Freedom of Expression, the Right to Vote, and Proportionality
at the European Court of Human Rights: An Internal Critique

Abstract

This article offers an internal critique of the European Court of Human Rights' deferential approach to the content and limits of the right to vote (under the right to free and fair elections, Article 3 of Protocol 1 ECHR). Rather than imposing an independent theory of democratic rights, the critique is internal as it relies on the Court's own conception of democracy developed under Article 10 ECHR (freedom of expression) and Article 11 ECHR (freedom of reunion and assembly). It uses normative democratic theory to show that the Court's conception under those rights reveals an utmost concern for political inclusion and that this conception is systematically used by the Court to balance alleged interferences with this article It then argues that this concern has implications for the Court's review of the right to vote. While the Court proclaims the complementarity between expression and vote at the level of principle, the Court refrains from engaging in the balancing exercise under P1-3. The article takes the notorious example of the right of convicted felons to vote. The article does not conclude, however, that the Court should systematically maintain their franchise on democratic grounds. It rather contends that the Court should apply proportionality with the same substantive democratic principles across democratic rights.

1. Introduction

Since its early days, the European Court of Human Rights (hereafter, the Court) has incessantly insisted on the place of freedom of expression in what the Court calls a 'democratic society'. The Court proclaims that a democratic society 'thrives on freedom of expression'.[1] This insistence can be measured by different and complementary patterns in the case law: a wide content and scope assigned to the right, a teleological or purposive approach to interpretation and, as a result, a thin margin of appreciation left to the respondent state party. The reasons for this insistence do not only relate to individual autonomy and flourishing. Rather, the Court emphasizes that (a wide) freedom of expression is crucial to realize and preserve a 'democratic society' conceived as a model of collective organization and decision-making processes.

In the Court's eyes, 'democratic society' extends far beyond a *formal* model of democracy limited to a procedure of majority voting. The role of Article 10 of the European Convention on Human Rights (hereafter, the Convention) specifically applies to the *informal* and *deliberative* stage of the democratic process. Allowing a person to express her views in the public debate – even the 'unpalatable'[2] and 'divisive'[3] ones – contributes to the person's inclusion in the democratic process. This explains, for instance, why the Court applies this approach only to views and opinions that concern issues of public interest, as we shall see. This also explains why the Court extends a wide protection of expression to a range of social actors whose common role is to inform individuals about issues of public interest, such as the press, political parties, scientists and intellectuals, or NGOs, as I shall illustrate.

This deliberative stage precedes the formal stage of voting and/or election protected in Convention through Article 3 Protocol 1 (P1-3). As we shall see, the Court clearly conceives those two articles as

[1] *Handyside v. United Kingdom*, App. No. 5493/72, 7 December 1976, at para. 49.
[2] *Erdoğdu and İnce v. Turkey*, App. Nos. 25067/94, 25068/94, 8 July 1999, at para. 42.
[3] *Lingens v. Austria*, App. No 9815/82, 8 July 1986, at para. 41.

interdependent to realize and preserve its 'democratic society'. However, when it comes to the content and limits of Article P1-3 (formally, the right to free elections), the Court's level of scrutiny remains surprisingly limited – in stark contrast to Article 10. This becomes clear when one compares how the Court applies the proportionality test to each of those provisions. The principled role of proportionality is to establish the conditions for a legitimate interference with Convention rights. Under Article 10, the Court balances the aim of these interferences against its substantive notion of 'democratic society'. Under P1-3, in contrast, the Court's application of the test is limited to examining whether the measure taken by the state party was rationally connected to the aim pursued and whether it was strictly *necessary*. But the normative basis of the measure itself – and its compatibility with the Court's 'democratic society' – is not assessed in substantive terms.

This is the case of the ban on the prisoners' right to vote: the Court fails to balance the principle of *civic disenfranchisement* (justifying the ban) against its rich notion of 'democratic society'. The specialized literature – in particular, on the "saga" of the prisoners' voting rights in the UK[4] – has noted the Court's particular and limited application of the proportionality test to P1-3, as we shall see in more details. To reinforce this form of deference, the Court may also refer to the consensus prevailing across the Council of Europe (hereafter, the CoE) – whose lack usually justifies allocating a wide margin of appreciation to the respondent state party. This form of deference exemplifies, following the Letsas, the 'structural' use of the margin of appreciation where the Court refrains from engaging in balancing between the right and the competing public or state interest.[5]

It is rather easy to illustrate how the Court expands on the need for a vibrant democracy through a rich and contradictory public debate on the one hand (Article 10, but also Article 11 (freedom of reunion and assembly), and a more restrictive approach to the right to vote (Article P1-3) on the other. The literature on P1-3 has specifically noted the Court's obscure definition of the legitimate aims that can justify an interference with the right to vote. As we shall see, Ziegler in particular urges the Court to adopt 'a more rigorous approach for scrutinizing legislative measure regulating access to the democratic process'[6] and precisely points to the Court's acceptance of "poorly defined policy aims".[7] To further develop the distinction between expression and vote, one can also distinguish the different interpretive methods the Court adopts: its activism on Article 10 reflects a *teleological* approach to judicial interpretation – understood as a vibrant 'democratic society' – while the restraint with regard to P1-3 reflects a *consensualist* approach connecting the content of the rights to the evolving consensus found across the CoE. What is missing, in my view, is a systematic *normative* evaluation of the Court's differential approach between expression and vote. One could surely point to a lack of coherence between the two methods of judicial reasoning underlying the reasoning. But restricting the analysis to identifying judicial methodology is incomplete. This is because the choice of interpretive method is itself *normative*. If expression and vote interdepend at the level of principle, as the Court makes abundantly clear, it is not clear why the method of adjudication should vary to such an extent. Therefore, I suggest that one cannot bring the debate forward without adopting a properly normative

[4] See in particular Ed Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg," *Human Rights Law Review* 14, no. 3 (2014): 503–40.

[5] George Letsas, 'Two Concepts of the Margin of Appreciation,' *Oxford Journal of Legal Studies* 26, no. 4 (2006): 705–32.

[6] Reuven (Ruvi) Ziegler, "Voting Eligibility: Strasbourg's Timidity" in Katja S. Ziegler, Elizabeth Wicks, and Loveday Hodson, *The UK and European Human Rights: A Strained Relationship?* (Bloomsbury Publishing, 2015), at 166.

[7] Ibid., at 173.

standpoint – one that both reconstructs the Court's reasoning and methodology and critically evaluates the Court's differential treatment *from within*.

This being said, the normative assessment should not only apply to one side of the equation, namely the Court's restraint with regard to the right to vote. The mere principle of political equality is also insufficient to explain the Court's expansive approach to freedom of expression: in what sense does allowing 'unpalatable' or 'divisive' views to 'find a place in the public arena'[8] enhance political equality? Extending freedom of expression inevitably implies restricting the state's pursuit of a public good that may also be defined in terms of (cumulated) individual rights. As a result, a fine-grained analysis is also needed on the normative side to clarify and assess the Court's purposive approach to Article 10.

To tackle those questions, this article is four-pronged. First, I critically survey the Court's approach to Articles 10 and 11 and reconstruct the Court's grounds for extending their content and scope. I emphasize the teleological reasoning adopted by the Court, which leads the Court to weigh interferences against its 'democratic society' in the proportionality test. More precisely, I illustrate the extent to which the Court's self-defined *telos* resists competing considerations. Second, I critically examine the Court's approach to Article P1-3 and explain the Court's grounds for limiting its content and scope. Here again, I reconstruct the Court's proportionality test and contrast it with Article 10. I show that despite firmly proclaiming their interdependence at the level of principle, the Court fails to balance interferences with the Court's *telos*. Third, I problematize the Court's differential approach by means of normative democratic theory. I show that the Court's expansive approach to Article 10 reflects a deep concern for equal inclusion in the democratic process. I then argue that this concern should apply to the right to vote of convicted prisoners. To illustrate this point, I examine the various judgments pertaining to the limitation of the prisoners' voting rights, and show how the Court should substantively engage with the arguments offered by state parties in favor of the ban. I do not conclude, however, that the Court should necessarily protected the right to vote to all convicted felons based on democratic reasons. Rather, my point is methodological: I hold that there is enough in the Court's *telos* of 'democratic society' to at least engage with the democratic credentials of such bans and weigh these credentials against arguments supporting the ban, thereby increasing coherence across the range of the concerned rights.

As a result, my argument does not question the Court's general approach to judicial deference (through the margin of appreciation). Unlike other accounts that generally view human rights adjudication as seeking moral truths[9], I reconstruct the Court's own conceptual and normative framework and place my coherence concerns within it. Similarly, at the level of normative theory, my critique does not only rely on the abstract continuum between Article 10 and Article P1-3. Rather, I build on the Court's own appeal to democratic considerations. The role of normative political theory is therefore not to assess the Court's practice from a privileged and independent normative standpoint (the 'philosopher king' position), but both to carefully reconstruct the Court's interpretive approach and to critically appraise it from within – in order to enhance the value of critique.

[8] *Piermont v. France,* App. Nos. 15773/89, 15774/89, 24 July 1995, para. 76.

[9] See in particular George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer,' *The European Journal of International Law* 21, no. 3 (2010): 509–41.

2. Articles 10 and 11

2.1. Grounds, content and scope

The objective of this first section is not to offer a descriptive overview of the Court's case law on freedom of expression (Article 10), which can be found in numerous textbooks. Rather, I aim to identify the type of reasoning that the Court develops when it interprets and balances Article 10 against competing considerations in the proportionality test. As explained in the introduction, despite the proclaimed complementary roles of Article 10 and Article P3-1 in principle, the Court uses different tools of interpretation in practice. What justifies the Court adopting a purposive approach to Article 10? I start by focusing on the notion of 'democratic society' and the crucial role it plays in the proportionality test.

In principle, the proportionality test examines the conditions for interfering with a protected right. As far as Article 10 is concerned, the Convention stipulates that these conditions should be determined in light of what is 'necessary in a democratic society'. This corresponds to the last, balancing phase of the proportionality test as conventionally construed. After having assessed the *legality* and *necessity* requirements of the state party's measure, the Court properly weighs the measure against what is 'necessary in a democratic society'. This step is conventionally called proportionality *stricto sensu*. As Barak explains in the constitutional context, proportionality *stricto sensu* 'requires a balancing of the benefits gained by the public and the harm caused to the constitutional right through the use of the means selected by law to obtain the proper purpose'.[10] On this conventional view, an interference with an individual right has to be weighed against the pursuit of a collective good or policy objective (what is 'necessary in a democratic society').

However, in the practice of the Court the notion of 'democratic society' has expanded from this original function of potentially *overriding* the right in question to a normative function of *justifying* the purpose of the right and delimiting its content.[11] As the Court held in the seminal *Handyside v. United Kingdom*, freedom of expression

> 'is applicable 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 the State or any sector of the population. Such are the *demands* of that pluralism, tolerance and broadmindedness *without which there is no "democratic society"'* (my emphasis).[12]

This clearly illustrates the normative role of 'democratic society' and the instrumental role of freedom of expression. This also demarcates the Court's approach from purely liberal approaches to freedom of expression. Indeed, one could argue that the right simply ought to be protected to the greatest possible extent for all, for instance. Instead, the Court suggests that the interest protected by the right is collective and uses 'democratic society' to convey this point. Alternatively, the Court could examine whether this or that 'offensive, shocking or disturbing' view is accepted or acceptable within the state party (or across the Council of Europe) and then induce the corresponding level of protection. Instead, the Court's link between expression and democracy is *inherent*. This link thereby suggests that

[10] Aharon Barak, *Proportionality: Constitutional Rights And Their Limitations* (Cambridge: Cambridge University Press, 2012), 340.

[11] On this specific point, see Alain Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of 'Democratic Society,'' *Global Constitutionalism* 5, no. 1 (2016): 16–47.

[12] See *Handyside v. United Kingdom*, *supra* note 1, at para. 49.

'democratic society' matters in a moral, independent sense, and that this notion should fix the limits of the right's content.

What, then, does 'democratic society' precisely consist of? I understand the Court's normative ideal as an *informed, plural* and *contradictory debate* on issues of public interest.[13] First and foremost, pluralism is a necessary component of the Court's 'democratic society'. Pluralism therefore justifies why 'offensive', 'shocking' or 'disturbing' views should fall within the scope of the right.

> '[A]s the Court has said many times, there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, 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'.[14]

One implication of the Court's attachment to pluralism is that not only individuals but also collective entities can contribute to it. This is clearly the case of political parties, for instance. It is well established that:

> 'such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. By relaying this range of opinion, not only within political institutions but also - with the help of the media - at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society'.[15]

Another implication is that the Court's review of freedom of reunion and assembly (Article 11) should be subsumed under the review Article 10. The Court explicitly emphasizes their interdependence:

> 'The Court reiterates that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy".[16]

As a result, the Court may subsume its review of Article 11 under its review of Article 10 although the two rights need in principle to be examined separately. In this respect, the recent case law of the Court points to an extension of a class of actors that nurture public debate, in particular to NGOs. As Mowbray rightly points out, 'an expanding range of organizations and bodies play important roles in formulating and disseminating ideas and information on topics of public debate in democratic societies'.[17] Mowbray further explains that the Court then scrutinizes the extent to which 'the purpose of the applicant's activities can therefore be said to have been an essential element of informed public

[13] I defend this argument in chapters 8 and 9 in Alain Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and the Political Conceptions* (Abingdon: Routledge, 2016).

[14] *United Communist Party of Turkey and Others v. Turkey*, App. No.13392/92, 30 January 1998, at para. 43.

[15] Ibid., at para. 44.

[16] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, App. Nos. 29221/95, 29225/95, 2 October 2001, at para. 27.

[17] Alastair Mowbray, 'Contemporary Aspects of the Promotion of Democracy by the European Court of Human Rights,' *European Public Law* 20, no. 3, 2014, at 472.

debate. The Court has repeatedly recognized civil society's important contribution to the discussion of public affairs'.[18]

Those passages illustrate not only that a diversity of social and political actors can contribute to the core of a democratic society, but also that pluralism should prevail within each class of actors in order to fully meet the Court's criteria. As Neuwinis puts it, 'the concept (of pluralism) both aims at an existing feature of certain societies and at an idea that is to be fostered'.[19] More precisely, pluralism does not only bring *diversity*, but also *contradiction* in the public debate – to the point that the Court has explicitly recognized the right of the wider public to receive contradictory views. In *Erdoğdu and İnce v. Turkey*, for instance, the Court found a violation of Article 10 on the ground that the interview of a sociologist pertaining to the analysis of the political situation in south-east Turkey cannot be conceived as exacerbating the Kurdish nationalist sentiment in the region:

> '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'.[20]

Yet, while a variety of social actors can play a similar function, none of them ranks higher than the press in the preservation of a democratic society. Since its early days, the Court has relentlessly insisted on its role of 'public watchdog of a democratic society'. The press therefore epitomizes the Court's substantive notion of 'democratic society' as enabling a vibrant and contradictory public debate:

> 'it is nevertheless incumbent on the press to convey information and ideas on political issues, even divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders'.[21]

Logically, the margin of appreciation in this domain is reduced and the Court makes this very clear. In *Editions Plon v. France*, it held that 'the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of "public watchdog"'.[22] As I further explain in section 4 of this article, the central role of the press is explained by its double function at the deliberative stage of the democratic process. Not only does the press operate as a public forum for exchanging views and opinions, but it also provides crucial information for individuals to form those views and opinions in the first place. One can conclude from this incursion that the Court has developed a substantive conception of democracy built into the notion of 'democratic society' initially located at the last stage of the proportionality test.

2.2. The prevailing type of judicial reasoning

Having illustrated the Court's predominant reasoning on Article 10 and its normative assumptions, I now leave aside the various cases and reconstruct the Court's approach in more abstract and theoretical terms. In a textbook on judicial methodology, the Court's reasoning on Article 10

[18] Ibid, at 472.

[19] Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case Law of the ECtHR,' *European Constitutional Law Review* 3, no. 3 (2007), at 368.

[20] *Erdoğdu and İnce v. Turkey*, *supra* note 2, at para.51.

[21] *Özgür Gündem v Turkey*, App No. 23144/93, 16 March 2000, at para. 52.

[22] *Editions Plon v. France*, App. No. 58148/00, 18 May 2004, at para. 43.

clearly appears as *teleological*. Rather than strictly relying on the text of the Convention, the intention of the drafters or the predominant practice in state parties (or in the respondent state party), the Court's reasoning is driven by a more encompassing normative value that the Court reads into the Convention. In the words of Jacobs, the teleological approach corresponds to 'a broader inquiry into the objects and purposes of the treaty taken as a whole, and individual provisions of the treaty are construed so as to give effect to these objects and purposes'.[23] The *telos* of the Convention is here understood as an effective democratic process tied to its core constitutive component, namely an informed, plural and contradictory public debate; and Article 10 and 11 as the provisions that can best serve to realize this *telos*.

The teleological doctrine originates in the central source for the interpretation of international treaties, namely the Vienna Convention on the Law of Treaties of 1969 (hereafter, the VCLT), and in particular in its Article 31(1). This article stipulates 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'. However, how exactly judges should order the triad of ordinary meaning, context, and purpose is still a matter of debate. Initially, the predominant view is that the purpose should be opted for as a measure of last resort. Citing the International Law Commission Commentaries on the draft of the VLCT, Cali explains that 'since 1969, there has been wider support for a holistic approach to Article 31. This approach emphasizes the importance of an interpreter's judgment as to how the wording, context, and object and purpose interact with each other'.[24]

In the specific context of the Court, it appears that the reference to context has grounded the doctrines of 'evolutive' and 'dynamic' interpretation[25], which are closely connected to the observation of a changing practice among state parties and the presence of a consensus. In contrast, the reference to purpose grounds the teleological method and that method seems to prevail under Articles 10-11. It must also be kept in mind, however, that generally speaking the Court rarely refers to the VCLT explicitly and does not widely appeal to other treaties or general principles of international law. Letsas for instance notes that the VCLT 'has been cited no more than sixty out of the more than then thousand judgments which the ECtHR has delivered'.[26] Forowicz further explains that 'generally, they prefer to remain within the confines of the ECHR, which were clearly mandated by the contracting states (…). This shows a lack of any initiative on the part of the Court or Commission to refer to international law'.[27]

As a result, if 'human rights treaties do not require exceptional rules of interpretation that are hermeneutically sealed off from the VLCT regime'[28], it remains to be seen how these rules exactly operate in practice. This is where one can question how the Court reads the *telos* into the Convention. Of course, one may find traces of the importance of public debate in the Preamble to the Convention or the preparatory works. Yet, the simple fact of tracing the teleological approach back to the VLCT is

[23] Francis G. Jacobs, 'Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference,' *International and Comparative Law Quarterly* 18, no. 2 (1969), at 319.

[24] Basak Çali, 'Specialized Rules of Treaty Interpretation: Human Rights', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012), at 598.

[25] See in particular George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy,' in Andreas Follesdal, Birgit Peters and Geir Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in National, European and International Context* (Cambridge; Cambridge University Press, 2013).

[26] See Letsas, *supra* note 6, footnote 10.

[27] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford: Oxford University Press, 2010), at 368-369.

[28] See Çali, *supra* note 20, at 537.

not sufficient to determine what the *telos* of a human rights convention exactly consists of. While such choice can exclude alternative approaches to interpretation, it does not by itself define the *telos* appropriate to a particular convention or treaty. As Letsas puts it, 'individuating the object and purpose of the treaty is by no means a mechanical exercise; it is itself an interpretive question'.[29] Given the indeterminate and abstract wording of the Convention, one cannot assume that the *telos* assigned to Articles 10 and 11, namely the imperative of an informed, plural and contradictor public debate, can be deduced from a single legal source. The *telos* explains that the Court's reasoning becomes *deductive*; the reasoning flows from the *telos* to the right and its correlative duties without being altered by competing or qualifying elements. This does not mean that the Court ignores the balancing phase of the proportionality test, but precisely that the *telos* is sufficiently strong to override competing considerations.

To develop this point further, I want to illustrate the kind of competing consideration against which the Court needs to balance its 'democratic society' in the proportionality test. Typically, a competing consideration may be another right protected by the Convention that conflicts with Article 10, such as the right to reputation under Article 8. In this respect, the weight of Article 10 may be less heavy if the view or opinion expressed does not pertain to an issue of public interest. Alternatively, as we shall see in more detail later, the absence of uniform practice across the Council of Europe with regard to that particular duty may also lead the Court to trigger the margin of appreciation. Similarly, the Court may be receptive to how sensitive a particular view or opinion within the respondent state party. Yet, those considerations do not matter when the issue pertains to the public debate and its place in a 'democratic society':

> 'In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment'.[30]

It is important to pause here and note that the 'dictates of public feeling' instantiate a notion of *sociological legitimacy*: it is the fact that some opinion or view is perceived as offensive as a matter of empirics by a majority of individuals within the respondent state party. As I shall explain later, it has been argued that the Court does not bring evidence of the acceptance of some opinion, view or symbol, when it relies on this alleged evidence to further extend or restrict an article of the Convention. This issue goes beyond the context of the Court. Helfer for instance argues that 'the tribunals have yet to clarify the relative weight that they should be given in determining the presence of absence of an evolving European viewpoint'. [31] Let us also notice that beyond numerical considerations, the *historical meaning* of the viewpoint may also count. In the case of freedom of expression, the resistance towards displaying political symbols in public – such as the five-pointed communist red star in *Vajnai v. Hungary* – is a good example. These symbols may carry a particularly traumatic history in some state parties that also may contradict the very principles and values pursued by the Court's 'democratic society'. Allowing those symbols in public might benefit a small number of persons while implying high costs for many. Yet, the Court dismisses any consideration for the losing side of the equation and grounds this refusal in the need for a contradictory public debate in a 'democratic

[29] See Letsas, *supra* note 8, at 33.

[30] *Vajnai v Hungary*, App. No. 33629/06, 8 July 2008, at para. 57.

[31] Lawrence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime,' *The European Journal of International Law* 19, no. 1 (2008), at 140.

society'. The balancing is therefore conducted with a clear 'preferential framing' [32] in favor of Article 10.

To conclude, this incursion into the case law and its abstract reconstruction leaves us with two questions: if legal sources fall short of explaining precisely how the Court understands 'democratic society' as the *telos* of the Convention, can democratic theory provide insights to make sense of the Court's generous approach to Articles 10-11? And how does the Court address other rights that complement the Court's attachment to the democratic process, such as the right to free elections? I start the next section with the latter question before addressing theoretical considerations in the following section.

3. Article P1 – 3

3.1. Grounds, content, scope

Let us then turn to the right to free and fair elections (Protocol 1 Article 3) and its jurisprudential developments. The complementarity between expression and elections is intuitively clear at the level of normative theory: while Article 10 and 11 protect the informal conditions of the democratic process, the right to free elections (P1-3) protects the formal conditions for all subjects to have an equal say on matters of public interest (the right to vote) and an equal opportunity to run for office (the right to stand for elections). Here again, I first survey the content adduced to this right when the Court interprets P1-3 before reconstructing how the Court applies the proportionality test. More precisely, I show that despite the Court's claim that Article 10 and P1-3 complement each other in fundamental ways, the Court limits proportionality analysis to the necessity step of the test and fails to weigh the purpose of the measure taken by the state party against its substantive notion of 'democratic society'.

Let us begin with the basic purpose of P1-3 as assigned by the Court. Given its necessary place in any basic model of a formal democracy, the Court has for long identified this purpose as the 'free expression of the will of the people in a democratic society'. The Court has also specified the indispensable practical conditions for this formal process to take place, namely that they should be free (that is, under secret ballot) and held at 'reasonable intervals'. All those elements, which have become constant in the case law, are found in a single proposition for instance in *Labita v. Italy*.

> '"free" elections at "reasonable intervals" "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people", are the subjective rights to vote and to stand for election'. [33]

In addition, the Court has also largely emphasized the interdependence between freedom of expression and the right to free elections in forming the foundations of a 'democratic society', thereby pointing to a consonance of purpose – in particular, when the Court explicitly refers to the *telos* of political debate discussed above:

> 'free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (…). The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past,

[32] On this notion, see in particular Smet Stijn, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict,' *American University International law Review* 26, no. 1 (2010): 183-236.
[33] *Labita v. Italy*, App. No. 26772/95, 6 April 2000, at para. 201.

> 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'.[34]

But defining the basic purpose of the right and establishing its location within a broader set of rights is one thing. Defining its content and scope is another. When the Court moves from the purpose of the right to its correlative obligations, one can notice some peculiarities. For instance, while the article does not form part of the qualified rights of the Convention with similar restriction clauses, the Court has held that P1-3 is not absolute and has in fact applied the same proportionality test as to the rest of the qualified rights. More importantly, the Court has explained that, contrary to the other rights of the Convention, the right to free elections entails significant positive obligations:

> 'Article 3 of Protocol No. 1 differs from other rights guaranteed by the Convention and its Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom'.[35]

What the Court underlies here is that a state party cannot fulfil the basic obligations corresponding to the right to free elections only *by allowing* individuals to do or not to do something. The level of positive obligations on the part of public authorities is therefore higher – not to meet some higher threshold defined by the Court, but to fulfil the necessary conditions for making the right effective. This already indicates that 'the Court's approach reveals a certain caution or prudence in imposing a Strasbourg view of how the national constitutional order should function in place of that chosen by the "people" through national institutions'.[36]

When it comes to correlative obligations, the Court has firmly distinguished the right to vote, on the one hand, from the right to stand for elections, on the other. With regard to the latter, 'the Court, like the Commission, considers that this Article guarantees the individual's right to stand for election and, once elected, to sit as a member of parliament'.[37] The obligation to exercise one's elected mandate is particularly important in this respect. For instance, the Court went on to rely on a principle of *legitimate expectation*, according to which the elected parliamentarian should serve the mandate given to him by the constituents. In *Lykourezos v. Greece*, which pertained to the disqualification of a Greek parliamentarian for exercising another profession, the Court held that: 'the Special Supreme Court had caused him to forfeit his seat and had deprived his constituents of the candidate whom they had chosen freely and democratically to represent them for four years in Parliament, in breach of the principle of legitimate expectation'.[38]

In contrast, the Court's restraint increases significantly when it comes to the obligations of the right to vote. The denial of the right to vote based on a person's criminal conviction is an illustrative example. Irrespective of whether the Court finds a violation of P1-3 (it did in *Hirst v. United Kingdom*, while it did not in *Scoppola v. Italy*, as we shall see in detail later), the type of reasoning widely differs from Articles 10-11 despite their alleged complementarity. Indeed, one might expect the Court to balance the justification for banning prisoners against the Court's 'democratic society', since the right to vote and freedom of expression form a continuum in the Court's own view. Yet, the Court has not engaged

[34] *Bowman v. United Kingdom*, App. No. 24839/94, 19 February 1998, at para. 18 and para. 22.
[35] *Zdanoka v. Latvia*, App. No. 58278/00, 16 March 2006, at para. 102.
[36] Michael O'Boyle, 'Electoral Disputes and the ECHR: An Overview', available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD(2008)010rev-e, at 2.
[37] *Sadak and Others v. Turkey (No.2)*, App. Nos. 25144/94, 26149/95, 26150/95, 26151/95, 26152/95, 26153/95, 26154/95, 27100/95, 27101/95, 11 June 2002, at para. 33.
[38] *Lykourezos v. Greece*, App. No. 33554/03, 15 June 2006, at para .57.

in such an exercise when examining the content and limits of P1-3. It is correct that the Court usually starts by purposive considerations when it explains that the conditions for restricting the right should 'not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness' when their essence is understood by the Court as 'the free expression of the people in the choice of the legislature'.[39] However, the decisive element of the Court's reasoning hardly appeals to teleology. What matters to the Court is whether the measure taken by the state is rationally connected and strictly necessary to serve the aim pursued (the second step of the test conventionally construed). In the words of Barak, necessity 'examines the question of whether alternative means can fulfil the law's purpose at the level of intensity and efficiency as the means determined by the limiting law'.[40] This is most famously the case in *Hirst v. United Kingdom (no.2)* where the Court found that the United Kingdom's measure – depriving *all* convicted felons from voting rights – was *indiscriminate* and therefore excessive:

> 'such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1'.[41]

It must be clear, however, that holding a particular law or policy to be disproportionate does not entail questioning its underlying purpose. In fact, the stage of purpose was passed earlier in the Court's review when it examined whether the law or policy pursued a legitimate aim (in this case, 'preventing crime and enhancing civic responsibility and respect for the rule of law').

Therefore, the Court does not discuss the purpose of disenfranchisement and its compatibility with its sacro-sanct 'democratic society' in normative terms. The same type of reasoning is found in *Scoppola v. Italy (No.3)* although this time the measure taken by the respondent state party is deemed proportionate: 'in the circumstances the Court cannot conclude that the Italian system has the general, automatic and indiscriminate character that led it, in the *Hirst (no. 2)* case, to find a violation of Article 3 of Protocol No. 1'.[42] The point has been well noted in the literature, most clearly by Ziegler: "without further analysis, the judgment proceeded on the assumption that the *Hirst* judgment (No. 2) are legitimate and applicable, here, too".[43] He also rightly mentions that the Court invokes democracy to ground the Italian's aim of "ensuring the proper functioning and preservation of the democratic regime".[44] This reveals the Court's attachment to formal democracy, and hence seems to uncomfortably fit the Court's substantive approach to Articles 10-11.

Before developing this critique, it is crucial to see that the Court refers to the consensus among state parties to adjust its level of scrutiny. It is a regular statement of the Court that P1-3 is not absolute and state parties may enjoy a wide margin of appreciation. But the consensualist approach also intervenes in the proportionality test, specifically as in *Scoppola*:

> 'since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and

[39] *Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 2 March 1998, at para. 22

[40] Barak, *supra* note no. 7, at 321.

[41] *Hirst v. the United Kingdom* (No. 2), App. No. 74025/01, 6 October 2005, at para. 82.

[42] *Scoppola v. Italy (No. 3)*, App. No. 126/05, 22 May 2012, at para. 82.

[43] Ziegler, "Voting Eligibility," 166.

[44] Ibid., para 92.

> within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved'.[45]

In that respect, the Court observed that:

> 'Only nineteen of the States examined impose no restrictions on the voting rights of convicted prisoners. Of the remaining twenty-four States, which do apply restrictions to varying degrees, eleven require a decision of the criminal court on a case-by-case basis (with some exceptions where the most serious sentences are concerned – as in Greece and Luxembourg)'.[46]

Then, the Court reiterated its principled approach:

> 'This information underlines the importance of the principle that each State is free to adopt legislation in the matter in accordance with 'historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into their own democratic vision'.[47]

3.2. The prevailing type of judicial reasoning

It is crucial to clearly disentangle the two types of reasoning that operate in the Court's assessment of P1-3 on the issue of prisoners' rights. Most importantly, it appears that the Court does not question the very principle of civic disenfranchisement that usually justifies the banning of prisoners from the voting process. This is the overarching question on which the Court adopts a consensualist approach of interpretation, whose guiding principle is to screen the legislation and associated practices of state parties across the Council of Europe. This method is not necessarily conservative; finding consensus on a particular issue allows the Court to interpret the Convention in a 'dynamic and evolutive' fashion – thereby echoing the VLCT's reference to 'context' – and thereby justifies extending the content and scope of rights.

A number of concerns have been raised with regard to consensualism in the literature. Given consensus's anchor in the idea of *unanimity*, concerns have been raised that 'trend' better describes what the Court is tracking. Concerns have also been raised about the object of consensus, namely whether it concerns principles or whether it extends to rules. Finally, the scope of consensus has also been questioned.[48] Dzetshiarou argues that 'the best practice of the Court is when European consensus is based on comprehensive and transparent analysis of the Contracting Parties' legislation'.[49] There is more agreement on the structural implications of consensus observation, namely that generally 'a lack of consensus established a presumption in favour of diversity and justifies a broader margin of appreciation'.[50] This last point is of particular relevance to the Court's approach to P1-3, as we have seen. It corresponds to what Letsas has called the 'structural' use of the margin of appreciation, in which the margin 'has to do with the relationship between the European Court of Human Rights and

[45] Ibid., at para. 94

[46] Ibid., at para. 101.

[47] Ibid., at para. 102.

[48] Jeffrey A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law,' *Columbia Journal of European Law* 11, no. 113 (2005), at 145.

[49] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015), at 27.

[50] Ibid., at 37.

national authorities, rather than with the relationship between human rights and public interest'.[51] In addition to those concerns, my inquiry into the Court's reasoning under Article 10-11 further reinforces the scepticism towards the role of consensualism. Indeed, if the doctrine were to be conferred any consistency, then one may seriously wonder why the doctrine is almost never used under Articles 10–11.

This being said, we have also noted that this *prima facie* judicial restraint with regard to the very purpose of the interference (civic disenfranchisement) does not prevent the Court from applying the proportionality test albeit limited to the necessity step of the test. Bates notes that "arguably the reference to proportionality suggested that the specific conduct ("crime committed") had to match the 'sanction' (disenfranchisement) for the individual prisoner concerned, the intervention of a judge being best suited for that".[52] In this restricted test, the Court's reasoning is more substantive when it comes to the rules of proportionality of the respondent state party's practice of disenfranchisement – that is, whether the sentence is indiscriminate or applied *ad hoc* by a judge. With respect to *Scoppola* specifically, Lang for instance compares the Court's reasoning with the Canadian Supreme Court and suggests that 'the Court should adopt a proportionality analysis similar to the analysis in *Sauvé v. Canada* (No. 2), which requires a rational relationship between the legitimate aim and the measure intended to further it'.[53] Therefore, the consensualist approach replaces the teleological approach on the question of the legitimate aim. The proportionality test takes places between the state party's legitimate aim and the measure adopted, without the legitimate aim being balanced against the Court's wider idea of 'democratic society' that plays such an important role under Articles 10-11, as we have seen. This is precisely where the dis-analogy appears. This lack of specification of the aim pursued has been well captured in the literature on P1-3.

This reconstruction shows that the choice of interpretive method follows from (explicit or implicit) premises about the normative significance the Convention's rights. One can conclude that P1-3 does not seem to form part of the *telos* of the Convention. As a result, state parties enjoy a wide margin of appreciation beyond the core obligation of ensuring the expression of the will of the people. The rest 'is for each Contracting State to mould into their own democratic vision', as the Court repeatedly holds. Only with this premise in mind can one explain why the Court simply relies on the incremental development of a consensus across the members of the Council of Europe when it reviews issues such as the prisoners' right to vote. Only then can one explain why the Court's review is limited to whether the measure was disproportionate or not. Yet, the Court does not clearly support this premise on clear and principled grounds. More importantly for our purposes, this restraint sharply contrasts with the teleological method used under Articles 10 and 11. Here, the Court balances the alleged interference against its substantive notion of a 'democratic society', which trumps a number of competing considerations, as we have seen.

4. Moving beyond judicial categories

Having surveyed the case law and identified the distinct types of reasoning that distinguish Articles 10-11 from Article P1-3, I hope that one can recognize the need for a normative evaluation of the Court's practice and methodology. As argued above, the findings of the Court depend upon the adoption of an interpretive approach (the teleological or the consensualist), but that approach remains intertwined with normative considerations about rights. To replace the content ascribed to those rights

[51] See Letsas, *supra* note 4, at 721.

[52] Ed Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg," *Human Rights Law Review* 14, no. 3 (2014), at 509.

[53] Edward Lang, 'A Disproportionate Response: Scoppola v. Italy (No. 5) and Criminal Disenfranchisement in the European Court of Human Rights,' *American University International Law Review* 28, no. 3 (2013), at 870.

within those interpretive categories is therefore a necessary step of the analysis, but not a sufficient one. This exercise merely reveals a dis-analogy between Article 10 and Article P1-3 lodged in the proportionality test. In this final section of the paper, I aim to show that this dis-analogy conventionally described in terms of judicial methodology embodies a deeper issue of coherence that normative democratic theory can identify and problematize.

There are two caveats here. First, the argument I am about to present does not problematize the Court's practice simply based on the complementarity between freedom of expression (informal stage of the democratic process) and the right to vote (formal stage) at the level of abstract normative theory. Rather, I start from the Court's own and rich conception of 'democratic society' under Articles 10-11 to avoid the charge of the 'philosopher king argument' imposing an independent theory of rights or human rights[54], an independent theory of human rights adjudication[55], or an independent theory of judicial review applied to the ECHR.[56] This risk also concerns experts of P1-3. As exposed earlier, Ziegler does appeal to normative reasoning and ultimately to the independent notions of 'dignity', 'autonomy' and ultimately to 'political equality'.[57] Further, he posits the 'facilitative role' of voting towards 'an effective political democracy': 'rigorous scrutiny of the franchise is essential in order to ensure that national policies represent the opinion of the people and are reached democratically'.[58] I suggest strengthening this link between voting and democracy by rather relying on the Court's own conception of political equality across its case law on Articles 10-11. I hence take the Court's reasoning at face value and place my coherence concerns within these limits. Second, I shall problematize the dis-analogy in the case of the prisoners' right to vote specifically, although this is only one issue among many under P1-3. I concentrate on this issue because it crystallizes the Court's restraint and has raised fierce criticism from state parties.

In the remainder of the article, I thus reconstruct the Court's reasoning from the standpoint of democratic theory. On the one hand, I suggest viewing the Court's sacro-sanct 'democratic society' (under Articles 10-11) as increasing equal political inclusion, and hence as realizing our moral right to an equal political status in the democratic process. If we are subject to democratic outcomes to the same extent, our voices and interests should matter equally in both the formal and informal stages of the democratic process. On the other hand, relying on the principle of equal subjection has implications for the prisoners' right to vote. Most importantly, this is because democratic decisions affect prisoners and citizens equally when the former are released. Their disenfranchisement may therefore amount to violating their equal political status from a democratic standpoint. In addition, recent research establishes that none of the consequentialist arguments (e.g. that disenfranchisement leads to 'healthier' democratic outcomes) is solid enough to be seriously considered. Therefore, there are strong democratic reasons for the enfranchisement of prisoners. However, I do not conclude that there could not be disenfranchisement at all – this would again amount to imposing an independent theory. Rather, my point is confined to judicial methodology: since there are strong democratic reasons in favour of enfranchisement – reasons that the Court uses to justify and extend Articles 10-11 – the Court should also engage in balancing (interferences with) P1-3 against its 'democratic society' in the proportionality test.

---

[54] See for example James Griffin, *On Human Rights* (New York: Oxford University Press, 2008).

[55] See in particular George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009).

[56] See for example Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights,' *European Journal of International Law* 25, no. 4 (2014): 1019–42.

[57] See Ziegler, *supra* note 6, at 184.

[58] Ibid., 193.

4.1. The Court's 'democratic society' and democratic theory

Let me start with the Court's sacro-sanct 'democratic society' under Articles 10-11. Why should the Court allow someone to express 'unpalatable', 'shocking', 'disturbing' 'divisive' views in public? Some democratic theorists suggest that this permits a more *egalitarian* form of public deliberation. Two premises matter here. First, the outcome of the democratic process may be very costly for those who eventually disagree with it. Allowing dissident views to be expressed prior to voting – in the deliberative stage, through Articles 10-11 – reduces this cost and allows them to see that they are publicly treated as equals. In the words of Christiano, 'if people judge the justice of an arrangement where a minority or even majority assumes for itself the right to rule for others, they will judge that it advances the interests of the ruling class at the expense of the others'.[59] This benefit serves the interest of the *speakers* in the deliberation. Second, allowing controversial and divisive views creates a public forum for individuals to confront their point of view and learn from those of others: 'the process of discussion and deliberation ought to be thought as instrumental in acquiring understanding about one's interests and one's society'.[60] At the same time, 'the person can identify with the larger projects of the society as a whole as well as the particular projects of parts of society'.[61] Therefore, listening to other viewpoints helps one make an informed decision about what is truly in the common interest in one's view. This second benefit serves the interest of the *listeners* in the deliberation. The combined benefit justifies the Court's core component of its 'democratic society' rooted in an informed, pluralistic and controversial public debate. This argument can explain other features of the Court's reasoning – for instance, that the wide content and scope applies only to views and opinions that concern issues of 'public interest', as the Court clearly insists: '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'.[62] Similarly, it can explain why the range of social actors whose role is particularly instrumental in helping individuals form those views and opinions, such as the press, political parties, scientists and intellectuals, or NGOs, as we have seen in the first part of the article.

Political inclusion and the equal considerations of views and interests are crucial to democracy because of the underlying principle of *equal share to rule*. This principle concerns the horizontal equality of democratic subjects and echoes Bentham's famous formulation that 'each to *count* for *one*, and *none* for *more than one*'.[63] But the conceptual framework would be incomplete without a third bedrock principle, the one of *equal subjection*, which concerns the vertical equality between a coercive norm and its subjects. The coercive effect of the norm sets the boundaries of the democratic community by coercing subjects equally. The variants of the principle span from Goodin's *all affected principle* (according to which anyone who is 'possibly affected'[64] by a political decision is entitled to vote on it) to López-Guerra's strictly *democratic-legal* version according to which 'anyone who is subject to the laws of a democratic polity should be included in the citizen body'.[65] As the norms under the Court's scrutiny are exclusively those of democratic states and must be prescribed by law (as

[59] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (New York: Oxford University Press, 2010), at 90.

[60] Ibid., at 41–42.

[61] Ibid., at 90.

[62] *Otegi Mondragon v. Spain*, App. No. 2034/07, 15 March 2011, at para. 50.

[63] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: W. Pickering, 1823), at Corollary 1 of Chapter 17.

[64] Robert Goodin, 'Enfranchising All Affected Interests, and Its Alternatives,' *Philosophy & Public Affairs* 35, no. 1 (2007), at 53–55.

[65] Claudio López-Guerra, 'Should Expatriates Vote?,' *Journal of Political Philosophy* 13, no. 2 (2005), at 221.

required by the proportionality test under the ECHR), I shall adopt the second variant for the remainder of my argument. Together with i) *equal shared rule* and ii) *equal political inclusion*, iii) *equal subjection* completes a basic framework to assess the Court's practice. The logical order however places equal subjection first, which then justifies the horizontal equality of the deliberation process (Articles 10-11) and culminates in the equal right to vote and stand for elections (Article P1-3).

Equipped with this framework, I argue that one can better grasp the problematic nature of the Court's judicial restraint on the issue of the prisoners' right to vote. More precisely, it helps question the consensualist approach to the principle of civic disenfranchisement considered by the Court as a legitimate aim in the proportionality test. The conceptual dependence between equal subjection and equal inclusion suggests that banning prisoners from voting violates those individuals' equal political status. This is because, although incarcerated, criminal offenders remain subjects to democratic decisions. It is unclear why criminal offenders should be excluded from the democratic community when collective decisions taken during their incarceration will equally affect them when their sentence is terminated. As López-Guerra puts it, 'they continue to be subject to the laws, and their basic interests continue to depend on the decisions of elected officials'.[66] This means that despite their particular condition, prisoners should keep their franchise capacity on grounds of democratic inclusion.

Now, one could counter-argue that what justifies the disenfranchisement of criminal offenders can be supported by another type of democratic argument – namely, that offenders have broken the terms of the social contract by committing criminal offenses, and should therefore be punished by disenfranchisement. There are two significant problems with this argument. First, it places unreasonable demands on individuals. As López-Guerra explains, 'knowingly or not, most adults have broken some law at some point'.[67] Such an argument should therefore provide a gravity threshold that would outweigh the democratic reasons for enfranchisement. Second, it is unclear why the function of punishment should apply to the right to vote *specifically*. If the ground for disenfranchisement is exclusion from the polity, it remains unclear why the polity should still satisfy the felons' other basic needs: 'to be sure, if they were no longer part of the polity, in addition to disenfranchising them, we could cease to provide for their basic needs'.[68] To suspend the convicted felons' equal status in society by imprisoning them is one thing, which needs to be justified by normative theories of the criminal law (retribution, deterrence, etc.). To deny their equal *political* status is another thing and needs to be balanced with reasons that support their enfranchisement.

Those counter-arguments come from within a democratic and/or social contract framework. Counter-arguments that are independent from democratic considerations come in different forms, but all centre on the idea that disenfranchisement *generates desirable consequences*. For instance, it is argued that allowing offenders to vote promotes the interests of criminals, so that there is an overall loss in the value of law enforcement. Alternatively, it is contended that disenfranchisement permits rehabilitation or deterrence as beneficial effects sufficient to support the policy. The problem with this kind of argument, however, is that it fully depends on empirical evidence, which remains largely unavailable. López-Guerra argues that 'not a single study shows higher crime rates and recidivism in polities where felons are allowed to vote, all else being equal'.[69] In other words, there are strong democratic reasons to keep convicted felons in the franchise, while principled but non-democratic reasons remain rather weak.

---

[66] Claudio López-Guerra, *Democracy and Disenfranchisement: The Morality of Electoral Exclusions* (New York: Oxford University Press, 2014), at 112.

[67] Ibid., at 111.

[68] Ibid., at 112.

[69] Ibid.

4.2. Returning to the Court's reasoning

Let us now see how these various arguments for and against disenfranchisement play out in the Court's reasoning under P1-3. More precisely, when the Court considers whether the disenfranchisement constitutes a legitimate aim, what does it base its reasoning on? In *Hirst*, the Court does not disapprove of the consequentialist type of argument outlined earlier, namely that the aim of disenfranchisement is:

> 'preventing crime by sanctioning the conduct of convicted prisoners and also of enhancing civic responsibility and respect for the rule of law (…). However, whatever doubt there may be as to the efficacy of achieving these aims through a bar on voting, the Court finds no reason in the circumstances of this application to exclude these aims as untenable or incompatible *per se* with the right guaranteed under Article 3 of Protocol No. 1'.[70]

Similarly, in *Labita v. Italy*, the Court more specifically endorses the view that allowing offenders to vote promotes the interests of criminals – in this case, the interests of the Italian mafia. The rationale here is that allowing suspected mafia members to vote poses a threat to the Italian institutions. The Court held the following:

> 'The Court observes that persons who are subject to special police supervision are automatically struck off the electoral register as they forfeit their civil rights because they represent "a danger to society" or, as in the instant case, are suspected of belonging to the Mafia (see paragraphs 107 and 110 above). The Government pointed to the risk that persons 'suspected of belonging to the Mafia' might exercise their right of vote in favour of other members of the Mafia. *The Court has no doubt that temporarily suspending the voting rights of persons against whom there is evidence of Mafia membership pursues a legitimate aim*" (my emphasis).[71]

Still, the Court went to find a violation of P1-3 on the ground that Italian law was disproportionate. Indeed, disenfranchisement was imposed after the acquittal of the applicant in domestic courts. This illustrates that the Court reviews the proportionality analysis in *necessity* terms only. As Lang concludes, 'this appears to impose a requirement that, to be proportionate, the punishment must bear a relevant and sufficient link to the legitimate aim'.[72] But the prior step of the legitimate aim is not addressed by the Court and that is where the problematic dis-analogy lies in my view.

4.3. Articulating and limiting the argument

I now have the two main pieces of my puzzle and can suggest how to articulate them coherently. On the one hand, I have reconstructed the Court's 'democratic society' under Articles 10-11 with help of normative democratic theory. I have argued that the Court's balancing of alleged interferences with its 'democratic society' reveals the Court's deep concern for political inclusion and representation – it is, to put it shortly, *democracy-enhancing*. On the other hand, I have showed that the Court refrains from engaging in balancing under P1-3 by granting that civic disenfranchisement pursues a legitimate aim. I argue that the Court needs to re-arrange the two pieces of the puzzle by balancing the legitimate aim of the state party against the Court's conception of 'democratic society'.

---

[70] See *Hirst v. the United Kingdom* (No. 2), *supra* note 34, at para. 74-75.

[71] See *Labita v. Italy*, *supra* note 27, at para. 202-203.

[72] See Lang, *supra* note 46, at 846.

This is because the Court's 'democratic society', when theoretically articulated, has enough normative resources to question the very principle of disenfranchisement.

It is crucial to identify the limits of my argument. I am not claiming that there cannot ever be any ground for criminal disenfranchisement. Rather, I argue on the one hand that disenfranchisement cannot hold if one seriously takes into account the Court's 'democratic society'. On the other hand, the kind of argument put forward by the Court's endorsement inherently and strictly depends upon empirical evidence, which is brought neither by the state party nor by the Court. But one could imagine that the Court does, in which case the Court would have to balance those arguments against democratic ones. In other words, my argument is limited to the claim that, given the Court's emphasis on political inclusion under Article 10-11, it ought to engage in a deliberation on the democratic merits of civic disenfranchisement and balance those merits against other kinds of arguments. The conclusion here is that the Court should not limit the proportionality test to necessity considerations under P1-3 but instead engage in a substantive weighing of criminal disenfranchisement against its sacro-sanct 'democratic society', as it does under Articles 10-11.

5. Conclusion

The ambition of this article was to demonstrate that the Court's methodology under Articles 10-11 and P1-3 have a more problematic relation than what has been conventionally suggested. The *prima facie* complementarity between freedom of expression and the right to vote alleged by the Court was only the starting point of my analysis. A core motivation for the argument sits on the Court's established case law and the predominant types of reasoning underlying Articles 10-11 and P1-3. While consonant in principle, the distinct methodology used to determine their content and scope indicates a troubling dissonance. The first step of the article consisted in reconstructing both the obligations and corresponding type of reasoning on Articles 10-11 and P1-3, respectively, in order to immerse ourselves in the Court's reasoning. My concern in this respect is located in how the Court applies the proportionality test. While 'democratic society' operates as a threshold against which interferences under Articles 10-11 have to be balanced, the Court refrains from balancing under P1-3. It rather applies a consensualist approach when addressing the principle of civic disenfranchisement.

The second step of the argument was that only a reconstruction of the Court's 'democratic society' by normative democratic theory reveals that the notion has normative implications for the Court's assessment of the right to vote. I have argued that the Court's emphasis on the need for an informed, plural and contradictory debate amounts to enhancing equal representation and inclusion in the democratic process. I then argued that the principle of equal inclusion depends on a principle of equal subjection, which in the Court's context is understood as reaching all those subjected to the democratic norms of the state party. I showed how this conceptual dependence between equal inclusion and subjection at the normative level provides for the bridging link between Articles 10-11 and P1-3 at the judicial level. I illustrated this bridge by the case of the ban of prisoners' right to vote: the ban does not generate any proven desirable effect for society while it violates the prisoners' equal political status.

The third and final step suggests a reform of the Court's methodology under P1-3. My argument does not imply that there cannot ever be any ground for civic disenfranchisement, and hence that the Court should never consider it in the balancing exercise. In fact, the proportionality test is precisely meant to consider exceptional circumstances. But the Court's application of the test, as it stands, is internally incomplete and incoherent. Given its insistence on political inclusion across its case law, it cannot leave the very principle of civil disenfranchisement outside of its reviewing horizon and simply examine proportionality in necessity terms.