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Multiparty Democracy: International and European Human Rights Law Perspectives

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Abstract

Although multiparty elections are not explicitly required by international human rights instruments or the European Convention on Human Rights (ECHR), certain human rights provisions have been interpreted as leading to such a requirement. While a democratic interpretation of human rights law has been settled in the ECHR framework, it remains disputable at the universal level. Despite numerous references to democracy in the documents adopted in the UN framework in the post-Cold War era, this article argues that an explicit link between international human rights law and multiparty elections has yet to be established. On the other hand, such a link has been developed by the European Court of Human Rights (ECtHR). Multiparty elections are considered to be part of the European public order. Moreover, the ECtHR has shown that it understands democracy beyond the existence of electoral procedures. But the role and understanding of democracy within the ECHR cannot be universalized.

Key words

democracy; European regional arrangement; human rights; political parties; universal level

After the end of the Cold War, the demise of the socialist/communist political and economic order led some scholars to proclaim liberal democracy the only legitimate political system.[1] This view was reflected even in some international legal writings, and arguments were made that a liberal democracy was the only political system compatible with the universal human rights instruments.[2] On this basis, democracy was both proclaimed to be a human right[3] and declared to be a requirement if states were to enjoy all attributes of statehood.[4]

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1 F. Fukuyama, *The End of History and the Last Man* (1992), 276–7.

2 See generally T. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 AJIL 46; T. Franck, 'Legitimacy and the Democratic Entitlement', in G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (2001). See also C. Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', (1995) 27 *New York University Journal of International Law and Politics* 289, at 295.

3 See generally Franck, 'Emerging Right', *supra* note 2.

4 Ibid.; see also F. Teson, *A Philosophy of International Law* (1998).

These ideas attracted determined criticism for being overtly ideological and based on the election-centric liberal-democratic self-image of some states.[5] It was further argued that even from the perspective of the election-centric definition of democracy, a liberal-democratic bias in reading universal human rights standards cannot be assumed.[6]

While it remains disputable whether international human rights instruments can be read with a liberal perception of democracy in mind, such a perception seems to have been adopted within the framework of the European Convention on Human Rights (ECHR).[7] This is so despite the fact that direct and implied references to democracy do not seem to feature any more prominently in the ECHR than in the universal human rights instruments.[8]

This article explores how the relationship between democracy and human rights within the ECHR framework differs from that within the framework of the universal human rights instruments, and considers how this difference has evolved. It is argued that the relatively similar elaborations of the so-called democratic rights in the universal human rights instruments and in the ECHR have led to different interpretations of the scope of these rights. At the universal level, several references to democracy and democratization have been made in the documents adopted within the UN framework in the post-Cold War era. This article, however, shows that these references are rather ambiguous and do not require a particular political system or electoral method. On the other hand, the jurisprudence of the European Court of Human Rights (ECtHR) has clearly linked human rights and multiparty democracy and has even adopted an understanding of democracy beyond electoral procedures. However, it is questionable whether this interpretation of the relationship between democracy and human rights can be universalized.

Section 1 considers the role of elections in democratic political theory, draws a distinction between procedural and substantive understandings of democracy, and outlines the relationship between human rights, elections, and democracy. Section 2 analyses the understanding of democracy and elections within international human rights instruments. It is argued that even if one adopts a procedural definition of democracy, which may well be inadequate from the perspective of political theory, international law does not support the reading of international human rights provisions with a liberal-democratic bias. Section 3 compares the universal understanding of the relationship between democracy and human rights with that developed in the framework of the ECHR. It is shown how the ECtHR linked human rights and multiparty democracy. It is further argued that the Court has not limited itself to promoting elements of procedural democracy but has even encroached on the field of democratic political theory: it has developed judicial mechanisms for the protection and consolidation of democracy.

5 S. Marks, *The Riddle of All Constitutions* (2000); J. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', (2001) 12 EJIL 183.
6 B. Roth, *Governmental Illegitimacy in International Law* (1999), 324–38.
7 Section 2, *infra*.
8 Section 3.1, *infra*.

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1. THE CONCEPTUAL CLARIFICATION: DEMOCRACY, ELECTIONS, AND HUMAN RIGHTS

Free and fair elections are an integral part of the right to political participation and also a concept in democratic political theory. But the relationship between democracy, elections, and human rights remains somewhat controversial. In democratic political theory there is an ongoing dispute as to whether elections should be considered a necessary or a sufficient condition for democracy. At the same time, there is some ambiguity as to what the threshold is of free and fair elections and whether such elections necessarily need to take place in a multiparty setting. This section outlines the procedural – that is, election-centric – and substantive definitions of democracy and points out that while the procedural definition may be inadequate, it is difficult to conceive democracy as an international legal principle on the postulates of its substantive definition. The question of democracy in international human rights law is therefore often reduced to the procedural understanding and to the question of whether human rights standards require multiparty elections. This section, however, points out that an automatic association of multiparty elections with democracy needs to be regarded with some caution.

1.1. Elections and the procedural understanding of democracy in political theory

The term 'democracy' is a synthesis of the Greek words *demos*, meaning 'people', and *kratos*, meaning 'rule'.[9] Semantically, the term 'democracy' stands for 'rule by the people'; however, in political science discourse there has been much ambiguity surrounding both components of the word 'democracy'. A consensus has been achieved that the term 'people' means all adult men and women.[10] However, a consensus over the meaning of the term 'rule' is more elusive. Thus the disputable question now is no longer who rules, but rather how people exercise their rule.

The classical modern theory of democracy, adopted at the end of the eighteenth century, was government-centric, and defined democracy 'in terms of sources of authority for government, purposes served by government, and procedures for constituting government'.[11] In the early years of modern democracy, when the category of 'people' was severely restricted, predominantly to wealthy men of a specific societal status determined by birth and education, the democratic method was confined to a small elite which exercised rule on behalf of the majority, itself excluded from the power to rule.[12] The democratic method of this kind still significantly resembled non-democratic methods.[13] This was rather a situation of '[a] society divided between

9 G. Sorensen, *Democracy and Democratization: Processes and Prospects in a Changing World* (1993), 3.

10 Relatively recently women in many states deemed that 'democratic' did not constitute the category of 'people who rule'. Many male citizens had long been excluded from this category based on reasons such as ethnic and racial background, class background, level of education, and wealth. Ibid., at 9–16.

11 S. Huntington, *The Third Wave* (1990), 6.

12 See D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995), 9–12.

13 In some sense such rule was similar to that later established in apartheid South Africa, where democratic rule was in the hands of a minority determined by race, while the majority could not participate in the exercise of rule. Sorensen, *supra* note 9, at 14–17.

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a large impoverished mass and a small favoured elite [which] would result either in oligarchy (dictatorial rule of the small upper stratum) or in tyranny (popularly based dictatorship)'.[14]

With the extension of the category 'people', the inadequacy of the government-centric definition of the rule became evident. The most tangible and quantitatively provable switch to the real rule of people happened by adoption of electoral laws that enacted universal suffrage.[15] This enabled everyone to participate in the democratic process. Thus the classical – that is, government-centric – understanding of democracy was challenged in the electoral process. Consequently a new understanding of democracy was developed, which is well captured in the writings of Joseph Schumpeter: 'the democratic method is that of institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.[16] His ideas have remained both influential and criticized.[17]

If one literally follows Schumpeter's definition, democracy would only be a matter of electoral process. In such an understanding people periodically have a chance to elect their political leaders, while in the time between the elections their participation in society is limited to the status of observers who assess the actions of their leaders in order to decide whether to re-elect or to replace them at the next elections.[18] In this understanding one could argue that the only action that political leaders are precluded from is suspension of the following elections.

The 'institutional arrangement'[19] necessary for the election of leaders may, however, point to an arrangement wider than merely that of electoral law which is not to be suspended. Indeed, the Schumpeterian definition of democracy already looks beyond the electoral process as the sole criterion of democracy, and 'elucidates the link between democracy, rights and the rule of law'.[20] Namely, if everyone is allowed to compete for political leadership, 'this will in most cases though not in all mean a considerable amount of freedom of discussion for all. In particular it will normally mean a considerable amount of freedom of the press',[21] which enables an individual to obtain more information on the candidates and their programmes and thus optimize the electoral choice. In essence, even the Schumpeterian understanding of the electoral process is not only about standing for an election and casting a vote, but it rather means that 'the institution of periodic elections must go hand in hand with

14 S. M. Lipset, *The Encyclopedia of Democracy* (1994), 75.
15 It is argued that elections are the most tangible part of the democratic process and therefore are often considered a synonym for democracy. T. Carothers, 'Empirical Perspectives on the Emerging Norm of Democracy in International Law', (1992) *ASIL Proceedings* 261, at 264.
16 J. Schumpeter, *Capitalism, Socialism, and Democracy* (1942), 269.
17 See section 1.2, *infra.*
18 Such an understanding of democracy may be challenged by the question whether a democratic political system would not be 'more democratic if ordinary citizens (as they typically do) lobbied their representatives between elections, organized campaigning groups, engaged in consultative processes, took part in demonstrations . . . if they actively regarded public matters as their affair, and if representatives were systematically required to listen to them'. D. Beetham, *Democracy and Human Rights* (1999), 3. In other words, the democratic process also operates between elections and not only *at* elections.
19 Schumpeter, *supra* note 16, at 269.
20 Marks, *supra* note 5, at 51.
21 Schumpeter, *supra* note 16, at 271–2.

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the necessary institutions for securing respect for the rule of law and constitutional guarantees of civil and political rights'.[22]

The Schumpeterian understanding of democracy does not literally refuse to look beyond elections but rather puts elections at the centre of the democratic method.[23] In this perception, free and fair elections are seen not as a necessary condition of democracy, but as a sufficient one.

While such a narrow (i.e. procedural) understanding of democracy acknowledges the necessity for other rights to be respected – expressly the freedoms of speech and assembly – it defines these rights vis-à-vis the right to political participation rather than vis-à-vis the entire human rights framework. In other words, the freedoms of speech and assembly in this model are the sine qua non of democracy because they are the sine qua non of the right to political participation.[24] Such a definition of democracy is thus based on a hierarchical order of a selection of civil and political rights.

1.2. The substantive definition of democracy in relation to human rights

In contrast to the procedural definition, the substantive definition of democracy is based on democracy's underlying principles rather than merely elections. In this view,

> The core idea of democracy is that of popular vote or popular control over collective decision-making. Its starting point is with the citizen rather than with the institutions of government. Its defining principles are that all citizens are entitled to a say in public affairs, both through the associations of civil society and through participation in government, and that this entitlement should be available on terms of equality to all. Control *by* citizens over their collective affairs and equality *between* citizens in the exercise of that control are the basic democratic principles.[25]

Democracy is defined in a much broader sense of popular control and equality for all. Such a definition enables the answering of the questions 'why particular institutions or procedures have a claim to be democratic, and what needs to be changed to be more so'.[26] Democracy is thus not defined as something absolute or as a promised destination, but rather as a continuous journey.[27]

In the substantive definition of democracy, civil and political, as well as social, economic, and cultural, rights are an integral part of democracy.[28] Indeed, '[i]f public decision-making is the business of all citizens equally, then all must be not just entitled, but also enabled, to undertake it, and that calls for access to the requisite social, economic and cultural resources. Political equality depends on overcoming

22 Marks, *supra* note 5, at 51.
23 Echoes of the Schumpeterian definition of democracy are apparent in the normative democratic entitlement theory: 'The existence of a democratic form of government – evidenced by fair and free periodic elections, three branches of government, an independent judiciary, freedom of political expression, equality before the law, and due process – is *sine qua non* to the enjoyment of human rights'. Cerna, *supra* note 2, at 295.
24 See the UN Human Rights Committee (HRC), General Comment 25, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 12.
25 Beetham, *supra* note 18, at 90–1 (emphasis in original).
26 S. Marks and A. Clapham, *International Human Rights Lexicon* (2005), 3.
27 Marks, *supra* note 5, at 73.
28 Beetham, *supra* note 18, at 114.

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material deprivation'.[29] This relationship is one of mutual dependency between economic, social, and cultural rights on one side and democracy on the other,[30] as the absence of social, economic, and cultural rights 'compromises civil and political equality, the quality of public life and the long-term viability of democratic institutions themselves; democracy, on the other hand, constitutes a necessary if not sufficient condition for the protection of economic and social rights'.[31]

Two main challenges to the argument of mutual dependency between social, economic, and cultural rights and democracy have been invoked. First, proponents of the procedural understanding of democracy argue that social, economic, and cultural rights lack normative precision and, consequently, democracy cannot be normatively defined. Such a view is well captured in the following observation:

> To some people democracy has or should have much more sweeping and idealistic connotations. To them, 'true democracy' means *liberté, egalité, fraternité*, effective citizen control over policy, responsible government, honesty and openness in politics, informed and rational deliberation, equal participation and power, and various other civic virtues. These are, for the most part, good things and people can, if they wish, define democracy in these terms. Doing so, however, raises the problems that come up with the definitions of democracy by source or by purpose. Fuzzy norms do not yield useful analysis.[32]

Second, the mutual dependence between social, economic, and cultural rights on the one hand and democracy on the other has been challenged by the neo-liberal[33] view that social, economic, and cultural rights contradict some of the rights from the civil and political cluster. Fukuyama defines 'fundamental rights' as civil and political rights, and rejects social, economic, and cultural rights, arguing that 'the achievement of these rights is not clearly compatible with other rights like those of property or free economic exchange'.[34] Such an argument has been described as 'the extreme neo-liberal view that private property and the freedom of exchange constitute absolute and untouchable "natural rights"'.[35] This is, however, to overlook that both private property and freedom of exchange are 'socially constructed and validated institutions, whose primary justification lies in their effectiveness in securing people's means of livelihood'.[36] Ultimately, '[a] democratic society . . . requires both

29 Marks and Clapham, *supra* note 26, at 64–5.
30 Beetham, *supra* note 18, at 114.
31 Ibid.
32 Huntington, *supra* note 11, at 9.
33 Consider the following definition of neo-liberalism: 'Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices . . . [I]f markets do not exist . . . then they must be created, by state action if necessary. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (process) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit'. D. Harvey, *A Brief History of Neoliberalism* (2005), 2.
34 Fukuyama, *supra* note 1, at 42–3.
35 Beetham, *supra* note 18, at 101.
36 Ibid.

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the institutions of private property and free exchange and the guarantee of basic economic rights, if it is to be founded upon a general consent'.[37]

Democratic political theory does not have a unitary definition of democracy. The procedural definition understands democracy in terms of electoral process. In this understanding, democracy can be expressed by a selection of civil and political rights, most commonly the right to political participation and freedoms of speech and assembly. It is highly disputable whether democracy is only a matter of electoral process. Therefore the substantive definition of democracy looks beyond the electoral process. However, as the critique of such a definition suggests, substantive democracy can be a philosophical ideal, while it is not possible to define it by a set of legal prescriptions. Therefore in international law parlance references to democracy are most commonly made with elements of procedural democracy in mind. However, even if the procedural understanding is adopted and democracy primarily associated with free and fair elections, it still remains questionable whether international human rights law requires that such elections be held in a multiparty setting.

2. The understanding of democracy in international human rights law

This section is concerned with direct and implied references to democracy in international human rights law. Special consideration will be paid to the right to political participation and to the question whether this right can be interpreted as a requirement for holding elections in a multiparty setting. Initially, it will be argued that in the Cold War era, international human rights standards could not be interpreted as a requirement for a particular political system. Subsequently, it will be considered whether this perception has changed in the post-Cold War practice.

2.1. Democracy and the body of international human rights law

The interdependence between human rights and democracy makes international human rights law the most suitable framework for invoking democracy as a principle of international law, but the word 'democracy' does not appear in either the UN Charter or universal human rights instruments, nor has the International Court of Justice (ICJ) 'based any of its decisions on the legal application of democratic principles'.[38] Some international human rights instruments, however, make references to 'democratic society'.

Such a reference initially appeared in the Universal Declaration of Human Rights (UDHR),[39] where the expression 'democratic society' is employed in the context of the limitation clause: human rights may be limited if the interest of 'democratic

37 Ibid., at 100–1.
38 R. Rich, 'Bringing Democracy into International Law', (2001) 12 *Journal of Democracy* 20, at 20.
39 Art. 29(2) of the UDHR provides, 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.

society' so requires. But it is questionable how broadly the adjective 'democratic' can be interpreted. Its inclusion at the time of the adoption of the UDHR, in 1948, could hardly imply a universal expression of *opinio juris* in favour of a particular political system. 'Democratic' at that time was rather a synonym for 'non-fascist'.[40] Subsequently, the expression 'democratic society' found its place in a number of international human rights treaties, where it was also employed within the limitation clauses.[41]

But the meaning of 'democratic society' in the universal human rights treaties remained unclear. Furthermore, the limitation clauses are not where links between democracy and human rights are usually established. It is rather argued that democratic principles operate within certain human rights provisions. In one such view, 'by becoming a party to an international human rights instrument, a state agrees to organize itself along democratic lines by establishing independent tribunals, allowing freedom of expression, and conducting free elections'.[42]

This understanding is a reflection of the procedural understanding of democracy, which places free and fair elections in the middle of the democratic process, while it acknowledges that some other rights are also important for the conducting of such elections. Human rights which are closely associated with the electoral process are sometimes referred to as 'democratic rights'.[43] However, even if one accepts the electoral-centric (procedural) definition of democracy, it is questionable whether the universal understanding of the right to political participation can only be fulfilled in a multiparty political system.

2.2. The right to political participation and democracy

The right to political participation is elaborated in Article 21 of the UDHR and in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). In the Cold War environment, the scope of the formulations the 'will of the people'[44] and the 'will of the electors'[45] was controversial.[46] This was a consequence of two competing interpretations of democracy and democratic principles at that time. The

40 Roth, *supra* note 6, at 326.

41 The International Covenant on Economic, Social and Cultural Rights (ICESCR) comprehends a general limitation clause in Art. 4, which, *inter alia*, makes a reference to 'democratic society'. The ICESCR also refers to 'democratic society' as part of the limitation clause in the elaboration of subparagraphs (a) and (c) of Art. 8 (the right to form trade unions). The International Covenant on Civil and Political Rights (ICCPR) attaches the interest of 'democratic society' as one of the limitation clauses to Arts. 14 (right to a fair trial), 21 (freedom of assembly), and 22 (freedom of association). The Convention on the Rights of the Child (CRC) invokes, *inter alia*, the interest of democratic society as a limitation clause to Art. 15 (rights of a child to freedom of association and assembly). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families attaches the interest of 'democratic society' within the limitation clause to Arts. 26 (the right of migrant workers to take part in trade unions) and 40 (the freedom of assembly of migrant workers).

42 Cerna, *supra* note 2, at 295.

43 The term 'democratic rights' in this article will therefore describe those civil and political rights which are relevant for the procedural definition of democracy. The right to political participation, freedom of assembly, and freedom of expression can be most notably identified as such. See section 1.1, *supra*.

44 UDHR, Art. 21(3).

45 ICCPR, Art. 25(b).

46 A possible interpretation could also be that, for example, multiparty elections are not required if the will of the people is against them. See Rich, *supra* note 38, at 23.

interpretation of the Western[47] world referred to the model of 'liberal democracy', which presupposes elections in a multiparty setting,[48] while the interpretation of the Soviet bloc referred to the model of 'people's democracy'.[49]

Neither Article 21 of the UDHR nor Article 25 of the ICCPR specifically requires multiparty elections.[50] Further, they do not establish a specific link between elections and government formation. In other words, nothing in these provisions defines the extent to which a government needs to reflect the electorate's will.[51] If in a liberal-democratic understanding the composition of government needs to reflect electoral results[52] and elections need to take place in a true multiparty setting,[53] such an interpretation is not acceptable for the Leninist concept of democracy.[54] Indeed, the drafting history shows that many, if not actually most, signatory states would have refused to ratify the ICCPR were it to bind them to liberal-democratic institutions, most notably to multiparty elections.[55] Thus the language of the UDHR and the ICCPR is to be understood as an attempt 'to avoid controversy over institutional requisites, while still asserting a universal human interest in political participation that states are bound to satisfy in some manner',[56] but one cannot proclaim the liberal interpretation of democracy the authoritative one.

The position that human rights treaty provisions and customary international law do not require a state to adopt any particular electoral method or, in general, any political, social, economic, and cultural system was confirmed by the ICJ in the *Nicaragua* case: 'the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the

47 The term 'Western states' at that time implied states belonging to the regional group 'Western European and Others', unofficially used within the UN system. Yet after the end of the Cold War such a definition of 'Western states' is no longer adequate. References to 'Western states' in the post-Cold War era should then be understood as states of Europe, broadly understood, and non-European states in which societies are of European historic, cultural, religious and linguistic origin. In this context Carothers, *supra* note 15, at 263, argues, 'Latin America and Eastern Europe are essentially parts of the Western world'.

48 Roth, *supra* note 6, at 325–32.

49 Ibid., at 331; consider especially the following argument: 'In the Marxist-Leninist view, multi-party competition [otherwise a crucial postulate of the Western concept of liberal democracy] masks the inalterable structure of power rooted in the concentrated ownership and control of the major means of production, distribution and exchange'.

50 The amendment to Art. 21 of the UDHR, which would call for multiparty elections, was withdrawn on a protest by the Soviet government. See Roth, *supra* note 6, at 326–7.

51 Ibid., at 330.

52 This postulate of liberal democracies is subject to caution. Since the liberal-democratic model does not prescribe a single model of government formation or a single constitutional system (presidential, semi-presidential, or parliamentary), the 'representative government' may significantly differ from electoral results. What is more, the question of what is a 'representative government' to a great degree becomes subject to subjective analyses. For more see note 150, *infra*.

53 Even this postulate is subject to caution, as the liberal-democratic model does not prescribe a single model of party system, which is also a consequence of different electoral systems. The model of two-party democracy may lead to significant considerations regarding its democratic quality and so can a fragmented, so-called hundred-party system. A detailed analysis of these deficiencies would, however, be beyond the scope of this article. For more see K. von Beyme, 'Institutional Engineering and Transitions to Democracy', in R. Elgie and J. Zielonka (eds.), *Democratic Consolidation in Eastern Europe* (2001), 3; R. Elgie and J. Zielonka, 'Constitutions and Constitution Building: A Comparative Perspective', in ibid., at25.

54 See *supra* note 49.

55 Roth, *supra* note 6, at 332.

56 Ibid.

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principle or methods of holding elections'.[57] The Court took this position although Nicaragua was a party to the ICCPR, and further argued,

> [A]dherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State . . . The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.[58]

However, if such an interpretation of the ICCPR and of customary international law was accurate in 1986, there is a question whether this has changed since the end of the Cold War.

2.3. A liberal-democratic bias in post-Cold War international law?

After the end of the Cold War, a number of references to democracy were made in the documents adopted in the UN framework. Democracy and its connection to human rights feature very prominently in Commission of Human Rights resolutions, entitled 'Promotion of the Right to Democracy',[59] 'Promoting and Consolidating Democracy',[60] and 'Further Measures to Promote and Consolidate Democracy'.[61]

The first two resolutions refer to elections within the limits of Article 25 of the ICCPR, which, *inter alia*, provides that elections shall be based on 'universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors'.[62] Resolution 2002/46, however, goes further and links democracy and multiparty elections: 'the essential elements of democracy include . . . the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and organizations'.[63] However, the legal relevance of this resolution is very weak. First, by its very nature it is a 'soft law' document. Second, it was adopted by 43 votes to none, with nine abstentions.[64] Such support does not prove the existence of general practice and *opinio juris*. Therefore the provisions of this resolution cannot be said to reflect customary international law in the same way in which the provisions of unanimously or nearly unanimously adopted General Assembly resolutions are capable of expressing the rules of customary international law.[65]

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57 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 132, para. 261 (hereinafter *Nicaragua* case).
58 Ibid., para. 263.
59 Commission on Human Rights Resolution 1999/57 (27 April 1999).
60 Commission on Human Rights Resolution 2000/47 (25 April 2000).
61 Commission on Human Rights Resolution 2002/46 (23 April 2002).
62 ICCPR, Art. 25(2).
63 Commission on Human Rights Resolution 2002/46 (23 April 2002), para. 1.
64 Ibid.
65 In the *Nicaragua* case, *supra* note 57, at 99, para. 188, the ICJ held that *opinio juris* may be deduced from, *inter alia*, the attitude of states toward relevant General Assembly resolutions, and concluded that consent to the text of a resolution 'may be understood as an acceptance of the rule or set of rules declared by the Resolution'. See also D. Harris, *Cases and Materials on International Law* (2004), 58, arguing: 'The process by which they [General Assembly resolutions] are adopted (adopted unanimously, or nearly unanimously, or by consensus or otherwise) establishes whether the practice is a "general" one'.

The issues of democracy and free and fair elections were also invoked in a number of General Assembly resolutions, but in all of them the understanding of democracy was expressed very cautiously, without reference to elections in a multiparty setting. Between 1988 and 1993 a set of General Assembly resolutions, entitled 'Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections', was adopted.[66] The most instructive in this context are Resolutions 45/150 and 45/151. Resolution 45/150 provides, *inter alia*:

> [T]he efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political, social, economic, and cultural systems, whether or not they conform to the preferences of other States.[67]

And Resolution 45/151:

> Recognizing that the principles of national sovereignty and non-interference in the internal affairs of any State should be respected in the holding of elections,
> Also recognizing that there is no single political system or single model for electoral process equally suited to all nations and their peoples, and that political systems and electoral processes are subject to historical, political, cultural and religious factors,
> . . .
> 4. Urges all states to respect the principle of non-interference in the internal affairs of States and the sovereign right of peoples to determine their political, economic and social system.[68]

These resolutions not only fail to specify that elections need to take place in a multiparty setting, but also affirm that the choice of a political system is not predetermined.

References to democracy and to the will of the people also appear in the set of General Assembly resolutions entitled 'Support of the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies'. However, when referring to elections, these resolutions use the language of the UDHR and do not mention that elections need to take place in a multiparty setting.[69] Furthermore, it is specifically affirmed that 'while democracies share common features, there is no single model of democracy and that [democracy] does not belong to any country or region'.[70] In the context of these resolutions, similar observations were expressed by the UN Secretary-General: 'the United Nations system does not promote any specific form of Government. Democracy is not a strict model to be

66 See UN Doc. A/RES/43/157 (8 December 1988); UN Doc. A/RES/44/146 (15 December 1989); UN Doc. A/RES/46/137 (17 December 1991); UN Doc. A/RES/47/138 (18 December 1992); UN Doc. A/RES/48/131 (20 December 1993). The last two resolutions mainly deal with electoral assistance.

67 UN Doc. A/RES/45/150 (18 December 1990). The Resolution was adopted with a vote of 129 in favour and 8 against, with 9 abstentions.

68 UN Doc. A/RES/45/151 (18 December 1990). The Resolution was adopted with a vote of 111 in favour and 29 against, with 11 abstentions.

69 UN Doc. A/RES/50/133 (20 December 1995); UN Doc. A/RES/51/31 (13 December 1996); UN Doc. A/RES/52/18 (21 November 1997); UN Doc. A/RES/53/31 (23 November 1998); UN Doc. A/RES/54/36 (29 November 1999); UN Doc. A/RES/55/43 (27 November 2000); UN Doc. A/RES/58/13 (17 November 2003); UN Doc. A/RES/58/281 (9 February 2004); UN Doc. A/RES/60/253 (2 May 2006); UN Doc. A/RES/61/226 (22 December 2006); UN Doc. A/RES/55/2 (8 September 2000) – the Millennium Declaration.

70 UN Doc. A/RES/60/253, preamble, para. 11; UN Doc. A/RES/61/226, preamble, para. 7, UN Doc. A/RES/62/7, preamble, para. 7.

copied, but a goal to be attained. It may take many forms, depending on the characteristics and circumstances of cultures and societies'.[71] In his letter to the General Assembly, the Secretary-General further stated, '[T]here is no one model of democratization or democracy suitable to all societies . . . individual societies decide if and when to begin democratization'.[72] References to democracy are also made in some other documents adopted in the UN framework, such as the Vienna Declaration and Programme of Action[73] and the Millennium Declaration,[74] but these documents do not go beyond general references to democracy, no definition is attempted, and no link between democracy and multiparty elections is established.

Arguably, these General Assembly resolutions may be considered to reflect customary international law regarding the relationship between obligations imposed by the right to political participation and the principle of non-interference in matters essentially in domestic jurisdiction, such as adoption of a particular political system and/or electoral method. While several references to democracy have been made, there is no indication of how international human rights law understands democracy.[75] References to multiparty elections are carefully omitted. Furthermore, the resolutions commonly affirm that international human rights standards do not prescribe any specific political system or electoral method. This was clearly stated even by the Secretary-General. Despite numerous references to democracy, the relevant General Assembly resolutions therefore confirm the *Nicaragua* case standard: obligations imposed on states by the right to political participation and other human rights provisions do not demand a specific political system or electoral method.

At the same time, some significant collective practice has developed which denies recognition to a coup government which has overthrown a democratically elected one. Most recently, the General Assembly condemned the coup in Honduras and demanded restoration of the elected government.[76] The Security Council has developed even more significant practice in this regard. In the case of Sierra Leone, the Security Council, acting under Chapter VII, demanded that 'the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order'.[77]

The example of Haiti is even more significant, as the Security Council authorized an intervention for the return of an ousted democratically elected government. In 1994 the Security Council, acting under Chapter VII of the UN Charter, adopted

71 UN Doc. A/51/512 (18 October 1996), para. 4. – Support of the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, Report of the Secretary-General.

72 UN Doc. A/51/761 (20 December 1996), para. 4 – Support of the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, Letter dated 17 December 1996 from the Secretary-General addressed to the President of the General Assembly.

73 UN Doc. A/CONF.157/23 (12 July 1993) – Vienna Declaration and Programme of Action.

74 UN Doc. A/RES/55/2 (8 September 2000), paras. 24, 25.

75 The UN Secretary-General has affirmed that due to different understandings of democracy in various societies, the UN system does not attempt to define democracy. See UN Doc. A/51/512 (18 October 1996), para. 4 – Support of the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, Report of the Secretary-General.

76 UN Doc. A/RES/63/301 (1 July 2009).

77 UN Doc. S/RES/1132 (8 October 1997), para. 1

Resolution 940 on Haiti. Based on this resolution, the United States led a multinational effort to bring the overthrown elected president, Jean-Bertrand Aristide, back to power. The resolution, *inter alia*, spelled out:

> Reaffirming that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide, within the framework of the Governors Island Agreement . . .
> . . .
> 4. Acting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti.[78]

Importantly, Resolution 940 thus authorized an intervention for the purpose of restoration of an elected government and not for the imposition of democracy.

It is questionable how broadly one should understand the Security Council's pro-democratic reaction to the situation in Haiti. Arguably, it was the internationalization of the internal matters of Haiti which proved to be the key to intervention. Namely, the United Nations observed the Haitian election in 1990 and, after it had verified the electoral results, was unwilling to accept nullification of these results by a coup.[79] As Resolution 940 also points out, the Governors Island Agreement[80] further internationalized the internal conflict. In the process of the negotiation of this agreement between the de facto government of Haiti and the government-in-exile, the United Nations also became a party to and thus also responsible for the implementation of solutions foreseen by the agreement. As Resolution 940 shows, the failure of the de facto government of Haiti to comply with this agreement was also a reason for intervention.

It is of note that the Security Council acted under Chapter VII of the UN Charter, although it is questionable whether a threat to international peace and security existed.[81] But Resolution 940 should not be understood too broadly, as the previous engagement of the United Nations in the electoral process in Haiti makes the situation somewhat specific. Furthermore, it is questionable to what degree other Chapter VII resolutions addressing the governance problem in a certain territory have been founded on expressly pro-democratic rather than general human rights arguments. There exists practice established in regard to the legitimacy of those governments which are in effective control but are 'unwilling to carry out essential international law duties and obligations'.[82] Grave breaches of international human rights and threats to international peace fall under this category, but absence of a

78 UN Doc. S/RES/940 (31 July 1994).
79 Roth, *supra* note 6, at 385.
80 The Governors Island Agreement, concluded on 3 July 1993, was a UN-sponsored agreement between the elected overthrown president Aristide and the de facto government of Haiti which foresaw a retreat from power of the non-elected de facto government in exchange for amnesty. For more see UN Doc. S/26063 (12 July 1993).
81 See R. Falk, 'The Haiti Intervention: A Dangerous World Order Precedent for the United Nations', (1995) 36 *Harvard International Law Journal* 341, at 342.
82 Roth, *supra* note 6, at 149.

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democratic government does not. This seems to have been affirmed in subsequent Security Council resolutions.

Kosovo[83] and East Timor[84] were put under international territorial administration by Security Council resolutions adopted under Chapter VII of the UN Charter. However, the reason for that was not the absence of democratic practices but rather the abuses of sovereign powers of their parent states which resulted in gross breaches of human rights and in grave humanitarian situations.[85] The Security Council, acting under Chapter VII of the UN Charter, denied legitimacy to the Taliban government of Afghanistan and called for a government representative of the Afghan people.[86] However, despite some references to democratic principles, such as a 'broad-based' government, which is 'multi-ethnic and fully representative of all the Afghan people',[87] one cannot argue that the Security Council expressed support for a particular political system. The term 'democracy' was avoided, and there is no indication in any of the Security Council resolutions dealing with the Taliban regime in Afghanistan that a representative government should be understood as one which comes to power upon multiparty elections. Instead, government representativeness was defined in terms of gender, ethnicity, and religion.[88]

Despite some support for the restoration of democratically elected governments in its resolutions, the practice of the Security Council does not deny legitimacy to non-democratic governments in general, nor does it establish a link between human rights and multiparty democracy.

On the other hand, the link between democracy and human rights has been developed by the Human Rights Committee (HRC). In General Comment 25, the HRC held that the right to political participation 'lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant'.[89] Further, it established that the right to political participation depends on some other rights: 'Freedom of expression, assembly and association are essential conditions for the right to vote and must be fully protected'.[90]

In one view General Comment 25 'gives teeth to the Covenant's obligation to hold "genuine periodic elections"'.[91] However, what is evidently absent in General Comment 25 is a specific reference to elections in a multiparty setting. Consequently, not even General Comment 25 allows for the adoption of a liberal-democratic bias when reading the elaboration of the right to political participation in the ICCPR, as '[t]here is a great difference . . . between obliging States to address seriously their citizens' interest in participation in governance and imposing on a state a specific political solution in a given circumstance'.[92]

83 UN Doc. S/RES/1244 (10 June 1999).
84 UN Doc. S/RES/1272 (25 October 1999).
85 R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', (2001) 95 AJIL 503, at 503.
86 UN Doc. S/RES/1363 (30 July 2001).
87 Ibid.
88 UN Doc. S/RES/1378 (14 November 2001), para. 1.
89 HRC, General Comment 25, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 1.
90 Ibid., para. 12.
91 Rich, *supra* note 38, at 23.
92 Roth, *supra* note 6, at 343.

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At the end of the Cold War it was also suggested that there exists state practice proving that multiparty democracy is the only legitimate political system. Writing in 1992, Franck argued, 'As of late 1991, there are more than 110 governments, almost all represented in the United Nations, that are legally committed to permitting open, multiparty, secret-ballot elections with a universal franchise. Most joined the trend in the past five years'.[93]

While Franck acknowledged that there are still a few out of 110 democracies that are democratic 'more in form than in substance',[94] there is much critique against such a generalization. Indeed, the number of democracies only formally following electoral procedures while not being a substantial democracy is too great to be put into the category of 'merely a few'.[95] It is therefore an exaggeration to claim that post-Cold War state practice evidences a nearly universal interpretation of the right to political participation as a requirement for multiparty elections.

The drafting history of the ICCPR and the *Nicaragua* case do not allow for the conclusion that in the Cold War period international human rights law bound states to hold multiparty elections. In the post-Cold War era, several references to democracy appeared in documents adopted in the UN framework. However, a link between democracy and multiparty elections has only been established in some 'soft law' documents, which are not an expression of a universal practice and *opinio juris*, and are thus unable to reflect the rules of customary international law. On the other hand, General Assembly resolutions may reflect customary international law. However, in their references to democracy, General Assembly resolutions fail to specify how democracy is to be understood, avoid mention of multiparty elections, and affirm that the choice of a specific political system and/or electoral method remains in the exclusive domestic jurisdiction of states. Some support for the restoration of democracy in coup situations has come from the Security Council, but this practice should not be overemphasized and does not imply that a non-democratic government will be considered illegitimate per se.

This section therefore shows that neither the ICCPR nor customary international law requires multiparty elections. In the forthcoming section it will be shown that examination of the link between human rights and democracy in the framework of the ECHR gives a different account.

3. The understanding of democracy in the European Convention on Human Rights

This section considers how democracy is understood within the framework of the ECHR and points out differences between international and European human rights

93 Franck, 'Emerging Right', *supra* note 2, at 47.
94 Ibid.
95 In response to Franck's argument it was held that 'this observation greatly overstates the prevalence of electoral structures that can usefully be characterized as liberal-democratic. Electoral processes in many countries coexist with *de jure* or *de facto* repression, exclusion of candidates regarded as unacceptable, and reserves of power (especially military) elites, not to mention mechanisms for the perpetration of fraud'. Roth, *supra* note 6, at 337.

law perspectives on (multiparty) democracy. Initially it shows that references to 'democratic society' in the ECHR were not significantly broader than those in the UDHR. Not even the interpretation of the so-called democratic rights in the ECHR was significantly different from that in the framework of the universal human rights instruments. But the ECtHR later developed a clear link between human rights and multiparty democracy. This section subsequently also shows that the ECtHR not only understands democracy in terms of electoral procedures but also deals with its substantive tenets and has developed mechanisms to protect and consolidate democracy.

3.1. References to democracy in the European Convention

A reference to democracy appears in the preamble of the ECHR, in which the state parties reaffirmed their 'profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend'.[96]

This reference reflects the zeitgeist of its drafting – the era of post-Second World War Europe. These circumstances did not allow for the meaning of 'democratic' to be interpreted beyond the implication of 'non-fascist' or 'non-totalitarian'.[97] Indeed, '[a] striking . . . feature of the Convention organs' early jurisprudence is that, when democracy was evoked, it was evoked in terms of a starkly drawn contrast with "totalitarianism"'.[98] The meaning of 'democratic' in the ECHR was therefore synonymous with the meaning of 'democratic' in the UDHR.[99] The references to 'democratic society' in the ECHR therefore did not aim to legislate a particular political system.

Although the ECHR comprehends a number of rights sometimes described as 'democratic rights',[100] the right to political participation, unlike in the UDHR,[101] did not initially find its place in the ECHR. The wording of the draft article, which would provide for free and fair elections, reads,

> Every State a party to this Convention undertakes faithfully to respect the fundamental principles of democracy in all good faith, in particular, as regards their metropolitan territory: (a) to hold free elections at reasonable intervals, with universal suffrage and secret ballot, so as to ensure that Government action and legislation is, in fact, an expression of the will of the people; (b) to take no action which shall interfere with the right of criticism and the right to organize a political opposition.[102]

96 ECHR, Preamble, para. 5.
97 Such an argument was also made with regard to the UDHR in the time of its drafting. See Roth, *supra* note 6, at 326.
98 S. Marks, 'The European Convention on Human Rights and Its "Democratic Society"', (1995) 66 *British Yearbook of International Law* 208, at 211.
99 See note 41, *supra*.
100 See note 43, *supra*.
101 UDHR, Art. 21.
102 Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly (11 May – 8 September 1949) (1975) (hereinafter *Travaux*, vol. 1), at 296 (attached to Teitgen report). From the aspect of the understanding of democracy and human rights at the time of the ECHR drafting, the inclusion of the phrase 'as regards their metropolitan territory' is especially interesting and self-explanatory. It points out the

This provision was not included in the ECHR, as it would overtly interfere with matters of a 'constitutional and political character', and with matters in the essential domestic jurisdiction of states.[103] Significantly, it was argued on behalf of the United Kingdom that inclusion of this draft article, and thus the requirement for free and fair elections in a multiparty setting, in the Convention would not be appropriate and would raise several practical difficulties for a variety of reasons, such as

> (a) The impossibility of reaching agreement on what precisely are the fundamental principles of democracy;
> (b) In no State is the right to vote enjoyed even by citizens without qualifications. The qualifications required differ from State to State . . . the variety of circumstances to be considered may justify the imposition of a variety of qualifications, as a condition of the exercise of suffrage;
> (c) Universal suffrage and secret ballot cannot always and of necessity ensure that governmental action and legislation are an expression of the will of the people.[104]

The right to vote was later included in a less comprehensive wording in Article 3 of Protocol 1 to the European Convention: 'The High Contracting Parties 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'.[105]

Like Article 29 of the UDHR and some elaborations of human rights provisions in the universal human rights treaties,[106] the ECHR also provides for the limitation of rights if 'necessary in a democratic society'. This concept is employed as a limitation clause in the contexts of Articles 6 (right to a fair trial),[107] 8 (right to respect for private life and family),[108] 9 (freedom of thought, conscience and religion),[109] 10 (freedom of expression),[110] and 11 (freedom of assembly and association).[111]

Thus, at the time of the drafting of the ECHR, some significant references to 'democracy' and 'democratic society' were made, but there was no unitary interpretation of their meaning. The ECHR did not require a particular political system or electoral method. References to democracy were rather understood in the sense of anti-fascism.[112] In this regard the ECHR did not significantly differ from the ICCPR.[113] It now needs to be established how references to democracy and democratic society were subsequently interpreted by the ECtHR.

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question whether one can assume that European colonial powers could be classified as democracies in the age of colonialism.

103 Committee of Experts (2 February–10 March 1950) (1976) (hereinafter *Travaux*, vol. 3), at 182 (Dowson). See also Marks, *supra* note 98, at 222.

104 Ibid.

105 ECHR, Protocol 1 (1952), Art. 3.

106 See notes 40 and 41, *supra*.

107 ECHR, Art. 6(1).

108 ECHR, Art. 8(2).

109 ECHR, Art. 9(2).

110 ECHR, Art. 10(2).

111 ECHR, Art. 11(2).

112 At the time of the drafting of the Convention there were also specific arguments made in favour of a liberal interpretation of democracy. In this context it was, for example, argued that the right to political participation, as worded in the draft article (see note 103, *supra*), is a 'fundamental requirement of democracy'. See ibid., at 202 (Teitgen).

113 Section 2.2, *supra*.

3.2. The meaning of 'democratic society'

In *Handyside*, the ECtHR established a link between freedom of expression and a democratic society:

> The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. 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. Subject to paragraph 2 of Article 10 (art. 10-2), it 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'. This means, among other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.[114]

The relationship between the freedom of expression and democracy was reaffirmed in subsequent case law.[115]

Significantly, in a number of cases dealing with freedom of assembly, the Court did not initially need to decide on the question whether elections in a democratic society necessarily need to be in a multiparty setting. But in *Young, James and Webster*, the Court clearly established a link between Articles 9, 10, and 11 – which are considered to be the provisions of democratic rights – arguing that realization of one right is not possible without the realization of another.[116] This link was reaffirmed and further developed by subsequent case law. In *Chassagnou*, the Court held,

> Freedom of thought and opinion and freedom of expression, guaranteed by Articles 9 and 10 of the Convention respectively, would ... be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests.[117]

The question whether elections need to take place in a multiparty setting was dealt with in relation to freedom of assembly, especially in a number of Turkish cases,[118] in which the Court had to answer the question whether the prohibition of a certain political party was 'necessary in a democratic society'. The Court thus also had to address the issue of whether the liberal interpretation of democracy, which requires elections in a multiparty setting,[119] was authoritative in the ECHR

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114 *Handyside v. United Kingdom*, (1976) 1 EHRR 737, para. 49.

115 See the following cases: *Lingens v. Austria*, (1986) 8 EHRR 407, Judgment, para. 41; *Oberschlick v. Austria*, (1991) 19 EHRR 389, Judgment, para. 57; *Castells v. Spain*, (1992) 14 EHRR 445, Judgment, para. 42; *Jersild v. Denmark*, (1995) 19 EHRR 1, Judgment, para. 31; *Goodwin v. United Kingdom*, (1996) 22 EHRR 123, Judgment, para. 39; *Karhuvaara and Iltalehti v. Finland*, (2005) 41 EHRR 51, Judgment, para. 37; *Busuioc v. Moldova*, (2005) 42 EHRR 252, Judgment, para. 58; and *Steel and Morris v. United Kingdom*, (2005) 41 EHRR 22, Judgment, para. 87.

116 *Young, James and Webster v. United Kingdom* (1982) 4 EHRR 22, para. 57.

117 *Chassagnou and Others v. France* (1999) 29 EHRR 615, para. 100. See also the *Ezelin* case: 'Notwithstanding its autonomous role and particular sphere of application, Article 11 (art. 11) must, in the present case, also be considered in the light of Article 10 ... The protection of personal opinions, secured by Article 10 (art. 10), is one of the objectives of freedom of peaceful assembly as enshrined in Article 11'. *Ezelin v. France*, (1991) 14 EHRR 362, para. 37.

118 These cases include *United Communist Party of Turkey and Others v. Turkey*, (1998) 26 EHRR 121; *Socialist Party and Others v. Turkey*, (1999) 27 EHRR 51; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, (1998) 26 EHRR 121; and *Refah Partisi and Others v. Turkey*, (2002) 35 EHRR 3 and (2003) 37 EHRR 1.

119 See note 48, *supra*.

framework – something which was not clarified at the time of the Convention drafting.[120]

In the *United Communist Party of Turkey* case, the ECtHR, *inter alia*, dealt with the meaning of freedom of assembly and association as provided by Article 11 of the ECHR.[121] In the context of this article, the Court interpreted freedom of assembly and association to cover the creation of political parties. The Court held, 'It is . . . not possible to conclude, as the Government [of Turkey] did, that by referring to trade unions . . . those who drafted the Convention intended to exclude political parties from the scope of Article 11'.[122]

The Court, furthermore, specifically invoked elections in a multiparty setting, which is, in the Court's view, an essential component of democracy:

> [P]olitical parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention . . . there can be no doubt that political parties come within the scope of Article 11.[123]

> [T]he State is under the obligation, among others, to hold, in accordance with Article 3 of Protocol No. 1, 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. Such choice is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within countries' population. By relaying this range of opinion – with the help of the media – at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society.[124]

Thus the ECHR framework became much more specific in terms of the definition of a particular political system than it had been at the time of its drafting. The ECtHR established a clear link between the so-called democratic rights and multiparty elections, a link which is missing at the universal level. While the ICCPR and customary international law do not bind states to holding elections in a multiparty setting, this cannot be said for the ECHR. In the ECtHR's view, 'Democracy is without doubt a fundamental feature of the European public order . . . Democracy . . . appears to be the only political model contemplated by the [European] Convention and, accordingly, the only one compatible with it'.[125] While this section has established that in the framework of the ECHR democracy requires multiparty elections, there also exists some evidence that the ECtHR understands democracy beyond its procedural definition.

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120 Section 3.1, *supra*.
121 ECHR, Art. 11.
122 *United Communist Party of Turkey* case, *supra* note 118, para. 24.
123 Ibid.
124 Ibid., para. 44.
125 Ibid., para. 25. The Court, *inter alia*, based this conclusion on the reference to democracy in the Preamble to the Convention (*supra* note 96): '[That democracy is without a doubt a fundamental feature of the European public order] is apparent . . . from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realization of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights'. *United Communist Party of Turkey* case, *supra* note 118, para. 45.

3.3. The boundaries of the limitation 'necessary in a democratic society'

At the time of the drafting of the European Convention, one drafter argued, 'Democracies do not become Nazi countries in one day ... One by one, freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxiated ... It is necessary to intervene before it is too late'.[126]

This observation is a clear argument in favour of the so-called concept of militant democracy. An argument in its support was expressly advanced in the *Refah Partisi* case and was similar to the one expressed in the *Travaux*: '[T]he Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy'.[127]

At the same time the Court has also stressed the importance for such a measure to be 'proportionate to the legitimate aim pursued'.[128] According to the Court, the anti-democratic nature of a political party can only be judged from its actions or its programme and not from its name, although associated with a particular ideology. In this regard the ECtHR held that the United Communist Party of Turkey (TBKP) posed no threat to the democratic political order solely because it chose to call itself 'Communist': '[The United Communist Party of Turkey] was not seeking, in spite of its name, to establish the domination of one social class over others ... on the contrary, it satisfied the requirements of democracy, including political pluralism, universal suffrage and freedom to take part in politics'.[129] The Court at this point acknowledged a clear distinction between the United Communist Party of Turkey and the German Communist Party. The latter was dissolved by the Federal Constitutional Court of Germany in 1956 on the basis of its anti-democratic programme and not merely its communist name,[130] and concluded,

> [I]n the absence of any concrete evidence to show that in choosing to call itself 'communist', the TBKP had opted for a policy that represented a real threat to Turkish society or the Turkish state, the Court cannot accept that the submission based on the party's name, by itself, entails the party's dissolution.[131]

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126 Consultative Assembly, second session of the Committee of Ministers, Standing Committee of the Assembly (10 August–18 November 1949) (1975) (hereinafter *Travaux*, vol. 2), at 157 (Teitgen). A cynical remark made by Joseph Goebbels could serve as a good comparison to this statement: 'This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed'. Quoted in G. Fox and G. Nolte, 'Intolerant Democracies', G. Fox and B. Roth (eds.), *Democratic Governance in International Law* (2000), 389.

127 *Refah Partisi* case (2003), *supra* note 118, para. 102. In English translation 'Refah Partisi' is often referred to as either 'Welfare Party' or 'Prosperity Party'.

128 *United Communist Party of Turkey* case, *supra* note 118, para. 47.

129 Ibid., para. 54.

130 See *Kommunistische Partei Deutschlands – Verbotsurteil*, BVerfGE 5, 85, 17 August 1956. The German Communist Party, *inter alia*, declared as its goals the 'dictatorship of the proletariat', the 'opposition to the democratic order' of the Federal Republic of Germany, and 'propaganda of the Marxist-Leninist teachings'. The Constitutional Court of Germany accepted the application of the German Government, arguing that 'The goals of the German Communist Party and the behaviour of its adherents aim at hindering, even abolishing, the liberal democratic fundamental order, and endangering the very existence of the Federal Republic of Germany'. (Ibid., s. 3, para. 1, author's translation. The original reads, 'Die KPD gehe nach ihren Zielen und dem Verhalten ihrer Anhänger darauf aus, die freiheitliche demokratische Grundordnung zu beeinträchtigen, ja sogar zu beseitigen, und den Bestand der Bundesrepublik zu gefährden'.)

131 *United Communist Party of Turkey* case, *supra* note 118, para. 54. At this point it is worth mentioning another wording from the same paragraph: 'The Court considers that a political party's choice of name cannot in

The ECtHR thus adopted the standard developed by the Federal Constitutional Court of Germany in the *German Communist Party* case, establishing that the dissolving of a democracy-hostile party is a legitimate act with the aim of preserving democratic order, but such an act also needs to be subject to rigorous judicial review. In the words of the Federal Constitutional Court of Germany, 'The dissolving of a Party is not an independent executive measure but a law-prescribed regular, typical and adequate consequence of finding a violation of the constitutional order'.[132]

Significantly, the Federal Constitutional Court of Germany took into consideration the goals and the actions of the German Communist Party, which it found to be anti-democratic. The Constitutional Court of Turkey, on the other hand, when it dissolved the United Communist Party of Turkey, did not take its goals and actions into consideration – as a matter of fact, its goals were expressly democratic while no actions had taken place, since the Party was dissolved after merely ten days of existence. The ECtHR, however, refused such an interpretation of the limitation of human rights based on the concept 'necessary in a democratic society' and declared the action of the Constitutional Court of Turkey 'disproportional' and thus 'unnecessary in a democratic society', which consequently means an infringement of the freedom of assembly and association:

> [A] measure as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, is disproportionate to the aim pursued and consequently unnecessary in a democratic society. It follows that the measure infringed Article 11 of the Convention [freedom of assembly and association].[133]

The *United Communist Party of Turkey* case established the standard requiring that reasons for dissolving a political party – and thus restrictions to the freedom of assembly in regard to political parties – need to be 'convincing and compelling'. Such restrictions cannot be justified if 'a party is promoting change, which, although bearing on the existing structures of the State and its established order, is in itself compatible with fundamental democratic principles, and . . . the means proposed to

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principle justify a measure as drastic as dissolution, in absence of other relevant and sufficient circumstances' (ibid.). Despite the clear argument made by the Court that merely a name associated with a particular ideology or political system does not necessarily imply the party's automatic commitment to such an (anti-democratic) ideology or political system, one cannot escape the impression that by including the phrase 'in principle' in the above-quoted wording the Court left the door open for a possible assessment of parties choosing to call themselves Nazi or Fascist. Unlike communist ideology, which stresses equality, the Nazi and fascist ideologies stem from the perceived superiority of a certain race. Thus there could be, arguably, a much stronger argument made in favour of dissolving Nazi or fascist parties based on their name than is the case with communist parties, which would mean a differentiation between political ideologies that are anti-democratic at their roots and those which become anti-democratic by development.

132 *Kommunistische Partei Deutschlands—Verbotsurteil*, BVerfGE 5, 85, 17 August 1956, section 3, para. 2, author's translation. The original reads, 'Die Auflösung der Partei ist keine selbständige Exekutivmaßnahme, sondern eine gesetzlich angeordnete normale, typische und adäquate Folge der Feststellung der Verfassungswidrigkeit'.

133 *United Communist Party of Turkey* case, *supra* note 118, para. 61.

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effectuate such change are legal and democratic'.[134] The standard established in the *United Communist Party of Turkey* case was also reaffirmed in subsequent cases.[135]

While the doctrine of the *United Communist Party of Turkey* case in essence deals with the question in which circumstances restrictions are not justified, the standards of dissolving of political parties have been further developed in subsequent cases, where when such restrictions are justified was more thoroughly examined. In the *Refah Partisi* case the Court relied on examination of a 'pressing social need' for such a restriction.[136] A 'pressing social need' was determined after examining the following questions:

> (i) [W]hether the risk to democracy was sufficiently imminent; (ii) whether the acts and speeches of the leaders of the party under consideration . . . could be imputed to the party itself; and (iii) whether the acts and speeches imputable to the party constituted a whole, which gave a clear picture of the model of society advocated by the party, and whether this model was compatible with the concept of 'democratic society'.[137]

In the *Refah Partisi* case, the Court observed that Refah Partisi (Welfare Party) was a threat to Turkish secularism, which is a cornerstone of the modern Turkish state and its liberal-democratic order.[138] The ECtHR, *inter alia*, noted an observation made by the Turkish Constitutional Court:

> Several members of Refah, including some in high office, had made speeches calling for the secular political system to be replaced by a theocratic regime. These persons had also advocated the elimination of the opponents of this policy, if necessary by force. Refah, by refusing to open disciplinary proceedings against the members concerned and even, in certain cases, facilitating the dissemination of their speeches, had tacitly approved the views expressed.[139]

The ECtHR later concluded,

> In making an overall assessment of the points it has just listed above in connection with its examination of the question whether there was a pressing social need for the interference in issue in the present case, the Court finds that the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were

134 A. W. Heringa and F. van Hoof, 'Freedom of Association and Assembly', in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (2006), 829.

135 See *Socialist Party* case, supra note 118, paras. 41–50; *Freedom and Democracy Party* case, *supra* note 118, paras. 37–48.

136 *Refah Partisi* case (2003), *supra* note 118, para. 132.

137 Heringa and Van Hoof, *supra* note 134, at 829. See also *Partidul Comunistilor and Ungureanu v. Romania*, (2007) 44 EHRR 17, para. 48.

138 'The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy . . .'. *Refah Partisi* case (2003), *supra* note 118, para. 125.

139 *Refah Partisi* case (2003), *supra* note 118, para. 12.

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> incompatible with the concept of a 'democratic society' and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a 'pressing social need'.[140]

This case is significant in two aspects: first, from the point of view of the relationship between curtailment of the 'will of the people' and the imminence of a threat to 'democratic society'; second, from the point of view of the relationship between the European image of 'democratic society' and cultural relativism. These will now be examined.

3.4. The will of the people and imminence

The problem of restrictions to political parties based on their acts and/or programmes is in essence risky from the aspect of democratic political theory, since such restrictions in general terms act against the concept of the will of the people.[141] As argued above, the concept of so-called militant democracy has been accepted by the Court; however, the *Refah Partisi* case opens a question of how far on the expression of the will of the people the Court may encroach.

An especially problematic aspect of the particular case is that Refah Partisi was not an obscure political party in Turkey but a major one within the Turkish party system. The Court established the existence of a 'pressing social need' on, among other factors, Refah's significant influence and on its realistic prospects for an electoral victory. The Court held that

> Refah was founded in 1983, took part in a number of general and local election campaigns and obtained approximately 22% of the votes in the 1995 general election, which gave it 158 seats in the Grand National Assembly (out of a total of 450 at the material time). After sharing power in a coalition government, Refah obtained about 35% of the votes in the local elections of November 1996. According to an opinion poll carried out in January 1997, if a general election had been held at that time Refah would have received 38% of the votes. According to the forecasts of the same opinion poll, Refah could have obtained 67% of the votes in the general election likely to be held about four years later . . . Notwithstanding the uncertain nature of some opinion polls, those figures bear witness to a considerable rise in Refah's influence as a political party and its chances of coming to power alone.[142]

In other words, the 'pressing social need' existed, *inter alia*, because a threat to a 'democratic society' was imminent, while imminence, *inter alia*, stemmed from the will of the people.

Thus it is problematic not only that the Court upheld the dissolving of a major and influential political party within the Turkish party system, but even more so

140 Ibid., para. 132.
141 See note 44, *supra*.
142 *Refah Partisi* case (2003), *supra* note 118, para. 107. The Court's reliance on opinion polls was criticized by Judge Kovler in his Concurring Opinion: 'I find the use of figures derived from opinion polls . . . which would be natural in a political analysis, rather strange in a legal text which constitutes *res judicata*'. *Refah Partisi* case (2003), *supra* note 118, Judge Kovler Concurring, at 49.

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that the party was dissolved precisely because of its influence and its size.[143] As noted above, the 'imminence of a threat' has become one of the decisive criteria when it is to be decided whether a political party poses a threat to 'democratic society'. Imminence, however, stems from the will of the people or, as has been invoked in the *Refah Partisi* case, possibly even from predictions of the will of the people, reflected in opinion polls.[144] It is highly unlikely that a minor political party, although known for extreme rhetoric, would pose an imminent threat if it had virtually no prospect of reaching the threshold at parliamentary elections, let alone forming a government.[145]

In the *Refah Partisi* case the ECtHR therefore upheld the position that people should not be given an opportunity to give support to political actors who may endanger the democratic political order. Furthermore, in the Court's interpretation, the likelihood that such actors would come to power is crucially important for establishing the imminence of a threat to democratic order.

3.5. Compatibility with 'democratic society' and cultural relativism

The preamble to the ECHR, *inter alia*, affirms the following: 'Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration . . .'.[146]

In the *United Communist Party of Turkey* case, the Court made a reference to the 'common heritage' in relation to democracy:

> The Preamble to the Convention . . . establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realization of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights.[147]

Thus there exists a strong opinion, expressed in the Preamble to the ECHR and in the jurisprudence of the ECtHR, that parties to this Convention share common values and thus a similar understanding of human rights provisions as well as of the idea of a 'democratic society'. The Court has also established that a liberal-democratic interpretation of democracy is the only one acceptable in the European public order[148] and specifically observed that liberal democracy is not a unitary

143 See Roth, *supra* note 6, at 442, arguing that it is rather odd to give a message that democracy gives people an option to choose any kind of government, except the one that most of them currently think they want to have. One could observe that the ECtHR adopted such reasoning, but used it in a pre-emptive way – to prevent Refah Partisi from winning the following election.

144 See note 142, *supra*.

145 *United Communist Party of Turkey* case, *supra* note 118, para. 54; *Partidul Comunistilor* case, *supra* note 137, para. 51. In cases when a political party was dissolved after a few days of existence (e.g. the United Communist Party of Turkey) or had not even been registered (e.g. Partidul Comunistilor), the Court was much more reluctant to acknowledge a 'pressing social need' than was the case with Refah Partisi, where the Court even referred to opinion polls in order to establish the existence of a 'pressing social need'.

146 ECHR, Preamble, para. 5.

147 *United Communist Party of Turkey* case, *supra* note 118, para. 45.

148 See note 125, *supra*.

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term. Thus, while free and fair multiparty elections (by a secret ballot) at reasonable intervals[149] are deemed to be a human rights standard in the framework of the ECHR, there is no single prescribed electoral system. As was held in the *Mathieu-Mohin and Clerfayt* case,

> [T]he Contracting States have a wide margin of appreciation, given that their legislation on the matter (the electoral system) varies from place to place and from time to time . . . [I]t does not follow . . . that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate 'wasted votes' . . . any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'.[150]

The Court's view on the issue of electoral systems is understandable. There was no unitary development of electoral systems in Europe. At the same time, as was also acknowledged by the Court, there exists no ideal electoral system which would be suitable for all states, regardless of their historical, political, geographical, social, and other differences.[151] Thus, while it has been argued that within the European human rights system, unlike at the universal level, the choice of political system is not within the essential domestic jurisdiction of states, the choice of a particular liberal-democratic model remains in the essential domestic jurisdiction. Further, despite the affirmed existence of the 'common heritage' of state parties to the European Convention, the critique of some of the Court's references in the *Refah Partisi* case gives a different account.

Although Refah Partisi was already the fifteenth political party to have been dissolved by the Constitutional Court of Turkey, its case differed in important ways from previous ones.[152] Unlike in previous cases, Refah Partisi was not a newly formed political party but was well established and influential. Furthermore, while previous Turkish cases had dealt most prominently with parties supporting the right of self-determination for Kurds, which is a violation of the Turkish constitution,[153] or with newly established parties implying certain political (and not religious) ideology in their names or programmes, Refah Partisi was dissolved because the Constitutional Court of Turkey held that it was 'a "centre" . . . of activities contrary to the principles

149 *Timke v. Federal Republic of Germany*, (1995) 20 EHRR CD 133, Decision on Admissibility, at 158. In this case the Commission had to establish what a 'reasonable interval' was, specifically whether an interval of five years was reasonable. The Commission held that a 'reasonable interval' should be neither too short nor too long. According to the Commission, an interval that was too short could prevent representatives of the people from implementing the 'popular will', while one that was too long would no longer represent the current 'popular will'. The Commission established that a five-year interval, as used in the German federal unit (Bundesland) of Niedersachsen, qualified as a 'reasonable interval'.

150 *Mathieu-Mohin and Clerfayt v. Belgium*, (1987) 10 EHRR 1, para. 54.

151 See generally A. Reynolds, *Electoral System Design* (2005).

152 *Refah Partisi* case (2003), *supra* note 118, Judge Kovler Concurring, at 48.

153 Constitution of Turkey (1982), Arts. 2, 3, 4, 5 and 6.

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of secularism'.[154] As argued above, the ECtHR examined whether there existed 'a pressing social need' for such a decision and upheld the dissolution:

> [F]ollowing a rigorous review to verify that there were convincing and compelling reasons justifying Refah's dissolution and the temporary forfeiture of certain political rights imposed on the other applicants, the Court considers that those interferences met a 'pressing social need' and were 'proportionate to the aims pursued'. It follows that Refah's dissolution may be regarded as 'necessary in a democratic society' within the meaning of Article 11 §2.[155]

The Court's reasoning has been criticized for being overtly stereotypical, if not offensive, in references made to jihad,[156] sharia,[157] and polygamy.[158] In his concurring opinion, Judge Kovler held that

> This general remark [that pluralism, which impinges mainly on an individual's private and family life, is limited by the requirements of the general interest] also applies to the assessment to be made of sharia, the legal expression of a religion whose traditions go back more than a thousand years, and which has its fixed points of reference and its excesses, like any other complex system. In any case legal analysis should not caricature polygamy (a form of family organisation which exists in societies other than Islamised peoples) by reducing it to . . . discrimination based on the gender of the parties concerned.[159]

In this regard it was further argued, 'While the actual holding of the Welfare Party case turns largely on the extreme nature of the acts committed by the Welfare Party, and not to the Islamic nature of those acts as such, the Court did treat important Islamic doctrines in ways that had troubling implications'.[160]

In the Court's reasoning, jihad, for example, only implied the minority view of holy war,[161] and not the majority view of 'struggle for justice, righteousness, or a better way of life'.[162] The ECtHR thus, arguably, adopted an 'idiosyncratic [to the liberal West] construction of several Islamic principles that led to the conclusion that the Welfare Party posed a threat to the sovereignty and security of Turkey'.[163] Such a construction thus lacks understanding for 'alternative conceptions of the good society' and reflects the Court's view of a 'good society' as a synonym for 'European democracy', which stems from 'Christian principles and values'.[164] In other words, the critique suggests that the ECtHR has not been able adequately to apply its jurisdiction to the only traditionally Muslim state party to the ECHR, without referring to clichés and possibly even to language offensive to Islam as a religion.

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154 *Refah Partisi* case (2003), *supra* note 118, para. 11. See also J. Petman, 'Human Rights, Democracy and the Left', (2006) 2 *Unbound* 63, at 77–8.
155 *Refah Partisi* case (2003), *supra* note 118, para. 135.
156 Ibid., para. 74.
157 Ibid., para. 123.
158 Ibid., para. 128.
159 Ibid., Judge Kovler Concurring, at 46–7.
160 Petman, *supra* note 154, at 80.
161 '[T]he concept of jihad, whose primary meaning is a holy war, to be waged until the total domination of Islam in society is secured'. *Refah Partisi* case (2002), *supra* note 118, para. 74.
162 Petman, *supra* note 154, at 80.
163 Ibid.
164 Ibid., at 79.

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It is not the purpose of this piece to give the final judgement on the degree to which the ECtHR indeed failed to assess the case with a measure of cultural relativism or how offensive its reasoning was toward Islam. The assessment of the critique rather intends to point out that the understanding of democracy and a 'democratic society' may prove difficult to universalize, even among an expressly homogeneous group of states, which parties to the European Convention are deemed to be.[165] Indeed, the concept of a 'militant democracy' enters on somewhat slippery terrain when it proclaims those political ideas which do not initially stem from certain political ideology but from the religion of 95 per cent of the state's population to be incompatible with a democratic society.[166] As argued by Judge Kovler, all complex systems, such as for example sharia, have excesses which are not to be treated as representative of the entire system.[167] On the other hand, particular political ideologies can be described as excesses per se. Clear examples of such political ideologies are fascism and Nazism.[168]

If jihad in its holy war meaning is not compatible with 'democratic society',[169] there is little reason to find any incompatibility if one understands it as a 'struggle for justice, righteousness, or a better way of life'.[170] The examination of the 'pressing social need' should therefore not have taken place solely on the consideration of references to, for example, jihad or sharia,[171] made by Refah Partisi leaders, but rather on the implied meanings of these terms.[172]

Further, one cannot escape the question of what kind of democracy the concept of a 'militant democracy' is defending in Turkey. In its submission to the Court, the government of Turkey stated, *inter alia*, that

> [T]he fact that Turkey was the only Muslim country where there was a liberal democracy after the Western model was due to the strict application of the principle of secularism there.[173]
>
> A democratic regime [is] entitled to take measures to protect itself from the danger. 'Militant democracy', in other words a democratic system which defended itself against all political movements which sought to destroy it, had been born as a result of the

165 See notes 146 and 147, *supra*.
166 'The Government further observed that the Turkish population was more than 95% Muslim and that the abusive use of religious ideas by politicians was a threat to, and a potential danger for, Turkish democracy'. *Refah Partisi* case (2002), *supra* note 118, para. 60.
167 See note 159, *supra*.
168 One of the arguments of the Constitutional Court of Germany in its Judgment on the Prohibition of a neo-Nazi Socialist Reich Party (Sozialistische Reichspartei, SRP) was: 'A Party which is in its views and in its essential forms of expression in essence related to a clearly constitutionally forbidden [i.e. anti-democratic] political movement from the past will, as long as it can further operate, try to pursue goals of the same or of a similar kind'. Verbotsurteil-SRP, BVerG, 23 October 1952, Section VI, para. 5 (author's translation). The original reads, '[E]ine Partei, die einer eindeutig verfassungswidrigen politischen Bewegung der Vergangenheit in ihrer Vorstellungswelt und in allen wesentlichen Formen der Äußerung wesensverwandt ist, wird auch, sofern sie weiterwirken kann, die gleichen oder doch gleichartige Inhalte zu verwirklichen suchen'.
169 See note 162, *supra*.
170 Ibid.
171 See, e.g., the *Refah Partisi* case (2002), *supra* note 118, para. 71.
172 See note 163, *supra*.
173 *Refah Partisi* case (2002), *supra* note 118, para. 61.

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> experience of Germany and Italy between the wars with fascism and national socialism, two movements which had come to power after more or less free elections.[174]

If one were to examine this statement more thoroughly, it would be possible to question how substantial Turkish democracy is and to what degree it has only adopted democratic institutions.[175] If the government of Turkey held in its submission to the Court that secularism was a bulwark of the Western model of liberal democracy,[176] the principle of Turkish secularism, on the other hand, attracts much criticism. In one view 'the real meaning of secularism, namely the autonomy of religious groups, was indeed an Islamic practice [while] the western notion of secularism emphasizes the importance of the civil society and its independence from state control. Yet Kemalist secularism strengthened the state vis-à-vis civil society'.[177]

This critique points out two issues. First, there is the question whether Islam is to be perceived as a threat to secularism or as its guarantor. If one interprets Islam as a threat to secularism, does this not mean that one resorts to a stereotypical assessment? Did not, then, the Court interpret secularism in the *Refah Partisi* case in a stereotypical manner, as was argued in its positions on jihad, sharia, and polygamy? Second, what consequences does a strengthened state have for Turkish democracy? In other words, does not Kemalist secularism actually undermine the democratic order? A strong civil society is one of the postulates of democratic consolidation,[178] while the Turkish secular constitution possibly undermines the role of civil society.[179] Another aspect of Turkish secularism is that the mighty Turkish military stands as its bulwark, as an implication of a strengthened state.[180] At the same time, depoliticization of the military and other repressive forces within the state-power apparatus has been an achievement of democratic consolidation in new European democratizations, a fact which has even been invoked by the ECtHR in *Rekvenyi*.[181] One could thus observe that while the Turkish constitutional order protects liberal democracy through secularism, at the same time it puts the democratic order at risk by generating troubled civil–military relations, which have culminated in a number of military takeovers in the history of the post-Kemal Turkish Republic.[182]

The objective at this point is not to assess the state of Turkish democracy but rather to point out that the claim that Turkey has adopted, as the Turkish government put it, 'a Western model of liberal democracy' is not straightforward if one were to examine

174 Ibid., para. 62.
175 Section 1.1, *supra*.
176 This argument has been supported even by the ECtHR in the *Refah Partisi* case (2003), *supra* note 118.
177 S. Tepe, 'Religious Parties and Democracy: A Comparative Assessment of Israel and Turkey', (2005) 12 *Democratization* 283, at 299–300.
178 See, e.g., J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation* (1996), 7.
179 Tepe, *supra* note 177.
180 See, e.g., G. Harris, 'The Role of the Military in Turkey: Guardians or Decision-Makers?', in M. Heper and A. Evin (eds.), *State, Democracy and the Military: Turkey in the 1980s* (1988), 177; A. Evin, 'Changing Patterns of Cleavages Before and After 1980', in ibid., at 201; I. Sunar, 'State, Society and Democracy in Turkey', in ibid., at 65.
181 See note 185, *infra*.
182 See, e.g., K. Karpat, 'Military Interventions: Army–Civilian Relations in Turkey before and after 1980', in Heper and Evin, *supra* note 180, at 137.

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it beyond the criterion of the existence of liberal-democratic institutions. Indeed, in the realm of Turkish political life, political demands by anti-secular parties, such as Refah Partisi, 'are often justified by pointing out the divergence of the Turkish model from its western counterparts'.[183]

3.6. Democratic consolidation in the jurisprudence of the ECtHR

So far it has been argued that the ECtHR has supported the idea that democracy needs to be able to defend itself. However, the Court has also shown some other approaches to pro-democratic activism.

In *Rekvenyi* the Court dealt with the question whether the Hungarian prohibition on members of police, military, and security forces joining political parties was a violation of Article 11.[184] The Court based its reasoning on a relatively recent Hungarian experience with a non-democratic regime, in which police, military, and security forces were heavily politicized and in the service of the regime.[185] The Court did not find the prohibition to be a violation of Article 11 and held,

> Bearing in mind the role of the police in society, the Court has recognised that it is a legitimate aim in any democratic society to have a politically neutral police force . . . In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate.[186]

Thus the Court not only established that a limitation of the right of members of police, military, and security forces to join political parties was permissible in certain circumstances, but also specifically invoked that such a limitation could be beneficial for the 'consolidation and maintenance of democracy'. If 'maintenance of democracy' has been implied in previous cases dealing with the so-called concept of a militant democracy,[187] a reference to the 'consolidation of democracy' implied a new approach. Indeed, as is known from democratization theory, the depoliticization of police, military, and security forces is one of the tasks of democratic consolidation in a liberal-democratic order.[188] The Court thus obviously encroached on the field of democratic political theory when considering actions for the purpose of its pro-democratic activism. However, at this point it is possible to argue that democratic consolidation had already been brought into the legal reasoning of the Court when it relied on the imminence of a threat to 'democratic society' and the concept of a 'pressing social need'.[189] Namely, as the Court pointed out, what may be an 'imminent threat to democracy' or a 'pressing social need' in one state might not be in another.[190] A decisive factor (or a point of difference between states) in establishing

183 Tepe, *supra* note 177, at 300.
184 See notes 112, 117, 122, 123, 124, 134, and 156, *supra*.
185 *Rekvenyi v. Hungary*, (2000) 30 EHRR 519, para. 47.
186 Ibid., para. 42.
187 Section 3.3, *supra*.
188 See, e.g., G. O'Donnell, 'Illusions about Consolidation', (1996) 7 *Journal of Democracy* 34, at 38.
189 See notes 137, 141 and 156, *supra*.
190 Ibid.

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whether a threat or a pressing social need exists appears to be the level of democratic consolidation in respective states.

Also significant from this perspective is *Ždanoka*, where the ECtHR held that the limitation of the right to stand for an election to a person who was actively involved in the activities of the Communist Party of Latvia (CPL) was disproportionate and not necessary in a democratic society.[191] The Court clearly separated the question of the depoliticization of police, military, and security forces, upheld in *Rekvenyi*, from the question of restriction of the right to political participation:

> In so far as the Government refers to the Court's case-law concerning restrictions on the political activities of civil servants, members of the armed forces, members of the judiciary or other members of the public service, the Court points out that the criteria established by its case-law with regard to those persons' political loyalty cannot as such be applied to the members of a national parliament . . . the second sentence of Article 11 §2 of the Convention, authorising 'lawful restrictions' with regard to 'members of the armed forces, of the police or of the administration of the State', does not apply to members of parliament or to members of the elected bodies of local authorities.[192]

Ždanoka is also instructive because of the Court's reasoning on the question of the imminence of a threat to 'democratic society'. The government of Latvia argued that former members of the CPL were a threat to Latvian democracy. According to the submission of the government of Latvia, the CPL had sponsored subversive actions against the newly elected Latvian government, following the first democratic elections in March 1990.[193] The government thus claimed that the limitation of the right to stand for an election to former members of the CPL was 'necessary in a democratic society', as democracy needs to be able to defend itself. The Court, however, rejected this view:

> [T]he applicant's disqualification from standing for election to Parliament and local councils on account of her active participation in the CPL, maintained more than a decade after the events held against that party, is disproportionate to the aim pursued and, consequently, not necessary in a democratic society.[194]

The Court thus gave express support to the view of the dissenting opinion of three (out of seven) judges of the Constitutional Court of Latvia, who held that: '[T]he Latvian democratic system had become sufficiently strong for it no longer to fear the presence within its legislative body of persons who had campaigned against the system ten years previously'.[195]

Importantly, the Court thus partly based its decision on the view that the state of Latvian democracy ten years after the subversive events was at a level where

191 *Ždanoka v. Latvia*, (2007) 45 EHRR 17, para. 110. This decision is interesting in the light of the lustration laws adopted in some post-communist states. See, e.g., V. Pettai, 'Estonia: Positive and Negative Institutional Engineering', in A. Pravda and J. Zielonka (eds.), *Institutional Engineering in Eastern Europe* (2001), 126–7.

192 *Ždanoka* case, *supra* note 191, para. 108. See also para. 85, where the Court held, '[N]either a parliament nor an individual member of parliament may, by definition, be "politically neutral"'.

193 *Ždanoka* case, *supra* note 191, para. 66.

194 Ibid., para. 110.

195 Constitutional Court of Latvia, Judgment of 30 August 2000, cited in the *Ždanoka* case, *supra* note 191, para. 49.

such restrictions were no longer necessary.[196] Although the Court did not use the specific term 'democratic consolidation', it notably took the latter into account when deciding that a threat to 'democratic society' was not imminent. Arguably, the Court thus also implied that its decision might have been different had it considered Latvian democracy 'not consolidated enough' to reject the existence of an imminent threat to 'democratic society'. Arguably, in a possible similar case in the future, the Court's decision might be different and imminence could be established based on a democracy more vulnerable than Latvia's was at the time when the decision in *Ždanoka* was taken.

The jurisprudence of the ECtHR not only provides for the authority that elections in the ECHR framework need to take place in a multiparty setting but has also considered the postulates of substantial democracy. In this regard mechanisms for the protection and promotion of the democratic political order have been developed. In doing that the ECtHR has resorted to democratic political theory and has applied political analysis in its judgments.

4. Conclusion

References to 'democratic society' appear as part of limitation clauses in the UDHR, in international human rights treaties and in the ECHR, but the adjective 'democratic' in this context should not be interpreted too broadly; it was not inserted with a particular political system in mind. The link between human rights and democracy rather follows from the interpretation that certain civil and political rights bind state parties to organize their political systems along liberal-democratic procedural lines.[197] From the aspect of democratic political theory it remains questionable whether the procedural (i.e. electoral-centric) definition of democracy is adequate. But in the framework of international legal scholarship, the debate on democracy appears to be dominated by the question whether certain civil and political rights can only be fulfilled in a multiparty setting.

In the Cold War period, the *Nicaragua* case confirmed that neither the ICCPR nor customary international law binds states to adopting a particular political system or electoral method. The ICJ therefore affirmed that universal human rights instruments and customary international law are not to be read with the idea of multiparty electoral democracy in mind. In the post-Cold War period, references to democracy have been made in several documents adopted in the framework of the United Nations. But the scope of these references should not be overstretched. The relevant General Assembly resolutions, which are capable of reflecting customary international law, make no mention of elections in a multiparty setting. Furthermore, these resolutions commonly affirm that the choice of a political system remains in the exclusive domestic jurisdiction of states. Despite the proliferation of references to democracy in post-Cold War documents adopted in the framework of the United

196 For more on Latvian democracy see, e.g., A. Sprudzs, 'Rebuilding Democracy in Latvia: Overcoming a Dual Legacy', in Pravda and Zielonka, *supra* note 191, at 139.

197 Note 42, *supra*.

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Nations, no attempt has been made to carve out a universally accepted definition of democracy. From the aspect of the procedural understanding of democracy, there exists no universally applicable authority holding that international (human rights) law requires elections in a multiparty setting.

Analysis of the ECHR framework, however, gives a different account. While the provisions of the so-called democratic rights do not significantly differ from their elaboration in the universal human rights instruments, the ECtHR has established that '[d]emocracy is without doubt a fundamental feature of the European public order'.[198] The ECtHR's jurisprudence also makes it clear that the democratic political system requires multiparty elections.[199] Therefore, unlike at the universal level, there exists a clear authority holding that a state party to the ECHR needs to organize its political system along liberal-democratic lines, the main procedural feature of which is elections in a multiparty setting. While at the universal level a particular political and electoral system remains in the exclusive domestic jurisdiction of states, the ECHR framework limits the choice to one of the variations of multiparty democracy.

Furthermore, its case law shows that the ECtHR has adopted mechanisms both to defend and to consolidate democracy. The ECtHR has therefore shown a clear tendency to understand democracy beyond its procedural (i.e. election-centric) definition. Indeed, reasoning in the case law such as *Refah Partisi*, *Rekvenyi*, and *Ždanoka* shows that the ECtHR considers the history of political action and the level of democratic consolidation before upholding or rejecting a ban on the political activity of either political parties or individuals. For this purpose the Court has even resorted to political analyses in its judgments.[200]

Although the ECHR makes no references to multiparty elections, the ECtHR's case law has established a clear link between human rights, democracy, and multiparty elections. Furthermore, the ECtHR has also shown that it understands democracy beyond its procedural definition. But parties to the ECHR are a group of relatively culturally homogeneous states. While multiparty democracy can be considered to have become part of the European public order, this does not mean that it has become part of the international public order. Indeed, at the universal level no authority exists which would be comparable with that of the ECtHR on the understanding of democracy and 'democratic rights'. While some general references to democracy have been made in the framework of the UN human rights machinery, no specific procedural or substantive definition of democracy has been attached to these general proclamations, and it is far from settled that either the ICCPR or customary international law requires elections to take place in a multiparty setting.

198 *United Communist Party of Turkey* case, *supra* note 118, para. 25.
199 Section 3.2, *supra.*
200 See especially the *Refah Partisi* case (2003), *supra* note 118, Judge Kovler Concurring, at 49.