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„Franchise and Legitimacy.

An analysis with reference to England's history of electoral law.“

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Franchise and Legitimacy.

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In the present paper I aim to analyse how the franchise can be distributed legitimately, i.e. according to the principles of freedom, equality and reasonable acceptability. For this purpose I use the example of the English history of electoral law in order to gain insights into actual franchise patterns. By systematizing the underlying justifications of the so-found qualifications I develop an analytical framework that can be used to assess the legitimacy, not only of the English suffrage but of any potential distribution of voting rights. The key conclusions are that a certain combination of citizenship/residence qualifications is legitimate, as are minimum age and mental sanity requirements. However, the exclusion of prisoners, conscientious objectors, or disenfranchisement based on property and sex can not be justified.

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I. INTRODUCTION

“Democratic institutions have intrinsic moral value.”¹

In recent political theory the discourse has often focused on the special value and significance of the democratic political process. In fact, democracy is mostly discussed in the context of justice and legitimacy, with authors often concentrating on the demonstration of democracy's intrinsic value. Its foundations, however, i.e. those conditions that render the democratic political process possible in the first place, are hardly ever questioned. Instead they are presumed to be “legitimate”, “just” or simply “pre-given” as such. In the first part of my paper I aim to reject this assumption by pointing out a precondition of democracy that, if constituted illegitimately, renders a democracy as such illegitimate: the demos.

Starting off from Lincoln's description of democracy as *“government of the people, by the people and for the people”* I will first explicate the conception of democracy that I endorse in the present paper. I argue it is a form of constitutional government that comes into being through regular free and fair elections in which all members of “the people” have a right to an equal say. It is a political concept, which is why the issue of coercive enforceability is crucial. There are several other participatory rights commonly associated with democracy, but it is primarily the “democratic say” that distinguishes democracy from all other forms of political organisation. No matter what particular conception of democracy we adopt, those in charge of political decisions always recruit from, belong to and are, in the end, the same as

¹ Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 2

those who are governed by them. Thus, what makes democracy special is the congruence of the people ruling and those ruled. The problem is that it is not at all obvious who those “people” are, let alone who “all” of them are. This ambiguity will be the main focus of my paper, because through my clarification of the concept of “legitimacy” I will show that democracy is quite often charged with normative aspirations that we should be careful to accept. For example, the concept of “democratic legitimacy” states that democracy uniquely realizes the normative requirements of legitimacy – namely freedom, equality and reasonable acceptability – and therefore claims that democracy itself is a requirement. However, I aim to show that democracy's legitimacy fundamentally depends on the premise that the demos is constituted according to principles that are themselves legitimate. Hence democracy can only be legitimate if both its demos and the political process live up to those standards. Theorists have spent a lot of time and energy defending the latter. But what renders a demos legitimate?

In the third part of this paper I will try to answer this question by constructing a systematic framework of principles that can be used to distribute the franchise legitimately. In order to define what kind of in- and exclusions are justified, I will use the second part of this paper to give an overview of English electoral law, because it is an example for how democracy may develop in regards to its people. I will analyse which qualifications are currently used for dis-/enfranchisement and on what basis they have evolved. The main questions are: Who enjoys suffrage? On what grounds has suffrage been granted? And: How have the answers to those questions changed over time? It is crucial to acknowledge that the aim of this assessment is not actually historic, but theoretical, as is the purpose of this paper. That is to say I do not mean to provide an exhaustive study of the history of England's electoral system, but rather give an account of its franchise patterns in a way that allows me to arrive at theoretical principles that can be used to develop a general system of franchise distribution. To this system I can then apply the concepts of legitimacy so to conclude, not only whether English franchise regulations are legitimate, but also whether their underlying justifications are. I thus mean to use this example to answer the general question of how to legitimately constitute a demos. Note that I will integrate political and historical as well as theoretical literature, in order to allow for a more comprehensive insight into potential franchise patterns and their justifications.

In sum, the question this paper seeks to answer is: Who should get the right to vote? Or, put

differently, how should franchise be regulated in a legitimate democracy? This means I will only deal with the legal aspects of franchise distribution, not with de-facto aspects such as indirect barriers to voting. I will not make any assumptions about whether the democratic political process is actually as “intrinsically legitimate” as some authors like to suggest, because for the present purpose it suffices to argue that (legal) franchise is a central precondition for democracy and that therefore it is necessary to analyse its legitimacy.

II. THEORETICAL CLARIFICATIONS

1. Democracy

1.1 Introduction

When searching for a definition of democracy² that is accurate, but at the same time allows to capture its spirit and the normative ideals associated with it, it is almost impossible not to stumble across an aphorism attributed to the American president Abraham Lincoln. To him, democracy was “*government of the people, by the people and for the people*”³. I have decided to pick up on this quote, not only because it is a very popular slogan, but also because it is a good starting point for clarifying the slightly different conception of democracy that I will be working upon in the present paper. Note that I do not presume that any of those clarifications are what Lincoln himself had in mind, but that I view it as a formulation which can be used in order to provide structure to my own argument.

I will proceed by firstly analysing three central aspects of Lincoln's definition: First, he states that democracy is “*government*”⁴. This is crucial because it renders democracy a political

² Note that my work will be concerned with modern democracy only. It is not possible within the limited scope of this paper to consider both ancient as well as modern versions of democracy. See e.g. Sartori, Giovanni: *Demokratietheorie*, Wissenschaftliche Buchgesellschaft, 2006, pp. 274-288 for exhausting comparison.

³ Note that he is claimed to have used this formulation in the famous “Gettysburg Address”, a public speech held in Gettysburg, Pennsylvania on 19 November 1863. For reference see e.g. <http://showcase.netins.net/web/creative/lincoln/speeches/gettysburg.htm> (last visited on 12 April 2010, 11:11) or Sartori, Giovanni: *Demokratietheorie*, Wissenschaftliche Buchgesellschaft, 2006, p. 44 [Note that I refer to the German version of this book where it literally says “Regierung des Volkes, durch das Volk, für das Volk.”. However, I have used several websites to confirm my English translation, e.g. <http://www.democracy.ru/english/quotes.php> (last visited on 18 April 2010, 12:28) or http://thinkexist.com/quotation/democracy_is_the_government_of_the_people-by_the/6959.html (last visited on 17 April 2010, 18:37)].

⁴ Note that some theorists might contest the idea that democracy primarily is a concept of government. However, I agree with Pennock in his observation that the “*primary meaning*” of democracy “*relates to a*

concept and that brings with it a specific set of implications which must not be overlooked. Second, to Lincoln democracy is government “*of*”, “*by*” and “*for*” the people. I will concede to the former two interpretations while deliberately cautioning against the latter. Last, I will turn to the aspect of the “people” and I will suggest that while this term is obviously most prominent within the quote, it has strangely often been overlooked by democratic theorists. I aim to deviate from this tradition in that the “people” and its role and significance within the concept of democracy will be the main focus of my paper. Actually, I will go even further and argue that it is central to democracy's legitimacy too. Hence I will have used Lincoln's quote to lay down the groundwork of my own argument.

1.2 Democracy as a strictly political concept

Lincoln referred to democracy as a form of government⁵. This is important, because it clarifies that democracy is first and foremost a *political* concept and is thus not to be confused with just any kind of majoritarian decision-making. Instead the “political”, or “narrow”, reading of the term implies that democracy is primarily concerned with making collectively binding decisions⁶. Its main function is to create laws, i.e. rules that every member of its community is bound to abide by. What is more, those rules are enforceable and hence a matter of coercion. On the other hand, a “general”, or “wide”, conception of democracy would suggest that it is not limited to the political realm, but that it refers to any sort of collective decision-making procedure which satisfies certain procedural requirements. I will argue that despite procedural similarities, it is nonetheless crucial that I commit to a political conception in the present paper.

In order to illustrate the difference, let us consider the following example: It is Saturday night and a group of friends decides to go to the cinema together⁷. There are several movies on, but none of them appeal to everyone and there is disagreement about what to watch, therefore they decide to hold a vote. Everyone has an equal say, and whichever movie has the most

form of government” (see Pennock, Roland: *Democratic Political Theory*, Princeton University Press, 1979, p. 3)

⁵ Note that some might feel confused by my defining democracy as “government” instead of a sort of government-producing *procedure*. However, by defining democracy as a particular sort of government I actually invite the explication that it is special due to the specific set of procedures (e.g. free elections) that bring that government into being.

⁶ See e.g. Dahl, Robert: *Democracy and its critics*, Yale University Press, 1915, pp. 106-107.

⁷ Note that David Estlund has inspired the following example when he offered a very similar one at a peer discussion at Warwick University in January 2009.

supporters is the one that they will watch together. This seems rather “democratic” compared to other options. For example, they could simply get annoyed by their disagreement and thus cancel movie-night altogether. While this would certainly prevent favouring any one person's movie preference, it would also be defeating the original purpose of movie night thought. Another option would be to simply split up, each of them going to see the movie of their choice. This way each of them would be able to see their most preferred film. Yet at the same time they would be quitting on going out together. They might therefore draw the conclusion to simply flip a coin and take their chances, still holding on to the idea of going in as a group. All of them would then assert an equal chance of having their movie preference realized, but in the end most of them would end up *not* seeing their preferred movie.

What makes the first option seem so much more “democratic”⁸ than the other scenarios, is that it involves the familiar act of “voting” and of having a majority decide, elements which we know well from the political democratic process. What is more, it actually depicts a *collective* decision-making procedure: A group is making a decision together *as* a group (instead of individually and each for their own), and they are actually *making* a decision on the issue at hand (not simply quitting in the face of disagreement). Furthermore, they do so by using a specific *procedure* (voting and aggregating preferences). All of this indeed resembles “democracy”. However, there is one important characteristic that this situation lacks: the matter of bindingness or enforceability. Even if the majority of my friends decides that we are going to see movie *A*, I may still drop out and not do it. Perhaps they will be angry, but it is not likely that they will quit our friendship over it, and – no matter their disappointment – they are not in any way entitled to drag me in to see the movie with them. This is because how I choose to spend my evening is not their decision to make, not even if we are friends, not even if I behave unreasonably – it just is not a collective matter, so to speak.

In contrast, consider another example: Imagine a democratic referendum on whether or not a certain tax law should be implemented. Again, every member of the community, e.g. each citizen, has an equal vote and an opportunity to use it. However, the point is that no matter my initial preference, if the collective decision is in favour of the new tax law, I will still end up having to abide by this rule. Trying not to will most likely result in the state taking the money

⁸ See Christiano, Tom: Democracy., In: Stanford Encyclopedia of Philosophy (first published online on 27 July 2006 - <http://plato.stanford.edu/entries/democracy/>, last visited on 11 April 2010, 23:13) for a definition of democracy that would allow for this situation to actually be called democratic.

away from me anyway, or in me having to leave the country. This is because state taxes actually are a matter of collective interest and being a member of society brings with it the responsibility to abide by rules that protect what is in the collective interest. Thus, in this case, even if I dislike the result of the collective decision, even if it is to my own disadvantage, I am not able to drop out (not usually, at least). This shows that in the case of political democratic decisions, when they have the form of laws that is, the matter of enforceability is pressing, because (within a constitutional state at least) those rules always have binding force.

What those two examples are supposed to show is that despite their procedural similarities there still is a crucial difference between “general” and “political” democracy. We may consider both cases of collective decision-making procedures, but the degree of collectivity is different and this results in a different degree of bindingness and enforceability – collective decisions do not generally have binding force over others⁹, but laws do.

In the present paper I will therefore work with a political conception of democracy. As we have seen, this definition is narrow in the sense that it excludes “private” situations. However the limitation does not refer to the content of decisions (e.g. in the sense that politics would be limited to questions of conquest and power¹⁰), but to the specific background of collectivity which leads to coercive enforceability. Regarding collectivity, I suggest that politics is about matters that *fundamentally* affect all people within a certain group and that it affects them *collectively*, because it shapes the “*basic structures*” - that is, its “*main political, social, and economic institutions, and how they fit together*”¹¹. Regarding enforceability, I argue that democracy should be understood as “*a way of making coercively enforceable collective decisions*”¹² and that therefore one of the key questions is about “*legitimate coercion*”¹³. The very concept of (political) democracy is hence intimately linked with questions of *what* may

⁹ Note that this is not to say that there never is any coercion (or never any legitimate coercion) within the private realm. I do claim, however, that it is of a different nature.

¹⁰ See Sartori, Giovanni: *Demokratietheorie*, Wissenschaftliche Buchgesellschaft, 2006, ch. 3 for further remarks on that issue.

¹¹ Note that I have borrowed this formulation from John Rawls (see Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 11), but slightly simplified it in order to make it fit my own conception. For Rawls, the basic structure of society has much graver implications, because he presupposes that it refers to a “closed” (ibid, p. 12), “democratic” (ibid. p. 11) society that members enter only by birth and leave only by death (ibid. p. 12).

¹² Coleman, Jules: *Rationality and justification of democracy*, In: Christiano, Tom (Ed.): *Philosophy and Democracy*, Oxford University Press, 2003, p. 216

¹³ Coleman, Jules: *Rationality and justification of democracy*, In: Christiano, Tom (Ed.): *Philosophy and Democracy*, Oxford University Press, 2003, p. 218

be enforceable, *how* we should decide upon that, and, obviously, *who* should be in charge of this decision.

1.3 Democracy – Government “of”, “by” and “for” the people?

As we have seen, American president Abraham Lincoln described democracy as government “*of the people, by the people and for the people*”. In the present section I will now turn to analyse each of those ascriptions. I suggest that they all refer to important strands of democratic thought, and that it is actually quite common for them to be referred to in the same breath. Yet, I claim that they are nonetheless distinct and should actually be treated that way.

1.3.1 Democracy – Government of the people

Lincoln's first ascription is that democracy is “*government of the people*”. Obviously there are two possible ways to construe this¹⁴. First, it can be understood to mean that democracy is a form of politics where “the people” have governmental authority. On the other hand, the formulation could also be seen to declare the exact opposite, namely that democracy is politics in the sense that it *governs* the people. On the one interpretation the people are (at least part of) the government, on the other they are merely subjected to it. In fact, both perspectives hold some truth and need to be combined in order to understand the nature of democratic politics.

The former interpretation simply states that the people are the subjects of democratic government. This may be seen as a confirmation of my argument in the previous section, where I claimed that democracy has to be understood first and foremost as a political concept. It means that democracy's main function is to create binding rules, i.e. these rules bind the people as their subjects. This is indeed a key feature of democracy in that it renders it political, yet it is in no way unique to it. Any form of effective government has this function. It is therefore not a strictly democratic characteristic at all, but rather a consequence of politics' nature more generally. However, the opposite is true if we combine it with the latter interpretation, which states that in democracy the people actually *form, are, or make up*, the government. It claims that the people are the ones having political authority and thus the

¹⁴ See Sartori, Giovanni: *Demokratietheorie.*, Wissenschaftliche Buchgesellschaft, 2006, p. 44 for a very similar version of the following analysis.

power to create binding laws¹⁵. If we combine this with the fact that the people are the subjects of the democratic government, it means that “the people” are both ruling and ruled at the same time. Government and those subjected to it are therefore one and the same¹⁶. This indeed is a fairly unique characteristic, because it is by no means common to all forms of government. This feature is therefore distinctly democratic in that it distinguishes democracy from other forms of political organisation¹⁷.

In sum, I thus conclude that democracy is indeed “*government of the people*”, in the sense that those ruling actually belong to and recruit from the people who are ruled¹⁸, and this is what marks out democracy as such.

1.3.2 Democracy – Government by the people

I will now analyse Lincoln's definition of democracy as “*government by the people*”. According to Giovanni Sartori this part of the quote is most difficult to flesh out and he claims that it does not actually add relevant insights about democracy's nature. Instead he claims that it shows how Lincoln's statement is mostly rhetoric and that the only reason we read so much into it is simply because we associate Lincoln himself with so many “democratic” achievements¹⁹. I disagree, arguing that Lincoln's aphorism is in fact a good starting point for clarifying some of the most important aspects of democracy. Consequently, I do think that the formulation of democracy as “*government by the people*” does hold some significant

¹⁵ Note that it is not possible within the limited scope of this paper to justify my definition of political authority (having the power to create laws that bind others). For detailed discussion of various concepts please see one of the following: Christiano, Tom: Authority., In: Stanford Encyclopedia of Philosophy (first published online on 2 July 2004 - <http://plato.stanford.edu/entries/authority/>, last visited on 15 April 2010, 12:13); Christiano, Tom: The constitution of equality. Democratic authority and its limits., Oxford University Press, 2008, ch. 6.; Dagger, Richard: Political Obligation., In: Stanford Encyclopedia of Philosophy (published online on 17 April 2007 - <http://plato.stanford.edu/entries/political-obligation/>, last visited on 15 April 2010, 12:13); Raz, Joseph (Ed.): Authority., New York University Press, 1990.

¹⁶ Note that this hints at another important characteristic of democracy: constitutionalism. Since the people making the rules are the same that are ruled by them, no one is exempt from the rules and democracy thus fits an important aspect of the rule-of-law principle.

¹⁷ See Christiano, Tom: The constitution of equality. Democratic authority and its limits., Oxford University Press, 2008, espec. ch. 3 for arguments how democracy is unique.

¹⁸ Note that this is true for both direct as well as representative forms of democracy: Even if only a few elected representatives are actually involved in formulating, passing and implementing laws, all members of “the people” can actually run for office and can thereby become one of those few. In this sense, even if government is not literally made up by the whole set of “the people” (as it might be in very pure forms of direct democracy), it is still made up by a part of exactly those. In this sense they are still the same. Or, as Pennock puts it: “*power resides in the people as a whole*” (see Pennock, Roland: Democratic Political Theory., Princeton University Press, 1979, p. 3).

¹⁹ See Sartori, Giovanni: Demokratietheorie., Wissenschaftliche Buchgesellschaft, 2006, pp. 44-45

insights²⁰.

So far, we were able to define democracy as a concept of politics in which a certain set people is both, ruled but also ruling at the same time. It has thus become obvious that democracy is indeed “*government of the people*”. However, it has not yet been clarified what actual procedure brings this sort of government into being. I suggest that it is this very aspect, the one of democratic political procedure, that the present formulation hints at. This is because by stating that democracy is “*government by the people*” one could also be saying that it is *elected by* (and therefore ultimately *legitimised by*) them²¹.

What is special about that? In fact, there are two important features to democratic elections. First, in modern democracies it is not usually the whole set of people ruling²², at least not directly in the sense that they all have a seat in government. Instead it is far more common for them to elect representatives (from their midsts), and to allow them to make the laws, i.e. decisions that bind not only themselves, but rather the people collectively. The process of election is important, then, because even those who are not literally part of the government are nevertheless actively involved in the creation of the institution that makes their collectively binding decisions – they get to elect those in office²³. Moreover, it is crucial to the concept of democracy that they get to do so on a fairly regular basis²⁴.

Note that this aspect has become even more important since modern democracies most commonly take the form of parliamentary party systems and this allows for the formation of a parliamentary opposition. With this institution in place, *all*²⁵ chosen representatives are in office some way or another, and they all play a vital role in the shaping of collectively binding decisions²⁶. This is because of the following reason: If it was only the actual rulers that were

²⁰ Note that I am not claiming that Lincoln himself meant to subsume this definition. Yet I agree that his formulation can very aptly be used to clarify what I deem an important clarification.

²¹ I recognize that we have not talked about legitimacy yet, so this formulation has anticipatory status at the present point.

²² See Bogdanar, Vernon: *The people and the party system. The referendum and electoral reform in British politics.*, Cambridge University Press, 1981, p. 2

²³ See Sartori, Giovanni: *Demokratietheorie.*, Wissenschaftliche Buchgesellschaft, 2006, ch. 2.3 for an analysis of how the delegation of power can be dangerous nevertheless and even in democracy.

²⁴ See e.g. Dahl, Robert: *Democracy and its critics.*, Yale University Press, 1957, p. 233

²⁵ Note that it may not be “all” in the strict sense of the word, but it is at least more than the ruling majority.

²⁶ See e.g. the work of Kurt Kluxen for details on the role and significance of the parliamentary opposition in democracy (e.g. “*Das Problem der politischen Opposition.*”, Verlag Karl Alber, 1956, espec. ch. 7 and 8;

elected, the people would still be the ones appointing them. However, since election procedures tend to include some sort of majoritarian mechanism in order to aggregate individual choices, not everyone would be able to secure his/her preferred representative a place in government. Government would still be representing the people as a collective, but perhaps not all of them to the same degree (if this was measured by individual choice). In contrast, a parliamentary system that allows for a government and opposition at the same time ensures that all individual preferences are represented in the formation of collectively binding decisions, even the “minority”²⁷.

A second important characteristic of democratic elections is that they are based on an equal “right to a democratic say”²⁸. As we have seen, in democracy the people are the rulers. Either they actually make the political decisions or they at least get to decide who will represent them in doing so. In democracy this is not a matter of chance, but a matter of right. Thus, the people have a right to participate in the political process and it is this participation of the people that actually constitutes the nature of democracy's political process²⁹. This is because the right to a democratic say is not a collective right, but an individual one. It is held by the persons that belong to the people, not to “the people” as one indivisible unit.

Now that the concept of rights is in play, we therefore finally come to see one of the most important aspects of democratic decision-making. So far, we have mostly been talking about the people as if they were one singular unit. What now comes into sight is that the people are actually individual human beings, though they are connected through the fact that they share certain political rights, hence enjoy political equality³⁰. This is because the right to a democratic say is held individually but nonetheless equally by the people. The exact meaning

“Geschichte und Problematik des Parlamentarismus”, Suhrkamp, 1983, espec. ch. 3). Also see Sartori, Giovanni: *Demokratiethorie.*, Wissenschaftliche Buchgesellschaft, 2006, p. 42.

²⁷ See Sartori, Giovanni: *Demokratiethorie.*, Wissenschaftliche Buchgesellschaft, 2006, ch. 2.4 for an analysis of the relation between “majority” and “minority” in democracy.

²⁸ Note that this term was inspired by Richard Arneson. See e.g. His essay “Democracy is not intrinsically just.” in “Dowding, Keith / Goodin, Robert E. / Pateman, Carole (Eds.): *Justice and Democracy. Essays for Brian Barry.*, Cambridge University Press, 2004.

²⁹ See e.g. Adrian, Wolfgang: *Demokratie als Partizipation. Versuch einer Wert- und Entstehungsanalyse.*, In: *Politik & Wähler*, Vol. 18, 1977, p. 53 and Dahl, Robert: *Democracy and its critics.*, Yale University Press, 1915, p. 233.

³⁰ Note that this is a very crude interpretation of political equality. See Beitz, Charles: *Political Equality.*, Princeton University Press, 1989 for a comprehensive theory on political equality. Also see Peter, Fabienne: *Democratic Legitimacy.*, Routledge, 2009, ch. 5 and Wall, Steven: *Democracy and Equality.*, In: *Philosophical Quarterly*, Vol. 57, No. 228, 2007 for further analysis.

of this equality depends on the particular conception of democracy we adopt, but the underlying principle is mostly the same: Every one member's say counts as much as any other member's one. On an *aggregative* interpretation this is captured by the slogan “one person, one vote”³¹ - every one person gets one vote and every vote counts as exactly one. On a *deliberative* interpretation, political equality “also demands access to the institutions of public deliberation”³². In sum, however, political equality of the people does not depend on any of those procedural specifications – neither regarding the point of the decision-making process at which the people may use their say³³, nor regarding the form that their say should take³⁴ – because it is at the core of *any* conception of democracy. Of course there are other rights commonly associated with democracy, e.g. political freedoms like the freedom of expression³⁵, but I suggest that those rights are not as constitutive for democracy as the right to an equal democratic say is, because they do not need to be unique to democracy. Instead they are conceptually compatible with non-democratic forms of government too.

I thus conclude that democracy is indeed “*government by the people*” in the sense that it is chosen (and ultimately legitimised) by them in regular fair and free elections. At its core we find the “equal right to a democratic say”, which is an individual right that all members of the people hold, and which they all hold equally.

1.3.3 Democracy – Government for the people

Lincoln ascribes three attributes to democratic government – its being a government “*of*” and “*by*” and “*for*” the people. By putting those claims together like this, parallel and within in the same breath, one is tempted to assume that they all have equal status in clarifying democracy's nature. However, I aim to caution against this reading because I have found that it is prone to misunderstanding. What does it even mean for democracy to be “*government for the people*”?

³¹ See Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p.75.

³² Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p.75

³³ Note that this refers to the different concepts of *direct* and *representative* democracy. For detailed descriptions and further differentiation see e.g. Sartori, Giovanni: *Demokratiethorie*, Wissenschaftliche Buchgesellschaft, 2006, espec. ch. 5.

³⁴ Note that this refers to the different concepts of *aggregative* and *deliberative* democracy. For detailed descriptions see e.g. Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, ch. 2 and 3.

³⁵ See Arneson, Richard: *Democratic rights at the national level*, In: Christiano, Tom (Ed.): *Philosophy and Democracy*, Oxford University Press, 2003, pp. 95-96 for an overview of rights commonly associated with democracy. Note that he makes an interesting distinction between “democratic” and “other fundamental” rights.

Sartori convincingly shows that it depicts democracy as a government acting in the interest and for the sake of the people³⁶. There are two ways to construe this. First it could be interpreted along the lines of some “rational actor” or “social choice” framework³⁷. On these views, “the people” are made up from rationally acting individuals who, in their acts and choices, seek to realize their own preferences. This works on a collective level too: *“just like individual preferences are interpreted as what is expressed by individual choices, [...] social preferences are expressed by democratic choices the collective makes.”*³⁸ Thus, democracy can be seen a form of government that is made up by the people and therefore acts according to their preferences, thus “for” them. In contrast, the second reading suggests that democracy's being “for” the people lies not merely in motivational mechanisms or outcome perceptions, but rather in an effective, measurable output. On this view, democracy is seen to – more or less inherently – lead to outcomes that are “for”, or in the interest of, the people. This is dangerous, because it might get confused with the assumption that these outputs are the objectively “best” ones (in regards to justice, legitimacy or effectiveness, for example) and this may lead to oversimplified arguments. For example, if the output of democratic government is in the interest of the people, this seems to suggest that democracy itself is. And if it is, shouldn't we spread it? The danger lies in the fact that democracy may no longer be treated as a form of politics, but rather be charged with an immediate presumption of its superior value³⁹. One can see how powerful this idea has become (especially after the end of the Cold War and the alleged victory of liberal democracy over all other forms of political organisation⁴⁰) by simply looking at the vast amount of literature on democracy's “intrinsic” value, justice or legitimacy. Most arguments centre around democracy's procedural value, yet some authors claim that this procedural superiority uniquely justifies its outputs too⁴¹. In the present paper I will actually use some of those authors' work, which is exactly why I think the present clarification was important.

³⁶ See Sartori, Giovanni: *Demokratietheorie.*, Wissenschaftliche Buchgesellschaft, 2006, pp. 44-45.

³⁷ See e.g. the work of Kenneth Arrow (e.g. “Social Choice and individual values.”, Yale University Press, 1963).

³⁸ See Peter, Fabienne: *Democratic Legitimacy.*, Routledge, 2009, p. 9 and note that she refers to Kenneth Arrow's concept of social choice there.

³⁹ Note that Joshua Cohen has focused on yet a different problem: *“The concern is that if we offer an interpretation of democracy that treats all good things as ingredient in the idea of democracy (...) then we may appear to integrate procedural and substantive values at the cost of practical guidance. What are we to do when the many elements of (...) democracy come into conflict?”* (“Procedure and substance in deliberative democracy.”, In: Christiano, Tom (Ed.): *Philosophy and Democracy. An anthology.*, Oxford University Press, 2003).

⁴⁰ See e.g. Fukuyama, Francis: *The end of history and the last man.*, The Free Press, 1992.

⁴¹ See e.g. the work of Fabienne Peter or Tom Christiano.

In sum, I suggest that the normative aspirations captured by the formula “*government for the people*” are vital elements of democratic theory, but that it is therefore just all the more important not to automatically read them as an objective description of facts⁴².

1.3.4 Conclusion

In the previous sections I have analysed whether it makes sense to describe democracy as government “of”, “by” and “for” the people. I conclude that this formula actually enables us to deduce some very important aspects of democratic politics. First, democracy is indeed government “*of*” the people in the sense that they are its rulers and those ruled through it. Second, democracy can also be viewed as government “*by*” the people because democratic government is elected and legitimised by them. Third, normative aspirations are central to democratic theory, but they have to be acknowledged as such and must not be read as an objective description of fact.

1.4 Democracy and “the people”

Lincoln states that “*democracy is government of the people, by the people and for the people*”. The triple repetition of “*the people*” suggests that this is the central notion within his definition of democracy. But what does Lincoln actually tell us about them? In short: Not much. Yet the *way* he refers to them suggests that he does in fact make a few assumptions about them and in the present section I will concentrate on revealing them. I will demonstrate that this is necessary, because the ambiguity of Lincoln's formulation is actually quite symptomatic for academic democratic theory too. In doing so I will point out how and why this poses a severe problem not only for conceptual clarity, but also for our ability to systematically deal with actual political developments.

From the way Lincoln's formulation refers to the people, the first impression we get is that it should be plain obvious who he is talking about. From my review of the available literature, most democratic theorists tend to do the same thing – they make serious efforts to define

⁴² See Christiano, Tom: Democracy., In: Stanford Encyclopedia of Philosophy (first published online on 27 July 2006 - <http://plato.stanford.edu/entries/democracy/>, last visited on 11 April 2010, 23:13) for a similar argument that the definition of democracy should not be seen to carry “*any normative weight*”.

democracy according to its procedural characteristics, and to show how this makes democracy somehow “special”, but at the same time they refer to the “demos” as though it is obvious whom it includes and why so. For example, most of them use “citizens” and “the people” interchangeably, but without ever systematically justifying this view⁴³. Those who actually address the issue mostly do so in the context of current political affairs, e.g. boundary problems and questions about migration⁴⁴ or global justice⁴⁵. If they do, they usually draw the same conclusions I have, i.e. that there is surprising ambiguity regarding the demos, because it is simply taken as pre-given⁴⁶. As Robert Goodin observes: “*Virtually all democratic theorists find they have surprisingly little to say on the topic.*”⁴⁷ Or in the words of Robert Dahl:

*“In expressing the idea of democracy as ‘rule by the people’ or asserting ‘the right of the people to self government’ democrats have sometimes assumed that what properly constitutes a ‘people’ for purposes of self-government is not highly problematical.”*⁴⁸

Most theorists actually treat “the people” as a non-issue. This is problematic, because “*Historical experience [...] shows that what and how ‘a people’ is constituted can be controversial to the point of violence and bloodshed.*”⁴⁹ History thus suggests that the idea of who the democratic people are has actually changed and evolved so often that there is hardly any agreement on what is presumed to be self-evident.

Besides the historical evidence, conceptual analysis brings us to the same conclusion: It is not obvious who the democratic people are, at least not from within democratic theory. In fact, there is no specifically democratic definition of “the people”, because the procedural features that mark out democracy as such cannot be used to determine who its people are. As Dahl

⁴³ See e.g. Pennock, Roland: *Democratic Political Theory*, Princeton University Press, 1979, p. 7, where Pennock claims that democracy is rule by the people where “*the people*” includes all adult citizens not excluded by some generally agreed upon and reasonable disqualification (...)” and continues to name some of those “reasonable disqualifications” without justifying them. Also see Wall, Steven: *Democracy and Equality*, In: *Philosophical Quarterly*, Vol. 57, No. 228, 2007, e.g. p. 49 for similar presumptions.

⁴⁴ See e.g. Hurley, Susan: *Rationality, democracy, and leaky boundaries: vertical vs. horizontal modularity*, In: Shapiro, Ian / Hacker-Cordón, Casiano (Eds.): *Democracy's Edges*, Cambridge University Press, 1999.

⁴⁵ See e.g. Goodin, Robert: *Enfranchising all affected interests, and its alternatives*, In: *Philosophy and Public Affairs*, Vol. 35, No. 1, 2007.

⁴⁶ See e.g. Canovan, Margaret: *Nationhood and political theory*, Edward Elgar Publishing, 1996, pp. 13-16.

⁴⁷ Goodin, Robert: *Enfranchising all affected interests, and its alternatives*, In: *Philosophy and Public Affairs*, Vol. 35, No. 1, 2007, p.41

⁴⁸ Dahl, Robert: *Democracy, Liberty and Equality*, Norwegian University Press, 1986, p. 19

⁴⁹ Dahl, Robert: *Democracy, Liberty and Equality*, Norwegian University Press, 1986, p. 19 (Also see p. 122 for elaborations.)

puts it: “*The fact is that one cannot decide from within democratic theory what constitutes a proper unit for the democratic process. (...) the democratic process presupposes a unit.*”⁵⁰ Goodin agrees that this is because “*Logically, constituting the demos (...) cannot itself be a product of ordinary democratic decision making.*”⁵¹ For example, if the “ordinary” way to make democratic decisions is to hold a majority vote, we need to decide who gets a vote prior to actually conducting the voting process. This decision, however, will lead to a *regressus infinitum*, if we aim to make it democratically, because we cannot make this decision democratically without first having a demos that can actually make the decision. Even saying that just “anyone” may participate does not answer the question if we cannot specify who “just anyone” is. Is it only humans, only humans of a certain age, only humans of a certain age and with certain intellectual abilities, only humans of a certain age and who are somewhat affected by the decision, or is it some different criterion altogether? In any case the same procedural features seem to attach to a democracy that includes *all sane adult citizens of a particular state* and to a democracy that allows *only women who are taller than 5 feet 10 inches* to participate in the political process. From what we have clarified so far, both procedures could be democratic as long as they include those who actually are included in a certain way. This would seem to imply that who the democratic people are and according to what principles they are assembled is irrelevant, as long as other democratic features such as the equal democratic say and the congruence of rulers and ruled are preserved. Yet I will claim that the opposite is true and I will give three arguments for that.

First, the demos is vitally important to democracy because it is “*the first step in constructing a democracy*”⁵². This is true temporally (in real world politics)⁵³ as well as logically (from an analytical perspective)⁵⁴ – without anyone voting, there can be no vote, without the vote there is no democratic process and hence no politics at all⁵⁵. We need the people and we need to determine who they are in order to be able to theorise about, or conduct, democracy. Second, Lincoln uses the definite article (“the”) when referring to the people - he does not say

⁵⁰ Dahl, Robert: *Democracy, Liberty and Equality*, Norwegian University Press, 1986, p. 122

⁵¹ Goodin, Robert: *Enfranchising all affected interests, and its alternatives*, In: *Philosophy and Public Affairs*, Vol. 35, No. 1, 2007, p.43. Also see Whelan, Frederik: *Democratic theory and the boundary problem*, In: Pennock, J. Roland/Chapman, John (Eds.): *Liberal Democracy*, New York University Press, 1983.

⁵² Goodin, Robert: *Enfranchising all affected interests, and its alternatives*, In: *Philosophy and Public Affairs*, Vol. 35, No. 1, 2007, p. 43

⁵³ See Nasström, Sofia: *The legitimacy of the people*, In: *Political Theory*, Vol. 35, No. 5, 2007, p. 628.

⁵⁴ See Nasström, Sofia: *The legitimacy of the people*, In: *Political Theory*, Vol. 35, No. 5, 2007, p. 629.

⁵⁵ See Goodin, Robert: *Enfranchising all affected interests, and its alternatives*, In: *Philosophy and Public Affairs*, Vol. 35, No. 1, 2007, p. 43

“democracy is government of people”, but that it is government of *“the”* people. This suggests that democracy does not apply to just any random plural of persons, but that it actually applies to a certain set of persons. It seems reasonable, then, that there have to be conditions that are responsible for uniting them and rendering them a “certain set”. Third, the definite article can be construed in another way too: From the way democracy refers to “the people” it becomes obvious that they are treated as one collective whole – it does not say “some of the people” or “many of the people”, after all – and that implies that wherever it says “the people” it actually means to say “all of the people” or “all who belong to the people”. This makes sense if we look at the previous clarifications about the nature of democratic politics. For example, democracy is special not because there is some congruence of rulers and ruled, but because *all* ruled are rulers in some way or another⁵⁶.

I thus conclude that the people are in fact of special significance for the concept of democracy. Only if we suppose that there is a certain set of people that it refers to, and only if it includes all of them in a certain way, democracy can actually be called democratic. Yet, none of those specifications have indicated that it matters according to which principle we assemble the demos. It seems like the only thing that matters is that there is a people, any people, but not *who* they are or *why* certain persons belong to it while others may not⁵⁷. From a merely democratic viewpoint this may not be a problem, because as long as there is a(ny) demos, there can be democracy and it can be democratic. However, *who* the people are and how, or according to which principles, they are determined does matter if we look at it from the perspective of legitimacy, and this is what I will show in the following chapter.

1.5 Conclusion

In the previous sections I have shown how Lincoln's description of democracy as *“government of the people, by the people and for the people”* can be used to clarify some of democracy's most important characteristics: First, that it is a political concept and that therefore the matter of the bindingness or coercive enforceability of democratic decisions is crucial. Second, it has been analysed what sort of government democracy refers to. It is a form of constitutional government that comes into being through regular free and fair elections in which all members of “the people” have a right to an equal say. There are several

⁵⁶ See e.g. Dahl, Robert: *Democracy, Liberty and Equality*, Norwegian University Press, 1986, p. 201 or Czermak, Emmerich: *Demokratie und Wahlrecht*, Europa-Verlag, 1948, p. 17.

⁵⁷ Note that there is not yet any justification why there should be any exclusions at all.

other rights, especially participatory rights, commonly associated with democracy, but it is primarily the “democratic say” that distinguishes democracy from all other forms of political organisation. No matter what particular conception of democracy we adopt, aggregative or deliberative, direct or representative, those in charge of political decisions always recruit from, belong to and are, in the end, the same as those who are governed by them. Thus what makes democracy special is the congruence of the people ruling and those ruled, i.e. all rulers are ruled and all ruled are rulers too.

The problem is that it is not at all obvious who those “people” are, let alone who “all” of them are. This ambiguity will be the main focus of my paper. First, however, I will now turn to make some clarifications regarding the concept of legitimacy. This will be important, because, as we have seen, democracy is quite often charged with normative aspirations that we should be careful to accept.

2. Legitimacy

2.1 Introduction

In this chapter I aim to explicate the notion of legitimacy that I will be working upon in the present paper. I will first clarify the most important aspects of the concept of *political* legitimacy, then compare it to the notion of *democratic* legitimacy. I will discuss several versions of this view, one that concentrates on freedom, one that centres around the value of public equality, and last the approach of reasonable acceptability. On this basis, I will then be able to show that democratic legitimacy is an insightful concept, but that it nonetheless has a significant blind spot; i.e. the role of the people. I will point this out by showing that even if the democratic process is legitimate, this legitimacy is hollow if it is not combined with a legitimate constitution of the demos.

2.2 Normative - Political - Legitimacy

In this section I aim to specify the notion of political legitimacy. For this purpose, I will first introduce two distinctions: First the distinction between justice and legitimacy and second a distinction between normative and descriptive legitimacy. On this basis I clarify that I will treat legitimacy as a strictly political concept and what this means for the context of this paper.

2.2.1 Legitimacy as a concept distinct from justice

Ever since John Rawls' "*A theory of justice*"⁵⁸, there has been a revival of normative democratic theory⁵⁹. However, while most of it originally centred around the concept of "(distributive) justice", "*this seems to be changing*"⁶⁰ and "*the concept of legitimacy is attracting increasing attention*"⁶¹. In fact both values have been used to provide a normative standard for political authority, yet Fabienne Peter has pointed out that there are at least two important differences: First, theorists of justice are usually concerned with the substance of policies, e.g. questions of how certain goods should be distributed within a society or "*what*"⁶²

⁵⁸ See Rawls, John: *A theory of justice*., Harvard university Press, 2001 (first printed 1971).

⁵⁹ See Peter, Fabienne: *Democratic Legitimacy*., Routledge, 2009, p. 57 for a brief overview of how Rawls' writing influenced the development of political philosophy.

⁶⁰ Peter, Fabienne: *Democratic Legitimacy*., Routledge, 2009, p. 56

⁶¹ Peter, Fabienne: *Democratic Legitimacy*., Routledge, 2009, p. 56

⁶² Note that this emphasis was added by myself, not the author.

is owed to people”⁶³. In most cases, they are thus concerned with distributive issues. In contrast, the concept of legitimacy is usually applied to political procedure, e.g. “*how*”⁶⁴ *decisions about distributive policies ought to be made*”⁶⁵. Moreover, legitimacy is often viewed as “*related to but weaker than justice*”⁶⁶. It is treated as a “*normative minimum*”⁶⁷, less demanding than justice and therefore achievable even under imperfect circumstances. In the face of the “*procedure versus substance dilemma*”⁶⁸, which describes the fact that just outcomes may not always result from legitimate procedures and legitimate procedures may not always lead to just outcomes, some theorists have argued that the latter of those options is actually more desirable⁶⁹. This is justified by the assumption that disagreement on substantial issues of justice (e.g. how resources should be distributed) is more pervasive than the disagreement on how to legitimately make this decision.

I thus define legitimacy as a concept distinct from justice, accepting the assumption that it specifies only a “normative minimum”, not a full-blown set of normative requirements. However, not all theorists actually embrace that differentiation, which is why I deem it permissible to look at the content of their arguments rather than attaching too much significance to whether they use the term “justice” or “legitimacy”.

2.2.2 Legitimacy as a normative concept

In the previous section I have pointed out that political legitimacy can be understood normatively, i.e. as a concept defining moral standards for evaluating political procedures. This approach is distinct from the descriptive notion of legitimacy in that it is not concerned with the question of whether people actually support certain political institutions or decisions, but whether they *ought* to⁷⁰. On the one view, political decisions have binding force simply because they have the form of laws and are effectively backed by coercive measures, on the other, their binding force is defined by them imposing the (moral) duty to obey⁷¹. Furthermore, descriptive legitimacy is measured empirically, e.g. by conducting surveys

⁶³ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 1

⁶⁴ Note that this emphasis was added by myself, not the author.

⁶⁵ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 1 (also see pp. 56-57)

⁶⁶ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 58

⁶⁷ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 56

⁶⁸ See Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, pp. 53-54 for a detailed description.

⁶⁹ See the work of John Rawls or Fabienne Peter.

⁷⁰ See Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 56.

⁷¹ See Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 57.

asking whether and to what extent people support political institutions or particular policies. Normative legitimacy, on the other hand, is specified through theoretical principles that can be applied to any political process, even an hypothetical one.

For the purpose of the present paper I will focus on the normative notion of legitimacy. This is reasonable if we look at the problem at hand: I argue that the concept of democracy does not tell us anything about who its “people” are and that this need not be a problem as long as there actually is a demos. Yet in the following sections I will show that how the demos is constituted, i.e. whom it in- and excludes on the basis of which principles does a make a difference in regards to legitimacy if we define it normatively.

2.2.3 Legitimacy as a political concept

In a previous chapter I have demonstrated why it is important to understand democracy as a strictly political concept. I now urge that the same is true for the concept of legitimacy. This is because adopting a normative concept of legitimacy means to adopt certain conditions that a decision-making process has to live up to in order to count as “legitimate”. Vice versa, calling a political procedure legitimate is asserting that it actually satisfies those conditions. By stressing that legitimacy is a political concept, I thus mean to emphasise that the conditions specified in the following sections are those that *political* decision-making ought to live up to, i.e. they only apply to a particular sort of decision-making, not just any sort. This is justified if we remember that political decisions are special in that they are collective and coercively enforceable in a certain way.

2.3 Democratic legitimacy

So far, I have given a brief overview of the most important aspects of *political legitimacy*. In the present chapter I now aim to clarify the concept of *democratic legitimacy*.

2.3.1 Democratic legitimacy - Not actually a normative concept?

In the previous sections I have specified the notion of political legitimacy so that it applies to *political* procedures only. Along those lines it would stand to reason that *democratic legitimacy* – since democracy is defined as a particular form of politics – is a concept

applying only to *democratic* political procedures. Furthermore, if political legitimacy is understood normatively, as specifying conditions that political procedures ought to live up to, democratic legitimacy could be assumed to set moral standards for the democratic process. However, one implication may strike us as odd: If democracy is nothing but a particular form of politics – why should we need a specialised concept of legitimacy at all? It would mean either that conceptions of political legitimacy are too crude or too general than to apply to democracy, or that democracy is so distinct from other forms of political procedures that a conception of political legitimacy needs to at least be supplemented, i.e. supplemented to such an extent that it makes sense to call it a conception of its own.

In contemporary conceptions of democratic legitimacy we actually find another, rather different approach: Instead of viewing democratic legitimacy as a specialised version of political legitimacy (in the sense that it specifies normative conditions for a particular form of politics - democracy), some theorists have actually argued that it is not just one version of, but essentially itself a requirement of political legitimacy. Only if a political procedure is democratic and lives up to the normative ideals associated with that, it can be called legitimate at all. For example, Fabienne Peter rejects what she calls “Democratic Instrumentalism” for that it “*wrongly denies how democratic procedures are constitutive for legitimacy*”⁷². She actually argues that “*democratic procedures are (...) necessary for legitimacy*”⁷³. This means that there is virtually no legitimacy outside of democracy. Political legitimacy essentially is democratic legitimacy, and democracy thereby becomes part of the measure instead of being a procedure yet to be evaluated.

In my view, this approach is questionable, because it somehow confuses normative and descriptive aspects of the notion of legitimacy. On the one hand, democratic legitimacy is still normative in that only a certain kind of democracy actually qualifies as a “measure”. This means that there still are some conditions that democracy has to live up to in addition to what makes it democratic. However, what is problematic is that those conditions are not viewed as external to democracy, but as constituting its very nature. This boils down to the assumption that democracy needs to satisfy certain conditions in order to be legitimate, but only if it is legitimate it even counts as democratic – there is no truly democratic illegitimate

⁷² Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 64

⁷³ Peter, Fabienne: *Democratic Legitimacy*, Routledge, 2009, p. 65

democracy⁷⁴. To put it differently: From a normative perspective, democratic legitimacy is supposed to be a concept that specifies standards which democracy ought to live up to, but which it does not necessarily *do* live up to. If it does it is a legitimate, if it does not it may not be legitimate, but it is nevertheless democratic. In contrast, incorporating democracy within the notion of political legitimacy itself means that there is no standard to actually evaluate democracy's legitimacy, because political legitimacy requires it. If it is democratic it is thus legitimate. Hence, it is legitimate because it is democratic, not because it lives up to an external normative standard.

While I find this approach rather unsatisfactory from an analytical perspective, I do believe that it captures some important insights about the nature of democratic politics. This is because adopting democracy as a measure of legitimacy is often justified by arguing that “true” democracy, by itself, is a realization of what is required by legitimacy – namely, freedom and public equality, as well as reasonable acceptability. The first argument states that coercive measures are problematic, because they conflict with our human right to live our lives free from domination. However, laws and politics do not necessarily need to count as domination if their interference is necessary for living in a society. Granting an equal say and ensuring the rule of law, democracy can live up to this requirement. Second, another argument states that people's equal status, either morally qua being human or politically qua being bound by the collective decision, requires that they have an equal say in those political decisions. Again, democratic procedure effectively realizes this requirement. Third, some theorists claim that in the face of “reasonable pluralism”⁷⁵ the legitimate way to make collectively binding decisions is through a procedure that is acceptable to all those who are willing to propose and accept fair terms of cooperation⁷⁶. Democracy is seen to satisfy this condition by granting all people an equal say in those decisions.

In the following sections I will elaborate on some of those arguments by using the work of Philip Pettit, Tom Christiano, John Rawls and David Estlund as examples. On this basis I will be able to show what their common premise is. At the same time it will allow me to

⁷⁴ Note that Pennock, too, has observed that “*much of the criticism of democracy heard today is in the name of the ideal. It claims only that democratic institutions are not working democratically.*” (Pennock, Roland: *Democratic Political Theory*, Princeton University Press, 1979, p. 122).

⁷⁵ Note that this term goes back to Rawls. See e.g. Rawls, John: *Political Liberalism*, Columbia University Press, 2005, pp. 3-4

⁷⁶ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, p. 54.

demonstrate that democratic legitimacy thus understood is not enough to render democracy legitimate, because it has a significant blind spot: The principles that underlie the process of constituting the demos also have to live up to the requirements of legitimacy, otherwise democracy cannot count as legitimate, no matter how legitimate its core procedure is.

2.3.2 Democratic legitimacy as based on freedom

In previous sections I have argued that one of the key features of political decision-making is that it creates laws which are coercively enforceable. This may be seen to stand in contrast with the common assumption that human beings are “free”, i.e. they are not to be dominated by others. However, most theorists accept that there actually is a need for society, or at the very least a need for collective decisions on some matters⁷⁷. This is why even from a rather liberal perspective institutionalised interference can be justified under certain circumstances. On the account of Philip Pettit, interference can be legitimate if it „tracks“ the relevant interests and ideas of a person⁷⁸. In contrast, interference counts as illegitimate domination if it constitutes „interference on an arbitrary basis“⁷⁹. Politics therefore have to satisfy certain constitutional requirements in order to avert arbitrary domination, for example grounding an extensive rule of law⁸⁰. Democracy is seen to realize these conditions, because it is a form of decision-making process that persons can identify with and because it involves stating their interests⁸¹. It hence permits government interference to track the relevant interests of the people. Moreover, it provides a safeguard against arbitrary domination due to what Pettit calls „contestability“: „It is only if I can effectively contest any such interference – it is only if I can force it to account to my relevant interests and ideas – that the interference is not arbitrary and the interferer not dominating.“⁸² By granting a democratic say, people's interests are hence tracked in a twofold way: Not only can they actually state their interests, but they can also contest interference if they deem it fails to do so.

In sum, Pettit's argument states that a political decision-making procedure should be able to justify government interference and it should entail safeguards against illegitimate or unjust interference (“arbitrary domination”). Democracy satisfies the first condition, because through

⁷⁷ See e.g. Dahl, Robert: Democracy, liberty and equality., Norwegian University Press, 1989, p. 192.

⁷⁸ Pettit, Philip: Republicanism. A Theory of Freedom and Government., Clarendon Press, 1997, p. 55

⁷⁹ Pettit, Philip: Republicanism. A Theory of Freedom and Government., Clarendon Press, 1997, p. 52

⁸⁰ Pettit, Philip: Republicanism. A Theory of Freedom and Government., Clarendon Press, 1997, pp. 171-183

⁸¹ Pettit, Philip: Republicanism. A Theory of Freedom and Government., Clarendon Press, 1997, p. 184

⁸² Pettit, Philip: Republicanism. A Theory of Freedom and Government., Clarendon Press, 1997, p. 185

the democratic say people's interests can be tracked, and it satisfies the second condition, because it allows contestation of interference.

2.3.3 Democratic legitimacy as based on equality

While Pettit concentrates on the value of freedom, some other theorists have stressed the importance of equality. In their view, the equal moral status of all human beings needs to result in an equal say in political decisions. For example, Tom Christiano's argument is based on the assertion that both justice and legitimacy require *public equality*. Since all persons have equal moral status, their interests have to be advanced equally and in a way that allows them to actually see that they are being treated as equals⁸³. Moreover, since there is pervasive disagreement on how to ensure equal distribution of interest advancement, and since there is no public measure of well-being which would allow for a fair comparison⁸⁴, the legitimate thing to do is to distribute „says“ instead of resources, and to distribute them equally⁸⁵. The democratic say thus allows for the satisfaction of four fundamental human interests: the interest in „*correcting for other's cognitive bias*“⁸⁶, the interest in „*learning the truth about matters of social importance*“⁸⁷ the interest in „*having one's equal moral standing among one's fellow citizens recognized and affirmed*“⁸⁸ and the interest in „*feeling at home in the world*“⁸⁹. By having an equal say in the political decision-making procedure, individuals can see that their judgement is taken seriously, they have a chance to influence how the „common world“⁹⁰ is shaped, and the communication with others is encouraged so that all can develop a more profound picture regarding their common human interest. All this makes collectively binding decisions legitimate. In contrast, it would be illegitimate if some members of society were denied a say in the political process, because it would mean that they are publicly treated

⁸³ See Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, ch. 1.

⁸⁴ See Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 59.

⁸⁵ See Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 60.

⁸⁶ Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 42.

⁸⁷ Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 65.

⁸⁸ Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 65.

⁸⁹ Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 43.

⁹⁰ See Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 57 for a definition.

as inferiors⁹¹ and their well-being would have less chance of being advanced equally⁹²: *“If the standpoint is not egalitarian, then it is not inclusive, which means that it is responsive to some and not to others.”*⁹³ Since democracy cannot be charged with either of those faults, it must count as a legitimate procedure.

From people's equal moral status Christiano thus deduces that legitimacy requires the right to a democratic say: *“The argument implies that there ought to be an institutionalized way in which the particular judgements of a person are accorded the respect that is embodied in the right to an equal say in the process of collective decision-making.”*⁹⁴

2.3.4 Democratic legitimacy as based on reasonable acceptability

The third argument for democratic legitimacy is based on the notion of reasonable acceptability. It essentially goes back to John Rawls who argued that the exercise of political power is legitimate only if it can be justified based on reasons that all those who are reasonable in the sense that they are willing to propose and accept fair terms of cooperation would accept⁹⁵. Note that in this context, “acceptable” does not mean “likely to be accepted (empirically)” but rather “meriting acceptance”⁹⁶ - it is what people would accept were they reasonable, thus it is what they ought to accept if they aim to propose and abide by fair terms of cooperation.

On the one hand, this notion of “reasonable acceptability” can be used to ground democratic legitimacy in that it applies to the procedure itself: By according someone a say in political decisions one realizes both their freedom and equality and it is thus unlikely that anybody will object to that. If they are reasonable, it has to be acceptable to them that everybody else's freedom and equality is realized the same way. Thus, the democratic procedure is reasonably

⁹¹ See Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 66.

⁹² See Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 63.

⁹³ Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 86

⁹⁴ Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009, p. 67

⁹⁵ See Rawls, John: *Political Liberalism.*, Columbia University Press, 2005, pp. 136ff

⁹⁶ See Weale, Albert: *Contractarianism, deliberation and general agreement.*, In: Dowding, Keith / Goodin, Robert / Pateman, Carle (Eds.): *Justice and Democracy. Essays for Brian Barry.* Cambridge University Press, 2004, pp. 91-92

acceptable to all who view themselves as free and equal: *“Democracy seems (...) reasonable (...) since it is a conception of government that accords equal respect to the moral claims of each citizen, and is therefore morally justifiable from the perspective of each citizen.”*⁹⁷ On the other hand, David Estlund has also developed an argument for how democracy renders its outcomes reasonably acceptable: democracy's “epistemic value”. Its key key premise is that there is no publicly recognized, or objectively true, standard for „maximum rights fulfillment“ and no person can reasonably be accepted to settle how everybody's rights are best fulfilled⁹⁸. Yet if I myself had an equal say in that decision and was thus accorded equal weight, the decision itself becomes acceptable to me (from a perspective of reasonableness).

In sum there are thus two ways how a concept of reasonable acceptability can be seen to justify democratic legitimacy. First, democracy itself is a “reasonably acceptable” way of making collectively binding decisions. Second, democracy thereby also renders its outcomes reasonably acceptable.

2.3.5 The common structure of arguments for democratic legitimacy

In the previous sections I have presented three arguments for democratic legitimacy. They all share a common structure that I now aim to briefly summarize: In a first step, they develop requirements of legitimacy. For this purpose they usually focus on one key value, e.g. freedom, equality or reasonable acceptability. Second, they then aim to show how the democratic political procedure satisfies those requirements. Last they conclude that this is proof for “democratic legitimacy”, i.e. that democratic procedure itself is a requirement of legitimacy. The premise of this claim is that the democratic process does not only live up to those standards, but that it is unique in doing so and that it is thus the only political procedure that satisfies the conditions of legitimacy. Their arguments work out that way, because they centre around the democratic say. As we have seen, this say is what actually distinguishes democracy from other forms of political organisation. Thus, if freedom, equality and/or reasonable acceptability are necessary for legitimacy, and if the only way to realize them is the democratic say, then democracy is not only legitimate, but uniquely so. This allows the conclusion that democracy itself is a requirement for justice, because the democratic say is.

⁹⁷ Gutmann, Amy / Thompson, Dennis: *Democracy and Disagreement.*, Harvard University Press, 1996, p. 26

⁹⁸ See Estlund, David: *Demoratic Authority. A philosophical framework.*, Princeton University Press, 2008, ch. 2.

It is not my aim within the present paper to challenge the assumption of democratic uniqueness in regards to legitimacy, because that is not necessary for the present argument. Instead the key aim was to elaborate three concepts of legitimacy and the arguments for how democracy lives up to them. On this basis I am now able to point out a blind spot of the concept of “democratic legitimacy”: It may be true that a democratic political process satisfies the requirements of legitimacy. However, “democracy” as a whole can only count as legitimate if its foundations, i.e. the principles underlying the constitution of the demos, also live up to those requirements. Demonstrating this will be the aim of the following sections.

2.4 Democracy's legitimacy

2.4.1 Democracy's legitimacy – A two stage concept

In the previous section I have claimed that in order for democracy to count as legitimate, not only the democratic political procedure itself must be legitimate, but also the foundation that renders this process possible in the first place. By “foundation” I refer to the constitution of the democratic people, because without anyone making a democratic decision there is no decision at all. From a democratic viewpoint it may not matter who the people are; as long as there actually is a demos, and as long as those people can participate in the political process in a certain way, democracy can persist to be democratic. Yet, the picture changes if democracy is supposed to not only be democratic but also count as legitimate. In this case, it does matter who the people are, because it does matter how, i.e. according to which underlying principles, the demos is constituted. I actually provide a twofold argument for this claim: In a first step I have demonstrated why the constitution of the demos is essential to democracy. This allows for the conclusion that if it is essential to democracy, it is essential for judging its legitimacy too. However, since constituting the demos requires a procedure other than the “ordinary democratic” one it is reasonable to assume that it needs its own check of legitimacy. Thus, democracy's legitimacy actually requires the legitimacy of both, its foundation (the constitution of the demos) and the core democratic process. *Both* need to be legitimate in order for democracy, as a whole, to count as legitimate. The second part of this argument is still missing; I have to show that the arguments used to support democratic legitimacy work out only if the same measures have been applied to the constitution of the demos too. For this purpose I will use the three concepts of legitimacy discussed in the foregoing sections –

freedom, equality and reasonable acceptability. The basic argument will be that all of those concepts refer to “someone” and that it is not irrelevant who this someone is, respectively who it is not.

Once I have demonstrated that the legitimacy of the democratic people is an essential precondition for democracy's legitimacy, I can turn to the key question of this paper: How can a legitimate demos be constituted?

2.4.2 Why democratic legitimacy based on freedom requires a legitimate demos

I have used Philip Pettit's approach to sketch a concept of democratic legitimacy that is based on the value of freedom. Now I will show how this approach relies on the premise of a legitimate demos and why it has to do so.

Pettit suggests that if someone interferes with my life this is legitimate only if my relevant interests are „tracked“ thereby. It is illegitimate, then, for anyone to interfere with my life without taking account of my interests, because this would constitute arbitrary domination. Democracy, or an equal democratic say, is legitimate, because it can do both; help governments make their interference track people's interests, and provide adequate protection against illegitimate interference. This suggests that anyone whose life a democratic government interferes with should have a democratic say, because this is how his/her interests can be tracked and how they can protect themselves against arbitrary domination. In contrast, it is illegitimate for someone to have a say if he/she is not actually interfered with by the democratic government. Put this way, it is obvious that it does matter who is included in the democratic political procedure and who is not – freedom and non-domination are realized by democracy only if *certain* people are included (and excluded, respectively). They are not realized if the inclusion of people is arbitrary and fails to follow principles that capture the spirit of freedom and non-domination⁹⁹.

⁹⁹ Note that Pettit's argument can be used not only to show that a legitimate demos is a necessary precondition of democratic legitimacy, but that it can also be used to specify its requirements. In fact it would suggest a concept along the lines of the “all affected principle”. This is not relevant here, but I will come back to this in later chapters of this paper.

2.4.3 Why democratic legitimacy based on equality requires a legitimate demos

Tom Christiano defends a concept of democratic legitimacy that centres around a notion of public equality. On this view, the democratic political process is legitimate, because it includes the democratic say which indeed realizes this value. Is a legitimate demos still necessary?

Some might argue that it is not, and they might justify this claim by pointing at the democratic say as an „equal“ say. They would maintain that democracy actually excludes the possibility of an illegitimate demos, simply in virtue of its being democratic. This is because the democratic say requires that “all” have an “equal” say. However, this objection is invalid in the present context: The right to a democratic say is held by all members of a certain group, and it is held by them equally. At best, it thus specifies how the say should be distributed within a certain group (that is, equally), but thereby it just all the more presupposes that there actually is a certain group. It requires that this group is constituted according to a principle that makes equality the right moral value to refer to. For example, if equal moral status is what justifies an equal democratic say, it would be illegitimate to include beings of unequal moral status within the demos. Obviously, if democratic legitimacy requires that equals are treated as such, it must require that unequals are not. Therefore it is crucial that the principle of equal treatment is applied only when the group in question has been assembled according to principles that actually justify equal treatment¹⁰⁰. Thus democratic legitimacy presupposes a legitimate demos, because it does matter who is included (respectively excluded) and why, and it does matter that those decisions are made legitimately. Equality is always equality among “someones” and it makes sense only if we make sure that those “someones” actually satisfy the conditions required by equality.

2.4.4 Why democratic legitimacy based on reasonable acceptability requires a legitimate demos

According to Rawls and Estlund, a political procedure is legitimate only if it is reasonably acceptable and if, due to its procedural features, it also renders its outcomes reasonably acceptable. As a consequence, this approach does not allow for an arbitrary constitution of the demos. This is because the very qualification of “reasonableness” could work as the principle

¹⁰⁰ Note that, again, we could use Christiano's argument to specify conditions that render a demos legitimate.

of in- and exclusion: Political procedure has to be acceptable to the people, but only to those who are reasonable. Thus, the principle of democratic legitimacy presupposes that the democratic people is of a certain sort, i.e. that it consists of reasonable persons who are willing to offer and abide by fair terms of cooperation. This means that it is not at all irrelevant who the democratic people are and how, or according to which principle, they were assembled. On the contrary, this concept of democratic legitimacy works on the premise that there is a demos and that it satisfies certain conditions of legitimacy. Again, as with the concepts of freedom and public equality, I do not aim to discuss whether this principle of enfranchisement is actually the most sensible one¹⁰¹, I merely conclude that the foregoing analysis has confirmed my claim that democratic legitimacy is fundamentally dependent on the legitimacy of the demos. Thus the legitimacy of democracy depends on the legitimacy of the demos, i.e. the legitimacy of the principles and procedures on the basis of which the demos is constituted.

2.5 Conclusion

In the previous sections I have clarified the notion of “legitimacy” that I will be working upon in the present paper. It is a concept that sets normative standards for political procedures. Also it is linked to the concept of “democratic legitimacy” which states that democracy uniquely realizes the normative requirements of legitimacy – namely freedom, equality and reasonable acceptability – and therefore claims that democracy itself is a requirement of legitimacy. However, I have shown that democratic legitimacy fundamentally depends on the premise that the demos too is constituted according to principles or procedures that are legitimate. Thus, democracy can only be legitimate if both its demos and the political procedure are legitimate, but the former is actually more fundamental. As Dahl puts it: “*The criteria of the democratic process presuppose the rightfulness of the unit itself.*”¹⁰². In the present paper I will therefore try to determine what renders a democratic people legitimate, i.e. how a demos can be constituted legitimately. For this purpose I will use England's history of electoral law as an example for how democracy may develop in regards to its people, and I will examine whether and why those developments could count as legitimate. This assessment will function as a basis for developing systematic framework that can be used to determine the legitimacy of a democratic people.

¹⁰¹ Note that I will, however, come back to this in later chapters.

¹⁰² Dahl, Robert: *Democracy and its critics.*, Yale University Press, 1915, p. 207

III. THE EXAMPLE OF THE ENGLISH **FRANCHISE**

1. Introduction

In the present paper I have set out to develop a systematic framework of principles that can be used to determine the legitimacy of a democratic people. While the previous chapter was meant to provide the necessary theoretical clarifications and concepts, the present chapter now turns to an empirical example – England's history of electoral law. I will analyse which qualifications are currently used for dis-/enfranchisement in England, on what basis they have evolved and how they can be justified. It is crucial to acknowledge, however, that the aim is not so much to provide an exhaustive study of England's political system, or even its electoral law, but rather to give an account of its franchise development¹⁰³ in a way that allows us to arrive at theoretical principles which can be used to develop a general but systematic framework of franchise qualifications.

Thus, the main questions are the following: Who enjoys suffrage? On what grounds has suffrage been granted? And: How has the answer to those questions changed over time? In this context I will not be overlooking the fact that one can only include someone if there are

¹⁰³ Note that because of the limited scope of this paper I will consider *legal* principles of (dis)enfranchisement only. This is to say that I will not deal with general “barriers” to voting, i.e. background circumstances that do not legally prohibit a person from voting but nevertheless may render him/her effectively unable to exercise their vote. (See e.g. Dahl, Robert: *Democracy and its critics.*, Yale University Press, 1955 or Parry, Geraint / Moyser, George / Day, Neil: *Political Participation and Democracy in Britain.*, Cambridge University Press, 1992, p. 19 for the distinction between legal and actual disenfranchisement.)

limits, or boundaries, to the group in question. For example, one can only include someone who previously was not, i.e. someone who had not enjoyed franchise before. Hence, the focus will also be on the change of circumstances which lead to the extension of suffrage. On the other hand, inclusion also suggests that there remain to be “outsiders”, i.e. people who continue to be excluded. In this case, the question goes to both the permissiveness and necessity of exclusion in general and of the particular groups or persons who are excluded. My aim is to give an account of who has been included in the franchise, and reversely who has not, why, when and under which conditions. The main interest is theoretical, because the English example is but a “case study”, meant to serve as a starting point for systematizing relevant principles.

I will proceed as follows: First, I will provide a general introduction into the English governmental and electoral system. This will serve to define the specific time span and electoral level that will concern me throughout the further course of this chapter. Second, I will then turn to outline the current franchise conditions in England. Note that my aim is to give an account of prevailing principles of enfranchisement as well as of *disenfranchisement*. I will explain the relevant qualifications and give a review of their historic evolution. At the same time, I will also provide an account of possible justifications supporting those conditions: Why should this particular qualification serve as a condition of (dis)enfranchisement and what are the underlying assumptions of this argument? This is crucial since the purpose will be to analyse whether and why certain principles actually convey legitimacy to the English democratic people. After having provided a detailed description of the prevailing principles of (dis)enfranchisement, I will thirdly turn to those historic qualifications that no longer prevail in English electoral law. Again, the question of potential justification will be the main focus of attention, especially in regards to the justification of their abolishment or replacement due to the course of time.

At the end of this chapter I will have given a detailed account of the English franchise and its evolution, as well as of its underlying justifications for in- and exclusion. On this basis, I will be able to develop a systematic framework of legitimate enfranchisement in the following chapters.

2. Government and electoral system in England

2.1 Introduction

In the following sections I aim to give a brief introduction into the main features and history of the governmental and electoral system in England. First I will acknowledge the fact that the idea of an “English” government might seem unclear, because it is officially that of the “United Kingdom of Great Britain and Northern Ireland”. Second I will describe the general structure of government in England by pointing out how parliament, government and the monarch are interconnected. This is relevant, because it will justify why the focus of this paper will only be on general election franchise, which is distinct from three other electoral levels, as I will show in section three. Fourth I will outline the voting system that is employed for general elections, before last summarizing some other relevant procedures. In the end I will have limited the scope of the following analysis, both in regards to the relevant time span and scope of the subject.

2.2 Government in England

2.2.1 Remarks on the subject of an “English” government

In this paper I set out to analyse the legitimacy of the English franchise. Some readers may find themselves confused by this notion, because strictly speaking there has not been a *Government of England* since 1707 when the Acts of Union were passed and joined the Kingdom of England and that of Scotland into one single *United Kingdom of Great Britain*. Today, the United Kingdom still shares a common head of state as well as a common parliament, and it has grown to include not only England, Wales and Scotland, but also Northern Ireland. In addition to that, the “*British overseas territories*”, formerly known as Crown colonies, also share the political bodies of the United Kingdom. The main reason why I have decided to focus on the *English* history of suffrage anyway, is that it would actually go beyond the scope of this paper to trace back the roots and differences regarding the electoral franchise in all constituent countries of the United Kingdom. Furthermore comparative literature is frustratingly ambiguous, with many authors using “England” and “Britain” interchangeably¹⁰⁴. While this may partly be justified due to the fact that England has always

¹⁰⁴ See Canovan, Margaret: *Nationhood and political theory*, Edward Elgar Publishing, 1996, p. 77 for confirmation of my observation.

been the most powerful constituent country within the United Kingdom – not least because it is the largest, both in regards to population and area – it does make stringent research difficult and time-consuming. Since the historic aspect of this paper is supposed to have only exemplary status, I therefore deem it sufficient to focus on England, whose history of electoral law is comparatively well documented and for which there is a vast amount of research available.

Hence, my decision is not so much to neglect the fact that England is part of the United Kingdom, but instead to incorporate its relevance indirectly, i.e. by analysing the significance of residence, nationality or citizenship for the right to vote. In this context I will indeed pay special attention to the relationship between England and the other constituent countries of the United Kingdom, as well as the special status of Commonwealth countries. Yet, I will ignore historic differences in franchise regulations, focussing only on those laws that were relevant for England. This is why I will refer to “England” rather than the United Kingdom in most of the cases.

2.2.2 The general structure of government in England

Politics in England comprise of constitutional monarchy and a parliamentary party system. The hereditary monarch functions as the head of state, but no longer has the sovereign power to make, amend or abolish laws on his/her own. Instead, legal sovereignty now lies with the bicameral parliament which consists of the House of Commons and the House of Lords. In order for a parliamentary bill to effectively become law, however, royal assent still has to be granted and the monarch thus retains some of his legislative capacity, even though today it is mostly a formal right¹⁰⁵.

The connection of Crown and Parliament goes back to the very beginnings of parliamentary history, even though the balance of power has of course changed drastically throughout the centuries: The first official mention of the Parliament, which can be found on a Plea Roll dated 1236¹⁰⁶, refers to a royal assembly of estates, i.e. an assembly summoned by the king in order to provide council and to witness the creation of new laws to be implemented

¹⁰⁵ See e.g. Keir, D. L.: The constitutional history of modern Britain 1485-1937., R&R Clark, 1938, p. 375 on the role and powers of the monarch today.

¹⁰⁶ See Kluxen, Kurt: Geschichte und Problematik des Parlamentarismus., Suhrkamp, 1983, p. 19

throughout the kingdom¹⁰⁷. Back then it was thus a royal prerogative to make law, with the parliament not yet having any independent legislative power. However, this began to change in the 14th century when it became accepted that there are some issues that monarch should not decide by himself but in parliament; one of the most fundamental issues being taxation¹⁰⁸. Due to the 1688 Bill of Rights Crown and parliament were later granted equal rights in the legislative process¹⁰⁹. What is more, it was established that both parliamentary houses had equal rights to participate¹¹⁰. This signifies the increasing importance of the Commons: In the beginning, the Parliament had comprised only of the King's council, mostly aristocrats of some sort. By 1322 the passive attendance of the “Commons” also came to be required¹¹¹. From 1327 on they were finally granted the privilege to function as petitioners, meaning they had the right and duty to propose new legislative acts, thus to initiate the process of legislation. In contrast, the “Peers” were assigned the role of judges, assessing the proposals brought up by the Commons. Hence it was only after the introduction of the Bill of Rights that the making of laws required consent of the King and both chambers of the Parliament¹¹².

Since the beginning of the 18th century, effective power over the legislative has shifted once again, with the Crown's influence decreasing in favour of the parliament. One of the main reasons for this change is that the monarch has effectively lost executive sovereignty and a new de facto sovereign power has emerged, enjoying a close connection to the Parliament: the Prime Minister¹¹³. Until today he formally remains the senior minister of the Cabinet of Her Majesty's government, but he actually functions as the head of government. His connection to the Parliament is twofold. First, the same general elections effectively appoint the personnel of the House of Commons and, albeit indirectly, that of the governmental Cabinet. This is because even though the Prime Minister is appointed by the Crown, this appointment follows the convention that he/she should be the member of the House of Commons. Usually the monarch chooses the leader of the political party which has the support of an absolute

¹⁰⁷ See e.g. Kluxen, Kurt: *Geschichte und Problematik des Parlamentarismus.*, Suhrkamp, 1983, p. 19 and p. 35 or Emden, Cecil: *The people and the constitution. Being a history of the development of the people's influence in British government.*, Clarendon Press, 1956, p. 12 for the role of the early medieval parliament in England.

¹⁰⁸ See Kluxen, Kurt: *Geschichte und Problematik des Parlamentarismus.*, Suhrkamp, 1983, p. 39.

¹⁰⁹ See Kluxen, Kurt: *Geschichte und Problematik des Parlamentarismus.*, Suhrkamp, 1983, p. 45.

¹¹⁰ See Kluxen, Kurt: *Geschichte und Problematik des Parlamentarismus.*, Suhrkamp, 1983, p. 45.

¹¹¹ See Kluxen, Kurt: *Geschichte und Problematik des Parlamentarismus.*, Suhrkamp, 1983, p. 34.

¹¹² Kluxen, Kurt: *Geschichte Englands.*, Alfred Kröner Verlag, 1968, p. 371

¹¹³ See Kluxen, Kurt: *Die Umformung des parlamentarischen Regierungssystems in Großbritannien beim Übergang zur Massendemokratie.*, In: Kluxen, Kurt (Ed.): *Parlamentarismus.*, Kiepenheuer & Witsch, 1967, p. 130 or Kluxen, Kurt: *Geschichte und Problematik des Parlamentarismus.*, Suhrkamp, 1983, p. 115 on the increasing importance of the prime minister and how his power depends on and refers to his being elected.

majority of seats in the House of Commons, because the executive is answerable to parliament and a successful “vote of no confidence” would therefore force the government to resign. Not only the prime minister is recruited from within the parliament, however, but (by convention) all ministers are. This means that all members of the government are supposed to be Members of Parliament (MPs) with a seat either in the House of Commons or the House of Lords¹¹⁴. Thus there is a close connection between executive and legislative in regards to personnel. It is tightened by the fact that part of the MPs of the House of Lords are actually chosen by the Prime Minister. This is because the so-called “Lords Temporal” are mostly life peers appointed by the king or queen on the prime minister's specific recommendation. To be sure, none of the MPs in the House of Lords are elected by the people. Those not appointed on the prime minister's recommendation are either hereditary peers (such as dukes, earls or barons by birthright)¹¹⁵ or “Lords Spiritual” who hold their office by virtue of an ecclesiastical role within the established church, which means that they usually are senior bishops of the Church of England.

Summing up, government in England, or the United Kingdom, is tightly linked to the parliament, because its personnel recruits from there and its leader, the Prime Minister, is also legitimised through parliamentary election by the people. Yet it has to be pointed out that only one chamber of the Parliament is actually elected and the role of the hereditary monarch, who holds this position in virtue of birthright rather than (democratic) election, should not be underestimated¹¹⁶. Note, too, that there is a special position of the Church of England, with permanent seats within the supreme legislative body.

2.3 Electoral system in England

2.3.1 The four levels of the English electoral system

As we have seen, government is indirectly appointed through parliamentary elections. Since the present paper will be concerned with electoral franchise, I aim to briefly distinguish four basic levels of election in England in order to make clear which of them will be relevant for the further course of my argument.

¹¹⁴ Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 2

¹¹⁵ Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 2

¹¹⁶ See e.g. Keir, D. L.: *The constitutional history of modern Britain 1485-1937*, R&R Clark, 1938, p. 375 and p. 461 on the role and powers of the monarch, and how it has (not) changed over time.

First, there are local elections generally used to appoint councils whose functions and powers may vary depending on local arrangements. Historically, the main function of local government is to promote the area's well-being, but there is no legislative power independent from the parliament. In the present paper I will therefore not deal with the franchise of local elections, but focus on “general elections” instead, i.e. the election to the House of Commons. On the one hand, this is because the concerns for democratic legitimacy most pressingly arise due to the bindingness and enforceability of laws. Since those are created by Acts of Parliament and royal assent, not within local councils, the former are much more relevant. On the other hand, there are but minor differences¹¹⁷ in the franchise of general and local elections and I therefore do not deem it necessary to further analyse the latter.

Apart from local and general election level, the third kind of election is the so-called “by-election” which takes place between regular elections if a political office has become vacant, for example following the death or resignation of the former office-holder. Since those by-elections do not involve a distinct franchise, they will not be of any special relevance for the purpose of this paper. This is also true for the fourth kind of election which is that of the Members of the European Parliament. Note that although the European Union obviously is a transnational institution, electoral procedures may vary according to the national customs of the member states. I will mostly neglect those elections, however, on the one hand because they are a relatively new development and I therefore do not deem them a good example to analyse the history of franchise. On the other hand, the suffrage for European elections in England is very similar to that of general elections, with the major exception being that all resident European Union citizens have a vote in European Parliament but not in general elections.

For the present paper I will thus concentrate on the English electoral system and voting procedures regarding only *general*, i.e. parliamentary, elections, because in my view those are the most relevant and representative for the purpose of analysing democratic legitimacy¹¹⁸.

¹¹⁷ Note that the main difference lies in the fact that European Union citizens are allowed to vote in local elections, but not in general elections.

¹¹⁸ Note that I have not mentioned referendums in this overview, because they are not so much elections as they are examples for direct voting.

2.3.2 Voting system employed for general elections in England

In their introduction to English politics, Reeve and Ware state that “*the two most obvious features of the electoral system used for the British Parliament today are that it utilizes plurality voting and that it is based entirely on territorially-defined constituencies*”¹¹⁹.

General elections function on the basis of plurality voting, more specifically a “first-past-the-post” system. That is to say that: “*Under the established system for electing MPs, each elector has only one vote, each constituency returns only one MP, and the winner takes all, as the candidate who is first-past-the-post with the most votes becomes the MP whether or not he or she has an overall majority of the votes cast in the constituency*”¹²⁰. Thus, each constituency gets to appoint one MP for the House of Commons with the candidate most voted for getting the seat, regardless of whether he/she has an overall majority or not. Two things are important about this. First, voters are required not only to cast their vote within a certain electoral constituency, but they vote specifically *for* this constituency – they specifically elect their constituency's MP. In turn, the MPs hold their office in the capacity of representing this particular constituency¹²¹. As Mackintosh has pointed out, this single-member seat¹²² “*gives an illusion of voting for a person rather than a party*”¹²³, because there usually is only one candidate per party within a constituency, not a range of party nominees the voters can rank or choose from, and thus the effective choice is for a particular candidate. On a wider perspective, of course, the appointment of the MP does not only determine who gets this one seat in parliament, but also contributes to settle which Party will form the government¹²⁴, because the leader of the winning Party will be prime minister¹²⁵, nevertheless the most obvious effect of a person's vote is to determine which candidate should represent the territorially defined constituency within the parliament.

¹¹⁹ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 44

¹²⁰ Dearlove, John / Saunders, Peter: Introduction to British Politics. Analyzing a Capitalist Democracy. (2nd edition), Polity Press, 1989, p. 178

¹²¹ See Judge, David: Representation. Theory and practice in Britain., Routledge, 1999, pp. 38-39.

¹²² See Mackintosh, John (Ed.) People and Parliament., Saxon House, 1978, pp. 49-52.

¹²³ Mackintosh, John (Ed.) People and Parliament., Saxon House, 1978, p. 52

¹²⁴ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 5 (referencing p. 9 of Michael Dummett's “Voting Procedures” published by the Oxford Clarendon Press in 1984)

¹²⁵ Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 2

This is actually one of the reasons why there are continuous debates about the legitimacy of this voting system: Some theorists argue that depending on a person's constituency and the anchoring of a particular party there, votes may not always have equal de facto weight or “influence”, and thus proportional representation should be implemented instead. Historically an even more urgent problem was the fact that there were various anomalies regarding the size and population of the constituencies, but the Redistribution Acts have set provisions to ensure that the electoral constituencies are roughly equal in size and population today¹²⁶. This does not change the fact, that territory still is an important aspect of representation in the parliament¹²⁷.

2.3.3 Other relevant procedures in the English general election process

So far, I have discussed the structure of government in England, distinguished between four levels of election and summarized the functioning of the voting procedure deployed in general elections. In the present section, I now aim to outline some formal procedures which voters have to follow in the general election process.

The most important procedure any potential voter has to undergo in order to be able to cast his/her vote is registration. It refers to an act whereby a person enters the electoral register of a certain constituency, usually the one he/she is resident in or can otherwise establish to have a relevant “local connection” to. Registration is crucial because regardless of whether a person satisfies the legal qualifications to vote, i.e. regardless of whether he/she is included in the franchise, he/she cannot actually vote unless formally registered: *“Only individuals whose names appear on the electoral register are entitled to vote.”*¹²⁸ Thus, only those eligible to vote may enter the electoral register, but only those registered can actually vote. Blackburn adds: *“Voting is a voluntary activity, but electoral registration is compulsory. A responsibility lies with the individual citizen to respond promptly to the forms for completion sent from the electoral registration offices (...)”*¹²⁹ Electoral Registration Officers are in charge for

¹²⁶ See Blewett, Neal: The Peers, the Parties and the People. The General Elections of 1919., Macmillan Press, 1972, pp. 364-365.

¹²⁷ See Judge, David: Representation. Theory and practice in Britain., Routledge, 1999, p. 149. Also see Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 49 for an overview of legitimacy problems arising from this fact.

¹²⁸ Electoral Commission: Who can vote?, 2006 (to be found online: http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144__E__N__S__W__pdf, last visited on 15 June 2010, 13:55)

¹²⁹ Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 85

comprising the register¹³⁰, but it is the potential voter's responsibility to facilitate that process.

The second set of procedures relevant to the general election process is the choice of voting method. In fact, voting is most commonly conducted in person at a local polling station, but one can also apply for extraordinary methods of voting. This is to say that one may also vote by post or proxy, but these methods require formal application and may be subject to certain conditions, such as timely application or the inability to vote in person ¹³¹.

In sum we can conclude that apart from meeting the legal qualifications relevant for being included in the franchise there also are formal qualifications which may also be necessary for the actual ability to vote.

2.4 Conclusion

In the foregoing sections I have provided a brief overview of the governmental and electoral system in England. I have emphasised the link between governmental cabinet and the parliament in order to show that the electoral level most relevant for analysing democracy's legitimacy with regards to its people is that of general election. Moreover I have shown that general elections are conducted on a territorial basis and employ a system of plural voting as well as several formal procedures the most important of which is registration. On the basis of this outline we may conclude that there are several possible starting-points for questioning the legitimacy of democracy in England, for example the remains of monarchy and aristocracy, the status of the established church, discriminations arising from the strict plurality voting system, and the division of constituencies. Some might even go as far as to question whether, for all those alleged problems, England can even be called a democracy at all. Nonetheless, for the purpose of the present paper I will go with Parry and Moyser who pointedly argued that *"Britain, for all its problems (...) remains one of the models for liberal democracy."*¹³² What this is meant to say is that the present paper will not provide a comprehensive analysis of the quality of English democracy, but my focus is only on the legitimacy of its franchise.

¹³⁰ Note that the Electoral Registration Officers use poll tax registers as main source of information in order to determine whom to send registration forms. (See Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 85 for further information.)

¹³¹ For more information please see <http://www.aboutmyvote.co.uk/faq.aspx> (last visited on 30 June 2010, 12:38).

¹³² Parry, Geraint / Moyser, George / Day, Neil: *Political Participation and Democracy in Britain*, Cambridge University Press, 1992, p. 3

The thus presented background knowledge allows us to limit the scope of the following analysis in two ways. First, I have justified my decision to focus only on general elections, which means that the scope of my review will not cover local or European Parliament elections. Second, since the “Common” MPs are my focus of attention it is reasonable to limit the time span to after 1322, when they first became an integral part of parliament.

3. England's democratic franchise

3.1 Introduction

In the previous chapter I summarized some of the most important background features of the English governmental and electoral system. Now I will turn to the main focus of this paper, the issue of electoral franchise, i.e. who has a vote and, vice versa, who does not. I will use the example of the English franchise, both current and historic, provides an insight into the actual design of franchise patterns and I aim to use it to develop a systematic framework of principles that can be followed to create a “legitimate” democratic people. The purpose of the present chapter is to provide a detailed account of franchise patterns in England as well as of their evolution. The questions I seek to answer are the following: Which qualifications does a person have to live up to in order to enjoy suffrage for general (parliamentary) elections in England? What attributes or circumstances can lead to legal disenfranchisement? When and how have those principles come to be accepted and what are their historic roots? What is the general structure of (dis-)enfranchisement in England in 2010?

In order to answer those questions, I will draw on two kinds of sources. First, there are “official” legal and advisory documents. Most of them can be found on the website of the Electoral Commission whose aim is to make suffrage information available to all potential voters. For example, I will make extensive use of their fact-sheet “*Who can vote?*”¹³³, because I find it does not only provide a concise outline of all relevant legal regulations, but it also gives an interesting insight into current political debate and justification. This is because there is “special mention” of certain groups and classes of persons, emphasising that they “especially” or “newly” are included in or excluded from the franchise. The official political justification of those rules is outlined too. Second, I have focused on sources providing historic analysis of the evolution of electoral law. This is because I aim to trace back the particular principles of (dis)enfranchisement – how have they come about, how far do they go back, why or based on what justification have they changed over time?

¹³³ See Electoral Commission: Who can vote?, 2006 (to be found online: http://www.Electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144_E_N_S_W_.pdf, last visited on 15 June 2010, 13:55). Note that the fact-sheet is dated 2006, but still valid as of June 2010.

I will first give an overview of the evolution of English franchise in general. The basic argument will be that there are four phases of development, all marked by specific statutes or Acts. I will suggest that continuity is the most prominent feature of this development. This interpretation is important, because it shapes the way I will portray and interpret those developments. Second I will then turn to analyse the principles of (dis-)enfranchisement currently prevailing in England, focussing on their historic evolution as well as their potential justification. Third, I will turn to those franchise qualifications that no longer prevail today, but which did shape historic franchise at some point. Again, I will outline their aim as well as their potential justification, but focus especially on the reasons for their abolishment. I will conclude by summarizing all so-found principles of enfranchisement.

3.2 Overview of the evolution of the English franchise

Before detailing the evolution and potential justification of particular franchise qualifications, I want to briefly sketch the general nature and course of the development of suffrage distribution in England.

In regards to the course of development, I suggest there are four phases, each marked by significant legislative acts or statutes. The first election of the Commons were conducted in the 14th century, though the electorate was actually rather limited and qualifications were extremely diversified. The first significant change occurred in 1430, when a statute introduced uniform franchise regulations for county constituencies¹³⁴. The franchise in boroughs actually remained diverse, because they retained the right to decide the basis of franchise for themselves¹³⁵. The third important phase of franchise development in England started with the Representation of the People Act of 1832¹³⁶. For the first time, borough franchise was unified too, even though it persisted to be distinct from that of counties. Due to the course of the 19th century, the Act was amended several times and the franchise was extended further, until in 1918 male universal suffrage had more or less been achieved. 1918 also marked a turning point, because women were introduced to the franchise. Further reform in 1928 finally

¹³⁴ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 45

¹³⁵ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 46

¹³⁶ Note that the Representation of the People Acts are the core source for legal dis-/enfranchisement. Almost all Acts can be found online at http://search.opsi.gov.uk/search?q=representation+of+the+people+act&btnG=Search&output=xml_no_dtd&client=opsisearch_semaphore&proxystylesheet=opsisearch_semaphore&site=opsi_collection, last visited on 20 June 2010, 16:48)

established “universal suffrage”. In sum, we may thus conclude that the history of franchise was generally that of its extension¹³⁷.

There were two important conceptual changes: First, there was a shift in the general concept of *who* should be represented in parliament. While at first the various national “*interests*”, such as trade interests, landed interests, etc.¹³⁸, were to be represented in parliament, territorially defined *constituencies*, i.e. communities defined by regional boundaries, later became the key focus of attention. The general idea of the parliament representing the (collective) interest of certain communities was perpetuated through the household franchise¹³⁹, but as Keir has pointed out there was nevertheless a revolution in that it was communities of *people* rather than interests that were to be represented from the 19th century on¹⁴⁰. Yet it was only after the First World War that the individual *person* prevailed as the effective unit for enfranchisement¹⁴¹. From this point on, it was only a few steps to the idea of “one person, one vote” which was effectively implemented in 1948¹⁴². The second important change concerns the perceived *character* of the right to vote. Today, the burden of proof mostly lies with those who argue that a certain person or group should be excluded from the franchise, while historic evolution started out from the idea that it was a privilege to be granted rather than a right to be demanded¹⁴³. The latter view was gradually softened when franchise qualifications became ever more legalised, i.e. standardized¹⁴⁴.

Despite the ongoing change there was nevertheless a strong continuity in all these developments. Not only was there a long period of unchanged electoral law from the 15th to the 19th century, but many historians have also pointed out that the “Great Reform Act” of

¹³⁷ See e.g. Bogdanar, Vernon: *The people and the party system. The referendum and electoral reform in British politics.*, Cambridge University Press, 1981, p. 5.

¹³⁸ See e.g. Kluxen, Kurt: *Geschichte und Problematik des Parlamentarismus.*, Suhrkamp, 1983, p. 124.

¹³⁹ See e.g. Blackburn, Robert: *The Electoral System in Britain.*, Macmillan Press, 1995, p. 68 on how one person was seen to vote representatively for all household members.

¹⁴⁰ See Keir, D. L.: *The constitutional history of modern Britain 1485-1937.*, R&R Clark, 1938, p. 415 on how the Representation of the *People* Act first introduced this notion.

¹⁴¹ Reeve, Andrew / Ware, Alan: *Electoral Systems. A comparative and theoretical introduction.*, Routledge, 1992, p. 63

¹⁴² Note that this is because in 1948 plural voting was finally abolished. (See Reeve, Andrew / Ware, Alan: *Electoral Systems. A comparative and theoretical introduction.*, Routledge, 1992, p. 63.)

¹⁴³ See e.g. Tanner, Duncan: *Political change and the Labour Party 1900-1918.*, Cambridge University Press, 1990, p. 112 or Pole, J. R.: *Political representation in England and the origins of the American Republic.*, Macmillan Press, 1966, p.399 and p. 469.

¹⁴⁴ See e.g. Tanner, Duncan: *Political change and the Labour Party 1900-1918.*, Cambridge University Press, 1990, pp. 104-112 on the periodic disenfranchisement of voters. Also see Blewett, Neal: *The Peers, the Parties and the People. The General Elections of 1919.*, Macmillan Press, 1972, p. 360.

1832 did not introduce fundamental change so much as it integrated the medieval principles into a coherent whole¹⁴⁵. The continuous amendments of the 19th century also perpetuated most of those justificatory principles, even if they were interpreted differently and therefore allowed for the extension of the franchise¹⁴⁶. In the following sections I will remain true to this “continuity reading” in that I will try to show how today's franchise qualifications have their roots in the very beginning of parliamentary history, if not in legislation then at least in their underlying principles.

3.3 Current principles and their evolution

3.3.1 Introduction

In the following sections I mean to give an account of the franchise qualifications currently prevailing in England, i.e. the requirements regulating suffrage in 2010. Apart from explicating their meaning and role within electoral law, I also aim to trace back their roots by giving an overview of their history and evolution. In this context, I will pay special attention to the potential justifications for each of those principles. Note that I will be distinguishing between two kinds of franchise qualifications, the ones enfranchising and the ones *disenfranchising*. While I admit that any principle of inclusion accounts for certain exclusions too, I deem it relevant whether a provision has mostly the purpose of in- or excluding persons in regards to franchise. This distinction will not be arbitrary as it is based on the legal concepts of “*conditions of enfranchisement*” on the one hand, and the “*legal incapacities to vote*” on the other¹⁴⁷.

3.3.2 Prevailing principles of enfranchisement

3.3.2.1 Introduction

The Electoral Commission's fact-sheet “*Who can vote?*” names three basic conditions for

¹⁴⁵ See e.g. Bogdanar, Vernon: *The people and the party system. The referendum and electoral reform in British politics.*, Cambridge University Press, 1981, pp. 5-7 or Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 7 or Keir, D. L.: *The constitutional history of modern Britain 1485-1937.*, R&R Clark, 1938, pp. 401-402 or Butler, D. E.: *The electoral system in Britain 1918-1951.*, Clarendon Press, 1953, p. 3 for confirmation of the continuity reading.

¹⁴⁶ See e.g. James, Toby: *Electoral Modernisation or Elite Statecraft. Electoral Administration in the UK 1997-2007.*, p. 8 (Not yet published but forthcoming in “British Politics” (Journal), kindly provided to me in advance by Andrew Reeve (PDF)).

¹⁴⁷ See Electoral Commission: *Who can vote?*, 2006 (to be found online: http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144__E__N__S__W__.pdf, last visited on 15 June 2010, 13:55)

enfranchisement:

“To vote in UK Parliamentary elections a person must (...):

- *be 18 years of **age** or over on polling day*
 - *be a British **citizen**, a Commonwealth citizen or a citizen of the Irish Republic*
- who is **resident** in the UK (...). ”¹⁴⁸*

In the following I will give an overview of the development and potential justification of each of those provisions.

3.3.2.2 The citizenship qualification

Design and working of the citizenship qualification

Citizenship is one of the most fundamental qualifications of enfranchisement in England. It is an absolute condition in the sense that it is necessary (though not sufficient) to transfer the right to vote. Living up to any or even all other qualifications does not entitle a person to vote, if he or she can not produce the “right” citizenship. It therefore functions as a basis for all other qualifications. What is interesting, however, is that it is not only the English, or rather British, citizenship, which entitles a person to vote in general elections, but that citizens of some other countries not part of the United Kingdom – Ireland and Commonwealth countries, to be precise – actually share this right.

Yet, while citizenship of either of the listed countries will entitle a person to vote in general elections, there still is variation in the depth of this right: British citizens retain their right to vote in general elections even if they are not resident in the United Kingdom at the time of the election, provided that their last residence does not lie back more 15 years¹⁴⁹. However, the same does not hold for Commonwealth or Irish citizens, because they do have to be resident

¹⁴⁸ Electoral Commission: Who can vote?, 2006 (to be found online: http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144__E__N__S__W__.pdf, last visited on 15 June 2010, 13:55). Note that the emphasis was added by me.

¹⁴⁹ See Sear, Chris: Electoral franchise. Who can vote? (Publication by Parliament and Constitution Centre of the House of Commons Library, to be found online at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02208.pdf>, last visited on 16 June 2010, 18:52)

at the time of the election, otherwise they are not eligible to vote in the United Kingdom's general elections. Thus it obviously makes a difference whether one is a “real” British citizen or whether one only belongs to the extended circle of related subjects. The “depth” or permanence of the right to vote therefore seems to depend on what particular citizenship a person has (an alien one, a British-related one or the actual British one) and citizenship therefore constitutes the core qualification for voting in England.

Historic evolution of the citizenship qualification

Citizenship has only recently become important to the distribution of political rights. Up until 1981, “*British citizenship itself did not devote any specific right*”¹⁵⁰, instead the “*right of residence conferred political rights rather than citizenship, since rights were granted to any resident without the necessary condition of being a citizen.*”¹⁵¹ This is not too surprising if we consider that the term “citizen” had not been introduced into British law before 1948¹⁵², when it became relevant especially in regards to immigration law. Before that the dominant concept had originally been “subjecthood”, which means that rights were generally not held in virtue of being a formal member in the political community, but were originally held in virtue of being the sovereign's *subject*. This means that a personal bond rather than legal membership was required¹⁵³, i.e. until the 18th century it was because of an owed allegiance to the sovereign, because one was subjected to his power and because one lived in his protected territory, that people held rights. After the French Revolution this slowly began to change, because a new terminology was introduced: *nationality*¹⁵⁴. In English law the nation was defined in territorial terms¹⁵⁵, because traditionally whoever was born to or living in the

¹⁵⁰ Dell'Olio, Fiorella: *The Europeanization of Citizenship. Between the Ideology of Nationality, Immigration and European Identity.*, Ashgate, 2005, p. 34

¹⁵¹ Dell'Olio, Fiorella: *The Europeanization of Citizenship. Between the Ideology of Nationality, Immigration and European Identity.*, Ashgate, 2005, p. 33

¹⁵² See Dell'Olio, Fiorella: *The Europeanization of Citizenship. Between the Ideology of Nationality, Immigration and European Identity.*, Ashgate, 2005, p. 35. Note that this is of course not meant to say that the term itself had not existed or been in use before that. See for example Dell'Olio, Fiorella: *The Europeanization of Citizenship. Between the Ideology of Nationality, Immigration and European Identity.*, Ashgate, 2005, p. 23 and p. 52 or Magnette, Paul: *Citizenship. The History of an Idea.*, ECPR Press, 2005, p. 185 for a brief overview of “citizenship” before that time.

¹⁵³ See Jones, Mervyn: *British Nationality Law and Practice.*, Clarendon Press, 1947, p. 4. Also see Valchars, Gerd: *Defizitäre Demokratie. Wahlrecht im Einwanderungsland Österreich.*, Braunmüller Universitätsverlag, 2006, p. 123 (note that he refers to Otto Kimminich here).

¹⁵⁴ See Jones, Mervyn: *British Nationality Law and Practice.*, Clarendon Press, 1947, p. 3.

¹⁵⁵ See Canovan, Margaret: *Nationhood and political theory.*, Edward Elgar Publishing, 1996, p. 77 (also see pp. 51-60 for an overview of how and on what basis “nations” can be defined). Note that some authors have tried to point out that English nationality has always been defined through cultural aspects, such as protestant religion, as . For details see e.g. Canovan, Margaret: *Nationhood and political theory.*, Edward Elgar Publishing, 1996, pp. 75-76 or Spinner, Jeff: *The boundaries of citizenship. Race, ethnicity and nationality in the Liberal State.*, John Hopkins University Press, 1994, pp. 55-60 or Rogers, David: *Politics, Prayer and*

sovereign's territory was entitled to his protection and owed allegiance to him¹⁵⁶. Subjecthood persisted to be an important element, but the concept was broadened to refer not only to individual persons but to a territorially defined people. Subjects (or nationals) were already contrasted with “aliens”¹⁵⁷, i.e. outsiders not member of the national community. Today “national” and “citizen” are terms used interchangeably¹⁵⁸, but some authors argue that the introduction of the latter term nevertheless signifies an important transition. They argue that “subjecthood” was a duty-centred notion relying on the individual rights and duties arising from the relationship to the sovereign, “nationality” conceptualised the idea of community and common state membership, and “citizenship” has continued this tradition but emphasises the active and political aspect even more¹⁵⁹.

In sum, the continuity of those developments¹⁶⁰ suggests that citizenship has developed as a concept of community in which individuals not only share a common sovereign and territory but where they have certain obligations and also hold certain rights. In the following I will show how all those elements are essential to the justification of the citizenship qualification for voting. I will first examine the justifications offered for extending the franchise to non-British citizens and then develop arguments for defending citizenship as a voting qualification in general.

Parliament., Continuum, 2000, pp. 110-111 or Piper, Nicola: Racism, nationalism and citizenship. Ethnic minorities in Britain and Germany., Ashgate Publishing, 1998, p. 55. Also see Barlow, Richard: Citizenship and conscience. A study in the theory and practice of religious toleration in England during the 19th century., University of Pennsylvania Press, 1962 or Roth, Cecil: A history of the Jews in England, Clarendon Press, 1964 for an overview of how religion has affected political rights in England.

¹⁵⁶ Jones, Mervyn: British Nationality Law and Practice., Clarendon Press, 1947, p. 2

¹⁵⁷ See Jones, Mervyn: British Nationality Law and Practice., Clarendon Press, 1947, p. 59. Note that the class of “aliens” has always been excluded from the franchise. Official documentation at least dates back until the Representation of the People Act 1832 which was the first universal legal act on general franchise. (See Tanner, Duncan: Political change and the Labour Party 1900-1918., Cambridge University Press, 1990, p. 100) Also note that in 1918, Parliament discussed the idea of regarding only those nationals as eligible to vote who had already been nationals for at least 15 years. Would it have been accepted, this would have established a third class of people besides subjects and aliens – those who are subjects, but only to a certain extent. (See Trachsler, Wilhelm: Das aktive Wahlrecht in England., K. J. Wyss Erben, 1927, p. 32)

¹⁵⁸ See British Nationality Act, 1981 (to be found online at http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1981/cukpga_19810061_en_1 (last visited on 13 June 2010, 19:47). Note that I will do the same throughout the course of this paper (unless stated otherwise).

¹⁵⁹ See e.g. Piper, Nicola: Racism, Nationalism and Citizenship. Ethnic minorities in Britain and Germany., Ashgate, 1998, p. 64 or Magnette, Paul: Citizenship. The History of an Idea., ECPR Press, 2005, p. 7 and p. 189 or Spinner, Jeff: The boundaries of citizenship. Race, ethnicity and nationality in the liberal state., John Hopkins University, 1994, pp. 33-34 and p. 54 or Dell'Olio, Fiorella: The Europeanization of Citizenship. Between the Ideology of Nationality, Immigration and European Identity., Ashgate, 2005, p. 24.

¹⁶⁰ See e.g. Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 80.

Citizenship as the personal tie between subject and government

In their fact-sheet the Electoral Commission offers three justifications for extending the franchise to some non-British citizens. First it mentions the “*traditionally close ties that exist*”¹⁶¹ in regards to Ireland. This can be interpreted in two ways: First, it may refer to the fact that there has always been a close relationship between the *countries*, because for a period of over 100 years both were part of the same kingdom¹⁶² and there still are various forms of cooperation today. Second, and perhaps even more importantly, the Commission's formulation could refer to a relationship between the *people*. This is because their second justification states that Irish citizens “*are not to be treated as aliens*”¹⁶³. They are to have special status in regards to otherwise national rights, because British citizens too are “*entitled to vote in elections to the Irish Parliament*”¹⁶⁴. Thus a distinction is drawn between “citizens” and “aliens” and it is obviously relevant for the question of franchise. Why is that? Perhaps the third justification helps to complete the picture: Commonwealth citizens are enfranchised, because they were historically considered British “subjects” and therefore have been seen to owe “*allegiance to the Crown*”¹⁶⁵. Note that the concept of allegiance applies not to the country, but to the sovereign, and that it stands for “*a personal bond between sovereign (in his natural capacity) and subject*”¹⁶⁶.

All three justifications drawn together, we therefore get the impression that citizenship matters because it signifies a tie between “subjects” and government. What is more, it refers to a relationship so substantially different from the relationship “aliens” have towards the government, that it justifies transferring the right to vote to only this group. Aliens, then, would be all persons who are not citizens of one of the listed countries¹⁶⁷, even if there are

¹⁶¹ Electoral Commission: Who can vote?, 2006 (to be found online: http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144__E__N__S__W__.pdf, last visited on 15 June 2010, 13:55)

¹⁶² Note that from 1800 until 1927, Ireland was part of the United Kingdom, while today Ireland constitutes an independent state with only Northern Ireland still belonging to the United Kingdom.

¹⁶³ Electoral Commission: Who can vote?, 2006 (to be found online: http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144__E__N__S__W__.pdf, last visited on 15 June 2010, 13:55)

¹⁶⁴ Electoral Commission: Who can vote?, 2006 (to be found online: http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144__E__N__S__W__.pdf, last visited on 15 June 2010, 13:55)

¹⁶⁵ Electoral Commission: Who can vote?, 2006 (to be found online: http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253-6144__E__N__S__W__.pdf, last visited on 15 June 2010, 13:55)

¹⁶⁶ Jones, Mervyn: *British Nationality Law and Practice*, Clarendon Press, 1947, p. 4

¹⁶⁷ Note that this distinction dates from the Nationality Act of 1981. For an explication also see Dell'Olio, Fiorella: *The Europeanization of Citizenship. Between the Ideology of Nationality, Immigration and*

significant bonds between the countries, for example common membership in the European Union¹⁶⁸.

Citizenship as a token for permanence

As we have seen, citizenship does not only determine whether a person is generally eligible to vote in England, but it also determines the depth of this right, because British citizens have to live up to different residence qualifications than non-British citizens. However, citizenship itself is subject to certain qualifications, because it is usually granted only due to descent or application¹⁶⁹. Since it is thus not a random thing to come by it indeed constitutes a rather permanent tie. As a consequence, one could suggest that the closer or more *permanent* the tie between a person and a country, the “deeper” or more permanent their right to vote there. British citizens are perhaps privileged, because it is assumed that their link to the United Kingdom is closer and more permanent than that of others. Their right is as permanent as their tie to the country and can therefore only be deferred if a person lives abroad for an exceptionally long period of time. In contrast, “*aliens*” are obviously assumed not to have any relevant link to the country of the United Kingdom at all, while Commonwealth or Irish citizens can, following historic bonds between the countries, establish that link, though only through residence. Their right to vote is not permanent because it does not follow directly from citizenship (which is that of a foreign country), but from a combination of a particular citizenship and a personal tie to Britain – a tie for which residence is the demonstration of.

Citizenship as membership in the community of fate

The arguments presented in the previous sections suggest that citizenship is justified as a qualification for voting, because it establishes a permanent tie between a subject and his/her government. It thus stands for the legal bond between a person and a political community and can be understood as a form of “membership”. On a third account, this membership may be seen to matter, because it conjoins persons into a “*community of fate*”¹⁷⁰: Politics are about

European Identity, Ashgate, 2005, p. 37.

¹⁶⁸ Note that while European Union citizens do have a right to vote in local and European Parliament elections, they are not enfranchised for the purpose of general elections¹, in this context therefore having the same status as all other “aliens”.

¹⁶⁹ Note that all details and procedures are defined in the British Nationality Act which can be found online at http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1981/cukpga_19810061_en_1 (last visit on 13 June 2010, 19:47). For explication and analysis see e.g. Jones, Mervyn: British Nationality Law and Practice, Clarendon Press, 1947.

¹⁷⁰ Note that this is actually a rather common notion. See e.g. Van Parijs, Philippe: The Disenfranchisement of

creating collectively binding rules and those rules fundamentally affect a person's interests and opportunities, not just on random occasion, but permanently. Since an individual's future is fundamentally influenced by, or even dependent on, that of his/her political community, his/her "fate" is too. Thus, nation-states, the most common form of political communities today, create a community of fate among their legal subjects, i.e. the nationals or citizens of their country. In regards to franchise this is important, because the general idea seems to be that only those persons who are members in the community of fate should be eligible to vote. On a theoretical level, this idea is explicated by the "all affected principle"¹⁷¹ which states that only those who are affected by a decision should have a say in it. Thus, only those persons who share a permanent link to a certain country should have a right to vote, because they are reasonably likely to be affected by the elected government's decision. As Goodin puts it: *"everyone who is affected by the decisions of a government should have the right to participate in that government (...) and only those who are affected by a decision should have a say in it"*¹⁷².

This suggests that British citizens' right to vote is most permanent, because they are most likely to be affected by the government's decision. For example, even if they decide to live abroad, they still count as "British" from other government's viewpoint and this might affect their ability to enter certain countries, get visa, etc. Irish or Commonwealth citizens may also share some link to the United Kingdom, because those countries' fates are linked. Aliens, on the other hand, are no members in the community of fate at all, because there is no reasonable certainty that they are committed to this country or its government. In sum, the degree to which citizenship is sufficient to establish a right to vote would seem to depend on the degree to which one's interests are likely to be affected.

the Elderly, and Other Attempts to secure Intergenerational Justice., In: Philosophy & Public Affairs, Vol. 27, No. 4, 1999.

¹⁷¹ See e.g. Valchars, Gerd: Defizitäre Demokratie und Wahlrecht im Einwanderungsland Österreich., Braunmüller Universitätsverlagsbuchhandlung, 2006 for detailed explication and application of this principle. Also see Dahl, Robert: Democracy and its critics., Yale University Press, 1915, pp. 107-8 and Goodin, Robert: Enfranchising all affected interests, and its alternatives., In: Philosophy & Public Affairs. Vol. 35, No. 1, 2007. Note that the Latin version of this principle ("Quod omnis tangit ab omnibus debet approbari.") can already be found in an English statute of 1322. (See Kluxen, Kurt: Englische Verfassungsgeschichte. Mittelalter., Wissenschaftliche Buchgesellschaft, 1987, p. 96.)

¹⁷² See Goodin, Robert: Enfranchising all affected interests, and its alternatives., In: Philosophy & Public Affairs. Vol. 35, No. 1, 2007, p. 51 in reference to Robert Dahl's "After the revolution?". Also see Christiano, Tom: The Constitution of Equality. Democratic Authority and its Limits., Oxford University Press, 2008. p. 58.

Conclusion

In sum, citizenship has proven to be the core qualification for voting in England, because only British, Irish or Commonwealth citizens can be eligible to vote. All other persons count as “aliens” and cannot qualify, even if they were to satisfy (all) other voting qualifications. Historically we have found that the two most significant characteristics of citizenship are that it is, first, a legal concept, and second that it is exclusive¹⁷³. Since it is a legal concept, not a natural fact, its structure is contingent on historic interpretation and justification. This will be important to keep in mind when we assess the legitimacy of using citizenship as a franchise qualification. In addition to that, citizenship is an exclusive concept because by conceding this status to certain people and not others we get away from the notion that “all” people are enfranchised in democracy. Indeed democracy does not enfranchise all people in the sense of “all human persons” at all, but it rather seems to refer to *a* people, e.g. defined by common nationality. This can be justified in several ways: First, only those should have a vote who are actually subject to the elected government. Second, only a permanent, legal tie can make for this sort of subjecthood. Third, political communities are communities of fate, and only “members” should have a right to vote. Citizenship signifies this sort of membership, because it stands for permanent commitment and obligation towards a certain country and its government.

3.3.2.3 The residence qualification

Design and working of the residence qualification

In the previous section I have outlined the relevance of the citizenship qualification for England's general election franchise. As we have seen, it is a necessary condition for being eligible to vote, but it needs to be combined with residence. To be sure, residence in the realm of the United Kingdom does not itself qualify anyone to be enfranchised. “Alien” residents, for example, are not enfranchised, even if they do live in the United Kingdom for an extended period of time. Nonetheless, residence is an important supplement to the citizenship qualification, because while British citizenship generally confers the right to vote, even a British citizen's right is deferred if they have not been resident in the United Kingdom for more than 15 years in a row¹⁷⁴. For Irish or Commonwealth citizens, the residence

¹⁷³ See Magnette, Paul: *Citizenship. The history of an idea.*, ECPR Press, 2005, p.182 for confirmation of this view.

¹⁷⁴ Note that there have always been some exceptions to this rule, e.g. government officials such as embassy

requirement is even stricter – they are not enfranchised at all, unless they are resident in the United Kingdom at the time of the general election.

Historic evolution of the residence qualification

As we have seen, it was only in the end of the 20th century that citizenship actually became the core franchise qualification in England. Its underlying justifications, however, already prevailed in the Middle Ages and I will suggest that citizenship was thus preceded by another qualification that effectively fulfilled the same purpose, i.e. ensuring the legal obligation and permanent allegiance of the subjects: residence.

While virtually none of the historic literature on the franchise dedicates much attention to “nationality” before the 20th century, residence was first mentioned as a franchise qualification in 1430¹⁷⁵ and thus clearly preceded it. In 1832 it was introduced as a necessary franchise qualification¹⁷⁶ and from 1918 on it even became the core requirement¹⁷⁷, before this place was taken by citizenship in 1981. There are various reasons for the early importance of the residence requirement. First, pragmatic reasons: Who was a Middle Age subject to the sovereign? Effectively it was the persons born to and *living* in the sovereign's territory. This is because one must not forget that the immense personal mobility that individuals experience today are characteristic for today's globalization and had no real equivalent before the 20th century¹⁷⁸. Therefore neither the franchise status of immigrants nor that of British nationals living abroad were much of a political issue, which is for example illustrated by the fact that the latter group first obtained their right to vote only in 1985¹⁷⁹. Second, “nationality” is by its very nature a comparatively universal concept¹⁸⁰, because it is held through birth. It was not in

officials living abroad or persons serving in the armed forces. (See Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 79.)

¹⁷⁵ See e.g. Pole, J. R.: *Political representation in England and the origins of the American Republic*, Macmillan Press, 1966, pp. 397-398.

¹⁷⁶ See e.g. Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 67 or Kluxen, Kurt: *Geschichte und Problematik des Parlamentarismus*, Suhrkamp, 1983, p. 122.

¹⁷⁷ See e.g. Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 69.

¹⁷⁸ See Nasström, Sofia: *The legitimacy of the people*, In: *Political Theory*, Vol. 35, No. 5, 2007, p. 651. Also see the UN International Migration Report of 2002 which provides a comprehensive overview of facts and figures relevant for transnational migration in its historical development (to be found online at <http://www.un.org/esa/population/publications/ittmig2002/2002ITTMIGTEXT22-11.pdf>, last visited on 24 July 2010, 13:37). For comments on those figures also see Benhabib, Seyla: *Borders, boundaries and citizenship*, In: *Political Science and Politics*, Vol. 38, No. 4, 2005 (to be found online at <http://www.jstor.org/stable/pdfplus/30044348.pdf>, last visited on 25 July 2010, 12:27).

¹⁷⁹ See Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 79.

¹⁸⁰ See Spinner, Jeff: *The boundaries of citizenship. Race, ethnicity and nationality in the liberal state*, John Hopkins University, 1994, p. 37 or Piper, Nicola: *Racism, Nationalism and Citizenship. Ethnic minorities in*

the will of the political leaders of those times to establish any sort of universal franchise yet, because voting was seen as a privilege or trust rather than a right¹⁸¹. Residence was more easily made subject to stringent regulations than nationality¹⁸², therefore it was better suited as a franchise qualification: Not anyone merely “living” within the territories of the United Kingdom actually counted as resident¹⁸³. Before the Reform Act of 1832 only “*scot-and-lot-residents*”, i.e. those paying local taxes and obligated to fill local offices, actually counted as residents in terms of franchise¹⁸⁴. On a similar note prisons, mental hospitals, work or poor houses all did not constitute places that would render their inhabitants “residents” in terms of voting qualification until the 20th century¹⁸⁵. This is because only residents actually living up to their own duties as subjects or only those even having such duty counted as members of a constituency and had the right to vote, because only they were seen to contribute to society. Apart from that, institutions like prisons or hospitals were usually quite big, often accommodating people from wider regions and not only one electoral district. Since a person's place of residence determines which constituency he/she votes for, the government's fear was that enfranchising those groups would mean conceding them decisive force over election outcomes within certain constituencies¹⁸⁶ and this was to be avoided. This shows that residence was considered important, thirdly, because it was a demonstration of the personal tie to the constituency one was voting in and for¹⁸⁷. For example, the prior duration of residence within a certain constituency only ceased to be a (dis-)qualification for voting in 1949¹⁸⁸. This

Britain and Germany., Ashgate, 1998, p. 37.

¹⁸¹ See Pole, J. R.: Political representation in England and the origins of the American Republic., Macmillan Press, 1966, p. 399 and p. 469.

¹⁸² Note that these were mostly property qualifications.

¹⁸³ See e.g. Trachsler, Wilhelm: Das aktive Wahlrecht in England., K. J. Wyss Erben, 1927, pp. 28-44 or Tanner, Duncan: Political change and the Labour Party 1900-1918., Cambridge University Press, 1990, pp. 101-128 for an overview of some historical discussions about what should or should not count as “residence” for the purpose of enfranchisement.

¹⁸⁴ See Pole, J. R.: Political representation in England and the origins of the American Republic., Macmillan Press, 1966, p. 400.

¹⁸⁵ See Trachsler, Wilhelm: Das aktive Wahlrecht in England., Buchdruckerei K.J. Wyss Erben, 1927, p.39 or Thomson, Mathew: The problem of mental deficiency: Eugenics, democracy and social policy in Britain. 1870-1959., p. 51 (to be found online at: http://books.google.at/booksid=9rIsDsV_WPkc&printsec=frontcover&dq=Thomson+Mathew+eugenics&source=bl&ots=bvY2xAZGjR&sig=poHTb4RAHGsbvMcR6s0e5oNAnJo&hl=de&ei=gn8aTNqnOJCVMGAsdYK&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCkQ6AEwAw#v=onepage&q&f=false, last visited on 17 June 2010, 22:04).

¹⁸⁶ See Thomson, Mathew: The problem of mental deficiency: Eugenics, democracy and social policy in Britain. 1870-1959., p. 52 (to be found online at: http://books.google.at/booksid=9rIsDsV_WPkc&printsec=frontcover&dq=Thomson+Mathew+eugenics&source=bl&ots=bvY2xAZGjR&sig=poHTb4RAHGsbvMcR6s0e5oNAnJo&hl=de&ei=gn8aTNqnOJCVMGAsdYK&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCkQ6AEwAw#v=onepage&q&f=false, last visited on 17 June 2010, 22:04).

¹⁸⁷ See Trachsler, Wilhelm: Das aktive Wahlrecht in England., Buchdruckerei K.J. Wyss Erben, 1927, p. 38.

¹⁸⁸ See e.g. Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 70. Note that it had gradually been reduced before that too. (In 1884 it was one year, in 1918 only six months, in 1928 it was reduced to three months, until it was finally abolished in 1948, so that today residency on the qualifying date is sufficient. See e.g. Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 67 and

shows that residence was important, because it made sense of the territorial aspect of English politics.

In sum, residence seems to be the historic predecessor of citizenship, because it effectively served the same purpose of distinguishing between permanent legal subjects and aliens. In the following I will examine whether and how residence can be justified as a franchise qualification today.

Residence and the personal "de facto" aspect of the community of fate

One possible justification for basing franchise on a residence requirement is formulated by Rainer Bauböck¹⁸⁹. According to him, citizenship constitutes state membership and is, by its legal nature, permanent. It is crucial because it links an individual's personal fate and environment to a country, its government and the people within it – not just on random occasion, but permanently. This gives rise to the idea of a “community of fate” where the individual future is fundamentally influenced by, or even dependent on, that of his/her national country. Bauböck points out that it is possible that some persons may hold a *de facto* link of this sort without it being formalised through citizenship. His claim is that *de facto* and formal link *should* be congruent (with *de facto* members of the community of fate actually holding that community's citizenship¹⁹⁰), but that they quite often are not.

Applying this to the issue at hand I would suggest that Bauböck's distinction between “formal membership” and “de facto link” is similar to that of citizenship and residence. It might be true that states are “communities of fate” and that citizenship signifies membership and thus establishes a permanent link between a person and this community. However, a citizen living abroad certainly is much less dependent on this country and its government than a person being resident there. Of course there always remains at least a formal tie between a citizen and his/her native country, be it only that his/her right to enter another country depends on nationality or because one has to pay certain taxes there. Yet a *de facto* link in everyday life is

p. 73.

¹⁸⁹ See Bauböck, Rainer: Gleichheit, Vielfalt und Zusammenhalt – Grundsätze für Integration von Einwanderern. As referenced by Czermak, Emmerich: Demokratie und Wahlrecht., Europa-Verlag, 1948, p. 113.

¹⁹⁰ See e.g. Dahl, Robert: Democracy and its critics., Yale University Press, 1915, p. 124 for a structured argument regarding different levels of “membership”.

most effectively established through residence¹⁹¹, simply because the degree to which a person is actually affected by national rules and regulations is much higher. Similarly, it may be true that there are historic ties between British and other communities, so that those countries' fates are somewhat linked, yet this need not affect a particular individual *personally*. A person choosing to live in the United Kingdom, however, certainly demonstrates a personal bond to this country, because he/she will be subjected to all its laws, pay taxes, have their livelihood depend on the economic situation there, etc. British nationals retain most of those conditions even if they live abroad, yet even their link becomes less tight when they are abroad for an extended period of time.

On this view, residence would be an important voting qualification, because it adds substance to the idea of community of fate; it establishes an actual, personal tie to the government elected in the course of general elections, because one is ruled by it directly and hence fundamentally affected by it.

Residence as a token for permanence

Another justification for the residence qualification lies in the issue of permanence: If the permanence of a person's bond to the government matters for enfranchisement, one must not forget that not only citizenship but residence too shows evidence of reasonable permanence. This is because residence is actually distinct from mere "*temporary presence at an address*"¹⁹² exactly because it signifies a certain degree of permanence. For example, what distinguishes a tourist or guest from a resident is that the former's presence in the country is temporary in a way that the latter's is not. It is "de facto permanent", because to an individual choosing one's place to live is usually neither random nor insignificant. Again, we therefore find that residence supplements citizenship in an important way.

Residence as "lawful residence"

If we conclude that residence adds depth to the bond established through citizenship, because it is both permanent and personal, why is residence required from foreign citizens and not from all persons allowed to vote? I suggest it is because "residence" is not only defined by

¹⁹¹ See e.g. Trachsler, Wilhelm: Das aktive Wahlrecht in England., K. J. Wyss, 1927, p. 38 for the argument that residency actually establishes a "link" or connection to the place where one is living.

¹⁹² Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 77

living in the realm for a reasonably permanent period of time, but by the fact that one is legitimately doing so. Today this provision is secured as follows: “*People who do not have leave to enter or remain in the UK may not be included in the electoral register, and consequently are not entitled to vote.*”¹⁹³ Legal frameworks do not allow for the expatriation of British citizens anymore, which means that they always “have leave” to live there and generally do not need to demonstrate either the legality or the depth of their tie to the United Kingdom. Instead their citizenship is usually seen to speak for itself unless they choose to live abroad for an extraordinarily extensive period of time, which would demonstrate that there is but a formal link to their national country anymore. Non-British citizens, on the other hand, might not have leave to remain and be resident in the United Kingdom at all, and if they are not, they are not entitled to vote. Through their residence foreign citizens demonstrate both the legality of their presence and their personal connection to the United Kingdom, because only officially registered residence renders a person eligible to vote and the register therefore only includes *lawful* residents.

Residence and the territorial aspect of politics

Last, the residence requirement could be justified due to the fact that “*political communities are typically territorial*”¹⁹⁴ and in modern times they mostly presuppose a nation state¹⁹⁵. For citizenship, the state matters mostly abstractly, as a “community” whose members share certain rules, rights and obligations. However, one must not forget that states usually have a concrete geographical form as well, with effective boundaries being an important issue, often subject to wars and conflict. On a theoretical level, one might therefore assume that politics actually need this territorial basis in order to function properly¹⁹⁶. More practically speaking, the actual workings of English national politics emphasise territory also in another aspect: that of voting constituencies. General elections are conducted on a highly territorial basis with the “local connection” of a person fundamentally mattering for his/her right to vote, because there is at least as much focus on the “where” of a person's voting (i.e. the constituency they are eligible to cast their vote for) as on “whether” they are allowed to vote at all¹⁹⁷. The residence

¹⁹³ See Sear, Chris: Electoral franchise. Who can vote? (Publication by Parliament and Constitution Centre of the House of Commons Library, to be found online at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02208.pdf>, last visited on 16 June 2010, 18:52).

¹⁹⁴ Canovan, Margaret: Nationhood and political theory., Edward Elgar Publishing, 1996, p. 17

¹⁹⁵ See Canovan, Margaret: Nationhood and political theory., Edward Elgar Publishing, 1996, p. 13.

¹⁹⁶ See e.g. Valchars, Gerd: Defizitäre Demokratie und Wahlrecht im Einwanderungsland Österreich., Braunmüller Universitätsverlagsbuchhandlung, 2006, p. 107.

¹⁹⁷ Note that this conclusion can be drawn from the fact that quite often the decision *whether* to enfranchise certain groups depended on whether they would be able to establish a reasonably tight connection to a

requirement could hence be justified because it provides a means to connect membership in the political community with the territorial requirement of (English) politics.

Conclusion

Residence can be seen as the predecessor of the citizenship qualification, because until the 20th century it essentially fulfilled the same purpose citizenship fulfills today. In England residence still is an important supplement to the latter qualification in that all persons eligible to vote actually have to live up to some sort of residence requirement regardless of their nationality. The main justification for this is that while citizenship stands for membership in a certain community and thus establishes a “general” bond between a group of people and its political structures, residence demonstrates a *personal* as well as permanent link of an individual towards a country, its people and its government. Furthermore, it provides a means to connect membership in the political community to the territorial requirement of politics.

3.3.2.4 The age qualification

Design and working of the age qualification

In the previous section I have discussed citizenship and residence as qualifications for the right to vote in general elections in England. I have pointed out that a particular citizenship is a necessary condition in the sense that no one can vote without satisfying this condition, no matter what other qualifications he/she might live up to. The second qualification for which this is true is the age qualification: Today's English electoral law requires a minimum age of 18 years of every potential general election voter. This means that no person is allowed to vote if he/she is not 18 years old on polling day. Conversely, it also means that once he/she has turned 18, no age requirement applies to them anymore, because the age qualification is only relevant for the first introduction to the franchise.

Historic evolution of the age qualification

Interestingly enough, though age is one of the oldest conditions for enfranchisement, it didn't change substantially over time, but varied only between 18 and 21¹⁹⁸. The only exception I

constituency. For example, this was reflected in the discussion about whether and how soldiers or sailors could be enfranchised. (See Trachsler, Wilhelm: *Das aktive Wahlrecht in England*, K. J. Wyss Erben, 1927, p. 12).

¹⁹⁸ Note that, interestingly, this observation is not only true historically within Britain, but also internationally, as

have found was in 1918 when women were first introduced to the franchise. They were allowed to vote only at the minimum age of 30 years¹⁹⁹, while male voters already qualified at 21²⁰⁰. In 1928, however, the voting age was equalised for both sexes and the age of 21 henceforth remained the relevant age requirement for both men and women²⁰¹. In 1969 it was reduced to 18 and has not been changed since²⁰². Nevertheless two proposals for change have dominated recent debates. First, some demand that the minimum age for voting should be lowered to 16. This idea has become popular not only in England, but also in various other European countries within the last few years²⁰³. Second, in academic circles the introduction of a maximum age for voting has also been discussed. This new provision is not supposed to replace the existing minimum age requirement, but supplement it. It would constitute an unprecedented change, because age qualification would then not only refer to the age of the first introduction to the franchise, but instead maintain that there was only a limited time or age span during which a person could vote at all, i.e. enfranchisement would only be possible from and up to a certain age. In sum, there currently is and always has been an age qualification for enfranchisement in England, but some suggest that its particular design should be adapted.

In the following I will outline several justifications for an age qualification for voting, most of which have been used to support a particular design. The first set of arguments centres around age-dependent competence. The second is concerned with how age and interests are interrelated, either in regards to their orientation or in regards to their substantial content. A third view is built on age as a measure for how many people should be included in regards to numerical proportions. It can be related to the issue of turn-out and actual participation in the election or to demographical considerations. The fourth and last approach strives for a balance of rights and duties held by every member of society.

an analysis of 63 democracies world-wide has shown (see Blais, André/Massicotte, Louis/Yoshinaka, Antoine: Deciding who has the right to vote. A comparative analysis of election laws., In: Electoral Studies, Vol. 20, No. 1, 2001, to be found online at http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6V9P-41JTSD0-3-1&_cdi=5904&_user=464575&_pii=S0261379499000621&_orig=browse&_coverDate=03%2F31%2F2001&_sk=999799998&view=c&wchp=dGLbVzb-zSkzV&md 5=f8436c09bd10498f813d75b23083944f&ie=/sdarticle.pdf, last visited on 23 July 2010, 09:37).

¹⁹⁹ See e.g. Evans, Eric: Parliamentary Reform 1770-1819., Longman, 2000, p. 135.

²⁰⁰ See e.g. Trachsler, Wilhelm: Das aktive Wahlrecht in England., Buchdruckerei K. J. Wyss Erben, 1927, p. 30.

²⁰¹ See e.g. Butler, D.E.: The electoral system in Britain 1918-1951., Clarendon Press, 1953, p. 12.

²⁰² See e.g. Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 72.

²⁰³ See e.g. Council of Europe (Parliamentary Assembly): Expansion of democracy by lowering the voting age to 16, 2009 (to be found online at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11895.pdf>, last visited on 18 June 2010, 00:23).

Age as a proxy for competence

The first argument is based on the notion that in order to actually cast their vote, a person needs a certain ability and competence. Age itself may not be a guarantee for that, but it might function as a proxy. This is because there is a typical course of development common to all human beings and we can therefore empirically determine at which age an average person is (or is not) in possession of the capacities relevant for voting. The age qualification is thus designed to indirectly ensure that all voters can reasonably be expected to meet a certain threshold of competence defined through certain key capacities or functions. Accepting this reasoning the main question is this: What kind of ability or competence are we referring to here? Is it physical or mental; is it the bodily ability to mark one's vote on a ballot paper, the intellectual capacity to understand what one is supposed to do, the ability to form an independent judgement, or the moral competence to reflect on the consequences of one's voting behaviour?

On the first assumption age is seen as a proxy for physical ability, so perhaps it would be designed to exclude very young infants and elderly people. One could argue, for example, that the common method of voting simply requires certain physical acts – be it only to pick up a pen and make a mark on the ballot paper – therefore only those capable of performing them should actually be eligible to vote. However, there are two problems with this reasoning. The first concerns effectiveness: If we aim to enfranchise people based on their physical capacity it is all but obvious that age would be the most effective or accurate proxy. Especially in regards to the elderly it seems that the individual lifestyle predicates more about the comparability of two ninety-year-olds than their numerical age. Second, it is similarly dubious why we should accept physical ability as a relevant competence for voting at all. This is because voting methods are not natural facts but can be structured so that they do not need to exclude people based on physical fitness or ability. In fact, the variety of voting methods which is available in England today proves that it is possible to accommodate people suffering from almost all common physical impairments – for example there is the option of voting by post or proxy for those unable to go to the polling station in person, the availability of tactile voting templates for blind persons, the accessibility of polling stations with special regards to persons with disabilities, or the option of getting general assistance for casting a vote²⁰⁴. Thus, while voting methods indeed can constitute a barrier for voting, they do not

²⁰⁴ See the Electoral Commissions website for further information on the different methods of voting and the

seem a profound justification for basing *rights* on physical ability. Quite another argument would be, of course, to suggest that physical ability is a relevant qualification per se, for example because it reveals something about a person's worth for the community. However, this argument would probably not be linked to the age qualification but rather be seen to establish a direct “physical fitness” qualification, which is why I will not discuss it in the present context. I thus conclude that physical ability is probably not the most convincing justification for age qualifications.

On a different approach, relevant “competence” is not understood as physical, but mental ability²⁰⁵. Consequently it is not so much about whether a person *can* actually cast a vote but what intellectual process has to be in place for this physical action to *count* as a vote. The underlying assumption is that casting a vote is tantamount to stating a political preference²⁰⁶. Yet, it only makes sense to respect it as a preference if it is meant as such – a mark on a sheet of paper counts as a vote, because we assume that the person *meant* to state a preference with it (e.g. the preference of being politically represented by person X in parliament). Most people would argue that we cannot actually ensure that the mark on the ballot paper is not just a random scribble, perhaps produced without any reflected consideration at all, but we can at least make sure that those people entitled to have their mark counted as votes indeed have the intellectual capacity to “mean” their vote. In order for this to be possible they should be able to grasp the concept of politics in general and the concept of voting in particular, hence they need to be able to “*review ideas about justice*”²⁰⁷ and to form an independent political preference based on deliberation about the consequences of their voting behaviour²⁰⁸. Age provides a proxy for those mental capacities and therefore is a relevant qualification for enfranchisement²⁰⁹. Provisions should be designed so that only age groups likely to be in possession of the required mental capacities are included in the franchise. Note that while this argument has most commonly be used to support minimum age requirements, centring around

provisions made for people with physical disabilities: http://www.aboutmyvote.co.uk/how_do_i_vote.aspx (last visited on 18 June 2010, 12:38).

²⁰⁵ See e.g. Dahl, Robert: *Democracy and its critics.*, Yale University Press, 1915, p. 105.

²⁰⁶ Note that from a standpoint of legitimacy it perhaps ought not only be a statement of preference, but an exercise of moral autonomy, etc. too. However, I am not yet at the point of assessing arguments from this viewpoint, which is why I aim to lay down possible justifications in neutral terms.

²⁰⁷ See Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2008, p. 82.

²⁰⁸ See e.g. Schrag, Francis: *Children and democracy: theory and policy.*, In: *Politics, Philosophy and Economics*, Vol. 3, No. 3, 2004, p. 365 for an outline of the mental capacities required for voting.

²⁰⁹ See e.g. Dahl, Robert: *Democracy and its critics.*, Yale University Press, 1915, pp. 92, 97, 105 and 120.

the notion of “maturity”²¹⁰, it may also be used to justify a maximum age requirement. This is, for example, if one assumes that at a certain age there is a great probability for the average person to lose the competency in question or to become too senile to use it anymore²¹¹.

Age as a proxy for interests

The second set of arguments focuses on interests instead of competence. Once again it uses age as a proxy for a certain required trait. The general idea is that either the orientation or the substance of the voter's perceived self-interest is important and that it correlates with age. Age qualifications should be used to enfranchise only those who (on average) can be expected to have a certain kind of interest.

The first version of this argument is concerned with the *orientation* of interests. It argues that people should only be included in the franchise if they have reason to have a long-term interest in the fate of the political community in question. We can find this idea most extensively elaborated in the regarding the “disenfranchisement of the elderly”. Supporters employ several different arguments and while some of them relate to mental fitness and competence as discussed above²¹², others suggest that it is not the competence but the likely interests of age groups that matter in regards to franchise. The basic idea is this:

*“The old, having no future, are dangerously free from the consequences of their own political acts, and it makes no sense to allow the vote to someone who is actuarially unlikely to survive, and pay the bills for the politician or party he may help elect. (...) The main fear is (...) that they may use it [their electoral strength] in excessive manner to benefit their unavoidably short-term self-interest.”*²¹³

There are several assumption at work here: First, only those persons should have a vote who

²¹⁰ See e.g. Clayton, Matthew / Chan, Tak Wing: Should the voting age be lowered to sixteen? Normative and empirical considerations., In: Political Studies, Vol. 54, 2006.

²¹¹ See e.g. Van Parijs, Philippe: The Disenfranchisement of the Elderly, and Other Attempts to secure Intergenerational Justice., In: Philosophy & Public Affairs, Vol. 27, No. 4, 1999, p. 292.

²¹² See e.g. Van Parijs, Philippe: The Disenfranchisement of the Elderly, and Other Attempts to secure Intergenerational Justice., In: Philosophy & Public Affairs, Vol. 27, No. 4, 1999, p. 292.

²¹³ Van Parijs, Philippe: The Disenfranchisement of the Elderly, and Other Attempts to secure Intergenerational Justice., In: Philosophy & Public Affairs, Vol. 27, No. 4, 1999, p. 293 (Addition in [brackets] made by me.) Also see Longman, Phillip: Born to Pay. The New Politics of Ageing in America., Houghton Mifflin, 1987, p. 143 for a similar argument.

are likely to have some permanent connection to the community and who thus share in its “fate”, i.e. who will experience not only the immediate effects of the policies implemented as a result of the election, but for whom it is reasonably probable that they will also be affected by the long-term consequences. As in the context of citizenship and residence, the idea of “permanence” once again functions as the basis of the argument. This relates to the second assumption which states that we are only interested in the long-term effects of the political outcome of elections, if we ourselves are affected by them. Third, since people are less likely to be affected by the long-term effects of their vote the older they get – simply because it becomes more and more probable that they will die before that – they are not likely to be interested in those effects. All people cast their vote out of self-interest, but that of old people is “*unavoidably short-term*”, because there is no long-term perspective for them anymore. Basically, the orientation of people's interest is seen to fundamentally depend on their age, with younger people being long-term oriented and old ones focussing on the short-term. The argument concludes that since only persons with a “permanent” interest in the political community, i.e. for whom the long-term effects are in their own self-interest, are to be included in the franchise, and since old people are not likely to live up to this requirement, there should be a maximum age for voting. In the presented argument age is thus employed as a proxy for the orientation of a person's interest and while Van Parijs and others have mostly used it to argue for the exclusion of the elderly, it could perhaps also be used to justify a minimum age qualification too. All that would need to be demonstrated is that up until a certain age, human interests are short-term, rather than long-term oriented for example because children do not yet have a concept of time or future the way adults do.

This then poses the question: Why should that even be a problem? Why is it that only those with a long-term oriented self-interest should have a vote? The hidden answer is this: The *quality* of political decisions is at stake. If a person is not likely to suffer the long-term risks and burdens of their decision, he/she is more likely to make those decisions anyway – even more so when the short-term consequences are beneficial to him/her. In extreme cases this might put the future of the whole political community or even earth at stake (e.g. if policies have to weigh economic benefits versus ecological damage). This is to be prevented, and thus the franchise has to be designed so as to minimize the likelihood of that happening. Therefore an age requirement is justified and should include only those age groups that are likely to have a long-term oriented self-interest.

The second version of an interest-based justification for age qualifications is not about the orientation, but rather the likely substance of a person's interest. The idea is that age groups form “generations” in such a way that people of similar age are likely to be rather homogeneous in regards to their interests or opinion on certain political issues. Furthermore, there are some interests likely to prevail only within certain generations, but not others²¹⁴. For older generations pensions are often cited as examples²¹⁵, while education and environmental issues are for younger ones²¹⁶. This gives rise to a defence of age qualifications, if we accept that some of those generation-dependent interests should be enfranchised while others should not. For example, some argue for a maximum age for voting, because they suggest that the older generations' attitude towards environmental issues may have detrimental effects on the future of the whole political community. Others think that the minimum age should be reduced in order to enfranchise ideas and interests that are so “fresh” and optimistic that they are likely to be held only by very young generations²¹⁷.

In any case, enfranchisement is to be based on the presumed “quality” of interests and their effects on the community should they prevail in general elections. If age is a proxy for generation-dependent political opinion, and if particular generations endorse harmful opinions while others hold reasonable ones, then an age qualification can thus be used to include (with some degree of probability) mostly those who hold the one sort of interest but not the other. Of course age qualification is a rather crude instrument, which is why it could only be applied to a very limited range of issues. Yet it should be considered that even though age may actually be a proxy for the likelihood of holding certain political views, the content is bound to change over time. For example, today's generation of the over-eighty-years-olds is likely to have a different take on environmental issues than the same age group 20 years from now. This is because it is not a direct result of age, but rather the result of belonging to a certain “*cohort*”, i.e. a generation not only characterised by common age but also by sharing a similar background era²¹⁸. Thus, basing franchise on the content of interests probably has the

²¹⁴ See e.g. Schrag, Francis: Children and democracy: theory and policy., In: Politics, Philosophy and Economics, Vol. 3, No. 3, 2004, p. 374 and Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, pp. 72-73.

²¹⁵ See e.g. Van Parijs, Philippe: The Disenfranchisement of the Elderly, and Other Attempts to secure Intergenerational Justice., In: Philosophy & Public Affairs, Vol. 27, No. 4, 1999, pp. 292-299.

²¹⁶ See e.g. Schrag, Francis: Children and democracy: theory and policy., In: Politics, Philosophy and Economics, Vol. 3, No. 3, 2004, pp. 374-375.

²¹⁷ See Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, pp. 72-73.

²¹⁸ See Clayton, Matthew / Chan, Tak Wing: Should the voting age be lowered to sixteen? Normative and

disadvantage of having to implement new age requirements on a periodic basis.

Age as a measure for controlling the electorate's numerical proportions

I will now turn to the third kind of argument which can be offered in favour of age as a qualification for enfranchisement. The first two justifications were concerned with age as a proxy, but the third is based on numerical and/or proportional considerations. In fact, age is a demographic measure which can be used to control the electorate. There are two ways to construe this: On the one hand, an age qualification could have the purpose of defining the total size of the electorate or the likely election turnout. On the other, it can be used to control the electorate's composition.

To my knowledge there is no historic example for the first approach which suggests age as a measure for limiting the total number of electors. However, a very similar version of this argument is used by supporters of lowering the voting age in England. They argue that there is a legitimacy problem of the government if it is elected only by a certain percentage of the population. Hence, if the electoral turnout is too low, even a majority of votes are not “enough”, because they will not count for a majority of the population. Lowering the voting age may increase the number of votes cast, i.e. the percentage of the population that has consented to the government, simply because there are more people eligible to vote. The size of the electorate should therefore be designed so that the probable electoral turnout will account for a certain percentage or majority of the population²¹⁹. In sum, the general idea is this: The size of the electorate is important and since the age qualification is a workable instrument to control the size of the electorate it is justified.

The second line of argument is not about the total size of the electorate, but about its composition and it can be found in the discussions preceding the Reform Act of 1918. This Act first introduced women to the franchise, but only at a minimum age of 30 years²²⁰. When designing this provision, one of the core considerations was the number of women that should

empirical considerations., In: Political Studies, Vol. 54, 2006, pp. 542-543 for the differentiation between “cohort” and “age” effect.

²¹⁹ See e.g. Clayton, Matthew / Chan, Tak Wing: Should the voting age be lowered to sixteen? Normative and empirical considerations., In: Political Studies, Vol. 54, 2006, pp. 535-538.

²²⁰ See e.g. Trachsler, Wilhelm: Das aktive Wahlrecht in England., Buchdruckerei K. J. Wyss Erben, 1927, p. 30.

be allowed to vote, or more precisely the percentage of the electorate which should henceforth be female²²¹. Franchise should extend to women, but they were not to constitute a majority in the electorate. After the war the majority of the population was female, thus enfranchising women on the same basis as men would likely have established a female majority in the electorate²²². This is why demographic statistics were consulted in order to find out what age qualification would enfranchise only a certain number of women. As Butler summarizes: *“The age of thirty was agreed as a result of compromise (...) designed to keep women in a minority of the electorate.”*²²³ The age qualification was used to ensure certain numerical proportions within the electorate. The goal was to ensure that a certain group of people, in this case characterized by their common sex, would not constitute an absolute majority within the electorate. Note that I have found a similar reasoning in the arguments for a maximum age disqualification. In this context the underlying idea is that only a certain percentage of the electorate should be allowed to be retired persons²²⁴, because otherwise the balance of rights and duties in society cannot be maintained. An alternative proposal suggests that the minimum age for voting could simply be reduced in order to ensure a “young” counterbalance to the old age electorate²²⁵. Again, the idea is to control the proportions of certain demographic groups within the electorate, i.e. to ensure a certain composition.

Age as the basis for distributing rights and duties in a community

The fourth justification for an age qualification for voting is based on the notion that rights are always to be balanced with duties, and that therefore only those persons should have a right to vote who also also share the duties of society. The underlying idea is that rights are benefits attributed to those who take up the necessary burdens which come with living in a community. Adherents argue that age is actually one of the most common criteria for distributing rights and duties, or benefits and burdens, within political communities. For example, there is a legal age that is relevant for concluding a valid contract, but also one for bearing criminal responsibility. They argue that the right to vote, too, constitutes a right that should be counterbalanced by certain societal responsibilities. For example, if small children

²²¹ See Trachsler, Wilhelm: Das aktive Wahlrecht in England., Buchdruckerei K. J. Wyss Erben, 1927, pp. 70-74 and Butler, D. E.: The electoral system in Britain 1918-1951., Clarendon Press, 1953, pp. 8-15.

²²² See Butler, D. E.: The electoral system in Britain 1918-1951., Clarendon Press, 1953, p. 15.

²²³ See Butler, D. E.: The electoral system in Britain 1918-1951., Clarendon Press, 1953, p. 8.

²²⁴ See e.g. Van Parijs, Philippe: The Disenfranchisement of the Elderly, and Other Attempts to secure Intergenerational Justice., In: Philosophy & Public Affairs, Vol. 27, No. 4, 1999, p. 293.

²²⁵ See Schrag, Francis: Children and democracy: theory and policy., In: Politics, Philosophy and Economics, Vol. 3, No. 3, 2004, p. 365.

are not held fully responsible for their actions in a court of law, why should they have a say in how those laws are made? As Schrag puts it: *“there is something amiss in the idea that our children might be considered competent to make decisions affecting millions of fellow citizens, but not competent to take charge of their own lives”*²²⁶. The argument is that if a person, legally, has less responsibilities or duties than the average person included in the franchise – why should he/she share the (equal) right to vote? Schrag applies this to children especially, because they are under parental guardianship until they reach a certain age, thus not bearing full responsibility for their lives. On the same note, however, one might suggest that people at the age of retirement, freed from the burden of earning their subsistence and contributing to that of the community, are not to be enfranchised either. If rights and duties are generally attributed according to age, then the right to vote should also be age-dependent, because it is to correlate with society's duties, such as paying taxes or entering military service²²⁷. Nevertheless, there is a risk of circularity in attributing duties according to previously granted rights and vice versa²²⁸. In sum, the approach states that only those who are under an obligation to contribute to the good fate of the community should have a political say.

Conclusion

In addition to citizenship and residence, age constitutes the third core qualification for enfranchisement in England, because only persons over the age of 18 can be eligible to vote. Like citizenship, it is a necessary condition, because regardless of his/her other characteristics, no one can vote if he/she does not live up to the age requirement. However, only a minimum age is specified and there is no maximum age for voting even though there are some who would support such change. Furthermore, the age qualification is contested as too high, with critics favouring a minimum age of 16 instead of 18. As for the potential justifications we have seen that age qualifications can be defended based on a requirement of competency or likely interest, but also by referring to numerical considerations regarding the electorate, or a sense of equal distribution of benefits and burdens within society.

²²⁶ Schrag, Francis: Children and democracy: theory and policy., In: Politics, Philosophy and Economics, Vol. 3, No. 3, 2004, p. 373.

²²⁷ See Schrag, Francis: Children and democracy: theory and policy., In: Politics, Philosophy and Economics, Vol. 3, No. 3, 2004, p. 373.

²²⁸ See Dahl, Robert: Democracy and its critics., Yale University Press, 1915, p. 128.

3.3.2.5 Conclusion

In the previous sections I have discussed the three qualifications for enfranchisement currently prevailing in England: citizenship, residence and age. Although justifications varied, they also showed profound similarities. First, we found the idea that only those persons should have a vote, who are actually linked to the political community in question. This link should be permanent, but also signify personal membership. It can be established by the fact that a person's interests, their “fate”, is fundamentally affected by that of the political community, for example because one is subject to its laws or because one's effective opportunities will depend on it in the future. Second, only those who are actually competent to vote should be eligible to do so. Third, considerations should not only go to the individual voter but also to the population or electorate as a whole. Numerical and demographical proportions may be just as important as the practical necessity of a territorial basis for politics. On a similar notion, the fair distribution of burdens and benefits within a society is to be considered.

3.3.3 Prevailing principles of disenfranchisement

3.3.3.1 Introduction

As we have seen, the three main principles of enfranchisement in England are citizenship, residence and age. All British citizens who are aged at least 18 years and who have not, on polling day, been living abroad for more than 15 years are eligible to vote. Irish and Commonwealth citizens may also be entitled to vote, provided that they are at least 18 years old and currently (lawful) residents somewhere within the United Kingdom. Citizenship and a certain age are necessary conditions, no alien citizen and no person under the age of 18 (regardless of their citizenship or resident status) is eligible to vote. These requirements are supplemented by a second set of principles that fulfil the opposite purpose, that is to identify conditions that *disenfranchise* people even if they fulfil the necessary qualifications of citizenship/residence and age. They constitute “legal incapacities to vote”²²⁹ and will be discussed in the following:

²²⁹ Note that, obviously, not living up to any of the thus far summarized principles of enfranchisement also results in a de facto legal incapacity to vote, but there are three more explicit conditions that I will describe in the following.

“At a general election, the following cannot vote (...):

- *Members of the House of Lords (...)*
- *Convicted persons detained in pursuance of their sentences (though remand prisoners, unconvicted prisoners and civil prisoners in default of fine or breach of recognisances can vote if they are on the electoral register) This includes offenders detained in mental hospitals (...)*
- *Anyone found guilty within the previous five years of corrupt or illegal practices in connection with an election*
- *Under common law, people with mental disabilities if, on polling day, they are incapable of making a reasoned judgement”²³⁰*

3.3.3.2 Members of the House of Lords

Design and working of the disqualification

One group of persons who is not eligible to vote in general elections in England, regardless of their nationality, residence status or age, is the members of the parliamentary House of Lords. They are either life peers, appointed by the Queen on the Prime Minister's recommendation, hereditary peers who have retained their seat through descent, or bishops and archbishops appointed by the Church of England. What they all have in common is that as Members of Parliaments they are personally included in the process of making laws.

Justification

The argument for this exclusion from the franchise seems simple: Being enfranchised for voting in general elections means that one gets a say in who will represent the people in parliament and, although indirectly, who will form the government. Members of the House of Lords do not need this kind of say, because they don't need representation. Instead they can speak their mind in person since they have a say in parliament directly. Enfranchising them to vote would double their potential political influence, because it would add up to two votes – one to elect the representatives in the House of Commons, one within the parliament directly.

²³⁰ Sear, Chris: Electoral franchise. Who can vote? (Publication by Parliament and Constitution Centre of the House of Commons Library, to be found online at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02208.pdf>, last visited on 16 June 2010, 18:52).

This would indeed violate the principle of equality incorporated by democratic say and this is why only those are to be enfranchised for a vote in general elections, who need representation because they are *not* personally involved in the process of making laws or who are at least not sure to do so. What this last provision implies is that members of the House of Commons indeed are eligible to vote in general elections, because their seat is not a guaranteed one since they can lose it as a result of the election. The same also goes for the Prime Minister who recruits from the House of Commons. In contrast, members of the House of Lords are not dependent on being (re-)elected by the people, because they hold their seats in virtue of (comparatively) permanent features – appointment for life or hereditary status – and therefore they are not eligible to vote in general elections. However, they can vote “*at elections to local authorities, devolved legislatures and the European Parliament*”²³¹ since they do not hold a permanent seat there. Note that taking those principle seriously would mean that it should extend to the King or Queen of England too, because the monarch still is the official sovereign in the United Kingdom and therefore holds a range of significant political competencies. Yet, the monarch is not legally excluded from the franchise. On the parliament's official website we instead find the following admission:

*“Can the Queen vote? - The Queen can vote, but in practice it is considered unconstitutional for the Monarch to vote in an election.”*²³²

Historic background

History shows that equality in voting power is a relatively recent invention. Until 1948 it was legally possible, and actually not uncommon, for persons to hold more than one vote in general elections. There were several reasons for this.

First, until 1928 persons were eligible to vote in as many constituencies as they qualified to vote in. This was actually possible because there was a rather diverse system of qualifications, so that persons could become enfranchised on the basis of either of the competing principles. That is to say that being qualified based on more than one condition did not have any effect

²³¹ Sear, Chris: Electoral franchise. Who can vote? (Publication by Parliament and Constitution Centre of the House of Commons Library, to be found online at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02208.pdf>, last visited on 16 June 2010, 18:52)

²³² See the Frequently Asked Questions section: <http://www.parliament.uk/about/faqs/house-of-commons-faqs/elections-faq-page/> (last visited on 19 June 2010, 23:23).

on a person's number of votes as long as it was all within the same constituency. If one satisfied the qualifications posed by different constituencies, however, one was eligible to vote wherever one qualified. One very common reason for plural voting was business property, because persons who owned a business in a constituency different from where they where resident held a vote in both of them²³³. The justification for this was seen to lie in the territorial representation prevailing in the House of Commons. Since its members were supposed to represent not simply “the people”, but the people of a certain constituency, it allowed for the argument that those who had a tight connection to more than one constituency, for example because they lived in one but earned their livelihood in the other, were justified to have a say in both of them. Perhaps this indicates some sort of paradigm shift: Today the main concern is whether a person can vote in England at all, with it being only a secondary concern where a person should cast their vote. In contrast, the former focus was on whether they had the right to vote within a certain constituency, and some people qualified in more than one. This argument was thus based on a very similar justification as the one discussed in the context of citizenship and residence requirements – votes should be given to those who have a “close tie”²³⁴ to, or a “firm root”²³⁵ in, a certain community. The difference is just that not the nation state as a whole, but rather the particular constituency, counted as the relevant community in question²³⁶. This notion was rejected in 1928, however, and henceforth a person had to choose a single constituency to vote in²³⁷, even if he/she actually qualified in more than one.

Nevertheless one form of plural voting persisted, because it was not based on territorial enfranchisement²³⁸. From 1603 on certain universities were allowed to appoint their own Members of Parliament and all those who (in addition to living up to other common qualifications such as age or nationality) held a degree or an honorary degree of particular universities were allowed a vote²³⁹. This resulted in additional vote, because people were

²³³ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 63. Also see e.g. Trachsler, Wilhelm: Das aktive Wahlrecht in England., K. J. Wyss Erben, 1927, pp. 45-55 for details on what would count as a business or business premise for the purpose of enfranchisement in 1918.

²³⁴ Electoral Commission: Who can vote?, 2006 (to be found online: http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0017/13274/0906whocanvote_23253_6144__E__N__S__W__.pdf, last visited on 15 June 2010, 13:55)

²³⁵ See Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 80.

²³⁶ See e.g. Trachsler, Wilhelm: Das aktive Wahlrecht in England., K. J. Wyss Erben, 1927, p. 38.

²³⁷ See Keir, D. L. The constitutional history of modern Britain 1485-1937., R&R Clark, 1938, pp. 117-118.

²³⁸ See Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 70.

²³⁹ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 47.

enfranchised regardless of whether they were already registered to vote in the constituency where they were resident in. The university seats in parliament thus lead to plural voting power for graduates and it was only in 1948 that this provision was abolished²⁴⁰. The main argument had been that enhanced voting power for the educated would “*elevate the intellectual quality of debate in the House of Commons*”²⁴¹. They usually did not elect a party member to represent them but someone from the university staff, which was supposed to guarantee that they were “*free from party discipline*” and spoke “*according to their conscience alone*”²⁴². Thus the argument did not go to justify the additional vote for certain people so much as justify why universities were allowed to send additional MPs, but it nevertheless made for a “*preferential voting right*” for the educated.

3.3.3.3 Criminals

Design, working and historic background of the disqualification

The second group of persons who are disenfranchised, even if they live up to the citizenship/residence and age qualification, are criminals. On the one hand, this refers to persons who are detained in pursuance of their sentence, that is prisoners or offenders who are detained in mental hospitals. On the other hand, “*anyone found guilty within the previous five years of corrupt or illegal practices in connection with an election*”²⁴³ is also disenfranchised.

The former group has always been excluded from the franchise, dating back at least as far as to the 14th century²⁴⁴, when King Edward III took up the notion of “civil death”, i.e. the ancient idea that felons were “*deemed civilly dead and thus lacking all civil rights*”²⁴⁵. However, while in the past imprisonment led to blanket disenfranchisement, simply because prisons could not be named as places of residence for the purpose of registration, today there

²⁴⁰ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 31.

²⁴¹ See Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 71.

²⁴² Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 71

²⁴³ Sear, Chris: Electoral franchise. Who can vote? (Publication by Parliament and Constitution Centre of the House of Commons Library, to be found online at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02208.pdf>, last visited on 16 June 2010, 18:52).

²⁴⁴ See the official judgement of the European Court of Human Rights in the case of Hirst vs. The United Kingdom (Application no. 74025/01) which can be found online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=787485&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, last visited on 22 June 2010, 23:30). Also see Lippke, Richard: The disenfranchisement of felons., Law and Philosophy, Vol. 20, 2001, p. 559 for more details about the origins of the notion “civil death”.

²⁴⁵ Lippke, Richard: The disenfranchisement of felons., Law and Philosophy, Vol. 20, 2001, p. 559.

are two exceptions to this rule. First, remand or unconvicted prisoners and, second, so-called “civil prisoners” who are detained for being in default of paying a fine or for contempt of court. The second is especially important, because disenfranchising those who are financially unable to pay fines would introduce a class distinction in franchise, with those possessing more money being able to buy themselves out of disenfranchisement and poor people unable to do so²⁴⁶. Thus the assumption seems to be that the criminal act for which one is detained is the reason for disenfranchisement, not the fact that one is in prison.

The disenfranchisement of those who broke election rules goes back to the Corrupt and Illegal Practices Act of 1883. For example, it defined bribery and intimidation corrupt practices, while actions such as the provision of party favours were defined as illegal practice. Both were punishable with fines and the loss of certain political rights such as the right to vote²⁴⁷.

Justification

The important thing to note about the disenfranchisement of criminals is this: The underlying justification is not, as with the Members of the House of Lords, the equality of the democratic say, i.e. that they already have a say somewhere in the core political process and may therefore not be included in general elections too. Instead, the decision is for them not to have any say at all, they may not elect a Member of Parliament to represent them. Their exclusion is hence pervasive and there are two lines of argument to defend this. One treats their disenfranchisement as part of their legal punishment, the other refers to a criminal's probable intention.

The first justification assumes that persons generally want to have a say in how their society is ruled, i.e. they have a genuine interest, if not in participating in general elections, then at least to have the option of doing so. Taking that option away may therefore function as an effective punishment, as officially stated by a Member of Parliament in 2000: “*it should be part of a*

²⁴⁶ See Thomson, Matthew: The problem of mental deficiency: Eugenics, democracy and social policy 1870-1959., p. 52 (to be found online at: http://books.google.at/booksid=9rIsDsV_WpkC&printsec=frontcover&dq=Thomson+Mathew+eugenics&source=bl&ots=bvY2xAZGjR&sig=poHTb4RAHGsbvMcR6s0e5oNAnJo&hl=de&ei=gn8aTNqnOJCVOMGAsdYK&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCkQ6AEwAw#v=onepage&q&f=false, last visited on 17 June 2010, 22:04).

²⁴⁷ See e.g. Blewett, Neal: The Peers, the Party and the People. The general elections of 1910., Macmillan Press, 1972, p. 371.

*convicted prisoner's punishment that he loses rights, and one of them is the right to vote*²⁴⁸. There are two reasons for this. First, it can be suggested that by *"violating the law, criminal offenders either take more benefits than they are entitled to or seek to avoid the burdens of law-abidingness"*²⁴⁹. By punishing them this imbalance can be set right again, because their violating other's rights results in their rights being taken away. Disenfranchisement is justified, then, because it is one way of setting the balance of rights and duties right again. Yet it may seem justified mostly for punishing *"offenders whose crimes involve direct attacks on democratic political institutions or voting process"*²⁵⁰, because in those cases the criminal's disenfranchisement will most likely correct an imbalance. The second reason for viewing disenfranchisement as a justified punishment for criminals is to suggest that it will have educative, or "improving", effects on the affected persons themselves. Their having taken a basic democratic right taken away may encourage them to *"acknowledge their past wrongdoing, repent of it and undertake genuine efforts to reform themselves so that future wrongdoing is avoided"*²⁵¹, because they feel *"a sting of exclusion from the ranks of equal political participation"*²⁵².

An alternative justification goes not so much to individual effects of disenfranchisement, be they retributive or educative, but rather to the moral characteristics of criminal offenders. Supporters assume that criminals, as a group, are to be disenfranchised because *"if they are not, they are likely to vote in ways that do not serve the public interest in crime reduction."*²⁵³. Their voting behaviour is assumed to be contrary to the common interest, therefore they should not be allowed to vote. Furthermore, a person's criminal record is seen as proof of their lack of intent to actually follow the collective rules of society, so why should they have a say in the making of those rules? As Lippke puts it: *"Criminal offenders are unwilling to obey the laws that result from everyone's exercise of the franchise, and thus have their rights to vote justifiably suspended."*²⁵⁴. Hence the general idea is that they lose their rights because of

²⁴⁸ See the official judgement of the European Court of Human Rights in the case of *Hirst vs. The United Kingdom* (Application no. 74025/01) for this citation. (online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=787485&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, last visited on 22 June 2010, 23:30).

²⁴⁹ Lippke, Richard: *The disenfranchisement of felons*, Law and Philosophy, Vol. 20, 2001, p. 571

²⁵⁰ Lippke, Richard: *The disenfranchisement of felons*, Law and Philosophy, Vol. 20, 2001, p. 571

²⁵¹ Lippke, Richard: *The disenfranchisement of felons*, Law and Philosophy, Vol. 20, 2001, p. 573 (Note that he references Jean Hampton's article "The Moral Education Theory of Punishment", published in *Philosophy and Public Affairs*, Vol. 13, 1984, in this context.)

²⁵² Lippke, Richard: *The disenfranchisement of felons*, Law and Philosophy, Vol. 20, 2001, p. 574

²⁵³ Lippke, Richard: *The disenfranchisement of felons*, Law and Philosophy, Vol. 20, 2001, p. 569

²⁵⁴ Lippke, Richard: *The disenfranchisement of felons*, Law and Philosophy, Vol. 20, 2001, p. 563

voluntary actions that go to testify a certain state of mind. This seems to suggest that a person's moral character is relevant for their right to vote.

While the disenfranchisement of criminals can thus be justified, some criticise that England still practices some sort of “*blanket disenfranchisement*”²⁵⁵. The core argument was detailed by the European Court of Human Rights in 2005²⁵⁶, where they claimed that the real source of disenfranchisement is not the nature or gravity of the offence, but rather the fact that a person is in prison. This is because not all criminal offenders are excluded, but only those who either broke election rules or those who are detained, either in prison or in a mental hospital. This is a problem, because whether a person is detained in pursuance of their sentence or whether detention is suspended does not only depend on the nature or gravity of their act, but also on background conditions such as age or family situation. The objection is that disenfranchisement of criminals is justified only if the gravity and nature of their act warrant this decision, but it cannot be determined simply by whether a person is detained in prison or not.

3.3.3.4 Mentally ill persons

Design and working of the disqualification

The third condition under which a person is disenfranchised, even if he/she satisfies the necessary conditions of citizenship/residence and age, is mental disability. More precisely, only persons who “*on polling day (...) are incapable of making a reasoned judgement*”²⁵⁷ are disenfranchised, but the provision does not apply to all persons with mental disorders. In fact, it mainly applies to “formal patients” of mental hospitals, i.e. those who are “*compulsorily detained under a section of the Mental Health Act 1983*”²⁵⁸, or to persons who have been placed under legal guardianship under the same provision. Both, detainment and

²⁵⁵ See e.g. Lippke, Richard: The disenfranchisement of felons., Law and Philosophy, Vol. 20, 2001, p. 566.

²⁵⁶ See the official judgment of the European Court of Human Rights in the case of Hirst vs. The United Kingdom (Application no. 74025/01) for this argumentation. (online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=787485&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, last visited on 22 June 2010, 23:30).

²⁵⁷ See Sear, Chris: Electoral franchise. Who can vote? (Publication by Parliament and Constitution Centre of the House of Commons Library, to be found online at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02208.pdf>, last visited on 16 June 2010, 18:52).

²⁵⁸ See http://www.mind.org.uk/help/rights_and_legislation/mental_health_act_1983_an_outline_guide (last visited on 19 June 2010, 23:24) Also see Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 83.

guardianship, are measures that can only be taken when they are warranted due to “*nature or degree*” of a person's mental disorder, which has to be confirmed by two doctors²⁵⁹. Furthermore, the doctors must confirm that these measures are necessary due to a concern for the patient's own safety and that of others²⁶⁰. Note that “necessity” in this context implies that both conditions cannot be satisfied unless the person is actually detained. In contrast, “informal patients” are “*in hospital on a voluntary basis*”²⁶¹ and are therefore not affected by this provision. We therefore get the impression that legislation is both very open and very strict at the same time. It is open in regards to what might count as a mental disorder, because since 2007 it simply refers to “*any disorder or disability of mind*”, thereby excepting only learning disabilities that are not associated with “*abnormally aggressive or seriously irresponsible conduct*”²⁶². At the same time, however, legislation is very rigid in defining who can certify a person to have a mental disorder, how or under what conditions he/she can do that, and under which circumstances this accounts for them losing their vote. In any case the disenfranchisement of mentally disabled persons is as pervasive as that of prisoners, because they do not have a say in general elections at all, at least for as long as they are committed.

Historic background

Dating back at least to early 18th century franchise legislation, “*certified lunatics*” have always been excluded from the franchise²⁶³. For example, persons who had been admitted to a “madhouse” following the Madhouses Act of 1774, were practically disenfranchised, simply because these institutions did not qualify as places of residence for the purpose of enfranchisement. Similarly, the “asylums” of the 19th century were authorised to detain “lunatics”, “idiots” and, more generally, all persons of “unsound mind” and also had this effect. Even the most radical supporters of an extension of the franchise agreed that “idiots” and “imbeciles” should not vote, because they were not fit to bear the responsibilities of citizenship²⁶⁴. However, while the 18th century indeed had introduced a “*new and more*

²⁵⁹ See http://www.mind.org.uk/help/rights_and_legislation/mental_health_act_1983_an_outline_guide (last visited on 19 June 2010, 23:24).

²⁶⁰ See http://www.mind.org.uk/help/rights_and_legislation/mental_health_act_1983_an_outline_guide (last visited on 19 June 2010, 23:24).

²⁶¹ See http://www.mind.org.uk/help/rights_and_legislation/mental_health_act_1983_an_outline_guide (last visited on 19 June 2010, 23:24) Also see Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 83.

²⁶² See Mental Health Act 2007 (to be found online at http://www.opsi.gov.uk/acts/acts2007/ukpga_20070012_en_1, last visited on 20 June 2010, 10:54).

²⁶³ See e.g. Tanner, Duncan: *Political change and the Labour Party 1900-1918*, Cambridge University Press, 1990, p. 100.

²⁶⁴ See Thomson, Matthew: *The problem of mental deficiency: Eugenics, democracy and social policy 1870-*

specialised system of (...) medical regulation”²⁶⁵, admission to asylums still often reflected transgression of the boundaries of social conventions rather than actual mental incompetence²⁶⁶. For example, persons displaying “dirty habits” such as the “*inclination to leave the workhouse without clothes*” were considered “*suitable candidates for treatment in an asylum*”²⁶⁷. In fact, one did not even need to display “*any remarkable symptoms*”²⁶⁸ at all, in order to be admitted to an asylum “distress”, “mania” or “melancholia” were enough to be certified insane²⁶⁹ and there did not need to be a precise medical diagnosis for this²⁷⁰. What is more, some of the main causes of “insanity” in the 19th century were not even mental, because they also included general paralysis or bodily ill-health²⁷¹. There also was a tight connection between “workhouses”, designed to provide a place to work and live for people who were unable to support themselves, and the “lunatic asylums”. Poor persons were often transferred from one place to the other without any medical justification at all²⁷². It was assumed that being admitted to any of those institutions showed that a person was no independent member of the community²⁷³, thus he/she qualified for support but not for free citizenship rights, which is why he/she lost the vote in either case.

All in all, the main difference in regards to today's legislation is that physical illness or bodily disabilities no longer constitute a disqualification in regards to franchise, and that only mental disorders prevent persons from forming an independent reasoned judgement are excluded from the franchise. This does not, by far, exclude all mentally “abnormal” persons, but mainly those who are compulsorily detained in mental hospitals following the medical advice of at

1959., pp. 53-54 (to be found online at: http://books.google.at/booksid=9rIsDsV_WPkC_&printsec=frontcover&dq=Thomson+Mathew+eugenics&source=bl&ots=bvY2xAZGjR&sig=poHTb4RAHGsbvMcR6s0e5oNANJo&hl=de&ei=gn8aTNqnOJCVOMGAsdYK&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCkQ6AEwAw#v=onepage&q&f=false, last visited on 17 June 2010, 22:04).

²⁶⁵ Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, p. 3.

²⁶⁶ See Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, p. 5.

²⁶⁷ Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, pp. 33ff

²⁶⁸ Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, p. 37

²⁶⁹ See Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, p. 178.

²⁷⁰ See Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, p. 195.

²⁷¹ Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, p. 178.

²⁷² See Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, p. 37

²⁷³ See Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006, p. 23.

least two doctors.

Justification

The general argument for excluding mentally disabled persons from the franchise relies on “competence” as the central notion. First, in order to exercise their franchise, voters have to be in possession of mental competence above a certain threshold²⁷⁴. Persons who, on polling day, are “*incapable of making a reasoned judgement*”²⁷⁵ actually *cannot* exercise their right to vote, because they cannot do what is required for voting – freely forming a reasoned judgement on politics. They lose their right to vote, because they *cannot* actually vote, they are not mentally able to. Second, the distinction between formal and informal patients shows that only those persons are to be disenfranchised who are, from a medical standpoint, not fit or capable of taking responsibility for their own lives in a way that does not harm them or others. Hence, the underlying argument is that they are not to get a say in collectively binding decisions, because they cannot even take responsibility for their own lives, let alone that of the community. In both cases, a certain mental competence is assumed to be required for voting, and certain groups of mentally disabled persons do not live up to this condition.

3.3.3.5 Conclusion

There are two groups of people excluded from the English franchise. First, there are those who do not live up to the *conditions of enfranchisement*, i.e. citizenship, residence and age. Second, there is a set of *legal incapacities* which also result in an individual being disenfranchised. Members of the House of Lords are excluded from the franchise, because their inclusion would violate the principle of equality in regards to the democratic say. The underlying argument is that they already have a guaranteed say in politics, hence they do not require representation. On the other hand, criminals and mentally disabled persons are more pervasively disenfranchised, because they are not to have any say at all. This can be justified by either referring to a fair distribution of rights and duties within society or due to a person's

²⁷⁴ See Thomson, Matthew: The problem of mental deficiency: Eugenics, democracy and social policy 1870-1959., p. 51 (to be found online at: http://books.google.at/booksid=9rIsDsV_WpkC&printsec=frontcover&dq=Thomson+Mathew+eugenics&source=bl&ots=bvY2xAZGjR&sig=poHTb4RAHGsbvMcR6s0e5oNAnJo&hl=de&ei=gn8aTNqnOJCVOMGAsdYK&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCkQ6AEwAw#v=onepage&q&f=false, last visited on 17 June 2010, 22:04).

²⁷⁵ See Sear, Chris: Electoral franchise. Who can vote? (Publication by Parliament and Constitution Centre of the House of Commons Library, to be found online at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02208.pdf>, last visited on 16 June 2010, 18:52).

state of mind. Prisoners are disqualified for their likely intent, while mentally disabled persons are assumed to be unable to actually cast a meaningful vote.

3.3.4 Conclusion

In the present chapter I have provided a detailed account of the current franchise patterns in England as well as of their evolution. I explicated the qualifications a person has to live up to in order to enjoy suffrage for general (parliamentary) elections in England, and conversely which conditions disenfranchise them. On the one hand, citizenship, residence and age are used as franchise qualifications. On the other, membership in the House of Lords, criminal conviction and mental disability constitute “legal incapacities to vote” and thus result in disenfranchisement. All of those conditions have firm historic roots, although design and justification has varied and changed over time. Since my aim is to use the example of the English franchise to develop a systematic framework for assessing a demos' legitimacy, the potential justification of all (dis)qualifications has been of special importance throughout this chapter. In fact, I have found six different principles of dis-/enfranchisement. First, there is the idea that only those persons should have a vote, whose fate is personally and permanently linked to the political community in question. Second, competency has proven an important issue. Although its meaning varies from “maturity” to general “mental ability”, the common assumption is that reasoned judgement is a precondition for voting. Third, the likely interest and intention of particular groups of people is an argument for franchise qualifications. Fourth, the fair distribution of burdens and benefits within a society has also been used as an argument. Fifth, numerical and demographical proportions within the electorate may justify franchise qualifications. Last, the issue of territory and its political significance can be deemed to justify certain limitations

For the context of this paper, there will be two main questions regarding those justifications: First, do they render the franchise qualifications legitimate? Second, is the particular English design of those qualifications legitimate? This question is important because it could turn out that the particular provisions in England are not legitimate, even though the underlying principles are. Before turning to this assessment, however, I will give an overview of franchise qualifications that no longer prevail in England so to give a more comprehensive insight into potential franchise patterns.

3.4 Review of no longer prevailing principles

3.4.1 Introduction

In the previous chapter I explicated those qualifications that shape England's franchise today. In the present chapter, I will now give an overview of those conditions that did prevail in England for some time, but were abolished and are thus no longer relevant for suffrage today. I will elaborate on the design and working of those conditions, but also suggest potential justifications and the official reasons for their abolishment. The main purpose is to allow for a comprehensive insight into franchise patterns that will help me to develop a theoretical framework for assessing the legitimacy of a democratic people.

3.4.2 No longer prevailing principles of enfranchisement

3.4.2.1 The property qualification

The oldest general election qualification is property. It was officially abolished in 1918, but some of its aspects have persisted until 2000. “Property” in the context of enfranchisement in England basically referred to the fact that a person had to own certain things in order to be eligible to vote. The qualification thus drew from the nature and value of those possessions, the criteria for both of which changed over time. In the present section I will now give an overview of property as a principle of enfranchisement and the justifications that were seen to support it.

Property as territorial stake

The property qualification goes back to the very beginnings of parliament itself. Even though the parliament did not, by far, have the political and legal powers it has today, it already played an important role and therefore I argue it is significant to take a look at the early franchise qualifications. The first important legislation on franchise was enacted in 1430²⁷⁶. Note, however, that it only affected the county franchise, because until 1832 boroughs had the right to decide the basis for enfranchisement by themselves²⁷⁷. Because of this right, borough franchise varied significantly in extent and nature, but it mostly adhered to the same principle

²⁷⁶ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 45.

²⁷⁷ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 46 .

as county franchise – property²⁷⁸. As for the counties: Before 1430, “*all free householders in a county had a right to vote in an election for members of the Commons*”²⁷⁹, but after that “*the franchise was restricted by statute to freeholders whose property was worth at least 40 shillings a year*”²⁸⁰. This introduction of a minimum value of the qualifying property indeed constituted a further limitation of the franchise and preserved the principle that only “*those who had a stake in the land should be entitled to vote*”²⁸¹. As Reeve and Ware have pointed out: “*in effect, all that changed after 1430 was what was to count as ‘having a stake’*”²⁸². Thus, in medieval England, the property qualification was justified with the argument that people had to have a stake in order to get a vote. Having a stake, however, meant to have a (propertied) stake in a territory²⁸³ and this was due to several reasons. First, the Commons have always been seen to represent constituencies, i.e. territorially defined parts of the realm. Against this background it is not surprising that having a “stake” in this constituency should also be defined on a territorial, or landed, basis. Having a stake meant for persons to have a stake in “*the territory they resided in*”²⁸⁴. Second, a connection to the particular constituency was established only by propertied stake²⁸⁵, because the parliament was to represent the main socio-economic interests²⁸⁶ of the country. Again, land was seen as the key resource, because any kind of economy, any kind of business or commerce or agriculture, had to be conducted somewhere, “*in a place*”²⁸⁷.

²⁷⁸ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 46.

²⁷⁹ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 45

²⁸⁰ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 45

²⁸¹ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 45

²⁸² Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 45

²⁸³ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 51 and Dearlove, John / Saunders, Peter: Introduction to British Politics. Analyzing a Capitalist Democracy. (2nd edition), Polity Press, 1989, p. 30.

²⁸⁴ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 51.

²⁸⁵ See Dearlove, John / Saunders, Peter: Introduction to British Politics. Analyzing a Capitalist Democracy. (2nd edition), Polity Press, 1989, p. 30.

²⁸⁶ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 46. Also see Pole, J. R.: Political representation in England and the origins of the American Republic., Macmillan Press, 1966, p. 443 for an argument how parliament was supposed to represent “interests” rather than persons.

²⁸⁷ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 46

Property as respectability

The principle of property as core condition for enfranchisement did not change but was instead re-iterated by the Great Reform Acts of the 19th century. In 1832 new principles of what should “count as a stake” were introduced and for the first time, borough franchise was harmonized²⁸⁸. The main change was the new enfranchisement of the middle-classes²⁸⁹, so that in sum about 18% of all adult males were eligible to vote after 1832²⁹⁰. In counties the franchise was extended to those adult males who owned freehold property worth at least £2 or copyhold land worth £10 yearly value, but also to those who had rented land worth £50 per year²⁹¹. In the boroughs all those who had been entitled to vote before 1832 remained eligible, but they were no longer able to automatically pass this right on to their heirs unless they too qualified according to the new requirements. Apart from that, franchise was limited to all those adult males who owned or occupied property worth £10 a year, provided that they had satisfied this condition for one year prior to the election, had paid the relevant taxes and not received poor relief within this period²⁹². As we can see, property remained the underlying qualification, even though it was not only established through *ownership* of land anymore, but also through the legitimate *occupation* of land as long it had a certain financial or economic value. The later reforms of 1867 and 1884 “*progressively reduced the economic barriers to voting for men*”²⁹³, but they also reflected a shift in principles. Instead of land ownership, general wealth became sufficient²⁹⁴. This is because in the 19th century the main criterion was not so much territorial stake anymore, but respectability, as Evans has pointed out:

²⁸⁸ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 51

²⁸⁹ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 51

²⁹⁰ See e.g. Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 51 or Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 129. See Trachsler, Wilhelm: Das aktive Wahlrecht in England., K.J. Wyss Erben, 1927 for numerical details on the continuing inclusion. Note however, that he is not concerned with the proportion of male adults that were allowed to vote, but rather the percentage of the whole English population who was enfranchised.

²⁹¹ See Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 128.

²⁹² See Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 129. - Note that the receipt of poor relief ceased to be a disqualification from voting in 1918 (see Butler, D. E.: The electoral system in Britain 1918-1951., Clarendon Press, 1953, p. 8).

²⁹³ Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 56.

²⁹⁴ Note that this may be seen to reflect the general change of societal and economic structures, in particular the emergence of the “industrial mass society”. (See Kluxen, Kurt: Die Umformung des parlamentarischen Regierungssystems in Großbritannien beim Übergang zur Massendemokratie., In: Kluxen, Kurt (Ed.): Parlamentarismus., Kiepenheuer & Witsch, 1967, p. 116) Also see Keir, D. L.: The constitutional history of modern Britain 1485-1937., R&R Clark, 1938, p. 416 on the role of the “industrial masses” in the 19th century.

*“Respectability was a key term in Victorian England. It denoted a degree of economic independence, such as could be enjoyed by those who had a secure job bringing in decent wages. (...) it indicated a willingness to play by the existing social rules. (...) The respectable were expected to be organised, thrifty and prudent. They kept up with their rent. (...) They would cast away surplus cash in saving banks (...)”*²⁹⁵

This suggests that the underlying idea was that only the socially “worthy” people should be enfranchised²⁹⁶. However, it was unclear how to legislate this principle, so the only feasible way was to rely on a person's financial status²⁹⁷ which was perceived as an indication of their prudence and social virtue. The wealthy thus contrasted with the “*residuum*”, i.e. the casually unemployed²⁹⁸, “*vagrants*” and “*wastrels*”²⁹⁹ who were to be excluded from the franchise. Like criminals or insane people, the poor were deemed unworthy of inclusion, in part because they had nothing to show for their responsibility³⁰⁰. This conclusion is confirmed by the fact that until 1918, the receipt of poor relief constituted a disqualification from the franchise³⁰¹.

Property as household qualification

While property was first introduced as a measure of “territorial stake” and then evolved to signify “respectability”, a third change began to show in 1867³⁰². This is because the 1867 reform implemented the basis for household suffrage which was later confirmed in the 1884 Act which finally equalised conditions for enfranchisement in counties and boroughs³⁰³. Where territory or certain interests had been the relevant basis for enfranchisement before, “households” now were the central social unit. Whereas the nature and monetary value of property became less important the social unit holding it became significant. Though England

²⁹⁵ Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 41 – Also see Blackburn, Robert: *The Electoral System in Britain.*, Macmillan Press, 1995, p. 66

²⁹⁶ See e.g. See e.g. Keir, D. L.: *The constitutional history of modern Britain 1485-1937.*, R&R Clark, 1938, p. 415 for an argument how democratisation was to be designed so that the poor and uneducated would be “outbalanced”. Also see Blackburn, Robert: *The Electoral System in Britain.*, Macmillan Press, 1995, p. 66.

²⁹⁷ See Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 42

²⁹⁸ See Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 41.

²⁹⁹ See Thomson, Mathew: *The problem of mental deficiency: Eugenics, democracy and social policy in Britain. 1870-1959.*, p. 51 (to be found online at: http://books.google.at/books?id=9rIsDsV_WpkC&printsec=frontcover&dq=Thomson+Mathew+eugenics&source=bl&ots=bvY2xAZGjR&sig=poHTb4RAHGsbvMcR6s0e5oNAnJo&hl=de&ei=gn8aTNqnOJCVOMGAsdYK&sa=X&oi=book_result&ct=result&resnum=4&ved=0CkQ6AEwAw#v=onepage&q&f=false, last visited on 17 June 2010, 22:04).

³⁰⁰ See Melling, Joseph / Forsythe, Bill: *The politics of madness. The state, insanity and society in England 1845-1914.*, Routledge, 2006 for the similarities and connections in the treatment of the insane and the poor.

³⁰¹ Butler, D. E.: *The electoral system in Britain 1918-1951.*, Clarendon Press, 1953, p. 8

³⁰² See Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 132.

³⁰³ Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 134

had not arrived at today's principle of "one person, one vote" yet³⁰⁴, it did come to be acknowledged that the head of household, who was effectively the one to be enfranchised, spoke not only for himself, in virtue of his economic or social achievement, but was expected to virtually represent all other members of his household too. This applied to wives and children, but also adult bachelors living with their parents as well as domestic servants sharing their employer's household³⁰⁵.

Property replaced by residence

Household suffrage and the idea of virtual representation was effectively replaced in 1918 (or 1928 for women) when franchise was no longer limited to the head of household, but extended to persons on an individual basis³⁰⁶. However, this was the point when property qualifications were abolished altogether and were instead replaced by residence as the core condition of enfranchisement³⁰⁷. As I have pointed out in earlier sections of this paper, residence still is one of the main principles of enfranchisement today, even if it is complemented by citizenship. Once again, the basic justification is that of "having a stake", but this stake need not be based on property anymore. For example, this is signified by the fact that homeless people, i.e. persons who are resident without having property, are explicitly enfranchised since 2000³⁰⁸.

According to Keir, one of the main reasons for the extinction of the property qualification is that it was "*too arbitrary to survive*"³⁰⁹. This is because it

"(...) did not even qualify any uniform social class, since in small towns it enfranchised a smaller proportion than in large towns where rents ruled higher. As national wealth increased, the £ 10 franchise declining in real (...) value, qualified a growing number of persons, and

³⁰⁴ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 63.

³⁰⁵ See Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 68 and Blewett, Neal: The Peers, the Parties and the People. The General Elections of 1919., Macmillan Press, 1972, p. 359.

³⁰⁶ See Reeve, Andrew / Ware, Alan: Electoral Systems. A comparative and theoretical introduction., Routledge, 1992, p. 49.

³⁰⁷ See Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 69.

³⁰⁸ See James, Toby: Electoral Modernisation or Elite Statcraft. Electoral Administration in the UK 1997-2007., not yet published but forthcoming in "British Politics" (Journal), provided to me in advance by Andrew Reeve (PDF). Also see <https://homeless.org.uk/voting-in-general-election> (last visited on 23 May 2010, 17:00) for an overview of conditions for voting of homeless persons.

³⁰⁹ Keir, D. L.: The constitutional history of modern Britain 1485-1937., R&R Clark, 1938, p. 415

made the contrast between those who could and those who could not vote even more indefensible."³¹⁰

Apart from arbitrariness, the main change lay in the issue of what should count as a stake for the purpose of enfranchisement. For example, Locke argued that people founded the political community by pooling their property, thus political status per se came through propertied stake³¹¹. However, his writings are open to interpretation in regards to the definition of property. While it is true that he sometimes refers to possessions, he also defines property as "*life, liberty and estates*". On this second reading, any living person would own property, thus being eligible for franchise³¹².

3.4.2.2 The marriage qualification

A second principle of enfranchisement that is no longer prevailing in England's electoral law today is marriage. From 1918 to 1928 women could qualify for franchise in general elections, not directly by satisfying the residence and age requirements that qualified men, but by being married to a man who actually was enfranchised³¹³. Thus marriage effectively was an enfranchising principle³¹⁴. This contrasts with the concept of household suffrage, because in this case the male head of household was enfranchised but supposedly exercised his vote in representation of all members of the household, including his wife. Today, women qualify to vote on an equal basis as men, with the marital or family status being irrelevant for the issue of franchise.

What could justify enfranchising a person based on her spouse's franchise status? Perhaps the general idea is that of the special affiliation of married couples. They usually share property

³¹⁰ Keir, D. L.: *The constitutional history of modern Britain 1485-1937.*, R&R Clark, 1938, p. 415

³¹¹ See Locke, John: *Two treatises of government.*, Cambridge University Press, 2005 (student edition edited with an introduction and notes by Peter Laslett). Also see Pole, J. R.: *Political representation in England and the origins of the American Republic.*, Macmillan Press, 1966, pp. 4-22 and pp. 526-528 for further explication.

³¹² See Laslett, Peter: *Introduction.*, In: Locke, John: *Two treatises of government.*, Cambridge University Press, 2005 (student edition edited with an introduction and notes by Peter Laslett) or Arblaster, Anthony: *Democracy.*, Open University Press, 1987, pp.33-34. Also see Pole, J. R.: *Political representation in England and the origins of the American Republic.*, Macmillan Press, 1966, pp. 465-468.

³¹³ See Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 135.

³¹⁴ Note that Tanner suggests that in the late 19th century, marriage constituted a franchise principle for men too, albeit indirectly, because the de facto design of the various qualification significantly favoured married men over bachelors (see Tanner, Duncan: *Political change and the Labour Party 1900-1918.*, Cambridge University Press, 1990, pp. 120-128 for details).

and their a place of residence, which could be seen to warrant that what qualifies the one should also qualify the other. On this view, if one person is enfranchised, this right should also be transferred to his/her spouse, because of the extraordinary connection they share.

3.4.3 No longer prevailing principles of disenfranchisement

3.4.3.1 The sex disqualification

The main franchise disqualification persisting throughout history and until well into the 20th century was sex³¹⁵. In fact, women were rigidly denied franchise until 1918³¹⁶, and it was only in 1928 that they qualified on the same conditions as men³¹⁷. Note, however, that “*it is probable that a few women did vote before 1832*”³¹⁸, because there was no uniform franchise in boroughs and it is likely that women were sometimes allowed to hold property in their own name, thus being able to qualify on a property basis³¹⁹. Yet this seems to have been an exception rather than the norm and in 1832 an “*all-male electorate*”³²⁰ was created. Henceforth, being a woman automatically disqualified a person from holding a vote in general elections in England. There were four common justifications for this, three of which were based on cultural prejudice and only the last being inherently political.

Female franchise and cultural prejudice

In order to justify female exclusion from the franchise conservatives used three lines of argument. First, they suggested that there were sex-dependent “*god-given spaces*”. Women were to be confined to the private sphere while men should be in charge of the public arena³²¹. Furthermore, some argued that women were “*generally indifferent to vote*” and that enfranchising them would thus be unnecessary or even unwise. Of course this might seem strange considering that it was an official line of argument even at a time when the women suffrage campaigns of the 19th century were already publicly known³²². It was not so much

³¹⁵ Note that I will treat sex as a principle of disenfranchisement rather than of enfranchisement, because while male sex was necessary for enfranchisement, it did not by itself constitute a qualification for voting. In contrast, being female did constitute an absolute disqualification from the franchise for a very long time.

³¹⁶ See e.g. Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 87.

³¹⁷ See e.g. Butler, D.E.: *The electoral system in Britain 1918-1951.*, Clarendon Press, 1953, p. 12.

³¹⁸ Reeve, Andrew / Ware, Alan: *Electoral Systems. A comparative and theoretical introduction.*, Routledge, 1992, p. 52

³¹⁹ See Blackburn, Robert: *The Electoral System in Britain.*, Macmillan Press, 1995, p. 67.

³²⁰ Reeve, Andrew / Ware, Alan: *Electoral Systems. A comparative and theoretical introduction.*, Routledge, 1992, p. 52

³²¹ See Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 77.

³²² See Evans, Eric: *Parliamentary reform 1770-1918.*, Longman, 2000, p. 77. Also see Mill, John Stuart: *The*

that women, as a gender, were *de facto* indifferent to franchise, rather they were *supposed* to be, especially considering the assumption of gender-specific traits and duties. Third, “*women were not ‘proper’ examples of their sex unless they had fulfilled their manifest duty to marry*”³²³ and if they were indeed married they did not actually need a vote, because their family was already represented through their husbands, the head of household³²⁴. To back up this argument, some opponents of the female franchise cited “*house-owning brothel madams*” as the only ones who would actually benefit from the inclusion of women. “*Respectable wives*”, on the other hand, would not benefit, because they already were virtually represented through their husband³²⁵ and did not need any further inclusion. Of course this is not entirely true, because even if we accept the premise that virtual representation through household suffrage tantamounts to being enfranchised this would still disqualify “respectable” widows³²⁶. In fact, this was the very argument used by many supporters of the female franchise. They suggested that while it was certainly true that women should not be entitled to vote merely based on their sex, sex should at least cease to be an a priori disqualification. Instead individuals should be enfranchised based on qualifications that do not require a certain sex³²⁷.

What all three of these justifications have in common is that they reflect cultural prejudice, because a biological trait was asserted to be decisive for whether a person *should* have the vote. Empirics and normativity were thus confused³²⁸. One could question whether the situation is different if women's disqualification was not based on sex, but on lack of “interest”, as the second argument indicates. In this context, some of today's theorists would claim that “interest in politics” is in fact relevant for enfranchisement³²⁹, but it would be quite another thing to establish that sex is the most reliable indicator for this.

subjection of women., In: Mill, John Stuart: On Liberty and other essays., Oxford University Press, 2008 [essay originally published in 1869] or Wollstonecraft, Mary: A vindication of the rights of woman., Oxford University Press, 1993 [first published in 1792].

³²³ Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 78

³²⁴ Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 68

³²⁵ See Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 78.

³²⁶ See Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 78.

³²⁷ See Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 80.

³²⁸ Note that “race” would be a similar example for an alleged “natural” or biological criterion, but which actually reflects cultural prejudice. (See e.g. Spinner, Jeff: The boundaries of citizenship. Race, ethnicity and nationality in the Liberal State., John Hopkins University Press, 1994, pp.14-16.)

³²⁹ See e.g. Weissberg, Robert: Democratic political competence. Clearing the underbrush and a controversial proposal., In: Political Behavior, Vol. 23, No. 3, 2001 for discussion.

Female franchise as danger to political stability

In contrast to the more culturally motivated arguments, the second approach of justification is political in nature. On the one hand, arguments against female suffrage centred around political stability. In the context of the 1918 reform some claimed that it would be irresponsible to introduce such a massive number of new voters which, due to their sex, were bound to show an entirely different voting behaviour³³⁰. This could have a negative impact on political stability and was therefore deemed unwarrantable. On the other hand, some argued that female franchise was unnecessary, because their voting behaviour would not change the quality of politics in England³³¹. The underlying assumption was that only those persons should be enfranchised whose votes are likely to have a positive impact on the nation's fate. Note that this argument thus reflects a similar principle as the notion of “respectability” or the plural voting for university graduates.

Female franchise and the abolishment of sex discrimination

When women were finally enfranchised in 1918, the main justification was their “*massive contribution to the war effort*”³³². Having shared the burdens of society and having contributed to the best of their abilities, thereby supporting the government during the World War³³³, public support for women's inclusion had grown stronger³³⁴. Nonetheless it “*could only be sold to parliament if the great majority of female voters were married, mature and could be linked in some way to the household qualification, either directly or through their husband*”³³⁵. This is one of the reasons why they were subjected to different qualifications than men, for example regarding age. Effectively only women over thirty who satisfied one of the following conditions were eligible to vote: Either they already were local government electors occupying property of £5 yearly value, or they occupied a dwelling house on the same basis as men, or they were married to a man entitled to be registered³³⁶.

³³⁰ See Butler, D. E.: The electoral system in Britain 1918-1951., Clarendon Press, 1953, p. 12.

³³¹ See Trachsler, Wilhelm: Das aktive Wahlrecht in England., Buchdruckerei K.J. Wyss Erben, 1927, p. 67.

³³² Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 87. Also see Emden, Cecil: The people and the constitution. Being a history of the development of the people's influence in British government., Clarendon Press, 1956, pp. 3-4 (Also see Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 68.)

³³³ See Trachsler, Wilhelm: Das aktive Wahlrecht in England., Buchdruckerei K.J. Wyss Erben, 1927, p. 68.

³³⁴ See Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 87.

³³⁵ Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 87.

³³⁶ See Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 135.

In 1928, this discrimination between sexes could no longer be maintained³³⁷, not least because female voting behaviour had turned out to not to have any destabilising effects on politics, and women have henceforth been enfranchised on the same basis as men, sex no longer being a principle of disenfranchisement.

3.4.3.2 The conscientious objection disqualification

The same Reform Act that first enfranchised women in 1918 also introduced a new principle of disenfranchisement: conscientious objection³³⁸. As summarized by Morris:

*“It was to apply to all persons who were exempted from military services on account of conscientious objections or those who were sentenced by court-martial for refusal to obey military law, on account of conscientious objection. Conscientious objectors, however, were not to be disqualified if before the expiration of one year after the war they obtained a certificate from the Central Tribunal that they had satisfactorily performed services during the war in some way connected with the war or had performed work of national importance.”*³³⁹

This disenfranchisement was not pervasive, because it was limited to five years after the end of the war³⁴⁰. As for justification, it seems that it was the reversal of the argument for enfranchising women which was based on the idea that their contribution to the war entitled them to be enfranchised. Only conscientious objectors who could not prove having at least engaged in *some* “work of national importance” were disenfranchised due to their lack of contribution³⁴¹. On the one hand, this once again reflects the rights/duties or benefits/burdens approach we have already encountered several times in the context of franchise. On the other, we get the impression that war is of special significance when it comes to the issue of

³³⁷ See e.g. Trachsler, Wilhelm: Das aktive Wahlrecht in England., Buchdruckerei K.J. Wyss Erben, 1927, p. 70.

³³⁸ See e.g. Butler, D. E.: The electoral system in Britain 1918-1951., Clarendon Press, 1953, p. 5.

³³⁹ Morris, Homer Lawrence: Parliamentary franchise reform in England from 1885 to 1918., BiblipLife, pp. 184-185 (to be found online at http://books.google.at/books?id=IjH1wDWldMkC&pg=PA182&lpg=PA182&dq=conscientious+objector+franchise&source=bl&ots=JVZ6xWKgQx&sig=AtIqHdyypCgZH3JSsGI_0QMIS64&hl=de&ei=E2QhTleuDoyoOIv9mWw&sa=X&oi=book_result&ct=result&resnum=3&ved=0CCUQ6AEwAg#v=onepage&q&f=true, last visited on 22 June 2010, 03:43)

³⁴⁰ See e.g. Butler, D. E.: The electoral system in Britain 1918-1951., Clarendon Press, 1953, p. 5.

³⁴¹ See Trachsler, Wilhelm: Das aktive Wahlrecht in England., K. J. Wyss Erben, 1927, p. 9. Also see Emden, Cecil: The people and the constitution. Being a history of the development of the people's influence in British government., Clarendon Press, 1956, pp. 3-4 for the more general argument that all widening of the franchise was at that time justified by the “necessity for allowing those who had taken a part in the war” to have a vote.

contribution. Perhaps this is because the nature of war per se requires commitment, or because it is an official “act” of the collectively elected government and lack of support may therefore result in the suspension of a person's democratic rights³⁴².

3.4.4 Conclusion

In the present chapter I have given an overview of those franchise (dis)qualifications that no longer prevail in English electoral law today. Property and marriage qualifications were abolished, as were sex and conscientious objection disqualifications. I have tried to show that while some of those requirements were based on similar justifications as those still prevailing today, there are some arguments that are no longer deemed valid. For example, having a “stake” in the political community is still important, but it no longer needs to be supported by property. Similarly, economic wealth is no longer presumed to reflect on a person's “respectability”, at least not in a way that matters for enfranchisement. Furthermore, biological traits such as sex are no longer seen to disqualify a person from voting, as long as they do not affect their ability to come to reasoned judgement. Last, a person's family, household or marital status no longer affects his/her franchise status and a person's engagement in the war is not a requirement for voting anymore.

³⁴² See Lippke, Richard: The disenfranchisement of felons., *Law and Philosophy*, Vol. 20, 2001 for a similar argument in the context of the disenfranchisement of criminals.

IV. ANALYSIS

1. Introduction

In the present chapter I will pull together the strings that have been introduced in the foregoing parts of this paper. In particular this means that I will analyse what kind of conditions make for a legitimate democratic people. On the one hand, I will integrate the three values of freedom, equality and reasonable acceptability into one coherent framework. On the other, I aim to systematize the principles of (dis)enfranchisement so that they can be distinguished according to their underlying justification and perspective. The so-developed framework will be applied to the example of the English franchise, because I want to examine whether their demos is legitimate or what would need to be changed in order for it to be. For this purpose I will consider both the legal qualifications and their underlying theoretical principles. The analysis will have exemplary status since the analytical framework proposed in this paper can also be used to examine any other franchise pattern.

2. Developing a systematic framework for assessing the legitimacy of a democratic people

2.1 Systematizing principles of legitimacy

The first criterion that qualifications for enfranchisement have to live up to in order to count as legitimate is freedom. As I have pointed out in an earlier section of this paper, Philip Pettit elaborates this to mean that all human beings are born free and must not be systematically interfered with unless this interference lives up to the following two conditions: First, systematic interference must not be arbitrary. Second, it is only justified when it tracks the relevant interests of all involved persons. Should the interference not live up to those conditions, a state of (arbitrary) “domination” is created and this is inconsistent with individual freedom.³⁴³ For the constitution of the demos the important implication is this: Anyone whose life a democratic government interferes with should be enfranchised, because this is how their interests can be tracked and how they can protect themselves against arbitrary domination. In contrast, it seems illegitimate for someone to have a say if he/she is not actually interfered with by the democratic government.

The second standard of legitimacy is based on the value of equality. For example, Tom Christiano argues that since all persons have equal moral status, their interests have to be advanced equally and in a way that allows them to actually see that they are being treated as equals³⁴⁴. We can specify this to mean that while moral equality requires morally equal treatment, politically equal treatment has to be justified from this particular perspective too. Obviously, if democratic legitimacy requires that equals are treated as such, it must require that unequals are not. What accounts for “equality” in the politically relevant sense does therefore not only depend on moral status, but also on the political one. Unlike moral status, the political does not seem to follow from mere humanity, however, but from other relevant traits, such as the extent to which a person is affected by the collectively made decisions, their political interest, their competence, etc. - in fact, the proper explication of what accounts for equal political status is what we will need to define due to the further course of this chapter. In any case, the value of equality requires that equal treatment should follow from equality in

³⁴³ See Pettit, Philip: *Republicanism. A Theory of Freedom and Government.*, Clarendon Press, 1997 for details on his argument.

³⁴⁴ See Christiano, Tom: *The Constitution of Equality. Democratic Authority and its Limits.*, Oxford University Press, 2009 for details on his argument.

regards to relevant traits or status, not from arbitrary favouring.

The third standard of legitimacy is based on the notion of reasonable acceptability. On this view, qualifications for enfranchisement must be designed so that they can be justified based on reasons that all those who are reasonable, in the sense that they are willing to propose and abide by fair terms of cooperation, would accept³⁴⁵. According to John Rawls, “acceptable” in this context does not mean “likely to be accepted (empirically)”, but rather “meriting acceptance” - it is what people would accept were they reasonable, thus it is what they ought to accept if they aim to propose and abide by fair terms of cooperation³⁴⁶. In particular this means that qualifications must be designed so that even those who are disenfranchised would be able to reasonably accept them, as long as they are fair-minded. John Rawls has developed the “Original Position” as a (hypothetical) tool for determining whether particular conditions actually satisfy the condition of reasonable acceptability. He argues that if persons were under a “veil of ignorance”, that is if they didn't know what their own position in society was, they would be likely to make truly just decisions, because they wouldn't be able to favour their own position (simply because they would not know what this position was) and thus would have an interest in making impartial decisions that would not arbitrarily discriminate against anyone³⁴⁷.

I thus suggest that there are three principles that franchise qualifications have to live up to in order to count as legitimate – freedom, equality and reasonable acceptability. I furthermore claim that all three principles are of equal normative power. A franchise qualification therefore is legitimate only if it does not contradict any one of those principles, if it is in fact compatible with all of them, and if it can be shown to realize at least one of their underlying values. That is to say, a franchise qualification does not have to foster both freedom and equality, but it will suffice if it actually fosters one, without contradicting or counteracting the other(s). For example, a red-hair-qualification for voting may be compatible with the value of equality if we assume that everyone has an equal chance of dyeing their hair red, but it is certainly questionable whether it could be reconciled with the values of freedom and

³⁴⁵ See Rawls, John: *Political Liberalism*., Columbia University Press, 2005, pp.136ff.

³⁴⁶ See Weale, Albert: *Contractarianism, deliberation and general agreement*., In: Dowding, Keith / Goodin, Robert / Pateman, Carle (Eds.): *Justice and Democracy. Essays for Brian Barry*. Cambridge University Press, 2004, pp. 91-92.

³⁴⁷ See Rawls, John: *Political Liberalism*., Columbia University Press, 2005, pp. 24-28 for details on the veil of ignorance and its purpose in Rawls' theory.

reasonable acceptability, because it seems a rather arbitrary qualification – there simply are no “good” reasons for why people should be required to have red hair and why being blonde should disqualify a person from voting.

2.2 Systematizing principles of (dis)enfranchisement

When clarifying my conception of democracy I argued that its key distinct feature is that it is rule of the people, but not only of *some* people, but *all*. Yet the example of the English franchise has made it obvious that “all” does not actually refer to all people in the sense that all human persons (or even all living) are enfranchised. Rather, it seems to refer to “all who belong to *the people*”, i.e. who are members of the relevant collective in question. At the same time, however, there usually is even further discrimination, because not all members of “the people” actually get a vote and there thus is franchise discrimination *within* the people too. How can we integrate those findings into a systematic framework for conceptualizing principles of (dis)enfranchisement?

First, I conclude that franchise qualifications can be differentiated according to the analytical perspective they adopt. There are two relevant levels, one treating the democratic people from an outside, the other from an inside perspective. From an outside perspective the core question is what constitutes a political community to begin with. Or, put differently, why is it that there should be “*a people*” instead of just people? What is it that makes persons form a collective for matters of politics at all? In contrast, the second level is about discriminations *within* this people. Even if a certain set of persons forms a people, not all members are necessarily enfranchised. How can this be reconciled with the idea that democracy means that *all*, and not just some, of the people are rulers? Both perspectives deal with potential exclusion, but they take different views on what kind of exclusion matters for legitimacy.

Second, I conclude that those two perspectives also differ in regards to the sorts of justification they endorse. For example, citizenship and/or residence requirements are the key examples of first level qualifications, and the two main justifications for those qualifications are the “all affected principle” and territoriality. Those arguments are actually meant to show that exclusion can be compatible with legitimacy; that it can be legitimate to constitute *a* people that does not comprise of all humans. There is an even more subtle distinction within

the second analytical level, because franchise qualifications within a people can be justified either with reference to the community or with reference to the individual. For example, the disenfranchisement of criminals can be justified with reference to the balance of rights and duties within the political community, but it can also be justified with reference to the criminal's character.

In sum, I thus conclude that when assessing the legitimacy of franchise qualifications we first have to determine whether they are meant to justify outside or inside exclusion (i.e. the “level” of exclusion we are dealing with), and, second, what their underlying justification is (i.e. their “reference point”). We thus get a systematic framework for how to assess the legitimacy of a democratic people. Note that this conceptualisation is actually rather different from those proposed by Czermak or Katz. For example, Czermak proposes that there are four principles of (dis)enfranchisement: being affected, capacity, territorial boundaries, temporal boundaries³⁴⁸. On the other hand, Katz suggests that there are only three sorts of principles: *“those based on community membership and having a personal stake in the election, those based on competence, and those based on autonomy”*³⁴⁹. In my view both approaches fail to properly distinguish between the *level* and the *reference point* of justification, which is why they seem too crude for the present purpose. This is because it is indeed significant to determine both, the inside and outside borders of a community, but also analyse the legitimacy of the reference point that is used to justify those borders. In the following I will therefore apply the principles of legitimacy to all levels of the demos, but also analyse the individual arguments in order to find out whether and on which basis a democratic people can legitimately be constituted.

³⁴⁸ See Czermak, Emmerich: *Demokratie und Wahlrecht*. Europa-Verlag, 1948, pp. 105-108.

³⁴⁹ Katz, Richard: *Democracy and Elections*., Oxford University Press, 1997, p. 216

3. Assessing the legitimacy of principles of (dis)enfranchisement

3.1 Legitimacy and the constitution of a people: Citizenship/residence qualifications examined

The first justification necessary when aiming to constitute a legitimate democratic people is the justification for why there is to be any exclusion at all. For example, if the equal democratic say is justified by referring to the equal moral worth of all human beings, then it is not at all obvious how *any* exclusion could be legitimate; i.e. why there is to be “a people” instead of just “people”. As we have seen, it is usually citizenship status in combination with some sort of residence requirement that is used as a (dis)enfranchising criterion of this sort. Yet, both qualifications are morally contingent in the sense that it is not due to any moral merit, justification or trait that a person holds a certain nationality, and none of those concepts apply to the particular borders of any particular state either³⁵⁰. From a viewpoint of legitimacy it may therefore seem arbitrary that a person should be (dis)enfranchised based on those features. Can the constitution of a democratic people based on those qualifications nevertheless be legitimate? In the following I will examine this question by analysing the potential justifications discovered in the context of the English franchise. The general idea is that political communities represent “communities of fate”. Therefore a democratic people should be constituted only by those who are actually members of this sort, i.e. who share a personal, permanent and lawful link to the community, who have a significant stake in it, and who therefore participate in the burdens as well as the benefits of this society. In order to determine whether citizenship and residence are legitimate principles of (dis)enfranchising a person, we thus have to analyse, first, whether the concept of a community of fate lives up to the standards of legitimacy, whether nation states are an appropriate tool for distinguishing between them, and, third, whether citizenship and residence qualifications are thus legitimate as franchise criteria.

3.1.1 The legitimacy of distinct political communities

First, can the existence of separate communities of fate be legitimate? Based on the argument of Pettit I argue that it can be, because a government should only be elected by those it

³⁵⁰ See e.g. Canovan Margaret: *Nationhood and political theory*, Edward Elgar Publishing, 1996, p. 34. (Note that she is referencing the work of Thomas Pogge there.)

interferes with. Thus the constitution of a democratic people is legitimate if it includes all those who it interferes with, while at the same time excluding those it does not. This fosters freedom, because one has the chance to participate in decisions that interfere with one's life and to actually contest them if necessary. At the same time it prevents others from interfering with me unless they themselves are affected by my choices. Goodin has criticised this all affected principle for being impracticable – after all, who is affected by a decision (or interfered with by a particular government) seems to depend on what that decision turn out to be³⁵¹. Furthermore, the notion of “being affected” or „being interfered with“ is open to interpretation: Does it apply to anyone whose interests are affected by the government's decisions in any way, or is it only those who are bound by their laws, or even restricted to those who are bound permanently? If we accept the notion of a community of fate, then the latter answer would seem most appropriate. For example, Christiano argues that it does not only matter whether one is affected at all, but rather to which *degree* one is interfered with. According to him “being affected” is not enough to legitimately be enfranchised. Instead suffrage should only extend to those who actually share a “common world”:

„A common world is a set of circumstances among a group of persons in which the fundamental interests of each person are implicated in how that world is structured in a multitude of ways. It is a world in which the fulfillment of all or nearly all of the fundamental interests of each person are connected with the fulfillment of all or nearly all of the fundamental interests of every other person.“³⁵²

Thus, what matters is not only that a person has any stake in the government's decisions at all, but that persons have roughly equal stakes and that those stakes are above a certain threshold³⁵³. Why should a person have an equal say in political decisions regardless of whether they are only temporarily and peripherally affected by them, or instead fundamentally bound? As he puts it: *„It must be the case that the individuals have roughly equal stakes in the things that connect them in order to justify giving each an equal say in these relationships.*

³⁵¹ See Goodin, Robert: Enfranchising all affected interests, and its alternatives., In: Philosophy and Public Affairs, Vol. 35, No. 1, 2007, p. 52.

³⁵² Christiano, Tom: The constitution of equality. Democratic authority and its limits., Oxford University Press, 2008, p. 57

³⁵³ Note that a similar argumentation lies behind Rainer Bauböck's concept of “stakeholder citizenship”. For details see his article “Expansive citizenship. Voting beyond territory and membership.”, In: Political Science and Politics, Vol. 38, No. 4, 2005 (to be found online at <http://www.jstor.org/stable/30044350>, last visited on 22 July, 16:54).

And though people are affected by what happens in societies beyond their borders, the normal case is such that the impacts on interests are not equal. “³⁵⁴ Hence, by the standard of equality, a demos is legitimately constituted if it enfranchises all and only those who have roughly equal stakes in the government's decisions, i.e. who actually have a fundamental and permanent connection to the political community in question. The existence of distinct political communities is thus legitimate if there are indeed separate “common worlds”, that is, if not all people are connected to everyone else to the same extent, but if there are some communities that actually share a tighter connection.

The last question therefore is: Is it acceptable, from a viewpoint of reasonable acceptability, to enfranchise only those who are significantly affected? I actually do not see any persuasive counter-argument. If someone is willing to propose and abide by fair terms of cooperation, why should they not agree that participation depends on sharing the „common world“ that is shaped by those decisions, and sharing it permanently? Seeing that political decisions are collectively binding it does seem reasonable that I should only be allowed to vote if I am actually part of the collective that is bound by them. Otherwise I would participate in interfering with other people's lives without allowing them to avoid domination. This would be illegitimate, because as Rawls has pointed out, reciprocity is a key value of reasonable acceptability³⁵⁵. That is to say that it is reasonable for me to not want others interfering with me, but at the same time others have an equal claim to that. Hence reciprocity requires that we may only interfere with others if we ourselves are affected. As a consequence, discriminating between peoples on the basis that they do not share a common world seems reasonably acceptable.

In sum I thus draw the conclusion that the constitution of *a* people, i.e. a political collective that does not comprise of all people, can in fact be legitimate. This is because peoples can be seen as communities of fate, meaning that while members share a “common world” with each other, outsiders do not have an equal part in it. It is legitimate that only members should have a right to an equal say in political decisions, then, because they are the ones fundamentally and permanently bound by them, i.e. because they are the ones that the elected government interferes with.

³⁵⁴ Christiano, Tom: The constitution of equality. Democratic authority and its limits., Oxford University Press, 2008, p. 59

³⁵⁵ See Rawls, John: Political Liberalism., Columbia University Press, 2005, e.g. p. xliv for details.

3.1.2 The legitimacy of state boundaries as franchise limitation

In the previous section I have argued that the existence of distinct political communities can be legitimate if the communities are constituted as communities of fate, so that only members can reasonably be assumed to actually share a “common world”. Does this mean that the boundaries of nation states, as they exist today, are legitimate? Or, put differently, are those boundaries reasonably congruent with those of distinct “communities of fate”?

It seems that the only forceful objection against this view lies in the fact that that state boundaries are contingent in the sense that they are the product of historical development and need not be morally justified. Considering this, why should I have more in common with one person rather than another, simply because one belongs to my side of the border while the other does not? The simple answer is: Because there *are* boundaries and they do run where they do. That is to say that while one does not have to prescribe to some obscure sort of determinism assuming that boundaries are running where they “should” or “have to” run, one cannot escape the fact that there actually are boundaries. We do not have to prove that territoriality is a “necessary” feature of politics (although perhaps one could³⁵⁶), and we do not have to prove that the particular territory of a particular state is morally “necessary”, but it suffices to show that territoriality actually *is* a pervasive feature of politics³⁵⁷. The mere fact that there is a state system and that there are national boundaries makes it more likely for me to share a common world with some people rather than others, because we are not in a pre-political state of nature³⁵⁸, but nation states do exist and governments are typically national, thus the laws that interfere with us are national and so are the governments that we are to elect for making them. This is why I suggest that, today, nation states are the most likely candidates for “communities of fate”.

3.1.3 The legitimacy of citizenship/residence requirements for voting

If it is legitimate for distinct political communities to exist and if nation states are today's

³⁵⁶ Note that one could imagine such an argument to either build on “feasibility” in the sense that administration, law-enforcement, etc. all are practicable only within a territorially limited realm, or by making some sort of Lockean argument that “common world” is not only a metaphorical but also a literal description of politics, e.g. referring to common land and resources of a political community.

³⁵⁷ See e.g. Canovan, Margaret: *Nationhood and political theory*, Edward Elgar Publishing, 1996, p.17.

³⁵⁸ Note that this is relevant because the hypothetical assumption of a state of nature is common in the political theory of e.g. Thomas Hobbes (“*Leviathan*”) or John Locke (“*Treatises of Government*”).

manifestation of this, does this mean that a combination of citizenship and residence is a legitimate criterion to distinguish between peoples, between communities of fate, and that they are thus justified as franchise qualifications? Is it legitimate to in- and exclude persons based on their nationality or place of residence?

In short: If nation states actually were the sort of “*closed*” systems that Rawls envisaged them to be³⁵⁹, or if only native citizens permanently lived within a particular state, it would mean exactly that³⁶⁰, because citizenship would equal membership in the community of fate and aliens would clearly be outside that community. As it is, however, there are not only members and non-members, but there also is the third category of non-formal *de facto* members, and this is why the citizenship requirement may be illegitimate at times. In the following I will elaborate on this argument.

As we have seen, resident co-citizens are, on average, most likely to have an equal and fundamental stake in certain political decisions such as the election of the national government, because they are bound by the same laws. Aliens, i.e. those who are neither native-born nor naturalized citizens³⁶¹, on the other hand, may well be affected by some decisions to some degree, perhaps even fundamentally, but probably not as extensively. For example, Afghanistan's citizens are fundamentally affected by the United Kingdom government's decision to go to war with them, but they are not likely to be affected by British car traffic regulations. Hence, they may have a stake in that government's decisions, but only in regards to a very limited range of issues, especially if compared to British nationals who actually live in England and who therefore have to abide by innumerable British legal regulations every day. Thus, the discrimination according to nationality and the exclusion of “aliens” from the franchise seem legitimate, because citizenship indeed signifies membership in a distinct community of fate. However, there is serious doubt that this argumentation can account for the disenfranchisement of long-term alien residents too. This is because they may be *de facto* members in the “community of fate” even if they do not hold formal membership. In many states their exclusion is based on the assumption that “*aliens, even resident aliens,*

³⁵⁹ See Rawls, John: *Political Liberalism*, Columbia University Press, 2005, e.g. p. 12 for details.

³⁶⁰ See e.g. Czermak, Emmerich: *Demokratie und Wahlrecht*, Europa-Verlag, 1948, pp. 111-113.

³⁶¹ See Raskin, Jamin: *Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage*, In: *University of Pennsylvania Law Review*, Vol. 141, 1993, p. 1397 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46) for this definition.

have a lesser stake than citizens in national, state, and local issues”³⁶². Yet this claim does not seem persuasive considering that they “drive on the same highways as citizens, pay the same taxes, breathe the same air, require the same police and fire protection, and send their children to the same schools”³⁶³. As Easton has pointed out: “In an era of large-scale migration, democracies today host populations of aliens that reside within their borders for years – if not decades or lifetimes – that pay taxes, face compulsory obligations like the draft, and often share more political interests with their local neighbors than they do with the citizens in their home countries.”³⁶⁴ If what matters is the degree to which a person's fundamental interests are affected by the government's political decisions, and on the range of issues that this is true for, then it hence would seem that long-term resident aliens have roughly equal stakes as citizens. In fact, there is no reason to doubt the permanence of their stakes any more than that of native citizens: “They may, to be sure, move from one community to another, and some will return to their country of origin. But citizens also move, and I know of no reason to believe that resident aliens have a higher rate of mobility than other persons.”³⁶⁵ It thus seems that the exclusion of long-term alien residents could pose a severe problem for the legitimacy of a people constituted based on citizenship qualifications. This is because it seems to violate equality and allow for domination of one group of persons (citizens) over another (non-citizens). While aliens are not usually interfered with by the citizens of another country and therefore may legitimately be excluded from the franchise, this does not seem to be not true for resident aliens, because they are in fact governed by the same “political institutions and are subject to all laws which apply to citizens (and many which they do not); they must pay all taxes that citizens pay (...) and have, in various categories, been subject to the military draft”³⁶⁶.

³⁶² Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, p. 1111 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50)

³⁶³ Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, p. 1112 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50)

³⁶⁴ Earnest, David: Noncitizen voting rights. A survey of an emerging democratic norm., paper prepared for delivery at the 2003 annual convention of the American Political Science Association, Philadelphia, Pennsylvania, August 28-31, 2003., p.1, to be found online at http://www.odu.edu/~dearrest/pdfs/Earnest_APSA_2003.pdf (last visited on 21 July 2010, 11:07). Also see Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional, and theoretical Meanings of Alien Suffrage., University of Pennsylvania Law Review, Vol. 141, 1993, p. 1394 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46).

³⁶⁵ Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, pp. 1112-1113 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50)

³⁶⁶ Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1442 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46)

The only reasonable attempt to counter this conclusion would be to “*deny that there is anything tyrannical about citizens ruling noncitizens when the noncitizens have the opportunity to become citizens and members*”³⁶⁷. Raskin refers to the option of naturalization here, i.e. the option of becoming a citizen of a state other than one's native country. Aliens usually get this chance after having been a lawful resident in the country of their choice for an extended period of time, or by being married to a national of this country. The present argument is based on the assumption that aliens are not generally members of the political community³⁶⁸, but they can become members by, firstly, freely choosing to do and, secondly, by demonstrating an adequate degree of commitment and sincerity through the act of applying for citizenship. Can this redeem citizenship as a legitimate franchise qualification? The underlying idea seems to be this: If a person *really* is a member of this particular community of fate, if he/she *really* has a stake there, then he/she should demonstrate this by becoming a formal member too. If he/she refuses to do so, this is tantamount to consenting to ongoing disenfranchisement. Citizenship is a legitimate franchise qualification, then, because it does not violate a person's freedom: It may be true that nationality is a contingent feature to begin with, because nobody chose the one he/she was born with. However, we later do have the chance to become citizens of another state, and once this option is open for us, nationality is not contingent anymore, but it is a matter of choice (at least to some degree). Indeed some might even go so far as to argue that an alien's foregoing or postponing to seek formal membership casts doubt on the durability of their loyalty or commitment to the political community in question³⁶⁹. It may signify a lack of “*willingness on the part of resident aliens to identify themselves with the country and its people and to give up once and for all their attachment to the countries in which they were born. The unnaturalized alien is perhaps holding something back, refusing to join in.*”³⁷⁰ However, this assumption loses persuasiveness if we consider that there are various reasonable justifications for choosing to

³⁶⁷ Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1448 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46)

³⁶⁸ See Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1432 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46).

³⁶⁹ See Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1451 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46).

³⁷⁰ Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, p. 1129 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50)

keep one's native citizenship, because not all of them represent a lack of relevant commitment to the new community:

“Sometimes unfavorable economic consequences under the former country's law, such as forfeiture of accrued pension rights or ineligibility to inherit from relatives, may be dominant. Political exiles may wish to preserve the option of return in case of an unlikely change in the character of the regime. Some business immigrants use the United States as a base for international activities, while maintaining close ties with their home-lands. Some immigrants expect ultimately to retire to the land of their childhood. Others may have no intention to make practical use of their prior citizenship, but view it as a part of their psychological identity that they are reluctant to renounce.”³⁷¹

Taking the values of freedom and equality seriously, what matters is the equal degree of interference. In general, nationality seems to be an appropriate proxy thereof, but it is neither a sufficient nor a strictly necessary requirement that a political community is comprised only of co-citizens, because what matters for inclusion is the equal stake. Thus the question is whether not being a citizen, or choosing not to become one, should make any difference as to whether a person is entitled to participate in electing their government, provided that he/she is nevertheless living there and sharing in the “common world” with all its burdens and benefits. As far as I can see, it does not.

Note, however, that I do not thereby deny that durational residence requirements for aliens are a legitimate means to ensure the commitment of aliens. In this view, I deviate from the position of Raskin, who suggests that there should be hardly any (or no) qualifying period of residence for aliens at all. He justifies this by claiming that even *“five years is a very long time to be voteless, lacking the crucial form of social recognition, in a community in which you live, work, socialize, pay taxes, use public services, and send your children to school.”*³⁷² According to him, durational qualifications can only be based on the assumption that *“knowledgeable exercise of the franchise”*³⁷³ cannot be guaranteed otherwise, i.e. because

³⁷¹ Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1451 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46)

³⁷² Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1448 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46)

³⁷³ Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien

aliens are not likely to have sufficient knowledge of local customs, values and political issues at the point of their arrival. He rejects this as “*seriously under- and over-inclusive*”³⁷⁴ and argues that duration of residence is too crude to function as a proxy of familiarity with local or national politics. A similar objection is raised by Rosberg who argues that a durational residence requirement “*excludes some newcomers who are as knowledgeable about local affairs as long-time residents, and it includes some long-time residents who are as ignorant of local affairs as newcomers.*”³⁷⁵ He claims that most resident aliens will actually have familiarised themselves with the necessary customs and obtained the relevant informations quite fast³⁷⁶. Furthermore, he deems it discriminatory that native-born citizens should be free from the burden of proof while aliens are not³⁷⁷, although he concedes that as “*a general proposition, long-time residents of a community are always likely to be more knowledgeable about local affairs than newcomers*”³⁷⁸. In fact, I do not disagree with this assessment. The likely level of information in a person with the genuine interest in making a new country his/her home is probably sufficiently equal with that of any native-born citizen. However, both Rosberg and Raskin make their arguments with the background of U.S. immigration in mind, and Raskin himself concedes that the case of the so-called “guest-workers” in Europe might be different in character³⁷⁹. While any kind of resident may have a fundamental stake in the political community he/she lives in, it is not obvious that all newly arrived ones actually have a “roughly equal” stake with long-term residents. This is because only once aliens have stakes as “*parents, homeowners, tax-payers, draftees, and consumers*”³⁸⁰, and not just the

suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1450 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46)

³⁷⁴ Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1450 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46)

³⁷⁵ Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, p. 1118 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50)

³⁷⁶ See Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, p. 1119 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50).

³⁷⁷ See Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, p. 1121 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50).

³⁷⁸ Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, p. 1121 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50)

³⁷⁹ See Raskin, Jamin: Legal Aliens, Local Citizens: The historical, constitutional and theoretical meanings of alien suffrage., In: University of Pennsylvania Law Review, Vol. 141, 1993, p. 1447 (to be found online at <http://www.jstor.org/stable/pdfplus/3312345.pdf>, last visited on 22 July 2010, 15:46).

³⁸⁰ Rosberg, Gerald: Aliens and Equal Protection: Why Not the Right to Vote?, In: Michigan Law Review, Vol. 75, No. 5/6, 1977, p. 1114 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50) – Note that this is of course a metaphorical list of “stakes” that does not claim to be exhaustive at all.

stake as aliens, their stakes may count as (roughly) equal. In order to develop this kind of stake, I argue it is reasonably acceptable that they should have lived in their new community for a while before they retain an equal status. This is not because they are of an unequal worth (as persons), or because one has to doubt their intention or competence, but it is due to the fact that their vote is participation in collectively binding decisions, i.e. decisions that bind all members of the community and not just themselves, and this justifies that they should demonstrate a genuine commitment to sharing the consequences of those decisions. As a matter of fact this need not be discriminatory if we take it to mean that citizens should not be fully exempted from the residence requirement either. For example, in England citizen's right to vote is suspended if they live abroad for an extended period of time.

We can therefore summarize our findings as follows: The thicker the congruence between citizenship and *de facto* membership in the community of fate, the more legitimate it is as a franchise qualification³⁸¹, because this is the more it lives up to the values of freedom, equality and reasonable acceptability. However, there are good reasons to believe that permanent residence within the national state is the most adequate evidence of this *de facto* membership, and this has two important implications. First, citizenship is probably not sufficient to justify a person's inclusion to the franchise. It should instead be combined with some sort of residence requirement. Second, citizenship is not a sufficient *disqualification* either. *De facto* members of the community of fate should have the chance to become a formal member, a citizen, to thus retain the right to vote, or be enfranchised regardless of their nationality provided that they have demonstrated genuine commitment, for example through permanent residence.

3.2 Legitimacy and discrimination within a people: Internal qualifications examined

In the foregoing chapter I have analysed whether and under what conditions it can be legitimate to constitute *a* people so that some people are in- and others excluded from it. I concluded that it is indeed legitimate for distinct political communities to exist, for example based on a combination of citizenship and residence requirements. However, as we have seen from the example of the English franchise, being a member of the political community is usually not sufficient to be enfranchised, because each citizen has to live up to certain additional qualifications, such as minimum age, law-abidance and mental ability

³⁸¹ See Czermak, Emmerich: *Demokratie und Wahlrecht*, Europa-Verlag, 1948, pp. 111-113.

requirements. Hence the main question is whether such kind of discrimination *within* a people can also be legitimate. There are two ways to approach this problem, one taking a community perspective, the other taking an individualised view. That is to say that “internal” franchise qualifications can be justified either with reference to the community or with reference to the individual. I will examine both sorts of argumentation in order to determine whether and under what conditions it might be legitimate to exclude people from the franchise although they share a common world.

Note that I will make my argument based on the assumption that all of the discussed qualifications are applied *within* the political community, i.e. the question is not about membership but about an even further restriction of voting rights. This is crucial, because it means that it is about the exclusion of people who actually share the same “common world”, who are affected and indeed bound by the collective decisions and thus interfered with by the national laws. Their disenfranchisement would thus be pervasive in a way that exclusion based on stake is not. This is because the latter only excludes a person from a particular political community, but – assuming that everyone has a fundamental stake – everyone is bound to be enfranchised *somewhere* (else)³⁸². Put differently, everyone has some nationality and place of residence, hence what counts as disqualification in one state is qualification in another. Disenfranchisement of members, i.e. discrimination within a people, is different, however, because it implies that a person is not enfranchised anywhere, not enfranchised at all. Can this kind of exclusion be legitimate?

3.2.1 Justifications with reference to the community

Adopting a community-oriented perspective, there are two possible ways to justify the disenfranchisement of members of the community of fate. One is concerned with the fair balance of rights and duties within the community, the other with the likely or potential consequences that the enfranchisement of certain groups or persons would have for the community. In the following I will assess the legitimacy of both argumentations, using the

³⁸² Note that I am of course aware that our world does not actually consist of only democracies. Thus a person's exclusion from one democracy may well mean inclusion, but not necessarily enfranchisement, in another state. However, it would exceed the scope of this paper to consider the different structure and political nature of political communities, which is why I am working on the presumption that although there are distinct political communities they are actually all of roughly the same inner political structure. Real world politics are different, of course, and it would indeed be an interesting question whether this should have an impact on the potential inclusion of aliens from non-democratic countries in democracies.

examples discovered in the context of the English franchise.

3.2.1.1 The balance of rights and duties within the community

As we have seen in the example of the English franchise, the idea that there should be a balance of rights and duties among the members of society functions as valuable reference point for justifying franchise qualifications. There are three variations of this argument, two of which are concerned with fair allocation while the other has its focus on equal obligation.

First, there is the idea that being a member of the political community comes with a responsibility to contribute, i.e. a duty to share the burdens that come with living in a society. On this view, only those who contribute to the welfare of society should have a say in how it is governed³⁸³. In order to make this concept workable as a franchise criterion, one has to specify what exactly is to count as a contribution. In the history of the English franchise I have found two possible examples, one economic (property qualification), the other related to war (exclusion of conscientious objectors, inclusion of women after World War II). In both cases, the general argumentation is the same: Only if a person satisfies condition X, that is, if he/she pays certain taxes or shows the willingness to participate in the war efforts of the state, he/she is eligible to vote. On the other hand, persons who do not satisfy this condition are persons who are either unable or unwilling to relevantly contribute to the good fate of the community, and are thus not entitled to have a vote. They may have a stake in the community, hence they are legitimate members, but the right to vote is a privilege that does not come with mere membership but with living up to the duties associated with it³⁸⁴. There are two classes of citizens/residents – “doers” who contribute and are therefore entitled to participate in making the collectively binding decisions, and “compliers”, who belong to the community but do not decide the fate of it, neither through contribution nor decisions. Some might argue this argumentation is the specification of the famous principle “*no taxation without representation*”³⁸⁵, while others may see it as its inversion, because what it actually implies is,

³⁸³ Note again that I discuss this principle as an addition to the “common world” principle, meaning that it is meant to justify (dis)enfranchisement within an already constituted people. However, one could perhaps also discuss it as an alternative approach, so that it would not apply to a people but would be meant to constitute it.

³⁸⁴ Note that the correlation of rights and duties, understood as privileges and obligations, is a notion that can be found e.g. in the analytical of Wesley Hohfeld (see Wenar, Leif: Rights., In: Stanford Encyclopedia of Philosophy, first published in 2005 (to be found online at <http://plato.stanford.edu/entries/rights/>, last visited on 26 July 2010, 21:31).

³⁸⁵ Note that this dictum goes back to the 1689 Bill of Rights, where it referred to the decision that taxes could

“no representation without taxation” (or, analogically, any other contribution). Indeed the argumentation seems to refer to one of the core values of legitimacy: equality. It claims that just as only equality in stake can get you membership in the political community, only equality in contribution can get you an equal democratic say. This actually seems intuitively plausible, because it expresses a common notion of fairness, i.e. no one should get more than their fair share. It calls for the question why those who are free from burdens should share the same rights as those who are not. For example, if children, elderly and insane people do not contribute to the GDP, why should they have a say in how it is spent? Similarly if conscientious objectors refuse to defend their country, why should they have a say in how it is run?

In order for this argument to legitimise the disenfranchisement of non-contributing members, it has to claim that contribution trumps stake, because only then it would justify excluding people who have a significant stake. However, this claim does not seem convincing to me, because while it assumes that the right to vote is a privilege, a commodity allocated according to merit, it offers no real justification for *why* this should be the case. It fails to show why there is a need for any further discrimination within the the people at all, why having a fundamental stake is *not* sufficient to be enfranchised. In fact, it appears to me that if we understand stake to give rise to a claim right, and I suggest that there is conclusive reason to do, then there is no room for conceptualising one and the same right as “privilege” too. Apart from that, contribution is indeed a rather vague concept which it is hard to form reasonable consensus on, thus it is doubtful whether it could function as a reasonably acceptable franchise criterion at all. I therefore reject the argument that voting rights can legitimately be allocated according to merit, because it conflicts with the value of equality.

The second duty-based approach to franchise is not so much about the original balance of rights and duties, but about its restoration once it has been violated. Thus, while in the first approach, citizens/residents are given the vote only once they have actually contributed what was required of them (or at least shown willingness to do so), on the second, the right to vote is granted as part of the original bundle of rights, and only revoked if a person has either violated his/her duties or claimed more rights than he/she is entitled to. This argument escapes

no longer be imposed on the people without the consent of the Parliament. See e.g. Spinner, Jeff: The boundaries of citizenship. Race, ethnicity and nationality in the liberal state., John Hopkins University Press, 1994, p. 123 for brief consideration of this idea.

the first objection, because enfranchisement is the original state of all members of the community of fate (for example qua their equal stake) and *disenfranchisement* only comes into play when the societal balance of rights and duties is upset. It is a measure that can be taken to restore the collective balance of rights, but it is not itself an integral part of that balance, which is why it can only be justified *ex post*. The disenfranchisement of convicted criminals could actually be an example for this sort of justification³⁸⁶.

Yet there is a serious problem with this view. It lies in the question of how to define the appropriate *quid pro quo* regarding the right to vote. For example, if “law abidingness” is the relevant duty, and its violation is to lead to disenfranchisement, even the transgression of speed restrictions would seem to constitute a ground for disenfranchisement. This does not seem justified, however, because the argument is plausible only “*if we assume that it refers to those whose lawbreaking is fairly serious*”³⁸⁷. On the other hand, if there is to be a threshold for how severe the violation has to be before it suspends the right stemming from a person's stake, then there is a high risk of arbitrariness. For example, while election related offences may quite evidently be linked to the right to vote, it is less obvious how disenfranchisement is the appropriate measure following tax fraud. In fact there is bound to be reasonable disagreement³⁸⁸ on what the core duties of citizenship are and what violations in fact justify disenfranchisement. This is why the second argumentation, too, seems insufficient to generally justify discrimination within a people, because as a foundation for franchise qualifications it cannot live up to the standard of reasonable acceptability.

In sum, what both the first and second argumentation have in common is that they perceive rights and duties as commodities to be distributed among the members of a community. Franchise is conceptualised as either a privilege stemming from duty-fulfillment or as a claim that can be suspended based on duty-violation. Both approaches presuppose some conception of how rights and duties *ought* to be distributed, envisaging this as an ideal state of balance with (dis)enfranchisement simply being one element among others. That is actually different

³⁸⁶ See Lippke, Richard: The disenfranchisement of felons., *Law and Philosophy*, Vol. 20, 2001, p. 570 (Note that he references Jean Hampton' article “The Moral Education Theory of Punishment”, published on *Philosophy and Public Affairs*, Vol. 13, 1984, in this context.)

³⁸⁷ Lippke, Richard: The disenfranchisement of felons., *Law and Philosophy*, Vol. 20, 2001, p. 563 (Note that he references Jean Hampton' article “The Moral Education Theory of Punishment”, published on *Philosophy and Public Affairs*, Vol. 13, 1984, in this context.)

³⁸⁸ Note that this notion goes back to John Rawls (for details see his “Political Liberalism”, Columbia University Press, 2005, e.g. pp. 36-37).

from the third approach which does not focus on the issue of distribution at all, but centres around obligation. The general idea is that every right has a corresponding duty and vice versa. Thus, for every right a person is granted he/she also inherits a duty, and every obligation goes along with some particular claim³⁸⁹. If a person, for whatever reason, is exempted from a certain duty or obligation, he/she is therefore also exempted from the right that goes along with it³⁹⁰. For example, if children or mentally incompetent persons are, to some extent, exempted from criminal prosecution, then they also are to be exempted from making the laws that are enforced thereby. Similarly, if the elderly do not live to experience the (long-term) consequences of their choices they are not equally affected as those who do and therefore are not equally obliged. What this argument suggests is that people who are not, or not to the same extent as others, interfered with by the government, should not have an equal right to elect that government's officials. This is because they do not have an equal stake at all, and because they are thus not equally affected by the consequences of the collective decisions.

The main problem with this view is that it relies on the assumption of some particular system of *quid pro quos*, i.e. particular rights correlating particular duties. However, the democratic vote is usually about the election of general representatives rather than about the decision on specific issues. If the latter were the case it could perhaps be legitimate, for example, to exclude children from decisions about criminal law, work place regulations, etc. as long as they are exempted from the obligations stemming therefrom. Since this is not the case, the argument actually loses most of its persuasive force³⁹¹, because it seems doubtful whether any member of the people would *not* be entitled to vote on this view. This is because the general assumption is that *all* members are significantly affected, otherwise they would not be members at all. Excluding children on the basis of their limited liability seems arbitrary, considering that they are indeed fundamentally bound by all sorts of other laws, e.g. those regarding education. Similarly, the elderly may not live to personally experience the long-term effects of the collective decisions, but I do not see how this justifies their

³⁸⁹ See e.g. Blais, André/Massicotte, Louis/Yoshinaka, Antoine: Deciding who has the right to vote. A comparative analysis of election laws., In: Electoral Studies, Vol. 20, No. 1, 2001, p. 43 to be found online at http://www.sciencedirect.com/science?_ob=MIImg&_imagekey=B6V9P-41JTSD0-3-1&_cdi=5904&_user=464575&_pii=S0261379499000621&_orig=browse&_coverDate=03%2F31%2F2001&_sk=999799998&view=c&wchp=dGLbVzb-zSkzV&md5=f8436c09bd10498f8_13d75b23083944f&ie=/sdarticle.pdf, last visited on 23 July 2010, 09:37).

³⁹⁰ See e.g. Dahl, Robert: Democracy, liberty and equality., Norwegian University Press, 1986, p. 150.

³⁹¹ Note that one could of course question the legitimacy of representative government altogether, but this is not the subject of this paper.

disenfranchisement for as long as they do live they will share roughly the same consequences as other members do. The question is: If this – albeit timely limited – stake is all they have, should they be discriminated against because of that? At the very best, it seems a slippery slope to suggest that the equality of stake should be measured in time. Indeed permanence matters, as I have myself argued in the context of membership in the community of fate. Yet I am not convinced that life expectancy is an appropriate measure for it. This is because what matters most for the significance of a person's stake is how fundamentally a person's life is affected, i.e. how fundamentally they are affected as long as they live. Hence, even if the elderly's stake is not equal, because they might not live to share the (long.-term) obligations that come with their decisions, it is not self-evident that this should actually trump the fact that they are nevertheless fundamentally affected until they die. Apart from that, it seems almost impossible to determine the relevant threshold of “permanence” according to human life expectancy. For example, the average English life expectancy at birth currently lies at 77,7 for males and 81,9 for females³⁹². At what age should citizens be disenfranchised then? There is bound to be reasonable disagreement as to whether ten or twenty more years of life are required to account for the on-going permanence of one's stake, and there thus is a high risk of violating people's freedom.

I conclude that despite the intuitive plausibility of the idea that rights should be allocated with corresponding duties in mind, this approach can not render discriminations in franchise legitimate within a (legitimately constituted) people, because it cannot justify voting qualifications without violating either equality, reasonable acceptability or freedom.

3.2.1.2 Avoiding negative consequences for the community

In the first version of a community-oriented argument for internal discrimination in voting rights the focus was on the preservation of a fair balance of rights and duties within a political community. The second version, however, is concerned with the fate of that community. As we have seen, a political community can be conceptualised as a community of fate, i.e. the members are conjoined by sharing a common fate or future. Voting is perceived as one of the most fundamental ways in which persons can shape or even determine this common future. Thus, if someone's voting could be shown to lead to a “bad fate”, i.e. collectively negative

³⁹² See <http://www.statistics.gov.uk/cci/nugget.asp?id=168> (last visited on 30 July 2010, 21:48) referring to the mid-year population estimates provided by the Office for National Statistics.

consequences, this might be seen to justify their exclusion from the franchise, because it would be against the “*substantial interest*”³⁹³ of the community. In fact, I have found three instances of this reasoning in the context of the English franchise – one concerns the possible exclusion of the elderly, another the reservation to include women, and a third the disenfranchisement of criminals.

The most straight-forward argumentation relies on the fact that certain groups of people actually do, or are likely to, have political interests that conflict with the “good fate” of the community. On the one hand, this may be due to their vicious interests or their unwillingness to be reasonable, on the other, it may be because of particular convictions that, were they implemented collectively, would have a negative impact on the fate of the community. In both cases the disenfranchisement is justified with concern for the quality of political decisions. For example, the exclusion of prisoners is commonly justified on the assumption that their criminal record documents their vicious intentions towards the community. Why would they violate collectively binding laws if not with either the explicit intention of hurting others or in order to profit at the expense of fairness and stability? Thus their voting behaviour is likely to reflect a state of mind that is unreasonable and conflicts with the requirements of (fair) cooperation. In order to prevent this state of mind to be translated in collectively binding decisions, those persons should be denied the vote, at least for the duration of their penance. Some theorists actually support the disenfranchisement of the elderly based on a very similar view, i.e. they suggest it is for the good of the community. They claim that even though age does not relate to malignance directly, it does relate to certain patterns of voting that are harmful for the community. For example, the elderly are generally likely to have short-term oriented interests and are hence at risk of not weighing burdens and benefits carefully enough, because their self-interest is not as affected. At the same time, they tend to have antiquated views on issues such as environment and education – issues that may be crucial to the fate and ongoing existence of the community. Again, the idea is that “the community” has to be protected from decisions that are of doubtful or even malicious quality, hence the elderly have to be excluded because of how they are likely to vote.

In order to embrace those arguments one must be prepared to accept that how one intends to

³⁹³ See Barlow, Richard: *Citizenship and conscience. A study in the theory and practice of religious toleration in England during the 18th century.*, University of Pennsylvania Press, 1962, p. 235 for the idea that members of the community may only be deprived of participation if this is in the “substantial” interest of the community.

vote is relevant for whether one should be allowed to vote at all. If either a person's intent is opposing the common good, or if the particular conviction one is holding might have negative effects on the community, one should be disenfranchised. However, there is one key objection against this argumentation and I don't see how it could convincingly be rejected: reasonable disagreement³⁹⁴. This term goes back to Rawls and refers to the fact that even reasonable people are likely not to find consensus on every issue of collective concern, perhaps even on what constitutes “reasonable” use of the vote. Do the potentially destructive effects of nuclear power plants disqualify anyone who is prepared to take that risk? Does the unwillingness to accept limitations on permissible CO₂ emission – even though this might lead to global warming, natural disasters and foreseeable hardship in the future – constitute grounds for disenfranchisement, because it reflects disregard for the long-term fate of the community? It seems there is no uniquely reasonable answer to this. First, there is disagreement on facts and likelihood of certain events and consequences, even from a scientific viewpoint³⁹⁵. Second, it is not immediately obvious what the “good” fate of a community is supposed to be. Persons are bound to have different preferences, for example when it comes to weighing security and profit, and interfering with that certainly seems to violate people's freedom. However, what about those views that actually are *unreasonable*, for example because they conflict with the equal human rights of others? If a certain group of people were likely to vote for a racist party – shouldn't they be disenfranchised to protect the equal rights of black people? I do not deny that there may indeed be cases like this, but franchise qualifications seem to be too crude an instrument to deal with that. Instead, constitutionally guaranteed minimum rights are a much more effective tool to protect minorities³⁹⁶. All in all, any sort of blanket disenfranchisement appears to be at risk of disenfranchising (some) people illegitimately³⁹⁷, because all qualifications such as age or even criminality would need to work on probabilities, not certainty, when it comes to voting behaviour.

The second sort of fate-based argument is not concerned with the consequences of political

³⁹⁴ See e.g. Rawls, John: *Political Liberalism*, Columbia University Press, 2005, pp. 36-37 for details on this notion.

³⁹⁵ See e.g. Christiano's “facts of judgement”, in his “The Constitution of Equality. Democratic Authority and its Limits.”, Oxford University Press, 2009, p. 39.

³⁹⁶ See e.g. Christiano, Tom: *The constitution of equality. Democratic authority and its limits.*, Oxford University Press, 2008, ch. 7.

³⁹⁷ See e.g. Lippke, Richard: *The disenfranchisement of felons.*, *Law and Philosophy*, Vol. 20, 2001, p. 566 or the official judgment of the European Court of Human Rights in the case of *Hirst vs. The United Kingdom* (Application no. 74025/01) for this argumentation. (online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=787485&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, last visited on 22 June 2010, 23:30).

decisions so much as with the effects that the mere enfranchisement of certain groups of people might have. For example, some politicians were afraid that giving women the vote would lead to political instability³⁹⁸, either because of a protesting male population or because of the unforeseeable voting behaviour of women. The underlying assumption is that political stability is actually more valuable than freedom or equality. It is seen as a higher order good, because without political stability there can be no political community at all, thus all citizens would be made worse off. Excluding certain groups of the people, even if freedom and equality would require their inclusion, may thus simply be the lesser evil. That makes these groups' disenfranchisement reasonably acceptable and therefore legitimate.

The problem is that this view conflicts with the idea that franchise qualifications must not violate any of the core values of legitimacy. In fact, if we are concerned with legitimacy at all, then an illegitimate distribution of the franchise is no less of an evil than an unstable community. This is because it constitutes arbitrary discrimination, violating both equality and freedom. I therefore conclude that this argument is invalid, because it cannot justify internal franchise discriminations from a viewpoint of legitimacy.

3.2.1.3 Conclusion

In the previous sections I have analysed the legitimacy of internal franchise discriminations based on community-centred justifications. I examined two approaches, one dealing with the fair distribution of burdens and benefits, the other concerned with consequences of non-discrimination. In both cases, I came to the conclusion that concern for the community is insufficient to disqualify members of the people from the right to vote, be it on the basis of age, intent or war effort. If we accept that fundamental stake gives rise to the right to participate in collective decisions, then this right cannot be suspended for the sake of a community made up by exactly those members. Equality requires that everyone can preserve his/her freedom as long as it he/she enacts it only within the boundaries of reasonable acceptability. This is an individual right and it seems unconvincing that it should be suspended in favour of any sort of “collective good”.

³⁹⁸ See e.g. Butler, D. E.: *The electoral system in Britain 1918-1951.*, Clarendon Press, 1953, p. 12.

3.2.2 Justifications with reference to the individual

In the previous chapter I have argued that franchise discrimination within a people can not legitimately be justified with reference to the community. Thus, if there are to be qualifications apart from stakeholderhood they must be based on justifications that refer to the individual member instead. In the following I will sketch three versions of this argument. One focuses on competence, another on character and the last one on affiliation. Note that the particular franchise qualifications I mean to examine are mostly the same as the ones discussed above (for example age and criminality), yet their justification is assumed to be different, because the individual and not the community is their reference point.

3.2.2.1 Competence

As we have seen in the example of the English franchise, competence is one of the core justifications to exclude persons based on age or mental insanity/inability. The general idea is that only individuals who show “competence” above a certain threshold should be allowed to vote. However, it is not always clear what kind of competence is significant and where the alleged threshold should lie. For example, on the most basic understanding, “competence” could refer to the mental or intellectual ability to understand the act of voting or the nature of politics that it is embedded in³⁹⁹. On the other hand, it would be more demanding to argue that a person must not only have the ability to form a political opinion, but that this opinion should be independent, that is, it must not be manipulated but should stand for autonomous judgement. Thus, a voter must have the ability to deliberate and reflect about competing political concepts and to form his/her own opinion thereon. For example, many view the exclusion of children as legitimate, because they assume that “*they adopt moral ideas from their parents not out of a sense of conviction but out of a desire to please and a sense of trust in their parents*”⁴⁰⁰. On an even more demanding note, what could be required is “moral competence”, i.e. the ability to *elaborate, reflect on and revise ideas about justice*⁴⁰¹. This

³⁹⁹ See e.g. Czermak, Emmerich: *Demokratie und Wahlrecht*, Europa-Verlag, 1948, p. 106.

⁴⁰⁰ Christiano, Tom: Knowledge and power in the justification of democracy., In: *Australasian Journal of Philosophy*, Vol. 79, 2001, p. 207. Also see Blais, André/Massicotte, Louis/Yoshinaka, Antoine: Deciding who has the right to vote. A comparative analysis of election laws., In: *Electoral Studies*, Vol. 20, No. 1, 2001, p. 43 (to be found online at http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6V9P-41JTSD0-3-1&_cdi=5904&_user=464575&_pii=S0261379499000621&_orig=browse&_coverDate=03%2F31%2F2001&_sk=999799998&view=c&wchp=dGLbVzb-zSkzV&md5=f8436c09bd10498f813d75b23083944f&ie=/sarticle.pdf, last visited on 23 July 2010, 09:37).

⁴⁰¹ See Christiano, Tom: Knowledge and power in the justification of democracy., In: *Australasian Journal of Philosophy*, Vol. 79, 2001, pp. 207-214.

refers to the fact that political decisions are somewhat special, because they are about how the basic structure of society is to be designed. Therefore only those persons should have a say who are capable of understanding politics as a form of cooperation and comprehend the need to weigh political options in the light of considerations about justice. Last, competence could also be meant to require knowledge and information, and hence a certain level of education. As Estlund puts it: “(...) *a decent education, including, say, some knowledge of politics, history, economics, close experience with others from diverse backgrounds, etc., must be admitted to improve the ability to rule wisely, other things equal (...)*”⁴⁰². For example, one might argue that in order to cast a reflected vote one has to be informed about party principles, election mechanisms, etc. Since it would exceed the scope of this paper to analyse those interpretations separately, I will be working under the assumption that the “competence” qualification presupposes a bundle of all four sorts of competences, requiring a certain threshold of each of them. The two main questions are: Can it be legitimate to disenfranchise persons because of a lack of competence? Second, are age and mental health qualifications a legitimate way of doing so?

For competence requirements to be legitimate criteria for (dis)enfranchisement they must not violate freedom, equality or reasonable acceptability. In regards to freedom, the first likely observation is that any “internal” exclusion from the franchise, i.e. exclusion of members of the community of fate, is at risk of violating the freedom of persons, because they would then be bound by decisions that they have no say in – they are interfered with, but cannot contest that interference. Thus there seems to be a case against any internal disenfranchisement, because assuming that young, old, mentally ill or mentally disabled persons all have interests, and that those interests are affected by law, they have a stake just as fundamental as anyone else, and it is hence not obvious whether their competence should make any significant difference regarding their right to vote. However, it is exactly because collective decisions bind *all* members of the people that there may nevertheless be a case for disenfranchising the “incompetent”. This is because their choices would affect the collective rules that bind everyone. If those choices are reasonably likely to lack deliberate consideration and moral judgement, then there is a chance that this might be reflected in the laws that are thus made. I suggest that it is reasonably acceptable that this situation should be avoided, i.e. all things

⁴⁰² Estlund, David: Why not epistocracy?, In: Desire, Identity and Existence. Essays in honor of T. M. Penner., Academic Printing and Publishing, 2003, p. 53 (to be found online at <http://www.brown.edu/Departments/Philosophy/onlinepapers/estlund/WhyNotEpistocracy.pdf>, last visited on 3 August 2010, 22:49)

considered, it seems reasonable that, if we are to be bound by collective decisions rather than our own, then we should at least be able to expect others to vote according to competent judgement. Since this is perhaps impossible to guarantee, the least that should be ensured is that the people who are involved in collective decisions are *able* to make this kind of judgement, that they have the ability, the competence, to do so. From a viewpoint of freedom and reasonable acceptability, disenfranchisement of the “incompetent” can therefore be legitimate and drawing the attention to the value of equality actually confirms this view. I have argued that it is “equality in the relevant category X” which entitles persons to an equal democratic say. Competence can be seen to qualify as “relevant category”, because by enforcing collective decisions on all members of the community, we ask them to submit to a will that may actually diverge from their personal preferences. It is not evident how we could ask them to do this, unless there is some provision to ensure that all persons involved in making those decisions are capable of doing so, i.e. that they indeed have the competence to. We would not ask a person to submit to medical recommendations unless the doctor has undergone adequate training, which shows that in the field of medicine not everyone's say counts equally. Political decisions such as the election of a national government are at least as fundamental, so why should we be forbidden to ask for any kind of qualification? Hence, asking for roughly equal levels of competence from voters seems justified from a viewpoint of equality.

The most common objection against this line of argument is that once we accept competence as a franchise qualification, this is bound to conflict with the equality of the democratic say. This is because there is an enormous variation in the intellectual capacity of persons and if roughly equal competence matters, then what this variation would seem to suggest is that says should be distributed accordingly, with more competent people getting more votes. Note that this was actually one argument used to justify plural voting of university graduates in England well into the 20th century. However, I do not believe that this is a necessary conclusion. As Peter has argued in one of her lectures: *“It is coherent to argue that voting rights can justly be withheld from teenagers if it is shown that their political competence fails to meet a relevant threshold, while at the same time resist the view that, above the threshold, variations in political competence should not produce variations in voting entitlement.”*⁴⁰³ This is to say

⁴⁰³ See Peter, Fabienne: Franchise., handout provided in her seminar “Democratic legitimacy and justification” held at Warwick University together with Matthew Clayton in February 2009. (Note that the handout is no longer available online, but that I will be glad to provide a hardcopy version on request.)

that equality need not be strict, but it can be understood to require the “roughly equal level” only up to a minimum threshold. For example, the competence qualification could mean that everyone has to be equally competent in so far that they are *at least* equally able to do X (e.g. form an independent political opinion that is based on reflected considerations), but it need not mean that everybody actually has to be equally competent. Thus it is compatible with the idea of a relevant threshold and need not violate the equality of the democratic say⁴⁰⁴. I therefore draw the conclusion that while the disenfranchisement of the incompetent may actually constitute domination, it does not constitute *arbitrary* domination, because from a viewpoint of reasonableness, competence is indeed a significant enough criterion to be required for voting and it is therefore compatible with the freedom and equality of persons. As Dahl puts it: “*Democracy – rule by the people – can be justified only on the assumption that ordinary people are, in general qualified to govern themselves.*”⁴⁰⁵

If competence can be a legitimate franchise criterion the remaining question is how this qualification could be implemented. The example of the English franchise has provided us with two suggestions: age and mental health or sanity. Before examining the legitimacy of those two criteria it is important to notice that they are actually very different. First, being of a certain age is not a permanent feature of a person, while a certain state of mental health may be. Furthermore, age in general is something that all persons have in common, because while people are obviously not all of the same age, it is certainly true that everyone shares the feature of having *some* age. There is no exception from either the process of ageing itself, nor are there any differences regarding to the tempo or course of it⁴⁰⁶. Thus, as a matter of principle “age” is a feature that all persons share regardless of their sex, profession, race or education. Mental health, on the other hand, is different in that there is no clear or universally accepted standard for it. For example, the history of the English franchise has shown that what is considered a mental disorder today is actually very different from how it was defined a few centuries ago. Keeping this in mind, the second important difference between age and mental health is that, when used as a franchise qualification, one functions as a proxy while the other does not. It is this difference which actually seems to suggest that mental health qualifications require a much preciser definition of the required competence levels. In order to classify an

⁴⁰⁴ Note that I made a similar argument regarding membership: I argued that for community membership roughly equal stakes matter, but only up to a certain threshold defined by fundamentality and permanence. Even if there was a way to measure and classify stakes above that, it need not matter for the issue of membership.

⁴⁰⁵ Dahl, Robert: *Democracy and its critics.*, Yale University Press, 1915, p. 97

⁴⁰⁶ Note that the only difference between persons seems to be that not all reach the same age.

individual as having a mental disorder or disability, there needs to be a clear standard for what levels of what competence are considered “normal” and how deviations can be measured. Whether a particular person satisfies this profile is then decided on a case by case basis, following rather rigid rules and regulations. As a consequence, disenfranchisement of mentally handicapped or ill persons can be permanent if their condition is. This contrasts with age, because as a proxy it does not need to test particular competence(s) so much as provide a guideline, a benchmark, for general “maturity” or “accountability”. What an age qualification says is not “person x has the competence level of z”, but “on average persons can reasonably be expected to show competence level z at age y”. I suggest that those differences between age and mental health qualifications render one more “(reasonably) acceptable” than the other. As Blais has pointed out:

“Depriving mentally deficient people of the right to vote is seemingly a self-obvious solution. How can people be expected to make a reasonable choice when their very personal sanity is in serious doubt? (...) Yet, it can be pointed out that criteria for mental illness have varied across time and space, and that while serious illness may warrant disqualification, lighter and occasional mental problems should not. It is nearly impossible to draw a line that is not arbitrary (...).”⁴⁰⁷

The problem is not that serious mental disabilities or disorders would be an illegitimate ground for disenfranchisement per se, but that there is a serious risk of those conditions being defined according to (arbitrary) prejudice. This is not only about the decision which mental conditions justify disenfranchisement, but also about whether a certain person has it or not. Age seems less objectionable, because it does not discriminate against persons due to individual judgement and it does not lead to permanent disenfranchisement. Indeed the fact that there has been so little variation in the age qualification over time or across different countries⁴⁰⁸ seems to show that it is generally accepted as a reasonable criterion. Perhaps there

⁴⁰⁷ Blais, André/Massicotte, Louis/Yoshinaka, Antoine: Deciding who has the right to vote. A comparative analysis of election laws., In: Electoral Studies, Vol. 20, No. 1, 2001, p. 51 to be found online at http://www.sciencedirect.com/science?_ob=MIImg&_imagekey=B6V9P-41JTSD0-3-1&_cdi=5904&_user=464575&_pii=S0261379499000621&_orig=browse&_coverDate=03%2F31%2F2001&_sk=999799998&view=c&wchp=dGLbVzb-zSkzV&md5=f8436c09bd10498f813d75b23083944f&ie=/sarticle.pdf, last visited on 23 July 2010, 09:37).

⁴⁰⁸ Blais, André/Massicotte, Louis/Yoshinaka, Antoine: Deciding who has the right to vote. A comparative analysis of election laws., In: Electoral Studies, Vol. 20, No. 1, 2001, to be found online at http://www.sciencedirect.com/science?_ob=MIImg&_imagekey=B6V9P-41JTSD0-3-1&_cdi=5904&_user=464575&_pii=S0261379499000621&_orig=browse&_coverDate=03%2F31%2F2001&_sk=999799998&view=c&wchp=dGLbVzb-zSkzV&md5=f8436c09bd10498f813d75b23083944f&ie=/sarticle.pdf, last visited on 23 July 2010, 09:37) for international comparison.

is some sort of prejudice to be found there too, because like recent discussions⁴⁰⁹ about the appropriate minimum age for voting show, there is serious disagreement about the age at which the threshold of relevant competence is reached (or about where the minimum threshold should lie) However, while the specific threshold of course matters in practice, for the present purpose it suffices to acknowledge that in general, age is a legitimate proxy for maturity. This is why it does not constitute arbitrary domination to exclude some teenagers who might already be competent enough simply because their average peer is not (yet). Note that it for the same reasons that maximum age qualifications for voting should actually seem dubious. This is because senility does not seem to be a function of age at all, i.e. it is dependent on individual lifestyle and circumstance much more than on the mere process of ageing. Not all persons actually become senile, thus it cannot be assumed that persons generally become senile or “unaccountable” in time. As a consequence, competence may legitimise age qualifications, but only in regards to a minimum, not a maximum, age requirement. This is because the “not yet” aspect of competence is better researched and more commonly acceptable, than the “not anymore” one.

All in all I thus conclude that age can constitute a legitimate franchise criterion because it may function as a proxy for competence, at least when it comes to defining a minimum age for voting according to a certain threshold of general maturity. Mental disability, on the other hand, while not per se illegitimate, at least seems more problematic, because it is at higher risk of discriminating against particular individuals based on arbitrary prejudice. On a similar note, maximum age requirements seem dubious when justified on the basis of competence requirements.

3.2.2.2 Character

There are two ways in which “character” can be construed as relevant for the issue of franchise: On the one hand, it could be argued that only “good” people, i.e. people of the right sort of character, are to be enfranchised, thus implying that discrimination within a people is legitimate if it manages to differentiate between people based on the worthiness of their character. On the other hand, it can be argued that a person's enfranchisement should depend

⁴⁰⁹ See e.g. Council of Europe (Parliamentary Assembly): Expansion of democracy by lowering the voting age to 16, 2009 (to be found online at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11895.pdf>, last visited on 18 June 2010, 00:23).

on the consequences it has on people's character(s). For example, will it improve them or corrupt them? In the following I will examine both sorts of arguments in order to determine whether they can justify character as an internal franchise qualification.

First, let us consider the option of (dis-)enfranchising people based on their character or its inherent value. For example, this sort of argumentation was used in 19th century England in order to justify property as a franchise qualification. It was assumed that a person's wealth was an indication for the sort of character they had. Being wealthy implied a person was "respectable" in the sense that they were willing "*to play by the existing social rules*" ⁴¹⁰, while being poor made them "*vagrants*" and "*wastrels*"⁴¹¹, that is persons who put themselves somewhat outside society. There are two evident objections against this kind of view: First, it seems that the definition of what makes a person's character "good" is contingent on social and historic circumstances, and thus arbitrary. Second, "goodness", even if there was an impartial definition of it, would indeed seem hard to measure and we it might be hard to find an appropriate proxy. Leaving those two obstacles aside – if there was such a thing as an indefeasibly good character and if there was a way to determine whether certain people had it or not, would it be a legitimate franchise qualification? On the one hand one could go back to the community-centred justifications claiming that good persons have good intentions, while bad persons have interests that go against that of the community, hence, for the sake of the collective fate it is legitimate to disenfranchise them. A different way would be to focus on the inherent value of goodness itself – is it necessary for being enfranchised and having a say in collectively binding decisions? Do we need to earn an equal vote by being equally good? Does it violate anyone's freedom if we let bad people vote or is it simply that they are less entitled to freedom? Is it reasonably acceptable to assume that goodness is a matter of choice and lifestyle, and that it is therefore legitimate to discriminate against people on this basis?

If we assume that equal stake is what entitles a person to a say, then I think that all those

⁴¹⁰ Evans, Eric: Parliamentary reform 1770-1918., Longman, 2000, p. 41 – Also see Blackburn, Robert: The Electoral System in Britain., Macmillan Press, 1995, p. 66

⁴¹¹ See Thomson, Mathew: The problem of mental deficiency: Eugenics, democracy and social policy in Britain. 1870-1959., p. 51 (to be found online at:

http://books.google.at/booksid=9rIsDsV_WPkC&printsec=frontcover&dq=Thomson+Mathew+eugenics&source=bl&ots=bvY2xAZGjR&sig=poHTb4RAHGsbvMcR6s0e5oNAnJo&hl=de&ei=gn8aTNqnOJCVOMGAsdYK&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCkQ6AEwAw#v=onepage&q&f=false, last visited on 17 June 2010, 22:04).

questions will fail to justify disenfranchisement based on “badness”. This is because I do not see how the kind of character a person has affects their stake at all. Compared to competence character is different in that it does not relativize a person's ability to either comprehend or express their stake. While it is reasonably acceptable that a person's say should actually be a say in order to count as one, it does not seem reasonably acceptable that only certain person's says should count. This would conflict with the claim for equality that has been established due to the stake qualification, and I therefore suggest that equality does not provide justification for this sort of franchise discrimination. From a perspective of freedom, the essential question is whether the disenfranchisement of the bad constitutes arbitrary domination or not. Supporters of a character qualification could suggest that it does not, because the nature of a person's character depends on their will and choices, hence it is not an arbitrary criterion, because people are themselves responsible for their character and they have the power to adapt so that they conform. However, if everyone had an equal opportunity to dye their hair red, a red-hair-qualification would nevertheless be arbitrary and thus not reasonably acceptable, because having or not having red hair is not relevant to the political process of voting at all. The same argumentation would probably defeat religion as a legitimate franchise criterion – even if everyone had the same chance to confess to a certain faith, why should it matter? This argument goes to show that the character qualification relates to a person's inner self, their identity, to who they are. If freedom does not include the freedom to choose our own character – and it would not, if we were to be disenfranchised for it – then it could not reasonably be called that at all. As a consequence freedom is incompatible with franchise criteria that dictate who a person has to be *as a person* for them to be allowed to vote. Assuming that they have an equal stake it should therefore not make any difference who they are, even if they are bad or bad by choice, because it would go against any reasonably acceptable definition of freedom. I conclude that a person can not legitimately be disenfranchised because of who they are or how their character is, because this does not have any inherent relevance for the political process of voting.

However, a related argument suggests that the disenfranchisement of the bad is not justified merely because they are bad, but because of the effect enfranchisement would have on them or others. For example, some theorists claim that enfranchising criminals even though they have shown disregard for the collective rules would send a message that those actions were not relevant. It might corrupt their character, because if they are not punished for

transgressions there is no motivation for them to improve and play by the existing rules. On the other hand, enfranchising only law-abiding people suggests that “fair play” is valuable, hence the right to vote functions as an incentive to be good⁴¹² or, at least, as a “*deterrent*” from being bad⁴¹³. It seems that this view is vulnerable to the same objection I have offered above: If I have a fundamental stake why should it matter who having or not having the vote makes me want to be? What does it have to do with politics at all? There is no reason why “character” should trump stake in this matter, why freedom requires goodness, or why it is reasonably acceptable that the good should rule over the bad. Besides, it also is not obvious why transgressions should have to be punished via disenfranchisement, i.e. why another set of punishments would not have the same effect, or why this particular measure would even have such a profound impact on a person's perception of their identity. As Lipke has pointed out, the argument might “*presuppose more interest in voting than is often displayed*”⁴¹⁴.

In sum I therefore reject goodness of character as a legitimate franchise qualification, because it cannot be justified with reference to either equality, freedom or reasonable respectability.

3.2.2.3 Affiliation

The third individual-centred justification for excluding members of the political community from the right to vote is affiliation. I found two instances of such qualification in the example of the English franchise: household suffrage and the exclusion of children. In both cases, certain individuals are disenfranchised from holding a vote, not because they do not share an equal stake or because they are unable to make a politically relevant decision, but because they are already “virtually represented” by another member of the political community. For

⁴¹² See Lippke, Richard: The disenfranchisement of felons., Law and Philosophy, Vol. 20, 2001, pp. 573-574. (Note that he references Jean Hampton' article “The Moral Education Theory of Punishment”, published on Philosophy and Public Affairs, Vol. 13, 1984, in this context.) Note that J.S. Mill also made extensive arguments for how enfranchisement may transform a person's character for the better (e.g. see his essay “The subjection of women”, or summaries of his argument in Spinner, Jeff: The boundaries of citizenship. Race, ethnicity and nationality in the liberal state., John Hopkins University Press, 1994, p. 95 and Pennock, Roland: Democratic Political Theory., Princeton University Press, 1979, p. 443). Similar ideas have been used by Tom Christiano, but he has focused on the issue of self-esteem (see e.g. his Christiano, Tom: The Constitution of Equality. Democratic Authority and its Limits., Oxford University Press, 2009).

⁴¹³ See Lippke, Richard: The disenfranchisement of felons., Law and Philosophy, Vol. 20, 2001, p. 568 (Note that he references Jean Hampton' article “The Moral Education Theory of Punishment”, published on Philosophy and Public Affairs, Vol. 13, 1984, in this context.).

⁴¹⁴ Lippke, Richard: The disenfranchisement of felons., Law and Philosophy, Vol. 20, 2001, p. 574 (Note that he references Jean Hampton' article “The Moral Education Theory of Punishment”, published on Philosophy and Public Affairs, Vol. 13, 1984, in this context.)

example, in the case of household suffrage only one member of the household, usually the man, was entitled to vote, but his say was seen to incorporate the preferences of all other members of the household too⁴¹⁵. Similarly, children can be excluded on the assumption that their parents will vote with their best interest in mind. The idea underlying this discrimination appears to be that it is not so much the individual person that needs to be represented, but their stake⁴¹⁶. Thus, if people's stakes are roughly the same, then this should count as only one stake and they therefore do not require separate representation. On this view it is legitimate that one person should vote as a representative for all those who share his/her stake, the equation being “one stake, one vote”. If persons share an intense kind of affiliation their stakes can be assumed to be virtually the same. For example, if two (or more) share a whole life, or at least their place of life, they are likely to have an equal (or even the same) stake and thus household suffrage as it was practised in 19th century England⁴¹⁷ is justified. Similarly, children do not need their own say, because their parents can generally be expected to look out for them and will thus vote with their interests in mind. As Rosberg puts it: *“And even though children have no formal voice in the making of government decisions that may affect them, their parents do have such a voice and presumably will undertake much of the responsibility for representing the interests of their children.”*⁴¹⁸ The whole argument seems to imply that political communities are composed by “interests” and that it is thus certain stake-holder groups, rather than the individual human persons, that need to be represented in government. However, even if we accept the – undeniably dubious – assumption that who shares a household actually shares the same stake (or interests), there still is one important objection: It is true that I argued that having roughly equal stakes in the political fate of a community is what entitles a person to have a say in it. Yet what matters is not the stake itself, but the person having it. This is because people are fundamentally affected by political decisions and their stakes matter only under the assumption that the people holding them do. Therefore it seems imperative that it should be persons rather than stakes, or interests, that are represented⁴¹⁹.

⁴¹⁵ See e.g. Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 68 and Blewett, Neal: *The Peers, the Parties and the People. The General Elections of 1919*, Macmillan Press, 1972, p. 359.

⁴¹⁶ Note that this argument of “virtual” representation was also used in other contexts, such as the exclusion of the colonies or the poor. See e.g. Pole, J. R.: *Political representation in England and the origins of the American Republic*, Macmillan Press, 1966, p. 23 and pp. 339-456.

⁴¹⁷ See Blackburn, Robert: *The Electoral System in Britain*, Macmillan Press, 1995, p. 68 and Blewett, Neal: *The Peers, the Parties and the People. The General Elections of 1919*, Macmillan Press, 1972, p. 359.

⁴¹⁸ Rosberg, Gerald: *Aliens and Equal Protection: Why Not the Right to Vote?*, In: *Michigan Law Review*, Vol. 75, No. 5/6, 1977, p. 1115 (to be found online at <http://www.jstor.org/stable/1288026>, last visited on 22 July 2010, 14:50)

⁴¹⁹ See e.g. Pole, J. R.: *Political representation in England and the origins of the American Republic*, Macmillan Press, 1966, p. 443 for observations on how the evolution of the English franchise is a transformation of representation (from “stakes” to “persons”).

That is to say that even if the *subject* of people's stake is the same, individuals are nevertheless bound to have their own unique sets of preferences, views and opinions on how their interests are to be understood. Even if this were not the case, and persons could be shown to share the same interests as others, it would not be legitimate to disenfranchise people because of that. Indeed it seems inconsistent to assume that equality in stakes is what gives rise to the equal say of people, but at the same time grounds their disenfranchisement. The value of equality in fact requires that individual persons are treated equally with respect to relevant features, thus discrimination based on that same equality seems illegitimate. Moreover, the value of freedom also presupposes human persons as the relevant unit. People need to have a say in order to be able to contest arbitrary domination, and this condition continues to hold even if the prevailing domination corresponds to my interests exactly. This is because the option for contestation is necessary in order to protect a person's freedom, regardless of whether this contestation is necessary at the time⁴²⁰. I therefore conclude that the assumption of "virtual representation" is not a legitimate criterion for disenfranchisement. On the one hand, it can be doubted, empirically, whether there are people who share the same stake at all. On the other, this approach would seem to illegitimately reverse the relevance of stakes and people. Stakes matter because the people having them do, not the other way around; this is what the values of freedom and equality imply by presupposing the individual as their core unit.

Note that this conclusion has several implications: It implies that the disenfranchisement of those who are already *actually represented* is nevertheless legitimate. For example, the exclusion of the members of the English House of Lords is legitimate, because it is not a case of virtual but actual representation and thus occurs on a very different level, without having anything to do with affiliation. Similarly, the exclusion of the King or Queen would also seem to be required by legitimacy. The same argument also implies that just like I cannot legitimately be disenfranchised because I am affiliated to someone, I cannot be enfranchised because of it. For example the latter was the case in the early 20th century England, when some married women were enfranchised while (other things being equal) unmarried women weren't. If affiliation is not sufficient ground for excluding someone, however, it is not sufficient to ground their inclusion either.

⁴²⁰ Note that this objection seems more urgent the more aggregative a democracy is designed, because in that case, the counting of votes would seem to disadvantage homogeneous groups more the bigger they are.

3.2.2.4 Conclusion

In the present chapter I have analysed whether referring to the individual may justify internal franchise discrimination. Assuming that the people is made up by persons who share a roughly equal stake in the fate of their community, the question is whether there is any condition that could justify certain member's disenfranchisement. I have analysed three potential approaches – competence, character and affiliation status – and concluded that there can indeed be legitimate franchise discrimination within a people. While the goodness of a person's character and their affiliation to another person should not matter for suffrage, because it would go against freedom, equality and reasonable acceptability, competence actually is a legitimate requirement. This is because whether a person is competent to form an independent and considered political opinion is relevant for whether they are actually able to express their stake. As a consequence, I deem minimum age requirements as well as mental health qualifications legitimate, while at the same time rejecting property, marriage and household conditions. Maximum age requirements have also been rejected on the account that average degeneration seems a rather unconvincing premise.

V. CONCLUSION

In the present chapter I have developed a systematic framework for assessing the legitimacy of a democratic people and applied it to the example of the English franchise. For this purpose I proceeded in three steps. First, I integrated the three values of legitimacy (freedom, equality and reasonable acceptability) into one coherent whole and systematized the principles of (dis)enfranchisement so that they were distinguished according to their analytical perspective and reference point. Second, I used this as a basis to analyse whether it can be legitimate to constitute a democratic people in a way that some people are in- and others excluded from it. I concluded that it actually can be, if the discrimination depends on whether people share a “common world” or not. Furthermore, internal discrimination of stakeholders can also be legitimate, but exclusions have to be justified with reference to the individual, not the community. Moreover, they may only be based on competence, not on character or affiliation. Regarding the English franchise I thus conclude, thirdly, that most of the implemented voting qualifications are legitimate, but that there still are some significant problems. For example, citizenship/residence requirements are legitimate but their justification does not seem to warrant the exclusion of long-term resident aliens. The exclusion of children and mentally ill persons also is legitimate, while that of prisoners is not. Similarly, the legitimate exclusion of members of the House of Lords suggests that the Queen should also be disenfranchised. In sum my assessment shows that the English franchise has become more legitimate over time, because many unjustified franchise patterns – such as property or sex qualifications - have already been abolished.

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VII. APPENDIX

A. Abstract (German)

In der vorliegenden Arbeit untersuche ich die Frage, wie das demokratische Wahlrecht legitim, d.h. auf Basis der Werte Freiheit, Gerechtigkeit und „Akzeptierbarkeit“, verteilt werden kann. Anhand des Beispiels der englischen Wahlrechtsentwicklung zeige ich auf, auf welchen Voraussetzungen und Einschränkungen das Wahlrecht basieren kann. Indem ich die zugrundeliegenden Prinzipien dieser Qualifikationen untersuche und systematisiere, entwickle ich ein Gerüst, dass eine umfassende theoretische Analyse ermöglicht und dadurch Schlussfolgerungen zulässt, die nicht nur für England sondern für das demokratische Wahlrecht allgemein von Bedeutung sind: Staatsbürgerschaft in Kombination mit bestimmten Aufenthalts- oder Wohnsitzqualifikationen können legitim sein. Das gilt auch für die Festlegung eines Mindestalters und die Voraussetzung relativer geistiger Gesundheit. Nicht legitim ist jedoch der Entzug des Wahlrechts auf Basis von Verbrechen, Wehrdienstverweigerung, Armut oder Geschlecht.

B. Summary (German)

In der vorliegenden Arbeit untersuche ich die Frage, wie das demokratische Wahlrecht legitim verteilt werden kann. Dies ist nicht nur aus unmittelbar real-politischen Gründen relevant (z.B. im Kontext von Migrationspolitik), sondern hat auch für moderne Demokratietheorie Bedeutung, wie der erste Teil meiner Arbeit zeigt: Der demokratische politische Prozess wird gemeinhin als besonders „gerecht“ oder „legitim“ angesehen, weil angenommen wird, dass er die Werte Freiheit, Gerechtigkeit und Akzeptierbarkeit („reasonable acceptability“) auf

einzigartige Weise realisiert, und zwar durch das allgemeine, freie und gleiche Wahlrecht. Was dabei allerdings oft übersehen wird ist die Tatsache, dass die Verteilung des Wahlrechts in Demokratien weder eindeutig noch in jedem Fall legitim ist. Lange Zeit waren in vielen Staaten zum Beispiel ausschließlich weiße, volljährige, männliche Staatsbürger mit einem gewissen ökonomischen Status und Bildungsniveau wahlberechtigt. Das würden heute die wenigsten als „legitim“ oder gar „gerecht“ bezeichnen, denn es verletzt alle der oben genannten Werte. Dennoch ist es eine Fehlannahme, davon auszugehen, dass der *politische Prozess*, der die Demokratie zur solchen macht, dadurch „undemokratisch“ wird, denn die Art wie politische Institutionen gestaltet sind, wie Wahlen abgehalten oder Regierungen gebildet werden, ist unabhängig davon, *wer* die Wähler sind. Daraus folgt, dass für die Legitimität einer Demokratie nicht nur der politische Prozess, durch den sie normalerweise charakterisiert wird, sondern dass auch die *Voraussetzungen* dieses Prozesses essentiell sind. Zu diesen Voraussetzungen gehört vor allem die Verteilung des Wahlrechts, oder anders ausgedrückt der Aspekt der In- und Exklusion. Meine Arbeit widmet sich daher der Frage, wie das Wahlrecht so verteilt werden kann, dass die zugrundeliegenden Prinzipien mit den Werten Freiheit, Gleichheit und „Akzeptierbarkeit“ übereinstimmen.

Um diese Frage zu beantworten, gehe ich in drei Schritten vor. Zuerst definiere ich die grundlegenden Konzepte dieser Arbeit, d.h. Demokratie und Legitimität, um so den Inhalt der Analyse klar abzugrenzen und die Ansatzpunkte für die folgende Argumentation darzulegen. Im zweiten Teil widme ich mich einem Fallbeispiel, nämlich dem englischen Wahlrecht. Ich analysiere nicht nur, historisch, wie das aktuelle Wahlrecht in England strukturiert ist und wie es sich entwickelt hat, sondern auch, theoretisch, auf Basis welcher Prinzipien diese Regelungen begründet werden können. Diese Untersuchung ermöglicht mir einen Überblick über aktuelle und potentielle Einschränkungen des Wahlrechts, die ich im dritten Teil der vorliegenden Arbeit systematisieren und theoretisch aufarbeiten werde. Auf dieses Gerüst lassen sich sodann die zuvor festgelegten Prinzipien der Legitimität anwenden, sodass festgestellt werden kann, ob die konkrete Wahlrechtsverteilung in England legitim gestaltet ist. Darüber hinaus ermöglicht es mir außerdem auch einen allgemeinen Schluss darüber, wie das Wahlrecht nicht nur in England sondern ganz allgemein verteilt werden muss, damit die daraufaufbauende Demokratie dem Anspruch von Legitimität gerecht werden kann, denn die theoretischen Ergebnisse meiner Arbeit sind in ihrer Anwendbarkeit nicht auf das Fallbeispiel England begrenzt.

Insgesamt hat meine Arbeit also ein zweifaches Ziel. Es geht einerseits um die historische Aufarbeitung eines konkreten politischen Prozesses, der Wahlrechtsentwicklung in England, andererseits geht es aber auch um die Abstraktion und Systematisierung der zugrundeliegenden Prinzipien, um so eine normative Analyse zu ermöglichen. Ich hoffe, damit einen originellen Beitrag zur aktuellen demokratietheoretischen Debatte zu leisten, da es meiner umfassenden Recherche zufolge bisher keinen vergleichbaren Versuch einer Fallstudien-basierten Systematisierung gibt.

Aspekte, die im Kontext demokratischer Legitimität ebenfalls relevant sind aber in dieser Arbeit aufgrund des begrenzten Rahmens nicht bearbeitet werden können, sind zum Beispiel nicht-legalisierte, d.h. indirekte, Beschränkungen des Wahlrechts. Indem meine Arbeit sich auf die Gestaltung des *Wahlrechts* konzentriert, werden nämlich all jene Umstände ausgeblendet, die unabhängig davon das Wahlrecht oder dessen Ausübung ebenfalls einschränken können. Beispielsweise wäre denkbar, dass das Wahlrecht zwar legitim verteilt ist, d.h. dass all jene dieses Wahlrecht besitzen, denen es zusteht und niemand, dem es nicht zusteht, dass jedoch die de-facto Ausübung des Wahlrechts indirekt an Bedingungen geknüpft ist, die nur bestimmte Bevölkerungsgruppen erfüllen können, zum Beispiel weil für die Erreichung des Wahlortes ein gewisser Grad an Mobilität und zeitlicher und/oder ökonomischer Flexibilität vorausgesetzt wird. Dies würde die Frage der Legitimität natürlich maßgeblich beeinflussen, ist jedoch ein Problem, das in der vorliegenden Arbeit nicht näher analysiert werden kann. Der zweite wesentliche Aspekt, der im vorliegenden Kontext nicht diskutiert wird, ist die Frage ob der demokratische politische *Prozess* tatsächlich legitim ist bzw. ob er dies notwendigerweise und in jedem Fall ist. Es ist nicht mein Ziel, die Frage zu beantworten, wie legitim Demokratie „wirklich“ ist, ob sie „immer“ legitim ist, wer in einer Demokratie „wirklich“ wählen kann oder ob das Wahlrecht „immer“ umgesetzt wird, sondern es geht um die Frage, wie das Wahlrecht verteilt werden muss, sodass der politische Prozess einer Demokratie die *Möglichkeit* hat, legitim zu sein. Das Wahlrecht wird also als Voraussetzung dieses Prozesses verstanden und auf diesen Aspekt der demokratischen Legitimität beschränkt sich die vorliegende Analyse.

Lebenslauf

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