others v. Argentina*, the I/A Court H. R. analysed a context of restriction on felony disenfranchisement. Even though the case was about the right of standing for elections, the findings made by the I/A Court of H. R. are very valuable to clarify limitations regarding disenfranchisement and unreasonable restriction on prisoners’ voting rights<sup>202</sup>.

The case was about an additional political sanction on convicts for committing crime of fraud. They were given 10 years of political restrictions as an additional penalty. The I/A Court H. R. held the State followed the requirement of social need, as long as the measure was the least intrusive possible and perceived a legitimate goal. Basically, the decision relied on the existence of a judicial sentence and non-permanent sanction to legitimate the disenfranchisement. The judgement pointed out the restrictions had the goal of complying with the criminal conviction and, therefore, protecting the society<sup>203</sup>.

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<sup>200</sup> I/A Court H R, case of *Tristán Donoso v. Panama* ( I/A Court H R Series C No 193, Judgment of 27 January 2009) [56]; I/A Court H R, Case of *Atala Riffo and daughters v. Chile* ( I/A Court H R Series C no 254 , Judgment of 24 February 2012) [164].

<sup>201</sup> I/A Court H R, case of *Castañeda Gutman V México* (I/A Court H R Serie C No 184, Judgment of 6 August 2008) [174], [181].

<sup>202</sup> I/A Court H R, case of *Argüelles and others v Argentina* (I/A Court H R Series C No, Judgment of 20 November 2014) [223].

<sup>203</sup> *Argüelles and others* (n 202) [230], [231].

### 4.1.3. Conclusion on Reasonability

After all, the case laws have shown a grave concern. Although the I/A Court H. R. follows the international human rights law's practice of defining the concept of "reasonable restriction", even by quoting the leading case of felony disenfranchisement for the Council of Europe System, there is still the enforcement of the arbitrary blanket ban. Although quite contradictory, the standing of the I/A Court H. R. is at the very least confusing and materially anachronic.

Above all, felony disenfranchisement has appeared to be substantially unreasonable at all levels, considering the international practice on the concept of "reasonable restrictions". It does not match the three requirements indicated by the I/A Court H. R. to analyse a reasonable restriction over political rights based on the sense of proportionality<sup>204</sup>.

First, criminal disenfranchisement policies are essentially prejudicial for prisoners, their family, rehabilitation process, and hence, security policies. Second, there is no opposing right to balance, as long as felony disenfranchisement is a retributive punishment itself, and entitling prisoners with the right to vote do not represent any social harm in a democratic society. Third, the protection of the social security and prisoners' rights are way more relevant than protecting a payback harm, with no social benefit<sup>205</sup>.

Furthermore, even the European Court of Human Rights follows the path of total enfranchisement of felons. Since the case *Hirst v. UK*, the European Court of Human Rights has improved a lot its standing to fight not only bans for all convicts but also bans on certain categories of convicts. This means the sense of proportionality is becoming even tighter. As has been seen, the goal of the court at issue is to ban all types of felony disenfranchisement.

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<sup>204</sup> Kimel (n 199).

<sup>205</sup> See footnote (n 31), (n 77), (n 78), (n 91).

Finally, the need of limitations to not be discriminatory is noteworthy. There is no question about the importance of establishing non-discriminatory policies under the international human rights law. In that sense, because felony disenfranchisement is unreasonable, it is already deemed to be a direct discrimination. However, it is possible to detect uncertainty about the indirect discriminatory effects of felony disenfranchisement, which must be clarified in the next topic.

For this reason, the next topic focuses on the concept of “discriminatory policies” under international law to highlight the second incompatibility of felony disenfranchisement: the incompatibility regarding indirect discrimination of felony disenfranchisement policies.

#### 4.2. DISCRIMINATORY POLICIES ON PRISONERS’ STEREOTYPE AND ETHNIC-RACIAL DISPARITY: A CASE OF INDIRECT DISPARITY

First and foremost, the importance of analysing the discriminatory side of restrictions relies on the assumption that a restriction can be unreasonable and additionally, as a plus, discriminatory. As it happens with the situation of felony disenfranchisement and also taking into account the Human Rights Committee, discriminatory differentiations may only take place when the restriction is already unreasonable<sup>206</sup>. Which means, in a different way, when the restriction is unreasonable, it can even be discriminatory or not.

On this line, this research considers that felony disenfranchisement also has discriminatory effects that can directly or indirectly be verifiable. Considering direct discrimination is directly linked to the unreasonable restrictions of felony disenfranchisement policies, the focus of this analysis was only the concept of “indirect discrimination”. Denying prisoners’ right to vote represents a clear unreasonable and direct discrimination itself<sup>207</sup>. This type of discrimination, in that case, is simply

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206 Mr. Rupert Althammer en others v Austria (2001) CCPR/C/78/D/998/ Human Rights Committee [10.2]

207 Committee on Economic, Social and Cultural Rights, ‘General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights’ (2009) UN Doc E/C.12/GC/20 (General Comment 20) [15]

consequence of the unreasonable restriction of criminal disenfranchisement<sup>208</sup>. For that reason, it is considered direct discrimination has already been discussed on the above analysis about “unreasonable restrictions”.

If it “has no objective and reasonable justification” and if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”, the difference of treatment related to a social status, for instance, is discriminatory by itself<sup>209</sup>.

Moreover, disenfranchisement is an unreasonable punishment that provides also serious indirect consequences. Either there is an indirect result in the whole categories of prisoners, owing to the stereotype of non-citizen that felony disenfranchisement brings, or there even is an indirect impact towards certain minorities groups due to their vulnerable situation.

It is a fact in many current societies, prisoners are already not taken as humans worthy of humane treatment. It is an image excessively and unfairly attributed to prisoners in general mainly because of their associated stereotypes. On this ground, felony disenfranchisement only makes their situation official and more difficult, as disenfranchisement policies help to promote their sub-human category<sup>210</sup>. This means prisoners are prone to suffer from indirect discrimination over stereotypes.

Furthermore, and more remarkable, even though there is no formal statement that felony disenfranchisement is based on racial issues, its operation affects mostly racial and ethnic minorities. As previously stated<sup>211</sup>, minorities, such as Afro-descendants and indigenous people, face huge challenges to obtain political rights in Latin America and, therefore,

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208 Barelli (n 115) 5-6

209 Abdulaziz, Cabales and Balkandali v the United Kingdom App 9214/80 (ECtHR, 28 May 1985) [35]-[36], [72].

<sup>210</sup> I/A Court H R, Case of Artavia Murillo and others (“In Vitro Fertilization”) v. Costa Rica (I/A Court H R Series C no 257, Judgment of 28 November 2012) [295].

<sup>211</sup> See footnote (n 118).

represent a sensitive prison population. If they are not the majority, they are disproportionately affected by the results of disenfranchisement policies in the polls.

Additionally, the concepts of both racial and ethnical factors are from similar and similarly considered racial discrimination. Race is expressed “in the idea of biological classification of human beings” and “ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds”.<sup>212</sup>

With this in mind, the international framework regarding international human rights law and the concept of “discriminatory policies” must be analysed with a focus on indirect discrimination in the Inter-American System within the scope of political rights and minorities. Non-discriminatory provisions are conventional and customary human rights<sup>213</sup>, for that reason, it is important to examine non-binding and binding sources to highlight the illegality of disenfranchisement policies with regard to their discriminatory effects.

#### **4.2.1. Non-Binding Provisions**

The principle of non-discrimination is present in several human rights treaties and is a well-used tool for the protection of minorities. The Universal Declaration of Human Rights, according to Article 21, provides that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives”. This is the right to be free from discrimination under the Universal Declaration<sup>214</sup>.

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<sup>212</sup> *Sejdić and Finci v Bosnia and Herzegovina* App 27996/06 and 34836/06 (ECtHR, 22 December 2009) [43].

<sup>213</sup> Margot E. Salomon and Arjun Sengupta, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples* (Minority Rights Group International 2003) 9.

<sup>214</sup> Penal Reform International (n 166) 2.

This represents the initial idea of protection against discrimination regarding the right to vote. This idea has been improved over the years, and nowadays, it is possible to see a better development of the right to be free from discrimination at the polls.

In this connection, the Principle and Best Practices on the Protection of Persons Deprived of Liberty in Americas took an important step to recognise any distinction, exclusion, or restriction that is designed to afford discrimination, or even those which are discriminatory in their operation. There are no circumstances in which a person should be devoid of the right to vote under intentional discrimination or even by the effects of restrictions<sup>215</sup>.

This point is highlighted in the United Nations Declaration on Minorities, by which “persons belonging to minorities have the right to participate effectively in ... public life”<sup>216</sup>. In other words, person belonging to minorities have not only right to be free from discrimination but also the right to take part in the decision-making. States must protect the effective participation in public affairs<sup>217</sup> and adopt appropriate measures to protect them<sup>218</sup>

Additionally, the Declaration of Principles on Freedom of Expression, a basic document of the Inter-American Commission on Human Rights, states that fundamental elements for the right to vote, such as any expression, opinion, or information, must be protected against direct or indirect influence. Thus, even the IACHR recognises the existence of indirect threats. In this way, the IACHR shows its concern about arbitrary impositions over the right to freedom of expression<sup>219</sup>.

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<sup>215</sup> IACHR, ‘Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas’ (n 85).

<sup>216</sup> UN Declaration on Minorities, art 2(2).

<sup>217</sup> Commission on Security and Cooperation in Europe (CSCE), ‘Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE’ (1990) 29 ILM 131 [35].

<sup>218</sup> UN Declaration on Minorities, art 1.

<sup>219</sup> IACHR, ‘Declaration of Principles on Freedom of Expression’ (IACHR 20 October 2000).



#### 4.2.1.1. The International Committees on Human Rights: Indirect Discrimination and Minorities

In this sense, when legal rules or policies are apparently neutral but have a different effect on minorities, they are indirectly discriminatory, as the Human Rights Committee held in the case *Althammer v. Austria*. As has been acknowledged, “a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate”<sup>220</sup>.

In addition, the Human Rights Committee in its General Comment number 23 held persons belonging to minority groups can also be benefited by the provisions from Articles 2 and 26 of the ICCPR. The guarantees and protections of non-discrimination that originate from these articles are completely applicable to situations involving minorities<sup>221</sup>.

The Committee on the Elimination of Racial Discrimination has also called attention to the concept. The Committee elaborates on a definition of discrimination that can also be implicit. Thus, the aim is deemed to be not only explicitly discriminatory, because it is also possible to find discriminatory measures in fact and effect, only verifiable in the circumstances of the case<sup>222</sup>.

Meanwhile, the Committee on the Elimination of Discrimination against Women on General Recommendation number 25 held that indirect discrimination can occur even in the gender base. It occurs when some criteria seem to be gender-neutral but unintentionally has a deficient effect on women<sup>223</sup>.

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<sup>220</sup> *Mr. Rupert Althammer and others v Austria* (2003) CCPR/C/78/D/998/ Human Rights Committee [10.2]

<sup>221</sup> *Barelli* (n 115) 6.

<sup>222</sup> *L R and others v. Slovakia* (2005) CERD/C/66/D/31/2003 Committee on the Elimination of Racial Discrimination [10.4].

<sup>223</sup> Committee on the Elimination of Discrimination against Women, ‘General Recommendation 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)’ (2004) GEC 3733 UN Committee on the Elimination of Discrimination against Women [7].

Moreover, according to the Committee on the Rights of Persons with Disabilities, Case of H. M. v. Sweden, the “law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration”. It was one more recall for particularities of indirect discriminations<sup>224</sup>.

#### **4.2.2. Relevant Binding Documents**

According to Article 2 of the ICCPR, the right to vote shall be enjoyed without discrimination<sup>225</sup>. It states that the restrictions cannot be made on the basis of race, colour, sex, language, religion, or other opinion, national or social origin, property, birth, or other status<sup>226</sup>. Even though the felony disenfranchisement may not be officially related to any of those aspects in its explicit intention, they are all remarkable in its impact on the participation of certain minority groups at the polls.

In that sense, Article 25 of the ICCPR states that any type of restrictions mentioned in Article 2, besides otherwise unreasonable, should not affect the equal participation in public affairs. In addition, the Article 26 complement explains that legal rules shall protect all persons against any type of discrimination by equal protection<sup>227</sup>.

Furthermore, Article 14.3 supports as follows: “in the determination of any criminal charge against him, everyone shall be entitled ... in full equality”. That represents the concern about the vulnerability of people detained, which is empowered by the provision from Article 27, according to which persons from minorities’ groups must have their rights, as ethnic, religious and linguistic minorities, granted by the member state<sup>228</sup>.

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<sup>224</sup> H M v Sweden (2012) CRPD/C/7/D/3/2011 Committee on the Rights of Persons with Disabilities [8.3].

<sup>225</sup> Penal reform International (n 166) 1-2.

<sup>226</sup> European Commission (n 145) 277.

<sup>227</sup> ICCPR, art 25, art 26.

<sup>228</sup> ICCPR, art 14, art 27.

Furthermore, notably, according to the International Convention on the Elimination of All Forms of Racial Discrimination<sup>229</sup> the concept of non-discrimination is aimed at the result as much as the effect of the legislation and/or policy<sup>230</sup>. It states the following:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment of exercise, on an equal footing, of human rights and fundamental freedoms in the political, economical, social, cultural or any other field of public life.”<sup>231</sup>

As the Minority Rights Group International set out, there is no basis to affirm the above-mentioned treaty protects minorities only against policies and legislations that have expressly the discriminatory intent. Sometimes there is no purpose, there is no textual intention, but there is still a discriminatory result. Policies without formal declaration can affect the minorities’ enjoyment of fundamental rights, such as the right to participation<sup>232</sup>.

Moreover, at the regional level, Article 14 of the European Convention on Human Rights, Article 1 of the Protocol 12 European Convention on Human Rights<sup>233</sup>, Article 24 of the American Convention on Human Rights<sup>234</sup>, and Article 2 of the African Charter on Human and Peoples’ Rights, also preclude discriminatory acts<sup>235</sup>. However, unlike the African and European conventions, the Inter-American provision does not enumerate the grounds of discriminations.

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<sup>229</sup> International Convention on the Elimination of All Forms of Racial Discrimination ( adopted 21 December 1965) United Nations, Treaty Series, vol 660, p 195 (International Convention on the Elimination of All Forms of Racial Discrimination) art 1.1

<sup>230</sup> Minority Rights Group, ‘Non-Discrimination’ ( Minority Rights Group) <<https://minorityrights.org/our-work/law-legal-cases-introduction/non-discrimination/>> 20 June 2019.

<sup>231</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art 1.1.

<sup>232</sup> Minority Rights Group, ‘Non-Discrimination’ (n 230).

<sup>233</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended in its protocol 3 and 12) (ECtHR) art 3; ECtHR, ‘Guide on Article 3 of Protocol n 1 to the European Convention on Human Rights: Right to Free Elections’ (European Court of Human Rights, 30 April 2019) 9.

<sup>234</sup> American Convention, art 24.

<sup>235</sup> African Charter on Human and Peoples' Rights ("*Banjul Charter*"), 27 June 1981, Organization of African Unity (OAU), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) art 2.

Even though the American Convention on Human Rights does not describe and define the concept of discrimination, there is The Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, which does this job. *Mutatis mutandis*, according to this Convention, discrimination is related to distinctions, exclusions, or restrictions, whether present or past, that has the effect or objective of impairing or nullifying the recognition of fundamental freedoms<sup>236</sup>.

### 4.2.3. Regional Case Law

#### 4.2.3.1. European Court of Human Rights

On this line, the European Court of Human Rights analysed the side effects of these restrictions made by the states. As reported in the case of *Aziz v. Cyprus* in June 2004, the court held that acts of member states towards restrictions cannot have an outsized impact on certain individuals or groups regarding their participation in political life. This case was about a refused application to enrol on the Greek-Cypriot electoral roll, which had been refused on the basis that “members of the Turkish-Cypriot community could not be registered on the Greek-Cypriot” community. Later, the ECtHR held measures regarding limitations and rules of electoral process should not be such as to exclude people, especially the most vulnerable, from political participation<sup>237</sup>.

The matter at hand is the clear unequal treatment of prisoners in enjoying the right to participation. As the ECtHR stated in the case *Dudgeon v. the United Kingdom*, if the difference in the enjoyment of certain right (e.g., the right to vote) is clear, it is a matter of discriminatory harm<sup>238</sup>.

#### 4.2.3.2. Inter-American Court of Human Rights

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<sup>236</sup> Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999, Organization of American States (OAS) AG/RES. 1608 (XXIX-O/99) art 1.

<sup>237</sup> *Aziz v Cyprus* App 69949/01 (ECtHR, 22 June 2004) [28].

<sup>238</sup> *Dudgeon v the United Kingdom* App 7525/76 (ECtHR, 22 October 1981) [67].

The I/A Court H. R., as well as the IACHR, has frequently found non-discrimination as the one paramount right of the human right system<sup>239</sup>.

Following this line of thinking, the Inter-American Court of Human Rights has gone in a similar direction. First, the I/A Court H. R. has frequently recognised a difference between the concept of “differentiation” and “discrimination” under the American Convention. The first is allowed by the Inter-American System, but the latter is not. While differentiation would be an instance of lawful restriction and discrimination, following the Inter-American Court case law represents arbitrary impositions that result in harm to human rights<sup>240</sup>

Second, in the Case of the Girls Yean and Bosico Children v. Dominican Republic, the Inter-American Court on Human Rights have undoubtedly recognised indirect discrimination over an ethnic minority in the Dominican Republic. The case is about a discriminatory veto on birth documentation to Haitian children. The denial had formally been neutral, but the strict rules have been disproportionately affecting Yean and Bosico children<sup>241</sup>.

In that case, the I/A Court H. R. held that states must refrain from elaborating on provisions that are “discriminatory or have discriminatory effects on certain groups of population when exercising their rights”<sup>242</sup>. According to the sentence, as long as Dominican Republic had refused to issue birth certificates, and its act had serious effects specifically on Yean and Bosico children, the State had violated the Article 24 of the American Convention on Human Rights (equal protection)<sup>243</sup>.

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<sup>239</sup>The Human Rights Clinic at The University of Texas School of Law, ‘Amicus Curiae on the Discriminatory Impact of the In Vitro Fertilization Ban on Women and Infertile Individuals (I/A Court of Human Rights Case No 12361, Gretel Artavia Murillo et al (“In Vitro Fertilization”) v. Costa Rica, 28 November 2012)’ (The Human Rights Clinic at The University of Texas School of Law, 2012) ]38], [41].

<sup>240</sup> Artavia Murillo (n 210) 285.

<sup>241</sup> The Yean and Bosico Children v Dominican Republic (I/A Court Serie C 130 , Judgment 8 September 2005) [3], [240]

<sup>242</sup> *ibid* [141].

<sup>243</sup> *ibid* [2].

Another important case is the Case of *Artavia Murillo et al. (“in vitro fertilisation”) v. Costa Rica*, where the I/A Court H. R. held a situation of indirect discrimination regarding the general prohibition of in vitro fertilisation<sup>244</sup>. It has been argued the ban had an arbitrary and disproportionate impact over woman and infertile people. While the State argued that “infertility is a natural condition that is not induced by the State”<sup>245</sup>, the I/A Court H. R. indicated the prohibition had an indirect and disproportionate effect on the intimacy of the individual<sup>246</sup>.

Moreover, the Inter-American Court on Human Rights held side impacts also occurred on the situations related to women stereotypes, disability, gender, and financial situation. Those, according to the I/A Court H. R., would be affected by indirect discriminations related to their vulnerable categories. The results of the interference of severe and indirect discrimination have been considered, owing to the excessive and arbitrary impact<sup>247</sup>.

It is relevant to mention the recognized discriminatory effect over woman’s stereotype, by which the I/A Court H. R. extended its scope of protection and protected a subjective right, the right to image. The social status of woman has been investigated and linked to the personal suffering of the target individuals<sup>248</sup>. In a similar situation, the stereotype of prisoner, as it was for women, can influence decisions and protection towards the social category. The ban on Convicts’ voting rights is essentially related with the idea of citizenship, which can have disproportionately negative impact on prisoners’ protection.

Meanwhile, by the case of *Nadege Dorzema and others v. Dominican Republic*, the Inter-American Court’s particularly secure international human rights law does not support the policies and practices that are deliberately discriminatory, as well as those whose effects impact certain categories of individuals, even if it is not viable to prove the intention<sup>249</sup>.

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<sup>244</sup> *Artavia Murillo* (n 210) [2].

<sup>245</sup> *ibid* [271].

<sup>246</sup> *Ibid* [279].

<sup>247</sup> *Artavia Murillo* (n 210) [284].

<sup>248</sup> *ibid* [295]-[299].

<sup>249</sup> I/A Court H R, *Case of Nadege Dorzema and others v Dominican Republic* ( I/A Court H R Series C No 251, Judgment 24 October 2012) [234].

Finally, taking into account all mentioned content so far, the Inter-American Court also considers that the American Convention on Human Rights enforces all essential aspects of a democratic regime. In that sense, the state shall act on the sense that the vulnerabilities of the certain groups of the society would be balanced. Since the Court recognises these vulnerable groups would be weak in front of illegitimate restrictions which can affect direct and indirectly the populations<sup>250</sup>.

#### **4.2.4. Conclusions on Discriminatory Effects**

It seems the I/A Court H. R., as well as international human rights law as whole, is aware of the right to be free from discrimination and the concepts of direct and indirect discriminatory policies. There are many provisions and decisions related to the matter regarding both the right to participation and minorities groups. Nonetheless, the I/A Court H. R. appears to neglect the remarkable advances on the practice to recognise indirect discrimination in international law,

As already discussed, the large majority states in Latin America, signatories of the American Convention of Human Rights, quite arbitrarily enforced a blanket ban on convicts' voting rights. This measure resulted in deep indirect effects in a region marked by multicultural diversity and rooted in racism and social discrimination. Indigenous and Afro-descendants consistently lose space in political participation for being vulnerable groups, self-identified as particular and specific minorities, which suffer from the indirect impact of the disenfranchisement of their community's members.

Not to mention, the situations of the prisoners were disproportionately affected by impacts of associated stereotypes. Well-known as a sub-human category, prisoners are in general one of the hardest people to protect from human rights abuses, for the reason that there is no social and political will to protect them. If at least their right to vote was

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<sup>250</sup> I/A Court H R, 'Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos n 20: Derechos Políticos (I/A Court H R, 2018) [172].

restored in the region, their citizenship would be more sustainable, through which related stereotypes and their protection would be improved.

According to the Manual on Human Rights for Judges, Prosecutors and Lawyers by the Office of the United Nations High Commissioner for Human Rights, discrimination can affect people in several circumstances in society, among which prison system is one of them<sup>251</sup>.

In that context, beyond a shadow of a doubt, felony disenfranchisement is also far from being compatible with International Human Rights Law in contrast to the right to be free from discrimination. The concept of “non-discriminatory policies” make the denial of convicts’ right to vote unsustainable. Primarily, there is the unreasonable and direct discrimination against the social status of being prisoner. Secondly, there is the indirect discrimination towards minorities’ communities and convicts’ stereotypes.

There is no wonder that criminal disenfranchisement of convicts is a contradictory practice under the Inter-American System. It can also be seen as completely outdated and illegal under the international human rights law’s legal practice. Rules and case laws regarding the concepts of “unreasonable restrictions” and “discriminatory policies” do not fit felony disenfranchisement at all.

## **5. CONCLUSION**

By addressing the general doctrine of felony disenfranchisement, this study concludes that the Inter-American System for the Protection of Human Rights is required to improve its standards on the right to vote for convicts. Based on the conflicting social aspect, its application on the reality of Latin American and illegality inherently attached to the very

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<sup>251</sup> OHCHR, ‘Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer’ (United Nations 2003) 645.



core of the idea of felony disenfranchisement, it is believed the Inter-American System should extend the right to vote for all convicts.

This main conclusion was a result of the intention to shape up the legal rule based on real facts of daily life. Since the current policy of felony disenfranchisement does not reflect the realities of human rights protections for minorities and prisoners in Latin America, it needs to change. The legal rule is a result of the social reality; if the norm does not explain the reality anymore due to social facts and inconsistencies with the international human rights legal system, the policy of felony disenfranchisement needs to be reviewed.

In this context, it is evident that the right to vote is essential for human nature, as it is part of the human essence. Denying convicts the opportunity to engage in political participation is incompatible with their natural need for social life and produces devastating results across the rehabilitation process, apart from widely affecting certain minorities groups undermined by the disenfranchisement of their members.

Based on the analysis of social prejudices and supposed benefits, as well as criminological and philosophical reasonings, felony disenfranchisement appears to be catastrophic as a criminal policy. It causes massive social blunders for both public security and minority groups. The result is a counterproductive engagement to achieve the goal of playing down criminal levels, rehabilitating people, and promoting minorities' participation rights. Felony disenfranchisement ends up being a superfluous punishment, as it does not fulfil legitimate aims and only causes further damages.

This theoretical basis was essential to judge and investigate the need for changes by the Inter-American System regarding its standing on the inexistence of convicts' right to vote. Through quantitative and qualitative analysis of the situation on ground under the Latin American System, it became clear these disenfranchisement policies have harmful effects that are perilous to the region. In a context of overcrowding prisons, low levels of rehabilitation and high social exclusion of minorities, while enfranchisement of criminals

shows up as a strategic social tool to overcome these problems, felony disenfranchisement only makes the situation even worse.

Latin American countries largely apply an arbitrary blanket ban on voting for convicts. Although felony disenfranchisement in the region is remarkably outdated and meets the social need for change, Latin American countries have a legal basis for this policy. The legally binding American Convention on Human Rights does allow disenfranchisement of all convicts on the basis of a criminal sentence, according to Article 23, subsection 2.

That is the context where the Inter-American System emerges as a potential driving force for effective change on prisoners' voting rights. Aside from a legal possibility to oblige countries in the region to take a step ahead on the matter, the Inter-American System is engaged on progressive visions of human rights regarding people deprived of their liberty and the protection of minorities, which are substantially contradictory with the concept of denying prisoners the right to vote.

In that respect, as far as the issue was raised, it was missing a legal investigation on the limits of prisoners' rights restrictions and the protection of discriminatory policies against minorities. For that purpose, binding and non-binding provisions were investigated regarding the concept of "unreasonable restrictions" and "discriminatory policies" under international human rights law. It was elucidated that felony disenfranchisement is incompatible with customary human rights law. This step was fundamental to prove the legal compelling viability of total criminal enfranchisement for the Inter-American System.

Reports, advisory opinions, declarations, and conventions, as well as case laws have shown a customary international law on the application of the legal concept of reasonable restrictions and on the concept of direct and indirect discriminatory policies. These concepts when applied on the ground, taking into consideration the multidisciplinary investigation of Chapter I and the actual situation of Latin America, as well as the regional legal framework of the Inter-American System, reported in Chapter II, reveal the

substantial illegality of criminal disenfranchisement as an unreasonable and discriminatory policy.

Therefore, the research has proven an illegal practice regarding unreasonable restrictions on prisoners' right to vote and the discriminatory effects regarding direct and indirect discrimination towards minorities' participation rights and against the stereotype of being prisoner. It is no wonder that the denial of the right to vote for convicts represents an unreasonable restriction, already illegal by itself, and thus, directly discriminatory with respect to the delimitation of the social status "convicts". Furthermore, apart from that, the practice additionally encompasses the indirect discrimination towards minorities' rights and the stereotype of being convicted in Latin America.

Moreover, enfranchisement policies have gained space in international human rights law. While it is clear, so far, that the current international provisions do not favour automatic and indiscriminate criminal disenfranchisement, the Council of Europe System's trend seems to progress towards a total enfranchisement of convicts. As the progression of case laws in the European Court of Human Rights has shown, the enfranchisement of all sort of convicts can be the next step in Europe.

For that reason, there is no excuse for the Inter-American System not to further the protection at issue. Either new interpretations of the Inter-American Commission and Inter-American Court on the Article 23, subsection 2, of the American Convention on Human Rights are required, or the material amendment of the Convention should take place.

In this line, the IACHR has already shown concern on developing its analysis on inmates' voting rights. Even though it is not a judicial organ, its political and academic influence is remarkable. The IACHR cannot oblige countries by legally binding decision but certainly can influence the region and the I/A Court H. R. to adopt new standards.

In this regard, the Inter-American Court of Human Rights is the judicial organ from the Inter-American System. Its judicial judgments do bind members' states of the American Convention by mandatory judgements. The I/A Court H. R. also can improve its interpretation regarding limits of felony disenfranchisement or even support the amendment of the American Convention on the Article 23.2. The activity of the judicial organ is essential, so far as it does not depend on political will or political acceptance to further the protection of human rights.

In that connection, the amended of the Convention would have a direct effect on the Latin American member states and force the required advancement on the ground. The American Convention is legally binding for these states. It means any domestic law or judicial decision that could cause prejudice for the protection of the rights recognised by the American Convention shall not prevail.

In the end, defending the right to vote for convicts in a social and legal perspective appears to be a fight already done: it runs contrary to the very essence of the democratic values and legal achievements of the Inter-American System. Moreover, those opposing have no argument good enough to face the negative consequences of disenfranchisement policies. Condemning convicts to lose their right to vote is not appropriate in the current democratic Latin American society and under the practice of international human rights law.

Finally, in the context of an ever-increasing cosmopolitanism, raising the discussion about the right to vote for convicts is a paramount issue. Voting is a fundamental right and needed in prisons. Advocating for ensuring the right to vote for convicts can contribute to overcome historical problematic issues in Latin America as never before.

## BIBLIOGRAPHY

### SECONDARY SOURCE

\_\_\_ ‘Aldeias indígenas se mobilizam para Eleições 2018’ ( Fundação Nacional do Índio 2018) <http://www.funai.gov.br/index.php/comunicacao/noticias/5066-aldeias-indigenas-se-mobilizam-para-eleicoes-2018>

\_\_\_ ‘Amicus Curiae on the Discriminatory Impact of the In Vitro Fertilization Ban on Women and Infertile Individuals (I/A Court of Human Rights Case No 12361, Gretel Artavia Murillo et al (“In Vitro Fertilization”) v. Costa Rica, 28 November 2012)’ (The Human Rights Clinic at The University of Texas School of Law, 2012).

\_\_\_ ‘Compendio Estadístico Penitenciario’ (Gendarmería 2017)

\_\_\_ ‘Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos n 20: Derechos Políticos (I/A Court H R, 2018).

\_\_\_ ‘En Numeros: Documentos de Analisis y Estadísticas’ (vol 1, n 11, Intituto Nacional de Estadística 2017).

\_\_\_ ‘Guide on Article 3 of Protocol n 1 to the European Convention on Human Rights: Right to Free Elections’ (European Court of Human Rights, 30 April 2019).

\_\_\_ ‘Highest to Lowest - Prison Population Rate’, (Data on total Prison population, including pre-trial detainees and remand prisoners, World Prison Brief Argentina 2017, Bolivia 2016, Brazil 2016, Uruguay 2017, Peru 2018, Ecuador 2018, Panama 2018, Nicaragua 2017, Honduras 2017, Costa Rica, El Salvador 2019, Guatemala 2019, Mexico 2018, Paraguay 2017, Chile 2019, Colombia 2019) [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=17](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=17)

\_\_\_ ‘Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer’ (United Nations 2003).

\_\_\_ ‘Indigenas Colombia Situation: Colombia, Costa Rica, Ecuador, Panamá y Venezuela’ ( The UN Refugee Angancy n 4).

\_\_\_ ‘Joenia Wapixana, winner, 2018 UN Human Rights Prize’ (OHCHR News 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/JoeniaWapixana.aspx>.

\_\_\_ ‘Non-Discrimination’ ( Minority Rights Group) <https://minorityrights.org/our-work/law-legal-cases-introduction/non-discrimination/>.

\_\_\_ ‘Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights: Comments on Zero Draft ( Human Rights Council 2018)

- \_\_\_ 'Prisons in Latin America and the Caribbean' (1997) Human Rights Watch, <https://www.hrw.org/legacy/advocacy/prisons/americas.htm>. Accessed on 22/05/2019
- \_\_\_ 'The right of prisoners to vote: a global overview' (Penal Reform International 2016)
- \_\_\_ *Citizen Security with a Human Face: Evidence and Proposals for Latin America* (United Nations Development Programme 2013).
- \_\_\_ *Compendium of International Standards for Elections* ( 3 edn, European Commission 2018).
- \_\_\_ *Estatísticas Sociais de Los Pueblos Indígenas em Chile senso 2002* (Instituto Nacional De Estadística, Ministerio de Planificación Nacional 2005).
- \_\_\_ *European Prison Rules* (Council of Europe June 2006).
- \_\_\_ *Handbook on Strategies to Reduce Overcrowding: Criminal Justice Handbook series* ( United Nations Office 2013).
- \_\_\_ *Levantamento Nacional de Informações Penitenciárias* (Ministério da Justiça e Segurança 2017)
- \_\_\_ *Multidimensional progress: well-being beyond income, Regional Human Development Report for Latin America and the Caribbean* (United Nations Development Programme 2016).
- \_\_\_ *Systems overload: Drug Laws and Prisons in Latin America* (Washington, Transnational Institute 2011).
- Abebe A K, 'In Pursuit of Universal Suffrage: The Right of Prisoners in Africa to Vote' (2013) 46 *Comparative and International Law Journal of Southern Africa* 410.
- Aristotle, *Politics* (Benjamin Jowett tr, Kitchener 1999).
- Beccaria C, *Of Crimes and Punishments* (first published 1764, Blackmask Online 2001) <<http://www.baskent.edu.tr/~zekih/ogrenci/crimpun.pdf>>.
- Binder A and others, *Defesa criminal efetiva na América Latina* ( São Paulo, Conectas 2015).
- Blackwell A, 'Third Meeting of Officials Responsible for Penitentiary and Prison Policies of the OAS Member States' (Opening Remarks for Multidimensional Security, Washington DC, 17 September 2012) <[http://www.oas.org/es/ssm/docs/speeches/ab-III\\_PrisonsMeeting\\_2012\\_09\\_14.pdf](http://www.oas.org/es/ssm/docs/speeches/ab-III_PrisonsMeeting_2012_09_14.pdf)>.

Capotorti F, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1979) UN Doc E/CN.4/Sub.384/Rev.1.

Carranza E, 'Crime, Criminal Justice, and Prisons in Latin America and the Caribbean: The United Nations Model based on Rights and Obligations, and the Need for Comprehensive Social and Criminal Justice Policies' in Elias Carranza (ed) *Crime, Criminal Justice and Prison in Latin America and the Caribbean: How to implement the united nations' rights and duties model* (ILANUD, Raul Wallenberg Institute of Human Rights and Humanitarian Law).

Chung J, 'Felony Disenfranchisement: A Primer' (2019) Sentencing Project, 6/2019, 4 <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

Clegg R and others, 'The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes' (2006) 14 *American University Journal of Gender, Social Policy & the Law* 1.

Committee on Economic, Social and Cultural Rights, 'General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights' (2009) UN Doc E/C.12/GC/20 (General Comment 20).

Committee on the Elimination of Discrimination against Women, 'General Recommendation 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)' (2004) GEC 3733 UN Committee on the Elimination of Discrimination against Women

Corning P A, 'The Fair Society: It's Time to Re-Write the Social Contract' (2012) 11 *Seattle Journal for Social Justice* 191.

Demleitner N V, 'Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (2000) 84 *Minnesota Law Review* 753.

Easton S, *The Politics of the Prison and the Prisoner: Zoon Politikon* (Kindle edition, New York : Routledge, 2018).

Economic and Social Council (ECOSOC), 'Standard Minimum Rules for the Treatment of Prisoners' Res 663 C (XXIV) (31 July 1957) and Res 2076 (LXII) (13 May 1977).

Ewald A C, 'An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument For Felony Disenfranchisement' (2004) 36 *Columbia Human Rights Law Review* 109.

Fellner J and Mauer M, 'Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States' (1998) The Sentencing Project and Human Rights Watch <<https://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf>>.

Fontecilla T, 'Chile's biased Counter-terrorist laws: the Luchsinger-Mackay Case' ( Council on Hemispheric Affairs 2017) <http://www.coha.org/chiles-biased-counter-terrorist-laws-the-luchsinger-mackay-case/>

Gaziano T F, 'Election Reform' (Testimony Election Integrity, March 2001) <https://www.heritage.org/testimony/election-reform>

Ghai Y, *Report Public Participation and Minorities* (Minority Rights Group International 2003)

Gomez V, 'The Inter-American Commission and Court of Human Rights' (G Oberleitner (ed), *The Inter-American Commission and Court of Human Rights* 2018).

Hennebel L, 'The Inter-American System for Human Rights: Operations and Achievements' in Felipe Gomez Isa and Koen de Feyter (eds) *International Human Rights Law in a Global Context* (Bilbao, University of Deusto 2009)

Hobbes T, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* ( London 1651)

IACHR, Annual Report 2002, Chapter IV, Cuba, (OEA/Ser.L/V/II.117, Doc 1 Rev 1, adopted on 7 March

\_\_ Indigenous Peoples, Afro-Descendent communities and Natural Resources: Human Right Protection in the Context of Extraction, Exploitation, and Development Activities' (OEA Ser L V II, Doc 47/15, Washington DC 31 December 2015).

\_\_ Rapporteurship on the Rights of Persons Deprived of Liberty (OAS Official records, OEA/Ser.L. . Doc.46/13.

\_\_ Report on Citizen Security and Human Rights (OEA/Ser.L/V/II. Doc. 57, adopted 31 December 2009).

\_\_ Report on the Human Rights of Persons Deprived of Liberty in the Americas ( OEA/Ser.L/V/II Doc 64, adopted on 31 December 2011).

\_\_ Second Report on the Situation of Human Rights in Peru: The Rights of Indigenous Communities ( OEA/Ser L/V/II.106 Doc 59 rev. 2 June 2000).

\_\_ Situation of the Human Rights of Indigenous Persons and Peoples in the Americas ( OEA/Ser L/V/II.108 Doc 62,20 October 2000).

\_\_ The Situation of People of African Descent in the Americas (OEA/Ser.L/V/II. Doc. 62, Washington DC 5 December 2011).



\_\_ Third Report on the Human Rights Situation in Colombia: The Rights of Indigenous Communities (OEA/Ser L/V/II.102 Doc. 9 rev. 1 26 February 1999).

Levine E L, 'Does the Social Contract Justify Felony Disenfranchisement?' (2009) 1 Washington University Jurisprudence Review 193.

Locke J, *Two Treatises of Government In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government* (London 1823)

Manza J and Uggen C, *Locked Out : Felon Disenfranchisement and American Democracy* (Kindle edn, Oxford University Press 2006).

Marshall A, Citizenship and Social Class in T. H. Marshall (ed), *Citizenship and Social Class and other Essays* (New York, Cambridge University Press 1950)

Mauer M, 'Voting Behind Bars: An Argument for Voting by Prisoners' (2011) 54 Howard Law Journal 549.

Muñoz C, 'Elecciones desde la cárcel: Los Votos que no Cuentan' (2018) Proyecto Justicia, 06/2018 < <http://proyectojusticia.org/elecciones-carcel-votos/>>.

Nolan M M and others, 'Mulheres Indigenas e o Sistema Prisional: Invisibilidade Etnica e Sobrecargas de Gênero' (Rede Justiça Criminal, 2018) <<https://redejusticacriminal.org/pt/portfolio/mulheres-indigenas-e-sistema-penal-invisibilidade-etnica-e-sobrecargas-de-genero/>>

Paterson J J, 'How the Greeks and Romans Did Them and Why lots Can Be Better than Votes' (2015) University of St Andrews Ancient and Modern Rhetoric <<https://arts.st-andrews.ac.uk/rhetoric/elections-how-the-greeks-and-romans-did-them-and-why-lots-can-be-better-than-votes/>>.

Pufendorf S, *On the Duty of Man and Citizen* (Kindle Edition 1682).

Raab D, *Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy* (Civitas: Institute for the Study of Civil Society London 2011).

Rousseau J J, *The Social Contract* (First published 1762, Jonathan Bennett 2017).

Shaw M N, *International Law* (New York, 8<sup>th</sup> edn, Cambridge University Press 2017).

Salomon M E and Sengupta A, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples* (Minority Rights Group International 2003).

Sanders E, 'Full Human Beings: An Argument for Incarcerated Voter Enfranchisement' (2018) Peoples Policy Project  
 <<https://www.peoplespolicyproject.org/projects/prisoner-voting/>> .

Trindade A A C, 'Desafios e Conquistas dos Direitos Internacionais dos Direitos Humanos no sec 21' (2016) OAS 407.

Uggen C and others, '6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement' (2016) Sentencing Project, 08/2019,  
 <<https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>>.

UN General Assembly (UNGA) Res 45/111 (28 March 1991) UN Doc A/RES/45/111.

UN Human Rights Committee 'General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service' (1996) CCPR/C/21/Rev.1/Add.7 (General Comments 25).

\_\_\_, 'General Comment 34 Article 19: Freedoms of Opinion and Expression' (2011) CCPR/C/GC/34GE.11-45331 (General Comments 34).

UN Human Rights Council 'Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2009) UM Doc A/64/215.

Vigne N L and others, *Release Planning for Successful Reentry: A Guide for Corrections, Service Providers, and Community Groups* (The Urban Institute 2008).

Waldman M, *The Fight to Vote* (New York, Simon & Schuster 2016).

Walmsley R, 'World Prison Population List' (Twelfth edn, World Prison Brief 2018)  
 <<http://www.prisonstudies.org/news/more-102-million-prisoners-world-new-icps-report-shows>>.

Zaffaroni E R and Oliveira E, *Criminology and Criminal Policy Movements* (Kindle edn, University Press of America 2013).

## PRIMARY SOURCE

### Case Law - Inter-American System.

Almonacid Arellano vs Chile (I/A Court H R Series C No 154, Judgment 26 September 2006).

Argüelles and others v Argentina (I/A Court H R Series C No, Judgment of 20 November 2014).

Artavia Murillo and others (“In Vitro Fertilization”) v. Costa Rica (I/A Court H R Series C no 257, Judgment of 28 November 2012).

Atala Riffo and daughters v. Chile ( I/A Court H R Series C no 254 , Judgment of 24 February 2012).

Case of Castañeda Gutman V México (I/A Court H R Serie C No 184, Judgment of 6 August 2008).

García Asto and Ramírez Rojas V Peru ( I/A Court H R Series C No 137, Judgment of 25 November 2005).

Kimel v. Argentina (I/A Court H R Series C no 177, Judgment of 2 May 2008).

Lori Berenson Mejía V Peru (I/A Court H R Series C No 119, Judgment of 25 November 2004).

Nadege Dorzema and others v Dominican Republic ( I/A Court H R Series C No 251, Judgment 24 October 2012).

Ricardo Canese v. Paraguay (I/A Court H R Series C No. 111, Judgment of 31 August 2004) .

The Yean and Bosico Children v Dominican Republic (I/A Court Serie C 130 , Judgment 8 September 2005).

Tristán Donoso v. Panama.( I/A Court H R Series C No 193, Judgment of 27 January 2009).

Vélez Looor V Panama ( I/A Court H R Series C No. 218, Judgment of 23 November 2010).

Yátama v Nicaragua ( I/A Court H R Series C No 187 Judgment 23 June 2005).

Yvon Neptune V Haiti ( I/A Court H R 2008 Series C No 180, Judgment of 6 May).

#### **Case Law - Council of Europe System**

Abdulaziz, Cabales and Balkandali v the United Kingdom App 9214/80 (ECtHR, 28 May 1985).

Aziz v Cyprus App 69949/01 (ECtHR, 22 June 2004).

Dudgeon v the United Kingdom App 7525/76 (ECtHR, 22 October 1981).

FRODL v AUSTRIA App 20201/04 (ECtHR, 8 April 2010).

Hirst v the United Kingdom App 74025/01 (ECtHR, 6 October 2005).

Kulinski and Sabev v Bulgaria App 63849/09 (ECtHR, 21 July 2016).

Ramishvili v Georgia App 48099/08 (ECtHR, 31 May 2018).

Scoppola v Italy App 126/05 (ECtHR, 22 May 2012).

Sejdić and Finci v Bosnia and Herzegovina App 27996/06 and 34836/06 (ECtHR, 22 December 2009),

### **Case Law - United Nations System**

Ballantyne, Davidson, McIntyre v. Canada (1993) CCPR/C/47/D/359/1989 and 385/1989/Rev Human Rights Committee.

H M v Sweden (2012) CRPD/C/7/D/3/2011 Committee on the Rights of Persons with Disabilities.

L R and others v. Slovakia (2005) CERD/C/66/D/31/2003 Committee on the Elimination of Racial Discrimination.

Marques v. Angola (2003) 1157/2003 Human Rights Committee.

Mr. Rupert Althammer en others v Austria (2001) CCPR/C/78/D/998/ Human Rights Committee.

Shin v. Republic of Korea (2000) CCPR/C/926/D/2000 Human Rights Committee.

Yevdokimov & Rezanov v Russian Federation (2005) CCPR/C/101/D/1410/ Human Rights Committee.

### **Case Law - Domestic jurisdictions**

Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (2004) Case CCT 03/04 ZACC 10 (South African Constitutional Court) <http://hdl.handle.net/20.500.12144/2233>.

Sauvé v Canada (Chief Electoral Officer 2002) 3 SCR 519.

### **International Treaties and Legal Provisions**

African Charter on Human and Peoples' Rights ("*Banjul Charter*"), 27 June 1981, Organization of African Unity (OAU), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

American Convention on Human Rights (Organization of American States [OAS]) OAS No 36, 1144 UNTS 123, B-32, OEA/Ser.L.V/II.82 doc.6 rev.1, 25.

Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169), (72 ILO Official Bull 59, 28 ILM 1382 1989).

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended in its protocol 3) (ECtHR).

Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999, Organization of American States (OAS) AG/RES. 1608 (XXIX-O/99).

Convention on the Elimination of All Forms of Discrimination against Women ( Adopted 17 December 1979, entered into force on 3 September 1981) UNGA resolution 34/180 (CEDAW).

Declaration of Principles on Freedom of Expression' ( IACHR 20 October 2000).

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN General Assembly RES 47/135 (18 December 1992).

First Protocol to the European Convention on Human Rights and Fundamental Freedoms (adopted 20 March 1952).

Inter-American Democratic Charter (OAS OEA Ser G CP-1).

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Convention on the Elimination of All Forms of Racial Discrimination ( adopted 21 December 1965) United Nations, Treaty Series, vol 660, p 195 (International Convention on the Elimination of All Forms of Racial Discrimination).

Organization of American States (OAS), *American Convention on Human Rights "Pact of San José, Costa Rica"*, Costa Rica, 22 November 1969.

Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, (Approved by the Commission during its 131st regular period of sessions, 13 March 2008).

Rules of procedure (Approved by the Commission at its 109<sup>o</sup> special session held from December 4 to 8, 2000 and amended at its 116th regular period of sessions, held from October 7 to 25, 2002).

Statute of the Inter-American Commission on Human Rights (OEA Ser G WI/C-sa 373(3)).

United Nations Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force on 3 May 2008) UNGA A/RES/61/106  
 United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) 61/295.

### **National Legislations**

Código Electoral de El Salvador (1992)

<<http://www7.mh.gob.sv/downloads/pdf/PMHDC9522.pdf>>.

Constituição da Republica Federativa do Brasil (1988)

<[http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm)>.

Constitución Política de Colombia (1991)

<<http://www.corteconstitucional.gov.co/inicio/Constitucion%20politica%20de%20Colombia.pdf>>.

Constitucion Politica de La Republica de Chile (17 de septiembre de 2005)

<[https://www.camara.cl/camara/media/docs/constitucion\\_politica.pdf](https://www.camara.cl/camara/media/docs/constitucion_politica.pdf)>.

Constitucion Politica de la Republica de Costa Rica (7 noviembre 1949)

<<https://www.wipo.int/edocs/lexdocs/laws/es/cr/cr039es.pdf>>.

Constitución Política del Estado de Plurinacional de Bolivia (7 de febrero de 2009)

<http://www.sepdavi.gob.bo/cs/doc/159Bolivia%20Consitucion.pdf>>.

Constitución de la Republica de El Salvador (1983)

<[http://www.oas.org/dil/esp/constitucion\\_de\\_la\\_republica\\_del\\_salvador\\_1983.pdf](http://www.oas.org/dil/esp/constitucion_de_la_republica_del_salvador_1983.pdf)>.

Constitución de la Republica de Honduras (1982)

<[https://www.oas.org/dil/esp/Constitucion\\_de\\_Honduras.pdf](https://www.oas.org/dil/esp/Constitucion_de_Honduras.pdf)>.

Constitución de la República del Ecuador (2008)

<<http://www.ecuanex.apc.org/constitucion/indice.html>>.

Constitución Política de la Republica de Nicaragua (1987)

<<https://www.wipo.int/edocs/lexdocs/laws/es/ni/ni033es.pdf>>.

Constitución de la Republica Dominicana, (2015)

<<https://www.one.gob.do/Multimedia/Download?ObjId=75805>>.

Constitución de la República Oriental del Uruguay (1967)

<<https://parlamento.gub.uy/documentosyleyes/constitucion>>.

Constitución de los Estados Unidos Mexicanos (1917)  
<<http://www.ordenjuridico.gob.mx/Constitucion/cn16.pdf>>.

Constitución Nacional del Paraguay (1992)  
<[https://www.oas.org/juridico/spanish/par\\_res3.htm](https://www.oas.org/juridico/spanish/par_res3.htm)>.

Constitución Política del Perú (1993)  
<<http://www.congreso.gob.pe/Docs/files/documentos/constitucionparte1993-12-09-2017.pdf>>.

La ley 65 Por la cual se expide el Código Penitenciario y Carcelario (1993)  
<[http://www.secretariasenado.gov.co/senado/basedoc/ley\\_0065\\_1993.html](http://www.secretariasenado.gov.co/senado/basedoc/ley_0065_1993.html)>.

Ley 1246 (1991) <<https://www.lexivox.org/norms/BO-L-857.html>>.

Ley 14.853 (1962)  
<[https://www.bcn.cl/historiapolitica/elecciones/detalle\\_eleccion?handle=10221.1/63071&periodo=1925-1973](https://www.bcn.cl/historiapolitica/elecciones/detalle_eleccion?handle=10221.1/63071&periodo=1925-1973)>.

Ley 18314 (Ministerio del Interior, Biblioteca del Congreso Nacional 1984)  
<<https://www.leychile.cl/Navegar?idNorma=29731>>.

ley 25.858 ( Decretal 1291/06, 2019)  
<[https://www.argentina.gob.ar/sites/default/files/ley\\_25.858\\_electores\\_privados\\_de\\_la\\_libertad.pdf](https://www.argentina.gob.ar/sites/default/files/ley_25.858_electores_privados_de_la_libertad.pdf)>.

Ley 55/03 (2012)< <https://docs.panama.justia.com/federales/leyes/55-de-2002-dec-6-2002.pdf>>.

Ley Electoral y de Partidos Políticos (1986) <  
<https://www.tse.org.gt/images/LEPP.pdf>>.

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