Introduction

The European Convention on Human Rights 1950 (the Convention)[1] has long been associated with the idea of democracy. Its preamble speaks of the importance of an 'effective political democracy' while several articles refer to the ideal of a 'democratic society'.

During much of the history of the European Court of Human Rights ('the Court) and the European Commission of Human Rights, the Convention institutions have shown some timidity or deference in developing the content of this effective political democracy, but this has changed in the last thirty years or so. There are several reasons for this. First, Turkey decided to accept the Court's jurisdiction; this has led to many cases involving the Turkish Constitutional Court's proscription of various parties. Second, a large number of Eastern and Central European countries have ratified the Convention, bringing with them questions of how to manage the transition to democracy. Third, among the new members are countries with decidedly dubious democratic and human rights records (most notably Russia). Fourth, even among established members, there have been rumblings of concern about the quality of democratic practices; Italy is perhaps the best example, though by no means the only one. Fifth, changes in governance, including the possibility of a supranational organisation (the European Union) joining the Convention, create new questions for the Convention institutions.

Concerns about democratic practices in Europe have increased even more dramatically in the last ten years. There is concern about the increasing rise of populism in some countries (Hungary, Greece, Italy), with the term 'authoritarian' even used (Turkey). The far-right has undergone something of a resurgence, with a Le Pen once again challenging for the Presidency of

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[1] European Convention on Human Rights, Rome, 4 November 1950, in force 3 September 1953, ETS 5.

France. Europe itself in the form of the European Union still has to deal with criticisms of its democratic legitimacy, and this has only been exacerbated by multiple crisis and the Union's response to them – the financial crisis, the refugee crisis, the rise of populist anti-European parties, the crisis in Ukraine, Brexit.

For these reasons we have moved from a situation where Convention decisions on matters of electoral rights (unlike free expression and free assembly) were on the fringes of European jurisprudence to one in which the Grand Chamber has delivered a string of important decisions in this area. The Grand Chamber has found that prisoner disenfranchisement in the UK breaches Convention rights (*Hirst*),[2] and that the consociational arrangements in post-Dayton Bosnia and Herzegovina breach the non-discrimination rights in the Convention (*Sejdic and Finci*).[3] On the other hand it has also upheld Latvian lustration laws (*Zdanoka*),[4] the Turkish electoral quota for a party to be represented in the legislature (*Yumak and Sadak*)[5] and, perhaps most controversially of all, the Turkish Constitutional Court's proscription of the Islamist Welfare Party (*Refah Paritisi*).[6] The sensitivity of decisions in this area is made apparent by the strength of the dissenting opinions in some of these cases, most strikingly Judge Bonnello's dissent in *Sejdic*. This increased interest in political rights jurisprudence makes it urgent to interrogate the European Court's idea or ideas of democracy.[7]

This book explores the ideas of democracy which are implicit in the jurisprudence of the European Court of Human Rights. I do not claim that there is any one model of democracy which is explicitly and exclusively promoted in the text of the Convention or in the jurisprudence of the European Court of Human Rights – or indeed in the opinions of individual judges of the Court. Nevertheless, the text and the interpretation of the text may tend to reinforce the requirements of a particular model of democracy, even if this is not always consciously articulated. Or the text and its

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[2] *Hirst v United Kingdom (No. 2)* App no 74025/01 (2006) 42 EHRR 41 (Grand Chamber).
[3] *Sejdic and Finci v Bosnia and Herzegovina* App nos 27996/06 and 34836/06 (2009) 22 BHRC 201 (Grand Chamber).
[4] *Zdanoka v Latvia* App no 58278/00 (2006) 45 EHRR 17.
[5] *Yumak and Sadak v Turkey* App no 10226/03 (2008) 48 EHRR 4.
[6] *Refah Paritisi (Welfare Party) v Turkey* App nos 41340/98 41342/98 41343/98 and 41344/98 (2003) 37 EHRR1.
[7] All civil, cultural, economic, social and political rights are interconnected, and so there are cases on the right to life, personal liberty, non-discrimination, religion, education and other rights which are also potentially relevant to the question of democracy, but this work focuses on the more narrowly conceived list of electoral and political rights.

interpretation may ignore or fail to promote other models of democracy. Or they may even undermine other forms of democratic experiment.

This is possible because the text, the jurisprudence interpreting it and the rights protected therein are all 'abstract concepts' or even 'floating signifiers' whose meaning needs to be fleshed out in the process of interpretation. In interpreting the Convention rights, we can draw on other sources not usually considered formal legal sources, including normative ideals (whether we label these ideals of political morality, or background assumptions, or views about what is reasonable). This monograph will focus on normative ideals or models of democracy.

This exercise has a critical and an interpretive dimension.[8] The exercise of examining the jurisprudence through the lens of democratic theory becomes more practically useful if we can draw on political literature to identify flaws and benefits in different models of democracy. If the text and jurisprudence support a particular model of democracy and we know that there are flaws or dangers associated with that model (e.g. marginalisation of minorities or tending towards oligarchy), then we can be more alert to the menace that the jurisprudence might unwittingly ignore, reproduce or aggravate those flaws or dangers. If we can identify models of democracy which are more appealing than mainstream ones, we can see if there is scope to make arguments within the Convention system to promote elements of those more progressive models. The models of democracy discussed in the Chapter 1 therefore provide a critical tool to analyse the Court's jurisprudence but also to suggest how to interpret the Convention.

While the previous paragraph sets out the general approach, let me be more specific. My conclusions are that (unsurprisingly) the text and jurisprudence of the Convention and the Court tend to reinforce a model of democracy that is representative, liberal and often substantive. My concern is to see how the Court's jurisprudence may be 'democracy-enhancing'[9] and support or encourage democratic practices that are more inclusive, deliberative and participatory.

We will do this in the following way. First, Chapter 1 examines different theories of democracy and how they might relate to the Convention. The next two chapters continue the introductory work and examine the historical

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[8] For more thorough critical readings of the Convention, see Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006) and Damian Gonzalez-Salzberg and Loveday Hodson, *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2020).

[9] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 487.

origins of the electoral rights and the basic principles used by the European
Court of Human Rights. Following these introductory chapters, Chapters 4 to
8 examine particular aspects of the Court's political and electoral rights
jurisprudence. These chapters cover the rights of expression, assembly and
association, the scope of the electoral rights, the right to vote, to run for
election and the regulation of elections. In examining the jurisprudence of
the Court in Chapters 4 to 8, each chapter considers whether the jurispru-
dence tends to reinforce any particular model of democracy. Each chapter
presents a critical analysis of the relevant right and in particular its role in
upholding a liberal representative model of democracy. Each chapter con-
siders the scope for the right to promote deliberative, participatory, inclusive
models of democracy. The final chapter summarises the potential for a
jurisprudence that would further enhance deliberative, participatory and
inclusive politics. To consider this, we first need to set out different models
of democracy, and to this we now turn in the first chapter.

1

Theories of Democracy

This chapter introduces some of the different models of democracy discussed in politics literature.[1] 'Democracy' is a classic essentially contested concept. Trying to identify a common core to these diverse models is difficult, though perhaps Beetham's focus on the twin principles of popular control and equality may be useful.[2] Even these, though, are subject to interpretation. Popular control may slide from the chance to replace one set of leaders in an election every four or five years to everyone affected by a particular decision sitting in a room and thrashing it out. Equality may range from a formally equal chance to vote to ensuring relative economic equality and special representation for different groups.

Any effort to discuss models is necessarily a simplification for many reasons. First, it is unlikely that any political system is consciously designed from first principles to reflect a particular model. Therefore, it is quite likely that we will find elements of different models happily being employed within the same polity. Second, there may not even be any great paradox or tension in this – it may make perfect sense in both theory and practice for a polity to employ elements of different models. Third, there are porous boundaries between the requirements of the different models. Fourth, none of these models are presented as flawless ideals or panaceas.

The following discussion seeks to identify the key features of each model and the key flaws in each model, or at least the challenges facing the model.

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[1]   J. Morison, 'Models of Democracy: From Representation to Participation' in J. Jowell and Dawn Oliver (eds) *The Changing Constitution* (Oxford University Press 2007); Frank Cunningham, *Theories of Democracy* (Routledge 2002); David Held, *Models of Democracy* (Polity 2006).

[2]   David Beetham, *Democracy and Human Rights* (Polity 1999).

Finally, each section outlines some of the implications of this model for the European Convention and Court.

The Convention and the jurisprudence seem to align well with a mixed model of democracy that incorporates three key elements – a democracy that is liberal, representative and substantive. We will discuss some of the tensions involved in *liberal* democracy and then examine more closely different variants of representative democracy – classical, competitive elitist and pluralist. We will also note that liberal representative democracy may be substantive and not merely procedural; the Convention text and jurisprudence seems to support a model of democracy that is substantive to some extent. Then we will discuss three broad models of democracy which all offer critical commentary on the claims of liberal and representative democracy. These are the participatory, deliberative and egalitarian and inclusive models. A final section will consider the challenges that modern governance, particularly processes of globalisation and supranationalisation, poses for democracy.

LIBERAL DEMOCRACY

We will not start the discussion with a purely procedural model of democracy. A purely procedural model would concentrate on the procedures by which decisions are made (eg majority voting) and be unconcerned with the actual outcomes. It would be surprising if a human rights instrument associated itself with a purely procedural model of democracy. After all, human rights are typically seen as limits on state power, including the power of democratic authorities. Such a purely procedural democracy emphasises political representative procedures but does not include special protection for rights.[3] Being procedural and majoritarian in nature, it runs the risk of representing the 'tyranny of the majority'. In particular, there is a danger that the rights of minorities may be infringed in a majoritarian representative democracy. This may be particularly the case with permanent minorities who cannot realistically hope to exercise political power. This purely procedural vision of democracy is unlikely to be supported by the text of a human rights treaty.

It is more logical and likely that a human rights treaty would embrace a model of democracy in which democratic procedures were limited in some way. This is the central theme in liberal democracy. In a liberal democracy, the people should not inherit the absolute sovereign power associated with absolutist monarchs; rather there are limits on the sovereign power even when

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[3]   It is possible that a representative democracy without special protection for rights may in practice be more liberal than some liberal democracies which do offer special guarantees.

exercised by the people (or their representatives).[4] This is the central theme in liberal democracy where democracy is seen as realising liberty or specific liberties. Indeed, we can be more specific and argue that the European Convention text (and the related jurisprudence) envisages a liberal representative democracy.

That the ECHR preferred model is liberal stems from its protection of largely classic civil and political rights – personal liberty, free expression, freedom of thought and religion, free association, (formal) equality in the enjoyment of rights, even the right to property[5] (a right that does not make it into either of the 1966 International Covenants). The very fact that the Convention establishes a Court where individuals can complain about state political decisions indicates its concern with ensuring there are limits on political power. That the Convention system is representative in character is evident from the text of article 3, Protocol 1 (P1–3), which speaks of elections by means of secret ballot to choose a legislature.

Liberal representative democracy has a considerable appeal. As well as allowing the participation of all in the political process (at least through their representatives), it also offers a guarantee that a range of rights will be protected. It avoids, therefore, the danger that certain vital interests are subject to a show of hands or a secret vote. However, liberal democracy does not just offer protection from abuse. More ambitiously, it may be seen as offering a zone of autonomy where the individual may develop and flourish.[6]

Liberal representative democracy also has benefits for the political system and society, not just the individual. It allows for the political system to be peaceful and stable; it takes the heat out of political disagreement – whatever may be the outcome of an election, it will not cost the losers their rights.

There are, of course, tensions and problems. In yoking together liberalism and democracy, there is the question of what weight to give to these values. Liberal democracy may seem an obvious, even the default, solution in the twenty-first century,[7] but it should not be forgotten that for many historic

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[4] Benjamin Constant, *Principles of Politics Applicable to All Representative Governments* in Benjamin Constant and Biancamaria Fontana (eds) *Constant: Political Writings* (Cambridge University Press 1988 [1815]), 175–180.

[5] Compare this list of the Convention rights with the one Constant gives: 'individual freedom, religious freedom, freedom of opinion, . . . the enjoyment of property.' Constant, *Principles of Politics Applicable to All Representative Governments*, 180.

[6] Benjamin Constant, *The Liberties of the Ancients Compared with that of the Moderns* in Benjamin Constant and Biancamaria Fontana (eds) *Constant: Political Writings* (Cambridge University Press 1988 [1820]), 327.

[7] Frank Cunningham, *Theories of Democracy*, 27.

liberals, democracy was seen as an undesirable practice wherein the multitude brought ignorance, rapacity, fear and anger to the table, as well as numbers.[8] Some may put so much emphasis on liberal rights that it is difficult to see what is left of democracy.[9] Conversely, others, while defending the idea of rights, believe that ultimately some authority has to have the final say on what rights we have and that final say belongs with a representative assembly.[10] Whilst the tension between liberalism and democracy (or the rights of the moderns and the rights of the ancients) is a central concern of modern political theorising,[11] it is not clear that there is any definitive resolution of this tension. At some point, it seems any balancing act must come down on the side (at least temporarily) of either liberal rights or representative democracy.

The nature and content of the liberal rights protected is also a point of contestation. Do they include only a minimum core of civil and political rights (somewhat like the ECHR and P1 were originally intended to do), or do they run the gamut of civil, cultural, economic, social and political rights found in UN human rights instruments? Not to mention collective rights, minority rights, people's rights, environmental rights and so on.

Liberalism's history is even more deeply contested than this, and critics may argue that liberalism and liberal rights create an overly individualistic or atomistic approach to politics, one where individuals are encouraged to be self-regarding and indeed selfish.[12] The implicit liberal preference for liberty may favour leaving unchecked market forces while the liberal zone of autonomy may well be a cloak for private oppression, particularly in the home.[13] Thus a host of political theorists from different camps – conservative, socialist, communitarian, republican, feminist – have taken issue with liberal individualism.

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[8]   Constant typifies the fear that the poor are no fit to exercise political power and need to be restrained from using it in a selfish manner: Constant, *Principles of Politics Applicable to All Representative Governments*, 214–215.
[9]   Dworkin is a prominent culprit here. See, for example, Ronald Dworkin, 'The Moral Reading and the Majoritarian Premise' in Harold Hongju Koh and Ronald Slye (eds) *Deliberative Democracy and Human Rights* (Yale University Press 2000).
[10] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 2001). In the UK context, this provides a strong argument for the traditional doctrine of parliamentary sovereignty. See, for example, Jeffrey Denys Goldsworthy, *The Sovereignty of Parliament* (Clarendon 1999), 261–263.
[11] Constant, *The Liberties of the Ancients Compared with that of the Moderns*, 327.
[12] This is the criticism raised by (among many others) Marx, Macpherson and communitarians such as Sandel: Karl Marx, 'On the Jewish Question' in E. Easton and K. Guddat (eds) *Writings of the Young Marx on Philosophy and Society* (Doubleday Books 1967 [1843]); C. B. Macpherson, *The Theory of Possessive Individualism* (Oxford University Press 1962); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982).
[13] David Held, *Models of Democracy* (Polity 2006), 88.

Whilst liberal democracy addresses some of the problems about a majority oppressing a minority, it does not necessarily address all of the problems associated with representative democracy. The representative democratic element in liberal democracy is not without problems either. To look at these more closely, we must disentangle some of the different variants of representative democracy.

REPRESENTATIVE DEMOCRACY

For centuries, Western philosophical discussions on democracy considered the Athenian forum to be the paradigmatic example of democracy. Yet with the rise of the modern state as a large territorial entity, indeed sometimes on a continental scale, this was not a viable conception of democracy. Furthermore, the Athenian model depended on the existence of a body of men who could devote considerable time to political discussion. This was only possible in Athens thanks to the labour of slaves, foreigners and women. And it is hardly possible in modern societies when individuals must spend a large portion of their time working.[14] The solution to the practical problems posed by the Athenian model of democracy is to institute some system of representation.[15] Representative government is the only feasible way of protecting political liberty in the modern world; it enables the citizenry to hold the governors to account by subjecting them to scrutiny and to reject them at regular intervals by means of elections.[16]

Representation is more than just a practical response, however. Constant thought that the ancient model of democracy associated with Greek city states protects political participation *at the expense* of private autonomy;[17] any effort to pursue those ancient ideals in modern societies would collapse in terror and infringe the modern liberties. Madison argued that representation in large-scale societies introduces a qualitative change for the better. Madison was wary of small parochial communities and thought that considering views from a larger-scale organisation allowed for better decision-making.[18] Weber thought that the use of representatives allowed for the negotiation of the compromises necessary in modern complex industrial societies.[19]

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[14] Constant, *The Liberties of the Ancients Compared with that of the Moderns*, 314.
[15] Thomas Paine, *Rights of Man* (Penguin 1984 [1791]), 180; Held, *Models of Democracy*, 129 citing Weber.
[16] Constant, *The Liberties of the Ancients Compared with that of the Moderns*, 326.
[17] Ibid., 311.
[18] Held, *Models of Democracy*, 73.
[19] Ibid., 130.

Liberal representative democracy solves (or at least offers a solution for) one of the problems associated with democracy – the danger of oppression by the majority. The problems with representative democracy, though, go beyond a failure to protect the rights of individuals. Even if individual rights are protected, there is much more to politics than just rights. There may still be difficulties if a minority or a section of the community fails to identify with the polity, perhaps because it is underrepresented or, if proportionally represented, is not able to influence policy (see later on egalitarian and inclusive models). Indeed, the danger is not just that a minority will fail to identify with the polity. The focus on procedures of representation, voting, the compromise and negotiation of interests may undermine any ideal of a 'common good' or other source of political integration. We shall return to the communitarian or civic republican critique in the section on substantive democracy; for now we will focus on the tendency towards elitism in representative democracy.

The process of representation may leave political power open to capture and monopolisation by a narrow elite or set of elites. This is particularly likely in large-scale[20] complex societies. Under such circumstances, it is not possible to participate in the political process without efficient and large organisations and financial resources. This leads to the dominance of political parties and professional politicians in the system. The dominance of political parties and professional politicians leads to a number of consequences. First, it may make it unlikely that the actual majority of the population will engage in political activity beyond voting. Second, the political process becomes dominated by political parties and professional politicians who may find it difficult to identify with the 'governed'. Third, the demands of organisation and financial resources may create a climate where wealth plays a significant role in politics. Indeed, the problem is not just that wealth can buy influence, but more fundamentally all governments depend on a successful private sector 'as the source of incomes, growth, jobs'.[21] Fourth, professional politicians seek power for its own sake, and in competing for electoral victory, parties and politicians may resort to a host of irrational stratagems, most notably personality politics and advertising techniques;[22] democracy on this model may involve nothing

[20]   Bellamy examines how late nineteenth- / early twentieth-century theorists saw the rise of mass democracy as facilitating the advent of new elites either in the form of demagogues or more bureaucratic or technical elites: Richard Bellamy, 'The Advent of the Masses and the Making of the Modern Theory of Democracy' in Terence Ball and Richard Bellamy (eds) *The Cambridge History of Twentieth Century Political Thought* (Cambridge University Press 2001).

[21]   Anne Phillips, *Which Equalities Matter?* (Polity 1999), 17.

[22]   In short, the political sphere becomes a marketplace where consumers (voters) can be manipulated into choosing particular products. For a critique of the consumer or marketplace