

***Two sides of the same coin:  
political equality and electoral rights,  
a study of formal qualifications  
on the right to candidacy\*\****

***Dos caras de la misma moneda:  
la igualdad política y los derechos  
electorales, un estudio de las restricciones  
formales sobre el derecho a ser elegido***

ABSTRACT

In popular democratic conceptions, the right to candidacy and the right to vote are two sides of the same coin. Nonetheless, as the legislative analysis in this paper shows, their sets of right holders are not symmetrical in the extant practice of otherwise paradigmatically democratic countries. This fact is problematic as democratic legitimacy is, first and foremost, predicated upon the formal equality of citizens. As such, this stark asymmetry between the two most fundamental electoral rights demands a sound normative account, one which has been seriously neglected by electoral scholars. After outlining what the most plausible account would look like, the paper argues that, all other things being equal, countries currently have no way to comply with it. It normatively follows that the qualification bars for candidacy, which formally demarcate its set of rightsholders, should be lowered and expanded to match those currently in place for the right to vote.

KEYWORDS

Electoral rights, right to candidacy, right to vote, political equality, democratic theory, representative democracy.

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## RESUMEN

En el imaginario popular sobre la democracia, el derecho a ser elegido y el derecho al voto suelen ser considerados como dos caras de la misma moneda. Sin embargo, el análisis legislativo realizado demuestra que el conjunto de sus derechohabientes no es simétrico en las prácticas existentes incluso en los países que, por lo demás, son paradigmáticamente democráticos. Este hecho es problemático debido a que la legitimidad democrática está predicada de manera especial sobre la igualdad formal de los ciudadanos. Por ello, la marcada asimetría entre los dos derechos electorales más fundamentales exige un cimiento normativo sólido. La elaboración de este, no obstante, es un trabajo que ha quedado descuidado por la academia. Tras bosquejar cómo podría verse el cimiento normativo más plausible para justificar la asimetría, se argumenta que, en igualdad de condiciones, los países actualmente no tienen manera de cumplir con él. La consecuencia normativa de ello es que las restricciones formales al derecho a ser elegido, mismas que de facto definen el conjunto de sus derechohabientes, deberían aminorarse y expandirse de modo que empaten aquellas que limitan el derecho al voto.

## PALABRAS CLAVE

Derechos electorales, derecho a ser elegido, derecho al voto, igualdad política, teoría democrática, democracia representativa.

## SUMMARY

Introduction. 1. Legal qualifications on the Right to Candidacy. 2. The right to candidacy as a more stringent right than the right to vote. 3. The Right to Vote and the Right to Candidacy as Equally Fundamental Political Participation Rights. Conclusion. References.

## INTRODUCTION

Despite all of the democratic advances of the last decades, there is still a fundamental feature of representative democracy that has surprisingly received little to no attention, both from academia and the general public. This is the role played by the formal and substantial shape and function of the Human Right to Candidacy (the right of every citizen to run for office, henceforth RC) within the context of a true democratic practice. Indeed, the focus of attention of both scholars and the public alike has been placed on the activity,

duties, and legitimate claims of citizens as voters<sup>1</sup>. And yet the RC, commonly referred to as the “opposite side of the coin” of the right to vote (RV), or even as “passive suffrage”, is also a paramount political right within the structure of modern representative democracies. Indeed, in general historical terms, the progressive expansion of the RV and the RC to more members of the polity was understood as the fight for a universal ‘full franchise’.

Overlooking the status of the RC, as has so far been the case, has led to a myopic understanding of the status of citizens as political equals. This has consequently handicapped their full potential to participate in the system as such, and to be agents of its amelioration. In response to this gap in both the literature and the practice of democracy, this paper develops a normative analysis of the formal content of the right to candidacy.

I will present an overview of extant empirical practice in relation to legal qualifications for office, which formally define the set of its right-holders. The most common amongst these qualifications are those defined in terms of residency, criminality, and age. I compare the thresholds as are most commonly set by individual countries for each of these categories and contrast them with those of the right to vote. Both rights tend to share the same set of qualification types, yet the benchmarks are usually set higher for the right to candidacy. In addition, there are cases in which countries establish additional kinds of qualifications for office, such as religious qualifications for example, which are not in place for the right to vote.

I will then analyse the logic behind that deviation in relation to the representative and state interests they are presumably meant to serve, particularly by tracing how this has been discussed within legal spheres. Such interests, in general terms, are those of a candidate’s probity and representative capacity. I will then argue in favour of this understanding of the Right to Candidacy as being necessarily a more constrained right than the right to vote, in relation to the need to satisfy certain conditions of quality in the right holders.

Nonetheless, I will further argue that the current empirical trend of setting the same formal restrictions as for the right to vote, usually with a higher benchmark, and sometimes additional categories of restrictions, will not do the trick. Setting a higher age, or longer residency requirements for office, for example, are not good proxies of representative effectiveness or of candidate probity. Their existence as such is arbitrary, and perhaps still in place on archaic historical grounds, rather than on empirical evidence of

1 First, on defining exactly what such claims are, both in relation to their electoral role, as on their wider claim to influence the formulation of the political agenda. And then, according to what those answers are, in looking for technical solutions that could advance them.

their effectiveness for isolating the type of candidates which representative democracies require.

What follows is the fact that formal qualifications on the right to candidacy should, at the very least, be the same as those that exist on the right to vote. Moreover, a moral case for the formal expansion of voting franchise has recently been made, which I will defend. Furthermore, in the face of the impossibility of formally qualifying the right to candidacy to protect the otherwise legitimate interests in candidates being of a certain quality, the same line of formal expansionist reason could be made for the candidacy franchise. Arbitrary hurdles on the right to candidacy unjustifiably widen the gap of those who can acknowledge themselves as full citizens in a relation of political equality with their fellow citizens and, as such, deter us from enhancing democratic and representative opportunities for all. In sum, I claim that the formal construction of the limits of the right to candidacy should be symmetrical with that of the right to vote. The presumption of political equality that grounds the core of these two electoral rights (right to vote and right to candidacy) as political individual rights should have normative primacy when formally qualifying them.

#### 1. LEGAL QUALIFICATIONS ON THE RIGHT TO CANDIDACY

The recognition of the individual Right to Candidacy (RC), the right to run for elective office, as a human right has risen in the past decades. It was excluded from the Universal Declaration of Human Rights (UDHR) in 1948 but has since gained inclusion in other international treaties and agreements.<sup>2</sup> For example, it was included in the International Covenant on Civil and Political Rights (ICCPR) in 1966, whose 25<sup>th</sup> article reads as follows (emphasis mine):

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2<sup>3</sup> and without unreasonable restrictions:*

2 For example, the OAS. *American Convention on Human Rights*. 1969. article 23 explicitly guarantees a right to “vote and be elected”, and the Organisation of African Unity. *African Charter on Human and Peoples’ Rights*. 1981. article 13 claims more generally that all citizens have a “right to participate directly in the government of their countries”. United Nations General Assembly. *Universal Declaration of Human Rights* includes a more general right to hold office in government, without restricting this right to offices dependent on election. In addition, the United Nations. *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*. 1969. protects “political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.”

3 Article 2 of the United Nations General Assembly. *International Covenant on Civil and Political Rights*. 1966. in its first section states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its juris-

- (a) To take part in the conduct of public affairs, *directly or through freely chosen representatives*;
- (b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage* and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, in general terms of equality, to public service in his country.

Legal Recognition of the RC has also gained track as a constitutionally protected individual right in western style democracies, though interestingly not in the US. Some national legislations have remained rather ambiguous about it, neither clearly including it nor excluding it from their constitutions.<sup>4</sup> However, independently of the status of its legal recognition today, it is fair to say that there tends to be consensus on the status of the RC as a political human right<sup>5</sup> and its place as a central tenet of western style democracy, or more specifically, of liberal representative democracy.<sup>6</sup>

And yet, the academic work that can be found on it is both scarce and unsystematic. There is, for instance, a need for more comprehensive work within comparative politics focused on the way in which the RC is interpreted, protected, restricted and qualified within and across different countries. This lack of focus might be correlated to the fact that, on one hand, not many policy recommendations with a focus on this right can be found, and on the other, that rationales used by courts to resolve cases of conflict in its implementation tend to be very varied and, on occasion, in contradiction with each other. Let me give a few examples of the latter.

At least two cases have been presented before the Interamerican Court of Human Rights adducing violations and unjustified burdens on the RC,

diction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

4 At least 42 of the currently existing 195 states include an express right to stand for election within their constitutions, and at least a further 20 include a more general right to access public office in general terms of equality. See Johns, Alecia. *Conceptualising Political Candidacy as a Human Right*. [S. 1.] : University of Oxford, 2014.

5 What I refer to as the Right to Candidacy is a concept that is not referred to through identical terms in the relevant legal literature. As is the case in the ICCPR, it is sometimes referred to as the “right to be voted”, “right to be elected”, or more specifically, “the right to be elected for political office.” It is also sometimes called the “right to run for office”, or the right to “stand for office.” Sometimes it is stretched to the “right to hold office”.

6 Alecia Johns has made a clean-cut case for this to show that it is already a customary right within international law in Johns, Alecia. *The Case for Political Candidacy as a Fundamental Right*. *Human Rights Law Review*. 2016, Vol. 16, n° 1, p. 29-54.

recognized in article 23 of the American Convention on Human Rights.<sup>7</sup> In *YATAMA v. Nicaragua*, the indigenous political association YATAMA argued that their inability to register candidates for the ballot, insofar as they were not a political party, constituted a fundamental violation of their candidacy rights. The case was resolved in their favour, both in terms of the violation of YATAMA's candidates RC and on the basis of the violation of their potential voters' free will.<sup>8</sup> In *Castaneda-Gutman v. Mexico*, the eligibility condition for office constituted by membership of a political party was also challenged, yet this time the court declared that such a requirement, as specified at the time by Mexican electoral law, did not constitute a violation of the right to candidacy, insofar as party structures were deemed a reasonable way to exercise such a right.<sup>9</sup> In both cases, though resolved under different rationales, the tension between the individual right of a citizen to run, against the need of securing adequate structures of representation comes to light.

At a national level, in 2013 the Mexican Supreme Court of Justice determined that the proposal for reform of the Constitution of the State of Durango was not unconstitutional, as had been alleged, insofar as it imposed a literacy requirement on the right to run for the local house of representatives. Such a requirement was deemed reasonable by the Court, as literacy was deemed a necessary condition for the adequate representation of the electorate, and for the overall adequate performance of the duties of office, in accordance with

7 OAS. *American Convention on Human Rights*. 1969. Seery, J. (2011). *Too Young to Run? A Proposal for an Age Amendment to the US Constitution*. Pennsylvania State University Press.

8 *Yatama vs Nicaragua*. Corte Interamericana de Derechos Humanos, 2005. In this case, the Court's ruling stated, among other things, that the state of Nicaragua had violated their citizens political rights as established in article 23 of the American Convention of Human Rights to the prejudice of YATAMA's candidates. The court considered that states can establish standards for political participation, as long as these are reasonable in terms of the principles of representative democracy (paragraph 207). Yet it considered that requirement to run for office through a political party went against the customs and traditions of YATAMA's candidates, which in turn made them vulnerable to political exclusion (paragraphs 217-8). In addition, by excluding the participation of YATAMA's candidates, the court stated, the interests and representation of members of indigenous communities that were represented by it were affected (paragraph 227). As such, the restriction was considered a violation of article 23 (paragraph 229). For the full discussion, see paragraphs 194 to 229.

9 *Castaneda Gutman vs. Estados Unidos Mexicanos*. Corte Interamericana de Derechos Humanos, 2008. The reasoning behind the court's decision on this regard was based on the analysis of both the explicit and presumptive duties and restrictions of the state in relation to the Right to Candidacy as established within article 23 of the American Convention of Human Rights. On the one hand, it recognizes explicit restrictions to the right to run for office in paragraph 2 of article 23 in terms of age, nationality, residency, language, education, civil or mental capacity or based on criminal proceedings (paragraph 155). Other acceptable restrictions, the court argues, can be those that stem from the positive duties for the state that guaranteeing such a right entail. Amongst these, the design of an electoral system which needs to be attuned to the specific needs of the country (paragraphs 156-9). In the case of Mexico, the need for political parties to function as funnels for candidate is deemed by the court to be a compelling social need (paragraph 193). For the full case as developed by the court, see paragraphs 140-205.

the public interest and proper state development. This was ruled even when discrimination towards marginalized groups (both of willing candidates and their voters) had been considered.

The *General Comment 25 to the International Covenant on Civil and Political Rights* leaves a fairly open rationale for the distribution of the RC in terms of its restrictions having to be *reasonable* and not discriminatory and yet gives no light as to how to proceed when it clashes with the rights of voters or the proper function of the state.<sup>10</sup> It could seem, upon superficial review, that after the decades of civil rights fights across nations and the consequent legal recognition of the RC in one form or the other, these theoretical incoherencies could well have been addressed in a way that would make them unproblematic.

The aforementioned cases, which serve as examples rather than an exhaustive list of issues, testify to the contrary. However, not only is there an important disparity amongst legal frameworks on the way this right is understood and qualified. There is also a virtual silence on the matter on the part of political philosophers. Within this literature John Rawls is perhaps the author who went the furthest in analysing the matter. Rawls considered the RC (independent of the Right to Vote) as one of the basic liberties encompassed by his first principle of justice and stated that its morally legitimate restrictions are ‘qualifications of age, residency and so on’.

The rationale behind such legitimacy is given in terms of those qualifications being ‘*reasonably* related to the tasks of office’ (emphasis mine). The condition for such restrictions not being discriminatory is that they will fall “evenly on all persons in the normal course of a lifetime”.<sup>11</sup> Rawls, however, comments no more. As such, further explanation of what that reasonableness would entail, how it could be justified, and how it might guide judgments over other sorts of restrictions is lacking. There is need for a clearer sense of which features of the “tasks of office” provide relevant grounds for the normative criteria we might need, and whether, and why, this would justify burdening the otherwise universal right of every citizen to run for office.

For Charles Beitz, one of the few other authors to have considered the matter, the right to hold office (of which the RC is a fundamental part), is ‘properly conceived as an opportunity for service and self-development, analogous, perhaps, to the right to choose a career.’<sup>12</sup> Yet, unlike Rawls, guaranteeing the overall fairness of the system, is for Beitz, an important

10 United Nations Human Rights Committee. *General Comment no. 25 to the International Covenant on Civil and Political Rights*. 1996.

11 Rawls, John. *A Theory of Justice*. Cambridge, MA : Harvard University Press, 1971. important requirement for democratic institutions.\n-Aims: 1

12 Beitz, Charles. *Political Equality: An Essay on Democratic Theory*. Princeton : Princeton University Press, 1989, p. 174.



consideration when choosing who can be allowed to run. As such, the RC is not considered to be a fundamental political liberty by Beitz, as it can lead to some benefits for the person who might come to hold office, as is the case for as many other social positions. As such it can be restricted in the interest of a fair agenda formation<sup>13</sup>.

In general, within democratic constitutional frameworks and international agreements, the right to run and hold office is presented in tandem with the right to vote as an electoral right. It is considered the passive counterpart of the right to suffrage, where voting is the active right, and is considered alongside it as one of the paradigmatic rights that define a democracy.<sup>14</sup> As a consequence, their distribution tends to be established in roughly the same terms, following the rationale of inclusiveness that tends to be associated with modern democracies. This framework may have arisen as the result of the historical evolution of the distribution of these rights in the past two centuries, given that the fights for the inclusiveness of different groups were usually fought and won together under a banner calling for “full suffrage rights”.

Philosophical theorizing since the Enlightenment has worked on the reasons why the right to vote should be universal (in the sense of being justly claimed by all citizens in equal measure, as in the dictum ‘one person, one vote.’). As such, there is arguably a wide overlapping consensus on the matter amongst political theorists today,<sup>15</sup> which is also shared by the general public on a global scale. Yet, it is far from clear that the same can be said about the right to candidacy. What is more, the past two decades have seen an explosion of arguments in favour of reducing, or eliminating completely, many of the current types of legal qualifications and restrictions that still apply

13 For an additional discussion of RC restrictions within political theory see Rehfeld, Andrew. On Quotas and Qualification for Office. In I. Shapiro, S. Stokes, E. Wood, & A. Kirshner (Eds.), *Political Representation*. Cambridge: Cambridge University Press, 2009.

14 An example of this is the way in which indexes such as Freedom House present their listing of more and less democratic countries in relation to the inclusiveness and factual functionality of their electoral practices in which both rights are fundamentally embedded. See Brandt, Christopher, Linzer, Isabel, O’toole, Shannon, et al. *Democracy in Retreat: Freedom in the World 2019*, 2019. A further example is the United Nations. *Declaration of Principles for International Election Observation*. 2005. which refers to the right to stand for election as an “internationally recognized human right”. Paragraph 2 states that “everyone has the right and must be provided with the opportunity to participate in the government and public affairs of his or her country, without any discrimination prohibited by international human rights principles and without any *unreasonable* restrictions. This right can be exercised directly, by participating in referendums, standing for elected office and by other means, or can be exercised through freely chosen representatives” (emphasis mine).

15 An exception to this is Jason Brennan, who has argued for the possibility of justifying an epistocratic distribution of the right to vote. Brennan, Jason. *Against Democracy*. Princeton : Princeton University Press, 2016.



to the right to vote.<sup>16</sup> Given the significant normative similarity that the RV shares with the RC as rights to political participation fundamentally, and in particular, participation in the government of one's country, it is surprising, to say the least, that similar rationales have not expanded to include the latter as well within political philosophy.

In 180 BC the 'Lex Villia Annalis' was passed in Rome to regulate the minimum age required for a senatorial magistrate candidate. That was the first time, as far as we know, that an age restriction was introduced to a candidacy for political office. Fast forward and today, no electoral democracy allows anyone under 18 years old to run for office. This minimum threshold is usually higher, the higher the office in question. A famous example is the requirement set by the US constitution for anyone wishing to be a candidate for president to "have attained to the Age of thirty five (sic)."<sup>17</sup> Having the required age is not enough, however. If one wants to run for office, further formal requirements need to be met. Keeping with the example, in order to be a candidate for president of the United States, one needs not only to have celebrated their 35th birthday, but also to have lived at least 14 of those years in the country. Analogous residency restrictions for political office can be found in most constitutions and electoral laws today.

Empirically, there exist further qualifications for office which tend to be similar across countries today, including the criterion of citizenship, as is established in the ICCPR, and generally, explicitly banning mental incapacity.<sup>18</sup> There are other barriers to ballot access such as that of non-criminality (currently being or having been in jail), or country of birth (i.e. having to be a natural citizen of the country), as is also the case in the United States, or the requirement to belong to, or at least be nominated by, a party. Additionally,

16 The following are notorious examples of these sorts of works. Some focus on specific restrictions, while others provide a more all-encompassing normative framework with which to evaluate RV qualifications. David Estlund, for instance, has argued against any types of epistemic-based restrictions on the grounds that their introduction would only be morally justified if it could be accepted by all reasonable relevant points of view, which, he argues, is impossible. Estlund, David. *Democratic Authority: a Philosophical Framework*. Princeton: Princeton University Press, 2008. Lately, there has also been a growing interest in RV restrictions fuelled by recent events both on the right of felons to vote, and on the right of children to vote. Examples of the first are: Kleinig, Joseph & Murtagh, Kevin. Disenfranchising Felons. *The Journal of Applied Philosophy*. 2005, Vol. 22, n° 3, p. 217-239. López-Guerra, Claudio. *Democracy and Disenfranchisement: The Morality of Electoral Exclusions*. Oxford: Oxford University Press, 2014. and Beckman, Ludvig. *The Frontiers of Democracy*. London: Palgrave-MacMillan, 2009. The argument in favour of reducing voting rights' restrictions is, as such, in a position of strong development within the literature and is not worth rehashing for the purposes of the present paper.

17 *Constitution of the United States*. 1778.

18 See for example, the United Nations Human Rights Committee. *General Comment no. 25 to the International Covenant on Civil and Political Rights*, 1996. "The right to participate in public affairs, voting rights and the right of equal access to public service" (Art. 25).

in some countries, religious requirements are still in place as a condition of holding office.<sup>19</sup>

Overall, however, as has been shown by the court cases discussed above, and by the ambiguity of the wording of the ICCPR, reproduced across legislation across the world, in relation to the acceptability of ‘reasonable’ restriction for office, there is an urgent need for a clarification of what that criteria might consist of. What is particularly puzzling however, is that legal qualifications on the right to candidacy are generally set at a higher threshold than the ones it otherwise shares with the right to vote. Indeed, in many countries, age, residency and criminality, for example, are today legal restrictions on the RV. However, the tendency is for the RC to be qualified with similar restrictions, and yet for these the benchmark is higher (as can be seen in relation to the age of eligibility for presidency in the United States).

On the face of this, this article will explore two interconnected questions. On the one hand, I will ask on what grounds could restrictions on the right to candidacy be accepted, particularly where they deviate from those imposed upon the right to vote. I will then ask whether the sort of legal restrictions that empirically exist on the right to candidacy can, as I have been discussing, be morally justified within liberal representative democracies today. Before delving into the matter, however, let me make a clarification.

The political system that I here call western-style democracy, or more abstractedly, liberal representative democracy, and which is considered to have been adopted by a significant majority of countries in the world today, is actually an umbrella term for a set of different types of political organization. A salient distinction within this is whether they constitute parliamentary, or presidential systems, for example. The consequence of such a plurality, is that the right to candidacy is embodied distinctly within different countries.<sup>20</sup> This situation, however, is shared by the right to vote. For the purposes of this paper, I, as many works on the justification of the right to vote, and democracy more generally do, will highlight such differences in terminology, and identify the specificity of their application. With that in mind, by

19 Furthermore, for example, the Mexican Constitution bars from political candidacy all those who are ministers of a cult or have an ecclesiastical status. *Constitución Política de los Estados Unidos Mexicanos*, 2016. article 82, paragraph 4. Similarly, the existence of 26 reserved seats in the House of the Lords of the United Kingdom for bishops of the Church of England could be read as a quota that restricted the access to those seats to the rest of the population.

20 To add to this, one could further add the different models of relationship that are or might be expected from officers and elected offices, as the different theories on models of representation show, from the paradigmatic delegate- trustee debate, to more recent works such as: Pettit, Philip. *Representation, Responsive and Indicative. Constellations*. 2010, Vol. 17, n° 3, Williams, Melissa. *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation*. Princeton: Princeton University Press, 1998., and Saward, Michael. *Shape-Shifting Representation* [on line]. 2014, Vol. 108, n° 4, p. 723-736.

stipulation, and in relation to what is relevant for this paper, the RC can be broadly defined as:

the political right that involves the claim to be eligible as a potential holder of an office, and the liberty to declare yourself willing to take the duties of office. The realization of the specific potentiality to hold power is subject to the selection, through voting mechanisms, from the population, or a part thereof, that would be subject to such power.

This conceptualizing of the RC aims to be flexible enough to capture real political contextual variations, and at the same time specific enough for us to unambiguously carry the normative work that follows. It is important to say that this will not be a work of legal theory, but instead, philosophical. This implies that the reasoning be made at a higher level of abstraction. Wherever legal documents are mentioned, they merely serve to illustrate the matter in its relation to political reality. As such, the conclusion presented, as constrained as it will be, is not meant to serve as a prescription of anything for any existing polity.

## 2. THE RIGHT TO CANDIDACY AS A MORE STRINGENT RIGHT THAN THE RIGHT TO VOTE

What I so far have described is a problem common to constitutional drafting or reform in many of today's democracies:<sup>21</sup> that of whether, and how, the right to candidacy should be qualified in practice. Yet, in order to answer it, we first need to clarify a higher order question, that of the basis on which we would be justified in qualifying it. In what follows I will search for an answer to this question by first discussing the rationales that seem to underlie existing qualifications. I will question whether, in the abstract, those rationales stand, and then determine the relation between such an answer and our practice.<sup>22</sup>

21 I am not claiming that these nations are empirically facing this question now (although some of them have, as I have previously discussed). Rather, given the lack of a clear rationale for the existence of qualifications on the RC today, other than a historical genesis, the burden of their justification is upon them. Particularly on the charge of being arbitrary, and perhaps discriminatory, in a parallel way to what has been claimed in relation to the right to vote.

22 A brief comment on this. Decisions in constitutional engineering are (ideally) the result of ethical reasoning (as are known and understood) as applied to a set of empirical circumstances (as are known and understood). The taking of those decisions is the job of constitutional drafters and reformers. However, part of the job of the political theorist is to provide theoretical models upon which those particular decisions can be based that can shed light upon those decisions. So, it is important to notice, what is true for the model, might not be true for the specific decision, because there might be further relevant particular considerations that might not have been taken up by the model. To do this, theorists identify commonalities between the particular ethical problems as faced by the political decision makers, then look to identify and isolate and generalize the common empirical data relevant to them. Once that has been modelled, they articulate an

Age qualifications, and particularly at the higher threshold in relation to the right to vote at which they tend to be established, seem to exist for the sake of guaranteeing that a given political candidate has achieved a certain level of maturity, or life-expertise, as seems required for adequate performance in office. A similar reason would seem to support residency restrictions: if someone presents herself as willing to take office, having lived in the place she is running for apparently constitutes a minimal guarantee of her having some kind of first-hand experience of that place, her fellow inhabitants, the problems they face, the resources it has available to solve them etc.

Life-expertise, and knowledge of the polity, are what we could call “minimal quality-securing” reasons for office-qualifications. More specifically, they seem to work as proxies for those. Other restrictions on political candidacy of this kind might exist in electoral democracies today, although none are as evenly widespread as age and residency. The single other type of restrictions that probably best represents this group of restrictions is that of educational qualifications. These would range from the requirement of basic literacy, as was discussed above, to the need of having attained a certain level of formal education in order to qualify to run for office. The absence of a criminal record, as a qualification for office, on the other hand, seems to be based, at least,<sup>23</sup> on the idea of securing certain moral probity of candidates. A further proxy of moral probity seems to be the prohibition of candidates having dual nationality, as was recently at the root of a political crisis in Australia.<sup>24</sup> This restriction seems to be aimed at, at the very least, preventing conflicts of interests, or even treason.

*Prima facie*, the existence of ‘minimal quality-securing’ qualifications on political candidacy does not seem very problematic. It can even seem commonsensical to have them. However, even conceding the logic of their existence in principle, it is not obvious that these restrictions should be set at a higher level than those for the right to vote. They are neither effective nor necessary. The abstract case for the right to candidacy being a more constrained right than the right to vote, can be made. But current restrictions, as they stand, do not seem to be justified. Indeed, the general statement that certain types of expertise and knowledge are necessary to adequately carry out the tasks

answer to that general problem by identifying what are the relevant ethical principles that should apply to them, and how they would do so.

23 Perhaps a case for criminality qualifications for office could also be based on the idea of disenfranchising felons and ex-felons as a method of punishment, or as necessary manifestation of their breach of the social contracts. Such arguments have been espoused in favour of felony restrictions on the right to vote, and the case could be expanded for these as well. Yet, for the purposes of this paper I will focus on the idea that restrictions seem to act as a proxy for criminality.

24 Five Australian politicians ousted over dual citizenship. *BBC News* [on line]. 18 mai 2018. Available at: [www.bbc.com/news/world-australia-44049929](http://www.bbc.com/news/world-australia-44049929).

of political office is hardly debated. It was as accepted in 180 BC Rome, as it is today. Apart from that, however, there is room for disagreement in much else. First, there is no one single answer for what precise type of expertise and knowledge are required for the tasks of office. Second, were an answer to that first problem to be identified, the problem of how to determine whether someone has it will surface.

This concern is obvious when age restrictions are contested. While it is generally acknowledged that 'life expertise' is necessary for office, it is not clear what fulfils this need. Moreover, even when we might perhaps come up with a rough conjecture of what that is, it is harder to then know whether having lived a given number of years on earth (rather than less, or perhaps more) can be used to correctly identify those who have attained such expertise. The difficulty of both these situations informs, for example, youth activists' view that existing age restrictions on candidacy are little more than arbitrary numbers.<sup>25</sup>

Unless we were able to directly trace that a trait such as being under 35 correlates with inability for hard decision making, of the kind expected of the president of the United States, that benchmark stands as nothing more than an arbitrary, even archaic, restriction that should have been removed along with property-ownership or only-male restrictions a while ago. Perhaps if it were possible to design a test to measure certain decision-making capacities that turned out to be infallible, we should then substitute age restrictions for a test-based restriction in this case. Alas, this is incredibly unlikely. The necessary empirical science to be carried out would certainly be challenging. But assuming the science is sound, there are, nonetheless, two further reasons for disagreement. First, these sorts of studies should always be read against the background of what is considered adequate office holding, which itself leaves room for ample discussion.

In truth, we might indeed need stronger restrictions based on expertise than the ones currently in place, at least if we look at what the stipulated tasks for specific offices are. However, the reason there is room for disagreement is not on these kinds of facts, such as which house should be responsible for passing a certain budget (though of course there might also be disagreement in that), but disagreements of a deeper, and more abstract nature. This is, on what the nature of office holding consists of. The standard answer refers to 'representatives', but the nature of representation itself is today a hotly contested matter. But even assuming that debate was settled, there is a second reason for disagreement. And this is the extent to which securing a given

25 John Seery has taken these complaints to heart and built the case for lowering age for candidacy restrictions in the United States. Seery, John. *Too Young to Run? A Proposal for an Age Amendment to the US Constitution*. University Park : Pennsylvania State University Press, 2011.

quality of candidates in relation to the above would be enough to justify the exclusion from the opportunity to run for office to those citizens that do not reach the quality benchmark. This burden is particularly hard in democracies, where the presumption is political equality amongst the citizens, which, as regards to the right to political candidacy, seems to be determined by the equality of opportunity to run for office.

The problem, in other words, is how to determine a just procedure for candidate selection on the face of the need for expertise (a literary trend which is currently on the rise within political theory)<sup>26</sup> in certain areas of high-level decision making. The matter is not about how voters choose which candidate will win. It is rather about how the candidates they get to choose from are determined. Whatever else happens informally (which also involves situations of justice), the rules of the game get settled at the constitutional level, which is a first place to review. This just procedure will need to consider what is due to each of the parties involved.

Bottom line, the dilemma faced is what should be done when it seems that political expertise is necessary for adequate decision making as entailed by the elected role, and yet there is no way to establish a future relation between preparation and decision making. Furthermore, even if that could be done, selecting people to fill offices on that basis seems to violate both the free choice that seems to be due to citizens as voters, and the equal opportunity for office holding that seems due to candidates as citizens.

The question of justice in the distribution of the RC and the justifiability of burdens on it is both particularly puzzling and particularly challenging when compared to similar work that might be done on other rights. The RC seems to be an individual right that should presumably be protected by the state – similar in this sense to rights such as the right to education, freedom of occupation, or to health – while at the same time, unlike these, being itself part of the structure of the state. It is, indeed, a mechanism for the allocation of positions of power within a state and due to the seriousness these positions entail, it can be defended as a more stringent right than the right to vote. However, given both the inefficiency of determining the necessary traits for adequate office holding, and of representing itself, along with the overall empirical inability to determine that certain proxies would adequately trace those traits, assuming the first debate was settled, it seems that there is not a strong case for enforcing more stringent restrictions at a formal legal level on the right to candidacy than at least those we have in place for the right to vote.

26 See, for example the work from Episto Project, Episto Project. *Why not epistocracy? Political legitimacy and “the fact of expertise”*, 2010.

### 3. THE RIGHT TO VOTE AND THE RIGHT TO CANDIDACY AS EQUALLY FUNDAMENTAL POLITICAL PARTICIPATION RIGHTS

So far, I have claimed that, even when it would be possible to make a case for filtering ballot access in terms of a person's expertise, experience, or even representative capacities, the sort of proxies we have in place for allegedly doing so do not correlate with a guarantee of either. As such, I have defended the idea that such restrictions should at least be reduced to a level where there are similar burdens on both rights, rather than having the right to candidacy carry a greater load than the right to vote. I have also suggested that some restrictions might need to be eliminated completely, following arguments that have been made in relation to the right to vote. Within this final section I will delve further into the establishment of a normative criteria over which this conclusion is fully reached. Indeed, the cases should be threaded together carefully because, as I have claimed, the freedom of the right to candidacy does indeed depend on concerns over adequate office holding and representation. It is merely because of our inability to determine both what exactly both these kinds of activities consist of, and the consequent empirical tracing of the personal traits that would be predictors of it, that I believe that the existing burdens on the right to candidacy are unjustified.

However, we need to further explain the reasons why burdening the right to candidacy in such ways – no matter how well intended, though misguided, the establishing of qualifications might be – would constitute serious harm on the population that would be excluded from the possibility of running for office. The argument for this conclusion builds upon the fact that participation, or the opportunity for participation, is in essence a fundamental right, and the fact that it must be open to all those entitled to it is a fundamental condition for the legitimacy of the system. This reasoning guides the presumption of citizen universality upon which the right to vote is distributed. And, upon our current material impossibility for the institution of direct democracy, the right to candidacy is to be equally understood as a fundamental political participation right. This being the case, unjustifiably burdening the right to candidacy harms those excluded from it, and brings into question the legitimacy of the system as a whole.

In other words, unless we were able to precisely define a standard that must be met to hold office, and therefore outline the necessary conditions under which it would be just to legitimately curtail the right to candidacy at a formal, legal level, as I have claimed we cannot do, the basic core presumption for the distribution of both rights should be symmetrical, based on a principle of basic legal equality of opportunity. The argument I wish to put forward can be formally presented through analogical reasoning:



1. The RV and the RC share equal, normatively-relevant traits as participatory rights within a representative democracy.
2. It has been argued to the satisfaction of most, and a general consensus has been reached, that the RV should be universal (shared equally by all humans, albeit exercised within their country of nationality) as a participatory right.
3. Ergo, via inductive reasoning, the RC should also be universal,

The basic equal trait is the presumption, at least at the formal legal level, that all persons (or citizens as the accepted precondition) are fit for participating in the politics of their country in the different ways that the existing mechanisms for political selection allow. Unless we could prove the contrary, the presumption holds. The exercise of the possibilities for participation that both rights open, in the most minimalistic account, asks for the same basic capacities: reasoning, having free will of your own, minimal capacity to judge over what is best for the common good, etc. The underlying idea behind this Equal Participation Analogy (EPA) is that equally direct participation of all citizens in law-making and policy design is not possible due to empirical restraints, the only way to legitimately substitute it would be by ensuring that those same citizens to whom direct participation could have been said to be due, are all equally entitled to the opportunity not only of selecting those that will make laws, and design policies, but also of being themselves selected for it.

In other words, it is accepted that the right to candidacy should be universal, given that the right to vote is already accepted as universal. This is *because* the RV and the RC are *similar enough* in terms of a trait relevant to the distributive rationale, a trait which has already been accepted as required for the RV: universality. To understand why there is a perceived similarity relevant to the distributional rationale which makes the EPA plausible, it is necessary to understand the grounds on which the universality of the right to vote is justified (with the qualification of it carrying the burden of proof against that presumption).

The literature on what I have called the distributional rationale for the right to vote is substantially intertwined with the normative literature on democracy, or at least has been for the past few decades. Indeed, the mainstream conception of democracy today, in philosophical literature, and perhaps even more so in literature around social sciences and from the general public, is that it is fundamentally synonymous with the universal right to vote. As such, the reasons that can philosophically justify broad overlapping consensus on the universality of the RV, can today be extracted from the arguments in favour of democracy. We can distinguish two sets that trace the general style of arguments in favour of democracy available to us:

On the one hand, there is what is known within the literature in democratic theory as ‘extrinsic arguments’, or the ‘consequentialist arguments’ for

democracy. The claim is that people are entitled to certain consequences, or states of affairs, such as peace. The one person one vote situation has been proven to guarantee peace and prosperity. So, people have the right to vote as derived from their right to peace, but not by any intrinsic quality of the right to vote to which they are (or are also) entitled. But if the justification cannot be made in terms of the intrinsic value of the one person one vote system, then if any other system brought about peace and nourishment more consistently, then we should prefer that.

This group of arguments is characterised by the fact that the case for democracy is made by reference to benefits which lay outside of the democratic process itself. In other words, the recognized benefits of democracy are to be found in the consequences brought about by a political process in which voting is universal. Examples of this type of argument include Amartya Sen's claim that democracy is desirable because no democratic country has ever experienced a famine,<sup>27</sup> or the fact that no democratic countries have ever declared war against each other. Another example of this sort of argument is John Stuart Mill's famous claim that democracy was desirable because it served to educate the people and generate a sense of political duty amongst them.<sup>28</sup> The most prominent argument of this kind in recent years has been made by the so-called 'epistemic democrats', who argue that democracy is valuable because of its inherent truth tracking capacity.<sup>29</sup> That is to say, all else being equal, democracy is valuable because it is likely to track the truth of the matter.

On the other hand, 'intrinsic arguments' for democracy argue that the right to vote should be universal because there is value in the democratic procedure itself, as characterized by a system of universal voting, independent of the results. The fact that every citizen has a right to vote is valuable in itself, independent of the consequences it might produce. Amongst the reasons given to support this claim we find the argument that the 'one person, one vote' distribution puts citizens in a situation of numerical equality amongst each other. This numerical equality in relation to the weight of one's vote is valuable itself as the minimal sort of political equality that can, and ought to be, pursued. It is, in a sense, a particular incarnation of the equal right to participation which we all share and gives a very concrete way of ensuring it.

Furthermore, it can either be added to this, or independently argued, that having an individual and equally weighted right to vote is due to every citizen as rational adults and autonomous agents, with dignity and/or with moral and

27 Sen, Amartya. *Development as Freedom*. New York: Random House, 1999.

28 Mill, John Stuart. *Considerations on Representative Government*. Auckland: The Floating Press, 1861/2009. Chapter III.

29 The canonical work on the matter is Estlund, David. *Democratic Authority: a Philosophical Framework*. Princeton: Princeton University Press, 2008.

social capacities that are to be acknowledged and respected by the polity, as an extension of her capacity to decide over her life within a social context.

A salient, intrinsic argument claims that a democratic procedure is itself necessary in order to justify the use of power by the state. The claim is that (from epistemic democrats) there is no way of ‘knowing’ the best answer of what needs to be decided in the polity because we are incapable of doing so. Moreover, there is no right answer to the matter because what is ultimately being traced politically is a moral problem and, it would be argued, moral claims are not truth-apt. Furthermore, even assuming there were right answers for our political problems, and we were somehow able to trace them, (via divine revelation for example), we cannot ‘impose’ such a truth on others. Possession of truth, and possession of political authority are separate and distinct matters, with their own criteria of justification. For political authority to be justified, every person’s reasonable moral standpoint needs to be considered, and in practice, the democratic process is what can best ensure this takes place. This presupposes that the people are capable of performing this role, and therefore, this same presupposition extends to the people who are chosen to hold office. So, as a result of the democratic process, it is not wrong to have to obey those in office, even if I had no right to be one of them.

The debate around the justification of democracy (understood in this context as ‘universal voting’), the main positions of which I have just presented, is alive and thriving. My interest here is not to take sides of either position. Rather, my aim is to show how each of these might justify universal candidacy rights, as is assumed in the Equal Participation Analogy. In other words, I aim to develop the different ways in which the analogy can work. Supposing any of above claims for democracy and universal voting were true (it is, as I mentioned, accepted by reasonable consensus that at least one of them, is true), then via the perceived similarity with the right to vote, they could also be applied to universal candidacy, per the EPA. In other words, the different understandings of democracy’s value inform different iterations of the EPA.

To construe an extrinsic argument for universal candidacies that was analogous to the argument for universal voting, the consequences positively attributed to universal voting would need to be attributed to universal candidacy as well. Following this line of thought, the analogy would imply that the existence of universal candidacy could be proven to account for such things as the absence of famines within democratic countries, the lack of wars between them, the political culture and conscience of their people, etc. On the other hand, it could be claimed that having universal candidacy also had truth tracking properties, as necessary for the political decision-making processes.

Extrinsic arguments for democracy admittedly are based on empirical results, or else on mathematical necessity predicated upon empirical conditions, as is the case for epistemic democratic claims that draw support from

the Condorcet Jury Theorem.<sup>30</sup> In a similar vein, if this style of justification for universal voting were to be also applied to universal candidacy, empirical data would be called for. This data would need to show that there is a link between universal candidacy and the required results in conjunction with the right to vote. To my knowledge, we do not currently have this kind of data available, perhaps because political science studies have also lacked a focus on the right to candidacy. Perhaps the more likely positive consequence of universal candidacy would be something along the lines of the Millian argument that linked universal voting with citizenship education.<sup>31</sup> It does seem plausible indeed, that universal candidacy would bring about similar pedagogic effects on a citizen. But, as an extrinsic process there are no reasons to say this is due to you, the citizen, when other external conditions might satisfy this. As such, I believe that the strongest way to build the EPA will be through intrinsic arguments for democracy, that is, the equal value of political participation.

This intrinsic value version of the EPA could plausibly satisfy our necessary requirements as it would have to consider the right to candidacy as fundamental for the analogy to succeed. The argument of equal respect in relation to the right to vote stated that the best way to respect citizens as equally autonomous moral agents – entities with a certain dignity etc. – is by giving them the right to participate as equals in their community, and that the right to vote was an instance of such participation. It could equally be said that universal candidacy as a type of political participation is equally entailed by the normative idea of respect to citizens as equals in terms of moral autonomy and/or dignity. The argument of liberal neutrality in relation to citizen's conceptions and moral views could also be extrapolated to the right to candidacy by saying that is that there is no right answer as of which of the possible candidate holds the right political views, or the best solutions for the political problems of the given situation. Therefore, a fair procedure under the criteria of neutrality regarding their political views would entail including them all in the pool of candidates who are all eligible for candidacy.

Put in other terms, the right to vote, within representative democracies, is derived from a positive right to be represented. This comes from the basic idea of democracy, etymologically signified, as “power to the people” once it faces the need for that power to be mediated within indirect democracies given, among other things, the size of a population. But that positive right cannot be fully satisfied for all due to scarcity and feasibility, given that many

30 Martí, José Luis. The Epistemic Conception of Deliberative Democracy Defended. In: Besson, Samantha et Martí, José Luis (dir.), *Deliberative Democracy and its Discontents*. Aldershot : Ashgate, 2006, p. 27-56.

31 Mill, John Stuart. *Considerations on Representative Government*. Auckland: The Floating Press, 1861/2009. p. 83-87

interests clash with others and not all can be satisfied at the same time. Thus, what the right to vote provides is, in the end, the liberty or negative right to enter the competition for representativeness. And that is what we consider should be universal, in addition to the fairness of the competition. This is, in the end, what is implicit in our current understandings of universal franchise as democracy, and of the way the arguments we make for democracy apply to it.

To put things more explicitly, our arguments for democracy are not meant to solely support Greek style democracy, understood as universal direct participation in the decisions that the ruling of the polis asks for. Rather, what we understand to be supporting when we defend democracy today, is universal participation in the selection (or “election” as we call it, insofar as within liberal democracies the selection is based ultimately on the criteria of free choice) of those who will make decisions on behalf of the citizenry as a whole. Citizens, therefore, in their capacity as voters, no longer make such decisions directly themselves. The way in which the arguments for democracy detailed above best work is through the assumption of an underlying right to the opportunity (insofar as it cannot feasibly be guaranteed for all) for representation of our positions, interests and wills. What is presumably being voted for is a certain political agenda (which itself is the crystallization of political views), under prudential considerations of how likely a given candidate is to bring it about.

Extrinsic types of pro-democracy arguments are based on the results brought about as consequences of the democratic process. Such results are predicated upon the process of selecting an agenda and judging the likelihood of a given person to fulfil it. Pro-democratic arguments based on factual claims such as the absence of war with other democratic countries, or the inexistence of famines within the democracy in question being the consequences of democratic processes are presumably predicated upon the agendas that have factually won, and their actual fulfilment. The political education of citizens that would seemingly result from their participation in the democratic process through voting is also presumably predicated upon the exercise of their reasoning in relation to political agendas, and the likeliness of political candidates to fulfil them. The fact that this is the case is perhaps even more obvious for epistemic arguments for democracy, which praise voting mechanisms for, among other things, their truth tracking qualities. And the truth, in the case of indirect or representative democracy, would indeed be what the *best* agenda for a given country is, measured against the likelihood that the candidate ‘representing it’ will fulfil it.

Intrinsic arguments, on the other hand, are related to the fairness of the competition for representation itself, and they link this procedural fairness with the overall justifiability of the government selected to be imposed over both winning and not-winning citizens. Here the question gets more interesting insofar as we can extend it to having another person (rather than position or

agenda) rule over you, even when you did not have the possibility of being in the contest, which is what the same argument as applied to the right to candidacy via the EPA would imply.

What we mean when we talk about representative democracies is that the political decisions are being taken by the people, or, rather, that they are being taken by the people through representatives. Within this framework then, the selection is allegedly not of someone who will rule for you, as a Schumpeterian model of democracy<sup>32</sup> would suggest, but of someone whose act of decision making over political matters is a proxy of what would be the constituents decision making act. How this happens, or should happen, can certainly be debated: whether the representative is a symbol, and if so in what way, whether her decision-making should expand over her own person and be based upon what she thinks are, or would be, her constituents modes of reasoning, or desired results for what she is deciding to do.

But candidates are not robots or preference filtering machines, there is still something about them ruling that is not completely encompassed in the possible forms of representation that we so far know to be possible for us. There is still something of their will that will be imposed upon us (notice that this is also a case with the right to vote). In this sense, what seemed to be possible applications of arguments for right to vote to the RC allow us to say that the right to candidacy is also based upon a universal citizen claim to representation, and as such, normative consideration for it should be no different. The presumption of universality for the right to candidacy is a requirement of representative democracy as we understand it today. It shares this symmetrical core with the right to vote and, as such, the practice of their qualifications at the formal, legal level, should be the same.

## CONCLUSION

Aristotle famously claimed that the true essence of citizenship, more than the formal aspects of their recognition, was that a citizen “should know how to govern like a freeman, and how to obey like a freeman”.<sup>33</sup> In the direct democracy of Athens of his day, a principle of that sort could be said to be respected insofar as citizens were expected to be prepared to govern as part of the assembly and in a public office, if drawn from a lot. Within the indirect representative democracies of our day, a principle of that kind still holds in a slightly different sense. Indeed, the idea of a universal voting franchise is meant to guarantee that all citizens exercise political power, and thus guide the destiny of their polity, at least as much as needed to select office holders

32 Schumpeter, Joseph. *Capitalism, Socialism and Democracy*. New York: Harper and Row, 1956.

33 Aristotle. *Politics*. Indianapolis: Hackett Publishing, 1998.



by election. The expansion of that power is promoted by other means of citizen input through specific group decision mechanisms such as referenda and in general through the formulation of the public agenda based on citizen deliberation and idea interchange within a context of freedom of speech.

Nonetheless, both empirically and theoretically, the positioning of political equality as the linchpin of democracy has been put fundamentally on the right of citizens to vote, and on whatever is needed to substantially guarantee that right. Yet, contemporary western democracy is predicated upon a package of political rights in which the right to run for office is as fundamental as the RV, and the right to freedom of expression. Yet, within current democracies, the RC can, in practice, only be fully exercised by a minute minority of the citizenry who will ever have the chance to run for political office. Given that this is a necessary trait of the system due to the empirical impossibility for it to be otherwise, it is understandable that the consideration of the requirements of justice imposed by the RC have been neglected.

However, there is no reason for us to think that empirical constraints on how many people can in practice be candidates for a given election justify as such the current shape and boundaries of the RC as they are today. As I have argued, from the very formal/legal framework from which it significantly takes shape, we need to do more normative work. The ideal of universal full franchise includes within itself the ideal of the extension of franchise (both the right to vote *and* the right to candidacy) to all citizens, unless there is enough reason to restrict it otherwise. In a formal, or merely legal sense, this is meant to be satisfied by establishing a set of as minimal conditions of eligibility for office as possible, as presumed to be reasonable. I have here argued that many of those restrictions are not set at what the reasonable threshold should be.

As long as democratic citizens are unjustly disempowered by being formally excluded from the possibility to run for office as is currently the case even in otherwise paradigmatically democratic countries, we will not be fully prepared to address the different sorts of crises of representative democracy that have come and those that are to come.

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