

The Unfinished Constitutional Debate: **Is Disenfranchisement of Prisoners’** **Right to Vote Possible in South Africa?**

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Chapter 1

Introduction

1.1 Background

The issue of prisoners being isolated from the political arena has existed since the ancient Greek times when crime was harshly punished,¹ for instance by ensuring that the convicted person remained isolated.² In a modern democracy harsh ostracism has no place since it goes against the values of equality and human dignity. In contemporary South Africa a person with a criminal record does not qualify for a position in the National Assembly, National Council of Provinces and in Local Government.³ Section 47 of the Constitution disqualifies people who have been sentenced to more than 12 months imprisonment without the option of a fine as well as those for whom five years has not expired after their sentence has been completed from obtaining membership to the National Assembly. This is taken further by the fact that a governmental department does not employ anyone with a criminal record and unlike the Constitution the forms that have to be filled in do not qualify the matter; they just seek a criminal record.⁴ There are positions created by the South African Constitution that require a level of virtue and ethics that are believed not to be possessed by criminal offenders and the government promotes the isolation of former inmates and this trumps the right of every adult citizen to stand for public office and, if elected, to hold office.⁵ It is the fact that no right is absolute that has led to the disenfranchisement of prisoners being a relevant and unresolved question of law in the South African democratic discourse. Many of the political rights of convicts are already limited to the extreme and so is it fair in an open and free democratic discourse to also strip them of the one political right that they have.

¹ W.M. Grant “Special Project-The Collateral Consequences of a Criminal Conviction” (1970) 23 *V and L Rev* 929 at 941.

² R Kingston “The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France” (2005) 9 *Citizenship Stud* 23.

³ Section 19(3)(b) of the Constitution provides that every adult citizen has the right to stand for public office and, if elected, to hold office.

⁴ The Z83 form asks about the status of a person’s criminal record, meaning that such record bears on whether the applicant fills a position as civil servant.

⁵ Section 19(3)(b) of the Constitution.

South Africa's constitutional dispensation is founded upon the premise that the fundamental rights entrenched within the Constitution of the Republic of South Africa, 1996,⁶ are equally available to all. This generous statement has to be qualified by the fact that fundamental rights are available to the extent that people are sufficiently empowered to exercise them. This point becomes clear in the case of prisoners who cannot exercise freedom of movement. The Constitution embraces liberal democratic values.⁷ This means that the constitutional text does not expressly exclude anyone, which is a great advance on the previous dispensation in which people were not free to participate in the country's political life. Upon emerging into the democratic discourse it was priority for the Constitutional Assembly's first priority was to ensure that such exclusion never occurred again; with the result that section 19 was written into the Bill of Rights to guarantee citizens' political rights. It stands to reason that human rights may be restricted by a law of general application that imposes provisions that are reasonable and justifiable in a democracy.⁸

1.2 The relevance of the topic in modern democracy

The right to vote is confined to adult citizens, but the question entertained here is whether a restriction can be applicable to convicted prisoners. The rights of prisoners has been a controversial question of law recently in South Africa and the series of these questions that the Constitutional Court (CC) has been grappling with began with the issue of the right to vote of prisoners. In the case of prisoners' right to health the CC, in *Lee v Minister for Correctional Services*,⁹ definitively determined that the Department of Correctional Services was responsible for failing to provide adequate health care for incarcerated people. The decision did not create a *lacuna* in the law as it applies to all incarcerated people. However, this was not the case with the question of the right to vote as the CC did not definitively establish that the government was responsible for ensuring that all prisoners could exercise their right

⁶ The Constitution of the Republic of South Africa, 1996 ("The Constitution").

⁷ Section 1(d) of the Constitution provides for South Africa as one, sovereign democratic state founded on the values of, alongside the other founding values, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

⁸ Section 36(1) of the Constitution.

⁹ 2013 2 SA 144 (CC).

to vote. All the CC did was to make sure that every prisoner could vote from behind bars for now, pending government's exclusion of a class of prisoners in terms of the limitation clause.¹⁰

Prisoners are the most unpopular and isolated members of society as a result of antisocial conduct which the state must curb by law enforcement. The crime rate in South Africa is extremely high and it is ruining the possibilities of young South Africans from getting an opportunity at a bright, successful future. It is safe to reach the conclusion that the community at large seems to share the sentiment that individuals that are inclined to carry out criminal conduct should be punished severely so as to deter them from future similar behaviour as well as others. Government would therefore be justified in taking drastic measures to curb this social evil. Thus the political rights in section 19 of the Constitution as well as the other human rights included in the Bill of Rights are not absolute and may be restricted where requirements of the limitation clause in section 36 of the Constitution have been met.

1.3 Research question

In both the *August and Another v Electoral Commission and Others (the August case)*¹¹ as well as *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) and Others (the NICRO case)*¹² the Constitutional Court (CC) left the door open for future disenfranchisement of prisoners. Thus, since the right to vote is fundamental until the question of all citizens within South Africa being legally permissible to vote is definitively answered it will remain a highly relevant topic in our modern democracy. A blanket prohibition on the right to vote of prisoners has been ruled to be unconstitutional by the CC in the *NICRO case* but the matter was not closed.¹³

The research question treated here is whether the “civil death” of some prisoners, that is in its narrow sense of denying them the right to vote in elections whilst they

¹⁰Section 36 of the Constitution.

¹¹ 1999 3 SA 1 (CC).

¹² 2005 3 SA 280 (CC).

¹³ *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) and Others* 2005 3 SA 280 (CC) (*NICRO case*).

are serving their sentence or to disenfranchise prisoners can be justified in the constitutional era of South Africa; and if the right to vote is denied, how the government would implement such disenfranchisement of rights.

1.4 Methodology

In this mini-dissertation the reasoning of the South African Constitutional Court (CC) is investigated to decide whether a decision to disenfranchise prisoners will pass the constitutionality test. First, the right to vote under section 19 of the Constitution; the application of the right under the Constitution, like who can vote; and the limitation of the right under section 36 of the Constitution will be investigated. Further legislation regarding voting; then case law relating to the right as regards interpretation and application by the courts, and then scholarly journal articles will be examined. A constitutional and theoretical methodology will be used as electoral democracy is an extremely important matter in a constitutional dispensation. Overall the main methodology that will be made use of is the desktop methodology as all the data made use of in the research process was literature, case law and legislation rather than field work research. These sources have been studied, analysed and interpreted.

1.5 Hypothesis

Disenfranchisement of prisoners seems most unlikely under the constitutional dispensation of South Africa, as will be shown by discussing the right to vote generally, as well as specifically in South Africa at present. The voting rights of convicted felons will then be probed together with the question whether such people can be a threat to the integrity of democracy in South Africa. Lastly the question of disenfranchisement of prisoners in South Africa will be considered to prove or disprove the hypothesis motivating this dissertation.

1.6 OUTLINE OF THE CHAPTERS

This mini dissertation is composed of five chapters; which are the introduction, the democratic right to vote, the voting rights of convicts, the disenfranchisement of prisoners in South Africa and the conclusion. All these chapters have been chosen to critically analyse my hypothesis so as to see if it is one that is being proven by the data.

The first chapter is the introduction and it is to give a broad overview in the direction the paper will take. The introductory chapter will set out the background of the topic; its relevance in modern democracy; the research question will be formulated; the methodology used and the reason behind its usage will be set out; the hypothesis and how will it be proven or disproven and the outline of the chapters are also set out.

The second chapter is the democratic right to vote and it looks at the relationship between the governmental regime of democracy and human rights. This shall be accomplished by looking at the democratic model endorsed by the Constitution of the Republic of South Africa; the right to vote in section 19; the effort of ensuring everyone's right is met; the weight of human rights in a democratic state and why the right to vote is particularly valuable to South Africans. All in an effort to show this human right sits at the foundation of democracy and as such without it democracy cannot be a stable structure in the system.

The third chapter looks at the voting rights of convicts from a historical perspective. It looks at the origin of civil death and also sets out the philosophy of punishment within the criminal law; sets out both the philosophical theories on citizenship as these state why citizenship is not absolute and how it is to be lost; which has been embraced by the government and which has been embraced by the Constitutional Court (CC), in this examination of the two standpoints in our system the wording of section 3 shall be compared to the wording of chapter 19 and then an enquiry shall be made into whether civil death falls squarely within any of the punishment theories within the criminal law.

The fourth chapter is the disenfranchisement of prisoners in South Africa and it shall be explored by looking at who it was sought by and why it has been invalidated by the CC; what section 36 requires when limiting a right and how these past attempts have failed this section; which of the philosophical theories could qualify as a

justifiable limitation in terms of section 36 within this constitutional dispensation and whether the possibility is there that it will ever pass the section 36 scrutiny.

The fifth chapter is the conclusion which will look at whether the hypothesis has been proven and wrap up the debate.

Chapter 2

The democratic right to vote

2.1 Introduction

Democracy, like the rule of law, has become one of those loosely used terms that seems to have as many definitions as there are legal and political scholars.¹⁴ This has become the case over the years as it has proved by far to be the most equitable form of governance. The concept of democracy can be traced back to ancient Greece and it literally means that the people shall govern.¹⁵ Although this form of governance was formed and developed in Europe it has become widely established in principle and in fact, to the extent that it has become a global phenomenon promoted by the United Nations (UN) as best one suited to correct the wrongs of the past and ensure that they are not repeated.

There are various types of democratic regimes and they are direct democracy, representative democracy as well as participatory democracy. Direct democracy is where the citizens govern directly, and in its purest form it can be extremely counterproductive because people are only interested in advancing their own interests, mostly at the cost of the greater good. This form of democracy barely exists today. On the other hand representative and participatory democracy are necessarily less direct in that representatives are appointed by the people to govern on their behalf. There are certain decisions which may not be made without the direct participation of the people, but generally the representatives are entrusted with the power to decide the best direction for the state to take. As uncertain as the meaning of democracy has become over the years, it remains the best solution for the modern state, provided the governing elite do not abuse their power and become a threat to democracy. In this chapter the democratic model endorsed by the Constitution will be considered with respect to the right to vote as guaranteed in section 19 of the Constitution, the application of this section, the limitation of the right to vote, and the value of the right for South Africans and democracy.

¹⁴ F Fukuyama *The Origins Of Political Order: From Prehuman Times to the French Revolution* (2011) 245.

¹⁵ K Malan "Faction rule, (natural) justice and democracy" (2006) 21 *SAPR* 142 148.

2.2 The democratic model endorsed by the Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa does not endorse a single democratic model but rather a model containing elements of different types. These types are direct democracy, representative democracy and participatory democracy. Direct democracy is hardly present in South Africa, but it does feature minimally such as in section 17¹⁶ of the Constitution, which states that. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. This is promotes the people directly participating in conduct that will bring about the change that they seek to see. Representative democracy is best expressed by the political rights¹⁷ and participatory democracy is best illustrated in public access to and involvement in matters concerning parliament.¹⁸

South Africa's democratic regime is one of proportional representation which primarily requires its citizens to exercise their political rights to ensure that their party of choice is representing them. This democratic model is composed of many elements that operate in concert to ensure efficiency in the service of citizens of the country. All the other elements of this democratic model are vital to its success but not pivotal to its existence. Political rights are an anchor element or requirement of a proportionally representative democratic model.¹⁹

Political rights ensure that there is engagement, or rather participation, in the system provided to serve people's interests. The only way in which it can be said that the prison population cannot meet "the anchor requirement of representative democracy"²⁰ is if society adopts the sentiment that the political arena is one of virtue and will be tainted by the participation of convicts. Today this sentiment is unlikely to gain much support because politicians are commonly known to adopt a cavalier approach to fraud and other white-collar crime. The argument that morality is protected by democracy is not very convincing against the backdrop of rampant criminality and disrespect for the law in official circles. This then begs one to ask as

¹⁶ Section 17 of the Constitution.

¹⁷ Section 19 of the Constitution.

¹⁸ Sections 59, 72 and 118 of the Constitution.

¹⁹ I Currie & J De Waal "Introduction to the Constitution and the Bill of Rights" *The Bill of Rights Handbook* (2015) 15.

²⁰ Ibid.

to the reason behind the government wanting to exclude this portion of the population, is it to protect the political arena or is it to send a message to the law-abiding citizens that special efforts will not be wasted on the guilty portion of our society so that it can exercise its right to vote. Next this train of thought shall be explored and also Robert Alexy's proportionality theory.²¹

2.3 The right to vote in section 19 of the Constitution

The most attractive thing about democracy as a form of governance is that it is based on the principle that the will of the people is paramount.²² In a system of direct democracy the people themselves perform conduct that ensures that their will is done.²³ In modern society the size and complexity of the community forbid the possibility of such direct governance,²⁴ hence the practice of electing representatives to perform the tasks of governance.²⁵ This action is a crucial right whereby people ensure that their will is respected,²⁶ people in this context being those who qualify for citizenship, which must be considered a sacred trust without which anarchy must ensue. The right to vote is therefore a basic condition for the success of democracy.

In the *August case*²⁷ Justice Sachs was the first to publicly recognise the right to vote as guaranteed in section 19(3) of the Constitution as being a symbol of South African citizenship.²⁸ The CC later also highlighted the importance of citizens exercising their right to vote as pivotal for the success of democracy.²⁹ Every vote in a democracy serves to "remind those elected that their position is based on the will of the people and will remain subject to their will. The moment of voting reminds us that both electors and those elected bear civic responsibilities arising out of our democratic

²¹ R Alexy *A theory of constitutional rights* (trans Rivers) (2002) 388.

²² K Malan "Republica Christiana - The Predecessor of Statism" in K Malan & J Scott *Politocracy: An assessment of the coercive logic of the territorial state and ideas around a response to it* (2012) 11 24.

²³ K Malan "Faction rule, (natural) justice and democracy" (2006) 21 *SAPR* 142 148.

²⁴ K Malan "Statist identity: the mortal god acquires a congregation of worshippers — the nation" in K Malan & J Scott *Politocracy: An assessment of the coercive logic of the territorial state and ideas around a response to it* (2012) 127 132.

²⁵ K Malan "Faction rule, (natural) justice and democracy" (2006) 21 *SAPR* 142 148.

²⁶ G Fick "Introduction to the Constitution and the Bill of Rights" *The Bill of Rights Handbook* (2015) 421.

²⁷ 1999 3 SA 1 (CC).

²⁸ *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) (*August case*), par 17.

²⁹ *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC) (the *Richter case*).

Constitution and its values.”³⁰ The only stricture imposed on the right to vote in terms of section 19(3) of the Constitution, therefore, is that it can only be exercised by adult citizens. Rather than a limitation, this stricture merely serves to indicate the special nature of political rights, they require a certain level of maturity and that is why it is entrusted to adults; regardless of the fact that the section itself imposes one stricture no right is absolute and as it can be limited in terms of the limitation clause.³¹

2.4 The effort of ensuring everyone’s rights are met

A vital principle encapsulated in the concept of democracy is that of unconditional equality of all citizens. Nevertheless the majority consider it unfair that convicts should be privileged to cast special votes while confined, whereas no concessions are available to many people in remote rural villages. In South Africa there are many people living in remote rural villages that are still unable to cast a vote and as such to many it seems proper that all the effort be placed into getting these people in a position where they can exercise their right to vote. This line of argument was presented by the state in the *NICRO* case³² in an attempt to justify disenfranchisement of convicts. However, the CC found it inadequate as grounds to impose a ban on such a fundamental right of citizens through which they ensure that the people’s will prevails through their elected representatives. Such rights, especially within the South African context, should be closely guarded and our CC is extremely wary of a situation where democratic rights are easily limited. This is the main reason why our CC places a high premium on the “balancing exercise”³³ when faced with a question of limiting a particular right. The balancing of rights theory is explained to advantage by Robert Alexy,³⁴ and will be used to convey the idea that the democratic rights are not unlimited and the process that the courts engage in when deliberating whether a limitation of such rights is justified.

The right to vote requires positive conduct from both the state and the people; this involves the process of in the registration and casting of a vote by eligible citizens,

³⁰ *Richter* case, par 53.

³¹ Section 36 of the Constitution.

³² 2005 3 SA 280 (CC).

³³ I Currie “Balancing and the limitation of rights in the South African Constitution” (2010) 25 *SAPL* 408 417.

³⁴ R Alexy (2002) 388.

which requires safe methods to prevent irregularities and fraud. The CC held that “the right to vote is indispensable to, and empty without, the right to free and fair elections”.³⁵ Glenda Fick states that the right to vote is guaranteed in sections 19(3) while section 19(2) requires government to ensure an effective electoral process so that all citizens can participate in free and fair elections.³⁶ Preventing electoral fraud is the main reason behind requiring registration as it ensures that South African citizens are the only ones that will be casting a vote as is required by the Constitution. The fact that everyone is marked on their thumb after casting a vote is also a means to prevent electoral fraud as it will ensure that people will not be casting their vote repeatedly. The Constitution awards the right to vote to every adult South African citizen but the Electoral Act³⁷ provides for the exclusion of classes of citizens from the right to vote.³⁸ Section 8 of the Act³⁹ excludes people with mental disabilities and mental-health detainees. Citizens living abroad also used to be excluded once, especially if they had been living abroad for prolonged periods for none of the reasons listed in section 33(1)(e) of the Electoral Act.⁴⁰ The constitutionality of this section was successfully challenged in the *Richter case*,⁴¹ hence such citizens are now free to cast their votes from abroad.

2.5 The weight of human rights in a democratic state

Fundamental rights are not absolute but summary limitation of such rights is naturally prohibited in view of their special nature, so a standard or test is prescribed for the justification of any proposed limitation. “The balancing exercise”⁴² is particularly favoured by the CC although the process is harshly criticised. When a right is limited proportionality is crucial in that the objective of the limitation of the right must not be disproportional to the harm done; this is where the balancing metaphor comes in. The court must ensure that one does not heavily outweigh the other. Robert Alexy

³⁵ *NNP case* par 12.

³⁶ G Fick (2015) 427-428.

³⁷ 73 of 1998.

³⁸ G Fick (2015) 432.

³⁹ 73 of 1998.

⁴⁰ *Ibid.*

⁴¹ 2009 3 SA 615 (CC).

⁴² Currie (2010) *SAPL* 417.

classifies rights as “principles”⁴³ and points out that “principles”⁴⁴ have an “optimisation requirement [which states that] a norm must be realised to the greatest extent possible given the legal and factual possibilities”.⁴⁵ This means that a principle can never be unfulfilled but rather it will only be outweighed by another principle in that particular instance and so just because in a particular circumstance a certain principle took precedence does not mean that it will necessarily take precedence in every circumstance. This interpretation of rights emphasises the fact that equality is not negotiable in a democratic society, so every group or person’s rights will get its due.

The *New National Party v The Government of the Republic of South Africa (NNP case)*⁴⁶ was the first case where the CC had the opportunity to deal in depth with the limitation of the right to vote. The court found that any statute introducing a “restriction that prevent[s] a voter from voting despite the voter’s taking reasonable steps to do so, the provision will constitute an infringement of section 19 of the Constitution;”⁴⁷ when the CC applied it to the relevant set of facts it found that the right to vote was not infringed as those concerned had ample time to apply for the required identity document in order to vote.⁴⁸ This reasoning is as a result of the balancing exercise as there was a legitimate purpose of combating electoral fraud and there was no harm done as people who took the necessary steps could exercise their right. The full proportionality enquiry was unnecessary as the logic is ingrained in our CC. In the *Richter case*⁴⁹ the CC continued with the application of the same standard and found that there was a limitation of the rights guaranteed in section 19 of the Constitution, the infringement was found to be unconstitutional as there was no legitimate purpose evident for the restriction and as such was not justifiable in terms of the limitation clause.⁵⁰

⁴³ Currie (2010) *SAPL* 415.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ 1999 3 SA 191 (CC).

⁴⁷ *Richter case*, par 58.

⁴⁸ *NNP case*, par 40.

⁴⁹ 2009 3 SA 615 (CC).

⁵⁰ *Richter case*, par 78.

Professors Henk Botha and Stu Woolman⁵¹ have been major critics of the balancing theory on the following four grounds. First of all they take issue with the fact that balancing itself presupposes a quantifiable weight that can be assigned to a right, which they disavow because “[h]uman goods are often incommensurable”,⁵² with the result that the practice of balancing creates an opportunity for arbitrary decisions that may be taken by subjective judges. The balancing exercise in a specific case does not necessarily create legal precedence as “a different balance may have to be struck”⁵³ in the next case. This, the two authors argue, contributes to the problem of “incrementalism and conservatism”.⁵⁴ Finally they argue that the balancing idea makes the process of deciding on the limitation of a specific right seem technical whereas it is actually a “dialogue about important moral and political issues”.⁵⁵ All this criticism raised by the two professors serves to place greater emphasis on the fact that rights in a democratic state are crucial and should not nor may not be arbitrarily taken away since that would enable groups to dominate others and thus violate the principle of equality in a democratic state.

2.6 The right to vote, particularly valuable for South Africans

The right to vote is the most foundational right of a democratic society and it is also the one right that the community at large seeks to protect, this is so because if it is lost then the state shall descend from being democratic to possibly being a dictatorship.⁵⁶ In the Republic of South Africa the right to vote has not lost its value intrinsically, but the electorate do not appreciate its power. Voter turnout proves the validity of the right for South Africans, as do the cases referred to the CC for protection of the right for citizens living abroad⁵⁷ or even behind bars.⁵⁸ The right to vote is treasured across the world regardless of how different societies perceive it. It is similarly valued by South Africans who therefore have to shore it up by ensuring

⁵¹ S Woolman and H Botha ‘Limitations’ *Constitutional law of South Africa* (2006) ch 34.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ G Fick (2015) 421.

⁵⁷ *Richter case.*

⁵⁸ *August case* and *NICRO case.*

that they participate in free and fair elections.⁵⁹ Whether this right should be available to all is where our community does not seem to be able to provide a concrete answer. There is also the uncertainty of whether it would ever be possible to legally exclude a class of the society from exercising the benefit of being heard in a democratic state.

2.7 Conclusion.

Representative democracy is anchored upon the availability and exercise of political rights by all the people within a state. It is true that a state enjoys the discretion of having to determine whether they limit rights, as they set out the purpose that they seek to further in so doing, as much as political rights are of fundamental importance within a system of representative democracy they too are not absolute like all the other rights, this means that the balancing exercise also applies to the equally. The foregoing invites the conclusion that the representative model does not recognise the limitation of political rights as a threat to its existence. As noted, proportionality must be preserved by balancing the harm that limitation may do to society against the object of the limitation. Democracy can honestly only be said to be in danger if and when a dictator arises, in which case the majority of the population are completely deprived of their political rights which leads to them also being deprived of most or all of their fundamental democratic rights. When one takes a look purely at the democratic model it does not make sense that a group of people be excluded from the participation in the political arena when their participation in the said political arena cannot be said to be a threat or to present danger to the democratic regime that is being made use of as the governing regime within the state. The SA Constitution is based on the principle of universal adult suffrage,⁶⁰ so exclusion of some adults presents the risk of allowing a tacit amendment of a founding value.

⁵⁹ G Fick (2015) 427.

⁶⁰ Section 1(d) of the Constitution.

Chapter 3

The voting rights of convicts

3.1 Introduction

Drastic changes characterising modern society include the perception that instead of being considered a privilege, citizenship and human rights are now considered an inalienable right. There were various reasons for a person to not be granted citizenship or even when they have they would not be entitled to the fundamental human rights granted by the state and that which we all mutually owe to one another in an effort to respect and uphold human dignity in our society. As noted, the matter at issue object in the present dissertation is loss of citizenship due to imprisonment, commonly referred to as civil death,⁶¹ a concept that denoted three things in English law.⁶² Firstly there was forfeiture to the king of all the convicted person's personal belongings.⁶³ Secondly there was the view that the blood of a convict is corrupt and as such his estate could not be inherited by the heirs or anyone else in the ancestry line.⁶⁴ Lastly the detainee was "regarded as [being] dead in law"; they were "*extra legem positus*" and "in law [they were] *civilitier mortuus*".⁶⁵

Civil death lived through the common law in the English society⁶⁶ and in the USA it was integrated into the legal system by the legislator.⁶⁷ Civil death was a form of punishment commonly imposed on a detainee convicted of treason.⁶⁸ It was an extremely harsh form of punishment as a living person was as good as dead in the eyes of the law, to the extent that even the person's heirs and family were affected.⁶⁹

⁶¹ H D Saunders, "Civil Death - A New Look at an Ancient Doctrine", (1970) 11 *William. & Mary Law. Review.* 988 <http://scholarship.law.wm.edu/wmlr/vol11/iss4/8> [accessed on 05/03/2015] at 988-989.

⁶² G J Chin "The new civil death: Rethinking Punishment In The Era Of Mass Conviction" (2012) 160 *University of Pennsylvania Law Review* 1989 1794.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Saunders, (1970) 11 *William. & Mary Law. Review.* 988 <http://scholarship.law.wm.edu/wmlr/vol11/iss4/8> [accessed on 05/03/2015] at 988.

⁶⁷ Saunders, (1970) 11 *William. & Mary Law. Review.* 988 <http://scholarship.law.wm.edu/wmlr/vol11/iss4/8> [accessed on 05/03/2015] at 990.

⁶⁸ Chin (2012) 160 *University of Pennsylvania Law Review* 1989 at 1794.

⁶⁹ Ibid.

Civil death in this extreme sense no longer applies in modern society;⁷⁰ this has become the case because our penal system is now guided by the various categories of the theories of punishment. One shall discuss these punishment theories and their implications and this shall be followed by a discussion of the traditional philosophies of civil death and citizenship. The South African idea of citizenship will be examined and this shall all lead one to conclude whether the traditional idea of civil death falls into any of the criminal law theories of punishment and into the South African concept of citizenship.

3.2 Punishment Theories

Professor Snyman acknowledges that the imprisonment of an offender infringes upon several of their basic human rights. Answers have been formulated as to “what right society has to punish such people and those have been called the theories of punishment”;⁷¹ categorised into the absolute theory, the relative theory and the combination theory.⁷² The absolute theory sees punishment as an end in itself; it is the offender’s “just desert”.⁷³ It only pays attention to the fact that a crime has been committed in the past and pays no attention at all to the future of the offender.⁷⁴ The retributive theory is the only type of absolute theory.⁷⁵ There is a balance in society that is disturbed by the commission of a crime, the retributive theory sets out to restore this legal balance that has been disturbed.⁷⁶ Punishment is therefore what the offender deserves; it is the payment that the offender owes to the society at large. Revenge is not what is sought but rather that the dignity of the victim is restored.⁷⁷ It is premised on the idea that the offender seeks to dominate their victim and as such by punishing them the right to equality is restored in society; the equality clause is one of our fundamental founding rights within our Bill of Rights.⁷⁸

⁷⁰ Chin (2012) 160 *University of Pennsylvania Law Review* 1989 1796.

⁷¹ C R Snyman *Criminal Law* (2002) 12.

⁷² Snyman *Criminal Law* (2002) 13.

⁷³ Snyman *Criminal Law* (2002) 14.

⁷⁴ Snyman *Criminal Law* (2002) 13.

⁷⁵ Ibid.

⁷⁶ Snyman *Criminal Law* (2002) 14.

⁷⁷ Snyman *Criminal Law* (2002) 15.

⁷⁸ Section 9 of the Constitution, which is the equality clause.

There are various relative theories in terms of which punishment is only a means to a “secondary purpose”.⁷⁹ According to the relative theories the focus is more on the future and on the object.⁸⁰ The first of the relative theories is the preventative theory.⁸¹ The preventative theory’s primary objective is to prevent crime and it generally overlaps with the other theories of punishment as long as they prevent the commission of a crime alongside their purpose.⁸² Then there is the theory of deterrence which can be sub-divided into two.⁸³ The theory of individual deterrence aims to teach the particular offender a lesson which will deter them from ever committing a crime in the future.⁸⁴ The theory of general deterrence makes use of punishment so that the whole community is deterred from committing crimes.⁸⁵ The last of the relative theories is the reformatory theory which is premised on the idea that the purpose of punishment is to reform the offender as a person, so that they may become a normal law-abiding member of the community once again.⁸⁶ Recently there has been mention of the combination theory because the courts do not accept anyone of the punishment theories on its own but rather combine the various theories set out above.⁸⁷

3.3 Civil death

The practice of prisoner disenfranchisement is ancient and it was a practice that was not questioned back then because the philosophers of the day had formulated various theories to defend and explain the need for this practice in our penal system.⁸⁸ The presence of this practice was explained in such a manner that one could accept that it was only reasonable for the justice system to take such harsh measures against an offender so that the equilibrium of the society can be restored. Quite a number of philosophical theories have been formulated to explain and defend prisoners’ exclusion from the right to vote. These range from moral ideas that the ballot paper must be kept pure to more legal arguments of that it is their just

⁷⁹ Snyman *Criminal Law* (2002) 13.

⁸⁰ Snyman *Criminal Law* (2002) 13-14.

⁸¹ Snyman *Criminal Law* (2002) 18.

⁸² *Ibid.*

⁸³ Snyman *Criminal Law* (2002) 19.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Snyman *Criminal Law* (2002) 21.

⁸⁷ Snyman *Criminal Law* (2002) 22.

⁸⁸ J Schall “The Consistency of Felon Disenfranchisement with Citizenship Theory” (2006) 22 *Harvard Black Letter Law Journal* 54 at 54.

punishment as a result of their breach of the social contract.⁸⁹ The dominant arguments in this regard are those held by republicans and liberals, which will now be considered.

3.3.1 The republican view of citizenship

The philosophical school of the republicans are all for the disenfranchisement of a criminally convicted person and their convictions are based upon the fact that the purity of the ballot box has to be preserved.⁹⁰ The argument presented by the republicanism is less based on principle but rather it is one of moral and ethics. One draws this conclusion from the fact that the political community is seen as being inherently good and for that reason it “requires a virtuous citizenry”.⁹¹ The bonds that exist amongst the members of the community are held in a higher regard than the individual rights of the people; these bonds are created and maintained by the political community.⁹² The people within the society must act in such a manner that unity within the community is achieved, every person is expected to carry out feelings that “inspire civic-republican citizens to participate in public affairs and work for the common good” and to seek to achieve “public-minded deliberation”.⁹³

Christopher Manfredi expresses sentiments of a republican when he expresses the view that disenfranchisement is a reasonable response to a criminal offence due to their selfish act and reckless state of mind.⁹⁴ The reaction is reasonable as they have a blatant disregard for their fellow citizens and people who display such conduct will corrupt and taint the inherent goodness of the political community therefore also becoming a threat to the purity of the ballot box.⁹⁵ “[T]he republicans believe that

⁸⁹ J Reiman “Liberal and Republic Arguments Against the Disenfranchisement of Felons” (2005) *Criminal Justice Ethics* 3 at 3.

⁹⁰ Reiman (2005) *Criminal Justice Ethics* 3 at 6.

⁹¹ *Ibid.*

⁹² Schall (2006) 22 *Harvard Black Letter Law Journal* 54 at 84.

⁹³ *Ibid.*

⁹⁴ C P Manfredi “Judicial Review and Criminal Disenfranchisement in the United States and Canada” (1998) 60 *The Review of Politics* 277 at 300.

⁹⁵ Reiman (2005) *Criminal Justice Ethics* 3 at 6.

virtue is necessary for political participation and as well that political participation enhances virtue”.⁹⁶

According to this standard classical school of thought a person convicted of criminal conduct should be disenfranchised as they lack the civic virtue needed for the proper exercise of political rights.⁹⁷ The concept of citizenship held by the republicans should not be mistaken as putting the political community on a pedestal but rather the one interprets their philosophy as holding the political arena in high regard because it is made up of people who consciously make the decision to be good and do good. A distinction is made between nationality and citizenship, as one is the status that one attains by being born within a specific area but the latter is not as a result of a natural process but requires one to show that they are loyal to the country itself and their fellow inhabitants.⁹⁸

3.3.2 The liberal view of citizenship

In his natural state man acts as a primitive beast to ensure that they attain all that is good for them, they are in a continuous state of war with one another.⁹⁹ The imposition of legal order changes this gratification and survival based mode of existence as it “offers every member of society a certain advantage, while at the same time burdening him with an obligation”.¹⁰⁰ This means that the law protects everyone but in return everyone has to meet their obligation of not infringing upon each other’s rights. This is all as a result of the social contract theory¹⁰¹ that the liberals formulated to explain citizenship and individual rights, the above is basically a clause within everyone’s contract when participating in societal issues so to speak. According to Reiman the standard classical liberal argument for disenfranchisement of convicted felons is that criminals violate the social contract and thereby forfeit the political rights to which the contract entitles them.¹⁰²

⁹⁶ Reiman (2005) *Criminal Justice Ethics* 3 at 8.

⁹⁷ Ibid.

⁹⁸ Reiman (2005) *Criminal Justice Ethics* 3 at 6-7.

⁹⁹ Reiman (2005) *Criminal Justice Ethics* 3 at 10.

¹⁰⁰ Snyman *Criminal Law* (2002) 14.

¹⁰¹ Reiman (2005) *Criminal Justice Ethics* 3 at 9.

¹⁰² Reiman (2005) *Criminal Justice Ethics* 3 at 3.

The liberals recognise and respect the autonomy of an individual by granting them individual rights and recognizing that they have choices.¹⁰³ It is therefore only correct that they be excluded from political participation when it is through their own conscious choices that lead them to be in breach of the social contract.¹⁰⁴ John Locke is the most famous social contract theorist and he believed in the natural freedom and equality of man; it is because of this that he states that man can only rightfully be subjected to the authority of others by his own consent.¹⁰⁵ A man consents to be under the authority of the state and to be governed by the laws written and passed by the legislator then it is only right that once they transgress those laws they should not have a say on who is to form the legislator for the next term.¹⁰⁶

The greatest difference between the liberals and the republicans is highlighted by John Rawls when he sets out the liberal thought that “the government may not compel adherence to any conception of the ‘good life’”.¹⁰⁷ This is in great contrast to the republicans who place a lot of emphasis on the virtue of a citizen and how that is required by the political community.¹⁰⁸ According to the liberals citizens are entitled to the “rights guaranteed by the rule of law”¹⁰⁹ and they will only lose them when their conduct portrays a choice to withdraw or breach their consent to the social contract and not because they are acting in a manner that goes against what the government or the political community prescribed.¹¹⁰

3.4 The situation in South Africa

The Constitution of the Republic of South Africa, when it comes to enunciating its standpoint on its view of citizenship, contains a big contradiction within itself. Political rights within the Bill of Rights are guaranteed to all except for children and non-citizens and this is a great departure from the interim Constitution where the political

¹⁰³ Schall (2006) 22 *Harvard Black Letter Law Journal* 54 at 70.

¹⁰⁴ Reiman (2005) *Criminal Justice Ethics* 3 at 10.

¹⁰⁵ Schall (2006) 22 *Harvard Black Letter Law Journal* 54 at 70.

¹⁰⁶ Ibid.

¹⁰⁷ P Josephson “The Great Art of Government: Locke’s Use of Consent” (2002) 1 *University Press of Kansas* at 366-390.

¹⁰⁸ Reiman (2005) *Criminal Justice Ethics* 3 at 3.

¹⁰⁹ Schall (2006) 22 *Harvard Black Letter Law Journal* 54 at 73.

¹¹⁰ Reiman (2005) *Criminal Justice Ethics* 3 at 10.

rights clause was a qualified section.¹¹¹ In the final Constitution the section awarding political rights is unqualified and does not provide for a limitation within itself. This is unproblematic and is extremely clear but the problem arises when one examines section 3, which is one of the founding provisions of our Constitution. In this section sentiments of the social contract theory seem to be enunciated. Section 3(2) of the Constitution assigns all the advantages of citizenship equally to all citizens, but at the same time imposes all the attendant “duties and responsibilities”¹¹² on them. Section 3(3) of the Constitution also authorises the legislator to pass laws that will “provide for the acquisition, loss and restoration of citizenship”.¹¹³ This founding provision clearly aligns itself with the liberal school of thought regarding citizenship; because it expresses the idea that citizenship is something that someone has only if they abide by certain regulations that are set out by the State. This section makes allowance for the State to enact the social contract in a legislation as that could be one of the means by which it regulates the acquisition, loss and restoration of citizenship. This is an alignment with the liberal school of thought rather than the republican because the republicans base their arguments on sentiments rather than a set out legal policy and the Constitution requires law and policy that a legal argument can be based upon in a court of law, especially the CC. It is these liberal sentiments that have motivated the government to support attempts to disenfranchise prisoners. Subsection 3 of the Constitution also promotes sentiment of the rule of law in that the actions of the government have to be authorised by legislation. The liberalist theory has a lot of influences from the rule of law like recognizing the individual liberties of everyone.¹¹⁴

The CC has had to deal with the question of prisoner disenfranchisement on two different occasions.¹¹⁵ The court’s decision on the matter does not fall under either of the ancient schools of thought on citizenship, but has clearly aligned itself with the modern view of including whoever lives within the borders of the state. The CC’s approach is that it is a right that is awarded by virtue of the Bill of Rights and as such

¹¹¹ Section 6(c) of The Constitution of the Republic of South Africa Act 200 of 1993 which states the every adult South African citizen may vote except if they are subject to disqualifications as prescribed by law.

¹¹² Section 3(2)(b) of the Constitution.

¹¹³ Section 3(3) of the Constitution.

¹¹⁴ Schall (2006) 22 *Harvard Black Letter Law Journal* 54 at 73.

¹¹⁵ *August case*; *NICRO case*.

has to meet the requirements of the limitation clause in order to be validly limited. Section 19 of the Constitution awards political rights equally and evenly to all adult citizens, and section 20 of the Constitution clearly and simply states that no citizen may be deprived of their citizenship. This great departure means that the drafters of the Constitution had the intention of the right not being able to be easily deprived from the citizens. This is rightfully so because of our past where the majority of the population were deprived of their political rights. If it was to be easily deprived to a class of the population then section 20 of the Bill of Rights would automatically not be met and that right would automatically be infringed for that class of the population.

Political participation is the essence of being a citizen and the deprivation of one's right to vote means that such a person has been deprived of their citizenship.¹¹⁶ The Constitution because of section 19 and 20, which are basically all inclusive with regards to political rights and citizenship subject to the limitation clause, presents a problem within itself by being founded upon the social contract theory. Yet within the Bill of Rights every adult citizen is awarded equal political rights with no conditions placed on that right and there is also a right of all citizens never being deprived of their citizenship.¹¹⁷ This conflict of which exists within the Constitution also explains the clash which exists between the government and the judiciary. There has been an attempt by the IEC,¹¹⁸ which is a body created by Chapter 9,¹¹⁹ and the legislature¹²⁰ to disenfranchise prisoners but on both these attempts the CC found them unconstitutional. The State on this matter can be said to have taken their mandate from section 3 whereas the judiciary are cognisant of the weight carried by the rights in section 19 and 20 and the importance of section 36 in the process of limiting these two rights.

¹¹⁶ Sections 3, 19 and 20 of the Constitution.

¹¹⁷ The Constitution; the clash is evident in the judgements of *August* and also in *NICRO*.

¹¹⁸ *August* case

¹¹⁹ Chapter 9 of the Constitution.

¹²⁰ *NICRO* case.

3.5 Conclusion

Civil death¹²¹ as a form of punishment falls squarely within the absolute theory of punishment and the type of retributive theory.¹²² This is so because in terms of these theories punishment is seen as an end in itself and it is what the offender deserves.¹²³ This theory of punishment seeks to harmonise the balance in society which has been disrupted by the commission of a crime.¹²⁴ The person who carries out criminal conduct is said that they victimise another so as to assert their dominance within the society.¹²⁵ It is because of this that they deserve punishment; a sense of equality must be restored within a particular society.¹²⁶ The underlying notion is that a person who chooses their actions also then chooses the consequences which flow from such conduct.¹²⁷

One could also find a place for civil death as a form of punishment under the category of the relative theories of punishment specifically the preventative theory which forms part of the cluster of the relative theories.¹²⁸ Civil death also serves the purpose of deterrence, both on an individual basis and generally for the community at large.¹²⁹ The only theory of punishment that civil death does not fall under is the reform theory.¹³⁰ Although with all of that said strictly speaking the punishment of civil death cannot fall under the category of relative theories¹³¹ including all of the punishment theories that form a part of it. The relative theory is also known as utilitarian theory as the person who commits a crime is not seen as a person who deserves to be punished as they are seen as having acted because of the psychological issues that they have not dealt with.¹³² The commission of a crime is not seen as a choice one made freely and consciously but rather their conduct is driven by the internal hurt that they carry.¹³³ It is because of this that punishment

¹²¹ Schall (2006) 22 *Harvard Black Letter Law Journal* 54 at 73.

¹²² Snyman *Criminal Law* (2002) 13.

¹²³ Ibid.

¹²⁴ Snyman *Criminal Law* (2002) 14.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Snyman *Criminal Law* (2002) 13.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Snyman *Criminal Law* (2002) 21.

¹³³ Ibid.

cannot be said to be the final step in the entire matter but rather there is mention of “penal reform”.¹³⁴ The penal system imposes punishment on an offender with the view of the impact that it will have on their future.¹³⁵ Civil death does not conform to any of these goals at all as the punishment is so severe that it accomplishes to sever any ties that the offender has to the legal systems that govern the society.

In modern times the “combination theory” has emerged and it is where the court sentences an offender making use of the various punishment theories together.¹³⁶ The combination of the punishment theories is dictated by the personal circumstances of the offender and the individual circumstances of the crime.¹³⁷ This means that in modern times we have moved away from the idea that we punish to seek to revenge that which was done to a particular victim and the community at large but rather we now acknowledge that the penal system should groom inmates so that they are fit to be released and live within the society. This is especially important in South Africa as our Constitution specifically caters for the rights of the accused and the detained.¹³⁸ This means that our constitutional order seeks to retain the full citizenship status of prisoners throughout the entire period that the person falls under the registration of the penal system. Civil death and all the ideologies that form its basis would be unconstitutional as the loss of the offender’s rights is eternal and some, such as the rights that they get from the law of succession, are perpetual.¹³⁹

The harshness of civil death can never be valid within modern society as a democratic discourse ensures that everyone counts and is protected. The exclusion of prisoners from the population that is eligible to vote, especially when it is practiced in the same manner as the state of Virginia; where disenfranchised prisoners remain without a vote well within their release, disenfranchisement is from conviction until death; does would be unconstitutional.¹⁴⁰ The people that govern in a democratic

¹³⁴ Commission on English Prisons Today (2009) *Do Better Do Less*, London: The Howard League for Penal Reform.

¹³⁵ *Ibid.*

¹³⁶ Snyman *Criminal Law* (2002) 22.

¹³⁷ *Ibid.*

¹³⁸ Section 35 of the Constitution.

¹³⁹ Chin (2012) 160 *University of Pennsylvania Law Review* 1989 1794.

¹⁴⁰ S C Grady “Civil Death Is Different: An Examination of a Post-Graham Challenge to Felon Disenfranchisement Under The Eight Amendment” (2012) 102 *Journal of Criminal Law and Criminology* 441 at 442.

discourse are the ones that actually cast a vote and this is even more so the case in South Africa's democratic discourse where the system of proportional representation is made use of.¹⁴¹ This means that within the governing elite everyone's views are represented and the exclusion of a portion of society from voting excludes their views from being voiced within government. It could be argued that prisoner disenfranchisement is the modern day version of civil death.¹⁴² This is the case in Virginia where the disenfranchisement is for a lifetime¹⁴³ but it has been established that this will never be a reality in South Africa as a blanket ban on prisoners' voting has been disallowed, because of the limitation clause which has to be strictly applied before an infringement of a right can be regarded as being justifiable.¹⁴⁴ The two step enquiry that is provided for in section 36 must both be complied with as so far the CC is yet to encounter a case that they feel is completely compliant. Proportionality between the infringement of the right and the harm that such an infringement will cause is an extremely important exercise that the CC has to engage in the *NICRO case*¹⁴⁵ the CC found such proportionality to be lacking.

¹⁴¹ K Malan "Faction rule, (natural) justice and democracy" (2006) 21 *SAPR* 142 148.

¹⁴² Chin (2012) 160 *University of Pennsylvania Law Review* 1989 at 1815.

¹⁴³ Grady (2012) 102 *Journal of Criminal Law and Criminology* 441 at 442.

¹⁴⁴ *August case*; *NICRO case*.

¹⁴⁵ 2005 3 SA 280 (CC).

Chapter 4

Disenfranchisement of prisoners in South Africa

4.1 Introduction

The right of prisoners' to vote in South Africa was not specifically provided for by the Constitutional Assembly when it was negotiating and drafting the Bill of Rights. The right to vote was simply drafted so as to set out the extent of it without excluding anyone from its ambit, this was left solely to the legislature to do and it had to be guided by section 36 whilst carrying out that task. The fact that it was not dealt with and finalised then meant that it was to remain a looming threat being left to the legislature and the CC to interpret the Constitution in an attempt to create legal certainty in this area of the law. Within the interim Constitution, section 6(c),¹⁴⁶ the right to vote was awarded to all adult citizens but the section qualified the right by stating that such as adult had to not be disqualified from casting a vote by any Act of law. In the final Constitution the right to vote is awarded in section 19(3) to all adult citizens and the section itself does not within itself provide for its own internal qualification or limitation like the interim Constitution did. This new state of affairs has made it that much more difficult for the government to infringe upon this right without a proper justification. The right to vote is one of the many rights within our Constitution that requires the state to take positive measures to ensure that the right is fulfilled. The fact that the government, or the Chapter 9 body that has been entrusted with the facilitation of ensuring that this right is fulfilled, is unable to maximize the budget so that all are able to exercise their voting rights is insufficient reason to permissibly infringe upon this right.¹⁴⁷

Quite earlier on in our democracy the voting rights of prisoners had been under threat as there had been a reluctance on the part of the officials to take the necessary positive measures so as to ensure that those that are living behind bars also have the opportunity to exercise their voting rights.¹⁴⁸ The first attempt was done by the Independent Electoral Commission (IEC) when they refused to implement the necessary steps to be taken for facilities to be in place for prisoners

¹⁴⁶ Section 6(c) of the Constitution of the Republic of South Africa Act 200 of 1993.

¹⁴⁷ *August* case par 33.

¹⁴⁸ Cause of action in the *August* case.

awaiting trial to cast their votes. This matter landed before the CC in 1999 right before the elections, after the Transvaal High Court found in favour of the IEC by stating that the IEC was not under any legal obligation to make any special arrangements for that portion of the society to be able to cast their vote. This decision was overturned by the CC in the August case¹⁴⁹ for reasons that will be explored later on in this chapter.¹⁵⁰ Another attempt was carried out by the legislator when parliament promulgated an amendment to the Electoral Act¹⁵¹ that made allowance for the blanket disenfranchisement of prisoners on the grounds that they were the authors of their own misfortune and as such no cumbersome and expensive steps should be taken for their benefit. The CC in the *NICRO* case¹⁵² found this reasoning to be unconstitutional alongside the blanket exclusion of prisoners from voting. This was seen as a blanket exclusion as prisoners awaiting trial and those serving a sentence but had an option of paying a fine and failed to do so were the only ones that could cast a vote.

The CC did not find this wide exclusion as being constitutionally valid and pointed out that a category of prisoners should have been disenfranchised instead.¹⁵³ The fact that a conclusive answer to this question of law has not been given means that we run the risk of a few more attempts being made at excluding a portion of the prison population. In this chapter one seeks to establish whether the disenfranchisement of some prisoners will ever pass the constitutional threshold and if so what it would take for such to happen. This will be achieved by examining why the CC invalidated the previous two attempts of disenfranchising prisoners and what does section 36 of the Constitution require when limiting a right. Then it will be examined the manner in which the past attempts failed to meet that which is required by section 36; an examination shall be held as to whether which of the philosophical theories could qualify as a justifiable limitation in terms of section 36 within this constitutional dispensation. All of this will lead one to conclude as to whether the possibility is there but will it ever pass the section 36 scrutiny.

¹⁴⁹ 1999 3 SA 1 (CC).

¹⁵⁰ *August* case par 42.

¹⁵¹ 73 of 1998.

¹⁵² 2005 3 SA 280 (CC).

¹⁵³ *Nicro* case par 67.

4.2 Why has disenfranchisement been invalidated by the CC?

When it comes to the infringement of the voting rights of some citizens, in this instance prisoners, the requirements set out by the limitation clause¹⁵⁴ have to be met; as neither the Constitution nor the Electoral Act¹⁵⁵ provides for the disqualification of prisoners from voting. The CC has had two cases where it had to judge on the constitutionality of the disenfranchisement of prisoners and they are to be critically analysed next.

4.2.1 *August v Electoral Commission (August case)*¹⁵⁶

The matter before the CC was about the voting rights of awaiting trial and sentenced prisoners. An appeal against the Transvaal High Court decision which held that the Independent Electoral Commission (IEC) had no obligation to ensure that prisoners could register and vote in the coming general elections was upheld. The CC pointed out that for the 1994 elections parliament had excluded prisoners convicted of murder, aggravated robbery and rape. Since the coming into force of the 1996 Constitution parliament has not sought to exclude these or any other class of prisoners. It was pointed out that the power to disenfranchise prisoners lies solely with the legislature. No legislation had been enacted or amended and as such the IEC was obliged to take all the reasonable steps to ensure that prisoners could vote. The CC raised the concern that over a third of prisoners were awaiting trial and many of these were kept behind bars as a result of them not being able to pay low amounts of bail and small fines. It was suggested that parliament could rather disenfranchise a class of prisoners and an example was made of those convicted of serious offences, as is done in other jurisdictions. No democratic jurisdiction was found that disenfranchised prisoners awaiting trial. The IEC was told to find a practical solution for defining “ordinarily resident” as they would in the case of hospitalised people and diplomats abroad. The IEC was therefore ordered to make the necessary arrangements for prisoners to be registered as voters.

¹⁵⁴ Section 36 of the Constitution.

¹⁵⁵ Electoral Act 73 of 1998.

¹⁵⁶ 1999 3 SA 1 (CC).

4.2.2 *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) and Others (NICRO case)*¹⁵⁷

The CC upheld an application challenging the amendments to the Electoral Act. The amendments deprived prisoners serving a sentence of imprisonment without the option of a fine of the right to register and vote in the 2004 elections. In South Africa's context the right to vote is extremely important and it is therefore required of the government to place sufficient information before the CC demonstrating what purpose the disenfranchisement is intended to serve. The Minister of Home Affairs stated that the reason behind the exclusion of prisoners serving sentences of imprisonment without the option of a fine from the right to vote was based on the costs and logistics involved. This reasoning was rejected by the majority of the court as the arrangements were already in place for those prisoners that were not covered by the disenfranchising provision and there was no evidence placed to prove that the IEC lacked the resources to expand these arrangements. The second reason advanced was that the government did not want to be seen as condoning criminal behaviour. The court acknowledged that crime was a big problem in South Africa but the amendment did not specify which criminal conduct it was targeted at and to do this merely to portray a certain image to the public was insufficient reason to deprive prisoners of their fundamental rights. No explanation was given for the fact that a person who qualifies to be a candidate for elections was prohibited from voting. The amendments prohibited all prisoners sentenced to imprisonment without the option of a fine from voting, while the Constitution permits a prisoner serving a sentence of imprisonment of less than 12 months without the option of a fine to stand for election.

The minority judgements found the limitation to be reasonable and justifiable therefore constitutional. This is because they found the policy of the government on crime to be valid and this reinforcement of it to be justifiable. They further point to the fact that the limitation is a temporary one that will only last for the duration of their imprisonment sentence. Justice Ngcobo remedied a possible problem in his judgement by stating that the provision should be read as excluding prisoners awaiting the outcome of an appeal as their conviction could be overturned and they would therefore be unjustifiably deprived of their right to vote.

¹⁵⁷ 2005 3 SA 280 (CC).

4.2.3 Implications of the two Constitutional Court judgements

In the *August case*¹⁵⁸ the disenfranchisement of prisoners was as a result of the IEC's refusal to meet their obligations in terms of the Electoral Commission Act.¹⁵⁹ The legislation requires positive conduct to be taken in order for the population to be in a position to exercise their voting rights. Section 5(1) of the Act¹⁶⁰ provided for the functions of the Commission which include managing any election, this includes registering voters. The CC found the conduct of the IEC to be unconstitutional in the *August case*¹⁶¹ as it was not conduct that was grounded upon the law of general application in terms of the limitation clause requirement.¹⁶² The court also further stated that the judgement was not a permanent prohibition on the Parliament to disenfranchise certain categories of prisoners but that such a further attempt had to be in terms of a law of general application so as to be compliant with the limitation clause.¹⁶³

Right before the third national elections held in 2004 the legislature heeded the call that there needs to be a law of general application when it amended the Electoral Act¹⁶⁴ with the Electoral Laws Amendment.¹⁶⁵ In terms of this amendment prisoners serving sentences of imprisonment without the option of a fine were disenfranchised by preventing them from registering as voters and voting while in prison.¹⁶⁶ This amendment set double standards as unsentenced prisoners and as well as those who were incarcerated because they could not pay imposed fines could effectively be registered and vote. Despite the platform that the CC was given they chose not to give a conclusive answer on this matter but rather they opted to give the legislature a sense of direction by stating what would never be permissible and left the rest up to them should they wish to make another attempt at limiting this right. This legal uncertainty left by the CC can be attributed to the fact that we live in a society

¹⁵⁸ 1999 3 SA 1 (CC).

¹⁵⁹ Electoral Commission Act 51 of 1996.

¹⁶⁰ Ibid.

¹⁶¹ 1999 3 SA 1 (CC).

¹⁶² *August case* par 23.

¹⁶³ Section 36 of the Constitution. *August case* par 3.

¹⁶⁴ 73 of 1998.

¹⁶⁵ 51 of 1996.

¹⁶⁶ *Nicro case* par 2.

governed by the principles of *trias politica*.¹⁶⁷ The doctrine of the separation of powers could have been behind the CCs reluctance to interfere in the functions of the legislator, which is to make laws.

In the *NICRO case*¹⁶⁸ the state categorised prisoners into three categories and they were prisoners waiting to be trialed; prisoners who had been sentenced to a fine but due to their inability to pay the fine they were then imprisoned as an alternative and then finally there were prisoners serving time behind bars without having received the option of paying a fine.¹⁶⁹ It was this last category of prisoners that would be effectively disenfranchised.¹⁷⁰ The CC was of the view that this amounted to a blanket ban on prisoners from voting as in this category of prisoners no distinction has been made between those that have committed grave crimes and those that have committed minor offences.¹⁷¹ The fact that the government seeks to project conduct that will be evidence of the fact that they detest criminal conduct was acknowledged by the CC as being a good and worthy goal, especially in a society such as ours where the crime rate is at an abnormally high rate.¹⁷² As good as the purpose driving the state was it was insufficient to allow for the blanket ban as it became evident that the state had no intention of using this as a means to deter people from participating or carrying out criminal conduct.¹⁷³ This was evident when the state stated that "...it would be unfair to others who cannot vote to allow prisoners to vote"¹⁷⁴ and this was rightfully rejected by the CC as there is a positive duty on the state regarding the right to vote that is owed to every citizen equally.¹⁷⁵ The state cannot use its failure to ensure that a portion of the population is able to vote as a reason to infringe upon the right to vote of another portion of the population.¹⁷⁶ The CC ruled in the *NICRO case*¹⁷⁷ that a blanket ban was unconstitutional and left the matter at that, Parliament is yet to make another attempt

¹⁶⁷ *Julius Malema v the Chairman of the National Council Of Provinces and the African National Congress* (Heard on 24 November 2014 and judgement delivered on 15 April 2015) par 45 where the court gives an explanatory note on the traditional doctrine of separation of powers.

¹⁶⁸ 2005 3 SA 280 (CC).

¹⁶⁹ *Nicro case* par 13.

¹⁷⁰ *Ibid.*

¹⁷¹ *Nicro case* par 67.

¹⁷² *Nicro case* par 46.

¹⁷³ *Nicro case* par 67.

¹⁷⁴ *Fick* (2015) 437.

¹⁷⁵ *Nicro case* par 25 and 28.

¹⁷⁶ *Nicro case* par 66.

¹⁷⁷ 2005 3 SA 280 (CC).

of infringing prisoners' right to vote but should they make another attempt in the future then that is the guideline which they will have to use as a point of departure.

4.3 What does section 36 require when limiting a right and how have the past attempts failed this section.

Section 36 of the Constitution encapsulates the limitation clause and it is in terms of this section that the limitation of any of the fundamental human rights that are included in our Bill of Rights should be carried out. The application of this general limitation clause is a two-stage approach that has to be fulfilled before there is a justifiable limitation of a right and not merely an infringement of a right.¹⁷⁸ "A law may legitimately limit a right in the Bill of Rights if it is (a) a law of general application that is (b) reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".¹⁷⁹ The first requirement is an expression of the basic principle of the rule of law,¹⁸⁰ which requires that the government's conduct must be authorised by law and that it must not be *ultra vires* that lawful authority.¹⁸¹ The effect of the lack of this first requirement was clearly illustrated in the *August case*¹⁸² where the infringement of a human right was based purely upon the decision that the IEC took. The fact that there was no law at all upon which the decision which was taken was grounded, it fell at the first leg of the section 36 enquiries and as such it was unnecessary for the CC to conduct any further probing into whether there was a justifiable limitation. The IEC only has the power to make policy and regulations regarding the positive steps that they will take so as to ensure that the people of South Africa are able to exercise their right to vote. This means that nothing that purely and originally emanates from the IEC will ever qualify to pass the first stage of the "two-stage approach"¹⁸³ and they need to wait upon the legislature to promulgate legislation on the matter. The fact that the law must be of general application is driven by our past and that was emphasised by Justice Ackerman in *S v*

¹⁷⁸ Section 36 of the Constitution.

¹⁷⁹ Section 36(1) of the Constitution.

¹⁸⁰ I Currie & J De Waal *The Bill of Rights Handbook* (2015) 156.

¹⁸¹ C Hoexter *Administrative Law in South Africa* (2015) 122.

¹⁸² 1999 3 SA 1 (CC).

¹⁸³ I Currie & J De Waal *The Bill of Rights Handbook* (2015) 152.

*Makwanyane (the Makwanyane case)*¹⁸⁴ where he stated that there is no room in a constitutional state for a law which has arbitrary and unequal application.¹⁸⁵ In South Africa's democratic discourse it was important that there would never be a possibility of law that is directly aimed at a particular person or specified group of people and that is because the country was emerging from an era where that was permissible and often happened, such as in the case where the Robert Sobukwe law¹⁸⁶ was successfully promulgated by Parliament. This law was enacted so as to specifically get Mr Robert Sobukwe to transgress the law and face penal action being taken against him and so to avoid this unfair situation playing out again it had to be required that a law must find application to the general population at large.

In terms of the second stage of the enquiry process the reasons behind the limitation of a right are probed into and basically the court is set out to look for reasons that are acceptable in a society that is in a transparent and democratic discourse. Beyond this reasonableness is also necessary and it basically requires "that [the limitation] should not invade rights any further than it needs to in order to achieve its purpose".¹⁸⁷ This leg is where the balancing exercise, as is set out by Robert Alexy in his work,¹⁸⁸ is applied by the court. The reason given for the limitation of a right in the Bill of Rights has to be an extremely compelling one and it is due to this requirement that the amendment to the Electoral Act¹⁸⁹ in the *NICRO case*¹⁹⁰ did not pass the constitutional probing. The reason was found to be not good enough to constitutionally limit a right and due to such circumstances that is where the enquiry process ended in that particular case. The balancing exercise requires for there to be proportionality between the right and the harm done by the limitation.¹⁹¹ In the *Makwanyane case*¹⁹² the CC identified factors to be taken into account during the proportionality enquiry and they are the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and if there are any other less restrictive means to

¹⁸⁴ 1995 2 SACR 1 (CC).

¹⁸⁵ *Makwanyane* par 156.

¹⁸⁶ General Law Amendment Act 37 of 1963, section 17 of it was known as the "Sobukwe clause".

¹⁸⁷ I Currie & J De Waal (2015) 162.

¹⁸⁸ Alexy (2002) 388.

¹⁸⁹ 73 of 1998.

¹⁹⁰ 2005 3 SA 280 (CC).

¹⁹¹ R Alexy (2002) 388.

¹⁹² 1995 2 SACR 1 (CC).

achieve the purpose.¹⁹³ This is to ensure that rights are not easily infringed upon and that if there is another way that will maximise the exact same purpose without there being any right being infringed then that should be utilised regardless of how much more it would be inconvenient on the State.¹⁹⁴ This is where the *August case*¹⁹⁵ would have also failed as it is insufficient for them to limit the right to vote as it would cause financial and administrative inconvenience; this second stage of the enquiry would have totally failed.

4.4 Which of the philosophical theories could be adduced to justify the limitation of a fundamental right under the present constitutional dispensation?

The disenfranchisement of prisoners has been eloquently formulated into theories of citizenship by two philosophical schools that have been around way before the Constitution with its limitation clause.¹⁹⁶ The question which then lingers in one's mind is which of the two philosophical theories on the matter would qualify as a justifiable limitation in terms of section 36 of the Constitution within this constitutional dispensation. In the *NICRO case*¹⁹⁷ the state relied heavily upon the republican train of thought which is basically that the integrity of the political system is being preserved and that is why the exclusion of incarcerated people is good. In this case “[t]he government’s rationale for introducing the amendment to the Electoral Act¹⁹⁸ was to preserve the integrity of the voting process”.¹⁹⁹ This was so because making it possible for prisoners to vote will mean that a mobile voting station will have to be made use of so that they can cast their special votes.²⁰⁰ The government took the view that these steps posed extremely high risks against the integrity of the right to vote and the electoral process in whole this then means that they will have to take special measures to ensure that these risks do not materialize into the potential

¹⁹³ These are now incorporated into section 36 of the Constitution.

¹⁹⁴ R Alexy (2002) 388.

¹⁹⁵ 1999 3 SA 1 (CC).

¹⁹⁶ Section 36 of the Constitution.

¹⁹⁷ 2005 3 SA 280 (CC).

¹⁹⁸ 73 of 1998.

¹⁹⁹ G Fick *The Bill of Rights Handbook* (2015) 436.

²⁰⁰ *Nicro case* par 26.

problems that they could cause.²⁰¹ This argument failed but not because it had been tested and tried against section 36, but rather because the state failed to discharge the onus that lay upon them regarding the financial and logistical difficulties that they would face in the pursuit of these financial measures.²⁰²

The government, within the same case, also presented arguments which expressed liberal views as they stated that disenfranchisement would “enhance civic responsibility and respect for the rule of law”.²⁰³ This argument is in line with the liberals who expect major respect for the rule of law to be shown by all in a society and civic responsibility to be exercised by every citizen. In this regard the CC made use of the *Sauvé v Canada (Chief Electoral Officer) case*²⁰⁴ where a similar argument had been presented. That court invalidated it regardless of the fact that evidence had been presented in support of the statement, in South Africa the CC rightfully invalidated it as the state did not have any evidence to serve as proof of the statements that they had made.²⁰⁵ This means that in none of the cases that the CC had to deal with on the matter did they ever have to test the philosophical theories presented against the section 36 enquiry.

On face value it would seem to one that the republican theory will never pass the section 36 enquiry, especially the leg where the balancing exercise has to be conducted. The reason of seeking to preserve the system’s integrity will never be in proportionality with the nature of the right as well as the harm caused by the limitation. The liberal’s theory on the other hand may suffice as that is driven by the purpose of seeking to decrease the crime rate and as such if sufficient proof is presented to serve as evidence to that effect it is more likely that this theoretical approach can pass the section 36 enquiry.

4.5 Conclusion

The possibility of prisoners being disenfranchised is there but will it ever pass the section 36 scrutiny. The first stage of the section 36 process is a relatively easy and

²⁰¹ Ibid.

²⁰² *Nicro case* par 51.

²⁰³ G Fick *The Bill of Rights Handbook* (2015) 437.

²⁰⁴ *Sauvé v Canada (Attorney General)* [1993] 2 SCR 438.

²⁰⁵ *Nicro case* par 67.

straight forward hurdle to get over because all that it requires is that a right be limited in terms of a law that has general application and is not targeted at a specific person or seeks to oppress a specific group of people. The greatest obstacle that the state will face when defending such a law is with the second stage of the enquiry process as that is when the court will have to engage itself with the balancing exercise.²⁰⁶ Political rights are extremely important within the system and as such the purpose driving the need or desire to limit them has to be an extremely compelling one as it needs to be weighty enough to strike a balance with the harm that will be caused by the infringement so that it becomes a justifiable limitation.²⁰⁷

Aside from the technicality of the balancing exercise one also has to bear in mind the value of political rights in the South African democratic discourse because South Africa has only now recently emerged from a time where political rights were deprived from the majority of the country purely on the arbitrary grounds of race. The final Constitution is clearly aimed at avoiding a repeat of such an unjust situation because it is extremely generous in the ambit of all the political rights²⁰⁸ as well as the rights regarding citizenship²⁰⁹ and voting.²¹⁰ It will be extremely difficult for the state to justify the limitation of all these rights to even a small portion of the society, this will be a great stumbling block in the second stage of the section 36 enquiry as the court has to bare this in mind especially when it probes into the nature of the right.

The fact that section 36 also requires the court to look into whether there was alternative means to achieve the exact same purpose that would be less restrictive²¹¹ on the human right that is being limited means that the court must always accept the limitation as a last resort. In the case of prisoners being disenfranchised there seems that there will always be less restrictive means because the people are already incarcerated as their punishment. It will be a difficult onus for the state to discharge that it is “reasonable and justifiable in an open and

²⁰⁶ The second part of section 36(1) of the Constitution requires the limitation to be reasonable and justifiable in a democratic society.

²⁰⁷ R Alexy (2002) 388.

²⁰⁸ Section 19 of the Constitution.

²⁰⁹ Section 20 of the Constitution.

²¹⁰ Section 1(d) of the Constitution.

²¹¹ Section 36(1)(e) of the Constitution.

democratic society based on human dignity, equality and freedom”²¹² that a further punishment be imposed on prisoners.

²¹² Section 36 of the Constitution.

CHAPTER 5

Conclusion

The law is more than just a mere rule and it is the one mechanism of the state that the people put a lot of trust in as it is assumed to see past social class, race and promotes equality before it. This ensures that the law creates order and to a certain extent it serves to tame our animalistic urges so as to ensure that we continue living in a civilised society. Legal certainty is a need so as to ensure that this state of affairs remains being the case, where there is a *lacuna* in the system it is our obligation within the legal profession to ensure that it is closed for the sake of achieving the maintenance of law and order. The right to vote of prisoners is such a *lacuna* that is a gaping hole that needs to be filled so as to obtain legal certainty on the extent of political rights. In this mini-dissertation one had set out to prove that it would seem to one that the disenfranchisement of prisoners would never become a reality in the constitutional dispensation of South Africa. One is placed under this impression by the fact that the law does not does easily yield to what the people want and align its decisions with the will of such people. It is one of the advantages of the judiciary not being elected as they do not have any need to please the people that put them into power but rather they stay true to their mandate upholding the law and most importantly the Constitution. This fact was extremely evident in the *Makwanyane* judgement²¹³ where the CC found the death sentence to unconstitutional and as such called for it to be abolished regardless of the fact that the majority of the people in South Africa wanted the death purpose to still be around. The justices of the CC were extremely unpopular after they reached such a decision but that was a secondary thing to take into consideration whilst the constitutional rights being infringed were a primary consideration to occupy the CC.

The prison population is the most unpopular in our society and as such the government is looking for ways in which it can make it obvious to all that those who commit hurtful deeds against the community will not be pampered and be showered by the government with special measures tailored for them. Parliament and the people occupying the various positions in the executive branch of the state are

²¹³ 1995 2 SACR 1 (CC).

elected into power by the people and as such they seek to please them. The CC does not have this pressure and they stay true to their mandate.

In its very essence and nature the right to vote is pivotal to the success of a democratic discourse as it is the primary way that it can be ensured that the people shall govern. This means that it will be extremely difficult for the state to put forth a purpose that is equally as weighty so that it can pass the proportionality enquiry to be conducted by the court as is required of it by the limitation clause.²¹⁴ The crime rate in South Africa is extremely high, especially the crimes of rape and murder, it would seem to one that since the CC found a blanket ban on prisoners from voting as being unconstitutional it would be more easy to justify the exclusion of these prisoners from voting. The danger that the pose to the society at large is grievous enough to be of a comparable weight against the right to vote when the CC performs the proportionality and balancing exercise in terms of the limitation clause²¹⁵ that all law has to comply with in order for an infringement to be converted to a valid limitation.

14 165 Words

²¹⁴ Section 36 of the Constitution.

²¹⁵ Ibid.

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