

## **Towards a stronger conception of democracy in the Strasbourg Convention**

### Keywords

Human rights, democracy, participation

### Abstract

The purpose of this article is to examine the promotion of democracy through human rights law. The focus will be on the possibilities for using the European Convention on Human Rights to promote participatory democracy. The author argues that the jurisprudence of the Strasbourg Court is beginning to recognise some participatory measures such as the requirement of consultation, notably under Article 8 of the Convention.

## **Towards a stronger conception of democracy in the Strasbourg Convention: The European Convention on Human Rights and Participatory Democracy<sup>1</sup>**

### *Democracy / Human Rights: From Antagonists to accomplices*

Two of the great values of modern political theory are democracy and human rights. The relationship between these two is one of the key topics in modern legal and political studies. The relationship is a much debated and contested one, sometimes giving rise to acrimonious disagreement.<sup>2</sup> The perception of the relationship between these values has changed.

Philosophers, lawyers and politicians used to talk about the conflict between rights and democracy, and this debate has certainly not disappeared.<sup>3</sup> Defenders of rights have regularly claimed that rights should limit the decisions of democratically elected authorities.<sup>4</sup> In the opposite camp, the democratic will of the people has been invoked

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<sup>2</sup> In the United Kingdom, some commentators have referred to the clash between the popular will of Parliament and the role of the judges in enforcing rights following the July 2005 bombings in London: Cherie Booth "Now we need judges more than ever" (2005) *Guardian* 2005/07/28; Matthew Tempest *Howard warns against 'judicial activism'* Guardian website <http://politics.guardian.co.uk/terrorism/story/0,,1546217,00.html> accessed on 23/08/2005.

<sup>3</sup> Waldron, Jeremy *Law and Disagreement* (Oxford: Oxford University Press, 2001), Harvey, C. "Talking about Human Rights" (2004) (5) *E.H.R.L.R.* 500 .

<sup>4</sup> Most commonly associated with Dworkin's image of rights as "trumps": Dworkin, Ronald *Taking Rights Seriously* (London: Duckworth, 1978) 364.

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to limit the impact of rights, often rejecting the idea of a Platonic elite deciding policy.<sup>5</sup>

This antagonistic interpretation of the relationship between rights and democracy may also explain one of the peculiarities of international human rights discourse from 1948 until the 1990s, which is the reluctance to stress the right to democracy. The focus of international human rights law was on substantive rights, a focus on the "liberty of the moderns" rather than the "liberty of the ancients".<sup>6</sup> This was perhaps understandable given the ideological disagreements on forms of Government during the Cold War period: international law being sandwiched between liberal democracies and people's democracies contributed to a certain agnosticism about democracy.

Since the 1990s both human rights lawyers and theorists have approached the relationship between rights and democracy in a more positive manner. Many practitioners and academics have stressed the *mutually reinforcing* nature of rights and democracy.<sup>7</sup> Arguably the two most important political philosophers of the late Twentieth Century announced as their programme the reconciliation of the liberties of

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<sup>5</sup> Walzer, Michael "Philosophy and Democracy" (1981) *Political Theory* 379 .

<sup>6</sup> The phrase is Benjamin Constant's, as cited in Rawls, John *Political Liberalism* (New York: Columbia University Press, 1993)5.

<sup>7</sup> Among academics, see Beetham, David *Democracy and Human Rights* (Cambridge: Polity, 1999), Fredman, Sandra "Scepticism under Scrutiny: Labour Law and Human Rights" in T. Campbell, K. Ewing and A. Tomkins (ed.) *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001).

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the moderns and of the ancients.<sup>8</sup> Scholars have begun to write about the right to democracy in international law.<sup>9</sup>

This mutually reinforcing nature is expressed in the 1993 Vienna Declaration. The 1993 Vienna Declaration with its agenda of integrating the diverse strands of human rights law, places them all firmly in the framework of a democratic order.<sup>10</sup> This has been reiterated in later work from the United Nations. A working paper for the UN Sub Commission on Human Rights outlines the evolving "right to democracy" in international law.<sup>11</sup> United Nations resolutions increasingly stress the importance of democracy<sup>12</sup> and it has been given even more prominent attention in the 2002 UN Human Development Report.<sup>13</sup>

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<sup>8</sup> Rawls, John *Political Liberalism* (New York: Columbia University Press, 1993) 5 and Habermas, Jürgen *Between Facts and Norms* (Cambridge: MIT Press, 1995)100-104. Habermas uses the terms public autonomy and private autonomy, and sees his discourse theory as resolving the debate between Kant and Rousseau.

<sup>9</sup> Franck, Thomas "Legitimacy and the democratic entitlement" in Gregory Fox and Brad Roth (ed.) *Democratic Governance and International Law* (Cambridge: CUP, 2000).

<sup>10</sup> Paragraph 8 of the Declaration states that "Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives."

<sup>11</sup> 2002 *Promotion and consolidation of democracy: Expanded working paper by Mr. Manuel Rodríguez Cuadros on the measures provided in the various international human rights instruments for the promotion and consolidation of democracy*, (E/CN.4/Sub.2/2002/36).

<sup>12</sup> The most recent being 2002 *Further Measures to promote and consolidate democracy, Commission on Human Rights Resolution 2002/46*.

<sup>13</sup> United Nations Development Program *Human Development Report 2002: Deepening democracy in a fragmented world* (New York, Oxford: Oxford University Press, 2002).

*The European Convention and Democracy*

This positive relationship is nothing new to the European Convention on Human Rights which has always stressed the link between rights and democracy. The concept of a democratic society is a unifying thread throughout the Convention. The Convention identifies 'an effective political democracy' as being one of the key guarantees of human rights and fundamental freedoms (Preamble). When it comes to allowing rights to be limited this may only be done in so far as is 'necessary in a democratic society' (Articles 8, 9, 10, and 11).<sup>14</sup> The First Protocol to the Convention specifies the elements of an 'effective political democracy' in its Article 3 (P1-3): the states

'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.<sup>15</sup>

The image of a democratic legislature is not limited to these references. The many references to the "rule of law" (Preamble), "prescribed by law" and "in accordance with law" and similar terms<sup>16</sup> in the Convention all refer to the adoption of norms, which may often be done by the democratically elected legislature, though this is not a requirement of the Convention.<sup>17</sup>

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<sup>14</sup> Gearty, Conor *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004), Ch. 2.

<sup>15</sup> On the drafting of P1-3, see Simpson, Brian *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2001), Ch. 15. As might be expected the position of peoples in Britain and France's colonial empires was seen as a potential problem: Simpson, Brian *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2001), p. 762, 766, 773.

<sup>16</sup> Articles 2, 5, 7, 8, 9, 10, 11, 12, P1-1, P4-2, P7-1, P7-2, P7-3, P7-4, P12-1.

<sup>17</sup> *Sunday Times v United Kingdom* (1979) 2 E.H.R.R. 245, para 47.

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The text and case law of the Convention give guidance as to the nature of the democracy envisaged.<sup>18</sup> The Convention specifies the elements of a democracy, indicating that a "representative democracy" is intended. Article 3 of Protocol 1 speaks of free secret elections at regular intervals where the people can choose their legislators. The contrast with Article 21 UDHR, which the Convention drafters were explicitly "considering" (ECHR Preamble), is enlightening. The UDHR speaks of a right to take part in government, directly or through representatives, and refers to the right of access to public service: these aspects of the right to democracy are dropped in P1-3, and only elections remain. Further although the heading of P1-3 uses the term "rights", the text of the article does not speak in terms of "rights", but merely of the states' undertaking to hold elections.

The Court has built on this notion of elections though, holding that P1-3, (as the heading to the article suggests) creates rights to vote and run for election.<sup>19</sup> These rights, as with most of the rights in the Convention, are subject to proportionate limits in the public interest,<sup>20</sup> and the Court often speaks of the margin of appreciation that is owed the state in the sensitive area of political arrangements.<sup>21</sup>

The Court has stressed the interrelationship of several rights to democracy, especially the rights to expression and assembly.<sup>22</sup> Further, the Court has identified the values of

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<sup>18</sup> On different conceptions of democracy see Held, D. *Models of Democracy* (Cambridge: Polity, 1996) and Cunningham, Frank *Theories of Democracy* (London: Routledge, 2002).

<sup>19</sup> *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 E.H.R.R. 1 .

<sup>20</sup> *Ahmed v United Kingdom* (1998) 29 E.H.R.R. 1.

<sup>21</sup> *Liberal Party v United Kingdom* (1980) 21 D&R 211 App. 8765/79.

<sup>22</sup> Mowbray, Alasdair "The Role of the European Court of Human Rights in the Promotion of Democracy" (1999) *Public Law* 703 ; Gearty, Conor "Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal" (2000) 51 (3) *Northern Ireland Legal Quarterly* 381-396 .

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the Convention model of democracy as one marked by pluralism,<sup>23</sup> tolerance and broadmindedness.<sup>24</sup> The Court also holds that democracy is a system that is entitled to defend these values.<sup>25</sup>

Overall therefore the Court has developed P1-3 beyond its early limitations. It has for instance upheld the right of convicted prisoners to vote,<sup>26</sup> and stressed that limitations on the right to stand for election must be shown to be necessary.<sup>27</sup> Further, despite the reference in P1-3 to elections for a "legislature", this has been interpreted widely. It has been held to apply to a supranational assembly such as the European Parliament.<sup>28</sup> The Court has applied P1-3 to sub-national assemblies, where they have sufficient rule making powers.<sup>29</sup> In a time of "multi-level governance",<sup>30</sup> when political power is flowing away from the national legislatures, these are welcome developments.

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<sup>23</sup> Democracy requires respect even for shocking ideas: *Yazar v Turkey*, (2003) 36 E.H.R.R. 59, para. 46.

<sup>24</sup> Speaking in the different context of the UK's ban on gay men and lesbians serving in the armed forces, see *Lustig-Prean v United Kingdom* (1999) 29 E.H.R.R. 548, para 80.

<sup>25</sup> *Vogt v Germany*, (1996) 21 E.H.R.R. 205. The European Court of Human Rights has accepted a ban on a religiously oriented party in Turkey: *Refah Partisi (Welfare Party) v Turkey*, (2003) 37 E.H.R.R. 1; the Refah party proposed to establish separate systems of personal law, to introduce Sharia law for Muslims, nor had the party distanced itself from the use of force. The idea of defending democratic values may owe something to the German constitutional concept of *streitbare demokratie*, discussed in Kommers, Donald *Constitutional Jurisprudence of the Federal Republic of Germany* (Durham and London: Duke University Press, 1997) 37-38.

<sup>26</sup> *Hirst v United Kingdom (No. 2)* (App. no. 74025/01), judgment of October 6, 2005.

<sup>27</sup> *Melnichenko v Ukraine* (2004) 42 E.H.R.R. 784. This test of necessity can be satisfied in some cases as shown in the recent case of *Zdanoka v Latvia* (App. no. 58278/00), judgement of March 16, 2006, where the Court accepted that a restriction on political rights may be justified in the context of a recently democratised country: para. 133.

<sup>28</sup> *Matthews v United Kingdom* (1999) 28 E.H.R.R. 361.

<sup>29</sup> *Santoro v Italy* (2004) 42 E.H.R.R. 771, paras 50-53.

<sup>30</sup> Bamforth, N. and Peter Leyland "Public Law in a Multi-Layered Constitution" in N. Bamforth and Peter Leyland (ed.) *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003), 2.

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These elements reflect a very traditional aim of judicially protected human rights: making representative democracy more open and fair.<sup>31</sup> Yet, these decisions under P1-3 are limited to the institutions of representative democracy. This article suggests that the ECHR can be pushed beyond this limitation, indeed the Court has already started the process.

### *Is Representation enough? The concept of participatory democracy*

Representative democracy is no doubt vital for the protection of human rights, but it is only one conception of democracy. Scholars have warned that the recent focus on democracy in international law runs the risk of being concerned primarily with questions about the features of elections, which is a narrow aspect of democratic self-government.<sup>32</sup>

Representative democracy may be contested for many different reasons. It might be contested because it is generally unsympathetic to minorities.<sup>33</sup> Someone who is represented is not governing him or herself: the voter in a representative democracy generally has a limited power of self-government, and his/her role as citizen is reduced to the negligible one of voting once every four or five years for representatives who tend to come from a class of professional politicians, segregating the "governors" from the "governed". This is an especially relevant topic today, when the relevance of the national Parliament is often doubted and citizens further doubt

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<sup>31</sup> Ely, John Hart *Democracy and Distrust* (Cambridge: Harvard UP, 1980).

<sup>32</sup> Marks, Susan *The Riddle of All Constitutions* (Oxford: OUP, 2000)

<sup>33</sup> Williams, Melissa *Voice, Trust and Memory: Marginalised Groups and the Failure of Liberal Representation* (Princeton: Princeton University Press, 1998) Young, Iris Marion *Justice and the Politics of Difference* (New Jersey: Princeton University Press, 1990).

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their ability to influence Parliament.<sup>34</sup> When democratic politics is reduced fighting against apathy to vote for a possibly irrelevant Parliament, then we are in a condition of "thin democracy", "low-intensity democracy" or even "post-democracy"<sup>35</sup> and perhaps participatory models offer more hope for democratic politics.<sup>36</sup>

In this article I want to explore how another conception of democracy, participatory or participative democracy, fares in the Convention. To paraphrase one of the advocates of participatory democracy I want to see just how strong is the Convention's conception of democracy.<sup>37</sup> Participatory democracy appears attractive because it suggests that citizens should have more of a real role in governing themselves. In recent years the value of participation has enjoyed a renewed vogue,<sup>38</sup> with a major UK inquiry into the possibilities for improving participation<sup>39</sup> and a "mainstreaming" provision in Northern Ireland designed to promote participation.<sup>40</sup>

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<sup>34</sup> Though Parliament in the UK, for instance, is often criticised for its irrelevance, there are those who are more optimistic: Tomkins, Adam *Public Law* (Oxford: Oxford University Press, 2003).

<sup>35</sup> See Marks, Susan *The Riddle of All Constitutions* (Oxford: OUP, 2000), Barber, Benjamin *Strong Democracy* (Berkeley: University of California Press, 1984); Crouch, C. *Post Democracy* (Cambridge: Polity Press, 2004); Tully, James "The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy" (2002) 65 *Modern Law Review* 204, 213; Power Inquiry *Power to the People* (London: Power Inquiry, 2006), Ch. 3.

<sup>36</sup> Morison, J. "Democracy, Governance and Governmentality: Civic Public Space and Constitutional Renewal in Northern Ireland" (2001) 21 (2) *Oxford journal of legal studies* 287 .

<sup>37</sup> Barber, Benjamin *Strong Democracy* (Berkeley: University of California Press, 1984).

<sup>38</sup> Morison, J. "Models of Democracy: from Representation to Participation" in J. Jowell and Dawn Oliver (ed.) *The Changing Constitution* (Oxford: Oxford University Press, 2004).

<sup>39</sup> Power Inquiry *Power to the People* (London: Power Inquiry, 2006).

<sup>40</sup> Section 75 of the 1998 Northern Ireland Act requires specified public authorities to adopt equality of opportunity plans to promote equality in relation to nine grounds. These plans must be based on consultation with associations representing those affected. Section 75 is limited to Northern Ireland and to the designated public authorities therein, and there have been queries about its effectiveness given the absence of any judicial sanction. McLaughlin, E. and N. Faris *Section 75 Equality Review - an operational review* (Belfast: Northern Ireland Office, 2004) On Section 75 see McLaughlin, E. and N. Faris *Section 75 Equality Review - an operational review* (Belfast: Northern Ireland Office, 2004); On

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Such participation should lead to a more deliberative democracy, where citizens debate and exchange ideas rather than merely voting their preferences every few years.<sup>41</sup> Participatory democracy attempts to break down the sharp divide between “governors” and the “governed”: everyone should have a chance to participate in self-government, not merely a professional political class. Such participation facilitates the development of an active, informed, citizenry rather than passive consumers of a range of electoral options. Does Convention human rights law offer the possibility to promote participatory democracy?

There are certainly dangers and flaws with participatory democracy. There are genuine problems of scale with trying to apply ideals of “face to face” democracy to large scale societies,<sup>42</sup> which is one of the reasons why such ardent democrats as Tom Paine supported representative democracy.<sup>43</sup> Opportunities for participation might be used by those with rhetorical or financial advantages to achieve their own goals. Participatory mechanisms may allow local elites, or special interests to achieve their goals, and foster a narrow-minded parochialism. Some critics may object that participatory democracy leads to “mob rule” and ignores the need for expert

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the absence of a judicial sanction see *Re Northern Ireland Commissioner for Children and Young People* [2004] NIQB 40 (2004/06/23). I am grateful to participants in QUB Equality Law module for discussion of Section 75 issues.

<sup>41</sup> In this regard, participatory democracy has much in common with some models of deliberative democracy. On deliberative democracy, see Bohman, James *Deliberative Democracy* (Cambridge, MA.: MIT Press, 1998), Fishkin, James and Peter Laslett *Debating Deliberative Democracy* (Oxford: Blackwell, 2003); Dryzek, J.S. *Deliberative Democracy and Beyond* OUP, 2000). As Dryzek notes, there are very different models of deliberative democracy, and some may be no more than idealised versions of representative democracy. This criticism has been expressed in strong terms about Jurgen Habermas’ work: Cook, D. "Habermas' Talking Cure" (2001) *New left review* 135 .

<sup>42</sup> Fishkin, James and Peter Laslett *Debating Deliberative Democracy* (Oxford: Blackwell, 2003).

<sup>43</sup> Paine, Thomas *The Rights of Man* (Hammondsworth: Penguin, 1984, 1791-1)

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decisions.<sup>44</sup> Certainly participatory democracy is not a panacea for the woes of democratic practice today: the introduction of more participatory politics would need to be complemented by other constitutional reforms to be fully effective.<sup>45</sup>

In what ways could human rights law further participatory democracy? The institutions of a more participatory democracy are certainly not mandated by human rights law. They may include wide ranging reforms to the political, social and economic sphere. Hirst suggests devolution of decision making powers to democratically run groups within civil society,<sup>46</sup> while Barber identifies a platform of reforms which would improve participation, including neighbourhood assemblies, referenda, selection by lot.<sup>47</sup> Participation need not necessarily involve only such major changes: Arnstein identifies a range of types of participation from "citizen control" all the way down, ominously, to elite manipulation and mere rubberstamping of decisions.<sup>48</sup> Participatory innovations which do not require such radical institutional change include the provision of information and better processes of consultation. Human rights standards could provide some scope for increasing participation by several techniques. It could insist on a duty to provide information, as participation is only possible if individuals know what public policy is, how their

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<sup>44</sup> According to Hannah Arendt, practically the entire history of political philosophy since Plato has been marked by philosophical distrust of democratic rule by ordinary people: Arendt, Hannah *The Human Condition* (Chicago: University of Chicago Press, 1998)194-5, 220-4.

<sup>45</sup> See the Power Inquiry's proposals: Power Inquiry *Power to the People* (London: Power Inquiry, 2006).

<sup>46</sup> Hirst, Paul Q. *Associative democracy : new forms of economic and social governance* (Cambridge: Polity, 1994) 20.

<sup>47</sup> Barber, Benjamin *Strong Democracy* (Berkeley: University of California Press, 1984), 268-305.

<sup>48</sup> Arnstein, S. "A Ladder of Citizen Participation" (1969) *Journal of American Institute of Planners* 216, discussed by Morison, J. "Models of Democracy: from Representation to Participation" in J. Jowell and Dawn Oliver (ed.) *The Changing Constitution* (Oxford: Oxford University Press, 2004) 165.

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rights and interests are affected, and so on. The European Court has been developing such a right in a string of well known cases.<sup>49</sup> Second, human rights law could provide that there must be opportunities for consultation. Third, the human rights law could provide that that consultation be made effective and even-handed. In the next section, I shall examine the extent to which there is support for the idea of a right to consultation in the Convention case law.

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<sup>49</sup> *Gaskin v United Kingdom*, (1990) 12 E.H.R.R. 36, para 49; *G. (M.) v United Kingdom*, (2002) 36 E.H.R.R. 22, para 30; *Guerra v Italy*, (1998) 26 E.H.R.R. 357, para. 60; *Oneryildiz v Turkey* (2005) 41 E.H.R.R. 325, paras. 89-90, 108; *McGinley and Egan v United Kingdom* (1998) 27 E.H.R.R. 1, paras 101-2; *LCB v United Kingdom* (1998) 27 E.H.R.R. 212, paras 38-9 and *Roche v United Kingdom* (2006) 42 E.H.R.R. 599, paras. 165-6. This last decision is potentially very important with its requirement of a structured mechanism for providing information.

### *Right to Consultation?*

Is there support in the European Convention for a duty to consult with persons whose rights may be affected by decisions?<sup>50</sup> There is some evidence for this.

In one special context, the Strasbourg Court has identified a right to “be heard”. This is in the context of Article 11 on freedom of association and assembly, which includes “the right to form and to join trade unions for the protection of his interests”. In the early *Belgian National Police Union* case, the Court of Human Rights rejected the former Commission’s view that this included a right to consultation: the text did not explicitly refer to such a right, nor was it a necessary implication, and trade union rights were really the province of the 1961 Social Charter.<sup>51</sup> The Court did however find that the phrase “for the protection of his interests” did require something more than mere non-interference with a union, and described this added element as a right to be heard. This could be implemented either by consultation or some other practice (in a separate opinion, Zekia J. commented that trade union relations might evolve so as to include a right to consultation as a normal aspect to be implied into Article 11). In this case, the right to be heard was satisfied when the Union could make representations which were not simply ignored by the Government.<sup>52</sup> Further, although the Government provided consultation processes for other Unions, the

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<sup>50</sup> I am leaving aside the issue of right of access to a court and the right to a remedy (Articles 6, 13 ECHR). Whilst these are important mechanisms of accountability, and allow the citizen to press for his or her rights, I want to focus on the idea of participating in the administration and political process rather than referring the matter to a court. This is not to deny the importance of judicial processes in giving persons a say in decisions affecting their own lives. Further there is an argument that the judicial process allows participation in the political process, through a “dialogue” between institutions.

<sup>51</sup> *Belgian National Police Union case* (1979-80) 1 E.H.R.R. 578, para. 38.

<sup>52</sup> *Belgian National Police Union case* (1979-80) 1 E.H.R.R. 578, paras. 39-40.

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decision not to extend these to the applicant union was a justified distinction under Article 14 (four judges dissented, finding that there was no sufficient justification for denying a right to consultation in this case).<sup>53</sup>

This right to be heard is then a rather minimal one: the right to make representations (which everyone has) which the expectation that those representations will not be ignored. The Court has given some more teeth to Article 11 in recent years. In *Wilson*, UK labour laws effectively allowed an employer to offer better contracts to employees who left a trade union.<sup>54</sup> This had been criticised by the European Social Charter's Committee of Experts and the ILO Committee on Freedom of Association.<sup>55</sup> The European Court accepted that the failure to provide for a duty to enter into collective bargaining did not violate Article 11.<sup>56</sup> Nevertheless UK law allowed an employer to offer preferential conditions to union members, in effect to leave the Union, and so undermined the possibility of the union representing its members interests.<sup>57</sup> As one concurring minority opinion expressed it:

"It permitted employers to ignore all representation by trade unions on behalf of their members and, furthermore, to use financial incentives to induce employees to surrender important union rights." (Jorundsson J.).

This stripped the right to be heard of any meaning. The Court has therefore taken some steps to ensure that the right to be heard, within Article 11, is not just a token.

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<sup>53</sup> Para. 49. These general points were reiterated in the *Swedish Engine Drivers case: Swedish Engine Drivers' Union case* (1979-80) 1 E.H.R.R. 617, paras. 39-40.

<sup>54</sup> *Wilson v United Kingdom*, (2002) 35 E.H.R.R. 523.

<sup>55</sup> Paras. 30-37.

<sup>56</sup> Para. 45.

<sup>57</sup> Paras. 47-8.

Aside from the special context of Article 11 though, the Court of Human Rights does occasionally speak of consultation. There are some important examples of this in cases involving the potentially wide ranging right to respect for private and family life in Article 8. When the Court of Human Rights is applying its proportionality test, one element it looks for in deciding whether a measure is too restrictive is whether there have been processes by which an individual can become involved in the decision making process or challenge it. In an early case dealing with the clash between the rights of Gypsies to live in caravans on land they own, and the general interest in respecting planning priorities, the Court explained:

“Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 (art. 8) contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8...”<sup>58</sup>

In *Buckley*, the planning decision denying permission for caravan's to be placed on the applicant's land, had been made after an investigation where written observations from the applicant had been considered. Further the applicant had the possibility to

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<sup>58</sup> *Buckley v United Kingdom* (1996) 23 E.H.R.R. 101, para 76.

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appeal the decision, and to take judicial review proceedings challenging it.<sup>59</sup> By a vote of 6-3, the Court found no violation of Article 8.

The *Chapman* case again concerned the rights of gypsies in the United Kingdom. Here the claimant had been denied planning permission to keep a mobile home or build a caravan on their land, due to environmental reasons. The Court of Human Rights, sitting in a Grand Chamber of seventeen judges, noted that it was not well equipped to review such planning decisions as it could hardly visit all sites to view the environmental impact. In such a case:

“In these circumstances, the procedural safeguards available to the individual applicant will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, it must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8”<sup>60</sup>

The Court noted that Article 8 imposed a duty on the authorities to accord some “special consideration” to gypsies given their “vulnerable position”, and to “facilitate the gypsy way of life” (para 96); further the Court accepted that unlawful discrimination might arise when a State without reasonable justification treats as being alike persons who in reality are differently situated (para 129). However the Convention does not create a right to a home for anyone (para 98-99). The court noted

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<sup>59</sup> Paras. 79-80.

<sup>60</sup> *Chapman v United Kingdom* (2001) 33 E.H.R.R. 399, para 92.

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that it would lean against persons who acted illegally to emplace homes,<sup>61</sup> though it would be more sympathetic where there was a lack of homes available (para 103). In this case the Court was influenced by the fact the applicant had the opportunity to present her circumstances fully to the authorities in two full enquiries, and the authorities took into account the applicant's circumstances (paras 106-7, 110). The authorities concluded the environmental needs outweighed the interests of the applicant after a careful weighing, and whilst there was a problem with the amount of sites available, the applicant had not shown that she had done what she could to find alternative accommodation. By a slim majority (7 judges dissented) the court found no violation. While the applicant lost in this case, it is significant that the court was impressed by the fact that she had access to fair procedures with which to put her case before the authorities, whilst the dissenters laid some stress on the fact that the applicant's position was considered by the inspectors in a context where only "token weight" would be given to her arguments.<sup>62</sup>

These issues were revisited in *Connors v UK*.<sup>63</sup> The applicant was a gypsy living in a caravan on a council provided plot for much of the previous fifteen years. He was subject to an eviction order largely due to complaints most of which related to his married daughter and her husband. This case called for a much narrower margin of appreciation than *Chapman*: the applicant had not set up his home illegally; there were no general issues of policy in question (para 86). He was subject to a summary

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<sup>61</sup> Para 102, but see Bonello J.'s dissent noting that the authorities had failed in their legal obligations to provide accommodation for gypsies.

<sup>62</sup> Para. 5 of the joint dissenting opinion.

<sup>63</sup> *Connors v United Kingdom* (2004) 40 E.H.R.R. 189. The case is discussed by the House of Lords in *Kay and others v. London Borough of Lambeth* [2006] UKHL 10. The *Blecic* case discussed in *Kay* has now been found by the Grand Chamber to be outside the temporal jurisdiction of the Strasbourg system: *Blecic v Croatia* (App. no.59532/00), judgment of March 8, 2006.

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power of eviction, unlike council tenants in settled accommodation, for which no convincing justification was offered: settled council tenants could not be evicted without a court hearing where the authority had to articulate its reasons, and where the person evicted could plead his case (para 89). In such a situation, "the existence of other procedural safeguards is however a crucial consideration" and the Court did not accept that the mere possibility of judicial review offered this particular applicant an adequate opportunity to test his case (para 92).

I do not want to suggest that the possibility of calling for legal accountability constitutes an act of participation, though it may be a useful forum for calling to account flawed decisions, including decisions flawed by an absence of participation. It is of note that the mere existence of a judicial remedy in *Connors* - judicial review - did *not* satisfy the need for adequate procedures. What was required was a public hearing before a court where the authorities could explain their reasoning and the applicant challenge it. The Court focused in on this particular type of procedure because that was what existed for settled tenants. This suggests that it is not necessarily the case that the procedures required must necessarily be judicial in nature.

Support for the idea that rights may only be limited if there are procedures for persons affected to make their views known comes from a very different type of case. *Hatton* concerned the disturbance caused to Article 8 family and private life by night flights over Heathrow. In the first *Hatton* case the Chamber concluded that the Government had not adequately investigated the need for night flights.<sup>64</sup> The Grand Chamber

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<sup>64</sup> *Hatton v United Kingdom* (2002) 34 E.H.R.R. 1.

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reversed this decision.<sup>65</sup> The Grand Chamber noted that it should examine the case both from a substantive and procedural view; the latter required the Court to consider whether the applicants' views were considered, and whether there were safeguards for their interests.<sup>66</sup> The Grand Chamber did not find the substantive decision unreasonable, and noted the applicants could have moved elsewhere without having to sell their property at a loss.<sup>67</sup>

On the procedural front, the Grand Chamber noted that there had been on going investigations, and that information about the proposed scheme, including details of the studies, had been sent to people affected, and they thus had the opportunity to make representations. Indeed, the applicants were members of a committee on noise which was then a member of the Heathrow Airport Consultative Committee. Further if those representations had been ignored there was the possibility of legal proceedings.<sup>68</sup>

The *Hatton* judgement, even though finding no violation, is important for two reasons. It indicates the sort of consultative practice that will satisfy the Strasbourg institutions. Second, it lays down a marker that the substantive and procedural questions must both be addressed: there must be both substantive correctness and a proper procedure allowing for consultation.

These Article 11 and Article 8 cases demonstrate the possibility for promoting at least a minimum form of participation, consultation, through the Convention. It is a trend to be more thoroughly developed in the Convention case law. In particular the Court will

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<sup>65</sup> *Hatton v United Kingdom* (2003) 37 E.H.R.R. 611.

<sup>66</sup> *Hatton v United Kingdom* (2003) 37 E.H.R.R. 611, paras. 99, 104.

<sup>67</sup> *Hatton v United Kingdom* (2003) 37 E.H.R.R. 611, paras. 120-127.

<sup>68</sup> *Hatton v United Kingdom* (2003) 37 E.H.R.R. 611, para 128.

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have to give further thought to what constitutes adequate consultation. From the Convention cases we can glean that if the authority can simply ignore representations without having to give reasons in a case of eviction, then this violates the Convention (at least if proper procedures are provided in analogous situations: *Connors*). Or if an employer can ignore Union demands and put pressure on Union members to leave the Union, then this violates the right to be heard (*Wilson*). At the other end, if the State conducts serious studies of a problem, and makes those known to the people affected by way of a consultation process, and some of those people are actually members of a consultative framework, then there is no violation (*Hatton*). Where consultation falling short of this standard violates the Convention needs to be clarified – a vital issue if we are to avoid the criticism that the consultation process is merely a token one.

*Conclusion: Forward to a right to effective consultation?*

What is meant by “democratic society”? The European Convention system seems to refer predominantly to the institutions of representative democracy. Yet the Court has already stretched the Convention’s conception of democracy beyond the maintenance of representative legislatures. This has been seen in the Court’s creative interpretation of Article 3 Protocol 1 beyond imposing an objective duty on states to hold elections, to include subjective rights of individuals to vote, run for and hold office. Further the Court has applied Article 3 Protocol 1 to bodies which are not typical legislatures, including local authorities (at least where they have important rule-making powers) and the European Parliament. Beyond this though, the Court has added a substantive dimension to the Convention’s conception of democracy, stressing that the

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Convention calls for an inclusive pluralist society in which vigorous debate can take place.

This enriching of the Convention vision of democratic society is only to be praised, but there are other democratic virtues besides pluralism, tolerance and broadmindedness: the virtue of participation is one the Convention could usefully foster.

We have seen that there are some hints in the case law of the Convention as to how a right to consultation could be developed where decisions impact on specific persons. These cases recognise the need for procedures that allow individuals to be involved in decision-making, both over the taking of decisions individually directed at them (*Buckley, Chapman*) and decisions not directed specifically at certain persons but specially affecting them nonetheless (*Connors, Hatton*). We can propose that this be developed more critically: where an authority has interfered with an individual's rights, either by a general measure or by a specific decision, then it must, as part of the "necessary in a democratic society" test, afford him or her the opportunity to argue against that decision or policy, whether this be through a consultation procedure (*Hatton*) or some other procedure (e.g. judicial in *Connors*). Such a duty to consult is not necessarily always appropriate.<sup>69</sup>

It may well be the case that in relation to certain types of decisions consultation is not the right approach. It may even be that some decisions are so important to the individual that he or she should have a sovereign right to decide about them.<sup>70</sup> In other

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<sup>69</sup> For instance, it is difficult to see its application in the context of Article 5 and Article 6 cases. In such cases an individual's possibility to participate is provided by means of a judicial hearing.

<sup>70</sup> Decisions about medical care: *Storck v Germany* (App. no. 61603/00), judgment of June 16, 2005 at para. 143-4.

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cases, a judicial remedy is provided and this is more appropriate than consultation processes. The Strasbourg Court has long emphasised the importance of fair procedures in Article 8 claims related to family matters.<sup>71</sup> However, judicial remedies cannot be provided for all types of decisions;<sup>72</sup> and where this is not appropriate the Convention should consider whether a duty of consultation is appropriate.

We must note two last important objections to this identification of a nascent development in the Strasbourg jurisprudence. First, this article is based on a relatively small number of cases: less than a dozen, whereas the Strasbourg court decides hundreds of cases a year.<sup>73</sup> It is important to keep this perspective in mind. However the cases should not be dismissed either: they include some very important decisions of the Strasbourg Court, including its first decisions on Gypsy rights (*Buckley*), its first decision upholding Gypsy rights (*Connors*), and landmark decisions in relation to trade union rights (*Wilson*). The cases also include a decision of the especially solemn Grand Chamber (*Hatton*),<sup>74</sup> which is only called upon to decide a score or so cases per year.<sup>75</sup>

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<sup>71</sup> *Hoppe v Germany* (2004) 38 E.H.R.R. 285, paras. 52-56; *T.P. and K.M. v United Kingdom* (2002) 34 E.H.R.R. 42, paras. 70-77.

<sup>72</sup> This is a point made clear by the European Court of Human Rights, when rejecting by 12 votes to 5 an Article 6 argument that claimed that a decision about the use of nuclear energy should be the subject of a judicial decision: *Athanassoglou v Switzerland*, (2001) 31 E.H.R.R. 372, paras 50-55. The applicants in that case had had an opportunity to make their views known by petitioning the executive Federal Council: *ibid.*, paras. 10-12.

<sup>73</sup> More than 700 in 2004; Council of Europe *Survey of Activities of the European Court of Human Rights in 2004* (Strasbourg: Council of Europe, 2005), 32.

<sup>74</sup> See also, on the related right to information cases, the Grand Chamber decisions: *Oneryildiz v Turkey* (2005) 41 E.H.R.R. 325; *Roche v United Kingdom* (2006) 42 E.H.R.R. 599.

<sup>75</sup> Fifteen cases in 2004, twelve in 2003; Council of Europe *Survey of Activities of the European Court of Human Rights in 2004* (Strasbourg: Council of Europe, 2005), 32; Council of Europe *Survey of Activities of the European Court of Human Rights in 2003* (Strasbourg: Council of Europe, 2004), 31.

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A second objection is more worrying from the viewpoint of participatory democrats: that the cases discussed here point to only a mild form of participation: the provision of procedures for consultation. Arnstein characterises this forms of participation as being "token" in nature.<sup>76</sup> It would certainly appear modest beside the ambitious schemes discussed by (e.g.) Barber<sup>77</sup> or the Power Inquiry.<sup>78</sup> There is no doubt that consultation processes are open to manipulation. However, merely being open to manipulation does not mean they inevitably will be manipulated. Knowledge, and opportunities to offer opinions and information are essential first steps along the path to participation.

The decisions also show the potential benefits and strengths of a Convention conception of participation. First, *Hatton* clarifies that procedures for consultation are not a substitute for substantive justification:<sup>79</sup> consultation does not excuse disproportionate interference with rights. Further the somewhat amorphous nature of Article 8 makes it possible to insist upon procedures for participation in a more general way than relying on specific legislative requirements of consultation: When the interests in family, home and private life protected by Article 8 are being interfered with, there must be processes for the persons affected to be involved in the decision-making. Third, the Court has indicated that it will not accept just a façade of

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<sup>76</sup> Arnstein, S. "A Ladder of Citizen Participation" (1969) *Journal of American Institute of Planners* 216 .

<sup>77</sup> Barber, Benjamin *Strong Democracy* (Berkeley: University of California Press, 1984).

<sup>78</sup> Smith, G. *Beyond the Ballot - 57 Democratic Innovations* (London: Power Inquiry, 2005); *Power Inquiry Power to the People* (London: Power Inquiry, 2006).

<sup>79</sup> Lord Bingham, relying on academic literature, warns of the danger of a "new formalism" and a retreat to procedures in the case of *R. (on the application of Begum) v Denbigh High School* [2006] UKHL 15, at paras. 30-31.

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consultation (*Wilson, Connors*) though this is an area of the jurisprudence that needs more development.

The Convention certainly does not offer a blueprint for a participatory democracy: the entire notion of participatory democracy would be undermined if it were something legislated for by an international text. However the Convention does offer opportunities for fostering participation, and permitting citizens to take a greater role in governing their own fate, if lawyers, litigants and citizens decide to take those opportunities.