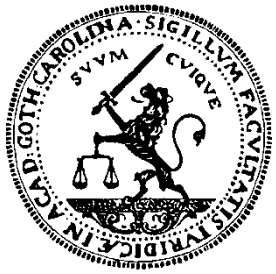

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The Democratic Dilemma: Dissolution of Political Parties in the Jurisprudence of the European Court of Human Rights

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Summary

Any democratic State must to some extent take a stand on the classic democratic dilemma of how to approach anti-democratic forces in society. When the threat to democracy emanates from a political party, whose existence and functionality are central to modern democracies, the State will have to undertake a very delicate balancing exercise. The primary research question is what legal standard the Court has set up for the dissolution of political parties. Additionally, the aim is to compare that legal standard with the conception of democracy of the Council of Europe.

To some extent, there is a common conception of democracy within the Council of Europe. It can be described as going well beyond a procedural model of democracy, but still emphasizing the importance of elections and therefore also of political parties. Furthermore, there appears to be some consensus as to what the general principles for the limits of dissolution of political parties should be. As an extremely intrusive measure that affects individual's democratic participation, it should only be applied in exceptional cases and with utmost restriction. The European Court of Human Rights has over the years developed a test for assessing the legality of party dissolution measures, that in many ways sets a high threshold for the legality of such measures. However, its reasoning in especially the *Refah Partisi* case can be criticized for not adhering to, for instance, the democratic principles of tolerance and pluralism.

The thesis concludes that it is not currently possible to give a clear answer to the research question. In some cases it is questionable whether the reasoning of the Court is in line with the conception of democracy within the Council of Europe. This is primarily due to the use of elusive concepts such as 'democracy', 'pluralism' and 'secularism'. Acknowledging the difficulties of undertaking to clarify the concept of democracy, the author nevertheless suggests that the institutions of the Council of Europe should attempt to do so.

Sammanfattning

Varje demokratisk stat måste i någon mån ta ställning till det klassiska demokratiska dilemmat om hur odemokratiska krafter i samhället bör bemötas. När demokratin hotas genom ett politiskt parti, vars existens och verkande är centrala i moderna demokratier, måste staten i fråga balansera motstående intressen. Den här uppsatsen handlar om praxis från Europadomstolen rörande upplösning av politiska partier. Frågeställningen är i första hand vilka gränser Europadomstolen har satt upp för sådana åtgärder. Dessutom är syftet var att jämföra domsolens praxis med Europarådets syn på demokrati.

I viss utsträckning finns det en gemensam syn på demokrati inom Europarådet. Den kan beskrivas som mer långtgående än en substantiell demokratisk modell, som dock ändå lägger stor vikt vid val och följaktligen också vid politiska partier. Det verkar också finnas viss konsensus om de generella principer som bör gälla för upplösning av politiska partier. Eftersom det är en mycket ingripande åtgärd som påverkar individens demokratiska deltagande, kan den bara tillämpas ytterst restriktivt i undantagsfall. Europadomstolen har under årens lopp utvecklat ett test för bedömningen av huruvida en upplösning av ett politiskt parti är tillåtlig. Dock kan dess resonemang i särskilt fallet *Refah Partisi* kritiseras för att inte uppfylla demokratiska principer om till exempel tolerans och pluralism.

Slutsatsen är att det för närvarande inte är möjligt att ge ett tydligt svar på frågeställningen. I vissa fall kan det ifrågasättas om Europadomstolens resonemang överensstämmer med Europarådets syn på demokrati. Detta beror främst på att domstolen använder förlitar sig på vaga termer såsom ”demokrati”, ”pluralism” och ”sekularism”. Trots att begreppet demokrati svårligen låter sig definieras, föreslår författaren att Europarådet ändå bör försöka tydliggöra dess innebörd.

Preface

Firstly, I would like to thank everybody who has been encouraging me and shown interest in my topic during this semester. Thanks in particular to Martin and Victoria for proof reading, and to Alejandro Fuentes for supervision.

The elections to the European Parliament on the 25th of May 2014 made it clear that right-wing extremist parties are increasing in popularity throughout Europe. At least in Sweden, the debate on to what extent a democracy may take legal measures against parties with anti-democratic values appears to be almost non-existent. It is my firm belief that we all need to start reflecting on this delicate but fundamental question. Let us not forget the horrifying words of Joseph Goebbels: 'This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed'.

Abbreviations

AmPolScRev	American Political Science Review
CoE	Council of Europe
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
EComHR	European Commission of Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EPL	European Public Law
ETS	European Treaty Series
EuConst	European Constitutional Law Review
Fordham Intl LJ	Fordham International Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International & Comparative Law Quarterly
ICON	International Journal of Constitutional Law
LJIL	Leiden Journal of International Law
OSCE/ODIHR	Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe
OUP	Oxford University Press
PACE	Parliamentary Assembly of the Council of Europe
RevIntl Stud	Review of International Studies
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UNSG	United Nations Secretary General
UNTS	United Nations Treaty Series
Vand J Transnatl L	Vanderbuilt Journal of Transnational Law
Venice Commission	European Commission for Democracy through Law

1 Introduction

1.1 Background

The question of to what extent a 'democracy' may defend itself against forces aiming for its destruction is a classic dilemma. Can a democracy eliminate its enemies and still remain a democracy – or does it have to commit suicide in the name of tolerance? The answer to that question will inevitably depend on what democracy is taken to mean. Nevertheless, it is fairly safe to say that in democracies in Europe today, political parties play a central role.[1] Thus, if the threat to democracy appears in the form of a political party, the question gets even thornier. The ultimate defence for democracy, then, would be to simply dissolve the party. For a long time, this was considered as a measure belonging to the age of the Cold War, the general view being that democracies punished crimes committed by individuals but that they did not prohibit parties.[2] However, the phenomenon got increased attention in the field of European human rights law in the 1990s,[3] perhaps due to a change in the nature of the threats to democracy. Today, parties are dissolved primarily because they incite hate and discrimination, because they encourage violence, or because they are perceived as threatening the identity of the state.[4] Thus, the topic is highly relevant in contemporary Europe – not least in the light of extremist movements rising and decreasing trust in political parties.[5] The Parliamentary Assembly of the Council of Europe (PACE) summarized the issue as follows:

> The question of restrictions on political parties reflects the dilemma facing all democracies: on the one hand, the ideology of certain extremist parties runs counter to democratic principles and human rights, and on the other hand, every democratic regime must provide maximum guarantees of freedom of expression and freedom of assembly and association. Democracies must therefore strike a balance by assessing the level of threat to the democratic order in the country represented by such parties and by providing safeguards.[6]

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[1] European Commission for Democracy through Law (Venice Commission), 'Report on the Establishment, Organisation and Activities of Political Parties' (12-13 December 2003) CDL-AD(2004)00G, para 13.
[2] Olgun Akbulut, 'Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties' (2010-2011) 34 Fordham Intl LJ 46, 46-47.
[3] Akbulut (n 2) 46. See also Gur Bligh, 'Defending Democracy: A New Understanding of the Party-Banning Phenomenon' (2013) 46 Vand J Transnatl L 1321, 1323-24.
[4] Bligh (n 3) 1337.
[5] See for instance Parliamentary Assembly of the Council of Europe (PACE) Res 1754 (5 October 2010) para 2.
[6] PACE Res 1308 (18 November 2002) para 3.

1.2 Purpose and Delimitations

The European Court of Human Rights (ECtHR) has dealt with about fifteen cases concerning the limits of States to dissolve political parties. The purpose of this thesis is twofold. Firstly, the aim is to clarify the legal standards for the dissolution of political parties as set out by the ECtHR. Secondly, the aim is to examine whether that standard is compatible with the conception of democracy in the Council of Europe (CoE). The second question is important not only because the approach to party dissolution theoretically affects the democratic character of a State, but also since democracy is the reference point for the legality assessment of a party dissolution. Article 11(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[7] requires that an interference with the freedom of association is 'necessary in a democratic society'.[8]

The purpose is certainly not to provide an answer to the 'democratic dilemma'; that exceeds the scope of this thesis. Rather, the idea is to compare the case law of the ECtHR to one of the many conceptions of democracy – that of the Council of Europe. It would not be possible to give a full account of the debate on what democracy is. The thesis sets out with a brief general theoretical background, but the focus will be on the conception of democracy in the view of the institutions of the Council of Europe. Likewise, the relationship between democracy and international law in general will be touched upon, but only very briefly in order to outline the context of which the European system is a part.

Furthermore, some delimitations follow from the terminology used. A definition of 'political parties' in this context has to take into account that the issue here concerns parties aiming to come to power. The European Commission for Democracy through Law (Venice Commission) has used the following definition:

> '[…][A] political party is an association with the task of presenting candidates for elections in order to be represented in political institutions and to exercise political power on any level: national, regional and local or on all three levels'.[9]

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[7] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

[8] Art 11 reads as follows: '1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State'.

[9] Venice Commission, 'Code of Good Practice in the Field of Political Parties' (12-13 December 2008 and 13-14 March 2009) CDL-AD(2009)021 para 10. The Venice Commission is an 'independent consultative body' which provides legal advice to Member

This is a suitable definition for this purpose, especially since States' legislation in this area varies.[10]

Moreover, 'dissolution' in this context is taken to mean the complete ban on a political party's existence; refusal to register parties will not be considered. Likewise, consequences of the dissolution concerning for instance party members that loose their parliamentary seats fall outside of the scope of this thesis. Nor will the effects of such a measure on the party's popularity or success be considered; the aim of this thesis is not to pronounce on the desirability of dissolution measures from a practical perspective. Minorities' interest of an effective political participation is a subject closely linked to the present one, which will however not be examined. Likewise, comparative aspects of the legislation in various States will not be considered.

1.3 Method and Material

In order to determine what legal standard the ECtHR has set up regarding the dissolution of political parties, the case-law of the ECtHR is of course central. Thus, the main part of the thesis consists of a study of the cases concerning the dissolution of political parties within the framework of the ECHR, using a legal dogmatic method. I also take into account documents from PACE and the Venice Commission, which have also pronounced on the dissolution of parties. These documents are useful since they allow for a comparison of the view of the ECtHR and other institutions of the Council of Europe. The general principles for the dissolution of political parties as set out by PACE, the Venice Commission and the ECtHR will be presented together. This provides a background for the central part of the thesis, namely the application of those principles in the specific cases of the ECtHR.

In light of the central role played by democracy in the case law of the ECtHR on the dissolution of parties, this thesis will examine what conception the Council of Europe has of democracy. As democracy constitutes the limit for when dissolution is allowed, it is necessary to clarify the term as much as possible. If the concept of democracy is unclear, the limit for the dissolution of political parties will consequently remain equally unclear.

States on matters relating to for instance democracy and the rule of law. See Committee of Ministers Res (2002) 3 (21 February 2002) (Revised Statute of the Venice Commission).

[10] Venice Commission, 'Report on the Establishment, Organisation and Activities' (n 1) para 13. See also Venice Commission, 'Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues' (12-13 March 2004) CDL-AD(2004)007rev., para 3; 'Thematic Monitoring Report Presented by the Secretary General' (19 October 2005) CM/Monitor(2005)1 Volume II para 2; Venice Commission, 'Code of Good Practice in the Field of Political Parties' (n 9) para 58.

For this part of the thesis, I use Council of Europe treaties and ECtHR case law, but also for instance policy documents from PACE and guidelines issued by the Venice Commission. It should not be forgotten that the Council of Europe is an intergovernmental organization, and it might be perceived as misleading to talk about the view of the institutions of the Council of Europe themselves (with the exception of the ECtHR). However, although the legal value of the two latter types of documents is somewhat unclear, they could be seen as 'soft law with "moral" authority'.[11] The Venice Commission has described other legal sources than the case-law from the ECtHR as reflecting best practices that go further than minimum standards.[12] As the aim is not provide a most likely non-existent legal definition of democracy, but merely to examine what elements the Council of Europe have in mind when they mention the word 'democracy', the value of those sources to this study is clear.

In 1937, Karl Loewenstein coined the term 'militant democracy' to signify a democratic state taking legal measures to defend itself against anti-democratic forces.[13] The literature on the concept is rather extensive compared to the literature on the conception of democracy of the Council of Europe, which is quite scarce. Jure Vidmar's article[14] has been of some guidance. Gregory H Fox and Georg Nolte have written a debated and widely cited article on militant democracies; it appears in an edited book by Fox and Brad R Roth, which has been of great use.[15] The works of Gur Bligh[16] and Patrick Macklem[17] have also been important sources as they provide a new perspective on militant democracy today. As regards literature on the dissolution cases in the ECtHR, it can roughly be divided into two groups: articles that focus on the Turkish cases altogether (for instance Olgun Akbulut[18]) and articles that focus on specific cases (for instance Kevin Boyle[19]).

[11] Hans-Heinrich Vogel, 'Regulation of Political Parties – Guidelines, Codes and Opinions' in Pieter van Dijk and Simona Granata-Menghini (eds), *Liber Amoricum Antonio La Pergola* (Juristförlaget i Lund 2009) 323, 324.
[12] Venice Commission, 'Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey' (13 March 2009) CDL-AD(2009)006, paras 11, 41. See also Vogel (n 11) 325.
[13] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) AmPolScRev (1937) 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) AmPolScRev 638.
[14] Jure Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives' (2010) 23 LJIL 209.
[15] Gregory H Fox and Georg Nolte, 'Intolerant Democracies' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (Cambridge University Press 2000) 389.
[16] Bligh (n 3).
[17] Patrick Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Delf-Determination' (2006) 4 ICON 488; Patrick Macklem, 'Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe' (2012) 19(4) Constellations 575.
[18] Akbulut (n 2).
[19] Kevin Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1(1) Essex Human Rights Review 1.

1.4 Structure

In order to present the material as clearly as possible, chapter 2 deals with the conception of democracy within the institutions of the Council of Europe. This chapter will provide for a background to the following chapters. Chapter 2 can also be seen as the most 'general' chapter, whereas chapter 3-4 will gradually go into depth on one specific issue related to democracy, namely, the dissolution of political parties. Thus, chapter 3 accounts for the opinions of the Venice Commission and PACE on the dissolution of political parties, and also the general principles to be applied in those cases according to the ECtHR. Chapter 4 is the central part of the thesis, focusing specifically on the cases from the ECtHR and what limits the ECtHR has dictated for the dissolution of political parties. At the end of each chapter, some concluding remarks will serve as a foundation for the concluding chapter at the end.

2 Human rights and democracy

2.1 Introduction

In democratic societies that make use of the system of political parties in order to enforce popular sovereignty, the issue of anti-democratic parties is a difficult one. This is because the parties are in these cases the very foundation for democracy, which means that any interference with their freedom will risk also harming democracy as a whole. On the one hand, there is a strong argument to be made in favour of the majority principle and popular sovereignty. If the democratic system does not consider the opinion of the majority as decisive, is it really democratic? On the other hand, it is not self-evident that a democratic system automatically should have the capacity to destroy itself; if the principle of popular sovereignty is so important, how come it can deny future generations access to the same principle?[20]

Thus, it is clear that the questions of dissolution of political parties and democracy are strongly interconnected. But in order to approach the issue of political parties, it is still necessary to clarify what democracy actually means. Otherwise it will be impossible to assess in what situations anti-democratic parties threaten democracy and when they do not.

This chapter will start with a brief account of conceptions of democracy, particularly the notions of 'procedural', 'substantive' and 'militant' democracy. These notions provide for different approaches towards the concept of democracy that can further the understanding of the view taken by the Council of Europe. This is also the rationale behind including a short section on the relationship between international law and democracy.

The main part of this chapter examines what conception of democracy may be discerned from the documents of the Council of Europe institutions. The thesis starts with the 'political' institutions and finishes with the ECtHR, which has, in party dissolution cases, pronounced generally on the elements and characteristics of democracy. Rather than defining democracy, the ECtHR can be said to have focused on certain aspects of the concept and emphasized principles without elaborating much on them.[21] From these fragments, it is still possible to discern an idea of liberal democracy where elections, the rule of law and human rights are central elements.[22]

[20] Fox and Nolte (n 15) 395-396.
[21] Boyle (n 19) 8.
[22] Boyle (n 19) 8. See also Yigal Mersel, 'The Dissolution of Political Parties: The Problem of Internal Democracy' (2006) 4 ICON 84, 91-95.

2.2 Notions of Democracy: Procedural, Substantive or Militant?

At the outset, it has to be acknowledged that a classification of different notions of democracy risk to be misleading. The question 'What is democracy?' is not easily answered. Political scientist James L Hyland points out that the question is 'deceptively simple', as there is in fact nothing to suggest that there is 'some objective, timeless essence of democracy'. He also notes that democracy is often taken as a 'sortal' concept, so that a given political system could clearly be said to either fall inside the democracy 'category' or outside of it. However, it would also be possible to think of democracy as a 'scalar' concept, so that the political system could be considered more or less democratic.[23] PACE has recognized this ever-changing nature of democracy:

> Democracy is never perfect but always evolving towards perfection; democracy is not a mere set of laws and institutions, but a way of thinking and living, and therefore it should grow naturally, without it being possible to export it or to transfer it mechanically from one place to another; democracy is not immutable but in constant evolution.[24]

The notions presented below should thus not be taken as static concepts that has to be chosen from. Rather, they represent ideas of possible approaches to the issue. Furthermore, they do not aspire to constitute a comprehensive overview; there are an almost endless variety of theories on the definition of democracy. Instead, they are possible approaches to a specific democratic problem – that of anti-democratic parties. Fox and Nolte argue that the number of possible responses to that specific problem is limited, and conclude that eventually, the issue can be boiled down to two models of democracy: a procedural one and a substantive one.[25]

The procedural model formed in the seventeenth and eighteenth centuries, in a time when individuals were perceived as capable of reasoning and enlightenment themselves. Protection from non-rational ideas by the State was thus considered unnecessary. However, democracy had to be tolerant in order to prevent the success of groups advocating the return to religious authority. This self-criticism was primarily carried out through electoral politics.[26] Inevitably, this tolerance also meant that democracy could abolish itself.[27]

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[23] James L Hyland, *Democratic theory: The philosophical foundations* (Manchester University Press 1995) 37, 45, 49-50.
[24] PACE Res 1407 (8 October 2004) para 12.
[25] Fox and Nolte (n 15) 405. See also Vidmar (n 14) 211-215.
[26] Fox and Nolte (n 15) 400-401.
[27] ibid 401. It could also be argued that this definition of democracy automatically goes beyond a mere focus on elections, requiring for instance freedom of expression, see Vidmar (n 14) 212-213.

The substantive model, on the contrary, points out that majorities are not static; depending on which issue is at stake, they will consist of different constellations of citizens. But in order for citizens to be able to form those different constellations, they need a core of rights that secures political participation. Democratic procedure is thus merely a means of creating essential rights for citizens, and not an end in itself.[28] These rights are not absolute in the sense that they cannot abolish themselves or other rights. The principles of justice that constitute the foundation of democracy would be meaningless if they could eliminate themselves.[29]

The distinction between procedural and substantive democracy could be criticised for assuming that the government is democratic and the opposition undemocratic. Taking the distinction between procedural and substantive democracy used by Fox and Nolte as a point of departure, the different sides may adhere to different models or indeed interpret the same model in different ways.[30] If both sides argue that they are democratic, the discussion will in the end be about which model of democracy is desirable.[31]

The 'militant' model of democracy takes the substantive model as a starting point. The growth of non-democratic regimes after World War I really put the issue of anti-democratic groups on the agenda among democratic theorists.[32] In the context of fascism spreading in Europe, Loewenstein argued that democracy had to become militant and protect itself in order to survive. Fascist technique was successful because democracy allowed it to be; 'democracy and democratic tolerance have been used for their own destruction'.[33]

The Weimar constitution illustrates this.[34] The constitution gave the executive branch the power to dissolve the legislature and declare a state of emergency in order to protect democracy. Article 48 of the Weimar Constitution (the 'suicide clause') provided that the executive could legislate in case of emergency, which was exactly what Hitler did when he banned all opposition parties in 1933.[35]

Loewenstein held that States ought to learn a lesson from the overly tolerant Weimar Republic. He even concluded that States had become 'militant' by

[28] Fox and Nolte (n 15) 401
[29] ibid.
[30] Martti Koskenniemi, 'Whose Intolerance, Whose Democracy?' in Fox and Roth (eds) (n 15) 436-437.
[31] ibid 436-437; Brad R Roth, 'Democratic Intolerance: Observations on Fox and Nolte' in Fox and Roth (eds) (n 15) 441, 441-442.
[32] Fox and Nolte (n 15) 399-400.
[33] Loewenstein, 'Militant Democracy and Fundamental Rights, I' (n 13) 422-423.
[34] ibid 426.
[35] Judith Wise, 'Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party' (1998) 5 University of Chicago Law School Roundtable 301, 305, 308.

adopting anti-fascist legislation.[36] However, it was not until after World War II that States began to introduce provisions aimed at protecting democracy at a larger scale.[37] For instance, the post-war German constitution allows the State to protect democracy.[38]

The original conception of a 'militant democracy' thus focused on parties that were expressly aiming at entirely abolishing democracy, such as Fascist or Communist parties.[39] This has been taken to mean procedural democracy; parties that do not want elections.[40] Today, the threats to democracy have changed; instead, parties advocating discrimination, violence, terrorism, hate or religious fundamentalism have emerged.[41] Perhaps that is why the concept of militant democracy has reached more attention recently.[42] Militant democracy has even been described as an emerging 'new archetype of statehood' which challenges traditional conceptions of democracy.[43] It can also be argued that the purpose of restrictions of parties has changed; instead of protecting democracy as a whole, they aim at denying some parties legitimacy and benefits.[44] In other words, the parties concerned are perceived as a threat to 'certain *elements* within the liberal constitutional order', for instance the principle of non-discrimination or secularism.[45] The reason for this development is arguably due to the ambiguity of the concept of democracy.[46] That ambiguity is to a large extent also due to the rather unclear status of democracy within international law.

2.3 Democracy and International Law

The right to political participation can be found in Article 21(3) UDHR and Article 25.[47] Those provisions do not, however, contain any explicit definition of democracy but focuses on elections. Democracy is only mentioned in connection with the limitation clause in Article 29(2) UDHR and Articles 14, 21-22 ICCPR, without any explicit definition being provided.[48] The reason is perhaps that during the Cold War, 'democracy' was used in human rights law as signifying only majoritarian elections,[49]

[36] Loewenstein, 'Militant Democracy and Fundamental Rights, I' (n 13) 426, 430-431; Loewenstein, 'Militant Democracy and Fundamental Rights, II' (n 13) 656.
[37] Macklem, 'Militant Democracy' (n 17) 488.
[38] Basic Law for the Federal Republic of Germany, Art. 20(1), 21(2).
[39] Bligh (n 3) 1325, 1333.
[40] Macklem, 'Guarding the Perimeter' (n 17) 575; Bligh (n 3) 1330.
[41] Macklem, 'Guarding the Perimeter' (n 17) 576; Bligh (n 3) 1325.
[42] Macklem, 'Guarding the Perimeter' (n 17) 576; Bligh (n 3) 1336.
[43] Macklem, 'Guarding the Perimeter' (n 17) 576.
[44] Bligh (n 3) 1325, 1335-36, 1366.
[45] ibid 1345, 1350. See also Macklem, 'Guarding the Perimeter' (n 17) 575.
[46] Macklem, 'Guarding the Perimeter' (n 17) 575.
[47] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[48] Cf UN Human Rights Committee, 'General Comment No. 25 (57)' (27 August 1996) UN Doc CCPR/C/21/Rev.1/Add.7.
[49] Fox and Nolte (n 15) 397-398; Boyle (n 19) 8.

whereas 'human rights' were treated separately.[50] This separation has to some extent remained; references are thus often made to both democracy and human rights at the same time.[51] Today, however, the mutually reinforcing relationship between democracy and human rights is well-established at the international level.[52]

Democracy was long seen as a domestic issue, which should not be the subject of international law. It was not until after the Cold War that democracy started to receive increased attention from legal scholars concerned with international law.[53] No common definition has been agreed upon, but elections appear to be central to most international actors.[54] Fox and Nolte even contend that there is an emerging international consensus on the issue. Their examination of treaties, decisions from human rights bodies and State practice points to a firm support for a substantive view on democracy.[55]

In the 1990s, it was even suggested that a right to democratic governance was beginning to take form.[56] This remains a controversial statement which has been widely debated.[57] The tension is quite apparent. On the one hand, defining democracy is a controversial issue since it would not be possible to find one definition that would suit all States.[58] Furthermore, the adherence to the principles of the sovereignty of States and non-intervention works as a counter force.[59] Resolutions from the United Nations General Assembly (UNGA) concerning the subject have been quite cautious and for instance not mentioned multiparty elections at all.[60] On the other hand, democracy

[50] Fox and Nolte (n 15) 397-398.
[51] ibid 398.
[52] See for instance 'Vienna Declaration and Programme of Action' World Conference on Human Rights, (Vienna 14-25 June 1993) (12 July 1993) UN Doc A/CONF.157/23, para 8; UNGA, 'Letter dated 17 December 1996 from the Secretary-General addressed to the President of the General Assembly' (20 December 1996) UN Doc A/51/761 ('Agenda for Democratization') para 15; Boyle (n 19) 8; Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (2005) UN Doc A/59/2005 ('In Larger Freedom') paras 14-17.
[53] Gregory H Fox and Brad R Roth, 'Democracy and International Law' (2001) 27 Rev Intl Stud 327, 327.
[54] Fox and Nolte (n 15) 396-397; Fox and Roth (n 53) 331. The importance of periodic and free elections has been emphasized by *inter alia* the UN Human Rights Committee in General Comment 25 (n 48) and the ECtHR in *United Communist Party of Turkey and Others v Turkey* App No 19329/92 (ECtHR, 30 January 1998) para 44.
[55] Fox and Nolte (n 15) 433-434.
[56] Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46. See also UN Commission on Human Rights (UNCHR) Res 1999/57 (1999) UN Doc E/CN.4/1999/L.11/Add.5.
[57] See eg Roth (n 31) 441; Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22 EJIL 507; Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549.
[58] 'Agenda for Democratization' (n 52) paras 3-4, 10, 21, 122.
[59] ibid paras 8, 27.
[60] Vidmar (n 14) 219. See eg UN General Assembly (UNGA) Res 43/157 (8 December 1988) UN Doc A/RES/43/157; UNGA Res 49/30 (22 December 1994) A/RES/49/30; UNGA Res 66/285 (12 July 2012) UN Doc A/RES/66/285.

has gained more and more support both in theory and practice.[61] It is no longer only connected to human rights but to concepts such as security, development and justice.[62] Thus, in 2005, the UN Secretary General (UNSG) even described the development as moving towards a universal right to democracy.[63]

It has also been suggested that democracy would be a decisive factor when it come to the recognition of States and governments. One of the reasons for the increasing importance of democratic legitimacy is probably that States have coordinated themselves through international organisations, a few of which require their members to be democratic.[64] The Statute of the Council of Europe is one of them.[65]

2.4 The Conception of Democracy within the Council of Europe

2.4.1 General Considerations

Both the Statute of the Council of Europe and the ECHR refer to democracy and its connection to human rights.[66] However, neither provides for a definition, as the States Parties could not reach an agreement.[67] Still, Articles 8-11 require that any interference with the freedoms prescribed by those articles be 'necessary in a democratic society'. Article 3 Protocol I to the ECHR is also related to the issue as it recognizes the right to free elections.[68] The ECtHR has somewhat clarified the meaning of a 'democratic society' in its case law,[69] as have PACE. Additionally, the Venice Commission has contributed to the elucidation of the concept. It was established in 1990 by 18 Council of Europe States, with the purpose of creating 'a fundamental instrument for the development of democracy in Europe'.[70] The Commission is an advisory body with the objective of, *inter alia*, 'promoting the rule of law and democracy' and 'examining the problems raised by the working of democratic institutions and their reinforcement and development'.[71]

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[61] 'Agenda for democratization' (n 52) paras 2-3, 7, 26, 56.
[62] ibid paras 15, 16, 118; 'In Larger Freedom' (n 52) paras 127-128.
[63] 'In Larger Freedom' (n 52) paras 148-149.
[64] Sean D Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 49 ICLQ 545, 555.
[65] ibid 555; Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) 87 UNTS 103 (CoE Statute) art 3.
[66] CoE Statute (n 65) preambular para 3, art 1(b); ECHR (n 7) preambular paras 4-6.
[67] Hans-Martien ten Napel, 'The European Court of Human Rights and Political Rights: The Need for More Guidance' (2009) 5 EuConst 464, 464.
[68] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (adopted 20 March 1952, entered into force 18 May 1954) ETS 5 art 3.
[69] See text to n 154-206.
[70] Committee of Ministers Res (90) 6 (10 May 1990) preambular para 5.
[71] Revised Statute of the Venice Commission (n 9) Art 1.1.

In general terms, democracy constitutes one of the three 'areas of excellence' of the Council of Europe, together with human rights and the rule of law.[72] These three concepts are intimately related; PACE has described democracy as the only political model which guarantees also human rights and the rule of law.[73] Democracy is also considered as related to various other concepts, such as peace and stability, pluralism, free elections, parliamentarianism, freedom of opposition, cultural diversity, an independent media and a system of checks and balances.[74] Although maintaining that there is a common view on the notion of democracy,[75] PACE also acknowledges the 'diversity of the organisation of democratic institutions in Europe'.[76]

This diversity is perhaps also the reason why no comprehensive document on the democratic principles common to the Council of Europe States has yet been created. On a number of occasions, PACE has asked the Committee of Ministers to draw up a list or charter on democratic principles and standards.[77] The Venice Commission has expressed its willingness to contribute, stating that guidelines on democratic standards could contribute to the legitimization of international support concerning democracy in Europe.[78] However, the Commission also cautioned that considering the diversity of democratic systems, it would be a difficult project. Formulations on democratic principles would thus have to reflect the minimum standards for a democracy adhering to the rule of law.[79] Although agreeing with the Venice Commission on the probable usefulness of democratic standards, the Committee of Ministers has been more hesitant.[80]

PACE has maintained the need for a list of democratic standards, especially in the light of the challenges facing democracy today. As participation in elections, and the trust for the democratic system, decreases, there is a need

[72] PACE Res 1547 (18 April 2007) para 27. See also Committee of Ministers, 'Future of Democracy: Strengthening Democratic Institutions: Parliamentary Assembly Recommendation 1629 (2003)' (8 July 2004) CM/AS(2004)Rec1629 paras 2-3.
[73] PACE Res 1353 (25 November 2003) para 5; Committee of Ministers, 'Future of Democracy' (n 72) para 2.
[74] PACE Res 650 (27 January 1977) para 2; 'Vienna Declaration' Council of Europe Summit (Vienna 8-9 October 1993) (9 October 1993) para 1; PACE Res 1353 (n 73) paras 1, 13; Committee of Ministers, 'Future of Democracy' (n 72) para 2; PACE Res 1547 (n 72) paras 52-53; PACE Res 1747 (23 June 2010) para 3, 8; PACE Res 1754 (n 5) para 7.
[75] PACE Res 1747 (n 74) para 3. See also 'Vienna Declaration' (n 74) para 1.
[76] PACE Res 1747 (n 74) para 9.
[77] PACE Rec 1629 (25 November 2003); PACE Rec 1680 (8 October 2004) para 3.3; PACE Rec 1791 (18 April 2007) para 20.
[78] Venice Commission, 'Opinion on the Possible Follow-Up to Parliamentary Assembly Recommendation 1629 (2003) on "Future of Democracy: Strengthening Democratic Institutions"' (12-13 March 2004) CDL-AD(2004)015, para 17.
[79] Venice Commission, 'Opinion on the Possible Follow-Up' (n 78) paras 8-11.
[80] Committee of Ministers, 'Future of Democracy' (n 72) para 5; Committee of Ministers, 'New Concepts to evaluate the State of Democratic Development: Parliamentary Assembly Recommendation 1680 (2004)' (6 April 2005) CM/AS(2005)Rec1680 final, para 6.

to redefine the core elements of democracy.[81] Therefore, the Assembly suggested a list of democratic standards to complement the Council of Europe's 'traditional standards (…), such as the various individual freedoms, free and fair elections, the separation of powers, the checks and balance's of the State's institutions, etc.'[82] The additional standards concern everything from transparency and accountability of State institutions to economic development and prison conditions.[83] Notably, 'measures for the protection of democracy against non-democratic initiatives' was suggested as a standard.[84]

Returning to the present conception of democracy within the Council of Europe, three specific aspects are presented below.

2.4.2 Political Parties and Elections: Essential Elements of Democracy

The Venice Commission has described human rights, the rule of law and democracy as the 'three pillars of the European constitutional heritage'.[85] Democracy is considered inconceivable without elections.[86] Political parties are therefore a 'permanent feature of modern democracies'.[87] Thus, a part of the constitutional heritage consists of an 'electoral heritage', which comprises a number of principles that make elections democratic.[88] The principles of 'universal, equal, free, secret and direct suffrage' constitute this 'electoral heritage'.[89] In addition to those principles, elections also have to take place at 'regular intervals'.[90] That heritage also contains the principle that essential requirements of a democratic State based on the rule of law have to be fulfilled in order for elections to be genuinely democratic.[91] This means that respect for human rights is one of the conditions necessary for

[81] PACE Res 1353 (n 73) para 4; PACE Res 1407 (n 24) para 2. This need is probably reinforced by what PACE has called a 'crisis of democracy' that is exacerbated by the world economic crisis. Symptoms are decreasing participation in elections and increasing extremism. See PACE Res 1746 (23 June 2010) para 1; PACE Rec 1928 (23 June 2010) para 1.
[82] PACE Res 1407 (n 24) para 9.
[83] ibid para 9.
[84] ibid para 9.18.
[85] Venice Commission, 'Code of Good Practice in Electoral Matters (adopted 16 October 2002) CDL(2002)139, para 12.
[86] Committee of Ministers, 'Declaration on the Code of Good Practice in Electoral Matters' (13 May 2004) Decl-13.05.2004/1E, preambular para 3.
[87] PACE Res 1546 (17 April 2007) para 4. See also Venice Commission, 'Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures' (10-11 December 1999) CDL-INF (98) 14, para 4.
[88] Venice Commission, 'Code of Good Practice in Electoral Matters' (n 85) para 12.
[89] ibid paras 5, 32. See also PACE Res 1320 (30 January 2003) para 1; Committee of Ministers, 'Declaration on the Code of Good Practice in Electoral Matters' (n 86) preambular para 4.
[90] Venice Commission, 'Code of Good Practice in Electoral Matters' (n 85) para 5; Committee of Ministers, 'Declaration on the Code of Good Practice in Electoral Matters' (n 86) preambular para 5.
[91] Venice Commission, 'Code of Good Practice in Electoral Matters' (n 85) para 12.

the implementation of those principles.[92] Especially freedom of expression and of the press, freedom of movement and freedom of assembly and association (including political parties) are prerequisites for democratic elections.[93]

The Venice Commission has, in a quite a detailed manner, specified the content of the principles just mentioned.[94] The Commission described them as minimum standards that are defined from the interpretation of the five principles.[95] In this way, democracy can be 'expressed in different ways but within certain limits'.[96] For the purposes of this thesis, it suffices to observe that as concerns the electoral heritage of Europe, there appears to be a strong consensus on what it entails.

PACE has held that democracy includes the principles of 'equality, dialogue, co-operation, transparency and the fight against corruption'.[97] The principle of equality between parties is essential, as elections are central in order for parties to achieve their aim of participating in public life.[98] The right to form a political opposition[99] is also essential to democracy. As political parties are crucial for the relationship between citizens and democratic governance, they have a certain responsibility.[100] The legitimacy of the entire democratic process depends on the legitimacy and credibility of the political parties, and it may be affected by dysfunctional parties.[101] In this context, it may be noted the both PACE and the Venice Commission have considered the internal democracy of parties to be a factor capable of strengthening democracy in general.[102]

At the same time, PACE has acknowledged that there is not one type of electoral system that is preferred in general; different countries need different systems.[103] The aim of PACE is thus not to promote a single electoral system but to 'establish a common understanding of principles which qualify elections as "free and fair" in compliance with democratic standards irrespective of the type of electoral systems'.[104] In general,

[92] ibid paras 9, 12, 24.
[93] ibid para 9. See also PACE Res 1264 (8 November 2001); PACE Res 1619 (15 June 2008) para 5; PACE Res 1705 (27 January 2010) paras 5, 9.
[94] Venice Commission, 'Code of Good Practice in Electoral Matters (n 85) paras 12-23. See also Venice Commission, 'Europe's Electoral Heritage' (14 March 2002) CDL(2002)7 rev.
[95] Venice Commission, 'Code of Good Practice in Electoral Matters (n 85) para 32.
[96] ibid.
[97] PACE Res 1546 (n 87) paras 10, 13.1.1.
[98] Venice Commission, 'Guidelines and Explanatory Report' (n 10) para 10.
[99] PACE Res 1547 (n 72) para 78; PACE Res 1747 (n 74) para 12.
[100] PACE Res 1546 (n 87) para 5.
[101] ibid.
[102] PACE Res 1546 (n 87) para 13.6; Venice Commission, 'Code of Good Practice in the Field of Political Parties' (n 9) para 17; PACE Res 1705 (n 93) para 13. The Venice Commission has found that when it comes to national legislation, the practice among states varies much as regards whether political parties are required to be internally democratic, see Venice Commission, 'Report on the Establishment, Organisation and Activities' (n 1) para 47.
[103] PACE Res 1705 (n 93) para 7.
[104] ibid para 8.

however, the representative model of democracy is regarded as essential by PACE.[105] This also means that elections should include the 'maximum number of opinions'.[106] This has several consequences. Firstly, the threshold in elections should not be too high.[107] Secondly, political participation is of outmost importance.[108] 'Equal participation of women in decision-making' is considered a sign of a well-functioning democracy.[109] Elections must be non-discriminatory, and should allow lawfully resident immigrants to vote at least at local and regional levels.[110] This is also connected to the view of the Council of Europe on the relationship between democracy and culture.

2.4.3 Culture and Religion: Enriching and Challenging Democracy

In the view of PACE, the coexistence of the diverse cultures and religions in Europe has 'considerably enriched the European heritage'.[111] According to the preamble of the Framework Convention for the Protection of National Minorities[112], the protection of national minorities is crucial for democracy, especially in light of Europe's history.

As concerns culture, it has been described as a crucial factor for the effective implementation of the core values of the Council of Europe, namely, human rights, democracy and the rule of law.[113] A genuine democracy should thus not only respect cultural identities of minorities, but also promote the expressions, maintenance and development of those

[105] PACE Res 1547 (n 72) para 55; PACE Res 1705 (93) para 4; PACE Res 1747 (n 74) para 7.
[106] PACE Res 1547 (n 72) para 58; PACE Res 1705 (n 93) para 10.
[107] 3 % should be the maximum, according to PACE. PACE Res 1547 (n 72) para 58.
[108] PACE Res 1546 (n 87) para 10.
[109] 'Warsaw Summit Action Plan' Third Summit of Heads of State and Government of the Council of Europe (Warsaw 16-17 May 2005) (17 May 2005) CM(2005)80 final, para I.3; PACE Res 1547 (n 72) para 57.
[110] PACE Rec 1500 (26 January 2001) para 4; PACE Res 1459 (24 June 2005) paras 3, 11.d; PACE Rec 1791 (n 77) para 6; PACE Res 1705 (n 93) para 12. See also Committee of Ministers, 'Participation of Immigrants and Foreign Residents in Political Life in the Council of Europe Member States: Parliamentary Assembly Recommendation 1500 (2001)' (18 September 2002) Dec 808/10.5; Committee of Ministers, '"The State of Democracy in Europe – Specific Challenges Facing European Democracies: the Case of Diversity and Migration" – Parliamentary Assembly Recommendation 1839 (2008); and "The State of Democracy in Europe – Measures to Improve the Democratic Participation of Migrants": Parliamentary Assembly Recommendation 1840 (2008)' (20 May 2009, CM/AS(2009)-Rec1839-1840 final) para 5.
[111] PACE Rec 1396 (27 January 1999) para 2.
[112] Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998) ETS 157 (Minorities Convention).
[113] 'Warsaw Summit Action Plan' (n 109) III. See also 'Declaration on Intercultural Dialogue and Conflict Prevention' Conference of European Ministers Responsible for Cultural Affairs (Opatija 20-22 October 2003) (22 October 2003) CM(2004)18) 21 January 2004 Appendix I ('Opatija Declaration') preambular para 2; Committee of Ministers, 'The State of Democracy in Europe' (n 110) para 2.

identities.[114] At the same time, there is a tension between democracy and culture. Cultural diversity as a fact is seen as unavoidable in democratic societies today, largely because of migration, but also as a 'challenge' for European democracies.[115] To overcome those challenges, equal political participation has to be ensured.[116] This means that a balance must be struck between 'respect for cultural diversity and the need for integration'.[117]

'Cultural diversity' has been defined as 'the co-existence and exchange of culturally different practices and in the provision and consumption of culturally different services and products'.[118] The concept has two parts: an intra-state dimension and an inter-state dimension.[119] Cultural diversity is a question of fact, as opposed to 'multiculturalism', which is a policy question.[120] 'Intercultural dialogue' is closely connected to cultural diversity and covers *inter alia* the 'tools used to promote and protect the concept of cultural democracy'.[121] It has been defined as:

> [A]n open and respectful exchange of view between individuals, groups with different ethnic, cultural, religious and linguistic backgrounds and heritage on the basis of mutual understanding and respect.[122]

Dialogue in itself is at the core of the concept of democracy.[123] Intercultural dialogue also supports human rights, democracy and the rule of law, [124] and falls under the principles expressed under Articles 9-11 and 14 ECHR.[125] Democracy and intercultural dialogue has been considered as connected since they both demand values like for instance open-mindedness and tolerance.[126] Furthermore, intercultural dialogue contributes to democratic stability, to the combat against intolerance and to prevention of conflicts.[127] To work properly, such dialogue must include all aspects of culture, both those that are 'cultural in the strict sense' and those that have 'political, economic, social, philosophical or religious' elements.[128] Additionally, intercultural dialogue also requires respect for human rights, the rule of law

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[114] Minorities Convention (n 112) preambular para 7.
[115] PACE Res 1617 (25 June 2008) paras 2, 4-5.
[116] ibid paras 8, 10.
[117] ibid para 12.
[118] 'Opatija Declaration' (n 113) para 9. See also Committee of Ministers, 'Declaration on Cultural Diversity' (7 December 2000) Decl-07.12.2000E, para 1.1.
[119] 'Opatija Declaration' (n 113) 9.
[120] Council of Europe, *White Paper on Intercultural Dialogue "Living Together as Equals in Dignity* (Council of Europe 2010) <http://www.coe.int/t/dg4/intercultural/source/white-%20paper_final_revised_en.pdf> accessed 27 May 2014 11.
[121] 'Opatija Declaration' (n 113) para 9.
[122] Council of Europe (n 120) 10.
[123] ibid 20.
[124] ibid 8, 17, 37.
[125] 'Opatija Declaration' (n 113) para 10.
[126] Council of Europe (n 120) 17.
[127] ibid 17; 'Opatija Declaration' (n 113) 7.
[128] 'Opatija Declaration' (n 113) para 9.

and democracy.[129] Intercultural dialogue should take place everywhere in society and all levels of governance.[130]

Religion is thus one part of intercultural dialogue and cultural diversity; in a broad sense, religion is also part of the concept of culture. It is therefore quite logical that as with culture in general, PACE considers there to be a tension between democracy and religion.[131] Religion must thus be 'reconciled' with, and respect, democracy, human rights and the rule of law.[132] But freedom of religion also flows from human dignity and its realisation is inextricably connected to that of democracy.[133] Democracy is the best framework for freedom of religion and all it entails. Likewise, religion with its morals, ethics, values, critical approaches and cultural expressions can be 'a valid partner of democratic society'.[134] In the context of intercultural dialogue and particularly the religious aspect of it, PACE has pointed out that freedom of religion is part of the basis of a 'democratic society' within the meaning of ECHR.[135]

PACE has suggested that the 'secular character of the state' should be one democratic standard.[136] This would mean that the State should be neutral to all forms of belief, including agnostics, and would not prevent the State from having a national culture containing elements taken from religions.[137] There is a risk that religion is turned into extremism. However, PACE distinguishes extremism from religion, as a 'distortion or perversion of it'.[138] It is a 'human invention that diverts religion from its humanist path to make it an instrument of power'.[139] Intolerant and prejudiced extremism that may advocate violence is a 'symptom of a sick society' and threatens democracy.[140]

2.4.4 Extremism and Intolerance: Threats to Democracy

PACE has also addressed extremism at a more general level.[141] The Assembly has defined extremism as

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[129] Council of Europe (n 120) 19, 20.
[130] Council of Europe (n 120) 10, 37.
[131] PACE Rec 1396 (n 111) para 3.
[132] PACE Rec 1202 (2 February 1993) para 9; PACE Rec 1396 (n 111) para 4.
[133] PACE Rec 1202 (n 132) para 14, Council of Europe (n 120) 22.
[134] PACE Rec 1396 (n 111) para 5. The Committee of Ministers held that religious pluralism is more than this; it is 'an inherent feature of the notion of a democratic society'. Committee of Ministers, 'Religion and Democracy' (19 September 2001) Dec 765/4.1.
[135] PACE Rec 1962 (12 April 2011) para 3.
[136] PACE Res 1407 (n 24) para 9.8.
[137] PACE Res 1407 (n 24) para 9.8. PACE has also emphasized that 'the principle of state neutrality applies to religious education at school', see PACE Res 1962 (n 135) para 14.
[138] PACE Rec 1396 (n 111) para 3.
[139] ibid.
[140] ibid para 9.
[141] See also Committee of Ministers, 'Declaration Regarding Intolerance – A Threat to Democracy' (adopted 14 May 1981) Decl-14.0581E.

> '[A] form of political activity that overtly or covertly rejects the principles of parliamentary democracy, and very often bases its ideology and its political practices and conduct on intolerance, exclusion, xenophobia, anti-Semitism and ultra-nationalism'.[142]

Racism, hatred and intolerance contribute to undermining the trust in 'authorities, the rule of law and ultimately democracy'.[143] Thus, extremist parties advocating values contrary to democracy and human rights are considered a threat to the 'fundamental values' of the Council of Europe.[144] In fact, PACE held in 2000 that the largest threat to democracy was right-wing extremist movements and parties that furthered intolerance, xenophobia and racism.[145] Even without directly encouraging violence, they were considered to create a 'climate that encourages its development'.[146] Such hostile climate may have an overt or covert connection with racist violence or 'organised racism'.[147]

Extremism thus poses a direct threat to democracy by endangering the constitutional order and freedoms.[148] However, it also poses an indirect threat by risking to 'distort political life', as 'traditional political parties' may try to combat extremist parties by adopting their ideas.[149] It may also be noted that extremist parties often do not apply internal democracy.[150]

In 2010, PACE again expressed its concern at the increase of extremism in Europe, which used the rights and freedoms of democracies to further aims incompatible with democratic and human rights values and even encouraged violence.[151] The Assembly particularly mentioned racism, xenophobia, Islamic fundamentalism and groups like PKK and ETA as preoccupying forms of extremism.[152] This corresponds more or less to the reasons often used by States when dissolving parties,[153] and some cases have reached the ECtHR. In those cases, the ECtHR has consistently pronounced on the characteristics of democracy in general. This will be the subject of the next subsection.

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[142] PACE Res 1344 (29 September 2003) para 3.
[143] PACE Res 1967 (28 January 2014) para 5. See also PACE Res 1344 (n 142) para 1.
[144] PACE Rec 1438 (25 January 2000) paras 1-2.
[145] ibid para 3. PACE also pointed out that violence used by extreme movements to the far left, in order to combat the extreme right, also were unacceptable. See also Committee of Ministers, 'Threat Posed to Democracy by Extremist Parties and Movements in Europe: Parliamentary Assembly Recommendation 1438 (2000) (CM(2000)48)' (28 March 2001) CM/AS(2001)Rec1438finalE.
[146] PACE Rec 1438 (n 144) para 3. See also PACE Res 1344 (n 142) 7.
[147] Committee of Ministers, 'Threat Posed to Democracy' (n 145).
[148] PACE Res 1344 (n 142) para 7.
[149] ibid.
[150] ibid para 6.
[151] PACE Res 1754 (n 5) para 1.
[152] ibid paras 2-5.
[153] See n 4.

2.5 European Court of Human Rights: Democracy and Human Rights

2.5.1 General Considerations

The ECtHR has held that the 'underlying values' of the ECHR to uphold and further democracy[154] are part of the 'common heritage'[155] mentioned in the preamble to the ECHR.[156] Taking into account that the rights and freedoms in Articles 8-11 ECHR may only be limited insofar as it is 'necessary in a democratic society', the ECtHR concludes that democracy seems to be the 'only political model contemplated' by, and thus compatible with, the ECHR.[157] Democracy is, according to the ECtHR, undoubtedly 'a fundamental feature of the European public order';[158] the Convention was made to 'promote and maintain the ideals and values of a democratic society'.[159]

Some of the provisions of ECHR have been singled out as characteristic to democracy;[160] Articles 9-11 ECHR have been described as 'democratic rights'[161] that are interdependent.[162] Freedom of expression is not only essential for democracy, but also 'one of the basic conditions for its progress and each individual's self-fulfilment'.[163] As pluralism is crucial for democracy, freedom of expression applies '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'.[164] Political

[154] *Kjeldsen, Busk Madsen and Petersen v Denmark* App Nos 5095/71, 5929/72, 5926/72 (ECtHR, 7 December 1976) para 53.
[155] ECHR (n 7) preambular para 6.
[156] *United Communist Party* (n 54) para 45; *Yazar and Others v Turkey* App Nos 22723/93, 22724/93, 22725/93 (ECtHR, 9 April 2002) para 47; *Refah Partisi (the Welfare Party) and Others v Turkey* App Nos 41340/98, 41342/98, 41343/98 (ECtHR, 13 February 2003) para 86.
[157] *United Communist Party* (n 54) para 45; *Yazar* (n 156) para 47; *Dicle for the Democratic Party (DEP) of Turkey v Turkey* App No 25141/94 (ECtHR, 10 December 2002) para 44; *Refah Partisi* (n 156) para 86; *Zdanoka v Latvia* App No 58278/00 (ECtHR, 16 March 2006) para 98. The CoE system here remarkably differs from the rest of international human rights law, where the concept of democracy has remained much more unclear, see Vidmar (n 14) 210.
[158] *United Communist Party* (n 54) para 45; *Yazar* (n 156) para 47; *DEP* (n 157) para 44; *Refah Partisi* (n 156) para 86; *Zdanoka* (n 157) para 98.
[159] *Zdanoka* (n 157) para 98.
[160] *United Communist Party* (n 54) para 45.
[161] Vidmar (n 14) 226.
[162] See, for instance, *Young, James and Webster v the United Kingdom* App No 7601/76, 7806/77 (ECtHR, 13 August 1981) para 57.
[163] *Handyside v the United Kingdom* App No 5493/72 (ECtHR, 7 December 1976) para 49; *Vogt v Germany* App No 17851/91 (ECtHR, 26 September 1995) para 52; *United Communist Party* (n 54) para 45.
[164] *Handyside* (n 163) para 49; *Vogt* (n 163) para 52; *United Communist Party* (n 54) para 43; *Socialist Party and Others v Turkey* App No 21237/93 (ECtHR, 25 May 1998) para 41; *Freedom and Democracy Party (ÖZDEP) v Turkey* App No 23885/94 (ECtHR, 8 December 1999) para 37; *Yazar* (n 156) para 46; *DEP* (n 157) para 43; *Refah Partisi* (n 156) para 89; *Socialist Party of Turkey (STP) and Others v Turkey* App No 26482/95

parties may seek protection under Articles 10-11 ECHR as their activities constitute a 'collective exercise of freedom of expression'.[165] The right to free elections in Article 3 Protocol 1 ECHR has also been considered as crucial for democracy.[166]

The ECtHR has also held that the values of pluralism, tolerance and broadmindedness are 'hallmarks of a "democratic society"'. This means that democracy is not only endorsing the views of the majority but rather must obtain a balance between individual and collective interests so that minorities are fairly treated and the majority does not abuse its power.[167] Consequently, in a democracy governments may be more widely criticised than private individuals or politicians, and thorough scrutiny of it is necessary.[168]

2.5.2 Political Parties: Ensuring Pluralism

The ECtHR has also several times held that political parties enjoying the right and freedoms in Articles 10-11 ECHR play a 'primordial role' in a democracy.[169] Political parties are 'essential to the proper functioning of democracy'.[170] Political debate, including on political programmes that challenge the prevailing organization of the State, is essential to democracy (as long as they do not impair democracy itself).[171] The State is the 'ultimate guarantor' of the principle of a pluralist democracy.[172] It also means that the State must organize regular free elections so that the people may express its opinions, which would be impossible without a plurality of political parties.[173] However, the State has a wide margin of appreciation to choose a suitable electoral system.[174]

It should be noted that the concept of 'pluralism' is an ambivalent one; it is used differently in different disciplines and it may refer both to individuals and groups.[175] Political parties and freedom of association is only one of the

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(ECtHR, 12 November 2003) para 37; *Herri Batasuna and Batasuna v Spain* App Nos 25803/04, 25817/04 (ECtHR, 30 June 2009) para 76; *HADEP and Demir v Turkey* App No 28003/03 (ECtHR, 14 December 2010) para 57.

[165] *United Communist Party* (n 54) paras 42-43; *STP* (n 164) para 37; *Batasuna* (n 164) para 76; *HADEP and Demir* (n 164) para 57.

[166] *United Communist Party* (n 54) para 45; *Zdanoka* (n 157) para 103.

[167] *Young, James and Webster* (n 162) para 63.

[168] *Christian Democratic People's Party v Moldova* App No 28793/02 (14 February 2006) para 65.

[169] *Refah Partisi* (n 156) para 87.

[170] *United Communist Party* (n 54) para 25; *Refah Partisi* (n 156) para 87; *UMO Ilinden – PIRIN and Others v Bulgaria* App No 59489/00 (ECtHR, 20 October 2005) para 56.

[171] *Lingens v Austria* App No 9815/82 (ECtHR, 8 July 1986) para 42; *United Communist Party* (n 54) para 44; *UMO Ilinden – PIRIN* (n 170) para 61; *CDPP* (n 168) para 66.

[172] *United Communist Party* (n 54) para 44, *CDPP* (n 168) para 66.

[173] *CDPP* (n 168) para 66.

[174] *Matthews v the United Kingdom* App no 24833/94 (ECtHR, 18 February 1999) para 64.

[175] Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights' (2007) 3 EuConst 367, 367-368.

fundamental rights that are directly connected with pluralism.[176] Furthermore, pluralism has an important role in the political process outside of the context of political parties. Individuals seek to influence politics also through other kinds of associations, which also contributes a pluralist democracy and social cohesion.[177] Political pluralism should not be distinguished from pluralism in society, and it could be argued that the ECtHR probably views the latter as a prerequisite for political pluralism.[178] Nieuwenhuis concludes that pluralism, in the view of the ECtHR, is a 'diversity of values, opinions, and social groups and the absence of predominance of particular values, opinions or groups'.[179] This seems to be supported by what the ECtHR has said about pluralism in general.[180]

It appears from the above that Articles 10 and 11 are often mentioned together. Indeed, they are so closely connected that Article 11 is to be 'considered in the light of Article 10'.[181] The reason is that the freedom of expression in Article 10 is also one of the aims of Article 11.[182] According to the ECtHR, this is especially important in the case of political parties, as they are vital for pluralism and democracy.[183]

'Pluralism' includes for the ECtHR respecting cultural diversity in order to enhance social cohesion.[184] The conception of democracy of the ECtHR has thus been described as a 'rather thick, inclusive' one, being attentive to the participation of minorities.[185] In the next section, the relationship between democracy, culture and religion in the view of the ECtHR is examined a little more closely.

2.5.3 Religion, Pluralism and Secularism

Freedom of thought, conscience and religion under Article 9 ECHR is considered as 'one of the foundations of a "democratic society" within the meaning of the Convention'.[186] The freedom of religion specifically is

[176] ibid 370-373.
[177] ibid 378.
[178] ibid 383.
[179] ibid 384.
[180] See text to n 167-168.
[181] *United Communist Party* (n 54) para 42; *Socialist Party* (n 164) para 41; *ÖZDEP* (n 164) para 37; *Yazar* (n 156) para 46; *DEP* (n 157) para 43; *STP* (n 164) para 36; *CDPP* (n 168) para 62; *Batasuna* (n 164) para 74; *HADEP and Demir* (n 164) para 56.
[182] *United Communist Party* (n 54) para 42; *Socialist Party* (n 164) para 41; *ÖZDEP* (n 164) para 37; *Yazar* (n 156) para 46; *DEP* (n 157) para 43; *Refah Partisi* (n 156) para 88; *STP* (n 164) para 36; *CDPP* (n 168) para 62; *Batasuna* (n 164) para 74; *HADEP and Demir* (n 164) para 5.
[183] *United Communist Party* (n 54) para 43; *Socialist Party* (n 164) para 41; *ÖZDEP* (n 164) para 37; *Yazar* (n 156) para 46; *DEP* (n 157) para 43; *Refah Partisi* (n 156) para 88; *STP* (n 164) para 36; *CDPP* (n 168) para 62; *Batasuna* (n 164) para 74; *HADEP and Demir* (n 164) para 56.
[184] Ten Napel (n 67) 467.
[185] ibid.
[186] *Refah Partisi* (n 156) para 90.

fundamental for believers, but it is also 'a precious asset for atheists, agnostics, sceptics and the unconcerned', as it has both a positive and a negative aspect.[187] The ECtHR held that 'the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on [the freedom of religion]'.[188]

In diverse democracies, it may be necessary to restrict the freedom of religion to 'reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.[189] The State here has the role of the 'neutral and impartial organizer', and thereby contributes to 'public order, religious harmony and tolerance in a democratic society'.[190] Thus, a State may require civil servants not to take part in the 'Islamic fundamentalist movement, whose goal and plan of action is to bring about the pre-eminence of religious rules'.[191] The State may also legitimately hinder fundamentalist religious movements from pressuring university students.[192] This could mean for instance limiting the place and fashion in which persons in universities may manifest their religion, in order to ensure 'peaceful coexistence between students' and thereby securing 'public order and the beliefs of others'.[193]

In the *Refah Partisi* case, which concerned a religious party aiming to introduce sharia law and a plurality of legal systems, the ECtHR held that the principle of secularism is compatible with the rule of law and respect for human rights and democracy.[194] Furthermore, not respecting that principle may result in loss of protection under Article 9.[195] Kocak and Örücü argue that the Turkish Constitutional Court may have affected the ECtHR in finding that the dissolution met a pressing social need, and that the case shows that secularism has an important role in democracy.[196] Secularism is considered a *sine qua non* of democracy by the Turkish government.[197] The authors also point out, however, that a possibility is that the ECtHR took this opportunity to 'warn' future Islamic parties to attempt to establish sharia and use religion as a political means.[198]

The ECtHR has been criticised for its reasoning. The principle of secularism is arguably difficult to define. [199] The parties in the *Refah* case seem to agree that the principle of secularism is necessary for Turkish democracy, but to

[187] ibid.
[188] ibid.
[189] ibid para 91.
[190] ibid.
[191] ibid para 94.
[192] ibid 95.
[193] ibid.
[194] ibid paras 91, 116.
[195] ibid para 93.
[196] Mustafa Kocak and Esin Örücü, 'Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights' (2003) 9 EPL 399, 423.
[197] ibid 422.
[198] ibid 423.
[199] Boyle (n 19) 14; Akbulut (n 2) 74.

disagree as to the content of that principle.[200] Under those circumstances, it could be questioned that the ECtHR still drew the drastic conclusion that not respecting secularism might lead to loss of protection under Article 9 ECHR.[201] Furthermore, it could be argued that the disagreement as to the content of secularism is precisely such an issue that should be discussed and resolved within the framework provided by democracy.[202] Otherwise it could not be said that democracy and pluralism is inextricably connected.[203] Critics have also asked whether it is for a human rights court to require adherence to secularism. Although the *Refah* judgment could be interpreted as an attempt to reconcile human rights, democracy and secularism, many European States are in fact not secular.[204] The standard in the *Refah* case seems arguably different from the one applied in, for instance, cases protecting Catholic States' legislation prohibiting abortion.[205] If secularism is seen rather as an ideology, it could be argued that human rights should not require it; international human rights standards do not do so.[206]

2.6 Concluding Remarks

Considering the many models of democracy, it is perhaps not surprising that no general definition has been agreed upon in international law. Although gaining in influence, the idea of for instance a right to democratic governance remains a controversial issue. The Council of Europe, on the contrary, seems to over the years have developed a common view on the concept of democracy. The Member States still have for instance different electoral systems, but there appears to be some agreement on the fundamental principles of democracy. Likewise, the 'political' institutions and the ECtHR in many ways appear to share the conception of democracy. Thus, it is clear that democracy is the only political system compatible with the Council of Europe, as well as that democracy, human rights and the rule of law are practically inseparable. It is also clear that the type of democracy considered is characterized by a tolerant pluralism that includes all kinds of ideas in its sphere. However, much focus remains on free and fair elections, which are still absolutely crucial for a contemporary democracy built around the electoral systems. As a consequence, political parties also play a vital role for democracy. But not only do they have to exist; in order for a democracy to be well functioning they also must enjoy certain rights and freedoms, such as freedom of expression and association. These rights and freedoms contribute to a pluralist political system where as many opinions as possible are allowed. It could thus be argued that the Council of Europe has settled for a democratic model which goes well beyond a procedural

[200] Boyle (n 19) 14.
[201] See text to n 195.
[202] Boyle (n 19) 14-15.
[203] ibid 15.
[204] ibid 14.
[205] Akbulut (n 2) 74.
[206] Boyle (n 19) 14-15.

one, although still strongly emphasizing the procedural core of democracy – elections.

Culture, including religion, is an example of an area where the boundaries of democracy are less clear. Culture is considered both as an asset and as a challenge to democracy. Threats to democracy may be related to religious fundamentalism, and could be seen as 'internal' when coming from political parties. Other threats may be external, such as an economic crisis. In either case, Bligh seems to be right that the threats to democracy have indeed changed from challenging democracy as whole to focusing on certain elements of democracy. Facing democratic challenges, dissolution of parties is one measure that States can use to protect democracy. The next section concerns how that measure is perceived by the Council of Europe institutions.

3 Restrictions on Political Parties within the Council of Europe

3.1 Introduction

Fox and Nolte hold that State practice points to the conclusion that most democracies have a possibility to in some way prohibit parties.[207] At a general level, there is a loose consensus on that democracies may undertake some kind of measures to protect themselves.[208] Among Council of Europe States, however, the practice varies considerably from country to country; measures vary from material restrictions to the dissolution of political parties.[209] Examples of material restrictions on parties include legal sanctions against parties with certain aims of behaviours.[210] The most common reasons for dissolution of parties are that they have unlawful or immoral aims, that they pose a threat to fundamental freedoms, extremist characteristics, encouraging of discrimination, hatred or violence, or that they threaten the existence of the State.[211] Most European States require that a political party pursue both unlawful means and objectives in order for it to be prohibited.[212]

However, the Venice Commission has found that in countries where parties had been dissolved relatively recently, they were generally small extremist groups.[213] As the number of cases where parties had been dissolved was so low, the Commission concluded that States consider freedom of association and the principle of proportionality to be of outmost importance.[214] This also indicated that this severe measure was only used in exceptional cases.[215] Furthermore, restrictions on political parties were not present in all of the States surveyed, which led the Commission to conclude that such measures were not fundamental for a well-functioning democracy.[216]

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[207] Fox and Nolte (n 15) 420.
[208] ibid.
[209] Venice Commission, 'Prohibition of Political Parties and Analogous Measures' (12-13 June 1998) CDL-INF(98)14, para 3; PACE Res 1308 (n 6) paras 5, 7; Venice Commission, 'Opinion on Turkey' (n 12) para 17.
[210] Venice Commission, 'Prohibition of Political Parties' (n 209) para 5.
[211] ibid paras 5-7; 'Thematic Monitoring Report' (n 10) para 23.
[212] Venice Commission, 'Opinion on Turkey' (n 12) para 26.
[213] Venice Commission, 'Prohibition of Political Parties' (n 209) para 10.
[214] ibid para 12. The Commission underlined the importance of the principle of proportionality when applying legislation limiting the freedom of association, as it was nearly impossible to define which behaviours would generally lead to severe measures as the dissolution of a political party.
[215] Venice Commission, 'Prohibition of Political Parties' (n 209) para 12.
[216] ibid.

Extremism is viewed as a serious threat to democracy by for instance PACE.[217] The Assembly has also acknowledged the dilemma that comes with extremism; democracy must ensure political groups the fundamental freedoms of expression, assembly and association but also be able to protect itself against extremist groups contrary to democracy and human rights.[218]

PACE considered that the Member States should use the ECHR, the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[219] and the general policy recommendations of the European Commission against Racism and Intolerance (ECRI) as guidelines when fighting extremism.[220] According to ECRI's General Policy Recommendation No 7, States' national law should contain a possibility of dissolving associations, including political parties, promoting racism.[221]

Thus, the Assembly has invited the Member States to limit the freedom of expression, assembly and association in order to combat extremism.[222] It also encouraged them to, in extreme cases, make it possible to legally dissolve extremist parties and movements when the constitutional order of the State is threatened.[223] The Member States should then also 'monitor, and if necessary prevent the reconstitution of the dissolved parties or movements under another form or name'.[224]

Dissolution of political parties is an exceptional measure. Other means to fight extremism could be more or less intrusive. Punishing members of political parties who incite to violence or intolerance or denial of public funding are examples of more serious measures. Encouraging awareness rising on extremism or using school curricula to educate on extremism are other possibilities.[225] Arguably, the dissolution of a political party is the most severe measure available for the State. Democracy is really brought to a head in these cases, and that is also why dissolution of parties is the sole focus of this thesis. This chapter will examine how the Council of Europe institutions perceive of that phenomenon.

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[217] See text to n 143-150.
[218] PACE Res 1344 (n 142) para 8.
[219] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD).
[220] PACE Res 1344 (n 142) para 12.
[221] ECRI, 'General Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination' (13 December 2002) CRI(2003)8, para 17.
[222] PACE Res 1344 (n 142) para 13.1.
[223] ibid para 13.2.d.
[224] ibid para 13.3.
[225] See, for instance, PACE Res 1344 (n 142) para 13.

3.2 Conditions for the Dissolution of Political Parties

Both PACE and the Venice Commission have pronounced on which circumstances could justify the dissolution of a political party. According to the Assembly, the dissolution of a political party may be legitimate under exceptional circumstances when the party threatens democracy.[226] The Venice Commission also considers it to be a very intrusive measure, that should be used with particular restriction.[227] Less intrusive measures should primarily be used; dissolution should only be considered as a last resort.[228] The dissolution decision should be taken by an appropriate judicial organ which ensures compliance with constitutional and international standards, due process, openness and a fair trial.[229] Furthermore, PACE held that prevention of abuse by political authorities should be provided for by specific rules set out in legislation.[230] The great risk of abuse in this context has also been pointed out by for instance Fox and Nolte; it is difficult to assess whether a certain party actually poses a threat to democracy.[231] The risk of abuse is even greater since what is at stake is really a norm about politics.[232]

According to PACE, political parties should only be dissolved if they are violent or if they are threatening 'civil peace and the democratic constitutional order'.[233] The Venice Commission, however, held that dissolution of a political parties may only be applied in relation to parties that encourage violence or that 'use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution'.[234] It is not sufficient, according to the Commission, that a party peacefully strives for a change in the Constitution in order for it to be dissolved.[235] As we shall see, this view is stricter than the one adopted by the ECtHR.[236] The Venice Commission has acknowledged this difference itself, holding that its view however 'conforms to what has been the actual practice in democratic Europe for many decades'.[237]

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[226] PACE Res 1308 (n 6) para 10.
[227] Venice Commission, 'Guidelines on Prohibition and Dissolution' (n 87) para 5.
[228] ibid; PACE Res 1308 (n 6) para 11. In 2010, the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) created, in consultation with the Venice Commission, 'Guidelines on Political Party Regulation', which *inter alia* contain largely the same principles (adopted by the Venice Commission 15-16 October 2010) CDL-AD(2010)024, paras 14, 23-24.
[229] Venice Commission, 'Guidelines on Prohibition and Dissolution' (n 87) paras 4-5; PACE Res 1308 (n 6) para 11.
[230] PACE Res 1308 (n 6) para 11.
[231] Fox and Nolte (n 15) 431-432.
[232] ibid 434-435.
[233] PACE Res 1308 (n 6) para 11.
[234] Venice Commission, 'Guidelines on Prohibition and Dissolution' (n 87) para 4.
[235] ibid.
[236] See text to n 399-438.
[237] Venice Commission, 'Opinion on Turkey' (n 12) para 59. See also Akbulut (n 2) 75-76.

Both PACE and the Venice Commission have held that the activities of the party's members must be distinguished from those of the party. In the view of the Assembly, activities by the members are not attributable to the party if they are incompatible with the statute or activities of the party.[238] The Venice Commission instead focused on whether the party had authorised the activities or not.[239]

Consequently, the Venice Commission has concluded that there is a European consensus that political parties should only be dissolved in the most extreme cases.[240] It could thus be said that the European answer to the classic democratic dilemma, is that threats to democracy should be met by 'open debate' and through 'democratic channels'.[241]

Generally, States have conferred on the judiciary to be responsible for the dissolution of political parties. [242] In most countries, however, prosecution did not have the exclusive competence to initiate dissolution proceedings.[243] The argument for this was that this type of cases is of political nature, and that a dissolution process may adversely affect the political situation.[244] Thus, legal criteria were not enough for dissolution, but rather should also the risk to democracy and the political consequences of a dissolution be considered.[245] Among the European countries, Turkey was perhaps the only one which allowed a public prosecutor to start a dissolution process 'without any kind of political and democratic check and balance'.[246] In either case, political parties that have been dissolved can turn to the ECtHR as a last resort. Before looking in detail at the dissolution cases from the ECtHR in chapter 4, the next section examines how the attitude of the ECtHR towards party dissolution at a general level.

3.3 European Court of Human Rights: General Limits for the Dissolution of Political Parties

The ECtHR has clearly stated that freedom of association under Article 11 ECHR is applicable in party dissolution cases,[247] and this provision has been

[238] PACE Res 1308 (n 6) para 11.
[239] Venice Commission, 'Guidelines on Prohibition and Dissolution' (n 87) para 5.
[240] Venice Commission, 'Opinion on Turkey' (n 12) para 18.
[241] ibid para 19.
[242] Venice Commission, 'Prohibition of Political Parties' (n 209) para 10; PACE Res 1308 (n 6) para 8.
[243] Venice Commission, 'Opinion on Turkey' (n 12) para 33.
[244] ibid.
[245] ibid.
[246] ibid para 35.
[247] *United Communist Party* (n 54) paras 24-34; *Socialist Party* (n 164) para 29; *Yazar* (n 156) para 32; *DEP* (n 157) para 30; *UMO Ilinden – PIRIN* (n 170) para 50. This has been disputed by States; Turkey held that a political party falls outside of the scope of Article 11.

the primary focus of the ECtHR. Furthermore, there has been little dispute regarding the fact that the dissolution of political parties constitutes an interference with the freedom of association.[248] In most cases, the question of whether the interference was prescribed by law does not give rise to any doubts either.[249] Moreover, the dissolution of a political party is mostly found by the ECtHR to pursue the legitimate aims of protecting national security[250] and public safety, prevention of disorder or crime and protection of the rights and freedom of others.[251] The core issue in party dissolution cases is thus whether the interference was necessary in a democratic society in accordance with Article 11(2) ECHR.[252]

In order to reach a compromise between individual rights and the protection of democracy, measures taken by national authorities must thus comply with Article 11(2) ECHR.[253] Petman observes that the ECtHR here acknowledges that popular sovereignty and individual rights may clash with each other.[254] The role of the ECtHR as the protector of democracy is therefore ambiguous. It must sometimes choose the protection of superior 'European' values over that of the people's will or the values of tolerance, pluralism and broadmindedness.[255] Furthermore, the wording in Article 11(2), 'necessary

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Rather than being an association, according to this view, a party belongs to the constitutional order of the state and is related to its essential organization. See Kocak and Örücü (n 196) 403; *Socialist Party* (n 164) paras 25-27.

[248] *United Communist Party* (n 54) para 36; *Socialist Party* (n 164) para 30; *ÖZDEP* (n 164) para 27; *Yazar* (n 156) para 33; *DEP* (n 157) para 31; *Refah Partisi* (n 156) para 50; *Democracy and Change Party and Others v Turkey* App Nos 39210/98, 39974/98 (ECtHR, 26 April 2005) para 19; *Emek Partisi and Senol v Turkey* App No 39434/98 (ECtHR, 31 May 2005) para 22; *Demokratik Kitle Partisi and Elci v Turkey* App No 51290/99 (ECtHR, 3 May 2007) para 26; *UMO Ilinden – PIRIN* (n 170) para 51; *Batasuna* (n 164) para 52; *HADEP and Demir* (n 164) para 37.

[249] *United Communist Party* (n 54) para 38; *Socialist Party* (n 164) para 30; *ÖZDEP* (n 164) para 29; *Yazar* (n 156) para 35; *DEP* (n 157) para 33; *Democracy and Change Party* (n 248) para 19; *EP* (n 248) para 22; *DKP* (n 248) para 26; *HADEP and Demir* (n 164) para 41. Cf *Refah Partisi* (n 156) paras 52-64; *UMO Ilinden – PIRIN* (n 170) paras 52-54; *Batasuna* (n 164) paras 56-60.

[250] *United Communist Party* (n 54) para 41; *Socialist Party* (n 164) para 36; *ÖZDEP* (n 164) paras 32-33; *Yazar* (n 156) paras 38-39; *DEP* (n 157) para 36; *Refah Partisi* (n 156) para 67; *Democracy and Change Party* (n 248) para 19; *EP* (n 248) para 22; *UMO Ilinden – PIRIN* (n 170) para 55; *DKP* (n 248) para 26.

[251] *Refah Partisi* (n 156) para 67; *Batasuna* (n 164) para 64.

[252] The three steps referred to, starting with the assessment of whether the interference was described by law, have been developed by the ECtHR and also follow from the provision itself. The ECtHR then does a proportionality test to conclude whether the interference was proportionate to the legitimate aim pursued. For an overview of the application of Article 11, see Robin C A White and Clare Ovey, *Jacobs, White, & Ovey: The European Convention on Human Rights* (5th edition, OUP 2010) 308-333.

[253] *United Communist Party* (n 54) para 32; *Refah Partisi* (n 156) para 96. In *Klass and Others v Germany* App No 5029/71 (ECtHR, 6 September 1978) para 59, the ECtHR held that such a compromise between democracy and individual rights was inherent in the ECHR.

[254] Jarna Petman, 'Human Rights Between Sovereign Will and International Standards: A Comment' in Venice Commission, *Definition of Human Rights and Popular Sovereignty in Europe* (Council of Europe Publishing, Science and Technology of Democracy No 49 2001) 131, 131.

[255] ibid 134.

in a democratic society' forces the ECtHR to choose one of all conceptions of democracy as a standard.[256] Petman holds that the ECtHR thus takes part in the debate in society over the understanding of democracy, and in doing so it is inevitably a political actor.[257] Lorange Backer notes that in the light of the aim of the Council of Europe to promote democracy, 'it is a paradox that important value judgments are made and issues affecting democratic government are decided' by the ECtHR, which has limited democratic legitimacy.[258]

The ECtHR has noted that European history shows that totalitarian political parties may well use a democratic regime to grow and then revoke it.[259] Articles 9-11 ECHR cannot, then, imply that a State does not have the right to protect its institutions when they are threatened.[260] Also, considering the close relationship between ECHR and democracy, the provisions therein must not be used to 'weaken or destroy the ideals and values of a democratic society'.[261]

The State may thus have to take measures to protect the 'stability and effectiveness of a democratic system'.[262] The question is then what the limits to those measures are. Because of the important role of political parties to democracy, Article 11(2) is to be applied in a strict manner.[263] The freedom of association in cases concerning political parties may only be limited by 'convincing and compelling reasons'.[264] Moreover, the Member States have 'a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts'.[265] Only in the 'most serious cases' may such intrusive measures as the dissolution of an entire political party of the temporary banning of its leaders from political life be used.[266]

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[256] ibid.
[257] ibid 135.
[258] Inge Lorange Backer, 'Definition and Development of Human Rights in the International Context and Popular Sovereignty' in Venice Commission, *Definition of Human Rights and Popular Sovereignty in Europe* (n) 137, 137.
[259] *Refah Partisi* (n 156) para 99.
[260] ibid para 96.
[261] ibid.
[262] *Zdanoka* (n 157) para 100.
[263] *United Communist Party* (n 54) para 46; *Socialist Party* (n 164) para 50; *ÖZDEP* (n 164) para 44; *Refah Partisi* (n 156) para 100; *STP* (n 164) para 44; *UMO Ilinden – PIRIN* (n 170) para 56; *Batasuna* (n 164) para 77; *HADEP and Demir* (n 164) para 59.
[264] *United Communist Party* (n 54) para 46; *Socialist Party* (n 164) para 50; *ÖZDEP* (n 164) para 44; *Refah Partisi* (n 156) para 100; *STP* (n 164) para 44; *UMO Ilinden – PIRIN* (n 170) para 56; *Batasuna* (n 164) para 77.
[265] *United Communist Party* (n 54) para 46, *Socialist Party* (n 164) para 50, *ÖZDEP* (n 164) para 44; *Refah Partisi* (n 156) para 100; *STP* (n 164) para 44; *Batasuna* (n 164) para 77; *HADEP and Demir* (n 164) para 59.
[266] *Socialist Party* (n 164) para 51; *ÖZDEP* (n 164) para 45; *Refah Partisi* (n 156) para 100, *Batasuna* (n 164) para 78.

However, the ECtHR has emphasized that it does not replace the view of the national authorities with its own.[267] At the same time, its supervision does not only consist of assessing whether the State has exercised its margin of appreciation 'reasonably, carefully and in good faith'.[268] Rather, the ECtHR reviews under Article 11 the decisions of those authorities, assessing whether they have 'based their decisions on an acceptable assessment of the relevant facts',[269] in order to determine whether the interference was 'proportionate to the aims pursued'.[270] In practice, the ECtHR conducts this review by using the grounds for the dissolution put forward by the national authorities as a basis for its assessment. The ECtHR then assesses each ground separately.[271]

The ECtHR has also defined the limits slightly more concretely. In order for an interference with the applicant's freedom of association to be *necessary* in a democratic society, it must meet a 'pressing social need'.[272] A fundamental characteristic of democracy is the peaceful resolution of issues even when they are 'irksome'; 'democracy thrives on freedom of expression'.[273] Therefore, a political party cannot be dissolved only because it engages in political debate.[274] Drawing on this, the ECtHR considers that a political party may advocate for legal and constitutional changes on two conditions: 'firstly, the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles'.[275] This means that if a party and its leaders incite to violence or have a policy that is incompatible with democracy, they cannot claim the rights and freedoms of the ECHR to protect them from penalties consequently imposed on them.[276]

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[267] *United Communist Party* (n 54) para 47; *Socialist Party* (n 164) para 44, *ÖZDEP* (n 164) para 39, *DEP* (n 157) para 48; *STP* (n 164) para 40; *Zdanoka* (n 157) para 96; *Batasuna* (n 164) para 75; *HADEP and Demir* (n 164) para 58.
[268] *United Communist Party* (n 54) para 47; *Yazar* (n 156) para 51; *DEP* (n 157) para 48; *STP* (n 164) para 40; *Batasuna* (n 164) para 75; *HADEP and Demir* (n 164) para 58.
[269] *United Communist Party* (n 54) para 47; *Socialist Party* (n 164) para 44; *ÖZDEP* (n 164) para 39; *DEP* (n 157) para 48; *STP* (n 164) para 40; *Zdanoka* (n 157) para 96; *Batasuna* (n 164) para 75; *HADEP and Demir* (n 164) para 58.
[270] *Yazar* (n 156) para 51; *STP* (n 164) para 40; *Herri Batasuna* (n 164) para 75; *HADEP and Demir* (n 164) para 58.
[271] See eg *Yazar* (n 156) paras 55, 58.
[272] *Vogt* (n 163) para 52; *Socialist Party* (n 164) para 50; *Yazar* (n 156) para 51; *DEP* (n 157) para 48; *Refah Partisi* (n 156) para 104; *STP* (n 164) para 39; *Batasuna* (n 164) para 83.
[273] *United Communist Party* (n 54) para 57, *Socialist Party* (n 164) para 45, *ÖZDEP* (n 164) para 44, *Yazar* (n 156) para 48, *DEP* (n 157) para 45; *Refah Partisi* (n 156) para 97; *STP* (n 164) para 46; *Batasuna* (n 164) para 76; *HADEP and Demir* (n 164) para 60;
[274] *United Communist Party* (n 54) para 57; *Socialist Party* (n 164) para 45, *ÖZDEP* (n 164) para 44; *Yazar* (n 156) para 48; *Refah Partisi* (n 156) para 97; *HADEP and Demir* (n 164) para 60.
[275] *Yazar* (n 156) para 49, *DEP* (n 157) para 46; *Refah Partisi* (n 156) para 98, *Democracy and Change Party* (n 248) para 22, *DKP* (n 248) para 29; *Batasuna* (n 164) para 79; *HADEP and Demir* (n 164) para 61.
[276] *Yazar* (n 156) para 49, *DEP* (n 157) para 46; *STP* (n 164) para 38; *Democracy and Change Party* (n 248) para 22; *Batasuna* (n 164) para 79; *HADEP and Demir* (n 164) para 61.

Judges Ress and Rozakis wished to clarify and limit the two conditions just mentioned in the case of *Refah Partisi*. They emphasized that they cannot be taken to mean that the ECHR only protects political parties who fully follows the law.[277] They further pointed out that:

> It is difficult to give an exhaustive list of the rules of democracy, apart from the basic ones. It is without doubt correct to say that parties that aim at the destruction of democracy cannot enjoy protection against even such drastic measures as dissolution. But whether the failure to respect this or that rule of democracy justifies dissolution or whether a less drastic measure is the only appropriate and adequate one is again a question that has to be judged with regard to the principle of proportionality.[278]

In the *Refah* case, the ECtHR focused on three issues in order to assess whether the interference with the applicants' freedom of association met a pressing social need:

1. Whether there was plausible evidence of a sufficiently imminent risk to democracy.[279] This concerns the timing of the dissolution.
2. Whether the acts and expressions made by the members of the party could be attributed to the party.[280]
3. Whether such acts and expressions taken together formed a 'clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society"'.[281]

The structure of the next chapter roughly follows this scheme, with the exception of the third point being divided into two parts. This point appears to encompass the two conditions mentioned above, set out by the ECtHR in its previous case-law.[282]

Finally, the case of *Vona v Hungary*, which did not concern a political party but an organisation, contains an interesting concurring opinion by judge Pinto de Albuquerque. The judge referred to Article 4 of ICERD, which prescribes that States Parties prohibit associations inciting racial discrimination.[283] He also pointed out that the Rome Statute to the International Criminal Court[284] considers persecution against a group on for instance ethnic, political or religious grounds as a crime against humanity.[285] Both the EU and Council of Europe had taken measures to combat racism, discrimination and xenophobia; ECRI had explicitly held

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[277] *Refah Partisi* (n 156), 'Concurring Opinion of Judge Ress Joined by Judge Rozakis' 46.
[278] ibid.
[279] *Refah Partisi* (n 156) para 104. See also *Batasuna* (n 164) para 83.
[280] *Refah Partisi* (n 156) para 104. See also *Batasuna* (n 164) para 83.
[281] *Refah Partisi* (n 156) para 104. See also *Batasuna* (n 164) para 83.
[282] See text to n 275.
[283] *Vona v Hungary* App No 35943/10 (ECtHR, 9 July 2013) para 30.
[284] Rome Statute to the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.
[285] *Vona* (n 283) para 31.

that banning racist associations was part of that.[286] Judge Pinto de Albuquerque concluded that States have a duty to dissolve groups, organisations, associations and parties that promote racism, xenophobia or ethnic intolerance.[287] They also must criminalize the dissemination of such ideas.[288] In this context, they have a positive obligation to hinder private actors from committing such offences.[289] Such an obligation was, in the view of the judge, a peremptory norm of customary international law.[290] Thus, it would be a breach of a State's international obligations to tolerate for instance political parties which aim to disseminate racism, xenophobia or ethnic intolerance.[291] Kocak and Örücü appears to agree on this issue, arguing that democracy is more than just a system of majoritarian rule and that it not only has to be able to, but that it has a *duty* to protect itself.[292]

3.4 Concluding Remarks

PACE and ECRI have held that States should, if they do not already have it, introduce the possibility of dissolving political parties in exceptional cases. Despite this, State practice varies and dissolution is a rarely used measure. In any case, the institutions of the Council of Europe clearly all acknowledge that it may be legitimate to dissolve a political party under exceptional circumstances. They also appear to be in agreement about the principles that should govern the dissolution process. As a dissolution is a particularly severe measure, it has to be applied restrictively in the most extreme cases, and as a last resort. The State therefore has a limited margin of appreciation in this respect.

It is also clear that actions and statements of party members are not automatically considered as representing also the party. In the next section the view of the ECtHR will be examined more in detail. Furthermore, both PACE and the Venice Commission have emphasized that the judiciary has an important role to play in those cases. However, only the Commission appears to consider that also political considerations should be taken into account before starting a judicial process. PACE and ECtHR both seem to have been silent on the issue. Likewise, the institutions seemingly disagree as to what should be required for a dissolution, particularly when it comes to the weight afforded to the party's attitude to violence. The Venice Commission has itself admitted that its standard is stricter than the one set out by the ECtHR.

From a legal perspective, Article 11 ECHR is the provision that is applicable to party dissolution cases. In order for a dissolution measure to be

[286] *Vona* (n 283) para 32.
[287] ibid para 33.
[288] ibid.
[289] ibid para 34.
[290] ibid.
[291] ibid.
[292] Kocak and Örücü (n 196) 401-402.

'necessary in a democratic society' it must correspond to a pressing social need. The ECtHR has developed quite a detailed test in order to assess whether such a need existed or not. In the next chapter, we will see how it has applied this test more concretely.

Lastly, some argue that it should in fact be a *duty* on the part of the State to dissolve parties that promote racism, xenophobia and intolerance. PACE, ECRI and judge Pinto de Albuquerque have argued so in the light of international law. Perhaps the ECtHR will in the future have to deal with allegations that a State violated the ECHR because it has *not* dissolved a party that for instance aimed for the destruction of the rights of others through discrimination. The next chapter, however, will examine the existing jurisprudence more closely.

4 Cases on the Dissolution of Political Parties in the European Court of Human Rights

4.1 Introduction

This section will examine what view the ECtHR has taken towards the dissolution of political parties. Twelve of the fifteen dissolution cases referred to below originate in Turkey. The *Refah Partisi* case is the only Turkish case where the ECtHR has found a dissolution to be compatible with the ECHR. The other eleven Turkish cases concern parties that in quite similar ways advocated for the rights and self-determination of the Kurdish people. The one case from Bulgaria examined below is quite similar to the Turkish cases, also concerning a party allegedly with separatist aims threatening the territorial integrity of the country. Besides the *Refah Partisi* case, the only case where the ECtHR has found a party dissolution to be legal is in the *Batasuna* case, which originates in Spain.[293] The case concerned a separatist party with close connections to ETA.

The core issue in party dissolution cases is whether the interference with freedom of association was necessary in a democratic society in accordance with Article 11(2) ECHR. As appears in chapter 3, the main part of the assessment of necessity concerns whether this measure met a pressing social need.[294] In the context of the dissolution of political parties, I have identified four elements that the ECtHR make use of to assess this question.

The ECtHR does not continue to examine violations of other Articles of the ECHR where it has found a violation of Article 11.[295] In two old cases, however, the EComHR has touched upon Article 17 ECHR,[296] which prohibits the abuse of the ECHR. Although this thesis is confined to the dissolution itself of a political party, Article 17 ECHR is still relevant here. A party that falls under Article 17 does not enjoy the protection of the

[293] *Batasuna* (n 164).
[294] For further information on the necessity test, see above text to n and White and Ovey (n 252) 325-332.
[295] *United Communist Party* (n 54) paras 62, 64; *Socialist Party* (n 164) paras 55, 57, 60; *ÖZDEP* (n 164) para 49; *Yazar* (n 156) para 62; *DEP* (n 157) para 67; *Refah Partisi* (n 156) paras 137, 139; *Democracy and Change Party* (n 248) para 28; *DKP* (n 248) para 35; *Batasuna* (n 164) para 97; *HADEP and Demir* (n 164) paras 89, 92.
[296] The art reads as follows: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'.

ECHR, which in principle means that the dissolution is justified (at least under this instrument).

4.2 Pressing Social Need

4.2.1 Timing of the Dissolution: Established and Sufficient Risk to Democracy

A State does not have to wait for a political party to come to power and actually starting to implement its policy before it takes measures, provided that there is a 'sufficiently established and imminent' danger to democracy.[297] Where domestic courts have found such a danger to exist, the State may 'reasonably forestall' interference with a policy incompatible with the ECHR and democracy before the party tries to realize it.[298] The ECtHR argued that this view is consistent with Article 1 ECHR, according to which the States have a duty to ensure that all persons within their jurisdiction enjoy the rights and freedoms set out in the ECHR.[299]

In the *Refah Partisi* case, the party in question had been dissolved for not adhering to the principle of secularism enshrined in the Turkish constitution. The ECtHR examined whether the timing of the dissolution was appropriate, i.e. whether Refah posed a threat to democracy at the time of its dissolution.[300] During the time from its formation in 1983 until the mid-90s, Refah gained considerable support.[301] Thus, in the 1995 general election Refah became the largest political party in the country, and a year later it formed a coalition government with another party.[302] Keeping this in mind, the ECtHR held that at this time, the party had 'real potential' to come to power on its own, without forming a coalition.[303] In assessing this risk, the domestic courts were allowed to take into account also statements by the members of the party made several years prior to the dissolution.[304] Furthermore, the 'real chances' that Refah would realize its policies after coming to power made the danger to the rights and freedoms enshrined in the ECHR 'more tangible and more immediate'.[305] Therefore, the ECtHR considered that the Turkish courts had not acted neither too late nor too early; in this respect, the authorities had not trespassed their margin of appreciation.[306] This could be taken to mean that the ECtHR supports

[297] *Refah Partisi* (n 156) para 102; *Batasuna* (n 164) para 81.
[298] *Refah Partisi* (n 156) para 102; *Batasuna* (n 164) para 81.
[299] *Refah Partisi* (n 156) para 103; *Batasuna* (n 164) para 82.
[300] *Refah Partisi* (n 156) para 107.
[301] ibid para 11.
[302] ibid para 11. The successor of Refah, the Justice and Development Party, later came to government with a former leader of Refah, Recep Tayyip Erdogan, as Prime Minister; see Boyle (n 19) 3.
[303] *Refah Partisi* (n 156) para 108.
[304] ibid para 109.
[305] ibid para 110.
[306] ibid.

'militant democracies' by allowing a State to intervene before an anti-democratic party has come to power.[307]

Macklem argues that the notions of timing, standard of proof and probability of harm need to be further clarified in order to avoid abuse of the 'militant democracy' concept.[308] Also, the evidence standard of proof was too low; 'clear and convincing evidence' should be presented to show that the party would probably come to power and that democracy will 'necessarily and immediately' be eliminated.[309] For a party ban to be justifiable, the 'acceptable and unacceptable components' of the party programme should be inseparable, so that it would be impossible to determine that certain elements, but not the entire party, was incompatible with democracy.[310] Furthermore, the assessment of the probability of harm should entail consideration of any alternative means of protecting democracy.[311] In light of the weak evidence in the case and the fact that the party was not really dissolved for what it had already done but for the future risk it posed to democracy, Boyle concludes that the ECtHR applied a quite wide margin of appreciation rather than a narrow one.[312] This could have been a sign of a multicultural attitude of the ECtHR, wanting to maintain the diversity in national jurisdictions.[313] However, one view is that it instead exercised 'cultural singularism'.[314]

Bligh points out that the ECtHR did not assess the timing of the dissolution in the *Batasuna* case.[315] Whether the party actually posed a 'sufficiently established and imminent threat' was not considered; the encouragement of violence and the connection to ETA appears to have been enough.[316] However, the ECtHR has in other cases held that the party in question was too small to realistically be having any chances to implement its ideas.[317]

[307] Vidmar (n 14) 228.
[308] Macklem, 'Guarding the Perimeter' (n 17) 513.
[309] ibid 515.
[310] ibid.
[311] ibid.
[312] Boyle (n 19) 10.
[313] Akbulut (n 2) 62-63.
[314] Martin Scheinin, 'How to Resolve Conflicts Between Individual and Collective Rights?' in Martin Scheinin and Reetta Toivanen (eds), *Rethinking Non-Discrimination and Minority Rights* (Åbo Akademi 2004) 219, 230; Akbulut (n 2) 63;
[315] Bligh (n 3) 1353.
[316] ibid 1353-54.
[317] See, for instance, *DEP* (n 157) para 55; *Yazar* (n 156) para 58; *UMO Ilinden – PIRIN* (n 170) para 61.

4.2.2 Relationship Between the Programme of a Party and Activities of its Members

The programme of a party may not always reflect the actual intentions of its leaders and members.[318] In the past, political parties with objectives incompatible with democracy have not stated these goals officially until after they have come to power.[319] The programme should therefore be compared with the actions and positions taken by the party and its leaders.[320] Insofar as these, taken together, depict the party's objectives, they may be taken into account when assessing the justification of the dissolution of a political party.[321]

In the *Refah Partisi* case, the ECtHR held that the statements of the party's chairman and vice-chairmen were clearly imputable to Refah as a whole.[322] If these leaders do not make clear that they are expressing their personal opinions, their statements are naturally taken to be made on behalf of the party.[323] Furthermore, the actions and statements of members of parliament or members of the party holding local government positions were attributable to Refah insofar as they together constituted a reflection of the sort of society that the party aimed for.[324] The ECtHR argued that such actions or statements are probable to influence the electorate, since they are made by persons elected for a certain party, and are thus perceived as made on behalf of that party.[325] In the case of *Refah Partisi*, however, the party had not distanced itself from the relevant actions or statements but on the contrary made the responsible persons candidates for important positions and in one case also disseminated the speech within the party.[326] The only disciplinary action taken by the party occurred after the institution of the dissolution proceedings, most likely as an attempt to avoid the dissolution.[327]

In a number of cases, parties have been dissolved immediately after their formation, limiting the assessment of the grounds for their dissolution to

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[318] *United Communist Party* (n 54) para 58; *Socialist Party* (n 164) para 48; *Yazar* (n 156) para 50; *DEP* (n 157) para 47; *Refah Partisi* (n 156) para 101; STP (n 164) para 47; *Batasuna* (n 164) para 80; *HADEP and Demir* (n 164) para 62.
[319] *Refah Partisi* (n 156) para 101.
[320] *United Communist Party* (n 54) para 58; *Socialist Party* (n 164) para 48; *Yazar* (n 156) para 50; *DEP* (n 157) para 47; *Refah Partisi* (n 156) para 101; *STP* (n 164) para 47; *Batasuna* (n 164) para 80; *HADEP and Demir* (n 164) para 62. In *Zdanoka* (n 157) para 120, in the context of Article 3 ECHR PI, the ECtHR even held that the aims of a party primarily must be assessed with regard to the acts of its members.
[321] *Refah Partisi* (n 156) para 101; *Batasuna* (n 164) para 80.
[322] *Refah Partisi* (n 156) paras 113-114.
[323] ibid.
[324] ibid para 115.
[325] ibid.
[326] ibid. It may be noted, in this context, that the reverse also appears to be true; in *Zdanoka* (n 157) para 123, the ECtHR held that unless members of a party distanced themselves from actions taken by the party, those act were imputable to the members.
[327] *Refah Partisi* (n 156) para 115.

their constitution and programmes.[328] This affects the proportionality assessment, as the result of such a measure is that the party is dissolved only for activities relating to the exercise of the freedom of expression.[329]

Conversely, it may also be the case that the ECtHR limits itself to assessing the activities and statements of members of the party in question.[330] In the *Socialist Party* case, the Turkish Constitutional Court had declared the programme of the party constitutional in a previous decision.[331] However, if the programme of the party supports the conclusion that it is not intending to pursue undemocratic aims or means, the national court should take it into account. In *HADEP and Demir*, it had not been claimed that the programme of HADEP was unconstitutional.[332] Nevertheless, the ECtHR observed that the programme advocated democracy, rule of law and human rights – and even condemned violence.[333] The Constitutional Court should have considered this.[334]

4.2.3 Undemocratic Aims

4.2.3.1 'Separatist' Parties

In cases concerning parties with allegedly separatist aims, the Court has only found there to be an undemocratic aim in one case. In the *Herri Batasuna* case, the party was found to have the illegal 'aim of overthrowing the constitutional order or seriously disturbing the public peace'.[335] However, *Batasuna* focuses on the party's support for violence and terrorism rather than its aims.

The constitution and programme of TBKP referred to one Kurdish nation and one Turkish nation, which according to the Turkish Constitutional Court 'encouraged separatism and the division of the Turkish nation'.[336] The ECtHR noted that the programme of the party did not describe the Kurds as a minority nor as entitled to any 'special treatment or rights', nor a right to secession.[337] Instead, the aim of the TBKP was a 'peaceful, democratic and fair solution of the Kurdish problem'.[338]

The statements of the party leader in the *Socialist Party* case were found to depict the party as striving for a federal system which was to be established

[328] *United Communist Party* (n 54) para 51; *Democracy and Change Party* (n 248) para 21; *EP* (n 248) para 24; *DKP* (n 248) para 28.
[329] *United Communist Party* (n 54) para 48; *Socialist Party* (n 164) para 48. See further n text to 451-455.
[330] *Yazar* (n 156) para 53; *UMO Ilinden – PIRIN* (n 170) para 57.
[331] *Socialist Party* (n 164) para 10.
[332] *HADEP and Demir* (n 164) para 67.
[333] ibid para 68.
[334] ibid.
[335] *Batasuna* (n 164) para 87.
[336] *United Communist Party* (n 54) para 10.
[337] ibid para 56.
[338] ibid.

through democratic means.[339] Although the leader had made reference to the 'Kurdish nation' and the right to secession, the ECtHR did not find that the statements taken together did promote the secession from Turkey.[340] Rather, they stressed the necessity of a referendum in order to ensure that the system was established with the free consent of the Kurds.[341] The ECtHR then held:

> In the ECtHR's view, the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.[342]

Similarly, in the *ÖZDEP* case, the ECtHR found that the party had not encouraged the secession from Turkey by referring to the right to self-determination for minorities, but rather that it attempted to stress the importance of a free consent of the Kurds for their proposed 'social order encompassing the Turkish and Kurdish peoples'.[343]

In *Yazar*, the ECtHR observed that merely promoting the principles of the right to self-determination and recognition of language rights, as the HEP did, could not in itself be contrary to democracy.[344] The ECtHR argued that this would harm democratic debate and fuel violent tendencies, which would be 'strongly at variance with the spirit of Article 11' and its founding democratic principles.[345] Also, the ECtHR considered it essential for 'the proper functioning of democracy' that ideas based upon those principles can be launched into the public debate and contribute to solutions to the nation's problems.[346]

The ECtHR has observed that analysing the situation of the Kurds in Turkey, advocating for the rights of Kurds in accordance with international instruments, promoting the cessation of oppression of Kurds, criticising the government's methods of fighting separatist, or analysing the development of the working class in Turkey and elsewhere, were not in itself contrary to fundamental democratic principles.[347] Furthermore, the programme of the parties did not at all encourage violence as a means of political change.[348]

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[339] *Socialist Party* (n 164) para 47.
[340] ibid. The ECtHR reiterated, in *STP*, that even if the party advocated self-determination of peoples, it did not in its context encourage the secession from Turkey. See *STP* (n 164) para 43.
[341] *Socialist Party* (n 164) para 47.
[342] ibid. See also *ÖZDEP* (n 164) para 41; *STP* (n 164) para 43.
[343] *ÖZDEP* (n 164) para 41.
[344] *Yazar* (n 156) para 57.
[345] ibid.
[346] *Yazar* (n 156) para 58. For a similar reasoning, see *DEP* (n 157) paras 51-55.
[347] *Democracy and Change Party* (n 248) para 24; *EP* (n 248) para 27; *DKP* (n 248) para 31.
[348] *Democracy and Change Party* (n 248) para 25; EP (n 248) para 29.

In the *UMO Ilinden – PIRIN* case, the ECtHR held that nothing suggested that the party had undemocratic aims.[349] It has been dissolved because of 'separatist ideas',[350] as shown by *inter alia* statements, letters and maps where members had held that there was a Macedonian minority in Bulgaria, and that the Pirin region did not belong to the country.[351] The ECtHR held, however, that it is not sufficient that a party is aimed at autonomy or secession for it to be contrary to democracy and its dissolution therefore automatically justified.[352] In a society where rule of law and democracy reign, it is essential that political parties are allowed to express their ideas about changing the existing order as long as they do it peacefully and without challenging democracy itself.[353] Even if the statements of the members of the party appeared illegitimate and incompatible with the values of the current Bulgarian State, that did not make it contrary to democracy.[354] In the present case there was additionally nothing that pointed to the party having a real chance to accomplish its goals in a way which would not be accepted by all political actors.[355]

4.2.3.2 Religious Parties

In *Refah*, the ECtHR distinguished between three main arguments used by the Turkish Constitutional Court to conclude that Refah was a centre for activities contrary to the constitution. The Constitutional Court had argued that the party intended establish a plurality of legal systems, that it wished to introduce sharia and that it was prepared to use violence.[356]

The ECtHR held that a plurality of legal systems would not be compatible with the ECHR. Such a system would mean that the State were no longer neutral and impartial, and it would be incompatible with the State's positive obligation to ensure that all within its jurisdiction enjoys the rights and freedoms of the ECHR.[357] It would also be contrary to the principle of non-discrimination, as the State would be unable to uphold a fair balance between the interests of religious groups wanting to have their own legal system and the interest of society as whole.[358]

The ECtHR has been criticised for this conclusion. Particularly, the ECtHR has been accused of having relied on insufficient evidence as to whether the plurality of legal systems proposed by Refah would allow individuals to

[349] *UMO Ilinden – PIRIN* (n 170) para 59.
[350] ibid para 58.
[351] ibid paras 26, 60.
[352] ibid para 61.
[353] ibid.
[354] ibid.
[355] ibid.
[356] *Refah Partisi* (n 156) para 116.
[357] ibid para 119.
[358] ibid.

choose a system.[359] Likewise, critics have held that the ECtHR assumed that the legal orders would be all-encompassing in scope and that the State would be unable to neutrally guarantee individual rights and freedoms.[360] Macklem argues that in doing so, the ECtHR protected a liberal conception of democracy.[361] Although liberalism is not a clear concept itself, it has individual liberty at its core and that was the concern of the ECtHR in this case.[362]

If by 'legal pluralism' one means 'the coexistence of two or more legal orders within or across the boundaries of a sovereign state',[363] a number of European States actually practice formal legal pluralism through differential treatment of minority groups.[364] The federal system proposed in the *Socialist Party* case[365] could be said to constitute a form of legal pluralism,[366] that the ECtHR apparently found to be compatible with the ECHR. However, the ECHR has a strong focus on individual rights, except regarding non-discrimination,[367] which may require 'differential treatment of "persons who are significantly different"'.[368] Scheinin suggests that instead of excluding a plurality of religious legal systems generally, the ECtHR should have considered the specific elements of such a system. What issues would be subject to this plurality, and what human rights safeguards would it entail?[369]

Conversely, one could say that the ECtHR in the *Refah* case defined what type of legal pluralism is compatible with the ECHR.[370] Such a system would have to meet three essential conditions. The legal pluralism must give individuals the opportunity to freely choose which system they want to belong to. Furthermore, it must not be to wide in scope and the State must remain the neutral guarantor of fundamental rights and freedoms.[371] Macklem asserts that there is an intimate connection between 'militant democracy' and legal pluralism, shown by the fact that in the *Refah* case, the 'legality of Turkey's militant democratic stance (…) rested on the illegality of Refah's proposed model of pluralism'.[372] Furthermore, the ECtHR imposed the same condition on both a pluralist legal system and a

[359] Macklem, 'Militant Democracy' (n 17) 509, Macklem, 'Guarding the Perimeter' (n 17) 578.
[360] Macklem, 'Militant Democracy' (n 17) 509.
[361] Macklem, 'Guarding the Perimeter' (n 17) 578.
[362] ibid.
[363] Macklem, 'Militant Democracy' (n 17) 495-496.
[364] An example would be local self-government for cultural minorities; Macklem, 'Militant Democracy' (n 17) 496.
[365] See text to n 339.
[366] Macklem, 'Militant Democracy' (n 17) 506.
[367] ibid 498.
[368] *Thlimmenos v Greece* App No 34369/97 (ECtHR, 6 April 2000) para 44, cited in Macklem, 'Militant Democracy' (n 17) 498.
[369] Scheinin (n 314) 230.
[370] Macklem, 'Militant Democracy' (n 17) 510.
[371] ibid.
[372] ibid.

'militant democracy', namely that they ensure that democracy can protect the rights and freedom of the ECHR.[373]

Two of the statements by members of parliament explicitly expressed their wish to introduce sharia, and one statement referred to 'the construction of an Islamic State'.[374] Two statements were more ambiguous, referring to a 'just order'[375] that were to be established once Refah had come to power, and 'hak nizami'[376] (a just order or God's order), and commending 'those who contribute, with conviction, to the supremacy of Allah'.[377] The ECtHR considered them, together with other statements of the leaders of Refah, to show the objective of the party to set up a sharia system.[378] Furthermore, the ECtHR stated that sharia is 'incompatible with the fundamental principles of democracy, as set forth in the Convention'.[379] The ECtHR regarded sharia as 'stable and invariable', excluding principles like political pluralism and the development of freedoms.[380] The ECtHR expressed the follow view:

> It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.

The ECtHR pointed out that States may, due to their history, oppose political movements founded on religious fundamentalism.[381] Turkey had a theocratic regime in the past, which was replaced by a democracy to which secularism was central. Therefore, the Turkish Constitutional Court could legitimately argue that sharia was not compatible with democracy.[382] This was not considered as contradictory with the establishment of a plurality of legal systems.[383]

The ECtHR has been criticised for too easily dismissing sharia as incompatible with democracy. Macklem argues that sharia is complex and comprehensive, and although some elements of it are admittedly contrary to democracy, others are not.[384] According to his view, the ECtHR should thus have analysed the sharia system more thoroughly by referring to specific rules.[385] Boyle observes that sharia has ancient roots and that millions of

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[373] ibid 511.
[374] *Refah Partisi* (n 156) para 120.
[375] ibid paras 121, 39.
[376] ibid paras 121, 35.
[377] ibid.
[378] ibid para 122.
[379] ibid para 123.
[380] ibid.
[381] ibid para 124.
[382] ibid para 125.
[383] ibid paras126-128.
[384] Macklem, 'Militant Democracy' (n 17) 512.
[385] ibid 512-513.

people only in Europe adheres to Islam; nevertheless, the ECtHR did not attempt to distinguish between the practices of the majority of Muslims and extremists.[386] According to Boyle, it was 'unnecessary and unhelpful' that the ECtHR pronounced on sharia;[387] the 'broad and seemingly hostile formulations' used in *Refah* were not supportive of a better understanding of the issue.[388] In any event, it could have asked for expert advice, which would have shown that there is a debate within Islam on sharia, democracy and human rights.[389]

Boyle asserts that the *Refah* case could be interpreted to mean that 'peaceful advocacy of the tenets of Islam is unprotected' by the ECHR,[390] and holds that:

> It is difficult to suppress the thought that the endorsement by a European-wide court of such a radical intervention in the democratic process, as a result of which the choice of a significant percentage of the Turkish electorate was removed from power, was influenced by the events of "9/11" and the world we have lived in since then.[391]

Since 9/11, Islamophobia has grown in throughout Europe; however, less attention has been given to this phenomenon and the discrimination it entails than to for instance anti-Semitism.[392] In light of the criticism against the judgment, it could be argued that the ECtHR failed to correctly apply its case law to 'the only traditionally Muslim state party to the ECHR'.[393] Instead, Vidmar argues, it referred to 'clichés and possibly even to language offensive to Islam as a religion'.[394] In either case, this demonstrates that it is difficult to find a common understanding of the meaning of democracy, even within a group of States that consider themselves to have a common constitutional heritage.[395] Vidmar points out that:

> [T]he 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.[396]

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[386] Boyle (n 19) 12.
[387] ibid.
[388] ibid 13-14. It may also be noted that Refah's successor, the Turkish Fazilet Partisi, withdrew its case from the ECtHR because it believed that it had created a double standard regarding Muslims and that it had prejudices towards Islam; see *Fazilet Partisi and Kutan v Turkey* App No 1444/02 (ECtHR, 27 April 2006) para 9; ten Napel (n 67) 475; Akbulut (n 2) 65.
[389] Boyle (n 19) 12-13.
[390] ibid 12.
[391] ibid 9.
[392] ibid 13.
[393] Vidmar (n 14) 234.
[394] ibid.
[395] ibid 235.
[396] ibid.

It has been argued that *Refah* is an example of that the jurisprudence of the ECtHR differs from its conception of democracy (on the premise that it is a 'thick, inclusive' one) in cases under Article 11 ECHR concerning religion.[397] What would be needed, according to ten Napel, is both a political discussion about concepts like 'pluralism', and a change in the case-law of the ECtHR to become more inclusive when it comes to religion.[398]

4.2.4 Undemocratic Means

In several cases, the ECtHR has found party programmes to indicate that the party did not intend to use undemocratic means. Naturally, this is an important indicator in cases where there are no activities or statements that could point to the contrary. In the *United Communist Party* case, the ECtHR pointed out that the programme of the TBKP rejected violence as a means and rather advocated a political debate.[399] Considering the importance for democracy of a peaceful dialogue and the freedom of expression, the ECtHR stated that a political party could not be dissolved only because it engaged in political debate.[400] This was also an essential factor in the *ÖZDEP* case, where the party also did not have a chance to start its activities before it was dissolved.[401]

The ECtHR did not find the statements of the Socialist Party leader, where he *inter alia* talked about a Kurdish and a Turkish nation and the 'oppression' of the Kurdish people, to be encouraging violence or countering democratic principles.[402] In fact, he had underlined the importance of adhering to democratic rules and he had also opposed the use of violence.[403]

The ECtHR has repeatedly emphasized that the government may be more widely criticized than an individual, and that it is necessary in a democracy that the executive is scrutinized from different perspectives.[404] Harsh criticism of State policy is not the same thing as encouraging violence, hatred, revenge or insurrection.[405] In *Yazar*, leaders of the HEP had claimed that PKK terrorists were freedom fighters and that security forces did not combat terrorists but the Kurdish people.[406] However, the party had not explicitly endorsed the use of violence as a political means and none of the leaders had been convicted for incitement to ethnic hatred or insurrection.[407]

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[397] Ten Napel (n 67) 474-478; see text to n 185.
[398] Ten Napel (n 67) 479.
[399] *United Communist Party* (n 54) para 56.
[400] ibid para 57.
[401] *ÖZDEP* (n 164) paras 40, 42.
[402] *Socialist Party* (n 164) para 46.
[403] ibid.
[404] See, for instance, *Yazar* (n 156) para 59.
[405] *HADEP and Demir* (n 164) para 70.
[406] *Yazar* (n 156) paras 59, 22.
[407] ibid paras 55.

In the view of the ECtHR, these could not in themselves make the HEP comparable to violent armed groups.[408] If merely defending the principles advocated by the party would amount to supporting terrorism, the possibility of handling these questions in a democratic manner would diminish and would give violent groups monopoly on defending these principles.[409] This would be contrary to the spirit of Article 11 and the democratic principles it is based on.[410] Likewise, in *HADEP and* Demir, the ECtHR held that calling the fight against terrorism, carried out by Turkish security forces in part of the country, a 'dirty war', did not make the party comparable to violent groups.[411]

The *Yazar* case can be contrasted with the *DEP* case, where the ECtHR found that one speech of a former leader to the party to endorse and incite to the use of violence as a political means.[412] The former leader had *inter alia* expressed the message that the armed movement of the PKK was comparable to a liberation war in the north of Kurdistan, and that the militants of the PKK who had been killed during this armed conflict had sacrificed themselves for Kurdish independence.[413] The speech had also aimed to stigmatize particularly the Turkish government by calling it the 'enemy' who indiscriminately kills Kurds without distinguishing between the PKK and other people.[414] In the light of the tense situation in south-east Turkey at the time of the speech, the ECtHR found that such formulations were likely to incite hatred and give the impression that violence is necessary and justified.[415] The ECtHR thus held that regarding this statement of the former DEP leader, the interference met a pressing social need.[416]

The ECtHR found in the *Refah* case that the statements by Refah's members were ambiguous as to the means that should be used to gain political influence.[417] Refah's chairman, for instance, had advocated for the introduction of Islamic law and asked whether the change would be violent or peaceful.[418] A member of the parliament had held that jihad had to be 'waged by an army'.[419] Another parliament member had said that 'blood will flow' if attempts were made to close down religious colleges.[420] Whatever 'jihad' was taken to mean, the relevant speeches were found to

[408] ibid para 59.
[409] ibid para 57; *DKP* (n 248) para 32; *Democracy and Change Party* (n 248) para 25; *EP* (n 248) para 28.
[410] *Yazar* (n 156) para 57; *DKP* (n 248) para 32; *Democracy and Change Party* (n 248) para 25; *EP* (n 248) para 28.
[411] *HADEP and Demir* (n 164) para 70.
[412] *DEP* (n 157) para 62.
[413] ibid para 61.
[414] ibid.
[415] ibid para 62.
[416] ibid para 63. However, it was not a proportional measure to dissolve the party, see below text to n 458.
[417] *Refah Partisi* (n 156) para 130.
[418] ibid para 31.
[419] ibid para 33.
[420] ibid para 37.

refer to the legitimate use of force.[421] Moreover, Refah had not distanced itself from statements of its members endorsing the use of force.[422]

In the *Herri Batasuna and Batasuna* case, the ECtHR observed that:

- Party leaders had used slogans supporting ETA prisoners and threatening expressions ('struggle is the only way', 'you, the Fascists, are the real terrorists', 'long live ETA military') at a demonstration in 2002.[423]
- A Batasuna representative had said that ETA was not in favour of violence because of 'the fun of it', but because it believed that the use of 'every means possible' was necessary.[424]
- A Batasuna councillor had participated in a demonstration supporting ETA.[425]
- Towns were the two parties were in power had made ETA terrorists honorary citizens.[426]
- The Batasuna had used an anagram of the association 'Gestoras Pro-Amnistía', which was illegal and mentioned on the European list of terrorist organisations.[427]

The ECtHR held that this evidence was close to 'explicit support' for the use of force and the support of people connected to terrorism.[428] It was also possible that it might fuel 'social conflict between supporters of the applicant parties and other political organisations'.[429] The Spanish courts had thus 'sufficiently established that the climate of confrontation created by the applicant parties risked provoking intense reaction in society capable of disrupting public order, as has been the case in the past'.[430]

The failure to condemn the use of force in the light of the long-lasting presence of terrorism in the country, which had been condemned by all other political parties, implied support for terrorism.[431] The link between the two parties and ETA could thus 'objectively be considered to constitute a threat to democracy'.[432] The ECtHR also took into account that the conclusions of the Supreme Court were a reaction to the 'concern to universally condemn justification for terrorism', as expressed by several documents issued by the EU and Council of Europe organs.[433] Moreover, the national court had not only based its conclusion on this, but rather found it to be part of repeated and severe acts which together with the absence of

[421] ibid.
[422] ibid para 131.
[423] *Batasuna* (n 164) para 85.
[424] ibid.
[425] ibid.
[426] ibid.
[427] ibid.
[428] ibid para 86.
[429] ibid.
[430] ibid.
[431] ibid para 88.
[432] ibid para 89.
[433] ibid para 90.

condemnation of violence amounted to an accommodation of terrorism.[434] In this context the ECtHR observed that also omissions by political actors may point to his or her opinions.[435] The ECtHR therefore found that the Spanish Courts had reached 'reasonable conclusions' after a thorough examination of the evidence.[436] The acts and statements which were attributable to the two political parties provided a 'clear picture of a model of society conceived and advocated by them, which is incompatible with the concept of a "democratic society"'.[437] The dissolution of the parties did thus meet a pressing social need.[438]

4.2.5 Internal Democracy of Political Parties: The Missing Piece?

What is evidently absent from the above, is any consideration of the internal democracy of political parties. Thus, it appears that the ECtHR and PACE have slightly different view on what should be afforded weight. PACE has not explicitly held that it should be a factor in the assessment of political parties. However, it has held that internal democracy is important for democracy as it affects the representativity of elected bodies,[439] and pointed out that extremist parties often are internally undemocratic.[440]

Mersel has suggested that the internal democracy of a political party should be taken into account in the dissolution process. Like PACE, Mersel notes the important representative role of political parties.[441] As parties are the vehicles ensuring that individuals can take part in democracy, the same rights should apply to them within those entities.[442] Mersel also seems to be in agreement with PACE that externally undemocratic parties are often internally undemocratic. The question is then if such a party can really be seen as externally undemocratic, as its internal opinions must in the end also affect the external actions of the party.[443]

However, Mersel also recognizes that, apart from impairing the functionality of parties, requiring political parties to be internally democratic would interfere with the freedom of association and right to autonomy of the party.[444] Likewise, the members of a party have chosen to be a part of it, exercising their freedom of association.[445] Other

[434] ibid para 88.
[435] ibid.
[436] ibid para 89.
[437] *Batasuna* (n 164) para 91.
[438] ibid.
[439] See text to n 102; PACE Res 1705 (n 93) para 13.
[440] See text to n 150.
[441] Mersel (n 22) 96.
[442] ibid.
[443] ibid.
[444] ibid 98.
[445] ibid 99.

counterarguments focus on, for instance, that political parties would become less pluralistic.[446]

Mersel concludes that internal democracy should not only be taken into account in dissolution cases, but also that there should be a possibility to enforce it through dissolution.[447] However, 'internal democracy' should be narrowly defined and enforced by a court or another neutral institution.[448] Requirements should be confined to 'minimum democracy':[449]

> These essentials may include: equal rights of participation and voting for members; open and regular elections for party leadership and party offices; freedom of speech and association within the party; and a right to information and transparency.[450]

So far, there are no signs that ECtHR intends to incorporate the factor of internal democracy into its case law. Instead, having found that the dissolution of a political party corresponds to a pressing social need, the ECtHR presently moves on to assess the proportionality of the measure.

4.3 Proportionality

The pressing social need must also be 'proportionate to the legitimate aim pursued'.[451] The dissolution of a political party is a severe measure, especially when it is immediate, permanent, the assets of the party confiscated and its leaders banned from political life.[452] As the dissolution of an entire party thus may only be taken in the most serious cases, the nature and severity of the interference also has to be considered in the proportionality assessment.[453] In cases where the parties have been dissolved so early that it is not possible to compare the party's programme with the actions taken and positions defended,[454] the ECtHR has described the dissolution as a penalty for merely exercising the freedom of expression.[455]

The ECtHR has acknowledged that the context of the case, such as for example the struggle against terrorism, might affect the outcome.[456]

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[446] ibid 100.
[447] ibid 101, 108, 113.
[448] ibid 101, 106.
[449] ibid 101.
[450] ibid 104.
[451] *Vogt* (n 163) para 52; *Socialist Party* (n 164) para 50.
[452] *Socialist Party* (n 164) para 51; *STP* (n 164) para 50;
[453] *Batasuna* (n 164) para 78.
[454] *United Communist Party* (n 54) para 58. See also *STP* (n 164) paras 41, 48.
[455] *United Communist Party* (n 54) para 58. See also *Socialist Party* (n 164) para 48; *STP* (n 164) para 48.
[456] *Socialist Party* (n 164) para 52; *STP* (n 164) para 49.

However, in most cases, there has not been sufficient evidence to show that the party had contributed to terrorism.[457]

In Yazar, the ECtHR considered that a single speech held in another language than Turkish by a former leader of the party abroad, for an audience not directly affected by the situation at hand, could not have more than a very limited impact on 'national security', 'public order' or the 'territorial integrity' of Turkey. As this speech alone could not justify the dissolution of an entire party, the interference was not proportional in relation to the aims pursued. The dissolution of the DEP was not necessary in a democratic society and there had been a violation of Article 11 ECHR.[458]

In *Refah*, the ECtHR had concluded that the interference with the applicants' rights and freedoms under Article 11 did meet a pressing social need.[459] Although the dissolution of a political party and the exclusion of its leaders from political life were severe and drastic measures, the ECtHR did not find anything that made the interference disproportionate to the aims pursued. The ban of the leaders was temporary and concerned a limited number of parliament members (three of which were applicants in the present case, but who were partly responsible for the party's dissolution). The economic loss of the applicants did not affect the proportionality assessment. As the interference thus met a pressing social need and was not disproportionate to the legitimate aims pursued, there had in conclusion not been a violation of Article 11 ECHR.[460]

As the views of the political parties' in the *Herri Batasuna and Batasuna* case were incompatible with democracy and constituted a 'considerable threat' to democracy, the dissolution was also 'proportionate to the legitimate aim pursued', namely public safety, the prevention of disorder and the protection of the rights and freedoms of others. It was consequently necessary in a democratic society and there had been no violation of Article 11 ECHR.[461]

4.4 Abuse of Rights

The prohibition of abuse in Article 17 ECHR has two purposes. It aims to make sure that the ECHR is not used to for instance incite anti-Semitism in the way done by the Nazis in connection with WWII. [462] This could indicate that the drafters did not have a procedural view on democracy.[463]

[457] *Socialist Party* (n 164) para 52; *ÖZDEP* (n 164) para 46; *STP* (n 164) para 49.
[458] *DEP* (n 157) paras 64-66.
[459] *Refah Partisi* (n 156) para 132.
[460] ibid para 133-136.
[461] *Batasuna* (n 164) paras 93-95.
[462] Fox and Nolte (n 15) 422.
[463] ibid.

Furthermore, its purpose is to prevent States from trying to undermine the ECHR.

Article 17 has to be connected with at least one of the rights and freedoms set out in Section I ECHR or its Protocols.[464] Arguably, there is a value in considering the question of Article 17 with the merits, as the applicability of it to a large extent depends on the substance of the case.[465] However, the EComHR and the ECtHR has not consistently done so.[466] In the *United Communist Party*, the ECtHR held that the assessment under Article 11(2) ECHR had to be done first in order to decide whether Article 17 would be applicable or not.[467] It could thus be said that the ECtHR did not treat Article 17 separately, as that would be inconsistent with the more general goals of the ECHR, namely to promote free expression and association.[468] This would also be consistent with the general rule in international law that a provision is to be interpreted in light of the context and objectives of the treaty.[469]

It is worth noting that the outcome in *United Communist Party* was different from the one in the *German Communist Party* case. This may be because of the fall of the Soviet Union, although the difference in the size and importance of the two parties might have played a role.[470] The ECtHR also noted, with respect to Article 17 ECHR, that the two parties were very different. The United Communist Party was found to fulfil democratic requirements and nothing in its programme showed that it intended to use the ECHR to destroy the rights and freedoms of others.[471]

In cases connected to Article 17, the ECtHR has taken three different approaches. Firstly, the Commission introduced the method to use elements of Article 17 to limit substantive provisions.[472] This method does not appear to have been used in party dissolution cases.

Secondly, it has used Article 17 to deny applicants' the protection of rights under ECHR. This does not mean that the applicant loses all its rights but only the one that is abused.[473] In 1957, the EComHR declared inadmissible an application by the German Communist Party, which had been dissolved by the German Federal Constitutional Court a year earlier. The Commission referred to Article 17, observing that this 'fundamental provision' intended

[464] Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 1084.
[465] ibid 1086.
[466] *German Communist Party v the Federal Republic of Germany* App No 250/57 (Commission Decision, 20 July 1957); *Refah Partisi* (n 156) paras 136-137.
[467] *United Communist Party* (n 54) para 32.
[468] Fox and Nolte (n 15) 424.
[469] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 31(1); Fox and Nolte (n 15) 424.
[470] Boyle (n 19) 9.
[471] *United Communist Party* (n 54) para 54.
[472] van Dijk and others (n 464) 1085-86.
[473] ibid 1088.

to ‘safeguard’ the rights of the ECHR ‘protecting the free operation of democratic institutions’. The Commission cited the *travaux préparatoires*, according to which ‘it is necessary to prevent totalitarian currents from exploiting, in their own interests, the principles enunciated by the Convention; that is, from invoking the freedom in order to suppress Human Rights’. The Commission found that it was clear that the party aimed to ‘establish a socialist-communist system by means of a proletarian revolution and the dictatorship of the proletariat’. As a dictatorship would destroy rights or freedoms in ECHR, it was incompatible with it.[474] The *German Communist Party* case should not be interpreted as considering restrictions on undemocratic parties so obviously legitimate that there was no need for any threshold of proof. The case was the first one where the Commission was to deal with the dissolution of a party, and the German Communist Party was exactly such a party that the drafters had in mind when they formulated Article 17.[475]

In *Glimmerveen and Hagenbeek v the* Netherlands, the applicants held leading positions in a political party, Nederlandse Volks Unie (NVU), which had been prohibited by the Regional Court of Amsterdam. The first applicant had been convicted for distributing leaflets for the NVU, which were found to be inciting racial discrimination. Both applicants were on a list of candidates for municipal council elections, which was found to belong to the prohibited party and consequently was declared invalid.[476] The EComHR stated that ‘the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated’ by the ECHR.[477] It applies mainly to rights that may be used to justify activities intended to harm other rights and freedoms of the ECHR.[478] The Commission found that the NVU had aims that were incompatible with the ECHR. The party advocated the removal of all ‘non-white people from the Netherlands’ territory, in complete disregard of their nationality, time of residence, family ties, as well as social, economic, humanitarian or other considerations’. The policy of the party thus clearly promoted racial discrimination, inconsistent with *inter alia* Article 14 ECHR.[479] As the activities of the applicants thus fell within the scope of Article 17, they could not complain under Article 10 ECHR or Article 3 of the First Protocol to ECHR.[480]

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[474] *German Communist Party* (n 466) 1-2, 4, 5.
[475] Fox and Nolte (n 15) 423.
[476] *Glimmerveen and Hagenbeek v the Netherlands* App Nos 8348/78, 8406/78 (Commission Decision, 11 October 1979) paras 189-190.
[477] ibid para 195. Similarly, in *Zdanoka* (n 157) para 99, the ECtHR held that there is a risk that individuals of groups will attempt to use the ECHR in order to destroy the rights and freedoms contained in it; this is why Article 17 was introduced.
[478] Glimmerveen and Hagenbeek (n 476) para 195.
[479] ibid.
[480] Although the applicants did not formally candidate on behalf of NVU, they did not dissociate themselves from the party but on the contrary stated that they still wanted to advance the objetives of the NVU. See *Glimmerveen and Hagenbeek* (n 476) paras 196-197.

Thirdly, the ECtHR has chosen to only assess the case under the substantive provisions and not made use of Article 17. In cases where the substantive provision has a limitation clause, like for instance Article 11, Article 17 seems to be 'absorbed' by that clause.[481] In a number of cases, the ECtHR simply stated that it had not been shown that the party in question intended to harm the rights and freedoms enshrined in the ECHR so that Article 17 came into play.[482] In the *Refah* case, neither the majority of the Chamber nor the Grand Chamber discussed Article 17. As the ECtHR found that the dissolution was justified and that the party might have other objectives than the ones found in its programme, it might be argued that the ECtHR should at least have explained why Article 17 was not applicable.[483] Furthermore, the arguments against Refah suggest that it would be logic to conclude that the party was indeed aiming at the destruction of the rights and freedoms of others.[484] In any case, it remains unclear what would be required for the ECtHR to separately examine Article 17 in those cases.[485]

4.5 Concluding Remarks

This chapter has focused on the conditions applied by the ECtHR when assessing the legality of the dissolution of a political party. At first sight, the ECtHR applies quite a rigorous test in those cases. However, several of the elements of that test appear to be more or less problematic. The *Refah* case has been criticised for setting an evidence standard that is too low for this type of cases, risking an excessively wide margin of appreciation as a result.

Furthermore, looking at the substantive criteria, the size and popularity of a party seems to affect the assessment of whether there was a sufficiently established and imminent danger to democracy. However, that criteria was not applied in the *Batasuna* case.

As concerns whether the party's aims are undemocratic or not, it is quite clear that advocating self-determination or criticizing the State's methods to combat terrorism are not signs of undemocratic aims. In this regard, it is not certain what would constitute an undemocratic aim. The ECtHR touched upon the issue only very briefly in the *Batasuna* case. Regarding parties with religious aims, however, the ECtHR has clearly stated that introducing sharia law would be contrary to democracy. Establishing a plurality of legal systems could perhaps be possible if it was limited in scope, ensured that individuals would choose which system they would belong to and that the State remained neutral. The ECtHR has been criticised for setting a double standard towards Islam compared to other religions, and for not having examined the issue thoroughly enough.

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[481] van Dijk and others (n 464) 1089-90.
[482] *Socialist Party* (n 164) para 53; *ÖZDEP* (n 164) para 47.
[483] Boyle (n 19) 10.
[484] ibid.
[485] Dijk and others (n 464) 1090.

The meaning of 'undemocratic means' is perhaps even more unclear. It is clear that violence constitutes an undemocratic method and, at the other end of the spectrum, that serious criticism of the State does not. However, the statements that have been considered as supportive of violence are at times quite similar to the ones that have not. The ECtHR seems to draw a very fine line between the two types of statements. Moreover, it is unclear whether undemocratic aims could mean something else than violence or support for violence.

The ECtHR has not considered the internal organization of political parties in its assessment of whether they are undemocratic or not. There are important arguments both for and against the inclusion of such a criteria. The question is if the ECtHR needs one more criteria to elaborate upon, or whether it is perhaps more desirable that it focuses on clarifying the ones currently being used.

The proportionality assessment has in dissolution cases often not been elaborated much upon. It seems that, apart form the nature and severity of the measure (for instance whether the dissolution was immediate and permanent), and the context in the particular country, the impact of the action or statement found to meet a pressing social need may also affect the outcome.

Lastly, it appears that the ECtHR has, contrary to the EComHR, chosen not to make use of Article 17 ECHR at all in party dissolution cases. As the ECtHR in the relatively recent *Refah* case did not even explain why the provision was not applicable, it seems doubtful if the ECtHR adheres to its principle from the *United Communist Party* case that Article 17 should be assessed after Article 11.

5 Conclusions

Not that surprisingly perhaps, to a large extent there appears to be an agreement as to what the concept of democracy entails among the Council of Europe institutions. It is clear that democracy is the only political system compatible with the Council of Europe; in this respect the European system appears to go much further than international law in general. Furthermore, democracy, human rights and the rule of law are seen as practically inseparable. Likewise it is clear that the type of democracy considered is characterized by a tolerant pluralism that includes all kinds of ideas in its sphere. Without making an overly strict classification of the European democracy, its conception arguably goes well beyond a procedural model. However, the strongest consensus still seems to concern elections. Largely by virtue of the work of the Venice Commission, there are quite detailed standards surrounding the electoral area. Likewise, there is a strong consensus among the institutions as to the general principles for the dissolution of parties.

The institutions of the Council of Europe clearly all acknowledge that it may be legitimate to dissolve a political party under exceptional circumstances. They also appear to be in agreement about the principles that should govern the dissolution process. As dissolution is a particularly severe measure, it has to be applied restrictively and as a last resort. Furthermore, both PACE and the Venice Commission have emphasized that the judiciary has an important role to play in those cases. However, only the Commission appears to consider that also political considerations should be taken into account before starting a judicial process. PACE and ECtHR both seem to have been silent on the issue.

In my view, Bligh and Macklem seem to be right that the threats to democracy have indeed changed. Their conclusion is supported by the fact that right-wing extremist groups and parties have been depicted as the largest threat to democracy today. These are groups that oppose certain democratic *principles* and *values* but that do not necessarily reject democracy as a system; on the contrary, they use it for their own benefits. Perhaps those changes in society are also why the ECtHR has been criticised for its position when it comes to secularism. Culture and religion are seen as ‘challenges’ to democracy in formerly homogenous societies that are today culturally diverse. Applying the principle of secularism is one answer, but using such a broad, elusive concept risks missing the point and give rise to suspicions about double standards. Arguably those two phenomena are sides of the same coin. On the one hand, we have right-wing extremist movements that often are reacting to a new, culturally diverse, society, with intolerance and racism. On the other hand, we have for instance the ECtHR, which also in a way reacts to a changed society but at the same time struggles to uphold democratic values.

It seems that the ECtHR for the most part does adhere to the principles of the conception of democracy within the Council of Europe. The few number of cases where the ECtHR has found dissolution to be legitimate suggests that it indeed does apply Article 11(2) restrictively. It is in my view possible to discern a development in the ECtHR's case law when it comes to what aims are considered compatible with democracy. In the early cases, the ECtHR seemed quite reluctant to admit that the parties in question advocated for instance a right to secession. In its later case law, the ECtHR has explicitly said that promoting self-determination, secession or minority rights is not in itself contrary to democratic principles.

In the *Refah* case, however, it could be questioned if the ECtHR really has given effective meaning to the principle of plurality that it values so highly. It is of course detrimental to the legitimacy of the ECtHR that it is implicitly accused of being Islamophobic and that a Muslim party felt obliged to withdraw its application from the ECtHR on this ground. It would probably be possible to write a thesis on the *Refah* case alone; for the purposes of this one, however, I will simply maintain that it affirms my conclusion above. At the core of the problem is how the ECtHR conceives of the world and how it defines democracy. It is really about another classic dilemma – that of the judge. In the end, they are also humans, and the point is not that they should not be, but that they should be aware of it. The criticism suggests that the ECtHR would perhaps have come to different conclusions, had it analysed the subject a little deeper.

Furthermore, some issues remain unclear. The ECtHR seemingly is very reluctant to use Article 17 in party dissolution cases. It remains uncertain in what situation it would be applied today. Perhaps it would take a party similar like the KPD that explicitly reject democracy as a whole, or that is as overtly racist and discriminatory as the NVU.

Moreover, there are tendencies within the 'political' institutions of the Council of Europe to acknowledge the importance of culture to democracy. The ECtHR does not appear to have taken this into account in party dissolution cases. Perhaps it would be helpful to acknowledge this aspect of this type of cases; not only in religious cases. Even in cases concerning for instance parties advocating the right to secession from a State, there is cultural aspect. That party arguably sees itself as belonging to another culture (in the widest meaning of the word) than the dominant culture of the State; thus it wants to secede. Assuming that the ECtHR might in the future have to deal with cases concerning right-wing extremist parties, advocating for instance the exclusion of immigrants, the connection is even more apparent. Perhaps it turns out to be irrelevant; my point is merely that it might be useful to reflect on it, especially in the light of the emerging view of the Council of Europe.

Additionally, it seems that the ECtHR performs a very delicate balancing act in assessing what activities amount to support for violence. It is clear that merely advocating the same principles as a terrorist group does not

make one a supporter of violence. But in my view there is not a significant difference between the statements in for instance *Yazar* and *DEP*. It seems that it is not only a question of what the party has said but also about whether there is a repeated use of similar statements. Furthermore, it is unclear if there are any other undemocratic means, or if it should actually be taken to mean violence. This is perhaps the one issue where the views of the different Council of Europe institutions diverge the most from each other. The Venice Commission takes the strictest view, that only violence or support for it can justify the dissolution of a party. PACE and the ECtHR seem to have almost the same opinion, that having undemocratic means are sufficient. The Venice Commission has itself admitted that its standard is stricter than the one set out by the ECtHR. Perhaps the view of the Commission should simply be looked at as 'good practices' whereas the view of the ECtHR represents the minimum standards. In either case, I would assert that the position of the Venice Commission could be questioned. Let us return for a moment to the classic problem that a party uses entirely democratic means in order to abolish democracy once it has come to power. Applying the 'best practices' of the Venice Commission would mean that the State could not dissolve that party. It would perhaps have other means to combat it, but if they were inefficient, the democracy would in the end be forced to commit suicide like the Weimar republic once did.

The question remains, however, what could constitute undemocratic means, apart from violence. Would a party that actively uses discrimination in its internal structure be considered as using undemocratic means? This is opposed by the fact that the ECtHR has not so far considered the internal structure of political parties to be of relevance in those cases. This is also an area where the view of the ECtHR seems to slightly differ from at least the view of PACE. It is of course possible that internal democracy should only be viewed as 'good practices' and nothing more. But it is hard to disregard the argument that the fact that a party does not apply democracy internally does say something about that party's commitment to democracy. Perhaps Mersel's suggestion that it should be a factor that alone could justify the dissolution of a political party is lowering the standard set by the ECtHR too much. But as an additional criteria in the assessment of the legality of a dissolution measure it could be useful. However, considering the varying practice in the Member States, it is perhaps not very likely that the ECtHR will impose such a criteria on political parties.

The same is probably true for the argument that, in the light of international law, it should in fact be a duty on the part of the State to dissolve parties that promote racism, xenophobia and intolerance. But perhaps the ECtHR will some time in the future have to deal with allegations that a State violated the ECHR because it has failed to dissolve a party that for instance harmed the rights of others through discrimination.

In conclusion, a clear answer to the research question is not possible to provide. And it would perhaps be naïve to expect that, in the light of the

elusive character of the notion 'democracy'. The institutions of the Council of Europe have repeatedly stated that there is not one model of democracy that suits all States. Yet, Article 11(2) ECHR requires that restrictions to the freedom of associations are 'necessary in a democratic society'. As Petman noted, this forces the ECtHR to choose a model of society. In my view, there are two sides to this. On the one hand, it means that the application of the article will be extremely difficult, as there is no clear definition of what the requirements of a democratic society are. Additionally, the problem is not much clarified by the use of equally elusive principles like pluralism and secularism. This entails a risk that the outcome will differ from the conception of democracy in the Member States – and all the more so considering the variations in national legislation. On the other hand, it is difficult to see what the alternative would be. Because – and this is the starting point of this thesis – the requirements of democracy is the core of the issue and the framework for the assessment.

From what I have argued so far, one could of course reply that the ECtHR all in all has applied Article 11(2) according to the principles it has set out. The questionable reasoning in the *Refah* case could be seen as not depending on an unclear conception of democracy, but rather an out-dated view on Islam. However, I would still maintain that a clarification, to the extent it is feasible, of the concept of democracy is desirable not least for the sake of foreseeability. How that should be done is a question that needs to be further examined. The ECtHR is an independent organ that should perhaps itself try to define democracy more concretely. But it is arguably not helpful that the Committee of Ministers appears to be so reluctant to elaborate on the issue, especially when PACE has repeatedly addressed the issue and the Venice Commission is prepared to contribute. Perhaps it would not be necessary to settle on one definition that would encompass all States. The Venice Commission has great experience in working with different kinds of democratic systems; a start could be to examine what different sorts of models are represented within the Council of Europe Members States. The Commission cautioned that democratic guidelines would inevitably be minimum standards. In this case, that could at least provide a good starting point. In fact, it might even be the most suitable form for such guidelines in order to ensure respect for the diversity of democratic systems within the Council of Europe and in order to avoid 'democratic legitimism'.

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