

ARTICLES

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Collateral Sanctions for Offenders and Ex-offenders – Contrasts between the United States of America and Nordic European Countries

Abstract

The enforcement of collateral sanctions on convicts and ex-convicts affecting political, civil and social rights that do not relate to the previous offence committed, frequently based on non-criminal law provisions, is proving to have a highly significant, socially exclusionary effect. This paper evaluates and confronts the reality of these sanctions in two different country regions, which apparently show distinctive criminal policies. The study forms part of wider research on the dimension of social inclusion / social exclusion as a guide to comparative criminal policy.

Keywords: Social exclusion, collateral sanctions, deprivation of political, civic or social rights, comparative criminal justice policy.

Contents: Introduction. 1 Deprivation of political, civil and social rights associated with the conviction. 2 Deprivation of political rights. 2.1. The deprivation of political rights in the United States. 2.2. The deprivation of political rights in Nordic European countries. 3 Deprivation of civil and social rights. 3.1. The deprivation of civil rights. 3.1.1. The deprivation of civil rights in the United States. 3.1.2. The deprivation of civil rights in the Nordic European countries. 3.2. Deprivation of social rights. 3.2.1. The deprivation of social rights in the United States. 3.2.2. The deprivation of social rights in the Nordic European countries. Conclusions.

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Introduction

In a previous study¹, I proposed the development of an analytical model to make comparisons between different national systems of crime control. To this end, I have advocated the social inclusion/social exclusion dimension as criterion of comparison, to the detriment of the most widespread criterion of punitiveness/non-punitiveness. It should be made clear that the social inclusion/social exclusion dimension is not intended to take into account the inclusive or exclusive social effects that a given system of national crime control has on the general population. Actually, it focuses attention on individuals or groups who are main targets of crime prevention and prosecution agencies. That is, those who have been, are, or are likely to be directly subjected to crime control agencies in their condition of either offenders, ex-offenders or suspects.

A crime control system would be inclusive if its intervention in relation to the suspect or offender predominantly generates effects that increase or at least do not worsen their ability to develop a future life of voluntary conformity with the law. By contrast, the crime control system would be exclusive if its intervention in relation to the suspect or offender places them in individual or social conditions under which it would be more difficult for them, if attempted, to break the law or avoid detection. This analytical proposal is based on two fundamental assumptions, pending final demonstration: maintaining a certain level of social inclusion of suspects, convicts and ex-convicts is one of the most effective strategies for crime prevention. The causation or deepening of social exclusion of suspects, convicts and ex-convicts ultimately leads to greater crime in the medium and long term.

Undoubtedly, the restriction on offenders, ex-offenders and suspects is a significant limitation of our analytical model. But no more than that derived from the usual approaches of comparative criminal policy which are also focused on the effects of crime control institutions over those most directly affected by its operations. Our approach has an advantage over these inasmuch as it is easily integrated into the broader strategy of public welfare policies, for which proper social integration of specially disadvantaged groups is one of its characteristic features.

In order to develop comparisons between different national crime control systems, the author has devised a set of 25 indicators, grouped into nine categories. Each should be clearly reflected in various current punitive rules or practices common in Western industrialized countries. These rules or practices have to be appropriate to express the social inclusion or social exclusion aspect predicated by the respective indicator.

A scale should then be implemented to measure the social inclusion/social exclusion dimension of different national crime control systems in accordance with the results obtained through these indicators. This would situate each country in a particular place on a continuum whose opposing ends would be occupied by the two most op-

1 See Díez Ripollés, JL. La dimensión inclusión / exclusión social como guía de la política criminal comparada. *Revista electrónica de ciencia penal y criminología*. 13-12 (2011). <http://crimine.ugr.es/repc>

posing national systems. It was also anticipated that there would be ample evidence to suggest that the majority of US states as well as its federal system could be on the end of social exclusion, while European Nordic countries –Denmark, Finland, Norway and Sweden– could be on the other end of social inclusion.

A team of researchers from the Institute of Criminology at the University of Málaga has already embarked upon the work necessary in order to validate the proposed instrument of comparative criminal policy.

Meanwhile, it may be illustrative to check whether the rules and practices integrated into the respective indicators show a mainly divergent configuration in the United States of America and the Northern European countries. This paper aims to verify this extreme concerning the pool of indicators named ‘Legal and social status of offenders and ex-offenders.’

1. Deprivation of political, civil and social rights associated with the conviction

The additional deprivation of certain political, civil or social rights of offenders and ex-offenders solely because their sentence, especially if it entails prison, is an increasingly widespread phenomenon. We are not referring to the deprivation of rights imposed as main penalty, or as penalty, preventive measure or any other punitive consequence, due to the direct relationship that the rights denied have in keeping with the nature of the crime. Nor are we thinking of the deprivation of rights necessarily linked to serving a sentence². It relates, on the contrary, to the compulsory or optional removal of rights derived from the simple fact of having been convicted of a crime or group of crimes unrelated or barely related to the right that has been deprived. No matter such deprivation of rights has been either imposed in the sentence as penalty, preventive measure or other punitive consequence, or later established by other judicial or administrative bodies.

An exhaustive list of all such rights may be difficult to achieve. However, it is possible to cite, among political rights, the right to vote, to be elected for public office, to be part of a jury or to legally reside in a country. Amongst civil rights, this can refer to continuation of marriage, parental rights, adoption, appointment to public office, holding of a professional license, access to private sector employments, eligibility for public contracting, or obtaining a driving license. Regarding social rights, this could include access to social welfare benefits, eligibility for public housing, access to scholarships and other educational financial aid or to some health programmes³.

2 Including obligations or duties related to probation, open prison regime or parole, among other assumptions.

3 See Travis, J. Invisible punishment: an instrument of social exclusion. In: Mauer, M, Chesney-Lind, M. (eds.). *Invisible punishment. The collateral consequences of mass imprisonment*. The New Press, 2002, p. 18-19, 22, 23-24; Petersilia, J. *When prisoners come home*. Oxford University Press, 2003, p. 105; Chin, G. Race, the war on drugs and the collateral consequences of criminal conviction. In: Mele, C.; Miller, T. (eds.). *Civil penalties, social consequences*. Routledge, 2005, p. 27-29; Demleitner, N. A vicious circle: re-sanctioning offenders. In: Mele, C.,

The additional deprivation of these rights, or collateral consequences of conviction, have until recently gone unnoticed or been neglected by legal operators, hence some scholars have been able to refer to them as invisible criminal penalties. It is not just that they are a fleeting object of attention in criminal legislative decisions, usually concentrated in major penalties corresponding to existing or newly created crimes. Nor in sentencing they enjoy minimal consideration, either because they are automatically imposed with the main penalty, or because they will later emerge, based on non-criminal legal provisions of simultaneous or subsequent application to the sentence.

The consequence is that, despite the fact that their punitive content may be equal or more intense than that of penalties such as imprisonment, they do not fully benefit from the legal safeguards which are attached to criminal penalties. Even in cases in which they are imposed within a criminal proceeding, it is very common for future convicts to be uninformed or unaware of the additional sanctions that will be placed on them, something that has an important impact when accepting a plea bargain⁴.

The application of these collateral sanctions, which are not usually imposed for misdemeanors, often extends to the periods of probation and parole for offences involving imprisonment and, in general, they endure or begin after the termination of the sentence or the main penalty.

In the United States, there have been attempts to quantify its extent despite the serious obstacles due to the fact that these sanctions are implemented, with highly diverse configurations, at the federal, state and local levels⁵. It can be seen in any case that the

Miller, T. (eds.). *Civil penalties*. Ibidem p. 185-186; Mele, C., Miller, T. Collateral civil penalties as techniques of social policy. In: Mele, C., Miller, T. (eds.). *Civil penalties*, Ibidem, p. 9-12; Colgate Love, M. *Relief from the collateral consequences of a criminal conviction: a state-by-state resource guide*, 2005. www.blogs.law.columbia.edu/4cs/files/2008/11/statebystatere-liffromccc.pdf Last access: November 2013; Uggen, C., Manza, J., Thompson, M. Citizenship, democracy and the civic reintegration of criminal offenders. *Annals of the American academy of political and social sciences*. 605, 2006, p. 296-299; Pinard, M. Collateral consequences of criminal convictions: confronting issues of race and dignity. *New York University Law Review*, vol. 85, 2010, p. 459-461, among others.

4 In the United States, the requirement for proper information regarding these collateral consequences of the conviction prior to the plea bargain agreement, has recently gained importance among legal practitioners. Some state laws have made it mandatory to report about the collateral consequence of deportation in the plea bargaining procedure, and the US Supreme Court, in its ruling on *Padilla v. Kentucky*, 559 US 356, issued in 31.3.2010, confirmed that requirement. However, this requirement is often not established for other types of deprivations of rights.

See Travis, J., cit., 15-17, p. 34-35; Mele, C., Miller, T., cit., p. 11-12; Chin, G., cit., p. 28, 41-42; Demleitner, N., cit., p. 186; Uggen, C., Manza, J., Thompson, M., cit., p. 296; Pinard, M., cit., p. 460, 490, 521-522; Ferster, L., Aroca, S. Lawyering at the margins: collateral civil penalties at the entry and completion of the criminal sentence. In: Mele, C., Miller, T. (eds.). *Civil penalties, social consequences*. Routledge, 2005.

5 As of 2004, some authors have estimated that such sanctions affect approximately 16 million people, 7.5% of the US adult population. Even if those who have been incarcerated in local jails and those with a suspended prison sentence are excluded, the figure, less subjected to estimates, still stands at 6 million citizens, 2.9% of the adult population. See Uggen, C., Manza, J., Thompson, M. cit. p. 283-290. See also a classification of the different US states based on the

so-called wars on drugs and terror have brought about since the 80s, and in contrast to the reverse movement recorded in the decades of the 60s and 70s, a marked expansion of these sanctions, which, with some exceptions, has been accelerated since the 2001 terrorist attacks. If the 'tough on crime' policies of recent decades largely explain this increase, the influence of electronic criminal recording and its easiest dissemination cannot be forgotten either, as well as federal incentives that have been offered to states willing to expand the use of a good number of these collateral sanctions. Moreover, during the initial decades of this century, a large cohort of those sentenced to prison during the first law-and-order policies of the 80s and 90s are now reentering society; as the effects of these collateral sanctions persist after termination of the sentence, it is now when the effects are fully realized⁶.

A reflection on the rationale of these sanctions brings us back to the discourse on social exclusion with which we are already familiar. It is difficult to understand these reactions from the perspective of retribution, as they bear little or no relation to the type of crime committed and its severity. Actually, some countries with a strong punitive trend do scarcely make use of them; they are perceived not as sanctions but administrative measures of social control. Nor does it appear that intimidation, at least general deterrence, plays a decisive role: sanctions, the provision of which in many cases is not known and their existence is discovered by the convict at the rate he suffers them, fail to be deterrent. Without doubt, the most commonly argued ground is the need to address the dangerousness of the individual, which would explain the resistance to classify these sanctions as penalties: most of these sanctions are, however, applied indiscriminately, without regard to the conditions of the offender or of his behaviour. Certainly, these sanctions could be conceived as incapacitating, aimed at preventing any kind of interaction of offenders and ex-offenders with the rest of the community.

This last point, however, leads us towards a more comprehensive approach, based on the attribution of a political, civil and socially inferior status to offenders and ex-offenders⁷. Through the cumulative deprivation of these rights, these individuals are placed in a socially shameful, stigmatizing situation, one that denies them full citizenship status and keeps them on the fringes of society⁸. Socially exclusionary effects already produced by imprisonment, or by direct subjection to crime control system, are reinforced by an additional reaction. This usually exceeds the time for termination of

extent of such disqualifications in Petersilia, J. cit. p. 133-136. References to a 2008 federal law that requires the compilation of collateral sanctions of the 50 states, in Pinard, M. cit. p. 532.

6 See Travis, J. cit. p. 18, 25-26; Petersilia, J. cit. p. 105-106; Colgate Love, M. cit. p. 2, 4, 7; Mele, C., Miller, T. cit. p. 13, 22-23; Pinard, M. cit. p. 459-461, 489-490.

7 Some authors have pointed out, following the Weberian conception, that certain groups of offenders, such as sex offenders, go on to become a caste, a group hindered from participating, often for life, in a number of social institutions. See Uggen, C., Manza, J., Thompson, M. cit. p. 299-303.

8 Some authors have shown that what ends up being narrowly interpreted in relation to offenders and ex-offenders is the concept of personal dignity, so that the rights they are deprived of are not as seen as such but rather as privileges that can be eliminated. See Pinard, M. cit. p. 519-523.

the main penalty and simply means severely disrupting access by offenders and ex-offenders to political and social participation and to the benefits of the welfare state. Instead, these groups become criminally governed, for which purpose the society has no doubt in involving social agents outside the criminal system itself, such as electoral or immigration authorities, various judicial and administrative bodies, employers, landlords, or those responsible for education or health services, among others.

That all this is a direct attack on the rehabilitation purposes pursued by the criminal law, and an increase in the short to medium term risk of recidivism, is beyond doubt. The continued exclusion of these people from social activities unrelated to their crime makes it difficult for their integration back into society to take place, and generates also dissociating effects on their families and even neighborhoods or districts in which such persons have a significant presence. Moreover, a respect to fellow citizens' rights can hardly be asked for if community denies you such rights in relation to a criminal behaviour that does not merit it⁹.

The realisation that this deprivation of rights actually focuses on socioeconomically disadvantaged groups, in some societies closely linked to certain ethnic minorities, adds an important political component. Not only are we before an abusive criminal policy which accords an inferior status on those subjected to the crime control system, but something altogether more ambitious: the design of an unequal society in which opportunities for personal development and political participation are conditioned by membership to one social group or another. In short, a society contaminated by social exclusion policies¹⁰.

An additional problem is that it is not always easy for the full recovery of the rights that the offender or ex-offender has been deprived of. Although national differences can be significant, studies conducted in the United States show a general failure of revocation procedures: provisions of automatic revocation of these deprivation of rights once the term has expired are rare, and the administrative or judicial procedures for pe-

9 See Uggen, C., Manza, J. Democratic contraction? Political consequences of felon disenfranchisement in the United States. *American Sociological Review*, vol. 67, 6, 2002, p. 796; Travis, J., cit., p. 19, 23, 25-27; Petersilia, J. cit., p. 105, 136-137; Mele, C., Miller, T., cit.; Mele, C. The civil threat of eviction and the regulation and control of US public housing communities. In: Mel, C., Miller, T. (eds.). *Civil penalties, social consequences*. Routledge, 2005; Colgate Love, M. cit., p. 2, 4; Demleitner, N., cit., p. 197-199; Manza, J., Uggen, C. *Locked out. Felon disenfranchisement and American democracy*. Oxford University Press, 2008, p. 113-135; Pinard, M., cit., p. 467-468, 506-511.

10 The concentration of these collateral sanctions on black and Hispanic minorities in the United States, in a context of poverty, is well established. This is partly explained by the frequent enforcement of these sanctions in relation to particular offences frequently carried out by these minorities, such as drug offences.

See Travis, J., cit., p. 31-33; Mauer, M. Mass imprisonment and the disappearing voters. In: Mauer, M., Chesney-Lind, M. (eds.). *Invisible punishment. The collateral consequences of mass imprisonment*. The New Press, 2002, p. 51-53; Rubinsteins, G., Mukamal, D. Welfare and housing. Denial of benefits to drug offenders. In: Mauer, M., Chesney-Lind, M. (eds.). *Invisible punishment*. Ibidem; Petersilia, J., cit., p. 136; Mele, C.; Miller, T., cit., p. 14-22; Chin, G. cit., p. 34-39; Uggen, C.; Manza, J.; Thompson, M., cit., p. 285-286, 291-296, 310; Pinard, M., cit., p. 470-471, 511-517

titioning the revocation often tend to be complex, expensive, lengthy and of an uncertain outcome as broad areas of discretion remain. This means that a significant number of ex-offenders can expect to put up with most of these sanctions for the rest of their lives¹¹.

2. Deprivation of political rights

The deprivation of political rights means limiting, and sometimes denying, access of the individual to the political community and, as such, their citizenship. The dissocialising effects produced by this are easy to identify and understand.

If we think of one of the most fundamental rights, the right to vote, its removal then contains a powerful message that offenders and ex-offenders have become, at least for a time, second-class citizens. The consequences of that decision are directly contradictory to the purpose of social rehabilitation of offenders and ex-offenders. This decision takes on a particularly inconsistent profile when imposed upon ex-offenders who have already paid their debt to society; or upon sentenced persons who are preparing themselves for successful reentry into society, as is the case with probationers, those in open prison regimes or parolees. But it is also a disturbing message for those serving a sentence that has, as one of its important aims, not to hinder the offender's future reintegration into society¹².

One wonders, however, whether disenfranchisement may be appropriate in order to achieve other criminal policy goals. A traditional argument, which dates from classical contractualism, bluntly states that criminals have broken their pact with society and it must have an impact on their recognition as citizens. Such reasoning, which could be included in a retributive idea of punishment, stumbles in the first place with the limited scope which today is attributed to this theory of punishment; to which it should be added that one of its essential components, that of proportionality, is frequently not

11 An overview of the situation in the US regarding the usual three-way revocation of these sanctions, namely, the forgiveness of the executive at the highest level, the sealing or expungement of criminal records and employment discrimination bans, in Colgate Love, M. cit. See also Petersilia, J. cit. p. 106; Mele, C Miller, T. cit. p. 22-23; Pinard, M. cit p. 504-506, 529-530.

12 See Mauer, M. cit., p. 56-57; Petersilia, J., cit., p. 133; Uggen C., Manza, J., "Disenfranchisement and the civic reintegration of convicted felons", in Mele, C., Miller, T. eds. *Civil penalties, social consequences*. Routledge. 2005; Rottinghaus, B. *Incarceration and enfranchisement: international practices, impact and recommendations for reform*. IFES (International foundation for election systems), 2005, p. 5, 37. www.procon.org/sourcefiles/RottinghausDisenfranchisement.pdf, Last access: October 2013; Uggen, C., Manza, J.; Thompson, M., cit., p. 283, 303-304; Brodeur, J.P. Comparative penology in perspective, in Tonry, M. (ed.). *Crime, punishment and politics in comparative perspective*. *Crime and justice Series*, vol. 36. University of Chicago Press, 2007, p. 55-56, 59-60, 81-84; Manza, J.; Uggen, C., cit., p. 36-37, 124-128, 230; Uggen, J., v. Brakle, M., McLaughlin, H. Punishment and social exclusion. National differences in prisoner disenfranchisement, in Ewald, A., Rottinghaus, B. *Criminal disenfranchisement in an international perspective*. Cambridge University Press, 2009, p. 74-75.

respected, given that disenfranchisement in countries where this disqualification is imposed, is applied across the board, regardless of the type of crime or criminals. The deterrent effects of disenfranchisement are also very scarce, in particular due to their marginal value in relation to other harsher components of the sentence, not to mention offenders and would-be offenders' frequent lack of awareness of this component of the sentence¹³. In terms closely related to an incapacitation perspective, it is mentioned the risk that offenders and ex-offenders could coordinate themselves in the exercise of their voting rights in order to promote policy options that favour or do not hinder their continued criminal activity. The argument is not plausible in our populated societies in neither operational nor quantitative terms, even in reference to local elections alone. Moreover, in the unlikely occurrence of this event, it is not clear which constitutional objections could prevent a particular group of citizens from using their vote to try to modify a rule that they feel inappropriate¹⁴.

In fact, taking into account the socio-demographic conditions of most of the once sentenced population, the role of disenfranchisement is to exclude from the political fray certain minorities or particularly disadvantaged social groups, who are frequently highly critical of the current state of affairs. Notwithstanding, this can be unintentional, if not an unexpressed intention¹⁵. Symptomatic in this respect is that in today's political doctrine, it is hard to find strong advocates of this ban on political rights¹⁶. In short, we return to their inconvenient impact on the social reintegration of offenders and ex-offenders.

Another disqualification worth mentioning, of a substantially political nature, is deportation of legal foreign residents after completion of their sentence or of a substantial part of it. Provisions of immigration laws on convicted foreigners with legal residence have become, in today's mobile society, a formidable instrument of social exclusion. These people have been formally accepted into our societies in order to lead their lives, engaging as such with other citizens in societal development. However, because of not having or not yet having, all their political rights, they are subjected to indiscriminate and discriminatory social control by being expelled from their country of residence for having committed a crime, ruining their life expectancies.

13 See Mauer, M. cit p. 55; Rottinghaus, B. cit. p. 4-7; Manza, J., Uggen, C. cit. p. 24-26, 35-36.

14 Consider, for example, particularly restrictive drug laws on small scale trafficking and consumption, or laws dealing with petty property offences, to cite two cases where there may be a relatively big group of offenders and ex-offenders. See Mauer, M. cit. p. 54-55; Manza, J., Uggen, C. cit. p. 12-13.

15 As we shall see below, the prevailing electoral preferences in these groups is also a non-negligible factor. See Uggen, C., Manza, J. (2002). cit. p. 779-781; Mauer, M. cit. p 51-53; Petersilia, J. cit. p. 130; Rottinghaus, B. cit. p. 9, 29; Uggen, C., Manza, J. (2005). cit. p. 69, 72; Manza, J., Uggen, C. cit. p. 9-10, 14-16, 41-68.

16 See Manza, J., Uggen, C. cit. p. 11-12, 25-26. It is certainly striking that international conventions protecting political rights do not prohibit the dispossession of the right to vote or stand for election, and focus instead on ensuring the practice of exercising these rights when allowed. See Rottinghaus, B. cit. p. 10-20.

Without denying the undoubtedly incapacitating and deterring effects of such legal provisions, one cannot ignore the fact that this is achieved at the expense of an unequal and disproportionate assessment of criminal behaviours, which are similar apart from the nationality of the offender. One need not detail the powerful and obvious effects of social exclusion that such approach generates¹⁷, but it should perhaps be mentioned that the deportation of legal foreign residents after completing their sentence has transformed the practice into an instrument that predominantly affects the poorest sectors in society, frequently linked to national, if not ethnic, minorities. In some countries, especially after recent experiences involving terrorism it is also used as a prominent tool for the discretionary control of suspected dissidents¹⁸.

2.1. The deprivation of political rights in the United States

In the United States, disenfranchisement of those sentenced to prison is widespread, and it is very common to extend this disqualification for a period of time after serving the penalty, sometimes for life. Moreover, the number of offences to which this prohibition can be applied, when not all, have expanded in recent decades, including occasionally misdemeanors. With the caveat that, given the large number of states, the figures are subject to constant, albeit not significant changes; in the first five years of the 21st century, there were only 2 states where prisoners' right to vote is not denied, in contrast to the remaining 48 states. In more than 30 states, disenfranchisement is applied to probationers and parolees. In 32 states, disenfranchisement remains after termination of prison sentence, either temporarily or permanently; disenfranchisement for life occurs in 13 states for certain, sometimes non-serious crimes; in 2 states all ex-offenders are permanently deprived of the right to vote for any crime. In 6 states disenfranchisement is imposed for having committed misdemeanors¹⁹.

Given the expansion of punitiveness in the United States in the last decades, the amount of citizens deprived of the right to vote at a certain time in the first five years of the century oscillates, according to various estimates, between 4 and 5 million peo-

17 Highly illustrative in this respect is the observation of an author who highlights that the hardening of deportation law for legal foreign residents because of crime was federally passed in the same parliamentary session of 1996, in which there was a general cut back on welfarist laws. See Miller, T. The impact of mass incarceration on immigration policy, in Mauer, M; Chesney, Lind, M. (eds.). *Invisible punishment. The collateral consequences of mass imprisonment*. The New Press, 2002, p. 223-225.

18 See Miller, T. (2002) cit.; Miller, T. By any means necessary: collateral civil penalties of non-US citizens and the war on terror, in Mele, C., Miller, T. (eds.). *Civil penalties, social consequences*. Routledge, 2005; Kanstroom, D. Immigration law as social control: how many people without rights does it take to make you feel secure?, in Mele, C., Miler, T. (eds.). *Civil penalties, social consequences*. Routledge, 2005; PINARD, M., cit., p. 490.

19 Some estimates reveal that the majority of those affected have not committed violent crimes and that only 4% are murderers or rapists. See Manza, J., Uggen, C. cit. p. 8-9. On these figures, see Uggen, C., Manza, J. (2002). cit. p. 778, 781-782; Travis, J. cit. p. 22, 25, 31; Mauer, M. cit. p. 51; Petersilia, J. cit. p. 130-131; Rottinghaus, B. cit. p. 28-32; Uggen, C., Manza, J. (2005). cit. p. 70; Manza, J., Uggen, C. cit. p. 7-9, 74, 247; Pinard, M. cit. p. 494.

ple. Possibly even more according to some studies. It means in keeping with the majority of these estimates, that around 2% of the national constituency cannot participate in the various elections that are held; in many states, the percentage is 3% and there is a state in which it rises to 10%. In 2004, among those who could not vote, a meagre 27% were in prison, 36% were serving a suspended sentence or on probation and 37% had already completed their sentence. To these figures, one must add 600,000 people, who in numerous states retain the right to vote while in remand detention or serving short jail sentences, but are unable to exercise this right as they cannot be guaranteed access to a polling station. The prevalence of disenfranchisement on certain groups disproportionately represented among the sentenced population is worth mentioning: among the black minority, 13% of the national adult population cannot vote, and in 10 states this percentage reaches or exceeds 20%, and there are some states in which 14% of blacks are disenfranchised for life²⁰.

Some reliable studies have shown that this extended disqualification to vote has been producing significant political effects for some time. First of all, a significant portion of the low percentage of American political participation can be so explained: not considering the well-established lower interest that convicts and ex-convicts have in participating in elections, around 1.5 million votes are lost which otherwise wouldn't be, had these groups not been deprived of their right. Such dispossession has practical effects, above all in relation to those who have already served their sentence, and to those who are serving their sentence out of prison.

In terms of the election results, various estimates of presidential and state elections have been made taking into consideration, in a statistically cautious and sustainable way, the fact that most of those disenfranchised are black or poor whites, and that both groups have a proven tendency to vote, when they do, for members of the Democratic Party. Statistical projections show that, contrary to what happened, the majority in the US Senate had been Democrat since 1986 and during most of the 90s, and that the same party would have had a blocking minority since 1978. Similarly, in the presidential elections of 2000, Al Gore would have won, and not George Bush Jr. given the clear victory that Gore would have had in Florida; and neither John Kennedy nor Jimmy Carter would have been presidents of the United States if at the time when they were elected there would have been as high a percentage as there is now of offenders and ex-offenders deprived of their voting rights. Similar results have been deduced from numerous gubernatorial elections in various states, and it would appear that in local elections in large cities the impact is much greater because concentration of ex-offenders in urban areas. In short, for decades, the large volume of those deprived of their voting rights is giving the Republican Party an electoral advantage, to say nothing of the fact

20 See Uggen, C, Manza, J. 2002. cit. p. 780-782, 785-786, 794-796; Travis, J. cit. p. 25; Mauer, M. cit. p. 50-53; Petersilia, J. cit. p. 130-133; Uggen, C, Manza, J. 2005. cit. p. 70-72; Chin, G. cit.; Rottinghaus, B. cit. p. 28-30; Manza, J., Uggen, C. cit. p. 69-94.

that the interests of nearly five million voters have effectively been excluded from the political debate²¹.

On the other hand, the enfranchisement, in cases where this is possible, may not always occur automatically after release from prison, termination of probation or parole, or a certain lapse of time after the sentence has been served; instead one must petition to have the disqualification revoked. These procedures are complex and the decision is often taken at the highest levels of the state. Successful recovery of the right is not assured as there are often significant margins of discretion; sometimes the applicant is required to provide sensitive information and denials must not be motivated. In fact, the percentage of successful applications is very low, which also explains the small number of petitions. Other problems exist, such as incomplete expungement from state repositories of those who have recovered their rights²².

In the 60s and 70s of last century, with the support of the Voting Rights Act of 1965, there was a clear tendency to limit the circumstances in which voting rights could be deprived for having committed a crime. However, since *Richardson v. Ramirez*, in 1974, the Supreme Court recognized the states' right to disenfranchise criminals, and has remained steadfast in this interpretation up until now, except in cases of intentional racial discrimination. This slowed down the tendency to restrict the use of this disqualification by the states from the 80s, which, combined with the remarkable criminal tightening since then, has led to the current unsatisfactory situation. Since the late 90s, state contradictory trends are evident, albeit legislative decisions that have moderately restricted disenfranchisement are predominant²³. It is indicative, however, that the political debate focuses on the deprivation of this right for those who have already served their sentence, with no debate worthy of mention on disenfranchisement for those who are serving time in prison²⁴.

Deportation of legal foreign residents after completion of their sentences could be implemented in the United States, until the 1980s, in relation to a limited number of crimes, despite frequent use of alternative measures to deportation. The number of

21 See Uggen and Manza, in Uggen, C., Manza, J. 2002 cit.; Uggen, C., Manza, J. 2005. cit. p. 74-75; Uggen, C., Manza, J., Thompson, M. cit. p. 297-298; Manza, J, Uggen, C. cit. p. 165-204.

22 See Colgate Love, M. cit.; Uggen, C., Manza, J. (2005). cit. p. 78-79; Ferster, L., Aroca, S. cit. p. 214 and ff; Manza, J, Uggen, C. cit. p. 84-94, 228 and ff.

23 However, in 2002, the Senate rejected to eliminate disenfranchisement for ex-offenders, and the Supreme Court has not changed its questionable interpretation of the second paragraph of Amendment 14, despite having already resolved numerous cases on disenfranchisement state laws. See Manza, J, Uggen, C. cit. p. 29-31, 223-227

24 See Uggen, C., Manza, J. (2002). cit. p. 794-795; Travis, J. cit. p. 22; Mauer, M. cit. p. 57; Peteresilia, J. cit. p. 133; Rottinghaus. B. cit. p. 31-32; Uggen, C., Manza, J. (2005). cit. p.72-74, 82; Manza, J, Uggen, C. cit. p. 20-22, 28-34, 221-233, 286-289; Ispahani, L. Voting rights and human rights: a comparative analysis of criminal disenfranchisement laws, in Ewald. A., Rottinghaus, B. *Criminal disenfranchisement in an international perspective*. Cambridge University Press, 2009, p. 34, 55-58, with reference to the pressures of international organizations for the US to change its policy in this regard; Pinard, M. cit. p.494, 513, 520.

crimes for which deportation was allowed was extended progressively by laws in 1988 (anti-drugs), 1990 and 1994²⁵.

The situation changed dramatically, however, following the passing of two laws in 1996. In virtue of this, the number of offences carrying deportation increased considerably, to include any type of crime, including misdemeanors for which a sentence of one year or more of imprisonment was foreseen. Moreover, the predicate penalty was not the specific one imposed in that case, but the penalty established in the legal provision for that offence, regardless of the fact that the maximum penalty for non-serious offences is usually high. The period of suspended sentence is also taken into account, and in some states like Florida, deportation can still be an option even if a deferred sentencing has been decreed. Finally, the 1996 laws were applied retroactively to acts committed before the entry into force of these laws in respect of crimes which when committed did not allowed deportation after the sentence had been served.

It is not surprising, therefore, that an accelerated increase of deportations occurred since the mid-90s. As the ban periods for entry after deportation usually extend up to 20 years, some states, under powers granted by a law in 2001, developed practices to reduce these high periods of readmission.

The laws of 1996 were subject from the beginning to intense criticism, even from practitioners, due to their excessively strict nature, and several rulings of the Supreme Court overturning some of their provisions have already been given, especially in respect of their retroactive application. However, the terrorist attacks of 2001 then took place, which apart from generating extremely harsh, specific legislation spearheaded by the US Patriot Act, ultimately legitimised in many minds the preceding laws of 1996. Currently, the set of laws affecting legal foreign residents is now equipped with powerful legal instruments which enable deportations without a previous conviction. Hence, it has been said that, in practice, any legal foreign resident may be expelled if recommended by the immigration services²⁶.

2.2. The deprivation of political rights in Nordic European countries

The Nordic countries are subject to the case law of the European Court of Human Rights (ECHR), which prohibits deprivation of voting rights that do not have a clear purpose or are disproportionate, including indiscriminate disenfranchisement that do not meet the nature of the offence, the seriousness of the crime or that of the penalty²⁷. In any event, offenders and ex-offenders always maintain the right to vote in these countries, as previous deprivations, which were associated with having committed certain crimes or in relation to specific penalties, have disappeared.

25 See Miller, T. 2005. cit. p. 50-54.

26 See Miller, T. 2002 cit.; Miller, T. (2005) cit.; Kanstroom, D. cit.; Travis, J. cit. p.23; Mele, C., Miller, T. cit. p. 19-20; Chin, G. cit. p. 33; Demleitner, N. cit. p. 187-194.

27 See ECtHR, *Hirst v. United Kingdom* (n. 2), Application no 74025, Judgment 6th October, 2005. See comments in Ispahani, L. cit. p. 41-45, 50.

In Denmark, offenders and ex-offenders maintain their right to vote. The constitution did, however, allow disenfranchisement for those serving a sentence, and up until 1933 the criminal code disenfranchised those convicted of electoral offences; this was abolished in 1951 and the current penal code establishes no disenfranchisement. Behind this attitude is the Criminal Code provision which expressly prohibits depriving offenders of any of their political and civil rights, as well as the principle of normalisation, that is to say, prison life should be as similar as possible to life outside prison. Since 1970, directives from the Internal Affairs Ministry ensure that inmates can exercise their right to vote in prison, either by mail or by setting up a polling station in prison²⁸.

In Sweden, offenders and ex-offenders also maintain the right to vote. The deprivation of this and any other political right was abolished in 1936. There are also specific mechanisms to ensure inmates' voting rights, whether this be establishing polling stations in prisons, or allowing the voter to do so by proxy in cases of pre-trial detention or when it is impossible to vote in prison²⁹.

While in Norway the constitution permits the deprivation of voting rights to those who commit crimes if such provision exists under the law, since 2005 there are no legal provisions in this regard³⁰. In Finland, since 1969, certain serious crimes no longer involve the deprivation of the right to vote, a right which is officially recognized in the constitution and the electoral law without limitation; this last statute establishes carefully how to vote in institutions, such as prisons³¹.

- 28 See Storgaard, A. The right to vote in Danish prisons, in Ewald, A., Rottinghaus, B. *Criminal disenfranchisement in an international perspective*. Cambridge University Press, 2009; art. 78.1 Danish Criminal Code, in Cornils, K., Greve, V. Übersetzer und Einführer. Dänisches Strafgesetz. 3. vollständig überarbeitete Auflage. Duncker und Humblot. 2009; EC-THR, Hirst v. United Kingdom (n.2) cit; Damaska, M. Adverse legal consequences of conviction and their removal: a comparative study. *Journal of criminal law and criminology*, vol. 59, issue 3, 1969, p. 358; Uggen, C., Manza, J. (2002). cit. p. 778; Mauer, M. cit. p. 57; Uggen, C., V. Brakle, M., McLaughlin, H. cit. p. 61.
- 29 See Damaska, M. cit., p. 358; v. Hofer, H., Marvin, R. Sweden, in v. Zyl Smit, D., Dünkel, F. (eds.). *Imprisonment today and tomorrow. International perspectives on prisoners' rights and prisons conditions*. Kluwer Law International, 2001, p. 638; Uggen, C., Manza, J., 2002, cit. p. 778; Rottinghaus, B. cit., p. 36-37; Chapter 3 section 5 and Chapter 7 sections 4 and 5 Swedish Elections Act, 2005:837 <http://www.government.se/sb/d/574>. Last access: February 2014.
- 30 See arts. 53.a of the Norwegian Constitution, and Chapter. 2.1 Election Law No. 57 of 28th June, 2002 with subsequent amendments, <http://www.ub.uio.no/cgi-bin/ujur/ulov/sok.cgi?type=LOV> Last access: May 2014. The reform of the penal code of 20th May 2005 abolished the previous cases provided, see General Civil Penal Code. Act 10 of 22 May 1902, with amendments. Ministry of Justice and the Police. 2006. Also Rottinghaus, B. cit. p. 22.
- 31 See Chapter 14 sections 1-4 of the Finnish Criminal Code, Act 39/1889, with amendments. 2012. <http://www.finlex.fi/en/laki/> Last access: February 2014; Chapter. 2 Section 14 of the Finnish Constitution; Chapters. 1 Section 2, 5 sections 46-66, and 13 section 186 of the Finnish Elections Act 714/1998, with amendments. 2004, <http://www.finlex.fi/en/laki/> Last Access: May 2014. See also Ispahani, L. cit. p. 27, 51, and information provided by Lappi-Seppälä. June 2014.

The deportation of legal foreign residents after the completion of the sentence is legally provided for in the four Nordic countries studied. Although regulation has gradually been tightened, it still maintains some moderate traits. Significantly, discretion governs the judicial or administrative decisions, which must be guided by the principle of proportionality of the deprivation of the right in relation to the nature of the conduct committed, and in consideration of the personal and family ties of the offender with the country itself.

In Sweden, in principle, it is possible to expel any foreign legal resident after serving a sentence for any offence for which imprisonment is established, provided the damage caused or interests affected by the criminal behaviour are severe, or there is a risk of going on with his criminal activity. The decision, which must be taken at the discretion of a judicial authority³², must consider the offender's ties with the country, whether these be of a personal nature, or family-related, with special attention given to the individual's obligations concerning minors. It should also assess the length of stay in the country, which may mean deportation becomes an exception or cannot be settled upon. Deportation may be temporary or indefinite³³. At the turn of the century, about 15% of foreign prisoners, who were not necessarily legal residents, were expelled upon completion of their term in prison³⁴.

In Denmark, the offences and penalties for which legal foreign residents can be deported vary according to length of residence in the country, and can range from any kind of prison sentence, including suspended sentences, for those who have not been resident for more than five years in the country, to prison sentences that exceed three years, or the year if you are convicted of various crimes or already had a previous prison sentence, if you have been a resident for over 9 years. For certain offences, the fact that it has been imposed a prison sentence will suffice. However, when taking the decision of deportation, the court must assess whether it is particularly necessary given the seriousness of the offence, previous convictions, the length of time served and the harm caused by crime, among others. Even then, it must be assessed as to whether the deportation is not going to be particularly burdensome, given the personal and family ties of the foreigner with the country, among others. It may also suspend the deportation at the expense of a probation period. Deportation can be temporary, for a minimum of four years, or permanent, depending on the case³⁵. According to information from the Danish Prosecution Office, from 2009 to 2012, between 1,000 and 1,400 foreign legal residents annually received a deportation order following a conviction.

32 In the other Nordic countries studied, the competent administrative migration authority takes the decision.

33 See Chapter 8 sections 8-14 and Chapter 12 Section 9 of the Swedish Aliens Act. 2005:716, with amendments 2009. <http://www.government.se/sb/d/574> Last access: February 2014

34 Data in v. Hofer, H., Marvin, R. cit. p. 648

35 See Part IV 22 to 27a, Part VI 32 of Danish Aliens (Consolidation) Act. No. 785. Version 10 August 2009. <http://kubis.kb.dk/friendly.php?s=dansk-ret-paa-engelsk> Last Access: February 2014.

However, the number of foreigners effectively deported is less, as a certain number of these individuals are entitled to protection under the legal exceptions indicated³⁶.

In Norway, permanent legal foreign residents can be deported if the sentence for the crime committed is a prison term longer than two years or if they have committed certain acts of terrorism. The requirements are less when considering temporary legal residents. However, deportation is not allowed if the measure seems disproportionate when taking into account personal or family ties with the country, especially when considering the interests of minors. Expulsion may be temporary, although never for less than two years, or permanent³⁷. Total figures for 2010 show that 3,430 foreigners were deported, mainly for infringements of the criminal code or immigration laws, a 30% increase with regard to 2009 and a 50% rise in relation with 2008³⁸.

In Finland, a legal foreign resident may be deported if found guilty of a crime entailing a sentence of one year or more in prison or if he has been convicted of various crimes, even if the sentence is not enforced due to an insanity excuse. However, a range of circumstances must be taken into account when deciding whether to enforce a deportation, such as the individual's personal, social or cultural ties with the country as well as those of their family, family interests, especially in the case of minors, in addition to the length and nature of their residence. If the expulsion is due to a crime, both the seriousness of the crime and damage caused to both public and private safety must be considered. Expulsion will be for a period of no longer than five years or indefinite. This latter is an obligatory punishment if convicted of aggravated or professional crime³⁹. Despite the legal modifications introduced by the law 1152/2010, only between 200 and 300 foreigners were expelled annually between 2011 and 2013 for infractions of the criminal code or immigration laws⁴⁰.

3. The deprivation of civil and social rights.

Depriving offenders and ex-offenders of civil and social rights places them at a disadvantage as regards other citizens when leading their lives within social rules. These deprivations establish serious difficulties to maintaining or building ties with their families and communities, to improving their chances in life through education or employ-

36 Information provided by Carlsen, May 2014.

37 See Chapter 8, sections 67 to 72 of the Norwegian Immigration Act of 15 May 2008, with amendments. 2010. <http://www.ub.uio.no/cgi-bin/ujur/ulov/sok.cgi?type=LOV> Last access: February 2014,

38 See Ugelvik, S., Ugelvik., T. Immigration control in Ultima Thule: detention and exclusion Norwegian style. *European Journal of Criminology*, vol.10 (6), 2013, p. 709-714., who point out that around 13% of the resident population in Norway, around 650,000 of 5 million, are immigrants or the children of immigrants.

39 See Chapter 9, sections 143 to 152 of the Finnish Aliens Act 301/2004 with amendments. 2010. <http://www.finlex.fi/en/laki/> Last access: February 2014.

40 See The Finnish Immigration Service Statistics. *Proposals and decisions regarding deportation in 2001-2013*. 2014 http://www.migri.fi/about_us/statistics/deportations Last access: June 2014.

ment, or to the help they may need when facing socially distressing situations. All of this leads to seemingly obvious negative consequences for the preservation or amelioration of social integration, one of the unavoidable goals of punishment. In all reality, all these obstacles objectively tend to create or increase offenders and ex-offenders' social exclusion and, ultimately, encourage recidivism and criminal reoffending.

Given the socio-demographic characteristics of the convicted population in contemporary industrialised societies, the fact that this deprivation of rights predominantly affects those groups most in need of these rights, or who suffer most from their loss, cannot be ignored. These groups are mainly composed of the poor, be they a minority or not, or of those with serious social integration problems due to a variety of reasons, amongst which drug consumption, family breakdown or previous criminal records are prevalent in many countries⁴¹.

Amongst the civil rights subject to deprivation, obstacles for employment are one of the most important barriers. There are, without doubt, incapacitative arguments linked to the threat posed to correct and efficient job performance or even to the public if the job requires contact with customers, in case persons with a criminal past carry out these activities. It is also possible to argue reasons of deterrence, even of distributive justice, to warn against hiring those who have not abided, contrary to the rest of their fellow citizens, essential rules to coexistence, particularly against a backdrop of a scarcity of jobs. But, apart from some sensitive occupations, none of these rationales is capable of counteracting the profound dissociating effect caused by blocking or restricting an individual's access to the job market on the basis of his criminal record⁴².

A similar phenomenon occurs with the deprivation of social rights concocted to protect the weakest groups of society, among them, those frequently subjected to the criminal justice system. Temporarily or permanently depriving ex-convicts of accessing public housing or merely living there with relatives, as well as the deprivation of social benefits, are two powerful instruments of social exclusion, which easily spread their socially destabilising effects to the whole family. Social reintegration becomes complicated when food or housing are not guaranteed.

In this regard, regulations making responsible those closest to the ex-offender of not allowing the individual to reside with them within public housing, under threat of

41 See Rubinstein, G., Mukamal, D. cit.; Travis, J. cit. p. 31-33; Mele, C., Miller, T. cit.; Uggen, C., Manza, J., Thompson, M. cit.; Pinard, M. cit. p. 459-461; Jacobs, J., Larrauri, E. Observations on conviction-based employment discrimination in the US & Spain. *Public law & legal theory research paper series. Working paper no. 11-72*. New York University School of Law, 2011 <http://ssrn.com/abstract=1945827> Last access: January 2014, p. 11, 19.

42 See Louks, L., Lyner, O., Sullivan, T. The employment of people with criminal records in the European Union. *European Journal on Criminal Policy and Research*. 6, 1998; Jacobs, J., Larrauri, E. cit. p. 1-4, 19-20; Jacobs, J., Blitsa, D. US, EU and UK employment vetting as strategy for preventing convicted sex offenders from gaining access to children. *European Journal of Crime, Criminal Law and Criminal Justice*. 20, 2012, p. 265-266.

eviction, are particularly remarkable⁴³. Vaguely conditioned by the risk that the ex-convict may carry on his criminal behaviour, these prescriptions demand a direct implication of family or relatives, not so much in crime control but in the social exclusion of their relative or friend. As has been outlined elsewhere, this can be understood as a new form of social space control of outcasts, who are not only excluded from city centres, public places or certain neighbourhoods, but also from their own home. Those authors, who integrate these techniques into the micro social level of disciplinary society, as described by Foucault, are right⁴⁴.

3.1 The deprivation of civil rights

3.1.1. The deprivation of civil rights in the United States

In the US, ex-convicts come across numerous legal barriers in order to obtain certain jobs, added to lawful employment practices, which substantially prevent their unimpeded access to the job market.

The majority of states have passed laws prohibiting access of ex-offenders to a wide variety of jobs. The list of these jobs is extensive but it is important to know that they are far from limited to work tasks related in some way to the past criminal behaviour of the applicant. They are not even confined to especially sensitive jobs, such as those related to public safety, caring for children or healthcare. Moreover, the dynamic of employment legal disqualification is currently expanding, covering more and more jobs, extending to foreign convictions and taking into account occasionally, for especially sensitive jobs, juvenile sentences. In addition to these restrictions on specific occupations, job applicants are often required to show their criminal record, making it legal to deny them the employment if they have not an unblemished record.

These legal prohibitions or restrictions are especially widespread in the case of sexual crimes or those related to drugs. According to federal law, criminal background checks on previous sexual convictions are compulsory for current or future employees in those services caring for children, the elderly or disabled. It is lawful to fire or deny work to these individuals regardless of whether their criminal sexual behaviour targeted these groups. A large number of states require these criminal background checks for teachers (50 states), school employees (40 states) or volunteers working with children (31) and a significant number explicitly ban hiring individuals convicted of a sexual

43 See below, as well as Díez-Ripollés, JL. El control de espacios públicos como técnica de exclusión social. Algunos contrastes regionales, *Revista española de investigación criminológica (REIC)*. No. 12. 2014. www.criminologia.net

44 It is not surprising that these demands for communitarian crime prevention are not to be found in financially and fiscally protected mortgage programs for private housing acquisition, which mainly benefit high or middle class individuals. In the US, 47% of those living in social housing are black, whilst 19% are of Hispanic origin. See Rubinstein, G., Mukamal, D. cit.; Mele, C. cit.; Travis, J. cit. p. 23-24; Petersilia, J. cit. p. 120-126.

crime with minors. In practice, all these legal provisions mean that a convicted sex offender of any nature has particular difficulty in accessing the job market⁴⁵.

Another legal avenue, which deprives convicts and ex-convicts of obtaining numerous jobs, is the denial of licences required to carry out certain professions, and it is not usually necessary for this profession to bear any relation to the crime committed. It is estimated that there are 6,000 professions and occupations which, in the federation or the states, require a licence. In Maryland alone, there are thought to be around 500 jobs requiring a licence and in Florida there may be 600,000 people disqualified to obtain certain professional licences due to past criminal behaviour. Restoring this right is usually problematic, as has been seen in other deprivations of rights. A decision by the highest state authorities is required and, for example in Florida, this procedure stretches on for 3 to 5 years, costs between 4,000 and 25,000 dollars and in the year 2000, only 1,000 restoration of rights had been issued, following a steady decrease since 1986. Although the reasons provided for denying licences are those already given for other employment disqualifications⁴⁶, there are serious indications that merely corporate reasons have taken precedence in order to handicap market competition⁴⁷.

Together with these legal barriers, most repercussion has the widespread practice amongst employers of not hiring ex-offenders, a practice which federal and state law considers legal. A study has quantified the practice of conditioning a job contract to a clean criminal record at between 50 and 80 percent of all hiring decisions. Another study estimates that over 80% of large employers in the US carry out criminal backgrounds checks on all or part of their workforce. If these employees are found to be lying or hiding a criminal record, they may be fired upon discovery, and if such a record is declared, they are not hired. Even some unions squarely exclude hiring ex-convicts. What is more, it is becoming increasingly frequent to take into account police arrest records. 29 states allow employers to ground their decision on the existence of arrests that did not then lead to a criminal conviction, although some demand a special justification for this.

These business practices are helped by the fact that previous criminal records are easily accessible⁴⁸. In any case, it is well documented that a previous criminal record clearly renders access to the job market difficult and that this bias is strengthened depending on race. Sometimes the disqualifying effect of a criminal record is indirect. Job applicants are not able to supply the required documentation, such as a social security card or a driving licence, which has been confiscated due to conviction; or in the ser-

45 See Petersilia, J. cit. p. 113-114; Chin, G. cit. p. 33; Uggen, C., Manza, J., Thompson, M. cit. p.297-299; Pinard, M. cit. p. 492-494; Larrauri, E., Jacobs, J. Reinserción laboral y antecedentes penales. *Revista electrónica de ciencia penal y criminología*. 13-09, 2011, p. 1-3. <http://criminet.ugr.es/recpc; 1-3>; Jacobs, J., Larrauri, E. cit. p. 1-3; Jacobs, J., Blitsa, D. cit. p. 265-271, 293-295.

46 See above, section 3.

47 See Petersilia, J. cit. p. 114; Ferster, L., Aroca, S. cit. p. 214-218; Chin, G. cit. p. 29, 32-33; Pinard, M. cit. p. 492-493; Larrauri, E., Jacobs, J. cit. p. 3; Jacobs, J., Larrauri, E. cit. p. 2-3.

48 See Jacobs, J., Crepert, T. The expanding scope, use and availability of criminal records. *Journal of Legislation and Public Policy*. NYU. N. 11, 2008.

vice sector they do not find insurance companies willing to cover their possible negligent or irregular conduct on behalf of the employer⁴⁹. When these individuals are lucky enough to find a job, it is then difficult for them to be promoted to positions of responsibility, and the percentage of temporary jobs amongst ex-convicts is high. Jobs requiring the unsupervised handling of valuable property or close contact with customers are, usually, not within their reach⁵⁰.

It is true that some federal and various state laws have been passed which prohibit conviction-based employment discrimination if there is no direct relation between their conviction and a successful performance of the job. This direct relation has been linked to the wide-reaching concept of “business necessity”. It has been proposed that this can be evaluated using three factors – the seriousness of the crime, the elapsed time and the kind of job⁵¹. However it is true that no more than 4 states extend this regulation to the private job market, that the courts accept the argument of business necessity with excessive ease and finally, that the level of implementation of these laws is generally low⁵².

This array of legal restrictions and practical obstacles sometimes ends up contradicting the efforts of the crime control system to successfully reintegrate convicts into society. 14 states revoke parole if the parolee is not capable of finding a job, although in 31 states it is enough to show serious attempts to do so⁵³.

When accessing or remaining in *civil service positions*, the difficulties increase. 40 states prevent or restrict convicts and ex-convicts’ access to public employment. Of these, 10 states definitively disqualify them, in another 10 this is left to the employer’s discretion, and in only 12 disqualification must be based on a relation between the crime committed and the work to be performed, a relation generously interpreted by the courts⁵⁴.

Also, the generalised practice of denying or removing *driving licences* to convicts of certain types of crimes neither directly nor indirectly related to road safety, has an important impact on the ex-offender’s job prospects. Since 1992, there has been a committed federal policy to promote this disqualification for those convicted of drug related crimes, which materialises in a number of economic incentives to the states practic-

49 The risk that the employees’ behaviour could possibly make employers liable for negligent hiring is exaggerated if employers are not able to predict this behaviour. See Petersilia, J. cit. p. 114, 117

50 See Petersilia, J. cit. p. 114-120; Uggen, C., Manza, J., Thompson, M. cit. p. 297-299; Pinard, M. cit. p. 492-494; Larrauri, E., Jacobs, J. cit. p. 2-3, 5; Jacobs, J., Larrauri, E. cit. p. 1-3; Jacobs, J., Blitsa, D. cit. p. 266-267, 294-295.

51 Pinard, M. cit. p. 527-529 mentions certain local proposals – “ban the box policies” – which go further, in which a criminal background check can only be asked to a job applicant once the selection process has advanced to a stage in which the individual is already considered qualified for the position. The contents of this record can then only be taken into account if they pose unacceptable risk to correct job performance

52 See Petersilia, J. cit. p. 116; Pinard, M. cit. p. 493-494, 527-529; Jacobs, J., Larrauri, E. cit. p. 2; Larrauri, E., Jacobs, J. cit. p. 3, 20.

53 See Petersilia, J. cit. p. 112-113.

54 Travis, J. cit. p. 22; Petersilia, J. cit. p. 115; Uggen, C., Manza, J., Thompson, M. cit. p. 297.

ing this policy. These are dependent on the deprivation of ex-offenders driving licence for six months upon completion of their sentence. In 2002, Washington D.C. and 19 states have implemented this disqualification whilst another 33 states have refused, making use of the exception provided⁵⁵.

But the deprivations of civil rights widely exceed the realm of employment and also affect especially sensitive rights relating to personality.

Perhaps the best example is the numerous *terminations of parental rights* due to criminal activity. In the last decades, there has been a steady increase in the number of states whose laws allow depriving parental rights to all convicts or those convicted for specific crimes. 48 states allow these rights to be deprived for a very diverse range of crimes, and murder, homicide or serious crimes against minors are usually amongst these.

The federal law of 1997, allowing child-care institutions to begin the process of removing parental rights from those who, in a period of 22 months, have had no contact with their underage children over an accumulated period of 15 months, has had further reaching consequences. This provision is compulsory, the term without parental contact is a maximum one, so that some states have lowered the term to 12 months, and there are federal economic incentives for the effective implementation of this practice. It is undoubtedly a well-intentioned law, favouring children from problematic families who spend long, intermittent periods of time away from home unattended or in the best of cases, institutionalised, or in foster homes. It is true, however, that this is having serious social disintegrating effects on single parent families, usually in the charge of the mother, when she is in prison. These effects take on racially discriminatory connotations as it is verified that they disproportionately affect black minority mothers.

In most cases, what usually happens is that these imprisoned single parent mothers depend heavily on penitentiary regulation, as well as on the goodwill of child-care institutions and foster families, in order to meet the legal requirements for contact with their children. Such contact, which may be face-to-face visits, phone calls or post, is frequently out of reach of these affected mothers, be it due to a lack of the economic resources required to be able to maintain this minimal contact, or because the foster families or child-care institutions consider that such contact is damaging to the children, and they intentionally hinder them. This is particularly true with mothers undergoing drugs treatment, as their normal relapses may be used as a powerful argument for avoiding contact. What is more, regarding those individuals convicted for certain crimes or being present certain aggravating circumstances, the 1997 Act exempts carers and institutions from trying to maintain or recover the family unit. In addition, the economic incentives granted to the foster families are clearly less than those offered if they adopt the children, another new factor promoting the deprivation of parental rights⁵⁶.

55 See Travis, J. cit. p. 18, 24, n.44; Petersilia, J. cit. p. 115 Chin, G. cit. p. 33.

56 See Franklin, S. A practitioner's account of the impact of the Adoption and safe families act (ASFA) on incarcerated persons and their families", in Mele, C.; Miller, T. (eds.). *Civil penal-*

In this context, it is worth mentioning that 29 states consider a conviction a legitimate reason for *divorce* on the part of the other spouse, and 15 states prevent convicts and ex-convicts from ever becoming *adoptive or foster parents*⁵⁷.

3.1.2 The deprivation of civil rights in Nordic European countries

In Nordic European countries, as in the rest of continental Europe under the influence of the French revolutionary and then liberal models, convicts' loss of civic rights had a long tradition which, in relation to certain crimes, deprived them of many significant civil rights and was understood to be akin to civil death. However, this widespread deprivation of rights disappeared from these countries' criminal legislation earlier than in the majority of European nations. In Sweden it was abolished in 1936 and in Denmark in 1951, although in Norway and Finland loss of civic rights, however tenuous and challenged, persisted until the end of the 1960s. It is not in force in any Nordic European country long time ago⁵⁸.

In order to understand possible conviction-based employment disqualifications in Nordic European countries, we need first to tackle the current legislation passed by different European institutions that these four countries belong to or are associated with.

In general, in continental Western Europe there is no particular concern that ex-convicts face labour discrimination, nor is it a relevant criminal policy issue. This does not mean that such individuals, owing to their frequently inadequate education and lack of work experience, do not encounter serious problems when looking for jobs.

However, in relation with sex offenders there have been significant recent changes both in the European Union (EU) and in the Council of Europe (CoE). An EU directive from 2011⁵⁹, demands that all member states permanently or temporarily ban convicts guilty of the sexual abuse of children from occupations involving regular and direct contact with children, and recommends extending this ban to volunteers' activities. This prohibition does not apply to those sex offenders whose victims were adults, nor those employees with previous convictions, nor convicted once employed⁶⁰. The Council of Europe, as of a 2007 convention, demands sexual abusers of minors to be banned from jobs requiring contact with children, and a 2011 parliamentary resolution prevents sex offenders from having jobs requiring contact with vulnerable people. Fol-

ties, social consequences. Routledge, 2005; Travis, J. cit. p. 23, 24; Rubinstein, G., Mukamal, D. cit. p. 48; Petersilia, J. cit. p. 126-127; Mele, C., Miller, T. cit. p. 18; Uggen, C., Manza, J., Thompson, M. cit. p. 297, 299.

57 See Travis, J. cit. p. 22, 24; Petersilia, J. cit. p. 126-127; Chin, G. cit. p. 32; Uggen, C., Manza, J., Thompson, M. cit. p. 297.

58 See Damaska, M. cit. p. 352-355; Storgaard, A. cit. p. 244.

59 This substitutes a 2004 Common Decision forcing all member states to ban, temporarily or permanently, convicted child abusers, if appropriate, from professions involving children supervision

60 The Directive does not take into account sentences served in EU countries by those residents who are not EU nationals.

lowing these international obligations, a considerable number of European countries generally prohibit individuals with a criminal record from obtaining jobs requiring contact with minors or the elderly⁶¹.

In this context, conviction-based employment disqualifications are limited in Northern European countries, although it is not easy to identify or quantify them, given their frequent provision in administrative regulations instead of by the penal code. Either way, a clear link between the nature of the crime committed and the type of work activity to be undertaken is usually required. As in the rest of Europe, the practice of demanding criminal background checks from those individuals applying to work with children is common, with the important caveat that, in the majority of cases, the fact that an applicant is in possession of a criminal record does not mean that the employer is obliged to refuse to hire them.

In Norway, the Penal Code allows to disqualify any convict from employment or the right to obtain it, and from practicing certain occupations if the individual has shown, through the crime committed, that he is not adequate to that work or may abuse it, provided there is a public interest. This penalty can be imposed together with another or instead of another, although in this case the sentence must be less than 1 year in prison. The disqualification may not extend for longer than 5 years after the prison sentence has been served, although this can be indefinite in some particular cases⁶². At the same time, the Education law states that all those who aspire to work in a primary or secondary school must present a police certificate detailing whether they have been accused, prosecuted or convicted of sexual abuse with children, and in the case of secondary schools, of any kind of sexual abuse. Ex-offenders with this criminal record may not be hired in primary schools or in lower secondary education⁶³.

Although in Denmark the Criminal Code expressly forbids the deprivation of civil rights because of conviction, including licenced professional activities, it is true that the Code allows significant exceptions. In this way, a convict can be disqualified for any professional activity, not just those of the public sector, or see that activity limited, if the previous criminal behaviour indicates a risk that he will abuse from this occupation, coming together other circumstances⁶⁴. The disability lasts between 1 and 5 years after final judgment or until further notice, though in this case the disqualification can

61 See Larrauri, E., Jacobs, J. cit. p. 4, 18, 20; Jacobs, J., Larrauri, E. cit. p. 3-4, 5-6, 14-15; Jacobs, J., Blitsa, D. cit. p. 271-282, 293-295.

62 See chapter 2 sections 29 and 33 of the Norwegian Criminal Code, cit. In reference to the Norwegian traditions of these deprivations, see Damaska, M. cit. p 550-555.

63 A criminal background check may also be demanded of those who regularly visit these institutions. The system, in place for primary and lower secondary education, also applies to those working in nurseries. See chapter 10, section 10-9 of Kindergarten Act n. 64 of June 2005 2005. <http://www.ub.uio.no/cgi-bin/ujur/ulov/sok.cgi?type=LOV> Last access: February 2014.

64 Requirements are less if these activities are subject to licences or public authorization.

be challenged in court after 5 years⁶⁵. It is also common that regulations of licenced activities allow denying licence on the ground of a previous conviction⁶⁶. On the other hand, administrative authorities or any private person or legal entity looking for applicants to jobs requiring contact with minors under the age of 15 must previously obtain their criminal background checks relating to crimes against children younger than this, their partner or their own children⁶⁷.

In Sweden, certain administrative authorities can disqualify convicts for certain professional activities or businesses for a certain period of time, a collateral consequence which the Criminal Code forces the judge to bear in mind when sentencing. So, convicts are prohibited from conducting a business for a period of 3 to 10 years if, whilst doing so, they have committed a crime punishable with a minimum penalty of 6 months in prison, unless there are specific reasons not to implement such a disability⁶⁸. As of 2010, doctors and healthcare professionals may be denied a licence if they have a hit in the criminal background check requested by the licencing administration, which shows that they are unsuited to the profession due to the previous commission of a number of crimes, of various nature and seriousness but punished with prison.

On the other hand, there has been a remarkable increase in criminal background checks for employment purposes, as this has gone from 10,000 in 1995 to 170,000 in 2011. From 2001 to 2010, following successive passage of wider legislation, those individuals aiming to be hired as preschool or primary school teachers, work in childcare or residential institutions for children, or carry out maintenance, repair or transport work in a school and preschool environment, must first present their criminal record regarding a wide range of crimes, not just limited to sexual abuse of children. However, concerns linked to respect for citizens' privacy and the rehabilitation right of ex-offenders have drawn up certain limits to this evolution. A previous criminal background check may only be demanded for professional activities which are compulsorily or inevitably financed by the state (although these activities are carried out by private entities), and not for private sector activities. A criminal background check may

65 See paragraphs 78 and 79 of Danish Criminal Code, in Cornils, K., Greve, V. *Dänisches Strafgesetz. Übersetzer und Einführer. 3. vollständig überarbeitete Auflage.* Duncker und Humblot. 2009.

66 See paragraph 4 (1) no. 4 and 5 of the Transport Law. 1051, 12th November 2012 and paragraph 3 (1), n. 6 and 7 of Law on Security Operations n. 227, 3rd March 2012. Information provided by Carlsen, B. May 2014.

67 See subsections 2.1 and 2.2 of Danish Act on the retrieval of a statement of previous convictions in respect of children. n. 520 of 21 June 2005. 2005.http://kum.dk/Documents/English/website/Sport/Act on the retrieval of a statement of previous convictions in respect of children on the appointment of staff pdf Last access: February 2014

68 See Law of Prohibition of business management 1986:436; further clarifications about this and other administrative laws in Svensson, B. *Criminal justice systems in Europe: Sweden.* HEUNI 1995, p. 43, 47-48; Cornils, K., Jareborg, N. Einführung, in Cornils, K., Jareborg, N. *Das schwedische Kriminalgesetzbuch.* Edition Iuscrim. Max Planck Institut für ausländisches und internationales Strafrecht, 2000, p 29; information provided by Lappi-Seppälä, T. June 2014. See also chapter 29, paragraph 5.5 of Swedish Criminal Code, in Cornils, K, Jareborg, N, cit.

also not be demanded of those who, given the professional activity they are carrying out, cannot avoid to apply for that new job or occupation⁶⁹.

In Finland, judicial decisions banning to conduct businesses are possible, if whilst managing the business a non-serious offence has been committed causing relevant damages to particular or general interests. The disability can stretch from 3 to 7 years. In 2012, there were 319 individuals deprived of this right for an average of 4 years. In the same way, professional licences can be removed if whilst practicing the profession, an offence punished with prison has been committed of such nature or in such a context which means that the professional can no longer be trusted. This disability may be temporary or permanent⁷⁰. On the other hand, individuals in search of employment, in process of starting a job or apprenticeship, or who are already carrying them out may be subject to a criminal background check at the initiative of their public or private employer located in Finland. The aim is to prevent crimes that would seriously affect, amongst other interests, the country's internal security, industrial secrets, or either public or private financial interests. It is expressly established that these criminal records, which cannot date back more than 10 years, are not binding for the employer⁷¹.

In addition, in employments or volunteers' activities where staff comes directly into permanent personal contact with minors without the presence of the legal child-keeper, the employer must require new employees, or those first assigned to this job to present an extract of their criminal record⁷². It is not applicable to those individuals who carry out these activities for less than 3 months a year. The extract must mention existing records on homicide, serious injuries, sexual offences, aggravated robberies and drugs related crimes⁷³.

When considering access to or remaining in *public office*, all Nordic European countries provide for the disqualification of civil servants who have committed certain crimes against the public administration. However, moderate use is made of this; it is usually down to the judge's discretion as to whether the crime committed shows that the employee is inadequate to the position and the disqualification is usually confined to the specific civil service performed while the offence was committed.

69 See Backman, C. Mandatory criminal record checks in Sweden: scandals and function creep. *Surveillance and Society*. 10 (3-4), 2012; Regeringskansliet. Ministry of Health and Social Affairs. *National action plan for safeguarding children from sexual exploitation*, 2007, p. 18-19. www.sweden.gov.se/publications Last access: February 2014.

70 Information provided by Lappi-Seppälä, T. June 2014, mentioning laws 1059/1985, 559/1994, 1107/2006.

71 See sections 1 to 13 of Finnish Act on Background Checks 177/2002. 2002. <http://www.finlex.fi/en/laki/> Last access: February 2014

72 This also applies to external suppliers of child services.

73 See sections 1 to 5 of Act on Checking the Criminal Background of Persons Working with Children 504/2002 2003. <http://www.finlex.fi/en/laki/> Last access: February 2014; section 6 (2) of the Finnish Criminal Records Act. 770/1993, with amendments. 2002 <http://www.finlex.fi/en/laki/> Last access: February 2014. Likewise, Larrauri, E., Jacobs, J., cit. p. 21.

This is the case in Norway for a large number of crimes against public administration, although the penalty is always an alternative for others, such as prison or a fine⁷⁴. In Sweden it is possible, in addition to prison or a fine, to permanently disqualify from their position civil servants who have committed these offences as long as these are punished with 2 or more years in prison and the civil servant, in light of the offence committed, has proven himself to be unsuited for that position⁷⁵. In Denmark, the right to carry out activities that require public appointment can generally be deprived or limited, if the criminal conduct indicates a risk that the individual will abuse their position or if the public deem the individual unworthy of the role. This disqualification lasts between 1 and 5 years but can also be until further notice⁷⁶.

Finnish regulation is stricter and provides for disqualification of civil servants for any public service the convict may have had at the time of conviction, as well as disqualification for public services related to the crime committed. The first is handed to convicts serving life sentences, as well as those convicted to 2 years or more in prison unless the judge believes that the offence does not show that the individual is unfit for public service. The disqualification can also be adjudicated on convicts sentenced to less than 2 years in prison if the judge believes that the offence does indicate that the individual is ill-suited to public service. This notwithstanding, disqualification for public service related to the crime committed can be enforced compulsorily, or discretionarily based on proof that the individual is unsuitable for the position in light of the offence committed, in the majority of offences against public administration and in torture offence⁷⁷.

Deprivation of *other civil rights* due to crimes not related with the exercise of these rights is rare in Nordic European countries. By way of example, the disqualification for owning, keeping or looking after animals, or for hunting or organizing hunting parties, as provided for in the Finnish Criminal Code, are linked to crimes committed against animal well-being and hunting respectively⁷⁸. Consequently, there is no legal provision for depriving a convict of their driving licence for crimes unrelated to road safety, nor for deprivation of parental, adoption or fostering rights for the mere fact of having committed crimes not linked to the exercise of these rights⁷⁹.

74 See chapters 11 and 33 of Norwegian Criminal Code, cit.

75 See chapter 20, section 4 of Norwegian Criminal Code, cit

76 See paragraphs 78 and 79 of Danish Criminal Code, cit., and Danish Electoral laws nos. 127 and 128, 11 February 2013.

77 See chapters 2, sections 7 and 10, 11, section 9 and 40, sections 1 to 12 of Finnish Criminal Code

78 See chapters 17, section 23 and 48 to section 6 of Finnish Criminal Code. Act 39/1889 with amendments 2012 <http://www.finlex.fi/en/laki/> Last access: February 2014

79 Regarding Denmark, this statement is confirmed by Carlsen, B. May 2014; regarding Finland, by Lappi-Seppälä, T. June 2014.

3.2 Deprivation of social rights

3.2.1 Deprivation of social rights in the United States

In 1996 in the US, far reaching federal reforms took place regarding *social welfare benefits* given to those with scarce economic resources. Since this time, those who receive such benefits must be employed and can only receive these payments for up to 5 years over their lifetime. On the other hand, there are strong federal incentives to spread this policy to other states.

No doubt that this has had an impact on convicts and ex-convicts' generalized loss of federal aid. Between 1996 and 2002, it is estimated that the granting of these benefits has decreased by 50%. It must also be taken into account that those who violate the conditions of suspended sentences or parole also remain temporarily deprived of these subsidies.

In addition, according to these federal regulations the large group of individuals convicted for drugs related crimes, including mere possession, remain deprived of these benefits for life, irrespective of whether the individual is a first time offender or a minor, their evolution regarding treatment for drug addiction, work history, recidivism, etc. Of all the states, 14 maintained this ineligibility permanently, 22 established it temporarily or under certain conditions, and 14 did not apply it⁸⁰.

The existing obstacles faced by offenders and ex-offenders when accessing *public housing*, are of special importance. It is worth emphasizing that around 10% of convicts leave prison with nowhere else to go other than shelters for the homeless, whilst many others only have provisional lodgings available. Individuals sometimes leave prisons far from their place of residence or, once released on parole, the accommodation they have found must be authorised. The private housing market is generally unaffordable, if not inaccessible due to the possession of a criminal record. It is therefore common that they have to ask families and friends to let them stay in their homes. Even to have access to a shelter for the homeless, the individual must have spent at least one night on the streets.

It is true that public housing compounds pose a special criminal dilemma: as such, compounds only represent 10% of housing stock, yet 20% of registered crimes take place there or in surrounding areas. This could explain certain reservations when providing convicts and ex-convicts with access to such accommodation. However, for a long time legal provisions on the matter have not been formulated with these necessities in mind, but have been limited to reflecting police discrimination practices⁸¹.

80 In 2004, 17 states still maintained this permanent or temporary disability for drugs offences, 21 used treatment to condition the eligibility, whilst 12 states did not apply it. See Rubinstein, G., Mukamal, D. cit. p. 37-43, 49; Travis, J. cit. p. 18-19, 23, 31-32; Petersilia, J. cit. p. 124-126; Mele, C., Miller, T. cit. p. 17-18, 22; Chin, G. cit. p. 29, 33; Uggen, C., Manza, J., Thompson, M. cit. p. 297; Pinard, M. cit. p. 490, 494, 513-514.

81 See Curtin, E. Home sweet home for ex-offenders, in Mele, C., Miller, T. (eds.). *Civil penalties, social consequences*. Routledge, 2005; Petersilia, J. cit., p. 120-122; Goldstein, E. Kept

Various federal regulations passed in 1996 and 1998 introduced important limitations on access and residence in public housing for any ex-offender, not just drug ex-offenders. On the other hand, generous federal incentives were laid out so that such laws would become widespread amongst the states. Consequently, all states restrict convicts and ex-convicts' access to public housing, and three of them impose particularly broad bans. Generally, public housing is closed to sex offenders with a lifelong obligation of registering and community notification, and in practical terms to their families too. This is also the case for those individuals convicted of producing amphetamines in public housing. Besides, probationers and parolees who break the terms of their sentence or release are temporarily ineligible to apply for public housing, and individuals evicted from such public dwellings due to drugs offences must wait three years following their conviction for being eligible again.

However, the discretion given to public housing administrators when making eligibility and eviction determinations has a much more determining effect. It should be taken into account that in 1997, of the 3,300 authorities of this kind in the US, 75% of them were making use of these restrictive rules. From there, it becomes difficult to prevent misuses of these permissions.

The administrators of these dwellings may temporarily deny housing to any family in which a member has been convicted of any crime within a reasonable previous time period. Determining what is a reasonable previous time period and how long a family must wait before becoming eligible is in the hands of the administrators. Although it is possible to appeal this refusal, the procedure is extremely bureaucratic and may last for years. A cross-section sample highlighted that, in practice, housing is denied to all those with a previous criminal record, irrespective of the type of crime or how long ago the offence took place. Sometimes, a police arrest without later charges, or an administrative infraction, is enough to be denied housing, and the waiting periods are frequently long. However, in some cases, eligibility is analysed in more detail, taking into account all the circumstances.

On the other hand, the administrators of these public dwellings can evict any family as long as any member or other individual residing there is involved in any criminal activity. This activity does not have to be performed in the building or the surrounding areas, but in any location⁸². To proceed with eviction, it is not necessary for the resident to have been arrested by police, to have been convicted, not even for the criminal procedure to be ended. In 2002, the Supreme Court admitted this practice, even if

out: Responding to public housing no-trespass policies. *Harvard Civil Rights-Civil Liberties Law Review*, vol. 38, 2003, p. 215-219

82 In 1988, the criminal behaviour committed by one of these individuals had to be a drug offence, including consumption, in or outside of the building. In 1990, this was extended to include any criminal activity that could affect the health, safety or peaceful enjoyment of the building. In 1996, the broad regulation mentioned in the text was drawn up.

those living in the housing conducted their criminal behaviour without the leaseholder's knowledge or ability to avoid it⁸³.

As to the rest, we discussed elsewhere the issue of banning non-residents individuals from entering into public housing⁸⁴.

The social rights disabilities endured by convicts and ex-convicts do not rest there. Together with restrictions on accessing bank accounts and loans, the public education system or health-care programmes, there are other obstacles in place when trying to obtain grants, student loans or other aid for public education. Following a federal law passed in 1998, all states deny these benefits at least to convicts and ex-convicts of drug felonies, even misdemeanors. In 2000, a significant number of individuals were effectively excluded from receiving this public aid⁸⁵.

3.2.2. The deprivation of social rights in Nordic European countries

The deprivations of social rights previously discussed are unknown in Nordic European countries⁸⁶. Such deprivations are in direct conflict with the established belief that the state must be actively involved in facilitating convict's social reintegration.

In these countries, the opposite occurs and highly developed public institutions are in place with the responsibility of providing social assistance to those individuals who find themselves in socially compromising situations, including ex-convicts.

On the one hand, this can be seen through the generous commitments undertaken by the penitentiary administration when facilitating the reintegration into society of those on parole, including frequently accommodation, work or training⁸⁷.

On the other, these countries have ambitious laws regarding social services, which attend to the needs of those who find themselves at risk of social exclusion regarding accommodation, job searches, healthcare, personal care or financial subsidies. Those individuals who find themselves disadvantaged for social reintegration due to conviction are explicitly or implicitly included in these groups⁸⁸.

83 See Goldstein, E. cit; Mele, C. cit.; Rubinstein, G., Mukamal, D. cit. p. 43-48; Travis, J. cit. p. 18, 23-24; Petersilia, J. cit. p. 12-123; Curtin, E. cit. p. 115-117; Chin, G. cit. p. 33; Mele, C., Miller, T. cit. p. 17-19; Uggen, C., Manza, J., Thompson, M. cit. p. 297; Pinard, M. cit. p. 490-492

84 See Díez-Ripollés, J.L. 2014, cit.

85 See Travis, J. cit. p. 18, 24, 26; Demleitner, N. cit. p.185; Mele, C., Miller, T. cit. p.18; Chin, G. cit. p. 33; Uggen, C., Manza, J., Thompson, M. cit. p. 297; Pinard, M. cit. p. 459, 513-514.

86 Carlsen, B. May 2014 confirms this idea regarding Denmark.

87 For all of these, see chapter 26, section 15 of Swedish Criminal Code, in Cornils, K, Jareborg, N, cit.

88 See chapters 14 to 20, 29a of Danish Consolidation Act on Social Services Act n. 941 of 2009, 2009. <http://kubis.kb.dk/friendly.php?s=dansk-ret-paa-engelsk> Last access: May 2014; chapters 4 section 29, chapter 2 sections 13 to 17 of the Finnish Social Welfare Act 710/1982, with amendments. 2011, <http://www.finlex.fi/en/laki/> Last access: May 2014; chapters 1 and 2 of the Finnish Social Assistance Act 1412/1997, with amendments 2010. <http://www.finlex.fi/en/laki/> Last access: May 2014; sections 1 to 5 of the Norwegian Act relating

Conclusions

This paper is part of studies into comparative criminal justice policy. A previous investigation proposed using the social inclusion/social exclusion dimension as a criteria for comparing different national crime control systems -under the terms laid out in the Introduction of this paper- instead of the more widely used dimension of punitiveness / non-punitiveness. For this purpose, it has been proposed to focus on a set of punitive rules and practices able to collect twenty-five indicators of social inclusion/ social exclusion, which were grouped together into 9 pools.

Attending to the need for studies demonstrating the ability of the nine pools of indicators to reflect the dimension of social inclusion/social exclusion, this paper has focused on one of these pools, that which refers to the legal and social status of offenders and ex-offenders. A critical analysis of rules and practices belonging to this pool, as currently in force in two groups of national systems, was performed. The selected national systems are hypothetically considered to be most different from each other in terms of this dimension – on the one hand, the Nordic European countries, and the United States of America on the other.

This paper has shown that convicts and ex-convicts are deprived of a considerable number of rights, owing compulsorily or discretionally to the simple fact that they have been convicted of a crime. These deprivations are not the main penalty for the crime, nor do they constitute an additional penalty related to the nature of the crime, nor are they a condition for serving a penalty or a preventive measure. Such disqualifications for political, civil or social rights cover a wide range of rights and frequently extend beyond termination of sentence, sometimes for life.

These deprivations, sometimes known as invisible criminal penalties, avoid largely or totally due process and other legal safeguards restrictions, and can be fully understood in terms of social exclusion. An inferior political, civil and social status is attributed to convicts and ex-convicts and they are kept in a socially dishonourable and stigmatizing condition, which places them on the margins of society, with no possibility of fully exercising their citizenship or of leading their lives. The denial of political rights, such as disenfranchisement or maintaining a legal residency status abroad, removes offenders and ex-offenders from the political community or excludes them from a society in which they were previously accepted. The blocking of civil and social rights, such as access to employment, public office, parental rights, public subsidies, public housing, educational or health benefits, is a formidable instrument in the social disintegration of these groups.

It is no coincidence that, in practice, the social exclusion promoted by these sanctions focuses on the most socially disadvantaged groups. Such groups are mainly made up of the poor, frequently those belonging to various ethnic minorities, or individuals with serious social adaptation problems due to a number of reasons, with drug con-

to Social services, n. 81 of 13 December 1991, with amendments. 1993. <http://www.ub.uio.no/cgi-bin/ujur/ulov/sok.cgi?type=LOV> Last access: May 2014.

sumption featuring highly amongst these. It seems that the rationale of these sanctions does not go beyond incapacitating these groups and aims to keep them subject to a penal governance for as long as possible.

The comparison between the existence and implementation of these rules and practices in the United States of America and Nordic European countries confirms expectations, with some varying details.

Amongst political rights, convicts and ex-convicts' disenfranchisement is deeply rooted in the US. It is linked to a large number of crimes, if not all, and often carries on for long periods after the sentence has been served, sometimes for life. This widespread application has had a significant effect on the electoral body, specifically disempowering certain social minorities, and there are grounded estimates reflecting how the results of federal and state elections have been affected by this for quite some time. On the other hand, Nordic European countries removed convicts and ex-convicts' disenfranchisement a long time ago, in keeping with the situation in most of Europe. In fact, significant efforts are made to guarantee this right for inmates and pre-trial detainees.

The deprivation of the right of a foreign legal resident to remain in the country once they have served a sentence is an important sanction in both groups of countries studied. However, the American evolution from 1996, which has accelerated following the events of 2001, has made it significantly easier. This has led to an enormous extension in the number of felonies, sometimes misdemeanors, which entail deportation. Some of these dispositions have been retroactively applied and alternatives to deportation have been abolished, among other decisions. Regulation in Nordic European countries has become more severe over the years, whilst still maintaining judicial or administrative discretion. This anchors in the principle of proportionality and in the personal or families that the offender has with the country.

The deprivation of convicts and ex-convicts' civil rights in the US operates in various different directions. The numerous legal obstacles to accessing employment or practices consolidated in the same direction are especially important – ex-offenders in general and specifically those convicted of sex or drug crimes are legally banned from accessing a large, ever increasing number of a variety of jobs. In many cases the effort required to maintain or apply for a licence to practice certain professions is in vain. Employers' generalised practice of not hiring ex-convicts is reinforced by accessible previous criminal records as well as by restrictive judicial interpretations of federal and state laws prohibiting employment discrimination. These obstacles are bigger when trying to hold public office. Disqualifications include indiscriminate deprivations of driving licenses. Extremely sensitive rights relating to personality, such as parental or adoption rights are also deprived due to conviction for a wide range of crimes or their loss in inmates is encouraged by institutions.

In Nordic European countries, there are some deprivations of the right to access employment due to conviction; however, the volume and spread of these deprivations are difficult to calculate as they are frequently provided for in administrative regulations. They are used extensively in relation to jobs involving children, partly in com-

pliance with European legislation, although in one country these disabilities are being extended to healthcare activities. When denying these rights, a clear link must frequently be proved between the job and the nature of the crime committed, and sometimes the obligation is restricted to demand the job candidate's criminal record, with an explicit or implicit reference that a hit does not imply their application will be rejected. Ex-offenders disqualification for holding public office is established in all these countries. However, the ex-offender must be considered unsuited to perform the office given the crime committed and this remains at the discretion of a judge. Other civil rights disqualifications are rare and of limited scope.

In the US, the policy of depriving convicts, and above all ex-convicts, of their social rights, is remarkable. Those convicted of drug crimes, including mere possession, are banned for life from social welfare programs, and new general conditions put in place to access these subsidies has meant that the number of ex-offenders granted with these benefits has fallen dramatically. Meanwhile, ex-convicts' ability to access public housing or remain there has become practically impossible. In addition to the far-reaching legal restrictions established in 1996, which included lifelong bans for sex offenders amongst others, the administrators of public housing compounds have been granted far-reaching powers to deny accommodation to any individual with a previous criminal record and even to evict families in which one member seems to be involved in criminal behaviour. Other social ineligibilities affect educational aid and health prevention programs.

In Nordic European countries, such deprivations of social rights are at odds with the state and community's active involvement for ex-convicts' social reintegration, and they are not known.

In short, whilst the expansion of these rights disqualifications for the aforementioned reasons is concerning, illustrative differences can be seen between the two groups of countries studied.