

The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria

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The inclusion into Austria's governing coalition of the far right Freedom Party has raised a great deal of controversy regarding democracy as a legal principle. At the centre of this controversy is the ability of an international organization to 'enforce' a legal concept of democracy. The EU has been at the forefront of condemning Austria, claiming that the inclusion of the Freedom Party violates the principles of democracy upon which Europe is founded. This condemnation has so far only remained rhetorical, as Austria has not in fact broken any of its obligations regarding democracy and human rights. This article examines the dilemmas faced by international organizations in promoting and protecting democracy in the absence of any clear agreement as to the content of a legal principle of democracy.

Introduction

The entry of the far-right Freedom Party into the governing coalition of Austria has raised a number of questions concerning the existence of democracy as a legal principle and the ability of international organizations to promote and protect principles of democracy. In reaction to the inclusion of the Freedom Party, led by the controversial figure Jörg Haider, numerous states have declared that they have downgraded their contacts with the Austrian Government on the basis that they

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cannot recognize the existence of the far-right party in the ruling coalition.¹ The other fourteen members of the European Union (EU) have joined together in downgrading bilateral relations with Austria and in the conduct of EU affairs offering at best a cold shoulder to Austrian representatives.

These measures have been justified on the basis that the inclusion of the Freedom Party is a threat to democracy and human rights in Austria and potentially a threat to wider Europe. This explanation is deemed legitimate even though the Austrian Government has not done anything that can be considered in violation of any accepted legal principles of democracy or human rights. The other Member States of the EU have justified the marginalizing of Austria on the basis that the EU is founded on principles of democracy and human rights and the Freedom Party does not conform to these principles. However, this position raises a serious issue concerning the ability of international organizations to promote and protect democracy as a legal principle. If, on the pressure from the other Member States of the EU, Austria were to exclude the Freedom Party from the ruling coalition, despite the fact that it achieved a significant percentage of the popular vote in a democratic election, would the EU itself be abiding by the principles of democracy and human rights upon which Europe is based? Much of the reaction against the inclusion of the Freedom Party in the Austrian Government is due to the statements made by its former leader Jörg Haider. Haider has been closely linked with the Nazi past and has publicly spoken of his approval of a number of aspects related to the Nazi regime. He has also taken a blatantly racist anti-foreigner stance in many of his policy statements as the governor of Carinthia.

Events in Austria have led to a fundamental dilemma in democracy – what to do when the democratic process produces an unfavourable result? This article will look at three regional organizations in Europe – the European Union (EU), the Council of Europe (COE) and the Organization for Security and Cooperation in Europe (OSCE) – and how they are able to promote and protect through legal means a principle of democracy upon which membership within each of the organizations is based. The situation in Austria will be used to demonstrate the inherent difficulties involved.

Democracy as a Legal Principle

The situation of Austria demonstrates the difficulties faced in transforming a contested political idea like democracy into an enforceable legal principle. The debate surrounding the idea of democracy as a legal principle took off in the 1990s with Thomas Franck's article on the existence of a right to democracy.² Much of the

¹ Along with the other Member States of the EU, the USA and Israel have also officially downgraded their relations with Austria: *Keesing's Record of World Events* 43223, 43373.

² T. Franck, 'The emerging right to democratic governance' (1992) 86 *American Journal of International Law* 46.

debate has concentrated on this idea of a right to democracy in general international law.³ Less consideration has been given to the issues surrounding the promotion and protection, including the eventual 'enforcement', of democracy as a legal principle by international organizations. The three regional organizations of Europe being studied here all have membership requirements that include commitments to democracy and respect for human rights. The content and scope of the required commitment to democracy is not elaborated to a great degree by any of the organizations.

In the general literature of democracy, and the relevant works of international legal literature, there is a tendency to take a limited view of democracy confined to procedural aspects, most notably voting.⁴ The favouring of this procedural view of democracy is attributable to the work of Joseph Schumpeter and has had a considerable influence on the bulk of subsequent writing on democracy.⁵ A procedural view of what democracy is or should be is perhaps the easiest approach to the subject. When discussions of democracy deal with normative issues concerning ends and ideals, numerous complications arise when the theory presented contrasts with the reality in practice. Schumpeter and others have overcome this 'embarrassing situation' by limiting democracy to a verifiable event – elections.⁶ By limiting democracy to a procedure, an understanding of what democracy is or should be not only becomes limited but also allows for claims that democracy exists when in reality the will of the people has no impact as individuals are not part of the processes surrounding their lives. In those situations a rhetorical form of democracy may exist but this does not mean that it is effective for the protection and development of the individual. If any theory of democracy 'seems intolerably remote from reality, it may be charged with utopianism'⁷ which explains the emphasis on elections. Conversely, maintaining Schumpeter's idea of democracy only being the vote is easily criticized as an apology for exclusionary government power, as it creates legitimate obstacles preventing individuals and groups from effectively pursuing their self-determination.

For establishing a legal principle of democracy, a starting point may be found in

³ See C. Cerna. 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?' (1995) 27 *New York University Journal of International Law and Politics* 290; M. Reisman. 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 868; A.-M. Slaughter 'International law in a world of liberal states' (1995) 6 *European Journal of International Law* 514; S. Marks. 'The end of history? Reflections on some international legal theses' (1997) 8 *European Journal of International Law* 449.

⁴ For example, see the collection of essays in G. Fox and B. Roth, *Democratic Governance and International Law*, Cambridge University Press, Cambridge, 2000, with the exception of the concluding section dealing with critical approaches.

⁵ For the influence of Schumpeter on democratic theory, see D. Ricci. 'Democracy attenuated: Schumpeter, the process theory, and American democratic thought' (1970) 32 *Journal of Politics* 239; C. Macpherson, *The Life and Times of Liberal Democracy*, Oxford University Press, Oxford, 1977, pp. 77–8.

⁶ Ricci, *op. cit.*, note 5, p. 255.

⁷ G. Duncan and S. Lukes. 'The new democracy' (1963) 11 *Political Studies* 165.

the Universal Declaration on Human Rights: 'the will of the people shall be the basis of the authority of government.'⁸ This goal is accomplished through participation and autonomy allowing the individual and society continually to engage in the process of self-determination. It is essential to view democracy as existing beyond the act of voting. Democracy needs to be seen as integral to the social, economic and cultural spheres of society. Democracy cannot be merely a set of political practices but must consist of the ability of individuals to participate fully in society and governance and provide for the necessary protection of human dignity. At the UN World Conference in 1993, the Vienna Declaration defined democracy as being 'based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.⁹ The inclusion of 'full participation in all aspects of [life]' shows that democracy is more than a political system or a method designed for choosing leaders but a set of practices and values based on the respect of human dignity.¹⁰ Democracy exists to allow individuals to be part of the decisions and processes which affect their lives, it helps to create a better thinking about others in society, and provides non-violent means to settle differences in society.

Inherent in democracy is the paradox where democracy presents itself as inclusive, allowing all to participate regardless of position or status,¹¹ but it also allows for the legitimate domination of a group over the larger society. Effective democracy needs to strike a balance between individual aspirations and collective responsibilities to ensure the development of the individual and society.¹² The purpose of democracy is to provide a system where the individual is able to achieve personal self-determination while at the same time fostering communal development within society.¹³ These two purposes are often seen as contradictory but there exists the possibility that they can be accommodated into a single conception of democracy.¹⁴ This accommodation is achieved through two foundational elements – participation and autonomy – which have been identified as common ground in a majority of democratic theories.¹⁵ Participation is necessary, for it allows individuals to be part of the processes impacting their lives. It is not confined to political acts but includes actions occurring in all aspects of society that are important to the individual.

⁸ Article 21(3) of the UDHR, GA Resolution 217A (III), GAOR, 3rd Session, Part I, Resolutions, p. 71.

⁹ Vienna Declaration and Programme of Action, 12 July 1993, UN Doc. A/CONF.157/23, para. 8.

¹⁰ L. Diamond, *The Democratic Revolution: Struggles for Freedom and Pluralism in the Developing World*, Freedom House, New York, 1992, p. xiii.

¹¹ See D. Held, *Models of Democracy*, 2nd edn, Polity Press, Cambridge, 1996, pp. 2–3.

¹² Council of Europe, *The Challenges of a Greater Europe: The Council of Europe and Democratic Society*, Council of Europe, Strasbourg, 1996, p. 168.

¹³ For an historical discussion, see I. Berlin, *Four Essays on Liberty*, Oxford University Press, Oxford, 1969, p. 118.

¹⁴ See the work of Held, *op. cit.*, note 11; and B. Fine, *Democracy and the Rule of Law: Liberal Ideas and Marxist Critiques*, Pluto, London, 1984.

¹⁵ Held, *op. cit.*, note 11, p. 300.

Participation allows for the pursuit of self-determination and ultimately fosters a greater sense of community.

Participation must occur within a specific framework so that the ability and right of an individual to participate does not infringe the rights of others and prevents abuse of the participatory process. It is known that strict personal autonomy – the ultimate and unfettered ability of the individual to exercise personal rights with no regards to others – is an unworkable concept.¹⁶ The converse holds equally true in that the individual cannot be made subject to the will of the community with arbitrary limits on personal autonomy. Human rights and the rule of law are necessary to ensure that all can participate equally with the understanding that individual rights are not supreme but carry equal obligations of respect. To ensure the ability of participation and to secure against the excesses of power, Held has formulated a principle of autonomy, which states that:

persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them; that is, they should be free and equal in the determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others.¹⁷

Institutional and structural arrangements are necessary to the realization of the principle of autonomy, as they will provide rules and stability when agreed forms and methods are used in the process of governance instead of arbitrary behaviour. The purpose of these arrangements will be to promote discussion and debate among the divergent views of the society. Active participation will occur within an accepted framework that protects and nurtures the principle of autonomy. Stability depends upon the effective protection of human rights, maintenance of the rule of law, the ability to carry out effective social and economic policies and other areas of governance.¹⁸ Respect for human rights alone cannot create democracy but does assist in ensuring the effective exercise of democracy by allowing for individuals to be active participants in society and ensuring the process is not abused.

The development of democracy as a legal principle is no easy task, as the actual forms of democracy will vary between societies in the international system, as the case of Austria has proven in the limited context of the EU membership. There can be no single model of democracy; democracy cannot be reduced to a structure of government or an act of society (elections) as it goes further to include the social, economic and cultural environments in which individuals exist. The interaction between society and the democratic structures and institutions it has

¹⁶ R. Harrison. *Democracy*, Routledge, London, 1993, p. 171.

¹⁷ Held, *op. cit.*, note 11, p. 301.

¹⁸ L. Diamond, *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives*, Report to the Carnegie Commission, New York, 1995, p. 41.

created is important since the two work together.¹⁹ A society will work to determine its democracy through institutions and structures that in turn will also react to the evolution of society.²⁰ This interaction means that the democratic structures and institutions of a society must uphold the underlying beliefs of the purposes of democracy. All democracies will have the same purpose 'to provide conditions for the full and free development of the essential human capacities of all members of the society'.²¹ Most importantly, democracy is to be seen as a dynamic process that carries on through thought, practice, experiences and reflection.

Events in Austria

Austria held parliamentary elections on 3 October 1999 with the Social Democrat Party winning sixty-five seats in the 183-member parliament, the Freedom Party and the People's Party each taking fifty-two seats, and the Greens fourteen seats.²² The Social Democrats were unable to form any sort of coalition so it was left to the Peoples Party and the Freedom Party to do so.²³ The new government was sworn in on 5 February 2000 with the two parties dividing the twelve government posts evenly, with Haider not taking up a government position.²⁴

Following the elections and the creation of the new government, the Portuguese Presidency of the EU stated: 'If a party which has expressed xenophobic views, and which does not abide by the essential values of the European family, comes to power, naturally we won't be able to continue the same relations as in the past.'²⁵ The Portuguese Presidency went on to release an official statement on action to be taken concerning the bilateral relations between Austria and the other fourteen Member States. The actions taken include the refusal to promote or accept official bilateral contacts with Austria, Austrian ambassadors will only be received on a technical level and there will be no support given to Austrian candidates seeking positions in international organizations.²⁶ Portugal's foreign minister, Jaime Gama, stated that the EU 'cannot stand by passively when faced with the possibility of the participation in an EU government of a party whose election platform represents

¹⁹ See J. Anaya, 'A contemporary definition of the international norm of self-determination' (1993) 3 *Transnational Law and Contemporary Problems* 143.

²⁰ With regard to Europe, see A.-M. Rieu, 'Introduction', in A.-M. Rieu and G. Duprat (eds.), *European Democratic Culture*, Routledge, London, 1993, p. 10.

²¹ C. Macpherson, *The Real World of Democracy*, Clarendon, Oxford, 1966, pp. 36-7.

²² For the full results of the election, see *Keesing's Record of World Events* 43223.

²³ *Keesing's Record of World Events* 43373.

²⁴ Haider remains the governor of Carinthia but has resigned as leader of the Freedom Party: see *Keesing's Record of World Events* 43419.

²⁵ CNN, 'EU threatens to cut political ties with Austria', 31 January 2000.

²⁶ 'Statement from the Portuguese Presidency of the EU', www.portugal.ue-2000.pt/news.

a systematic attack on the democratic values of Europe'.²⁷ Belgium called for an unprecedented meeting of foreign ministers in order to defend the 'democratic values' on which the EU was founded.²⁸ The German Chancellor, Gerhard Schroeder, stated that any action taken with regard to Austria was not interfering with the domestic affairs of another state but that the position taken was an expression of the democratic values upon which Europe is based and to which Haider does not adhere.²⁹

The reaction to the inclusion of a far-right political party in the government of Austria is primarily fuelled by past events. While Austria's history will give rise to concern over the inclusion of the Freedom Party in the government, concern over the presence of such a party in a government applies to any society. Statements based on emotion can be viewed as acceptable when presented by politicians and individuals. However, no international organization can legitimately apply legal rules based on the emotional impact of history. Austria is an equal member of the international system and of the organizations to which it belongs. There are no special conditions attached to its membership of any organization. Therefore, any action taken regarding the inclusion of a far-right party in the government needs to be based on the fundamental principles that are common to all members in a particular organization, not contextualized with regard to a particular history of a particular society.³⁰ To do so would make a mockery of any set of legal rules or legal system. If we were to stand by the logic that, due to Austria's history existent legal rules safeguarding against the abuses of far-right political agendas have to be applied in a more stringent sense, then it would hold that legal rules regarding race discrimination have to be applied more stringently to states such as Portugal and the UK due to their colonial past. Any suggestion that because of their past certain states are deserving of a greater degree of criticism and scrutiny than others would be rejected by these states, and rightly so.

The legal principles discussed below that have been developed by the regional organizations of Europe with the purpose of promoting and protecting democracy and human rights have their origin in Europe's past. The mechanisms in place have as their primary function the prevention of the destruction of democracy and the abuse of human rights; in other words, to prevent the history of Europe from repeating itself. If these mechanisms are to work and the legal rules involved are to be respected, then they must be applied to all members equally. Arguments calling

²⁷ 'Austria warned on coalition talks with far right', *Financial Times*, 2 January 2000.

²⁸ CNN, 'Belgium seeks EU meeting on possible Haider inclusion in Austria government', 28 January 2000.

²⁹ The USA has also stated that it will review its ties with Austria for the same reason: CNN, 'Austria shrugs off threats, will allow far-rightists into ruling coalition', 2 February 2000.

³⁰ The US Defence Secretary, William Cohen, stated that the inclusion of the Freedom Party in the Austrian Government 'might be a step back into a very dark past'. 'Riots as Austria's crisis deepens', *Guardian*, 5 February 2000, p. 1. Such statements assume that history will automatically repeat itself in Austria. A point upon which the USA itself is on dubious ground with regard to its own history.

for the application of legal rules based on a particular context are bound to fail if the overall system is to survive.

Democracy and the EU

From the outset it is important to note that the reaction of the Member States of the EU was taken collectively but implemented individually. The EU as an organization has not taken any official action against Austria. The ability of the individual Member States of the EU, or any other state, to declare its dissatisfaction with Austria complies with international practice where states may choose to recognize governments as they see fit.³¹ This is in essence what the statement from the Portuguese Presidency of the EU is stating; it is the bilateral relations with Austria and not the EU itself that is affected.³² Individually, states are free to do as they please in their bilateral relations relying on whatever criteria they choose to determine how another government is to be treated. International organizations, on the other hand, have to act within their constitutive treaties that set out the obligations of members and action to be taken when those obligations are not met.

The beginnings of the EU are found in the Treaty of Paris (1951) and the Treaty of Rome (1957). These treaties were economic in nature and did not contain any specifics concerning democracy with the belief that democracy in some form would exist through the eventual creation of an assembly.³³ At the 1972 Paris Summit, the Member States reaffirmed 'their resolve to base their Community's development on democracy, freedom of opinion, free movement of men and ideas and participation by the people through their freely elected representatives'.³⁴ In 1978 a 'Declaration on Democracy' was issued at the Copenhagen Summit³⁵ which stated that the application of the principles of representative democracy, social justice, the rule of law, and respect for human rights implies a political system of pluralist democracy guaranteeing freedom of expression and opinions within the constitutional organization of powers and the procedures necessary to protect human rights. It was further declared that the respect and maintenance of representative democracy and human rights are essential elements of membership of the EC, a point only recently institutionalized in a binding treaty provision. The Single European Act (1987) expressed the idea of democracy for the EU in a treaty-based document for

³¹ On recognition generally, see H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge, 1947; M. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995*, Macmillan, Basingstoke, 1997; 'Symposium: Recent developments in the practice of state recognition' (1993) 4 *European Journal of International Law* 36.

³² European Commission, 'Statement on Austria', IP/00/93, Brussels, 1 February 2000.

³³ C. Duparc, *The European Community and Human Rights*, COE, Luxembourg, 1993, pp. 11-12.

³⁴ EC Bulletin 10-1972, p. 15.

³⁵ EC Bulletin 3-1978, p. 5.

the first time. The signatories declared, in the preamble, their determination towards the promotion of democracy on the basis of fundamental rights, freedom, equality and social justice and confirmed the European Parliament as an indispensable means of expression for the democratic wishes of the individuals of the Member States.³⁶ The Treaty on European Union (TEU), signed in 1992, marked a continuing commitment to the idea of democracy as a guiding principle of the organization and was further developed by the changes implemented through the Treaty of Amsterdam signed in 1997.³⁷

Article 6(1) of the TEU reads: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.' The Council of the European Union is entrusted with the task of ensuring members meet these objectives and may suspend members if they fail to do so. Article 7(1) of the TEU and Article 309(1) of the EC Treaty set out that:

The Council ... acting in unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its reservations.

If a serious and persistent breach is found to exist, the Council may suspend certain rights of the Member State in question and is able to vary or revoke suspension based on changing circumstances.³⁸ Naturally the requirement of unanimity will not include the state in question and the actions taken by the Council in this regard apply equally to the EC Treaty.³⁹ To date the procedures under Article 7 of the TEU and Article 309 of the EC Treaty have not been used.

Much of the debate surrounding democracy in the EU deals with the democratic nature of the workings of its own institutions.⁴⁰ The treatment of Austria is a new dimension where the issue of democracy is being raised as a constituent principle and a requirement of continuing membership in the organization. A number of difficulties have immediately arisen since there is no clear formulation of what the principles of democracy expressed in Article 6(1) actually are, leading to a fundamental contradiction in the treatment of Austria. The Freedom Party was brought into the coalition government through an accepted and legitimate

³⁶ See N. Neuwahl, 'The Treaty on European Union: A step forward in the protection of human rights?', in N. Neuwahl and A. Rosas (eds.), *The European Union and Human Rights*, Nijhoff, The Hague, 1995, p. 14.

³⁷ OJ 1997 No. C340/1.

³⁸ Article 7(2)–(3) of the TEU.

³⁹ Article 7(4) of the TEU and Article 309 of the EC Treaty.

⁴⁰ A point that will not be elaborated upon here. For further discussion, see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, 2nd edn, Oxford University Press, Oxford, 1998, pp. 155–62, who provide a concise account complete with references to the voluminous literature.

democratic process. The fourteen other Member States of the EU say that the Freedom Party's existence in the government is contrary to the democratic principles upon which the EU is founded. If the Freedom Party were denied a position in the government even though it received a considerable part of the popular vote, would this not be a denial of democracy and fundamental rights? The reaction of the EU brings to light the fact that the principle of democracy in Article 6(1) of the EC Treaty has no determinate meaning and that the organization itself has no coherent mechanism for addressing compliance with freedom, democracy and human rights.

There is no denying that democracy and human rights have evolved into important principles in the EU regime. The ECJ has established that principles of democracy and human rights are based on the common heritage and provisions of the Member States. The criticism of Austria is that they are going against the common understanding of democracy that exists within the Member States. Austria disagrees and says it must recognize the democratic choice expressed by its electorate. How then do we determine what is common to the Member States? The ECJ has explained that, when assessing the common constitutional provisions of the Member States, recourse cannot be made to the national legislation of a single Member State since that would undermine the Community order.⁴¹ This was reiterated in the case of *Nold* where it was stated that the 'constitutions of Member States' determine the existence of fundamental rights.⁴² However, the Advocate-General in *ICRA* stated that principles under a single constitutional tradition of a Member State should be upheld as part of the overall legal regime.⁴³ In *Grogan*, the ECJ held the constitutional traditions of one Member State to be indicative of fundamental rights at the Community level.⁴⁴ Finally, Article 6(3) of the TEU provides: 'The Union shall respect the national identities of its Member States.'

Austria has gone through an accepted democratic process that can be seen to be similar to the other Member States of the EU. It has held free and fair elections where the diverse views of society have been expressed and individuals have been allowed to make their own choices. This leads to the conclusion that in this respect Austria has conformed to the traditions of democracy common to the EU. Since all democratic systems differ, preferred results may be disputed. The other Member States appear to imply that their democratic process would never allow a right-wing party to enter into power and that this in turn is a fundamental principle of the EU. This raises a number of problems, for it implies that the other Member States are better able to control the expression of opinion by their societies. Either that or they are making a claim that far-right-wing groups do not exist. The denial of

⁴¹ Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125, paras. 3-4.

⁴² Case 4/73, *Nold v. Commission* [1974] ECR 491, para. 13.

⁴³ Case 7/76, *ICRA v. Amministrazione delle Finanze dello Stato* [1976] ECR 1213.

⁴⁴ Case 159/90, *SPUC v. Grogan* [1991] ECR I-4685.

representation due to differing views not shared by the majority would appear to be fundamentally in conflict with the principles of democracy in the EU.

It has been stated by the ECJ that democratic legitimacy depends upon the right of the people to participate in the law-making process through properly constituted representatives.⁴⁵ If the Freedom Party were to be denied its place in government, then the legitimacy of the Austrian political system would be in question for there would not be 'properly constituted representatives' for a large minority of the population. Furthermore, there is no basis to discard the democratic process due to subjective differences in ideology.⁴⁶ If Austria subsequently adopts any policies that run contrary to fundamental rights as established by the ECJ the individuals affected may be able to pursue their case through the appropriate Community procedures. The ECJ has actively interpreted the rights provisions of the treaties and has looked to the European Convention on Human Rights (ECHR) and other human rights treaties to which the Member States are party in order to determine the rights individuals possess and the obligations upon governments.⁴⁷ The ECJ has viewed the existence of rights as within the larger framework of a democratic society and any restriction must be 'necessary in a democratic society'.⁴⁸ The ECJ has not fully elaborated its conception of a democratic society but it has in general followed the approach of the European Court of Human Rights (see below). The denial of the results of a legitimate electoral process cannot be deemed to be 'necessary in a democratic society'. Furthermore, the Austrian Government will not be allowed to justify any policies that violate the rights of certain groups as being 'necessary in a democratic society'.

Alongside the protection of fundamental rights, a further source of protection against anti-democratic action taken by Austria may be found in Article 13 of the EC Treaty which states that: 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, or sexual orientation.'⁴⁹ Action by the Council under Article 13 is not mandatory⁵⁰ and the requirement for unanimity might appear to be a major obstacle in taking any action. In the present situation, Austria is not

⁴⁵ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I.

⁴⁶ At the Community level, the ECJ has held that it is necessary to follow democratic procedures in the decision-making process: see Case 138/79, *Roquette Freres v. Council* [1980] ECR 3333, para. 33. If this is the case, then there can be no basis for ignoring the democratic procedures at the national level.

⁴⁷ Case 4/73, *Nold v. Commission* [1974] ECR 491, para. 12.

⁴⁸ Case 36/75, *Rutili v. Minister for the Interior* [1975] ECR 1219, para. 32. See also Case 136/79, *National Panasonic v. Commission* [1980] ECR 2033.

⁴⁹ For a more in-depth view of Article 13 of the EC Treaty, see T. Hervey, 'Putting Europe's house in order: Racism, race discrimination and xenophobia after the Treaty of Amsterdam'; and C. Barnard, 'Article 13: Through the looking glass of Union citizenship', in P. Twomey and D. O'Keeffe, *Legal Issues of the Amsterdam Treaty*, Hart, Oxford, 1999, pp. 329 and 375.

⁵⁰ See Hervey, *op. cit.*, note 49, p. 338. Individuals will not be able to rely directly on Article 13: see Barnard, *op. cit.*, note 49, p. 382.

preventing unanimous agreement as it has expressed a willingness to establish some form of monitoring or scrutiny regarding discrimination.⁵¹ Furthermore, the European Monitoring Centre on Racism and Xenophobia has been established which has the task of studying and investigating racism and xenophobia throughout the EU.⁵² Undoubtedly this body will be keeping a close eye on Austria, as well as the other Member States for none are immune from the problems of racism and xenophobia.

The situation of Austria has placed the other members of the EU in an awkward position. They are claiming that the Freedom Party is contrary to the principles of democracy and human rights as accepted in the treaties. At the same time the existence of the Freedom Party in government is a result of Austria respecting democracy and human rights. Until there is an actual occurrence where the democratic process is restricted or the rights of individuals and groups are actually violated the EU's ability to react is limited. Presently there are in place a number of mechanisms for ensuring that the people of Austria do not suffer from any negative consequences brought about by the Freedom Party. Beyond the political measures taken by the individual Member States, there has been no action taken at the institutional level. For Article 7 measures to be invoked, only five Member States need to act; this has yet to occur. Article 13 has not been brought into action either, and no action has been brought before any of the Community institutions alleging behaviour by Austria that violates any of the principles of democracy and fundamental rights set out in the treaties. For the 'enforcement' of democracy to be seen as legitimate, it would be more constructive for the EU to use the institutional measures that are in place rather than the other Member States acting collectively outside the EU regime but under its banner. The end result is that Austria has not acted in any way that would allow for the present mechanisms to be invoked, demonstrating the contentious nature of democracy as a legal principle.⁵³

Democracy and the Council of Europe

All the members of the EU are also members of the Council of Europe (COE) and signatories to the ECHR.⁵⁴ As members they have obliged themselves to the Charter

⁵¹ Haider and Wolfgang Schüssel, the leader of the People's Party, the other member of the governing coalition, took the unprecedented step of signing a document entitled 'Responsibility for Austria – A Future in the Heart of Europe', *Keesing's Record of World Events* 43419.

⁵² Council Regulation No 1335/97 OJ 1997 No. L151, 10 June 1997.

⁵³ Austria's president, Thomas Klestil, has called on the EU to change the arrangement concerning Article 7 to include a monitoring regime so that it may determine if democracy and human rights were actually being violated. 'Austria looks for end to political isolation in EU', *Financial Times*, 13 April 2000, p. 10.

⁵⁴ ETS No. 5, as amended by Protocol No. 11, ETS No. 155.

of the COE⁵⁵ which states in Article 3 that all members 'must accept the principles of the rule of law and the enjoyment of all person within its jurisdiction of human rights and fundamental freedoms'.⁵⁶ Article 8 of the Charter stipulates that any member which has seriously violated the terms of Article 3 may be suspended from the work of the organization until it complies with Article 3 or it may have its membership revoked. The Committee of Ministers declared in 1994 that it has the power to ensure Member States conform to their commitments to democracy, human rights and the rule of law as agreed to in the COE Statute, the ECHR and other legal instruments.⁵⁷ The Committee is able to take up the issue of compliance with commitments in situations referred to it by a Member State, the Secretary-General or the Parliamentary Assembly of the COE. Once a situation is before the Committee it will receive information on the matter and issue an opinion or recommendation or 'take any other decision within its statutory powers'. The COE Parliamentary Assembly also conducts monitoring activities on compliance with the Charter commitments for both existing states and potential members.⁵⁸

The primary legal framework in the COE for the protection and promotion of democracy and human rights rests with the ECHR. Keeping in mind the past events in Europe, the ECHR was adopted with the purpose of protecting against the revival of aggressive and repressive dictatorships.⁵⁹ In the preamble states reaffirm their belief in human rights which are seen as a foundation for peace and justice and 'are best maintained ... by an effective political democracy and ... a common understanding and observance of the Human Rights upon which they depend'. Interpretation of the ECHR takes into account the aims of the COE, the need for effective representative democracy and the acknowledgment of a common heritage among members with respect for the rule of law.⁶⁰

The ECHR framework assumes the existence of democracy in a signatory state through the membership criteria of the COE. The ECHR itself contains no provision

⁵⁵ ETS No. 1.

⁵⁶ This has been interpreted to include elections at reasonable intervals with secret ballot and universal suffrage, sovereign parliaments and free political parties: COE Parliamentary Assembly Resolution (800), 'Principles of democracy' (1983). The Consultative Assembly felt that democracy, individual freedoms, and the rule of law are three aspects of one reality and that they were inseparable, see COE, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, Nijhoff, The Hague, 1979, vol. 5, p. 288.

⁵⁷ 'Declaration on compliance with commitments accepted by Member States of the Council of Europe', 95th Session of the Committee of Ministers, 10 November 1994, reprinted in (1995) 2 *International Human Rights Reports* 250; 'Procedure for implementing the Declaration of 10 November 1994 on compliance with commitments accepted by Member States of the Council of Europe', 20 April 1995, reprinted in (1997) 4 *International Human Rights Reports* 244.

⁵⁸ The Monitoring Committee's website contains information on their activities: see stars.coe.fr/index_e.htm.

⁵⁹ A. Robertson and J. Merrills, *Human Rights in the World*, 3rd edn, Manchester University Press, Manchester, 1989, p. 82.

⁶⁰ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Series A, No. 23 (1976), para. 53.

directly dealing with democracy, with obligations regarding voting being a later inclusion in Protocol No. 1. During the drafting of the ECHR there was disagreement as to whether there should be explicit protection of democratic institutions.⁶¹ Some states favoured such an inclusion,⁶² while others, like the UK, felt that it would be 'inappropriate' to include provisions concerned with democratic institutions.⁶³ The Consultative Assembly, which was charged with drafting the ECHR, felt strongly about including provisions on democracy as a necessary means to give practical effect to the protection of rights, as the only way to ensure rights are truly protected is through a democratic regime and democratic institutions.⁶⁴ In the end, the Committee of Ministers rejected the Assembly's proposals and there was no inclusion of measures for the protection of democracy within the ECHR regime.

The European Court of Human Rights has established that the ECHR is 'an instrument designed to maintain and promote the ideals and values of a democratic society'.⁶⁵ The belief of democracy underwriting the entire ECHR system was expressed by the Commission who stated that Article 3 of Protocol No. 1 'presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society'.⁶⁶ The Court has expressed the view that, regardless of variations upon the right to vote, the 'free expression of the people' remains the core concept of democracy as well as 'one of the essential foundations' of a democratic society.⁶⁷ The Court has made it clear that a democratic society does not mean that the will of the majority shall prevail over the minority.⁶⁸ During its existence the Commission contributed to this idea by declaring the need for government to be accountable to society⁶⁹ and that the 'democratic process is dependent on the interplay of a wide variety of group interests'.⁷⁰ The Court has expressed the need to take into account 'pluralism, tolerance and broadmindedness' without which there is no 'democratic society'.⁷¹ This was in the

⁶¹ For more on the drafting history, see S. Marks, 'The European Convention on Human Rights and its "democratic society"' (1996) 66 *British Yearbook of International Law* 209.

⁶² See the remarks by Ireland in *Collected Edition*, *op. cit.*, note 56, p. 60.

⁶³ *Ibid.*, p. 70.

⁶⁴ *Ibid.*, p. 290.

⁶⁵ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Series A, No. 23 (1976), para. 53. The Court's translation of the original French text is found in *Soering v. UK*, Series A, No. 161 (1989), para. 87.

⁶⁶ *The Greek Case*, Commission Report (1969), para. 416.

⁶⁷ *Handyside v. UK*, Series A, No. 24 (1979-80), para. 49. Freedom of expression is also essential for each individual's self-fulfilment: *Vogt v. Germany*, Series A, No. 323 (1995), para. 52.

⁶⁸ *Johnston v. Ireland*, Series A, No. 112 (1986). In the Separate Opinion of Judge De Meyer, 'democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of the dominant position', para. 5.

⁶⁹ *Barfod v. Denmark*, Series A, No. 149 (1989), para. 64.

⁷⁰ *Markt Intern and Deerman v. Germany*, Series A, No. 165 (1990), para. 203.

⁷¹ *Handyside v. UK*, para. 49. *Young, James and Webster*, Series A, No. 44 (1981), para. 63; *Dudgeon v. UK*, Series A, No. 45 (1982), para. 53; *Jersild v. Denmark*, Series A, No. 298 (1994), para. 37.

context of freedom of expression with the same idea being applied to the freedoms of association and assembly⁷² and religious freedom,⁷³ demonstrating that 'pluralism, tolerance and broadmindedness' are general principles of democracy for Europe.

In establishing the context of a 'democratic society' the European Court of Human Rights has usually taken the Member States of the COE as examples but has also allowed for the possibility of examining the situations and practices of other democratic societies.⁷⁴ The meaning and content of a 'democratic society' is not elaborated upon concerning its inclusion in Articles 8–11 of the ECHR. The result, in the view of some commentators, is 'a phrase heavy with uncertainty'.⁷⁵ The approach to the idea of a democratic society by the organs of the ECHR demonstrates the difficulty of giving a political concept legal elaboration, for, even if the members of the COE possess a common heritage, the intricacies of their democratic systems do differ.⁷⁶ To accommodate the essential differences of the democratic societies of the members states there has developed the concept of 'margin of appreciation' used by the Court to acknowledge the variations that exist in the different domestic systems.⁷⁷ In utilizing the margin of appreciation, the existence of a 'democratic society' creates the basis by which the actions of governments are judged.⁷⁸ With democratic governments there is the assumption that human rights are generally adhered to and any action taken to limit rights, as with assembly, expression, etc., is justified since the elected representatives imposing the limitations possess a legitimate mandate from society. Within the ECHR framework there is the need to balance the popular mandate upon which government action is based, while at the same time ensuring that power is not arbitrarily abused or sectors of society are disadvantaged by the tyranny of the majority.⁷⁹ The margin of appreciation provides the Court with a legal tool

⁷² *Plattfrom 'Arzte für das Leben'*, Series A, No. 139 (1988), para. 32.

⁷³ *Kokkinakis v. Greece*, Series A, No. 260-A (1993), para. 31. *Buscarini v. San Marino*, No. 24645/94, judgment of the Court, 18 February 1999, para. 34.

⁷⁴ See L. Loucaidis, 'Restrictions or limitations on the rights guaranteed by the European Convention on Human Rights' (1993) 4 *Finnish Yearbook of International Law* 350.

⁷⁵ D. Harris *et al.*, *Law of the European Convention on Human Rights*, Butterworths, London, 1995, p. 291. One author has come up with a non-exhaustive list of the elements of a democratic society based on the statements of the Court; it includes participation, accountability, representation, pluralism, tolerance, broadmindedness, freedom of expression for public discussion and the protection of minorities. A. Clapham, *Human Rights in the Private Sphere*, Clarendon, Oxford, 1993, p. 147.

⁷⁶ The Court recognized this in *Mathieu-Mohin and Clerfayt v. Belgium*, Series A, No. 113 (1987): 'any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another', para. 54.

⁷⁷ See generally 'The doctrine of the margin of appreciation under the European Convention on Human Rights: Its legitimacy in theory and application in practice' (1998) 19 *Human Rights Law Journal* 1.

⁷⁸ P. van Dijk and G. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd edn. Kluwer, The Hague, 1998, pp. 772–3.

⁷⁹ See the Court's opinion in *Young, James and Webster*, Series A, No. 44 (1981), para. 63.

allowing it to agree that the limitations upon certain human rights as defined by the government are necessary.⁸⁰

For the Court democracy is 'a fundamental feature of the European public order'⁸¹ and the ECHR generally has the purpose of upholding democracy. 'Democracy ... appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.'⁸² The Court does not feel it necessary to lay out the specifics of a democratic society as it 'considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence'.⁸³ This implies that European societies have a wide 'margin' to establish the democratic structures best fitting for their circumstances with the role of the Court making determinations regarding conflict over the exercise or limitations of rights within a democratic society. As stated above, the Austrian Government will not be allowed to exploit this margin of appreciation by adopting policies that violate the rights of certain groups or individuals. Nor will the Court be likely to allow the destruction of the democratic process through actions justified by the margin of appreciation.

In addition to the ECHR framework, the 1993 Vienna Summit created the European Commission against Racism and Intolerance (ECRI). The ECRI consists of independent experts who have the purpose of examining 'the effectiveness of the range of measures (legal, policy and other) taken by member States to combat racism, xenophobia, anti-semitism and intolerance and propose further action in this field' through a country-by-country approach. The ECRI has found that discrimination continues to persist throughout Europe at multiple levels of society, a situation exacerbated by the lack of anti-discrimination legislation at the domestic level. The ECRI places a great deal of importance upon legal measures for combating racism and intolerance as a means of offering the individual a remedy and shaping the attitudes of a society to see that racism is wrong.⁸⁴ As with the EU's Monitoring Centre on Racism and Xenophobia there is in place a monitoring system to ensure that Austria does not eventually begin to act in a discriminatory way towards certain targeted groups. The ECRI has yet to release any official statements regarding Austria.⁸⁵

To date the institutions of the COE have not taken any legal action regarding Austria and its commitments to democracy under Article 3 of the COE Charter. The reason for this has already been discussed above – by including the Freedom Party in the government, Austria has only recognized the democratic process; it has not

⁸⁰ *Mathieu-Mohin and Clerfayt v. Belgium*, Series A, No. 113 (1987), para. 52.

⁸¹ *Loizidou v. Turkey*, Series A, No. 310 (1995), para. 75.

⁸² *United Communist Party v. Turkey*, para. 45. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Series A, No. 23 (1976), para. 53.

⁸³ *United Communist Party v. Turkey*, para. 57.

⁸⁴ ECRI General Recommendation No. 1 (1997), 'Combating racism, xenophobia, anti-semitism and intolerance'.

⁸⁵ See their website at www.ecri.coe.int.

violated it. Both the Parliamentary Assembly and the Committee of Ministers have expressed concern over the inclusion of the Freedom Party in the Austrian Government. The Secretary General of the COE, Walter Schwimmer, recognized the concern of states over the situation in Austria and reiterated the COE's commitment to democracy, the rule of law and human rights.⁸⁶ He pointed out that to respect these principles 'governments are formed strictly according to the constitution and are responsible to a parliament elected in free and fair elections'. Furthermore, governments must continually respect the rights of all which means rejecting racist or xenophobic attitudes. He rightly concluded that *if* Austria violated any of these principles the COE would take action. The President of the Parliamentary Assembly, Lord Russell-Johnston, used stronger terms that appear to contradict the Court's position to say that pluralism is to be respected but not when it extends to racist or xenophobic practices.⁸⁷ So far no practice has occurred that can be deemed to be racist or xenophobic. Until that determination may be made the official position of the COE is that the policies and practices of the Austrian Government will be closely watched along with the attitudes it encourages among the citizens of Austria.⁸⁸

Democracy and the Organization for Security and Cooperation in Europe

The OSCE (formerly the CSCE) has had a long-standing commitment to democracy and human rights in Europe. Its effectiveness in this area has been limited as the organization itself has been restricted by Cold War politics. The OSCE has been actively involved in the process of democracy and human rights in the former communist states but its principles apply to all members, which includes the rest of Europe. Unlike the EU and the COE, the OSCE contains no binding obligations to democracy or human rights, or any type of enforcement action in this area.⁸⁹ It has, however, elaborated at great length on the importance of democracy and human rights and all Member States have expressed a commitment to these principles.⁹⁰

⁸⁶ COE Secretary General, 'On the political situation in Austria', Press Release, Strasbourg, 3 February 2000.

⁸⁷ From the COE Parliamentary Assembly President, 'Our belief in pluralism cannot extend beyond our values of tolerance and anti-racism', Press Release, Strasbourg, 2 February 2000.

⁸⁸ 'Council of Europe sends clear signal to new Austrian government', Press Release, Strasbourg, 4 February 2000.

⁸⁹ There is no binding legal framework with which the participants in the process have to comply. However, it is commonly held that many of its principles and declarations do have some binding force: see O. Schachter, 'The twilight existence of non-binding legal instruments' (1977) 71 *American Journal of International Law* 296; T. Buergenthal, 'The CSCE rights system' (1991) 25 *George Washington Journal of International Law and Economy* 340; and *OSCE Handbook*, 3rd edn, 1999, P. 3.

⁹⁰ The primary documents are the Helsinki Final Act; the Copenhagen Concluding Document; and the Charter of Paris. See A. Bloed (ed.), *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents, 1972-1993*, Kluwer, Dordrecht, 1993.

In 1990 the OSCE adopted the Copenhagen Concluding Document, one of the first international instruments adopted by an organization that explicitly sets out the importance of democracy for its members.⁹¹ Participants committed themselves to multi-party democracy based on free, periodic and genuine elections, the rule of law and equal protection under the law for all based on respect for human rights and effective, accessible and just legal systems. The Document states that 'pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms' and recognizes the need for the active involvement of all persons, groups, organizations and institutions to ensure the continual progress of the democratization process. The Concluding Document outlines a number of specific ingredients that are necessary for a society based on democracy and the rule of law with the underlying belief that the protection and promotion of human rights and fundamental freedoms is a basic purpose of government.⁹²

The primary work of the OSCE for the promotion and protection of democracy and human rights rests with the Office for Democratic Institutions and Human Rights (ODIHR).⁹³ The focus of the ODIHR is to assist the participating states of the OSCE in building and strengthening democratic institutions and the implementation of commitments related to human rights. The priorities for the ODIHR are the promotion of elections based on OSCE commitments and the building of civil society and democratic institutions. In their work of strengthening civil society and democratic institutions the ODIHR works closely with the media and NGOs, for the free flow of information is seen as an essential element of the democratic process.⁹⁴ Within the OSCE there is also a High Commissioner for National Minorities.⁹⁵ The High Commissioner's responsibility is to identify, and seek early resolution of, ethnic tensions that might endanger peace, stability or friendly relations between the participating states of the OSCE. The High Commissioner operates independently of all parties concerned conducting on-site missions, engaging in preventive diplomacy and providing reports and recommendations. The primary goal of the High Commissioner is to promote dialogue, confidence and cooperation between conflicting parties.

If a participating state of the OSCE engages in 'clear, gross and uncorrected'

⁹¹ See T. Buergenthal, 'The Copenhagen CSCE meeting: A new public order for Europe' (1990) 11 *Human Rights Law Journal* 221; and M. Halberstam, 'The Copenhagen Document: Intervention in support of democracy' (1993) 34 *Harvard International Law Journal* 164.

⁹² Copenhagen Concluding Document, paras. 5–15.

⁹³ On the activities of the ODIHR, see A. Glover, 'The human dimension of the Organization on Security and Co-operation in Europe – The ODIHR in Warsaw' (1997) 2 *European Human Rights Law Review* 553.

⁹⁴ See R. Brett, 'A new role for NGOs in the CSCE', in A. Bloed (ed.), *The Challenges of Change: The Helsinki Summit of the CSCE and Its Aftermath*, Nijhoff, Dordrecht, 1994, p. 359.

⁹⁵ See R. Zaagman and H. Zaal, 'The CSCE High Commissioner on national minorities: Prehistory and negotiations', and R. Zaagman, 'The CSCE High Commissioner on national minorities: An analysis of the mandate and the institutional context', in Bloed, *op. cit.*, note 94, pp. 95 and 113.

violations of these commitments they may be suspended by the organization.⁹⁶ The ODIHR could easily keep track of events in Austria through its cooperative relationships with NGOs and the media. If Austria begins to discriminate or in any other way violates the rights of minorities then the High Commissioner for Minorities will be able to act within the terms of his mandate. Presently Austria holds the Chairman in Office of the OSCE and there has been no official calls for it to stand down. As Chair in Office Austria has been active in supporting OSCE efforts in democracy and human rights where the OSCE is involved and it appears the other participants, including the members of the EU, have not taken any action against Austria in the workings of the organization.

The Selective Enforcement of Democracy in Europe

The reaction of the individual Member States of the EU to the inclusion of the Freedom Party in the Austrian Government indicates that they do not believe Austria's form of democracy in this instance is acceptable, even though Austria has yet to contravene any of its obligations. They are further denying any acceptance of diversity, pluralism, tolerance or broadmindedness based on their own subjective determinations of the situation within Austria. Of greater concern for the future of democracy in Europe is that they are demonstrating a lack of faith in the current systems of protection provided by the regional organizations that will ensure that the Austrian Government does not engage in any form of illegal behaviour. Inclusion of a far-right-wing party in a government is a worry. Considering what has occurred in the recent past, Europe's voicing concern over the policies of the party and the statements of its former leader is only right. However, calling for action to be taken based on the past and automatically assuming those same events are possible in the future has put the Member States of the EU in a position they will find difficult to get out of.⁹⁷

Traditionally international law has only required a minimum of conditions for recognizing the legitimate existence of a state.⁹⁸ Beyond these minimum conditions individual states are free to recognize as legitimate any government that meets their own subjective criteria. In the past, states such as the USA and the UK have changed their criteria for recognition, sometimes requiring elements of democracy, sometimes not.⁹⁹ Leaving it up to individual states to 'enforce' democracy on their own terms

⁹⁶ As was done in 1992 with the former Yugoslavia: see *OSCE Handbook*, *op. cit.*, note 89, p. 29.

⁹⁷ See P. Ludlow, 'Europe's righteous indignation', *Financial Times*, 7 February 2000, p. 24.

⁹⁸ These minimum conditions are a permanent population, a defined territory, a government, and a capacity to enter into international relations. They were originally set out in the Montevideo Convention on Rights and Duties of States, (1933) 165 LNTS 19.

⁹⁹ See Lauterpacht, *op. cit.*, note 31, pp. 115-40; and P.K. Menon, *The Law of Recognition in International Law*, Lewiston, Lampeter, 1994, pp. 221-54.

hinders the development of a legal principle of democracy, as adherence will continue to be based on subjective political choices cloaked in legal terms.¹⁰⁰ Confusion regarding the existence of a legal principle of democracy is compounded when individual states act under the guise of an international organization.

International organizations that possess an obligatory principle of democracy are not allowed the subjective leeway that individual states have in the process of recognition under international law. International organizations must possess clear standards of democracy established in the constituent documents that apply equally to all members. Furthermore, there needs to be specific machinery that is able to react when standards of democracy or human rights are not met. The major issue that Austria has raised is how international organizations are able to react to what are perceived by individual members to be violations of principles of democracy and human rights based on political preferences. To place the reaction of individual states and the organizations of Europe into perspective it is worth examining how they are responding to current events in Russia, specifically with regard to Russia's actions in Chechnya.

Russia is a member of the COE and the OSCE and is a signatory to the ECHR. Russia is not a member of the EU but the EU does have a strong interest in developments there.¹⁰¹ In its actions in the Chechen Republic Russia has been accused of

- (1) the total and wanton destruction of the city of Grozny, the most striking example of indiscriminate and disproportionate military action which has cost hundreds, if not thousands, of civilian lives;
- (2) continued attacks on the civilian population, ranging from the use of aerial bombardments and other heavy weaponry in densely populated areas to the committal of war crimes by federal troops, including the murder and rape of civilians;
- (3) rape – a cruel means of war – perpetrated on Chechen women and girls;
- (4) the alleged arbitrary arrest and detention of non-combatants, and their reported subsequent ill-treatment in detention; and
- (5) the continued use of young conscripts in the military campaign in the Chechen Republic.¹⁰²

¹⁰⁰ Lauterpacht felt that some form of collective recognition by an international organization would help in overcoming the problems of individual recognition. He also noted that states are unlikely to give up this sovereign prerogative, as demonstrated by the members of the EU. See Lauterpacht, *op. cit.*, note 31, pp. 401–2.

¹⁰¹ The following statement demonstrates this importance: 'The Council underlines Russia's importance as a major partner of the EU. The EU would like to continue to build and develop this long-term strategic partnership with a view to enhancing security and stability in Europe and beyond. To this end, it is ready to continue its political dialogue with Russia in order to address questions of mutual interest, including issues of disagreement and concern such as the conflict in Chechnya.' Council of the EU, 2239th Council Meeting, Brussels, 24 January 2000.

¹⁰² Recommendation 1456 (2000), 'Conflict in the Chechen Republic – Implementation by Russia of Recommendation 1444 (2000)'.

These accusations are not speculation as to what might happen in the future, in the same way the Austrian Government is being chastised, but real and verifiable events that are clear violations of international obligations ranging from democracy to humanitarian law to human rights. The COE Parliamentary Assembly has revoked Russia's right to vote in the Assembly. It has further called for the Committee of Ministers to begin the process of revoking Russia's membership of the COE due to its actions and for other signatories to the ECHR to bring action against Russia under Article 33.¹⁰³ So far no action has been taken on either point by the Committee of Ministers, who in turn have tried to emphasize the positive steps taken by Russia and only agreeing to keep the issue under consideration.¹⁰⁴ The OSCE has had an Assistance Group of only five individuals in Chechnya since 1995 that has relied on the power of persuasion to resolve the conflict.¹⁰⁵ The ODIHR has also been involved in discussions with Russia with the hope of contributing to a solution to the conflict.¹⁰⁶

The Council of the EU has also only limited itself to persuasion, calling on Russia to respect human rights and to live up to 'the standards expected from all members of the community of free and democratic nations'.¹⁰⁷ Chris Patten, the European Commissioner responsible for external relations, has also condemned Russia but then concluded the only way to a solution was through understanding and dialogue between the EU and Russia.¹⁰⁸ One may try to explain the difference in treatment by the EU as due to the difference in membership status of Austria and Russia with regard to that particular organization. However, this does not change the fact that Austria has not violated any obligations under the EU treaties nor under any other international convention. Russia on the other hand has been taken to task for its actions by the COE Parliamentary Assembly and by the United Nations, but the EU feels that dialogue and understanding are the most appropriate way of approaching the situation.¹⁰⁹ Calls for more forceful action to be taken against Russia have fallen on deaf ears as leaders who express deep concern regarding the possible future for democracy and human rights in Austria are not so concerned with the presently reality in Russia.¹¹⁰

¹⁰³ *Ibid.* Article 33 of the ECHR allows for inter-state complaints regarding violations of the Convention.

¹⁰⁴ Press Communiqué of the 106th Session of the Committee of Ministers, 10–11 May 2000.

¹⁰⁵ *OSCE Handbook*, *op. cit.*, note 89, pp. 60–2.

¹⁰⁶ Most recently the Director of the ODIHR met with the Russian Presidential Special Representative for Human Rights in Chechnya, OSCE/ODIHR Press Release, 24 March 2000.

¹⁰⁷ 2239th Council Meeting, Brussels, 24 January 2000.

¹⁰⁸ SPEECH/99/166, The Rt Hon. Christopher Patten, Member of the European Commission Responsible for External Relations Declaration on Chechnya, European Parliament, Strasbourg, 17 November 1999.

¹⁰⁹ The United Nations High Commissioner for Human Rights visited Russia in March and reported widespread allegations of human rights abuses that warranted international attention and concern. See Commission on Human Rights, 56th Session, 5 April 2000.

¹¹⁰ US President Clinton, speaking before the Russian Parliament, demonstrated a degree of support for democracy and Russia while at the same time recognizing Russia's past. 'Clinton backs democracy in Russia', *Financial Times*, 6 June 2000, p. 10.

Obviously Russia and Austria rate very differently in importance in the international political scene. However, this should not prevent the equal application of principles of democracy and human rights. It further harms the legitimacy of any idea of democracy as a legal principle if Austria is ostracized for allegedly contradicting shared fundamental principles by recognizing the democratic process but Russia is only given the most delicate of rhetorical condemnation in the face of outright violations of democracy and human rights. The politicians provide plenty of excuses to explain the difference in treatment – the need to improve trade and business relations,¹¹¹ the desire to avoid basing relationships on single issues and the necessity of establishing good relations with an important world leader.¹¹² Such selective use of the importance of principles of democracy and human rights does not help the development of legal principles.

Conclusion

The treatment of Austria, especially by the EU, demonstrates that democracy, as a legal principle, is highly indeterminate and subject to a wide degree of controversy. Any definition of democracy depends upon who is providing the definition and the context in which they are speaking, making democracy an 'essentially contested concept'.¹¹³ In the present case the statements being made show how contentious democracy is, especially when one's own system is questioned. In response to criticisms of the Austrian political system, Wolfgang Schüssel, leader of the People's Party, stated: 'Austria does not need lessons in democracy. We are not a developing country as far as human rights are concerned.'¹¹⁴ Mr Schüssel misses the point; no one's democracy is perfect and that in all cases it needs to be kept under observation. However, those observations need to be based on a recognition of difference and with a good deal of tolerance and faith in monitoring systems. Even though democracy in both meaning and practice is essentially elastic in nature allowing for numerous forms, this does not preclude efforts at establishing foundations for an effective democracy.¹¹⁵

The Austrian example shows that there is no acceptable definition of democracy that may be enforced through purely legal means. Even when legal regimes contain built-in elements that recognize diversity and difference as to how a democratic society develops, political differences of opinion will carry a great deal of weight. All

¹¹¹ 'Putin announces investigation into Chechnya "abuse"', *Financial Times*, 18 April 2000, p. 2.

¹¹² 'Putin greeted by London protests', BBC Online, 17 April 2000.

¹¹³ T. Ball and R. Dagger, *Political Ideologies and the Democratic Ideal*, Harper Collins, New York, 1991, pp. 22–3. See also K. Bollen, 'Political democracy: Conceptual and measurement traps', in D. Beetham, *Defining and Measuring Democracy*, Sage, London, 1994, p. 5, who observes that providing a definition of democracy that everyone finds acceptable is impossible.

¹¹⁴ 'Austria is risking isolation over far rights, EU warns', *International Herald Tribune*, 1 February 2000.

¹¹⁵ R. Harrison, *Democracy*, Routledge, London, 1993, p. 134.

Austria has done is recognize the results of a democratic election. Elimination of the Freedom Party from the government would be a refusal of the expressed will of the people by the Austrian Government and would have to be seen as a serious violation of human rights as stated in Article 6(1) of the TEU. Attempts by the EU to ensure the expressed will of 27 per cent of the Austrian population is not adhered to would be a contradiction of its own expressed principles. If the Freedom Party works to exclude others from the process of governance or acts in a discriminatory fashion, then it may be held to be violating legal principles of democracy; the EU and the COE can then take action at the intergovernmental level and individuals will be able to utilize the ECHR protection system.

The overwhelming majority of individuals in Europe and the world do not subscribe to the ideas of Haider and his political platform.¹¹⁶ The Freedom Party, along with other right-wing parties, has been part of European politics for a good period of time. Their presence has usually been minimal raising few reactions. As one commentator notes, we are able to handle far-right political parties in society so long as their share of the vote remains low, but once that share begins to rise to about 10–15 per cent then anxieties arise.¹¹⁷ It is feared that Haider will follow the path of Hitler and use the democratic process in order to gain power and destroy Austrian democracy.¹¹⁸ To prevent the possible destruction of democracy in Austria based on past events, undemocratic action by a certain group of states acting under the banner of an international organization suddenly becomes acceptable.

The UK MEP, Glyn Ford, has expressed the belief that it is legitimate to intervene in the Austrian political process and not recognize the outcome of elections.¹¹⁹ This would set an extremely dangerous precedent especially since Austria has not violated any accepted obligations. Admittedly there is the potential for violations, but it would be better left to the international organizations involved to deal with these when they arise and not for individual states to demand action based on their own political preferences. If democracy is to be accepted as a legitimate legal principle, it must be applied equally. It cannot be applied as a single model for all states that will guarantee the same results. It must be a process that recognizes the freely expressed will of a society and provides for peaceful mechanisms of conflict resolution when differences arise. Anything less based on subjective political differences of opinion would be a significant obstruction to the long-term development of democracy as an effective legal principle.

¹¹⁶ It is interesting to note that one of the Freedom Party members who was a potential candidate for finance minister was a strong believer in the economic policies of Margaret Thatcher: see 'Haider set to call the shots from power base', *Financial Times*, 3 February 2000, p. 8.

¹¹⁷ 'The far right: A nationalist international?', BBC Online, www.bbc.co.uk/worldservice/theneweuropa/wk19.htm.

¹¹⁸ The President of the European Parliament has stated that the concern over the inclusion of the Freedom Party in the Austrian Government is based on 'an observable fact and an indelible memory': 'Austria looks for end to political isolation in EU', *Financial Times*, 13 April 2000, p. 10.

¹¹⁹ BBC Online, 'MEPs Threaten Sanctions against Austria', 3 March 2000.

The most worrying aspect of the treatment of Austria is the 'righteous indignation'¹²⁰ and closedmindedness of those critical of the regime, the so-called defenders of democracy. Democracy is about diversity and debate where differences are resolved through peaceful discussion. However, those that say they are concerned about the future of democracy in Austria refuse to engage in any sort of debate and discussion. The EU declared in 1978 that democracy depended upon pluralism and respect for freedom of expression and opinion. The European Court of Human Rights has stated that respect for freedom of expression and opinion is central to democracy, that the majority cannot impose its views on the minority, that wider group interests and needs have to be taken into account and, most importantly, that pluralism, tolerance and broadmindedness are the core of the democratic process. There is no doubt that the ideas of the Freedom Party are dangerous, even more so now that they have been legitimated to a degree by being part of the government of Austria. Of greater danger though is the belief that we can override the democratic process in order to save what we feel to be the appropriate form of democracy.

¹²⁰ Term used by Ludlow, *op. cit.*, note 97.