

# DEMOCRACY AND CRIMINAL LAW RIGHTS<sup>1</sup>

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## Abstract

*One of the problems choice theory of rights has confronted is linked to the fact that under criminal law, individuals do not have the requisite control over the duties of others. According to this theory, „anyone who holds these powers (waiver / enforcement) over a duty or disability holds the right correlative to it. (...) Unwaivability, it is argued, is a characteristic feature of the duties imposed by criminal or public law as opposed to civil or private law”<sup>2</sup>. As a consequence, some choice-theorists have concluded that there are no claim rights correlative to the duties people have in the case of criminal law; others have claimed that they must be vested with the higher officials who have the right to amnesty and pardon.<sup>3</sup> My paper shall try to provide an alternative to both these positions by appealing to a democratic decision-making basis for criminal law so that I can claim that the right holder in this case is the body of citizens.*

## Introduction

Any form of specifically human interaction is necessarily rule governed. There will always be norms of some kind (principles, rules, laws, conventions) that people are expected to follow. What is inherent in the conception of a rule is that some disadvantage (penalty, sanction, unpleasantness, punishment) is characteristically suffered by the person who breaks it. Then the natural question to be asked is: Why and by what right do people punish others?

This is one of the most often asked questions in moral and legal philosophy and authors coming from different fields of research have tried to provide final answers. The main versions of justification are the consequentialist and the retributive projects; where both fail, however, is in their lack of consideration for the nature and content of the rules on which the practice of punishment is based.

My study will try to provide a justification for punitive practices based on a story of democratic rule making; I shall attempt to distinguish the retributive aspects of justice from the distributive ones and to

demonstrate that a moral justification of political obligation, and particularly of punishment as one of its instances, can be obtained for those communities which have chosen the democratic principle as the best solution for the problem of legitimacy.

The relevance of this attempt lies with the fact that contemporary theories of justice have not often considered punitive issues and have mainly focused on the distributive aspects. But the justification of punitive practices is an inherent part of any theory of justice and is subsumed under the question of the fundamental principles used for the guidance of a just society. Punishment is just another aspect in need of justification. Solving the problem of just punishment implies having solved the problem of just principles that are to regulate citizens' functions within democratic institutions.

I would like to start by clarifying what a claim-right is and by introducing the Choice Theory of rights which will be the theoretical framework I adopt for this paper. I shall introduce its conditional accommodation of a natural claim-right to equal freedom; then I shall move on to the presentation of an account of legal and moral responsibility as the main concepts to be used in my justificatory account of punitive practices. The second part of the paper will be concerned with the issue of “Who holds the right in the case of criminal law?” The necessity of answering such a question arises from the fact that my justification assumes the Choice Theory of Rights, which has been seen as having problems in ascribing the right to punish to the victims. In the case of criminal law, the choice of whether to punish the perpetrator or not does not lie with the victim of the offence, so the victim cannot be said to have the right to punish. If so, who is the right-holder in this case? As I mentioned in the abstract, some theorists gave up trying to find an answer, others have pointed to state officials as having the right of clemency or amnesty. My answer to this question is quite different and will be developed along democratic lines. I shall try to show how, in the case of criminal law, the right-holder is the collective body of living citizens, as the last group to have contributed to the content of the laws governing society. The concluding section will summarize my findings into a hopefully clearer picture and I shall suggest further possible implications for future research. But let us first turn to our framework of analysis, Choice Theory, and see what a claim right is.

## *What Is a Claim Right? Are There Any Natural Claim-Rights?*

As in the case of all moral concepts, the concept of a right is a profoundly controversial one, and the situation is likely to remain like this for as long as there is scarcity of resources and different visions of the good life. Two major theories have broadly

<sup>1</sup> This paper is part of a larger project which first materialized in an MA dissertation submitted to the University of Manchester, UK in 2003.

<sup>2</sup> Hillel Steiner, *An Essay on Rights*, (Oxford: Blackwell, 1996), 60-65.

<sup>3</sup> Hillel Steiner, Matthew K. Kramer, and N. E. Simmonds, *A Debate over Rights*, (NY: Oxford University Press, 1998).

covered the scope of the debate in rights talk: the Interest Theory – which claims that it is an interest in having a right that entitles one to have that right - and the Choice Theory of rights – which emphasizes the capacity for choice as the ground of all rights.

Here I shall adopt the Choice-Theory point of view as it has been voiced by its main representative, H. L. A. Hart<sup>4</sup>. Hart adopts Hohfeld's<sup>5</sup> conception of a claim right and states that a person has a right when he is owed a duty by another or others. Complaining about the imprecision with which both lawyers and the general public have used the word "rights" when referring to the conduct constraining implications of legal rules, Hohfeld distinguishes no fewer than four quite different positions, any one of which might be held by persons commonly and indiscriminately described as right-holders: claims, liberties, powers, and immunities. Holders of any of these positions are placed in certain bilateral relations to others who thereby hold correlatively entailed positions with regard to the conduct governed by those rules: duties, no-claims, liabilities, and disabilities.<sup>6</sup> In this paper we shall be concerned with the first of these correlatives and we shall look at how a claim right implies that the right-holder has a power over whether to enforce or to waive the duty that others have as correlative to his or her right. The person to whom the duty is owed has the control over the performance of that duty and is the right holder.

Now, how does this theory perceive of natural rights? Are there such things as natural rights from the choice-theorist's point of view? Choice theory does accommodate for one natural right, namely the right of all men to equal freedom, because, it is claimed, it is only by virtue of being capable of choice that adults have this right, and, secondly, this is a right that men have not reciprocally awarded each other. In addition, Hart's contention is that both special and general rights are based on the natural right to equal freedom. His claim is however rather weak since it is conditional: if there are any natural rights, then this is the only one.

After introducing this one natural right, among the sources of special rights Hart enumerates the mutuality of restrictions, of which political obligation is a particular instance, and it is this that the essay will be concerned with.

[...] [W]hen a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required, have a right to a similar

restriction from those who have benefited by their submission. [...] the moral obligation to obey the rules in such circumstances is due to the co-operating members of the society, and they have **moral** correlative right to obedience.<sup>7</sup>

This is the initial requirement of reciprocity in social interaction processes as expressed in the language of claim rights. Persons are free to do whatever does not infringe on the freedom of the other persons. The natural claim right to the greatest equal freedom lies at the basis of lawmaking and in a true democracy it is constitutive for the sovereign electorate. It is by virtue of this right that qualified persons (persons for whom it is possible to say that they can enforce or waive a duty) can legislate for themselves by complying with a certain procedure.<sup>8</sup> In this way, the basic norms and rights for future social cooperation are established. Offences are nothing but infringements on all the possible formulations of this right.

### *Punishment and the Claim-Right to Equal Freedom in Democratic Societies*

I shall claim that in a democratic society committed to the equal moral worth of its members, what is needed in order to make a justification for punishment plausible is the assumption of an equal moral worth of persons (the conception of equal moral worth of persons as reformulated by Hart in the form of the natural reason/choice-based claim right to equal freedom will be adopted here). This would provide normative and justificatory force first to the imperative force of the law and, implicitly, to retributive punishment. When a man is punished, the moral justification depends on the morality of the law and not only on the fact that a law has been broken. Punishment cannot be limited to the application of a particular procedure by the correct authority. It is the fact that a person has behaved not only illegally but also immorally that justifies the punitive practice.

Therefore, the point I want to make is that, if it is to be meaningful, a justification of punishment must link its cancellation/annulment claims to the moral wrongness of the offending act. This is to be done by means of a correct understanding of what we morally owe to responsible agents. It is the equal right to freedom, which is the basic human right justifying punishment as a response to its violation in all its instantiations, which Choice Theory can sustainably defend.

In demonstrating this, I shall make use of two of Herbert Hart's categories; the first one is that of **role**

<sup>4</sup> H.L.A. Hart, "Are There Any Natural Rights?" *The Philosophical Review*, (April 1955), 64(2), 175-191.

<sup>5</sup> Wesley Hohfeld, *Fundamental Legal Conceptions*, (New Haven: Yale University Press, 1919).

<sup>6</sup> I am indebted in this presentation to Hillel Steiner's *An Essay on Rights*, (Oxford: Blackwell, 1994).

<sup>7</sup> Hart, "Are There Any Natural Rights?", 185, (emphasis added).

<sup>8</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon press, 1967), 75.

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(and I would add, formal) *responsibility*, which refers to the fact that:

(...) whenever a person occupies a distinctive place in a social organization to which specific duties are attached to respect or provide for the welfare of others or to advance in certain way the aims or purposes of that organization, he is properly said to be responsible for the performance of those duties, or for doing what is necessary to fulfil them<sup>9</sup>.

I shall use this in its widest sense as the responsibility that persons have towards one another and towards society as a fair scheme of cooperation based on a mutuality of restrictions. The second concept is that of *legal liability responsibility*, which points to the fact that:

(...) when legal rules require men to act or abstain from action, one who breaks the law is usually liable to punishment for his misdeeds or to make compensation to persons injured thereby<sup>10</sup>.

What follows from here is that legal liability responsibility draws on a legal procedural role responsibility as mutuality of restrictions, which in turn the legal-procedural expression of what I would label as *moral role responsibility*. By moral role responsibility I mean the responsibility that people have towards one another by virtue of their equal claim right to freedom in the initial lawmaking moment and later on within the legally-constituted society.

What is needed for the reproduction of society is that the agents necessarily conceive of their interests as compatible with those of the others, not merely in the sense that each accepts that there are beneficial reasons for participation in a scheme of cooperation, but also in the sense that each agent comes to see every other participant as a being of equal value to himself or herself. In order to keep this commitment alive, a minimum civic education towards a respect for difference and different point of views as well as punishment in case of deviation from this respect is necessary. This paper shall deal only with the latter of these and I shall further on try to show that, in a democratic society, it is the collective body of citizens who continuously deliberate and revise the types of acts that are to be punished and the types of duties that may be waived. In order to do this, we first need an account of democratic, deliberative lawmaking based on the citizens' perception of one another as sharing in the possession of an equal right to freedom.

Theorists generally agree that the only alternative to social conflict is coercive positive law. But, due to the complex character of societies, there will always be disagreement as to what law should be and how institutional arrangements should reflect the law. The way things work in a democratic society will be different from the way in which decisions are made in a traditionalist society. In the case of the former, through democratic rules of deliberation, practical and ethical-political reasons enter deliberation to the extent that they do not contradict society's commitment to the primordial claim right to equal freedom. It is this principle/right that represents the most basic level of justification for a democratic society's legal rights and the sanctions attached to them. The democratic procedure for deliberation depends on the community's acknowledgement of this initial right as its basic precondition and standard. The Constitution as the basic law of this community is a list containing the political form of this right and all the other basic rights that can be derived on its basis. In addition, the Constitution should be seen as a historical learning process: the historical circumstances may require further formulations of the basic rights and the conditions under which the duties attached to them are to be either enforced or waived. It is only fair that the generations subsequent to the founding fathers have their voices heard within the limits of this right that their community sees as constant over time<sup>11</sup>.

The assumptions of democratic procedures for rule making is, I believe, coextensive with the Hartian formal role responsibility specifying the fact that there are duties citizens have in the political society. However, behind it lies the claim right to freedom, so moral responsibility can also be conceived of as clearly presupposed by legal responsibility. In a democratic society, democratic rule making necessarily entails this pre-political moral right which enables it; it is made possible by the latter. Unless laws are based on and rights derived from this moral principle, law and the sanctions attached to its breaches cannot be justified. The possessors of this right are to be seen as morally responsible persons capable of choice and, with the institutionalization of this right, they also become legally responsible persons, liable to be held legally accountable (either in the form of restitution/compensation or punishment) in case they break the law to which they themselves have contributed. This leads us to see this right as prior and as limiting the lawmaking procedure, namely, as a moral aspect that has to be taken into account by the

<sup>9</sup> Herbert Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1992), 212.

<sup>10</sup> Hart, *Punishment and Responsibility*, p.215.

<sup>11</sup> My account of democratic rule making is indebted to the Habermasian story: Jurgen Habermas, *Between Facts and Norms*, (Cambridge: Polity Press, 1996).

legislators with regard to all those persons to be affected by the norms that they are about to devise. Moreover, if the initial enterprise of lawmaking depends on the recognition of others as equally free partners, then the language they use has to have in it the standards of free and equal persons with mutual obligations to one another.

After the institutionalisation of this natural right to freedom, and hence to participation in the public dialogue in a Constitution, the collective body of citizens will exchange arguments regarding the particular instantiations of this natural right and the conditions under which their afferent duties are to be enforced or waived. The agreed-upon set of rights and conditions of enforcement represent the content of a society's basic law. The natural conclusion is that in terms of public law, the collective body of citizens is the right holder since its content has been reached through a dialogical role-taking inter-subjective process of will formation.

To sum up, in a democratic society, the Constitutional essentials would be fully justified should they be agreed upon and later revised by all participants in a practical discourse entered by all persons having the capacity of choice and being equally free to participate and make contributions. The Constitution is thus the expression of the collective will of the citizens acknowledging a pre-political right to equal freedom. The historical constant can only be a right that is perceived as pre-positive and that can transcend the different historical circumstances within which the different stages of the democratic constitutional project take place.

The obvious question one can ask now is what happens to those who do not participate in the process of collective will formation. Here I think we have to distinguish between several categories. First, there are those who do not participate but still choose, by tacitly accepting the rules produced in the process, so they still keep the right because they have not raised a no position; they can exercise this right in an explicit manner and take a yes/ no position at a future time with regard to other implications of the original set of rights. Their claims may be reversed due to the cognitive and transformative functions that the dialogue performs or they may persuade others to take a similar position to theirs with regard to the issue under scrutiny. Second, there are those who are unable to participate due to the incapacity to exercise choice or those who refuse to enter the dialogue for various reasons, but who remain within the boundaries of legally regulated society; they are therefore third party beneficiaries – not right holders- who do not contribute to the process of collective will formation. Third, there are those who may exercise their right to equal freedom by exiting the community and hence lose the benefits and protection they could get under the rules emerging from the process. Fourth, there are those

who conditionally delegate the power attached to their right to some other people but this delegation is conditional and revocable.<sup>12</sup>

Therefore, in a democratic society, choice-capable persons have the right to enter the decision-making processes as individuals but in the course of the deliberation their will may be transformed due to the cognitive influence of the process itself. In the end, the law is the product of the collective will of those who have participated themselves directly or through conditioned representatives.

The conclusion is that, if we are to preserve the legitimacy of a democratic society, reaching understanding cannot be assumed to be dependent only on formal procedure. Equal liberty as a claim right - correlated with others' duties - has to be seen by its members as implicit in any such attempt. It is the determinative role of this right that enables the members of a democratic society to see all offences as violations of its partial instantiations. This enables them to determine desert and justify punishment on grounds that can be acceptable to all. What is desirable is that law as it stands be obeyed and that there be unrestrained discussion about the issues in dispute. However, I need to emphasize that unless formal role responsibility is seen as presupposing moral role responsibility there cannot be a solid ground for the application of sanctions. An offence is the violation of any of the possible instantiations of the natural equal-claim right to freedom in the form of derivative and special rights. An offence results from not observing the correlative duties attached to these rights. This by itself justifies the application of punitive treatment as a necessary consequence.

The question I would like to ask now is: if this is the case with constitutional law, what happens in the case of criminal law, the other important branch of public law? Who holds the right?

I shall argue that the right holder in the case of criminal law within a democratic society is the collective body of *living* citizens against criminals individually. I shall suggest that we can conceive of criminal law as derived from the Constitution (which is the expression of the inter-subjectively reached collective will of subsequent generations, the present generation being the one that has most recently brought its contribution) as a set of conditions under which this collective body of citizens has chosen that the delegated powers of waiver or enforcement are to be exercised by the state officials, no matter what branch of government they belong to. I shall claim that the highest officials *should be disabled* to enforce or

<sup>12</sup> Here I made appeal to the Choice Theory account of delegating powers as it has been expressed by Hillel Steiner in *An Essay on Rights*, (Oxford: Blackwell, 1996), 70. According to this account the power to waive / enforce the duty attached to a claim-right may be *conditionally* delegated without the right-holder losing his or her right.

waive outside those conditions expressed in the law as the latest product of the present collective will. The institutional consequence of this unwarranted discretion is in most legal systems identified as nullity. The criminal law prescribes the conditions under which the duties that individual citizens have are to be either enforced or waived, but let me try and elaborate a bit on this point.

***Communicative and Administrative / Delegated Power: The Case of Criminal Law***

As I have said in the beginning, one of the supposedly main problems that the choice theory of rights is said to have is linked to the fact that under criminal law, individuals do not have the requisite control over the duties of others. According to Choice Theory,

(...) anyone who holds these powers (of waiver / enforcement) over a duty or disability holds the right correlative to it. (...) Unwaivability, it is argued, is a characteristic feature of the duties imposed by criminal or public- as opposed to civil or private law<sup>13</sup>.

As a consequence, some choice-theorists, including Hart himself, have concluded that there are no claim rights correlative to the duties people have in the case of criminal law. Others have claimed that they must be vested with the higher officials since unwaivable immunities always logically entail waivable ones.<sup>14</sup> Others still have tried to provide a democratic account of who the right-holder is in criminal law by claiming that it is the collective body of citizens who delegates the power of enforcement / waiver to state officials who can only act

(...) constrained by preordained rules and restrictions, usually related to wider beliefs about justice and fairness that prevent the arbitrary choices that appear to be a central component of the choice theory right-holders.<sup>15</sup>

This is a point made by Stephens who claims that the duties incumbent upon individuals in criminal law are created by the choices made through democratic means, meaning that the structure of correlative duties and rights is not hierarchical but circular.

In trying to provide a moral justification for the practices of punishment and to find the claim holder in criminal law I shall start from Stephens's premise. However, I shall not follow him in his demonstration of the collective right holder, since I think his account

of democratic will formation is based on a sum of assumptions that need further clarification and arguments to support them. Instead, I shall appeal to Habermas again, and more precisely to his story of the conversion of communicative power into administrative power in the public sphere.

What I shall claim is that after the initial Constitution-making process guided by the perceived equal right to freedom and resulting in the collective will of democratic values-prizing citizens, the parties may decide to delegate their power to state officials in order that the initial set of legal provisions enlisted in the Constitution be logically interpreted and developed through derivative laws. Another reason for this delegation is that the administration (the executive and the judiciary), which has to act as a part for the whole, can be programmed and controlled only through laws. The legislative power that in principle rests with the citizenry as a whole is delegated to the parliamentary bodies that justify and adopt derivative laws in accordance with the Constitution and democratic procedures. These represent the conditions of the delegation, so the citizens as a collective body delegate the power to enforce/waive duties to the legislative body but under the conditions that they themselves enlisted in the existing basic law as an expression of their choice.<sup>16</sup>

But how do these conditions function? How do the citizens exercise control over their representatives who are to develop the initial legal provisions, also in the form of criminal law? How do they exercise control over Courts? What about the executive's social programs and strategies linked to criminal law? Last but not least, how can the citizens control a Constitutional Court that may undermine the democratic deliberative will formation?

After the collective body of citizens has decided on the set of basic rights, they delegate power to representatives to further specify the logical implications of these rights and to create the institutional framework for their protection. The role of the executive is to ensure the creation of programs that will facilitate the exercise of these rights by all citizens; the role of the courts is to establish whether certain actions fall under the conditions of enforcement / waiver established in the basic law. The principle that all governmental authority derives from the people is specified in the Constitution in the form of freedoms of opinion and information; the freedoms of assembly and association; the freedoms of belief, conscience, and religious confession; entitlements to participate in political elections and voting processes; entitlements to work in political parties and citizens' movements; and so forth. These liberties get actualized as informal will formation in the political public sphere, as participation inside the political parties, as participation in the general elections, as deliberation

<sup>13</sup> Steiner, 1996, p.60-65.

<sup>14</sup> Steiner, Kramer, and Simmonds, *A Debate over Rights*, 1998.

<sup>15</sup> Peter Stephens, "Choice Theory Rights, Democratic Choice, and Criminal Law: A Case for Choice Theory Group Rights", (MA Thesis, University of Manchester, 2002).

<sup>16</sup> For the account of the delegation of powers by the Choice Theory right-holders see also Steiner 1998, 247.

and decision-making in parliamentary bodies, and so on.

Therefore, discourses conducted by representatives can meet the condition of equal participation on the part of all members only if they

(...) remain porous, sensitive, and receptive to the suggestions, issues, and contributions, information and arguments that flow in from a discursively structured public sphere, that is, one that is pluralistic, close to the grass roots, and relatively undisturbed by the effects of power.<sup>17</sup>

So, as opposed to the initial Constitution-making moment, in the case of further revisions of the constitution and further making and application of law in general - and of criminal law in particular - control over the legislative body should be exercised through public deliberation. To the rights already mentioned I would add recall rights, the imperative mandate, popular legislative initiatives, and impeachment rights as other necessary institutionalizable means of control over the legislative body in its attempt to develop law.

These rights are collective rights and control is exercised collectively by a "subjectless" public sphere that, through institutionalized channels of democratic participation and communication, puts forth claims, proposals, and opinions on which all participants capable of choice can agree. This is the form that communicative power takes. Administrative power - which in my framework of analysis is the delegated power exercised by the legislatures, the executive, and the Courts - depends on communicative power and is subordinate to it. In a democratic society, government becomes illegitimate when administrative power becomes autonomous from communicative power, which is the monopoly of the collective body of citizens:

If the sources of justice from which the law itself draws its legitimacy are not to run dry, then a juris-generative communicative power must underlie the administrative power of the government<sup>18</sup>.

No political authority can expand the resources of its power as it wishes. Communicatively-produced power is a scarce resource that organizations compete for and officials manage, but which none of them can produce as it has its origin in the inter-subjective practices of collective will formation in which citizens - as agents capable of both moral and legal role responsibility - enter for the purpose of regulating behaviour within society. This communicative power is created through inter-subjective, transformative, cognitive, role-taking, epistemic processes which, I

think, do not allow us to trace back individual contributions to collective will formation. Therefore, the public will is not reducible to the individual wills that took positions regarding the claims raised in the private sphere. The right attached to this will is therefore a collective right. Administrative power should not reproduce itself on its own terms but should only be permitted to regenerate from the conversion of communicative power. This is a general condition for the further elaboration of law in general and criminal law in particular. From this perspective, the legislatures are only delegated power in order to further formulate this condition, but they are not the right holders since they are held in check by basic constitutional provisions as the expression of the will of the present generation. The present generation has exercised its choice and hence its right either by accepting what the previous generation has willed or by amending the Constitutional provisions to fit the present, within the limits of what they see as a moral right to equal freedom. The power of the delegates, on the other hand, is revocable.

To recapitulate, the utilization of administrative power on the part of the legislature and judiciary is unobjectionable only insofar as this resource is necessary for the institutionalization of the corresponding discourses. To the extent that administrative power works to establish and organize the construction and application of the law, it operates in such a way as to provide enabling conditions.

Conversely, if the administration takes on functions that go much beyond the implementation of legal programmes, then legislative and adjudicative processes become subject to restricting conditions. Such interventions or substitutions violate the communicative presuppositions of legislative and legal discourses and disturb the argumentation-guided processes of reaching understanding that alone can ground the rational acceptability of the laws and court decisions<sup>19</sup>.

These are the ways in which power that has been delegated to the legislatures can be controlled; these are the conditions for its delegation. In case legislatures go beyond the conditions of the law, power gets withdrawn since delegation is revocable. State officials have to keep within the conditions listed in the law as they are at this particular moment in time. Should they attempt to exercise powers of enforcement or waiver outside the conditions included in the law, they are to be held accountable and their decision nullified. As far as I can see, the only way they can justify going outside the existing provisions would be by appeal to the incompleteness thereof (e.g. they can appeal to the presence of extraordinary

<sup>17</sup> Habermas, *Between Facts and Norms*, 182.

<sup>18</sup> Habermas, *Between Facts and Norms*, 146.

<sup>19</sup> Habermas, *Between Facts and Norms*, 173.

consequences/costs that have not been foreseen by the last revisers of the law in question). In this case they only have a temporary tenure of the right; the law will be further on inter-subjectively revisited in order to decide on whether to incorporate the so far unforeseen conditions.

This is also the case with the courts:

In legal discourses of application, a decision must be reached about which of the valid norms is appropriate in a given situation whose relevant features have been described as completely as possible.<sup>20</sup>

The right lies with the makers of the law; the court must justify its decision as being in concordance with the existing legal provisions. This is the expression of what Habermas calls the principle of binding the judiciary to the existing law. Therefore court officials are delegated power and they only apply the law according to the conditions set in it by the collective body of citizens through their controllable trustees. The representatives are not entitled to unjustifiably make use of criteria outside those expressed in the law; this could potentially trigger nullification of their decisions. In my opinion, their appeal to criteria outside those inscribed in the law may have two consequences: withdrawal of their power of application in case their action was unwarranted, or revision of the law in case circumstances that have not been foreseen by the drafters of the law forced the magistrates to take action outside the conditions mentioned in the law. In either case, the right ultimately stays with the collective body of citizens.

Here we should devote some attention to the Constitutional Court, which plays a crucial role. Many theorists have feared that the functions exercised by a Constitutional Court represent a democratic deficit<sup>21</sup>. I think that, provided some conditions are observed, this should not be the case. Generally democracies have institutionalized mechanisms for control that limit the potential of legislating actions by such courts. Thus, I think that to the extent that it is established as a second-order delegate (its members being nominated by the parliaments) and to the extent that the parliaments can overrule the decisions of the court by means of a qualified majority (the parliaments themselves being under the direct control of the collective body of citizens through the mechanisms mentioned above) the Court acts more like a watchdog for the sovereignty of the people; when the Court points to the necessity of a constitutional revision, a referendum is generally held or appeal to a qualified

majority in the constitutional assembly is imposed. In case the electorate decides in favour of the revision, the revision of all legal provisions based on the revised constitutional clause is to be effected in order to keep up with the will of the present generation. In case a law proves to be unconstitutional, it is to be annulled, as it is not consistent with the will of the present generation expressed in the present version of the Constitution.

As for the executive branch – whose exercise of power in the case of criminal law is limited to the proposals of social/educational programmes and policies related to criminal and anti-social behaviour - it should be subordinate to the same control by communicative power to which the other forms of administrative power are subject. This requirement of statutory authorization has the effect of nullifying regulations, ordinances, agency rules and guidelines, orders, and other administrative acts that contradict a legal statute.

The priority of laws legitimated in democratic procedures has the cognitive meaning that the administration does not have its own access to the normative premises underlying its decisions. In practical terms, this means that administrative power may not be used to intervene in or substitute for processes of legislation and adjudication.<sup>22</sup>

In conclusion, political legislators alone enjoy unlimited access to normative, pragmatic, and empirical reasons, but only within the framework of constitutional provisions and a democratic procedure designated for the justification of norms. The judiciary cannot make whatever use it likes of the reasons packaged in and linked to statutes. The norms fed into the administration bind the pursuit of collective goals to pre-given premises and keep administrative activity within the control of the collective body of citizens. The basis of the collective right that citizens collectively have against criminals over whom they indirectly exercise the power to waive or to enforce their correlative duties lies with an equal right to freedom in which all members of a democratic community are supposed to share. This right represents the justification for all law produced through the interaction of choice-capable citizens exchanging arguments and agreeing on the form that the set of rights will take for now. Criminal law has the same moral justification. Offences are violations of all the instantiations of the equal claim right to freedom as they are formulated in public law. The conditions under which the duties correlative to these instantiations will be enforced are inscribed in the law together with the extraordinary conditions under which these duties are to be waived. Since the law is the

<sup>20</sup> Habermas, *Between Facts and Norms*, 172.

<sup>21</sup> See as one of the best examples of such a point of view Frank Michelman's "Always under the Law?" in *Constitutional Commentary*, No.12, 1995, 227- 247 and especially in Frank Michelman, *Brennan and Democracy*, (Princeton NJ: Princeton University Press, 1999).

<sup>22</sup> Habermas, *Between Facts and Norms*, 173.

expression of the collective choice and it designates the terms of the application of punishments, the right belongs to the people and not to the state officials.

### *Conclusions*

The use of rights in society does not occur in a vacuum, in isolation from the rights of others. The enjoyment of a right is limited by the enjoyment of another right by somebody else. Therefore, rights secured by law are always correlated with other people's duties not to interfere with the exercise of the recognized rights. This is a definitional characteristic of a right; it is implemented only if others abstain from doing something or if they do specific things required by the law. This is what Hart meant by formal role responsibility - the responsibility that citizens in a society have towards one another according to the law. Any break from these requirements constitutes an offence and a violation of the laws, but this is not enough to justify the application of punishment as a response to an offence. What we need is an account of what it is that makes the law just in a certain society. What this paper has tried to show is that in a democratic society, we can conceive of law as a result of a dialogical practice governed by what people see as a basic natural claim right to equal freedom representing the moral limit that the dialoguers have to observe. This is the basis from which all other rights as expressions of moral role responsibility are derived and, at the same time, the reason why we are entitled to consider the collective body of living citizens as the claim-right holders of the right to punish.

Of course the model I present here should be seen more as a corrective, regulative ideal for assessing real life democratic performance rather than a description of how the normative substance of democratic societies gets actualized. It might be useful, then, to conclude by saying that, ideally, we may see a democratic constitution as the agreed-upon expression of a meta-constitution (or pre-constitutional rule), with the latter consisting of agreed-upon norms and pre-positive rules instantiated in the moral claim right to equal freedom<sup>23</sup>. The constitution and the meta-constitution are inseparable at the initial moment of agreement but they can come apart at any time thereafter. Thus, although we may at some time later lack the earlier ethical, substantive agreement regarding the content of the rules embodied in the Constitution, we can still have wide agreement on the meta-constitution. This will enable us to revise the Constitution without losing the moral justification which comes from the meta-constitution.

I realize that there are still a lot of questions to be answered if this paper is to achieve its purpose. Many of these questions arise due to the possibly overly ambitious scope of this attempt. The relationship between the Habermasian conception of reason and the Hartian one is one of the problematic issues that come to mind and this issue needs a serious exploration. Also, a careful examination of the tensions between normative deliberative ideals and their corrective or exemplary functions for real life democracies is yet another must. Due to the economy of this paper these questions cannot be dealt with here but they constitute fertile grounds for further intellectual exercises.

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<sup>23</sup> For a non-universal, contextualised, rather communitarian account of meta-constitutions and constitutions see Larry Alexander, "Introduction" in *Constitutionalism – Philosophical Foundations*, ed. Larry Alexander, (Cambridge: Cambridge University Press, 1998), 1-15.