

SPECIAL ISSUE ARTICLE

(Republican) democracy and the European Court of Human Rights

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Abstract

The relationship between the European Court of Human Rights and the ideal of democracy is a complex one: Convention states tend to understand it in terms of the supremacy of national democratic arrangements, whereas the Court has conceived of the relationship in more substantive procedural terms involving Convention rights as interpreted and promoted by the Court. In recent political debates the ideal of democracy has been instrumentalized to attack the authority of the Court based on the former understanding, such that its contribution to democratic ideals has become muted. Against this background, this article seeks to rebalance political debates about the relationship between democracy and the ECtHR by clarifying ways in which we can understand the Court as playing a democratic role based on the republican democracy of Phillip Pettit. It highlights elements of Pettit's republican democracy relevant to the Court and analyses features of the Court and its practice which can be understood as expressing those elements. In doing so it contributes to ongoing debates about the relationship between democracy and the Court with a view to protecting and promoting the ideal of democracy in an era in which it is increasingly under threat.

Keywords: democracy; European Court of Human Rights; judicial review; legitimacy; republicanism

Introduction: The democratic ambivalence of the European Court of Human Rights

[T]his House notes the ruling of the European Court of Human Rights in *Hirst v the United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for *democratically-elected lawmakers*; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand.

Thus opened a debate on the issue of prisoner voting in the UK in the lower house of the UK legislature on the 10th of February 2011. It was one step in a well-known and increasingly bitter argument between the Strasbourg Court and national UK institutions provoked by the Court's ruling in 2005 that the UK legislature's undifferentiated ban on voting for most prisoners regardless of the offence committed or the length of the

sentence was a breach of the right to vote protected by Article 3 of the 1st Protocol (P1) of the Convention.¹ The judgement also provoked strong reactions in other quarters of the British establishment, with then UK Prime Minister David Cameron declaring that the matter of prisoner voting was for the '[UK] *Parliament* to decide, not a *foreign court*'²; members of a Parliamentary Committee on the matter arguing that in the *Hirst* decision the ECtHR had 'exceeded its mandate in seeking to dictate to a *democratically elected legislature* the detailed arrangements regarding prisoner voting'³ noting the need for 'further reform of the Court and in particular of its relationship to *democratically elected national legislatures*'⁴; and individual politicians and even senior members of the judiciary arguing that the UK should 'stand firm ... to prevent future incursions into the *sovereignty of our democracy* [sic]'⁵ or calling for the possibility of a '*democratic override*' of decisions from the ECtHR,⁶ based on the fact that such decisions coming from a 'foreign court' suffered from a '*democratic deficit*'.⁷

This is but one discrete example of a broader trend over recent decades, where prominent actors of Convention Signatory states across Europe have attacked the Court for undermining national democracy.⁸ As can be clearly seen in the prisoner voting example, the common theme in these attacks is that the decisions of the ECtHR, an international court, undermines national democracy by challenging law and policy produced by national democratically representative bodies upheld by national courts, something which has only intensified even more recently in respect of the Court's decisions impacting upon national immigration policy.⁹

¹*Hirst v UK (No 2)* [2005] ECHR (GC) 4025/01. *Emphasis added here and in the ensuing quotations.* The saga only ended in December 2018 when the Committee of Ministers of the Council of Europe closed its supervision of the UK's implementation of the judgement on foot of an Action Plan produced by the UK government. Resolution CM/ResDH(2018)467, adopted by the Committee of Ministers on 6 December 2018 at the 1331st meeting of the Ministers' Deputies. For a comprehensive overview of the issue, from which many of these references were drawn, see Ed Bates, 'Principled Criticism and a Warning from the "UK" to the ECtHR?' in Martin Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer, 2019). See also E Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *Human Rights Law Review* 503. The Court has itself recently found that a case of disenfranchisement based on the same legislative provision at issue in *Hirst* – s. 3 of the Representation of the People Act 1983 – was compatible with the Convention. See *Hora v. UK*, App. No. 1048/20, Judgment of 23 September 2025.

²HC Deb, vol. 517, col 921 (3 Nov 2010). *Emphasis Added.*

³Report of the Joint Select Committee on the Draft Voting Eligibility (Prisoners) Bill (18 December 2013), available at www.parliament.uk/business/committees/committees-a-z/joint-select/draft-voting-eligibility-prisoners-bill/, para. 227.

⁴*Ibid.*, Para. 230.

⁵See Nick Gibb MP: With Respect, I Disagree with My Committee. Prisoners Should Not have the Vote (14 March 2025), available at www.conservativehome.com/.

⁶Jack Straw, *Aspects of Law Reform: An Insider's Perspective* (Cambridge University Press, 2013) 44.

⁷This latter opinion coming from a senior UK judge. Lord Judge (former Lord Chief Justice), 'Constitutional Change - Unfinished Business', 3 December 2013, cited in Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (n 1), 525.

⁸For overviews of the various criticisms that have been launched against the Court from various jurisdictions in the past decade or so, see Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia, 2016); Spyridon Flogaitis, Tom Zwart and Julie Fraser, *The European Court of Human Rights and Its Discontents: Turning Criticism Into Strength* (Edward Elgar Publishing, 2013).

⁹See, for example, the joint letter of 22 May 2025 from several Council of Europe heads of government led by Denmark and Italy calling for an 'open minded conversation' on the role of the ECHR in national

There is, of course, an irony in the UK's reaction to the Court's decision on prisoner voting: whereas the decision was decried as a threat to democracy, the substance of the ECtHR's decision itself was to extend the franchise to hitherto excluded members of the society. On its face, then, the decision could be interpreted as emphatically *promoting* rather than *undermining* national democracy. Indeed, democracy promotion is something the Court itself has seen as part of its mission since its foundation. The fact that, in the words of one former president of the Court, '[t]he democratic ideal permeates the Convention in every respect – its historic origins, its spirit and ... the case law of the court'¹⁰ is something that has dominated the self-understanding of the Court since its inception.¹¹ It was there in the drafting of the Convention itself, with delegates arguing that the Convention was necessary to 'ensure that the States of the Members of the Council of Europe are democratic, and remain democratic'¹²; that the Convention would provide a 'code of law for the democracies'¹³; and that the rights and freedoms protected by the Convention were those considered 'essential for a democratic way of life'.¹⁴ It is reflected in recital 5 of the preamble to the Convention, which states that the '*best*' way to protect the Convention's 'fundamental freedoms' (which, the recital maintains, are the 'foundation of justice and peace in the world') is to maintain 'an *effective political democracy*'.¹⁵ Furthermore, many of the rights protected by the Convention have, in one way or another, been identified by the Court as having a close association with the value of democracy, chiefly among them the 'political' rights protected in Articles 8–11 and the right to vote and stand for election protected by Article 3 of the first protocol of the Convention, allowing the Court to conclude that '[d]emocracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it'.¹⁶

immigration policy: <https://www.coe.int/en/web/portal/-/alain-berset-on-the-joint-letter-challenging-the-european-court-of-human-rights>. On this role more generally, see Başak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (Oxford University Press, 2021).

¹⁰Jean-Paul Costa, *The Links Between Democracy and Human Rights Under the Case Law of the European Court of Human Rights* (Council of Europe, 2008), available at https://www.echr.coe.int/Documents/Speech_20080605_Costa_Helsinki_ENG.pdf.

¹¹See S Marks, 'The European Convention on Human Rights and Its "Democratic Society"' (1996) 66 *British Yearbook of International Law* 209; Alastair Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy' (1999) *Public Law* 703; Conor Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal Special Issue: On the Occasion of the 50th Anniversary of the European Convention on Human Rights' (2000) 51 *Northern Ireland Legal Quarterly* 381; Alain Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of "Democratic Society"' (2016) 5 *Global Constitutionalism* 16; Rory O'Connell, *Law, Democracy and the European Court of Human Rights* (Cambridge University Press, 2020).

¹²Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* (Martinus Nijhoff, 1949) Vol. 2 p. 60. See generally Marks (n 26).

¹³Council of Europe (n 27) Vol. 2 p. 4.

¹⁴*ibid.*, vol. 1 pp. 43–4.

¹⁵Council of Europe, 'Convention for the Protection of Human Rights and Fundamental Freedoms', available at https://www.echr.coe.int/documents/d/echr/Convention_ENG. Recital 5. *Emphasis Added*.

¹⁶*United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I, para. 45. Article 10 ECHR, protecting the freedom of expression, and Article 3 P1, protecting the right to vote and stand for election, have arguably provided the most fertile areas for the Court to develop the link between democracy and the rights protected in the Convention, although, as Marks notes, the Court has also drawn links between democracy and the right to education, the right to a fair trial

Alongside the democracy-enhancing features of particular rights contained in the Convention, the Court has furthermore emphasized the relationship between the Convention and democracy in its interpretation of the restrictions in the ‘political rights’ contained in Articles 8–11. Each of these articles in their second-paragraph restrictions explicitly envisages a particular conception of ‘democratic society’ which can make a particular restriction on, say, the freedom of expression, ‘necessary’ for the purposes of the Convention.¹⁷

The role of the ECtHR in democracy promotion within its signatory states, therefore, is ambivalent, with both sides in the contemporary political debate – national officials and the Court – claiming to uphold the value of democracy.¹⁸ On one side of the debate, that promoted by national actors, notwithstanding divergences between different constitutional systems, the basic idea of democracy at stake is a relatively intuitive one which almost seems to defy justification: democracy means whatever national self-styled democratic constitutional arrangements prevail in the national constitutional settlement. This involves, paradigmatically, and perhaps most obviously, representative assemblies (potentially supported by national constitutional courts), which make the laws that apply within their jurisdiction in the pursuit of the ideal of self-legislation.¹⁹ While the idea of a representative law-making assembly intuitively seems like a *sine qua non* of any arrangement which can be plausibly considered democratic, this, rather simple, understanding of democracy struggles with the idea of a role for an international human rights court in reviewing national democratically produced laws. Indeed, as we have seen, this understanding of democracy leads to a defensiveness with regard to the rulings of an international human rights court, where democracy functions as a sort of shield against perceived overreach in the rulings of the Court.²⁰ On the other side of the debate, of

and the right to liberty. Marks (n 26), 213–4. With regard to the former, the Court has found that it ‘constitutes one of the essential foundations’ of a democratic society; one of the ‘basic conditions of its progress’ (*Handyside v UK* [1976] ECHR 5493/72. Para. 49); that it protects an essential feature of its democracy in the form of ‘freedom of political debate’ (*Lingens v Austria* [1985] ECHR 9815/82, para. 42) and envisages a free press and media as a democratic ‘public watchdog’ (*Barthold v Germany* [1985] ECHR 8734/79, para. 58). With regard to Article 3 P1 of the Convention, the Court has read into the general commitment by the high contracting parties to ‘hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature’ as protecting both a right to vote and a right to stand in elections (*Mathieu-Mohin and Clarfayt v Belgium* [1987] ECHR 9267/81). In doing so, the Court has emphasized the link between this article and Recital 5 of the Convention upholding the importance of democracy to the Convention system and found that the unusual phrasing of the article – couched in terms of an undertaking by states rather than a subjective right – as reflecting a desire on the part of the states’ parties to the Convention to ‘give greater solemnity’ to their democratic commitments (*ibid.*, para 50 *emphasis added*). See further Zysset (n 26).

¹⁷ Articles 8, 9, 10 and 11 all make a reference to restrictions which are ‘necessary in a democratic society’ as the basis of the proportionality test.

¹⁸ At least with respect to the UK, Bates sees the disputes about the role of the Court emerging from different conceptions of constitutionalism – a ‘political constitutionalism’ which captures the traditional view of the UK constitution and a ‘legal constitutionalism’ which is more receptive to human rights adjudication by Courts. Bates, ‘Principled Criticism and a Warning from the “UK” to the ECtHR?’ (n 1), 201.

¹⁹ Jürgen Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles?’ (2001) 29 *Political Theory* 766.

²⁰ Something which Buchanan and Powell describe in terms of ‘incompatibilist concerns’ between national democracy and international law. See Allen Buchanan and Russell Powell, ‘Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?’ (2008) 16 *The Journal of Political Philosophy* 326–328.

which the ECHR's rhetoric around democracy is representative, a more substantive conception of democracy is in question.²¹ On this view, democracy requires, alongside representative law-making institutions, respect for certain substantive features of political processes, including deliberation,²² pluralism,²³ tolerance and broadmindedness,²⁴ and dialogue and a spirit of compromise,²⁵ all supervised by an international human rights court such that national democratic decision-making and rights protection go 'hand in hand with European supervision'.²⁶

Ambivalence is not, by itself, a bad thing. Bauman famously defended ambivalence,²⁷ and in a complex constitutional architecture such as that involving the ECHR and national constitutional systems, a measure of ambivalence can 'grease the wheels' of the functioning of the Convention. However, the ambivalence prompted by the democratic role of the Court in the past two decades has arguably had significant negative repercussions for the Court. The tenor of many of the political disagreements with the Court's decisions have strayed well beyond legitimate, good faith, critique of the Court when it makes mistakes or potentially overreaches, marshalling the idea of democracy into a weapon to attack the very authority of the Court and its role in interpreting and adjudicating upon the rights contained in the Convention in a context of political polarization and increasing extremism in national democracies more generally.²⁸ This can have implications not only for the protection of rights in its signatory states, quite obviously, but also, potentially, for national democracy too.

This imbalance in political debates about the role of the Court in promoting democracy within its signatory states is not entirely attributable to national political actors; the Court itself has often struggled to provide a substantive justification for its role in democracy promotion beyond simple, and perhaps simplistic, rhetoric.²⁹ The aim of the current contribution, then, is to contribute to academic scholarship aimed at 'raising the level' of political debates involving the complex question of democracy within the

²¹Zysset (n 26).

²²*Hirst v. UK (No. 2)* (n 1), para. 79. See also O'Connell (n 26), Chapter 7.

²³*Federación Nacionalista Canaria v Spain* [2001] ECHR 56618/00; *Informationsverein Lentia and Others v Austria* [1993] ECHR 3914/88; 15041/89; 15717/89; 15779/89; 17207/90.

²⁴*Handyside v. UK* (n 31), para. 49.

²⁵*Leyla Şahin v Turkey* [2005] ECHR (GC) 44774/98, para. 108.

²⁶*Hertel v Switzerland* [1998] ECHR 59/1997/843/1049, para. 46. A position which Buchanan and Powell identify as 'cosmopolitan compatible', 328.

²⁷Particularly as against the totalizing logics of modernity. See Z. Bauman, *Modernity and Ambivalence* (Cornell UP, 1993).

²⁸The volume of criticism prompted a former President of the Court, a former registrar of the Court and the General Secretary of the Council of Europe to raise concerns about the rising number of political attacks on the Court. Guido Raimondi, 'Speech of Mr Guido Raimondi, President of the European Court of Human Rights', Nijmegen (18 November 2016), available at https://www.echr.coe.int/Documents/Speech_20161118_Raimondi_Nijmegen_ENG.pdf. Fribergh, 'The European Convention and Court of Human Rights: Our Shared Treasures' (2015) 35 *Human Rights Law Journal* 313–317, at 314. See also Council of Europe's Secretary-General, Thorbjørn Jagland, 'ECHR Judicial Seminar 2018 – The Authority of the Judiciary' (Strasbourg, 26 January 2018), available at <https://www.coe.int/en/web/secretary-general/> (institutions like the Court are susceptible to 'simplistic and misleading arguments', 'precisely because international institutions operate outside national control').

²⁹Buchanan and Powell note in a similar vein that cosmopolitans 'unreflectively assume' that human rights law and national democracy are always 'in harmony'. Buchanan and Powell (n 35), 328.

Convention system,³⁰ based on the republican democratic theory of Phillip Pettit.³¹ It does this by clarifying particular reasons for a democratic role for the Court which, as we have noted, have been relatively absent from the contemporary political debate on the Court.³²

As we will see, Pettit's republican account of democracy provides a particularly useful way of understanding the ways in which the ECtHR can contribute to the promotion of democracy in that it envisages a democratic role for non-representative institutions such as courts and shows how they can contribute to strengthening the practice of democracy in two significant ways: they can contribute to 'testing' the decisions of electoral institutions such as legislatures to ensure popular *influence* on government; and they can also

³⁰In his well-known account of 'essentially contested concepts' Gallie argued that 'one very desirable' consequence of recognizing a concept as essentially contested was an expected and marked 'raising of the level of quality of arguments in the disputes of the contested parties'. He also argued that democracy was one such concept. WB Gallie, 'Essentially Contested Concepts' (1955) 56 *Proceedings of the Aristotelian Society* 167–193.

³¹As noted above, Bellamy and Zysset have made similar contributions to this end, with Bellamy, like the current contribution, also co-opting republican theory. Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25 *European Journal of International Law* 1019; Richard Bellamy, 'The Limits of Lord Sumption: Limited Legal Constitutionalism and the Political Form of the ECHR' in Richard Ekins, Paul Yowell and NW Barber (eds), *Lord Sumption and the Limits of the Law* (Bloomsbury Publishing, 2016); Zysset (n 26). With regard to Bellamy's contribution in particular, whereas the current contribution shares Bellamy's aims in outlining reasons for the democratic compatibility of the ECHR system to enrich the debate on the role of the Court in national democracy and is broadly in sympathy with Bellamy's argument in the sense that they both envisage a 'contestatory channel at the international level' (2014: 1033), Bellamy's conclusions see republican democracy as justifying an 'international political constitution' where democracy is primarily expressed in national popular and state sovereignty and the Convention system therefore remains accountable to, and under the control of, its sovereign democratic state signatories, whereas the current contribution does not limit its understanding of republican democracy to its potential expression in national institutions and state sovereignty. Rather, it starts from the bottom up by examining the basic elements of a republican account of democracy, examining the ways in which the structure and practices of ECtHR fit into that scheme as another democracy-enhancing institution according to what we might consider a more cosmopolitan ethos. Buchanan and Powell (n 35). See also M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 *Indiana Journal of Global Legal Studies* 605; James Tully and others, 'Introducing Global Integral Constitutionalism' (2016) 5 *Global Constitutionalism* 1. More generally, Bellamy relies on the idea of 'political constitutionalism' to express the relationship between democracy and the ECHR system in structural terms. However, the extent to which Bellamy's approach is compatible with political constitutionalism can be questioned based on his emphasis on strong judicial review, the amendability of the Convention and its political enforcement. For discussion, see C. Mac Amhlaigh, 'Political Constitutionalism and the ECHR: An Alternative View' (forthcoming). It is worth also noting that Pettit himself has made contributions to thinking about the role of international courts in enhancing the democratic legitimacy of states upon which this contribution builds. See Philip Pettit, 'Democracy, National and International' (2006) 89 *The Monist* 301, where he notes that 'many [...] international bodies [which includes courts] should be welcomed by democrats, on the grounds that they enhance contestatory democracy on the national scene' *ibid.*, 316. He also notes that 'the fact that there is a court to which citizens can appeal at this level, and a court that national governments have to keep an eye on, surely makes for an expansion of democratic space: an expansion in the possibilities of contestation open to ordinary people in their dealings with government' (320–321). See also Phillip Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010).

³²In this regard, Buchanan and Powell have lamented the quality of political debates on the compatibility of international human rights law with national democracy. See Buchanan and Powell (n 35).

help ensure the popular *direction* of government by contributing to the development and maintenance of fundamental norms of public acceptability expressing this popular direction in tandem with national institutions, including national courts.³³ The paper goes on to examine the role of the ECtHR as a potentially important institution in promoting and upholding this republican account of democracy in respect of state parties to the ECHR. It emphasizes two features of the Court's practice in this regard: its robust independence from domestic electoral institutions when compared with national courts helping ensure the popular influence of government and the role of its interpretative doctrines – particularly its evolutionary approach to the interpretation of Convention rights – in shoring up the norms which guide government in a popular direction.

The paper will proceed as follows: Part II reviews and highlights the key elements of Pettit's theory of republican democracy relevant to a democratic role for the ECtHR; Part III draws on comparative constitutional scholarship to provide an analysis of elements of the organization and work of the ECtHR in the light of Pettit's republican democracy; and Part IV concludes.

Pettit's republican democracy

As we can see from the debates involving the ECtHR, the value of democracy is a contested one. In Gallie's exploration of the idea of an 'essentially contested concept', he offered the concept of democracy as an essentially contested concept *par excellence*.³⁴ We have, therefore, in democratic theory, a wide variety of definitions and conceptions to choose from. However, in thinking about the democratic ambivalence surrounding the ECtHR and exploring ways of further clarifying the role of this international human rights court in democracy promotion, we are not concerned with an account of democracy in the abstract, necessarily, but rather with a conception of democracy which can function and make sense under the current political and institutional arrangements in our area of interest: Europe's composite system of rights protection and democracy promotion made up of national institutions as well as the ECHR. We are, in Pettit's words, therefore, interested in 'realistic' rather than 'other-worldly' theories of democracy: ones that can 'inform politically serious contemporary debate'³⁵ such as those surrounding the role of the ECtHR in the national democracies of its signatory states. The focus of this particular democratic debate, then, is on *institutions*: which institutions – legislatures, courts, international courts – can claim to have a legitimate role in promoting and shaping national democracy and which cannot.

What makes Pettit's republican account of democracy particularly suited to our task, then, is its *institutional* focus right down to the key value of his account – his republican conception of freedom. In particular, three dimensions of Pettit's account are important

³³Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012), Chapters 4 and 5. For a similar argument relying on Pettit's work to support the general practice of judicial review in domestic constitutional systems, see Tom Hickey, 'The Republican Core of the Case for Judicial Review' (2019) 17 *International Journal of Constitutional Law* 288.

³⁴Along with 'art' and 'a Christian life'. Gallie (n 46).

³⁵Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (n 49), 181. He does note that his institutional prescriptions are suggestions rather than a universal blueprint. What matters for Pettit is less the specific model than a commitment to the theory which allows for some experimentation in how, precisely, the theory can be institutionalized. Here, we offer an interpretation of his suggestions in the model of the Convention system.

for this purpose: his definition of republican freedom, his account of the control necessary for this freedom and his institutional prescriptions of how that control and therefore freedom can be achieved. Whereas these elements of Pettit's work have received considerable attention in the literature,³⁶ it is worth dwelling on them momentarily in order to help clarify the ECHR's potential democratic credentials.

Republican freedom

Pettit's institutional focus goes all the way down in his account, beginning with the very basic value which justifies democratic governance: freedom. Freedom, on Pettit's republican account, is not the negative freedom associated with classic liberal understandings of the idea such as those associated with Thomas Hobbes or Isaiah Berlin, where freedom is defined as the absence of 'hinderance' or 'non-interference'.³⁷ Drawing on the classical republican tradition, Pettit argues that freedom involves the idea of non-domination. Domination occurs, for Pettit, where one agent has a certain power over another 'in particular a power of interference on an arbitrary basis'.³⁸ Thus, on the republican account of freedom as non-domination, even if a slave-owner, colonial metropole or political authority is generally well disposed to a slave, colony or subject, treats them well and, for much of the time, does not interfere with their choices, the latter are perpetually susceptible to their choices being interfered with by the former on terms which they cannot control. Freedom, on this view therefore, involves a type of 'structural'³⁹ independence of agents where law and institutions have a particularly important role.⁴⁰

In the context of political authority, this republican account seeks to establish the types of institutions and inter-institutional relationships necessary to preserve this ideal of freedom as non-domination. Here, the issue of domination relates to how one can be subject to political authority, including to a decision which they do not endorse and yet still somehow avoid being dominated: that is, avoid interference on an arbitrary basis. Pettit squares this circle through the idea of *control*. If domination on the republican account is *uncontrolled* interference, including by a political authority, where the interference by the political authority is *controlled* by the political subject, then domination does not occur. This is the key ingredient of Pettit's republican account of democracy.⁴¹

³⁶See, for example, 'Symposium on Philip Pettit, On The People's Terms: A Republican Theory and Model of Democracy' (2015) 18 *Critical Review of International Social and Political Philosophy* 642; 'Review Symposium: On the People's Terms: A Republican Theory and Model of Democracy' (2016) 44 *Political Theory* 669. See also Hickey (n 49).

³⁷Hobbes *Leviathan*, 21.2. 'a free man is he that in those things which by this strength and wit he is able to do is not hindered to do what he has a will to do'. One is free to the 'degree to which no human being interferes with my activity'. Isaiah Berlin, *Four Essays on Liberty* (OUP, 1969) 19.

³⁸Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997) 52.

³⁹Frank Lovett, 'Republicanism' (2018) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/sum2018/entries/republicanism>. *Emphasis Added*.

⁴⁰Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (n 49), 221. As the examples of domination suggest, this conception of freedom is not limited to the freedom of citizens subject to state authorities. It can operate in a wide variety of social contexts. See, for example, John Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republic Separation of Powers' (1997) 47 *University of Toronto Law Journal* 305.

⁴¹The idea of controlled interference provides us with the core element for a republican theory of political legitimacy. It suggests that if the people governed by a state control the interference practised by government – if they control the laws imposed, the policies pursued, the taxes levied – then they may not suffer domination

Control as influence and control as direction

Of particular relevance to the institutional prescriptions necessary to preserve republican freedom, Pettit considers the issue of the subjection of political power to popular *influence* and popular *direction* as central to securing control on this republican understanding.⁴²

With regard to the question of influence, control must, for Pettit, be ‘individualized appropriately’ in the sense that everyone subject to the authority is given an ‘equal share’⁴³ in the control of the government. Such individualized control must also be ‘unconditioned’ in character in the sense that it is not granted as an indulgence or on the whim of another.⁴⁴ Furthermore, equally shared influence requires equal *access* to the system of popular influence rather than equal *actual* influence. What is required is ‘an opportunity for participation in that system that is available with equal ease to each citizen’.⁴⁵

With regard to the question of the *direction* dimension of control, he argues that a non-dominating political authority must achieve a result in the form of, say, legislation that ‘each is ready to accept; that each is disposed to find *acceptable*’⁴⁶ at least to those ‘who are willing to live on equal terms with others’.⁴⁷ It is in these twin requirements of *access* and *acceptability*, of popular *influence* and popular *direction*, that the key *institutional* prescriptions of Pettit’s account emerge.

Mechanisms of popular influence

Here, Pettit argues that the mechanisms through which popular control is retained over government are varied. A clear prerequisite for achieving the republican goals of influence is electoral institutions such as democratically elected representative legislatures.⁴⁸ However, while ‘essential in practice’, Pettit argues they ‘do not suffice on their own to maintain a suitable system of popular influence’.⁴⁹ This is because a singular institution cannot, by itself, secure the conditions of republican democracy, even where it is an electorally representative one. There must be, Pettit argues, alternative means of engagement by individuals with the system to allow them to *test the laws or proposals produced for compliance* with the value of equal access to influence and the value of equal status.⁵⁰ It is, he argues, required by the individualization of influence.⁵¹ ‘To deny voters the right to invoke the value of equality in critique of a system that is chosen for its promise of delivering equality’, Pettit argues, ‘would be to fail to honour that very value’.⁵² Allowing the testing of a system of egalitarian decision-making to ensure that it actually practises

at the hands of their rulers and may continue to enjoy their freedom in relation to the state. A state that was suitably controlled would be legitimate in the required sense of not exercising domination over its people. It would practise interference, for sure – think about how frustrating laws and taxes can be – but it would only interfere with them on their terms, not at its own will or pleasure.’ Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (n 49), 153.

⁴²ibid.

⁴³ibid., 167.

⁴⁴ibid., 239.

⁴⁵ibid., 169.

⁴⁶ibid., 170.

⁴⁷ibid., 163.

⁴⁸ibid., 208.

⁴⁹ibid., 208.

⁵⁰ibid., 213.

⁵¹ibid., 222.

⁵²ibid., 214.

the equality it preaches requires a ‘recursive procedure’⁵³ which shapes not just the issues the system addresses, but also *the very form of the system itself*.

Can such an alternative institution be another electorally representative assembly such as the upper house in a bicameral legislature? In terms of the types of institutions that can effectively test decision-making procedures and lead the ‘recursive procedure’, to use the self-same decision-making procedure – majority vote in a legislature for example – to remedy any deficiencies in equality would be problematic, Pettit argues. Whereas majority rule in a representative assembly is an important feature of the republican account of democracy, he argues that ‘[t]o canonize majority rule – to give it sacred and unquestionable status – would be to *deny the possibility of recursion* and, inevitably, the possibility of reforming the system itself’.⁵⁴ To overcome this problem, Pettit sees ‘only one realistic possibility’, which is ‘a system of individualized contestation that *parallels* the collective challenge that elections make possible’ in which individuals gain an ‘impartial hearing’.⁵⁵ Pettit endorses the ‘traditional’ republican view that a ‘system of courts and other tribunals in which challenges to laws can be heard and decided’ in order to recognize the ‘constraints of the rule of law and due process that authorities ought to be held to account for breaching’ is a particularly prominent way of ensuring that the ‘channels of consultation and appeal between the public and the legislature’ are opened up.⁵⁶ Such a system, as a key feature of the recursive mechanism to test and ensure the egalitarian credentials of representative legislatures, requires an ‘overtly *impartial* system of adjudication and resolution’.⁵⁷ Such impartiality can only be achieved pursuant to a process of appointment ‘under constraints that give them general credibility; for establishing the *independence of those authorities*, and for providing plaintiffs with the opportunity to launch appeals against the decisions of those authorities themselves’.⁵⁸ This, for Pettit, is part and parcel of a mixed constitution and contestatory citizenship under an unconditioned and robust popular influence on government.

Mechanisms of popular direction

Whereas popular influence is important for Pettit’s republican conception of democracy, it is, by itself, insufficient. To ensure that freedom as non-domination is secured, it is necessary to also ensure that the government follows a popular *direction*.⁵⁹ That is, the government is responsive to the needs of the people *when in power*, and not just at the point of election. The popular direction necessary for legitimate republican government, Pettit argues, equates broadly with the ‘public good’ or the ‘public interest’. That is, the

⁵³*ibid.*, 215. An ‘established term’ that Pettit draws from Benhabib. See Seyla Benhabib, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 79. It connotes an ongoing process of engagement, critique and validation of norms of respect and reciprocal equality.

⁵⁴Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (n 49), 215. *Emphasis Added*.

⁵⁵*ibid.*, 213–4. *Emphasis Added*.

⁵⁶*ibid.*, 216. This is also a key feature of John Hart Ely’s democratic defence of judicial review which Pettit approvingly cites. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). For an exploration of Ely’s defence of judicial review in the ECHR context, see Michaela Hailbronner and Lisa Kujus, ‘Representation Reinforcement in the European Court of Human Rights’ (2025) 14 *Global Constitutionalism* 396. See also Stephen Gardbaum, ‘Comparative Political Process Theory’ (2020) 18 *International Journal of Constitutional Law* 1429.

⁵⁷Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (n 49), 216.

⁵⁸*ibid.*, 216. *Emphasis Added*.

⁵⁹*ibid.*

direction of governing power should aim at the purpose of peaceably living together as equals notwithstanding divergences in private interests and pursuits.⁶⁰

For Pettit, the popular direction of government is best secured through a series of fundamental norms which direct and constrain the actions of government. These norms are, in turn, guided by a 'norm of norms'⁶¹ in the form of the idea of *public acceptability*. Public acceptability, Pettit argues, constitutes a type of public reason in the, perhaps more familiar, Rawlsian sense.⁶² The reasons that are relevant to the popular direction of government, in this vein, are those which all can regard as relevant: those which are acceptable to all. The norms of public acceptability diverge from Rawlsian public reasons, however, in the sense that they do not emerge out of some sort of 'original position'. They develop, rather, through the ordinary practices of political decision-making: that is, in the formulation, deliberation, contestation and adoption of ordinary law and policy.⁶³ Over time, certain norms which have gained widespread acceptance will constitute 'points of reference' that are 'manifestly' relevant to public policy.⁶⁴ This will, in turn, give rise to specific norms of argumentation and deliberation as a 'by-product' of the iterative practice of providing publicly acceptable reasons. These will, over time, Pettit argues, develop into 'society-wide' shared norms.⁶⁵

Furthermore, as we would expect from norms which emerge in the practices of ordinary politics, they are not static and can evolve and change through changes in the membership of the political community as well as through the introduction of new facts or issues that feed into policy choices.⁶⁶ As Pettit argues, such norms:⁶⁷

will never constitute a closed set, fixed once and for all. They will be subject to constant development, as deliberative innovators manage to gain acceptance for novel sorts of argument, perhaps by extending the reach of recognized arguments to new domains, perhaps by coming up with new arguments that gain acceptance by others. Such innovations are likely to be triggered by changes in the dispositions of the existing membership and, of course, by changes of members that occur at any time and across different times. As new norms evolve in this way, others may decay and lose potential, say because they are not acceptable to some members in the changed society.

However, such change will be iterative and incremental and build upon the sediment of previous norms laid down according to the 'norm of norms' of public reason. Whereas the specific content of such norms will vary, some indicative features of such norms will include, Pettit argues, equality of influence, norms emanating from equal respect and norms prescribing freedom in a sphere of personal choice. These norms, moreover, will

⁶⁰ibid., 244.

⁶¹ibid., 256.

⁶²ibid., 254–5. Albeit that Pettit distinguishes his account of public acceptability from Rawlsian public reason. Unlike Rawlsian public reason, Pettit's idea of public acceptability can be context-bound in three senses: they may be acceptable because of the history of the group, as currently configured (as opposed to a hypothetical group under the conditions of the original position) and can be tied to specific policy issues which are not necessarily Rawlsian 'constitutional essentials'. In this respect, Pettit argues that his account of public acceptability is closer to the work of Jürgen Habermas than that of John Rawls (253–4 FN 5).

⁶³ibid., 255.

⁶⁴ibid. 255.

⁶⁵ibid., 261.

⁶⁶ibid., 257.

⁶⁷ibid.

influence institutional arrangements to ensure their respect such as the impartiality of the judiciary and the separation of powers.⁶⁸

As such norms develop over time, and often off-stage, ‘silent as gravity’ when compared with the ‘fast democracy’ of electoral contestation, they operate to impose a ‘slow, long-haul direction on government’.⁶⁹ Significantly, then, these norms have a ‘constraining’ or ‘guiding’ effect on policy-making, which ensures that they are respected in whichever policy proposals are adopted by taking norm-incompatible policies and processes ‘off the table’.⁷⁰ This permits a wide berth for divergence and even adversarial and agonistic struggle on matters of policy. However, the norms of public acceptability constrain the policies and processes available to be adopted as decisions.⁷¹

These norms feature as part of a ‘dual aspect of democracy’ encapsulating the ‘fast democracy’ of legislative electoral politics and the more incremental development of common democratic norms of acceptability. This dual model of democracy relies on a plurality of governing institutions in a ‘mixed constitution’, including courts, which lend coherence to governing practice, including through ensuring conformity to norms of public acceptability.⁷²

This model of popular influence and popular direction, then with its institutional prescriptions and its identification of key fundamental norms, is – Pettit concludes – *thoroughly* democratic. The people, Pettit argues, are:

present or represented at each of the mutually checking centres whose interaction within a mixed constitution generates the public laws and policies under which everyone lives. The river of their influence washes into every corner where decisions are taken in their name, and it has the effect of directing those decisions towards the satisfaction of popular policy-making norms.⁷³

Non-domination and the European Court of Human Rights

If we consider the role of the ECtHR through the lens of Pettit’s framework of republican democracy, we can gain clarity with respect to the ways in which it can be said to contribute to achieving the ideals of republican democracy both structurally and in its practices and doctrines. This, then, helps clarify reasons for thinking about the positive contribution it can make to democracy promotion within its signatory states and therefore enrich and enhance political debates surrounding the role of the Court in national democracy.

Perhaps most obviously, the ECtHR can be understood to feature as part of the more general ‘recursive’ procedure to test the equality of influence of law-making assemblies in Pettit’s account. However, it can also, it is argued, contribute to the development of norms of public acceptability in the ways in which it interprets the rights contained in the Convention.⁷⁴ In order to understand the credentials of the ECtHR as a feature of this

⁶⁸ibid., 263.

⁶⁹ibid., 271.

⁷⁰ibid., 269.

⁷¹ibid., 278.

⁷²ibid., 284–5.

⁷³ibid., 286.

⁷⁴There remains also, of course, the question of the control of the Court itself as part of this recursive mechanism. Who watches the watchdogs? The answer here seems pretty clear – the signatory states of the Convention itself. They remain the most powerful actors in the composite system of European Human rights protection. They individually appoint the judiciary of the Court (see further below), and they can also change

republican account of democracy, it is necessary to examine the features of the ECtHR as one of the institutions of the republican ‘mixed constitution’, which speak to these elements of Pettit’s account. Here, we will focus on two particular features of the Court and its work within this broader enterprise: the Court’s role in securing the popular *influence* of national decision-making as an *independent* actor in this process; and its contribution to the securing of the popular *direction* of national decision-making through its interpretation and development of Europe-wide norms of public acceptability.

Ensuring popular influence: The ECtHR’s radical judicial independence

In terms of a role for the ECtHR in securing the popular influence of national decision-making on a republican democratic scheme, it is important that the appointment of the ECtHR judiciary takes place, in Pettit’s terms, ‘under constraints that give them general credibility for establishing [the Court’s] independence’⁷⁵. As we will argue, to the extent that the republican case relies on the independence of the judiciary as part of a ‘recursive’ procedure of republican democracy, the ECtHR can play a particularly significant role, in some cases more significant than national judiciaries, in the achievement of the popular influence of national decision-making, given its enhanced independence from national majoritarian institutions.⁷⁶ However, in order to understand this potential role for the ECtHR, we need to understand what independence means in this context. To do this, it is useful to contrast the model of independence envisaged by the account of republican democracy we are considering here with actual examples of a compromised, i.e. non-independent, judiciary. Unfortunately, we have a plethora of recent examples to choose from in thinking about indicators of non-independent courts drawn from recent illiberal populist constitutional reforms.⁷⁷

A particularly salient method of undermining the independence of a Court and therefore undermining its ability to contribute to the republican ideal of democracy is through outright manipulation and threats on individual judges. As Dixon and Landau note, this has been a successful, if somewhat extreme (and thankfully rare), method of

the terms under which they operate, which is evident in the various amendments to the Convention through the various protocols produced over the years, particularly Protocol 15 following the Brighton declaration considered below. Pettit has similarly argued that the (democratic) control of international organizations more generally is effectively undertaken by the state parties to those institutions. Pettit, ‘Democracy, National and International’ (n 47), 317. See also Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights’ (n 47). Of course, recognizing the important role of states in the Convention system need not involve a commitment to an ‘incompatibilist’ view; as Buchanan and Powell note, cosmopolitans also see states as important for their view of the relationship between democracy and international law. See Buchanan and Powell (n 35).

⁷⁵Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (n 49), 216.

⁷⁶Following Pettit, we focus mainly on the issue of independence as opposed to impartiality, which is a common distinction in UK administrative law, where the former relates to external influences on the judiciary such as terms and tenure of appointment and the latter relates to the personal circumstances of the judiciary in terms of their personal influences and interests. See Paul Reid, *Public Law* (4th edn, W. Green, 2020) Chapter 8 & 15; a distinction which has been endorsed by the ECtHR itself, See *Sigríður Elín Sigfúsdóttir v. Iceland*, Appl. no. 41382/17, Judgment of 25 February 2020. The question of judicial impartiality is, however, considered in respect of the issue of potential national bias considered further below.

⁷⁷See generally Rosalind Dixon and David E Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021).

compromising a court's independence.⁷⁸ Beyond outright threats and intimidation, Dixon and Landau classify methods to undermine the independence of a court in terms of two broad categories: court 'packing' and court 'curbing'.⁷⁹ Court packing can be understood in terms of the irregular reform of the judiciary with the aim of installing judges loyal to a particular political party or political agenda.⁸⁰ It can occur in a variety of different ways including the manipulation of various procedural rules around the appointment and dismissal of the judiciary as well as the operation of the court, including the retirement age of judges,⁸¹ the promotion of judges,⁸² the taking of annual leave,⁸³ the size of the court, rules on the appointment⁸⁴ and impeachment⁸⁵ of judges, rules around case distribution, case load and docket control,⁸⁶ the composition of individual judicial panels,⁸⁷ and rules around quorum and the types of majority necessary for a formal ruling.⁸⁸ Examples of court 'curbing' involve the undermining of the independence of courts through measures external to the composition of the court itself such as the manipulation of the funding of courts, jurisdiction-stripping through 'ouster clauses',⁸⁹ restricting court access,⁹⁰ the passing of immunity rules, manipulating the publication of judgements⁹¹ or failure to respect court rulings.

In thinking about the role of the ECtHR as an independent agent to engage in the contestation required of our republican account of democracy, then, we have some general indicators as to what independence requires on this metric. In its easy formulation, independence requires a *not*-packed and *not*-curbed court along the lines summarized above. In this respect, we can point to two general features of the ECtHR system which highlight its robust structural independence: its international nature founded in an international treaty – the European Convention on Human Rights – and its pluralistic appointments process and independent governance, making the undermining of its independence along the lines of court 'packing' and court 'curbing' highly, if not, as we shall see, completely, unlikely.

In terms of judicial appointments, the fact that the Court is made up of judges from each of the Contracting Parties under Article 20 ECHR makes the kind of manipulation of

⁷⁸See, for example, their discussion of incidents arising in Burundi and Fiji, *ibid.*, 88.

⁷⁹*ibid.*, 89.

⁸⁰*ibid.* See also Michal Kovalčík, 'The Instrumental Abuse of Constitutional Courts: How Populists Can Use Constitutional Courts against the Opposition' (2022) 26 *The International Journal of Human Rights* 1160.

⁸¹As occurred, for example, in Poland. See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

⁸²Such as Indira Gandhi's attempts to pack the Indian Supreme Court through promotion after its *Kesavananda* decision. Dixon and Landau (n 93), 90.

⁸³Such as occurred in courts in Poland and Fiji, *ibid.*, 90; Sadurski (n 97).

⁸⁴Such as the non-standard appointments procedure to the Polish Constitutional Tribunal by the Polish government. Dixon and Landau (n 93), 90; Sadurski (n 97).

⁸⁵Such as the impeachment of judges hostile to Evo Morales's regime in Bolivia. Dixon and Landau (n 93), 89.

⁸⁶Such as the lack of notification of judges around a decision on presidential term limits in Nicaragua and the requirement that the court in Poland change its order of proceedings to hear most recent cases first so that older cases against the government would be timed out. *Ibid.*, 86; Sadurski (n 97).

⁸⁷Such as in Fiji and Nicaragua. Dixon and Landau (n 93), 90.

⁸⁸Such as in Poland, *ibid.*, 90.

⁸⁹Such as in Hungary and Poland, *ibid.*, 93.

⁹⁰Such as the Hungarian government's removal of the 'actio popularis'. *ibid.*, 93.

⁹¹Such as in Poland where the Polish government refused to publish court decisions, *ibid.*, 93.

judicial appointments documented by Dixon and Landau among others quite difficult. Even if, as has been well documented, individual member states can ‘game’ the formal rules of appointment by designing the list of three candidates required in Art. 22(2) ECHR in such a way that makes the appointment of their preferred candidate virtually inevitable,⁹² and the fact that the stages of the appointments process are relatively cursory,⁹³ the Court remains a very difficult one to pack. A single rogue judge, doing the bidding of its national paymaster, is unlikely to compromise the overall independence of the Court in a significant way.⁹⁴ What would be required to really compromise the independence of the Court in the manner outlined above would be an international coalition of states, hell-bent on undermining the independence of the Court, co-ordinating the manipulation of the judicial appointment process by promoting candidates who will faithfully carry out the ideology of whatever coalition is built. Whereas such supranational illiberal coalitions are not impossible,⁹⁵ it is much more difficult to achieve than the kind of domestic coalition necessary to pack a domestic judiciary in a national legislature with strong party discipline.⁹⁶ In respect of judicial appointments, then, given its international nature, the ECtHR is arguably more robustly independent of national legislatures than national courts in a way which can more effectively contribute to securing the popular influence of national decision-making on our republican scheme.

With respect to the terms of employment of ECHR judges, the fact that they are independently remunerated from the Council of Europe budget and not by national authorities (or at least not directly)⁹⁷ makes it harder for individual national governments to manipulate their terms of employment.⁹⁸ Similarly, Art. 23 ECHR takes the question of

⁹²See, for example, John Hedigan, ‘The Election of Judges to the European Court of Human Rights’ in M Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l’homme et du règlement des conflits par le droit international* (Brill Nijhoff, 2007). See also Jean-François Flauss, ‘Les Elections de Juges à La Cour Européenne Des Droits de L’Homme (2005–2008)’ (2008) 19 *Revue Trimestrielle Des Droits de l’homme* 713; (2008) *Revue trimestrielle des droits de l’homme* 713. Also, Stiansen and Voeten note a slight change in the type of judge nominated to the Court since 2010. Øyvind Stiansen and Erik Voeten, ‘Backlash and Judicial Restraint: Evidence from the European Court of Human Rights’ (2020) 64 *International Studies Quarterly* 770.

⁹³Leif Sevón, ‘The Procedure for Selection of Members of the Civil Service Tribunal: A Pioneer Experience’, available at <http://curia.europa.eu>, 3; Flauss (n 108), cited in David Kosaf, ‘Selecting Strasbourg Judges: A Critique’ in Michal Bobek (ed), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015).

⁹⁴Although, as Petrov points out, single judges can find cases to be inadmissible under Article 26(1) ECHR, Jan Petrov, ‘The Populist Challenge to the European Court of Human Rights’ (2020) 18 *International Journal of Constitutional Law* 476–494. However, there is some safeguard in Art. 26(3) ECHR, which prohibits a judge sitting in single formation in respect of an action against the state which elected it.

⁹⁵See, for example, the ‘regional illiberalism’ of the so-called Visegrád coalition in respect of EU law and policy. James W Scott, ‘Visegrád Four Political Regionalism as a Critical Reflection of Europeanization: Deciphering the “Illiberal Turn”’ (2022) 63 *Eurasian Geography and Economics* 704.

⁹⁶Something that the Polish government managed to do without having a sufficient majority for constitutional amendment. Dixon and Landau (n 93), 95.

⁹⁷Salaries are determined by resolution of the Committee of Ministers. Resolution CM/Res(2009)5

on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights.

⁹⁸The running costs of the Court comes from the general budget of the Council of Europe as overseen by the Committee of Ministers. However this does not mean, as Petrov notes, that the Council of Europe, and the Court, do not suffer from funding pressures. Petrov (n 110), 490.

dismissal out of the hands of national governments and places it squarely with ECHR judges themselves, requiring a two thirds majority of judges to dismiss an individual judge for failing to fulfil the conditions required of ECHR judges in Art. 21 ECHR. Questions of retirement are also regulated by the Convention under Art. 23 ECHR. Furthermore, the fact that the Court can adopt its own rules of procedure under Articles 25–29 ECHR, including the management of case distribution and configuration of the bench for individual cases, provides a large degree of independence from interference by national governments.⁹⁹

A potential disadvantage of the Court being an international court from the viewpoint of judicial *impartiality*,¹⁰⁰ in contrast to national courts, is the threat of a nationalist impulse interfering in judicial decision-making when a judge hears a case from their appointing state. Notwithstanding the requirements in Art. 21 ECHR that judges sit on the Court in an individual capacity, and the fact that they are not to engage in activity when in office which might compromise their independence and impartiality,¹⁰¹ it is possible that when their state is in the dock, the temptation by a national judge to soft-pedal scrutiny or critique, or excoriate decisions against their home state in a dissenting judgement, can be very difficult to resist. This is clearly a risk that arguably affects national courts less.¹⁰² However, studies have shown that this potentially major factor compromising the impartiality of an international court like the ECtHR is not generally borne out in practice.¹⁰³ One area where national bias could have emerged was with regard to the tenure of the judiciary. Until the entry into force of Protocol 14 ECHR in 2010, the tenure of judges was renewable once. There was some evidence that judges would ‘play to the national gallery’ at times in order to secure re-election to the Court.¹⁰⁴ However, since 2010, the Convention provides that judges are appointed for one term only of nine years.¹⁰⁵

⁹⁹ See *ibid.*; Başak Çalı and Stewart Cunningham, ‘Judicial Self Government and the Sui Generis Case of the European Court of Human Rights’ (2018) 19 *German Law Journal* 1977.

¹⁰⁰ See n 87 above.

¹⁰¹ Art. 21(2) and Art. 21(3) ECHR respectively.

¹⁰² Although they are not completely immune. In plurinational states such as Canada or the UK, it is, in theory, possible that judges from a national minority jurisdiction may betray bias in cases involving institutions from those jurisdictions. For discussion see Robert Schertzer, ‘Quebec Justices as Quebec Representatives: National Minority Representation and the Supreme Court of Canada’s Federalism Jurisprudence’ (2016) 46 *Publius: The Journal of Federalism* 539. There is scant evidence of this among the Scottish and Northern Irish judges on the UK Supreme Court, however. Two of the most comprehensive works on the UK’s highest courts – the Supreme court and its predecessor, the Judicial Committee of the House of Lords – do not even consider the issue. Chris Hanretty, *A Court of Specialists: Judicial Behavior on the UK Supreme Court* (Oxford University Press 2020); Louis Jacques Blom-Cooper, Brice Dickson and Gavin Drewry, *The Judicial House of Lords: 1876–2009* (OUP Oxford, 2009).

¹⁰³ See Erik Voeten, ‘The Impartiality of International Judges: Evidence from the European Court of Human Rights’ (2008) 102 *American Political Science Review* 417; Erik Voeten, ‘The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights’ (2007) 61 *International Organization* 425, 33.

¹⁰⁴ Jean-François Flauss, ‘Brèves Observations Sur Le Second Renouveau Triennal de La Cour Européenne Des Droits de l’homme’ (2005) *Revue trimestrielle des droits de l’homme* 9; Koen Lemmens, ‘(S)Electing Judges for Strasbourg: A (Dis)Appointing Process?’ in Michal Bobek (ed), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015) 99.

¹⁰⁵ Introduced by Protocol 14 of 2004, which entered into force in 2010. For comparison and analysis, see Helga Molbæk-Steensig and Alexandre Quemy, ‘Judicial Independence and Impartiality: Tenure Changes at the European Court of Human Rights’ (2023) 34 *European Journal of International Law* 581.

As such, then, the independence of the Court in terms of court ‘packing’ is reasonably robust, and therefore, it arguably constitutes an important site of contestation of national law and policy on a republican schema to ensure that the equality necessary for the popular influence of national democracy is borne out in practice.

With regard to court curbing, there are two areas that can potentially compromise the independence of the Court and affect its role in enhancing the popular direction of national decision-making: amendments to the ECHR, which could be understood as a court ‘curbing’ move, and actions by domestic political actors hostile to the Court, often supported by a hostile national press. With regard to amendments to the ECHR which could be interpreted as a court curbing, as opposed to a court packing, move, the 2012 Brighton Declaration, Madsen notes, presented the first ever reform to the Court aimed at rebalancing power away from the Court towards national authorities in the ECHR’s history.¹⁰⁶ It amended the preamble of the Convention to include a reference to ‘subsidiarity’ and codified the idea of the ‘margin of appreciation’ in the Convention for the first time, emphasizing the primary responsibility of signatory states to secure the rights and freedoms in the Convention.

With regard to actions by national political actors, whereas instances of outright intimidation against the ECHR judiciary are rare,¹⁰⁷ a significant feature of potential court curbing in the ECtHR context is public hostility from national authorities and press.¹⁰⁸ Political hostility to the Court can take a variety of forms, usually expressed in severely critical statements of individual judgements such as those with which this article opened involving complaints about its ‘foreignness’, its ‘sovereignty eroding’ and ‘democracy undermining’ capacity as well as threats to withdraw from the entire Convention system.¹⁰⁹ This can be contrasted with substantive critique of the Court’s work in the form of thoughtful, evidence-based, well-informed and well-argued good-faith criticisms of individual judgements of the Court based on relevant and appropriate reasons, which is the stuff of much Court commentary in academic journals. Rather, the type of political hostility we are concerned with here, as noted above, constitutes a direct attack on the authority of the Court itself.¹¹⁰ As most citizens rely on elites for knowledge of international organizations given their generally low political salience, the effect of hostile rhetoric regarding the Court from the top of government can be very effective in mobilizing public opinion against the Court and therefore further undermine its independence and legitimacy.¹¹¹ One of the ways in which hostile political rhetoric on the independence of the Court can impact upon its work can involve a reduction in the

¹⁰⁶Mikael Rask Madsen, ‘From Boom to Backlash? The European Court of Human Rights and the Transformation of Europe’ in Helmut Philipp Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical Perspective* (Edward Elgar Publishing Limited, 2021) 38.

¹⁰⁷Former president Luis Wildhaber claimed to have been poisoned during a trip to Russia. L. Harding, ‘I Was Poisoned by Russians, Human Rights Judge Says’ (2007) *The Guardian*, 1 February, available at <https://www.theguardian.com/world/2007/feb/01/russia.topstories3>.

¹⁰⁸Another feature would be non-compliance with Court judgements. Whereas non-compliance appears to have been a significant problem, indicators show that it reached a peak around 2011 and has been declining since so here we will only consider the political hostility dimension. See Rask Madsen (n 122).

¹⁰⁹See references at n 26.

¹¹⁰Rask Madsen (n 122), 23.

¹¹¹See Alexandra Guisinger and Elizabeth N Saunders, ‘Mapping the Boundaries of Elite Cues: How Elites Shape Mass Opinion across International Issues’ (2017) 61 *International Studies Quarterly* 425; Lisa M Dellmuth and Jonas Tallberg, ‘Elite Communication and the Popular Legitimacy of International Organizations’ (2021) 51 *British Journal of Political Science* 1292. Tom Ginsburg, ‘Political Constraints on

scrutiny of national law and policy for rights violations by the Court and/or a reduction in the number of rights violations determined by the Court, thereby potentially undermining the Court's contribution to democracy promotion as well as rights protection.¹¹² There is some evidence to suggest that the Court has stepped down its scrutiny of national law and policy in respect of some countries in the light of these attacks.¹¹³ For example, after suffering hostile attacks from certain quarters in the UK, the Court in a decision involving the UK in 2017 determined that a previous ruling from the UK Supreme Court, which the Court itself had considered incompatible with the Convention, was, in hindsight, compatible with the Convention.¹¹⁴ This decision prompted a judge of the Court, Judge Albuquerque, to warn in a dissenting judgement that the decision, which he argued was part of a growing trend, would undermine the authority of the Court.¹¹⁵ In another example, in 2024, in a seeming reversal of its own case law, and in response to divergent decisions by the UK Supreme Court on the issue, the Court found no violation of the presumption of innocence under Article 6 for lack of payment of compensation to prisoners whose conviction was found to be unsafe.¹¹⁶ The Court's recent *volte face* on UK legislation on prisoner voting is another salient example.¹¹⁷

Summarizing the role of the ECtHR in a broader 'recursive process' according to a republican framework of democracy, we can conclude for current purposes that the Court enjoys a robust independence from the perspective of court 'packing'. With respect to court 'curbing', the picture is more mixed. We have seen how the amendments introduced by Protocol 15 could be interpreted as a potentially 'curbing' move in that its aim was to move power away from the court for the first time; however, the extent to which they do constitute a curbing move such as to compromise the Court's independence is unclear. For one thing, the amendments to the preamble are wholly in line with the Court's own case law on its role within the Convention system, as a subsidiary organ to signatory states which are charged, in the first instance, with the protection of the rights contained in the Convention and the reference to the margin of appreciation merely codifies the long-standing practice of the Court. This is supported by the fact that early analyses of the entry

International Courts' in C. P. R. Romano, K. J. Alter, Y. Shany (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 493.

¹¹²See Ginsburg (n 127). See also Petrov (n 110), 499–500.

¹¹³Başak Çali, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' in H. P. Olsen and H. S. Lund (eds.) *The Making of iCourts* (1st edn, Nomos Verlagsgesellschaft mbH & Co KG, 2022); Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 *International Studies Quarterly* 770.

¹¹⁴*Hutchinson v UK* [2017] ECHR 57592/08.

¹¹⁵The decision, he argued, 'may have seismic consequences for the European human-rights protection system. The majority's decision represents a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards. If the Court goes down this road, it will end up as a non-judicial commission of highly qualified and politically legitimised 47 experts, which does not deliver binding judgments, at least with regard to certain Contracting Parties, but pronounces mere recommendations on "what it would be desirable" for domestic authorities to do, acting in an mere auxiliary capacity, in order to "aid" them in fulfilling their statutory and international obligations. The probability of deleterious consequences for the entire European system of human-rights protection is heightened by the current political environment, which shows an increasing hostility to the Court'. *ibid.*, Dissenting Opinion of Judge Albuquerque, para. 38.

¹¹⁶See *Nealon & Hallam v UK* [2024] ECHR 32483/19; 35049/19. For the background and context to the decision in the UK, see Bates, 'Principled Criticism and a Warning from the "UK" to the ECtHR?' (n 1).

¹¹⁷*Hora v. UK* above n. 1.

into force of Protocol 15 ECHR which followed the Brighton Declaration suggest that it is not having a significant impact on the decisions of the Court.¹¹⁸

More concerning, from a republican democratic perspective, is the effect of hostile criticism of the Court, which seems to have resulted in a more lax scrutiny by the Court of certain signatory states.¹¹⁹ Of course, the Court must, even in its radical independence, remain responsive to the views of its key constituents – the signatory states of the Convention and their populations – and this responsiveness must feature as part of the republican account defended here, which we could understand, more benignly, in terms of ‘dialogue’.¹²⁰ However, there is an irony in the fact that in trying to appease national governments on putatively democratic grounds, the Court could end up compromising its own democratic legitimacy from a republican perspective.

The emergence of norms of popular direction: The Court’s evolutionary interpretation of convention rights

In terms of the popular *direction* of national decision-making, the rights contained in the Convention, combined with the dynamic interpretation of those rights through the Court’s ‘living instrument’ doctrine, can be understood to contribute to the development of common norms of public acceptability of the composite system of human rights and democracy involving the ECHR.

With regard to the specific norms of public acceptability, the rights contained in the Convention are exemplars of the public acceptability norms emphasized by Pettit in his account of republican democracy. As noted above, for Pettit, the types of norms in question for the popular direction of government are those such as equality of influence, norms emanating from equal respect and norms prescribing freedom in a sphere of personal choice.¹²¹ We can assume, therefore, that the rights contained in the Convention, from prohibitions on torture to due process and privacy rights, to freedoms of expression and association, are compatible with norms of public acceptability in the abstract on a republican scheme.¹²² The fact that the states within the ECHR’s composite system voluntarily signed up to protect the rights it contains further supports the characterization of ECHR rights as norms of public acceptability for the purposes of our republican account of democracy.¹²³

¹¹⁸See M. Rask Madsen, Preliminary report on the European Court of Human Rights’ use of the principle of subsidiarity and margin of appreciation in relation to Protocol No. 15 to the European Convention on Human Rights for the Council of Europe’s Drafting Group on the Evaluation of the First Effects of protocols No. 15 and No. 16 to the European Convention of Human Rights of 24 September 2024. Available at <https://rm.coe.int/drafting-group-on-the-evaluation-of-the-first-effects-of-protocols-no-/1680b1b9f4>.

¹¹⁹Stiansen and Voeten (n 129).

¹²⁰See Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights’ (n 47), Geir Ulfstein, ‘The European Court of Human Rights and National Courts: A Constitutional Relationship?’ in O. M. Arnardóttir and A. Buyse (eds.) *Shifting Centres of Gravity in Human Rights Protection* (Routledge, 2016).

¹²¹Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (n 49), 262–3.

¹²²See *ibid.*, 185. ‘The very idea of rights’ such as those contained in the ECHR, Hickey argues, ‘corresponds with that of a politics based on commonly avowable norms’ in Pettit’s sense of norms of public acceptability’. Hickey (n 49), 301.

¹²³Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights’ (n 47).

Furthermore, with regard to the idea that such norms are shaped and evolve over time by 'real life' practice and contestation, the fact that the Court's characterization of the Convention as a 'living instrument'¹²⁴ warranting an 'evolutionary approach' to its interpretation captures this dynamic and iterative development of these norms of public acceptability. The idea of the Convention as a 'living instrument' is a well-established approach taken by the Court whereby the text, concepts and values of the Convention are approached in the context of 'present-day conditions'¹²⁵ and not, say, the moral and political mores of the Roman Empire, medieval Christendom or even the Cold War politics within which the Convention itself emerged.¹²⁶ As such, the Court, in interpreting the rights contained in the Convention, cannot, in the Court's own words, 'but be influenced by the developments and commonly accepted standards'¹²⁷ in the state parties to the Convention. The evolutionary interpretation of the Convention in this regard is made particularly clear when the Court changes its view on the protection afforded by the Convention in the light of the changing social morals of its signatory states. There are many examples which could be pointed to illustrate this, but one, particularly clear, example is with regard to the extent to which the right to privacy contained in Article 8 ECHR protected gender identity, and in particular the right of transgender people to have their gender formally recognized in official documentation where it does not coincide with their biological gender at birth. Thus, for example, in *Rees v. UK*, a case decided in 1986, the Court found that the right to privacy did not create an obligation on states to alter the register of births or issue birth certificates based on what it called the 'psychological gender' of individuals noting that 'there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage',¹²⁸ thereby affording states a wide margin of appreciation in terms of the extent of their recognition of gender identity in public documents. However, by 2002, in another case involving the UK, the Court noted 'clear and uncontested evidence of a continuing international trend in favour not only of increasing social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals',¹²⁹ arguing that the scientific evidence relied on in earlier cases regarding the biological aspect of gender identity should no longer be decisive in the legal recognition of transsexual people.¹³⁰ As such, the Court found that Article 8 did protect the gender identity of transsexual people, including the right to amend public documents to better reflect their gender identity based on the evolving standards of the recognition of gender identity in the social norms of Convention states.

The point here is not to interrogate the complexities of the issue of gender recognition, nor to engage in the extensive, at times divisive, contemporary debates on the issue. Rather, this brief example illustrates quite clearly the ways in which the Court's interpretation of the Convention tracks Pettit's account of the evolutionary nature of the application of norms of public acceptability. In interpreting the rights contained in the

¹²⁴*Tyrer v UK* [1978] ECHR 5856/72, para. 31.

¹²⁵*Ibid.*

¹²⁶Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217.

¹²⁷*Tyrer v. UK* (n 141). Para. 31.

¹²⁸*Rees v UK* [1986] ECHR 9532/81, para. 37.

¹²⁹*Goodwin v UK* [2002] ECHR 28957/95, para. 85.

¹³⁰*Ibid.*, para. 82.

Convention, the Court's reliance on the developing norms, standards and morals of national democracies, particularly through the idea of a 'European Consensus' on particular moral issues,¹³¹ provides a clear example or the incremental development of 'commonly avowable norms'¹³² of public acceptability which help secure the popular direction of national decision-making in a way which reflects changes in those norms through practice and changes in membership of the relevant political community.¹³³ As noted above, Pettit argues that innovations in the norms of public acceptability will be 'triggered by changes in the dispositions of the existing membership and [...] changes of members that occur at any time and across different times'.¹³⁴ This is precisely the ethos that the ECtHR has taken in the development of its evolutionary approach, aimed at achieving the 'increasingly high standards required in the area of the protection of human rights and fundamental liberties [in democratic societies]'.¹³⁵

Thus, we can understand the rights contained in the Convention, as well as the Court's interpretation of them, as broadly conforming to Pettit's account of the norms of public acceptability which help secure the popular direction of national decision-making by providing arguments for taking certain policy options – Convention rights violations – 'off the table'. Crucially, for Pettit's conception of popular direction, individual actors – and, perhaps most importantly, the Convention's signatory states – do not necessarily need to *agree* with the decision in terms of its substantive content; they may have alternative views and alternative preferred outcomes on a particular question of what popular direction requires. However, what they must be able to do is to understand a particular decision as in principle publicly *acceptable* to all, as an acceptable decision or outcome based on the ideal of the equality of citizens and a desire to avoid the types of domination upon which republican freedom is trained. As Hickey emphasizes, it is precisely because we are likely to disagree on substantive outcomes that Pettit emphasizes the idea of the *justification* of a particular decision or outcome based on the idea of public acceptability to all,¹³⁶ as part of a general *recursive* procedure involving both national institutions – both democratically representative and judicial – and the ECtHR to contest and secure the popular direction of government for the citizens of ECHR signatory states. On this view, disagreement with the Court's judgements can be made acknowledging that such justifications for the decision exist, and without attacking the very authority of the Court, its 'foreignness' or assuming that it has no democratic role whatsoever.

As such, the ECtHR's interpretive devices of the evolutionary approach and European consensus with regard to the interpretation of rights in the Convention can be understood as shaping Convention-wide 'commonly avowable norms' of popular direction in Convention states.¹³⁷

¹³¹For a critical analysis of how the Court examines whether a consensus exists or not, see Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015).

¹³²Hickey (n 49), 296.

¹³³Arguably, the evolution of the Court's thinking on prisoner voting from *Hirst v. UK*, through *Scoppola v. Italy*, App. No. 126/05, Judgment of 22 May 2012, to *Hora v. UK* could, potentially, be understood in these terms.

¹³⁴Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (n 49), 257.

¹³⁵*Rantsev v Cyprus & Russia* [2010] ECHR 25965/04. para. 42.

¹³⁶Hickey (n 49), 299.

¹³⁷Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (n 49), 270.

Conclusion

Democracy has been the battleground of much criticism of the ECtHR over the years, and particularly in the past decade or so, where criticism of international law and international institutions has become increasingly commonplace with the rise in national populism.¹³⁸ However, the ambivalence which surrounds our understandings of the ECtHR's role in national democracy has contributed to a more destructive contestation involving the Court, where its very authority is challenged, risking the values and rights protected by the Convention and potentially the strength of national democracies. In order to provide for a more fruitful exploitation of this ambivalence, one which proceeds in a spirit of pluralist virtues and democratic contestation, we have here tried to contribute to enriching the 'radically inconclusive'¹³⁹ and 'incomplete'¹⁴⁰ political debate on the compatibility of democracy and international human rights through an examination of the role of the ECHR system in a republican scheme of democracy by highlighting features of the Court and its work which can be understood to potentially have a democracy-enhancing role, particularly in its structural independence from national politics and its evolutionary interpretation of Convention rights based on the republican democratic theory of Phillip Pettit. Pettit's democratic theory is particularly suited to the Convention system given its institutional focus and the fact that it relies on a composite set of institutions – which can be both national and international¹⁴¹ – to achieve the republican ideals of freedom as non-domination. This is a particularly useful exercise, we argue, in an era of mounting populist challenges to international courts as well as to core constitutional democratic norms.

¹³⁸Andrea Pin, 'The Transnational Drivers of Populist Backlash in Europe: The Role of Courts' (2019) 20 *German Law Journal*, 225.

¹³⁹Buchanan and Powell (n 35).

¹⁴⁰*ibid.*

¹⁴¹See Pettit, 'Democracy, National and International' (n 47); Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective' (n 47), 347.