

# Human Rights, Religion and Democracy: The Refah Party Case<sup>1</sup>

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## Abstract

This article analyses the decision of the European Court of Human Rights in the case of *Refah Partisi v. Turkey* from 2003. The Refah Partisi political party was in power in Turkey when it was dissolved in 1998 by the decision of the Constitutional Court of Turkey for its alleged involvement in activities contrary to the principles of secularism. The European Court upheld this decision and found it compatible with the freedom of association guarantees under the European Convention on Human Rights. This article argues that the Court's judgment in the *Refah* case was wrong, and that it proposes an unsatisfactory model of relations between religion and state. It is further critical of the Court's decision on account of its incidental assessment of Islam, and its inappropriate critique of this religion where it should have promoted inter-cultural understanding instead. In the light of the *Refah* case, this article addresses the complex relationships of secularism and democracy, religion and democracy, and asks whether rights, or democracy, should come first. The article concludes with reminding the Court of its duty to protect the rights of secularists and religious believers alike, and emphasizes the importance of the Court's applying a cautious and sensitive approach as a stronghold for human rights in multi-ethnic and multi-religious Europe.

## 1. Introduction

On 13 February 2003 the European Court of Human Rights (hereinafter: 'European Court') sitting as a Grand Chamber gave one of the most momentous judgments in its fifty-year history. *Refah Partisi (The Welfare Party) and Others v. Turkey*<sup>2</sup> concerned a challenge to the decision of the Constitutional Court of Turkey in 1998 that ordered the dissolution of a Turkish political party, Refah, the exclusion of its leaders from political activities for five years, and the forfeit of the Party's assets to the State treasury. The European Court unanimously upheld the dissolution of the Refah Party and the sanctions against its leaders as compatible with the freedom of association guarantee under article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: 'European Convention'). What was remarkable about this case was that at the time the Refah

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<sup>1</sup> This article is based on a paper given at the Essex University Centre for Theoretical Studies with a video link to New York University Law School on 17 Mar. 2004.

<sup>2</sup> The case of *Refah Partisi (The Welfare Party) and Others v. Turkey*, European Court of Human Rights Grand Chamber, Application Nos. 41340/98, 41342/98 and 41344/98, 13 Feb. 2003. Hereinafter: '*Refah*' or '*Refah Party* case' and 'Grand Chamber judgment'. The case was first heard by a Chamber of the European Court of Human Rights, the Third Section on 31 July 2001 (hereinafter: 'Chamber judgment').

Party was closed down by decision of the Turkish Constitutional Court, it had actually been in government for twelve months in a coalition with the centre-right True Path Party. Refah had won the largest share of the vote, 22 per cent, in general elections held in 1995 and its leader, Necmettin Erbakan, was the Prime Minister. By any standard, the dislodging of a government from office is a radical intervention in democratic political life by a national court. It took the notion of ‘militant democracy’, the measures permissible to defend democracy from being subverted through electoral politics, to a new level.<sup>3</sup> Nevertheless, the European Court of Human Rights’ Grand Chamber upheld that decision unanimously.

While the Court has described the closure or dissolution of a political party in its case law as a ‘drastic’ and ‘radical’ step, it could hardly be so described in Turkey.<sup>4</sup> The Constitution of Turkey of 1982, drafted by the Turkish military, provides for the dissolution of political parties by the Constitutional Court upon the application of the Principal State Counsel at the Court of Cassation.<sup>5</sup> In the recent past, before Refah, no fewer than fourteen other political parties had been dissolved.<sup>6</sup> The *Refah* case was the fourth such dissolution to be challenged in Strasbourg.<sup>7</sup> It was the third occasion in which a political party led by Necmettin Erbakan had been suppressed.<sup>8</sup> The four cases from Turkey have provided the European Court with important opportunities to develop its jurisprudence on the meaning of democracy under the Convention, and the relationship between democracy and human rights. It declared the dissolutions in the three earlier cases to be a violation of the guarantees of the Convention on freedom of association and freedom of expression. However, the European Court decided not to second-guess the Turkish authorities in the *Refah* case and upheld the dissolution as compatible with the Convention.

In the first three political party cases, the *United Communist Party* case, the case of the *Socialist Party and Others*, and the *Freedom and Democracy Party* case, the Court was dealing with new political formations of little political weight. Controversially, in the *Refah* case it dealt with a long established party that had won the most votes in recent elections and a place in government. When can the removal of a party chosen by the people in elections and serving in a coalition government be justified, in the name of protecting human rights and democratic values? In this case the short answer is that the Refah Party was dissolved because it was a religious party – an Islamic inspired party – and the Constitutional Court of Turkey held that it intended to introduce Islamic principles and laws (shariah) that would change the Turkish secular order and undermine democracy.

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<sup>3</sup> The concept was first used by Karl Loewenstein in ‘Militant Democracy and Fundamental Rights’ (1937) 31 *American Political Science Review* 417 at 638, writing about the most notorious example, the rise of Hitler and Nazism. Through elections in the Weimar Republic in 1933 the National Socialists became the largest party and installed a dictatorship. The Turkish Government expressly invoked this concept in the Strasbourg proceedings. The decision of the former European Commission of Human Rights in the *German Communist Party* case (Application No. 250/57, 20 July 1957, Yearbook 1 at 222) was also cited by the Government. Militant democracy is discussed further below.

<sup>4</sup> *Socialist Party and Others v. Turkey* (20/1997/804/1007), 25 May 1998 (Reports 1998 – III), para. 51.

<sup>5</sup> Constitution of Turkey, arts. 68 and 69.

<sup>6</sup> Chamber judgment, joint dissenting opinion of judges Fuhrmann, Loucaides and Sir Nicholas Bratza. The Turkish authorities have suppressed some 30 parties in total in the last 25 years, see E. Yuksel, ‘Cannibal Democracies: Theocratic Secularism: the Turkish Version’ 7 *Cardozo J. Int. & Comp. L.* 443.

<sup>7</sup> *United Communist Party of Turkey and Others v. Turkey* (113/1996/752/951), 30 Jan. 1998 (Reports 1998-I); *Socialist Party and Others v. Turkey* (20/1997/804/1007), 25 May 1998 (Reports 1998 – III); *Freedom and Democracy Party (ÖZDEP) v. Turkey* (23885/94), 8 Dec. 1999.

<sup>8</sup> The previous occasions were in 1971 and 1980 after the military coup of that year. See Yuksel, n. 6 above.

It would be difficult to conjure up a more ‘real life’ subject than that raised in the *Refah* case. At the time of writing, twenty-five member states of the Council of Europe and signatories of the European Convention, which are also members of the European Union, have been arguing over the appropriateness of including a reference to Christianity in the new draft Constitution of the European Union.<sup>9</sup> At the same time, across the Turkish border in Iraq, where a number of Council of Europe states form part of the US-led coalition that overthrew Saddam Hussein, the interim Constitution acknowledges Islam and enshrines shariah as a source of law.<sup>10</sup> The United States has often proclaimed its ambition to see a future Iraq as a beacon for democratic values and human rights in the Middle East as a whole. Meanwhile Turkey, the overwhelming majority of whose population is Muslim, waits for the European Union to give it a date for the opening of negotiations on its membership, a decision expected in December 2004.<sup>11</sup> The party of government that hopes to achieve membership of the European Union for Turkey is an offshoot of the suppressed Refah Party: The Justice and Development Party (*Adalet ve Kalkınma Partisi*) was founded in August 2001 and obtained 34.2 per cent of the votes cast and 363 of the 550 seats in the Parliament in elections in November 2002. Recep Tayyip Erdogan, a leading member of the former Refah Party, is currently Prime Minister. Thus, by the date of the *Refah* judgment by the European Court of Human Rights’ Grand Chamber, Turkey had an Islamic inspired government again, albeit also a politically conservative one committed to Turkish membership of the European Union, not this time in coalition but in a single party government.<sup>12</sup> Therefore questions about the relationships between religion, democracy, elections, and human rights in a European and wider context are hardly marginal issues. Such questions are at the core of the *Refah* judgment, and that judgment will be the point of departure for discussions for some time to come in Europe and elsewhere.

This article will argue that the Grand Chamber judgment in the *Refah* case was unfortunate and wrong.<sup>13</sup> It submits that the reasoning of the minority of judges in the Turkish Constitutional Court and the minority in the Chamber judgment of the European Court, who held that the dissolution was a *disproportionate* step, is to be preferred. In their

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<sup>9</sup> The final text of the preamble to the draft Constitution of the European Union omits a reference to God and refers to drawing ‘...inspiration from the religious inheritance of Europe’, a formulation that was welcomed by the Foreign Minister of Turkey and disappointed the Pope, available at [www.hrwf.net](http://www.hrwf.net) (22 June 2004).

<sup>10</sup> *Law of Administration for the State of Iraq for the Transitional Period 8 March 2004*, Art. 7 – State Religion, Freedom of Religion, Arab Nation: ‘(A) Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period. This Law respects the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice’, available at [http://www.oefre.unibe.ch/law/icl/iz00000\\_.html](http://www.oefre.unibe.ch/law/icl/iz00000_.html).

<sup>11</sup> *International Herald Tribune*, ‘In Turkey, a Pro-EU consensus’, 6-7 Mar. 2004.

<sup>12</sup> Menderes Cinar, ‘The Justice and Development Party in Turkey’, *International Development Economics Associates*, 29 January 2003, available at <http://www.networkideas.org/themes>.

<sup>13</sup> For a positive appraisal of the judgment, see L.S. Lehnhof, ‘Freedom of Religious Association: The Right of Religious Associations to Obtain Legal Status under the European Convention’, 2002 *BYIL* 560 at 580. For other largely critical comments, see ‘Freedom of Association: Dissolution of Political Party and Revocation of MP’s Status by Judgment of Constitutional Court: Case Comment’ (2003) 3 *EHRLR* 356-359; B. Olbourne, ‘Refah Partisi (the Welfare Party) v. Turkey’ (2003) 4 *EHRLR* 437-444; C. Moe, ‘Refah Partisi and Others v. Turkey’ (2003) 6 *Int. J. of Not-for-Profit L.* 1; C. Moe, ‘Strasbourg’s Construction of Islam: A Critique of the *Refah* Judgment’, unpublished paper presented at the Central European University on 2-3 June 2002, available at <http://folk.uio.no/chris/moe/papers/Strasbourg-Islam.vla.pdf>; M. Vermeulen, ‘Freedom of Association and the Dissolution of Political Parties – a Critique of *Refah Partisi and Others v. Turkey*’, unpublished research paper, University of Essex, 2003.

view the evidence adduced to support the step of dissolving the Party did not reach the high threshold of sufficiency required if such a radical interference by courts in the democratic political process was to find justification under the Convention. Thus, the source of disagreement over the Grand Chamber judgment does not concern the principles to be applied under the Convention when contemplating the protection of democracy and the dissolution of a political party. Rather it concerns their application to the facts of this case in the light of Convention law.

A further criticism of the Grand Chamber judgment concerns its incidental assessment of Islam. The Court indulged in a wholly unnecessary and inappropriate critique of this religion, which has over 100 million followers<sup>14</sup> in the European legal space of forty-five States over which the Court exercises jurisdiction.<sup>15</sup> The intemperate and injudicious language used, including such expressions as ‘Islamic fundamentalism’ and ‘totalitarian movements’ brought forth protests from the judge of Russian nationality, Judge Kovler. Nevertheless, Judge Kovler voted with the other judges to uphold the dissolution of Refah for the reason that some of the activities of the applicants contradicted ‘...the principle of secularism, a pillar of Turkish democracy as conceived by Mustafa Kemal Atatürk’.<sup>16</sup> But what is the relationship between secularism as a principle – or ideology as in the case of Turkey – and democracy? Has secularism, meaning broadly the divorce of political life and institutions from religious precepts and values, become a human rights principle? If it has, what is the relationship between religion and the right to religious freedom, and democracy? Which comes first, rights or democracy? This article will address these questions in the light of the *Refah* case. But first it is appropriate to give an account of the litigation over the Refah Party in Turkey and Strasbourg.

## 2. The *Refah* Case

As noted, the Refah Party, at the time of its dissolution in 1998, was the leading partner in the government of Turkey. Its leader, Necmettin Erbakan, was the Prime Minister. The Party was the largest political party in Turkey, claiming some 4.3 million members, and had been in existence for almost twenty years. In the general elections in 1995 it had gained some 22 per cent of the vote, which translated into 157 MPs or one third of the seats in the Turkish Grand National Assembly. In local government elections the following year, 1996, it won 35 per cent of the vote and entered a coalition government with a centre right party, True Path. The Refah Party had been in office for a year when it was dissolved. Before it came to power and during its time in office the Party’s Islamic roots and anti-secularist image brought it into tension with the Turkish military, who are accorded a ‘guardianship role’ in relation to Turkish secular principles under the Constitution.<sup>17</sup> The proceedings

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<sup>14</sup> This figure was given by the Secretary General of the Council of Europe in a speech to the 11<sup>th</sup> Organization of Islamic Conference, Ministerial Conference, Istanbul, 15 June 2004, available at <http://www.coe.int>.

<sup>15</sup> On the concept of European legal space, see *Bankovic v. Belgium and 16 Other Contracting Parties* 2001 41 *ILM* 517, para. 80.

<sup>16</sup> Grand Chamber judgment, n. 1 above, concurring opinion of Judge Kovler.

<sup>17</sup> In particular through the military’s membership of the National Security Council established under the Constitution. For a critical view of the role of the military in present day Turkey, see the European Parliament, ‘Final Report on Turkey’s Application for Membership of the European Union’: The report ‘notes with regret that the army’s excessive role slows down Turkey’s development towards a democratic and pluralist system, and advocates that Turkey must take the opportunity of its present government with its strong parliamentary support to elaborate a new political and constitutional system, which guarantees the principles of a secular system without military supremacy above civil institutions, so that the traditional power of the bureaucracy and

brought against the Party were widely understood in Turkey to have been prompted by the military.

### 2.1 The Turkish Constitutional Court Decision

In 1997 the Turkish legal authorities had applied to the Constitutional Court to have the Refah Party closed because it was a 'centre' (*mihraç*) of activities contrary to the principles of secularism.<sup>18</sup> Such activities were unconstitutional and offended against provisions of Law no. 2820 on the regulation of political parties.<sup>19</sup> The evidence adduced to support the application for dissolution comprised certain acts of the Prime Minister and statements or speeches made by him and by several other members of Refah, all of which were made before entering government. The language in the speeches of the Refah members of parliament was florid in its rhetoric and in some cases aggressive and inflammatory. Several of these Party members were prosecuted for their remarks and expelled from the Party at the outset of the constitutional proceedings against Refah. The expelled MPs were not in the leadership of the Party and, it should again be emphasised, their statements were made some years before the Party came to power.

The evidence brought before the Constitutional Court did not include the statute of the Party, its election manifesto or the programme for government agreed with its coalition partner.<sup>20</sup> Such documents would be the best evidence of the Party's activities and its involvement, as a Party and as a centre promoting anti-secularism. But that these documents disclosed nothing that could support any concern that the Party intended to undermine democracy or violate the constitutional principle of secularism, such as through the advocacy of a theocratic state, was not disputed. Nor was evidence adduced before the Constitutional Court that members of the Party had espoused or encouraged violence while in government.

The Turkish Court held that members of Refah had in the past promoted a policy of plurality of legal systems for Turkey, a policy that, were it to be introduced, would institute discrimination based on religion and would be a step towards the introduction of shariah. In addition, while in government certain activities of party leaders had offended against secularism.<sup>21</sup> Therefore the true aim of the Party was to bring the democratic order enshrined in the Constitution to an end. The impugned statements held to countenance violence that were made by members or former members of the Party gave grounds for believing that the party was prepared to use force to install Islamic law. Those statements could be rightly attributed to the Party as a whole since they were not repudiated by it. Refah was thus dissolved and its leaders were banned from political life for five years. The remaining 153 party members continued as elected representatives to the Grand National

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the army (the 'deep State') can resume the forms which are usual in the Member States' in Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, Rapporteur: Arie M. Oostlander, Final A5-0160/2003, 19 May 2003.

<sup>18</sup> The judgment was published in the *Official Gazette* on 22 Feb. 1998. The proceedings before the Constitutional Court are set out in some detail in both the Chamber and Grand Chamber judgments, see n. 1 above.

<sup>19</sup> The relevant legal provisions are set out at paras. 45 and 46 of the Grand Chamber judgment, n. 1. above.

<sup>20</sup> The joint programme for government stated that it was based on 'Kemalist principles' and rested on 'the fact that Turkey is a civil, democratic, secular and social State', cited in the Chamber judgment, n. 1 above, para. 55.

<sup>21</sup> The acts of the Refah leadership while in government which are complained of included: Altering working hours in the public service to accommodate fasting during Ramadan; visiting a party member in prison while he awaited trial for anti-secular activities; and giving a reception to religious leaders at the Prime Minister's residence. The details of these accusations and the impugned speeches are set out in both the Chamber and Grand Chamber judgments, n. 1 above.

Assembly in their individual capacities. Two members of the Constitutional Court dissented from the judgment.<sup>22</sup> Their reasoning was based on the European Convention on Human Rights. They noted that the guarantee of freedom of expression extended to debate over ideas that were thought shocking and disturbing, and that the dissolution of a party that did not advocate violence was in contradiction of the case law of the European Court of Human Rights.<sup>23</sup>

## 2.2 The Strasbourg Proceedings

The Chamber of the European Court of Human Rights that first heard the *Refah* case divided four-three and upheld the dissolution of the Refah Party as compatible with article 11 of the Convention. The majority determined that there was a pressing social need to close down the party based on the same public statements and actions submitted to the Constitutional Court. The dissenting minority thought that the dissolution of the Party was an excessive or disproportionate response to the allegations against the applicants. The minority considered that, in weighing the necessity to act, it was relevant that all the impugned remarks favouring shariah had been made long before the Party was in government. There had been the possibility of alternative sanctions other than proceedings to close the party, for example, prosecution of those individuals who had made the challenged speeches, and indeed some had been prosecuted. As regards the activities of the Prime Minister and Minister of Justice, the minority judges held that, whether taken alone or together, these could not justify the step of dissolving the political party.<sup>24</sup> For the minority it was decisive that no evidence had been evinced that the Party had, in its year in government, done anything to challenge secularism. The Party's constitution and the programme for government agreed with its coalition partner committed it to the secular character of the State as embodied in the Turkish Constitution. For these and other reasons, to close down a political party and expel the serving Prime Minister were extreme steps for which there was no compelling justification under the European Convention on Human Rights.

The Grand Chamber, to which the applicants referred the case, upheld the Chamber majority, this time unanimously.<sup>25</sup> The Grand Chamber adopted the reasoning of the majority of the Chamber. But it is striking that the Grand Chamber made no effort to address the arguments of the dissenters in the earlier Chamber judgment.<sup>26</sup> Such failure reduces the persuasiveness of the single judgment of the Court, a judgment that serves to represent the opinion of seventeen judges. The Grand Chamber based its decision entirely on the reasons given for dissolution by the Constitutional Court. Crucially these included those which the minority in the Chamber thought particularly questionable, based on the facts, namely that the Party could be held to be responsible for the speeches of certain of its members or former members.<sup>27</sup>

The Government responded to the argument that Refah's programme for government was unobjectionable as regards anti-secularism with the claim that the programme may well have concealed the party's true intentions. The Grand Chamber also

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<sup>22</sup> Judges Hasim Kilic and Sacit Adali.

<sup>23</sup> Chamber judgment, n. 1 above, para. 30.

<sup>24</sup> See n. 21 above.

<sup>25</sup> Although there are concurring opinions in which a number of judges express, at the least, unease over some of the reasoning of the Court, n. 1 above.

<sup>26</sup> There is only one reference to the dissenting opinions, n. 1 above, para. 5.

<sup>27</sup> See in particular paras. 111-115 of the Grand Chamber judgment and the dissenting opinions in the Chamber, n. 1 above.

accepted that argument. The Turkish government explicitly stated that it was characteristic of Islamic politicians to lie about their true intentions. The Court, while not endorsing that gross remark, accepted that it was the actions of the party that mattered, alluding to political experience in Europe where totalitarian parties had only disclosed their true intentions after winning elections.<sup>28</sup> Clearly they had in mind the Nazi Party in the Weimar Republic and experiences in Eastern Europe with communist seizures of power. Whether such observations were intended or not to equate Islam with totalitarianism, no Muslim reading the case could be in any doubt as to the suspicions that Islam aroused in this Court, which has jurisdiction over millions of such believers.<sup>29</sup>

Indeed the majority, both in the Chamber and the Grand Chamber, went further. Noting that opinion polls predicted that the Party could win a majority of seats outright at the next election, it accepted that the State did not need to wait until the Party actually took steps to introduce its ideas for plural legal systems or to undermine democracy. The State had a right of pre-emption to prevent a ‘seizure of power’.<sup>30</sup> It may or may not have gone through the heads of the judges that the occasions in recent Turkish history in which power was seized and democracy overthrown were as a result of the acts of the self-styled guardians of secularism, the Turkish military.<sup>31</sup> But it would most probably be in the minds of many Muslims.

It seems quite extraordinary that the Grand Chamber could accept the finding of the Constitutional Court that the encouragement given by Recep Tayyip Erdogan, the Prime Minister, prior to his period in Government, for the wearing of the Islamic headscarf in school – the wearing of which is unlawful in Turkey – could be a supporting reason for the dissolution of a political party. It seems equally strange that his party’s decision to adjust regulations governing working hours in the public service to take account of fasting in Ramadan, which was agreed with the coalition partner, was a further supporting reason for the radical step of removing a democratically elected government. There is certainly no wording in the judgments of either the Chamber or the Grand Chamber that acknowledges that either issue might raise questions of respect for religious conviction or its manifestation.

### 3. Democracy and the European Convention

In the *United Communist Party* case, the Court gave its most extensive interpretation to date of the relationship between democracy and the European Convention on Human Rights:<sup>32</sup>

Democracy is without doubt a fundamental feature of the ‘European public order’ ... That is apparent, firstly from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other hand by a common understanding and observance of human rights... The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the

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<sup>28</sup> ‘...In that context, the Court considers that it is not at all improbable that totalitarian movements, organized in the form of political parties, might do away with democracy after prospering under the democratic regime, there being examples of this in modern European history’ in Grand Chamber judgment para. 100; see also n. 3 above.

<sup>29</sup> Moe, n. 13 above.

<sup>30</sup> Grand Chamber judgment, n.1 above, paras. 108 and 110.

<sup>31</sup> See European Parliament Report, n. 15 above.

<sup>32</sup> *United Communist Party of Turkey and others v. Turkey*, n. 7 above.

Convention... it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society... In addition Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may be claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it'.<sup>33</sup>

That rights require democracy, and democracy rights, is not only a European understanding but also a universal one.<sup>34</sup> However, the meaning of democracy as an international norm remains far from agreed. International law has made slow progress over the specification of core democratic principles beyond the ideas first set out in the Universal Declaration of Human Rights: 'That the legitimacy of government rests on the will of the people and on the holding of elections and on the right to stand for office in such elections.'<sup>35</sup> This clause, defining democratic rights in the Universal Declaration, fails to mention the word 'democracy' – reflecting the ideological rift in the Cold War over its meaning.<sup>36</sup> The relationship between democracy and rights, proclaimed as interdependent concepts, was explored formally for the first time in a UN conference in November 2002.<sup>37</sup> That event did not result in much greater clarity over that relationship or democracy itself. It is clear that more efforts need to be made to achieve a universal understanding of democracy and human rights, if it can be achieved.<sup>38</sup>

In the *United Communist Party of Turkey* case, the Court did not propose a definition of democracy as such. Rather it confined itself to specific dimensions and statements of principle, asserted without much elaboration. Nevertheless the case provides important normative guidance on the idea of democracy and on its relationship to human rights. It is clear that the Court has in mind the model of liberal democracy, constituted by popular elections, the rule of law and human rights. Thus the Court states that there can be no democracy without pluralism and the State is a guarantor of that pluralism. An expression of pluralism is the existence of political parties reflecting different shades of opinion, and the State has a duty to guarantee the rights of political parties to freedom of association and freedom of speech. Importantly, the Court confirmed in this case that political parties were entitled to invoke article 11 of the Convention on freedom of association.<sup>39</sup> Political parties have a 'primordial role' in democracy and only convincing and compelling reasons could justify restrictions on their freedom of association as 'necessary in a democratic society'.<sup>40</sup> Contracting States have an especially narrow margin of appreciation in determining necessity when it comes to the justification for the dissolution of political parties.<sup>41</sup>

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<sup>33</sup> *United Communist Party of Turkey and Others v. Turkey*, n. 7 above, para. 45.

<sup>34</sup> See the *Declaration and Programme of Action of the Vienna World Conference on Human Rights* (1993).

<sup>35</sup> Art. 21 and see also European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, art. 3.

<sup>36</sup> J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Penn, 1998) 61-65.

<sup>37</sup> Pursuant to *Commission on Human Rights Resolution 2001/41*, the Seminar was held in Geneva on 25-26 Nov. 2002.

<sup>38</sup> Conclusions of the seminar are available at <http://www.ohchr.org/english/issues/democracy/seminar.htm>.

<sup>39</sup> For essays that explore the relationship see D. Beetham, *Democracy and Human Rights* (Cambridge: Polity Press, 1999).

<sup>40</sup> Grand Chamber judgment n. 1 above, para. 87.

<sup>41</sup> *United Communist Party of Turkey and Others v. Turkey*, n. 7 above, para. 45.

The Grand Chamber in *Refah* unanimously declared that the closure of the Party was compatible with the Convention's basic principles on democracy and human rights and also within the State's margin of appreciation. But in the *United Communist Party* case, the Court determined the opposite. In the *United Communist Party* case, the Turkish authorities had dissolved a new political grouping made up of several socialist and communist parties. The grounds were that it had offended against the law that prohibited the use of the word 'Communist' in the title of a political party, and had pronounced in its manifesto the need to recognize the identity and rights of the Kurdish minority and open dialogue with them. The Party was held to have thereby offended against the prohibition against claiming that Turkey had unacknowledged national minorities.

While, admittedly, the Communist Party was a small and recently established party, any interpretation of the two cases gives the clear impression that, since the dissolution of the Soviet Union, the European Court is more relaxed about the promotion of the ideology of communism than the Turkish authorities. It also took a different view to Turkey on the need for the state to come to terms with the existence of its ethnic minorities. This was reflected in the *United Communist Party* case judgment and in the Court's rejection of the dissolution of the Kurdish-supported Freedom and Democracy Party (ÖZDEP).<sup>42</sup> But in upholding the suppression of Refah and adopting the reasoning of the Turkish Court in that case, the European Court lined up with the Turkish authorities on the question of the promotion of Islam. It is difficult to suppress the thought that the endorsement by a European-wide court of such a radical intervention in the democratic process, as a result of which the choice of a significant percentage of the Turkish electorate was removed from power, was influenced by the events of '9/11' and the world we have lived in since then.

### 3.1 'Militant Democracy'

This concept, which is neither elegant nor clear, has come to refer in political science discourse to the means of safeguarding the democratic system from political extremism.<sup>43</sup> In Convention terms, it is reflected in the safeguards on the abuse of rights in article 17. Article 17 provides that:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in this Convention.<sup>44</sup>

The Turkish Constitutional Court invoked article 17 in its judgment in *Refah*. It concluded that Refah's leaders and members were using democratic rights and freedoms with a view to replacing the democratic order with a system based on shariah:

It held that where a political party pursued activities aimed at bringing the democratic order to an end and used its freedom of expression to issue calls to action to achieve that aim, the Constitution and supranational human rights protection rules authorised its dissolution.<sup>45</sup>

As the dissenting minority noted in the Chamber judgment, the Turkish Constitutional Court placed similar reliance on article 17 in the earlier *United Communist Party* and *Socialist Party* cases to justify the dissolution of those parties. The Turkish Court invoked the 1957 decision of the former European Commission of Human Rights, in which the dissolution of

<sup>42</sup> *Freedom and Democracy Party (ÖZDEP) v. Turkey*, n. 7 above.

<sup>43</sup> See n. 3 above and G. Cappocchia, 'Defending Democracy: Reactions to Political Extremism in Inter War Europe' (2001) 39(4) *European Journal of Political Research* 431.

<sup>44</sup> European Convention, art. 17.

<sup>45</sup> Cited in Chamber judgment n. 1 above, para. 27.

the German Communist Party was held to be compatible with the Convention.<sup>46</sup> In the *United Communist Party v. Turkey* case, the Grand Chamber rejected the Turkish Court's application of article 17 and its reliance on the *German Communist Party* case, noting that the two cases were entirely different. The European Court noted that the Turkish United Communist Party satisfied the requirements of democracy, including political pluralism, universal suffrage and freedom to take part in politics. There was nothing in the constitution or programme of the Turkish United Communist Party to suggest that it sought to use the freedoms or rights protected in the Convention to destroy the rights and freedoms of others so as to justify the application of article 17.<sup>47</sup>

Whereas the minority judges found that the same conclusion could be arrived at with respect to the constitution and programme of Refah, the majority judgment in the Chamber and the Grand Chamber was silent on the applicability of article 17 in *Refah*. Although the judges in both cases had accepted that Refah's constitution and political programme could not justify its closure, they agreed with the Turkish argument that its real objectives might be concealed, and in any event found sufficient grounds for its dissolution in the actions and speeches which had been adduced as evidence of supposed intent.

In those circumstances it might be argued that both Courts should either have applied article 17, with the effect that the applications by Refah and its political leaders would have been declared inadmissible, or the Courts ought to have stated why article 17 did not come into play. Given the arguments, accepted by the Chamber and the Grand Chamber, which were advanced by the State against Refah arguments, it would seem an inescapable conclusion that the Party was intent on destroying the rights and freedoms of others.<sup>48</sup> Both courts accepted that the point about political parties vying for the support of the electorate was to obtain power in order to implement their programmes. The Grand Chamber noted that seeking change in a democracy is legitimate provided such change does not harm democracy itself. The Grand Chamber set out a dual test by which a party may promote a change in the law: That the party is committed to peaceful means and that the change 'is compatible with fundamental democratic principles'.<sup>49</sup> Refah failed both tests in the judgment of both the Turkish and European Courts.

It is in the application of those tests that the reasoning of the European Court seems deficient. It should be recalled that Refah was not suppressed for anything it had done in government but rather because of what it might do, should it, at some point in the future, become the outright party in power. In order to dissolve a political party, the Turkish Constitution requires that the Constitutional Court be satisfied that the Party concerned 'constitutes a centre of such activities'.<sup>50</sup> The evidence adduced for the involvement of the Party as such in anti-secular activities was not convincing. The European Court asserted that the importance of political parties in a democracy requires that a narrow margin of appreciation only be given to a State. However, any reading must find that the Grand Chamber gave a rather wide margin of appreciation to the Turkish authorities, including the legitimacy of pre-emption. It is submitted that the precise, concrete, rigorous and detailed reasoning of the minority in the Chamber judgment in its assessment of the evidence, exemplifies the meaning of a narrow margin of appreciation. The minority opinion correctly

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<sup>46</sup> *Kommunistische Partei Deutschland*, Application No. 250/57 (Yearbook 1, 1995-7) at 222.

<sup>47</sup> *United Communist Party of Turkey and Others v. Turkey*, n. 7 above, para. 54.

<sup>48</sup> See Vermeulen, n. 13 above.

<sup>49</sup> Grand Chamber judgment, n. 1 above, para. 98.

<sup>50</sup> Art. 69(6).

refers to the context of the case, namely, that it was not a unique event; numerous political parties had been closed in Turkey in recent years. In effect, there was arguably a virtual practice in Turkey of the suppression of political opinion through the closure of political parties, although the applicants did not argue this.

The question of safeguards over the use of powers to defend democracy is as important for the rule of law and human rights as that of safeguards over the invocation of emergency powers against terrorism. The European Court of Human Rights has frequently had to address this issue, not least in respect of Turkey.<sup>51</sup> More attention needs to be paid, both at national level and under the Convention, to the means and the grounds used to control political parties, not least in Turkey. United States experience and jurisprudence are of value here. The ‘clear and present danger’ principle under the First Amendment provides an appropriate test to apply to the impugned speeches that were held to suggest a willingness to use force to establish the supremacy of shariah law in the future.<sup>52</sup> It is difficult to accept that statements made a number of years before *Refah* came to power would be classified under that test as meeting an immediate risk or danger of such a policy being implemented. At the same time it should be acknowledged that extreme political groups, including racist and Neo-Nazi groups, do constitute a real challenge to democracy in some European states.<sup>53</sup>

In the *United Communist Party* case, the Grand Chamber highlighted the virtue of democracy as a forum for debate and resolution of differences within a population:

One of the principal characteristics of a democracy is the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence even when they are irksome. Democracy thrives on freedom of expression. From that point of view there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to find according to democratic rules solutions capable of satisfying everyone concerned. The fact that a political programme is incompatible with the current principles and structures of a State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even if that calls into question the way the State is currently organised provided that does not harm democracy itself.<sup>54</sup>

The idea that democracy is to be valued as a forum for the resolution of differences seems precisely to be what was *not* accepted in *Refah*. There is experience of democratic sustainability as well as its disruption. The African National Congress is hardly the standard bearer of the working class and communism that it once proclaimed itself to be, before

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<sup>51</sup> See, for example, *Aksay v. Turkey*, 18 Dec. 1996, paras. 70 and 84, and generally *Guidelines on Human Rights and the Fight against Terrorism* (Council of Europe Publishing, Sept. 2002).

<sup>52</sup> *Brandenburg v. Ohio*, (1969) 395 U.S. 444. The European Court’s approach has more connection in its reasoning with the earlier Supreme Court jurisprudence on communism, see, for example, *Schenck v. United States*, (1919) 249 U.S. 47. See also S. Leader, ‘Free Speech and the Advocacy of Illegal Action in Law and Political Theory’, (April 1982) 82(3) *Columbia Law Rev.* 413-443.

<sup>53</sup> See ‘Resolution 1308 (2002): Restrictions on Political Parties in the Council of Europe Member States’, Standing Committee of the Parliamentary Assembly 18 Nov. 2002, and European Commission for Democracy through Law (‘Venice Commission’), *Guidelines on Prohibition of Political Parties and Analogous Measures*, CDL-INF (2000) Council of Europe. See also, M. Sanchez, ‘The Move towards a (and the Struggle for) Militant Democracy in Spain’, European Consortium on Political Research Conference Paper, Marburg, 18-21 Sept. 2003; T. Rensman ‘Procedural Fairness in a Militant Democracy: The Uprising of the Decent Fails before the Federal Constitutional Court’ (Nov. 2003) 4(11) *German Law Journal*.

<sup>54</sup> *United Communist Party of Turkey and Others v. Turkey*, n. 7 above, para. 57.

becoming involved in negotiations for power in South Africa.<sup>55</sup> Nearer to home, Sinn Fein is now committed to utilizing the very institutions of government it spent many years seeking to destroy in Northern Ireland. Political parties learn to compromise but to do so they need the opportunity to exercise power. It is submitted that Refah did not challenge democracy as such, but rather sought to question an ideology imbued in the institutions of the State and enforced by the Turkish military. It was for such questioning that implicitly challenged the undemocratic control of the military over Turkish political development that it was removed. Ironically it is the incumbent successor to Refah in government, the Justice and Development Party, which has made more progress in Turkey's democratic transformation over the last two years than any of the previous 'secular' parties who held power.<sup>56</sup>

#### 4. The Question of Islamic Law

The Grand Chamber judgment on *Refah* was given a month before the United States-led invasion of Iraq in March 2003. A year later, it is surely of interest to note that the interim constitution of Turkey's neighbour Iraq would be denounced in Turkey and presumably in the Strasbourg Court. In Iraq, Islamic law is declared to be a source, although not the sole source, of law and it is further declared that no law may contradict the tenets of Islam. The *Refah* case can be read to suggest that peaceful advocacy of the tenets of Islam is unprotected under the European Convention.<sup>57</sup>

The stridency of the European Court's assessment of Islamic law and shariah is regrettable. In effect the Court seems to say that shariah, *tout court*, is incompatible with universal rights, or at least European ideas of democracy and rights. The judgment of the Grand Chamber highlighted in particular the question of women's rights and criminal punishments and their evident incompatibility with the Convention.<sup>58</sup> Nevertheless, the judgment represents an unsympathetic dismissal of what is a central element of a 1400-year-old civilization, comprising today the cultures of in excess of a billion people, and the religion of at least 100 million Muslims in the Council of Europe countries. The Court makes no effort, in its thinking or language, to separate the vast majority of Muslim people and their religious practices from extremists. A major problem for the world is the stereotyping of religious believers as well as ethnic groups. This applies to Christians in Islamic countries as much as to Muslims in Christian countries. It is submitted that it was unnecessary and unhelpful for the Court to pronounce on shariah at all. If the Court did

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<sup>55</sup> See also the role of the communist party in the world's largest democracy, India, where it is supporting the current Congress Party government in *International Herald Tribune*, 'Historic compromise, the maturing of India's communists', 24 June 2004.

<sup>56</sup> On 22 June 2004, the Council of Europe's Parliamentary Assembly voted to end the formal monitoring of human rights in Turkey, declaring that the country had 'achieved more reform in little over two years than in the previous decade', in 'Council of Europe Parliamentary Assembly Press Release', 313 a (2004). See also 'In Turkey, a Pro-EU consensus', *International Herald Tribune*, 6-7 March 2004.

<sup>57</sup> 'An attitude which fails to respect [secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention', cited in Grand Chamber judgment, n. 1 above, para. 93.

<sup>58</sup> It is noteworthy that among the reforms of the Justice and Development Party in Turkey has been an 'equal rights' amendment of the Constitution: 'Equality before the Law: Art. 10: All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. *Women and men possess equal rights. The State is responsible for securing this equality in practice*' (emphasis added), accepted by the Turkish National Assembly on 7 May 2004 and published in the *Official Gazette* on 22 May 2004.

consider it necessary to pronounce on shariah, it might have sought expert pleadings, for example by means of an amicus curiae brief, which at the very least would have brought to the Court's attention the considerable ongoing debate within Islam on shariah and democracy and those aspects of Islamic law that are in conflict with international human rights standards.<sup>59</sup> It might have understood better the difference between political Islam and the faith of the vast majority of followers of Islam. Thus, the definition it gives to jihad as 'Holy War' represents a false interpretation to millions of Muslims. The concept has been expropriated by extreme believers to mean religiously-sanctioned killing. But the majority of Muslims see this as a grave distortion of what is in actuality the spiritual idea of personal struggle for piety.<sup>60</sup>

In the *Refah* case the only caution expressed was by the Russian judge, Judge Kovler, an irony given that Russia has limited experience of liberal democracy. While he concurred 'for the most part' with the judgment, he chided the Court for its intemperate language in dealing with 'extremely sensitive issues raised by religion and its values'. He complained, 'I would prefer an international court to avoid terms borrowed from politico-ideological discourse such as 'Islamic fundamentalism', 'totalitarian movements' and 'threats to the democratic regime'.<sup>61</sup>

He is equally critical of the Court's assessment of shariah, 'the legal expression of a religion whose traditions go back more than a thousand years and which has its fixed points of reference and its excesses like any other complex system'.<sup>62</sup>

Especially since the events of '9/11', the Muslim population of Europe has experienced an intensification of Islamophobia, violence and discrimination that represents one of the many human rights scars on the European body politic.<sup>63</sup> The atrocity in Madrid, in March 2004, which killed 200 people and for which avowed North African Islamic extremists have been charged, has created an even more dangerous problem for the peaceful Muslim populations of all European countries. In France the implementation of the religious symbols law in September 2004 has potential for increasing anti-Muslim prejudice.<sup>64</sup> There has been less attention given in Europe to anti-Muslim discrimination and hate rhetoric than the equally abhorrent surge of anti-Semitism.<sup>65</sup> The rejection of intolerance must however be even-handed. Such broad and seemingly hostile formulations as in the *Refah* case will not

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<sup>59</sup> See A.A. An-Na'im, *Towards an Islamic Reformation: Civil Liberties Human Rights and International Law* (New York: Syracuse University Press, 1990); M.A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003); K. Delacoura, *Islam, Liberalism and Human Rights* (New York, I.B. Taurus Publishers, 1998).

<sup>60</sup> Grand Chamber judgment, n. 1 above, para. 130 and see also Moe, n. 29 above.

<sup>61</sup> Grand Chamber judgment, concurring opinion of Judge Kovler, n. 1 above.

<sup>62</sup> Ibid.

<sup>63</sup> European Monitoring Centre on Racism and Xenophobia, *Anti-Islamic Reactions within the EU after the Terrorist Attacks against the USA*, Vienna, Nov. 2001.

<sup>64</sup> Following a report to the President of France of a Commission of Inquiry on the wearing of religious clothing and emblems in schools (Commission de Reflexion sur l'application du principe de laïcité dans la République, Dec. 2003), France has passed a law to prohibit the wearing of religious emblems at school, including the Islamic headscarf. The European Court upheld a prohibition on the wearing of the headscarf under educational regulations at Turkish universities in *Leyla Şahin v. Turkey*, Application No. 44774/98, 29 June 2004. This would suggest that a challenge to the French law would fail before the European Court.

<sup>65</sup> On the alarming rise of anti-Semitism in Europe, see the European Monitoring Centre on Racism and Xenophobia, *Manifestations of Anti-Semitism in the EU: 2002-03*, Vienna, 2004; J. Horowitz, *The Second OSCE Conference on Anti-Semitism (Berlin, 28-29 April 2004)*, Papers in the Theory and Practice of Human Rights, Human Rights Centre, University of Essex, 2004.

promote understanding or contribute to the essential distinction that needs to be drawn between the extreme networks promoting terrorism in the name of Islam, such as Al Qaeda, and the millions of Islamic moderate believers who are also Europeans, European Muslims in fact.

#### 4. Secularism

In rehearsing the parties' arguments in *Refah*, the Chamber noted that they agreed 'that preserving secularism is necessary for protection of the democratic system in Turkey. However they did not agree about the content, interpretation and application of the principle of secularism.'<sup>66</sup> Nevertheless, the Grand Chamber found itself able to assert that 'an attitude that fails to respect [secularism] will not necessarily be protected under Article 9 of the Convention's protection of freedom of thought and religion'.<sup>67</sup> While it is clear that the Court had in mind the case of Turkey, unease should be registered at such a proposition. The concept of secularism is not at all easy to define, and especially in Turkey where it was an imposed ideology from the beginnings of the Turkish state to counter the traditional Muslim culture. Was it not perfectly legitimate for a political party such as Refah, which represented millions of Muslim voters, to introduce administrative provisions varying working hours in the public service during Ramadan? For generations, in other Council of Europe countries, businesses were prevented from opening on Sunday because it was a Christian day of religious observance. Many of these countries are secular countries and others are formally non-secular. But in neither case has enforcement of Sabbatarian laws been seen as subversive of democracy or human rights.

There seems little doubt that in *Refah* the European Court has sought to weld together human rights democracy and secularism. Is this the longer-term purpose of the judgment? Is it laying down a European model of human rights and democratic pluralism that is predicated on secularism? What implications flow for the rights protected under article 9 of freedom on religion?<sup>68</sup>

Bryan Wilson has usefully distinguished the terms 'secularisation' and 'secularism' by defining the former as 'that process whereby religious thinking, practice and institutions lose social significance and become marginal to the operation of the social system', and on the other hand secularism 'as an ideology [that] denotes a negative evaluation towards religion and might even be appropriately seen as a particular "religious position" in the sense that secularism adopts certain premises *a priori* and canvasses a normative (albeit negative) position about supernaturalism'.<sup>69</sup>

The problem with secularism is that the global international human rights standards do not ordain secular states – likewise, many of the European states are not formally secular, including the United Kingdom. The Head of State, the Queen, is also the Head of the

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<sup>66</sup> Grand Chamber judgment, n. 1 above, para. 65.

<sup>67</sup> Grand Chamber judgment, n. 1 above, para. 93.

<sup>68</sup> For an excellent critique of recent article 9 jurisprudence including the *Refah* case, see M.D. Evans, 'Believing in Communities, European Style' in N. Ghanea (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff Publishers, 2004) 133-155. See also, *Leyla Şahin v. Turkey*, n. 64 above.

<sup>69</sup> B. Wilson 'Secularisation: Religion in the Modern World' in S. Sutherland and P. Clarke (eds.), *The World's Religions, the Study of Religion, Traditional and New Religion*, (London: Routledge, 2<sup>nd</sup> edn., 1991) at 196.

established Anglican Church.<sup>70</sup> If secularism, as Wilson suggests, is an ideology, should it not, under European Court standards, compete within democratic society with other dispositions? Human rights cannot trump what people regard as authentic meaning to such an extent that it imposes an ideology such as secularism. Yet this is precisely the position in Turkey, where secularism has been imposed through the Constitution for generations by a regime that has nevertheless had an unenviable record of gross human rights violations.<sup>71</sup>

If *Refah* and the Turkish Government were agreed on the importance of the principle of secularism, but not on what it meant, it is surely the purpose of democracy to enable such differences to be debated and resolved peacefully. It may be difficult for a devout Muslim in Turkey to understand why it is acceptable for some European countries to have constitutional recognition and indeed privileges for Christian churches, for example in England or Norway, while it is impermissible to have any reflection of Muslim religious values in Turkey, or indeed France, where Islam is counted as the largest religion in terms of active believers.

An important further criticism offered by Judge Kovler of the *Refah* Grand Chamber judgment concerned the Court's failure to analyse in more depth the concept of plurality of legal systems before giving it such an emphatic rejection as incompatible with the Convention. He noted that various personal status laws are part of the legal culture to be found in many societies.<sup>72</sup> These include countries that are democracies, where separate personal laws exist for different religious communities, Israel for example, where it is based on the Ottoman 'millet' system, or India. In Canada, under the Arbitration Act 1991, Ontario plans to offer Muslims voluntary recourse to arbitration tribunals in the matter of some personal issues of status, in which shariah may be applied in terms similar to long-standing arrangements for Jews. Decisions reached by the tribunal applying shariah would be upheld by the secular courts, provided they are reasonable and do not violate the Canadian Charter of Rights.<sup>73</sup>

The point of raising these matters is not to advocate such solutions, but to show that precisely in a democracy, which the European Court defines as inseparable from pluralism of values, it should be possible to debate and study such arrangements. However, this is not possible in Turkey and perhaps, following *Refah*, it is not possible elsewhere in Europe.

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<sup>70</sup> For an interesting defence of this constitutional position, see M. Ipgrave, 'Fidei Defensor Revisited: Church and State in a Religiously Plural Society' in N. Ghana (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff Publishers, 2004) 207-222.

<sup>71</sup> The Rapporteur of the European Parliament, charged with examining Turkey's preparedness to join the European Union, has called for a completely new constitution for Turkey: He stressed that 'the changes demanded are so fundamental that they require the establishment of a new constitution, explicitly based on European democratic foundations, with the rights of the *individual* and of *minorities* balanced against *collective* rights, in accordance with the customary European standards, as set out for example in the European Convention on the Protection of Human Rights and Fundamental Freedoms and the Framework Convention on the Protection of National Minorities, which Turkey should sign and implement', in European Parliament Report, n. 17 above, para. 11. The report also welcomed the decision of Prime Minister Erdogan's intention to prepare a new constitution.

<sup>72</sup> 'Admittedly this pluralism, which impinges mainly on an individual's private and family life, is limited by the requirement of the public interest. But it is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than to reject the very idea of a compromise from the outset' by Judge Kovler in his concurring opinion, n. 1 above.

<sup>73</sup> The shariah-based marriage, divorce and family tribunal will be run by the Islamic Institute of Civil Justice. However public concern among women's groups over the Ontario initiative is mounting, see L. Hurst, 'Islamic law in Ontario', *Toronto Star*, 8 June 2004.

The core issue is: Can religion, democracy and human rights guarantees relate in ways that neither require the strict secularism as espoused in Turkey, nor the subordination of individual human rights to unchallengeable religious rules such as would result from shariah?<sup>74</sup> Or may democracy and plurality of religion be accommodated only through the endorsement of secularism and the complete divorce of the religions of the electorate from political affairs? These questions undoubtedly constitute a new frontier of human rights study, not just in multi-cultural Europe, but in the Middle East and in particular in the new Iraq.

To insist that religion belongs in the private sphere is meaningless to, and indeed induces alienation in, the vast majority of religious believers in the world.<sup>75</sup> It is of interest that the European Parliament's rapporteur on Turkey, Arie M. Oostlander, has criticised the ideological secularism of Turkey as likely to feed religious extremism and has called for a 'more relaxed attitude towards Islam and religion in general'.<sup>76</sup> It is submitted that to acknowledge that the influence and reflection of religious commitment on public policy and human rights will vary, depending on the culture and strength of those commitments, is preferable to a rigid linkage of the secular and the democratic. At the same time, to make human rights and democratic society conditional on the tenets of a religious majority is not compatible with universal human rights or democracy. That is a major challenge for the Koran and Islam. But it is also a constant if less critical issue for other religions.

Cole Durham has undertaken an interesting exercise in developing a typology of religion – state relationships across the world.<sup>77</sup> He locates them within a continuum from absolute theocracy to absolute separation and argues that what is most optimal for religious freedom is what he terms an 'accommodationist' model. In such a model the intent of the State is neither to marginalise religion, nor to insist it retreat from any domains that the state decides to occupy, nor to interfere with its internal life.<sup>78</sup> The model of religion and state reflected in the European Court judgment in *Refah* seems to fall short of this. It appears to legitimate strong intervention on the part of the state in the name of pluralism.<sup>79</sup> But if pluralism is a defining value of democratic societies, as suggested by the European Court, then there must be 'pluralism of ideologies', to include spiritual as well as secular traditions.<sup>80</sup> That requires, in Europe and indeed more widely, more emphasis on education in inter-cultural understanding, especially between Muslims, Christians and Jews. It also requires more caution and sensitivity in the Court that is mandated to protect the rights of secularists and religious believers alike. Nothing could be more important for the future of Europe's multi-cultural societies, which are not only multi-ethnic but also multi-religious.

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<sup>74</sup> S. Leader, 'Toleration without Liberal Foundations' (June 1997) 10(2) *Ratio Juris* 139-64.

<sup>75</sup> See Ghanea, n. 68 above, at 115.

<sup>76</sup> 'Considers that a successful reform of the State will partly be dependent on the extent to which the government succeeds in handling in another way the dangers of fundamentalism and separatism, reflecting Articles 13 and 14 of the Constitution; considers that a relaxed attitude to Islam and to religion in general will counteract the rise of antidemocratic movements such as intolerant and violent religious extremism' in European Parliament Report, n. 17 above. See also A. Khan, 'Will the European Court of Human Rights Push Turkey Towards Islamic Revolution' (2002) available at <http://www.jurist.law.pitt.edu/forum/forumnew59.php>.

<sup>77</sup> See C. Durham, 'Perspectives on Religious Liberty: A Comparative Framework' in J. D. van der Vyver, and J. Witte (eds.), *Religious Human Rights in Global Perspective* (Martinus Nijhoff Publishers, 1996) 1-44.

<sup>78</sup> See also Evans, n. 68 above.

<sup>79</sup> *Ibid.*

<sup>80</sup> R. Künneman, 'A Coherent Approach to Human Rights' 17(2) *Human Rights Quarterly* 340.