ARTICLE

# The dissolution of political parties: The problem of internal democracy

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*In recent years, various democracies have faced the problem of nondemocratic political parties. In response, some have adopted the practice of the party ban. The main focus in existing jurisprudence has been on the external activities of these parties. In determining whether a political party is nondemocratic, attention has centered on the party's goals and practices. This judicial practice, manifest in different European constitutional courts as well as the European Court of Human Rights, is problematic. It often ignores an essential element in political parties, namely, their internal structures. This paper argues that political parties must be democratic not only externally, in their goals, but also democratic internally, in their organizational practices. The very interdependence between political parties and democracies should promote the parties' adherence not only to democratic goals and activities but also to democratic internal structures. This paper further argues that such internal democracy must be mandatory, and that, in rare cases, there is valid justification for banning political parties that lack internal democracy.*

Since 1998, the European Court of Human Rights (ECtHR) has delivered six judgments on a very delicate issue—the dissolution of political parties.[1] All the cases concerned decisions by the Turkish government to dissolve parties or ban their activities, based on findings that the parties in question were

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[1] *See* United Communist Party of Turkey v Turkey, 62 Eur. Ct. H.R. 1 (1998); 26 Eur. H.R. Rep. (1998) 121; The Socialist Party and Others v. Turkey; 75 Eur. Ct. H.R. 1233 (1998); 27 Eur. H.R. Rep. 51; Case of Freedom and Democracy Party (Özdep) v. Turkey, 8 Eur. Ct. H.R. 333 (1999); Refah Partisi (The Welfare Party) v. Turkey, Apps. No. 41340/98, 41342/98, 41344/98), Eur. Ct. H.R., Third Section (2001), unpublished, *summary available at* http://www.echr.coe.int/eng/Press/2001/July/RefahPartisi2001jude.htm; followed by Refah Partisi (The Welfare Party) and Others v. Turkey, (Apps. 41340/98, 41342/98, 41344/98 Eur. Ct. H.R. (2003)(Grand Chamber), unpublished, *summary available at* http://www.echr.coe.int/eng/Press/2003/feb/RefahPartisiGCjudgmenteng.htm; Yazar v. Turkey,Apps. No. 22723/93, 22724/93, 22725/93, Eur. Ct. H.R. (2002) unpublished, *summary available at* http://www.echr.coe.int/Eng/Press/2002/apr/PR_Yazar_et_al_(HEP)09042002E.htm; Demokrasi Partisi v. Turkey, App. No. 25141/94, Eur. Ct. H. R. (2002), unpublished, *available at*: http://www.echr.coe.int/Eng/Press/2002/dec/DICLE(DemocraticParty)judepress.htm. Full texts of all judgements can be found by searching HUDOC, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.

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encouraging violence and activities undermining the territorial integrity and secular nature of the state. In most of the cases, the Court found that the reasons given by the Turkish government, as well as by Turkish domestic courts, did not justify the interference with the applicant's individual liberties, as protected by the European Convention on Human Rights (ECHR).[2] The Court held that even if a political activity is considered incompatible with state principles this does not mean it infringes democratic rules and that, in a democracy, even activities challenging the way a state is currently organized should be tolerated, provided they do not seek to harm democracy itself. However, in rare cases where a political program does not respect the rules of democracy, the state has a right to take steps, including party dissolution, to protect the democratic society from intentions that would undermine its democratic regime.[3]

Indeed, the problem of nondemocratic parties and party bans is not a new one—the European Commission on Human Rights had addressed it as early as the 1950s;[4] furthermore, the issue's recent resurgence is not unique to Turkey. The Supreme Court of Spain dissolved the radical Basque party—Batasuna—in 2003, on the ground that it was supporting terrorism.[5] The German Constitutional Court considered in 2002 a petition to ban the extreme right-wing NPD party, eventually halting the proceedings on technical grounds.[6] The new East European democracies,[7] as well as

[2] *See* United Communist Party of Turkey v. Turkey, *supra* note 1; The Socialist Party v. Turkey, *supra* note 1; Freedom and Democracy Party (Özdep) v. Turkey, *supra* note 1; Yazar v. Turkey, *supra* note 1; Demokrasi Partisi v. Turkey, *supra* note 1.

[3] *See* Refah Partisi (The Welfare Party) v. Turkey, *supra* note 1.

[4] *See* The Communist Party Case, 1 Y.B. Eur. Conv. on H.R. 222 (1955–1957).

[5] *See* Emma Daly, *Spanish Court Outlaws a Basque Party, Seeing Terrorism Links*, N.Y. Times, Mar. 18, 2003, at 7A. This decision was confirmed by the Constitutional Court on January 16, 2004. For a review of the different proceedings in the Batasuna case and an evaluation of a prospect adjudication of the case by the ECtHR, see Katherine A. Sawyer, *Rejection Of Weimarian Politics Or Betrayal Of Democracy?: Spain's Proscription of Batasuna Under The European Convention On Human Rights*, 52 Am. U. L. Rev. 1531 (2003); *see also* Leslie Turano, *Spain: Banning political parties as a response to Basque terrorism*, 1 Int'l J. Const. L. (I·CON) 730 (2003).

[6] This was due to the late discovery that some of the NPD activists whose activities were part of the evidence presented by the government were actually informers employed by the state. *See* BVerfGE, 2 BvB 1/01, 2 BvB 2/01, 2 BvB 3/01 (Mar. 18, 2003), *available at* http://www.bverfg.de/entscheidungen/bs20030318_2bvb000101.html. For previous cases of party dissolution in Germany and the court's practice on these matters, see Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 217–224 (Duke Univ. Press 2d ed. 1997).

[7] *See* BUL-2000-1-001 summary translated in 2001(1) Bulletin on Constitutional Case Law 32; MKD-1998-1-002, summary translated in: 1998(1) Bulletin on Constitutional Case Law 140.

Israel,[8] have recently faced similar challenges in their courts. The Council of Europe has referred to the rise of nondemocratic and extremist parties and movements as "[a] threat to the fundamental values that the Council of Europe sets out to defend."[9]

Analyzing the recent cumulative doctrine and jurisprudence of the ECtHR and various European constitutional courts, it seems that these courts have focused primarily on the goals and practices of the political parties. The Turkish cases dealt with parties' programs and policy statements regarding autonomy for the Kurds, national unity, and promotion of Islamic law.[10] The German case dealt with the activities and aims of right-wing extremists. The Spanish and Israeli courts were concerned mostly with the programs of parties that allegedly support terrorism. These proceedings, and the attendant jurisprudence, generally dealt with what might be called the "external" democracy of political parties—that is, their democratic inclinations, or lack thereof, vis-à-vis the society to which they belong. The aim of the various proceedings was to ban parties on the basis of their professed or demonstrated intentions to abolish a democratic regime or to change the democratic rules currently in place. In each case, the court's focus was mostly on the challenged party's platform, its leaders' statements, and its members' activities.

However, there is another dimension to the link between a political party and a democratic state—that of the organization's "internal" democracy, which is a function of the organization of the party itself rather than its relationship with society or the state. Relations between the party and its members, as well as the party's organization and structure, will determine the extent of internal democracy. Some parties discriminate among their members on the basis of race, gender, or religion, while others adopt an

[8] On the last general elections (2003) the court ruled on the matter of five decisions of the Central Election Committee regarding the disqualification of certain lists or candidates from participation in the elections. The grounds for the requested dissolution were support of terror, racism and negation of the Jewish-Democratic nature of the State of Israel. *See* E.A. 11280/02 The Central Elections Committee v. Achmad Tibi M.K., 57(4) P.D. 1 [Hebrew]. For previous rulings of the Israeli Supreme Court on these matters, *See* Raphael Cohen-Almagor, *Disqualification of Lists in 1988 and 1992: A Comparative Analysis, in* LAW JUSTICE AND THE STATE 88–103 (Michel Troper & Mikael M. Karlsson eds., Franz Steiner Verlag 1995); Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988–1996*, 11 EMORY INT'L L. REV. 67 (1997).

[9] *See* Threat Posed to Democracy by Extremist Parties and Movements in Europe, EUR. PARL. DEB. 1438 (Jan. 25, 2000), *available at* http://assembly.coe.int/Documents/AdoptedText/ta00/erec1438.htm. *See also* the annexed report to the assembly, Threat posed to democracy by extremist parties and movements in Europe, EUR. PARL. DEB. 8607, (Jan. 3, 2000), *available at* http://assembly.coe.int/Documents/WorkingDocs/doc00/Edoc8607.htm

[10] *See* The Peoples Labor Party Case, July 14, 1993, TUR-1993-2-002; The Democratic Party Case, TUR-1994-2-003 *translated summary in* 1994(2) BULLETIN ON CONSTITUTIONAL CASE LAW 173; The Welfare Party Case, Jan. 16, 1998, TUR-1998-C-001; The Democratic Party Case, Nov. 20, 2001, TUR-2001-3-012; and the Cases as reported in the ECtHR judgments, *supra* note 1.

oligarchic structure that denies members the ability to replace, or even affect, the party leadership. Hence, a political party could be democratically inclined *externally* but undemocratic *internally*. Externally, it could profess legitimate goals and pursue them in a legal manner, yet, at the same time, it might function—internally—as a dictatorship. However, neither the ECtHR, nor the constitutional courts of the European democracies, have been much concerned with the lack of internal party democracy.[11] The party's internal structure is rarely referred to, and it is usually not cited as a basis for party dissolution.[12] Even the guidelines published by the Venice Commission of the European Union, regarding dissolution of political parties, do not refer to the parties' internal structure.[13]

The tension between the external and the internal dimensions of party democracy will be the focus of this paper. The main argument will be that we must recognize the importance of both applications of democracy, based on normative reasoning as well as the functional advantages realized by the party system. Political parties should not only profess to espouse the rules of the game but also apply these rules indoors. The duty to support an internal democracy, I will argue, has a major implication. Since democracies and courts, including the ECtHR, are willing to ban nondemocratic parties, the question arises whether a party that professes to be democratic externally, but not internally—from the point of view of its own structure—should be banned. By the same token, one must ask, therefore, whether a party's internal democratic structure is relevant at all to the question of its enforced dissolution.

I will argue that the lack of internal democracy should be a major factor in any analysis or decision regarding party dissolution. Continuing to ignore this crucial factor runs counter to the foundations of modern liberal democracy. For that matter, deciding whether to dissolve a political party solely on the basis of its goals and activities, without reference to its internal structure, is not coherent. Domestic and international courts should give due attention to the internal democratic behavior of political parties.

Indeed, it is not clear that party bans have any effect on the democratic practices of parties. Dissolution is rarely invoked, as democracies often opt, instead, to absorb the extremists into the democratic equation rather than pushing them underground. Many democracies do not ban undemocratic parties at all. Furthermore, it is not often that one encounters a distinct

[11] This phenomenon will be discussed further on, in section 3.3.

[12] Perhaps the sole exception to this tendency is the German Constitutional Court in its 1952 decision on the Socialist Reich Party, 2 BVerfGE I. This decision and the German constitutional provision will be analyzed further on.

[13] *See Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, Venice Comm., 41st Sess., CDL-INF (2001)1 (Jan. 10, 2000), *available at* http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.html.

constitutional duty of internal democracy. There are strong arguments to be made against imposing such a duty, based on the private characteristics of political parties, the importance of party autonomy, and the fear of creating a ''totalitarian'' democracy. Any argument in favor of imposing an obligation for internal democracy by means of the threat of party banning must address such criticisms and find sufficient theoretical and practical justifications for overruling them. I intend to show that such a step is plausible in terms of both constitutional theory and practice, although its problematic aspects demand a prudent approach to its definition and enforcement.

In section 1, I analyze the complex link between democracy and political parties, where both the advocates and opponents of internal party democracy base their arguments on democracy itself. I examine the questions of whether democracy presumes parties, whether parties presume democracy, and whether parties can be nondemocratic. Section 2 focuses on the problems created by a lack of internal party democracy, analyzing various justifications for imposing a duty of internal democracy on political parties and suggesting the advantages that might be achieved by doing so. This section also looks at possible disadvantages, theoretical and practical. Section 3 elaborates on the main argument of the essay—that the justifications for requiring internal political party democracy outweigh the arguments against. I further suggest guidelines for the scope and enforcement of such a duty, in the specific context of party dissolution.

## 1. Political parties and democracy

This discussion must begin by unpacking the complex relationship between democracy and parties, taking into account that many of the justifications for internal party democracy, as well as for party autonomy, rest on democratic theory and principles. One may begin by examining the interdependence between political parties and democracy: Can we have political parties without democracy? Can we have democracy without political parties? Is it possible, within a democracy, to entertain nondemocratic parties? Answers to these questions will pose the basis for confronting the last question: Is it possible, in a democracy, to have parties that lack internal democracy?

### 1.1. Parties without democracy?

Perhaps the most essential premise is that without democracy there can be no parties. This assertion has clear evidence in history—nondemocratic regimes tend to ban associations and parties, whereas democratization tends to begin with the free formation of political parties.[14] The theoretical basis is no less

[14] The French regimes of the nineteenth century, for instance, often banned political associations by criminalizing them—*see* Christian Mestre, *Le statut des partis politiques en France* [The status of political parties in France], Revue d'Allemagne 181, 181–183 (1994). Political associations were also banned under Franco's regime in Spain. In 1978, one of the first steps of Spain's new

clear. The meaningful functioning of political parties assumes the existence of such preconditions as freedom of association, voting rights, equality, freedom of speech, freedom of information, and party autonomy. In other words, functioning parties require a functioning liberal democracy or ''polyarchy.''[15] Indeed, some nondemocratic regimes claim to have parties or, more often, *a* party.[16] These, however, are not true parties, which, according to modern theory, exist only within a context of pluralistic party interaction.[17] A party is part of a whole, the whole being the party system. Pluralism entails equality, diversity, and autonomy. Only when there are several distinct groups that can compete freely on an equal footing, can we speak of a party system. Democracy is thus a precondition for the existence of parties.

### 1.2. Democracy without parties?

If parties cannot exist and function without democracy, is the opposite also true? Can democracy function without political parties? The historical answer might be ''yes.'' Direct democracy, in which all citizens participate in governance, does not necessarily depend on political parties. Nor does a move toward representative democracy change the picture; as long as democracy simply signifies popular sovereignty, it may be argued that the popular will can be executed by a single representative organ—the king or a single ruling class.[18] Parties are not necessary. Furthermore, early democratic theory even saw a contradiction between democracy and the existence of political parties, which it regarded as factions, groups of self-interested people operating against the public good, obscuring the general will and national sovereignty.[19]

democratic regime was to enable freedom of political association. *See* Maria J. Sauca, *Le Régime Juridique des Partis Politiques dans la Constitution de 1978* [The Legal Regime of Political Parties in the 1978 Constitution], *in* Dix Ans de Democratie Constitutionnelle en Espagne 111 (Editions du CNRS 1991). Furthermore, many new East European democracies have enacted specific constitutional provisions on freedom of political association and formation of political parties. *See, e.g.*, Const. Bulg. art. 11; Const. Croat. art.6; Const. Hung. art 3.

[15] *See* Robert A. Dahl, Democracy and Its Critics 106–113, 220–223 (Yale Univ. Press 1989).

[16] *See* Brantly Womack, *Party-State Democracy: A Theoretical Exploration*, 25(1) Issues & Studies 37 (1989). It should be noted that in some democracies there is a dominant party, among other parties. This has its own problems but is still considered to be democratic, and different from the undemocratic phenomenon of a single party state. *See generally, Introduction, in* Uncommon Democracies—The One-Party Dominant Regimes 1, 2–7 (T.J. Pampel ed., Cornell Univ. Press 1990).

[17] *See* Giovanni Sartori, Parties and Party Systems 39–50 (Cambridge Univ. Press 1976).

[18] *See* Jérôme Léron, *Pluralisme et Partis Politiques en Droit Public Français* 33–35 (Thése de Doctorat en Droit, Lyon, 1999) [Pluralism and Political Parties in French Public Law, unpublished Ph.D dissertation] (on file with the author).

[19] Madison's arguments against factionalism are known in this context—*see* The Federalist No. 10 (James Madison). *See also* Richard Hofstadter, *On The Birth of American Political Parties, in* Studies in Opposition 146, 146–149 (Rodney Barker ed., Macmillan 1971); Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. Chi. L. Rev. 1479, 1484–1496 (1994). For the idea of ''General Will'' *See* Jean-Jacques Rousseau, The Social Contract 70–74 (Penguin 1968) (1762).

However, this antagonism toward parties changed significantly throughout the nineteenth century, as parties were legitimated and came to be seen as essential. As modern democracy is characterized by representative governments and large electorates, political parties have many important functions to play.[20] The ability of an individual to influence government depends on collective action within organized groups.[21] Political parties can often spread information more extensively and effectively than an individual, and for less cost. At the same time, this spreads any risk associated with such activity among many participants.[22] By grouping varied individual interests along central societal cleavages, parties facilitate the ability of an individual voter to choose among fewer, and clearer, alternatives.[23] The aggregation of public opinion through elections also produces legitimacy.[24] Thus, parties play an important role, as they enable the individual to participate more intensively in political life.[25] Furthermore, they function as channels of communication between government and society, expressing demands[26] and articulating cleavages.[27] Parties also contribute to the legislative mechanism as they organize national assemblies and provide leadership.[28]

Moreover, parties compete with one another and thus are motivated to produce a better and more representative government. As governance becomes increasingly complicated, parties form and educate politicians for

[20] For a list of these functions, see Richard Gunther & Larry Diamond, *Functions of Parties, in* Political Parties and Democracy 3, 7–9 (Richard Gunther & Larry Diamond eds., Johns Hopkins Univ. Press 2001).

[21] *See* Nikolaus Saripolos, La Democratie et l'Élection Proportionnelle 119 (Paris, 1899).

[22] *See* Yigal Mersel, The Constitutional Status of Political Parties 72–73 (2004) [Hebrew]; Louis Levy-Garboua, *General Interest And Redistribution With Self-Interested Voters: Social Contract Revisited*, 69 Public Choice 175 (1991); Ota Weinberger, *Information and Human Liberty*, 9 Ratio Juris 248, 253 (1996).

[23] David B. Robertson, A Theory of Party Competition 12–15 (Wiley 1976).

[24] James Jupp, Political Parties 29–30 (Routledge & Kegan 1968).

[25] Sigmund Neuman, *The Party of Democratic Integration, in* The West European Party System 46 (Peter Mair ed., Oxford Univ. Press 1990); Anthony H. Birch, The Concepts and Theories of Modern Democracy 84 (Routledge 1993).

[26] Sartori, *supra* note 17, at 27–28.

[27] Seymour M. Lipset & Stein Rokkan, *Cleavage Structures, Party Systems, and Voter Alignments, in* The West European Party System, *supra* note 24, at 91; Stein Rokkan, *Towards a Generalized Concept of Verzuling, in* The West European Party System, *supra* note 25, at 139. Some even argue that political parties are not articulating cleavages but actually forming them. *See* Giovanni Sartori, *The Sociology of Parties: A Critical Review, in* The West European Party System, *supra* note 25, at 150.

[28] David .M. Olson, Democratic Legislative Institutions—A Comparative View 31 (ME Sharpe 1994); Jörn Ipsen, *Political Parties and Constitutional Institutions, in* Studies in German Constitutionalism 195, 203 (Christian Starck ed., Nomos 1995).

whom politics is a profession.[29] Additionally, they address the problem of accountability. Individual voters do not have sufficient incentives to monitor their representatives, but political parties are motivated to fulfill the monitoring function, whether because of prior party investment in financing a representative's campaign, or interparty competition, where each party monitors its opponent's representatives. In so doing, they reduce agency costs between voters and their agents.[30]

Thus, modern democracy has come to depend on parties. Indeed, some of the arguments about party decline are based on an erosion of these justifications. Other entities—nongovernmental organizations (NGOs), the media, and direct democracy mechanisms such as referenda—have replaced some of the traditional functions of political parties and sometimes do a better job.[31] Globalization weakens domestic governance and thus weakens political parties as well.[32] Nonetheless, parties are still an essential element of democracy. They are the players in the political arena that seek to gain office and enact their policies, as opposed to merely influencing the policies of others; thus, parties constitute the only institution in a position not only to legitimize an idea but also to concretize it.[33] Moreover, they are also the only players to endure. Based on a presumption of permanent existence rather than issue-based advocacy, they play a unique role in the government ''marketplace''—that of creditors.[34] The parties' presumed permanence enables them to grant political credit by forming coalitions and voting agreements. Political parties are, therefore, a unique mechanism for governance, decision making, and consensus building. They are an essential element of democracy.

### 1.3. Nondemocratic parties?

The interdependence of political parties and democracy is made clear by the problem, or paradox, of nondemocratic parties. Political parties may, in some cases, form around the goal of replacing a democratic regime or changing the rules of the game. Sometimes they act to promote these

[29] Max Weber, *The Advent of Plebiscitarian Democracy, in* The West European Party System, *supra* note 25, at 31.

[30] *See* Calabresi, *supra* note 19, at 1522–1530.

[31] *See* Constance Grewe & Helen Ruiz-Fabri, Droits Constitutionnels Europeens [European Constitutional Law] 230–231 (PUF 1995); Bernard Manin, Principes du Gouvernement Representative [Principles of Representative Government] 279–299 (Calmann-Levy 1995); Kay Lawson, *Partis Politiques et Groupes d'Intéret* [Political Parties and Interest Groups], 79 Pouvoirs 35, 37–45 (1996).

[32] *See* Pierre Brechon, Les Partis Politiques [The Political Parties], 144–145 (Montchrestien 1999).

[33] Nathan Yanai, *Why Do Political Parties Survive?*, 5 Party Politics 5, 14–15 (1999).

[34] Alessandro Pizzorno, *Parties in Pluralism, in* The West European Party System, *supra* note 25, at 61, 71–72.

ideologies,[35] seeking to achieve the goal of nondemocracy by nondemocratic (or even democratic) means. The paradox is that such parties need democracy in order to organize as political parties and freely advocate their ideologies, all the while they are advancing a nondemocratic agenda—thus using democracy as a platform for nondemocracy.[36]

Resolving the paradox is not easy. On the one hand, there are good reasons for arguing that a democracy must not commit suicide but, rather, must protect itself.[37] One may also assert an axiomatic principle to the effect that one cannot use freedom as a platform to deny someone else's freedom.[38] On the other hand, how can one deny the right to object to democracy, which is based on pluralism, free speech, and equality, all of which recoil from the exclusion of selected opinions from the political marketplace? Furthermore, on what basis can the majority of the people deny the right of a minority to be represented?[39] One could also question what practical purpose is served by denying nondemocratic opinions. If only a small minority holds these views, then why bother banning it when there are advantages to be gained by legitimizing this small group and absorbing it into the system? Then again, if a large group espouses these views, what is the point of banning them? Thus, if there are nondemocratic streams we should, according to this perspective, understand them and address their reasoning, rather than ''breaking the thermometer'' by banning the group itself.[40]

Different democracies have found different solutions to this problem. Some ban antidemocratic parties or establish a constitutional or legislative mechanism for dissolving them, as Croatia, Italy, Germany, Poland, Spain, and France have done.[41] These provisions usually reflect a society with

[35] On different variations of nondemocratic behaviors by political parties, *See* Hans Daalder, *The 'Reach' of the Party System, in* The West European Party System, *supra* note 25, at 78, 83–84.

[36] Cas Muddle, *The Paradox Of The Anti-Party Party*, 2 Party Politics 265 (1996).

[37] The German idea of ''defensive democracy'' is well known in this context. See Walter F. Murphy, *Excluding Political Parties: Problems For Democratic And Constitutional Theory, in* Germany and Its Basic Law 173, 180 (Paul Kirchhof & Donald Kommers eds., Nomos 1993).

[38] *See* Mustafa Koçak & Esim Örücü, *Dissolution of Political Parties in the Name of Democracy: Cases From Turkey And The European Court Of Human Rights*, 9 Eur. Pub. L. 399, 401–404 (2003).

[39] Gregory Fox & Georg Nolte, *Intolerant Democracies, in* Democratic Governance and International Law 389, 395 (Gregory Fox & Brad R. Roth eds., Cambridge Univ. Press 2000).

[40] *See* Pierre Esplugas, *L'intrediction des partis politiques* [The Ban of Political Parties], 1998 Revue Francaise de Droit Constitutionnel 675, 675.

[41] See Const. Croat. art. 6; Const. Italy art. 49; Const. Ger. art. 21(2); Const. Pol. art. 13; Const. Spain art. 6. France, for instance, uses a law from 1936, and not a constitutional provision, in order to dissolve associations and political parties. *See* Esplugas, *id.*; Pascal Mbongo, *Actualité Et Renouveau De La Loi Du 10 Janvier 1936 Sur Les Groupes De Combat Et Les Milices Privees* [Reality and renewal of the law of January 10th 1936 on combating private militias], 1998 Revue De Droit Public Et De La Science Politique En France Et A L'Etranger 715.

extremist antidemocratic streams, as well as societies that have experienced periods of nondemocratic regimes.[42] Other democracies—such as the United States or United Kingdom—do not explicitly ban nondemocratic parties. Sometimes, it seems that the ban is not needed due to the weakness of the extremist veins and the strong homogeneity of society.[43] This is often the case in countries that have a plurality election system with single-member districts that makes it nearly impossible for nondemocratic parties to gain electoral support,[44] or in countries that have not themselves experienced dominance or control by nondemocratic parties.[45]

Yet it seems that these differences in the way that nondemocratic parties are treated are a function not only of historical or institutional settings but also of different concepts of democracy. If the essence of democracy is procedure, then there are no true opinions or false ones—any opinion is legitimate, at least from the point of view of societal organization—and so the conflict between one opinion and another proves the essence of procedural democracy. So long as political parties follow the rules implicit in this perspective, their activities cannot be banned merely because their ideology and long-term goals are antidemocratic.[46] There is, however, another perspective on democracy, which focuses on substance rather than procedure and describes elections, pluralism, and the marketplace of ideas as means, not ends. There are basic rights and values that are not part of the public discourse and are not open for debate; even if the majority wished to change them, it could not do so, as these rights and values are the essence—the very core—of democracy.[47]

[42] Dan Avnon, *Parties Laws in Democratic Systems of Government*, 1 J. Leg. Stud. 283 (1995).

[43] Robert A. Dahl, *The American Oppositions: Affirmation And Denial*, in Political Oppositions in Western Democracies 34 (Robert .A. Dahl ed., Yale Univ. Press 1968).

[44] As a matter of fact, the difficulty a single-member district poses in a plurality system concerns the formation of any third party, not just an undemocratic one, because a rational voter will typically seek to vote for one of two alternatives that have a real chance of winning the single seat. This phenomenon will also lead, usually, to a centralized ideological spectrum focusing on the median voter. Under these circumstances, the chances that an extremist party—or a nondemocratic one—will gain significant support are very low. *See* Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, The Law of Democracy—Legal Structure of the Political Process 1091–1092 (Foundation Press 2002); Pietro Narava & Diego Lignana, *The Strategic Behavior Of Italian Left In A Risk Sharing Framework*, 93 Public Choice 131 (1997); *See* Nancy L. Rosenblum, *"Extremism" And Anti Extremism In American Party Politics*, 12 J. Contemp. Legal Issues 843, 860–861 (2002).

[45] *See* Avnon, *supra* note 42, at 287.

[46] *See* Fox & Nolte, *supra* note 39, at 400–401.

[47] *Id.* at 401–405.

I agree that, as a matter of fact, the general tendency is toward a more substantive view of democracy.[48] As observed earlier, regimes that ban nondemocratic parties often do so because they find that the ideologies and practices of these political parties run counter to basic democratic values.[49] That is the case, for instance, in Germany,[50] Turkey,[51] Israel,[52] and for the ECtHR as well.[53] Countries that opt not to ban nondemocratic political parties do so, in my view, because they do not consider them a major threat. The United States is a good example: history shows, that as a potential threat becomes more acute, there is a willingness to outlaw a competing political view, as was done with the Smith Act of 1940,[54] which made it unlawful

[48] Perhaps theory should also be regarded as favoring a substantive approach of democracy. Hence, it is often considered acceptable to view nondemocratic parties as nonliberal parties, as objecting to the core values of democracy such as freedom, liberty, separation of powers, and police restraint. *See* Rosenblum, *supra* note 43, at 852–856.

[49] Obviously, the determination whether a specific party is nondemocratic is difficult, especially as there may be a gap between the aims of a party and its actual activities, and the regime may in any case be willing to tolerate, to some extent, nondemocratic activities within the democratic system. For instance, it is questionable whether the Nazi opposition party and the Communist Party during the Weimar Republic, or the Communist Party in Italy in the 1950s and 1960s, should have been seen as nondemocratic. *See generally* Gordon Smith, *Party and Protest: The Two Faces of Opposition in Western Europe, in* Opposition in Western Europe 52, 59–63 (Eva Kolinsky ed., Croom Helm 1987); William E. Paterson & Douglas Webber, *The Federal Republic Of Germany: The Re-Emergent Opposition?, in* Opposition in Western Europe, *id*, at 137, 139–141; Geoffery Pridham, *Opposition In Italy: From Polarised Pluralism To Central Pluralism, in* Opposition in Western Europe, *id*, at 169.

[50] "A party may be eliminated from the political process only if it rejects the supreme principles of a free democracy." See The Socialist Reich Party Case (1952) 2 BVerfGE I, *translated in* Kommers, *supra* note 6, at 218–222.

[51] As demonstrated in the Turkish cases adjudicated by the ECtHR, and especially the Welfare Party case, the main reason for the decisions in Turkey to ban political parties were the threat these parties posed, according to the government, to democratic basic values. *See supra* note 3. *See also* Koçak & Örücü, *supra* note 37.

[52] In 1988, the Israeli Supreme Court had authorized the ban on participation in national elections of a list of candidates of the Kach political party. The major basis for the disqualification was the party's racist agenda, and not its opposition to the democratic regime as such. *See* E.A. 1/88 Neiman v. The Chairman of the Election's Committee, 42(4) P.D. 177 [Hebrew].

[53] *See supra* note 2.

[54] *See* The Smith Act, 18 U.S.C. § 2385 (1940). *See also* The Communist Control Act, 50 U.S.C. §§ 841–844 (1954). There are also some Supreme Court cases handling this topic. *See, i.e., American Communist Party v. Douds*, 339 U.S. 382 (1950) (Section 9 (h) of the National Labor Relations Act (commonly referred to as the non-Communist affidavit provision), which imposes certain restrictions on labor organizations whose officers did not file their "non-Communist" affidavits, is valid under the federal constitution); *Dennis v. United States*, 341 U.S. 494 (1951) (Convictions of the Communist Party leaders with violating provisions of the Smith Act. The court ruled that the Smith Act did not inherently violate the First Amendment). *See also* Dan Gordon, *Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence With That of the United States and Germany*, 10 Hastings Int. & Comp. L. Rev. 347 (1987).

knowingly to conspire to teach, advise, or advocate the overthrow or destruction of the U.S. government and which served as the basis for the federal prosecution of members of the Communist Party and other left-wing political groups during the late 1940s and early 1950s. Hence, although there is no authority for party dissolution in the United States, the American democracy has also seen the enactment and enforcement of regulations that outlaw certain political opinions on the basis of their potential threat to basic democratic values.

In sum, untangling the democratic paradox is sometimes done by banning or dissolving nondemocratic parties. It is a theoretical and practical possibility that has been affirmed—under appropriate circumstances—by constitutional courts and international courts such as the ECtHR. The basis for this practice lies in a substantive approach to democracy, which seeks to protect the system's basic values as well as its procedures. We will proceed, therefore, on the assumption that it is possible for an effectively functioning democracy to yield a decision to dissolve a political party while still preserving its democratic values.

## 2. Lack of internal democracy?

The last step in our analysis is, perhaps, the most problematic. As complex organs, political parties are associations with various structures, institutions, memberships, and rules, which are distinct from such features such as activities, programs, and declarations. We can, accordingly, assess their democratic character in terms of internal as well as external functions. One may evaluate and characterize not only the relationship between the party and others but also the internal party structure and the relationship between the party and its members.

What makes a party internally democratic? Some scholars have amassed a list of features that characterize internal party democracy—in party–member relations as well as party structure and institutions. These features include: the ability of party members to elect the party leadership or recall it, including their ability to elect the party's nominees to public positions; equal and proportional representation of intraparty minorities and majority-rule voting; the ability of members to influence the party platform and agenda; protection of party members' basic rights, including the right not to be expelled without a fair proceeding; the right to information and transparency of party management, especially fiscal accountability; freedom of speech and association within the party, especially with respect to forming factions; and the provision for independent judicial review of internal party democracy.[55]

[55] *See* Maria del Pilar Hernandez, *Democracia Interna: Una Asignatura Pendiente Para Los Partidos Politicos En Mexico, in* Partidos Politicos: Democracia Interna y Financiamiento de Precampanas 127, 134–135 (Maria del Pilar Hernandez ed., UNAM 2002); Ruban Hernandez Valle, *La Democracia Interna de los Partidos Politicos* [The Internal Democracy In Political Parties], in Partidos Politicos: Democracia Interna y Financiamiento de Precampanas, *id.*, at 145, 148–150.

Assuming that the foregoing are the likely characteristics of internal party democracy,[56] how should the law treat a political party that does not adhere to these basic elements of internal democracy? A political party is not democratic internally, for instance, if it fails to conduct, at regular intervals, open elections among its members for party leadership, or bans the establishment of intraparty factions. The party structure is, therefore, vertical, as authority flows from leadership to the bottom, and not from individual members to the top.[57] Should this kind of party be banned? This question is not merely theoretical. Some countries have within their political systems parties that apparently lack internal democracy, such as parties that are led by figures whose authority is not derived from elections.[58] What are the justifications for imposing a duty on political parties to be not only democratic externally, when facing outward, but also internally, when looking inward?

### 2.1. Justifying internal democracy

The first rationale for imposing a duty of internal democratic structures on political parties is based on their representative and participatory functions. In modern democracy, as noted,[59] political parties have an important role to play in articulating the ideologies and demands of the society itself. It follows that political parties are thus a component of the democracy and constitute a major part of it. Therefore, if individuals have a right to equality and liberty in a democracy, they must also have these rights within the bodies that enable them to participate in that democracy.[60] Furthermore, if we see political parties as entities that represent the society not by determining its ideologies but rather by reflecting and channeling the social currents within it, then we must make sure that the ideologies and politics of the parties are produced by large and representative groups within society.[61] In other words, we need internal democracy in parties.

[56] This is only an assumption; I will argue, later on, that this definition is too wide and must be narrowed, especially in the context of a party ban.

[57] On the distinction between *vertical* and *horizontal* links within political parties, *See* MAURICE DUVERGER, POLITICAL PARTIES 47–52 (Wiley 1954).

[58] There are few Israeli political parties that might be said to demonstrate these ideas. *See* Mersel, *supra* note 22, at 430–431.

[59] *See supra* notes 20–34.

[60] *See* Grewe & Ruiz-Fabri, *supra* note 31, at 234–235; Jean-Paul Jacqué, *Le Statut des Partis Politiques en Europe* [The Status of Political Parties in Europe], *in* LES DROITS DE L'HOMME—DROITS COLLECTIFS OU DROITS INDIVIDUALS 102, 118 (Paris 1980).

[61] *See* James A. Gardner, *Can Party Politics be Virtuous? Symposium: Law and Political Parties*, 100 COLUM. L. REV. 667, 683–685 (2000). As Gardner points out, this is not necessarily the ultimate model for, or role of, political parties (the ''populist'' role). We might also assent to a ''pluralist'' system in which parties are representing small groups and specific interests, and virtue

The second rationale is connected to the problem of external democracy in political parties. If we accept the idea that there is no place for nondemocratic parties in a democracy, then we must also find that there is no place for parties that lack internal democracy. Lack of internal democracy may be seen as evidence of external nondemocracy.[62] It is arguable that a party that is not internally democratic cannot really be externally democratic; in the long run, the internal agenda and predispositions would be bound to influence the party's external attitudes and activities.

The third justification for imposing a duty of internal democracy involves what Roberto Michels described as the Iron Law of Oligarchy—namely, the fear of the excessive power of the party leadership.[63] Political parties tend—as a sociological characteristic—to concentrate power and influence. The party leadership gathers more and more power to itself, while that of the individual member weakens, the former becoming more suspicious of change as it concentrates on preserving its dominion.[64] This tendency might yield political parties that oppress and control not only their own members but also the general public.[65] Internal party democracy is needed, therefore, as a means of dilution and decentralization of party leadership.

The fourth rationale focuses on collective-action problems within a party. As mentioned earlier,[66] political parties are essential in modern democracies since an individual can have a significant impact on politics only through organized collective action. Political parties are thus a means by which an individual can influence politics and access information at minimal cost and risk. However, the collective action within political parties also causes a problem. There is the risk that party leadership will not be supervised at all by party members. This could arise from an assumption by each party member that other members are doing the job. The individual member has no incentive to monitor the party leadership, as it entails great cost, and the benefit is spread among all party members. Internal party democracy rules

is achieved through the confrontation of different ideas. Each model has significant outcomes in political reality and for the normative framework of political parties.

[62] It seems that German jurisprudence has followed this idea as it focuses on the internal structure of political parties as evidence of their external democracy. *See, e.g.*, KOMMERS, *supra* note 6, at 222. Obviously, this German practice is strongly connected to the constitutional provision explicitly imposing internal democratic structure as one of the duties of political parties. *See* GG art. 21(1).

[63] ROBERTO MICHELS, POLITICAL PARTIES 342–356 (Free Press 1962); *See also* MANIN, *supra* note 31, at 265–266. Other scholars like Mosei Ostragorski, Max Weber and Maurice Duverger have described similar oligarchic tendencies within parties. *See* Hernandez, *supra* note 55, at 131–133.

[64] *See* DUVERGER, *supra* note 57, at 151–168.

[65] *See* MARCEL WALINE, LES PARTIS CONTRE LA REPUBLIQUE 86–93 (Rousseau et Cie 1948).

[66] *See supra* notes 21–30.

help to mitigate this collective action failure.[67] If any party member has the right to be elected in free and open elections to any post in the party, the party as a whole has a cheap incentive to monitor and audit the party leadership. Internal democracy also means transparency and the free flow of information. Individual members can associate in internal party factions and thus have better incentives to monitor the party leadership. In sum, internal party democracy is important in order to solve collective-action failures.

Thus it seems that there are significant justifications for the requirement of internal democracy in political parties. Some are based on the need to promote and protect the democracy from the party; others are aimed at advancing the rights of individuals within parties and thus promoting the country's democratic procedure. This duty to follow internal democratic procedures can be enforced potentially by dissolving noncompliant political parties.

### 2.2. Totalitarian democracy?

However admirable the justification, the imposition of internal democracy is clearly an extremely problematic move. First, it constitutes, without question, an infringement on a constitutional right of association and autonomy.[68] This right is not only the right of individuals to form political parties and associate within them but also a distinct association right belonging to the political party as a legally independent entity.[69] Any imposition of a certain internal structure, be it a duty to conduct primaries or an obligation to treat all members on an equal basis, infringes on this right.[70] Such an infringement is not merely a problem of constitutional law but a threat to the party system as a whole. Hence, the imposition of internal democracy could become a means by which one party could harm, or outlaw, another. There are many instances of laws that purportedly were enacted to ''promote'' democracy but actually served the attempt by one party or party cartel to damage

[67] *See* Thomas A. Koelble, *Economic Theories Of Organization And Politics Of Institutional Design In Political Parties*, 2 PARTY POLITICS 251 (1996).

[68] *See* Nathaniel Persily, *Towards A Functional Defense Of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001); Arthur M. Weisbrud, *Candidate-Making And The Constitution: Constitutional Restrains And Protection Of Party Making Methods*, 57 S. CAL. L. REV. 213, 255–270 (1994).

[69] *See* Jeffery L. Anderson, March Fong Eu v. San Francisco County Democratic Central Committee: *Tension Between Associational Rights Of Political Parties And Fair Elections*, 16 J. CONTEMP. L. 381, 386–387 (1990); Leon D. Epstein, *Will American Political Parties Be Privatized*, 5 J.L. & POL. 239, 242 (1989); Charles G. Geyh, *It's My Party And I'll Cry If I Want To: State Intrusions Upon The Associational Freedoms Of Political Parties*, WIS. L. REV. 211, 222–223 (1983). It seems that the Spanish approach to this issue is different; it assumes that the associational rights of the parties cannot be separated from those of the individuals comprising it. *See* Rubio Llorente & Javier Campo, *Espagne—Table Ronde—Constitution et Partis Politiques*, IX ANNUAIRE INTERNATIONALE DE JUSTICE CONSTITUTIONNELLE 125, 130 (1993).

[70] *See* Hernandez, *supra* note 55, at 136.

another by weakening the force of its leadership and candidate selection.[71] Furthermore, the imposition of an overly democratic structure within parties might cause a collective-action problem within the parties. That is, if all members are eligible to hold any position within the party, and there is no special status given to the party leadership, everyone may try to maximize their chances to be elected to a party position, while no one focuses on promoting the party agenda, assuming that others will take care of this. The result is the weakening of the party.[72]

Another functional failure resulting from the imposition of internal democracy might be to render party discipline ineffective. One of the conditions for efficient collective action in political parties is discipline, manifested in the party's ability to assure the adherence of its members and representatives to party doctrine.[73] Party discipline is needed; as the party invests resources in securing the election of its representatives, it must ensure that they do not cross the aisle to another party or act independently.[74] It may be argued that, once a political party becomes too democratic internally, its power to discipline its members and monitor its representatives is limited. The more rights and power enjoyed by those members and representatives, the fewer incentives they have to respect party doctrine and party cohesion.[75]

Second, party autonomy is also members' autonomy. Membership in a political party is not compulsory in a democracy. Arguably, anyone who affiliates with a party accepts its internal structure and rules and may even be seen as entering into a contract with the party to do just that. Why, then, must we interfere with party members' autonomous decisions? Imposition of internal democracy is a paternalistic move, forcing members to adopt an alternative set of rules.

Third, the imposition of internal democracy has an effect on party ideology. A party may adopt a nondemocratic internal structure as part of its ideology, which could be, for instance, a fundamentalist religious

[71] *See* Persily, *supra* note 68, at 794–805; Samuel Issacharoff & Richard .H. Pildes, *Politics As Markets: Partisan Lockups of Democratic Process*, 50 STAN. L. REV.643, 668–690 (1998).

[72] *See* Eyal Benvenisti, *Party Primaries As Collective Action With Constitutional Ramifications: Israel As A Case Study*, 4 THEORETICAL INQUIRIES IN LAW 175 (2002).

[73] This adherence makes voting agreements more efficient, as the party can provide a bloc of votes. *See* Roderick D. Kiewiet & Mathew D. McCubbins, *Parties, Committees, And Policymaking In The U.S. Congress: A Comment On The Role Of Transaction Costs As Determinates Of Governance Structure Of Political Institutions*, J. INSTITUTIONAL & THEORETICAL ECON. 676, 677–678 (1989).

[74] *See* G. Holocombe & James D. Gwartney, *Political Parties And Legislative Principal-Agent Relationship*, J. INSTITUTIONAL & THEORETICAL ECON. 669, 672 (1989).

[75] For the connection between party power and the discipline of its representative, see Holcombe & Gwartney, *id.* at 673–674. For a general overview of a party's discipline advantages and disadvantages, see Giovanni Sartori, COMPARATIVE CONSTITUTIONAL ENGINEERING 189–193 (N.Y. Univ. Press 2d ed. 1997).

ideology according to which men and women are not equal, or that there is no authority other than the spiritual leader of the party.[76] Also possible is a Leninist or ultranationalist party in which the power is concentrated in party leadership with no substantial power accorded the individual member.[77] Some parties are structured as cells, or even militia, following their own ideologies.[78] In these cases and others, the imposition of internal democracy might impact severely on the ability of the party—and its adherents—to advocate their own ideology. Such an imposition can be justified as promoting democracy in all the units that operate within the political market—including political parties—but its price might be impairment of the ability of some parties, however democratic their programs, to gain power and support.

Fourth, the imposition of internal party democracy undermines the basic idea of pluralism. As the state and the legal system force political actors to become more and more democratic, they also become less pluralistic. The political system shrinks in its ideological variety. Tolerance for the other decreases as all political members are expected to think and act according to the same leading ideology. Thus can democracy develop into dictatorship.[79] This fear is especially significant inasmuch as one might argue that there is no single universally acceptable definition of ''democracy.''[80] Imposing internal democracy means oppressing alternative views and, in so doing, this might cause a failure of democracy. Political parties, as agents of society, may not be able to transmit calls for change to the government if they have to comply with a strict preexisting definition of democracy. They should be able to define themselves and not be obliged to follow a single pattern of internal democracy.[81] Furthermore, if there is a fear that internally nondemocratic parties will become nondemocratic

[76] *See* GUNTHER & DIAMOND, *supra* note 20, at 21–22. Furthermore, as mentioned earlier, few Israeli parties manifest these characteristics, *supra* note 56.

[77] GUNTHER & DIAMOND, *id.* at 18–19.

[78] For the different structures of parties as reflecting their ideologies, *See* JEAN BLONDEL, COMPARATIVE GOVERNMENT 139–143 (Longman 2d ed. 1995). On militia structure of parties, *See* DUVERGER, *supra* note 57, at 36–40.

[79] The famous work of Talmon had shown how democratic theory can be used as a basis for totalitarian thinking, beginning with Rousseau and the Jacobin terror after the French revolution. *See* JACOB TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY (Secker & Warburg 1952).

[80] For this reason, some argue that banning political parties for being nondemocratic is also problematic, as there are many different ways of defining democracy. *See* Martti Koskenniemi, *Whose intolerance, which democracy?, in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 436 (Gregory Fox & Brad R. Roth eds., Cambridge Univ. Press 2000).

[81] *See* Kostas Chryssogonos, *Political Parties And Constitutional Institutions In Greece*, 45 JAHRBUCH DES ÖFFENTLICHEN RECHTS 501, 504 (1997).

externally, then we should rely on general elections as a sufficient safeguard, counting on the public to vote against nondemocratic parties. According to this view, there is thus no need to intervene in the internal structure of political parties.

Last, even if bound to a formal requirement of internal democracy, there is no guarantee that a party will become more democratic in reality. For instance, even if there is a duty to conduct open elections within the party, it is quite possible that only an insignificant number of members—usually the oligarchic circle—will actually vote.[82] Hence, a lack of internal democracy may defy attempts at regulation.

In sum, there are strong arguments against seeking to impose internal democracy on political parties. Acknowledging the importance of a pluralistic political party system implies that, even if a ban on nondemocratic political parties may be justified in some instances, we should not go so far as to impose on them a duty to be democratically structured.

## 3. Toward a duty of internal democracy in political parties

Despite the problems just enumerated, I would argue that the advantages of creating a duty to ensure internal democracy are more compelling than the disadvantages. Internal democracy should be seen as a basic structural feature of any constitutional organ, including a political party. Because we cannot have democracy without political parties, and because a substantive approach to democracy cannot accept nondemocratic, or undemocratic, parties, the jurisprudence regarding the dissolution of parties must be based not only on their external aspects but also on their internal democracy. However, the special features and unique role of political parties in a democracy must be taken into account, when defining the scope of their duty of internal democracy, as well as its applicability and enforceability. The special role of political parties and pluralism, as well as the importance of intra-party autonomy, must be given proper weight. A balance must be struck between the advancement of noble democratic ideals, on the one hand, and a pluralistic political system, on the other. As both the justification for internal democracy and the objection to it derive from democracy itself, a balance is required to ease the tension. I propose two principles by which to achieve that balance: first, the concept of internal democracy must be defined narrowly, taking into account the need for party autonomy, as well as the importance of democratic structure. Second, enforcement of internal democracy must be assigned to a neutral institution.

[82] *See* Hernandez, *supra* note 55, at 136.

### 3.1. The scope of the duty

One way to ease the tension among the competing concerns, described above, without abandoning the advantages of internal party democracy, is to fine-tune our definition. If one is to dissolve a political party on the basis of a lack of *internal* democracy, then the definition of that democracy should be narrower than the one used for *external* democracy. We should characterize relations between party members and party leadership differently from the way in which we would characterize the relationship between the individual and the state. For example, the scope of equality may be different. The state may need to promote equality by advancing affirmative action. Political parties ought not to be banned for a failure to promote certain minorities or groups within the party, insofar as every individual has the right to vote in general elections, regardless of ideological affiliation or sexual or racial characteristics. Political parties can ask members to prove their affiliation to the party ideology. They can also impose fees on members for participation in party elections, whereas it is questionable whether states can impose a voting tax. The preceding are instances in which a party needs to be democratic, but not as democratic as the state. Thus, we can speak of varying degrees of democracy applicable to state agencies, to the external activities of political parties, and to the parties' internal structures, with the degree of required democratization decreasing as we move away from the state and toward the level of the autonomous party.

What justifies this democratic sliding scale? First, political parties function within a party system. This implies at least two major parties competing freely; thus, in theory, an individual member of a party always has the option of switching to another party or forming a new one. A comparable set of alternatives does not exist in the context of the individual's relationship with the state. If she cannot take part in the national general elections, she does not have the option of forming a new state or participating in some other, equivalent election. This places a greater burden on the state than on the political party. Interparty competition means that the level of internal democracy that might be imposed on a party need not be identical in its content to the democratic obligations imposed on the state. Furthermore, many of the justifications for internal democracy, as discussed above, are based on the symmetry between internal party democracy and the democratic structure of the state. In other words, we have justified internal democracy on the basis of the rights of the individual in the society.[83] However, a closer look reveals that not all individuals are party members. Even within the party there are different degrees of participation—leaders, members, supporters, voters.[84] Hence, there is no correspondence between protecting the individual and protecting party members. This difference in status should lead

[83] *See* Pierre Avril, Essais Sur Les Partis 133–134 (LGDJ 1986).

[84] *See* Duverger, *supra* note 57, at 90–115.

to a parallel but lesser degree of democracy within the party, as compared with the state.[85]

Second, the risk posed by an internally nondemocratic structure is smaller than that represented by external nondemocracy. At the end of the day, policy and governance are performed by the legislature and the executive, not by political parties, and there is, after all, a greater risk for the individual in a nondemocratic regime. There is another, less significant risk posed by a nondemocratic party, that is, a party whose activities and goals are not democratic (external democracy). Such a party is not equal to a nondemocratic state in its strength or its potential to harm the individual, although the risk that it will gain enough support to overturn democracy leads to a willingness to ban its existence in certain cases. Lack of internal democracy also creates a danger. However, while the oppression of party members might lead to a party becoming nondemocratic, this result is not critical. Parties often draw a clear line between their internal structure and their external activities.[86] Hence, the threat posed by parties lacking internal democracy is not as significant. Furthermore, party members might accept their nondemocratic party leadership and structure and, hence, need not the protection of the state.

Nevertheless, internal democracy is too important a value not to be protected, even if the threat posed to the state by its absence is not as significant as that posed by an externally nondemocratic party. There is a greater likelihood of the pursuit of nondemocratic goals in parties that have a nondemocratic structure. Furthermore, while it is true that party members are able in theory to leave—to change their party affiliation or to form another party—that option is not always available in practice. There are cases where the political system as a whole acts in the same nondemocratic way toward certain groups in society. For instance, the *White Primary* cases in the United States demonstrated how the political market, as a whole, was discriminating against African-Americans.[87] The voters had no alternative to the dominant Democratic Party that had disenfranchised them. Thus, the

[85] *See* Philip Kunig, *Parteien, in* HANDBUCH DES STAATSRECHTS II 115 (Paul Kirchhof & Josef Isensee eds., 1987).

[86] For instance, it is relatively clear that the ultraorthodox religious parties in Israel manifest a problematic internal structure. However, scholars point out that in their external activities, these parties accept the rules of the game and even use them to their own benefit. See Arhend Lijphart et al., *Party Systems and Issue Dimensions: Israel and Thirty-five Other Old and New Democracies Compared*, in PARTIES, ELECTIONS AND CLEAVAGES 29, 42–43 (Reuven Y. Hazan & Moshe Maor eds., Frank Cass Publishers 2000). It should be noted also, that this is a ''gap'' between the party ideology, on the one hand, and its pragmatic behavior, on the other. This gap is one of the reasons that certain democracies are relatively tolerant of allegedly nondemocratic parties. *See supra* note 47.

[87] *See Nixon v. Herndon*, 273 U.S. 536 (1927). In that case, a statute passed in Texas that denied Afro-Americans the right to vote in primary elections was found to be an obvious infringement of the Fourteenth Amendment. Color cannot be made the basis of a statutory classification affecting

political market might be locked up, leaving no exit alternative.[88] Moreover, the establishment of a new party is not so easy. Some entry barriers—chiefly ballot access restrictions, such as voter registration rules, ballot formulation schemes, and state-mandated party nomination procedures—make it almost impossible to form another party, not to mention the tremendous cost of such a venture.[89] In these cases, the real ability of the individual to participate and influence the party is within the party, through internal democracy.[90]

Yet, however powerful the justification for the imposition of internal democracy, such action must be taken with extreme care, while maintaining maximum autonomy and diversity within the party system. Therefore, we must apply a narrower definition of democracy in the context of internal party functions. Only the essentials of democracy—what may be termed *minimum democracy*—must be imposed on political parties, especially when it comes to such a drastic move as party dissolution, which should be used only in cases of a clear threat to the core of democratic values. These essentials may include: equal rights of participation and voting for party members; open and regular elections for party leadership and party offices; freedom of speech and association within the party; and a right to information and transparency.[91]

the right to vote. As a result of the decision in Nixon v. Herndon, the Texas Legislature enacted a new statute giving every political party the power to prescribe the qualifications of its own members. The Democratic party adopted a resolution saying that only white men were allowed to participate in primary elections. In a subsequent decision, the court ruled that the party's action was state action prohibited by the Fourteenth Amendment, which forbids the states to deny any person the equal protection of the laws, *Nixon v. Condon*, 286 U.S. 73 (1932). Furthermore, in *Smith v. Allwright*, 321 U.S. 649 (1944), the Democratic Party of Texas denied black men right to vote in the 1940 primary elections. The court found that although the party was a ''voluntary association,'' primary elections are a state action and a state may not permit private organizations to practice racial discrimination. Afro-American voters were later excluded from voting in an association that selected candidates to run for nomination in the Democratic primary. As a result, for over sixty years, only the association candidates had been elected to office. The court ruled that the combined election machinery of the association and the Democratic Party deprived petitioners of their right to vote due to their race and color, contrary to the Fifteenth Amendment, *Terry v. Adams*, 345 U.S. 461 (1953).

[88] For the idea of market lockups in political parties, see Issacharoff & Pildes, *supra* note 71.

[89] For examples of entry barriers for minor and third parties in the United States, see Benjamin D. Black, *Developments In The State Regulation Of Major And Minor Political Parties*, 82 Cornell L. Rev. 109 (1996); Chris Hocker, *Legal Barriers To Third Parties*, 10 N.Y.U. Rev. L. & Soc. Change 125 (1980–1981).

[90] This is the ''voice'' option, rather than the ''exit'' option. *See* Nathaniel Persily & Bruce E. Cain, *The Legal Status Of Political Parties: A Reassessment Of Competing Paradigm*, Symposium: *Law and Political Parties*, 100 Colum. L. Rev. 775, 791 (2000).

[91] Indeed, this was also the definition of internal democracy that was given by the Spanish Constitutional Court. *See* Llorente & Campo, *supra* note 69, at 128.

There are other possible definitions of minimum internal party democracy;[92] however, adherence to the list above should suffice to enable a political party to function within a democracy and avoid having its activity banned. This minimal definition corresponds to the failures that have brought attention to the need for internal democracy to be imposed in the first place. Thus, the justifications for internal democracy are mainly concerned with representation, participation, and the liberty of individual party members.[93] Internal democracy is needed in order to enable individuals to participate in functions of party channeling, aggregation, and expression; accordingly, a minimal degree of participation and influence should be guaranteed. Internal democracy is likewise needed to prevent party dictatorship and oligarchy; hence, a minimal ability to monitor and to replace the party leadership must be guaranteed.

Indeed, this definition of internal party democracy in the context of party banning is similar to that adopted by the German Constitutional Court in the *Socialist Reich* case (1952), where the party was dissolved on the grounds of its nondemocratic structure. The Constitutional Court noted that: ''A party must be structured from bottom up; that is members must not be excluded from decision-making processes, and [there must be a] . . . basic equality of members as well as the freedom to join or leave the party . . . it would also contravene democratic principles either to promise absolute obedience to party leaders or to demand such a promise.''[94]

However, given the distinct importance of pluralism and party autonomy, as well as a fear of totalitarian democracy, we must not surpass the minimal demand of internal democracy by dissolving political parties just for having a problematic internal structure. For example, we should not ban parties that do not use primaries to nominate their candidates. Primaries may be a democratic tool, but they are certainly not the only reasonable means of participation by party members in the candidate selection process. Likewise, separation of powers may be a crucial element of democracy, but its lack within a political party should not be sufficient grounds for dissolving the party. Affirmative action is an important state duty in the context of equality and of democracy; however, there is no basis for dissolving a party that does not actively promote the intraparty participation of women or

[92] For a more fully elaborated definition of minimal internal democracy, including, for example, protection of the procedural rights of party members and dominance of the party's general members' assembly, see Jose Ignacio Navarro Mendez, Partidos Politicos y ''Democracia Interna'' [Political Parties and ''Internal Democracy''] 75–94 (Centro de Estudios Políticos y Constitucionales 1999).

[93] *See* part II, sec. 1, *supra*.

[94] *See* The Socialist Reich Party Case (1952) 2 BVerfGE I, *translated in* Kommers, *supra* note 5, at 218, 222.

minorities.[95] Political parties may decide to impose fees on voting, or other qualifications, such as a minimum number of years of membership or a demonstration of party loyalty. The point is that, in balancing the importance of internal democracy with other interests, such as pluralism and party autonomy, we should ban only those parties that do not conform to the minimal definition.

### 3.2. The duty of enforcement

Even if there is agreement on the scope of obligatory internal democracy, another problem arises: Who will define and enforce internal democracy? One objection to the concept is the legitimate fear that this duty will become a means for one party to oppress a rival, or a cartel of parties to exclude a group of competitors.[96] Indeed, in any instance of party regulation, there is the fear that what is justified as advancing the public interest is no more than an anticompetitive tactic lurking behind regulatory powers, as when parties use campaign finance laws to ban certain fund-raising sources that are mostly used by rivals, or impose a method of holding a primary that will disadvantage another party. Similarly, there is the fear that the imposition of internal democracy may be used to exclude a party or diminish its chances of success. It is, therefore, important that the enforcement of internal democracy be executed by an independent and neutral political player—usually a court.

The fear that a party in power will ban its opposition, or that it will refrain from banning a nondemocratic ally for purely political reasons, has led some democracies—including Andorra, Croatia, the Czech Republic, Estonia, Germany, Portugal, Slovenia, and Turkey—not only to specify in their constitutions the duty of parties to be democratic but also to invest exclusive jurisdiction over these matters in independent courts.[97] Indeed,

[95] There could, of course, be other ways less severe than party dissolution to promote affirmative action and equal representation within parties. *See, e.g.*, the French constitutional amendment articles 3 and 4 (No. 99–569 of July 8, 1999, J.O. July 9, 1999) (imposing a duty on political parties to "promote equal access by women and men to elective offices and positions"); *see also* the Spanish parties' affirmative action practices in MENDEZ, *supra* note 92, at 405–407.

[96] For the phenomenon of party cartels, both in political science and law, see PIERRE BRECHON, LES PARTIS POLITIQUES [The Political Parties] 146–150 (Montchrestien 1999) (describing the usage of party cartels for achieving state financing their activities); MOSHE MAOR, POLITICAL PARTIES & PARTY SYSTEMS 110–112 (Routledge 1997) (analyzing the effect of party cartels and competition deficiency on the voters); Richard S. Katz & Peter Mair, *Changing Models of Party Organization and Party Democracy*, 1 PARTY POLITICS 5 (1995)(describing the development of the cartel party); Issacharoff & Pildes, *supra* note 71 (describing cases of lockups in the political market due to party cartels); Chris Hocker, *Legal Barriers To Third Parties* 10 N.Y.U. REV. OF LAW & SOC. CHANGE 125 (1980–1981) (describing the use of party power in order to undermine the chances of potential third-party rivals).

[97] *See* CONST. ANDORRA art. 26; CONST. CZECH REP. art. 87(1)(i); CONST. CROAT. art. 125; CONST. EST. art. 48; CONST. GER. art. 21(2); CONST. PORT. art. 233(e); CONST. ROM. art. 144(I); CONST. SLOVN. art. 129(4); CONST. TURK. art. 69.

the determination as to whether a political party is democratic, and whether it has a democratic internal structure, should be made by a nonpolitical organ.

When imposing this duty, courts must be mindful of the delicate balance between the important democratic principles of representatives' and members' equality, on the one hand, and party autonomy and pluralism, on the other hand. Thus, though there must be regular and open elections within each party, the specific method of election should remain an autonomous party decision, as should election dates, vote-counting techniques, and possibilities of appealing the outcome. Parties should enjoy a margin of discretion in their internal affairs. The dynamics of the internal political structure should be preserved. Courts should intervene only in cases where party practice clearly contradicts the minimal definition of democracy, and only as a last resort.[98] And they must—as in other cases of party dissolution—rely on firm evidence of the party's structure.

### 3.3. Banning internally undemocratic parties

Different countries have found different solutions to the paradox of nondemocratic political parties. As a practical matter, party banning is a legal possibility only in some democracies, certainly not in all of them. Were these countries to adopt the concept of imposing internal democracy, they would then have the option of banning parties whose internal structure is undemocratic—whether as the sole justification or as one factor among others. However, must internal democracy be imposed on political parties through practice of banning parties? It could be done through a legislative provision, specifying a general duty of political parties to be internally democratic, as some democracies have done.[99] Alternatively, party members might seek to impose internal democracy on parties from within, basing their arguments on corporation laws.[100] The question is not whether the

[98] *See, e.g.*, the approach of the Constitutional Court of Poland in case Pp1/99 (Mar. 8, 2000): "[t]he Constitution provides for the dynamic unity of internal and external organizational structures and methods of activity of a political party. The unity should enable citizens organizing themselves into parties to influence effectively and to participate in democratic life. The freedom to form internal structures and methods of activity cannot be limited as long as they do not threaten the party's performance of its constitutional role and do not exclude democratic methods of influence over national policy," *summary translated in* 2001(1) BULL. ON CONST. CASE LAW 96.

[99] *See, e.g.*, Law On Political Parties (Romania, 1996) art. 16; Law On Political Parties (Germany, 1967) art. 6–15; and Federal Election Law (Germany, 1956) art. 21.

[100] This possibility depends on the specific legal status of a political party in a given state. Hence, a political party might be regulated like any other corporation and subject to the general provision of the law on corporations. In this case, party members might have some enforceable rights vis-à-vis the party. In France, for example, the legal status of political parties is still regulated via the law on corporations from 1901 (La loi du 1er juillet 1901 sur le contract d'association): MOHAMMED R. KHEITMI, LES PARTIS POLITIQUES ET LE DROIT POSITIF FRANCAIS [Political Parties and French Law] 11–128 (Librairie générale de droit et de jurisprudence 1964).

imposition of internal democracy can be done through legal models other than banning party but, rather, whether those alternatives are sufficient. I maintain that the imposition of internal democracy in political parties should be done not only through laws on political parties or corporation laws but also by means of party banning.

Indeed, even if a greater degree of democracy in the operation of political parties is desirable, it is not particularly easy to enforce by means of regular legislation. A mere obligation in regular law, aimed at regulating political parties' internal democratic structure, might be ineffective and inadequate. The parties may not be sufficiently deterred from breaching the law as long as they remain able to conduct their political activity. Political parties that have an oligarchic structure will do all they can to maintain their power and control over their members. This is especially true if the reason for the undemocratic party structure is the party ideology itself; becoming democratic might result in a loss of members and supporters. It is also clear why the enforcement of internal democracy by party members—on the basis of the rights afforded them by corporation law—is problematic. They might be disinclined to litigate those issues for ideological or practical reasons—that is, they might accept the oligarchic structure of the party as part of their ideology or, on the basis of a cost-benefit analysis, not see enough to be gained to warrant contesting the status quo. Even if they do decide to bring suit against their party, it is doubtful whether the law of corporations would extend to protection of internal party democracy as defined earlier.[101]

Furthermore, imposing internal democracy through legislation entails a monitoring and enforcement mechanism that could obscure or inhibit a party's normal operations by exposing the organization to permanent litigation and regulation.[102] There is even a risk that such a mechanism—if it rested, for instance, on criminal indictments by an administrative official—could be controlled and abused by other parties in government. Both features—lack of incentives for compliance and the risk of misuse—could result in the law's being mocked or ignored, with attempts at enforcement leading only to an erosion of the authority of the courts that would adjudicate these matters. Not surprisingly, therefore, some authors regard

[101] For example, many of the party member's rights might be regulated by the party's internal regulations (articles of incorporation, articles of association). In an oligarchic party, these internal regulations might deprive the members from any significant executive role. Corporate law theory would not forbid such a provision per se. This difference is one example of the problems inherent in regulating political parties by means of corporate law. *See also* KHETIMI, *id.* at 129–134.

[102] This is especially true in regard to enforcement of inner party democracy by party members on the basis of the party's articles of association or internal regulation. In these cases, courts might intervene in the internal management of the party due to the contractual characteristic of the conflict between the member and the party. The result might be the weakening of the party, on the one hand, and intensification of the tension between the court and the political system, on the other.

the desire to impose a duty of internal democracy upon political parties as utopian and a waste of time.[103]

I maintain, however, that to achieve some crucial elements of internal democracy in political parties, we should adhere to a minimal definition of democracy and enforce it through the party-ban jurisprudence. As shown above, there is no plausible analytical justification for banning political parties on the basis of their activities and platforms while ignoring their internal structures. Using the ban to advance a party's internal democracy seems, therefore, natural, in addition to its effectiveness in eliciting compliance.[104] The practice is narrow by definition, as it aims not at regulating the political market or changing the functions of political parties but, rather, at setting the rules of the game and protecting democracy. This narrow aim ensures that only rare cases—those with a clear evidentiary basis—will reach the courts, thereby diminishing the chances of the practice being misused. Thus, the party-ban option, used only to ensure a minimal degree of internal democracy, might promote and protect democracy while avoiding some of the pitfalls inherent in regulating political parties.

The possibility of banning political parties that do not have an internally democratic structure depends first and foremost on the constitutional text and its interpretation. The German Constitution, in article 21(1, 2), offers a clear example of a provision that specifies the internal structure required of political parties:

1. Political parties participate in the forming of the political will of the people. They may be freely established. Their internal organization shall conform to democratic principles. They shall publicly account for the sources of their funds and for their assets.
2. Parties that, by reason of their aims or the behavior of their adherents, seek or impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.

Notably, article 21(1) specifically requires the internal organization conform to democratic principles. The ban provision is in article 21(2), which does not specify the internal structure among the grounds for dissolution; however, the Federal Constitutional Court did refer to

[103] *See* Mendez, *supra* note 92, at 152; *see also* n.91, *id.*

[104] *See* Rudiger Wolfrum, Die Innerparteiliche Demokratische Ordnung Nach Dem Parteiengesetz 201–202 [The Systen of Inner-Party Democracy in the Law on Political Parties] (Duncker & Humblot 1974). It should be noted, however, that Wolfrum seems, on a normative basis, to advocate the use of the party ban only in cases where a party avows undemocratic goals or platform, or its internal structure demonstrates them, but not in cases where the sole reason for the party ban is the party's internal structure, *see id.*

party structure as part of its rationale for dissolving the Socialist Reich party.[105]

Similar provisions may be found in the constitutions of other democracies, such as Spain,[106] Turkey,[107] and Argentina.[108] Perhaps the most detailed is in the Constitution of Portugal, which provides that political parties must be governed by the principles of transparency, democratic organization and management, and the participation of all of its members.[109] In other constitutions, mostly those of the new European democracies, the duty to have an internally democratic structure is not spelled out but the text does impose duties regarding structure. For example, political parties may be disallowed from having a religious,[110] paramilitary,[111] or secret-association character.[112] Or there may be a provision requiring political parties to be founded on the basis of equality and voluntary participation.[113]

While the importance of party structure and internal party democracy is explicitly recognized in some European constitutions, others, such as

[105] In the Socialist Reich Party case, the Court noted that: ''If a party's internal organization does not correspond to democratic principles, one may generally conclude that the party seeks to impose upon the state the structural principles that it has implemented within its own organization.'' KOMMERS, *supra* note 6, at 220. On this basis the court found that the party should be banned, as its structure was built from the top down and demanded absolute obedience, i.e., it was governed in a dictatorial manner, suggesting the intention to impose a similar political order. *See id*, at 221.

[106] CONST. SPAIN art. 6: ''Political parties express democratic pluralism, assist in the formulation and manifestation of the popular will, and are a basic instrument for political participation. Their creation and the exercise of their activity are free within the observance of the Constitution and the laws. Their internal structure and operation must be democratic.''

[107] CONST. TURK. art. 69: ''The activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law.''

[108] CONST. ARG. art. 38: ''(1) Political parties are basic institutions of the democratic system. (2) This Constitution guarantees the free establishment and exercise of their activities, as well as their democratic organization and performance, representation of minority groups, competition for those standing as candidates for elective public positions, access to public information and communication of their ideas.''

[109] CONST. PORT. art. 51(5).

[110] CONST. KYRG. art. 8(4): ''The following shall not be allowed in the Kyrgyz Republic: . . . formation of political parties on religious grounds. Religious organizations must not pursue political goals and objectives.''

[111] CONST. UKR. art. 37: ''Political parties and public associations shall not have paramilitary formations.''

[112] CONST. ROM. art. 37(4): ''Secret associations are prohibited.''

[113] CONST. POL. art. 11(1): ''The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means.''

the French[114] and Italian,[115] make no mention of it. Furthermore, in the jurisprudence of many European countries, as well as in that of the European Court of Human Rights, the internal structure of political parties is rarely invoked as a basis for banning them.[116] There are several reasons for this. Historically, constitutions were sometimes elaborated by parties that were not completely democratic internally; hence, the constitutional compromise was to include a duty of external democracy without a parallel duty of internal democracy.[117] Furthermore, in young democracies, the shift from the old, nondemocratic regime had to be gradual. Political parties were the main tool for this transformation. Their nondemocratic internal structures enabled the gradual transition from a nondemocratic society to one with functioning democratic institutions.[118]

I maintain, however, that these historical and pragmatic explanations must give way to the justifications already given for imposing a duty of internal democracy on political parties, and that one of the most effective ways to impose the duty could be through provisions for a party ban. In countries that explicitly impose it, the ban would be simply a matter of enforcing the constitutional provisions. In countries whose constitutions merely refer to the obligation of parties to behave democratically, the courts should interpret these provisions as requiring the internal party structure be democratic as well. So long as the proposed safeguards are maintained (that is, a minimal

[114] *See* CONST. FR. art. 4.

[115] *See* CONST. ITALY art. 49.

[116] *See* GREWE & FABRI, *supra* note 31, at 234–235. In the European Commission of Human Rights we have found infrequent references to the internal structure of political parties. In the case of the German Communist Party, the commission had noted that the organization and functioning of the party were against democracy. *See* Case No. 250/57, supra note 3, at 225. In the case of Freedom and Democracy Party, the commission had noted that it did not find the internal structure of the party to be undemocratic. *Freedom and Democracy Party (Özdep) v. Turkey*, supra note 1, at 353. Obviously, there is always the possibility that there was no argument on this point or no evidence concerning the internal structure of the party. This kind of lack, however, is precisely the point raised in this paper.

[117] The French constitution of 1958 was supposed to include a provision on internal democracy in political parties. It was left out eventually, since the Communist Party did not agree to include it in the constitutional text. See Andre Roux, *France—Table Ronde—Constitution et Partis Politiques* [Round-Table, Constitution and Political Parties] 9 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 135, 139–140 (1993). This failure was manifested also in the 1946 constitution. *See* Maurice Duverger & Jean-Louis Seurin, *Le Statut Juridique Des Partis Politiques En France* [The Legal Status of Political Parties in France], 4 ÉTUDES DE DROIT CONTEMPORAIN (1959) 43, 58. The Israeli experience was similar, as a provision on internal democracy was omitted from the 1992 Law on Political Parties, due to the refusal of religious parties to include it in the law. *See* Dan Avnon, *Law and Democracy in the Law on Political Parties, in* PARTIES LAW IN ISRAEL: BETWEEN A LEGAL FRAMEWORK AND DEMOCRATIC NORMS 37 (Dan Avnon ed., HaKibbutz Hameuchad Publishing House 1992) [Hebrew].

[118] KLAUS VON BEYME, POLITICAL PARTIES IN WESTERN DEMOCRACIES 233 (Gower 1985).

definition of democracy is satisfied, as adjudicated by a neutral court), internal democracy should be an essential element of party definition and behavior. We need democracy in order to maintain parties and we need parties in order to maintain democracy. Democracy implies, as well, the need for parties to act democratically and includes a need for them to be democratically structured. Failing to maintain party internal democracy is inconsistent with these principles and perhaps even dangerous.

Historical justifications for ignoring the question of internal democracy are questionable today. The lack of consensus at the time of framing the constitutions, as well as the important role played by internally nondemocratic parties in gradually transforming nondemocratic societies into democracies, has lost its significance as young democracies have become stable, and the transition from nondemocratic regimes to democracy—at least in most European countries—is largely complete. The decision to dissolve a party is always complicated, involving intense scrutiny, in terms of law and fact. However, if it is accepted that democracy must protect itself and its values in certain difficult circumstances, there is no reason to focus only on the external democracy of parties while ignoring the internal dimension.

## 4. Conclusion

In his famous essay, ''The Future of Democracy,'' Roberto Bobbio argues that the real challenge for modern democracy lies in its expansion in the social dimension. Hence, the more the individual can experience democracy, notwithstanding the exercise of traditional governmental power, the more democratic the state will be. The important question, according to Bobbio, is no longer who can vote, but where the right to vote can be exercised.[119] Indeed, the injection of internal democracy into political parties should be seen as an essential move—a next step—in democratic theory and political practicality. A meaningful party system depends on democracy. But democracy depends on democratic parties and internal democracy within parties. Political parties' autonomy and diversity are very important for democracy as well. However, the proposal for the imposition of internal democracy, based on a minimal definition and enforced by a neutral court, is a balanced one, and one whose implementation should lead to clear jurisprudence, eliminating only those extreme political parties that do not conform to the minimal tenets of internal democracy. It was only in the early twentieth century that a role for political parties was recognized,[120] and only

[119] Roberto Bobbio, Il Futuro Della Democrazia [The Future of Democracy] 11–12; 39 (Einaudi 1984) [Hebrew Translation, Magness University Press 2003].

[120] For a description of this evolution in the understanding of political parities' utility, see Heinrich Triepel Die Staatsverfassung und die politischen Parteien [The State's Constitution and political parties] (Otto Liebmann 1930).

after World War II that they were finally integrated into the democracies and accorded major importance.[121] I would argue that, today, democracy is sufficiently developed to take a further step in the integration of political parties by imposing the duty of internal democracy and, in rare cases, dissolving a party that lacks internal democracy.

Obviously, this premise has its drawbacks. One cannot disconnect the political parties from the society in which the parties function. The call for imposing internal democracy on parties could be meaningless if the society itself does not cherish and promote democratic values. Ultimately, political parties are not likely to be more democratic than the systems in which they function.[122] If we want parties to be more democratic, we need to have a more democratic society. Furthermore, the mere fact that a certain party is structured along democratic lines may not mean that it is actually democratic. It could be that not all the members want to participate in its management; they may choose to place power in the hands of professional leadership.[123] Party size is also important; it has been shown that internal democracy is less likely as the number of party members decreases.[124]

In conclusion, despite possible reservations, achieving and maintaining real democracy will sometimes require hard decisions. The decision to ban a political party due to its nondemocratic internal structure is one of the more difficult ones to make within a liberal democracy cherishing civil liberties. Nonetheless, there are instances in which it is essential to force internal party democracy, not only as a practical matter but as a real manifestation of democratic values themselves.

[121] *See* Grewe & Fabri, *supra* note 31, at 231–232.

[122] *See* Von Beyme, *supra* note 118, at 233.

[123] *Id.* at 235.

[124] *See* alexander C. Ton, Members, Organization and Performance 71–74 (Aldershot 2000).