

Chapter 2. The influence of legal changes on the development of the electorate

2.1. Restrictions to the right to vote across space and time

Democracy is the ‘government of the people, by the people and for the people’. According to this definition, attributed to Abraham Lincoln, the people are a fundamental element of all democratic systems. Democracy is the rule *of* the people, since governments are composed by individuals who belong to the people. It is a rule *by* the people, since its members participate in decision-making processes. Finally, democracy is a rule *for* the people, since governments are expected to rule in accordance with the people’s best interests.⁵⁵ While there is a wide agreement that the rule of, by and for the people is a hallmark of democratic systems, much less agreement exists on how membership of ‘the people’, or electorate, should be defined.⁵⁶ In the following sections, examples from electoral law⁵⁷, democratic theory and international law will be contrasted to show that conceptions about who should be a member of a demos have changed over time. Even today a consensus on who should be able to vote does not exist. After the comparison of these examples, it will briefly be discussed in Chapter 2.2. how changing conceptions about who should be entitled to vote have shaped the size and structure of electorates in European countries over time.

2.1.1. Electoral law

In the ancient Greek polis of Athens (around 5th/4th century before Christ; BC) membership in the demos was restricted to free adult male citizens. Citizenship was defined by descent: only individuals whose parents or even ancestors of

⁵⁵ See *Breit, G.*, Lincoln, 2003, p. 166.

⁵⁶ See *Rubio-Marín, R.*, Immigration, 2000, p. 25 f.; *López-Guerra, C.*, Expatriates, 2005, p. 218.

⁵⁷ Access to the franchise has not always been regulated by law, but was regulated by customs and unwritten rules during long parts of history (see for instance *Wölk, M.*, Wahlbewußtsein, 1984, p. 316 and *Payling, S. Y.*, Elections, 1999, p. 237). While this chapter is especially interested in definitions of the demos which are incorporated in written law, it will also refer to polities in which such unwritten rules existed.

higher order had already been citizens of Athens were also considered citizens. The members of the *demos*, thus defined, regularly met in public assemblies, debated and decided political questions, legislated and distributed public offices by lot or by vote and controlled the magistrates. Slaves, women, children and resident aliens were excluded from these processes of public decision making. Members of the *demos* who were convicted of a crime could also be deprived of their right to participate. In addition, since physical presence in the assembly was required, membership in the *demos* was de facto limited to men living in or close to Athens.⁵⁸ Membership in the *demos* of Athens was thus, as Koslowski stresses, of a “highly exclusionary nature”.⁵⁹

During the times of the Roman Republic (from 5th century BC), political power lay with the magistrates, the senate and – to a lesser extent – with different types of public assemblies. The most important of these assemblies were the *comitia centuriata* which was composed of Roman men of military age and the *concilium plebis tributa* which was open to all male citizens with the exception of patricians. In contrast to Athens, membership in the assemblies was also open to non-natives and to free inhabitants of conquered cities and regions who had obtained citizenship rights. The latter group of persons however could generally not exercise their political rights, since it required physical presence in the assemblies held in Rome.⁶⁰ The functions of the different assemblies were more limited than in Athens. Instead of arguing about political questions that could be put on the agenda by all, the members of the Roman assemblies decided by means of yes/no-answers about questions that were put to their notice by the Senate or the consuls of Rome. The members of the assemblies also elected magistrates and tribunes. During elections votes were not counted individually but by units. These units could be rural or city tribes or military units, and they were designed to give higher influence to wealthier groups of the population.⁶¹

⁵⁸ See Saage, R., *Demokratiethorien*, 2005, pp. 50-55; Koslowski, R., *Migrants*, 2000, p. 73; Pammatt, J. H., *Elections*, 1988, pp. 137-139; Lippke, R. L., *Disenfranchisement*, 2001, p. 559.

⁵⁹ Koslowski, R., *Migrants*, 2000, p. 82.

⁶⁰ See Pammatt, J. H., *Elections*, 1988, p. 131 f.; Saage, R., *Demokratiethorien*, 2005, p. 64.

⁶¹ See Roth, K., Cicero, 2003, p. 48 f.; Saage, R., *Demokratiethorien*, 2005, p. 64 f.; Pammatt, J. H., *Elections*, 1988, p. 131 f.

During the Medieval ages and early modern period, public assemblies as they had existed in Athens or during the Roman Republic were held mainly in villages, for instance in 14th and 15th century Switzerland, San Marino or in medieval Scandinavia. Membership in these assemblies was generally open to adult free men, but in some cases additional criteria to limit membership were used. In San Marino, for instance, only male heads of households could participate. Public assemblies in Scandinavia, so-called ‘things’, were only open to free adult men who could fulfil property requirements.⁶² Apart from local assemblies, the Medieval period witnessed the development of city councils, for instance in Flanders, German cities or Italy. Again, the right to elect or become member of these bodies was the prerogative of small groups of the population. In Italian city states of the 11th to 13th century, for instance, peasants, workers, the poor, women and children did not enjoy political rights and could not become members of councils. In contrast to the practice in ancient Rome, inhabitants of conquered towns were also excluded from participation.⁶³

In addition to assemblies and city councils, early forms of regional and national parliaments developed in medieval times, for instance in France, Spain or England. In these bodies, members of noble families or the clergy were generally most influential, but towns were sometimes represented as well.⁶⁴ England is often considered a forerunner of representative parliamentary practice, since elections to the House of Commons were held from a very early period. The first documents dealing with electoral regulations date back as far as the early 15th century. Throughout the medieval and early modern period, the right to vote in these elections remained similarly restrictive as in village assemblies or city councils. Only adult males with property could vote, while women, children and less wealthy men were not enfranchised.⁶⁵

⁶² On Switzerland, see *Im Hof, U.*, Schweiz, 2007, pp. 35-37 and *Hansen, M. H.*, Athenian democracy, 1992, p. 21 f. On San Marino, see *Sundhaussen, U.*, Peasants, 2003, p. 217. On Scandinavia, see *Wildte, F.*, Thing-steads, 1928, p. 329 and *Myrberg, N.*, Room for all, 2008, pp. 135 and 143-145.

⁶³ On Italy, see *Jones, P. J.*, Communes, 1964, p. 74 f. For a general overview of developments in Europe, see *Blockmans, W. P.*, Typology, 1978.

⁶⁴ See *Blockmans, W. P.*, Typology, 1978, p. 204 ff.

⁶⁵ See *Payling, S. Y.*, Elections, 1999; *Phillips, J. A./Wetherell, C.*, Reform act, 1995, p. 413.

The criteria used to limit membership in the demos were also set high when the first large-scale representative democratic systems developed after the French and American Revolutions. The first written constitution of France, enacted in 1791, contained an extensive list of criteria to define membership in the demos. While some of the criteria had been used in previous times already, other restrictions appear to not have been used before. The constitution stipulated that only French men, aged 25 or older, who lived in France and paid direct taxes in the amount of at least three days' work, who were registered in the municipal list of the national guard and had taken a civic oath, were 'active citizens', i.e. members of the electorate. Servants were excluded, as were citizens who were indicted or bankrupt, who had been deprived of their civil rights by court ruling, who had been sentenced *in absentia* or who had joined foreign orders of knights or similar corporations. Male foreign residents in France could become French citizens and join the electorate after five years of residence, if they fulfilled all other electoral requirements and if they had married a French woman, bought property or had founded a farm or an enterprise in France.⁶⁶ Active citizens, thus defined, were entitled to participate in biennial elections, in which the members of an electoral college were chosen. The college members then elected the members of parliament.

In contrast to the first French constitution, the constitution of the USA, adopted in 1787, did not contain any regulation on who should be entitled to vote. Instead, the states of the Union were given the right to define which members of their population should form part of the demos.⁶⁷ Due to this lack of definition at the national level, access to the franchise developed differently across states during the following century. Most states restricted the franchise to adult, property-owning white men, but they varied with regard to exact property or income requirements as well as with regard to the rights granted to women, foreign residents, prison inmates, native Americans and other population

⁶⁶ See *Saage, R.*, *Demokratietheorien*, 2005, p. 119, see also French Constitution of 03.09.1791, Second title, Second article and Third title, First chapter, Second section.

⁶⁷ See *Keyssar, A.*, *Right to vote*, 2009, p. 18.

groups.⁶⁸ A stronger approximation of franchise regulations across states was only reached when successive constitutional amendments during the 19th and 20th century declared illegal all suffrage restrictions based on “race, colour or previous condition of servitude”⁶⁹, established the suffrage for women and set the minimum voting age at 18 years.⁷⁰

In Germany, the right to vote was introduced during the 19th century. Different German states which formed the German Confederation (*Deutscher Bund*) in 1815 established bi-cameral parliaments and entitled male adult citizens of Christian faith to elect the members of the second chambers. Electors generally had to fulfil property or income requirements. A homogeneous set of electoral rules was only introduced after the foundation of the North-German Confederation (*Norddeutscher Bund*) in 1866. The constitution of the Confederation stipulated that the members of parliament (*Reichstag*) should be elected by resident male citizens aged 25 and older. Electors could be excluded from elections if they were receiving poor support, were bankrupt, were placed under guardianship or had lost their civil rights through court ruling. Soldiers also had to abstain from voting.⁷¹

The above examples show that criteria to restrict membership in assemblies or electorates have differed across time and space. Some groups such as children, women or foreign residents were excluded in many or all examples mentioned above. Other population groups such as the poor, racial or religious minorities formed part of the demos in some polities, but not in others. In addition, some polities varied the degree to which individual electors could influence election results, e.g. by means of a census suffrage. Especially since the late 19th century, many franchise restrictions have been abolished in Western democracies.

⁶⁸ See Neale, T. H., Eighteen year old vote, 1983, p. 2; Aylsworth, L. E., Alien suffrage, 1931; Keyssar, A., Right to vote, 2009, pp. 305-368.

⁶⁹ 15th constitutional amendment of 1869, quoted in Neale, T. H., Eighteen year old vote, 1983, p. 3. This regulation was initially circumvented by many Southern states. The disenfranchisement of African-American citizens was only completely abolished in the 1960s.

⁷⁰ See Neale, T. H., Eighteen year old vote, 1983, p. 2 f.

⁷¹ For a detailed description of the historic development of the franchise in Germany, see Schreiber, W., Handbuch, 2002, pp. 60-66; Schmilowski, F., Demokratisierung, 2008, pp. 79-90.

Table 1: Current restrictions of the franchise based on membership and competence in Western European countries in 2011

Countries	Elections to	Community Membership			Competence	
		Citizenship: Only citizens allowed to vote?	Residence: Disenfranchisement of expatriates possible?	Law abidingness: Disenfranchisement of prison inmates possible?	Age: Which minimum voting age?	Mental health: Disenfranchisement of people with mental disabilities possible?
Austria	Nationalrat	Yes	No	Yes	16	No
Belgium	Congrès national	Yes	No	Yes	18	Yes
Denmark	Folketing	Yes	Yes	No	18	Yes
Finland	Eduskunta	Yes	No	No	18	No
France	Assemblée Nationale	Yes	No	Yes	18	Yes
Germany	Bundestag	Yes	No	Yes	18	Yes
Greece	Vouli Ton Ellinon	Yes	No	Yes	18	Yes
Iceland	Althingi	Yes	Yes	No	18	No
Ireland	Dáil	Yes, or British citizenship	Yes	No	18	No
Italy	Camera dei Diputati	Yes	No	Yes	18	Yes

Continuation of Table 1

Countries	Elections to	Community Membership			Competence	
		Citizenship: Only citizens allowed to vote?	Residence: Disenfranchisement of expatriates possible?	Law abidingness: Disenfranchisement of prison inmates possible?	Age: Which minimum voting age?	Mental health: Disenfranchisement of people with mental disabilities possible?
Luxem- bourg	Chamber of Deputies	Yes	No	Yes	18	Yes
Nether- lands	Tweede Kamer	Yes	Yes	Yes	18	No
Norway	Storting	Yes	No	Yes	18	No
Portugal	Assembleia da República	Yes or Brazilian citizenship with equal rights status	No	Yes	18	Yes
Spain	Cortes Generales	Yes	No	Yes	18	Yes
Sweden	Riksdag	Yes	No	No	18	No
Switzer- land	Nationalrat	Yes	No	No	18	Yes
United Kingdom	House of Commons	Yes or qualifying citizen of Commonwealth countries or Ireland	Yes	Yes	18	No

Source: *Blais, A./Massicotte, L./Yoshinaka, A.*, Right to vote, 2001, pp. 44-50. Information was adjusted, updated and complemented by own research (see Annex 1).

Poor persons, women or workers, for instance, are today entitled to vote. In addition, the votes cast in elections count equal, since systems of census suffrage have been abolished. Definitions of the electorate have thereby become somewhat more similar across countries. Nonetheless, in a comparative study of 63 democracies, Blais and colleagues show that membership in electorates continues to differ across countries today.⁷² Table 1 shows the findings on current voting restrictions in national parliamentary elections of Western European states.⁷³ As can be seen, these countries use citizenship, residence and law abidingness as well as age and mental health to restrict access to the franchise. Blais and colleagues subsume these restrictions into two subgroups: community membership restrictions and competence restrictions.

Citizenship, residence and law abidingness are defined as membership restrictions. States use them to ensure that only fully integrated members of the political community are enfranchised. Foreign residents are not considered to be full members of the community in most states and are therefore not entitled to vote. Only Ireland, Portugal and the United Kingdom are exceptions. The UK entitles citizens of Commonwealth countries and Ireland who are resident in the UK to participate in elections to the House of Commons. Ireland reciprocates this entitlement by granting the suffrage in *Dáil* elections to British citizens living in Ireland. Portugal entitles resident Brazilian citizens who enjoy an equal political rights status to vote in elections to the *Assembleia da Republica*.⁷⁴

Citizens who live abroad – so-called expatriates – today retain the right to vote in many Western European countries. Only Denmark, Iceland, Ireland, the Netherlands and the United Kingdom have enacted provisions that allow for their disenfranchisement. These countries thus do not consider all expatriates as

⁷² Blais, A./Massicotte, L./Yoshinaka, A., Right to vote, 2001.

⁷³ The content of the table is based on Blais, A./Massicotte, L./Yoshinaka, A., Right to vote, 2001, pp. 44-50. It was adjusted, completed and updated by own research. Constitutions, electoral laws and webpages of parliaments and governments were consulted to verify whether electoral criteria have changed since the publication of Blais' and colleagues' book. The legal sources that were consulted in the updating process are included in Annex 1 at the end of this study.

⁷⁴ See Blais, A./Massicotte, L./Yoshinaka, A., Right to vote, 2001, p. 54. Regarding the UK and Ireland, also see Miller, M. J., Participation, 1989, p. 129. States differ with regard to how citizenship can be acquired: See Bauböck, R., et al., Acquisition and Loss, 2006.

full members of the polity. The exact conditions under which disenfranchisement is possible however differ.⁷⁵

Finally, Blais and colleagues classify law abidingness as a membership restriction. They argue that the disenfranchisement of prison inmates can be interpreted as their (temporary) exclusion from membership in the political community. In Western Europe, countries appear to be divided on this issue.

The last two criteria that Western European countries employ to restrict access to the franchise – age and mental health – are classified as competence restrictions by Blais and colleagues. Western European states use these criteria to restrict the franchise to persons who are judged competent enough to make autonomous and informed decisions about political questions.⁷⁶ Children are generally not considered mature enough for these tasks. States therefore define a minimum voting age. With the exception of Austria, which entitles 16- and 17-year-olds to vote, all countries currently define 18 years as the minimum voting age for parliamentary elections at the national level.

Similarly, where persons with mental disabilities are excluded from voting, this reflects the view that these persons cannot make an independent and informed choice at the ballot box. Belgium, Italy and Spain belong to the group of countries which disenfranchise persons with mental impairments. This might include persons who are placed under guardianship or are in psychiatric hospitals. Other countries like Norway or Sweden allow all mentally impaired persons to vote and hence consider them competent to participate in elections.⁷⁷

The membership and competence restrictions which individual countries currently define are used cumulatively: Persons are excluded from the franchise if any of the restrictions applies to them. Conversely, individuals who are granted the right to vote have to fulfil all requirements. Table 1 reveals that countries in Western Europe have enacted at least one restriction based on community membership and competence each. They however differ with regard

⁷⁵ For an extensive description and discussion of expatriates' voting rights in different countries see Ellis, A., *et al.*, *Voting*, 2007 and Bauböck, R., *Stakeholder citizenship*, 2007.

⁷⁶ Blais, A./Massicotte, L./Yoshinaka, A., *Right to vote*, 2001, p. 42.

⁷⁷ See Blais, A./Massicotte, L./Yoshinaka, A., *Right to vote*, 2001, p. 51 f. See also Nash, M., *Voting*, 2002.

to the number and type of restrictions which are used. Only for two criteria we find a stronger degree of concurrence: The right to vote remains a prerogative of citizens in most countries and the minimum voting age is nearly always set at 18 years. Apart from this, many differences in the definition of the demos remain.

2.1.2. Democratic theory

Just as electoral criteria which polities have used differ across time and space, opinions about how membership in a demos *should* be defined have changed over the course of history.

Until the early modern period, political thinkers discussed democratic participation with reference to the ancient polis of Athens. Democratic participation in this context meant direct participation in a city state or village assembly. This form of rule did not receive much support from political thinkers.⁷⁸ Already ancient philosophers like Aristotle (384-322 BC) and Plato (427-347 BC) were critical of the direct democratic practices that existed in Athens. They considered democracy to be the rule of the poor, or the mob, that uses political power to further their own personal interest rather than the common good. The ‘poor mob’ in their understanding included adult male citizens. The exclusion of women, resident aliens, children, slaves or convicted criminals from political participation, as it was practiced in the polis of Athens, was not put into question by them.⁷⁹ Aristotle and Plato acknowledged that direct democratic practices would promote personal freedom better than other political systems, but also criticised that it would lack discipline and stability. Thus, they considered democracy to be inferior to other types of government. Aristotle for instance favoured ‘mixed’ political systems in which democratic participation would be just one element.⁸⁰

Between the rediscovery of Aristotle’s oeuvre in the 13th century and the beginning of the modern period, political theorists such as Jean Bodin (~1529-

⁷⁸ See Hansen, M. H., *Athenian democracy*, 1992, p. 23; Schmidt, M. G., *Demokratietheorien*, 2006, p. 59 f.

⁷⁹ See Schmidt, M. G., *Demokratietheorien*, 2006, p. 34 f.; Salkever, S. G., *Women*, 1986, p. 242.

⁸⁰ See Hansen, M. H., *Athenian democracy*, 1992, p. 16; Saage, R., *Demokratietheorien*, 2005, p. 58 f.; Schmidt, M. G., *Demokratietheorien*, 2006, pp. 38-55.

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