Calibrating the response to populism at the European Court of Human Rights

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This article aims to examine the relationship between the populist phenomenon and the European Court of Human Rights (ECtHR) from a normative perspective. It asks whether the Court, given its particular jurisdiction and established practice, is equipped to respond to the attacks of populist governments on European Convention on Human Rights (ECHR) rights and how it should adjust its interpretive apparatus to address these attacks. To this end, this article first reconstructs the ideational structure of populism, distinguishes two ideal-types (an exclusive/naturalized one and an inclusive/aggregative one, respectively), and posits that both ideal-types entertain a distorted account of democracy that fuels antagonism and partisanship. Second, it argues that across this spectrum the notions of pluralism and deliberation offer a vantage point to evaluate the role and practice of the ECtHR in responding to populism. Based on recent empirical studies evidencing populist attacks on democratic rights and structures, the article highlights the prototypical phenomena of media and electoral captures. Turning to the Court's practice, this article shows how pluralism and deliberation heavily inform its reasoning as to the nature, scope, and justification of the two ECHR-relevant rights—namely freedom of expression and the right to free and fair elections—and the decisive role these notions play in resolving cases in proportionality analysis. The article finally explores whether the Court's interpretive equipment is tailored to address the populist attacks on these fronts and articulates a practice-induced set of interpretive principles and techniques to better detect populist abuses.

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I would like to thank audiences at research seminars at the Hertie School's Center for Fundamental Rights (2019) and at PluriCourts, University of Oslo (2020). I am particularly grateful to Başak Çalı and Andreas Føllesdal for their very helpful comments on a draft of this article. This research was supported by a Re-Constitution Fellowship (2019–20) funded by the Mercator Foundation and by a Senior Research Fellowship at PluriCourts, University of Oslo (2021–23; project number 223274).

1. Introduction

Populists entertain an instrumental relationship with the institutions of liberal democracy. They are known for vilifying any countermajoritarian force that may frustrate the enactment of the will of their "people." Indeed, as political theorists have long argued, the populist ontology centers around a dichotomy between the virtuous people on the one hand and the compromised "élite" on the other. On that simple count, the very existence of an independent judiciary, for instance, may irritate the populist project—and that is particularly the case of the authoritarian kind of right-wing populism typically observed in Hungary and Poland in recent years.

Yet, there is increasing evidence that even this authoritarian kind, when in elected office, is unlikely to abolish counter-majoritarian institutional safeguards. Rather, the insidious controlling and perverting of these safeguards—such as diminishing the independence of their office holders, packing their ranks, or simply creating new offices endowed with new powers—reflects the same objective of effectively strengthening the authority of the executive. In the case of the judiciary, this instrumentality implies for instance changing the terms of appointment of an apex courts' judges. In the words of Lawrence Helfer, "these institutions are politically penetrated or hollowed out as populist politicians pack them with cronies, starve them of resources, or create new bodies willing to carry out the government's bidding."[1] Instrumentality is pervasive.

However, what is true of the domestic judiciary may not be true of the supranational judiciary in Europe. In concrete, the most important supranational institutions—the Court of Justice of the European Union (CJEU) for the European Union and the European Court of Human Rights (ECtHR, or "the Court") for the Council of Europe (CoE)—are (at least for now) relatively insulated from the reach of populist governments. As far as the ECtHR is concerned, the recent literature has suggested that the Court is relatively immune to the typical attacks inflicted on the domestic judiciary (e.g. court packing, jurisdiction stripping, or budget reduction).[2] Yet, their judicial supremacy, together with their foundational commitment to liberal and democratic values, make these supranational institutions a privileged target for the populist resentment. The lower chance that populists will be able to alter these courts' internal rules of operation or even limit their jurisdiction—similarly to what has occurred at the domestic level—may only make things worse at the level of domestic law and politics.

This leads to a pressing question, namely how supranational courts *can* and *should* respond to the populist phenomenon within states given these courts' particular nature, jurisdiction, and subject matter. While the interest in populism among legal scholars is fervent and has generated a myriad of conceptual innovations (e.g. "constitutional capture,"[3] "abusive constitutionalism,"[4] "autocratic legalism,"[5] "anti-constitutional

[1] Laurence R. Helfer, *Populism and International Human Rights Law Institutions*, *in* Human Rights in a Time of Populism 218, 224 (Gerald L. Neuman ed., 2020).

[2] Jan Petrov, *The Populist Challenge to the European Court of Human Rights*, 18 Int'l J. Const. L. 476 (2020).

[3] Jan-Werner Müller, *"The People Must Be Extracted from Within the People": Reflections on Populism*, 21 Constellations 483 (2014).

[4] David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013).

[5] Kim Lane Scheppele, *Autocratic Legalism*, 85 U. Chi. L. Rev. 545 (2018).

populist backsliding,"[6] "democracy decay,"[7] and "constitutional chicanery"[8]), the majority of contributions focus on alterations to domestic constitutions and develop at a descriptive, rather than normative, level of argument. Further, at the supranational level the most comprehensive studies of the judicial response focus on the CJEU, with only passing reference to the ECtHR.[9]

To remedy the deficit of normative examination, this article focuses on the response to populism that the ECtHR *should* offer but also the extent to which it *can* do so given its specific coordinates. I therefore suggest adopting the particular position of the Court without assuming that it is identical to other supranational judicial organs or to apex courts domestically. Unlike the CJEU, for example, the ECtHR remains an international and subsidiary court. Yet, any exercise of calibration of the Court's response will first depend on discussing whether populism is only a distortion of or also a corrective to democracy,[10] which requires delving into democratic theory before approaching the Court and its practice. One may wish to avoid the binarism that would portray the Court as the guardian of a democratic terrain that populists are only there to excavate. Further, one should note from the outset that the word "populism" is still absent from the Court's case law. Of course, populism is an analytical concept that may be relatively foreign to the Court's legal and judicial terminology. Populism may therefore already be present in the facts and the arguments presented by an applicant, a respondent state, or the Court's adjudication without being qualified as such. For example, in *Baka v. Hungary* the Court examined the question of access to a court (under article 6 of the European Convention on Human Rights, ECHR) in the context of the dismissal of the former President of the Hungarian Supreme Court,[11] which intuitively resonates well with the practices of populist governments,[12] as I further explain in the final part of this article.

Yet, as states hold primary responsibility to interpret and uphold ECHR rights, populist governments may invoke the "will of the people" to erode virtually any article enshrined in the ECHR in domestic proceedings, in particular if the domestic judiciary is already captured. The same could then occur at the Court where populist governments may invoke the same will of the people against any finding of a (non-) violation of the ECHR by the Court. And again, they may very well question the Court's

6 Wojciech Sadurski, Poland's Constitutional Breakdown 1 (2020).

7 Tom Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, 11 Hague J. on Rule L. 9 (2019).

8 Renata Uitz, *The Rule of Law at Risk: What Is Next?*, 11 Hague J. on Rule L. 473 (2019).

9 Mark Dawson, *How Can EU Law Respond to Populism?*, 40 Oxford J. Legal Stud. 183 (2020); Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, 21 Eur. L.J. 141 (2015).

10 Robert Howse, *Epilogue: In Defense of Disruptive Democracy: A Critique of Anti-Populism*, 17 Int'l J. Const. L. 641 (2019); Silvia Suteu, *The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution?*, 15 Eur. Const. L. Rev. 488 (2019); Paul Blokker, *Populism as a Constitutional Project*, 17 Int'l J. Const. L. 536 (2019); Cristóbal Rovira Kaltwasser, *The Responses of Populism to Dahl's Democratic Dilemmas*, 62 Pol. Stud. 470 (2014).

11 Baka v. Hungary, App. No. 20261/12, June 23, 2016. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

12 David Kosař & Katarina Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, 10 Hague J. on Rule L. 83 (2019).

very legitimacy and the intergovernmental institution that created it in the first place (the CoE). From a populist standpoint, the Court remains an optimal object of vilification: it benefits from compulsory jurisdiction; it represents a highly institutionalized and international club of "corrupt élites"; and its overarching function is precisely to review and sanction the majoritarian abuses of states. Given this systematic risk and the uncertainty as to when and where populism will materialize at the Court, this article opts for calibrating a response based on the ideational basis of populism, what empirical social science can say about the democratic structures and rights it tends to erode, and then selectively examining the Court's relevant areas of case law.

Methodologically, pursuing this project first requires discussing what distinctive aspect(s) of populism is particularly relevant to the Court's distinctive position and practice. Populism comes in various shades and it is surely beyond the scope of this article to address the phenomenon comprehensively—rather, I suggest identifying two ideal-types of populism (exclusive/naturalized and inclusive/aggregative, respectively) that predominate in the specialist literature. Provided that these indeed pose a threat to democracy that speaks to the Court's position and practice, the second step is to determine if and how the Court should respond at the level of its interpretive principles and identify areas of its practice that may require some adjustments. One important caveat is in order here: scrutinizing the Court's practice is inevitably selective in terms of the Convention articles covered. Nonetheless, the ambition is to craft a judicial response with the widest application span across the practice of the Court.

My argument in this article is two-pronged. First, I argue that the core democratic notion of *pluralism* offers an important and fruitful point of connection between populism as an idea, on the one hand, and the jurisdiction and practice of the Court, on the other. It will be important to qualify this argument: as populism runs on a spectrum, the relation to pluralism should be placed on a spectrum too. Yet, whether more exclusive-naturalized or inclusive-aggregative, I argue that the populist spectrum fails to acknowledge the mediating and egalitarian functions of pluralism and deliberation in a democratic society. This is because both ideal-types similarly attempt to capitalize on the alleged existence of antagonistic entities (the "us" and the "them") that pluralism and deliberation precisely aim to overcome. In this sense, the spectrum of populism(s) exacerbates division.

This is all the more important in transitioning to the Court's practice, as pluralism and deliberation heavily inform its reasoning with respect to a variety of ECHR rights—in particular, the democratic ones. For example, the reference to "tolerance, pluralism and broadmindedness" that is "necessary to a democratic society" is crucial to the resolution of cases under articles 10–11 ECHR (freedom of expression and freedom of reunion and assembly, respectively) and has become an interpretive threshold for states to benefit from any margin of appreciation in this domain. In this sense, this established practice may very well help the Court tackle the populist attacks on media freedom and regulation, for instance, which have already materialized in various state parties. Equally, this established case law can serve the charitably construed corrective that populism points to, namely alleviating the entrenchment of minorities and élites through enhancing an egalitarian and pluralistic debate and participation. As

we shall see, the Court's careful attention to minorities and their representative may precisely help overcome divisive and polarizing tendencies—while helping to incorporate the unheard and/or misheard views and opinions that nurture the populist resentment in the first place.

However, and this will the second and critical part of the argument, the attack on pluralism and deliberation orchestrated by the populists is clearly not confined to freedom of expression and the media. On the right end of the populist spectrum, for instance, the constitutional alterations observed in Poland and Hungary potentially engage other, more positive and institutionally sensitive rights included in the Convention, such as the right to free and fair elections.[13] Scholars of populism make it clear: the endurance of populist governments depends on electoral legitimacy, and these governments have a strong interest in controlling any area of discretionary authority in this domain too. That is the normative space that I shall specifically investigate in this article. In allocating party subsidies, in imposing fines on opposition parties for minor irregularities, or in depriving them from access to the media, electoral bodies are well placed to "choke" opposition agents in their attempt to participate in the democratic process. However, the interpretive apparatus and the scrutinizing frame of the Court in this institutional and procedural domain requires a significant upgrade, I argue. Indeed, the Court has consistently shown a high degree of deference and tolerance for diversity that it is for state parties to "mould into their own democratic vision"[14] as the Court holds.

The key concept for explaining (but not justifying) this discrepancy is *subsidiarity*. In electoral matters, the Court deliberately retracts from reviewing, for example, the aim pursued by the alleged interference by placing the burden of demonstration of a right's violation on the applicant or by granting the respondent state a thick margin of appreciation at the balancing stage of the proportionality test. While claiming the complementarity of Articles 10–11 and Article 3 Protocol 1 in principle, in practice the Court's level of scrutiny is asymmetric and problematically so. The multifaceted deference under the right to free and fair elections has been defended on the grounds that the Court's role is not to review domestic constitutional provisions "in the abstract," but the alleged violations of the applicants' rights "in the concrete case."[15] I argue, however, that the Court does not need a principled extension of its interpretive jurisdiction. Rather, the Court should only be prepared to surgically scrutinize how populist governments surreptitiously deprive democracy of its substance based on the populists' established records with the basic principles the Court repeatedly invokes under Articles 10 and 11.

[13] Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, March 20, 1952, U.N.T.S. No. 262.

[14] Hirst v. UK (No. 2), App. No. 74025/01, Oct. 6, 2005, ¶ 62.

[15] Yumak and Sadak v. Turkey, App. No. 10226/03, July 8, 2008, ¶ 73.

2. Populism and the ECtHR: Developing a framework for analysis

The first step of the article is to identify a relevant point of connection between populism and the ECtHR with a view to defining a conceptual and methodological framework. This step is particularly needed in the absence of a critical mass of scholarship on the link between populism and the ECtHR. The claim I defend here is that the democratic notions of pluralism and deliberation offer one fruitful bridging point between the primarily social and political phenomenon of populism (as an ideational construct) and the distinctively legal and judicial context of the Court—one that allows for designing a comprehensive response of the Court. Locating this bridging point will also help set the limits of our investigation while distinguishing it from existing approaches in the literature.

Does the instrumental relationship that populist governments entertain with domestic institutions extend to the international judiciary? The prime examples of Poland and Hungary in recent years suggest that populist governments have significantly eroded the separation of powers by enabling the placement—through the usual channel of parliament—of "friendly" judges on their apex court or by packing supervisory bodies with cronies.[16] That is only one form of instrumentality where the executive is able to alter the relative spheres of constitutional authority to its own benefit—without, however, abolishing the function of the judiciary formally speaking. This is particularly the case of the right-wing, authoritarian ideal-type of populism. In the words of Andrew Arato, "the goal is to make the judiciary pliant instruments of the executive, unable to police the separation of powers or to defend the rights of individuals and minorities when populist governments, true to their principles, come to threaten them."[17] However, this form of instrumentality is more difficult to implement in the context of an international court such as the ECtHR as this would require changing the terms of the Convention itself, which requires the consent of all state parties to the ECHR. As Jan Petrov suggests, "these features regulated by the ECHR itself can be changed only by amending the Convention. Thus, state parties face a particularly high threshold for changing the structural features of the ECtHR."[18] In the absence of a similar dismantling process at the supranational level, how does one problematize the relationship between populism and the Court?

The absence of an established specific field of research on populism and the ECtHR does not imply an absence of conceptual tools and empirical measures to inform the building of a framework of analysis. One existing approach is to examine the growing wave of criticism(s) raised against the Court—an approach recently popularized by the "backlash against [international courts]" literature in the field of political science.

[16] Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. Democracy 38 (2012).

[17] Andrew Arato, *Populism, Constitutional Courts, and Civil Society*, *in* Judicial Power: How Constitutional Courts Affect Political Transformations 318, 333 (Christine Landfried ed., 2019).

[18] *See* Petrov, *supra* note 2, at 480.

However, the conceptual perimeter of the backlash literature seems excessively broad to capture what is distinctively populist about the backlash and, further, what is populist about the backlash against the ECtHR specifically. Indeed, "backlash" refers to the idea of "the action of the reactionary: a reaction to a development that is sought to be blocked or reversed."[19] The definition remains therefore neutral with regard to the level of reaction (e.g. national, regional, international) and with regard to its ideational inspiration (e.g. populist, authoritarian, sovereigntist).

A connected approach is to adopt a definition of populism and interpret the state criticisms against the ECtHR in its light. In his study of twenty-eight "backlash episodes" originating from populist leaders against international courts, Erik Voeten indicates that none specifically and directly concerns the ECtHR. His argument remains insightful in illustrating the different and perhaps distinctive kind of instrumentality that populist governments and leaders entertain with international courts. These governments criticize an international court's judgment when doing so helps support a "pre-existing narrative" of theirs at the domestic level—in particular, a narrative that concerns mega-identity politics.[20] The backlash literature here helps depict the kind of instrumental relationship that populist governments entertain with international courts in general and with the Court in particular: rather than placing friendly judges on their apex court, they selectively criticize those judgments that conveniently fit the narratives that populists promote and nurture domestically—and here again, the populist ambition is not necessarily to overturn the (supranational) institutional system in place.

More importantly, this brief overview highlights the lack of a Court- and practice-centered approach to the study of populism—that is, how the Court itself may relate to populism in its jurisdictional position and established case law. This is despite the widely accepted point that "the CJEU or the ECtHR for that matter. . . can be the last resort to enforce compliance with European values."[21] As already briefly mentioned, the rare contributions that have examined the specific link between populism and the Court adopt a predominantly sociological (rather than normative) lens and do not engage with the Court's practice and reasoning at great length. Most recently, Petrov for instance adopts a sociological account of legitimacy (in particular, the perception of state parties to the ECHR) and concludes that populism "provides a basis for distorting the ECtHR's legitimacy and explaining why resisting or attacking the Court is justified, appropriate or even necessary"[22] without, however, addressing the Court's practice in great detail. Andrea Pin connects the rise of populism at the domestic (political) level to the notorious "living instrument" doctrine of the ECtHR at the supranational (judicial) level.[23] Pin intimates that the ECtHR overusing this dynamic approach to

[19] Mikael Rask Madsen, Pola Cebulak, & Micha Wiebusch, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 Int'l J. L. in Context 197, 200 (2018).

[20] Erik Voeten, *Populism and Backlashes against International Courts*, 18 Persp. on Politics 407, 409 (2019).

[21] Gábor Halmai, *Populism, Authoritarianism and Constitutionalism*, 20 Ger. L.J. 296, 299 (2019).

[22] *See* Petrov, *supra* note 2, at 480.

[23] Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, 20 Ger. L.J. 225 (2019).

interpretation has strengthened a "progressive" approach that has exacerbated the populist frustration.[24] However insightful, these analyses remain largely descriptive.

In light of these limitations, I suggest switching the focal point from states and governments to the Court's internal position and practice. This perspective, however, first needs a robust working definition of populism in light of which one may assess the Court's role and practice. I therefore suggest drawing on the fast-developing political theory of populism and then examine the Court's role and practice in that light.

2.1. Varieties of populism and (anti-)pluralism

Let me first selectively reconstruct the basic ontology of populism as discussed by political and constitutional theorists. By "ontology," I understand populism's predominant category of description of social and political reality, namely the "people" and its boundaries vis-à-vis other social and political entities and/or institutions. For the sake of concision, I emphasize three minimal features of populism and also distinguish two ideal-types across these. First, populism centrally expresses an appeal, and often an exaltation of, the "people" that is almost always portrayed as "real," "pure," or "authentic." The theoretical literature on the idea of populism can start with Cas Mudde's standard: "a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, the 'pure people' versus the 'corrupt elite.'"[25] Jan-Werner Müller also speaks of a "single, homogeneous, authentic people"[26] to characterize that ontology. On this basic account, populism is Manichean to the extent that it morally connotes two fundamental and fixed groups that coexist within the same polity: "populism is in essence a form of *moral* politics, as the distinction between 'the elite' and 'the people' is first and foremost moral (i.e. pure vs. corrupt), not situational (e.g. position of power), socio-cultural (e.g. ethnicity, religion), or socio-economic (e.g. class)."[27] The contours of this antagonism, we shall see below, however need to be nuanced.

The second trait has to do with the rigidity of the antagonism between the people and the perceived "élite" or "establishment"—between the "us" and the "them." On the right end of the populist spectrum, the populist "people" simply flows from a supposedly natural order of things. As Fabio Wolkenstein puts it, populism (on the right end of the spectrum) "obscures this fundamental political decision, presenting instead the boundaries and the character of the people as natural."[28] The literature on populist constitutionalism has recently brought a number of nuances here. Paul Blokker

[24] *See id.* at 243.

[25] Cas Mudde, *The Populist Zeitgeist*, 39 Gov't & Opposition 541, 543 (2004).

[26] Jan-Werner Müller, *What Is Populism?* 1, 3 (2016); A. Nieuwenhuis, *The Concept of Pluralism in the Case Law of the ECtHR*, 3 Eur. Const. L. Rev. 367 (2007).

[27] Cas Mudde & Cristóbal Rovira Kaltwasser, *Populism and (Liberal) Democracy*, *in* Populism in Europe and in the Americas 1, 8–9 (Cas Mudde & Cristóbal Rovira Kaltwasser eds., 2012).

[28] Fabio Wolkenstein, *Populism, Liberal Democracy and the Ethics of Peoplehood*, 18 Eur. J. Pol. Theory 330, 335 (2019); see also the "organic connection" between the people and the leader as postulated by Paula Diehl. Paula Diehl, *Twisting Representation*, *in* Routledge Handbook of Global Populism 129 (Carlos de la Torre ed., 2018).

for instance mentions a temporal dimension in that this populism oscillates between the restoration of an older order and the reflection of a forward-looking form of messianism (the two are not mutually exclusive).[29] This rigid and naturalized antagonism may also explain why the populist rhetoric does not disentangle the "people" from the "will of the people" and the process of its formation.

However, while prevalent on the right side of the populist spectrum that typically predominates in Eastern Europe (what is more generally called "authoritarian populism,")[30] this naturalized dimension is not a necessary feature of all populisms. One may also find a more inclusive and aggregative ideal-type that suggests that "the contours of the people can only be shaped through continuous acts of political mobilization"[31]—an account that is predominantly found on the left-wing side of the populist spectrum (across governments and parties). What distinguishes that type is a form of inclusiveness that is at odds with the fixed antagonism of the authoritarian type. Two recent accounts are worth mentioning here: on the one hand, Bojan Bugarič has well explained how a "democratic" form of populism is not necessarily anti-pluralist (or authoritarian for that matter) but rather inclusive and aggregative in Greece (e.g. Syriza)[32] and in Spain (e.g. Podemos):[33] "these examples of democratic, liberal, socially inclusive forms of populism quite clearly show that authoritarianism and anti-pluralism are not necessarily the key elements of populism."[34]

In a similar vein, Robert Howse has argued that one should carefully distinguish *anti-pluralism* from *anti-elitism*—and how the latter may be more intrinsic to the very notion of populism. In a provocative article, Howse asks why the populist qualification pejoratively applies to the authoritarian breed and not to the progressive and grassroot forces protesting against institutional capture: "[W]hy label the authoritarians 'populists' in places like Hungary, rather than the thousands who have engaged in street protests against attacks on the judiciary and other independent institutions?"[35] These nuances further illustrate one well-noticed feature of populism as a "thin-centered" doctrine: it can lodge itself within a variety of more comprehensive ideologies,[36] and as such reveals the limits of the concept's extension.

[29] *See* Blokker, *supra* note 10.

[30] *See* Halmai, *supra* note 21.

[31] *See* Wolkenstein, *supra* note 28, at 336.

[32] As Damiani puts it in a recent article on left-wing populism, "the 'people' called upon by Syriza to participate in the new democratic process of transformation is an inclusive and plural subject, not limited by ethnical, racial, sexual or gender restrictions." Marco Damiani, *Radical Left-Wing Populism and Democracy in Europe*, *in* Routledge Handbook of Global Populism, *supra* note 27, at 295, 304.

[33] As Blokker explains in a recent article, the "people" of Podemos extends to foreigners, for example: "for Podemos, foreigners are not the 'enemy within,' and its construction of the People is rather one which groups together those citizens (and non-citizens) that are victims of globalization and neoliberal capitalism." Blokker, *supra* note 10, at 118.

[34] Bojan Bugarič, *Could Populism Be Good for Constitutional Democracy?*, 15 Ann. Rev. L. & Soc. Sci. 41, 46 (2019).

[35] *See* Howse, *supra* note 10, at 647.

[36] Michael Freeden, Ideologies and Political Theory: A Conceptual Approach (1996).

These two basic and connected traits are important for the purpose of this article in that they reveal the populists' underlying and distorted account of democracy. Yet, one should be cautious about where the distortion precisely lies: their antagonistic account of the political sphere and, for some of its variants, their claim to exclusive representation of the people, do indeed address fundamental and important questions of democratic theory—the questions of the *boundaries of the people* and the *limits of self-government*, respectively. Whether the responses are satisfying should be kept distinct. As Kaltwasser has explained, the first question pertains to who is entitled to participate in the democratic process. The second pertains to the "paradox of constitutionalism"[37] between self-authorship and the separation of powers.

There is, however, an underlying feature that cuts across all the ideal-types of the populist ontology that I shall further explore here, namely the neglect—if not the denial—of *pluralism* and *deliberation* and their place in democratic politics. Based on the nuances mentioned above, it is important to qualify this argument: populism on the left side of the spectrum tolerates and even promotes a measure of pluralism in the definition and formation of the "people," namely a "heterogenous collective subject, as it is made up of a plurality of social categories."[38] Yet, there is homogeneity across the spectrum in denouncing the entrenched failure of the "élite" to represent and respond to the demand(s) of the people, which presupposes the existence of a structural antagonism. In his reconstruction of left-wing populism, Damiani emphasizes this simultaneously aggregative and exclusive dynamic: "[T]he idea that emerges from this form of populism is that of opening, not closing, decisional processes, and opening to the plurality of social categories (not only those involving organized interests), which the procedural mechanisms of liberal democracies tend to exclude from the governance of public affairs."[39]

In other words, it appears that the populist ontology conflates the existence of the people and the formation of a seemingly Rousseau-inspired general will that may ground its existence in the first place. "How do the people come to know their will?" is the relevant question here.[40] The missing explanatory step, therefore, is how one moves from a multitude of irremediably different individuals and/or groups to a collective and unified body, given what political theorists have called the "fact of reasonable pluralism."[41] The left-wing ideal-type's inclusionary strategy precisely aims to address this fact through its aggregative approach but still preserves a rigid antagonism: "[D]eliberation and participation are circumvented while the followers are mobilized."[42]

For the purpose of the rest of this article, it is important take stock of the overall sequence we just outlined: the populist relationship to mediating institutions in fact starts with a severe skepticism toward—if not an utter rejection of—pluralism and

[37] *See* Kaltwasser, *supra* note 10.
[38] *See* Damiani, *supra* note 32, at 299.
[39] *See id.* at 303.
[40] *See* Diehl, *supra* note 30, at 135.
[41] John Rawls, A Theory of Justice 1 (1971).
[42] *See* Diehl, *supra* note 30, at 140.

disagreement at the basic level of deliberation and its translation in representative politics. Theories of deliberative democracy have articulated the crucial legitimating role of deliberation in the condition of pervasive pluralism and disagreement. In the absence of a convergence on a comprehensive (and metaphysical) understanding of value, "the deliberative conception requires more than that the interests of others be given equal consideration; it demands, too, that we offer politically acceptable reasons—reasons that are acceptable to others, given a background of differences of conscientious conviction."[43] Blokker's general diagnosis corroborates this view at the level of constitutional theory: "[P]opulism, in contrast, prioritizes the political will of the real people over any kind of value pluralism or societal plurality of groups."[44]

The third trait has to do with the implications of the populist ontology for defining the political process (and for amending the constitution, as a result). The institutional corrective proposed by populism is a "more direct identification of the represented with the representatives than free elections allow because it sees representation primarily as a strategy for embodying the whole people under a leader, rather than regulating the political dialectics among citizens' plural claims and advocacies."[45] Populism across the spectrum is skeptical of the conventional ideas of democratic deliberation and representation as mediating institutions. Here again, the more recent literature is insightful: on the one hand, Paula Diehl has aptly explained how the populists across the board "promote a concealment of diversity."[46] On the other hand, Blokker has cogently diagnosed how the diversity is ultimately concealed *against* the representative politics: "populists assume that representative politics is deeply affected by partisanship and invisible interest groups behind the scenes that operate for reasons of self-interest, rather than the common good of the ordinary citizens."[47] Another implication noted by Blokker is how the populists deny, or severely marginalize, the mediating role of the constitution itself: "[T]here is no need for a higher law that mediates between and integrates different social forces that compete for political power. Rather, the populist mission becomes one of more thoroughly and extensively inscribing the people's standing, values, and necessities in the constitution."[48]

To conclude this conceptual section, one may view the populist distortion as negating—or at least heavily simplifying—the process through which the "people" may even be formed through deliberation in the context of deep pluralism about value and consequentially how this pluralism ought to be mediated and represented in and by institutional structures. Rather than aggregating the consent or the preferences of individuals, deliberative democrats argue that "what makes it a form of self-rule is the formation of a collective agent, a political 'we' through the practice of reasoning

[43] Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* Philosophy and Democracy: An Anthology 17, 24 (Thomas Christiano ed., 2003).

[44] *See* Blokker, *supra* note 10, at 117.

[45] Nadia Urbinati, *Populism and the Majority Principle*, *in* The Oxford Handbook of Populism 571, 584 (Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo, & Pierre Ostiguy eds., 2017).

[46] *See* Diehl, *supra* note 30, at 135.

[47] *See* Blokker, *supra* note 10, at 120.

[48] *See id.* at 542.

together."[49] Populists across the spectrum assume that they are immune to the requirements of deliberation and mediation—and that reveals the extent of their shortcomings, democratically speaking.

2.2. The anti-pluralism of populism: Ideational and institutional

One may now wonder how these considerations are at all relevant to the relationship between populism and the ECtHR. One can envision this link by switching from an ideational to a more institutional perspective—and further explore the fast-growing literature on what populist governments do when they reach elected office. There are two important steps to envision the link. The first is to take stock of our conclusion above that, fundamentally, the populist distortion starts with denying deliberation and mediation and the place (and the constraint) of pluralism and disagreement in modern politics. Democratic theory here helps specify that mediating institutions start with the micro level of deliberating and exchanging reasonably divergent views, which is crucially important to pursuing the ideal of democratic legitimacy—and eventually forming a popular or collective will that populists are keen to celebrate. Only then is the institutional dismantling explainable. Constitutional scholars are well placed to notice and document this process: the literature is filled with references to the "deconstruction of the existing constitutional order"[50] or the "disabling of the constitution."[51] In the next section, I shall bridge these perspectives in the context of the ECtHR by looking at one rather informal stage (democratic debate through the right to freedom of expression) and at one rather formal stage (the right to free and fair elections).

Second, beyond the (more informal) institution of deliberation, one should note that representation is another (more formal) institution that gets twisted, to use the words of Paula Diehl: "[T]he populist twist invokes people's powerlessness in the face of bad representation by established politicians, parties, and élites."[52] While this article does not specifically investigate this aspect, the populist strong identification between the people and the leader replaces the requirement of mediation, which then runs the risk of falling into authoritarianism proper. Yet again, on the deliberative account of democracy, representative institutions have not just an instrumental but also an egalitarian function. That is also where one may charitably conceive of the corrective of populism across the political spectrum as denouncing an *establishment*—a definitional category recently developed by Urbinati in her analysis of the populisms' relation to established political parties: "populism ascribes a factional nature to the existing parties, accusing them of putting the will of the people in the service of partial interests."[53] Nonetheless, methodologically, it remains an empirical and not conceptual question whether established parties do indeed favor particularistic interests.

[49] Assaf Sharon, *Populism and Democracy: The Challenge for Deliberative Democracy*, 27 Eur. J. Phil. 359, 367 (2018).

[50] David Landau, *Populist Constitutions*, 85 Chi. U. L. Rev. 521, 527 (2018).

[51] *See* Bánkuti, Halmai, & Scheppele, *supra* note 16.

[52] *See* Diehl, *supra* note 30, at 134.

[53] *See* Urbinati, *supra* note 45, at 80.

Now, and conversely, there are institutions that play a characteristically important role in enabling the democratic and deliberation community to form against the background of pluralism and disagreement and these may be particularly prone to the populist insidious repression as a result. I suggest zooming in on two of these, one at the more informal end of the spectrum (the media) and one at the more formal end (the electoral system) of the democratic process. It should be noticed here that the media and the electoral system have also been registered as key targets of populist governments by empirical social science.[54]

The specialist literature has well documented how populist governments orchestrate their attack on the independence of the media. As a matter of general empirics, Kenny has shown that "populists' lack of an institutionalized support base, and dependence on the media to mobilize voters, makes it more likely that they will seek to manipulate and even control the media when in office."[55] The attack is largely subversive: the notions of "media capture" or "media colonization" have been used to depict the insidious process by which the populist executive surreptitiously extends its control over the media landscape. In Hungary, for instance, the Orbán government (in power since 2010) installed a "centralised, pyramid-shaped, institutional structure with the Media Council's Chair on top, herself appointed by the Prime Minister."[56] As a result, the ruling Fidesz party (benefiting from a supermajority in parliament) effectively exercises control not only over media legislation but also over content monitoring, distribution of frequency, and allocation of public media funding. Further, while the Media Authority pre-existed the Orbán government, a new supervisory body (the National Media and Telecommunications Authority) was created and empowered to impose fines on outlets that may (among other things) fail to offer a balanced coverage of the news. The parliament elected Fidesz members to all the seats of the new body. In Poland, the "Small Media Act" effectively terminated the mandates of the executive boards of public media companies.[57] Another coincidental pattern observable in both Hungary and Poland is the redirecting of funding and state advertisement toward government-friendly media.[58]

The literature has also made clear how populist governments instrumentalize electoral institutions, for example by (re)placing office-holders in charge of running and supervising the electoral process (in particular, electoral commissions and courts) with cronies, which effectively represses pluralism at an institutional level. This can be seen as reflecting the attack on representative and supervisory institutions specifically. In Hungary, the seats on the electoral commission that were supposed to be filled

[54] Christian Houle & Paul Kenny, *The Political and Economic Consequences of Populist Rule in Latin America*, 53 Gov't & Opposition 256 (2018).

[55] Paul Kenny, *The Enemy of the People: Populists and Press Freedom*, 73 Pol. Res. Q. 261, 265 (2020).

[56] Péter Bajomi-Lázár, *The Party Colonisation of the Media: The Case of Hungary*, 27 E. Eur. Pol. & Soc'ies 69, 84 (2013).

[57] Ustawa z dnia 30 grudnia 2015 r. o zmianie ustawy o radiofonii i telewizji [Act of 30 December 2015 amending the Broadcasting Act], January 7, 2016.

[58] Aron Kerpel, *Pole and Hungarian Cousins Be? A Comparison of State Media Capture, Ideological Narratives and Political Truth Monopolization in Hungary and Poland*, 29 Slovo (2017).

through political negotiation and compromise between the government and opposition parties are now filled by members of Fidesz. As Bánkuti, Halmai, and Scheppele explain, "thus the Commission could thwart attempts by civil society groups to use referendums to derail aspects of the government's program."[59] In Poland, the composition of the National Electoral Commission, which is responsible for all aspects pertaining to the electoral process (e.g. registration of parties and candidates, management of electoral polls, control of party finances, and distribution of state subsidies), has historically been but is also becoming increasingly politicized in favor of the ruling party. It should be noted that in both Hungary and Poland parties are traditionally heavily dependent upon public funding (e.g. 80% for Polish parties).[60] A packed electoral commission could more easily impose fines on opposition parties by abusing its discretionary authority, for example.

The capture in the media and in the electoral domain are therefore similarly orchestrated: the formal function of supervisory bodies is preserved (or a new body is created), but the effective operation of this function is perverted—that is, lenient office-holders exploit any area of discretionary authority to benefit the executive and further damage any form of oppositional agency. Oran Varol has well explained how discretionary authority is systematically used in his study of "stealth authoritarianism": "[T]he discretion accorded to these institutional actors may be constrained through various formal and informal mechanisms. The fewer informal and formal restraints on discretion, the more room there is for selective enforcement of law."[61] In Hungary, for instance, this has been facilitated by the structural lack of accountability of administrative bodies—and, more recently, the controversial Fundamental Law of 2011 that enables the prime minister to directly appoint the head of regulatory agencies—allowing "the prime minister to choose among those who are loyal to him or her, and therefore raises serious questions of political independence."[62] And while this goes beyond the reach of this article, one may trace the lack of accountability and deliberation back to the transition to liberal democracy, as Krygier and Skąpska have brilliantly explained.[63]

This subtle form of capture not only affects the separation of powers but coincidently chokes the protected space (informal and formal) devoted to expressing, mediating, and representing dissent and pluralism. In his larger work on political corruption, Samuel Issacharoff emphasizes that "the concept of choking levels of regulatory overkill with large margins for discretionary application or exemption is key. This

[59] *See* Bánkuti, Halmai, & Scheppele, *supra* note 16, at 140.

[60] Anna von Notz, *How to Abolish Democracy: Electoral System, Party Regulation and Opposition Rights in Hungary and Poland*, Verfassungsblog (Dec. 10, 2019), https://verfassungsblog.de/how-to-abolish-democracy-electoral-system-party-regulation-and-opposition-rights-in-hungary-and-poland/.

[61] Oran Varol, *Stealth Authoritarianism*, 100 Iowa L. Rev. 1673, 1719 (2015).

[62] Attila Vincze, *Regulatory Bodies in an Illiberal Democracy*, *in* Governance and Constitutionalism: Law, Politics and Institutional Neutrality 119, 127 (Bogdan Iancu & Elena Simina Tănăsescu eds., 2020).

[63] Martin Krygier, *The Challenge of Institutionalisation: Post-Communist "Transitions," Populism, and the Rule of Law*, 15 Eur. Const. L. Rev. 544 (2019); Grażyna Skąpska, *The Decline of Liberal Constitutionalism in East Central Europe*, *in* The Routledge International Handbook of European Social Transformation 8 (Peeter Vihalemm, Anu Masso, & Signe Opermann eds., 2018).

becomes the entry point for political consolidation through the punishment of those who run afoul of that consolidated power."[64] Of course, this choking function may have desirable second-order effects for populists—e.g. the characteristic "chilling" effect that may dissuade any pluralistic or contestatory voice from seeking any form of expression and/or representation in the first place. Here again, it is worth keeping in mind that the media and the electoral process are only two examples of populist distortion—there is *a priori* no particular sphere of regulation that is immune to it, and again the choice to focus on these two areas is linked with how relevant (and problematic) they are to the ECtHR and its practice.

The third step is to reconstruct the (distorted) nexus between the media and electoral institutions, which consists of operating a seemingly democratic process while repressing pluralism and deliberation *from within*—by occupying and exploiting any area of discretionary authority, whether in supervising the deliberative phase of the process (media and public debate) or in the sanctioning and supervising of that process (elections and vote). Here again, democratic theory can further explicate the depth of the distortion: the very purpose of elections is the need to renew popular consent and by the same token strive to improve representational legitimacy.[65] The capture of the media landscape and of the electoral process reveal the populist governments' relentless effort to enable a *façade democracy*. The respect for pluralism and the need to mediate it through deliberative institutions is a main obstacle to this project. It is important, however, to delineate how the populist capture of these domains can be translated into the domain of *rights*. Here again, the transition is selective: as far as the media capture is concerned, one can well imagine practices of censorship and the repression of journalistic freedom when the management of an outlet is suddenly packed with government cronies. Freedom of expression (in particular, press freedom) is therefore particularly relevant. Similarly, capturing the oversight function of an electoral commission may lead to opposition parties being deprived of resources (particularly during campaigns), both financial (e.g. funding and subsidies) and non-financial (e.g. media outlets, radio frequencies, TV licensing, and airtime). The right to stand for elections and political participation could be severely affected as a result.

3. Pluralism at the European Court of Human Rights

The objective of the article so far was twofold: the first was to explain the extent to which anti-pluralism forms parts of populism's ideational core. While this does not concern all the variants of populism to the same extent, a detour via the theory of deliberative democracy showed how the populists' "people" is distorted as it profoundly neglects pluralism and deliberation in the very formation and preservation of a democratic body and their repercussions for institutional and representative processes. The

[64] Samuel Issacharoff, *The Corruption of Popular Sovereignty*, 18 Int'l J. Const. L. 1109, 1120 (2020).
[65] *See id.*

second objective was to specify how this applies to the institutions of the media and the electoral processes.

3.1. Structure and substance

In this section, I switch the focus to the Court's understanding of pluralism and how it informs the Court's jurisdictional position and interpretive practice. Before delving into the specificities of the case law, it is important to recall the level of legal authority that the Court enjoys over state parties. Indeed, pluralism (and democracy) already matter at this structural level: even though the Court is a permanent and professional judicial body that enjoys compulsory jurisdiction over forty-seven state parties (based on article 46 ECHR), the principle of subsidiarity makes it so that state parties benefit from a wide area of authority and discretion in interpreting and enforcing the ECHR—and this undoubtedly expresses utmost concern for state parties constructed as democratic and sovereign entities. For example, and despite various extensions of its interpretive powers (e.g. pilot judgement procedure introduced by Protocol 14[66]), the scope of the Court's review remains of a *declaratory* kind in contrast to other regional human rights courts[67] and constitutional or supreme courts.

In principle, pluralism and democracy might also be observed at the level of remedies as a consequence of the fact that the Court leaves it to the respondent state to determine how to execute its judgments—what Samantha Besson has called "remedial subsidiarity,"[68] although some exceptions to remedial subsidiarity have been observed (especially the pilot procedure, as authorized by Protocol 15[69]) with respect to the dismissal of judges specifically (see, e.g., *Volkov v. Ukraine*[70]). More generally, being an international court, each judgment in principle only binds the state that is party to that judgment (*res judicata*), although the Court has explicitly recognized the *erga omnes* effect of its judgements, which implies that the content of a judgement holds against all state parties (*res interpretata*).[71] Moreover, as the Court also repeatedly emphasizes, it is not empowered to replace domestic authorities in interpreting the ECHR—the primary obligation falls upon them to interpret (and enforce) these rights. As a result, there is a wide pluralism in the legal forms under which the ECHR is domesticated. In the words of Besson,

[66] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, C.T.S. No. 194 [hereinafter Protocol No. 14], http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm.

[67] Başak Çalı, *Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders*, 16 Int'l J. Const. L. 214 (2018).

[68] Samantha Besson, *Subsidiarity in International Human Rights Law: What Is Subsidiary about Human Rights?*, 61 Am. J. Jurisprudence 69 (2016).

[69] Protocol No. 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms, June 24, 2013, C.T.S. No. 213 [hereinafter Protocol No. 15], http://conventions.coe.int/Treaty/EN/Treaties/Html/213.htm.

[70] Oleksandr Volkov v. Ukraine, App. No. 21722/11, May 27, 2013.

[71] Oddný Mjöll Arnardóttir, *Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights*, 28 Eur. J. Int'l L. 819 (2017).

> [There is] a positive duty to legalize those rights as legal rights under domestic law and to implement them legally so as to grant them full effectivity. There is to date no obligation, however, to legalize them as constitutional rights. Not all states have written constitutions to date, and some do not even have bills of rights.[72]

Here again, the subsidiary role of the Court facilitates the expression of pluralism resulting from the embeddedness of the ECHR in each state party's constitutional and democratic order[73] and the limited authority that the Court enjoys as ultimate and subsidiary interpreter of the ECHR.

Last but not least, Protocol 15 makes very clear that states have reaffirmed the limits of the Court's interpretive authority through the margin of appreciation by adding a paragraph to the Preamble of the ECHR. More generally, as I later illustrate in this article, the margin of appreciation doctrine helps the Court justify the limits of its interpretive reach in light of inherently democratic and pluralistic considerations—for example, when the respondent state has duly considered the ECHR in domestic proceedings and conducted the proportionality test accordingly.[74] If successful, this robust internal process usually justifies the granting of a margin of appreciation. As the Court repeatedly says, "domestic authorities are better placed" to establish the scope of their conventional obligations for a number of articles,[75] in particular the derogable ones (arts. 8–11 ECHR). In light of the above, therefore, one can assert that while the Court is a properly *judicial* body exercising a broad constitutional function, it nonetheless remains an *international* one due to the limits imposed on its authority, whether these limits are jurisdictional (exhaustion of domestic remedies), interpretive (margin of appreciation), or remedial (remedial subsidiarity—with the caveat of the pilot judgment procedure).

One may wonder how these structural and procedural considerations matter to the response of the Court to populism. They reveal, first, that the Court's degree of authority pays due respect to the state parties' democratic and sovereign nature. The Court is not conceived as a superstructure over and above the state parties but as an external, minimal, and subsidiary mechanism of review. From a democratic and constitutional standpoint, the procedural primacy of state parties over interpretation and their exclusiveness over enforcement certainly involve and facilitate an *appropriation* process of these international norms—especially given their irremediably abstract character. In that sense, the state parties' primary position and the Court's subsidiary position echo Seyla Benhabib's approach to the tension between human rights and democracy as iterative:

> [D]emocratic iterations signal a space of interpretation and intervention between the context-transcendent norms and the will of democratic majorities. On the one hand, the rights frame

[72] Samantha Besson, *Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation*, *in* Philosophical Foundations of Human Rights 281, 289 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015).

[73] Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 Eur. J. Int'l L. 125 (2008).

[74] Andreas Føllesdal, *Appreciating the Margin of Appreciation*, *in* Human Rights: Moral or Political? 269 (Adam Etinson ed., 2016).

[75] *See, e.g.*, Otto-Preminger-Institut v. Austria, App. No. 13470/87, Sept. 20, 1994, ¶ 48.

> democratic politics must be viewed as transcending the specific enactments of democratic majorities in specific polities; on the other hand, such democratic majorities re-iterate these principles and incorporate them into the democratic will-formation process of the people through contestation, revision and rejection.[76]

Iteration applies not only at the structural level—by explaining the Court's subsidiary position—but also at the substantive level of the Court's interpretation of rights. Indeed, if iteration is important to the legitimation of human rights, then the Court ought to protect the (rights-based) conditions for that process to unfold without replacing state parties in primarily performing that process. As a result, if populism entails a distorted approach to democracy, one may assign the Court the responsibility of scrutinizing and addressing the insidious populist attacks without, however, interfering with that iteration process. In the next section, I shall provide an overview of how the Court has been addressing this tension through the allocation of the margin of appreciation. What matters here is to indicate that the jurisdictional position of the Court is also important when addressing the place of democracy and pluralism in the context of populism.

3.2. Pluralism in the Court's reasoning

The jurisdictional considerations surveyed above are therefore more substantive and important than one may think: if populism thrives on a distorted notion of democracy (with respect to pluralism and disagreement, as we have seen), one the one hand, and if the Court's limited authority is grounded in the respect for the democratic nature of its subjects (and the pluralism associated with it), on the other hand, then the former may very well contaminate the latter: populists may very well try to abuse and pervert the discretionary authority that the system already allocates to them (for instance through the exhaustion of domestic remedies rules (art. 35 ECHR)). As such, populism may put in question the jurisdictional foundations of the system of European human rights protection. But, of course, there is far more to the Court's relation to pluralism and democracy—and therefore to populism—than procedural and jurisdictional issues. To offer a fuller picture of the Court's relation (and potential response) to populism, one must delve into the Court's reasoning and reconstruct the specific role of pluralism that permeates the case law. Here again, I shall limit the investigation to the two domains highlighted earlier, namely the capture of the media (via freedom of expression and assembly) and the electoral process (via the right to free and fair elections).

a) Articles 10–11 ECHR

The notion of pluralism heavily informs the interpretation of a number of ECHR articles with an emphasis on the so-called derogable rights, in particular expression (art. 10 ECHR), reunion and assembly (art. 11 ECHR), thought and religion (art. 9 ECHR) and to a lesser extent education (Protocol 1, art. 2). Rather than documenting all the

[76] Seyla Benhabib, *The Legitimacy of Human Rights*, 137 Daedalus 94, 99 (2008).

cases (and all the Convention articles) where pluralism can be relevantly observed, I suggest delineating the overarching role that it plays in the Court's reasoning and then illustrate in the two areas of democratic distortion observed earlier, namely the media and the electoral process. A few contributions have rightly noted that the notion of pluralism is operating at both a descriptive and normative level in the Court's reasoning. As Nieuwenhuis puts it, "pluralism is described as a characteristic of and a condition for a democratic society, and 'democratic society' is not narrowly interpreted. That means that several fundamental rights can be directly linked to the concept of pluralism."[77] As this contribution focuses on the normative response of the Court, I shall focus on the latter use of the notion.

On this normative level, one may turn to a closer analysis of articles 10 and 11 and to the Court's relentless emphasis that there is no "democratic society" and, in particular, democratic debate, without "pluralism, tolerance and broadmindedness."[78] In that sense, the Court defines pluralism as (part of the very) telos of freedom of expression in addition to the more individualistic purpose of self-fulfillment. Further, since the seminal *Handyside* case, the Court has defined the scope of expression in the same light, asserting that freedom of expression applies "not only to 'information' or 'ideas' that are favorably 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."[79] Based on the Convention's Preamble, this definition has become the Court's *lingua franca* on the justification, content, and scope of the freedoms of expression and assembly and reunion. As a result, whether it is extremist political views, insults to heads of states, satire, or just exaggeration in public debate, pluralism justifies that they fall within the scope of article 10 or 11.

This helps to see that pluralism (normatively understood), more generally, governs the allocation of duties and duty-bearers which correlates with the right to freedom of expression. Further, the pluralistic and adversarial account of Strasbourg's "democratic society" culminates in a "right of the public to be informed of various perspectives" on any public interest issue. In *Erdoğdu and İnce v. Turkey*, which concerned the interview of a sociologist on the conflict in Kurdistan, the Court asserted that "domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them."[80] The literature has shown that pluralism is placed within the normative core of freedom of expression via the thick notion of "democratic society."[81]

Finally, pluralism also informs the limits of articles 10 and 11. One may use the example of Islamism (in the context of art. 11) and the numerous cases against

[77] Aernout Nieuwenhuis, *The Concept of Pluralism in the Case Law of the ECtHR*, 3 Eur. Const. L. Rev. 367, 370–71 (2007).

[78] Handyside v. United Kingdom, App. No. 5493/72, Dec. 7, 1976, ¶ 50.

[79] *Id.*

[80] Erdoğdu and İnce v. Turkey, App. No. 25067/94, July 8, 1999, ¶ 51.

[81] Alain Zysset, *Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of "Democratic Society,"* 5 Global Const. 16 (2016).

Turkey as a case study. In *Gündüz v. Turkey*, which concerned the leader of an Islamic sect defending sharia law on an independent Turkish television channel, the Court famously asserted that while sharia law is incompatible with a democratic society, publicly defending its implementation cannot be subject to restriction under the "democratic necessity" clause:

> [T]he applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a *pluralistic* debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.[82]

In fact, for a particular view or opinion to be restricted there must be an incitement to violence and hatred—or, in the context of article 11 specifically, the risk that an anti-democratic political party is likely to seize power and endanger the democratic process itself once in office (notably by not respecting pluralism[83]). In *United Communist Party of Turkey and Others v. Turkey*, in which the Turkish communist party was dissolved by Turkey's constitutional court, the Court held that "there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned."[84] This in turn indicates the close link that the Court makes between deliberation, pluralism, and democracy—a link that we already touched upon in our review of the theoretical link between democracy and populism. I shall critically reconstruct the Court's reasoning from that standpoint in the next section of the article.

The Court's interrelated account of pluralism, freedom of expression, and democracy applies all the more to media freedom under article 10. As a matter of established interpretive principles, the Court cannot insist enough on the role of the press as "public watchdog" of its "democratic society"—and within it that of pluralism. This role was established in the seminal case of *Jersild v. Denmark*, which examines the TV interview of members of a racist group in a Danish newspaper:

> It is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog." Although formulated primarily with regard to the print media, these principles doubtless apply also to the audio-visual media.[85]

Now, we have seen earlier how pluralism and deliberation are surreptitiously repressed by populist governments, most notably by exercising monopoly over (the institutions in charge of regulating) the distribution of media resources, in particular the allocation of licenses and airtime, and the imposition of fines. The Court is well equipped to

[82] Gündüz v. Turkey, App. No. 35071/97, Dec. 4, 2003, ¶ 51.

[83] Refah Partisi and Others (The Welfare Party) v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98, and 41344/98, Feb. 13, 2003, ¶ 87.

[84] United Communist Party of Turkey and Others v. Turkey, App. No. 29400/05, June 19, 2012, ¶ 57.

[85] Jersild v. Denmark, App. No. 15890/89, Sept. 23, 1994, ¶ 31.

use its established principles in that context. An illustrative example in that respect is *Centro Europa 7 S.R.L and Di Stefano v. Italy*, in which the applicant alleged that the Italian state unlawfully deprived the applicant's media company from the necessary frequencies for television broadcasting (against the background of a duopoly prevailing in Italy). The Court observed that:

> [I]n such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee *effective pluralism*. . .. This is especially desirable when, as in the present case, the national audio-visual system is characterised by a duopoly.[86]

The Court added that only "a pressing need" would justify such a restriction of the media landscape. Further, the Court cited the CoE guidelines that also require state parties to "adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed."[87] The Court's conclusion again emphasises pluralism, in particular the positive duty identified earlier: "This shortcoming resulted, among other things, in reduced competition in the audio-visual sector. It therefore amounted to a failure by the State to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee *effective media pluralism*."[88]

A number of implications follow from the Court's reliance on pluralism so construed. One is that the Court establishes an interpretive threshold for state parties to benefit from the margin of appreciation. This is salient for instance in *Matuz v. Hungary* in which a journalist aimed to alarm public opinion by writing and publishing a book about alleged practices of censorship in the public broadcasting agency of Hungary. This case directly speaks to the process of media capture in Hungary referred to earlier in this article: the appointment of a new director of the television company allegedly led to modifying the content of a periodical cultural program. The Court did not link these allegations to broader concerns about the independence of the media in Hungary. Rather, it only examined how domestic courts used the established interpretive principles of article 10 of which pluralism is an important part:

> As a result, they (national courts) did not examine whether and how the subject matter of the applicant's book and the context of its publication could have affected the permissible scope of restriction on his freedom of expression, although it is such an approach that, in principle, would have been compatible with the Convention standards.[89]

It therefore appears that the Court swiftly applies its thick notion of pluralism-informed "democratic society" to cases involving potential media capture. The more structural implication of the Court's conception of "democratic society" concerns the allocation of the margin of appreciation. If freedom of the media is one of the vehicles through which pluralism and deliberation are ensured, then the

[86] Centro Europa 7 S.R.L and Di Stefano v. Italy, App. No. 38433/09, ¶ 134 (emphases added).
[87] *Id.* ¶ 156.
[88] Centro Europa 7 S.R.L and Di Stefano v. Italy, App. No. 38433/09, ¶ 156 (emphasis added).
[89] Matuz v. Hungary, App. No. 73571/10, Oct. 21, 2014, para 49.

margin of appreciation left to states parties should be thin even if that involves significant costs for the other party (such as in the conflict with the right to reputation under article 8). In the same *Matuz v. Hungary*, the Court held that "if the national court demonstrates a lack of sufficient engagement with the general principles of the Court under Article 10 of the Convention, the degree of margin of appreciation afforded to the authorities will necessarily be narrower."[90] Pluralism, therefore, also operates as a threshold for the Court to determine the (wide) limits of its interpretive authority. One may draw from this incursion that the Court is well equipped to systematically incorporate the corrective of populism discussed earlier (as far democratic participation and debate are concerned), namely the protection of minor and dissenting views and entities that may be structurally marginalized by an established élite. The ECtHR has made this point very explicitly in *Piermont v. France*: "[A] person opposed to official ideas and positions must be able to find a place in the political arena."[91] In *Young, James, and Webster v. United Kingdom*, the Court precisely pointed to minority incorporation and protection in the democratic process: "[D]emocracy does not simply mean that the views of the majority must always prevail. A balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."[92]

Yet, as the recent literature has shown, the Court may also adjust its scrutiny to the particular techniques of control and manipulation outlined earlier in privileging this or that Convention article allegedly breached. Indeed, the attack on freedom of expression may result from a broader and enabling ecosystem under populist governmental control. This becomes clearer in the more recent *Baka v. Hungary*, where the Court found that the termination of the office of the former President of the Hungarian Supreme Court amount to a violation of articles 10 and 6 ECHR.[93] The Hungarian government argued that the motivation was motivated by his repeated criticism of the ongoing reforms in the judiciary. While the Court did already find a violation at the first stage of the proportionality test, namely necessity (whether the changes to the judicial apparatus required the termination of Mr. Baka's office), and at the second stage (whether the government had a legitimate aim), Kosař and Šipulová have well explained how focusing on article 10 to tackle populism is shortsighted in that it cannot reach the structural conditions that underpin, for instance, the system of judicial office nomination.[94] More generally, this justifies taking a more institutional perspective and the ECHR rights that matter in that respect, as our review of the right to free elections illustrates below.

[90] *Id.* ¶ 35.

[91] Piermont v. France, App. Nos. 15773/89, 15774/89, July 24, 1995, ¶ 76.

[92] Young, James, and Webster v. United Kingdom, App. Nos. 7601/76, 7806/77, Oct. 18, 1982, ¶ 63.

[93] Baka v. Hungary, App. No. 20261/12, June 23, 2016. For a similar case involving article 8 ECHR, see *Erményi v. Hungary*, App. no. 22254/14, Nov. 22, 2016.

[94] *See* Kosař & Šipulová, *supra* note 12.

b) Article 3 of ECHR Protocol 1

Surprisingly, what applies to expression and the media does not equally apply to other democratic and more institutional rights of the Convention, in particular the right to free and fair elections (Protocol 1, art. 3). The Court may insist on the interdependence of expression and vote at the level of principle in arguing that:

> [F]ree 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, 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.[95]

This interdependence applies particularly in pre-electoral contexts, as the Court established in the same *Bowman v. United Kingdom*. Up until this point, the Court is harmoniously linking the two articles: the free expression of the opinion of the people requires a robust and lively public and pluralistic debate:

> The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the "conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature". . .. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.[96]

Yet, there are multiple ways to demonstrate that the right to free and fair elections (including the right to stand for elections) is not articulated with a comparable level of specificity textually and, as a result, is not subject to a comparable level of scrutiny judicially, which should alert us. Let me detail three of them. Most importantly, the text of article 3 of Protocol 1 ECHR is not structured around the same restriction clauses as articles 8–11 in the text of the Convention. The Court holds that the right has "implied limitations" which, in effect, only mean that the right is not absolute. The Court, however, does not ascertain the grounds and scope of the potential limitations. Limitations 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." The essence of the right is defined as "free elections" at "reasonable intervals," "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people."[97] However, the Court has not established these criteria more tangibly. Moreover, it appears that "the free expression of the opinion of the people" is clearly too abstract and demanding a proposition to be realized by one single (procedural) right. As a result, the right (textually construed) does not lend itself to a careful and precise scrutiny.

Yet, the practice indicates a second sign of recurrent restrain. The Court does not, indeed, assess the aim of the right restriction—even if it may ultimately find a violation

[95] Bowman v. United Kingdom, App. No. 24839/94, Feb. 19, 1998, ¶ 18.
[96] *Id.* ¶ 42.
[97] Labita v. Italy, App. No. 26772/95, Apr. 6, 2000, ¶ 201.

on mere proportionality grounds (by allegedly distinguishing the legitimate aim question from the strict necessity and proportionality questions). This is very clear for instance in the contentious cases involving the restriction of the right to vote or criminal felons, as in the famous *Hirst v. United Kingdom* case, which contrasts quite strikingly with cases of article 10 ECHR. In this important and contentious case, the Court simply accepted the aims advanced by the respondent state party, namely "preventing crime and enhancing civic responsibility and respect for the rule of law."[98] In other words, the Court does not discuss the state's legitimate aim and its compatibility with its sacrosanct "democratic society" the way it systematically does for alleged violations of freedom of expression. The same type of reasoning is found in *Scoppola v. Italy (No. 3)* where the Court validated the aim of the Italian state as "ensuring the proper functioning and preservation of the democratic regime."[99] It therefore appears that while "democratic society" operates as a trump against state interferences under article 10, as we have seen, democracy is used to justify restrictions under article 3 of Protocol 1 ECHR. More evidence of this flip is found in *Zdanoka v. Latvia* where, in fact, the Court defers the very definition of democracy to the domestic authorities all together:

> The Court therefore accepts in the present case that the national authorities of Latvia, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order. Those authorities should therefore be left sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions, including the national parliament, and to answer the question whether the impugned measure is still needed for these purposes, provided that the Court has found nothing arbitrary or disproportionate in such an assessment.[100]

It seems that there is not much more to the Court's review than proportionality assessment stricto sensu, which proceeds independently of the purpose of the interference. This helps identify one area of potential judicial scrutiny where the Court may fall short of grasping the subtle form of abuse that populists instil in institutional settings pertaining to the electoral process. For example, one may think of a populist government invoking grounds for interference (e.g. "the impartiality of the judiciary")—and if the Court only examines proportionality stricto sensu without examining the legitimate aim in great detail, it leaves opens a valve for the populist penetration. This could corroborate other efforts made by the Court to investigate the states' motives for interference based on Article 18, as Çali and Hatas put forward in a recent article: "[T]his assessment, for example, may require an inquiry into actual the motives of states or the actual results of their acts or omissions."[101]

[98] Hirst v. UK (No. 2), App. No. 74025/01, Oct. 6, 2005, ¶¶ 74–5.

[99] Scoppola v. Italy (No. 3), App. No. 126/05, May 22, 2012, ¶ 92.

[100] Zdanoka v. Latvia, App. No. 58278/00, March 16, 2006, ¶ 102.

[101] Başak Çalı & Kristina Hatas, *History as an Afterthought: The (Re)Discovery of Article 18 in the Case Law of the European Court of Human Rights* 2 (2020), https://ssrn.com/abstract=3677678; *see also* Corina Heri, *Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights*, 1 Eur. Convention on Hum. Rts. L. Rev. 25 (2020).

Finally, one can measure the Court's timidity in electoral matters through its more general approach to interpretation used to establish the appropriate level of protection. Unlike the limits of freedom of expression, which are established based on the Court's self-defined *telos*, article 3 of Protocol 1 ECHR is delimited by inferring from the practices of CoE states some European consensus, which is a well-established approach in wider areas of the case law. In the same *Scoppola v. Italy (No. 3)*, 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).[102]

Unsurprisingly, the implication of the Court's timidity in these matters is a wider margin of appreciation. However important article 3 of Protocol 1 ECHR might be at the level of principle, in effect states benefit from an important discretion when balancing conflicting rights: "in striking the balance between these two rights the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral systems."[103] Here again, looking at the general pattern across CoE states may have the result of missing what is specific about the populist subtle and insidious distortion of these processes.

There is, of course, a range of issues that make up the organisation of an electoral system that one should review across the active part (the right to vote) and the passive part (the right to stand for elections) of the article. However, this overview already reveals that the Court's level of scrutiny takes opposite directions between freedom of expression and the right to vote. This becomes even clearer for what ultimately matters for this article, namely the normative role of pluralism and deliberation. Under Protocol 1, article 3, the reference to pluralism is also found in the Court's assessment and/or in the arguments submitted by the applicants. However, the normative role it plays is far more minor than under article 10 or 11 ECHR. More precisely, the burden of justification for not meeting this criterion rather falls upon the applicant. An illustrative example of this is the issue of media coverage during an election campaign in *United Communist Party of Russia v. Russia*, which the Court acknowledges as falling within the scope of the right to vote. Here again, the Court does start by emphasizing the positive duty of pluralism in line with its overarching account of "democratic society":

> "In the field of audio-visual broadcasting the Court has stated that where a State decide[s] to create a public broadcasting system. . .., domestic law and practice must guarantee that the system provides a pluralistic service. In the context of elections, the duty of the State to adopt some positive measures to secure pluralism of views has also been recognised by the Court."[104]

[102] Scoppola v. Italy (No. 3), App. No. 126/05, 22 May 2012, ¶ 101.
[103] Bowman v. United Kingdom, App. No. 24839/94, Feb. 19, 1998, ¶ 43.
[104] United Communist Party of Russia v. Russia, App. No. 29400/05, June 19, 2012, ¶ 125.

Yet, in enouncing and justifying its methodological principles for the assessment of the case, the Court is keen to immediately recall its subsidiary role, which here implies not revisiting the facts of the case and requiring that the burden of proof falls upon the applicant:

> The Court emphasizes once again that it has only a subsidiary role in such matters and it is not its task to substitute itself for the domestic courts and conduct a fresh assessment of evidence. The applicants failed to convince the Supreme Court that the opposition was a victim to a political manipulation. Having reviewed the materials submitted by the parties the Court does not have sufficient evidence to discard the Supreme Court's conclusion in this part. It follows that the applicants' allegations of abuse by the Government were not sufficiently proven.[105]

The Court's timidity cuts cross various areas of scrutiny. First, whether the applicants' claims were examined by an independent domestic body in charge of receiving electoral appeals, thereby emphasizing the procedural obligations correlative to the right:

> It is sufficient to note that the applicants' complaint about unequal media coverage of the elections was examined by an independent body in a procedure which afforded the basic procedural guarantees, and that a reasoned judgment was given. The applicants did not explain what other remedies or legal tools could possibly be more effective in the situation complained of. The Court concludes that the system of electoral appeals put in place in the present case was sufficient to comply with the State's positive obligation of a procedural character.[106]

Importantly, the Court does not scrutinize the independence of that particular body—it simply presumes that it is. Second, and relatedly, the Court's substantive and conclusive assessment is notoriously timid in that it essentially examines minimal and unspecified criteria of equal media coverage between all the candidates to the election before re-emphasizing the wide margin of appreciation that state parties generally benefit from:

> The Court considers that the respondent State took certain steps to guarantee some visibility of opposition parties and candidates on Russian TV and secure editorial independence and neutrality of the media. Probably, these arrangements did not secure de facto equality of all competing political forces in terms of their presence on TV screens. In the present case, however, when assessed in the light of the specific circumstances of the 2003 elections as they have been presented to the Court, and regard being had to the margin of appreciation enjoyed by the States under Article 3 of Protocol No. 1, it cannot be considered established that the State failed to meet its positive obligations in this area to such an extent that it amounted to a violation of that provision.[107]

It is important to see that the Court's use of the margin of appreciation is operating as a justificatory device without much content to it. As the literature on this topic has long shown, the Court's reasoning presupposes that it has a metric for determining how wide the margin of appreciation is.[108] Clearly, however, the wording used ("some

[105] *Id.* ¶ 122.
[106] *Id.* ¶ 124.
[107] *Id.*
[108] George Letsas, *Two Concepts of the Margin of Appreciation*, 26 Oxford J. Legal Stud. 705 (2007).

visibility," "probably," etc.) exemplifies the unsubstantiated account of the margin, which seems to operate ad hoc and almost retrospectively.

One can draw a number of implications from this overview of the Court's scope review of article 3 of Protocol 1. First, deference can amount to simply validating the outcome of domestic judicial or supervisory processes pertaining to electoral systems. The Court takes them to be valid following a very superficial scrutiny. We should note that the Court invokes jurisdictional limitations that it almost never refers to when it scrutinizes violations of article 10 or 11. Second, the substantive principles employed leave (very) limited room for the role pluralism in informing the right to vote and the right to stand for elections. The example of media coverage during election campaigns is very telling as the Court examines it in light of its alleged complementary between freedom of expression and the right to free elections through the thick notion of "democratic society" in which pluralism prominently stands. Yet, under article 3 of Protocol 1, one can observe four different but interrelated types of restraint that apply to: (i) the procedural nature of its positive obligations and the poor content of substantive obligations; (ii) the *epistemic* deference to domestic authorities as "better placed"; (iii) the method of European consensus; and finally, but not surprisingly, (iv) the margin of appreciation. Surely, the Court may still find violations of the right but mostly on proportionality stricto sensu grounds. The potential result of this multifaceted restraint is that the structuring and normative role of pluralism and deliberation is severely neutralized, which may further enable the populist repression of it.

4. Conclusion: From populism to pluralism, to the ECtHR and back

In Section 3, I showed how pluralism and deliberation embed into the reasoning of the Court. I suggested that the concept is crucial to the Court's interpretive toolkit under articles 10–11 as the building block of its driving notion of its normatively loaded "democratic society." On this principled count, the Court does reinforce a deliberative notion of democratic legitimacy that has remained the normative grid of this article. I also indicated the implications of the notion's prevalence for the Court's allocation of the margin of appreciation. This framework, however, almost completely unravels under article 3 of Protocol 1 where the normative and interpretive function of pluralism is almost lost. Correlatively, the margin of appreciation is significantly wider. I now return to the populist distortion of the notion of democracy I analyzed in Section 2 and delineate the contours of my argument.

Theoretically and methodologically, the core argument of this article was that pluralism and deliberation offer one (and only one) fruitful point of connection between populism as an idea, on the one hand, and the jurisdiction and practice of the Court, on the other hand. To recall our conclusion in Section 2, the populist ontology assumes the antagonistic "people"—both exclusive/naturalist and inclusive/aggregative—to be immune to the requirement of mediation and deliberation. Only democratic theory and in particular the deliberative approach can explain the extent to

which pluralism and deliberation matter to democratic legitimacy. In denying the role of deliberation in mediating and adjudicating pluralism and disagreement, populism violates the fundamental demand of democratic equality. While the democratic process (qua procedure) cannot satisfy all its subjects, the democratic process (qua deliberation) can attenuate the costs of the democratic verdict for minorities.[109] Indeed, given the fact of pluralism and disagreement, deliberation aims at offering reasons that are acceptable to all and, potentially, that help consolidate the formation of a democratic community of "people."

In light of this analysis, one can establish that the Court is well equipped interpretively to address the populist distortion of democracy through the thick notion of "democratic society" generally and the role that pluralism plays in it in particular. Yet, it depends on how consistent and thorough its scrutiny in practice is. We have seen that the Court pays utmost attention to protecting and actively promoting pluralism (including through positive obligations) at the level of public debate (through articles 10–11). This established interpretive framework can tackle the populist distortion of the "people." By firmly attending to the views of minorities, the Court's contribution may contribute to the justifiability of public norms[110] and the formation of a deliberative community. Using the seminal notion of Hannah Arendt, the Court hence "externally" protects the "right to have rights" as membership within the community of people under the authority of the state.[111] As we have seen, this right extends beyond the right to have one's views heard and taken into account but in some case requires states actively promoting practices of justification (through positive obligations). In that sense, I submit that the Court's toolkit can and should curtail the discriminatory and antidemocratic project of populism while still acknowledging the legitimacy of its expression and representation in public debate. One tool in that kit concerns the conditions for granting the margin of appreciation. Føllesdal, for instance, has suggested that when the decisions taken by state authorities are duly democratic (and apply proportionality requirements), these authorities may benefit from a wider margin of appreciation. He observes that "the margin of appreciation is likewise not granted for rights central to the functioning of democratic mechanisms. The ECtHR, then, only grants a margin when the state's decisions reflect democratic deliberation."[112] Yet, our analysis nuances this approach considerably—evidence indicates the Court does not enhance the conditions for equal political participation and deliberation across all the stages of the democratic process. Similarly, the emerging literature on the so-called "turn to procedural review"[113] is another area of investigation that our analysis may contribute to inform. Procedural review typically occurs when the Court, rather than reviewing the (substantive) merits of the case fully via

[109] Thomas Christiano, The Constitution of Equality: Democratic Authority and Its Limits 1 (2008).

[110] Rainer Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, 120 Ethics 711 (2010).

[111] Hannah Arendt, The Origins of Totalitarianism 1 (1966).

[112] *See* Føllesdal, *supra* note 74, at 159.

[113] Janneke Gerards, *Procedural Review by the ECtHR: A Typology*, *in* Procedural Review in European Fundamental Rights Cases 127 (Eva Brems & Janneke Gerards eds., 2017).

the proportionality assessment, focuses on the quality of the domestic procedure by which the (potentially infringing) law under consideration was adopted and applied. This then informs the merits stage of evaluation.[114] Here again, reading procedural obligations into Convention rights will only be consistent if, correlatively, the Court also reads populist distortions into them.

Indeed, the crucial role that pluralism and deliberation ought to play does not only apply to the informal sphere of democratic debate. The institutions of democracy bear the same corresponding duty of upholding pluralism and deliberation based on their representative and/or distributive functions. Section 2 revealed that populist governments extend to the repression of pluralism to supervisory and regulatory bodies—and the article only focused on the media and in the electoral domains. While this article cannot render justice to all the areas of discretionary authority in which populists (could) insidiously exercise their control, we have seen through our review of article 3 of Protocol 1 that the Court is not inclined to review what domestic authorities do in electoral matters, for example. As far as the right to free elections is concerned, the Court does define procedural obligations, such as the access to an appeal system, but does not scrutinize the substance of domestic decisions. That is a significant area of concern, precisely because populists are particularly good at maneuvering within, and not against, existing procedures. Pluralism and deliberation should also inform the composition of an electoral commission or a media supervisory body or the decisions that it takes, for example. Ensuring that domestic authorities take some positive steps (without establishing any particular threshold) is potentially giving way to the populist manipulations of the state apparatuses.

It is crucial to see that this argument is informed both by a rigorous analysis of the populist distortion as well as by the Court's own account of a "democratic society." That is, the extension of the Court's interpretive jurisdiction is not called for only in light of what populists do to democratic structures and their ethos. The extension I am proposing is already implied in the very principles that the Court invokes under articles 10 and 11. These principles also form part of the definition of article 1 of Protocol 3, as we have seen, but they do not translate into substantive obligations that could detect the populists' insidious patterns. An argument is therefore needed to explain why the Court should not adopt a coherent approach to the democratic rights as a matter of principle, but even more in the face of the populist wave that is growing across CoE states. The usual objection is the limits of the Court's jurisdiction, which usually dwell on its subsidiary role, as we have seen. Yet, as we have also seen, subsidiarity is itself predicated on the assumption that states are democratic and sovereign. In that regard, the Court has itself explained that the state possesses "direct democratic legitimation."[115] Subsidiarity, on this account, cannot play the justificatory role it usually plays precisely because populists may profoundly but subtly pervert democratic

[114] Eva Brems, *Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights*, *in* Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights 137 (Eva Brems & Janneke Gerards eds., 2014).

[115] S.A.S v. France, App. No. 43835/11, July 1, 2014, ¶ 129.

structures in the first place. As a result, extending the Court's scrutiny over the populist distortions and the need for elaborating on the substantive obligations correlative to the right to free and fair elections, for instance, is also grounded in the structural features of the system of European human rights protection. The more specific translation of this argument is that the Court should more systematically review the aim that the respondent state party is invoking to justify a restriction and evaluate that aim against its account of a "democratic society." That way, it could check whether the actual aim of the state interference is to curtail the pluralism that is constitutive of that society. In other words, the Court should only be prepared to surgically scrutinize how populist governments hollow democracy of its substance with only the help of a coherently applied interpretive framework that is already operative under articles 10–11 ECHR.