The Right to Rule of the European Court of Human Rights: A Democratic Defense

by

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Abstract

In this thesis, I develop an objection to the claim that the “right to rule” of the European Court of Human Rights cannot be reconciled with the democratic-procedural standards by which state parties, in accordance with the principle of subsidiarity, decide about the content and scope of human rights norms. First, I suggest drawing the attention to the neglected balancing exercise of the review process, in which the Court has to determine whether a violation is nevertheless “necessary in a democratic society”. Second, I shed light on the role that “pluralism” plays in the balancing of the Court and on the implications it has on the identification of duties and duty-bearers (with particular emphasis on Articles 8-11). Third, I argue that Thomas Christiano’s egalitarian argument for democracy can best illuminate the Court’s emphasis on pluralism, making the search for public equality the implicit normative ideal of the Court.
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1 Introduction

When one examines the current place of democracy in the political discourse surrounding the European Court of Human Rights (hereafter, the Court), one is struck by how drastically it has changed since the Court’s early days. Legal historians are clear that democracy played a significant role in supporting the creation of the Convention nascent system. Early civil society activists and politicians then put emphasis on the need to install an intergovernmental “alarm bell” system against the return of totalitarian practices while drafting states aimed to “lock up” the democratic process against internal opponents. Article 2 of the first draft of the Convention prepared by the European Movement in 1948 (before it reached the legislative and executive levels of the Council of Europe (hereafter, the CoE)) required each state party “faithfully to respect the fundamental principles of democracy” and to proscribe any action “which would interfere with the right of political criticism and the right to organise a political opposition”. In schematic terms, the preservation of democracy was the end and the Convention “system” the means.

Today, the political discourse has significantly changed. In a number of state parties (including early promoters of the Court’s system such as the United Kingdom⁴), democracy is increasingly

¹ For the non-governmental group the “European Movement”, which initially formed the project of an international convention in July 1949 in the Hague, the main goal was “the creation among the European democracies of a system of collective security against tyranny and oppression” and that “without delay, joint measures should be taken to halt the spread of totalitarianism and maintain an area of freedom”. In European Movement, European Movement and the Council of Europe (Published on behalf of the European Movement by Hutchinson, 1949). The limited purpose of the “alarm bell” system would therefore explain the quasi-judicial character of the Court, which lasted until the introduction of Protocol 11 in 1949. As to the Court more specifically, Bates explains that “it would be the conscience of the free Europe, acting like an “alarm bell” warning the other nations of democratic Europe that one of their number was going “totalitarian”. At this stage, then, the human rights guarantee was minimalist in its ambition”. In Ed Bates, “The Birth of the European Convention on Human Rights,” in The European Court of Human Rights between Law and Politics, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011), 21.

² In his seminal article, Moravcsik argues that neither realism nor idealism explains the state’s acceptance of the Court's compulsory jurisdiction and the right to individual petition, which “constrain its domestic sovereignty in such an unprecedentedly invasive and overtly non-majoritarian manner”. Rather, the explanation lies in the state's tactic to consolidate democratic institutions vis-à-vis internal political opponents in times of uncertainty: “sovereignty costs are weighted against establishing human rights regimes, whereas greater political stability may be weighted in favour of it”. In Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” International Organization 54, no. 2 (2000), 220, 235.

³ European Movement and the Council of Europe, Ibid.

⁴ Most recently, Prime Minister David Cameron included in his agenda for EU reform the following objective: UK police forces and justice systems should be “able to protect British citizens, unencumbered by unnecessary
employed as a normative standpoint to criticize the Court’s right to rule. On this view, the Court has excessively extended the scope of its interpretative freedom (based on Article 32) to determine the obligations of state parties. This has led not only politicians but also academics and national judges to question the legitimacy of the Court’s judicial powers. A senior judge of the United Kingdom has even questioned the very right of the Court to exist: “if one accepts, as I have so far argued, that human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual cases, still less why the Strasbourg court was thought a suitable body to do so”. It is one thing to explain that the indeterminacy inherent in the wording of the Convention together with the rich diversity of cases reviewed throughout the years required an extension of the Court’s initial judicial powers. It is another to justify what many describe as illegitimate judicial discretion. Indeed, to determine whether state laws conform to the Convention, the Court has created and developed particular interpretive doctrines (“living instrument”, “evolutive and dynamic”; “autonomous concepts” or even “practical and effective”) that extend its judicial powers far beyond what drafting states could possibly have envisioned.

There at least two ways in which one can theoretically support the objection to the Court’s right to rule. First, one may remark that the expansion of the Court’s right to review domestic legislation has been supported by interpretive doctrines that contradict conventional approaches to treaty interpretation based on state consent. Those doctrines are jurisprudential creations with only a tenuous basis in the Vienna Convention on the Law of Treaties of 1969 (hereafter, the VLCT). Intentionalists, for instance, place the boundaries of legality in state consent and “frozen” at the time of the drafting of the Convention. For such theorists, the Court’s famous claim that “the mere fact that a body was not envisaged by the drafters of the Convention cannot interference from the European institutions, including the European Court of Human Rights”. Available at http://www.theguardian.com/world/2014/mar/16/david-cameron-eu-reform. On the issue of the prisoners’ right to vote, Cameron held in 2009 that “it makes me physically ill to even contemplate having to give the right to anyone who is in prison (...).” Available at: https://www.youtube.com/watch?v=DjzmvvozHuW.


6 The group of legal experts mandated by the Committee of Ministers of the Council of Europe (CoE) to examine the Convention’s proposal (in 1949) claimed in their advisory opinion that “the jurisprudence of a European Court will never, therefore, introduce any new element or one contrary to existing international law”. Cited in Bates, “The Birth of the European Convention on Human Rights,” 39.
prevent that body from falling within the scope of the Convention” is likely to be highly problematic. However, the recent literature suggests that given initial disagreement over the scope of the rights among drafting states, and in light of the constant evolution of European societies, relying on the drafters’ intentions to contest the expansion of the Court’s right to rule is not fruitful.

The second objection to the Court’s right to rule is more vivid and has been defended by democratic theorists. National or supranational, democratic theorists argue that judicial review does not and cannot respect the representativeness that is required from democratic institutions.

In a seminal article, Jeremy Waldron is particularly concerned that judicial review does not respect disagreement among citizens on substantive issues. On this count, installing a (supranational) court with the final word over the content and scope of abstract rights “inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizen”.

Interestingly, this objection has recently been re-cast in the context of international human rights bodies (thereafter, IHRBs), of which the Court is an instance. It however operates with a distinct conception of democracy and judicial review. In a recent contribution, Steven Wheatley accepts that human rights need not necessarily be “in an antagonistic relationship with political will-formation, as it requires each democratic society to work out its own conception of ‘human rights’ through political deliberation and legal argument”. Central to this claim is a specifically Rawlsian conception of judicial review based on the standard of public reason: “the function of judicial review is to develop the best interpretation of constitution norms, including human rights norms, that can be justified in terms of the public concept of justice and public reason, based on the relevant body of constitutional materials and precedents”. What poses the problem is therefore not the process of judicial review within state parties prior to the case

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11 Ibid.
reaching Strasbourg (to which critics of the very idea of judicial review, such as Waldron, would need to object), nor the distance from the drafting states’ intentions. Rather, the objection is that Strasbourg’s judicial methodology (the doctrines of interpretation that give principled support to its judgments) does not incorporate the democratic specification of human rights norms that has been ongoing within state parties. In light of that normative standard, the Court’s right to rule is conclusively non-democratic.

The central argument defended in this thesis is that the democratic critique of the Court’s self-extended right to rule, and in particular Wheatley’s recent contribution, reaches their conclusion by neglecting a crucial premise: the place of democracy in the review of the Court. True, how democracy operates within this judicial context and what kind of reason it gives – to justify, to enlarge or to restrict the scope of the Convention rights – is not clear from the text of the Convention. Although it is found prominently in the Preamble, democracy is absent from the text of the rights. However, even a quick look at the case law shows that democracy and more particularly “democratic society” is salient (most clearly, on Articles 8-11). This is because, in the structure of the Court’s review, “democratic society” stands prominently at the final stage of what has been called the “fair balance test”\(^{13}\), that is, when the Court finally balances the interference with the Convention right(s) against the justification given by the respondent state party. In order to determine whether the respondent state party “struck a fair balance” between the two, the Court has to determine whether the interference found was nevertheless “necessary in a democratic society” and whether it responded to “a pressing social need”. This is also where the Court may allocate a margin of appreciation and limit its interpretative authority on its subjects if the state party succeeds in offering justification.\(^ {14}\) This restriction clause is therefore crucial to the characterization of the Court’s right to rule.


\(^{14}\) Yukata Arai-Takahashi, “The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry,” in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, ed. Andreas Follesdal, Birgit Peters, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013), 62. The margin of appreciation doctrine is not explicit in the Convention (or in the preparatory works). The doctrine is conceived as justifying the limits of the Court’s interpretive authority on national courts. It is a jurisprudential creation that dates back to the need for acceptability of the Court’s authority vis-à-vis the state parties. As Arai-Takahashi explains, “since the inception, this consideration has impacted upon the judicial policy of the Strasbourg organs (the European Court of Human Rights (ECtHR, or the Court) and the erstwhile European Commission of Human Rights) in mitigating ‘damaging confrontations’ between them and the member states by allocating ‘spheres of authority’”. In Ibid., 63.
Since “democratic society” is at least as indeterminate as the wording of the rights themselves, the Court has had to specify its normative content and explain how each right fits in it. On pain of emptying the concept of its normative content, one cannot contend that the definition of what “democratic society” entails should be the exclusive domain of democratic states. This would also be the case if the Court held that “democratic society” is just what democratic state parties democratically decide it is. Adopting a teleological approach, the Court has not taken human rights and democracy as independent concepts. Rather, it has affirmed their inherent interdependence. In other words, the limits to the rights adduced by the Court tell us a lot about what the rights are about. Moreover, the conceptual specification at this balancing stage is crucial to the Court’s right to rule because “a definitive conclusion about the alleged violation can be reached only when the soundness of the justification adduced by the government has been scrutinized”. This point leads to a preliminary counter-argument to Wheatley’s democratic objection: to employ democratic theory to vindicate the Court’s right to rule on democratic-(Rawlsian) grounds without examining how democracy operates in generating the state parties' obligations in the case law seems just too quick. In fact, in his contribution on the international human rights bodies (hereafter, the IHRBs), Wheatley does not reconstruct in detail the reasoning of the Court and neglects this crucial part of the balancing process (the allocation margin of appreciation is mentioned in a footnote), whereas the reasoning of the Court was supposed to justify the democratic objection in the first place.

My argument operates precisely at this point. By closely examining the “democratic necessity” test, I show that the Court has articulated and now routinely affirms a conception of “democratic society” that cuts across the case law on the central “qualified” rights of the Convention (Articles 8 – 11). I argue that this judicial conception considerably alters the view that the Court’s right to rule cannot be reconciled with the democratic-procedural standards that state parties aim to attain internally (or, in Wheatley’s Rawlsian terms, in view of obtaining the assent of all the

17 It is now acknowledged that the restriction clauses of those articles can be enlarged to all ECHR rights. As De Schutter and Tulkens report, “the case law of the European Court of Human Rights has extended this approach to certain rights and freedoms whose formulation in the Convention does not follow this two-tiered structure, progressively developing what may be called a general theory of restrictions to the guarantees of the European Convention of Human Rights”.
affected subjects). Far from extracting this conception from explicit and principled statements of the Court, I adopt an inductive approach and identify the contours of this conception by jointly examining the reasoning of the Court with respect to Article 10 (expression), Article 11 (assembly and association) and Article 3 (Protocol 1) (free elections). Despite the ad hoc character of the “democratic necessity” test, the Court is rather firm on which function each of the three provisions serves in a “democratic society” and how those rights complement each other. Regrettably, the systematic reconstruction of the Court’s reasoning has been rather neglected in the theoretically inclined literature on the Court’s adjudication.

There are three central steps in my argument. First, I shed light on the crucial role that “pluralism” plays in the reasoning of the Court and on the implications it has on the identification of duties and duty-bearers correlative to the Convention rights. There is first the Preamble’s passage to which the Court systematically refers to justify the wide scope of Article 10 (expression) and Article 11 (reunion and association): “such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society””.\(^\text{18}\) But that is not the whole story. More importantly, pluralism imposes a positive duty on state parties requiring that “not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb” find a place in the public arena”.\(^\text{19}\) The adversarial character of public debates is routinely required by Strasbourg’s “democratic society” and culminates in the formal recognition of a “right of the public to be informed” of various perspectives on an issue of public interest. In other words, pluralism in the Court’s eyes plays a foundational role in a democratic society; the very point of pluralism is to foster democracy.

The second step of my argument is to make normative sense of the Court's emphasis on pluralism through democratic theory. I argue that the Court’s inherent connection between democracy and pluralism finds support in the so-called “egalitarian” argument for democracy (as a theory of political authority). Following Thomas Christiano, the expression of pluralism in public life realizes the cardinal democratic value of political equality. The driving thought is that


\(^{19}\) *Ibid.*, §49.
members of a community may accept the outcome of a democratic procedure if they were able to equally express their disagreement and have their interests taken into account in public deliberation. Note that Wheatley assigns a more ambitious objective to the democratic procedure, namely the assent of all affected subjects (through the Rawlsian prism of public reason), whereas Christiano concentrates on the egalitarian advancement of interests. I aim to show that the Court’s reasoning is closer to the latter than to the former.

Finally, I return to the reasoning of the Court to show how my framework can illuminate the identification of particular rights- and duty-bearers. Here I want to show that not just expression but also peaceful assembly and association (Article 11) as well as the right to free elections (Article 3 (Protocol 1)) – specified by their distinctive duties and duty-bearers – are all consequences of the same egalitarian conception of democracy anchored in the search for public equality in conditions of deep pluralism. Once those rights and their duties are envisioned as a whole, it appears that the Court attempts to justify its interpretive authority on distinctively democratic grounds. The Court’s insistence on pluralism can be viewed as consolidating the democratic procedure within state parties – the one that state parties are expected to follow in the first place. Under Article 11 (association and reunion) for instance, the Court is very permissive when minorities – those that are at risk of exclusion in public debate and whose interests may not be taken into consideration – express or manifest their views on public issues. As far as the right to free elections is concerned (Article 3 (Protocol 1), the Court has firmly established that “free elections are inconceivable without the free circulation of political opinions and information”.20

The conception I extract is therefore deployed throughout a set of rights that all converge towards the same egalitarian-democratic ideal. In conclusion, the judicial definition of “democratic society” reveals the co-originality between democracy and the Convention rights as specified by the Court, which offers a fundamental response to the democratic critique(s) of the Court’s right to rule as far as the rights examined are concerned.

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20 Şükran Aydin and Others v. Turkey, App. Nos. 49197/06, 14871/09, 23196/07, 50242/08, 60912/08, 22 January 2013, §55.
2 Wheatley’s procedural desideratum

In a recent collection on the legitimacy of international human rights bodies, Steven Wheatley questions the Court’s right to rule in advancing a powerful argument based on standards of democratic theory. Although Wheatley does not concentrate on the Strasbourg Court specifically, his argument fully applies to the European context, which is illustrated by the reference to seminal cases of the Court. In my review of Wheatley’s account, I want to start by identifying the common premises to his and my inquiries. There are in fact a number of them, which in turn make the critical discussion more precise. First and foremost, I agree with Wheatley that the current adjudication of international human rights bodies poses the question of their legitimacy vis-à-vis state parties constructed as constitutional and parliamentary democracies. The radical indeterminacy of those norms implies that their scope and content cannot be covered within the text of the Convention. This question, of course, can be posed in international legal theory based on state consent. As Wheatley explains, “where, however, IHRBs develop an interpretation that goes beyond the literal expression of the text of the treaty, they can appear to be imposing restrictions on the internal freedom of action without clear evidence that states have consented to the limitation, without the possibility of “constitutional override” (...)”.

Second, I follow Wheatley’s legal premise that the state parties, in accordance with the principle of subsidiarity, may develop their own understanding of the content and scope of rights through their internal democratic procedure, including in courts. However, the issue is, Wheatley argues, that the Court’s judicial methodology (the predominant doctrines of interpretation) takes no account of the outcome of that procedure prior to the case reaching Strasbourg: “the dynamic or teleological approach to interpretation has led IHRBs to construe human rights norms in a way that is not consistent with the sovereign political wills of State parties reflected in the adoption of the international law instrument and their accession to the regime”. It will be important to capture exactly what counts as “interpretation” for Wheatley. This is precisely where I shall argue that Wheatley does not fully reconstruct the process of judicial review.

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22 Ibid., 100.
Third, Wheatley assumes, as I shall do, that democracy (that he specifies through the concept of “self-government”) is a response to the facts of pluralism and disagreement. Moreover, Wheatley infers, as I shall also do, that those facts impose requirements on the conduct of political deliberation:

“the importance of a self-government conception of democracy is confirmed by the facts of reasonable disagreement and imperfect knowledge in political discussions; the importance of private autonomy and public participation for the individual citizen; the requirement for (at least hypothetical) consent for the exercise of political authority; and the need for members of a political community to commit themselves to a process of collective decision-making that takes into account the interests of others within the community”.

Now the normative spectrum about what we should aim for in the circumstances of deep disagreement looms large. In short, Wheatley’s take on this question is Rawlsian and Habermasian in that democracy should strive, through deliberation, to attain the assent of the all affected subjects, whether the norms in question originate at the national or international level (as with human rights treaties). In turn, this standard has implications for the function of judicial review, whether national or international: “the function of judicial review is to develop the best interpretation of constitutional norms, including human rights norms, that can be justified in terms of the public concept of justice and public reason, based on the relevant body of constitutional materials and precedents”.

Human rights norms, like any other norm that affects individuals, can according to Wheatley be incorporated into the domestic democratic procedure, which in turns aims for the assent of all affected subjects in order to gain its legitimacy. This is how Wheatley understands the “political conception” of human rights: “an act of political will formation”.

This being said, the question of how exactly we should manage disagreement is peripheral to the main challenge that Wheatley poses to the Court’s right to rule. The core of the argument is minimally procedural: while human rights norms are debated within the domestic legal and

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23 Ibid., 105.
24 Ibid., 106.
25 Ibid., 104.
political sphere like other public norms, the self-created doctrines of the Court are not: “the problem lies in the seeming absence of any parallel political discourses, in contrast to the position within the State, as international human rights law regimes do not provide a formal public space for political deliberation”.26 Given this basic democratic-procedural desideratum, Wheatley argues that the Court should be responsive to the democratic specification of those rights by national courts: “the function of IHRBs is not to give expression to moral rights, i.e. inherent rights we possess simply by virtue of ‘being human’, but to give expression to the overlapping consensus of the subjects of the regime on the issue of human rights”.27 It must be clear at this point that the Court, as constitutional courts, fully addresses the “democratic” interpretation of human rights made by domestic courts. This is because national judges remain the primary judges of the Convention following the principle of subsidiarity. The Court therefore confronts itself with the domestic interpretation of those norms. It systematically reconstructs the relevant laws of the state party in question and their application to the case at hand. Rather, what constitute the targets of the democratic argument are the prevalent doctrines of interpretation that the Court relies on to justify its final judgments.

Take the case of the “teleological” doctrine of the Court. The origin of the doctrine lies in Article 31(1) and 32 of the VLCT. Article 31(1) states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and light of its object and purpose”. Of course, it is not clear at all from this treaty norm how one should determine the normative content of the “object” and “purpose” of the Convention. As Letsas rightly points out, “individuating the object and purpose of the treaty is by no means a mechanical exercise; it is itself an interpretive question”.28 When one examines how the Court has filled this gap, it appears that it does not take into account the democratic specification of those norms in domestic legal orders. If that were the case, the Court would investigate the judicial practices of state parties and induct the appropriate level of protection based on the democratic deliberations. By contrast, the Court rather relies on what it itself takes to be the purpose(s) of the Convention. Two seminal cases must be mentioned here. In Golder v. United

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26 Ibid., 108.
27 Ibid.
Kingdom, a prison detainee (Mr. Golder) intended to contact a lawyer to sue a warden who had accused him of having taken part in a mutiny. The problem of interpretation turned on the question of whether the right of access to a court may be derived from the right to fair trial (Article 6). The Court answered affirmatively by focusing on the “object and purpose” (Article 31(1) of the VCLT) of the Convention on the basis of the Preamble (and also Article 3) that refers to the “common heritage of the political traditions, ideals, freedom and the rule of law” of the States Parties – citing the Preamble. But once the object and purpose are identified, it remains to see how their more precise normative content is specified. The Court held the following:

“taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a law-making treaty”.

In opting for the teleological method of interpretation, the Court dismissed a number of alternatives approaches. The Court may have claimed, as the United Kingdom did in its response, that the absence of a right to access to court in the text of the ECHR speaks against its existence. It may also have focused on the intentions of the drafters (back in the 1950’s and 1960’s) to support this interpretation. Instead, the Court has confined its interpretive inquiry to what it takes to be the inherent components of the right to a fair trial. As Letsas puts it, the Court “felt confident that the “object and purpose” of the ECHR contains the ideal of the rule of law which leaves no ambiguity (…) as to whether it contains a right of access to court”.

Golder is therefore a landmark case in the rejection of intentionalism, a variant of the broader doctrine of originalism, famously debated in the United States.

The second foundational case worth mentioning at this point is Engel and Others v. The Netherlands. This case laid down the basis of another self-created doctrine of the Court, that of

29Ibid., §36.
30Ibid., 517.
“autonomous concepts”. The issue in this case turned around the scope of the term “criminal charge” contained in Article 6 (fair trial). Mr. Engel and four other conscript soldiers serving in the Dutch army claimed, among other things, that the military authorities had violated Article 5 (liberty and security) and Article 6 (fair trial) in the proceedings. The respondent state party argued that military penalties do not constitute criminal offences and thereby do not fall within the scope of Article 6. The Court accepted the distinction and recognized it as a long-standing practice of states parties. But it did not take this practice to be decisive. The Court stated that the meaning of the term “criminal charge” by a national court is only one factor to be taken into account in determining the scope of the notion. The nature of the term “criminal charge” has a greater importance:

“the very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government”.

This is precisely where Wheatley’s argument operates: the content of those rights is not informed by the outcome of the democratic procedure (understood normatively as the quest for public reason in Wheatley’s framework). There is no way in which the Court can “know better” about the content and scope of the Convention rights: “the political culture of the democratic States, i.e. the way in which political debate is conducted within democratic society, is not sympathetic to any claim to “know better” by an actor or institution on issues of social, economic and political controversy, i.e. where there is disagreement (…)”. In addition, in a constitutional democracy all norms – including the domestic interpretation of human rights norms – must be subject to contestation and appeal, while the rulings of the Court can be appealed (to the Grand Chamber) only in a very limited number of cases. Can therefore the Court’s right to rule be reconciled with our overarching procedural conception of democratic legitimacy?

31 The Court has applied this approach to various central concepts of the ECHR, such as “possessions”, “association” or “victim”. The approach emphasizes the limited informative role that domestic interpretation plays – a starting point at best. See George Letsas, A Theory of Interpretation of the European Convention on Human Rights (Oxford University Press, 2009), 568.
3 The role of “pluralism” in the reasoning of the Court

The starting point of my investigation is Wheatley’s only partial reconstruction of the Court’s process of review. This may be due to the fact that he examines IHRBs more broadly and not only the European context. In my view, nevertheless, the Court’s right to rule even broadly taken cannot be confined either to the set of unconventional doctrines of interpretation outlined above, which primarily apply to the terms of the provisions, or to a broad and abstract characterization of a constitutionalization process (implying the identification of “basic norm” or a “rule of recognition” in Wheatley’s terms). Since what creates the tension is ultimately the finding of a violation or not, all the steps of the review that lead to the final decision, and how each may relate to democracy, must be carefully addressed. Among those is the application of the restriction clauses for the qualified rights (Articles 8 – 11) of the Convention. When the Court reviews whether a piece of domestic legislation conforms to the Convention, it can find an interference with one or more rights only on the basis of the facts of the case presented by the applicant and examined in light of a set of established interpretive principles. Yet the interference does not amount to a violation if the respondent state party can justify its interference via the restriction clauses, which are almost identical for all the qualified rights of the Convention (“publicity”, “legitimate aim”, “democratic necessity”). As Gerards and Senden confirm, “even when the Court finds an interference with the so-called derogable Articles 8-11 (private life, religion, expression, peaceful assembly and association), a further examination is required to determine whether it survives the three-pronged test”. 34 This is the particular judicial context that I want to concentrate on in the following sections.

It is widely agreed that the Court has spilled much more ink on this last step (“democratic necessity”) than on the two others (“accessibility of the law”35 and “legitimate aim”36) and

35 At this stage, the Court reviews whether the legal norm was accessible to the individual. This mostly implies that the law must be published. The Court also reviews whether the legal norm is formulated with the precision as to its meaning and scope — the foreseeability of the law. As the Court held in Sunday Times v. United Kingdom, “the law should be accessible to the persons concerned and formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee — if need be, with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.
36 At this stage of the test, the Court reviews whether the interference pursued a “legitimate aim” — as specified in the second paragraph of Articles 8-11: the protection of public safety, public order, health or morals, or for the protection of the rights and freedoms of others, etc.). This standard is ambiguous. Its wording suggests that it
sometimes even conflates the first two with the third. While “legitimate aim” is treated by the Court as an exercise of classification without much discussion, it takes “necessary in a democratic society” as forming the central step of the test. As Arai-Takahashi confirms, “the Strasbourg organ may prefer to focus their scrutiny on the third standard, finding it unnecessary to ascertain compliance with the first and second standard”.37 It goes without saying that the formulation is ambiguous: not only is “democratic society” undefined in the Convention, but it is also silent on which normative standards make the violation necessary (the standards of proportionality stricto sensu) in that society. In fact, rather than directly specifying what those standards are, the Court has engaged in defining what it takes to be the essential conditions of a “democratic society”, and how each of those rights (and how their limits are to be determined) serves it. Consequently, the interpretation of this restriction clause provides the Court with another occasion – in addition to the interpretation of the wording of the rights – to specify what those rights ultimately are about, and more importantly, how specifically they relate to democracy. Wheatley’s critique, as most of the recent contributions of the Court’s adjudication, tends to neglect that judicial specification. The objective in this section of the thesis is to reconstruct the substantive claims that the Court has held at this particular point of the review before turning to normative evaluation.

The first step is to capture the role that the Court has assigned to “pluralism” in order to justify the rather extensive scope of the right to freedom of expression (Article 10). True, the Court long ago established the inherent link between expression and democracy. In the seminal Handyside v. United Kingdom, which pertained to the publication of the Little Red School Book (encouraging young people to reflect on societal norms including sex and drugs), the Court held that “freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man (…)”.38 Yet the Court has not subsequently specified how expressing a view in public furthers self-development.

38 Handyside v. United Kingdom, App. no. 5493/72, 7 December 1976, §49.
Rather, it has placed emphasis on how the expression of pluralistic views benefits a democratic society as a whole. Since the same *Handyside v. United Kingdom*, the Court routinely relies on the Preamble’s widely cited passage that “such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society””\(^{39}\) to support this emphasis.

It must be clear that the Court’s emphasis on pluralism goes well beyond a mere factual recognition of diversity and disagreement in public debate. It plays a central *normative* role in justifying the wide scope assigned to expression. This can be seen in how pluralism generates a salient positive duty requiring states to guarantee access “not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb” find a place in the public arena”.\(^{40}\) This last statement has acquired the status of a *lingua franca* in the case law on freedom of expression and is routinely located at the end of the reasoning of the Court when it justifies, for instance, extremist political views, insults to heads of states, satire or just exaggeration in public debate. The thought is that the Court does not just allow individuals to make their claim in the public arena, however “unpalatable” they are. Rather, it suggests that the counterbalancing of views is the standard that should govern the scope of freedom of expression. Let us take the case of extremist political views. In *Gündüz v. Turkey*, which concerned the leader of an Islamic sect defending sharia law on an independent Turkish television channel, the Court famously held that while Sharia law is incompatible with a democratic society (it “clearly diverged from Convention values”\(^{41}\)), publicly defending its implementation cannot be subject to restriction under the “democratic necessity” clause. The standard against which the case is measured, which in turn determines the margin of appreciation, is precisely whether the views expressed by the claimant were counterbalanced in the public arena:

> “the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the

\(^{39}\) *Handyside v. United Kingdom*, §49. See also *Jersild v. Denmark*, App. no. 15890/89, 23 September 1993, §37.

\(^{40}\) Ibid.

\(^{41}\) *Gündüz v. Turkey*, App. No. 35071/97, 4 December 2003, §51.
Court considers that in the instant case the need for the restriction in issue has not been established convincingly”.\textsuperscript{42}

Note that the same is true of separatist views.\textsuperscript{43} In other words, the Court suggests that extremist views are equally entitled to be expressed within an on-going public debate (if those exist and seek to participate, which is demonstrated by the fact they brought their case before the Court) and counterbalanced with opposing views. The same is true, for instance, in \textit{Lehideux and Isorni v. France}, which pertained to the publication of a press article depicting the career of Marshal Pétain in a positive fashion and which the French courts condemned. However, the Court found a violation of Article 10 arguing that “that forms part of the efforts that every country must make to debate its own history openly and dispassionately”.\textsuperscript{44} Several questions emerge from this reading of the Court’s reasoning: is pluralism compelling because it allows individuals to find some form of \textit{consensus} on issues on which they initially disagreed? Or is pluralism desirable because it allows publicly held views to go through the Millian process of “trial and error” in the search for improved beliefs? I shall leave those crucial questions for the second part of the thesis in which I engage with democratic theory.

More importantly at this point: does the Court’s attachment to pluralism apply to all views held in public? The Court faced this question, for instance, when it balanced freedom of expression against the right to reputation under Article 8 (privacy). In the recent \textit{Von Hannover v. Germany}, which concerned the publication the pictures of the private life of Princess Caroline of Monaco, the Court made explicit that pluralism is particularly important when a \textit{public} interest is at stake. As a result, states enjoy a margin of appreciation in this domain. The Court circumscribes the domain of “public interest” very clearly:

“The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for

\textsuperscript{42} Ibid.
\textsuperscript{43} In \textit{Stankov and the United Macedonian Organisation Ilinden v. Bulgaria}, the Court held that “demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country’s territorial integrity and national security (…)”. In \textit{Stankov and the United Macedonian Organisation Ilinden v. Bulgaria}, App. Nos. 29221/95, 29225/95, 2 October 2001, §97.
\textsuperscript{44} \textit{Lehideux and Isorni v. France}, App. No. 24662/94, 23 September 1998, §51.
example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of “watchdog” in a democracy by contributing to “impart[ing] information and ideas on matters of public interest (…), it does not do so in the latter case”.45

The suggestion here is that the margin of appreciation is proportional to the degree to which the public expression of views contributes to an on-going, plural and adversarial debate of public interest. In applying the “democratic necessity” clause, the Court systematically conducts such an assessment. In the recent case of Otegi Mondragon v. Spain, in which the applicant heavily criticized the institution of the Spanish monarchy, the Court confirmed that “there is little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest”.46 Most recently, in Pentikäinen v. Finland, which pertained to the arrest of a photographer in demonstrations surrounding an Asia-Europe meeting in Helsinki, the Court judged the facts against the same standard: “the Court considers that the demonstration was a matter of legitimate public interest, having regard in particular to its nature. From the point of view of the general public’s right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for reporting the event to the public”.47

Indeed, the Court’s positive duty of pluralism culminates in the formal recognition that the larger public has a “right to be informed” on issues of public interest. The right to be informed is clearly not confined to hear about a recent public issue. Here again, the Court suggests that “democratic society” requires people to receive plural perspectives on those issues. This right is first found in Erdoğan and İnce v. Turkey, which pertained to the interview of a sociologist on the conflict in Kurdistan; the Court held that “domestic authorities in the instant case failed to have sufficient regard to the public’s right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for

them”. A recent instance of this reasoning is found in Çamyar and Berktaş v. Turkey, where the Court examined the content of a book that severely criticizes the Turkish penitentiary system. The recognition of the right to be informed reinforces the view that pluralism is not just about diversity, but about disagreement. Yet despite this effort in conceptual exploration, the Court has not specified what pluralism is about. It has not specified why it matters in a democratic society. It has not said what exactly justifies this broad range of duties or why those duties outweigh other rights and duties protected by the Convention in case of conflict. This is where, I believe, normative democratic theory can play a crucial clarifying and justificatory role.

4 Pluralism in the egalitarian argument for democracy

Having investigated the “democratic necessity” clause and identified a positive duty justified by pluralism, the second step of my argument is to make normative sense of this duty through the egalitarian argument for democracy. The limited scope of the paper does not allow me to retrieve all the steps of this argument, of course. What I want to concentrate on is the crucial role that pluralism plays in it, and how it can illuminate the Court’s specification of “democratic society”. Indeed, egalitarian democrats not only assume that there are deep conflicts exist about how to define the terms of association in a political community; they argue that pluralism and disagreement is the reason that makes democracy desirable and preferable as theory of political authority. This is the core argument I want to use to show that the Court’s reasoning is democratically sustainable.

In his path-breaking book, Thomas Christiano firmly insists on the facts of diversity, disagreement, cognitive bias and fallibility pervade collective deliberations on issues of public interest. Those facts constitute a serious challenge to the realization of political equality. The effect of cognitive bias, for instance, is that a person’s “ideas about the good life and even justice tend to reflect her own background, distinctive experiences, and talents”. The risk is that this person’s judgment about the common good (the right ideas and the rights actions) unilaterally applied to all is likely to fail to take into account the interests of others. Further, egalitarian

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democrats assume that such conflicts cannot be solved by rational persuasion on the terms that will be acceptable to all, which marks the distinction with a range of views in deliberative democracy that very much place the distinctive democratic standard on the reach of a consensus or an overlapping consensus (as Wheatley does). The cost of attempting to find consensus remains too high for egalitarian views based on the equal advancement of individual interests.\(^{51}\)

Of course, the justification of democracy cannot just rely on factual considerations pertaining to pluralism and disagreement. Any account of democracy relies on a deontological premise about the fundamental equality of individuals. Christiano, for instance, relies on a concept of persons as “authorities in the domain of values” to express that concern.\(^{52}\) Democratic theorists articulate the contours of this basic equality differently but all converge on the implication that domestic political and legal authorities must treat individuals equally when it comes to the process of designing the norms that will affect everyone involved. However, what rights should be exercised to foster this basic equality in practice, and to what extent, is highly contentious. A particular force of the egalitarian conception is that it is able to determine the scope of which rights and duties – including the resolution of conflicts of rights, as I shall explain later – maximize the political equality of individuals in the circumstances of deep pluralism. As Christiano explains, “the principle invites us to think about how all the rights, duties, roles, and special relationships fit together in in an overall institutional scheme so that people’s interests are advanced in such a way that they are advanced equally”.\(^{53}\) The combination of pluralism qua fact with the principle of equality qua norm implies that the judgment made by individuals on issues of public interests should be informed by those of others. If an individual advances a view regardless of what other individuals think, then she does not treat others as equals within the context of deep pluralism. Therefore, to be informed on others’ views on an issue of public interest is instrumentally related to the quest for public equality (“instrumentally just”\(^ {54}\) in Christian’s terms).

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\(^{51}\) As Cohen explains, “the deliberative conception requires more than the interests of others be given equal consideration; it demands, too, that we find politically acceptable reasons – reasons that are acceptable to others, given a background of differences of conscientious conviction”. In Joshua Cohen, ‘Procedure and Substance in Deliberative Democracy’, in *Philosophy and Democracy: An Anthology*, ed. Thomas Christiano (Oxford: Oxford University Press, 2003), 24.


\(^{53}\) Ibid., 31.

\(^{54}\) Ibid., 264.
This is precisely where the right to freedom of expression gains prominence. Allowing individuals to widely express their views in public equally ensures that their interests are equally taken into consideration (on issues of public interest, of course). Given the fact of deep pluralism, “a person can learn just about just as much by having his ideas expressed by others and responded to as he can by expressing his ideas himself”. If those interests cannot be expressed in public equally, it involves “a disastrous loss of standing among one’s fellows”. If the society is regulated by norms one cannot endorse, and if one’s right to expression is not respected equally, then it “gives one good reason to think that the dominant interests are being advanced and that one’s own interests are not being advanced”. It is therefore crucial to the egalitarian argument for democracy that individuals are equally entitled to publicly participate in the process of deliberation in order for them to see that they are treated as equals: “the thought is that when an outcome is democratically chosen and some people disagree with the outcome, as some inevitably will, they still have a duty to go along with the decision because otherwise they would be treating the others unfairly”. This is how the legitimate authority of a piece of legislation is obtained. There are of course other conditions that Christiano takes to be central to realize public equality, such as an economic minimum and a larger account of democracy could clearly provide a normative standpoint to assess the limits of the Court’s “democratic society”. My argument in this thesis is limited to an interpretation of the Court’s reasoning on “democratic society” and how that interpretation may alter the view that the Court’s right to rule fails to be faithful to democratic-procedural values.

5 Rights- and duty bearers in the reasoning of the Court

Up to this point, my objective was to show that the positive duty generated by the Court and ultimately based on and justified by pluralism finds support in democratic theory and, within the field, in the egalitarian argument for democracy. I concentrated on the right to freedom of

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55 Ibid., 131.
56 Ibid., 153.
59 As Christiano explains, “the first claim must be assessed against the background that the democratic and liberal rights are assured and that each has a basic minimum of material goods. If these latter conditions are satisfied, then it appears that the society is treating its members publicly as equals”. In Christiano, The Constitution of Equality, 178.
expression (Article 10) and on the main definitional statements of the Court when it addressed “democratic society”. In this section, I want to show how this approach can not only illuminate the Court’s identification of particular rights- and duty-bearers correlative to that right but also show how it extends to peaceful assembly and association (Article 11) and to the right to free, fair and regular elections (Article 3 Protocol 1). I want to show that that the claims held by the Court in those instances are instances of the same concern for public equality in circumstances of deep disagreement. The central tenet, again, is that in order to pursue the ideal of public equality, all individuals must be equally informed on the issues that affect them all, and equally informed on what others think on those issues. If one simply thinks that one can easily access the other’s thoughts on those issues, then one treats others unfairly in the context of deep pluralism. Let us start with more specific right-bearers under Article 10 (expression). Most clearly, the Court has identified the press as having a vital role to play in preserving the democratic process. The Court cannot insist enough on the role of the press as “public watchdog” of its “democratic society”. Since this argument first appeared in *Jersild v. Denmark*, which concerned a TV interview of members of racist group in a Danish newspaper, the Court has been reinforcing the point:

“It is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”. Although formulated primarily with regard to the print media, these principles doubtless apply also to the audio-visual media”.

The allocation of the margin of appreciation is the legal-structural implication of the Court’s attachment to democracy. If freedom of the press is the vehicle of an informed debate on issues of public interest, then the margin of appreciation left to states parties should be thin even when the finding of a violation involves significant costs on the other party (such as in the conflict with the right to reputation under Article 8). This is precisely the argument defended by the Court. As the Court makes clear in *Editions Plon v. France*, which concerned the publication of a book on the health of French president François Mitterrand, “the national margin of appreciation is

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circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of “public watchdog”. Note here that by “political” or “public” issue, the Court can mean post-electoral comments such as in Lingens v. Austria, the status of past political figures in Lehideux and Isorni v. France, the issue of doping in sport as in the recent Ressiot et autres c. France or the quality of public water in the recent Sabanovic v. Montenegro. If the press cannot inform the people about the nature of the public interest and offer plural views on it, one can neither limit one’s own bias on the ideas and actions that should constitute the public good, nor receive the guarantee that one is publicly treated an equal. The same line of reasoning extends to the actions of governments and political parties that the press may report (as well as NGOs, scientists, intellectuals, etc.).

This rather broad extension of the right to freedom of expression justified on distinctively democratic grounds naturally leads to the question of whether the Court poses any limit to the content of what can be publicly expressed. One limit is that, despite the need for exaggeration and provocation needed to realize a “democratic society”, there should be a significant distortion of facts. This is the case of Kania and Kittel v. Poland, in which two Polish journalists published pictures of a car that a Polish minister supposedly received as a gift from a businessman:

“It is true that, when taking part in a public debate on a matter of general concern – like the applicants in the present case – an individual is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (…). However, the Court considers that there is a difference between acceptable exaggeration or provocation, or somewhat immoderate statements, and the distortion of facts known to the journalists at the time of publication”.

The Court adopted the same argument in Lindon, Otchakovskv-Laurens and July v. France, which involved a series of criminal convictions related to the publication of a book on French politician and then-head of Front National party Jean-Marie Le Pen, implicating Le Pen’s

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62 Lingens v. Austria, App. No. 9815/82, 8 July 1966, §42.
responsibility in the party’s violent action. In this case, the Court held that the terms of “executioner” and “chief of a gang of killers” exceeded the limits of the right to freedom of expression on empirical grounds.\textsuperscript{66} This is one of the only cases in which defamation and reputation outweigh expression. When the expression is about opinions and judgments (non-factual), the Court falls back on its democratic justification. The expression of criticism, insult, exaggeration or satire is most justifiable when it concerns elected politicians and members of the government. This is best seen in the way the Court understands the conflict between Article 10 and the right to reputation of politicians subject to criticism (under the right to private life in Article 8). In \textit{Oberschlik v. Austria} (no 2), the applicant was convicted and ordered to pay a fine for having used the term “idiot” in reaction to a speech of Austrian politician Jörg Haider. The Court held the following:

“as to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly”.\textsuperscript{67}

The same is true when private citizens publicly insult heads of states as in the recent \textit{Eon v. France}.\textsuperscript{68} How does the egalitarian defense of democracy view the resolution of this conflict? Again, it suggests considering the costs of limiting each right in light of the quest for public equality. The head of state holds a crucial public role and stands at the core of how a society is organized. This position implies that what people think about that particular person should be constantly and equally debated, so that public equality can be advanced: “these public figures have a great influence on the public and represent certain ways of living or approaches to the \begin{footnotesize}
\textsuperscript{67} Oberschlik v. Austria, App. No. 20834/92, 1 July 1997, §29.  
\textsuperscript{68} Eon c. France, App. No. 26118/10, 14 March 2013, §60.
\end{footnotesize}
organization of society or even styles of thinking. Thus they ought to that extent be more open to attacks and the standard of libel that protects them ought to be more stringent, so that open and free discussion about the issues they raise can be advanced”.

Under Article 11 (reunion and association), an issue that is reflective of the stringency of pluralism is the Court’s understanding of the role of political parties and the specification of the conditions of their dissolution. Since pluralism is at least as pervasive among individuals as among political parties, the threshold for dissolving a party should be equally stringent. In United Communist Party of Turkey and Others v. Turkey, in which the Turkish communist party was dissolved by Turkey’s constitutional court, the Court held that “there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned”. Even when it considered the public defense of Sharia law, the Court maintained its line of reasoning. For the egalitarian democrat, banning anti-egalitarian views is a violation of the principle of public equality even if the anti-egalitarian does not adopt it: “there is no difficulty in treating people who are opposed to equality in accordance with the principle of public equality. And there is no difficulty in seeing that the banning of the expression of beliefs opposed to equality is a public violation of equality”.

However, if the political party in question has a real chance to seize power and endanger the democratic process itself once in office (notably by not respecting pluralism), the Court holds that it should be dissolved. This is where the democratic procedure is limited by the substantive values that justify the procedure in the first place. More broadly, any political party or group may promote an alternative “societal model” through constitutional changes conducted through democratic rules. The right to free elections (Article 3 (Protocol 1)) is here certainly implied. However, for a ruling party to implement elections and yet constrain pluralism would clearly fail to respect the standards of a “democratic society”. On that other count, the Court’s requirement

73 Ibid., §87.
of respecting the democratic procedure also implies substantive limits on the outcome of that procedure. But the normative basis is essentially the same: the respect for public equality in the context of deep pluralism. The interest in promoting public equality is an interest in exercising some rights to some extent. If the outcome of that procedure amounts to limiting that distribution, or to discriminate among groups or persons in the exercise of those rights, then this outcome is anti-democratic. For the egalitarian democrat, “the principle of public equality serves as a constraint on the advancement of the interests of the members of society”. The rights therefore operate as trumps against the utilitarian quest for the aggregated majoritarian good when such a quest harms the deontological principle of public equality.

Finally, under the right to free and fair elections (Article 3 (Protocol 1)), the Court has made explicit that elections are inconceivable if the state party has failed to fulfill the positive duty associated with pluralism. On the egalitarian view, this is simply because voting on an issue of public interest without being informed of others’ views on an issue public interest is suboptimal in terms of realizing public equality. The point has been recently reiterated in Şükran Aydın and Others v. Turkey, concerning a mayor having campaigned for parliamentary elections in Kurdish, where the Court held “that free elections are inconceivable without the free circulation of political opinions and information”. Of course, if it forms part of a conceptual continuum with Articles 10 and 11, the right to elections does not play the same practical role. Freedom of expression is prevalent in pre-electoral periods; in Bowman v. United Kingdom, for instance, the Court held that:

“for example, as the Court has observed in the past, freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely”.  

75 Şükran Aydın and Others v. Turkey, App. Nos. 49197/06, 14871/09, 23196/07, 50242/08, 60912/08, 22 January 2013, §55.
76 Bowman v. United Kingdom, §42.
As to the more specific duties correlative to the right to free elections, the Court is remarkably modest. It does not examine the constitutional arrangements of the state party in great detail. This modesty is clearly questionable under the egalitarian conception of democracy. The core duty established by the Court is that elections “must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage”.\(^{77}\) This implies, most importantly, the absence of pressure on the voters. As the Court held in the same *Yumak and Sadak v. Turkey*, which pertained to the organization of parliamentary elections in Turkey, “the words “free expression of the opinion of the people” mean that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another”.\(^{78}\) In the same modest vein, the Court protects the effective representation of elected members (most notably, in the national parliament) and their duty to apply the commitments they made during the pre-election period. As the Court held in *Ahmed and Others v. United Kingdom*, which concerned the limits put to the involvement of local government officials in political activities, “members of the public also have a right to expect that the members whom they voted into office will discharge their mandate in accordance with the commitments they made during an electoral campaign and that the pursuit of that mandate will not flounder on the political opposition of their members’ own advisers”.\(^{79}\)

However, the Court does not require states parties to conform to a specific system of elections and representation and the type of ballot designed (proportional, majority, etc.) as long as the core duties outlined above are protected. As the Court held in the seminal *Mathieu Mohin v. Belgium*, which concerned various discriminations between Dutch-speaking and French-speaking parliamentary members,

“article 3 (P1-3) provides only for “free” elections “at reasonable intervals”, "by secret ballot" and “under conditions which will ensure the free expression of the opinion of the people”. Subject to that, it does not create any "obligation to introduce a specific system" (…) such as proportional representation or majority voting with

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\(^{77}\) *Lykourezos v. Greece*, §52.  
one or two ballots. Here too the Court recognises that the Contracting States have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time". 80

A specific example of the Court’s restraint is that it does not protect the equality of opportunity for election:

“it does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate “wasted votes”. For the purposes of Article 3 of Protocol No. 1 (P1-3), any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the “free expression of the opinion of the people in the choice of the legislature”.

This judicial restraint is clearly questionable if one adheres to the egalitarian democrat’s argument. Regulating the conditions for parties to run for election is another crucial opportunity to preserve and promote public equality. One crucial issue is campaign finance – on which the Court has not yet taken a clear stand. This issue is crucial because among the conditions to run for election, political parties representing minorities may have significantly lower levels of financial resources and therefore lower capacities to make the views of minorities heard and debated – therefore influencing not only the outcome of elections, but also designing the agenda for discussion. As Christiano explains: “the views of the disadvantaged are likely to receive much less of a hearing in the democratic forum. As a consequence, there will be little opportunity to learn from the responses to these views”.

It is difficult to insist on pluralism in the exercise of expression but to restrain the financial conditions that contribute to that same expression. In the same vein, one could ask the Court to scrutinize the role of legislators and the sphere of freedom they have in choosing the best means to reach the end they think appropriate

80 Mathieu Mohin and Clerfayt v. Belgium, §54.
81 Ibid.
to fulfill mandate they have received from the voters. Following the egalitarian argument of democracy, it seems unclear why the legislators could change the aims worthy of pursuing if voters have debated about those aims. As Christiano puts it, “giving legislators authority to change aims would be an arbitrary infringement of the right of citizens to be equal members of the political community”. However, a further argument is needed to ask a (supranational) court to investigate the decisions of representatives of state parties to such an extent. Both practical reasons (how exactly is the Court going to measure how legislators deviate from their promises) that and normative reasons (what if the electorate changes its mind in the course of its mandate?) seem to speak against this broader judicial power. In any case, my objective in this section was interpretive. It was to show how “democratic society” understood in normative terms pervades the justification of those rights and their duties.

In this sense, the intermediate conclusion that needs to be drawn is that the Court is very attentive to considerations of democracy understood in procedural terms. What is more, I have shown that democracy, through the “democratic society” clause, plays a central normative role in justifying the existence of the Convention rights, in fixing their scope or in balancing their weight against other rights. Further, I have argued that the egalitarian justification of democracy can best make normative sense of their scope and the various duties the Court has generated on its behalf, making the public equality the implicit normative ideal of the Court under the rights examined. Based on this investigation, there is enough to say that there is a conception of democracy implicit in the reasoning that reveals the co-originality of those rights with “democratic society”.

Before returning to my critique of Wheatley’s argument, I want first to draw some implications from my conclusion for how the balancing conducted by the Court, more specifically, has been conventionally portrayed and criticized. This is another point on which the current literature seems rather limited. Indeed, the literature tends to reconstruct the balancing as a largely arbitrary determination between deontology (the rights derived from the status of right-holders) against utilitarianism (the public interest understood as the aggregated preferences of others, or the aggregated preferences of all the state parties). Since this conflict is ultimately between two

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mutually exclusive concepts of morality, one cannot find a standard that would neatly strike the balance between them. Moreover, the Court remains silent on what exactly constitutes the public interest sufficient to override a right. The combined effect is a strong skepticism towards the very idea of balancing. As Greer explains, “the central problem with the “balance model” is that it suggests a weighing of rights and collective rights which does not only down-grades to interests, but requires judges – who are ill-equipped to decide what is in the public interest – constantly to defer to non-judicial determinations of how the balance between the two should be struck”. One proposal defended by Greer is that the Court should insist on applying a “priority-to-rights principle” inherent to the Convention itself. This principle, in short, “systematically accords rights greater weight than collective goods” without however implying that rights should systematically trump public interests. Rather, “the Convention merely suggests that rights should be “prioritized” or “privileged” over collective goods in different ways according to the terms of the Convention” and “without the need for judges to refer directly to political morality at all”. This view clearly amounts to a principled renouncement of balancing.

There is a point in favor of that strong skepticism towards balancing: the Court describes this step of the review in terms that invite it. In every case brought before it, the Court holds that it “must look at the interference in the light of the case as a whole”, including “the content of the impugned statements” and the “context in which they were made”. This apparent vagueness has lead scholars to argue that “the balancing between the various conflicting interests takes place ad hoc, in the absence of a normative theory. This has naturally appeared arbitrary, particularly in view of the general requirement that courts must justify their decisions”. We should note here

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84 In a seminal case, Young, James and Webster v. United Kingdom, The Court implicitly rejected the theorizing of the public interest: “democracy does not simply mean that the views of the majority must always prevail. A balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position”. In Young, James, and Webster v. United Kingdom, App. Nos. 7601/76, 7806/77, 18 October 1982, §63.


86 For instance, the strong version of the principle is the derogation clause of Article 15, which establishes that “no more than absolutely necessity” considerations justify interfering with those rights.

87 Steven Greer, “Constitutionalizing Adjudication under the European Convention on Human Rights”, Ibid., 414.

88 Ibid., 414.

89 Ibid., 413.

that this skepticism could go hand in hand with the democratic critique I examined, that is, that the Court’s judicial methodology is not attentive to the democratic specification of human rights norms within state parties.

Yet in light of my investigation on the “democratic society” clause, and the justificatory role it plays for the rights examined, portraying the Court’s balancing in those skeptical terms seems just too quick. Greer’s “priority-to-rights” principle presupposes that the wording of the rights should orient the balancing, whereas my interpretation of the reasoning suggests that it is the “democratic society” clause that not only helps the Court strike the balance but also define what those rights are about in the first place. The underlying idea is that the judicial identification of the limits to the rights, through conflict with other normative considerations, tell us something about the interests they protect. Consequently, the reason why the public defense of Sharia law is permitted, for instance, should not have to do with some a priori stringency accorded to the freedom of expression. On my view, it is the deontological basis implicit in “democratic society” (namely, how each of the rights serve the democratic process and which, according to my interpretation, derive from the concept of public equality) that explains why it is the right-holder, or the respondent state, that overrides the other. On this view, the Court navigates throughout the qualified rights with the same deontological conception anchored in public equality and fully balances the two interests with one determinative (democratic) standard.

Surely, I am not extending this point to all the claims the Court has held on all the qualified rights of the Convention. It has been clearly shown that when the Court screens the pan-European practice to determine the appropriate level of protection of the rights under examination and fails to identify it, the respondent state party tends to override the applicant (through the margin of appreciation). More generally, “where the Court is unable to find the existence of a European consensus then it will tend to adopt a more literal interpretation of the Convention”.\(^91\) For instance, under Article 9 (freedom of thought and religion), the Court has not specified what it takes to be a sufficiently strong manifestation of a religious belief in question to be protected and invokes the lack of a pan-European standard.\(^92\) Yet the Court does not adopt

\(^91\) Mowbray, “Between the Will of the Contracting Parties and the Needs of Today,” 36.
\(^92\) This is the case for instance of scientology: “in the absence of any European consensus on the religious nature of Scientology teachings, and being sensitive to the subsidiary nature of its role, the Court considers that it must rely on
this majoritarian approach when it finds a violation, which clearly introduces inconsistency in the methodology. There is room for questioning how that “empirical” justification of judicial restraint fits into the overall normative conception “democratic society” I have extracted.

6 The implications for the Court’s right to rule vis-à-vis state parties

In this final section of the thesis, I want to go back to Wheatley’s critique and highlight some broader implications about the Court’s legitimate right to rule vis-à-vis state parties based on my investigation of the “democratic necessity” clause. To see those implications in their best light, it is useful to quickly re-cast Wheatley’s conceptual framework. As I explained in my introduction to Wheatley’s argument, the premise of the democratic critique of the Court’s right to rule is his “self-government” concept of democracy, which entails a specifically Rawlsian conception of judicial review. However, this conception of democracy is just one of two legs of Wheatley’s conceptual apparatus in his contribution. The second leg is the concept of legitimate authority borrowed from Raz’s Normal Justification Thesis (hereafter, the NJT). The NJT is supposed to illuminate the distinctive concept of authority as characterizing the relation between two agents and the ability of the one to change the situation of the other. In our context, the thesis applies to the citizens of the state parties subjected to both the state directives and the supranational directives of the Court. How can those norms have legitimate authority? To recall, the NJT

“involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly”.

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In other words, the necessary condition for an authority to be legitimate is that it gives content-independent reasons for action, that is, the subject is bound by the directive without trying to abide by her own balance of reasons. The other necessary condition is that the subject would

the position of the domestic authorities in the matter and determine the applicability of Article 9 of the Convention accordingly”. In Kimlya and Others v. Russia, App. Nos. 76836/01, 32782/03, 1 October 2009, §79.

better conform to the reasons that already apply to her rather than by her own balance of reasons. So how does Wheatley combine the “self-government” conception of democracy (which, as we have seen, is a content-dependent concept of political legitimacy) with the Razian concept of authority (content-independent) in the context of IHRBs? The idea here is that Raz’s concept of legitimate authority could have particular relevance in the democratic context. Indeed, in the Razian view, the authority generating the directive operates in accordance with the interests of the subjects. This implies, in the democratic context, that subjects understand the authority to be “better placed” if and only if they can assume that the directive is obtained by respecting their political equality in the norm-making process. As Wheatley explains, “in the case of democratic societies, it is likely that subjects will conclude that the only way in which the government can establish the reasons that already apply to them is by engaging with subjects through democratic procedural mechanisms”.94 It is only because in a democratic society founded on the equality of views “no one knows better” on how to set the content and scope of public norms that the subjects can routinely conform to the directive of the state. This is what Wheatley terms – also following Raz – a “moral worthy political culture”: “existing and prospective democracies will share some minimum conception of legitimate democratic political authority, which can be expressed in terms of a morally worthy political culture”.95 The adoption of human rights treaties by a sovereign state, in Wheatley’s view, precisely reflects that predominant culture. As a result, the Razian concept of legitimate authority could, according to Wheatley, illuminate the problematic relation of the Court to the state parties and their subjects only when a worthy political culture is found.

This is exactly where I want to draw on my investigation of the Court’s “democratic society”. It transpires from Wheatley’s Razian approach that state parties are assigned democratic virtues that make the directives of IHRBs, such as those of the Court, rather superfluous. It depicts the domestic political and legal institutions as operating with well-functioning procedural standards. But if subjects cannot assume, on a general basis, the democratic pedigree of any state directive that applies to them, then there is no reason for them routinely to conform to it, and the very reason why the directive can be adopted (on content-independent grounds) collapses. As Wheatley himself acknowledges, the Razian model involves sociological elements, that is, it

95 Ibid., 108.
implies that the subjects assume or perceive that the authority is “better placed” to judge about their interests. This is an assumption that needs to be revised in light of my investigation of the “democratic necessity” clause. It reveals that the violations found by the Court on the rights examined – and therefore most of the decisions taken by supposedly “democratically worthy” judicial institutions – are just about the procedural safeguards that need to be in place for the state parties’ institutions to be democratically trustworthy. The role that pluralism plays in the Court’s reasoning (in justifying the rights, in determining their scope and in arbitrating conflicts of rights) reflects the Court’s implicit commitment to the egalitarian representation of views in the democratic process. The Court’s general function becomes one of fostering the value of public equality (within the limits established by the same internal value) within state parties. Consequently, if one seeks to evaluate the Court’s right to rule through the Razian concept of legitimate authority, it seems that the Court stands as a better candidate than the state parties. The Court’s authority should be regarded as a legitimate because individuals will do better (as political equals) if they conform to its judgments than if they followed the directives of the state authorities.

7 Conclusion

My overall argument in this thesis involved methodological and substantive considerations. At the methodological level, is suggests that when the Court’s right to rule is viewed as “a legal system organized in accordance with its own basic norm or rule of recognition”96, it follows that the balancing exercise of the same Court should be included in the identification of any supreme norm. Obviously, I confined my analysis of the reasoning of the Court to the Articles 8 – 11 and did not incorporate other provisions. Although I fully concede the limits of my inquiry, I would mention that given the existence of the restriction clauses, the Court enjoys more interpretive freedom on those “qualified rights” than on others – the same freedom that raised the legitimacy question. Therefore, I believe, how the Court has specified their content should play a significant role in reflecting on the normative legitimacy of its reasoning vis-à-vis state parties.

At the substantive level, my investigation suggests that the democratic legitimacy of the Court’s right to rule is obtained through a careful reconstruction of the balancing step and how the Court

96 Ibid., 102.
has specified the clause of “democratic society”. The positive duty of pluralism, more precisely, has been my jurisprudential basis. I have shown that the Court’s attachment to pluralism amounts to preserving and consolidating the egalitarian conditions of the democratic procedure. The final location of the “democratic necessity” clause has allowed the Court to specify how each right serves or does not serve it. I have concluded that an implicit egalitarian conception of democracy not only justifies the rights themselves, but also fixes their scope or balances their weight against other rights.
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