***Should prisoners enjoy all their political rights?***

Elena Larrauri and José L. Martí

(Pompeu Fabra University)

*Notes for a paper presented in the Workshop on Political Rights for Prisoners*

*(Pompeu Fabra University, Barcelona, January 29, 2016)*

**1. INTRODUCTION**

• Prisoners all over the world are usually deprived of at least some of their political rights. In some countries (in the US, the UK, and in more than 50 other countries, see Rottinghaus et al. 2003), felons are totally disenfranchised. Even in some countries where prisoners are allowed to vote, they are usually deprived of the right to run and stand for elections as well as of other non-electoral political rights. There is no country on earth where prisoners keep all their political rights intact.

• This paper questions whether this denial of political rights is justifiable. And we respond negatively to that question. We argue that the deprivation of political rights of any kind to prisoners is *generally* unacceptable –keeping open, however, to admit some marginal exceptions.

• There is much confusion in the use of the concept of political rights by the literature on prisoners. The traditional scope in this literature focuses on voting rights. But the category of ‘political rights’ is much wider than that. It certainly includes voting rights. But it also embraces, first, other political rights that are associated with, and instrumental to, voting rights; second, other electoral rights that are not voting rights; and finally, many kinds of non-electoral rights. Still, prisoners might also enjoy other democratic rights that are not strictly political, like rights of internal participation in the management and organization of prisons. Very little has been said regarding these other political rights and the participatory non-political rights, despite the fact that prisoners are usually deprived of them. And this paper proposes to expand this traditional scope to cover all of them. We will clarify all these types of political rights –and non-political rights- in section 2.

• In many jurisdictions, like the Spanish one, there is also much confusion in how to describe such denial or deprivation of political rights, whether as part of the punishment or as a collateral consequence of it, whether by legislation, judicial decision or administrative decision. We also aspire, in section 3, to clarify the different ways in which political rights are usually denied or deprived. We will focus in the Spanish case, but will make comparisons with other systems. Sections 2 and 3 integrate the conceptual and descriptive part of the paper.

• The normative part starts, in section 4, with the assumption that prisoners should enjoy voting rights. This is a big assumption, since the existing debate about political rights has precisely focused on this premise and there is no agreement about whether prisoners should enjoy such rights or not. But we do not aim at contributing to such debate here. We will take for granted that prisoners should keep such right protected, as it actually happens in countries like Spain. The aim of the paper is rather to make a step further, by extending the discussion on voting rights to the rest of political rights. Thus, this paper is an attempt to trigger the discussion about a comprehensive view of prisoners’ political rights that is virtually non-existent in the current literature.

• Despite taking it for granted, we will sketch an argument to show why prisoners should enjoy political rights. We will claim that democracy requires giving political rights to all adult, mentally abled citizens. And when some are deprived of such rights, they are dominated by the democratic system. Political rights are part of the core of citizens’ fundamental rights and freedoms, like the freedom of conscience and religion, the freedom of expression, the right to education or the right to health care. If some citizens are deprived of some of these rights, these citizens will be unduly and unnecessarily harmed in a way that exceeds the area of a justified punishment. As we said, the purpose of section 4 is not to make a case for recognizing political rights to prisoners against those who have advocated the denial of such rights, which we take for granted. The aim is rather to show that the reasons why prisoners should have voting rights are the same why they should enjoy all the other political rights.

• But if this is so, why there seems to be an asymmetry between voting rights and the other political rights? In those countries, like Spain, where citizens are allowed to vote, they are significantly deprived of most of their other political rights, like the right to stand for election. Why is it so? Is there any argument that might justify such asymmetry? As the literature has not paid any attention to this issue, we cannot discuss the arguments of any scholar who has tried to justify such asymmetry. Consequently, in section 5 we speculate about what such arguments might be. We identify four main arguments that could justify the denial of political rights other than voting rights: namely, the empirical impossibility argument; the security argument; the general liberty deprivation argument; and the lost trust argument. We reply to all these four arguments affirming that they are insufficient to justify a denial or deprivation of political rights, but except in very exceptional circumstances.

• The paper concludes, in section 6, by stating that prisoners should have generally granted all their political rights. The aim of this paper is to call the attention of experts and the public around this important phenomenon that, very surprisingly, has been almost entirely neglected by both the scholar literature and the political debate. There is no country that we know in which prisoners enjoy all their political rights. In different degrees, then, a very serious injustice is being done to them. And, even more importantly, all our democracies face a legitimacy deficit, they are less legitimate than they could be, because of that.

**2. THE NOTION OF POLITICAL RIGHTS**

• When we speak of political rights in a democracy, we normally think in the right to vote in periodic elections. But the category of political rights is much wider than that. We propose to see political rights as divided into two categories: electoral and non-electoral political rights. Still, we will add to these categories other democratic rights that are not strictly political: the rights of participation internal to prisons.

• Electoral rights are the rights associated to the electoral process. The core of electoral rights is two-fold. On the one hand, we certainly have the right to vote in the elections. On the other, we have the right to stand for those elections. These two folds always go together, and they are considered the two sides of the same coin. This is how democratic rights have been always conceived and preserved by international declarations of human rights (like the ICCPR) or by constitutional bills of rights (art. 23 Spanish Constitution).

• It is important to notice that these core electoral rights presume other political rights that are instrumentally necessary for a correct exercise of the right to vote and the right to be elected. For instance, the freedom of information about political issues and about the electoral alternatives. How could someone meaningfully vote in an election without having at least the possibility to get informed about the candidates who are running for election? But also the right to be informed about the government’s decisions and activities, which is crucial to assess the task of government in the next election, or the right to contribute and get involved in electoral campaigns.

In sum, under the heading of electoral rights there are two core rights, the right to vote and the right to be elected, plus a bunch of other political rights, that are also linked to electoral processes and that are instrumental to the other two.

• Non-electoral rights are all those political rights that are not necessarily associated to an electoral process. Sometimes they are referred as rights of direct participation in the public affairs (art. 25 ICCPR; art. 23 Spanish Constitution). This is an ample category that includes rights such as:

* the freedom of expression
* the freedom of association
* the right of access to public information (other than electoral)
* the right to serve in a jury
* the right to petition
* the right to political initiative
* the right to participation in referenda, consultations, or recalls
* the right to take part in bodies of citizen participation like citizen assemblies, councils, participative budgeting
* the right to take part and give support to political (but non-electoral) campaigns
* the right to participate in political marches and demonstrations

• All this covers the category of political rights. But besides them, prisoners might enjoy other kind of democratic, participatory rights, that are not strictly political. These are the rights of participation in the administration and management of the prison itself, like the right to elect representatives to be members of the board, the right to issue a complaint, the right to create commissions, etc. In this article, we will not pay much attention to these other democratic rights, but there is no reason why prisoners should not enjoy them as well.

**3. THE DENIAL OF POLITICAL RIGHTS**

• Political rights are being denied to prisoners in many forms in different countries. Sometimes they are formally or explicitly denied, either by legislation, judicial decision, or administrative decision. Some other times they are simply not recognized in prisons, and prisoners are not helped to exercise them, as they often are with other fundamental rights like, for instance, their freedom of religion or their right to education.

• Rights can be denied as part of the punishment itself, as it happens in many countries with voting rights or with the disqualification for legislative or public office mostly associated to bribery or corruption crimes. This can be, in turn, part of the direct punishment (established by the legislation in civil law systems) or as ancillary punishment (discretionally imposed by the judge).

In some cases it is usually conceived as a collateral consequence,[[1]](#footnote-1) as an additional consequence or measure, particularly of imprisonment –even if in some legal systems they can persist much longer than imprisonment itself. Quite often, it is not very clear –even for experts- whether they should be seen as one thing or the other.

• Sometimes, even if the right is not formally denied, for some reason its exercise is made very difficult or is compromised. For instance, in Spain prisoners enjoy a right to vote in elections since 1995. However, the reality of the exercise of this right to vote is far from ideal. First, only 0.5% of felons vote in the elections. It is true that 40% of felons in Spanish prisons are not Spanish citizens, and –with some exceptions- they do not enjoy voting rights in Spain at all.[[2]](#footnote-2) But a turnout of 0.8% of Spanish felons is still extremely low. You can expect felons to be more disaffected than the average. But in a country were turnout usually oscillates around 70%, something else must be going on. The gap is simply too large.

• The reason for that gap does not lie in the difficulty of the procedure of voting. They can vote by mail, which is reasonably easy. Part of the reason might be, instead, that they do not enjoy the other electoral rights instrumental to voting. For instance, prisoners are not recognized to have a right of access to political information as such. Candidates and political parties are not allowed in Spain to organize rallies or political meetings in prisons (the case of the CUP in Catalunya). Newspapers and access to Internet are often restricted. During electoral campaigns, there is certainly no political climate in prisons.

• Things are worse regarding the other side of the core of electoral rights: the right to run and stand for in elections. In Spain it is possible to eliminate the *right to run for election for a limited time, while the person is serving his sentence.* This can be done through two ways:

1. As a *sentence* that the judge imposes (this is usually the case in electoral offences, see Ley Orgánica 5/1985 de Régimen Electoral General, LOREG).
   1. This in turn might be as a *direct punishment* (art.41, art.44) or as an *ancillary punishment* (art.55: mandatory in the case of prison higher than 10 years; or optional, art. 56: in case of prison sentences up to 10 years).
      1. When it is an ancillary punishment especially for sentences below 10 years this a ‘cheap’ punishment to impose. Additionally the judge does not have to motivate that it is related to the offence. Therefore the most common ancillary punishment imposed in Spain is the ‘prohibition to run for election’. Somehow paradoxically this is done because there seems to be no harm in this punishment….
2. As a ‘*collateral consequence*’ meaning that the electoral law (art. 6.2 of the Ley Orgánica 5/1985 de Régimen Electoral General, LOREG) forbids anybody convicted of prison to run for election while they are serving their punishment. This is done through the RCP that sends all this information to Junta Electoral Central.
   1. Since it is only while people serve their prison sentence probably the justification is that he could not serve his position. This is the reason why somebody convicted of a fine or community service could be elected (if the judge has not sentenced him, in which case it would be a)
   2. Interestingly, criminal records are not an obstacle to run for election.
3. As a *case study Otegui* (he wants to run for election as soon as he has served his prison sentence, but the case is now being legally contested).

• Finally, many non-electoral rights of prisoners are often denied or restricted also as a collateral consequence. Prisoners are not allowed to get out of the prison to participate in a citizen assembly, or in a consultation, or in a citizen council, or in a participatory budgeting process, or to organize a political initiative or a campaign. They have no special access to Internet in order to allow them to sign electronic petitions, or to give support to a legislative initiative. They are not allowed to attend a demonstration. In many of these cases, they are not explicitly denied such rights. But they are not able to exercise them without some collaboration of the prison administration. And the mere fact that they are in jail is not a reason not to take seriously the exercise of such political rights. In virtue of their freedom of religion, prisoners are provided with religious services –even if not of all their religious faiths- in order to facilitate the exercise of such right. In virtue of their right to education, they are allowed to receive books or connect to Virtual Campuses to study at open universities. In virtue of their right to health they are allowed not only to receive treatment in prison, but also to get out to go to hospital, if necessary. The exercise of all these other fundamental rights is granted and facilitated. But nothing similar happens with political rights, except with strict voting rights, and even in that case, as we have seen, something seems to make voting very difficult.

**4. THE IMPORTANCE OF POLITICAL RIGHTS**

• Democracy is the ideal of the government of the people, by the people and for the people. And it is the only form of government that respects the values of political freedom and equality. Freedom here requires self-government, the government of the people and by the people. Equality requires that everyone is equally included in the process and that the government is for the people.

• In a democracy, all adult, mentally abled citizens must have a fair share in the distribution of political power. This is so according to all philosophical principles of inclusion (for instance, the all-affected principle, the all-subject principle, or the equal stakes principle). Democratic laws are legitimate because they are, directly or indirectly, the expression of the people’s preferences and judgments. And the only way to know what such preferences and judgments really are is by letting the people vote in periodic elections as well as participate through other non-electoral but important mechanisms.

• Thus, a government is not democratic unless all adult, mentally abled citizens have the capacity to participate directly and indirectly in the determination of the public affairs (art. 25 ICCPR). This entails the recognition of the principle of universal suffrage, both active and passive, but also of other forms of citizen involvement and direct participation in the public affairs.

• As republicans have stressed, enjoying these extensive political rights is a condition for saying that the government is *self*-government, and compatible with individual freedom (Pettit, Habermas). Republicans distinguish between horizontal or social domination and vertical or political domination. The former is exerted by a private agent over another private agent. The latter is exerted by the state or a public agent over a private agent. Being dominated just means falling under the arbitrary will of the others, under the ultimate control of others. If we fall under the domination of another private agent, we are horizontally dominated. If we live in a political system in which we are not granted a fair share in the determination of its political direction, we are vertically dominated. Thus,

republicans emphasize that i) when some adult, mentally abled citizens are deprived of their political rights, they are vertically or politically dominated; and consequently ii) the democratic state that deprives some of its citizens of their political rights is less legitimate; so the existence of vertical domination over a fraction of the population undermines the legitimacy of the whole system.

• Think on the historical examples of disenfranchised women or racial minorities. Regardless of whether those political systems protected more or less effectively the interests of those collectives –and the truth is that they did not such at all-, those disenfranchised groups were politically dominated, and such political systems were significantly less democratic and legitimate for that reason. The same argument extends to prisoners. And for republicans, for that reason, political rights are the most fundamental of all rights. They are, so to speak, the rights of rights. And the deprivation of such rights produces not only the political domination of the state over prisoners, but also compromises the legitimacy of our democracies.

• Children or mentally disabled people can be denied political rights without being vertically dominated. The reason is that they are incapable of leading an autonomous life. Only those who are capable of such an autonomous life can claim to have political rights that, in the end, are rights of (political) autonomy. But any other exclusion would be unjustifiable because it would produce vertical domination, as it happened with women or African American in the US, since they are as capable of developing an autonomous life as male and whites. And the same applies to prisoners, even if, temporarily, they have the mobility restricted.

• But republicans also emphasize that electoral rights are not enough. Public authorities must be accountable before the people, they must be subject to popular contestation, and the people must retain the ultimate control over them. Having electoral rights (voting rights and the right to run for election) is an essential part of that, but it is not sufficient. In order to make democracy work, to avoid the risk of abuses of power, to prevent also the powerful from getting more power through lobbying or other forms, and to hold public authorities accountable and subject to contestation, transparency and other kinds of rights of direct participation (like the ones mentioned in the previous section) are needed. Just voting once every four years among a range of candidates without knowing much about them and about their policies is not sufficient. That is why republicans emphasize the importance of having an active citizenry engaged in public affairs and participating in different ways. It is not that this kind of active engagement should be mandatory for all citizens, but at least those who want it should be able to do it. Therefore, a wide range of political rights that go beyond mere electoral rights should be granted for all adult, mentally abled citizens.

• Even from non-republican democratic theories, which attribute a less central role to political rights, such rights are always seen nevertheless as basic or fundamental. They are regarded at least as so fundamental as the right to education, the freedom of religion or the right to health care.

• Now, the question is: is it justifiable to deprive prisoners from their political rights? In principle, it is not. These are rights that belong to the core of individuals’ fundamental rights. A punishment that consists in depriving prisoners from their rights to health care, their right to education, or their freedom of religion, would not be justifiable. And the same applies to political rights. But in this case there is an additional reason: depriving them from such rights means making the system as a whole illegitimate for them, so it turns the rest of the punishment –like imprisonment itself- illegitimate as well. Things are worse if we see this political rights deprivation as a collateral consequence of punishment. If it is not justified to deprived them from these rights as an imposition of punishment, how could it be justified to allow such deprivation as a collateral consequence?

• For the same reason, we would never accept that women or African American could enjoy voting rights but not their other political rights, electoral and non-electoral. Normatively speaking, it is simply not consistent to deprive an individual or group of individuals of their rights to run for elections or their non-electoral rights if their voting rights are being warranted.

• And moving beyond this: assuming that depriving prisoners from their voting rights is unjustifiable, is there any reason why it would justifiable to deprive them from the other political rights, such as running for elections, participating in citizen assemblies, or organizing political campaigns or legislative initiatives?

**5. FOUR ARGUMENTS TO DEPRIVE PRISONERS FROM POLITICAL RIGHTS OTHER THAN VOTING**

• We will examine two pragmatic arguments and two principled arguments. But we are happy to consider any other objection you might think it would be appropriate.

*5.1. The physical impossibility argument*

• The simplest argument, and the one that might have played a larger role in the Spanish legislation depriving prisoners from the right to run for election, is the argument that certain political rights require liberty of movements of the kind that is lost during imprisonment. For instance, MPs must be able to attend parliament meetings, talk to their constituencies, receive the visit of lobbies, negotiate with other MPs, etc. But that would apply to the right to participate in participation bodies, like Citizen Assemblies, or the right to organize campaigns or promote legislative assemblies. This argument fits with the collateral consequence hypothesis. The denial of political rights is not part of the punishment. It is not even a formal denial. It is just a collateral consequence of having lost the freedom of movement.

• But this argument is really weak. First, the Internet can make physical presence avoidable or reduce it to very marginal instances. Mechanisms of virtual participation are developed enough, and will be even more in the future, to make physical presence largely unnecessary (example of business meetings, and the case of breastfeeding in Parliament). Second, in those cases in which physical presence is necessary or irreplaceable prisoners might enjoy specific temporal permissions to get out of the prison (as they already do in exceptional circumstances, like when they need some medical treatment that cannot be administered in prison).

• Very few actions of exercise of political rights are physically impossible unless one enjoys permanent freedom of movement. What is impossible is, of course, impossible. But all the rest should be facilitated.

*5.2. The security argument*

• The argument for restricting certain political rights, like the right to attend a political rally or meeting –implementable by letting candidates to enter into the prison- or the right of access to information through Internet, might be that these activities might endanger the security of the prison or might allow prisoners to continue with their criminal life through Internet.

• We agree that the argument of security might justify **some restrictions** to the exercise of some rights. But given that we are talking about a very core fundamental right of people, it should be applied very restrictedly, only to very exceptional and clear cases. Allowing the prisoners to demonstrate in the prison might easily develop into a rebellion. But if prisons allow priests to come along in order to allow prisoners to exercise their freedom of religion, why political candidates should be different? On the other hand, if it were true that having unrestricted access to Internet might really generate some risk of promoting crime or allowing prisoners to organize their evasion, then that could be a reason to restrict such access maybe only to political resources. But this should be done on an individual basis, and not as blanket ban. And its application should be, in any case, very exceptional.

*5.3. The general liberty deprivation argument*

• A more principled argument, that might complement the physical impossibility one, could emphasize that all political rights that are not, strictly speaking, voting rights are just secondary, less important rights, associated to the general liberty of movement. Citizens have the right to attend a political rally or to participate in a march as they have the right to go to the beach or to the movies. All these are rights associated to the general liberty of movement, and it is justified that they are restricted or even denied when prisoners are punished to lose their liberty of movement. Prisoners cannot invoke their right to go to the beach to get a license to get temporarily out of the prison. That is why we can call this argument the beach argument.

• But this argument is flawed. It begs the question regarding the importance of political rights other than voting rights. As we saw in section 4, all political rights are fundamental and they come in a package. Some electoral rights are instrumentally necessary to make the exercise of voting rights valuable and meaningful. Rights to stand for election are as central to democracy as voting rights. And most of the non-electoral rights are also fundamental both to avoid political domination and to grant the legitimacy of the political system. Therefore, exercising political rights *is not* like exercising the right to go to beach. It is not a mere instance of the general liberty of movement. These rights are really comparable to other fundamental rights, such as the right to education, the freedom of religion, or the right to health care. And the legal system as well as the prison system should make the necessary decisions to make their exercise possible and compatible with their confinement in prison. What is more, to the extent that these two things were not compatible, that would be an additional reason against the punishment of privation of liberty (as it would be if such punishment were incompatible, for instance, with the right to health care).[[3]](#footnote-3)

*4.4. The lost trust argument*

• The last principled argument we want to examine here targets the recognition specifically of the right to run for election to prisoners. It does say nothing about the other political rights, but aims to show that there is a case for limiting the rights to run and stand for elections on normative grounds. The argument states that running for election, and therefore trying to become a democratic representative, requires certain doses of honorability and trustworthiness that prisoners have generally forfeited. How can you represent your constituents and promote the common good if you have failed to behave properly even at the most basic level of not committing crimes?

• We respond to this argument with **several counter-arguments. First,** it is not obvious to us that the argument, if plausible, applies equally to all sorts of crimes. Committing a political corruption crime might compromise the honorability and trustworthiness of the offender in a way that it other crimes, like possessing or selling a small amount of marihuana might not. Similarly, one thing is to be a serial killer who torture and rip the victims, and quite another to be a reckless driver who killed a pedestrian when lost the control of the car for being checking the mobile phone. So even if the argument were sound, we would favor a very restrictive interpretation of it that would reduce the deprivation of political rights only to some specific crimes, mainly those with a political nature. And then again, shouldn’t the people be able to choose or not choose this person?

• The **second** thing is that we do not use the argument of honorability and trustworthiness to restrict the right to run for elections of any other collective in our society. For instance, we do not deprive of such right to **Nazi** associations –with some exceptions in some countries-, or to **alcohol or drug addicts** who are following a program of detoxification, or to people with some mental illnesses like depression or stress disorder that are not sufficient to declare them mentally disabled. We do not exclude any of these people, even if we might think that some of them are not very trustworthy. And we do not make this kind of political rights conditional to any other marker of honorability. Why we do not do so? First, because the price to pay in terms of political domination and democratic legitimacy is simply too high. And second, because we trust the electors and their judgment to select the best candidate taking all these considerations and others into account. In other words, the ones who have to make a judgment about the honorability and trustworthiness of candidates are the citizens themselves, not the legislators who are legally excluding some collectives or the judges who are imposing certain specific punishments in the use of their discretion, let alone the prisons official who is making a decision about whether prisoners can exercise certain rights or not.

• **Finally**, the state may be justified in punish the offenders for having committed a crime by depriving them from their general liberty of movement. But it is not obvious why this justified punishment should come normatively associated with a general loss of trust on behalf of the fellow citizens. We are not saying that it is irrational that the trust of other citizens on them can be partially undermined by the commission of a crime. This might happen, as a matter of fact. For the same reason, other citizens might be more suspicious of them if some other similar crime is committed as soon as these offenders get out of the prison. Imagine a rapist who operated in certain neighborhood gets out of the prison and the day after another woman is raped in the same area. Many people will probably think that he was guilty of that new rape. Even it might be rational for the police to start by asking him where he was that day on that hour. But all this is compatible with a strict respect for his right to presumption of innocence. It is the normative, automatic loss of the right to run for elections what bothers us, even in those cases in which the prisoner committed a political crime. Again, we are talking about a fundamental right of individuals, not a secondary, almost irrelevant liberty or privilege. And its loss should be justified with stronger normative arguments than this.

**6. Conclusions**

Since we are mainly interested in the Spanish situation we would like to highlight two points for discussion:

1. Even if prisoners may vote, retain this right, this will not be a fully recognized right unless the Administration admits what we called ‘instrumental rights’. Prisoners in Canada and Norway are reported as voting close to 50/70%. The fact that only a 0,8% vote cannot be easily dismissed. It sends a double negative symbolic message: that we do not take (prisoners) rights seriously, and that governors may do as they please.
2. The withdrawal of the right to run for election is questionable as a sentence and as collateral consequence.
3. As a sentence it is discussable if we should admit the deprivation of political rights (we do not admit for example the deprivation of nationality)
4. As a collateral consequence we have shown that there are no consistent arguments to deprive prisoners of this right.

1. In some cases it is an ancillary punishment imposed by the judge but in many it is a collateral consequence imposed automatically by some administrative law or body. [↑](#footnote-ref-1)
2. However, the denial of voting rights to immigrants is already unacceptable and unjust, and it undermines also the legitimacy of our democracies (Martí 2016). And foreign prisoners are not even helped to vote in the countries of which they are nationals. So they are deprived of voting rights in a double dimension. [↑](#footnote-ref-2)
3. We thank Zach Hoskins for that suggestion. [↑](#footnote-ref-3)