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WHEN THE EUROPEAN COURT OF HUMAN
RIGHTS SPEAKS, WHAT SHOULD IT SAY?

TESTING BRETTSCHEIDER'S VALUE
DEMOCRACY AT THE SUPRANATIONAL LEVEL

BY

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When the European Court of Human Rights speaks, What Should It Say?

Testing Brettschneider's Value Democracy at the Supranational Level

Alain Zysset

In *When the State speaks, What Should It Say?*, Corey Brettschneider aims to resolve the dilemma opposing two conceptions of the role of the liberal and democratic state in addressing hateful and/or discriminatory beliefs and practices: the Invasive State, on the one hand, and the Hateful Society, on the other. At one extreme, the Invasive State coerces its subjects by prohibiting the expression of certain discriminatory viewpoints that are inconsistent with the ideal of free and equal citizenship. 'Prohibitionists' would therefore use coercion to promote democratic values and thereby 'promote equality as its expense.'¹ In the Hateful Society, in contrast, 'neutralists' protect the expression of all opinions and may leave deeply discriminatory beliefs and practices 'thrive in a culture of rights'² and thereby make the state complicit in those beliefs and practices.

Faced with such dilemma, Brettschneider defends an alternative model, 'value democracy', which aims to avoid the 'dystopias' of coercion or neutrality. Rather than attempting to

¹ Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton: Princeton University Press, 2012), p. 168.

² *Ibid.*

change beliefs and practices by coercing individuals, the state and the citizenry should engage in ‘democratic persuasion’ by criticizing discriminatory beliefs and practices and persuade them to adopt the founding values of freedom and equality. The state’s duty of democratic persuasion does not face the justificatory burden of both the ‘prohibitionists’ and the ‘neutralists’ because it is met by the *expressive* and not *coercive* capacities of the state. Democratic persuasion has the advantage that the state and the citizenry actively and publicly defend the ‘reasons for rights’ (free and equal citizenship) without limiting those rights.

In this article, I aim to test Brettschneider’s value democracy at the supranational level. To specify what I mean by ‘supranational’, it is necessary to concentrate on one central state actor bearing the duty of democratic persuasion, namely courts. Indeed, Brettschneider assigns a central expressive role to courts in ‘promulgating the reasons for rights.’³ While no single state institution holds a monopoly on the expression of those reasons, the opinion of courts is a central and concrete requirement of value democracy. The courts’ expressive function helps to resolve the tension between the interest of speakers and listeners in viewpoint neutral protections and the interest of the citizenry in ensuring that democratic values are publicly expressed and hateful views are combatted. Courts are generally asked to give reasons for their judgments, but they not are assigned the specific duty of democratic persuasion that their subjects deserve to know the reasons that underlie their legally protected rights.

Throughout the book, Brettschneider focuses on prominent cases at the U.S Supreme Court—an ‘exemplar of public reason’⁴—either to illustrate its expressive role or to critically examine some predominant jurisprudence. In Europe, in contrast,

³ *Ibid.*, p. 82.

⁴ *Ibid.*

it is no longer possible to examine domestic courts without addressing the role of supranational courts. This is surely valid for the Court of Justice of the European Union (hereafter, the CJEU) established by the European Union (hereafter, the EU) but also for the European Court of Human Rights (hereafter, the Strasbourg Court), established by the Council of Europe (CoE), which adjudicates the civil and political rights enshrined in the European Convention on Human Rights (hereafter, the Convention). In supervising the implementation of the Convention and reviewing the domestic legislation (statutory provisions, case law, or executive acts) of forty-seven European state parties to the Convention, the Court has become of utmost importance to the protection of basic human rights of more than 800 million people.

While it cannot ‘strike down’ domestic laws but only ‘declare’ the conformity of domestic law to the Convention, the Strasbourg Court can be qualified as ‘supranational’ based on its interpretive authority: it holds the final say over the interpretation—hence the content—of the Convention’s rights (Article 46). Not only are the state parties to the Convention legally bound by the Court’s judgments since the entry into force of Protocol 11 in 1998.⁵ A vast majority of state parties also routinely attribute the Court’s judgments *direct effect* in the domestic legal order implying that those judgments are directly

⁵ The introduction of Protocol 11 amounts to the ‘full judicialization’ of the Court. It contains three major reforms: first, the old European Commission of Human Rights and its screening role is abolished. Second, the Court becomes a full-time judicial organ in charge of all the tasks previously performed by the Commission. Third, both the rights of individual petition and the acceptance of the Court jurisdiction become compulsory. For an overview, see Robert Harmsen, ‘The Reform of the Convention System’, in *The European Court of Human Rights Between Law and Politics*, eds. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011).

invocable before any public institution (legislative, executive, judicial) without any legislative step.⁶ This makes the Court rather unique among international courts in general and among human rights courts in particular. The conjunction between its concentration on basic civil and political rights and its supreme interpretive role lays down a fertile terrain for an application of value democracy.

By ‘testing’ Brettschneider’s argument at the European level, I aim first to show (in Section 3) how the Court has expressed the ‘reasons for rights’ in a way that mirrors Brettschneider’s moral duty of democratic persuasion assigned to domestic courts. Rather than merely inducing the level of rights protection based on an existing consensus among state parties to the Convention, the Court has adopted a so-called ‘teleological’ approach that amounts to specifying, in substantive terms, the role that each right ought to play in a ‘democratic society.’ This approach applies most clearly to the Articles 8—11 of the Convention (privacy, conscience and religion, expression, assembly and association). This promulgation is not only necessary because those rights are in principle derogable—the Court being required to examine whether the interference with one or more rights was nevertheless ‘necessary in a democratic society.’⁷ As I shall

⁶ This attribution of direct effect thereby goes beyond the strict legal obligation of state parties to Convention. As Polakiewicz explains, according to the Court, instead of imposing an obligation to give direct effect to the substantive provisions of the Convention, article 13 of the ECHR only guarantees the availability at the national level of an effective remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured (...). In Jörg Polakiewicz, ‘The Status of the Convention in National Law’, in *Fundamental Rights in Europe: The ECHR and Its Member States 1950-2000*, eds. Robert Blackburn and Jörg Polakiewicz (Oxford: Oxford University Press, 2001), p. 32.

⁷ ‘Necessity in a democratic society’ includes ‘the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for

explain, this promulgation is the strongest in affirming what it takes to be the foundations of a ‘democratic society.’ The main implication is that the Court leaves no margin of appreciation to the respondent state party when such values are at stake.

To illustrate this point, I reconstruct (Section 3.1.) the Court’s reasons for extending the scope of freedom of expression (Article 10) ‘not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb’ find a place in the public arena.⁸ This established principle derives from what the Court considers essential to a ‘democratic society’, namely ‘pluralism’—a notion that has constantly helped the Court to fix the limits of all the derogable rights. In my view, the waves of duties required to meet the Court’s demand of pluralism echoes Brettschneider’s attachment to the interest of speakers and listeners in viewpoint neutral protections. However, while the Court tolerates the expression of those views, it explicitly affirms that they violate the Convention’s founding values—and thereby meets its expressive and affirmative duty. I illustrative this role in the case of the public defense of Sharia law in Turkey. The Court’s explicit affirmation can be viewed as an instance of democratic persuasion addressed both to the right-holders (individuals) and duty-holders (the respondent state party). However, value democracy also allows us to question the Court’s judicial restraint on other rights (such as freedom of religion (Article 9) and

the protection of health or morals, for the protection of the reputation or rights of others, etc.’ The grounds for restriction are identical for Articles 8 – 11. For an overview of their application, see Janneke Gerards and Hanneke Senden, ‘The Structure of Fundamental Rights and the European Court of Human Rights’, *International Journal of Constitutional Law* 7, no. 4 (2009): pp. 619–653.

⁸ The seminal case is *Handyside v. United Kingdom*, App. No. 5493/72, 7 December 1976, §50.

privacy (8)) on which the margin of appreciation is more salient. Indeed, an important implication of value democracy is that religious beliefs and practices should not be exempt from the principle of public relevance. I suggest (Section 3.2.) that if the Court were to apply value democracy consistently, it should significantly revise its established case law. I examine in particular the recent case of crucifixes in Italian schools.

Moreover, if Brettschneider's value democracy can both illuminate the Court's rights-promulgation and suggest how to revise parts of its case law, the practice of international courts can also put in question some assumptions of his international model of democratic persuasion. In his (regrettably short) conclusive chapter ('Value Democracy at Home and Abroad'), Brettschneider considers the implications of the model for international law: 'a second implication of the book's view is that it can also serve as a model for understanding how to promote ideals of equality in international law without violating the rights of individuals or the rights of states.'⁹ Interestingly, however, Brettschneider seems to defend a more modest account of value democracy at the international level: in contrast to the domestic level, where courts play a central persuasive function, the mere fact of 'signing the treaty is one way for states to use their expressive capacities abroad.'¹⁰ Referring mostly to UN human rights treaties, Brettschneider assumes that 'because there is no international state that can threaten coercion, international law often relies on mechanisms of persuasion.'¹¹

⁹ Brettschneider, *When the State Speaks, What Should It Say?*, p. 181.

¹⁰ *Ibid.*, 172.

¹¹ *Ibid.*, 171.

This modest account is puzzling. As I explain in Section 4, what marks the development of international law over the last two decades is the establishment of judicial or quasi-judicial institutions protecting individual rights against standard threat(s) of their states. Should those institutions (e.g. UN Treaty Bodies, the Strasbourg Court, but also the International Criminal Court (hereafter, the ICC) and Special Tribunals play the same expressive role as constitutional courts? Beyond the question of the *function* of international courts, the question of the *content* that those organs should affirm is pressing. Surprisingly, in Brettschneider's account the central value to be expressed is identical to the domestic level: democratic citizenship. The extensive corpus of anti-discrimination norms can certainly support Brettschneider's preservation of equality as one founding value of international human rights law. But as the predominant literature in human rights theory suggests, the same is not necessarily true of democracy. I suggest in Section 4.1 that an important and intermediary step is missing—one that more clearly connects democratic citizenship to human rights. I argue that this connection can meaningfully obtain by appealing to a variant of what human rights theorists have called the 'political conception' of human rights in order to sustain a identity between the two levels of rights-promulgation: international courts should express values by which their state subjects (and the individuals those states serve) have reasons to abide domestically *qua* democratic states. With a view to develop value democracy further, I finally sketch in Section 4.2 how one can potentially apply democratic persuasion to international criminal courts by relying on a freedom- and equality-enhancing account of the criminal law. This identity thesis is facilitated by the primarily *declaratory*, and therefore *non-coercive*, function of international courts. This account therefore further develops the profoundly liberal attachment to persuasion.

II

Courts and the reasons for rights

The realization of value democracy depends on the expressive rather than coercive capacities of state institutions in combatting beliefs and practices that are at odds with the values of free and equal citizenship. When hateful and/or discriminatory viewpoints are expressed, state institutions must, on behalf of the citizens they represent, criticize and attempt to change those beliefs and practices by persuasion. Affirming the ‘reasons for rights’ is thereby crucial to the very possibility of an alternative to the Hateful Society and the Invasive State. If state actors remain neutral, ‘they fail to answer the challenge that hateful viewpoints pose to the core democratic values of freedom and equality.’¹² If they prohibit the expression of those views (by law), they also fail to abide by the reasons why liberal rights are protected in the first place, namely the freedom and equality of their subjects. The promulgation of the reasons for rights is therefore a *moral* duty based on the deontological status of individuals: ‘these reasons appeal to the entitlement of each citizen, whose is subject to coercion, to be treated as free and equal.’¹³ As such, it is a ‘diffuse duty incumbent in all state actors and citizens.’¹⁴

Is there nonetheless anything distinctive to the courts’ expressive and persuasive role? It seems that there is. Courts have a general duty—a *legal* one—to publicly express reasons for their judgments. This duty does not derive from the particular ideal of value democracy but from the more general ideal of the rule of law. As Brettschneider puts it, ‘the content of law should be publicized so that citizens can predict when their actions will be

¹² *Ibid.*, p. 72.

¹³ *Ibid.*, p. 73.

¹⁴ *Ibid.*, p. 151.

sanctioned.¹⁵ This is also the case at the Strasbourg Court in reviewing domestic legislation.¹⁶ But courts in the Hateful Society do not have to give the kind of ‘reasons for rights’ that Brettschneiders asks them to give: ‘I would add that citizens should not only know their rights and the rules that are set out by law; they should also know what the reasons are for these rights and legal rules.’¹⁷ This is where two distinct duties, one *legal-prudential* and one *moral-democratic*, happily meet. In addition to their recognized authority to strike down illegitimate laws, courts are particularly well placed to endorse the further *explanatory* task of democratic persuasion, that is, to explain ‘why certain laws are legitimate or illegitimate and when it speaks in favor of the values of free and equal citizenship.’¹⁸ This is even more the case of judicial authorities such as the U.S. Supreme Court and the Strasbourg Court given their particular position of ultimate interpreters of the law.

Now let us see how value democracy concretely applies in judicial practice by quickly recasting Brettschneider’s evaluation of two important Supreme Court cases: *Virginia v. Black* (2003) and *Church of the Lukumi Babalu Eye v. City of Hialeah* (1993). I choose to concentrate on freedom of expression (in *Virginia*) and freedom of religion (in *Lukumi*) as this continuum offers us

¹⁵ *Ibid.*, p. 82.

¹⁶ The publicity of law is also found in the Strasbourg Court’s criteria of legality. As the Court held in *Sunday Times v. United Kingdom*, ‘the law should be accessible to the persons concerned and formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.’ *Sunday Times v. United Kingdom* (No. 1), App. No. 6538/74, 26 April 1979, §51. For a recent case, see e.g. *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, App. No. 33014/05, 5 May 2011, §65-66.

¹⁷ Brettschneider, *When the State Speaks, What Should It Say?*, p. 82.

¹⁸ *Ibid.*

strong reasons to criticize the dis-continuum that prevails in the Strasbourg Court's case law. In *Virginia v. Black*, the Supreme Court held that an act of cross burning is to be prohibited if it threatens particular individuals with the intention to intimidate. Brettschneider suggests—with the support of Justice O'Connor's opinion—to preserve the distinction between threats and viewpoints: while the threatening of particular individuals should be prohibited, the banning of cross burning without the intention to intimidate would imply departing from the core principle of 'viewpoint neutrality' and thereby fail to treat persons as free and equal. Indeed, 'respect is owned not to specific viewpoints per se, but to individual citizens.'¹⁹ This explains why the act of cross burning should not be banned despite that it 'opposes the normative reasons that underlie its legality in the first place.'²⁰ But it is not enough to protect this founding principle by enforcing it. Courts should 'emphasize why the act of cross-burning is an affront to this ideal (...).'²¹ If that affirmation is not provided, it runs the risk that the meaning of the rights-protection will be inverted. Hence the 'substance-based limit' according to which value democracy only promotes the shared value of free and equal citizenship is respected.

In *Lukumi*, the councilmen of the city of Hialeah (Florida) had passed a law that prohibited the religious practice of animal sacrifice with particular reference to the Santeria religion. While the city's law may be seen as protecting animal welfare, it did not prohibit other forms of animal sacrifice deemed slow or painful. What raises Brettschneider's interest in this case is the kind of reasons invoked by the city's councilmen to pass the law, namely the intent to burden the Santeria religion specifically on the basis

¹⁹ *Ibid.*, p. 80.

²⁰ *Ibid.*, p. 86.

²¹ *Ibid.*

of their own Christian (and therefore discriminatory) religious principles. If the court did just protect the members of the Santeria religion, one could conclude that it is ‘neutral and has no opinion about religious views.’²² But in conformity with value democracy, courts should not only protect liberal rights (in this case freedom of religion) but also criticize views that oppose equal citizenship (in this case the councilmen’s justification of the prohibition), which the Supreme Court did in its decision. Brettschneider points out that ‘far from having no opinion about all religious beliefs, the Court is protecting one set of religious beliefs while criticizing another.’²³ One can concretely see here how courts can play this double function of both protecting the right and expressing the reasons for the right. The ‘means-based limit’ requires using the state’s expressive and not coercive capacities.

Let us now view those judicial conclusions through the core moral principles of value democracy before turning to the European context. The first principle is the one of ‘viewpoint neutrality’, according to which rights should protect the expression of all opinions and beliefs without discrimination. This principle derives from the interest of individuals to ‘develop their own notion of justice and the good’²⁴ illustrated notably in Rawls’ ‘two moral powers’ of the person. This applies to the act of cross burning in or to the practice of animal sacrifice. The individual interest in exercising those two moral powers forms the basis for legally protecting liberal rights for all. However, this goes for both the Hateful Society and value democracy. For the added value of the latter model to emerge, one must more closely examine the scope of the state’s duty of viewpoint neutrality:

²² *Ibid.*, p. 147.

²³ *Ibid.*

²⁴ *Ibid.*, p. 79.

‘viewpoint neutrality requires that the state not coercively limit the free speech, but it does not give the state the obligation to be neutral when it comes to the defense and expression of the values central to its own legitimacy.’²⁵ As a result, viewpoint neutrality leaves a space open – a space that can be occupied by a collective interest derived from the same founding values of freedom and equality, namely the interest in ‘seeing that the viewpoints consistent with the values of free and equal citizenship succeed while those inimical to those values fail.’²⁶ Because of its wide expressive capacities, the state should use that space to promote the values upon which its very legitimacy depends.

III

The ‘reasons for rights’ at the European Court of Human Rights

Having surveyed Brettschneider’s value democracy in courts and traced back to its core principles, I now want to show how the model can illuminate an important component of the Strasbourg Court’s case law. In order to smoothly switch from North American context to the European one, I concentrate on the same rights reviewed above, namely freedom of expression (Article 10) and freedom of religion (Article 9). Before reconstructing the Court’s reasoning, let me mention in more general terms how central the value of democracy is to the Convention and to the institution from which it emerged, namely the CoE. Legal historians are clear that democracy played a significant role in supporting the creation of the Convention nascent system. More precisely, among the civil society activists and politicians in and around the European Movement in 1949,

²⁵ *Ibid.*, p. 80.

²⁶ *Ibid.*

the priority was to install an intergovernmental ‘alarm bell’²⁷ system against the return of totalitarian practices while drafting states aimed to ‘lock up’²⁸ the democratic process against internal opponents. Article 2 of the first draft of the Convention prepared by the European Movement in 1948 (before it reached the legislative and executive levels of the CoE) required each state party ‘faithfully to respect the fundamental principles of democracy’ and to proscribe any action ‘which would interfere with the right of political criticism and the right to organise a political opposition.’²⁹

This historical point allows me to place another introductory remark about interpretation at the Court. It is now widely documented how the Court has over the years dismissed most of the conventional doctrines of treaty interpretation. That is, rather than fixing the level of protection of rights upon state intent (*intentionalism*), upon the ordinary meaning of treaty terms in the legal culture of the respondent state party (*textualism*) or upon an

²⁷ As Bates explains, the Court ‘would be the conscience of the free Europe, acting like an ‘alarm bell’ warning the other nations of democratic Europe that one of their number was going ‘totalitarian.’ At this stage, then, the human rights guarantee was minimalist in its ambition.’ In Ed Bates, ‘The Birth of the European Convention on Human Rights-and the European Court of Human Rights,’ in Ed Bates, ‘The Birth of the European Convention on Human Rights,’ in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011), p. 19.

²⁸ In his seminal article, Moravcsik argues that the explanation lies in the state's tactic to consolidate democratic institutions vis-à-vis internal political opponents in times of uncertainty: ‘sovereignty costs are weighted against establishing human rights regimes, whereas greater political stability may be weighted in favour of it.’ In Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,’ *International Organization* 54, no. 2 (2000): p. 220.

²⁹ See *European Movement and the Council of Europe* (Published on behalf of the European Movement by Hutchinson, 1949).

existing consensus among state parties to the Convention (*consensualism*), the Court has progressively applied what has been called a ‘teleological method’ of interpretation that amounts to addressing the substantive content of the rights.³⁰ While I cannot retrace the precise evolution of its methodology, it appears that this substantive approach developed when the Court gained compulsory jurisdiction in 1998. In the following year, it for instance affirmed in *Matthews v United Kingdom* that ‘the mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention.’³¹ While such approach is (yet) not valid for all the rights of the Convention—the Court has for instance not delineated the contours of what ‘religion’ precisely amounts to and accords a wide margin of appreciation³², the Court has made a special effort in explaining the normative role of freedom of expression in a ‘democratic society.’

³⁰ The teleological approach has its origins in the Vienna Convention of the Law of Treaties of 1969. The Court originally referred to the ‘object and purpose’ (Article 31(1) of the VCLT) of the Convention on the basis of the Preamble (and also Article 3 ECHR) that refers to the ‘common heritage of the political traditions, ideals, freedom and the rule of law’ of the states parties. On this point, see George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer,’ *The European Journal of International Law* 21, no. 3 (2010): pp. 509–41.

³¹ *Matthews v. United Kingdom*, App. No. 24833/94, 18 February 1999, §39.

³² This is for instance the case of scientology. In *Kimlya and Others v. Russia*, the Court held that ‘the Court observes that the question whether or not Scientology may be described as a ‘religion’ is a matter of controversy among the member States. It is clearly not the Court’s task to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a ‘religion’ within the meaning of Article 9 of the Convention.’ *Kimlya and Others v. Russia*, App. Nos. 76836/01, 32782/03, 1 October 2009, §79.

3.1. *Freedom of expression*

Indeed, the Court established from very early cases on how free expression *serves* democracy. In the seminal *Handyside v. United Kingdom*, which pertained to the publication of the Little Red School Book encouraging young people to reflect on societal norms including sex and drugs, the Court held that ‘freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man (...).’³³ The *individual* dimension of the right is therefore salient. However, since then the Court has not further specified this individual dimension. Rather, it has established (as a matter of principle) how freedom of expression benefits a ‘democratic society’ as a whole. To understand this relation, one should first capture the role that ‘pluralism’ plays in the reasoning: since the same *Handyside v. United Kingdom*, the Court routinely relies on the Preamble’s passage that ‘such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’³⁴ to explain the importance of freedom of expression and extend its correlative duties. Indeed, to allow for an inherent pluralism to flow is clearly not enough to realize ‘democratic society’ in the Court’s view. Another general and more significant principle of the case law is that such freedom

‘is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’³⁵

³³ *Handyside v. United Kingdom*, App. No. 5493/72, 7 December 1976, §50.

³⁴ *Ibid.*

³⁵ *Ibid.*

This is where one can start testing the Court's principled reasoning against the tenets of Brettschneider's value democracy. As explained in Section 2 of the article, value democracy combines two interests, one individual and the other collective, that are both derived from the same 'reasons for rights.' The individual interest in exercising moral powers implies protecting the expression of all opinions and beliefs without discrimination—even those views that blatantly deny that same equality to others. This individual interest resonates rather well with the Court's widely established principle that 'freedom of expression constitutes (...) one of the basic conditions for its progress and *for the development of every man (...)*' (my emphasis). In more recent cases, the Court also refers to 'individual's self-fulfillment.'³⁶ In turn, the Court's second established principle that freedom of expression 'is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or offend (...)' can be viewed as embodying the doctrine of 'viewpoint neutrality' in the U.S. context.

Now it is one thing to establish those principles *in abstracto*, yet another to calibrate *in concreto* the situations to which they apply and therefore determine the extent to which one's views can be 'offensive', 'shocking' or 'disturbing.' The Court may indeed state those general principles but then retract itself (by granting a margin of appreciation) in the face of the lack of an existing consensus between members of the CoE. This is where a more fine-grain analysis of cases is necessary. I deliberately concentrate on the class of extremist political and religious groups. Those cases are particularly relevant because political or religious groups defending and promoting an openly illiberal and undemocratic agenda can reach a high number of citizens (as the American

³⁶ *Gündüz v. Turkey*, App. No. 35071/97, 4 December 2003, §37.

Nazi Party in Brettschneider’s account). Let me concentrate on the case of *Gündüz v. Turkey*, which pertained to the leader of an Islamic sect defending Sharia law on an independent Turkish television channel. The National Security Court of Turkey found that the defendant’s views violated the Turkish criminal code provision related to incitement to violence. More specifically, it held that the defendant

‘describes concepts such as democracy, secularism and Kemalism as impious [*dinsiz*], mixes religious and social affairs, and also uses the word ‘impious’ to describe democracy (...). The Court is satisfied beyond reasonable doubt that the defendant intended openly to incite the people to hatred and hostility on the basis of a distinction founded on religion.’³⁷

By relying on a particular religious doctrine as applicable to all, the defendant’s view—the political project it contains—implies denying freedom and equality to non-believers on which the right to freedom of expression itself relies. In turn, the National Security Court’s reasoning echoes Brettschneider’s prudential justification of value democracy, namely that neutralism runs the risk of turning into a Hateful Society in which discriminatory beliefs and practices ‘thrive in a culture of rights.’³⁸

In its review of Turkish courts, the Strasbourg Court first acknowledged that the applicant’s views can offend the Turkish people’s attachment to secularism: ‘the Court cannot overlook the fact that the Turkish people, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner.’³⁹ But despite those costs and the risk of a thriving

³⁷ *Gündüz v. Turkey*, §15.

³⁸ Brettschneider, *When the State Speaks, What Should It Say?*, 168.

³⁹ *Gündüz v. Turkey*, §49.

hostility, the Strasbourg Court found that Turkey violated Article 10. The main reason is that the Turkish court failed to consider the conditions in which those views were received in the debate – more precisely, that they were heavily counterbalanced:

the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.⁴⁰

I suggest that by emphasizing the reception of the applicant's view by the public (the other participants to the program), the Strasbourg Court points to the second (collective) interest that grounds value democracy, namely the state's interest (on behalf on all the citizens) 'in seeing that the viewpoints consistent with the values of free and equal citizenship succeed while those inimical to those values fail.'⁴¹ But as we have seen, the duty of persuasion does not only fall upon citizens. In other words, the Turkish court should not only have allowed those views to be held. It should have criticized those views based on 'the reasons for rights.' While the Strasbourg Court did not assess the case based on this criterion, it explicitly affirmed the incompatibility of Sharia law with democracy, which points to the expressive capacity of the Strasbourg Court itself:

As regards the relationship between democracy and sharia, the Court reiterates that in *Refah Partisi (the Welfare Party) and Others v. Turkey* (...), it noted, among other things, that it was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia. It considered that sharia, which

⁴⁰ *Ibid.*, §51.

⁴¹ Brettschneider, *When the State Speaks, What Should It Say?*, p. 80.

faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts.⁴²

Surely, one may say that the Strasbourg Court fulfilled half of its duty of ‘democratic persuasion.’ Indeed, the court merely *criticized* the view held but did not attempt (at least not explicitly) to *persuade* the sect’s leader to adopt the values of freedom and equality. But by both respecting viewpoint neutrality and by explicitly and principally criticizing Sharia law, one may conclude that the Strasbourg Court made good use of its expressive capacities. One legal remark is needed here: when one uses ‘capacity’ in this context, one should not forget that the Strasbourg Court cannot ‘strike down’ domestic law as the U.S. Supreme Court. The international nature of the Court implies that it *declares*, but not *enforces*, its own judgments. The execution of judgments falls back on the state parties. Therefore, the capacities of the court are not coercive but only *expressive* and *persuasive*. Moreover, this expressive role is double: the court has to offer reasons not only to right-holders (individuals) but also to duty-holders (states). I come back to this distinction in Section 4 of the article when I examine Brettschneider’s implication of international democratic persuasion.

3.2. *Freedom of religion*

Now what is distinctive of the model of value democracy is its extension to freedom of religion. That is, religious beliefs and practices should not be exempt from the principle of public

⁴² *Ibid.*

relevance. I want now to show that this extension can help us questioning the Strasbourg's Court judicial restraint on Article 9 (freedom of religion) on which it has tended to accord a wide margin of appreciation. Value democracy applies to religion on the basis of the same 'reasons for rights': 'some of these religious practices and beliefs are at odds with religious freedom itself.'⁴³ Brettschneider is fully aware of the special character of religion (e.g. its 'insularity'). In treating it on a par with expression, value democracy puts in question the underlying thought that freedom of religion 'is endangered whenever religious beliefs are burdened or changed.'⁴⁴ For Brettschneider, in contrast, 'abandoning the discriminatory or hateful aspects of religious doctrines is not tantamount to abandoning religions belief itself.'⁴⁵

For the Strasbourg Court, things are different. True, the Court has established a number of principles suggesting that religion and expression, given their centrality to 'self-development', are necessary to a well-functioning 'democratic society': 'it is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life (...).'⁴⁶ The exercise of inherent moral powers is here certainly implied. Further, the Court has derived the principle of viewpoint neutrality from that premise: 'the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.'⁴⁷ So far, so good. But as indicated above, a key step of the Court's review is when it balances those established principles with the arguments put forward by the

⁴³ *Ibid.*, p. 147.

⁴⁴ *Ibid.*, p. 145.

⁴⁵ *Ibid.*, p. 158.

⁴⁶ *Kokkinakis v. Greece*, App. No. 14307/88, 25 May 1993, §31.

⁴⁷ *Bayatyan v. Armenia*, App. No. 23459/03, 7 July 2011, §120.

respondent state party, which may terminate in the attribution of a margin of appreciation. This is seen in the much debated case of *Lautsi v. Italy* (2011), which pertained to the practice of hanging crucifixes in Italian classrooms. The applicants, a father and his two children, argued on the basis of viewpoint neutrality:

The applicants contended that every democratic State had a duty to guarantee the freedom of conscience, pluralism, equal treatment of beliefs and the secular nature of institutions. The principle of secularism required above all neutrality on the part of the State, which should keep out of the religious sphere and adopt the same attitude with regard to all religious currents (...). By imposing religious symbols, namely crucifixes, in classrooms, the Italian State was doing the opposite.⁴⁸

In contrast, the Strasbourg Court (the Grand Chamber) found that such practice fell within the margin of appreciation left to state parties and thereby did not find a violation of Article 9. This is all the more surprising as the Chamber previously found a violation of Article 9 precisely by relying on the state's positive duty of neutrality. To overrule the Chamber and justify its judicial restraint, the Grand Chamber listed a number of facts: the 'passive symbol' of the crucifixes and its weak influence on pupils; the fact that the presence of crucifixes is not associated with compulsory teaching about Christianity; the pupils' guaranteed freedom to wear religious symbols in class (such as headscarf); the fact that religious teachings were optional; and the absence of 'teaching practices with a proselytising tendency.'⁴⁹ In conclusion, the Court held that:

⁴⁸ *Lautsi v. Italy*, App. No. 30814/06, 18 March 2011, §47.

⁴⁹ *Ibid.*, §47.

there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.⁵⁰

It seems to me correct to hold that the state did not actively promote a particular religious doctrine *beyond the hanging of crucifixes itself*. Irrespective of that *active* neutrality, the *passive* practice of hanging crucifixes seems to me at odds with the commitment to freedom and equality that form the basis of religious freedom – ‘reasons for rights’ argument. Even if the facts were to point only to a weak influence on the formation of religious beliefs, this practice still gives one religious doctrine a widely institutionalized advantage over others and does not cohere with the state’s wide secular efforts.

Further, in conformity with its duty of persuasion, the Grand Chamber should also have criticized the reasons provided by the Italian courts for preserving this practice. Indeed, central to the defense of the Italian Administrative Court (later confirmed by the Supreme Administrative Court) was the historical argument that the principle of secularism is inherent and was ‘born out’ of Christianity:

it is easy to identify in the constant central core of Christian faith, despite the inquisition, despite anti-Semitism and despite the crusades, the principles of human dignity, tolerance and freedom, including religious freedom, and therefore, in the last analysis, the foundations of the secular State.⁵¹

While the Grand Chamber mentioned this passage in its review of Italian law, it did not address it in the balancing. To recall, democratic persuasion requires that courts *qua* state actors should not just rely on their power to strike down illegitimate

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, §11.6.

laws. It also should and criticizes the reasons that presided over the adoption of those laws. Therefore, I want to argue that the Grand Chamber should not only have found a violation of Article 9 on the ground of state neutrality. More subtly, it should also have explained that irrespective of the hypothesized *historical* and therefore *descriptive* relation between secularism and Christianity, secularism as a *normative* principle stands firmly on its foundations of the inherent moral powers of individuals—the ‘reasons for rights.’ In my view, the grounding of neutral principles (secularism) in historical considerations (Christian history) remains ambiguous. In other words, the Strasbourg ‘voice’ lost an occasion to defend the reasons and values that underlie basic liberal rights as the U.S. Supreme Court did in *Lukumi*.

IV

Democratic persuasion at the international level: what role for courts?

In the precedent section, I showed how Brettschneider’s value democracy can help both illuminating the Court’s rights-promulgation (on freedom of expression) and suggesting how to revise parts of its case law (on freedom of religion). As I explained earlier, the *prima facie* reason for screening the practice of the Court with value democracy is the founding role of democracy and its pregnant justificatory role in the case law. But if one wants to render justice to Brettschneider’s book, one should also view the practice of the international courts through the lens of his conclusive chapter entitled ‘value democracy at home and abroad.’ Indeed, however important the reception of its judgments is domestically, the Strasbourg Court remains an international organ established by an international organization (the CoE) on the basis of an international treaty (the

Convention). As Letsas puts it, being an international treaty – the objection goes—the ECHR lacks the attribute of legality, as we know it in municipal law.⁵² What quickly emerges from the last chapter is that while the *content* of the duty of democratic persuasion remains the same at the international level (equal citizenship), the *identity* and the *function* of the actor bearing this duty remains under-specified. For Brettschneider, the signing of an international human rights treaty or the discourse of governments are enough to count as instances of international persuasion. An important question is thereby left unanswered: should international courts (human rights courts, UN Treaty Bodies, but also international criminal courts) play the same expressive role as constitutional courts? And which values should they express *qua* international courts?

4.1. *Human rights law*

Let me first tackle the question of the *function* of international human rights law. Referring mostly to UN human rights treaties, Brettschneider claims that ‘because there is no international state that can threaten coercion, international law often relies on mechanisms of persuasion.’⁵³ As a result, Brettschneider opens the class of expressive acts to the signature of international treaties or simply to discourses of governments. It is undoubtedly correct that international law in principle relies on states for its enforcement.⁵⁴ But it does not follow that international law—in

⁵² George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009), 31.

⁵³ Brettschneider, *When the State Speaks, What Should It Say?*, p. 171.

⁵⁴ For instance. It has been advanced that seventy per cent of the Views delivered by the Human Rights Committee (HRC) established by the ICCPR are not implemented. For a recent analysis of the effects of the decisions of UN treaty bodies, see Rosanne Van Alebeek and André Nollkaemper, ‘The

particular human rights law—has not given rise to judicial or quasi-judicial organs empowered by those same states to promulgate what one may call ‘the reasons for international rights.’ This is not only true of the Strasbourg Court, which promulgates the reasons for rights and thereby attempts to provide democratic reasons to its subjects (states and individuals) as we have seen. Some UN human rights treaties (including the CEDAW to which Brettschneider refers) also have established quasi-judicial organs, namely Treaty Bodies, whose function is precisely to specify and hence potentially ‘express’ the content of abstract moral norms enshrined in treaties. The question is thereby whether those quasi-judicial organs—the ‘principal interpreters’⁵⁵ of UN human rights treaties—should perform the same expressive function as domestic courts.

Brettschneider rightly explains that such a project is ambitious and cannot be fully developed in a conclusive chapter. Nonetheless, Brettschneider seems to assume that the current quasi-judicial framework, namely Treaty Bodies, suffices to meet to the duty of democratic persuasion. It is true that the Views and Recommendations adopted by Treaty Bodies ought to authoritatively guide the states’ interpretation of human rights norms—‘the Views have a judgment-like quality.’⁵⁶ They may even ask—similarly to constitutional courts—for structural reforms such the amendment or repeal of legislation, the reopening of national proceedings, the release of prisoners, an investigation to establish the facts, the restitution of property,

Legal Status of Decisions by Human Rights Treaty Bodies in National Law’, in *Human Treaty Bodies: Law and Legitimacy*, eds. Helen Keller and Geir Ulfstein (Cambridge University Press, 2012).

⁵⁵ *Ibid.*, p. 358.

⁵⁶ Birgit Schlütter, ‘Aspects of Human Rights Interpretation by the UN Treaty Bodies’ in *Human Treaty Bodies: Law and Legitimacy*, eds. Helen Keller and Geir Ulfstein (Cambridge University Press, 2012), p. 266.

etc.).⁵⁷ More importantly, they may optionally allow for an individual right of complaint (such as the CEDAW). As a result, the addressee of the rights-promulgation is not just states in the final report but also individuals in the procedure. But do Treaty Bodies thereby enjoy the same ‘expressive’ legitimacy as constitutional courts? Treaty Bodies are not judicial organs *stricto sensu*. International human rights law lacks anything close to a central supranational judicial organ for authoritatively adjudicating state-individual disputes similar to the one we have in constitutional or regional regimes. Moreover, the human rights experts forming Treaty Bodies are not constitutional judges. As a result, it would be worth asking Brettschneider about the criteria for an international human rights institution to count as an ‘expressive’ agent with an identical ‘rights-promulgating’ function to domestic courts in a world deprived of a global sovereign. The same question applies *in fine* to the Strasbourg Court too: despite its compulsory jurisdiction and the compulsory right to individual petition, the Court does not rule in the name of a supranational political community and rather offers ‘democratic’ reasons to states. As we have seen, the lack of consensus within the CoE justifies allocating a margin of appreciation as in the case of freedom of religion. Should international courts still affirm the same reasons for the same catalogue of rights or opt for an incremental approach—a form of ‘judicial diplomacy’ as in the case of the Strasbourg Court?⁵⁸

⁵⁷ Van Alebeek and Nollkaemper, ‘The Legal Status of Decisions by Human Rights Treaty Bodies in National Law’, p. 361.

⁵⁸ In the case of the Strasbourg Court, Madsen described the Court’s first fifteen years as a form of ‘legal diplomacy’: ‘a very measured legal development over the first fifteen years where the objective of providing justice to individuals was carefully balanced with both national and geopolitical interests.’ In Mikael Rask Madsen, *The Protracted Institutionalization of the Strasbourg Court*, in *The European Court of Human Rights Between Law and Politics*, eds. Jonas

It quickly appears that the argument for the ‘identity thesis’ between the national and international levels of right-promulgation directly depends upon the more vexing question of the content of human rights norms. Surprisingly, Brettschneider replicates the values promoted domestically onto the international level: democratic citizenship. Surely, the extensive corpus of anti-discrimination norms across human rights law support Brettschneider’s preservation of equality as one founding value of international human rights law. The egalitarian dimension of human rights norms has also been developed in the recent philosophical literature.⁵⁹ Moreover, Brettschneider’s concentration of CEDAW is also understandable given value democracy’s deployment into the private sphere. But one may argue—in line with a still predominant literature—that what is valid for equality is not *prima facie* valid for democracy. Following a long Rawlsian tradition⁶⁰, it has been maintained that the right to democracy does not fall within the class of human rights. In the more recent literature, Charles Beitz defends a ‘practical’ conception of human rights in which the right to democracy does not pass his first criterion, namely that the right protects a fundamental interest ‘across a wide range of possible lives.’⁶¹ In

Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011), p. 50.

⁵⁹ Allen Buchanan for instance argues that human rights ‘foster the public recognition of equal basic status for all in all society.’ In Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2014), p. 88.

⁶⁰ John Rawls, *The Law of Peoples: With ‘The Idea of Public Reason Revisited’* (Cambridge: Harvard University Press, 2001), Section 9. See also Joshua Cohen, ‘Is There a Human Right to Democracy?’ in *The Egalitarian Conscience: Essays in Honour of G.A. Cohen*, ed. Christine Spynowich (Oxford: Oxford University Press, 2006).

⁶¹ Charles Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009), 111. The two other criteria of human rights are their ‘advantageous protection by the state’ and their suitability for some form of ‘international

reaction to Beitz' excessively 'practical' conception, human rights theorists have recently articulated a modified 'political' conception of human rights in which democratic citizenship and human rights contribute to the quest for political equality. In my view, this intermediary step is needed to support the 'content-identity' thesis and thereby support Brettschneider's assertion that 'democratic persuasion, far from being out of place at the global level, is at the heart of much international human rights law.'⁶² Let me articulate one suggestion below.

The driving thought is that human rights and democratic citizenship have in common the fundamental premise of the equal moral status of individuals in their moral-political communities—a status that ought to be recognized before all public institutions (legislative, executive, judicial at the domestic, regional or international levels). This is how Samantha Besson (among others) understands the 'point of passage' from a general and fundamental interest to a human right: 'the threshold of importance and point of passage from a general and fundamental interest to a human rights is reached, may be found in the normative status of each individual *qua* equal member of the moral-political community.'⁶³ One may further develop the point with Rainer Forst's reflexive argument that human rights protects and expresses the equal status of individuals as 'agents of justification' within any moral-political community – that is, human rights are all grounded in 'a right to be recognized as an agent who can demand acceptable reasons for any action that claims to be morally justified and for any social or political

concern.' See *Ibid.*, pp. 138–139.

⁶² Brettschneider, *When the State Speaks, What Should It Say?*, p. 172.

⁶³ Samantha Besson, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation,' in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, eds., *Philosophical Foundations of Human Rights* (New York: Oxford University Press, 2015), p. 282.

structure or law that claims to be binding upon him or her.⁶⁴ Two important implications follow. First, the individuals' equal interest in participating to collective decisions that affects them all is obtained. Human rights 'generate duties on the part of public authorities not only to protect equal individual interests, but also individuals' political status *qua* equal political actors.'⁶⁵ This is where one can find the connecting thread between human rights and democratic citizenship that Brettschneider assumes. Second, the complementary relation between international human rights and constitutional law as forming the 'dual-sourced sovereignty'⁶⁶ characteristic of international law post-1945 is also obtained. That is, human rights and constitutional rights operate as the basis *for* and the constraint *on* the self-determination of states. Interestingly, this relation is salient in the European context analysed earlier: the Strasbourg asserts its authority—leaving no margin of appreciation—by invoking the 'democratic reasons for rights' that places the conditions of the procedure of mutual justifiability to occur. This bridging link between human rights and democratic citizenship hopefully supports the 'content-identity' that Brettschneider presupposes.

Now there is a more general reason why Brettschneider's neglect of the increasingly important international judiciary is puzzling: the structure of international law's operation – in which courts promulgate and states enforce – fits Brettschneider's central attachment to persuasion over coercion particularly well. Brettschneider mentions it (p.173) but does not account for the various international judicial organs to which it could apply. In

⁶⁴ Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach,' *Ethics* 120, no. 4 (2010): p. 719.

⁶⁵ *Ibid.*, p. 283.

⁶⁶ *Ibid.*, p. 280.

analogy to domestic courts attempting to convince individuals to conform to its founding values, international courts attempt to convince both duty-bearers (states) and right-holders (individuals) of conforming their beliefs and practices to the ideal of freedom and equality. I illustrated this structure in the European human rights context above: the Strasbourg Court is strongly promoting ideals of democracy and equality in trying to persuading their subjects (states and individuals) by offering ‘democratic’ reasons, while respecting those subjects sovereign rights of states—through the principle of subsidiarity—in analogy to the state not seeking to prohibit citizens from expressing hateful views. In other words, the very function of the international judiciary seems particularly well-suited to incorporate the model of democratic persuasion. Let me pursue this idea in the context of international criminal courts below.

4.1 *International criminal law*

With a view to further extend the expressive function to international courts, I finally want to test value democracy against other another fast-developing body of international law, namely international criminal law and its various judicial organs: the ICC, the Special Tribunals (ICTY, ICTR, etc.) or just state parties to the Rome Statute (on the basis of universal jurisdiction). Legal and political theorists have recently tackled the question of the moral reasons in virtue of which international criminal courts ought to ‘pierce the veil’ of state sovereignty in order to prosecute, adjudicate and enforce international criminal law. In the criminal context, the question more precisely pertains to the nature and scope of the moral community to which wrongdoers (e.g. perpetrators of crimes against humanity) ought to answer

under a non-instrumentalist account of the criminal law.⁶⁷ Here again, the world is deprived of a global political community to which wrongdoers could respond. The literature is rather divided. Anthony Duff for instance suggests that given the destructive effects of international crimes, ‘there is no basis left on which to identify a political community to which their perpetrator ought to answer.’⁶⁸ The community cannot but be aspirational. Others argue that international crimes (e.g. crimes against humanity) are attacks on a substantive ‘human dignity’, the violation of which creates a universal moral community to which wrongdoers should respond. Crimes against humanity are distinctive crimes in that they ‘deny their victims the status of being human.’⁶⁹

I want to suggest that Brettschneider’s account of ‘international democratic persuasion’ can help us delineate an alternative model of the expressive function of international criminal courts. Roughly put, the argument goes as follows: when the ICC’s prosecutor delivers a warrant of arrest (usually the first step of the procedure), it does not only re-affirm the inherent status of individuals odiously attacked (such as Renzo’s ‘dignity’) in the name of a universal moral community. While it cannot enforce the warrant, the ICC can also attempt to convince state authorities that a well-functioning criminal law system counts among the crucial standards to improve their legitimacy *qua* state authorities. More than expressing the dignity of the victims, therefore, international courts can persuade states of their crucial

⁶⁷ I refer here primarily to Anthony Duff’s accountability model. See Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2003).

⁶⁸ Antony Duff, ‘Authority and Responsibility in International Criminal Law,’ in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010), p. 598.

⁶⁹ Massimo Renzo, ‘Crimes Against Humanity and the Limits of International Criminal Law,’ *Law and Philosophy* 31, no. 4 (2012): p. 448.

role of providing their subjects with the guarantees of the criminal procedure, that is, that state authorities will use coercion (public prosecution, adjudication and enforcement) *if and only if* their subjects' right to freedom and equality is seriously endangered. The 'reasons for rights' in the domestic, constitutional context become the 'reasons for establishing a trial' in the international, criminal context. What both have in common is a set of reasons that appeal to the founding values of liberal states, namely their subjects' freedom and equality and the institutional arrangements that sustain them.

Now how exactly the criminal law sustains the liberal state's founding values need to be clarified in a further project. Malcolm Thorburn has recently defended the generic argument in the domestic context under a so-called 'public law' approach to the criminal law.⁷⁰ This approach contrasts with the predominant 'legal moralist' conception of the criminal law according to which the structure of the criminal law simply mirrors the moral relations that ordinarily take place in the private sphere. In Thorburn's 'public law' account, in contrast, the basic function of the criminal justice system is not to enforce a particular and/or substantive moral view but to secure the individuals' basic sphere of freedom and equality owed to individuals *qua* citizens; it is therefore 'concerned with ensuring the institutional conditions within which it is possible to make moral choices without thereby undermining our own status as the equal of those around us.'⁷¹ In other words, the criminal justice system promises to enforce those conditions in the name of our basic moral equality: 'the law focuses on each person's jurisdiction—the set of issues that it is

⁷⁰ Malcolm Thorburn, 'Criminal Law as Public Law,' in *The Philosophical Foundations of Criminal Law*, ed. Antony Duff and Stuart Green (New York: Oxford University Press, 2010).

⁷¹ *Ibid.*, p. 42.

up to them to decide—and the state promises to enforce the limits of jurisdiction in the name of us all.⁷² Translated onto the international level, international criminal courts can make use of their expressive capacities and aim either to incite states to establish a well-functioning criminal justice system or persuade them that establishing international trials on behalf of an unwilling or/and unable state amounts to re-installing the role of the criminal justice system in the name of the founding value of equal citizenship.

V

Conclusion

The expressive and persuasive role of courts a central requirement of Brettschneider's model of value democracy. This article was an attempt to show the potential application(s) and challenge(s) of value democracy at the supra- and international level. The first part of was dedicated to the potential deployment of value democracy in the case law of the Strasbourg Court. My starting point was double: first, the applicability the duty of democratic persuasion is premised upon the founding role of democracy to the very establishment of this supranational court. Second, the Court has spilled a lot of ink specifying the role of liberal rights in a 'democratic society'—an effort that reveals a significant expressive and explanatory dimension rather unique in international law. In my view, the teleological approach applied to 'democratic society' amounts to expressing and explaining the 'reasons for rights' in the vein of Brettschneider's duty of democratic persuasion, which requires that state actors and the citizenry criticize but not prohibit viewpoints that are at odds

⁷² *Ibid.*

with the values that justify protecting the rights in the first place. I illustrated how this core principle can illuminate the Court's reasoning on freedom of expression and concentrated on extremist political and religious groups in order to test the limits of Strasbourg's viewpoint neutrality. Moreover, I also showed how the Court in my view has failed to meet the duty of democratic persuasion on freedom of religion where the Court's restraint (by way of allocating the margin of appreciation) remains salient. The critical potential of value democracy in this domain is therefore significant—and to my knowledge not accounted for in the theoretical literature on the Court.

But if there is room to fruitfully exploit value democracy in Strasbourg, there is also room to identify potential challenges when it comes to extend the scope of value democracy within and beyond European boundaries. In the second part of my article, I aimed to help preparing the terrain for what looks like one of Brettschneider's future projects. As it stands, the project seems to rely on an asymmetry between the function of international courts and the content of international norms. The first question I identified is whether the current quasi-judicial UN framework – namely Treaty bodies – ought to play the same expressive role as supreme domestic courts. The factual distinction lies in the absence of a global sovereign. Whether this distinction should impact on the function of international courts seems to be an important question for the extension of value democracy across international law. But the question of function is irredeemably related to the question of content. On this point, Brettschneider pleads for a clear identity between the domestic and international levels in expressing the values of equal citizenship and human rights. While this connection is implicit in Brettschneider's account, I offered a suggestion to make this connection clearer. Finally, I sketched how the core attachment to the courts' persuasion could potentially develop in

international criminal law. I relied on the same ‘reasons for rights’ argument, that is, how to persuade states to conform to values to which they owe their legitimate existence *qua* states. The institution of the criminal law is a necessary condition for the exercise of liberal rights. Therefore, the same reasons for rights can be reasons for having a well-functional criminal justice system. In that sense, value democracy cannot only fruitfully apply beyond human rights law but point to a more comprehensive account of the ‘expressive’ role of international courts.

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