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Representation Reinforcement in the European Court of Human Rights

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Abstract

The European Court of Human Rights has long been cast as a defender of democracy in Europe. Yet, this idea has not always been at the core of the Court's perception in the literature or indeed aligned with its jurisprudence which are often viewed in more Dworkinian terms. We suggest that there are good reasons, however, to take this idea more seriously in line with some of the early discussions on the function of the Convention. We argue that a good way to flesh out this idea is by drawing on the recent discussion on comparative representation reinforcement, sometimes labelled comparative political process theory, which builds on earlier work by US constitutional theorist John Hart Ely. Such an – expanded and updated – Elyian approach, we believe, has much to offer not just for domestic constitutional courts around the globe, but also for a supranational human rights court such as the ECtHR. We spell out what this might mean for the Court's jurisprudence with reference to a few key areas of jurisprudence and the protection of minority rights in particular and sketch some implications for when to exercise restraint and when to intervene in a robust manner.

Keywords: European Court of Human Rights; European Convention on Human Rights; democracy; political process theory; representation reinforcement; trust

Introduction

The role and function of the European Court of Human Rights ('ECtHR' or 'Court') has long been a matter of debate. For some, the Court is too activist and progressive, reading things into the Convention that are not there. For others, it is too timid, hewing too closely to state interests while abandoning the rights of those most in need of protection. In light of recent political developments, the Court is increasingly cast as a defender of liberal

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democracy in Europe. But can the Court really fulfill such a role? And what does this imply for its interpretive approach?

We take up these questions in this paper, drawing on the revival of ideas of judicial representation reinforcement linked to earlier work of US constitutional theorist John Hart Ely[1] in the comparative law literature. The Court, we argue, should understand its role in a more representation-reinforcing manner and emphasize the protection of the democratic process and specific minority rights, in a way that builds on Ely as well as current proposals in the literature for a broader responsive theory of review[2] or a comparative political process approach.[3] We believe that such an understanding ties in with existing calls from both judges and scholars for a broader role of the ECtHR in protecting democracy and the rule of law,[4] but complements their work by helping us flesh out some of the details of such an account. It would also bring the Court closer to what some important framers believed to be its key function, to serve as an alarm bell and safeguard against democratic backsliding, while speaking to the need for subsidiarity to domestic mechanisms in other regards. Our proposal thus connects to existing themes in academic literature and its jurisprudence, while it also diverges from many standard accounts of the Court.

In the following, we first provide an outline of current discussions on the role and function of the ECtHR in academic literature, with particular attention to existing work calling for its democracy-protecting role. Subsequently, we explain what a focus on representation reinforcement would bring to the discussion, while also recognizing where it is problematic with regard to existing understandings of the Court's role. We turn next to examining some of the Court's substantive case law which has particular relevance to representation reinforcement, namely its jurisprudence on Art 18 ECHR, Art 3 Protocol No 1 and the protection of minorities. These highlight the ways in which the Court already speaks to the idea of representation reinforcement, while also pointing out some deficits in this regard. Finally, we turn back to the big conceptual questions, outlining what a representation-reinforcing approach might look like as a broad sketch for the Court's role and function in the future.

What is representation reinforcement?

Ely's democracy and distrust

Ely's original theory certainly offers no intuitive fit with the practice of the ECtHR. In his monograph 'Democracy and Distrust' published in 1980, Ely developed his account of a political process theory as an attempt to explain and justify much of the jurisprudence of

[1]JH Ely, *Democracy and Distrust* (Harvard University Press, Cambridge, MA, 1980).

[2]R Dixon, *Responsive Judicial Review* (Oxford University Press, Oxford, 2023).

[3]S Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1429–1457; MJC Espinosa and D Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19(2) *International Journal of Constitutional Law* 548–568.

[4]See e.g. H Keller and C Heri, 'Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights' Untapped Potential to Protect Democracy' (2016) 36(1–6) *Human Rights Law Journal* 1–10; R Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights' (2021) 27(1–3) *European Law Journal* 211–227; B Çalı, 'Autocratic Strategies and the European Court of Human Rights' (2021) 2(2) *European Convention on Human Rights Law Review* 11–19; F Tan, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?' (2018) 9(1) *Goettingen Journal of International Law* 109–141; R O'Connell, *Law, Democracy and the European Court of Human Rights* (Cambridge University Press, Cambridge, 2020).

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the US Supreme Court under the leadership of Earl Warren ('Warren Court'), famous for its progressive civil rights jurisprudence. Central to Ely's original theory was the epistemic question *why* courts should interpret constitutional rights in cases where that interpretation was not clear from the constitutional text itself. His argument was framed as a relational account of judicial power as a question about trust and distrust: Trust in the political process generally seemed appropriate to Ely – like Jeremy Waldron[5] – in a well-functioning democratic system, but – unlike Waldron – Ely thought some exceptions were warranted. Whenever the constitutional text was not clear, Ely argued, constitutional review should be geared at and limited to two particular constellations: (1) when insiders were 'choking off the channels of political change to ensure that they will stay in and the outs will stay out', or in situations where (2) 'though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying the minority the protection afforded other groups by a representative government'.[6] For Ely, both scenarios concerned the importance of participation and thus representation in the democratic process.

Comparative representation reinforcement

Ely's arguments have come in for considerable criticism over the years. In particular, the questions of which minorities are in need of judicial protection and how to identify them have been hotly debated and the usefulness of the minority prong of Ely's argument has been contested.[7] This may be surprising given that judicial review has often been linked with the need to protect minorities. It is perhaps less surprising that the details of the argument have been hard to operationalize. Recently, it is the representation reinforcement strand of Ely's work on judicial intervention that has attracted renewed attention, as a response to political developments and signs of democratic backsliding in a host of different countries. In the comparative law literature, the work of David Landau deserves particular mention in this regard, who put forward an Elyian argument in a comparative context in 2010, arguing that the dysfunctionality of the Colombian parliament and its democratic institutions more broadly are central to understanding and evaluating the legitimacy of the expansive jurisprudence of the Colombian Constitutional Court.[8] Rosalind Dixon subsequently put forward a similar argument, building on Waldron and Ely, by spelling out cases of democratic dysfunction in 'ordinary' and otherwise well-functioning democratic states that called for (weak forms of) judicial intervention,

[5]J Waldron, 'Judicial Review and the Conditions of Democracy' (1998) 6(4) *The Journal of Political Philosophy* 335–355; J Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *The Yale Law Journal* 1346–1406.

[6]Ely (1) 103.

[7]See e.g. BA Ackerman, 'Beyond Carolene Products' (1985) 98(4) *Harvard Law Review* 713–746; M Tushnet 'Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory' in R Bellamy (ed), *Constitutionalism and Democracy* (Routledge, London, 2017) 195–220. For a brief overview of Ely's reception see R Dixon and M Hailbronner, 'Ely in the World: The Global Legacy of *Democracy and Distrust* Forty Years On' (2021) 19(2) *International Journal of Constitutional Law* 427–438.

[8]D Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51(2) *Harvard International Law Journal* 319–378.

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focusing on what she calls legislative blind spots and burdens of inertia.[9] Drawing on Ely as well as other US political process theorists such as Samuel Issacharoff and Richard Pildes[10] as well as Pamela Karlan,[11] Niels Petersen has also argued for a stronger role of courts in cases of 'political market failures' including the capture of democratic processes, for example, by wealthy minority interests, as well as faulty legislative reasoning, for example, because of misinformation or a lack of information. He suggests that stricter judicial scrutiny is necessary in these cases.[12] Issacharoff and Tom Daly have put forward similar arguments in favor of judicial intervention in the context of fragile and developing democracies.[13] More recently, Stephen Gardbaum has developed a more comprehensive proposal for a 'comparative political process theory' in which he argues for a broader role for courts when it comes to protecting and enabling democracy. According to Gardbaum, courts should intervene in cases of outright dysfunction of the political process, or in cases where legislatures fail to hold executives accountable; in cases of government capture of independent institutions and more broadly capture of the political process by special interests, and even legislative failures to deliberate.[14]

Finally, Dixon has more recently put forward a more comprehensive theory of responsive judicial review[15] which argues for tailoring judicial review to the political context and the nature of issues at stake, ranging from super-strong review to protect a democratic minimum core to weaker forms of review that may address more standard cases of political dysfunction.[16] The 'democratic minimum core' is defined by Dixon and Landau as

> *'the idea that democracy entails* at the very least *regular, free and fair elections, with some minimum level of competition between political parties, and a set of background conditions that includes respect for those political rights and freedoms necessary for democratic processes as well as some conception of the rule of law and protection for independent institutions necessary to oversee and protect the other elements of a competitive electoral system'.*[17]

These proposals are not just theoretical. The work surveyed here shows that in a wide range of jurisdictions, courts already exercise political process review along the lines sketched out in the literature and Elyian ideas are underlying their practice, sometimes, albeit not always, explicitly so.[18] Yet, current writing on the importance of judicial

[9]R Dixon, 'The Core Case for Weak-Form Judicial Review' (2016) 38(6) *Cardozo Law Review* 2193–2232.

[10]S Issacharoff and RH Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 (3) *Stanford Law Review* 643–717.

[11]PS Karlan, 'Politics by Other Means' (1999) 85(8) *Virginia Law Review* 1697–1724.

[12]N Petersen, *Proportionality and Judicial Activism* (Cambridge University Press, Cambridge, 2017), Chapter 1, 13.

[13]S Issacharoff, *Fragile Democracies* (Cambridge University Press, Cambridge, 2015); TG Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-Builders* (Cambridge University Press, Cambridge, 2017).

[14]S Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1429–1457.

[15]Dixon (2).

[16]Dixon, ibid, Introduction and Chapter 1.

[17]R Dixon and D Landau, *Abusive Constitutional Borrowing* (Oxford University Press, Oxford, 2021) 25; see already earlier for their definition of the 'democratic minimum core': R Dixon and D Landau, 'Competitive Democracy and the Constitutional Minimum Core' in T Ginsburg and AZ Huq (eds), *Assessing Constitutional Performance* (Cambridge University Press, Cambridge, 2016) 268–292.

[18]For several examples see Dixon and Hailbronner (7).

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representation reinforcement has mostly been confined to domestic (constitutional) courts. This begs the question of whether the arguments presented might also usefully inform the work of a supranational human rights court such as the ECtHR on which we focus here.

Representation reinforcement beyond the domestic sphere

Fit with existing approaches and resources

The European Convention of Human Rights ('ECHR' or 'Convention') protects a number of individual rights central to the democratic process, such as freedom of expression (Art 10 ECHR), freedom of assembly and association (Art 11 ECHR), as well as the right to free elections in the Additional Protocol No 1 (Art 3 Protocol No 1). Perhaps even more importantly, the Preambles of the Statute of the Council of Europe as well as of the Convention both refer to the value of a 'genuine' or 'effective political democracy'. Restrictions on a number of important Convention rights can only be justified if they are necessary in a 'democratic society' (Arts 8 to 11 para 2 ECHR). Yet, the Convention also guarantees many individual rights that don't aim to protect democracy or the political process as such. These include the right to respect for private and family life (Art 8 ECHR), freedom of thought, conscience and religion (Art 9 ECHR) or the prohibition of torture (Art 3 ECHR), which are rooted in the protection of individual human dignity.

Given the breadth of rights listed, it is perhaps not surprising that most legal scholars seem to understand the Court's role and function in Dworkinian rather than Elyian terms, emphasizing the need for a moral reading of the Convention and often drawing on the Court's 'living instrument' doctrine[19] rather than focusing on the protection of the democratic process. This is in line with many broader understandings of human rights as rights that are based on human dignity and are thus both individualized and universal,[20] rather than, for example, guarantees of protection for specific groups as envisaged under the predecessor of the current European human rights regime, i.e., the Minority Treaties under the framework of the League of Nations.[21]

This is not to say that authors or indeed judges see no role for the Court in protecting democracy nor would such an understanding be incompatible with the Convention itself which sets out a number of rights central to the democratic process as highlighted above. Sometimes arguments for democracy protection are even framed in Elyian terms. For example, Ian Cram suggests that '*[t]he principled arguments he [Ely] makes in respect of safeguarding the channels of political change in the US Constitution can, without too much difficulty be transposed across to Europe*'.[22] Cram is not the only one

[19]See e.g. K Kovács and G Attila Tóth, 'Standing Upon Stilts: Philosophical Interpretations of the European Convention on Human Rights' in I Motoc, PP de Albuquerque, K Wojtyczek (eds), *New Developments in Constitutional Law: Essays in Honour of András Sajó* (Eleven International Publishing, The Hague, 2018) 239–258, 242 with reference to G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, Oxford, 2007), in particular 58–79; J Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17(1) *European Law Journal* 80–120.

[20]As famously theorized inter alia by Hannah Arendt: id, *The Origins of Totalitarianism* (Harcourt Brace and Company, New York, 1951), Chapter 9.

[21]See only the Polish Minority Treaty, 225 CTS 412, signed at Versailles on 28.6.1919 ('Little Treaty of Versailles'), as the first of the Minority Treaties and serving as the template for the subsequent ones.

[22]I Cram, 'Protocol 15 and Articles 10 and 11 ECHR: The Partial Triumph of Political Incumbency Post-Brighton?' (2018) 67(3) *International & Comparative Law Quarterly* 477–503, 491.

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referring to Ely on a supranational level.[23] However, Elyian arguments tend to appear mostly in the context of scholarly interpretative analyses of the Convention's substantive political rights or with regard to the margin of appreciation[24] rather than in the form of a more comprehensive argument about the ECtHR's overall role and function. Notably, Cram himself provides no further argument for why an Elyian approach would be appropriate as a normative and analytical framework for the ECtHR as a supranational human rights court. What this might mean beyond an argument for stricter judicial scrutiny with regard to restrictions on political rights, pushing against the political calls for a more restrained role of the Court, is also not spelled out in detail.[25] This is, however, not as straightforward as it might seem, given that the protection of democracy routinely figures as just one of the many important values such as human dignity or equality the Court is called upon to protect in its own self-understanding[26] as well as in academic literature.[27]

There are a range of resources that provide support for our argument that the Court should take protection of democracy more seriously, perhaps not as the only aim underlying the Convention, but at least as one of its key roles and functions.

One of these is the literature which essentially views the ECtHR as a supranational *constitutional court* for Europe. Constitutionalization theories come in very different forms and guises, but by drawing on a constitutional framework they open the door for arguments about representation reinforcement. If we understand the Convention as a 'constitutional instrument of European public order',[28] in the sense of providing a comprehensive regulatory framework, it suggests at least some role for the Court in safeguarding democracy in member states. In addition, the idea of a European constitutional court is hard to conceptualize entirely outside of the Kelsenian tradition of constitutional review in Europe which is geared toward protecting democracy and hence emphasizes procedural review.[29] This represents not just theory, but reflects the practice of many domestic constitutional courts attempting to stabilize democratic institutional arrangements. However, for some, this kind of institutional legal guardianship is precisely

[23]See e.g. Thomas Kleinlein on Ely and the margin of appreciation (briefly) in id, 'Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' (2017) 28(3) *European Journal of International Law* 871–893, 889.

[24]E.g. C Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom' (2011) 22(3) *King's Law Journal* 309–334; Kleinlein (23).

[25]Cram (n 22) 502 et seq.

[26]For human dignity see e.g. ECtHR, *Kudła v Poland* [GC], no 30210/96, 26.10.2000, paras 92–94; *Popov v Russia*, no 26853/04, 13.7.2006, para 208; *Vinter and Others v the United Kingdom* [GC], nos 66069/09 and 3896/10, 6.7.2013, para 113; *Yaroslav Belousov v Russia*, nos 2653/13 and 60980/14, 4.10.2016, para 92; for equality see e.g. ECtHR, *D.H. and Others v the Czech Republic* [GC], no 57325/00, 13.11.2007, paras 175 et seqq.; *Sampanis and Others v Greece*, no 32526/05, 5.6.2008, paras 66 et seqq.; *Oršuš and Others v Croatia* [GC], no 15766/03, 16.3.2010, paras 143 et seqq.

[27]For human dignity see e.g. R Spano, 'Deprivation of Liberty and Human Dignity in the Case-Law of the European Court of Human Rights' (2016) 4(2) *Bergen Journal of Criminal Law and Criminal Justice* 150–166; J-P Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in C McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, Oxford, 2013) 393–402; for equality see e.g. R O'Connell, 'Substantive Equality in the European Court of Human Rights?' (2009) 107(1) *Michigan Law Review First Impressions* 129–133; OM Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, London, 2002), in particular 18 et seqq.

[28]For a (critical) discussion see K Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (Cambridge University Press, Cambridge, 2021), Introduction.

[29]H Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' *VVDStRL* 5 (1928) 30–84, 80.

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not the task of a supranational human rights court meant to protect human and thus individual rights rather than structural arrangements. From that traditional perspective, an Elyian approach certainly looks out of place.

Yet, there are other reasons why we think that an Elyian approach may fit the ECtHR nevertheless. First and foremost, some drafters cast the court as a bulwark against totalitarianism in Europe[30] in spite of academic and political disagreement on the role and function of the ECtHR.[31]

In the words of one of its most important founding fathers, the French politician Pierre-Henri Teitgen: '*Democracies do not become Nazi countries in one day. Evil progresses cunningly* […]. *One by one, freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxiated.* […] *It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril and to show them that they are progressing down along a road which leads far* […]. *An international jurisdiction within the Council of Europe, a system of surveillance and guarantee, could be this conscience, of which other countries also maybe have special need.*'[32]

Teitgen was not alone with such a vision for the Court's role. Perhaps ironically in our eyes today, many British conservatives initially supported the Council of Europe as they thought it might function as an instrument against communism as well as fascism, providing tools for criticism and potentially even intervention.[33] Kriszta Kovács points out that some drafters sought to include a broader democracy clause in the Convention that would go beyond protections of freedom of expression (Art 10 ECHR) and freedom of assembly and association (Art 11 ECHR).[34] Their efforts failed because legal experts and representatives worried that such a clause would be too vague in light of the very different understandings of the fundamental principles of democracy in individual European states as well as the UK government's efforts in particular to preserve their domestic institutions and overseas colonial empire.[35] Ultimately, such a clause was not included in the Convention itself. As something of a compromise, Art 3 was inserted in Protocol No 1 to the Convention, guaranteeing a right to free elections on which all member states could agree in spite of their otherwise existing constitutional differences and disagreements.[36]

Drawing inter alia on this drafting history, Kovács has recently put forward a more comprehensive argument for a robust role of the ECtHR in combatting democratic backsliding, albeit not in Elyian terms. Importantly, Kovács also does not argue that

[30]E Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press, Oxford, 2010) 44 with reference to the remarks by Pierre-Henri Teitgen; see also Marco Duranti on the conservatives' support for the European Convention: id, *The Conservative Human Rights Revolution* (Oxford University Press, New York, 2017) 96 et seqq.

[31]K Kovács, 'Parliamentary Democracy by Default: Applying the European Convention on Human Rights to Presidential Elections and Referendums' (2020) 2(3) *Jus Cogens* 237–258, 239; A Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40(1) *Yale Journal of International Law* 2–40, 5–8.

[32]Council of Europe (ed), *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, Vol I, 1975, 292.

[33]Duranti (30) 96 et seqq.

[34]Kovács (31) 240–241.

[35]Ibid, 241.

[36]Ibid, 242.

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protecting democracy is the primary or perhaps only role of the ECtHR, but rather treats it as one of several important functions of the Court. This is also echoed in the writings of several other authors.[37]

Often the literature does not spell out precisely *why* and *how* the Court should protect democracy, particularly considering the variety of democratic systems in Europe. We believe there is a gap to be filled and aim to do so by drawing on recent proposals for a comparative representation-reinforcement approach to judicial review. This is not because representation reinforcement answers all questions – it does not, as we will see – but because it can serve as a bridge to connect two literatures that have until now not been connected up sufficiently, namely the comparative law literature on representation reinforcement and human rights law. As the ECtHR decides how to address issues of democratic dysfunction, the comparative literature on this can provide a first important source of inspiration.

Representation reinforcement beyond the domestic sphere

Yet, approaching the ECtHR's role in terms of representation reinforcement raises several questions. This is partly because the ECtHR is a regional tribunal rather than a domestic constitutional court and is therefore operating in different political context, without the same kind of obvious interinstitutional support that domestic institutions routinely have. In particular, representation reinforcement might appear too bold for a supranational institution dealing with a range of different national democratic systems and foremost charged with the protection of human rights. But doubts arise also because of the ECtHR's more specific role and its fit with a representation-reinforcing approach. This is because Ely's original theory designs a comparatively narrow role for courts that might not fit the self-understanding and existing practice of the ECtHR.

The question of whether, and how, it matters that the ECtHR is a supranational rather than a domestic court when it comes to the idea of representation reinforcement is not easily answered. This is not so much because the Convention itself sets out the task for the courts to protect rights rather than democratic process (unlike many modern constitutions) since Ely himself clearly viewed representation reinforcement as a yardstick regarding the interpretation of constitutional rights.[38] His argument was thus not actually focused on protecting institutional arrangements, procedures or competences, but rather on how to interpret constitutional rights. Nevertheless, international and domestic courts are different in many ways.[39] These differences matter both with respect to their legitimacy and capability. International courts such as the ECtHR are not embedded in a broader constitutional framework and their legitimacy – understood in both normative and sociological terms – is more contested than that of domestic courts, making subsidiarity a key concern. Secondly, issues of capability may arise when it comes to both understanding domestic contexts and in terms of implementation – with regard to either, supranational courts may have a harder time than domestic courts.

[37]See the references in (4).

[38]Ely (1).

[39]See e.g. KJ Alter, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' in JL Dunoff and MA Pollack (eds), *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship* (Cambridge University Press, Cambridge, 2013) 345–370.

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Yet, we believe that neither of these issues poses a fundamental obstacle to a theory of representation reinforcement at the supranational level. This is partly because the ECtHR is not just any international court. As we have seen above, it is frequently described as a constitutional court of Europe and it is also not as institutionally isolated as it may seem at first glance. Indeed, the ECtHR is embedded institutionally not just in a relationship with other constitutional courts, but also supported by the Committee of Ministers and embedded in a broader European legal framework which also includes EU institutions.[40] Partly on account of the latter, many civil society organizations today operate transnationally, and even where they do not do so, they frequently have links and connections to other organizations that do so. As a result, their support structure when it comes to gathering information is not always significantly worse than that of domestic courts.

In contrast, the challenge of non-compliant states particularly affects the very foundation of human rights protection and thus also applies to our argument that the Court should more rigorously protect democracy. The lack of institutional agility and sometimes of coordination of the Council of Europe's organs as well as the influence of the overall political context in Europe constrain the Court's ability to provide timely, consistent and robust responses to systemic threats – as opposed to providing for merely remedial payments.[41] Nonetheless, the challenge of implementation is a general one and one the Court and other bodies are working hard to address. Thus, over time the Committee of Ministers has for example exercised more collective and streamlined pressure upon execution of abusive human rights restrictions under Art 18 ECHR in order to ensure the effective monitoring of the execution and implementation process.[42] In addition, the pilot-judgment procedure as an 'instrument for dialogue'[43] has been employed by the Court to address systemic or structural dysfunction and its root problems at the national level by way of indicating more targeted general measures that ought to be taken and subsequently enhanced supervision by the Committee of Ministers, albeit with mixed success[44]. More recently, a new study demonstrated that partial compliance is likely in states on a spectrum of democratization, often identified in the form of minimalistic, dilatory and/or contested compliance, rather than full compliance or non-compliance.[45] All things considered, while these studies suggest that we should not place too much hope

[40]R Harmsen, 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights' in J Christoffersen and MR Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, Oxford, 2011) 119–143; see also KJ Alter, 'The Global Spread of European Style International Courts' (2012) 35(11) *West European Politics* 135–154.

[41]See to great extent the Special Issue edited by B Çalı and E Demir-Gürsel on 'The Council of Europe's Responses to the Decay of the Rule of Law and Human Rights Protections' (2021) 2(2) *ECLR* 165–338. See also on the challenges of compliance generally, V Fikfak and UA Kos, 'Slovenia – An Exemplary Complier with Judgments of the European Court of Human Rights?' (2021) 40(8) *Pravna Praksa, Special Edition*, II–XI., iCourts Working Paper Series, No 249, available at SSRN: <https://ssrn.com/abstract=3801105> or <http://doi.org/10.2139/ssrn.3801105>.

[42]B Çalı, 'How Loud Do the Alarm Bells Toll? Execution of "Article 18 Judgments" of the European Court of Human Rights' (2021) 2(2) *ECLR* 274–302, 286 et seqq.

[43]J Gerards, 'The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue' in M Claes, M de Visser et al (eds), *Constitutional Conversation in Europe* (Intersentia, Cambridge, 2012) 271–297, 271.

[44]LR Glas, 'The Execution Process of Pilot Judgments Before the Committee of Ministers' (2019) 13(2) *Hum Rts & Int'l Legal Discourse* 73–98, 81.

[45]R Remezaite, *Compliance with Judgments of the European Court of Human Rights* (Brill, Leiden, 2023), Chapter 6, 188 et seqq.

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in the Court as solution to all problems, they by no means suggest that one should simply abandon the idea that the Court can make a meaningful contribution to protecting democracy in member states. Rather, the challenge is to set out when and how to do that – which is an issue we cannot tackle in this paper.

And questions of subsidiarity are real and particularly pressing if we understand representation reinforcement in its broadest sense as an argument for structural interventions in the political process, as advocated in recent literature, such as Stephen Gardbaum's argument for intervention in cases where there is a '*serious violation of one or more core democratic process values or their systematic undermining over time*'.[46] Adopting such a broad approach to representation reinforcement is already problematic in a domestic context given that democracy is a vague and contested concept,[47] but those problems are compounded when dealing with a supranational context where room for different national understandings of democracy must be preserved.[48] The concerns arising from approaches like this led to the Convention's drafters not to adopt a general democracy clause in the Convention and prompted past and current judges to be very careful about portraying the Court primarily as a guardian of democracy and the rule of law. The challenge will then be to reconcile this role and function with the Convention's need for subsidiarity, since, as Luzius Wildhaber and Steven Greer note, the Convention points to the existence of shared values such as democracy and the rule of law among its member states but its '*constitutional landscape is also undeniably pluralistic, polyvalent, and heterarchical*'.[49] In the field of democratic politics in particular it can be very hard to delineate what constitutes dysfunction, given the interplay between different rules or institutional arrangements and the importance of seemingly technical details. As a result, arrangements that may be unproblematic and democratic in one state may have a very different effect in another.[50]

In spite of these difficulties, we believe the answer should not be for the ECtHR to simply stay away from addressing democratic dysfunction. As already mentioned, the drafting of the Convention was – at least for a large part – about preventing democracies from backsliding into authoritarian regimes. This is also why the ECtHR reiterates time and time again that democracy is '*the only political model contemplated by the Convention and, accordingly, the only one compatible with it*'.[51] The challenge then must be about finding the right balance. But representation reinforcement is not just about expanding

[46]Gardbaum mentions the following as values at a minimum in this sense, (1) political competition, contestation, and opposition; (2) governance as a pluralistic, not monopolistic, enterprise; (3) differentiated institutional roles; (4) accountability of public power; (5) the political equality of citizens; and (6) representation of voters in terms of connecting public opinion and public policy: id (14) 1450–1451.

[47]See for this critique in response to Gardbaum also M Hailbronner, 'Political Process Review: Beyond Distrust' (2020) 18(4) *International Journal of Constitutional Law* 1458–1465. More generally on democracy as a contested concept F Cunningham, *Theories of Democracy* (Routledge, London, 2002) 3.

[48]See in particular for a skeptical account RH Pildes, 'Supranational Courts and The Law of Democracy: The European Court of Human Rights' (2018) 9(2) J *Int'l Disp Settlement* 154–179.

[49]S Greer and L Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2013) 12(4) *Human Rights Law Review* 655–687, 685.

[50]See e.g. on thisKL Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26(4) *Governance* 559–562; see also Dixon and Landau, *Abusive Borrowing* (17). See also on the importance of local context in the context of protecting democracy Pildes (48).

[51]See e.g. ECtHR, *United Communist Party of Turkey and Others v Turkey* [GC], no 19392/92, 30.1.1998, para 45; *Refah Partisi (the Welfare Party) and Others v Turkey* [GC], nos 41340/98 and 3 others, 13.2.2003, para 86; *Gorzelik and Others v Poland* [GC], no 44158/98, 17.2.2004, para 89.

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review; it is also about limiting judicial intervention – which is why we believe it is so attractive in this context.

And this takes us to the second question sketched above: namely, if representation reinforcement might not be too narrow and deferential as to be reconciled with the Court's existing practice. To start with, we do not provide a comprehensive answer here as to whether representation reinforcement should be understood as the *only* thing the ECtHR should be doing. Rather, we adopt the approach taken by the more recent comparative representation-reinforcing school of judicial review which uses Ely's account only partly as an argument to justify (or deter) intervention in the first place, but rather as an argument for calibrating and fine-tuning judicial review, with regard to degrees of judicial scrutiny and the choice of remedies. Focusing on *how*, and not just *if*, courts should intervene makes sense insofar as most modern constitutions explicitly provide for judicial review[52] unlike the older US Constitution addressed by Ely's more restrictive approach. Modern constitutional courts often do not have the option of declining review, which is also the case for the ECtHR, at least in principle.[53] Not least, it is important to emphasize that Ely believed that courts should take the legal text seriously and had no problems with judges wielding their power where the law was clear. His theory thus aimed to provide help in situations where the law lacked clarity. This raises the question of what this means for systems which explicitly provide for judicial review, a hard question to answer and again one we mostly bracket here, since Ely explicitly rejected broader non-interpretivist approaches to judicial review.[54] It suffices to say here that representation reinforcement will be hard to reconcile with a broad living-document approach or indeed arguments for a moral reading of rights, both of which are important strands in the Court's jurisprudence and the academic literature. Applying a representation-reinforcing approach thus involves a departure from these strands in the Court's jurisprudence and comes with arguments for deference where deference is currently not applied. That said, there is a fair amount of variation in the literature regarding the scope of political process theory and representation reinforcement.[55]

However, representation reinforcement is no magic bullet for the ECtHR. Like most theories of judicial review, it will often not generate clear answers in concrete cases. This is all the more true for the more recent strands in the literature which have expanded on Ely's original approach. But representation-reinforcement ideas should be interesting to ECtHR lawyers because they connect two strands in the Court's jurisprudence that are not typically connected: namely, its procedural approach to the margin of appreciation and its role in protecting democracy. It thus provides a way to reconcile two ideas – that of subsidiarity and that of democracy protection – with each other, which are traditionally seen to be in tension with one another. Moreover, it does so in an attractive manner, bringing together arguments for strengthening representation reinforcement and on protecting those that are not represented. And finally, it does so in a way that respects the need for subsidiarity in an international court while protecting democracy and minority rights.

[52]See e.g. for judicial review in individual complaints the German (Art 93 para 1 no 4 lit a) or Spanish Constitution (Art 161 para 1 lit b).

[53]According to Art 32 ECHR, '[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto'.

[54]Ely (1). See also Bo Tjojanco, in this volume for a discussion of this point.

[55]J Fowkes, 'Transformative Process Theory' (2024) *Global Constitutionalism* (published online) 1–21, 11.

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As a theory involving both restraint and activism, representation reinforcement thus provides a principled approach to the question of when to intervene strongly and when to defer, which already fits in many respects with what the court is doing – albeit not in all respects. It is this *combination* that cuts across the constitutionalist–individualist divide in the literature[56] and which also sets it aside from other theories of the Court's role, such as broader democracy-promoting proposals, those casting the Court as a constitutional court of Europe or indeed attempts to adopt the label of transformative constitutionalism to supranational courts[57]. At the same time, we do see important overlap with existing work by Kovács,[58] Janneke Gerards[59] as well as Alain Zysset[60] who has drawn on the reference to a 'democratic society' as a tool to both sharpen and strengthen the Court's function vis-a-vis member states as well as limit its authority in light of existing democratic processes.

Review of the ECtHR's case law

We now turn to the ECtHR's existing case law on a range of core themes and substantive rights that are central to both Ely's original argument about judicial intervention and its subsequent modifications and expansions in the comparative law literature. We could have discussed a range of different issues and questions here, but any attempt at being comprehensive would require a book-length treatment rather than a paper. We have thus selected a few issues that seem to us to highlight some areas and cases where we believe that representation reinforcement provides a useful lens on the ECtHR's existing practice.

Once again though, it is important to emphasize that representation reinforcement offers no ready-made answers.[61] And our understanding of what cases should trigger strict review, because it is necessary to protect the political process or the rights of minorities, will sometimes diverge from Ely's quite formalist approach to his own framework. This holds, for example, with regard to questions of which minorities are in need of protection, which we discuss below, but it is also true with regard to issues of free speech where Ely defended the US Supreme Court's jurisprudence in terms of his framework. These differences arise from disagreements about what democracy entails. They can arise within domestic

[56]On this divide and the problems that come with it see S Hennette-Vauchez, 'Constitutional v. International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' in J Christoffersen and MR Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, Oxford, 2011) 144–163.

[57]See e.g. A von Bogdandy and R Urueña, 'International Transformative Constitutionalism in Latin America' (2020) 114(3) *American Journal of International Law* 403–442; A von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine' (2020) 57(3) *Common Market Law Review* 705–740. The label of transformative constitutionalism in the work of Armin von Bogdandy refers to any judicial efforts, including by supranational courts, to combat systemic deficiencies and is not restricted to addressing deficits in the political sphere – unlike theories of representation reinforcement. Much suggests generally that transformative constitutionalism as a label does not fit supranational institutions insofar as it envisages a distinctive politically left agenda, which is hard to fit with the role of international courts, but this is an issue for another day.

[58]Kovács (31).

[59]Gerards (19); J Gerards and E Brems, 'Introduction' in J Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, Cambridge, 2017) 1–14.

[60]A Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of "DemocraticSociety"' (2016) 5(1) *Global Constitutionalism* 16–47.

[61]See already on this point M Hailbronner, 'Combatting Malfunction or Optimizing Democracy? Lessons from Germany for a Comparative Political Process Theory' (2021) 19(2) *International Journal of Constitutional Law* 495–514.

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systems, but are exacerbated at the supranational level where courts such as the ECtHR must leave room for different understandings. Accordingly, we believe the ECtHR's acceptance of certain limitations to free speech (e.g., hate speech) where it is necessary to enable certain groups – in particular minorities – to participate in political discourses can be defended in terms of representation reinforcement. This is not to say that anything goes, but rather that an approach focusing on representation reinforcement is likely to offer no clear answers in cases where different plausible substantive conceptions of democracy come with different approaches to free speech. Yet, this is not a problem confined to free speech cases, but can arise whenever the ECtHR adopts one particular understanding of democracy. Thus, Rory O'Connell has criticized the Court for placing too much emphasis on a traditional model of representative democracy, crowding out other competing ideas.[62] Yet, if the ECtHR is to protect democracy in member states at all, there need to be some clear lines it must be able to draw. Not everything someone defends in terms of democracy can be allowed to stand.[63]

In this regard, it is central to emphasize that a theory of representation reinforcement building on Ely's original framework must be focused on identifying dysfunctions rather than simply strengthening or indeed perfecting democracy – and this is also what distinguishes it from a range of other proposals in the literature casting the Court as the role of defender of constitutional democracy. This also plays a role, for example, when it comes to evaluating the Court's jurisprudence with regard to the concept of a 'democratic society' which is relevant in assessing limitations of a number of Convention rights. Some have argued that the Court adopts a different standard here with respect to different rights, prioritizing political freedoms over rights protecting personal autonomy.[64] Yet, such a distinction is precisely in line with an approach focusing on the protection of the political process and representation because broader questions of personal autonomy are questions that – without more – might well be addressed in the political process itself. This is not to say that autonomy is not important as a basis for democracy – it most certainly is! – but that from an Elyian perspective the question must be an institutional one: who can be trusted to protect the rights in question? It is, in other words, a question of responsiveness.[65] And the default answer to that question is that it must be domestic parliaments unless there are specific reasons for distrusting them.

Representation reinforcement in a supranational setting must then mean at least three things: first, it must entail the protection of a thin minimum core of rights and institutional guarantees necessary to protect democracy; second, it must involve distinguishing between cases where distrust in the democratic process is warranted from others where we are dealing with reasonable disagreements about rights and/or democracy; third, it must involve saying something about which minorities are in need of particularly strong protection and when – which is the part of Ely's framework most neglected in the current comparative literature.

In the following, we discuss some examples in the Court's case to illustrate these three points starting with protection from politically motivated criminal prosecution (1),

[62]O'Connell (4). See similarly L Raible, 'A Look at the ECHR's Democratic Society – Secessionist Movements and Human Rights' (2023) 19 *Re:Constitution Working Paper (Forum Transregionale Studien)* 1–16.

[63]See e.g. on this Dixon and Landau (n 17).

[64]B Bulak and A Zysset, '"Personal Autonomy" and "Democratic Society" at the European Court of Human Rights: Friends or Foes?' (2013) 2(1) *UCLJLJ* 230–254.

[65]Dixon (2).

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moving to active and passive voting rights (2), and finally the question of minority protection which is discussed here with regard to the concept of vulnerability in the Court's jurisprudence (3). We analyze where and to what degree the ECtHR's existing jurisprudence already reflects Elyian approaches and where it opens up room for criticism and/or improvement.

Protection from politically motivated criminal prosecution

The ECtHR's jurisprudence with regard to Art 18 ECHR is central when it comes to policing a minimum core of democracy throughout all member states. Art 18 ECHR, one of the lesser-known provisions to the Convention, states that '*restrictions* […] *shall not be applied for any purpose other than those for which they have been prescribed*'. Based on this clause, the Court has in recent years developed a robust representation-reinforcing case law, by prohibiting restrictions for illegitimate purposes with broad ramifications for the democratic process.[66] It examines *why* state authorities restrict substantive rights, with the aim of assessing objectively if governments pursue ulterior purposes than they state on paper.[67] As we learn from case law, in the majority of such prosecutions pre-trial detention is not imposed for the purposes of bringing the applicant before the competent legal authority on reasonable suspicion of having committed an offence,[68] but instead to exclude dissidents from the political process by punishing them for their work and eventually silencing them, at least temporarily.[69] The underlying root problem of such practice is always an abuse of power for political purposes – and thus the textbook example for insiders seeking to keep outsiders out and blocking the channels of political change. It also illustrates what protecting a democratic minimum core in the context of a broader representation-reinforcement approach might look like.

There are several reasons for that, but we want to highlight three points in particular here:

First, the applicants' criminal prosecution, especially that of opposition politicians, is often deliberately initiated during crucial campaigns in the run-up to referenda or parliamentary elections,[70] aimed at '*stifling pluralism and limiting freedom of political*

[66]In conjunction with other substantive rights, see e.g. ECtHR, *Merabishvili v Georgia* [GC], no 72508/13, 28.11.2017, paras 264 et seqq; *Navalnyy v Russia* [GC], nos 29580/12 and 4 others, 15.11.2018, paras 163 et seqq; *Selahattin Demirtaş v Turkey (No 2)* [GC], no 14305/17, 22.12.2020, paras 421 et seqq.

[67]In cases where the political motive is not the sole basis for criminal prosecution, the ECtHR has recognised the possibility of a plurality of purposes ever since *Merabishvili v Georgia* [GC], ibid, paras 285 et seqq, particularly 292, and tests, in this context, whether the ulterior purpose is also the predominant one; for an overview over the criticism raised by dissenting judges and in academic literature: A Tsampi, 'The New Doctrine on Misuse of Power under Article 18 ECHR: Is it About the System of Contre-Pouvoirs Within the State After All?' (2020) 38(2) *Netherlands Quarterly of Human Rights* 134–155, 143 et seq.

[68]This, for example, would qualify as legitimate purpose for restrictions on the right to liberty under Article 5 para 1 lit c ECHR.

[69]See for a comprehensive overview of ulterior political purposes with broad ramifications for the democratic process in the ECtHR's case law: Çalı (n 42) 283–285.

[70]See e.g. ECtHR, *Lutsenko v Ukraine*, no 6492/11, 3.7.2012; *Tymoshenko v Ukraine*, no 49872/11, 30.4.2013; *Ilgar Mammadov v Azerbaijan*, no 15172/13, 22.5.2014; *Merabishvili v Georgia* [GC] (n 66); although no violation was issued: *Navalnyye v Russia*, no 101/15, 17.10.2017; with view to electoral observation: *Mammadli v Azerbaijan*, no 47145/14, 19.4.2018; *Navalnyy v Russia* [GC] (n 66); *Navalnyy v Russia (No 2)*, no 43734/14, 9.4.2019; *Selahattin Demirtaş v Turkey (No 2)* [GC] (n 66).

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debate'.[71] The underlying motivation behind such practice is twofold: For one, anyone in pre-trial detention cannot, as a matter of fact, conduct an election campaign and may even be excluded from the candidacy in question or the following one. For another, abusive criminal prosecution of politically inconvenient dissents generally has a considerable chilling effect, discouraging others from participating in public discourse and attempting to paralyze civil society as a whole. In this context, the Grand Chamber in *Navalnyy v Russia* [GC] (2018) explicitly pointed toward a wider threat to democracy when it observed that '*the restriction in question would have affected not merely the applicant alone, or his fellow opposition activists and supporters, but the very essence of democracy as a means of organizing society*'.[72] In this respect, the classic reading of Ely's theory in the sense of protecting the openness of the political process against insider manipulation provides a useful framework for understanding and defending the ECtHR's case law on Art 18 ECHR. For whatever different understandings of democracy we may cherish, imprisoning governmental critics and opposition leaders, unless they are genuinely suspected of having committed an offense, will not be considered compatible with it.

Second, the cases also speak to the close connection of rule of law questions and democracy, with the rule of law understood to reign in state authorities' abuse of powers.[73] Thus, the ECtHR has attributed a significant role to judicial review itself when it found that '*the domestic courts, being the ultimate guardians of the rule of law, systematically failed to protect the applicants against arbitrary arrest and continued pre-trial detention […], limiting their role to one of mere automatic endorsement of the prosecution's applications to detain the applicants without any genuine judicial oversight*'.[74] Although rule of law aspects do not necessarily play an explicit role in Ely's original theory, the Court's Art 18 jurisprudence can be understood as a concretization of the Convention's democratic minimum core that should trigger both strict and substantive review and robust remedies where a violation is found.

Third, Art 18 ECHR provides the ECtHR with a legal basis for its response to the political foul play that marks a member state's departure from the most basic rule of good faith human rights protection. Especially in its early case law on Art 18 ECHR, the Court emphasized that the system of the Council of Europe and thus '*the whole structure of the Convention*' rests on the overarching presumption that its member states fulfill their obligations in good faith.[75] Such an inquiry into state authorities' bad faith when restricting human rights or more generally member states' unwillingness to fulfill their obligations under the Convention is strongly reminiscent of the above-mentioned Ely-inspired question of 'distrust' in member states' rule-making or practice. It also suggests that procedural review may play an important supplemental role in these cases as a way of identifying the facts of the respective cases and, in doing so, recognizing bad faith.

[71]These two core elements to democracy are explicitly mentioned in ECtHR, *Selahattin Demirtaş v Turkey (No 2)* [GC] (n 66) para 437.

[72]ECtHR, *Navalnyy v Russia* [GC] (n 66) para 174.

[73]See e.g. Tom Bingham's fundamental definition: id, *The Rule of Law* (Penguin Books, London, 2010) 60; for a more detailed analysis and references in the ECtHR's case-law: Tan (n 4) 114 et seqq.

[74]ECtHR, *Aliyev v Azerbaijan*, nos 68762/14 and 71200/14, 20.9.2018, para 224.

[75]Starting with ECtHR, *Khodorkovskiy v Russia*, no 5829/04, 31.5.2011, para 255; only later with its Grand Chamber judgment in *Merabishvili v Georgia* [GC] (n 66) 65, the Court shifted toward a more objective assessment of ulterior purposes.

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Two challenges in this regard are of course how to identify bad faith in these cases and, subsequently, what it means for the overall Convention system in a larger context. Scrutiny of states' motivation can often prove difficult, given it is contingent on the ECtHR's fact-finding capacities and thus naturally limited for reasons of subsidiarity, according to which the Court does not act as a court of fourth instance and the facts of the case have already been predominantly settled at the national level.[76] It is, however, peculiar to bad faith scenarios that the ECtHR might have to reassess these facts since judicial independence is oftentimes affected by populist or autocratic aspirations, and this makes it difficult to establish protection in the spirit of Art 18 ECHR by domestic courts in the first place.[77] We propose that the Court might embrace a more holistic approach to contextual evidence in line with the recent literature on the singular nature of the existing evidentiary regime under Art 18 ECHR.[78] In this sense, the ECtHR would also engage with bad faith effects on the broader political context beyond the concrete circumstances of the case. All of this surely prompts criticism of the ECtHR's increasing politicization. Başak Çalı has long proposed this risk can be mitigated by way of applying tailor-made judicial responses within clear and principled normative frames,[79] for example within her 'variable geometry' in which trust in domestic authorities is central, giving more deference to governments acting in good faith than those who are not.[80] This is also why we believe our normative understanding of representation reinforcement under the Convention can provide a helpful argumentative tool for robust protection of the democratic minimum core and minority rights, while otherwise resorting to process-based coping strategies as we have seen in other politically sensitive cases.

Going beyond Art 18 ECHR, such an approach would also involve an inquiry as to the legitimacy of governmental purposes when restricting rights. It would thus be in line with a whole new range of Strasbourg case law, questioning governments' assertions of legitimate aims underlying restrictions on rights with regard to not only their legal justificatory capacities but also to their factual accuracy,[81] in particular with a view to judicial independence under Art 6 ECHR and its effects on the rule of law in Europe.[82]

Finally, representation reinforcement as it is discussed in the more recent literature also involves paying attention to the choice of remedies, providing for a tailored approach, including robust structural review in cases where the democratic minimum core is

[76]Council of Europe, Copenhagen Declaration of the High Level Conference on the Future of the European Court of Human Rights, European supervision – the role of the Court, para 28 lit a; ECtHR, *Klaas v Germany*, no 15473/89, 22.9.1993, paras 29 et seqq.

[77]In more detail for this question see J Finnerty, 'When Is a State's "Hidden Agenda" Proven?' (2023) 4 (4) *ECLR* 447–472; Çalı Başak, 'Proving Bad Faith in International Law: Lessons from the Article 18 Case Law of the European Court of Human Rights' in id, Gábor Kajtár and Marko Milanović (eds), *Secondary Rules of Primary Importance in International Law – Attribution, Causality, Standard of Review and Evidentiary Rules in International Law*, 2022, pp 183 et seqq; P Leach, Fact-Finding: European Court of Human Rights (ECtHR), *Max Planck Encyclopedia of International Law*, paras. 44 et seqq.

[78]Finnerty (n 77) 472.

[79]B Çalı, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35(2) *Wisconsin International Law Journal* 237–276, 270–274, adding the Court's clarity of reasoning will be most important in this context (276).

[80]Çalı (n 79) 275–276.

[81]NU Orcan, 'Legitimate Aims, Illegitimate Aims and the ECtHR: Changing Attitudes and Selective Strictness' (2022) 7(1) *University of Bologna Law Review* 7–40.

[82]See only for example ECtHR, *Baka v Hungary*, no 20261/12, 23.6.2016; *Erményi v Hungary*, no 22254/14, 22.11.2016.

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violated.[83] In line with this, the ECtHR increasingly adopts a robust approach to remedies in Art 18 ECHR cases, especially where opposition politicians are concerned. Rather than leaving implementation to the state parties concerned, the Court has begun to prescribe both individual and/or general measures by virtue of Art 46 para 1 ECHR, namely to immediately release the applicant,[84] to restore the applicant's professional activities[85] and to '*focus, as a matter of priority, on the protection of critics of the government, civil society activists and human-rights defenders against arbitrary arrest and detention*' by legislative and/or other measures.[86] For the reasons mentioned above, decisions establishing bad faith violations of the Convention are often hard to implement,[87] prompting the Committee of Ministers to use the infringement procedures under Art 46 para 4 ECHR before the Court in two cases thus far.[88] Importantly, a responsive approach would not be to insist on one particular form of remedy in all cases, but will be sensitive to the challenges at hand and seek to work around existing obstacles.

Voting rights

Voting rights, too, are central to democracy and should thus trigger a heightened degree of scrutiny by the ECtHR under a representation-reinforcing approach. Art 3 Protocol No 1 protects both the right to cast a vote and to run for office in elections for a (not necessarily national) parliament: '*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*'

In spite of its drafting history as a democracy-protection clause (see above), it was only accepted over time that Art 3 Protocol No 1 entailed individual rights, initially in the practice of the (now abolished) European Commission of Human Rights.[89] The ECtHR itself has not only emphasized its justiciability in terms of individual rights given its importance to democracy[90] but has also stressed – with reference to the Preamble of the Convention – that the preservation of democracy is central to the protection of human rights: '*fundamental human rights and freedoms are best maintained by "an effective political democracy"*'.[91]

[83]Dixon (2), Chapter 7.

[84]See e.g. ECtHR, *Kavala v Turkey*, no 28749/18, 10.12.2019, para 240 and findings para 7; confirmed by the Grand Chamber: *Selahattin Demirtaş v Turkey (No 2)* [GC] (n 66) para 442 and findings para 14.

[85]See e.g. ECtHR, *Aliyev v Azerbaijan*, nos 68762/14 and 71200/14, 20.9.2018, para 227 et seq.

[86]See e.g. ECtHR, *Aliyev v Azerbaijan*, ibid, para 226 where the Court further specified the general measures to be taken 'must ensure the eradication of retaliatory prosecutions and misuse of criminal law against this group of individuals'; confirmed by the Grand Chamber: *Navalnyy v Russia* [GC] (n 66) para 186.

[87]For a critical analysis of execution and implementation of Article 18 judgments in Georgia ('difficulty of executing dominant ulterior purpose judgments of the Court'), Turkey ('evasive tactics') and Russia ('no official response to Article 18 aspects of judgments'): Çalı (n 42) 292 et seqq.

[88]ECtHR, *Kavala v Türkiye (Article 46 para 4)* [GC], no 28749/18, 11.7.2022 and *Ilgar Mammadov v Azerbaijan (Article 46 para 4)* [GC], no 15172/13, 29.5.2019.

[89]The EComHR's view has evolved from the idea of an 'institutional right' to the concept of 'universal suffrage' and then to the concept of subjective rights of participation: *W., X., Y. and Z. v Belgium*, nos 6745/74 and 6746/74, 30.5.1975.

[90]See for its first case ECtHR, *Mathieu-Mohin and Clerfayt v Belgium*, no 9267/81, 2.3.1987, paras 48–51; subsequently *Ždanoka v Latvia* [GC], no 58278/00, 16.3.2006, paras 102–103.

[91]ECtHR, *Mathieu-Mohin and Clerfayt v Belgium*, ibid, para 47.

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The jurisprudence on Art 3 Protocol No 1 broadly mirrors the early debates of the Convention's framers. Noting the lack of more specific provisions in the Convention and the travaux préparatoires in which representatives referred to the need for domestic implementation measures, the Court recognizes that Art 3 Protocol No 1 is subject to 'implied limitations' and emphasizes in this context that state authorities enjoy a wide margin of appreciation,[92] although the width of this margin unsurprisingly varies in practice. The idea of implied limitations, as the Court's very own Guide on Art 3 Protocol No 1 explains, is important as it allows restrictions of the right to free elections that go beyond the standard list of legitimate aims familiar from other Convention rights such as Arts 8 to 11 ECHR. It focuses on two aspects rather than its otherwise traditional inquiry into the necessity of the restriction in a democratic society: '*whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people*'.[93] In addition, it underlines '*the need to assess any electoral legislation in the light of the political evolution of the country concerned, which means that unacceptable features in one system may be justified in another*'.[94]

In the literature, this relatively wide margin of appreciation has frequently come in for criticism, in particular in the context of the ECtHR's battle over prisoner voting rights in the UK in the *Hirst* (2005) saga.[95] Scholars have drawn attention to discrepancies between the Court's freedom of expression jurisprudence with its relatively robust proportionality approach and the Court's tendency to grant a wide margin of appreciation combined with its propensity to invoke the concept of a European consensus when voting rights were involved.[96] Others have argued more specifically for stricter judicial scrutiny when it comes to adjudicating the withdrawal of individual voting rights as opposed to broader questions of the organization of the electoral system where member states should enjoy larger leeway.[97] Overall though, apart from a somewhat lesser standard of scrutiny with regard to running or standing in an election as opposed to voting rights, it seems hard to discover clear lines in the Court's jurisprudence.

From a representation-reinforcing perspective, we must clearly envisage a robust role of the ECtHR when it comes to Art 3 Protocol No 1. Electoral rules really are central to enabling voting and thus a democratic form of government, and they must be a part of a democratic minimum core. This suggests that the Court should engage in substantive review of such rules, albeit without putting forward one specific concept of representation across all member states.

This requires a difficult balancing act. It seems to us that a good way of coping with this challenge is by adopting a substantively broad approach to the scope of application of Art 3 Protocol No 1, but at the same time engaging in a procedural review of the rules in question. This implies some protection not just for elections but also for referenda, in

[92]ECtHR, *Mathieu-Mohin and Clerfayt v Belgium*, ibid, para 52.

[93]ECtHR (Registry), Guide on Article 3 of Protocol No 1 to the European Convention on Human Rights – Right to Free Elections, last updated on 31.8.2022, paras 12–13 with reference to the ECtHR's case-law.

[94]Ibid, para 13.

[95]ECtHR, *Hirst v the United Kingdom (No 2)* [GC], no 74025/01, 6.10.2005, para 82 where the ECtHR granted the UK a rather wide margin of appreciation; nonetheless, it found the general, automatic and indiscriminate restriction to fall outside of any acceptable margin of appreciation and thus violated Art 3 Protocol No 1.

[96]Zysset (n 60).

[97]R Ziegler, 'Voting Eligibility: Strasbourg's Timidity' in K Ziegler, E Wicks and L Hodson (eds), *The UK and European Human Rights* (Hart Publishing, Oxford, 2015) 165–191.

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contrast to the ECtHR's position[98] and in line with Kovács and other critics,[99] at least in those cases where they are understood as either constitutional referenda or as referenda that are legally binding for legislators with regard to the adoption of specific rules or policies. The reason for this is that constitutional referenda are in many ways even more central to the establishment of constitutional democracies than regular elections, and it is thus important from a democratic perspective that they be free and fair. Similarly, binding referenda for legislators on specific rules or policies are functionally equivalent to legislative rule or policy making and thus at the core of democratic law-making. Not least, referenda have played a considerable role in enabling democratic backsliding in some contexts and if we understand the ECtHR as a tool to address the latter, this, too, suggests a broad reading of Art 3 Protocol No 1. Such an approach may go beyond Ely's original focus on the text, but is very much in line with the more recent literature in comparative constitutional law.[100]

However, we also understand that different member states will choose different ways of organizing referenda, elections and representative institutions. In this regard, it seems essential to us to consider the process in which existing rules are changed and pay attention to insider-outsider dynamics as well as minority protection. The gold standard for changes to central electoral rules should be broad multi-partisan support because it suggests that the changes made are not directed solely or primarily toward increasing the governing party's or coalition's chances of staying in power by tilting the electoral playing field in their favor. A procedural approach should also mean more than a review of the amending process itself, particularly as the ECtHR is not dealing with new changes in all cases but rather longer established electoral rules. Several factors seem particularly relevant: whether the rules in question are likely to benefit insiders in the systems or seem to have little relevance and effect on electoral outcomes, and whether they have particular implications for minorities facing long-entrenched hostile prejudice.[101] When it is hard to make such determinations, the ECtHR may also scrutinize the consistency of the respective legislative frameworks surrounding voting rights as a tool for screening out illicit bias.[102]

A representation-reinforcing approach should, however, not be understood as a blueprint for perfecting states' democratic systems. Thus, we might also seek to distinguish between a democratic minimum core which would entail that any members of minority groups can exercise their rights to vote on a formally equal, free and fair basis and non-core concerns with better representation for minority groups. On this basis, the difference in the ECtHR's treatment of the demands of the German non-minority party *Die Friesen* for lowering vote thresholds to enter the German parliament so that their party would be able to gain seats, which the ECtHR upheld,[103] and the referral of national minorities in Hungary in *Bakirdzi and E.C. v Hungary* (2022) to one particular minority voting list, which the ECtHR treated as a violation of the Convention,[104] makes sense.

[98]See e.g. ECtHR, *Cumhuriyet Halk Partisi v Turkey* (dec), no 48818/17, 21.11.2017, paras 33 and 38; *Moohan and Gillon v the United Kingdom* (dec), nos 22962/15 and 23345/15, 13.6.2017, para 40; earlier already the EComHR argued that Art 3 Protocol No 1 does not guarantee a general right to consultation of the population: *X v the UK* (dec), no 7096/75, 3.10.1975, The Law, para 2.

[99]Kovács (31) 249 et seqq.

[100]See e.g. Gardbaum (14) 1433.

[101]See also Hailbronner (n 61).

[102]See similarly Petersen (12) 184.

[103]ECtHR, *Partei Die Friesen v Germany*, no 65480/10, 28.1.2016.

[104]ECtHR, *Bakirdzi and E.C. v Hungary*, no 49636/14 and 65678/14, 10.11.2022 [Section I].

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Minority protection

The protection of minorities has long been a core function of constitutional courts in the existing literature and is similarly important in academic writing on the ECtHR, in particular George Letsas' arguments for a moral reading of the Convention, inter alia to protect minorities against majorities.[105] There is of course a significant body of jurisprudence on Art 14 ECHR prohibiting discrimination which warrants closer analysis. We focus instead on the concept of 'vulnerability' in the ECtHR's jurisprudence which is one of the factors the Court uses to determine the appropriate margin of appreciation and an argument the court draws on in determining the scope of states' obligations. As such, it resonates with Ely's concern about protecting minorities to some degree.

In the Court's jurisprudence and existing scholarly accounts, vulnerability is generally not understood in light of Ely's theory, which emphasized that two things mattered in particular: First, that a minority has faced long-entrenched hostile prejudice, and second, that it was sufficiently 'discrete and insular' to make it difficult to build political coalitions to advocate for its own interests. Instead, the Court conceives of vulnerability more broadly, which includes, for example, vulnerability due to pregnancy[106] or, what Corina Heri calls, dependency-based vulnerability affecting minors, the elderly and those with psychosocial and cognitive disabilities.[107] There is, however, no entirely precise definition of vulnerability in the Court's jurisprudence. Thus, the ECtHR has in some cases identified vulnerability in terms of 'historical disempowerment',[108] recognizing inter alia asylum-seekers and sexual minorities,[109] people with mental disabilities[110] or living with HIV[111] and the Roma minorities[112] as groups in this sense. It is easy to see that this might be extended to other groups, such as those who are disadvantaged more broadly because of their race or gender. While this focus on past discrimination fits into an Elyian paradigm, Kovács and Gábor Attila Tóth argue, for example, that a focus on past social injustice is insufficient if we are trying to make sure that all citizens are treated equally in a moral sense and that their rights are not restricted in an unjustified manner.[113]

This is clearly different from Ely's original approach which focused mostly on the formal representation of the groups in question, with the consequence that women, for example, would not qualify for special judicial protection as long as they are able to voice their complaints through ordinary democratic channels. Thus, Ely noted that while women were obviously subject to long-entrenched prejudice, many women themselves held such prejudices and often seemed to prioritize other political issues, in addition to not constituting a numerical minority of the population. Although women might be

[105]Letsas (19).

[106]ECtHR, *Bati and Others*, nos 33097/96 and 57834/00, 3.6.2004, para 122.

[107]C Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR* (Hart Publishing, Oxford, 2021) 40.

[108]Kovács and Tóth (19) 253.

[109]See e.g. ECtHR, *O.M. v Hungary*, no 9912/15, 5.7.2016, para 53.

[110]See e.g. ECtHR, *Alajos Kiss v Hungary*, no 38832/06, 20.5.2010, para 42.

[111]See e.g. ECtHR, *Kiyutin v Russia*, no 2700/10, 10.5.2011, para 64.

[112]See e.g. ECtHR, *D.H. and Others v the Czech Republic* [GC] (26) para 182; *Oršuš and Others v Croatia* [GC] (26) paras 147–148; *Horváth and Kiss v Hungary*, no 11146/11, 29.1.2013, para 102.

[113]Kovács and Tóth (19) 253–254.

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wrong to adopt such beliefs about themselves, Ely argued that it was not the function of judicial review to correct such 'false stereotypes'.[114]

However, Ely's analysis lacks some nuance and ignores a range of other questions that arise in this context. Thus, we might wonder if it matters that women often face structural hurdles when seeking to enter politics, e.g., because of the way political parties are organized and operate, and as a result, they typically make up considerably less than half of all members of parliament. Ultimately, there is no entirely level democratic playing field which grants all people equal chances to achieve positions of power by running for office or otherwise – and of course, women are only one example here.[115] The question would then be whether and to what degree this is significant from a representation-reinforcing point of view. We may think that even if women or other minorities are underrepresented, this does not necessarily lead to their interests being insufficiently represented in the democratic process. Thus, men running for office should be incentivized to take up issues important to women because after all, women make up half of the electorate. Yet, we also know that this is not always true.

One solution may then be to adopt a more case-by-case-based approach when it comes to identifying minorities in need of stronger judicial protection, rather than distinguishing between different groups a priori. In her work, Dixon suggests a path to such an approach by focusing on what she calls 'democratic blind spots' or 'burdens of inertia' due to coalition-building constraints.[116] Democratic blind spots arise when legislators are simply unaware of certain consequences of the rules they are putting forward. This may particularly be the case when these rules have an unequal impact on different groups and thus target minorities in unforeseen ways.[117] Burdens of inertia arise when the need to hold together or build a coalition leads legislators to neglect certain topics, even though the issues in question may well have majority support but perhaps particularly affect certain minorities.[118] As an example, we might think of some conservative government's unwillingness to push through laws allowing same-sex marriage out of fear of splitting the political coalition on whose support they depend. In those cases, Dixon argues that weak forms of judicial review – pointing governments to their oversight without necessarily prescribing a fixed solution – are generally sufficient and appropriate here.[119] And yet, some unease remains given that minority rights violations are not always a sign of democratic blind spots or burdens of inertia, but rather of more straightforward hostile prejudice. For example, in many debates about issues such as same-sex marriage or abortion rights, there will be a range of different ideological positions involved, some of which will be outrightly misogynist or homophobic, whereas others will not be. The question is how this should impact judicial review.

We believe that the best way for courts including the ECtHR to respond is to consider two things in particular: first, the degree of long-entrenched hostile prejudice to which the respective minorities are subjected to, and second, the broader quality of the democratic debate in terms of their representation. Such an approach would be narrower than the vulnerability literature suggests but broader than what Ely had in mind. Thus, when the

[114]Ely (1) 165.

[115]See e.g. for Europe: European Parliament Briefing 03-03-2023, Women in Politics in the EU: State of Play, available at <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)739383>.

[116]Dixon (2) 160–169.

[117]Ibid.

[118]Ibid.

[119]Dixon (2) 160–169.

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Court is dealing with groups traditionally subject to long-entrenched hostile prejudice and when the debate significantly reflects prejudice and bias (or when there was no real debate, in the sense of a democratic blind spot or burden of inertia, as was the case in *Hirst*, at least initially), the ECtHR should scrutinize the rules in question strictly, leaving a relatively narrow margin of discretion. In contrast, when the case involves groups not typically subjected to long-entrenched hostile prejudice, such as children or elderly people, and there are no signs of a particularly skewed or entirely lacking debate, states' margins of appreciation should be correspondingly wider.

Such an approach would combine two lines in the Court's existing jurisprudence, on vulnerability and existing domestic processes, both of which are already central factors in determining what margin of appreciation the Court will grant in the individual case at hand. By focusing on past injustice, the Court would not be denying equal rights to some citizens but rather exercise trust in the democratic process when there are no reasons to assume that political mobilization is unavailable to those who believe their rights have been violated. In other words, the judges would seek to encourage political responses to representation deficits as long as there is not a straightforward case for distrust.

Conclusion

We have argued here that the drafting history of the Court's jurisdiction, the current discussion about its role and function and not least the Court's existing case law offer fertile ground for arguments about representation reinforcement. Such a representation-reinforcing approach would judge the untrustworthiness of a respective rule-making or practice of a case, which can stem from insiders seeking to gain political advantage or concerns of long-entrenched hostile prejudice against minorities, by drawing on a range of factors, and tailor both the degree of judicial scrutiny and the choice of appropriate remedies accordingly. We also think that the best way to determine whether there is a case of trust or distrust will often involve looking at the process in question, thus building on the ECtHR's turn to the procedure in its more recent jurisprudence,[120] albeit equipped with a better understanding of what we should be looking for. But there will be cases where procedural review is not enough and a representation-reinforcing approach will call for strong substantive review, in particular where the ECtHR is confronted with potential violations of a democratic minimum core or rights of minorities facing long-entrenched hostile prejudice. A focus on representation reinforcement provides arguments for looking more closely at ways in which their interests are (un)represented in the existing process underlying the respective rulemaking or practice, and for taking this into account to tailor the margin of appreciation in concrete cases.

As stated above, such arguments do not necessarily exclude other understandings of the Court's role and function. However, it is important to emphasize that a representation-reinforcing approach should – in line with the core of the political process and representation-reinforcement approaches and the voices stressing the importance of subsidiarity in a supranational context – offer an account of the Court's role that

[120]See for an analysis from within the ECtHR: R Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) *Human Rights Law Review* 473–494.

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empowers as well as restrains. Going forward, it will be important to spell out more details as to what this entails and clarify the relationship between representation reinforcement and the Court's other roles and functions, which have been assumed over time and were put aside here. The lesson and future inspiration we draw from Ely is that it is important to view judicial review of human rights law at both the domestic and supranational level as a relational exercise that requires the Court to distinguish between cases in which there is reason to distrust the democratic process in individual member states and intervene in a potentially strong and structural manner, and other cases that are better characterized as cases of legitimate disagreement over rights and in which member states can subsequently be accorded more respect.

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