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# Intolerant Democracies

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# Intolerant Democracies

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Gregory H. Fox\*  
Georg Nolte\*\*

If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

Thomas Jefferson<sup>1</sup>

This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.

Joseph Goebbels<sup>2</sup>

## ABSTRACT

International law is increasingly concerned with national transitions to democratic government. The holding of free and fair elections alone, however, provides no guarantee that a democratic system will become firmly established and capable of resisting challenges by anti-democratic actors. The question thus arises of how intolerant a democracy may become toward such actors in order to preserve itself without relinquishing the claim of being democratic. This problem has arisen on a number of occasions, perhaps the most dramatically upon the cancellation of the second round of the Algerian elections in early 1992.

This Article explores the legal issues raised by the presence of anti-democratic actors in an otherwise *generally* "free and fair" electoral process. The Article first examines two models of democratic government—the procedural and the substantive—which take opposite per-

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1. Thomas Jefferson, First Draft of the Inaugural Address (Mar. 4, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 1, 3 (Paul Leicester Ford ed., 1897).

2. "Das wird immer einer der besten Witze der Demokratie bleiben, dass sie ihren Todfeinden die Mittel selber stellte, durch die sie vernichtet wurde," quoted in NATIONALSOZIALISTISCHE DIKTATUR 16 (Karl Dietrich Bracher et al. eds., 1983).

spectives on the permissibility of excluding anti-democratic actors. Using these models as organizing themes, it then examines the practice of a number of democratic states and the jurisprudence of international human rights regimes. The Article concludes that both national and international practice favor a substantive model of democracy, which holds that the long-term survival of democratic institutions outweighs short-term deprivation of political rights to anti-democratic actors. Having reached this general conclusion, the Article goes on to examine the standards required under international human rights law for the exclusion of such actors and the type of conduct that might justify a ban. Finally, the Article asks whether states that have obligations under human rights treaties to guarantee democratic government are now legally required to exclude anti-democratic actors if the integrity of their democratic institutions is at stake. The Article concludes that such a requirement does exist, though its concrete meaning will differ greatly from state to state.

## I. INTRODUCTION

How to define "democracy" has remained one of the fundamental questions of political theory, engaging statesmen and philosophers in debate since ancient times. The issue has only recently been addressed in a serious way by international lawyers. Scholars such as Thomas Franck now claim that a distinct right to participate in government—a "democratic entitlement"—is emerging as an internationally protected human right.<sup>3</sup> The task that Franck and others have set for themselves is nothing less than to define democracy in a global context, as their works seek to identify an international consensus on a set of core "democratic" principles.

That international law should have any role in prescribing the makeup of domestic political institutions is remarkable in itself.<sup>4</sup> How-

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3. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992). See also JAMES CRAWFORD, *DEMOCRACY IN INTERNATIONAL LAW INAUGURAL LECTURE: WHEWELL PROFESSOR OF INTERNATIONAL LAW* (1994); Jochen Abr. Frowein, *Demokratie und Völkerrecht in Europa, VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT: FESTSCHRIFT FÜR KARL ZEMANEK* 365-75 (1994); David Padilla & Elizabeth Houpert, *International Election Observing: Enhancing the Principle of Free and Fair Elections*, 7 EMORY INT'L L. REV. 73 (1993); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Babacar Ndiaye, *International Co-operation to Promote Democracy and Human Rights: Principles and Programmes*, 49 REV. INT'L COMM'N JURISTS 23 (1992); Jon M. Ebersole, *The United Nations' Response to Requests for Assistance in Electoral Matters*, 33 VA. J. INT'L L. 91 (1992); David Stoelting, *The Challenge of UN-Monitored Elections in Independent Nations*, 28 STAN. J. INT'L L. 371 (1992); *National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law*, 86 PROC. ANNUAL MTG. AM. SOC. INT'L L. 249 (1992); Mélida N. Hodgson, Note, *When to Abstain: A Framework for U.N. Election Monitoring*, 25 N.Y.U. J. INT'L L. & POL. 137 (1992).

4. As recently as 1987, the *Restatement of Foreign Relations* declared that "[i]nternational law

ever, global and regional human rights instruments have spoken directly to this question for some time. Article 25 of the International Covenant on Civil and Political Rights (Political Covenant), the general human rights treaty to which the largest number of states currently subscribes, provides that "every citizen shall have the right and the opportunity . . . without unreasonable restrictions . . . to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."<sup>5</sup> In delineating proper electoral procedures, article 25 sets out a legal threshold of governmental legitimacy. As stated by one of the article's drafters, "no government is valid unless it reposes on the will of the majority."<sup>6</sup>

For many years, article 25 and similar provisions of other human rights treaties lay dormant as a consequence of Cold War tensions. Their impact was marginalized by superpower support for so-called "peoples' democracies" on the one hand and anti-communist dictatorships of the right on the other. Yet the transition to western forms of democracy in virtually all the former socialist countries, as well as in many developing countries, now makes it possible for the international community to address the perennial question of what makes a state "democratic." That this is a legitimate question for international law is borne out by the practice of states and international institutions in recent years.

does not generally address domestic constitutional issues, such as how a national government is formed." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203, cmt. e (1987).

5. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 25, S. EXEC. DOC. E, 95th Cong., 2d Sess. 23 (1978); 999 U.N.T.S. 171, 179 [hereinafter Political Covenant]. For a detailed discussion of Article 25, see Fox, *supra* note 3, at 553-60. As of July 30, 1993, there were 122 states parties to the Political Covenant. *Report of the Human Rights Committee*, U.N. GAOR, 48th Sess., pt. 1, Supp. No. 40, at 7, U.N. Doc. A/48/40 (1993). Article 25 was modeled after the virtually identical article 21 of the Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948) [hereinafter Universal Declaration].

Other human rights instruments guaranteeing a right to political participation include the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1953, art. 3, 213 U.N.T.S. 262, Europ. T.S. No. 9 (entered into force May 18, 1954) [hereinafter European Convention]; American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 23, O.A.S.T.S. No. 36, 9 I.L.M. 673 (1970) (entered into force July 18, 1978), [hereinafter American Convention]; the African [Banjul] Charter on Human and Peoples' Rights, *adopted* June 27, 1981, art. 13, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986); the Document of the Copenhagen Meeting of the Council on Security and Cooperation in Europe (CSCE) (¶¶ 5.1-5.4, 7.1-7.9); the International Convention on the Elimination of all Forms of Racial Discrimination, *adopted* Dec. 21, 1965, art. 5(c), 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969) [hereinafter Race Convention]; and the Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, art. 1, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force for U.S. July 7, 1976).

6. U.N. GAOR 3d Comm., 16th Sess., 1097th mtg. at 186, U.N. Doc. A/C.3/SR.1097 (1961) (statement of Mr. Ferreira Aldunate, Uruguay).

The monitoring of national elections is now a regular activity of the United Nations: a new Office of Electoral Assistance, created in 1992,<sup>7</sup> provided aid to thirty-two member states in the first year of its operation.<sup>8</sup> Other organs of the United Nations regularly express support for notions of democratic legitimacy.<sup>9</sup> Regional organizations have looked to the democratic nature of states as a criterion for initial or continued membership.<sup>10</sup> Human rights tribunals are creating an increasingly rich jurisprudence on the nature of democratic institutions,<sup>11</sup> including ruling on such controversial questions as the legitimacy of the one-party state.<sup>12</sup> International lending institutions, notably the European Bank for Reconstruction and Development, look to the quality

7. G.A. Res. 137, U.N. GAOR, 46th Sess., Supp. No. 49 U.N. Doc A/46/609 at 209 (1991); *Report of the Secretary-General: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, U.N. GAOR, 47th Sess., UN Doc. A/47/668, at 4 (1992) [hereinafter *Electoral Assistance Report*]; *Report of the Secretary-General: Guidelines for Member States Considering the Formulation of Requests for Electoral Assistance* U.N. GAOR, 47th Sess., Addendum 1, U.N. Doc. A/47/668/Add.1 at 1 (1992) [hereinafter *Electoral Guidelines Report*] (setting out uniform guidelines for UN election observers).

8. *Electoral Assistance Activities of United Nations System*, U.N. Press Release GA/8481 (Apr. 16, 1993) (press release on file with author). In all of its prior history the UN had provided electoral assistance to only two member states, Nicaragua and Haiti (though it had done so in numerous colonial territories). *Report of the Secretary-General: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections* U.N. GAOR, 46th Sess., U.N. Doc A/46/609, at 10-16.

9. See S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993) (calling for "steps leading to the establishment of representative democratic institutions" in Somalia and expressing Council's readiness "to assist the people of Somalia . . . to participate in free and fair elections, with a view towards achieving and implementing a political settlement"). For the past four years the General Assembly has annually adopted resolutions entitled "Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections," most recently with no dissenting votes. See G.A. Res. 138, U.N. GAOR, 47th Sess., Supp. No. 49, at 214 (1992); G.A. Res. 137, U.N. GAOR, 46th Sess. Supp. No. 49, at 209 (1991); G.A. Res. 150, U.N. GAOR 3d Comm., 45th Sess., Supp. No. 69, U.N. Doc. A/45/766, at 254 (1990); and G.A. Res. 146, U.N. GAOR, 44th Sess., Supp. No. 49, at 225 (1989). Companion resolutions affirming the importance of state sovereignty in electoral matters have also been adopted. See, e.g., G.A. Res. 47/130 (1992).

10. The Maastricht Treaty on European Union provides that democracy and respect for human rights, as set forth in the European Convention, shall be pre-conditions for membership in the newly reconstituted European Union. Treaty on European Union, Title I(F), 31 I.L.M. 247, 256 (1992). In December 1992 the Organization of American States amended its Charter to provide for the suspension from the General Assembly of any member state whose "democratically constituted government has been overthrown by force." OAS Charter, art. 8 bis; see OEA/Ser.P, AG/doc.11 (XVI-E/92) rev.1 (1992). In a related fashion, the states of the Conference on Security and Cooperation in Europe have pledged that in the event of an "overthrow or attempted overthrow of a legitimately elected government of a participating state" they will "support vigorously . . . the legitimate organs of that State upholding human rights, democracy and the rule of law." Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, art. 17.2, 30 I.L.M. 1670, 1677 (1991).

11. See, e.g., Final Report on Cases 9768, 9780 and 9828 of Mexico, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1989-90, at 116 (1990) (rejecting Mexican claim that electoral matters fall within its exclusive domestic jurisdiction and affirming Commission's right "to assess the relationship between popular will and the final results of the electoral contest").

12. *Bwalya v. Zambia*, Commun. No. 314/1988, reprinted in 14 HUM. RTS. L.J. 408 (1993)

of the borrower's governance in making lending decisions.<sup>13</sup> And both international organizations and some states have based decisions to recognize new states and regimes on their adherence to democratic norms.<sup>14</sup> In a March 1993 speech, U.N. Secretary-General Boutros-Ghali summarized his perspective on democratic reforms:

[D]emocratization is the thread which runs through all the work of the Organization. Within nations as much as within the family of nations, democracy should underpin the structures of international peace and security. Human rights, equal rights and government under law are important attributes of democracy. With participation, social and economic development become meaningful; with freedom of speech and of thought civil institutions become durable. Individual involvement in the political process enhances the accountability and responsiveness of governments. Governments which are responsive and accountable are likely to be stable and to promote peace.<sup>15</sup>

#### A. *The Problem of Intolerant Democracies*

For the international community to promote an effective guarantee of political participation, it must agree on fundamental principles governing electoral processes. In order to reach such agreement, the community must begin to address certain crucial aspects of democratic governance which have been debated for years within states attempting to shape their domestic political institutions, but which have only recently been of international concern.

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("restrictions on political activity outside the only recognized political party amount to an unreasonable restriction on the right to participate in the conduct of public affairs").

13. The European Bank for Reconstruction and Development was established to assist the former communist states of Eastern Europe. The Bank's Charter provides that its lending policies shall attempt to foster the growth of multiparty democracy. Agreement Establishing the European Bank for Reconstruction and Development, ch. 1, art. 1, 29 I.L.M. 1077, 1084 (1990).

14. Much of this activity came in response to developments in Haiti and the former Yugoslavia. See MRE/RES.1/91; corr., at 2, OEA/ser.F/V.1 (Oct. 3 1991) (declaring that the OAS would recognize delegates from the Aristide government "as the only legitimate representatives of Haiti"); G.A. Res. 7, U.N. GAOR, 46th Sess., 31st plen. mtg., Supp. No. 49, at 13, U.N. Doc. A/46/L. 81 Rev. 1 (1991) (referring to the Aristide regime as "legitimate" and the coup as "illegal"); Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485, 1487 (1992) (in order to be recognized by EC member states, former Yugoslav republics must demonstrate respect for, *inter alia*, "the rule of law, democracy and human rights"). See *U.S. Approaches to Changes in the Soviet Union*, 2 U.S. DEP'T ST. DISPATCH No. 36 (Sept. 9, 1991) at 667; *US Recognition of Former Yugoslav Republics*, 3 U.S. DEP'T ST. DISPATCH SUPP. No. 7 (Sept. 1992) at 19; *U.S. Recognition of Angolan Government*, 4 U.S. DEP'T ST. DISPATCH No. 21 (May 24, 1993) at 375.

15. BOUTROS BOUTROS-GHALI, MAINTAINING INTERNATIONAL PEACE AND SECURITY: THE UNITED NATIONS AS FORUM AND FOCAL POINT (Mar. 25, 1993) (mimeographed document on file with author).

This Article will focus on the issue of what we call intolerant democracies. Such an issue arises when a democratic country takes restrictive measures to prevent the change of its own democratic character by the election of anti-democratic parties. This is a particularly troublesome aspect of the right to democratic government which has become evident as issues of state governance move from the exclusive realm of national constitutional law to the purview of international human rights law. It is an issue that tests the core of the international community's commitment to popularly elected government, and is therefore fundamental to its understanding of what constitutes a "democracy."

### *B. The Algerian Example*

On December 26, 1991, Algeria held its first multiparty election in thirty years. The Islamic Salvation Front (FIS) won 189 of the 231 parliamentary seats distributed in the first round of the elections. This margin of victory virtually assured the FIS of winning sufficient additional seats in the second round to attain the two-thirds parliamentary majority necessary to ratify constitutional amendments.<sup>16</sup> The elections were generally thought to be free from serious irregularities.<sup>17</sup> The FIS, founded in 1989,<sup>18</sup> made clear during the election that if victorious it intended to remake Algeria into an Islamic state. While FIS leaders issued contradictory statements as to whether their plans included holding future elections, several expressed open hostility toward multiparty democracy.<sup>19</sup>

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16. *Human Rights in Algeria Since the Halt of the Electoral Process*, MIDDLE E. WATCH, Feb. 1992, at 3 [hereinafter *Human Rights in Algeria*].

17. *Id.*

18. Article 40 of Algeria's revised constitution, introduced in 1989, prohibited the formation of political parties based on religion, linguistic differences, or regional identities. The government chose not to enforce this provision against the FIS and several other religious and ethnic parties. Hugh Roberts, *The Algerian State and the Challenge of Democracy*, 27 *GOV'T. & OPP.* 433, 450 n.10 (1992).

19. For example, in early January FIS leader Imam Abdelkader Moghni told an audience at a mosque, "Islam is light. Why do you fear it? It is in democracy that darkness lies. Those who refuse the light want to create injustice in society." *Human Rights in Algeria*, *supra* note 16, at 13. FIS deputy chief Ali Belhadj reacted to the prospect of a pluralist Algeria by declaring: "If the Berber activist expresses himself, the communist expresses himself, along with everyone else, then our country will become a battleground of diverse ideologies in contradiction with the hopes of our people." *Id.* Other more theoretical, but no less aggressive attacks on democracy by Ali Belhadj are compiled in *L'ALGÉRIE PAR SES ISLAMISTES* 87-100 (Mustafa Al-Ahnaf et al. eds., 1991). According to one commentator:

Few were convinced that the FIS, once in power, would respect the multi-party system. Statements by the party such as 'democracy is blasphemy' and 'no charter, constitution, just the word of Allah' did little to reassure Algerians that the country would be safe in fundamentalist hands.

Before the second round of voting could occur, however, President Chadli Benjedid resigned and the Algerian army took effective control of the country. A "High Security Council" announced itself to be in charge and immediately canceled the second phase of the elections.<sup>20</sup> Shortly thereafter, security forces carried out mass arrests of FIS members, restricted political activities at mosques, and effectively shut down several pro-FIS newspapers.<sup>21</sup> A state of emergency was declared on February 9, 1992, and remains in effect to this day.<sup>22</sup>

The government's Minister for Human Rights, Ali Haroun, explained the crack-down as follows:

The FIS, which has at least shown some honesty and frankness in this area, said that it is not democratic, that it is against democracy, that it does not want democracy. It has said that when it takes power there will be no more elections; there will be the Shura, the religious men who meet together and decide on your behalf . . . . As a minister of human rights, my question is: who is there to defend the notion of human rights? Am I going to allow a situation where, in a month or two, people will no longer have any rights? I cannot do that. There are currently men in Algeria who are assuming their responsibilities. There is a great part of the population that feels reassured. We are going to take the time to set up real institutions to lead this country toward real democracy—not some pretext of using a democratic process that ends up killing democracy.<sup>23</sup>

The Algerian crisis raises a familiar question in an unfamiliar context: assuming Algeria was democratic at the time of the elections, could it suspend the function of regular electoral procedures in order to save the democratic system as a whole or at least preserve a democratic option? And in so doing, would it remain democratic? The many facets of this question have been discussed throughout this century by constitutional theorists.<sup>24</sup> In the aftermath of World War II, some countries adopted constitutions that explicitly responded to the problem. The importance of the Algerian case, however, is the context in which it has taken place: Algeria's dilemma has arisen during an era in which the relaxation of international tensions has made the appli-

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Alfred Hermida, *Democracy Derailed*, AFRICA REPORT, Mar.-Apr. 1992, at 14; see also II WELTGESCHEHEN, 107 (1993).

20. Hermida, *supra* note 19, at 14-16.

21. *Human Rights in Algeria*, *supra* note 16, at 5-11.

22. *Algeria Presents Timetable for a Return to Democracy*, N.Y. TIMES, June 22, 1993, at A9; *Algeria: First Round to the Assassins*, AFRICA CONFIDENTIAL, July 3, 1992, at 7.

23. *Human Rights in Algeria*, *supra* note 16, at 5.

24. See discussion *infra* part III.

cation of pertinent international norms on this subject a realistic and meaningful possibility.

With the end of the Cold War, liberal states, no longer preoccupied by fear of communist subversion, have made democratic reforms a centerpiece of their foreign policies.<sup>25</sup> But as the old opponents have faded away, new ones have arisen. The more recent threats to democratic rule appear to come from groups that profess traditional but undemocratic values and claim that their citizenry supports those values.<sup>26</sup> Algeria is just one clear example of this trend. A number of other states, many of them in their first years of independence, have banned or restricted political parties that espouse religious, nationalist or ethnic solidarity, perceiving them as antithetical to the democratic order.<sup>27</sup>

The response of the international community to events such as the elections in Algeria must start from the international obligations of the state in question. Like many states, Algeria has ratified the Political Covenant which requires state parties to hold regular and genuine elections and to respect their results.<sup>28</sup> However, it is not clear if the obligation to respect the democratic entitlement is enforceable as a "suicide pact," forcing governments to hand over power to anti-democratic parties who win electoral majorities or pluralities. Even though tolerance is a bedrock principle of democratic government, it may be argued that where the survival of the democracy itself is threatened, survival takes precedence over tolerance. On the other hand, the exclusion or suppression of political parties based on their allegedly subversive nature goes to the heart of the democratic process. While preservation of democracy is a laudable goal, experience suggests that the power to exclude groups from the political process is often exercised arbitrarily and in a fashion that detracts from rather than enhances the democratic character of the state.<sup>29</sup>

25. See, e.g., Anthony Lake, *From Containment to Enlargement*, 4 U.S. DEP'T ST. DISPATCH No. 39 (Sept. 27, 1993) at 658.

26. For a recent survey of electoral gains by such groups in Europe, see *The Rise of Europe's Far Right*, *ECONOMIST*, Oct. 15, 1994, at 40-41.

27. Christian Tomuschat, *Democratic Pluralism: the Right to Political Opposition*, in *THE STRENGTH OF DIVERSITY: HUMAN RIGHTS AND PLURALIST DEMOCRACY* 27, 35-37 (Allan Rosas & Jan Helgesen eds., 1992).

28. Political Covenant, *supra* note 5, art. 25. Algeria became a party to the Covenant in September 1989. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF DECEMBER 31, 1991, at 133, U.N. Sales No. E.92.V.4, at 133 (1992).

29. Middle East Watch, which issued a detailed report on the Algerian election and its aftermath, took the position that the crack-down was impermissible. It argued that the mere seating of FIS deputies in Parliament was not sufficient justification for cancelling the elections and for the derogation from other human rights guarantees that followed. HUMAN RIGHTS WATCH, *HUMAN RIGHTS WATCH WORLD REPORT 1993* 294 (1993).

A resolution of the paradox should start by employing the relevant principles of democratic theory and proceed to analyze the limits on a government's power to protect the integrity of its electoral system. It must be determined whether international human rights instruments would allow states to invoke so-called "self-protection legislation," under which the rights of anti-democratic parties may be curtailed. Absent such laws, is a state justified in cancelling elections during an emergency?

This traditional constitutional inquiry—a search for limitations on governmental authority—is the approach taken in Parts II–IV of this Article. We will survey the practice of a representative group of democratic states on the question of self-protection legislation and review global and regional human rights instruments to determine the permissible scope of such restrictions. But the international character of this inquiry suggests that a second question must be asked: if a state has committed itself by treaty to maintain a democratic system, is it under an international obligation to enact self-protection legislation so as to ensure the system is not subverted by authoritarian groups? In Part V we ask whether the international community has a sufficient interest in its members' remaining democratic to require them to take affirmative steps to protect their fragile regimes from internal opponents.

## II. THE NATURE OF THE PROBLEM

Intolerant behavior by democratic governments can take various forms. This Article is concerned only with the question of how a democracy can protect itself against its enemies and still remain democratic. This inquiry excludes two other types of anti-democratic behavior by elected governments which, while of concern to human rights law, are not at issue here. The first is the abridgement of certain individual rights through discrete legislative or executive acts. Such laws may be targeted specifically at political opposition movements<sup>30</sup> or the abridgment of rights may come as an unintended side-effect of attempts to address more general social problems.<sup>31</sup> The second is discrimination against specific racial, ethnic, religious, or other well-defined minority groups who, by virtue of their limited numbers, cannot seek redress through a majoritarian political process.

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30. An example would be laws requiring political reform groups to disclose their membership lists, thereby exposing the members to harassment and violence. See *NAACP v. Alabama*, 357 U.S. 449 (1958) (forced disclosure of membership lists violates freedom of association).

31. An example would be certain types of campaign finance reform which in the United States have been held to abridge political candidates' freedom of speech. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (striking down candidate expenditure limits).

In both of these cases the majoritarian system continues to function as intended: those who win elections gain control of the government. In theory, at least, the government is still acting in the interest of those citizens who elected it to office. The problem for human rights law comes from the lack of *anti-majoritarian* checks on the government such as those imposed by judicial review. By contrast, the problem of anti-democratic actors involves the rejection (at least potentially) of *majority* rule. In Algeria, if FIS statements are to be taken at face value, it appears that a majority was about to deny itself the right to vote again in the future. A central assumption of democratic theory is that a regime unwilling to submit itself to electoral challenge cannot claim democratic *bona fides*. According to the major human rights instruments, regimes become suspect if the citizenry is not consulted regularly.<sup>32</sup> Thus, our problem can be described as involving oppressive minority rule achieved by majoritarian means, rather than oppressive majority rule brought about by majoritarian means.

The central historical example of this phenomenon is Hitler's rise to power in Weimar Germany, which reveals the scope and complexity of the problem with the benefit of historical perspective. The Weimar constitution provided for proportional representation in the Reichstag. While the Nazi Party won an increasing number of seats in the early 1930s, it never actually won a majority of seats.<sup>33</sup> In January 1933, when Hitler was appointed Chancellor (head of government), the party held slightly less than one-third of the seats in the Reichstag, where it was nevertheless the strongest party.<sup>34</sup> Despite the Nazis' lack of a governing majority, they succeeded in eroding support for the Republic by working within established democratic institutions. Beginning with elections in the summer of 1932, the Nazis held, together with the Communist Party, a "negative" majority in the Reichstag. This allowed them to block the formation of any government with parliamentary support.<sup>35</sup> Under these circumstances, President Hindenburg first tried to derail Hitler's rise to power by appointing minority chancellors and allowing them to rule by presidential emergency legislation. After two chancellors failed, however, Hindenburg was persuaded to appoint

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32. This stems from the requirement of "periodic" elections. See Political Covenant, art. 25(b); European Convention, art. 3; American Convention, art. 23(1)(b); Universal Declaration, art. 21(3), *supra* note 5.

33. Before Hitler's appointment as Chancellor in January 1933, the Nazi high water mark occurred in the elections of July 31, 1932 when the party received 37.4% of the popular vote. A.J. NICHOLLS, *WEIMAR AND THE RISE OF HITLER* 136 (3d ed. 1991).

34. With 33.1% of the popular vote, which suggests that support for the Nazis actually decreased from the elections four months earlier. *Id.* at 137.

35. The results of all Reichstag elections under the Weimar Constitution are contained in *Ergebnisse der Wahlen im Reich 1919 bis 1933*, reprinted as Doc. No. 533 in *IV DOKUMENTE ZUR DEUTSCHEN VERFASSUNGSGESCHICHTE* 668 (E.R. Huber ed., 3d ed. 1991).

Hitler as chancellor of a coalition government with the motive that Hitler's ultra-conservative coalition partners would contain him and prevent the implementation of his then clearly evident agenda.<sup>36</sup>

Not surprisingly, Hitler abused his power over the few key ministries held by his party by arresting and intimidating opponents before calling for new elections.<sup>37</sup> Despite rampant intimidation of other parties and their candidates by the now unchecked Nazi storm troopers, the elections of March 1933 still did not yield an absolute majority for the Nazis.<sup>38</sup> But Hitler's position was now strong enough to pressure Reichstag deputies to vote for the "*Ermächtigungsgesetz*," temporarily suspending most aspects of constitutional rule and permitting government legislation by decree.<sup>39</sup> By vesting near absolute authority in the government, the *Ermächtigungsgesetz* effectively nullified the principle of separation of powers. A dictatorship, in the eyes of most contemporaries, had been legalized. Although it is possible to raise technical objections to the constitutional validity of the *Ermächtigungsgesetz*,<sup>40</sup> the requisite two-thirds majority of deputies in the First Chamber had clearly consented to its passage.<sup>41</sup>

A totalitarian regime thus came to power in Germany without clearly violating the strictures of a democratic constitution.<sup>42</sup> The demise of the Republic suggests that threats to liberal regimes may arise not only, as in Algeria, when a single radical party wins or threatens to win an absolute majority of seats in parliament, but also in a variety of circumstances when democrats become demoralized<sup>43</sup> or are caught between competing extremist forces.<sup>44</sup> But apart from this

36. Details may be found in VII DOKUMENTE ZUR DEUTSCHEN VERFASSUNGSGESCHICHTE 1052–1265 (E.R. Huber ed. 1984).

37. NICHOLLS, *supra* note 33, at 138–39.

38. *Id.* at 139–40.

39. Gesetz zur Behebung der Not von Volk und Reich, RGBl. I 141 (1933), reprinted in Huber, *supra* note 35, at 665 (Doc. No. 532).

40. Hans Schneider, *Das Ermächtigungsgesetz vom 24 März 1933*, in VON WEIMAR ZU HITLER 1930–1933 405, 430 (Gothard Jasper ed., 1968). It is disputed whether the unconstitutional arrest of the 81 deputies of the Communist Party on February 28, 1933—an attempt to prevent them from taking part in the vote—affected the constitutional validity of the *Ermächtigungsgesetz*, since the required two-thirds of the members of the Reichstag were present for the vote. *Id.* at 428.

41. See Ernst Friesenhahn, *Zur Legitimation und zum Scheitern der Weimarer Reichsverfassung*, in WEIMAR, SELBSTPREISGABE EINER DEMOKRATIE 91, 94 (K.D. Erdmann & H. Schulze eds., 1980).

42. At the time, Germany was not the only country facing a threat from totalitarian parties. Throughout the inter-war years, Fascist and other far-right political parties competed in elections in European states, a number of which attempted to ban or restrict their activities. Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI. REV. 417, 420–24 (1937).

43. Friesenhahn, *supra* note 41, at 108.

44. KURT SONTHEIMER, *ANTIDEMOKRATISCHES DENKEN IN DER WEIMARER REPUBLIK* 391–400 (1962).

rather general conclusion, several more specific lessons have been drawn from the Weimar and other similar experiences.

First, once an anti-democratic party obtains the means to exert pressure on democratic parties to cede power "voluntarily," democratic government may be beyond salvation. Democratic parties, in essence, become the unfair victims of a process dedicated to fairness—a process they themselves seek to preserve until the end. Second, there may be no fool-proof way of determining whether a party will turn a democracy into a dictatorship. For example, in a widely noted statement, Hitler swore under oath in court that he would seek and exercise power only by constitutional means.<sup>45</sup> Moreover, the *Ermächtigungsgesetz* explicitly provided that elections would be held after the expiration of the current electoral period. On paper, at least, the events of 1933 did not put an end to democracy in Germany. Third, if precautionary measures are to be taken, they must be instituted before a radical party has become so strong and well-organized that its prohibition would result in civil war: With Nazi storm troopers and their Communist counterparts already engaging in regular street brawls, this certainly would have been the case in Germany after the first set of elections in 1932.<sup>46</sup>

The downfall of the Weimar Republic is also significant as the historical period foremost on the minds of the U.N. delegates who drafted the post-war human rights instruments.<sup>47</sup> In crafting the Universal Declaration and later the Political Covenant, the drafters saw in Weimar Germany several crucial "mistakes" to be avoided in the social blueprints they were creating. The centrality of this historical episode to contemporary human rights law will become evident when we discuss the international community's response to anti-democratic parties in the post-war era.<sup>48</sup>

45. In September 1930 Hitler was called to testify at the trial of three army officers accused of high treason for infiltrating the army with Nazi propaganda. He stated:

The national-socialist movement will try to attain its aims in this state by constitutional means. The constitution only prescribes the methods but not the goal. We will try to obtain the necessary majorities in the legislative bodies by constitutional means in order to mould the state, once we have succeeded, into the form which conforms to our ideas.

HERBERT MICHAELIS, *URSACHEN UND FOLGEN—VOM DEUTSCHEN ZUSAMMENBRUCH 1918 UND 1945 BIS ZUR STAATLICHEN NEUORDNUNG DEUTSCHLANDS IN DER GEGENWART* 532 (1962). As to Hitler's "legality tactics" generally, see KARL DIETRICH BRACHER, *DIE AUFLÖSUNG DER WEIMARER REPUBLIK* 110–15 (5th ed. 1971).

46. The Nazis and Communists were only two of several parties openly hostile to the Weimar constitution. A successful ban of any one of the parties would not necessarily have saved the Republic. See ROBERT MOSS, *THE COLLAPSE OF DEMOCRACY* 182 (1977).

47. Richard B. Lillich, *Civil Rights*, in *HUMAN RIGHTS IN INTERNATIONAL LAW* 115, 122 (Theodor Meron ed., 1984); MOSES MOSKOWITZ, *INTERNATIONAL CONCERN WITH HUMAN RIGHTS* 8 (1974).

48. See discussion *infra* parts V.A & V.B.

Some lawyers may derive a different lesson from the Weimar tragedy. While the experience may have inspired legal innovation at the United Nations, one might well ask whether a ban on the Nazi party—pursuant either to national or international law—would have made any difference. Weimar Germany dissolved due to a longstanding and complex political crisis that gave rise to Nazism as a symptom rather than a cause of the Republic's dissolution. Thus lawyers may come to think that bans on authoritarian parties are not only fraught with the many dangers noted above; such bans may simply miss the point. By and large, states in which extremist parties achieve broad appeal have weak economies, ineffectual social institutions and a governmental system facing a legitimacy crisis,<sup>49</sup> as clearly illustrated by the Algerian experience.<sup>50</sup>

It seems that the most fruitful course of action for such regimes would be to address these underlying social ills, thereby demonstrating to their citizens that resort to extremism is unnecessary to achieve real social change.<sup>51</sup> It might be argued that if international law allowed banning extremist parties, it would provide the illusion of an easy answer to social problems of complex origin, encouraging governments to ignore the need for real reform.

But, in many cases, extremists have sufficient strength to present an actual threat of assuming power and prevent the incumbent government from regaining popular support by enacting fundamental reform. The government's choices are narrowed either to removing the extremists from the political process or gambling on their threat being overstated and allowing them to stand for election. In these cases, removal may become a legitimate policy choice.

Whether such a decision comports with minimum legal standards is a question ceded to the international community by relevant human rights norms. States weighing a decision whether or not to institute a ban are entitled to seek guidance from international law on this subject. The danger that a norm permitting bans may be misinterpreted or misused does not seem a persuasive argument against endeavors seeking to explain and clarify the norm. The norm needs to be clarified in order to ensure that regimes facing antidemocratic opponents can make decisions with the knowledge that they are acting in compliance with international law.

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49. Many scholars now see such conditions present in secular Arab societies. See, e.g., Muhammad Muslih & Augustus Richard Norton, *The Need for Arab Democracy*, FOR. POL., Summer 1991, at 3.

50. John P. Entelis, *State and Society in Transition*, in *STATE AND SOCIETY IN ALGERIA* 1 (John P. Entelis & Phillip C. Naylor eds., 1992).

51. For an argument that this should have been the course pursued in Algeria, see Robin Wright, *Islam, Democracy and the West*, FOR. AFF., Summer 1992, at 131.

### III. THEORIES OF DEMOCRATIC TOLERANCE

The rise of totalitarian movements after World War I spurred many democratic theorists to address the basic question here at issue: whether or not to tolerate anti-democratic ideologies. This problem is perhaps the central paradox of democratic regimes.<sup>52</sup> Democratic theory embraces diversity of public opinion as a fact of political life and holds that society is best served by allowing equal competition among the various factions. This ethic of tolerance makes possible all the other characteristics associated with democratic systems—e.g., freedom of political opinion, the notion of a loyal opposition, peaceful transitions of power—and so becomes the primary claim to legitimacy of democratic systems.<sup>53</sup> The presence of anti-democratic ideologies thus presents a dilemma: to suppress such movements infringes upon democracy's bedrock principle, but to allow them endangers the survival of the very system institutionalizing the principle of tolerance. On this fundamental question democratic theory has broken into two broad camps.

#### A. Procedural Democracy

The first model defines democracy as a set of procedures. In Joseph Schumpeter's classic formulation, democracy is the "institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."<sup>54</sup> This sort of democracy provides a framework for decision-making but does not prescribe the decisions themselves. Its formal character derives from its Enlightenment roots as a reaction against societies based on religious orthodoxy and the authority of a single moral order. In their place, theorists of the seventeenth and eighteenth centuries invoked "the figure of reasoning man who might achieve total knowledge, total autonomy, and total power; whose use of reason would enable him to see himself, not God, as the origin of language, the maker of history, and the source of meaning in the world."<sup>55</sup> A legitimate political society embodied the triumph of such rational discourse among citizens on a national scale.

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52. See generally BENJAMIN E. LIPPINCOTT, *DEMOCRACY'S DILEMMA: THE TOTALITARIAN PARTY IN A FREE SOCIETY* (1965).

53. See JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1919 ed.) (1861); see generally DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986), especially at 133-36.

54. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (2d ed. 1947).

55. Kate Manzo, *Modernist Discourse and the Crisis of Development Theory*, 26 *STUD. IN COMP. INT'L DEV.* 3, 7 (1991).

According to the procedural view, because an individual's capacity to reason was sufficient to "enable movement along the path of political enlightenment and progress,"<sup>56</sup> there was little need for government to protect citizens from the influence of anti-rationalist ideas. When rational citizens agree to create a political society, they do not delegate to their government the power to select among the various points of view present in their midst. In giving up its claim to truth, the modern secular political order takes no position when a plurality of truths is asserted.<sup>57</sup> Citizens are encouraged to assert their individual preferences, each of which is presumed to have equal moral worth and equal entitlement to an airing.<sup>58</sup> Therefore, the only way to constitute legitimate authority is through a procedural mechanism giving effect to each individual view, i.e., majority rule. Consensus decision-making would be preferable, but impractical in the modern state as even early republics recognized.

The procedural model acknowledges that for many citizens such an enforced heterogeneity can become disconcerting. Central organizing truths provide a sense of comfort that a constitutional "agreement to disagree" cannot.<sup>59</sup> In any pluralistic society, therefore, certain groups will continue to agitate for a return to orthodoxy of one form or another, whether political, ethnic, religious, or based on a cult of personality. In order to combat this tendency and remain vital, the procedural view holds that a democratic system must subject itself to continued self-criticism through exploring the value of tolerance.<sup>60</sup> Electoral politics, in the procedural view, is the primary vehicle for this self-examination to occur. The enemies of democracy will be among the likely participants.

By opening the electoral process to its critics, democracy necessarily retains the possibility of failure. This is implicit even in the cherished central image of democratic theory—the social contract—which suggests that pluralistic systems are not somehow ordained *a priori*, but rather arise from a decision of the people. If a popular majority may create a democratic system, it would seem to follow that it should also

56. *Id.*

57. Of course, this begs the question of whether the ethic of tolerance is itself an asserted truth. Democratic states have certainly acted as if this were the case. Few such states take the position that their ideology is no better or worse than any other. See W.J. STANKIEWICZ, *APPROACHES TO DEMOCRACY* 100 (1980).

58. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 108 (1989).

59. Loewenstein, *supra* note 42, at 428.

60. As Thomas Emerson writes: "Even if we consider freedom of expression an absolute value . . . nevertheless it is important that it remain open to challenge. Otherwise it becomes a 'dead dogma,' ill-understood, lacking in vitality, and vulnerable to erosion or full-scale attack." THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 51 (1971).

have the power to disband it.<sup>61</sup> The process itself cannot guarantee that supporters of democracy will always emerge victorious; that is a question of political will.<sup>62</sup> The procedural view therefore recognizes that formal political structures have limited capabilities in moments of crisis, holds nonetheless that the political will of committed democrats can be strengthened if the alternatives to democracy are understood and debated.

### B. Substantive Democracy

The second view of democracy is substantive, defining democracy not as the process of ascertaining the preferences of political majorities, but as a society in which majority rule is made meaningful.<sup>63</sup> The substantive view begins from the proposition that majorities are fluid. In order for citizens to move in and out of the majority as issues change, they must at all times enjoy a core of political rights that ensures effective participation. In this view, democratic procedure is not an end in itself but a means of creating a society in which citizens enjoy certain essential rights, primary among them the right to vote for their leaders.

None of these rights, however, is absolute in the sense that it may be used to abolish the right itself or other basic rights. Thus, an authoritarian party does not achieve legitimacy simply because it enjoys support among the electorate at a given moment. In this respect the principles of justice undergirding a democratic society are, in the substantive view, somewhat deceptive. By their nature they are permissive, encouraging individual dissent, but those principles cannot be understood as permitting their own alienation.<sup>64</sup> Otherwise they would become meaningless: the principles would describe as fundamental a social condition that no longer exists once a totalitarian party takes power. John Stuart Mill argues that society can no more alienate its collective liberty than an individual can sell himself into slavery:

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61. See HANS KELSEN, *VOM WESEN UND WERT DER DEMOKRATIE* 94, 98, 102-03 (2d ed. 1929); EMERSON, *supra* note 60, at 49-50.

62. See CARL COHEN, *DEMOCRACY* 202 (1971); Ernst Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip*, in *HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND* 1, 912-14 (Josef Isensee & Paul Kirchhof eds., 1987).

63. Ralph Gilbert Ross, *Democracy, Party and Politics*, 64 *ETHICS* 100, 120-21 (1953).

64. This argument is commonly phrased as saying that freedom can permit skepticism about all viewpoints save the value of freedom itself. As Carl Auerbach writes:

[I]f the theory that there are no political orthodoxies is taken to mean that we must also be skeptical about the value of freedom and therefore tolerate freedom's enemies, it will tend to produce, in practice, the very absolutism it was designed to avoid—as experience with modern totalitarianism demonstrates.

Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 *U. CHI. L. REV.* 173, 188 (1956).

[B]y selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself . . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.<sup>65</sup>

One cannot, it is argued, simultaneously postulate tolerance as the fundamental organizing principle of government and accept the possibility that a group preaching mass *intolerance* may one day gain control of that government.

The substantive view of democracy finds support among theorists from a variety of philosophic traditions—we highlight two.

### 1. John Rawls: The Remedial Power of Reasoned Debate

In the Anglo-American world the strongest current of the substantive model requires that any valid theory of social organization be grounded in notions of justice. Achieving the condition of justice must be the theory's ultimate end. A legitimate political process must always act in service of creating that condition; in this sense it is result-oriented. In contrast to the procedural approach, the substantive view does not regard tolerance as the transcendent norm of a democratic society. Tolerance is important for facilitating the enjoyment of liberty and equality, the essential components of a just political order. However, when tolerance acts to negate those conditions its value must be reconsidered.<sup>66</sup>

John Rawls, perhaps the most influential contemporary theorist of democratic society, adheres to a version of the substantive view. For Rawls, the principles of liberty selected in his hypothetical "original position" carry their own imperative; they are "not derived from practical necessities or reasons of state,"<sup>67</sup> and can only be "justified when it is necessary for liberty itself, to prevent an invasion of freedom that would be still worse."<sup>68</sup>

Under such a framework Rawls examines the problem of "toleration of the intolerant." He asks two central questions. First, does an intolerant group "[have] any title to complain if it is not tolerated"? Rawls answers no: "[a] person's right to complain is limited to violations of principles he acknowledges himself."<sup>69</sup> Rawls' position can be restated

65. JOHN STUART MILL, *ON LIBERTY* 236 (World Publishing Co. 1962) (1859).

66. John Locke gave early expression to this view in his writings on religious tolerance. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 14–18, 51 (2d ed. Bobbs-Merrill 1955) (1689).

67. JOHN RAWLS, *A THEORY OF JUSTICE* 214 (1971).

68. *Id.* at 215.

69. *Id.* at 217.

in terms more directly relevant to our problem: if a party announces its intention to suppress minorities once it attains power, claiming justification in an electoral mandate, then that party may be subject to suppression while it is itself in the minority. As Rawls says, this is a principle that both sides accept.

Second, Rawls asks under what conditions a tolerant group has the right not to tolerate those who are intolerant. Rawls answers that intolerance is permissible only where there are "some considerable risks to our own legitimate interests."<sup>70</sup> Short of such a dire threat, tolerant citizens must have faith in the remedial powers of their democratic institutions:

[T]he natural strength of free institutions must not be forgotten . . . . Knowing the inherent stability of a just constitution, members of a well-ordered society have the confidence to limit the freedom of the intolerant only in the special cases when it is necessary for preserving equal liberty itself.<sup>71</sup>

Rawls is willing to invest much time and faith in this "psychological principle" on the assumption that in most cases an intolerant group whose liberties are protected "will tend to lose its intolerance and accept liberty of conscience."<sup>72</sup> Should such tolerant proceduralism fail, Rawls countenances repressive measures against the intolerant not as a suspension of principle but an application of principles of justice agreed to even by the intolerant in the original position. "What is essential is that when persons with different convictions make conflicting demands on the basic structure as a matter of political principle, they are to judge these claims by the principles of justice."<sup>73</sup> Thus, despite the denial of liberty to a group of citizens, the fundamental organizing principles of justice according to Rawls are, in the end, well-served.

## 2. Carl Schmitt: The Theory of the "Unalterable Core"

In continental Europe, the most influential theoretical critique of a purely procedural understanding of democracy comes from Carl Schmitt. Drawing on writings of the French constitutional theorist Maurice Hauriou,<sup>74</sup> Schmitt suggests an alternative to the procedural positivism and relativism which prevailed in Germany during the Weimar era.<sup>75</sup>

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70. *Id.* at 219.

71. *Id.*

72. *Id.*

73. *Id.* at 221.

74. See MAURICE HAURIUO, *PRECIS DE DROIT CONSTITUTIONNELLE* 297 (1923).

75. See HELMUT STEINBERGER, *KONZEPTION UND GRENZEN FREIHEITLICHER DEMOKRATIE* 208-09 (1974).

In his famous 1932 article "Legalität und Legitimität" ("Legality and Legitimacy"),<sup>76</sup> Schmitt made a distinction between the procedural rules in a constitution and its substantive principles. Schmitt claims that the basic substantive principles such as the democratic character of the state were the result of a fundamental decision of the "pouvoir constituant" (the people) and therefore could not be simply swept aside by the "pouvoir constitué" (the elected representatives), even if the procedures for a constitutional amendment were followed.<sup>77</sup>

Schmitt's theory was not wholly new. Since 1884 the French constitution had provided that the republican form of government could not be changed even by constitutional amendment.<sup>78</sup> Schmitt, however, asserted that a democratic constitution contains an implicit core of unalterable rules which embody its identity. Because procedural rules could not function to abolish the essence of that which they were designed to effectuate, they contain implied limitations. Consequently, in 1933, he interpreted Hitler's rise to power not as a legal appointment under the Weimar constitution but as a successful revolution.<sup>79</sup>

The idea of constitutions containing an unalterable core received widespread support after the Second World War. Article 79(3) of the German Basic Law (*Grundgesetz*) explicitly provides that the articles guaranteeing the dignity of man and the basic principles of government (democracy, rule of law, separation of powers, federalism, social state) cannot be changed by constitutional amendment. Its framers reasoned that if such a clause had been present in the Weimar constitution, Hitler would have been forced to violate the constitution openly before assuming virtually dictatorial power.<sup>80</sup> They concluded that given the traditional orderly and legalistic sentiment of the German people, this might have made a difference.<sup>81</sup>

The idea of the unalterable core also serves the function of legitimizing the establishment of legal institutions designed to prevent a democratic constitution from being turned against itself. Thus, Schmitt's views find expression in those provisions of the *Grundgesetz* setting out

76. See Carl Schmitt, *Legalität und Legitimität* reprinted in CARL SCHMITT, VERFASSUNGSRECHTLICHE AUFSÄTZE 263 (1958).

77. See *id.* at 311; see also CARL SCHMITT, VERFASSUNGSLEHRE 102–12 (1928); CARL SCHMITT, DER HÜTER DER VERFASSUNG 16 (1931).

78. LA CONSTITUTION DE LA FRANCE (of Feb. 25, 1875) art. 8(3), reprinted in LES CONSTITUTIONS DE LA FRANCE 308 (L. Duguit et al. eds., 1952). For discussion of the legal force of this rule, see HAURIUO, *supra* note 74, at 366–67 (1923), and IV LÉON DUGUIT, TRAITÉ DE DROIT CONSTITUTIONNEL 538–41 (1924).

79. Carl Schmitt, *Das Gesetz zur Behebung der Not von Volk und Reich*, 38 DEUTSCHE JURISTENZEITUNG 455–58 (1933); CARL SCHMITT, DAS REICHSTATTHALTERGESETZ 9 (1933).

80. PARLAMENTARISCHER RAT, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (ENTWÜRFE), Formulierungen der Fachausschüsse des Allgemeinen Redaktionsausschusses, des Hauptausschusses und des Plenums 102 (1948/49).

81. Friesenhahn, *supra* note 41, at 95.

a procedure for banning anti-democratic parties (art. 21), for stripping extremist individuals of certain civil rights (art. 18), and giving every citizen, when no other means are available, the right of resistance against attempts to overturn the constitutional order (art. 20 (4)).<sup>82</sup>

Schmitt's theory is not limited to democratic constitutions, however, and should therefore be regarded as morally relative,<sup>83</sup> as born out by Schmitt's own life. Although he served as a counsel to President Hindenburg until 1932 and supported his efforts to preserve the democratic constitution against totalitarian movements,<sup>84</sup> Schmitt became the best-known legal defender of the Nazi regime once Hitler assumed power.<sup>85</sup> While this switch cost Schmitt his position as a university teacher after the Second World War,<sup>86</sup> the validity of his theory of the unalterable core and his parentage of article 79(3) of the German Basic Law is widely, although sometimes not explicitly, recognized.<sup>87</sup>

Carl Schmitt was not the only advocate in Germany (or elsewhere) during the inter-war era of a more substantive or militant understanding of democracy.<sup>88</sup> However, he was doubtless the best-known representative of those who claimed that democracy rests on a value-choice which does not require, or even permit, a procedure of self-abolition.

### C. Democratic Theory and International Norms

What is the value of these two theoretical models to an understanding of international law? Theoretical conceptions of democracy do not possess normative value as such; and in particular, as models of domestic constitutionalism, they have no necessary international normative value. However, discussions of democratic theory do not take place in a political or normative vacuum. Often, by drawing upon ideas expressed in nascent legal rules and political institutions, theoretical discussions serve to crystallize a new conception of democracy arising

82. *Id.* at 92.

83. STEINBERGER, *supra* note 75, at 191.

84. J.W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH 172-91 (1983).

85. *See id.* at 195-218; PAUL HIRST, REPRESENTATIVE DEMOCRACY AND ITS LIMITS 128-37 (1990); David A.J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law*, 26 N.Y.U. J. INT'L L. & POL. 1, 53-59 (1993).

86. BENDERSKY, *supra* note 84, at 274.

87. *See* MAUNZ-DÜRIG, GRUNDGESETZ KOMMENTAR, art. 79 nos. 21-25 (1963); FRIEDRICH KARL FROMME, VON DER WEIMARER VERFASSUNG ZUM BONNER GRUNDGESETZ 179-80 (1960); Friesenhahn, *supra* note 41, at 92; BENDERSKY, *supra* note 84, at 283-84.

88. *See, e.g.*, Karl Loewenstein, *Comment*, in VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER, Hef 7, 193 (1932); GERHARD LEIBHOLZ, DIE AUFLÖSUNG DER LIBERALEN DEMOKRATIE IN DEUTSCHLAND UND DAS AUTORITÄRE STAATSBILD 9-20 (1933); Loewenstein, *supra* note 42 at 417-32 & 638-58.

in a state. The discussion among constitutionalists in Weimar Germany—with its main protagonists Hans Kelsen and Carl Schmitt—was closely followed by an interested public and profoundly influenced popular opinion on the subject.<sup>89</sup> In this sense theoretical discussions often reflect the very practical need of democratic societies to reassess and redefine their identities in times of crisis. In so doing, they generate a practice to which the international lawyer may turn for normative guidance.

In addition, theoretical debate also aids the pedagogical task of meaningful classification. The range of possible responses to the problem of democratic intolerance is necessarily limited, even taking into account the many differences among the world's democratic societies. Any thorough discussion of the issue, therefore, will inevitably revert to the level of abstraction represented by the substantive and procedural models, and eventually to those models themselves. This will become apparent in the next section where we use these two models of democracy as a framework to classify and analyze state practice.

#### IV. THE PRACTICE OF REPRESENTATIVE DEMOCRATIC STATES

The focus of this discussion concerning whether anti-democratic actors (political parties, other groups, or individuals) may be excluded from the political process presupposes that the process is otherwise democratic. Accordingly, in examining state practice on this question we will survey only states with "stable" democratic systems.<sup>90</sup> Such a methodological approach necessarily implies a certain bias in favor of the western democratic tradition, given the origin of modern democratic systems in the West. However, in order to ground any universal or quasi-universal norm in a cross-section of international practice and opinion, we will also include discussions of several developing countries with long-standing democratic traditions. The practice of states with no meaningful democratic tradition is simply not helpful in answering the question of who may be excluded from a political process that is otherwise democratic.

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89. SONTHEIMER, *supra* note 44, at 82–84, 94–98, 105–12.

90. The determination of whether a state has a "stable" democratic system is both relative and subjective. Yet, in states where genuine elections are in fact the norm—a norm presumably preserved by the exclusion of certain political actors—a majoritarian political process must have become embedded in the political culture. Stable states have made real the political model envisioned by human rights treaties. Because each stable state was at some point a nascent or endangered democracy itself, its legislation and practice with regard to anti-democratic actors reflects its sense of when such actors can appropriately be excluded and is relevant to our model for the international level.

We have classified the states examined according to the substantive and procedural models of democracy outlined in Part III. This theoretical typology is only a rough abstraction of actual state practice. In an attempt to bring the classification closer to meaningful ideal types, we have further subdivided these two broad categories into "tolerant" (passive) and "militant" (active) categories. These designations allow us to take account not only of a state's formal constitutional framework but also of how its norms regarding anti-democratic actors have been interpreted and implemented over time. Thus, we divide state practice into the following four categories: (1) tolerant procedural democracy; (2) militant procedural democracy; (3) tolerant substantive democracy; and (4) militant substantive democracy.

#### *A. Tolerant Procedural Democracy in the United Kingdom, Botswana, and Japan*

The United Kingdom, Botswana, and Japan provide examples of a tolerant procedural model of democracy.

##### 1. Procedural Democracy in the United Kingdom

The unwritten British constitution rests on the concept of the sovereignty of Parliament.<sup>91</sup> Traditionally, the British legislature is not bound by any substantive rules and every act of Parliament is valid if enacted according to the proper procedures.<sup>92</sup> Such legislative supremacy is a formidable obstacle to introducing an anti-majoritarian bill of rights into British law. While an absolutist view of the sovereignty of Parliament is increasingly questioned today, "short of an extreme situation," it is still "very unlikely that the courts would of their volition begin to exercise power derived solely from common law to review the validity of Acts of Parliament."<sup>93</sup> Therefore, the United Kingdom still appears to adhere to a purely procedural model of democracy.

This lack of written substantive principles, on the other hand, grants the British government substantial latitude in confronting anti-democratic actors. In practice, though, the British Parliament has only enacted laws empowering the government to dissolve certain groups—including political parties—if they pose a threat of violent behavior. Section 2(1)(b) of the Public Order Act of 1936,<sup>94</sup> for example, criminalizes membership in any association "organised and trained or organ-

91. J. ALDER, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 63-67, (1989); See *Manuel v. Attorney-General* [1983] 1 Ch. 77, 89 (appeal taken from Canada).

92. E.C.S. WADE & A.W. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 68-81 (11th ed. 1993).

93. *Id.* at 75.

94. Public Order Act, 1 Edw. 8 & 1 Geo. 6, ch. 6, § 2 (1936) (Eng.).

ised and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object." And according to Section 28(2) of the Northern Ireland (Emergency Provisions) Act of 1991,<sup>95</sup> the Secretary of State may proscribe "any organisation that appears to him to be concerned in terrorism or in promoting or encouraging it."<sup>96</sup>

In the scheme of possible restrictions on political actors, these provisions are fairly benign.<sup>97</sup> Not only do they require that the groups engage in or support actual physical violence, but the application of these laws has also been measured and restrained. Although the British government would clearly have had the power to dissolve Sinn Fein—a party which openly sides with the still outlawed Irish Republican Army—it has refrained from doing so.<sup>98</sup> The British system thus embodies the tolerant view that it is less dangerous to allow anti-democratic actors unfettered access to the electoral system than it is to suppress them and in so doing create martyrs. The threat that such actors pose is perhaps minimized by the fact that Britain's "first past the post" electoral system, based on single member electoral districts, acts as an efficient barrier to extremist parties becoming serious contenders for political power.

## 2. Procedural Democracy in Botswana

Like the United Kingdom, the Republic of Botswana has maintained a democratic system which has remained officially tolerant with respect to anti-democratic actors since its independence in 1966. Botswana's constitutional provisions on freedom of expression and association provide that those rights may be restricted if "reasonably justifiable in a democratic society."<sup>99</sup> These clauses have not, however, been invoked to suppress anti-democratic parties.<sup>100</sup> The remarkable atmosphere of relative cooperation and mutual trust that has marked Botswanan politics is no doubt responsible for the absence of extremist groups and any laws designed to restrict them.<sup>101</sup> The procedural character of

95. Northern Ireland Act (Emergency Provisions Act), 1991, ch. 24 (Eng.).

96. *Id.* A number of organizations are already proscribed by the Act. See § 28(2) and sched. 2. *Id.* These rules were first embodied in the 1974 Prevention of Terrorism Act.

97. Compare the legal restrictions in Britain with the more militant restrictions described *infra* part IV.D.

98. Gordon Smith, *Die Institution der politischen Partei in Großbritannien, in* PARTEIENRECHT IM EUROPÄISCHEN VERGLEICH 304, 329 (Dimitris Tsatsos et al. eds., 1990).

99. BOTS. CONST. ch. II, §§ 12 & 13.

100. See John D. Holm, *Botswana: One African Success Story*, 93 CURRENT HIST. 198, 200–01 (1994); DEMOCRACY IN BOTSWANA 167 (John Holm & Patrick Molutsi eds., 1989); NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, DEMOCRACIES IN REGIONS OF CRISIS: BOTSWANA, COSTA RICA, ISRAEL 89–120 (1990).

101. See NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, *supra* note 100,

Botswanan democracy is further evidenced by a lack of restrictions on the scope of constitutional amendments.<sup>102</sup>

### 3. Procedural Democracy in Japan<sup>103</sup>

The procedural character of the Japanese system is seen by examining two clauses of the Japanese constitution that could conceivably justify party restrictions. The first provides that the people "shall refrain from any abuse" of constitutional freedoms and rights.<sup>104</sup> The second, which renounces war as a sovereign right of the nation,<sup>105</sup> has been interpreted as "excluding antidemocratic militarism from national politics and governmental power."<sup>106</sup> Most Japanese constitutional scholars, however, agree that the lack of a clause explicitly permitting restrictions and the presence of a guarantee of freedom of association would likely render legislation authorizing a ban on a party unconstitutional.<sup>107</sup> In addition, the Japanese Political Finance Control Law does not contain a procedure for excluding political parties from participating in the electoral process.<sup>108</sup> Despite constitutional provisions to the contrary, the Japanese system operates as a procedural democracy.

#### *B. Militant Procedural Democracy in the United States*

Like the United Kingdom, Botswana, and Japan, the United States practices a procedural form of democracy. One clear line of demarcation between "militant" and "tolerant" systems is whether the national constitution can be amended to alter or eliminate democratic institutions. As we will see, a number of constitutions contain seemingly paradoxical clauses which provide that certain basic structures can not be altered, even by amendment. In the United States, however, no rule precludes the remote possibility of amending the Constitution to abolish a republican form of government.<sup>109</sup> In *The Federalist*, Alexander Hamilton declared that it is a "fundamental principle of republican

at 109; Jack Parson, *Republic of Botswana*, in 1 *WORLD ENCYCLOPEDIA OF POLITICAL SYSTEMS AND PARTIES* 116-18 (George E. Delury ed., 2d ed. 1987) [hereinafter *WORLD ENCYCLOPEDIA*]; James J. Zaffiro, *The Press and Political Opposition in an African Democracy: the Case of Botswana*, 27 *J. COMMONWEALTH & COMP. POL.* 51-73 (1989).

102. *BOTS. CONST.* ch. V, pt. IV, § 89.

103. We would like to thank Akiho Shibata, senior fellow of the Center for International Studies at New York University Law School, for his assistance in providing information for this section.

104. *KENPO* [Constitution] ch. III, art. 12 (Japan).

105. *Id.* ch. II, § 9.

106. Lawrence W. Beer, *Constitutionalism and Rights in Japan and Korea*, in *CONSTITUTIONALISM AND RIGHTS* 225, 235 (Louis Henkin & Albert J. Rosenthal eds., 1990).

107. KOJI SATO, *THE CONSTITUTION* 96-97 (1981).

108. Martin E. Weinstein, *Japan*, in 1 *WORLD ENCYCLOPEDIA*, *supra* note 101, at 608.

109. Two areas of the United States Constitution are unamendable, though neither preserves

government" to allow "the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness."<sup>110</sup>

Yet despite a professed commitment to an open political process, often regarded as the primary justification for judicial review,<sup>111</sup> the United States has enacted qualitatively more restrictive anti-subversion legislation than has the United Kingdom. Three major statutes, all products of hot and cold wars, were clearly designed to frustrate the activities of allegedly subversive parties.<sup>112</sup> The Smith Act of 1940 parallels British legislation by criminalizing membership in groups dedicated to overthrowing the United States government by force.<sup>113</sup> Ten years later, the Internal Security Act of 1950 abandoned the requirement of a showing of an actual or imminent threat to the democratic system by establishing a registration system for parties designated as "subversive" by the Subversive Activities Control Board.<sup>114</sup> And finally, the Communist Control Act of 1954 divested the Communist Party of the United States (CPUSA), and any of its successors, of all rights and privileges under state and federal law.<sup>115</sup> Although these statutes have not been invalidated, there have been no reported prosecutions since the early 1960s.<sup>116</sup>

Since the United States Constitution does not explicitly guarantee freedom of association, these statutes have been challenged under the First Amendment as violations of free speech. In reviewing convictions

representative government *in toto*. Article V prohibits amendments that concern certain slavery issues and the equality of state representation in Senate. U.S. CONST. art. V. Article IV, section 4 of the Constitution, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," addresses only the federal government's obligation to *states*, but not its obligation to itself or the alteration of that obligation by amendment. U.S. CONST. art. IV, § 4. Moreover, any claim that the guarantee clause does make the form of state government immutable would almost certainly be dismissed by the federal courts as a non-justiciable political question. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). For a discussion of the possible implied limitations on the amending power, especially where the Bill of Rights is concerned, *see* JOHN R. VILE, *CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS* 127-46 (1993).

110. THE FEDERALIST No. 78, at 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

111. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 106 (1980).

112. The Espionage Act of 1917 was used to prosecute Eugene V. Debs, the Socialist Party candidate for President in 1920. *See Debs v. United States*, 249 U.S. 211 (1919). The *Debs* case and other prosecutions under the Espionage Act, however, were limited by the terms of the statute to times of war. *See* Espionage Act, ch. 30, § 3, 40 Stat. 217, 219 (1917), codified as 18 U.S.C. 2388 (1988).

113. 18 U.S.C. § 2385 (1982).

114. 50 U.S.C. §§ 781-835 (1991).

115. 50 U.S.C. §§ 841-844 (1991).

116. *See, e.g., United States v. Robel*, 389 U.S. 258 (1967); *Communist Party of United States v. United States*, 384 F.2d 957 (D.C. Cir. 1967).

under these statutes, the United States Supreme Court has generally distinguished protected speech about anti-democratic activity from unprotected incitement to action against democratic institutions.<sup>117</sup> In early cases involving the CPUSA, the Court declined to consider whether the Party was by its nature dedicated to overthrowing the government. Instead, the Court chose to take judicial notice of the Party's goals<sup>118</sup> or to give deference to congressional findings.<sup>119</sup> Later, the Court began to require specific evidence that individual defendants were active members of the CPUSA and had knowledge of its illegal activity.<sup>120</sup>

Nevertheless, the Court has consistently upheld the core of these statutes as legitimate acts of preemptive self-defense by a democratic society<sup>121</sup> under an evolving standard.<sup>122</sup> This judicial confirmation of anti-subversive legislation makes it possible to speak of the United States as a militant procedural democracy, although it has become progressively less so since the 1950s. In its more recent jurisprudence, the Court has heightened its scrutiny, returning to its original "clear and present danger" standard. For example, the Court has held that advocacy becomes unlawful incitement only "where such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action."<sup>123</sup> This significantly enhanced standard of proof has made successful prosecutions extremely difficult.<sup>124</sup>

117. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 841 (2d ed. 1988).

118. *Dennis v. United States*, 341 U.S. 494, 510-11 (1950).

119. *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 93-94 (1960). Congress had declared that "a world Communist movement" existed, whose goal was "to establish a Communist totalitarian dictatorship in the countries throughout the world" and that in the United States members of the Communist Party "in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement." 50 U.S.C. §§ 781(1) & (9) (1991). *But see Dennis*, 341 U.S. at 588 (Douglas, J., dissenting).

120. *Robel*, 389 U.S. at 262 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 511 n.9 (1964); *Scales v. United States*, 367 U.S. 203, 229 (1961); *Yates v. United States*, 354 U.S. 298, 318-27 (1957).

121. *Dennis*, 341 U.S. at 509.

122. The standard used early in the century to uphold convictions under the 1917 Espionage Act was "clear and present danger," *Schenck v. United States*, 249 U.S. 47, 52 (1919). The standard was later modified in *Dennis* to require the courts to "ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis*, 34 U.S. at 510.

123. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968).

124. The Supreme Court has reinforced the procedural nature of First Amendment theory by striking down a "hate speech" ordinance as impermissible content regulation. *R.A.V. v. St. Paul*, 112 S.Ct. 2538 (1992).

### C. Tolerant Substantive Democracy in France, Canada, and India

While the United States, Great Britain, Botswana, and Japan all exemplify "procedural democracies," France, Canada, and India can be characterized as tolerant *substantive* democracies.

#### 1. Substantive Democracy in France

In contrast to the American system, the French constitution of 1958 explicitly provides that, "[t]he republican form of government shall not be subject to amendment."<sup>125</sup> A further substantive limit on traditional democratic principles appears in article 4 of the French constitution. This article provides that all political parties must respect the principles of national sovereignty and democracy.<sup>126</sup> This principle originated from concern over the threat posed by the French Communist party.<sup>127</sup> At one point it was even suggested that the constitution should explicitly allow the government, upon application to the *Haute Cour de Justice*, to dissolve a political party which violated its constitutional duties.<sup>128</sup> Although this proposal was ultimately defeated, French constitutional law still seems to pose no obstacles to the banning of political parties on the basis of an act of parliament. Indeed, according to article 34, only parliament, and not an independent judiciary, can promulgate rules concerning a citizen's fundamental rights.<sup>129</sup>

The evolution of the right of association in France, including the right to form political parties, provides a good example of how civil rights are protected. Like its United States counterpart, none of the various French constitutions have explicitly guaranteed the right of association. But unlike the United States, the French legislature proclaimed this right—and specifically defined its limitations—by statute in 1901.<sup>130</sup> Article 3 of this 1901 law states that any association which "intends to infringe on the republican form of government is null and void,"<sup>131</sup> as pronounced *ex officio* by a civil court. In practice, however, a prohibition under the law of 1901 has never taken place,<sup>132</sup> in part

125. LA CONSTITUTION DE LA FRANCE (of Oct. 4, 1958) title XIV, art. 89.

126. *Id.* art. 4 at 53. "Les partis et groupements politiques . . . doivent respecter les principes de la souveraineté nationale et de la démocratie."

127. 2 L'HISTOIRE DE L'ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958 128-31 (1988).

128. 1 *id.* at 427.

129. 1 JEAN RIVERO, LES LIBERTÉS PUBLIQUES 184 (6th ed. 1991).

130. Law of July 1, 1901 (J.O. July 2, 1901) 4025-27; see JACQUES ROBERT, LIBERTÉS PUBLIQUES ET DROITS DE L'HOMME 94, 584-604 (4th ed. 1988).

131. See *id.* at 588.

132. G.P. BOVENTER, GRENZEN POLITISCHER FREIHEIT IM DEMOKRATISCHEN STAAT 170 (1985).

because the law applies only to officially registered associations and not to more informal political groups.<sup>133</sup>

The same is not true of a 1936 law that gives the President of the Republic the power to dissolve groups that: (1) provoke armed demonstrations, (2) are of a paramilitary nature, or (3) have as their goal the dismemberment of the territorial state, the forceful overthrow of the republican form of government, the instigation of racial or other group discrimination, or the dissemination of propaganda promoting such discrimination.<sup>134</sup> This rather imprecisely worded statute<sup>135</sup> has frequently been invoked by French Presidents<sup>136</sup> against small groups on the political fringe,<sup>137</sup> even though it is clear that the law of 1936 could also be applied against major political parties.<sup>138</sup>

The highest French administrative court, the *Conseil d'Etat*, is empowered to review the President's action.<sup>139</sup> The court has interpreted the 1936 law rather broadly.<sup>140</sup> For instance, the court has held that a group need not pose a threat of actual violent behavior to apply the law if, for example, its platform or published views question the integrity of the national territory. Accordingly, the *Conseil d'Etat* has affirmed the dissolution of parties and groups based solely on their secessionist goals.<sup>141</sup> Groups that merely express support for other violent groups may also be prohibited.<sup>142</sup> The court has reversed only two prohibition decisions—one for lack of good cause<sup>143</sup> and the other because the government failed to meet its burden of proof.<sup>144</sup>

While there appears to be meaningful judicial review of party prohibition orders under the 1901 and 1936 laws, the French parliament retains the power to enact more restrictive legislation, subject to a

133. *Id.* at 164.

134. Law of Jan. 10, 1936 (J.O. Jan. 13, 1936, p.522) art. 1.

135. See Jean-Jacques Israel, *Article 4 in FRANÇOIS LUCHAIRE & GÉRARD CONAC, LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE* 218 (2d ed. 1987).

136. The Conseil d'Etat reviewed seventeen dissolution decisions between 1955 and 1984. See [1955–1964] CONSEIL D'ETAT, TABLE DÉCENNALE, [1965–1974] *id.*, [1975–1984] *id.*

137. See Michel Fromont, *Die Institution der politischen Partei in Frankreich, in PARTEIENRECHT IM EUROPÄISCHEN VERGLEICH*, *supra* note 98 at 219.

138. See Israel, *supra* note 135, at 218.

139. See decisions cited in *infra* notes 139–143.

140. *Id.*

141. Judgment of Oct. 8, 1975 (Association Enbata), Conseil d'etat, Lebon 494 (Fr.) (affirming the dissolution of Basque separatists); Judgment of Jan. 9, 1959 (Sieurs Hoang Xuan Man), Conseil d'etat, Lebon 25 (Fr.) (dissolving group for propaganda hostile to French sovereignty over Indochina); Judgment of July 15, 1964 (Dame Tapua et autres), Conseil d'etat, Lebon 407 (Fr.) (dissolving political party in Tahiti seeking to found an independent Polynesian republic).

142. Judgment of Feb. 5, 1965 (Association Comité d'entente pour l'Algérie française), Conseil d'etat, Lebon 73 (Fr.).

143. Judgment of June 26, 1987 (Fédération d'action nationale et européenne), Conseil d'etat, Lebon 235 (Fr.).

144. Judgment of July 21, 1970 (Sieurs Bussel, dit Lambert (Pierre), Dorey, Stobnicer, dit Berg), Conseil d'etat, Lebon 504 (Fr.).

challenge under a landmark 1971 decision of the *Conseil Constitutionnel* requiring that no act of parliament infringe certain core civil rights principles ("principes fondamentaux").<sup>145</sup> The precise impact of the 1971 rule is not entirely clear. Nevertheless, because political parties owe a constitutional duty to respect the principle of democracy (article 4), it appears that behavior threatening the democratic process would not be protected by the *Conseil Constitutionnel* as an element of the right of association.<sup>146</sup>

In short, French law contains several elements of a substantive theory of democracy. A number of French scholars have questioned the legal force of these elements, chiefly, articles 4 and 89 of the Constitution.<sup>147</sup> Evidently, a comparatively tolerant political culture since 1958 has made the elaboration of a more militant form of democracy unnecessary.

## 2. Substantive Democracy in Canada

Canada can also be labeled a tolerant substantive democracy. In 1982, a new Charter on Rights and Freedoms for Canada came into force by act of the British Parliament. Its provisions on the rights of anti-democratic parties parallel, in many ways, the international legal regime discussed in Part V *infra*.<sup>148</sup> For example, while section 2 of the Charter guarantees both freedom of expression and freedom of association, section 1 provides that those rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In the *Oakes* case, the Canadian Supreme Court scrutinized section 1 restrictions through a two-pronged test: (1) the objective served must be of sufficient importance to warrant overriding a protected right or freedom; and (2) the means chosen must be reasonable and demonstrably justified.<sup>149</sup>

Section 1 has never been invoked to justify restrictions on political parties, although prior to the enactment of the Charter, Canada had

145. Judgment of July 16, 1971, *Conseil Constitutionnel*, 29 (Fr.); see RIVERO, *supra* note 129, at 187-88.

146. Jean-Paul Jaqué, *L'abus des Droits Fondamentaux et la Lutte contre les Ennemis de la Démocratie-en Droit International et en Droit interne Français*, in ILIOUPOULOS-STRANGAS, *DER MISSBRAUCH VON GRUNDRECHTEN IN DER DEMOKRATIE* 129, 137 (1989). This view seems to be confirmed by a decision of the *Conseil Constitutionnel* holding that under article 4, political parties are granted no privileges beyond the general right of association. *RECUEIL DES DÉCISIONS DU CONSEIL CONSTITUTIONNEL* 78 (1984). See also MARCEL PRÉLOT & JEAN BOULOIS, *INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL* 669 (11th ed. 1990).

147. See, e.g., CHARLES DEBBASCH ET AL., *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* 93 (3d ed. 1990); Jean-Louis Seurin, *Article 4 in LUCHAIRE & CONAC, supra* note 134, at 213, 215-16.

148. See *Regina v. Keegstra*, 3 C.R.R. (2d) 193, 230 (1990).

149. *Regina v. Oakes*, 19 C.R.R. 308, 311 (1986).

placed severe restrictions on communist party activities and in 1970 it declared the Front de Liberation de Quebec an illegal organization.<sup>150</sup> During the Charter era, the controversy most relevant to party restrictions has been an attempt to regulate so-called "hate speech." In 1990 the Canadian Supreme Court heard three cases challenging the constitutionality of statutory provisions criminalizing speech which fosters hatred against persons based on their group status.<sup>151</sup> Following the *Oakes* test, the Court first found an overriding societal interest in combatting the sense of inequality fostered by hate speech, which, it held "erod[es] the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality."<sup>152</sup> Second, the Court found the legislative restrictions both reasonable and justifiable, primarily on the grounds that the hate speech targeted was "only tenuously connected to the values underlying the freedom of speech" and so its suppression engendered minimal cost to Canadian democracy.<sup>153</sup>

The hate speech decisions seem to be clear precedent for the constitutionality of self-protection legislation in Canada. The Supreme Court has opted for a strongly substantive model of democracy, viewing free speech as a contingent value which may, at certain crucial moments, erode rather than enhance fundamental democratic principles.<sup>154</sup> Some Canadian commentators have argued that suppressing anti-democratic parties will only increase their allure.<sup>155</sup> Yet, this is a question of tactics. Doctrinally, self-protection legislation in Canada appears to have a firm constitutional footing.

### 3. Substantive Democracy in India

The Indian Supreme Court is granted the power of judicial review under article 132(1) of the Indian Constitution, thereby enabling it to protect the fundamental rights set out in articles 12–35. One of these

150. See J. PATRICK BOYER, 1 ELECTION LAW IN CANADA 19–24 (1987); THOMAS R. BERGER, FRAGILE FREEDOMS: HUMAN RIGHTS AND DISSENT IN CANADA 127–62 (1981).

151. See Criminal Code § 319(2) (targeting those "who, by communicating statements, other than in private conversation, wilfully promote[] hatred against any identifiable group."). See Canadian Human Rights Act § 13(1) (concerning telephone communications) (1976–77).

152. Taylor and W. Guard Party v. Canadian Human Rights Comm'n, 3 C.R.R. (2d) 116, 134 (1990); see also *Keegstra*, 3 C.R.R. (2d) at 226–29; Regina v. Andrews, 3 C.R.R. (2d) 176, 188 (1990). The emphasis on equality over absolutist notions of liberty pervades Canadian constitutional law. See section 27 of the Charter.

153. *Keegstra*, 3 C.R.R. (2d) at 256–57.

154. See *id.* at 237 (stating that while dissent must be allowed to flourish "it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles" embodied in the Charter); *id.* at 240 ("[e]xpression can work to undermine our commitment to democracy where employed to propagate ideas anathemic [sic] to democratic values.").

155. BOYER, *supra* note 150, at 20.

rights is the freedom of all citizens "to form associations or unions,"<sup>156</sup> subject "to reasonable restrictions" which are enacted by law "in the interests of the sovereignty and integrity of India or public order or morality."<sup>157</sup> As in Canada, the right of association in India is formulated in general terms and applies to political parties as well as all other associations. Unlike Canada, however, in India the Supreme Court has issued an important decision concerning the prohibition of political parties.

At issue in the 1952 case, *State of Madras v. V.G. Row*,<sup>158</sup> was an order issued by the state government of Madras declaring the "Peoples Education Society" unlawful. The government relied on a 1908 law which gave it the power, after obtaining the consent of an advisory board, to declare an association unlawful if in the opinion of a provincial government, it: (1) interferes or has for its object interfering with the administration of the law, (2) does so with regard to the public order, or (3) constitutes a danger to the public peace.<sup>159</sup> The government argued that it had obtained information indicating the Society was actively engaged in helping the banned Communist Party.<sup>160</sup> The question for the court was whether these restrictions met the constitutional requirement of reasonableness.

The Indian court observed that "reasonableness" could not be defined in the abstract, but must be gleaned from the circumstances surrounding enactment of each restriction. The court expressed considerable reluctance to challenge the judgment of the legislature, since the people's elected representatives had clearly found the restrictions reasonable.<sup>161</sup> Nevertheless, the court struck down the statute because the legislature had failed to provide for sufficient procedural safeguards in the application of a ban. Noting the importance of the exercise of the right to form associations and the political reactions to a curtailment of the right, the court stated that summary review by the advisory board can not be a substitute for judicial review:

The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very

156. INDIA CONST. art. 19, § 1 (c).

157. *Id.* art. 19, § 4.

158. *State of Madras v. V.G. Row*, 1952 S.C.R. 597 (1952). The *State of Madras* decision is still considered to be the leading case in India on both the scope of the right of association and the test of reasonableness to be applied to restrictions on fundamental rights. See H.M. SEERVAI, 1 CONSTITUTIONAL LAW OF INDIA 803-04 (4th ed. 1991).

159. *Madras*, 1952 S.C.R. at 601.

160. *Id.*

161. *Id.*

exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights.<sup>162</sup>

Despite its ultimate holding, the *Madras* opinion seems to allow for a wide range of party prohibitions. The Indian court's main concern was ensuring the possibility of judicial review of the factual basis for a ban; it had little to say about the actual deprivation of rights. Indeed, the court's emphasis on the need for judicial review of the factual basis for bans is clearly incompatible with holding bans to be unconstitutional in themselves. In the end, the Indian court's approach was a substantive one. This is confirmed by other decisions of the court holding that Parliament's power to amend the Indian Constitution does not extend to dismantling fundamental features of the government, such as the separation of powers or its republican form.<sup>163</sup>

#### D. Militant Substantive Democracy: Germany, Israel, and Costa Rica

Germany, Israel, and Costa Rica illustrate the model of militant substantive democracy.

##### 1. Militant Substantive Democracy in Germany

When the West German constitution (the "Basic Law," now the constitution of the unified Germany) was drafted in 1948-49, two over-arching factors influenced its content: the fresh memory of the Nazi regime and the aggressive communist dictatorship then consolidating power in the East. These experiences fostered a strongly anti-totalitarian mindset in the framers of the *Grundgesetz*. The *Grundgesetz* contains several provisions collectively described by the Federal Constitutional Court (*Bundesverfassungsgericht*) as expressing the principle of "militant democracy."<sup>164</sup> A close look at these provisions, however, reveals that on their face they do not go much further than French law: several core principles (including that of democracy) are unalterable even by constitutional amendment,<sup>165</sup> and all associations whose purposes or activities violate criminal law or are directed against the constitutional order may be prohibited.<sup>166</sup>

A group to which a dissolution order is addressed must challenge that act in court. If, however, the group is a political party, the

162. *Id.* at 607-08.

163. See *Kesavananda v. State of Charily*, 1973 A.I.R. (S.C.) 1461, 1535 (1973); SUNDER ROMAN, CONSTITUTIONAL AMENDMENTS IN INDIA 1-18 (1989).

164. See *Communist Party Case*, 5 BVerfGE 85, 139 (1956), translated in DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 223.

165. GRUNDGESETZ [Constitution] [GG] art. 79, § 3 (E.R.G.).

166. *Id.* art. 9, § 2.

dissolution order is initiated by the federal government filing an application with the *Bundesverfassungsgericht*.<sup>167</sup> The Court will order dissolution upon a finding that parties "by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany."<sup>168</sup> A similar procedure appears in article 18. Upon application by the federal government to the *Bundesverfassungsgericht*, individuals may forfeit certain fundamental rights if they have used those rights to combat the "free democratic basic order."<sup>169</sup>

Yet, the most important differences between the French and German systems lie not in the written law but in their interpretation and application. In post-war France, no association or political party has been dissolved without a showing that it either posed a threat of violent behavior or pursued secessionist goals. In Germany, by contrast, two prominent and (until then) non-violent parties were declared unconstitutional by the *Bundesverfassungsgericht*: the Nazi-like *Sozialistische Reichspartei* in 1952,<sup>170</sup> and the German Communist Party in 1956. In the second case the court adopted a higher standard of proof, requiring that the party adopt "a fixed purpose constantly and resolutely to combat the free democratic basic order" and manifest this purpose "in political action according to a fixed plan of action."<sup>171</sup> This seemingly objective standard, although formulated in terms of actual danger to the democratic system, does not require evidence of imminent harm. The focus is on a party's attitude as revealed by its conduct.<sup>172</sup> Proof of a "concrete undertaking" to that end, or evidence of an actual danger to the democratic system, is not necessary.<sup>173</sup>

The instruments of "militant democracy" continued to play a role in Germany after the prohibition of the Communist Party. In the 1960s, the federal government brought applications for the forfeiture of fundamental rights against two individuals.<sup>174</sup> In the 1970s, the principle of militant democracy played an important role in a debate

167. *Id.* art. 21, § 2; see generally, Paul Franz, *Unconstitutional and Outlawed Political Parties: A German-American Comparison*, 5 B.C. INT'L & COMP. L. REV. 51 (1982).

168. *Sozialistische Reichspartei Case*, 2 BVerfGE 1 (1952), translated in KOMMERS, *supra* note 164, at 509.

169. The European Commission on Human Rights upheld a similar Belgian procedure under the European Convention on Human Rights, while invalidating its application in the instant case. *De Becker Case*, Application No. 214/56, Eur. Comm'n H.R., Ser. B 123-29 (1962).

170. *Sozialistische Reichspartei Case*, 2 BVerfGE 1 (1952), translated in KOMMERS, *supra* note 164, at 509.

171. *Communist Party Case*, 5 BVerfGE at 141, translated in KOMMERS, *supra* note 164, at 228.

172. In the *Communist Party Case* the Court relied on the Party's program, its official declarations, the statements of its leaders, and its educational materials. See *id.*

173. *Id.*

174. 11 BVerfGE 282 (1960); 38 BVerfGE 23 (1974). The government later chose not to pursue the cases, and the applications were eventually dismissed.

over disloyal public servants.<sup>175</sup> Today, the rise of right-wing violence following reunification has prompted the federal government to dissolve several organizations under article 9(2) of the *Grundgesetz*.<sup>176</sup> In addition, proceedings have been instituted before the *Bundesverfassungsgericht* to dissolve three neo-Nazi parties and to divest two right-wing individuals of their free speech rights.<sup>177</sup>

## 2. Militant Substantive Democracy in Israel

Like the United Kingdom, Israel does not possess a formal constitution. However, the Israeli Knesset has passed several so-called Basic Laws, which do not rank higher than ordinary laws but have some constitutional significance. According to Section 7A of the *Basic Law: The Knesset*, a party "shall not participate in elections to the Knesset if its objectives or actions entail, explicitly or implicitly, one of the following: (1) a denial of the existence of the State of Israel as the State of the Jewish nation, (2) a denial of the democratic character of the state, (3) incitement to racism."<sup>178</sup>

Although this rule excludes political parties only from elections, and not from political life altogether, its essential feature is a loosely phrased test focusing on the goals or organizing principles of a party. This attitude-based standard thus mirrors article 21(2) of the German *Grundgesetz*. Section 7A was enacted in response to a 1984 decision of the Israeli Supreme Court which had found no legal basis for the Israeli Election Commission's decision to bar two political parties from participating in the Knesset elections that year.<sup>179</sup> When the Election Commission, this time acting under the new section 7A, decided to exclude the same two political parties from the next elections, the Israeli court affirmed the exclusion of one of the two parties.<sup>180</sup> In so doing, the court adhered to its general practice of interpreting nar-

175. See K.H.F. Dyson, *Anti-Communism in the Federal Republic of Germany*, 27 *PARL. AFF.* 51-67 (1975).

176. See 38 *KEESING'S RECORD OF WORLD EVENTS* 39,245 (1992).

177. Appl. 2 BvA 1/92; Appl. 2 BvA 2/92; Appl. 2 BvB 1/93; Appl. 2 BvB 2/93; Appl. 2 BvB 3/93. See 21 *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* 207 (1994).

178. This is an unofficial translation of BASIC LAW: THE KNESSET, § 7A, in Dan Gordon, *Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence with That of the United States and West Germany*, 10 *HASTINGS INT'L & COMP. L. REV.* 347, 364 n.117 (1987). No official translation is yet available of this provision which was inserted into the BASIC LAW: THE KNESSET as amended in 1985, Amend. No. 9, S.H., no. 1155, at 196, translated in 12 *LAWS OF THE STATE OF ISRAEL* 85. We would like to thank Judge Itzak Zamir of the Supreme Court of Israel for providing the information in this section.

179. See Gordon, *supra* note 178, at 353-64.

180. Election Appeal 1/88, Naiman v. Chairman of the Central Appeal Committee of the Twelfth Knesset, 42(4) P.D. 177 (1988).

rowly statutes which restrict fundamental rights.<sup>181</sup> Not unlike the German *Bundesverfassungsgericht* in the Communist Party case,<sup>182</sup> the Israeli court focussed on party goals as shown through concrete action: it held that in order to meet its burden, the government must prove beyond any doubt, and by clear and unequivocal evidence, that (1) a party has as its dominant and central objective one of the proscribed goals set out in the statute; and (2) that it intends to implement this goal in a concrete manner.<sup>183</sup>

This standard was held to be satisfied by the right-wing Kach Party, whose objectives and activities were found to be clearly racist in the sense contemplated by the statute.<sup>184</sup> The test was not satisfied by the other party, which advocated a form of Palestinian nationalism.<sup>185</sup> Thus, the Court seems to have tightened the requirements of the statute by rejecting exclusion of a party solely on the basis of its platform.

### 3. Militant Substantive Democracy in Costa Rica

Costa Rica is an example of a militant democracy which has become more tolerant over the years. Originally, article 98 of its constitution prohibited "the founding or the activity of political parties which for their ideological stance, means of action or international connections try to destroy the foundations of the democratic organization of Costa Rica, or which act against the sovereignty of the country."<sup>186</sup> The Costa Rican Parliament, acting on the basis of this rule, outlawed the Communist Party in 1950 by the required two-thirds majority vote.<sup>187</sup> In 1975, however, the formal party-prohibition procedure was abolished by constitutional amendment. Today, article 98 of the constitution grants citizens "the right to join parties in order to participate in national politics," subject, however, to the restriction "that such parties are committed in their platforms to respect the constitutional order of the republic."<sup>188</sup>

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181. Zeev Segal, *A Constitutional Law Without a Constitution: The Israeli Experience and the American Influence*, 21 *CAP. U. L. REV.* 1 (1992).

182. See Communist Party Case, *supra* note 164.

183. Naiman, *supra* note 179.

184. Jacqueline Gatti-Domenach, *Le Système Electoral Israélien*, in *REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE* 989, 1031-32 (1990).

185. *Id.*

186. Quoted in OSCAR AGUILAR BULGARELLI, *DEMOCRACIA Y PARTIDOS POLITICOS EN COSTA RICA (1950-1962)* 80 (1981) (authors' translation).

187. *Id.* at. 84.

188. CONSTITUCION POLITICA DE LA REPUBLICA DE COSTA RICA art. 98.

## 4. Militant Substantive Democracies in Other Countries

In brief, the laws of several other established democracies also permit restrictions on anti-democratic actors. Both the Italian and Spanish constitutions contain a clause prohibiting the reestablishment of the fascist party.<sup>189</sup> The Portuguese constitution prohibits all paramilitary associations which adhere to a fascist ideology.<sup>190</sup> In Finland, a group can only register as a political party if it demonstrates, by its actions, a respect for democratic principles.<sup>191</sup> Austria makes it a criminal offense to found an association dedicated to endangering national independence or the constitutionally mandated form of government.<sup>192</sup> And the Greek constitution prohibits the abusive exercise of fundamental rights.<sup>193</sup>

In addition, the model provided by the German *Grundgesetz* has been adopted by several of the new and nascent Central and Eastern European democracies, including Croatia,<sup>194</sup> Lithuania,<sup>195</sup> Poland,<sup>196</sup> Romania<sup>197</sup> and Slovenia.<sup>198</sup> In Russia the former Constitutional Court affirmed President Yeltsin's dissolution of the Communist Party.<sup>199</sup> However,

189. LA COSTITUZIONE DELLA REPUBBLICA ITALIANA [Constitution] art. XII(1) (Italy); CONSTITUCIÓN DE ESPAÑA [Constitution] art. 6 (Spain).

190. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [Constitution] art. 46(4) (Portugal).

191. Rainer Hofmann, *Die Rechtliche Stellung der Minderheiten in Finnland*, in 1 *DAS MINDERHEITENRECHT EUROPÄISCHER STAATEN* 118 (Jochen Abr. Frowein et al. eds., 1993) [hereinafter *MINDERHEITENRECHT*]. For a discussion of prohibitions on irredentist groups in Finland, see KLAUS TORNUDD, *FINLAND AND THE INTERNATIONAL NORMS OF HUMAN RIGHTS* 171 (1986).

192. Thilo Marauhn, *Die Rechtliche Stellung der Minderheiten in Österreich*, in *MINDERHEITENRECHT*, *supra* note 191, at 254.

193. SINTAGMA TIS ELLATHAS [Constitution] art. 25(3) (Greece); see Prodrimos Dagtoglou, *Der Mißbrauch von Grundrechten in der Griechischen Theorie und Praxis*, in ILIOUPOULOS-STRANGAS, *supra* note 146, at 103–16.

194. USTAV REPUBLIKE HRVATSKE [Constitution] arts. 6 & 43 (Croatia) (setting out prohibition procedure for all organizations that endanger the democratic constitutional order, independence, unity, or territorial integrity of the State).

195. LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 2(3) (Lithuania) (declaring "strictly forbidden" the establishment and activities of political parties "whose programme documents propogate and whose activities practice racial, religious, social class inequality and hatred, methods or authoritarian or totalitarian rule, methods of violent seizure of power, war and violent propoganda, violation of human rights and freedoms, or other ideas or actions which are incompatible with universally recognized norms of international law").

196. KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 84(3) (Poland) (granting the right of association subject to the condition that "[i]t shall be prohibited to set up and to participate in associations whose objective or activities threaten the social and political system or the legal order of the Republic of Poland"). In Poland, an existing political party may be banned only if a danger of violent behavior exists. See Mahulena Hoskova, *Die Rechtliche Stellung der Minderheiten in Polen*, in *MINDERHEITENRECHT*, *supra* note 191, at 299.

197. CONSTITUTIA ROMÂNIEI [Constitution] arts. 8(2) & 37(2) (Romania) (parties working against "political pluralism" are unconstitutional).

198. URADNI LIST REPUBLIKE SLOVENIJE [Constitution] arts. 63 & 160 (Slovenia) (prohibiting incitement "to national, racial, religious or other inequality and the encouragement of national, racial, religious or other hatred and intolerance").

199. 38 *KEESING'S RECORD OF WORLD EVENTS* 39,224 (1992).

in Bulgaria the Constitutional Court refused to declare unconstitutional a party supported mainly by the Turkish minority population. This decision is surprising, given that article 11(4) of the Bulgarian constitution expressly prohibits the formation of ethnically or religiously based political parties.<sup>200</sup>

### E. Conclusion

The foregoing analysis of state practice makes clear that some form of party prohibition procedure is common to most democratic systems. Even the procedurally based systems do not seem inconsistent with Rawls's observation that "[j]ustice does not require that men must stand idly by while others destroy the basis of their existence."<sup>201</sup> At the same time, democratic states have substantial differences in the treatment of extremist political actors.

Perhaps, to paraphrase Holmes, experience and not logic provides an explanation.<sup>202</sup> The United States, with little tradition of a fascist or monarchical right or a truly revolutionary left, generally adheres to a procedural tolerance confident in its ability to diffuse extremist threats through open debate.<sup>203</sup> In Germany, by contrast, the memory of the Nazis' rise to power during the Weimar era has created profound skepticism about the power of political competition to delegitimize extremist groups. In multi-ethnic states such as India, elections are often seen as challenges by sub-groups to the territorial integrity of the state in addition to or rather than expressions of individual preferences.<sup>204</sup> Limitations on ethnically based parties may result from this perceived threat.

International norms, which are the subject of the next section, obviously cannot assimilate all the vast diversity of this national experience. Yet there are at least two reasons why the variety of state practice just reviewed need not frustrate the development of international law in this area. First, we have noted there exists rough consensus at a general level on the need for some form of self-protection. This provides important common ground for adjudication of individual disputes. As human rights tribunals evaluate cases in this area, they

200. See Emilia Drumeva, *Das bulgarische Verfassungsgericht—Rechtsgrundlagen und erste Entscheidungen*, 53 ZAÖRV 112, 128–29 (1993).

201. RAWLS, *supra* note 67, at 218.

202. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1923 ed.) (1883).

203. See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 3–14 (1955).

204. For example, the overwhelming victory of the Awami League in the East Pakistani elections of December 7, 1970 on a platform of federative autonomy led directly to intervention by the Pakistani Army, counter-intervention by the Indian Army and, ultimately, to the birth of Bangladesh as an independent state. See generally SUBRATA ROY CHOWDHURY, *THE GENESIS OF BANGLADESH* 50–58 (1972).

will begin to give contour and detail to the general principles already formalized in human rights instruments by drawing on aspects of various national traditions.

The second reason for hope is precedent. Creating international law on issues of local concern without reference to the historical tradition of any one national community is not a problem unique to this area of human rights. In fact, it inheres in every human rights issue. The response of human rights law, by-in-large, has been to work at legitimating certain minimum standards of conduct as universal, though at the same time leaving room for local traditions not inconsistent with such guarantees of basic rights. An international regime to protect democracies may also emerge by following this pattern.

## V. THE STATE OF INTERNATIONAL LAW ON THE QUESTION OF ANTI-DEMOCRATIC POLITICAL PARTIES

Contemporary international law favors the substantive view of democracy without entirely rejecting the procedural view. Accordingly, the primary focus of norms on the subject lies in prescribing limits on the potentially abusive exercise of human rights. This section focuses on the nature of these limits. First, we will address the general permissibility of substantive restrictions on an open democratic process. Second, we will explore the standards to which restrictions on civil and political rights must conform to remain democratic. Finally, we will review the permissibility of restrictions imposed during a state of emergency. Since the democratic entitlement derives primarily from global and regional human rights treaties, it is these treaties which will be the main sources of international law on this issue.

### *A. Substantive Democracy in the Political Covenant and Other Human Rights Treaties*

All comprehensive human rights instruments provide that certain key rights, normally deemed essential to effective political participation, may be restricted when "necessary in a democratic society." Article 22(2) of the Political Covenant, protecting the freedom of association, provides a typical example of such a provision:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.<sup>205</sup>

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205. Political Covenant, *supra* note 5, art. 22(2). *See also* American Convention, *supra* note 5,

Clauses permitting the restriction of these rights for the protection of democratic society appear in articles concerning public access to criminal trials,<sup>206</sup> the right of assembly,<sup>207</sup> the right to privacy,<sup>208</sup> and the freedom of religion and beliefs.<sup>209</sup> The Political Covenant allows restrictions on the freedom of movement necessary "to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, as long as the restrictions imposed are consistent with the other rights recognized in the present Covenant."<sup>210</sup> Similar restrictions are permitted on the freedom of expression.<sup>211</sup>

The rights to vote and to be elected are not subject to a "democratic society" clause; restrictions on these rights are measured by a test of reasonableness.<sup>212</sup> If these provisions permitted a government to restrict an anti-democratic party's freedoms of expression and of association, the party would be shut out of an electoral process.

In a comprehensive study, Oscar Garibaldi concludes that the notion of "democracy" used by the Political Covenant's drafters in these clauses is one describing a traditional Western society in which the panoply of rights outlined in human rights instruments is respected in practice.<sup>213</sup> If this view is correct, then human rights instruments do not directly answer the question of whether restricting the rights of anti-democratic actors is permissible in a democratic society. Rather, the answer lies in an evaluation of the practice of those societies. As the preceding section has shown, the banning of certain groups or political parties is frequently considered necessary for the survival of democratic systems.<sup>214</sup> According to Garibaldi's view, such restrictions are to be considered "necessary in a democratic society" for purposes of international law.

art. 32(2) ("The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."). See generally Oscar M. Garibaldi, *On the Ideological Content of Human Rights Instruments: The Clause "In a Democratic Society"*, in *CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN 23* (Thomas Buergerthal ed., 1984).

206. Political Covenant, *supra* note 5, art. 14(1); European Convention, *supra* note 5, art. 6(1).

207. Political Covenant, *supra* note 5, art. 21; European Convention, *supra* note 5, art. 11(2); American Convention, *supra* note 5, art. 15.

208. European Convention, *supra* note 5, art. 8(2).

209. *Id.* arts. 2(3) & 2(4); American Convention, *supra* note 5, art. 22(3).

210. Political Covenant, *supra* note 5, art. 12(3).

211. Political Covenant, *supra* note 5, art. 19(3); European Convention, *supra* note 5, art. 10(2); American Convention, *supra* note 5, art. 13(a).

212. *Id.* art. 25.

213. Garibaldi, *supra* note 205, at 65. Similarly, John Humphry suggests that "the General Assembly meant by democratic society the kind of society in which the rights enunciated by the Universal Declaration of Human Rights are recognized and respected." John Humphry, *The Just Requirements of Morality, Public Order and The General Welfare in a Democratic Society*, in *THE PRACTICE OF FREEDOM 137, 147* (Ronald St. J. MacDonald & John P. Humphry eds., 1979).

214. See discussion *infra* part IV.

That the Political Covenant does not itself provide a clear picture of what constitutes a democratic society is confirmed by an episode in its drafting history. Early in the process, the Soviet Union offered two amendments that would have embraced an extreme version of the substantive view. The first provided that all organizations "of a Fascist or anti-democratic nature" shall be "forbidden by law."<sup>215</sup> The second would have explicitly restricted those organizations' freedoms of assembly and of association "in the interests of democracy."<sup>216</sup> The Soviets argued that anti-democratic organizations "could not be allowed to assemble and associate for the purpose of overthrowing democracy."<sup>217</sup> Both proposals were rejected. While the states opposing these amendments were primarily concerned that their inclusion would legitimize one-party Communist rule, their defeat also suggests that the Political Covenant as a whole cannot be said to embody a consensus (anti-fascist or otherwise) on the substantive elements of a democratic society.

Despite the outward-looking focus of the "democratic society" clauses, other provisions of the Covenant address the legitimacy of self-protection legislation more directly. Article 5(1) of the Covenant is a manifestation of substantive democratic principles:

Nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.<sup>218</sup>

This article, and its predecessor in the Universal Declaration,<sup>219</sup> emerged from the drafters' memory of fascist and other extremist parties gaining power in pre-war Europe through the exercise of protected political rights.<sup>220</sup> In the words of the French delegate to the

215. *Draft Covenant on Human Rights*, U.N. ESCOR, 5th Sess., 222d mtg., U.N. Doc. E/CN.4/222 (1949).

216. *Draft International Covenant on Human Rights and Measures of Implementation*, U.N. ESCOR, 8th Sess., Agenda Item 4, U.N. Doc. E/CN.4/L.126 (1952).

217. U.N. ESCOR, 8th Sess., 325th mtg. at 4, U.N. Doc. E/CN.4/SR.325 (1952) (statement of Mr. Morozov).

218. Political Covenant, *supra* note 5, art. 5(1). See also European Convention, *supra* note 5, art. 17; American Convention, *supra* note 5, art. 29.

219. Article 30 of the Universal Declaration provides:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Universal Declaration, *supra* note 5, art. 30.

220. U.N. GAOR 3d Comm., 3d Sess., 156th Mtg. at 673, U.N. Doc. A/C.3/SR.156 (1948) (statement of French delegate); *United Nations, Economic and Social Council, Commission on Human Rights, Drafting Committee*, 2d Sess., 28th Mtg. at 5, U.N. Doc. E/CN.4/AC.1/SR.28 (1948)

U.N. Human Rights Commission, "[t]he edifice of liberty which was erected in the Covenant must not be capable of being used against liberty itself."<sup>221</sup> Democracies should not be forced to wait until the very moment a totalitarian take-over is imminent in order to protect themselves. Rather, they should be able to act preemptively against a menacing group.<sup>222</sup>

Human rights tribunals have issued a number of opinions construing article 5(1)-type clauses and have confirmed their role as protection against erosion of democratic systems from within. In a 1984 decision the U.N. Human Rights Committee held that organizing a fascist party was an act "removed from the protection of the Covenant by article 5 thereof."<sup>223</sup> Similarly, the European Court of Human Rights has held that a virtually identical article of the European Convention was designed "to prevent totalitarian groups from exploiting in their own interest the principles enunciated by the Convention."<sup>224</sup>

Additionally, article 20 of the Covenant requires states to prohibit propaganda for war and the advocacy of national, racial, or religious hatred.<sup>225</sup> In a similar vein, the International Convention on the Elimination of all Forms of Racial Discrimination obligates states to "declare

(statement of Lebanese delegate); *United Nations, Economic and Social Council, Commission on Human Rights*, 5th Sess., 123d Mtg. at 8, U.N. Doc. E/CN.4/SR.123 (1949) (statement of Lebanese delegate). This fear was not restricted to parties of the right. By 1950 some 30 states had outlawed local communist parties. Auerbach, *supra* note 64, at 176 n.12.

221. U.N. Doc. E/CN.4/SR.123, *supra* note 220, at 8.

222. The French delegate explained that the drafters

had wished to give a preventive sense to article 28 [the predecessor of Universal Declaration art. 30], considering that it was preferable to prevent the final act which, in general, was the outcome of a long activity. In the case of nazism and fascism, for example, the activity had been evident for many years. If the rights and the freedoms laid down in the declaration of human rights were really to be protected, provision should be made to prevent, at the very beginning, any activity aimed at their destruction.

U.N. GAOR 3d Comm., 3d Sess., 156th Mtg. at 673, U.N. Doc. A/C.3/SR.156 (1948); *see also United Nations, Economic and Social Council, Commission on Human Rights, Drafting Committee*, 2d Sess., 28th Mtg. at 5, U.N. Doc. E/CN.4/AC.1/SR.28 (1948) (statement of Lebanese delegate) (predecessor of Political Covenant art. 5(1) was "based on the concept of checking and preventing the growth of nascent nazi, fascist or other totalitarian ideologies.")

223. *M.A. v. Italy*, Communication No. 117/1981, *reprinted in 2 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL*, U.N. Doc. CCPR/C/OP/2, at 31, 33 (1984) [hereinafter *SELECTED DECISIONS*].

224. *Lawless Case (Merits)*, 1961 Y.B. Eur. Conv. H.R. 438, 450 (Eur. Ct. H.R.); *see also De Becker Case*, 123 Eur. Comm'n. H.R. (ser. B) at 137 (1962) (article 17 of European Convention "applies only to persons who threaten the democratic system of the Contracting Parties"); *Glimmerveen & Hagenbeck v. Netherlands*, 1979 Y.B. Eur. Conv. H.R. 366 (Eur. Comm'n on H.R.) (similar holding); *Kommunistische Partei Deutschlands*, 1957 Y.B. Eur. Conv. H.R. 219 (Eur. Comm'n H.R.).

225. Political Covenant, *supra* note 5, arts. 20(1) & 20(2); *see J.R.T. & W.G. Party v. Canada*, Communication No. 104/1981 (1983), *reprinted in SELECTED DECISIONS, supra* note 223, at 28 [hereinafter *J.R.T.*] (anti-Semitic messages "clearly constitute the advocacy of racial or religious hatred" and must be prohibited under article 20(2)). Some Western states entered reservations as to article 20, but these may be seen as limitations on its potential reach and not on the principle

illegal and prohibit organizations" that promote or incite racial hatred.<sup>226</sup> These clauses suggest that the drafters of these instruments did not share the proceduralists's unwavering confidence in the power of open debate to discredit insidious ideas. Such ideas, these instruments suggest, have real power and citizens in an open society must in some circumstances bear responsibility for the potentially destructive consequences of their advocacy.<sup>227</sup>

Also relevant is approval by various United Nations organs of self-protection provisions in constitutions and electoral laws whose drafting they have supervised or approved. In Namibia,<sup>228</sup> Cambodia,<sup>229</sup> and Mozambique,<sup>230</sup> the UN has approved electoral standards which allowed for the exclusion of violent or anti-democratic groups from the electoral process. The Secretary-General recently lent normative significance to these actions when he stated that in providing electoral assistance the United Nations seeks to uphold "the relevant principles enunciated in fundamental international human rights agreements."<sup>231</sup>

it embodies. While the European Convention does not contain a comparably explicit provision, it has been interpreted to permit anti-hate propaganda laws. See Glimmerveen & Hagenbeck, *supra* note 224.

226. Race Convention, *supra* note 5, at 219.

227. The U.N. Human Rights Committee, in a comment on these provisions, explained that the right of free expression "carries with it special duties and responsibilities." U.N. GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 40, at 110, U.N. Doc. A/38/40/Annex (1983).

228. The Namibian Constitution provides that political parties shall be "subject to such qualifications prescribed by law as are necessary in a democratic society." NAMIB. CONST. art. 17(1).

229. The Paris Peace Accords, which set out a comprehensive scheme of human rights guarantees as part of a new political order in Cambodia, state that parties competing in the supervised elections must adopt platforms "consistent with the principles and objectives of the Agreement on a comprehensive political settlement." *Final Act of the Paris Conference on Cambodia*, U.N. GAOR, 46th Sess., Annex, at 3, U.N. Doc. A/46/608/Annex (1991), reprinted in 31 I.L.M. 174, 198 (1992).

230. The General Peace Agreement, which sets out principles to guide the first post-war elections, provides that freedoms of expression, association and political activity "shall not extend to the activities of unlawful private paramilitary groups or groups which promote violence in any form or terrorism, racism or separatism." *General Peace Agreement for Mozambique*, U.N. Doc. S/24635/Annex, at 13 (1992).

231. Electoral Guidelines Report, *supra* note 7, at 1. The one U.N. mission that seems to run counter to this trend is the supervision of a plebiscite in Malawi. There, the Malawian people were asked whether they wished to continue the one-party rule of President-for-life H. Kamuzu Banda. *Report of the U.N. Technical Team on the Conduct of a Free and Fair Referendum on the Issue of a One Party/Multiparty System in Malawi (15-21 Nov. 1992)*, April 14, 1993, U.N. Doc. A/48/120. Malawi has one of the worst human rights records in Africa and there was little doubt that a vote to continue one-party rule would result in more of the same. HUMAN RIGHTS WATCH WORLD REPORT 1993 25-30 (1992). Yet in agreeing to provide advice on the campaign for and structure of the referendum, and to monitor the vote itself, the U.N. appeared ready to accept a decision not requiring multiparty participation. In many ways such an outcome would resemble the election of an anti-democratic party. As it turned out the Malawian people voted overwhelmingly against one-party rule and so the question remained academic. Reuters News Service, *Opposition Says It Won Vote to Oust Dictator in Malawi*, N.Y. TIMES, June 16, 1993, at A13.

In sum, article 5(1) of the Covenant, accompanying U.N. and regional practice, and state practice with respect to "democratic society" clauses all suggest that a state may introduce party-prohibition procedures or equivalent restrictions, such as stripping individuals of certain fundamental rights, under certain circumstances.

### *B. The Limits to Restrictions on Civil and Political Rights*

More difficult than establishing the principle that anti-democratic actors may be excluded from the electoral process is determining where, according to human rights law, the precise limits of this power lie. What standard must a government meet to justify an exclusion? The answer lies in interpretation of human rights instruments as informed by state practice.

#### 1. The Applicable Standard

##### a. The Abuse Clause in Context

The Political Covenant seems not to contain any standard regarding restrictions on the rights of anti-democratic actors.<sup>232</sup> Accordingly, the Human Rights Committee held that the (re)establishment of a fascist party in Italy was "removed from the protection of the Covenant by article 5 thereof."<sup>233</sup> In a similar vein, the European Commission of Human Rights held that the equivalent provision of the European Convention was "of a more general nature" than the Convention's "necessary in a democratic society" limitation clause, therefore making that clause inapplicable to restrictions on anti-democratic actors.<sup>234</sup> These rather categorical decisions would seem to suggest that restrictions on anti-democratic parties are so clearly permitted by human rights treaties that the restrictions need not be justified by any formula or threshold of proof.

But such an interpretation cannot be correct. If a government were permitted to deprive a political actor of protected rights merely by labelling him "anti-democratic," then these treaties would lose much of their practical effect.<sup>235</sup> Many of the Covenant's provisions, particu-

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232. Article 5(1) simply states that those who "engage in any activity or perform any act aimed at the destruction of any of the [protected] rights and freedoms" enjoy no independent right to do so. Political Covenant, *supra* note 5, art. 5(1).

233. *M.A. v. Italy*, *supra* note 223, at 33.

234. *Kommunistische Partei Deutschlands*, *supra* note 224, at 224.

235. Frowein argues that the invocation of article 17 of the European Convention must be very carefully reviewed lest its application should itself become a danger to the democratic system. JOCHEN ABR. FROWEIN, *EUROPÄISCHE MENSCHENRECHTSKONVENTION—EMRK-KOMMENTAR* 339 (Jochen Frowein & Wolfgang Peukert eds., 1985).

larly those regarding freedom of expression and conscience, are designed specifically to prevent the uncontrolled suppression of political dissent based on spurious claims of subversion and "anti-state" activity. Consequently, the reasoning in the two decisions cited above should not be interpreted too literally. Both tribunals were confronted with cases of party prohibition for the first time, and in both the outcome was never in doubt: the Italian Fascist party and German Communist party had always belonged to a small group of obvious candidates for prohibition proceedings. It is not surprising, therefore, that both tribunals were concerned primarily with establishing the principle of allowing exclusions rather than delineating its contours and possible limitations.

When confronted with more ambiguous cases, however, tribunals must move beyond such a simplistic interpretation. Article 5 of the Political Covenant and its regional equivalents stand in the larger context of the entire instruments, and they must not be given interpretations which would frustrate the essence of the rights guaranteed. It necessarily follows that states cannot enjoy unlimited powers to exclude political actors under abuse clauses such as article 5.

The European Court has rendered a decision in an analogous setting which may serve as a useful guide in this regard. In language which resembles that of Article 5(1), Article 10(1)(3) of the European Convention declares that the duty to respect the freedom of expression "shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." Despite suggestions to the contrary, the European Court of Human Rights refused to interpret this so-called "broadcasting clause" in isolation but required that its application be considered in the context of the Convention's ordinary limitation clause.<sup>236</sup> This clause, which appears in paragraph 2 of Article 10, allows only those restrictions which are "necessary in a democratic society." The court acknowledged that the broadcasting clause itself states only that licensing systems may be established; it sets no limits on the scope of the clause and thus its potential abuse. The absence of such limits in the text, however, does not mean "that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole."<sup>237</sup>

The European Court thus recognized that to interpret the broadcasting clause in isolation would not be consistent with a broader purpose

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236. *Groppera Case*, 173 Eur.Ct.H.R. (ser. A) at 24 (1990); see also *Antronic Case*, 173 Eur.Ct.H.R. (ser. A) at 24 (1990).

237. *Id.* This holding was reaffirmed in the *Informationsverein Lentia Case*, 176 Eur.Ct.H.R. (ser. A) at 29-33 (1993).

of the treaty, which was to further free expression. This holding embodies a broader rule of treaty law: a provision must be interpreted in light of its context and of the treaty's object as a whole.<sup>238</sup> The court's reasoning may therefore be applied to the Political Covenant. Assuming that requiring no standard of proof for the application of Political Covenant article 5 is untenable, two standards suggest themselves as interpretive devices to limit recourse to the abuse clause. These are the ordinary limitation clauses of the rights at issue: "necessary in a democratic society" (articles 14(1), 21, 22(2)) and "without unreasonable restrictions" (article 25).

Of course such a borrowing of ordinary limitation clauses cannot serve to frustrate the ultimate purpose of article 5, which is to prevent anti-democratic actors from using protected liberties as a vehicle to realize their goals. Thus, the limitations clauses can only fit comfortably with article 5 if they permit governments sufficient flexibility to confront such threats. Accordingly, we will treat these clauses as points of interpretive departure rather than literal injunctions.

Such an approach does not mix mutually incompatible rules.<sup>239</sup> Traces of this approach can be found in the opinion of the Human Rights Committee in the Italian case, *M.A. v. Italy*,<sup>240</sup> and in the opinion of the European Commission of Human Rights in the *De Becker Case*.<sup>241</sup>

#### b. The Standards of Reasonableness and Necessity

What is the nature of these two alternative standards? The difference between "reasonableness" and "necessity" emerges from a distinction basic to the Covenant as a whole. As is suggested by its title, the Covenant guarantees both "civil" and "political" rights. Civil rights, such as freedom of expression and association, are those which guarantee individuals or groups certain freedoms *from* state interference. Political rights, such as the right to free and fair elections, are those which facilitate participation *in* public affairs.<sup>242</sup> The difference is not merely

238. Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(1), 1155 U.N.T.S. 331.

239. See Frowein, *supra* note 235, at 340.

240. *M.A. v. Italy*, Communication No. 117/1981, reprinted in 2 SELECTED DECISIONS, *supra* note 223, at 33 (1984) ("[The] acts . . . were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18 (3), 19 (3), 22 (2) and 25 of the Covenant").

241. *De Becker Case*, *supra* note 224, at 137 ("[I]n one sense, then, Article 17 is of somewhat limited scope: it applies only to persons who threaten the democratic system of the Contracting Parties and then to an extent strictly proportionate to the seriousness and duration of such a threat, as is also confirmed by article 18 [prohibiting restrictions on rights for reasons other than those for which they have been prescribed]."). See also Glimmerveen & Hagenbeck, *supra* note 224, at 380-82 (carefully reviewing invocation of Article 17 by the Dutch Government).

242. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: A CCPR COMMENTARY 436 (1993).

semantic, since the Covenant provides for different types of restrictions in each category. While restrictions on most "civil rights" are permitted only if "necessary in a democratic society," the right to democratic governance in article 25 is only guaranteed "without unreasonable restrictions." The Covenant's drafting history suggests that the restrictions clause of article 25 was intended primarily to cover issues of eligibility to vote, such as age and mental capacity.<sup>243</sup> But neither the legislative history nor the text precludes use of this clause to evaluate more far-reaching restrictions on the right to be elected, such as excluding a party from taking part in elections. A candidate's obligation to respect the democratic system may be seen as a consequence of "the higher responsibility associated with election to a public office,"<sup>244</sup> and thus may be subject to the limitations clause in article 25. Given the clear inapplicability of the "necessary in a democratic society" standard to article 25 rights, it seems logical to look to the more lenient "without unreasonable restrictions" standard in regard to the right to political participation.<sup>245</sup>

According to this distinction between the "civil" right of association and the "political" right of standing for election, if a political party is excluded only from taking part in elections, such a restriction should be measured according to the "reasonableness" standard. Strictly speaking, the freedoms of expression (Covenant article 19) and of association (Covenant article 22) are not at issue, and so neither is the "necessity" standard. As rights to be free from interference, they do not involve an affirmative right of participation. If, however, *all* activities of a political party are prohibited, both the right of the party's members to associate (Covenant article 22(1)) and their freedom of expression (Covenant article 19) would be implicated. Such a measure would require additional justification under the stricter standard of "necessity in a democratic society."

One objection to applying different standards of review to the exclusion of political parties from elections on the one hand and their total prohibition on the other is that the rights in question are not readily or neatly distinguishable. After all, the freedoms of expression and association derive much of their value from the roles they play in the electoral process. Similarly, the right to political participation is meaningless if it is not preceded and accompanied by an open and vigorous debate between all relevant political actors.

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243. *Id.* at 445; see Fox, *supra* note 3, at 553-54.

244. NOWAK, *supra* note 242, at 446-47.

245. On the distinction between "unreasonableness" and stricter standards in administrative law, see Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, in TEL AVIV STUDIES IN LAW 131-36 (1992).

Yet making this distinction does not artificially disassociate one right from the other. It simply recognizes differences in the respective severity of each deprivation and adjusts the legal standard accordingly. The European Commission of Human Rights recognized such a gradation of political rights when it held that the right to vote "does not give the citizen a right to demand that all political parties competing in an election be granted radio and television coverage or be granted the same amount of such coverage."<sup>246</sup> It thereby rejected a challenge to Irish legislation denying use of the broadcast media to representatives of known terrorist organizations.<sup>247</sup> Following this principle, human rights law may require a stricter standard of review when a political group is banned from the political process altogether, as opposed to its mere exclusion from an election.

This distinction is also embodied in the difference between German and Israeli law.<sup>248</sup> In Germany, certain radical groups cannot engage in public debate at all, while in Israel such groups are excluded only from the electoral process. That both systems can be supported by rational arguments suggests that the distinction we propose represents an important value judgment—on which these two legitimate democratic regimes differ—concerning the capacity of particular democratic societies to withstand ideological assault.

## 2. Refining "Reasonable" and "Necessary" Restrictions

The difference between a strict standard of "necessity in a democratic society" (concerning restrictions on civil rights) and a more lenient standard of "reasonableness" (concerning restrictions of the political right of democratic governance), however, is not self-evident; further refinement is necessary. If a restriction must be "necessary in a democratic society," it must also pass a test of proportionality. The requirement that a response be proportional, if it is claimed as necessary, appears in international law in a variety of contexts.<sup>249</sup> In human rights law, the proportionality principle "requires that the type and intensity of an interference be absolutely necessary to attain a purpose."<sup>250</sup>

If, on the other hand, a restriction must only be "not unreasonable," interpretations of this term in the Anglo-American tradition suggest that measures are justified as long as they are not "capricious or

246. *Betty Purcell et al. v. Ireland*, App. No. 15404/89, 70 Eur. Comm'n. H.R. Dec. & Rep. 262 (1991), reprinted in 12 HUM. RTS. L.J. 254, 260 (1991).

247. *Id.*

248. See discussion *supra* parts IV.D.1–2.

249. For example, the two are essential elements of a state's traditional right of self-defense. See *Military and Paramilitary Activities in and Against Nicaragua: Merits (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94 (June 27).

250. NOWAK, *supra* note 242, at 211, 379 & 394.

arbitrary, manifestly unjust, made in bad faith, oppressive etc."<sup>251</sup> Thus, a proportionality standard proceeds from the assumption that every restrictive measure must be shown to be necessary, while a reasonableness standard requires only that the decision be not clearly unjustifiable. In the first case, the state carries a heavy burden of proof to justify its restrictive measure, while in the second, the party affected by the restrictive measure must be able to identify a clearly verifiable error of judgment by the state. Thus, a proportionality standard is clearly more favorable to (i.e., less restrictive of the rights of) parties and citizens who are subject to restrictions by the state.

Two factors must be considered, however, which blur this seemingly bright line between the two standards. First, in human rights law, the proportionality principle is generally mitigated by a "margin of appreciation" accorded to state parties by international supervisory organs.<sup>252</sup> The scope of the margin depends on the nature of the activities involved.<sup>253</sup> It is particularly generous with regard to actions which domestic authorities regard as critical to the prevention of disorder or crime.<sup>254</sup> Thus, a wide margin of appreciation would likely be accorded to a determination that a political actor constituted a threat to the survival of the democratic system. The presumption against the permissibility of restrictions is thereby largely reversed.

Second, the standard of "reasonableness" may become more rigid depending on the nature of the right or the type of restriction at issue. For example, the Human Rights Committee strengthened the "reasonableness" standard of article 25 of the Political Covenant by introducing the principle of proportionality in a case in which an individual, for political reasons, had been deprived of his right to vote and to be elected for fifteen years.<sup>255</sup> Although these mitigating factors do not make the two standards indistinguishable, they do suggest that together they constitute a sliding scale which permits certain more or less far-reaching restrictions on the rights at issue. The application of this sliding scale in particular cases must take place with due regard to the usual practice of democratic states.

251. Zamir, *supra* note 245, at 131.

252. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 21-23 (1976) ("margin of appreciation" referring to a limited deference accorded to domestic authorities in their judgment on whether certain "restrictions" and "penalties" are "necessary in a democratic society" pursuant to article 10, section 2 of the Convention).

253. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21-22 (1981).

254. *X v. United Kingdom*, App. No. 3898/68, [1971] 13 Y.B. Eur. Conv. on H.R. 666, 684.

255. *Pietrararoia v. Uruguay*, Communication No. 44/1979, reprinted in 1 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL, at 76, 79 U.N. Doc. CCPR/C/OP/1 (1981).

This analytical framework suggests the following hierarchy. The most severe and suspect restriction on the right to free elections is the establishment of a one-party system.<sup>256</sup> As the Human Rights Committee has recognized, the breadth of restrictions involved in silencing all organized political opposition renders the one-party state unreasonable per se.<sup>257</sup> A less severe type of restriction is to exclude from elections those parties or individuals which pose a threat to the state's democratic form of governance. Since article 5 of the Covenant expressly legitimizes the fight against enemies of democracy, such exclusions are permissible under a less stringent standard of "reasonableness." The total prohibition of a political party, on the other hand, must satisfy a higher level of scrutiny since such a measure impinges not only on the right to free and fair elections but also the freedom of association, a right which is subject to the standard of "necessity in a democratic society." But given the margin of appreciation accorded to governments in such complex and difficult cases, and given the overriding importance of the abuse exception in article 5 of the Covenant, this difference may not always be very great. Finally, because individuals typically pose less of a threat to the democratic system than organized groups, restrictions on their rights are subject to stricter scrutiny.

Under these standards, it appears that a fundamentalist religious party which expressly denied the legitimacy of democratic rule and instead promised that once in power, the highest secular authority would derive from certain sacred texts as interpreted by unelected "wise men" would fall into the category of excludable anti-democratic actors.

### 3. Forms of Conduct Prohibitible by Article 5

What forms of conduct justify application of article 5 as interpreted above? We focus here on the total prohibition of a political party, which is far more common in national legal systems than the Israeli practice of mere exclusion from the electoral process. Since such a measure is subject to a rather low level of scrutiny ("reasonableness"), it might seem appropriate to require that such groups at least engage in specific destructive "acts" or "activity" to justify state action against them. Merely holding anti-democratic opinions would not be sufficient under this standard. This view finds some support in the drafting history of the Universal Declaration of Human Rights and among some commentators.<sup>258</sup>

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256. See Fox, *supra* note 3, at 556-60.

257. *Bwalya v. Zambia*, *supra* note 12, at ¶ 6.6.

258. U.N. GAOR, 3d Comm., 3d Sess., 155th mtg. at 667, U.N. Doc. A/C.3/SR.155 (1948)

The problem with this view, however, is that the Political Covenant itself, in article 20, requires that governments punish individuals or groups on the ground of certain offensive beliefs. Moreover, a fair number of established democracies have at times considered it necessary to prohibit political groups or parties on much lesser grounds than a demonstrable threat to the system. In France, secessionist goals alone were sufficient to ban certain groups.<sup>259</sup> In West Germany, a crypto-Nazi party was banned without the government having to show that it posed an actual danger.<sup>260</sup> In Israel, certain parties may be excluded from elections if their goal is primarily to spread racist propaganda.<sup>261</sup> In the United States, the Supreme Court in the 1950s diluted its danger oriented standard to such a degree that one can legitimately ask whether it had not become mainly fictitious.<sup>262</sup> And on the international plane, the European Commission of Human Rights has expressly confirmed that the abuse-prohibition clause of article 17 of the European Convention would justify the prohibition of a party merely upon evidence of anti-democratic goals, even if it were established that the party would limit its activities to acquiring power by legal means.<sup>263</sup>

This practice suggests that a party may reasonably be considered a threat to democratic institutions based upon (1) its members holding anti-democratic beliefs, *and* (2) a manifest intent to act on those beliefs through the vehicle of the party. The evidence need not include the commission of violent acts directed against the democratic infrastructure (though such acts would certainly constitute powerful evidence of a specific intent). The fact that a group organizes itself into a political party—thus by definition seeking to implement its agenda into law—might permit an inference of intent to be drawn. Under this formulation, small parties as well as large movements that have made significant electoral gains may be subject to restriction. The legitimacy of this decidedly preemptive approach, applicable to large and small groups alike, traces its roots to two aspects of the Weimar experience. First was the mistaken belief on the part of political moderates that either Hitler would not pursue his stated agenda once in power, or that his coalition partners would not permit him to do so. Second was

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(statement of Mr. Jiménez de Aréchaga, Uruguay) (“[The word ‘acts’ did not include opinions, but did include conspiracy and attempts, whether successful or not, to destroy any of the rights and freedoms prescribed in the declaration.”); *see also* Thomas Buergenthal, *To Respect and Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS* 72, 88–89 (Louis Henkin ed., 1981); NEHEMIAH ROBINSON, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 79 (1950).

259. *See* discussion *infra* part IV.C.1.

260. *See* discussion *infra* part IV.D.1.

261. *See* discussion *infra* part IV.D.2.

262. *See* discussion *infra* part IV.B.

263. *Kommunistische Partei Deutschlands*, *supra* note 224, at 224–25.

the practical impossibility of restricting or banning the Nazi Party after its representation in the Reichstag jumped from 12 to 107 seats in the elections of September 1930, thereby making it the second largest party in Germany.<sup>264</sup>

While readers from the United States in particular may find such inferences of intent difficult to accept, it is important to remember that the entire problem of anti-democratic parties arises precisely because those parties are *not* engaged in anti-state violence. There is no question that states may criminalize and punish acts of revolutionary terrorism. What is involved here is a more subtle threat, one which becomes manifest only when citizens organize groups with professed anti-democratic goals and demonstrate an intention to act on those goals. A finding of requisite intent cannot help but draw upon statements of belief, delineations of goals and exhortations to support the cause. In the end, deciding that a specific anti-democratic intention indeed exists is a difficult but essential judgment call for the state and the international community to make.

#### 4. A Meaningful Formula

It would appear that the abuse prohibition clauses and their "margins of appreciation" permit governments to ban political parties on the basis of their organization around certain professed beliefs that are considered inherently dangerous. Can this standard be said to embody real, judicially identifiable limits on state power in this area? This question becomes particularly acute if a state claims, as some have, that its continued existence as a democracy is threatened not by one, but a multitude of anti-democratic actors (nationalist, separatist, religious fundamentalist, communist, racist, etc.). In Mozambique, for example, the United Nations has agreed to monitor elections which will include only parties whose objectives are "non-regional, non-tribal, non-separatist, non-racial, non-ethnic and non-religious."<sup>265</sup> Do the ordinary restriction clauses of the Covenant permit such an extreme narrowing of the political spectrum?

The answer will necessarily be context specific. Only in cases of extreme political instability such as Mozambique may it be considered "reasonable" or "necessary" for governments to radically narrow the range of political actors; such measures are clearly not permitted in all cases. A meaningful formula, which is applicable to all cases, must proceed along the following lines. The "margin of appreciation" entitles the government to determine, in the first instance, whether a

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264. NICHOLLS, *supra* note 33, at 124.

265. *General Peace Agreement for Mozambique*, *supra* note 230, at 9.

particular political group, by its words or deeds, is sufficiently dangerous as to pose a threat to the continued existence of the state's democratic system. Such discretion, however, goes hand in hand with the capacity of international organs with supervisory authority over human rights issues to decide whether the government has "exercised its discretion reasonably, carefully and in good faith."<sup>266</sup>

This formula is particularly well-suited as a global standard.<sup>267</sup> It is similar to the traditional "reasonableness standard" which is used in British and American administrative law.<sup>268</sup> Its use is justified for several reasons: it has a textual basis in article 25 of the Covenant ("no unreasonable restrictions"); it is widely used in other legal systems—under different names<sup>269</sup>—as a more lenient standard of review for decisions which involve highly complex assessments of facts and prediction of future developments; it is abuse-oriented and therefore complementary to the abuse clause of article 5 of the Covenant; and it allows a degree of supervision which adapts to the particular facts of a case.

Important test cases for such a standard have arisen from Turkey's recent prohibition of moderate Kurdish oriented parties. Some of these cases are currently pending before the European Commission of Human Rights.<sup>270</sup> The case of the Turkish Socialist Party is particularly instructive. This party distanced itself from any form of separatism but nonetheless advocated constitutional amendments that would transform the unitary Turkish state into a two-member federal state consisting of a Turkish part and a Kurdish part.<sup>271</sup> Since the Turkish constitution prohibits the exercise of fundamental rights for the purpose of destroying the "indivisible integrity of the territory and the people and the existence of the Turkish state,"<sup>272</sup> the Turkish Constitutional Court held that the party could be banned.<sup>273</sup> In its judgment it also referred to article 17 of the European Convention and held that

266. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 36 (1979).

267. While this standard has been rejected by the European Court of Human Rights in *Sunday Times* as granting too much discretion to governments under the European Convention, the diversity of political systems and traditions outside Europe makes a broad grant of discretion highly appropriate.

268. *But cf.* Zamir, *supra* note 245.

269. In France, for example, the equivalent standard would be the "erreur manifeste d'appréciation." See RECUEIL DES DÉCISIONS DU CONSEIL D'ÉTAT 611 (1970) (*Société anonyme "Librairie François Maspero"*). For a comparative evaluation, see Georg Nolte, *Der Wert formeller Kontrollpflichtenmaßstäbe*, in *DIE KONTROLLDICHTEN BEI DER GERICHTLICHEN ÜBERPRÜFUNG VON HANDLUNGEN DER VERWALTUNG* 278 (Jochen Abr. Frowein ed., 1993).

270. We are grateful to Dr. Jörg Polakiewicz of the Directorate of Legal Affairs of the Council of Europe for providing us with this information.

271. Christian Rumpf, *Das Verbot der Sozialistischen Partier durch das türkische Verfassungsgericht*, 6 *ZEITSCHRIFT FÜR TÜRKISTUDEN* (forthcoming Jan. 1995) (manuscript on file with authors); see also the summary of the decision in the Turkish Constitutional Court concerning the prohibition of the Freedom and Democracy Party (ÖZDEP) in 2 *BUL. CONST'L CASE LAW* (1994).

272. *Id.*

273. *Id.*

it was "beyond doubt" that the activities of the Socialist Party violated the provisions of the Convention.<sup>274</sup> One judge in dissent argued that this question was far from clear.<sup>275</sup> This would indeed seem to be a borderline case, requiring the European Court of Human Rights to engage in a thorough review of the facts.

### 5. Procedural Limitations

Unfortunately, substantive standards alone cannot ensure that governmental overreaching will not occur, particularly when the state concerned does not allow its citizens to bring individual petitions under the Covenant's Optional Protocol. This leaves significant potential for abuse which can only be ameliorated if a government must respect certain procedural requirements before implementing a banning order.

That procedural steps must be followed is indicated by the practice of both states and international organs. Each democratic state we have surveyed provides for judicial review of prohibition decisions.<sup>276</sup> The Indian Supreme Court even declared that a law empowering the government to dissolve political organizations would be invalid if it did not provide for judicial review.<sup>277</sup> This requirement is particularly relevant to the formulation of a global standard, coming as it does from a court in a developing country with a multi-ethnic and multi-religious population. On the international plane, the Human Rights Committee has already taken a first step toward exercising review powers by imposing a strict burden of proof on a state that has failed to give clear reasons for depriving an individual of his political rights, including the right to be elected.<sup>278</sup> Both state and international practice suggest, therefore, that party prohibitions are only justifiable under the Covenant if their validity can be tested before an independent tribunal or other body. Such an institutional safeguard ensures that the final decision on a ban will not come from the political branches of government, which may have a direct stake in outlawing an opponent. This is the logic behind the German system,<sup>279</sup> which has been upheld by the European Commission on Human Rights.<sup>280</sup>

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274. *Id.*

275. *Id.*

276. See discussion *supra* part IV.

277. State of Madras, *supra* note 158, at 607-08.

278. *Tourón v. Uruguay*, Communication No. 32/1978, reprinted in *Selected Decisions of the Human Rights Committee Under the Optional Protocol*, Human Rights Committee, 33d Sess., at 61, 62, U.N. Doc. CCPR/C/OP/1 (1978).

279. See U.N. GAOR, Hum. Rts. Comm., 4th Sess., 96th mtg. at 3, U.N. Doc. CCPR/C/SR.96, (1978) (West German representative explains to U.N. Human Rights Committee that power to ban subversive parties is vested exclusively in the Federal Constitutional Court "in order to prevent a governing party from eliminating an opposition party for political reasons.")

280. *Kommunistische Partei Deutschlands*, *supra* note 224.

## C. States of Emergency

Assuming a state had neither enacted nor applied self-protection legislation, could it prevent an anti-democratic party from assuming power after an electoral victory by declaring a state of emergency? This is essentially the Algerian case.<sup>281</sup> All comprehensive human rights instruments permit derogations in times of public emergency,<sup>282</sup> though the American Convention does not permit derogation from the right to political participation.<sup>283</sup>

The Political Covenant and European Convention require that the following conditions be fulfilled before a state of emergency may be legitimately declared: (1) the emergency must be actual or at least imminent; (2) its effects must involve the whole population; (3) the threat must be to the life of the nation; (4) the declaration of emergency must be a last resort; (5) the declaration must be a temporary measure; and (6) the state party must immediately notify a treaty organ of the measures taken and the reasons therefor.<sup>284</sup> Each of these elements except number (3) essentially poses a question of fact. As such, the answers will tend to be case-specific. The question of whether the election of an anti-democratic party threatens the "life of the nation,"<sup>285</sup> however, implicates broader philosophical issues and so is more susceptible to discussion as a question of law.

The "life of the nation" refers not only to its physical continuation as an independent state, although clearly the attempted annexation of a state would justify derogation.<sup>286</sup> The phrase also encompasses some

281. Two technical issues make the Algerian case more complicated. First, the state of emergency was declared several weeks after the cancelling of the elections, thus precluding the government from justifying actions taken before the declaration. Second, in its notification of the state of emergency to the Secretary-General of the United Nations, Algeria did not derogate from article 25 of the Covenant, relying instead on its derogation from other articles. *Covenant on Civil and Political Rights*, U.N. ESCOR, 47th Sess., at 2, U.N. Doc. CCPR/C/SR.1128 (1992) (statement of Algerian representative).

282. Political Covenant, *supra* note 5, art. 4; European Convention, *supra* note 5, art. 15; American Convention, *supra* note 5, art. 27.

283. American Convention, *supra* note 5, art. 27(2). The Inter-American Commission on Human Rights has held that a four-year postponement of elections is not a per se violation of article 27(2)—its provision requiring genuine elections—only that "the date proposed for calling the elections is too far off." INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF NICARAGUA at 139, OEA/ser.LV/II.53, doc. 25 (1981).

284. JAIME ORAÁ, HUMAN RIGHTS IN A STATE OF EMERGENCY IN INTERNATIONAL LAW 27-30 (1992).

285. The phrasing of the two conventions varies only slightly. The Political Covenant speaks of a "public emergency which threatens the life of the nation." Political Covenant, *supra* note 5, art. 4(1). The European Convention speaks of a "war or other public emergency threatening the life of the nation." European Convention, *supra* note 5, art. 15(1). By contrast, the American Convention refers to a "war, public danger, or other public emergency that threatens the independence or security of a State party." American Convention, *supra* note 5, art. 27(1).

286. ORAÁ, *supra* note 284, at 12.

notion of the state continuing in its present political configuration or constitutional structure.<sup>287</sup> This interpretation is suggested not only by the fact that many national constitutions consider "danger to the constitution" to be a ground for emergency rule,<sup>288</sup> but also by the human rights treaties themselves. The continued existence of a democratic society is one of their foremost objectives.<sup>289</sup> The European Commission of Human Rights has confirmed that the emergency clause of the European Convention can be invoked if the threat challenges "the organized life of the community of which the state is composed."<sup>290</sup>

If the concept of "threat to the life of the nation" includes threats to its basic constitutional order, the question arises whether the emergency clauses can justify self-protection measures by unelected regimes, such as in Algeria. The answer will depend on the nature of the political actors involved. Because human rights treaties prescribe regimes that respect human rights and hold regular and genuine elections, the establishment of such a government cannot, by definition, be considered a threat to the life of the nation. A mildly repressive regime—one, for example, which respected most human rights but did not hold regular and genuine elections—would seem to have the right to protect itself against the coming into office of a regime which would also violate human rights but on a much greater scale. In the Algerian case, these principles could lead to one or the other result depending on whether a FIS government could be expected to violate human rights to a substantially greater degree than the incumbent government, which would stay in power if the election results were not respected.<sup>291</sup>

An important aspect of this analysis is whether a FIS government would be less likely than the current government to hold elections in

287. See SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY* 36–40 (1989).

288. U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, *STUDY OF THE RIGHT OF EVERYONE TO BE FREE FROM ARBITRARY ARREST, DETENTION AND EXILE* at 184, U.N. Doc E/CN.4/826/Rev.1, U.N. Sales No. 65.XIV.2 (1964); Article 20(4) of the German *Grundgesetz*, for instance, suggests this idea when it extends emergency powers to every individual in the case of an attempt to overturn the (free democratic) constitutional order where no effective help from state organs can be expected.

289. See INTERNATIONAL LAW ASSOCIATION, *REPORT OF THE SIXTY-FIRST CONFERENCE HELD AT PARIS* 59 (1984) ("It is neither desirable nor possible to stipulate *in abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term: each case has to be judged on its own merits, taking into account the overriding concern for the continuance of a democratic society."); see also ORAÁ, *supra* note 284, at 30–31.

290. The Lawless Case, *supra* note 224, at 474.

291. Article 25 of the Covenant would not permit this situation to remain static; the necessity of holding "periodic" elections would require that an election without the FIS be held at the earliest opportunity.

the future. But the holding of elections is only one of many human rights potentially at risk, and assuming both sides in the Algerian conflict would engage in some human rights violations, determining the relative value of each right is crucial to deciding whether the "life of the nation" is threatened. One must ask, therefore, whether the acceptance of the results of democratic elections—a realization of an important human right—is of such intrinsic value that it justifies putting respect for certain other human rights at risk. Although it may be impossible to answer this question in a way that would be useful in resolving all specific cases, it seems that agreement could be reached on certain clear-cut situations. For example, if the only risk engendered by an Islamic fundamentalist party coming to power would be that all women would be required to cover their hair in public, it would not be permissible to cancel elections. On the other hand, if such a party had clearly indicated it would not only cancel all future elections but would also introduce discriminatory measures clearly violative of other fundamental human rights, the result would be the opposite.

Two objections can be raised against this approach. First, it may seem rather disingenuous for a regime to declare a state of emergency after losing an election to an anti-democratic party which it had allowed to participate without restriction. Such a "crisis" would appear to be largely of its own making. But this view is tantamount to obligating an incumbent regime to exclude an anti-democratic party from an election; it forecloses the possibility of any other restrictive measures once the decision has been made to allow the party to participate. Given a choice between preemptive exclusion through self-protection legislation and exclusion after-the-fact by declaring a state of emergency, a government might reasonably choose to avoid the fall-out associated with a preemptive ban and instead concentrate on persuading voters, in the course of an electoral campaign, of the danger posed by its opponents. Such a response does not "create" a crisis; it simply reflects the reasonable (though surely disputable) view that a preemptive ban, while arguably less restrictive, would only exacerbate the situation.

Second, it might be argued that states of emergency are generally disfavored in international law. The broad suspensions of civil liberties they permit are often used as cover for suppression of a regime's political opponents rather than as genuine responses to crises.<sup>292</sup> And once declared, they allow for concentrations of power that are at odds

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292. As an early UN study on political discrimination concluded:

The most drastic type of discrimination in this sphere, found in some countries, consists of the total suppression of all political parties and organizations. While clearly discriminatory, such action has been explained in most cases as a temporary emergency measure, necessary

with the pluralism at the heart of human rights law. One might argue, therefore, that if a state has not taken timely steps to ban anti-democratic forces through an established legal process, it should not be permitted to do so later under an abuse-prone emergency rule.

However, such a rigid view is unwarranted for several reasons. First, self-protection legislation is itself subject to abuse and it is by no means clear *a priori* that it constitutes a less restrictive alternative. Second, self-protection legislation carries the unique danger of creating martyrs or escalating political struggles into full-scale civil war, thereby increasing the danger to the system. As we have noted, this could well have been the case had the Nazi party been banned after receiving just over thirty-seven percent of the vote in the July 1932 elections.<sup>293</sup> Third, as we have also noted, it is often quite difficult to estimate the danger posed by a party until it actually comes close to or assumes power. A regime might reasonably conclude that a party's anti-democratic zealotry will subside once it assumes office. Finally, the danger of abuse can, to a certain extent, be mitigated through international supervision. In *The Greek Case*, for example, the European Commission of Human Rights rejected the government's claim that a potential Communist takeover threatened the life of the nation.<sup>294</sup>

While grave dangers lurk in the imposition of a state of emergency, the legal standard of a "threat to the life of the nation" would appear to be met only where a party threatens a significant worsening of the human rights situation, including the suspension of future elections. The mixed international reaction to the Algerian crisis, which fell far short of outright condemnation, tends to support this view. Even before the election, several of Algeria's North African neighbors had formed a joint task force to persuade Western countries of the need to preserve their regimes, however repressive, in the face of "radical Islam."<sup>295</sup> For their part, many Western governments "quietly criticised the . . . [ruling council's] cancellation of elections in January and the subsequent state of emergency, but have continued to provide economic support."<sup>296</sup> The European Community issued a rather anemic state-

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to the survival and growth of the State. However, in some notable instances it has become a permanent arrangement, reflecting the philosophy of the Government, and therefore a persistent form of discrimination directed against almost all the nationals of that country. HERNAN SANTA CRUZ, *STUDY OF DISCRIMINATION IN THE MATTER OF POLITICAL RIGHTS*, at 37, U.N. Doc. E/CN.4/Sub.2/213/Rev.1, U.N. Sales No. 63.XIV.2, (1962).

293. See *supra* text accompanying note 47.

294. *The Greek Case*, 1969 Y.B. Eur. Conv. H.R. 1, 76 (Eur. Comm'n on H.R.).

295. Dirk Vandewalle, *At the Brink: Chaos in Algeria*, 9 *WORLD POL. J.* 705, 716 (1992).

296. *Algeria: First Round to the Assassins*, *supra* note 22, at 7. See also Wright, *supra* note 51, at 137 ("After the Algerian coup, Western reaction was notable largely for its passivity.")

ment which "strongly urged" the Algerian government to uphold its stated commitments to human rights.<sup>297</sup>

Reaction in the U.N. Human Rights Committee<sup>298</sup> was divided, reflecting the complexity of the issue.<sup>299</sup> Some members perceived the FIS as a genuine threat which justified extreme measures.<sup>300</sup> Others raised the question whether the annulling of the elections violated provisions of the Political Covenant.<sup>301</sup> Most members seemed to agree, however, that even if the FIS victory justified some form of derogation, the government's open-ended state of emergency and mass suppression of other civil liberties were disproportionate reactions to the crisis.<sup>302</sup>

It seems clear that under some circumstances recourse to a state of emergency will be inevitable if the life of a nation, including its democratic form of government, is to be saved or at least if the democratic option is to be preserved. The scope of review by international organs in such cases must focus on the probability of the danger in question on the one hand, and the values to be protected on the other. This allows for a flexible form of international control which serves to legitimate the use of this instrument of last resort in certain extreme cases. By employing such a balanced approach, it would appear that the Algerian measures could be justified under the circumstances

297. *Statement on Algeria Issued at Lisbon on 17 February 1992 by the European Community*, U.N. GAOR, 47th Sess., Annex, Agenda Item 69 at 2, U.N. Doc. A/47/98 (1992).

298. Algeria submitted a report to the Human Rights Committee, as required by article 40 of the Political Covenant, in June 1991. U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/62/Add.1 (1991). This report contained no discussion of the elections, which were held five months later in November. Algeria's comment on these events was limited to an oral presentation to the Committee, which consisted of vague explanations that "it was impossible to continue the electoral process" and that the FIS had been dissolved because its leaders had incited violence. U.N. GAOR, Hum. Rts. Comm., 44th Sess., 1128 mtg. at 3-4, U.N. Doc. CCPR/C/SR.1128 (1992) [hereinafter Human Rights Committee, 1128th mtg].

299. In the words of one Committee member, "a paradoxical situation had arisen, in which the commitment to democratic principles might lead to a situation in which the people's wishes were no longer respected." Human Rights Committee, 1128th mtg, *supra* note 298, at 7 (statement of Mr. Sadi).

300. U.N. GAOR, Hum. Rts. Comm., 44th Sess., 1125th mtg. at 4, U.N. Doc. CCPR/C/SR.1125 (1992) [hereinafter Human Rights Committee, 1125th mtg] (statement of Mr. Mavrommatis) ("certain anti-democratic parties had abused the democratic process in an effort to seize power"); *id.* at 7 (statement of Mr. Dimitrijevic) (describing "attempt of anti-democratic forces to use the democratic process to come to power"); Human Rights Committee, 1128th mtg, *supra* note 298, at 7 (statement of Mr. Sadi) (evidently accepting government's contention that "if the Islamic Salvation Front took power, it would deal a death blow to the democratic process").

301. Human Rights Committee, 1125th mtg, *supra* note 300, at 6 (statement of Miss Chanet) (asking how banning of FIS could be reconciled with art. 25 of the Covenant); *see also* Human Rights Committee, 1125th mtg, *supra* note 300, at 8 (statement of Mr. Ndiaye) (because Islam is official religion of Algeria it is unclear "how the Islamic Salvation Front could be considered a threat to democracy").

302. The Committee asked Algeria to submit a supplemental report detailing the basis for the state of emergency and its effect on various human rights protected by the Covenant. Human Rights Committee, 1128th mtg., *supra* note 298, at 11-12.

at the time when they were taken. Of course this conclusion speaks only to the decision to abort the elections; compelling arguments can be made that other aspects of the crack-down were clearly disproportionate to the initial threat. Perhaps more importantly, concluding that derogation was permissible does not make it the preferred form of action.

As between the legal options available to protect an incumbent regime in crisis, self-protection legislation, if accompanied by the procedural safeguards outlined above, can better accomplish the objective of preserving the democratic character of the society than can a resort to a state of emergency. We have noted, of course, that a preemptive law carries risks of its own. Yet properly constituted, it can achieve its goals without the broad suspension of civil liberties that usually accompanies a state of emergency.<sup>303</sup> Thus we conclude that if a state party chooses to take action against anti-democratic parties, it should do so preemptively by enacting self-protection legislation rather than by declaring a state of emergency.

#### VI. DO STATE PARTIES OWE AN OBLIGATION TO THE INTERNATIONAL COMMUNITY TO MAINTAIN DEMOCRATIC GOVERNMENT?

The international community could take one of three positions in regard to national restrictions on anti-democratic actors: it could forbid such restrictions, it could allow them under certain conditions, or it could obligate states to protect themselves against internal subversion. So far we have addressed only the second question: whether a state may defend itself against anti-democratic actors. We have concluded that it may do so under a defined set of circumstances. The question remains, however, whether there exists an even farther-reaching obligation to preserve the democratic entitlement. Is it possible that parties to the Political Covenant have relinquished the sovereign right to abolish their democratic form of governance,<sup>304</sup> as foreseen by the procedural model of democracy? Is it possible that a state party is obligated, under certain circumstances, to enact self-protection legislation? If so, which policy considerations should inform such a decision?

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303. See Tom J. Farer, *Elections, Democracy, and Human Rights*, 11 HUMAN RTS. Q. 504 (1989).

304. In the *Nicaragua* case the International Court of Justice held that absent an explicit treaty commitment on the subject, a state's decision to establish democratic governance is purely a matter for its domestic jurisdiction. *Nicar. v. U.S.*, *supra* note 249, at 131. It would seem to follow that the decision to dismantle democratic institutions is also a domestic issue.

*A. The Duty Not to Abolish Democratic Rule*

It would seem obvious that the citizens of each state should be the ones to decide whether they live in a "suicide pact" democracy, in which the peril of collapse is seen as a necessary price of liberty, or under a system that sets the limit of permissible political discourse at advocating destruction of the system itself. This choice would appear to form an integral part of each society's social contract, whether metaphorical or actual. If the parties to that contract choose to commit communal suicide then that decision may not be questioned by outsiders, for only members of that society hold rights under the contract. To make a case against this view, one would need to argue that one of the two classical models of democracy had been excluded by international human rights instruments.

If this were a question involving any other human right—such as the right against torture—the international lawyer would respond that there are certain things a society cannot choose to do to itself. Where such other human rights are concerned, international law looks past the fiction which underlies the social contract metaphor and prescribes rules regarding individual citizens. The views of political majorities are simply irrelevant to the validity of such rules. Indeed, these rules are only meaningful as counter-majoritarian rights, since those in the political majority can protect themselves from abuse through the normal political process.<sup>305</sup>

This response, however, seems inappropriate in the case of the democratic entitlement. In the scenario we have examined, a majority or plurality of voters chooses to elect an anti-democratic government, thereby waiving its right to participate in future elections. The democratic entitlement, which acquires meaning only when the preferences of voting groups—especially majorities—are honored, requires that the victorious candidates assume office. If international law discards this result, how can it claim to uphold the democratic entitlement? The substantive model of democracy would respond that this entitlement protects not only present but also future voting majorities. To the procedural model, however, it seems illogical to take steps that deny the majority's preferences in the name of preserving the right to majority rule.

The heart of this dilemma lies in the social contract model generally thought to provide the normative foundation for majoritarian political processes: the citizens of a state contract among themselves to create a democratic constitution. International law, from this perspective, can only serve the role of supporting a citizenry's choice of one of the two forms of democratic governance. It cannot dictate the selection of one

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305. See ELY, *supra* note 111.

or the other. Because the international community plays no part in the choice—that is, in the formation of the social contract—it holds no rights under the contract, and thus cannot prevent a state from committing political suicide by following the procedural model.<sup>306</sup> Nor can it look past the contract in the name of protecting minority rights, since the right in question is that of majority rule.

For one simple reason, however, this classical perspective no longer holds: the various citizenries of parties to the Political Covenant have made a binding commitment to the international community to hold “genuine periodic elections.” By committing themselves to the democratic entitlement, parties have necessarily rejected the possibility envisaged by the procedural model that a citizenry may waive its democratic entitlement. In social contract parlance, this means that parties to human rights conventions, by undertaking an obligation to govern by majority rule, have added the international community as a party to their national covenants. While the primary rights still accrue to individual citizens, human rights instruments empower the international community to act as a kind of contractual guarantor when those primary rights are denied. In this role—acting on behalf of the citizenry—the international community may protect the democratic entitlement whether or not a majority of citizens at a particular moment chooses to reject its democratic institutions.<sup>307</sup>

The international community has good reason to take this position. The idea that one state’s commitment to democratic principles may also serve the collective interests of the international community pre-dates the contemporary human right to political participation. It traces its origins to Kant’s conception of a separate peace among liberal nations,<sup>308</sup> the notion that states whose citizens have a say in public affairs are less likely to go to war with each other.<sup>309</sup> Many justifications have been offered for this hypothesis.<sup>310</sup> One explanation, recently elaborated by Bruce Russett, is particularly relevant to the notion of a

306. Traditional social contract theory had two variants. The first saw the agreement as bilateral, between “the people” and the government or state. The second saw it as an agreement among the people to establish a government or state. The international community would hold no rights under either variation.

307. It does not follow that the existence of this guaranty permits recourse to force on the part of states or international organizations. Whether unilateral pro-democratic invasion is permissible under international law or whether denial of the democratic entitlement could be designated a “threat to the peace” by the U.N. Security Council are entirely separate questions.

308. Immanuel Kant, *Perpetual Peace* (1795), in KANT: POLITICAL WRITINGS 93 (H.B. Nisbet trans., 1991). Michael W. Doyle has been the most prominent contemporary proponent of this notion. See Michael W. Doyle, *Kant, Liberal Legacies and Foreign Affairs*, (pts. 1 & 2) 12 PHIL. & PUB. AFF. 205 (1983), 12 PHIL. & PUB. AFF. 323 (1983); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986).

309. See BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1993) (summarizing and discussing recent literature on the subject).

310. See *id.* at 24–42.

binding international commitment to preserve democratic institutions. Russett argues that the theory of democratic societies, as well as their regular patterns of behavior, creates powerful incentives against the resolution of conflicts by violence. A host of alternative mechanisms, as well as the perception that dissent and ideological conflict are not necessarily threats to the health of the polity, operate as powerful constraints on the resort to force.<sup>311</sup> Russett argues that these traits characterize not only internal democratic politics but also relations between democratic states:

The norms of regulated political competition, compromise solutions to political conflicts, and peaceful transfer of power are externalized by democracies in their dealing with other national actors in world politics. On the other hand, nondemocracies may not externalize these norms. Hence, when two democracies come into a conflict of interest, they are able to apply democratic norms in their interaction, and these norms prevent most conflicts from mounting to the threat or use of military force.<sup>312</sup>

Few claim that democratic constitutionalism alone can effectively check a resort to military aggression. Kant himself wrote of the need for a "pacific union" among states; an organization resembling a collective security arrangement designed "to preserve and secure the freedom of each state in itself."<sup>313</sup> Yet even if the correlation is less than absolute, it is nonetheless powerful.<sup>314</sup> Theorists such as Russett describe a community of democratic states that is by its nature cooperative rather than confrontational, and that is predisposed to finding value in the rule of law among its members. Both traits are consistent with the notion of an agreement among such states to preserve each other's democratic institutions. In this sense, the Kantian thesis embodies a normative proposition: the adoption of nonviolent forms of dispute resolution by democratic cultures in both the internal and external realms. This normative aspect of the Kantian thesis can be seen explicitly today in the Universal Declaration of Human Rights and its subsequent binding instruments, many of whose drafters shared the Kantian view.

311. *Id.* at 33-38.

312. *Id.* at 33.

313. Kant, *supra* note 308, at 104.

314. Rawls has written recently that "the absence of war between democracies is as close as anything we know to an empirical law in relations between societies." John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 41, 58 (Stephen Shute & Susan Hurley eds., 1993).

As one of the drafters of the Political Covenant noted in debate over the right to political participation (Article 25), "when citizens could really express their views on the conduct of the State's affairs, the danger of its recourse to aggression was practically non-existent. Hence the best way of maintaining peace was to give the citizens an opportunity to choose between peace and war."<sup>315</sup> A broader and more recent statement of the Kantian thesis appears in the 1993 Vienna Declaration on human rights, which describes efforts by the U.N. system to promote human rights as contributing "to the stability and well-being necessary for peaceful and friendly relations among nations, and to improved conditions for peace and security."<sup>316</sup>

For our purposes it is not necessary to accept or reject the Kantian thesis as an empirical matter, though the historical data in support of the thesis are impressive.<sup>317</sup> What is crucial is: (1) that the norms of openness, cooperation, and non-violent resolution of disputes which typify theories of democratic societies arguably carry over into relations between such societies; and (2) that the drafters of the Political Covenant evidently believed that the "suicide" of a democracy is of concern not only to its own citizens but to the international community as well. The prospects for collective peace suffer through the demise of an important control on aggressive behavior. As Secretary-General Boutros-Ghali has stated rather bluntly, "Democracies almost never fight each other. Democratization supports the cause of peace."<sup>318</sup> Seen in this light, the democratic entitlement serves as not only a human right enacted "merely" in the interest of individual citizens, but as one of the important legal bulwarks of world peace.

## 2. The Duty to Adopt Self-Protective Measures

The duty not to abolish democratic rule does not necessarily entail a complementary duty to adopt self-protective measures. The Political

315. U.N. ESCOR, 9th Sess., 363d mtg. at 7, U.N. Doc. E/CN.4/SR.363 (1953) (statement of Mr. Jevremović).

316. Vienna Declaration and Programme of Action, U.N. Doc. A/Conf. 157/23, at 5 (1993). For a comprehensive listing of international instruments and declarations linking respect for human rights with international peace, see the report of the Sub-Commission of the U.N. Human Rights Commission, *Interrelationship Between Human Rights and International Peace*, 40th Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1988/2 (1988).

317. See Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT'L L.J. 393, 395 (1992); Brad Roberts, *Democracy and World Order*, 15 FLETCHER F. WORLD AFF. 9 (1991); RUSSETT, *supra* note 309, at 3-23. The nature of the "democracy" established in developing countries may stray quite far from the western model from which the Kantian thesis takes much of its force; as a result, these societies' propensity to non-violence may be concomitantly weaker. See Robert L. Rothstein, *Democracy, Conflict and Development in the Third World*, WASH. Q., Spring 1991, at 43.

318. Boutros-Ghali, *An Agenda for Peace: One Year Later*, ORBIS: J. WORLD AFF., Summer 1993, at 328.

Covenant, in language echoed by all other human rights treaties, requires state parties "to adopt such legislative or other measures *as may be necessary* to give effect" to this and other enumerated rights.<sup>319</sup> This rule describes states' obligations at a very general level: if, in order to ensure the continuation of democratic rule, it is *necessary* to adopt measures of self-protection, then they must be adopted. The more difficult problem lies in determining the circumstances under which such a "necessity" arises. The existence and form of legislation necessary to accomplish the goal of self-preservation will vary from state to state.<sup>320</sup> In states which face, or may face, real threats from anti-democratic groups, self-protective legislation may be necessary. In others, with few such threats either in their history or in their contemporary political landscape, self-protective legislation may not be needed.<sup>321</sup>

These principles suggest that the question of whether self-protective legislation is required in a particular state will be an extremely difficult and fact-intensive inquiry. Reaching a well-informed conclusion will often be beyond the capabilities of both judicial and quasi-judicial bodies, not only because of the extensive fact-finding that will be entailed, but also because of the political judgments that will be needed on many of the questions raised above. Commissions of inquiry such as the Inter-American Commission on Human Rights which prepare in-depth reports on the situation in individual countries, may be able to master the factual side of the problem. Their conclusions on the political question of whether a state's democratic institutions are *in extremis*, however, will often be very controversial. Despite the difficulty of determining whether self-protective measures must be taken in particular cases, it is important for the international community to provide recourse to an impartial body which can make such determinations.

An important objection to this approach arises from the Algerian case. It could be argued that a duty to adopt self-protective measures cannot exist because the incumbent, quasi-democratic regime is not

319. Political Covenant, *supra* note 5, art. 2(2) (emphasis added).

320. The Human Rights Committee has noted, for example, that in societies where forms of discrimination are especially pervasive and entrenched, the Covenant may require a government to take special "affirmative action," involving the temporary granting of preferential treatment to the affected groups, in order to fulfill its treaty obligations. International Covenant on Civil and Political Rights, Human Rts. Comm., U.N. Doc. CCPR/C/21/Rev. 1/Add.1, at 9-10 (1989).

321. Justice Douglas, in a dissent opposing restrictions on Communist Party activities in the United States, echoed this view in a passage which strikes today's reader as rather self-righteous: Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men merely for speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

Dennis v. United States, 341 U.S. 494, 588-89 (1951) (Douglas, J., dissenting).

obligated to guarantee that elections are held after it leaves office. Rather, new elections are an obligation of the anti-democratic successor regime. According to this view, the democratic entitlement in Algeria would only have obligated an FIS government to hold elections after the expiration of its term in office.<sup>322</sup> If it failed to do so, and instead established a theocracy, the FIS government would have violated Algeria's human rights obligations. The international community would then consider the matter, and would hopefully respond decisively. This approach, however, would prevent the incumbent Algerian government from preemptively defending the democratic entitlement. It suggests that one regime is not entitled to prevent another from taking power on the basis of mere speculation that the successor regime may not respect the human right to democratic governance.

This formal approach, while containing an appealing logic, involves a degree of brinkmanship which the drafters of the Political Covenant found unacceptable. To argue that the FIS should have been permitted to take charge of the Algerian electoral process is to hope for a democratic conversion by an openly anti-democratic party. This is the Weimar "mistake" the Covenant's drafters sought to avoid. Article 5(1) of the Covenant was included precisely to allow for preemptive action where an obviously anti-democratic threat exists.<sup>323</sup> Article 2(2) of the Covenant, requiring parties to take the steps necessary to ensure respect for protected rights, cannot allow a government to shift responsibility for preserving human rights, including the democratic entitlement, if it is the last actor with a realistic possibility of doing so. The common law of torts recognizes a similar duty born of necessity in the "last clear chance" doctrine.

This argument would lose its force only if a potentially anti-democratic regime were free to discard its international obligations by renouncing the Covenant in a timely manner. Presumably, it would do so well in advance of the next scheduled election. Because the Covenant contains no provision for unilateral termination, however, a state must be deemed to have incurred its obligations indefinitely.<sup>324</sup>

### 3. Policy Considerations

A state's duty to adopt measures "necessary" for self-protection does not mean that such steps should be taken lightly or without a careful

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322. This has been suggested by Middle East Watch in its report on Algeria. *Human Rights in Algeria*, *supra* note 16, at 16-17. Clearly the "democratic" nature of the incumbents was questionable at best. Their claim to democratic *bona fides* rests primarily on the relative fairness of the December 1991 elections, which they initiated and supervised.

323. Tomuschat, *supra* note 27, at 33.

324. Vienna Convention on the Law of Treaties, *supra* note 238, art. 56.

weighing of the consequences. In fact, there are several strong arguments at the level of prudence, rather than law, for identifying conditions of necessity with extreme caution.

First, the right to ban certain political parties carries with it an enormous potential for abuse. Virtually every democracy can point to shameful episodes in its history in which alleged "subversives"—who often espoused legitimate social grievances<sup>325</sup>—were denied political rights. The example of Chile is instructive. The 1980 Chilean constitution contained a clause permitting bans on parties advocating, among other things, a totalitarian political order.<sup>326</sup> This provision was used to deprive virtually all Communist Party members of their rights of expression and association,<sup>327</sup> and was a specific reaction by junta leader General Augusto Pinochet to the election of Salvador Allende as President in 1970. While the clause clearly went beyond the restrictions permitted by international human rights instruments, it is symptomatic of the danger inherent in legitimating any party restrictions in the name of protecting democracy. What better cloak for those seeking to consolidate absolute control over a political system than that of claiming to be the saviors of democracy?

A second problem is determining whether a political movement constitutes a threat to democratic institutions. The human rights instruments we have reviewed require more than the mere identification of anti-democratic beliefs. Rather, they require "acts" or "activities" "aimed at the destruction of . . . rights."<sup>328</sup> In a judicial-type inquiry, however, absent an overt breach of the peace, such evidence will be rare and often contradictory.<sup>329</sup> Few parties will call for an outright end to future elections. Others may adopt the rhetoric of

325. See EMERSON, *supra* note 60, at 51-52.

326. Article 8 of the 1980 Chilean Constitution provided:

Any action by an individual or group intended to propagate doctrines which are antagonistic to the family, or which advocate violence or a concept of society, the State or the juridical order, of a totalitarian character or based on class warfare, is illegal and contrary to the institutional code of the Republic. The organizations and political movements or parties which, due to their purposes or the nature of the activities of their members, tend toward such objectives, are unconstitutional . . . . Without impairment of the other sanctions established by the Constitution or the law, persons who incur or who should have incurred the aforementioned violations shall not, for a period of ten years from the date of the Tribunal's decision, be eligible for public duties or positions, regardless as to whether they should or should not be obtained through popular vote.

CHILE CONST., Art. 8.

327. See Note, *Abriding Freedom of Expression in the Name of Protecting Democracy: The Case of Article 8 of the Chilean Constitution* (undated) (unpublished manuscript on file with authors). We would like to thank Professor Allejandro Garro of Columbia University Law School for providing information in this section.

328. See article 5 of the Political Covenant, *supra* note 5, art. 5.

329. See Carl J. Friedrich & Arthur E. Sutherland, *Defense of the Constitutional Order*, in *STUDIES IN FEDERALISM* 683 (Robert R. Bowie & Carl J. Friedrich eds., 1954).

committed democrats as a tactical device.<sup>330</sup> Justice Robert Jackson, concurring in the United States Supreme Court's upholding of restrictions on Communist Party activity, acknowledged this difficulty:

[to find] that petitioner's conduct creates a 'clear and present danger' of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether, and when, a time will come that they consider propitious for action, and whether and how fast our existing government will deteriorate . . . . The judicial process is simply not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more.<sup>331</sup>

Third, both the substantive and procedural models of democracy, articulating the legal tension between speech and association rights for some and political rights for all, represent hypotheses concerning human behavior in addition to being arguments from principle. Both make arguments concerning the best way to curb the dark side of human nature, the side susceptible to persuasion by authoritarian movements. The substantive view is skeptical about citizens' capacity to resist the allure of these movements. The procedural view, as evinced by Jefferson's faith in the remedial power of open debate, is optimistic.

While data exist both to prove and disprove these hypotheses, the information comes mostly from established democracies.<sup>332</sup> Dangers to the democratic entitlement, however, are most prevalent in new and nascent democracies. In these states, it is very difficult to predict how citizens will react to authoritarian movements. If such movements are successfully resisted, a strong civil society emerges, and the international community should welcome such developments, however achieved. It may be counter-productive to criticize the state's actions simply because the means involved—self-protective legislation, for example—do not conform to preconceived notions of how democracy is best preserved.

Fourth, special care must be taken in the case of newly established democracies. As the Russian experience suggests, the period immedi-

330. See David Reisman, *Civil Liberties in a Period of Transition*, 3 PUB. POL. 33, 56 (1992).

331. *Dennis*, 341 U.S. 570 (Jackson, J., concurring). Early in its history, the Supreme Court indeed refused to decide which of two competing factions constituted the lawful government of a state, citing the absence of judicially manageable standards to guide its decision. *Luther v. Borden*, 7 How. 1 (1849).

332. Raymond M. Dutch & James L. Gibson, *Putting Up With Fascists in Western Europe: A Comparative, Cross-Level Analysis of Political Tolerance*, 45 W. POL. Q. 236, 238 (1992).

ately following an emergence from authoritarian rule can be marked by extreme instability, as various factions vie to create a new political identity for the state.<sup>333</sup> In such situations, two equally powerful, but contradictory, arguments could be made regarding the advisability of restricting anti-democratic actors.

One might argue that given the fragility of newly formed democratic civil societies, and, in particular, the prevalent distrust of motives among political opponents, to legitimate bans would simply confirm their mutual suspicions and lead quickly to polarized societies. On this view, there can be no worse beginning to a democratic experiment than to allow the first regime to achieve power to begin banning other actors from the process.

However, one might well argue the opposite. From this perspective, the boundaries of legitimate political advocacy must be made clear at the very outset. If one believes as a general matter that opponents of majority rule have no right to participate in the majoritarian process, then that norm is best established before anti-democratic parties gather strength. This argument can also be stated on a more theoretical level. The transition to democracy is often secured only after long struggles against authoritarian regimes, sometimes taking the form of violent revolution. The right of revolution against undemocratic regimes is at the core of traditional democratic theory. Given the legitimacy of such acts, it would seem anomalous to hold that anti-democratic parties cannot be restricted during their ascension to power when the possibility of their defeat is much greater. From the perspective of political morality, the former (anti-democratic revolution) would appear to legitimize the latter (restricting anti-democratic parties) *a fortiori*.<sup>334</sup>

Finally, the international community should recognize that choices of whether to ban anti-democratic parties mark important episodes in a state's democratic development.<sup>335</sup> Mistakes made in the short term—arguably the case in the United States with the Alien and Sedition Acts of 1798, the Espionage Act of 1917, the Smith Act of 1940, the Subversive Activities Control Act of 1950, and the Communist Control Act of 1954—may become valuable negative lessons over time. These are lessons that the international community is unlikely to impart in any meaningful fashion by fiat. Thus, while the international community may define a permissible range of responses to authoritarian movements, it should not dictate a choice among them.

333. TED R. GURR, *MINORITIES AT RISK* 137–38 (1993) (discussing the risks of instability and civil war in democratizing autocracies).

334. See Auerbach, *supra* note 64, at 192–93; but see EMERSON, *supra* note 60, at 49–50 (responding to Auerbach).

335. MICHAEL WALZER, *JUST AND UNJUST WARS* 86–108 (2d ed. 1992); Michael Walzer, *The Moral Standing of States*, 9 *PHIL. & PUB. AFF.* 209 (1980).

## VII. CONCLUSION

The growing recognition in international law and practice of a democratic entitlement represents an emerging consensus among states regarding the nature of a “democratic” society. Given the ideological and cultural obstacles in the path of reaching such a consensus, it is not surprising that the earliest points of agreement have been on questions of procedure: what is a “free and fair” election; must more than one party participate; must ballots be secret? At first glance, the problem of dealing with anti-democratic actors might be seen as yet another procedural question. All electoral systems have rules concerning who may participate and who may not. This might simply be one more.

However, the issue transcends procedure. Whether a political system elevates tolerance above all other values is a fundamental choice that defines the nature of the polity itself, not simply the rules of engagement between those who have agreed to compete within its boundaries. The choice itself generally does not occur at a singular moment in a state’s history but rather emerges from the tumult of struggles, debates, wars, and the daily experiences of governing that together create the social and political identity of a society. These observations might lead one to be quite pessimistic about the possibility of agreement on a global legal standard. The body of this Article, however, has demonstrated that the international community is not hopelessly divided on the problem of anti-democratic actors. Sources of law that include human rights treaties, the decisions of human rights bodies, United Nations practice in election monitoring, and the practices of representative democratic states all point overwhelmingly to a substantive theory of democracy. Even the United States—which entered reservations to the Political Covenant’s articles on freedom of expression on the grounds that they would erode the First Amendment’s tolerance of virtually any political opinion, however dangerous or offensive<sup>336</sup>—bears a legacy of debilitating restrictions on the American Communist Party. The international community thus seems to have adopted a substantive view of democracy as a legal norm.

International law has developed various mechanisms for separating actions with normative significance from “mere” politics. Yet here is a norm that is *about* politics. It seeks to inject the rule of law into societies facing challenges to their fundamental institutions by well-organized extremist groups. Inevitably, even in the most optimistic scenario, the strict letter of these rules will be tempered to accommodate political exigencies. Bans on parties with substantial followings

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336. 138 Cong. Rec. S4781–84 (daily ed., Apr. 2, 1992).

may cause unrest; bans on parties with little support serve as instruments of repression; and bans of either sort may be enacted based on evidence that is not much more than speculation. This Article has been filled with responses to such prudential concerns. The standards discussed are calibrated to take account of such potential pitfalls. The necessity of a procedural check, in the form of an independent review, is also essential if abuses of the power to exclude anti-democratic actors are to be curtailed.

Yet the question remains of how a norm about politics can stand apart from politics. It may be that, for the time being, the international community must recognize that a rule embodying a substantive view of democracy—requiring that restrictions on anti-democratic parties be “reasonable”—may be ignored, or used as convenient cover for repression. Realistically, the best that the community may hope for is that the consequences of a decision to ban a party will not result in the collapse of a state’s democratic system altogether. Using institutional carrots and sticks to encourage a return to full pluralism may prevent this result. Through this minimally interventionist route, the international community may slowly bring about adherence to the letter of the norms themselves.