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REPORT: HINDERING ACCESS OF THE BLACK POPULATION TO THE ELECTORAL PROCESS

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I. Introduction

1. In Brazil, it is often said that, with the promulgation of its Constitution in 1988, political rights were expanded to their maximum level to all its citizens. After a long period of civil-military dictatorship (1964-1985), the new constitutional text became a symbol of the attempt to rebuild fairer, more egalitarian and democratic society, in what became as the Citizen's Constitution. However, despite these achievements and the fact that universal suffrage had been achieved by allowing illiterates to vote, article 15, item III of the Constitution establishes a case in which the right to vote is restricted: the suspension of political rights in the case of an unappealable criminal conviction, for as long as its effects last.

2. The true understanding of the issues entailed by such a measure can only be achieved when two factors are considered together: a) the interpretation of to this article has always been that **every** criminal conviction has the effect of **automatically** suspending political rights of the condemned individual; b) the Brazilian prison population and the incarceration rate have increased dramatically since the 1990s. As a result, there are a huge number of people barred from voting because they have suffered unappealable criminal convictions.

3. In practice, what happens is the democratic jettisoning of thousands of people, with a very demarcated profile – young, black, and working-class individuals.

4. In addition to violating the basic principles that regulate the Democratic Rule of Law – such as universal suffrage, freedom of choice of representatives, the right to equal voting, freedom of expression in elections, and political pluralism, particularly the right to non-discrimination –, there is no legitimate aim that can be achieved by measures that restrict political rights. In other words: the suspension of the right to vote as a direct consequence of a criminal conviction has the effect of denying the status of equal citizenship to people who have been imprisoned, imposing, in practice, another foundation of Brazilian structural racism.

II. Methodology

5. In this document, AMPARAR, Conectas and IPB examine the Brazilian government in the fulfillment its international human rights obligations related to respect to the exercise of universal suffrage, the right to full political participation and the principle of non-decriminalization (Articles 2 and 21 of the Universal Declaration of Human Rights, articles 10, 11 and 25 of the International Covenant on Civil and Political Rights, Rule 108 - Mandela Rules, Inter-American Convention against Racism, Racial Discrimination and Related Intolerance, Articles 1 and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination).
6. To this end, we evaluated Brazil's implementation of the recommendations received during the 3rd cycle of the UPR, specifically the one that suggests fighting racism (Recommendation 136.46) and the adaptation of criminal legislation to international human rights principles and treaties (Recommendations 136.106 and 136.85) from the perspective of the impact of the suspension of voting rights for people with criminal convictions in Brazilian democracy.
7. To demonstrate the relationship between this agenda and the Recommendations made in the 3rd Cycle of the Universal Periodic Review, we shall start by presenting how the issue is dealt with in Brazilian legislation and case law. Then, through the analysis of official data from the Brazilian government, we shall shed light on the current impacts of the suspension of political rights for people involved with the criminal justice system, identifying the total number of people affected and their specific socioeconomic profile. Then, through an analysis of the specialized international literature and the case law of foreign and international Courts, we shall indicate how the matter is treated in other countries and how it is seen vis-à-vis international human rights documents.
8. Finally, acknowledging the need for more assertive Recommendations on the agenda, based on the best international practices on the subject, we indicate possible texts that could support the elaboration of new Recommendations for the achievement of the right to vote for convicted persons in Brazil, with the consequent observance of the effective right to non-discrimination and universal suffrage.

III. Suspension of political rights of persons involved in criminal proceedings in Brazil

9. Historically, since Brazil achieved its independence in 1822, the exercise of universal suffrage has never been assured to the entire population - in other words, without discrimination by class, race, and/or gender. In its first Constitution, the country adopted the census criterion, automatically excluding women, black people, and indigenous peoples. Then, through a legislative reform carried out on the eve of the abolition of slavery (Saraiva Law), illiterate people lost the right to vote. The educational criterion was established into the Constitution of the Republic (1891) and revised only in 1985, effectively excluding black and indigenous people from the electoral process. In 1988, in turn, the current Federal Constitution was ratified.

10. With the end of the long-standing civil-military dictatorship that took place in Brazil between 1964 and 1985, the work began in order to build a new Constitution that would match the redemocratization moment¹. In addition to the Constitution establishing a huge list of individual and collective rights and guarantees, with regard to political rights, its article 14 expressly determines that popular sovereignty would be exercised through universal suffrage, with direct, private, and equal voting rights to all. Electoral registration and voting are mandatory for those over the age of 18 and optional for those who are illiterate, over the age of 70, over the age of 16 and under the age of 18.

11. It just so happens that, although the forfeiture of political rights is prohibited by the Constitution (article 15, item III), the loss or suspension of these rights is allowed in cases of “unappealable criminal convictions, for as long as their effects last”².

12. Maintaining an understanding that has lasted for more than two hundred years, this passage is interpreted as determining that every person who has a final and unappealable criminal conviction shall have their political rights suspended, regardless of *a*) the type of crime committed; *b*) the intensity of the sentence awarded; or even *c*) the type of sentence. As such, the right to vote is suspended for those sentenced to imprisonment, to the fulfillment of sentences that restrict rights, or even to the mere payment of a fine.

13. A study carried out between 2016 and 2019 attempted to understand the origins and current impacts of the suspension of political rights for criminally convicted persons in

¹The first article of the Constitution established that Brazil is a Democratic Rule of Law country whose foundations would be sovereignty, citizenship, human dignity, and political pluralism, with all emanating from the people, who would exercise said power through directly or indirectly elected representatives. BRAZIL. **Constitution (1988)**. Available at: <http://www.planalto.gov.br/ccivil_03/Constituicao/Constitui%C3%A7ao.htm>.

² “Art. 15. The forfeiture of political rights is prohibited, and the loss or suspension of these rights will only occur in cases of: [...] III - final and unappealable criminal convictions, for as long as their effects last.” BRAZIL. **Constitution (1988)**. Available at: <http://www.planalto.gov.br/ccivil_03/Constituicao/Constitui%C3%A7ao.htm>.

Brazil³, allowing us to note that, in the first statements by the National Constituent Assembly (responsible for the text enacted in 1988), it was understood that the right to vote should be guaranteed for all persons, even if they were in custody. The arguments in this sense involved the idea of facilitating reintegration and maintaining links with society at large, the possibility of giving voice to an entire socially invisible population, and the clear violation of penal principles that would occur by applying a general and indiscriminate punishment, without any dosage of penalty taking into account necessity and proportionality criteria.

14. However, with the subsequent sessions of this Assembly, what began with an attempt to expand the right to vote to people in prison became, at first, the possibility of suspending political rights as a *type* of penalty, to be expressly declared by a judge with jurisdiction over the matter. But then, with the pretense of improving the text that was being established, the proposal of limitations of political rights, which seemed reasonable, ended up reaching its current form - it is understood that political rights cannot be revoked, but are rather suspended due to criminal convictions, withdrawing the right to vote from those convicted of any crime, in a general and unrestricted manner.

15. The issue of the right to vote for convicted persons was once again debated in the legislative sphere in the years of 1993-1994, when the first and only Constitutional Revision of the text enacted in 1988 was carried out. In this Review, the rapporteur concluded that the suspension of political rights should be seen as an extreme measure, applicable only in very restricted, particularly serious and rigorously delimited cases, contrary to the general and indiscriminate application granted by article 15, III of the Constitution, which was unethical and violated the very essence of a Democratic Rule of Law state. However, given the alleged difficulties in carrying out voting in prisons, it was concluded that, despite it being necessary, there would be no way to implement this right for practical reasons.

16. Furthermore, in the years 1997, 2002, and 2003, three Bills of Amendment to the Constitution were presented in the Lower House of Representatives and in the Federal Senate, with the goal of extending the right to vote to inmates. All three bills stated that the restriction of political rights of an entire group would violate the foundations of the very idea of democracy, removing the legitimacy of the State and preventing several people from freely presenting their demands (with this being an additional conviction that would go beyond the deprivation of liberty itself and hinder social reintegration by severing all ties with society).

³ FERRARINI, Luigi Giuseppe Barbieri. **Cárcere e voto**: a morte social pela suspensão dos direitos políticos do condenado. Belo Horizonte: Editora D'Plácido, 2019.

However, even though such proposals had favorable opinions from their rapporteurs, all of them were ultimately shelved by the end of the legislature periods.⁴

17. In the judicial sphere, the only direct manifestation took place in 2019, when the Federal Supreme Court (STF) – the Brazilian constitutional court – understood that the suspension of political rights also applied to cases in which the only penalties imposed were restrictive of rights, that is, alternatives to imprisonment.⁵ Thus, the literal interpretation given to article 15, III, of the Constitution, merely reinforced its character of general and automatic application to all types of criminal conviction, for as long as their effects last.

18. It is also worth noting that, at least in theory, people who are under temporary arrest do not have their political rights suspended, and they fully enjoy their rights to vote and participate in politics. Thus, the Electoral Courts, in tandem with Penitentiary Administration Secretariats, should provide adequate documentation for voters and the transfer of electronic voting machines to prisons on voting days. However, in practice, under the justifications of the alleged high risk of prison establishments, logistical difficulties or the absence of adequate documentation, little is done to guarantee the right to vote for temporary detainees, and their participation in elections is negligible.

IV. Suspension of voting rights in numbers

19. Due to the implementation of penal policies that accompanied the movements of law and order and zero tolerance, Brazil is experiencing an exponential increase in its incarcerated population. In light of official government data provided by Infopen (National Penitentiary Information Survey) 2017⁶, one can observe that, while in 1990 the Brazilian prison population amounted to approximately 90,000 people, with an imprisonment rate of 61

⁴ CÂMARA DOS DEPUTADOS. Proposta de Emenda à Constituição nº 486, de 1997. **Diário da Câmara dos Deputados**, Brasília, DF, 9 ago. 1997. p. 22560-22566. Available at: <<http://imagem.camara.gov.br/Imagem/d/pdf/DCD09AGO1997.pdf#page=10>> ; SENADO FEDERAL. Proposta de Emenda à Constituição nº 22, de 2002. **Diário do Senado Federal**, Brasília, DF, 11 maio 2002. p. 7847-7849. Disponível em: <<http://legis.senado.leg.br/diarios/BuscaDiario?tipDiario=1&datDiario=11/05/2002&paginaDireta=07847>>; SENADO FEDERAL. Proposta de Emenda à Constituição nº 65, de 2003. **Diário do Senado Federal**, Brasília, DF, 28 ago. 2003. p. 25171-25172. Disponível em: <<http://legis.senado.leg.br/diarios/BuscaDiario?tipDiario=1&datDiario=28/08/2003&paginaDireta=25171>>.

⁵ BRASIL. Supremo Tribunal Federal. Tribunal Pleno. Recurso Extraordinário 601182/MG. Relator: Ministro Marco Aurélio, 02 de outubro de 2019. Disponível em: <<https://jurisprudencia.stf.jus.br/pages/search/sjur412201/false>>.

⁶ DEPEN. **Levantamento Nacional de Informações Penitenciárias**: INFOPEN. Atualização – junho de 2017. Brasília: Ministério da Justiça e Segurança Pública; Departamento Penitenciário Nacional, 2019. Disponível em: <<http://antigo.depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/infopen-jun-2017-rev-12072019-0721.pdf>>.

individuals per 100,000 inhabitants, in December 2020, according to data from the Information System of the National Penitentiary Department (SISDEPEN),⁷ this prison population amounted to 811,707 people for a total of 545,060 vacancies – representing an increase of 801.89% compared to 1990, with an incarceration rate of 383.32 people per 100,000 inhabitants.

20. However, the number of people deprived of their political rights is much higher than that of inmates of prison institutions. Given the application of the suspension of the right to vote to all convicted individuals, regardless of the type and intensity of sentences applied, even those who are free and serving prison alternative sentences will not be able to vote. As a result, according to official data from the Brazilian Superior Electoral Court, in 2018, at least a total of 788,700 people could not vote because they had an unappealable criminal conviction against them⁸.

21. And, as mentioned, despite the fact that the right to vote for prisoners who are still awaiting trial is recognized in Brazil, in 2018, when the population of pre-trial detainees was 242,133 people in the period from July to December, according to the SISDEPEN, only 9,331 of these individuals voted in that year's presidential elections in the first round and 8,594 in the second round.

22. **In the end**, Brazil had, in 2018, about 147 million eligible voters, but **at least 1,021,000 of them did not vote in that year's elections for reasons related to the criminal justice system.**

a) Profile of the prison population, the suspension of the right to vote, and structural racism

23. The Brazilian criminal justice system affects very specific portions of the Brazilian population in different ways. It suffices to look at its socioeconomic profile: it is a socially and economically vulnerable population, with marked racial characteristics, young, with low education levels and usually coming from specific urban regions.

24. Whilst the Brazilian population is 43.6% white, 46.8% brown (*pardo*) and 8.6% black, in the prison system the percentage of white individuals drops to 35.48%, with 46.27% *pardo* individuals and 17.37% black individuals.

⁷ DEPEN. **Sistema de Informações do Departamento Penitenciário Nacional: SISDEPEN**. Disponível em: <<https://www.gov.br/depen/pt-br/servicos/sisdepen>>.

⁸ Dados constantes no Cadastro de Eleitores sob o código ASE 337, tratando-se de um número aproximado em razão de lançamentos retroativos e inativações em datas posteriores.

25. The prison population is still essentially young - 72.39% are under the age of 34⁹, and with low education levels – 51.35% of the prison population has not completed Elementary School, while, in the general population, that same number is 33%.

26. The people who are most subject to Criminal Justice reside in specific urban areas - those of greater social vulnerability. Taking the largest Brazilian city (São Paulo) as an example, one may notice that these people have the worst socioeconomic conditions. Crossing data from Instituto Sou da Paz in a survey on costs and alternatives to prison in the city of São Paulo¹⁰ with those obtained by the 2021 Inequality Map¹¹, one may correlate the regions of the city with the highest rates of imprisonment with the areas with the highest proportion of households in favelas, with the lowest average monthly remuneration for formal employment, with the highest number of youth homicides per 100,000 inhabitants, with the lowest average age at death and with the most female deaths from maternal causes per 100,000 children born, among several other factors that point to a state of urban vulnerability.

27. Thus, it should be noted that the withdrawal of the right to vote from convicted persons ends up affecting specific sectors of the population differently: the right to vote is withdrawn from more black and *pardo* people than white people; from the subsets with the lowest level of education; from those with the worst social and economic conditions; and from the urban regions that make their population the most vulnerable within big cities - the same population that has been excluded from the electoral process since the Empire times.

28. In summary, the process of insertion into the criminal justice system – considering all its consequences –, accompanied by the withdrawal of the right to vote, represents the passage from an already harmful stage of *sub*-citizenship to the near complete denial of citizenship, or, as survivors of the prison system and their families call it – a political and social death.

29. A

b) A type of census vote - the criminalization of poverty and structural racism

⁹ 29,95% dela possui de 18 a 24 anos, 24,11% de 25 a 29 anos e 18,33% de 30 a 34 anos. DEPEN. **Sistema de Informações do Departamento Penitenciário Nacional: SISDEPEN**. Disponível em: <<https://www.gov.br/depen/pt-br/servicos/sisdepen>>

¹⁰ INSTITUTO SOU DA PAZ. **Vale a pena?** Custos e alternativas à prisão na cidade de São Paulo. São Paulo, 17 de junho de 2019. Disponível em: <http://www.soudapaz.org/upload/pdf/vale_a_pena_final_online.pdf>.

¹¹ REDE NOSSA SÃO PAULO. **Mapa da Desigualdade**. São Paulo, outubro de 2021. Disponível em: <<https://www.nossasaopaulo.org.br/campanhas/#13>>.

30. Recently, as a result of the understandings in case law adopted on the penalty of fines, the situation of restriction of political rights for socially vulnerable convicted persons became even more severe.

31. In Brazil, the penalty of fine can be applied in three different ways: a single penalty applicable to a crime; in the place of incarceration, provided that certain requirements are met; and, mainly, cumulatively to the deprivation of liberty stipulated for each crime. In the latter case, in order to determine the total amount of the fine to be paid, the judges jointly calculate the incarceration time and the fine amount for each specific case.

32. With regard to the nature of this fine, it was discussed whether it was of a criminal or merely administrative nature, which directly influenced the moment of extinction of punishability of convicted persons. In 2018, the Federal Supreme Court established the understanding that the fine is penal in nature, that is, until it is paid, the punishment will not be declared extinct, even if the individual has already served their incarceration time.

33. The consequence of not ending the sentence due to the inability to pay has several concrete effects on the citizen's life beyond the vote: maintenance of the repeat offender status, with their sentence being increased in case of a new conviction; the non-recovery of political rights and, consequently, the impossibility of accessing various documents such as Voter IDs, Individual Taxpayer Ids (which are required to open bank accounts and obtain work permits), difficulty in accessing social benefits and public or private financing, difficulty in entering prisons as visitors, among others.

34. The exclusion scenario is worsened when considering the minimum payment amounts: while, currently, for the commission of crimes such as robbery, theft or embezzlement, a minimum fine equivalent to BRL 366.66 must be paid together with the incarceration sentence, for the crime of drug trafficking - responsible for the imprisonment of 29.26% of the male prison population and 64.48% of the female prison population¹² -, the minimum fine charged is BRL 18,333.33, which, when undergoing a special reduction, drops to BRL 6,111.11 – a very high value, considering the Brazilian minimum wage of BRL 1,212.00 in 2022.

35. Considering that the people sent to the penal system are those with the most fragile socioeconomic conditions, the payment of this debt is seldom achieved, so the penalty and its effects will be extended exclusively due to poverty.

¹² DEPEN. **Levantamento Nacional de Informações Penitenciárias**: INFOPEN. Atualização – junho de 2017. Brasília: Ministério da Justiça e Segurança Pública; Departamento Penitenciário Nacional, 2019. Disponível em: <<http://antigo.depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/infopen-jun-2017-rev-12072019-0721.pdf>>.

36. The impact of the enforcement of the fine penalty and the extent of its effects on the citizenship of the black population are worth emphasizing: according to data from the Family Budget Survey (POF) of the Brazilian Institute of Geography and Statistics, 77.8% of all poverty is concentrated “in the population whose reference person in the family was black or brown”.

37. The suspension of the right to vote of people who have gone through the criminal justice system is another structuring mechanism of racism in Brazil and implies, in practice, the jettisoning of black and poor people from democracy, i.e. the denial of their citizenship. It is a patent violation of the right to non-discrimination and undermines the State's obligation to promote affirmative and inclusive actions that seek to fight racism and face its effects.

38. Due to the 2019 STF decision¹³, the numbers of individuals who are not allowed to vote tend to be much higher in 2022 as a direct result of the impossibility of paying a fine, with voting being denied due to lack of income – which harkens back to the extinct institute of census voting. It is not mere rhetoric to say that the link between the extinction of punishability and compliance with the fine leads to the establishment of an unconstitutional perpetual sentence for poor convicted individuals, consequently violating Article 11 of the ICCPR.

V. International human rights documents and the right to vote of convicted persons

39. The Universal Declaration of Human Rights of 1948, in its articles 2 and 21, stated that every person would have the right to take part in the management of the public affairs of their country, with the will of the people being the basis of authority for public authorities, to be expressed through periodic elections, with universal and equal suffrage.¹⁴ In turn, the International Covenant on Civil and Political Rights states in its articles 10 and 25 that every person deprived of liberty must be treated with humanity and with the respect inherent to the dignity of the human person, and the prison system must consist of treatment aimed at

¹³ It is worth noting that, in November 2021, the Superior Court of Justice determined that the default in the fine by a convicted person who proves they are unable to pay does not prevent the recognition of the extinction of punishability. The decision has been celebrated, but one must monitor and assess whether it shall be accepted by the State Courts of Justice and how the proof of inability to pay shall be interpreted. *Multa não impede extinção da punibilidade para condenado que não pode pagar.* Available at: <https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/24112021-Multa-nao-impede-extincao-da-punibilidade-para-o-condenado-que-nao-pode-pagar.aspx>

¹⁴ ASSEMBLEIA GERAL DAS NAÇÕES UNIDAS. Declaração Universal dos Direitos Humanos. Paris, 1948. Available at: <<https://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=por>>.

reforming and rehabilitation. At the same time, the covenant determines that every citizen will have the right and the possibility to vote and be elected in periodical and authentic elections, carried out by universal and egalitarian suffrage to assure the expression of the voters' will.¹⁵

40. In turn, the International Convention on the Elimination of All Forms of Racial Discrimination – relevant due to the specific profile of the populations affected by the restriction of political rights – states in its articles 1 and 4 that there can be no distinction, exclusion, restriction or preference based on race, color, descent or origin, and Member States commit to adopting active measures to eliminate any incitement to discrimination, focusing on political rights and particularly the right to take part in elections – to vote and to be voted – in a system of universal and equal suffrage.¹⁶

41. Therefore, even though there is no direct order that involves the relationship between the right to vote and criminal convictions, these documents suggest greater interpretation parameters: suffrage must be universal, periodic, egalitarian, and exercised through a confidential vote. There may be restrictions, but they cannot be discriminatory or contribute to the dissemination of any form of discrimination. On the contrary, States should promote “special policies and affirmative action necessary to ensure the enjoyment or exercise of fundamental rights and freedoms by persons or groups that are subject to racism, racial discrimination, and related forms of intolerance, in order to promote equitable conditions and equal opportunities”¹⁷.

42. In addition, the above documents – and others – establish minimum rules to be observed for the treatment of the prison population; as such, international case law is explicit in that the restrictions established must not go beyond those inherent to the deprivation of liberty itself.

a) international case law on the right to vote for convicted individuals

43. A review of the specialized literature and recent international case law reveals four judicial decisions are considered paradigms to understand the issue of the right to vote

¹⁵ ASSEMBLEIA GERAL DAS NAÇÕES UNIDAS. Pacto Internacional de Direitos Civis e Políticos. 1976. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm>.

¹⁶ ASSEMBLEIA GERAL DAS NAÇÕES UNIDAS. Convenção Internacional sobre a Eliminação de Todas as Formas de Discriminação Racial. 1969. Disponível em: <<https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cdhm/comite-brasileiro-de-direitos-humanos-e-politica-externa/ConvIntElimTodForDiscRac.html>>.

¹⁷ ORGANIZAÇÃO DOS ESTADOS AMERICANOS. Convenção Interamericana contra o Racismo, a Discriminação Racial e Formas Correlatas de Intolerância, firmado pela República Federativa do Brasil em 2021. Disponível em <https://www.in.gov.br/en/web/dou/-/decreto-n-10.932-de-10-de-janeiro-de-2022-373305203>

for those with criminal convictions: *Sauve v. Canada*; *August and Another v. the Electoral Commission and Others* (South Africa); *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* (South Africa); and *Hirst v. United Kingdom* (European Court of Human Rights)¹⁸.

44. In the cases of *Sauvé v. Canada* (1992 and 2000), the Ontario Court of Appeal (1992) and the Canadian Supreme Court (2000) concluded on the unconstitutional character of the articles of its electoral law that determined the suspension of political rights of all those who were incarcerated, or, in their later version, of all those sentenced to a prison term of more than two years. The arguments of the Courts that should be highlighted include: a) logistical difficulties cannot be considered valid arguments when denying the realization of rights; b) that it cannot be said that suffrage must be restricted to a supposed group of decent and responsible individuals, which is an outdated characterization; c) that access or lack thereof to electoral information would be an individual choice, and not a requirement for voting; d) and, above all, that no legitimate criminal policy goal can be demonstrably achieved through the suspension of political rights, as it is only a form of punishment.¹⁹

45. With regard to decisions made by the Supreme Court of South Africa - *August and Another v. the Electoral Commission and Others*, 1999, and *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*, 2004 – the court emphasized that: a) pragmatic and economic issues cannot be considered reasons to prevent the consecution of rights; b) that voting is the founding value of that nation, as a tool for the acquisition of rights, the realization of citizenship and a symbol of dignity and personality in a country of great disparities; c) that the right to vote had already been used to guarantee the supremacy of a group and to marginalize the rest of the people; d) and that in order to discuss restrictions, a criterion of reasonableness and proportionality should be observed within a democratic context, especially when affecting an entire group of people.²⁰

¹⁸ Conforme BRAKLE, Michelle Van; MCLAUGHLIN, Heather; UGGEN, Christopher. Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement. In: EWALD, Alec; ROTTINGHAUS, Brandon (ed.). **Criminal Disenfranchisement in an International Perspective**. New York: Cambridge University Press, 2009.

¹⁹ CANADÁ. Supreme Court of Canada. *Sauvé v. Canada* (Attorney General), [1993] 2 SCR 438, 1993 CanLII 92 (SCC). 27 de maio de 1993. Disponível em: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1009/index.do>>.

²⁰ ÁFRICA DO SUL. Constitutional Court of South Africa. *August and Another v Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363. 1 de abril de 1999. Disponível em: <<http://www.saflii.org/za/cases/ZACC/1999/3.html>>.; ÁFRICA DO SUL. Constitutional Court of South Africa. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC). 3 de março de 2004. Disponível em:

46. However, for this document, it is worth paying particular attention to the criteria adopted by the European Court of Human Rights to resolve the case *Hirst v. United Kingdom* (no. 2), since the limits of restrictions on the right to vote established therein can serve as an interpretative basis for the American Convention on Human Rights, as we will see below.

47. In *Hirst v. United Kingdom*, it was claimed that Article 3 of the United Kingdom's Representation of the People Act opposed the European Convention on Human Rights, which guaranteed the free expression of the people through elections. As a response from the European Court of Human Rights, using the European Convention on Human Rights and the aforementioned documents, an understanding was established in that there could not be any form of suspension of the right to vote in a general and indiscriminate manner, since the application of such a restriction to all those who commit crimes would not follow any criterion of proportionality to the penalty applied, the severity of the crime or the personal circumstances of the individual; as such, should there be any limitations, they could not violate the essence of the very idea of democracy.

48. It was also stated that, surely, incarceration will always result in the restriction of some rights, but this cannot go beyond that which is strictly necessary for the very fulfillment of the sentence; as such, all rights that are not directly affected by incarceration should be preserved. And, thus, an understanding was established so that, for any suspension of the right to vote resulting from a criminal conviction, there should be an individualized judicial decision for each specific case, with the suspension of political rights being expressly addressed and its need being pointed out for that situation according to its particularities,²¹ - which, in later cases, came to be understood as a necessary relationship between the crime committed and crimes committed against elections or democratic institutions²².

<<https://collections.concourt.org.za/bitstream/handle/20.500.12144/2233/Full%20judgment%20%28407%20Kb%29-1333.pdf?sequence=2&isAllowed=y>>.

²¹ CORTE EUROPEIA DE DIREITOS HUMANOS. Case of *Hirst v. The United Kingdom* (nº. 2). Application nº. 74025/01. October 6, 2005. Available at: <<https://hudoc.echr.coe.int/eng#%7B%22dmdocnumber%22:%5B%22787485%22%5D%2C%22itemid%22:%5B%22001-70442%22%5D%7D%7E%3E>>.

²² *Frodl v. Áustria*. Available at: <<https://hudoc.echr.coe.int/eng-press?i=003-5010996-6151237>>. The understanding established in *Hirst v. United Kingdom* was restated in a series of later decisions, such as *Söyler v. Turkey* (2013), *Murat Vural v. Turkey* (2014) and *Kulinski and Sabev v. Bulgaria* (2016), and one should observe particularly the cases of *Anchugov and Gladkov v. Russia* (2013), *Isakov and Others v. Russia* (2017) and *Ramishvili v. Georgia* (2018), in which the European Court of Human Rights understood that the constitutional texts of Russia and Georgia opposed article 3 of protocol 1 of the European Convention on Human Rights, since they determined the application of a general and automatic restriction of the political rights of its convicted population, just as it currently occurs in Brazil.

b) Decisions on restrictions of political rights of the American Court (INT) of Human Rights

49. Although the Inter-American Court of Human Rights has not yet ruled on the right to vote of convicted persons, in discussions that dealt with the right to run for office and be voted on - *Yamata v. Nicaragua* (2005), *Castañeda Gutman v. Mexico* (2008) and *Argüelles y otros v. Argentina* (2014) cases - clear delimitation parameters of what would be acceptable political rights restrictions were established in the light of the text of the American Convention on Human Rights, other international human rights documents and international case law.

50. In these cases, emphasis was placed on the fact that political rights are not absolute and may be subject to limitations, but, as stated in *Yamata v. Nicaragua* (2005)²³, with express mention of the precedent of *Hirst v. United Kingdom* described above, its regulation must take into account the principles of legality, necessity and proportionality within a democratic society. Thus, States are allowed to regulate the exercise of political rights, provided that the limitations imposed are reasonable in view of the principles of a representative democracy.

51. And, as also highlighted in *Castañeda Gutman v. Mexico* (2008)²⁴, based on a series of international precedents that discuss the possibilities of restricting rights²⁵ and an Advisory Opinion of the American Commission on Human Rights²⁶, it is understood that, for any regulations or restrictions of rights and freedoms provided for in the Convention, the Court adopts certain criteria that must necessarily be observed: *a)* the legality of the restrictive measure; *b)* the purpose of this measure, so that the reason invoked to justify the restriction is permitted by the Convention, as provided for in specific provisions; *c)* the necessity and

²³ Corte IDH. Caso *Yatama Vs. Nicaragua*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de junio de 2005. Serie C No. 127. § 206.

²⁴ Corte IDH. Caso *Castañeda Gutman Vs. México*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 6 de agosto de 2008. Serie C No. 184.

²⁵ Os precedentes citados são: “*Caso Ricardo Canese*, *supra* nota 5, párrs. 96 y 133; *Caso Herrera Ulloa*. Sentencia de 2 de julio

de 2004. Serie C No. 107, párrs. 121 y 123; y *La colegiación obligatoria de periodistas* (arts. 13 y 29 Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-5/85 del 13 de noviembre de 1985. Serie A No. 5, párr. 46. Asimismo *cf.* *Eur. Court H.R., Case of Barthold v. Germany*, Judgment of 25 March 1985, Series A no. 90, para. 58; *Eur. Court H.R., Case of Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A no. 30, para. 59; O.N.U., Comité de Derechos Humanos, Observación general N° 27, Libertad de circulación (art. 12) de 2 de noviembre de 1999, párrs. 14 y 15; y O.N.U., Comité de Derechos Humanos, Observación general N° 25, Derecho a participar en los asuntos públicos, derecho a votar y derecho al acceso, en condiciones de igualdad a las funciones públicas (art. 25) de 12 de julio de 1996, párrs. 11, 14, 15 y 16”.

²⁶ “*Colegiación Obligatoria de Periodistas* (arts. 13 y 29 Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-5/85 del 13 de noviembre de 1985. Serie A No. 5, párr. 39; y *Caso Kimel*, *supra* nota 4, párr. 52”.

proportionality of the restrictive measure within a democratic society, which, in turn, requires a verification of whether *c.1)* it meets an imperative social need; *c.2)* it is the measure that least restricts the protected right within the existing possibilities; *c.3)* the measure fits perfectly within the scope of the legitimate goal pursued.

52. Thus, given the precedents of foreign and international human rights courts on the right to vote for convicted persons, as well as the limiting parameters established by the Inter-American Court of Human Rights in order for there to be measures that restrict rights, the automatic suspension of political rights automatically to all those convicted by the criminal justice system cannot be considered acceptable.

53. Bearing in mind that the relationship between criminal convictions and the suspension of voting rights is treated differently in each country²⁷, we should note that, in many of them, it was not necessary for there to be any judicial measure in order to achieve the expansion of suffrage to convicted individuals.

54. As such, it is worth noting that in those countries where the suffrage of convicted individuals is allowed, there are no difficulties that prevent the realization of the right to vote, with simple solutions being adopted in order to circumvent any imaginable logistical difficulties. As an example, we can mention Germany, where, even in the rare cases in which the suspension of political rights is determined – for crimes that are related to electoral issues or that violate the foundational principles of Germany as a democracy –, votes are counted from all inmates, as it is understood that the exercise of political rights contributes to the non-stigmatization and reintegration of convicted individuals.²⁸In Portugal, the collection of votes from people arrested is done by means of an early postal vote: the ballot paper is filled out, folded, placed in two envelopes that are sealed, signed and sent to the polling station voter.²⁹In Luxembourg, voters are allowed to leave prison on election day, with or without an

²⁷ Christopher Uggen, Mischelle Van Brakle e Heather McLaughlin, in a 2009 study, indicate that the following countries currently lack measures that restrict voting rights as a result of criminal convictions: Albania, Germany, Austria, Bangladesh, Bosnia, Canada, China, Croatia, Denmark, Slovenia, Spain, Finland, Greece, Netherlands, Iceland, Iran, Ireland, Israel, Italy, Japan, Laos, Lesotho, Lithuania, Luxembourg, Macedonia, Montenegro, Norway, New Zealand, Pakistan, Poland, Porto Rico, Portugal, Czech Republic, Romania, São Tomé, Serbia, Sweden, Switzerland, Turkey. According to: BRAKLE, Mischelle Van; MCLAUGHLIN, Heather; UGGEN, Christopher. Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement. In: EWALD, Alec; ROTTINGHAUS, Brandon (ed.). **Criminal Disenfranchisement in an International Perspective**. New York: Cambridge University Press, 2009. p. 25-58.

²⁸ Conforme DEMLEITNER, Nora V. U. S. Felon Disenfranchisement: Parting Ways with Western Europe. In: EWALD, Alec; ROTTINGHAUS, Brandon (ed.). **Criminal Disenfranchisement in an International Perspective**. New York: Cambridge University Press, 2009. p. 79-108.

²⁹ Conforme PORTAL DO ELEITOR. Voto antecipado. Pessoas Presas e não privados de direitos políticos. Disponível em: <https://www.portaldoeleitor.pt/Documents/Europeias%202014/AF_FolhetoVoto_Presos.pdf>.

escort; in Canada, votes sent by post are counted at the inmate's place of residence outside the prison system; in other places, electoral commissions are moved to prisons to collect votes, and proxies are used to grant powers legally to third parties so they may vote on behalf of an inmate.³⁰

VI. Recommendations

55. Considering that the suspension of the voting rights of convicted persons affects a huge portion of the Brazilian population, preventing more than one million people from exercising their political rights in the year 2018; that the groups affected by the suspension of the right to vote are the most socially and economically vulnerable, specifically individuals who are mostly young, black or brown, with low education levels and coming from urban areas with the worst conditions for the full exercise of their citizenship; that in the last Universal Periodic Review for Brazil, the country received recommendations to adapt its penal regulations to international human rights conventions and treaties, to incorporate and observe Mandela's Minimum Rules (85) and to promote actions to combat racism, but the recommendations remain unfulfilled; the following recommendations are suggested for Brazil:

56. Review its regulations in accordance with international human rights conventions and treaties, in order to guarantee universal suffrage, in particular, the right to vote for accused persons with criminal convictions;
57. Assure the effective right to vote for people who are provisionally arrested, in compliance with the Mandela Rules and as measures of non-discrimination and to fight racism;
58. Promote the extinction of the fine penalty and its effects on the exercise of political rights and citizenship;
59. Adopt effective measures to assure the full exercise of citizenship to people who have been in prison, including the right to vote, access to documentation and the extinction of fines;

³⁰ ISPAHANI, Laleh. Voting Rights and Human Rights. In: EWALD, Alec; ROTTINGHAUS, Brandon (ed.). **Criminal Disenfranchisement in an International Perspective**. New York: Cambridge University Press, 2009. p. 25-58.