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Commentary: Symposium: Cannibal Democracies: Human Rights and Democracy in Turkey

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I am very glad to follow Professor Christiano, because I would like to speak in international legal terms about the issue he addressed in philosophical terms: that is, to what extent can a democratic political system protect itself against erosion or destruction from within. This question is obviously at the core of the debate in Turkey. That debate essentially asks whether the Turkish political process is sufficiently open to discussion of the Kurdish issue, or whether even discussing the issue threatens the integrity of the Turkish state. At present, it appears that for the Kurdish question to be resolved through political compromise as opposed to force of arms, the Turkish political process will need to open its institutions substantially. Until then, peaceful resolution does not appear possible.

Whether this in fact occurs lies in the realm of political speculation. What I would like to focus on today is the question of whether the Turkish political process is now sufficiently open to accommodate the Kurdish debate in terms dictated by public international law and, more specifically, the law of human rights. First, I will give some general background on the international law that bears on this question. Second, I’d like to discuss two recent cases brought before the European Court of Human Rights dealing directly with the Kurdish debate in Turkey.

Let me start out at a very general level and describe how human rights law views the issue of political participation and the potential exclusion of political actors from the political process. As recently as ten years ago, to say that international law sought, as a normative goal, to protect democracy would have been an extraordinarily controversial statement. If one looked at instruments and resolutions produced by the United Nations or other international organizations, the word “democracy” almost never appeared. But events of the late 80’s and early 90’s have worked a revolution in this area and today, it seems one can’t look at any instrument of international law without finding a reference to democratic participation, openness, transparency, accountability, or the other values generally associated with democratic systems. So, I believe it is not an exaggeration to say that the promotion of democracy has be-
come an objective of public international law and of those international organizations dedicated to implementing international norms.

International actors have articulated a number of reasons why the international legal system has moved so strongly behind the goal of promoting democracy. Democratic systems are seen as being self-policing in their respect for human rights; that is, independent judiciaries and diverse civil society sectors are expected to expose human rights abuses and deter future misconduct. In this way, the necessity of ongoing international supervision would be minimized.

And then there are systemic reasons for democracy. International relations theorists are now debating a proposition referred to as the “democratic peace thesis.” This holds that democratic states, in general, do not go to war with each other. While they frequently go to war with other kinds of states, the data are impressive in showing that democratic states almost always find non-forceful ways of resolving their disputes. This is not an uncontroversial thesis by any means, but it is widely accepted. Taking it as a point of departure, many now argue that one of the fundamental goals of the UN system—that of maintaining international peace and security—would be substantially advanced by encouraging transitions to democracy. More democracy, some argue, will lead to more peace.

This is not the place to review objections to this hypothesis. Suffice it to say that it is widely accepted enough to pose the following dilemma to the Turkish case: if there are compelling systemic reasons to support the promotion of democratic governance, how is the international community to react to anti-democratic actors threatening—or potentially threatening—the integrity of democratic states? We just heard from Professor Christiano that the essence of a democratic system, in the traditional view, is a process that is equally open to all voices regardless of the policies they espouse. In some cases those voices may include parties or individuals who are simply using democracy as a vehicle to attain power, though they themselves share very few “democratic” values. In fact, their agenda may, explicitly or implicitly, be at odds with the very idea of electoral democracy. The clearest instance of such a case would be a party advocating the end of the electoral process itself. It may instead favor a hereditary monarchy or a theocracy. Or perhaps the party supports including certain groups (women, ethnic minorities) from the political process. Or perhaps
they promise to impose religious laws in place of secular laws. The difficulty, obviously, as we just heard, is how a process committed to openness confronts parties and individuals who take the absolute opposite view.

This dilemma was very much on the minds of those in the post-World War Two era who drafted the major human rights instruments: the Universal Declaration of Human Rights, the International Covenant of Civil And Political Rights, and, more relevant for our purposes, the European Convention on Human Rights. More specifically, the drafters were thinking about the experience of Nazi Germany and the fact that the Nazi party first achieved political power by election to the Reichstag. The Europe of the 1930's also saw many democratic systems in which Fascist, Neo-Fascist, and Communist parties were scoring impressive victories in national elections. In the minds of the drafters of human rights instruments, permitting these profoundly anti-democratic forces to take advantage of the openness of democratic systems was a major mistake that could have been averted. In their view, rightly or wrongly, early and prescient action to exclude these parties from electoral systems might have played a role in avoiding the horrors of the Second World War.

The drafters of these instruments decided that it was important to build mechanisms into these treaties that would allow democratic states to protect themselves from anti-democratic actors. These mechanisms appear in different articles in the different treaties: Article 5 of the Covenant on Civil and Political Rights, and Article 17 of the European Convention, for example. These articles provide that no right enumerated in any of the treaties can be used as a justification for the suppression of any other right. In our case such articles mean that the enumeration of a right to political participation — which is in all of these human rights treaties — cannot be used as justification for anti-democratic actors who attain power to suppress rights of others. Political parties can't say simply that because they win 51% of the election, they therefore acquire the right to end a system of free and fair elections, exclude women from education, discriminate against racial or religious minorities, or to shut down newspapers. All these actions would be violative of other articles in human rights instruments.

These clauses create a textual basis for excluding individuals or parties who incorporate these sorts of policies into their electoral platforms. These textual provisions have formed the basis for a
number of decisions by international human rights bodies. Quite early on, the European Court of Human Rights upheld bans, first, on a German Neo-Nazi party and then on the Nazi Communist party. The UN human rights committee has upheld an Italian ban on a neo-fascist party and a Canadian ban on a White supremacist party. This jurisprudence makes it fairly well established in human rights law that anti-democratic actors are not legitimate players in the democratic process.

If such bans strike you as bizarre abnormalities, it is important to keep in mind that the principle they embody is very much consistent with another aspect of human rights law: the condemnation of hate speech. The United States obviously takes quite a different view of this issue, since the First Amendment requires the government to be content neutral in any restrictions it imposes on speech. But, for example, the UN convention on racial discrimination and Article 20 of the Covenant on Civil and Political Rights not only permit states to suppress hate speech, but create affirmative obligations to ensure that hate speech does not enter the national political discourse. The race convention extends that obligation to racist organizations as well.

For the U.S. this is quite difficult to understand given our First Amendment history. Thus, when the U.S. ratified the Political Covenant, we took explicit reservation to Article 20. But for most of the rest of the world this is not a controversial matter. And so neither is the exclusion of anti-democratic actors. Both rest on the view that the democratic process need not function as a "suicide pact" that tolerates and protects the seeds of its own destruction.

One may conclude that the principle of a narrow democratic process is fairly well established in human rights law. To state this principle, however, is really not to answer the hard questions. Under what circumstances may anti-democratic actors be excluded? What are the evidentiary standards that must be met? What aspect of a party’s program or platform should an international body review in order to decide that it represents a demonstrable threat to the democratic system?

Here, the debate has ranged between two camps. First, there are those who say there must be a demonstrable, immediate threat. The group must have a widespread following. It must engage in acts of violence and we must know exactly what its political program portends. This view is similar to the criminal law doctrine of self-defense which requires an immediate threat to one’s personal
safety. The problem with that argument, of course, is that if a democratic society waits until an anti-democratic party has a widespread following and is well organized enough to engage in violence, then suppressing that party may produce a backlash and itself lead to civil unrest. The point at which a party represents a demonstrable threat to democratic institutions, the argument goes, is already too late for the state to take effective action.

What would be the alternative? The opposing view to the "demonstrable threat" camp would permit states to ban parties when they're quite small, and there is little likelihood of a backlash. To take the example of the German Nazi party once again, proponents of this view would argue that it would have been better for Germany to take action before the elections of 1932 when the Nazis became the largest party in the Reichstag. The difficulty with this view, of course, is that there is much less evidence available that small parties actually constitute a threat to the democratic system. They may not have much of a track record, and their platforms may be underdeveloped or vague. This view, therefore, invests much faith in the subjective judgments of the government officials imposing a ban. And, as America's own history regarding the Communist Party suggests, such judgments can often be wrong!

Let me turn now to my second topic, which is the two cases decided by the European Court of Human Rights involving Turkish bans on political parties. It is interesting to note, by the way, that Turkey has (by a large margin) been subject to more claims than any other European state before the European Court of Human Rights. As of 1998, there were 1825 matters pending against Turkey in the European Court. Italy was in second place with 1191 and then came the Netherlands with 131. So the disparity is quite large. These two cases mentioned involved action taken, first, against the United Communist Party of Turkey in 1991 and, second, against the Socialist Party of Turkey in 1992. Both parties were banned by order of the Turkish Constitutional Court. The Turkish government argued before the Court that because these two parties encouraged dialogue with the PKK, they had called into question the idea of a unified Turkish citizenship and nationality and thereby advocated a political process in which a separate national identity within Turkey would become realized.

The Court held that both bans violated the European Convention on Human Rights. The Court stated that the essence of democracy is dialogue and that this was all these parties were
promoting in regard to the PKK. It held they were not advocating secession or any other policy that would disrupt the territorial integrity of the Turkish state. They were simply proposing an alternative to the armed struggle and this the Court found to be perfectly legitimate. The two decisions do not fit squarely within the paradigm of bans on anti-democratic actors, for Turkey did not argue that the two parties were a threat to democratic values as such. Rather, the threat was posed to the character of the Turkish state and to civil order. The Court appeared to hold that neither of these values was sufficiently protected by human rights law that it could justify the bans. Of course, this is not a non-controversial holding.

The United States fought a civil war to protect its own territorial integrity, as have many other central governments. The answer of the European Court is that these are issues to be worked out within the democratic process and do not themselves pose threats to the integrity of that process. The Court seems to be saying that a Turkey engaged in debate over the Kurdish question, or perhaps even denuded of its Kurdish-dominated territory, may remain democratic nonetheless. These are possibilities in a pluralistic society, and the European Court does not seem to be prepared to protect open societies from the divisive consequences of airing these points of view.