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Freedom of association and minority diversity in democratic society Aspects of the European Court of Human Rights' case law

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Abstract: The European Convention on Human Rights is argued to be inadequately equipped to deal with minority claims due to its lack of explicit minority rights. It does, however, enshrine several individual human rights of crucial significance for minority diversity. Central among these is Article 11 of the Convention on the right to freedom of association, which has become one of the main vehicles through which certain groups of individuals seek to affirm and manifest a minority consciousness, the recognition of minority status or, the preservation of their ethnic, cultural, linguistic, etc., identity. The European Court of Human Rights, for its part recognised the particular importance of freedom of association for persons belonging to minorities and for minorities as such and produced a comprehensive jurisprudence, which provides that in democratic societies distinguished by the principles and values of political and cultural pluralism and tolerance, such associations should freely pursue their aims unless they incite to violence and/or disrespect for democratic rules. This being the case, the Strasbourg Court strongly rejects state and national judicial approaches that seek to limit this field of freedom on the basis of security arguments or other reasons of public interest, promoting instead the idea of an open and inclusive society, where minority identities can be the subject of free public debate and their proponents can unhindered claim their recognition and protection.

Keywords: European Convention on Human Rights European Court of Human Rights democratic society freedom of association minorities

(A) INTRODUCTION

Freedom of association, meaning the right of individuals to establish various forms of associations (clubs, nongovernmental organisations, political parties, cooperatives, trade unions etc.) and/or to participate in them, in order to express themselves and act collectively and pursue, defend and promote jointly their interests and goals,[1] is considered to be the "legal foundation of civil society"[2] and one of the basic elements of a truly democratic society.[3] For this reason, therefore, its protection is enshrined in

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1 See Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, *Maina Kiai*, UN Doc. A/HRC/20/27, 21 May 2012, paras. 51-52; General Assembly, Report of the Special Representative of the Secretary-General on Human Rights Defenders, *Hina Jilani*, UN Doc. A/59/401, 1 October 2004, para. 46.

2 K. Tsitselikis, *Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers* (Martinus Nijhoff Publishers, Leiden, 2011), at 227.

3 R. Hofmann, 'Implementation of the FCNM: Substantive Challenges', in A. Verstichel *et al.* (eds), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Antwerp/Oxford/Portland, 2008) 159, at 168.

numerous international and regional provisions for the protection of human rights, such as, *inter alia*, in Article 11 (1) of the European Convention on Human Rights (ECHR).[4]

Although the right is universal in nature, applying indiscriminately to all persons, regardless of whether or not they identify themselves as members of a minority, it is moreover of specific importance for safeguarding the protection of minorities, as noted in the Explanatory Report of the Framework Convention on the Protection of National Minorities (FCNM) of the Council of Europe (CoE),[5] since "[t]here cannot be a minority group without the right of persons belonging to the minority group to associate freely."[6]

This fact has also been recognised by the Grand Chamber (GC) of the European Court of Human Rights (ECtHR), which has stressed that "freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities […] Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights."[7] Reasonably, then, almost all modern international and regional texts for the protection of minorities include relevant stipulations (Article 7 of the FCNM, Article 2 (4) of the United Nations (UN) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and para. 32.2 of the Document of the Copenhagen Meeting of the then Conference and now Organisation for Security and Cooperation in Europe (CSCE/OSCE), which explicitly recognise the right of persons belonging to minorities to form their own associations.[8]

In practice, however, the enjoyment of the right encounters serious obstacles, especially when it is sought through it either the recognition of the existence of a population group as a distinct / separate people[9] or as a national minority,[10] or the cultivation and promotion of a cultural and linguistic identity,[11] which according to the

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4 Art. 11 (1) of the ECHR provides that: "[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." See M. Evans (ed.), *Blackstone's Statutes on International Law Documents* (13th ed., Oxford University Press, Oxford, 2017), at 54.

5 'Explanatory Memorandum on the Framework Convention for the Protection of National Minorities', 16 *Human Rights Law Journal* (1995) 101-108, at 104, paras. 51, 54.

6 G. Gilbert, 'Expression, Assembly, Association', in M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, Oxford, 2007) 149, at 153.

7 *Gorzelik and Others v. Poland*, ECHR (2004) Grand Chamber (GC) Applic. No. 44158/98, para. 93.

8 Euro-Mediterranean Human Rights Network (EMRN), 'Ethnic, Linguistic, Cultural and Religious Diversity and the Right to Freedom of Association in the Euro-Mediterranean Region', in EMRN (ed.), *Monitoring Report on Freedom of Association in the Euro-Mediterranean Region — 2009* (Copenhagen, 2009) 96, at 98.

9 In the case of *The United Communist Party of Turkey*, for example, one of the central positions of the party that caused *inter alia* its dissolution by the Constitutional Court was its call for the constitutional acknowledgement of the existence of the Kurdish people and the lifting of bans on the Kurdish language and culture, *The United Communist Party of Turkey and Others v. Turkey*, ECHR (1998) (133/1996/752/951), paras. 9, 56.

10 For instance, one of the principal aims of the association repeatedly denied registration by the Bulgarian courts under the name "United Macedonian Organisation Ilinden" ("Ilinden") was "the recognition of the Macedonian minority in Bulgaria", *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, ECHR (2006) Applic. No. 59491/00, para. 9.

11 For example, one of the new in relation to its original statute goals of the association twice denied registration by the Greek courts under the name "Home of Macedonian Civilization" was "the promotion and evolution of the Macedonian culture and the preservation and advancement of the Macedonian language", *Home of Macedonian Civilization v. Greece* (in Greek), ECHR (2015) Applic. No. 1295/10, para. 6.

official state and prevailing social narrative do not exist or are not perceived as such and consequently are not accepted by the name and designation that those appearing as their agents use to identify them.[12] In some of these cases, the national courts favour a range of interventions in freedom of association (dissolution of 'pro-Kurdish' parties in Turkey, refusal to register minority associations in Greece, Bulgaria and Poland, ban on rallies in Bulgaria and dissolution of associations in Greece and North Macedonia),[13] which the respective governments in turn argue before the ECtHR invoking, cumulatively or separately, reasons of : a) protection of national security, b) preservation of public order, and c) safeguarding of the rights and freedoms of others.[14] These three reasons constitute, according to Article 11 (2) of the ECHR, legitimate aims which may in principle justify restrictions on the enjoyment of freedom of association[15] provided that there is legal provision for the latter, that they are "necessary" in a "democratic society" that is, that they serve, according to the interpretation of the ECtHR, an "imperative social need" and that they are proportional to the aforementioned lawful purposes.[16]

The Strasbourg Court, for its part, has in considering the relative cases followed the judicial reasoning it has developed in its case-law for the key features that distinguish the Convention's fundamental constitutional axis of reference, the *democratic society*, focusing amongst them on the principles and values of pluralism and tolerance, and rejected the above-mentioned state arguments as not sound enough to establish sufficient and convincing grounds for interfering in freedom of association especially since in no case was there an incitement to violence and/or opposition to democratic principles and consequently as incapable of proving the existence of an "imperative social need" justifying proportionately necessary restrictions in a democratic society.[17] By finding, then, in almost all relevant cases a violation of Article 11[18] and at the same time delivering important secondary legal reasoning for the proper treatment of minority diversity, such as, for example, that "the existence of minorities and different cultures in a country was a historical fact that a "democratic society" had to tolerate and even protect and support

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12 J. Ringelheim, 'Identity Controversies Before the European Court of Human Rights: How to Avoid the Essentialist Trap?', 3 *German Law Journal* (2002) [1]-[15], at [1] [https://doi.org/10.1017/S2071832200015170].

13 See G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law — A Comparative Perspective* (Martinus Nijhoff Publishers, Leiden/Boston, 2009), at 38.

14 See the first relevant cases in chronological sequence: *The United Communist Party*, *supra* n. 9, para. 39; *The Socialist Party and Others v. Turkey*, ECHR (1998) (20/1997/804/1007), para. 33; *Sidiropoulos and Others v. Greece*, ECHR (1998) (57/1997/841/1047), para. 37; *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, ECHR (2001) Applic. Nos. 29221/95 and 29225/95, paras. 70-71; *Gorzelik and Others v. Poland*, ECHR (2001) Applic. No. 44158/98, para. 39.

15 Art. 11 (2) of the ECHR provides that: "[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others", *see* Evans, *supra* n. 4, at 54.

16 See D. Anagnostou, 'Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on Minority Related Policies', 14 *The International Journal of Human Rights* (2010) 721-743, at 723-724 [https://doi.org/10.1080/13642980903205417].

17 J. Marko, 'Effective Participation of National Minorities in Public Affairs in Light of National Case Law', 16 *International Journal on Minority and Group Rights* (2009) 621-642, at 626 [https://doi.org/10.1163/157181109_016_04-10].

18 See indicatively the aforementioned cases: *The United Communist Party*, *supra* n. 9, para. 61; *The Socialist Party*, *supra* n. 14, para. 54; *Sidiropoulos*, *supra* n. 14, para. 47; *Stankov*, *supra* n. 14, para. 112; *The United Macedonian Organisation Ilinden*, *supra* n. 10, para. 82; *Home of Macedonian Civilization*, *supra* n. 11, para. 57.

according to the principles of international law",[19] the ECtHR made Article 11 a pillar of indirect protection of minorities' needs, securing even for members of groups not recognised as such[20] a sufficient scope of freedom to jointly pursue their goals.

Notwithstanding this fact, the Court, as a regional juridical body competent to supervise the compliance of states with the obligations arising from the ECHR with regard to respect for individual human rights, does not take a stand on the essentialist narratives of either the state and the majority it represents or those groups claiming minority status or the preservation of a culture as they perceive it.[21] Instead, it focuses on respecting and ensuring all those conditions that make it possible in a democratic society to express all views on national and ethnic identities, so that through the friction of ideas there may occur the harmonious interaction of individuals and groups with different identities, which is necessary to the achievement of social cohesion.[22] This last is essential for the fulfilment of the three core values of the CoE, human rights, democracy and the rule of law, and requires for its success the realisation of a degree of integration of all the different population groups in the national society at large, a result that cannot be achieved without the adoption of policies that ensure a real and full and not just formal equality for the whole of the population, and also those conditions necessary for the further development of all the different cultural traditions.[23]

(B) THE EUROPEAN CONVENTION ON HUMAN RIGHTS, NATIONAL MINORITIES AND THE EUROPEAN COURT OF HUMAN RIGHTS

The ECHR was adopted at a time (1950) when, for a variety of reasons, the issue of minority rights was not a priority of the international community's agenda.[24] According to the prevailing ideological and political narrative of the period, the introduction of

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19 *Sidiropoulos*, *supra* n. 14, para. 41. See L. M. Danforth, 'The Macedonian Minority in Northern Greece', in J. S. Forward (ed.), *Endangered Peoples of Europe: Struggles to Survive and Thrive* (Greenwood Press, Westport/Connecticut/London, 2001) 85, at 96.

20 "While the Court considers that that lacuna in the law [the non-recognition of Silesians as a national minority] left a degree of legal uncertainty for individuals and a degree of latitude for the authorities… it does not find that that fact in itself had consequences for the applicants' rights under Article 11", *Gorzelik*, *supra* n. 14, para. 63. See G. Pentassuglia, 'Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee', 46 *German Yearbook of International Law* (2003) 401-451, at 411 (note 46).

21 "In this connection, the Court points out that it is not in a position nor is it its role to take the side of any of the parties as to the correctness of the applicants' idea", *Association of Citizens Radko and Paunkovksi v. the Former Yugoslav Republic of Macedonia*, ECHR (2009) Applic. No. 74651/01, para. 76. "The Court observes that it is not its task to express an opinion on whether or not the Silesians are a "national minority"…", *Gorzelik*, *supra* n. 14, para. 62. See also Ringelheim's relevant observations, *supra* n. 12, at [2-3], [12].

22 "The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion", *Gorzelik* (GC), *supra* n. 7, para. 92. See also J. Ringelheim, 'Integrating Cultural Concerns in the Interpretation of General Individual Rights Lessons from the International Human Rights Case Law', UN Doc. E/C.12/40/4, 9 May 2008, at 14.

23 A. Eide, 'Towards a Pan-European Instrument', in A. Verstichel *et al.* (eds), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Antwerp/Oxford/Portland, 2008) 5, at 10.

24 See H. Hannum, 'The Concept and Definition of Minorities', in M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, Oxford, 2007) 49, at 50-51.

special provisions for the protection of minorities was not necessary,[25] as the universal guarantee of equal and non-discriminatory enjoyment of the then emerging regime of human rights (would) constitute sufficient condition for the satisfaction of the needs of these groups and their members.[26]

In this light, then, it came as no surprise that the ECHR does not incorporate special rights for minorities,[27] but is limited to providing guarantees to their members for the non-discriminatory exercise of the human rights contained in its text, overlooking the rights of the group to which they belong as such.[28] In addition, its focus is on ensuring the protection of civil and political rights,[29] while it is less generous with regard to cultural rights,[30] such as linguistic and educational, which are of particular importance to persons belonging to minorities.[31] Finally, the Convention is extremely sparing, if not deafeningly silent, in terms of economic and social rights,[32] which are also of crucial importance for the preservation of minority identities.[33]

Essentially, the only explicit reference to the issue of minority diversity occurs in the context of Article 14, which stipulates that the enjoyment of the Convention's rights shall be ensured without discrimination of any kind, such as those based on "association with a national minority",[34] a concept which, however, is not defined in its text.[35] Even this provision, however, is not autonomous, but can be invoked only in conjunction

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25 A. Eide, 'Good Governance, Human Rights, and the Rights of Minorities and Indigenous Peoples', in H. Otto and G. Alfredsson with the collaboration of R. Clapp (eds), *Human Rights and Good Governance — Building Bridges* (Martinus Nijhoff Publishers, The Hague/London/New York, 2002) 47, at 58.

26 F. Horn, 'Recent Attempts to Elaborate Standards on Minority Rights', in O. Bring and S. Mahmoudi (eds), *Current International Law Issues — Nordic Perspectives: Essays in Honour of Jerzy Sztucki* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1994) 277, at 278.

27 "The Commission observes that the Convention does not guarantee specific rights to minorities", ECommHR, *G. and E. v. Norway*, Applic. Nos 9278/81 and 9415/81, Decision of 3 October 1983, DR 35, 30, at 35.

28 "The Convention does not provide for any rights of a linguistic minority as such, and the protection of individual members of such minority is limited to the right not to be discriminated against in the enjoyment of the Convention rights…", ECommHR, *X. v. Austria*, Applic. No. 8142/78, Decision of 10 October 1979, DR 18, 88, at 92-93.

29 P. Macklem, 'Minority Rights in International Law', 6 *International Journal of Constitutional Law* (2008) 531-552, at 541 [https://doi.org/10.1093/icon/mon019].

30 C. F. Furtado, 'Guess Who's Coming to Dinner? Protection of National Minorities in Eastern and Central Europe under the Council of Europe', 34 *Columbia Human Rights Law Review* (2002-2003) 333-411, at 342.

31 A. Eide, 'Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes', in G. Alfredsson and M. Stavropoulou (eds), *Justice Pending: Indigenous Peoples and Other Good Causes — Essays in Honour of Erica-Irene A. Daes* (Martinus Nijhoff Publishers, The Hague/London/New York, 2002) 83, at 91.

32 A. Rosas, 'The Protection of Minorities in Europe: A General Overview', in J. Packer and K. Myntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Åbo Akademi University Institute for Human Rights, Turku/Abo, 1993) 9, at 10.

33 See M. E. Salomon, 'Socio-Economic Rights as Minority Rights', in M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, Oxford, 2007) 431-475.

34 E. J. Aarnio, 'Minority Rights in the Council of Europe: Current Developments', in A. Phillips and A. Rosas (eds), *Universal Minority Rights* (Åbo Akademi University Institute for Human Rights and Minority Rights Group (International), Turku/Abo and London, 1995) 123, at 124.

35 Av. A. D. Güler, 'The Protection of Minorities in the Council of Europe: Possibilities to Use the European Convention on Human Rights for Minority Issues', 19 *Dokuz Eylul Universitesi Hukuk Fakultesi Dergisi* (2017) 2451-2506, at 2462.

with some other substantive provision of the Convention and its Protocols,[36] which has led to its characterisation as "parasitic".[37] The specific gap was to be filled by the adoption and entry into force (2005) of the 12th Protocol to the ECHR, which contains an autonomous non-discrimination clause, prohibiting discrimination on the grounds *inter alia* of association with a national minority, as to the enjoyment of any right provided for in national law and not only in the Convention and its Protocols.[38] That expectation, however, has so far failed to materialize due to the reluctance of states to ratify it, as shown by the small number (only 20) of accessions.[39]

The "glaring omission"[40] of an explicit reference to minority rights and the reduction of the protection of minority diversity to a single and limited in scope guarantee of formal equality which by the requirements of international law is not sufficient to achieve real equality, as the Permanent Court of International Justice (PCIJ) had ruled since the interwar period in the case of the Greek schools in Albania[41] has in the past given a solid basis to academic positions holding that the ECHR cannot meet the modern requirements of international protection of minorities[42] or can at best make only a partial contribution in this direction.[43] In fact, relevant studies have sufficiently documented the "repeated failure"[44] of the Convention to effectively protect the rights of minority persons, in particular as regards the use of their mother tongue in education and in the administrative and public services in the few cases brought up to the late 1980s before the now abolished European Commission and the ECtHR.[45]

From the second half of the 1990s, however, the situation gradually began to change, as the emergence of minorities in the international and in particular the European reality and the consequent adoption of texts for their protection by the OSCE, UN and

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36 "The Court reiterates that Article 14 of the Convention has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and of the Protocols thereto", *Muñoz Díaz v. Spain*, ECHR (2009) Applic. No. 49151/07, para. 42.

37 K. Henrard, 'Non-Discrimination and Full and Effective Equality', in M. Weller (ed.), *Universal Minority Rights — A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, Oxford, 2007) 75, at 82.

38 R. Medda-Windischer, 'Religious and Linguistic Minorities and the European Court of Human Rights: Between Restrictive Measures and Concerted Solutions', 78 *Europa Ethica* (2021) 36-47, at 37.

39 H. Sawari, J. Aslani and K. Aslani, 'The Protection of National Minorities within the Council of Europe: An Analytical Review', 21 *International Journal of Humanities* (2014) 55-82, at 72.

40 S. Stavros, 'Cultural Rights for National Minorities: Covering the Deficit in the Protection Provided by the European Convention on Human Rights', 25 *IALS Bulletin* (1997) 7-13, at 7.

41 See *Minority Schools in Albania*, 1935 PCIJ Series A/B No. 64, at 17. See also G. Zyberi, 'The International Court of Justice and Peoples and Minorities', in C. J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, Oxford, 2013) 327, at 332.

42 C. Tavani, 'The Protection of Cultural Identity of Minorities in International Law: Individual versus Collective Rights', 9 *European Yearbook of Minority Issues* (2010) 55-92, at 66 [https://doi.org/10.1163/22116117-90000163].

43 G. Pentassuglia, 'Minority Protection in International Law: From Standard-Setting to Implementation', 68 *Nordic Journal of International Law* (1999) 131-160, at 135 [doi: https://doi.org/10.1163/157181099202959539].

44 G. Gilbert, 'The Legal Protection Accorded to Minority Groups in Europe', XXII *Netherlands Yearbook of International Law* (1992) 67-104, at 85 [doi:10.1017/S0167676800002191].

45 See A. M. de Zayas, 'The International Judicial Protection of Peoples and Minorities', in C. Brölmann, R. Lefeber, and M. Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993) 253, at 274-281.

the CoE, and the accession to the ECHR of Eastern European states characterised by intense ethnic conflicts, created new data and as a result to some extent enriched the nature of the cases before the Court.[46] In this climate, the ECtHR began to become, as one eminent author points out, gradually more "sensitive"[47] to ethnic issues and to interpret in a way more 'friendly' to minority diversity a series of ECHR's provisions of particular importance to it, such as, *inter alia*, Article 8 on the right to respect for private and family life and residence, Article 14 on the prohibition of discrimination, Article 10 on the right to freedom of expression and Article 11 on the right to freedom of assembly and association.[48] Particularly with regard to the last, the Court has been quite receptive to the appeals of 'pro-minority' parties and associations alleging its violation,[49] a development of indisputably crucial significance for groups of persons who seek to gain some form of recognition from the authorities through the freedom of association.[50] In this context, the ECtHR produced a rich and coherent body of case-law — with the exception of its decision in the *Gorzelik* case[51] — that gradually distances itself from the

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46 S. Rosa, 'What Can the European Court of Human Rights Learn from the Inter-American Court of Human Rights' Approach to Reparation in Indigenous Peoples' Rights Decisions?', 7 *Birkbeck Law Review* (2020) 58, at 61.

47 P. Thornberry, 'Treatment of Minority and Indigenous Issues in the European Convention on Human Rights', in G. Alfredsson and M. Stavropoulou (eds), *Justice Pending: Indigenous Peoples and Other Good Causes — Essays in Honour of Erica-Irene A. Daes* (Martinus Nijhoff Publishers, Hague/London/New York, 2002) 137, at 165.

48 R. Hofmann, 'The Future of Minority Issues in the Council of Europe and the Organization for Security and Cooperation in Europe', in M. Weller, D. Blacklock and K. Nobbs (eds), *The Protection of Minorities in the Wider Europe* (Palgrave MacMillan, New York, 2008) 171, at 174.

49 D. Anagnostou, 'The Strasbourg Court, Democracy and the Protection of Marginalised Individuals and Minorities', in D. Anagnostou and E. Psychogiopoulou (eds), *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context* (Martinus Nijhoff Publishers, Leiden/Boston, 2010) 1, at 18.

50 S. Spiliopoulou Åkermark, 'The Limits of Pluralism — Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?', 3 *Journal on Ethnopolitics and Minority Issues in Europe* (2002) 1-24, at 8. As the ECtHR noted in the first examination of the *Gorzelik* case: "[b]ut there was no legal procedure at the domestic level whereby a national or other minority could seek recognition […] Consequently, groups which were not recognised as national minorities by the bilateral treaties on good neighbourliness…could only obtain "indirect" recognition through the procedure for the registration of associations", *supra* n. 14, para. 62.

51 As far as minority associations are concerned, the only exception, where the Court did not find — twice indeed, since the case was re-examined by the Grand Chamber — a violation of Art. 11 was in the *Gorzelik* case. This concerned the refusal of the Polish courts to register the applicant association under the name "Union of People of Silesian Nationality", on the grounds that, although according to its statute submitted for approval, it appeared as an organisation of the "Silesian national minority", aiming among other things "to awaken and strengthen the national consciousness of the Silesians" and to protect their ethnic rights, it in fact aimed, in the opinion of the Polish authorities, at exploiting the electoral law then in force, which provided for preferential treatment in the electoral arena (exemption from the obligation to form electoral combinations in all regions of the country, as well from the 5% threshold for entry into the Polish Parliament) to recognised national minorities, *Gorzelik*, *supra* n. 14, paras. 8-9, 39-40 and *Gorzelik* (GC), *supra* n. 7, paras. 16, 19, 75, 83-84. See R. Medda-Windischer, 'The Jurisprudence of the European Court of Human Rights', 2 *European Yearbook of Minority Issues* (2002-2003) 445-469, at 460 [doi: https://doi.org/10.1163/22116110 3X00210]; R. Medda-Windischer, 'The Jurisprudence of the European Court of Human Rights', 3 *European Yearbook of Minority Issues* (2003-2004) 389-422, at 401-405 [doi: https://doi.org/10.1163/22116104X00219]. The Court's decision has given rise to several critical comments in academia. It was pointed out, for example, that the ECtHR accepted the precautionary measures of the Polish state with a rather weak argumentation and did not require substantial evidence of how the presumed final "abuse" of the electoral law would endanger the entire electoral system, Spiliopoulou Åkermark, *supra* n.

narrow logics of securitization of the minority phenomenon, promoting instead the idea of an open and inclusive society where minority identities can be the subject of free public debate and their proponents can claim their recognition and protection.[52]

(C) THE BEGINNINGS OF THE THREAD: THE FUNDAMENTAL THINKING OF THE EUROPEAN COURT OF HUMAN RIGHTS ON FREEDOM OF EXPRESSION IN A DEMOCRATIC SOCIETY

The weaving of the Court's case-law began in the late 1970s with cases that were not directly related to the minority phenomenon, but rather to the democratic one, i.e. the characteristics of the democratic state, such as the orientation of freedom of expression within it and the regulation of power relations between majority and [numerical] minorities. Starting, then, with the historical case of *Handyside v. the United Kingdom* (1976), which concerned an intervention in freedom of expression (Article 10 of the ECHR)[53] in order to protect morality, the ECHR stressed that its supervisory functions oblige it to pay the utmost attention to the principles that characterise a "democratic society".[54] This concept permeates the ECHR's entire system, starting with its Preamble, which declares that the existence of an effective political democracy is a necessary condition for the true guarantee of human rights and fundamental freedoms.[55] In fact, according to the now established case-law of the Court, on the one hand, the ECHR was designed to maintain and promote the ideas and values of a democratic society[56] and on the other democracy is the only political model that is compatible with it.[57] Having thus "democratic society" as a central point of reference, the Court formulated the basic interpretative principle of the provision, according to which freedom of expression is

50, at 14. According to another reading, the Court's acceptance of the Polish government's assumptions that the real purpose of the association was not the one stated in its statute but a different one, i.e. the circumvention of the electoral law, is in direct contradiction with its previous decision in the case of *Sidiropoulos and Others v. Greece*, where the Strasbourg Court dismissed the Greek government's suspicions as to the real intentions of the founders of the association as a reason for legitimizing the interference with freedom of association, stressing that priority must be given to actions over speculations, G. Pentassuglia, 'Inside and Outside the European Convention: The Case of Minorities Compared', 6 *Baltic Yearbook of International Law* (2006) 263-291 at 265-266. In any case, as Henrard notes who attributes the atypical decision of the Court to the fact that the case involved, among other things, issues of electoral legislation, for which the ECtHR recognises a wide margin of discretion in the states the overwhelming case law of the Court after the *Gorzelik* case shows that the Court tends to be "very protective" of associations and parties with a minority profile and consequently its specific decision is an exception that simply confirms the rule, K. Henrard, 'A Patchwork of 'Successful' and 'Missed' Synergies in the Jurisprudence of the ECHR', in K. Henrard and R. Dunbar (eds), *Synergies in Minority Protection — European and International Law Perspectives* (Cambridge University Press, Cambridge, 2009) 314, at 334-338.

52 G. Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?', 19 *International Journal on Minority and Group Rights* (2012) 1-23, at 3 [doi: https://doi.org/10.1163/157181112X620519].

53 Art. 10 (1) of the Convention provides that: [e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers", Evans, *supra* n. 4, at 54.

54 *Handyside v. the United Kingdom*, ECHR (1976) Series A, No. 24, para. 49.

55 *Klass and Others v. Germany*, ECHR (1978) Series A, No. 28, para. 59.

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

57 *Church Scientology Moscow v. Russia*, ECHR (2007) Applic. No. 18147/02, para. 74.

one of the fundamental foundations of such a society and one of the main conditions for its progress and for the development of the personality of each individual.[58] This freedom is applicable not only to

> "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, *but also to those that offend, shock or disturb the State or any sector of the population*. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[59]

For the Court, therefore, the value of pluralism, which is not explicitly mentioned in the ECHR, is a fundamental principle of a democratic society and an integral part of it.[60] As originally noted in a classic study of the early 1990s on the ECHR and national minorities and confirmed by the subsequent case law of the Court,[61] this position is particularly important although adopted in a completely different context for minority autonomist or even separatist claims that do not encourage the use of violence, since it places their propagation within the scope of the protection of Article 10 "even if the State considers it a threat to its (territorial) integrity and unity and the majority of the population considers it a threat to "their" political community."[62]

Pluralism, therefore, together with tolerance and broadmindedness, are constituent principles and emblematic values ("hallmarks") of a democratic society, as the Court later ruled in the also historic case of *Young, James and Webster v. the United Kingdom* (1981),[63] and has since repeated consistently in its case law.[64] In this case, which concerned the violation of the negative dimension of Article 11, i.e. the freedom of the applicant railway workers to refuse obligatory membership of a specific trade union organisation with which the employer had signed a relevant exclusive agreement, the ECtHR on the one hand linked, for the first time, freedom of association with freedom of expression, noting that "notwithstanding its autonomous role and particular sphere of application, Article 11 must… be considered in the light of Articles 9 and 10", since the "protection of

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58 *Handyside*, *supra* n. 54, para. 49. See also *Lingens v. Austria*, ECHR (1986) Series A, No. 103, para. 41; *Saaristo and Others v. Finland*, ECHR (2010) Applic. No. 184/06, para. 54; *Mariya Alekhina and Others v. Russia*, ECHR (2018) Applic. No. 38004/12, para. 197.

59 *Handyside*, *supra* n. 54, para. 49 [emphasis added]. See also *The Sunday Times v. the United Kingdom*, ECHR (1979) Series A, No. 30, para. 65; *Open Door and Dublin Well Woman v. Ireland*, ECHR (1992) Series A, No. 246-A, para. 71; *Herri Batasuna and Batasuna v. Spain*, ECHR (2009) Applic. Nos. 25803/04 and 25817/04, para. 76. See also S. Marks, 'The European Convention on Human Rights and Its 'Democratic Society'', 66 *British Yearbook of International Law* (1995) 209-238, at 212-213 [https://doi.org/10.1093/bybil/66.1.209].

60 O. Kudriashova, 'Religious Associations as a National Security Threat: The Russian View in Light of European Standards', 42 *Review of Central and East European Law* (2017) 101-133, at 111-112 [https://doi.org/10.1163/15730352-04202004].

61 *Stankov*, *supra* n. 14, paras. 86, 97-98. See also F. de Varennes, 'Linguistic Identity and Minority Rights', in M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, Oxford, 2007) 253, at 281.

62 C. Hillgruber and M. Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities* (Verlag, Cologne, 1994), at 47.

63 *Young, James and Webster v. the United Kingdom*, ECHR (1981) Series A, No. 44, para. 63.

64 See for example, *S.A.S. v. France*, ECHR (2014) Applic. No. 43835/11, para. 128; *Christian Democratic People's Party v. Moldova*, ECHR (2006) Applic. No. 28793/02, para. 64; *Chassagnou and Others v. France*, ECHR (1999) Applic. Nos. 25088/94, 28331/95 and 28443/95, para. 112.

personal opinion afforded by Articles 9 and 10…is also one of the purposes of freedom of association as guaranteed by Article 11"[65] and on the other stressed that:

> [a]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[66]

(D) 'PRO-MINORITY' POLITICAL PARTIES' FREEDOM OF ASSOCIATION IN THE LIGHT OF THE DEMOCRATIC SOCIETY'S PRINCIPLE OF PLURALISM

Having, therefore, roughly defined the orientation of the limitations on freedom of expression and the framework of the relations between majority and numerically minority groups in a democratic society, and having made the principle of pluralism an emblematic value of the latter, the Court entered the field of ethnic claims in the second half of the 1990s with a series of judgments condemning Turkey for violating the freedom of association of Turkish political parties in cases which to a considerable extent touched on aspects of the Kurdish question and therefore indirectly on minority diversity, although the 'pro-Kurdish' platform of the parties, as well as the general demands of the Kurds, did not focus on achieving a minority status[67] but on recognition of the Kurdish population as a "people" and/or "constituent nation" of the Turkish Republic.[68]

The first such case was that of the *United Communist Party of Turkey ("TBKP"/ "UCP") and Others v. Turkey* (1998), where the applicants alleged a violation of Article 11 of the ECHR by reason of the dissolution of the party, which had taken place following an application submitted by the Attorney-General of the state to the Constitutional Court on 14 June 1990, just a few days after its founding [4 June 1990] and before it had even

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65 *Young, James and Webster*, *supra* n. 63, para. 57. See also *Sigurður A. Sigurjónsson v. Iceland*, ECHR (1993) Series A, No. 264, para. 37; *Sørensen and Rasmussen v. Denmark*, ECHR (2006) Applic. Nos. 52562/99 and 52620/99, para. 54; *Batasuna*, *supra* n. 59, para. 74.

66 *Young, James, and Webster*, *supra* n. 63, para. 63. Also, *Valsamis v. Greece*, ECHR (1996) Applic. No. 21787/93, para. 27; *Folgerø and Others v. Norway*, ECHR (2007) Applic. No. 15472/02, para. 27; *Hyde Park and Others v. Moldova*, ECHR (2009) Applic. No. 18491/07, para. 51. See also K. Tsitselikis, 'Minority Mobilisation in Greece and Litigation in Strasbourg', 15 *International Journal on Minority and Group Rights* (2008) 27-48, at 44-45 [doi: https://doi.org/10.1163/138548708X272519]. On the other hand, the ECtHR stressed in the first *Gorzelik* case that pluralism and democracy are by nature based on compromises that require concessions from individuals and groups of individuals, who must sometimes be willing to accept restrictions on their freedoms in order to secure the stability of a country. Although the ECtHR's specific position clearly reflects a more general reality, it needs to be understood in the context of the case and what is at stake, since, as the Court itself has added, it applies in particular to the electoral system, which is fundamental to any democratic state, *supra* n. 14, para. 66.

67 D. Kurban, 'Protecting Marginalised Individuals and Minorities in the ECHR: Litigation and Jurisprudence in Turkey', in D. Anagnostou and E. Psychogiopoulou (eds), *The European Court of Human Rights and the Rights of Marginilised Individuals and Minorities in National Context* (Martinus Nijhoff Publishers, Leiden/ Boston, 2010) 159, at 170. See also the Court's observation in the first relevant case of the *United Communist Party of Turkey*, that the TBKP refers in its programme to Kurdish "people" and "nation" and to Kurdish "citizens" and not to a "minority", *supra* n. 9, para. 56.

68 B. Ersanli and G. Göksu Özdoğan, 'Obstacles and Opportunities: Recent Kurdish Struggles for Political Representation and Participation in Turkey', 35 *Southeastern Europe* (2011) 62-94, at 68 [doi: https://doi.org/10.1163/187633311X545689].

engaged in any activity.[69] In support of his request, the Attorney-General cited extracts from the TBKP's political programme, which emphasised, *inter alia*, the achievement of "a peaceful, democratic and just solution to the Kurdish problem" on the basis of the principle of equal rights for Kurds and Turks with a view to a democratic reconstruction based on their common interests, so that the two peoples could live together by virtue of their free will within the borders of the Republic of Turkey.[70] In particular, the TBKP considered that the "Kurdish problem is a political one arising from the denial of the Kurdish people's existence, national identity and rights" and called for the lifting of prohibitions on Kurdish language and culture, free discussion of the issue and constitutional recognition of the existence of the Kurds.[71]

For the Constitutional Court, on the other hand, the Turkish state was unitary and indivisible and only one nation [the Turkish] lived within it. Consequently, the TBKP's position on the existence of two nations and its support for non-Turkish languages and cultures was aimed at creating minorities other than those recognised in the Lausanne Treaty and the Friendship Treaty with Bulgaria, which, however, did not exist in Turkey, according to the official state view and that of the Court, and consequently at encouraging separatism and undermining the unity of the Turkish nation.[72] On this basis the Constitutional Court decided to dissolve the party on 16/07/1991.[73]

The ECtHR, in accordance with the proposal of the then European Commission, examined the case within the scope of Article 11 of the Convention, noting that although the provision explicitly refers only to trade unions, it undoubtedly also covers political parties which constitute a form of association essential for ensuring pluralism and the proper functioning of democracy.[74] The Turkish government argued, *inter alia*, that the distinction between Turks and Kurds and the recognition of the latter's national identity and right to self-determination would undermine national and territorial integrity, destroy unitary citizenship and inevitably incite violence and hostility between different sections of Turkish society.[75] In this line of defence, it invoked the protection of national and public security, territorial integrity and the rights and freedoms of others to justify the intervention.[76]

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69 *The United Communist Party*, *supra* n. 9, paras. 8-9. See also O. Akbulut, 'Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties', 34 *Fordham International Law Journal* (2010) 46-77, at 48 [https://ir.lawnet.fordham.edu/ilj/vol34/iss1/2].

70 *The United Communist Party*, *supra* n. 9, para. 9. See H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd ed., Oxford University Press, Oxford, 2008), at 982.

71 *The United Communist Party*, *supra* n. 9, para. 9. See O. Akbulut, 'The State and Political Participation of Minorities in Turkey An Analysis under the ECHR and the ICCPR', 12 *International Journal of Minority and Group Rights* (2005) 375-395, at 378-379 [doi:10.1163/1571811057750018 58].

72 *The United Communist Party*, *supra* n. 9, paras. 10, 55. See D. Kurban, 'Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union', 35 *Columbia Human Rights Law Review* (2003) 151-223, at 204 (note 239).

73 *See* O. O. Varol, 'Alien Citizens: Kurds and Citizenship in the Turkish Constitution', 57 *Virginia Journal of International Law* (2018) 769-797, at 782-783.

74 *The United Communist Party*, *supra* n. 9, paras. 24-25, 43. See G. Dutertre, *Key Case-Law Extracts — European Court of Human Rights* (Council of Europe Publishing, 2003), at 338. Also, *Batasuna*, *supra* n. 59, para. 74.

75 *The United Communist Party*, *supra* n. 9, para. 21.

76 *Ibid*, para. 39. See A. Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd ed., Oxford University Press, Oxford, 2012), at 727.

The Court accepted that the dissolution of the party pursued the legitimate aim of protecting national security. In this context, it reiterated the position first expressed in *Young, James and Webster* that Article 11 must also be considered in the light of Article 10, as the protection of opinion and freedom of expression constitute one of the purposes of the freedoms of assembly and association.[77] Thus, by closely linking these two freedoms, the ECtHR reverted to the position it adopted in *Handyside* that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as non-offensive or indifferent, but also to those that offend, shock or disturb.[78] In this light, the Court stressed that the exceptions provided for in Article 11 must be interpreted strictly when political parties are involved. Only convincing and compelling reasons can justify restrictions on freedom of association in their case.[79] Indeed, in determining the existence of the necessity of an intervention within the meaning of Article 11 (2), states have only a limited margin of appreciation, accompanied by a strict European control, which focuses at the same time on the law and the decisions applying it, including decisions of independent courts.[80]

Turning to an examination of the factual events, the Court first observed that the TBKP's dissolution was based solely on the provisions of its statute and its political programme, since it had not carried out any activities. A careful reading, however, of the party's programmatic positions led the Court to find that, on the one hand, there was no reference to a right of secession for the Kurds, but rather an exclusive focus on the recognition of their existence and the peaceful, democratic and just resolution of the issue within the borders of the Republic of Turkey, and that, on the other hand, they placed particular emphasis on the need for an agreement between all sides to avoid violence of any kind.[81]

On this point the Court made the following fundamental reasoning:

> The Court 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, 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

77 *The United Communist Party*, *supra* n. 9, para. 42. Also, *Batasuna*, *supra* n. 59, para. 74. See T. Avres, 'Batasuna Banned: The Dissolution of Political Parties under the European Convention of Human Rights', 27 *Boston College International and Comparative Law Review* (2004) 99-113, at 105 [https://lawdigitalcommons.bc.edu/iclr/vol27/iss1/3].

78 *The United Communist Party*, *supra* n. 9, para. 43. See L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, Oxford/New York, 2011), at 410. Also, *Batasuna*, *supra* n. 59, para. 76.

79 *The United Communist Party*, *supra* n. 9, para. 46. See S. Tyulikna, 'Fragmentation in International Human Rights Law: Political Parties and Freedom of Association in the Practice of the UN Human Rights Committee, European Court of Human Rights and Inter-American Court of Human Rights', 32 *Nordic Journal of Human Rights* (2014) 125-175, at 165 [https://doi.org/10.1080/18918131.2014.896970]. Also, *Batasuna*, *supra* n. 59, para. 77.

80 *The United Communist Party*, *supra* n. 9, para. 46. See S. Green, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing, 2000), at 38-39. Also, *Batasuna*, *supra* n. 59, para. 77.

81 *The United Communist Party*, *supra* n. 9, para. 56. See B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, Oxford, 2014), at 513.

> the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.[82]

This position has since become a constant echo in all relevant cases concerning the dissolution of political parties with a 'pro-Kurdish' agenda in Turkey, in which the Court found without exception that there had been a violation of Article 11 of the Convention,[83] as well as in relevant cases of minority-oriented associations outside Turkey.[84] In conclusion, the Court found that a measure as drastic as the immediate and permanent dissolution of a party before it had even begun its activities, it therefore being impossible to ascertain thereby its alleged non-peaceful intentions, was disproportionate to the objective pursued (of protecting national security) and therefore unnecessary in a democratic society.[85] Therefore, it unanimously ruled that there was a violation of Article 11 of the ECHR.[86]

Next, equally important was a key thought expressed by the ECtHR in the similar case of *Socialist Party (SP) and Others v. Turkey*, handed down in the same year (1998). The SP was established on 01/02/1988 and was dissolved by a decision of the Constitutional Court on 10/07/1992 following a request by the Attorney-General of the state submitted on 14/11/1991.[87] The latter cited extracts from the party's election material, as well as from speeches of its President, where *inter alia*: (a) emphasis was placed on the peaceful resolution of the Kurdish problem, (b) a call was made for the recognition of a separate Kurdish nation with a right of self-determination up to the degree [in principle] of secession by referendum, and (c) the reorganisation of the Turkish state into a federal republic with two equal federal states for the two nations was promoted as the official position of the party.[88] For the Constitutional Court, the positions on the existence of a Kurdish nation and its national and cultural rights were aimed at creating minorities

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82 *The United Communist Party*, *supra* n. 9, para. 57. See also O. Akbulut, 'A Critical Analysis of Current Legal Developments on the Political Participation of Minorities in Turkey', 17 *International Journal on Minority and Group Rights* (2010) 551-560, at 554 [doi: https://doi.org/10.1163/157181110X531439].

83 Indicatively in chronological sequence, *The Socialist Party*, *supra* n. 14, para. 45; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, ECHR (1999) Applic. No. 23885/94, para. 44; *Yazar and Others v. Turkey*, ECHR (2002) Applic. Nos. 22723/93, 22724/93 and 22725/93, para. 48; *HADEP and Demir v. Turkey*, ECHR (2010) Applic. No. 28003/03, para. 60.

84 See for example *Stankov*, *supra* n. 14, para. 88.

85 The Court accepted that it cannot be excluded that a party's political programme may conceal aims and intentions different from those it proclaims. However, in order to establish that this is not the case, the content of its programme must be compared with the actions it advocates. In the present case, the TBKP's programme could hardly be contradicted by any action, since it was disbanded immediately after its creation without having had time to take any action. Consequently, it faced the axe of justice for conduct that had to do solely with the exercise of freedom of expression, *The United Communist Party*, *supra* n. 9, para. 58. See B. Algan, 'Dissolution of Political Parties by the Constitutional Court in Turkey: An Everlasting Conflict Between the Court and the Parliament?', 60 *Ankara Üniversitesi Hukuk Fakültesi Dergisi* (2011) 809-836, at 827 (note 41).

86 See E. Hughes, 'Political Violence and Law Reform in Turkey: Securing the Human Rights of the Kurds?', 26 *The Journal of Social Conflicts* (2006) 71-103, at 89.

87 *The Socialist Party*, *supra* n. 14, paras. 8, 13, 15.

88 *Ibid.*, para. 13. See also Ieva Vezbergaite, *Self-Determination for the Kurdish People: Undermining the Unity of the «Turkish Nation»?*, 9 *IFF Working Paper Online* (2015), at 9.

and ultimately a Kurdish-Turkish federation to the detriment of the unity of the Turkish nation and the territorial integrity of the Turkish state.[89]

The ECtHR, following the precedent of the *United Communist Party*, subjected the case to the protection of Article 11 of the Convention, while Turkey again invoked the protection of national and public security, territorial integrity and the rights and freedoms of others to justify the dissolution of the party.[90] The Court accepted as the purpose of the intervention the protection of national security and reiterated all the relevant considerations it had made in the *United Communist Party* case as to the relationship between Articles 10 and 11 of the Convention, the orientation of the limitations on the freedom of expression of political groups in a democratic society and the forcefulness and convincingness which must govern the reasons for restricting that freedom.[91]

Subsequently, when examining the facts of the case, the Court stressed that it was not possible to establish the existence of any element in the speeches of the Party's President that would substantiate incitement to violence or circumvention of the rules of democracy.[92] On the contrary, the Court pointed out that a combined reading of the statements showed that the main objective of the political programme was the establishment, in accordance with democratic rules, of a federal system in which Turks and Kurds would be represented on an equal and voluntary basis.[93] Even the statements referring to the right of secession of the Kurdish nation made it clear, in the overall context of the case, that they did not encourage secession from Turkey, but rather sought to emphasise that the proposed federal system could not come about without the free consent of the Kurds, which would have to be expressed through a referendum, where all options would be possible.[94] At this stage the Court made a key reasoning, which has since become a constant reference in all relevant cases concerning the right of association of political parties, stressing that the fact that a political programme is considered incompatible with the principles and structures of the Turkish state (and by analogy of any state) does not imply that it is also incompatible with democratic rules,[95] as:

> [i]t is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself. [96]

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89 *The Socialist Party*, *supra* n. 14, paras. 15, 43. See T. Marinkovic, 'Europeanization of Constitutional Standards of Freedom of Association Restrictions', in A. Dupeyrix and G. Paulet (eds), *European Constitutionalism: Historical and Contemporary Perspectives* (Peter Lang, Brussels, 2014) 75, at 83.

90 *The Socialist Party*, *supra* n. 14, para. 33.

91 *Ibid*, paras. 41, 45, 50.

92 *Ibid*, paras. 46, 52. See R. Türmen, 'Freedom of Forming Political Parties and Its Restrictions', *XVIII Id-Dritt* (2002) 21-25, at 22.

93 *The Socialist Party*, *supra* n. 14, para. 47. See G. Gilbert, 'Autonomy and Minority Groups: A Right in International Law?', 35 *Cornell International Law Journal* (2002) 307-353, at 348.

94 *The Socialist Party*, *supra* n. 14, para. 47. See European Commission for Democracy Through Law (Venice Commission), Comments on the Constitutional and Legal Provisions Relevant for the Prohibition of Political Parties in Turkey, Opinion 489/2008, CDL(2008)137, Strasbourg, 4 December 2008, at 6.

95 *The Socialist Party*, *supra* n. 14, para. 47. See E. Özbudun, 'Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights', 17 *Democratization* (2010) 125-142, at 128-129 [https://doi.org/10.1080/13510340903453807].

96 *The Socialist Party*, *supra* n. 14, para. 47. See P. Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination', 4 *International Journal of Constitutional Law* (2006) 488-516, at 507 [https://

The Court did not exclude the possibility, as it had pointed out in the case of the *United Communist Party*, that the statements of the President of the SP might conceal other purposes than those he had publicly proclaimed. In the absence, however, of concrete acts contradicting the truth of his words, it was not possible to question his sincerity. Essentially, therefore, the Court concluded, SP was brought before the Court solely for conduct relating to the exercise of freedom of expression.[97] On the basis of these findings, the Strasbourg Court unanimously ruled that such a direct and drastic intervention of a permanent nature, as the dissolution of the SP, at a time when its leadership explicitly declared its commitment to democratic institutions and rejected violence, was disproportionate to the intended purpose of protecting national security and therefore constituted a violation of Article 11 of the ECHR.[98]

The aforementioned forensic reasoning demonstrated in the most categorical way that for the Court "there can be no democracy without pluralism", as it explicitly pointed out in the case of the *United Communist Party of Turkey* and subsequently in all similar cases of 'pro-Kurdish' parties.[99] Pluralism, then, "which has been dearly won over the centuries" is for the ECtHR inseparable from democratic society,[100] implying that even the most provocative and disturbing views must have an equal opportunity to be expressed in a continuous public dialogue and fruitful confrontation with opposing dominant and majority positions.[101] In this light, the ECtHR is said to embrace a pluralist conception of democratic society that moves beyond its formal majority version and recognises the importance of ethnic minority participation in socio-political processes.[102] In any case, it is indisputable that the aforementioned judgments broadly delineate the parameters on the basis of which a state may invoke national unity and territorial integrity as grounds for limiting the claims of an ethno-political group, demonstrating that where there is no incitement to violence or rejection of democratic principles, the peaceful expression

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doi.org/10.1093/icon/mol017].

97 *The Socialist Party*, *supra* n. 14, para. 48.

98 *Ibid*, paras. 51-52, 54. Using inversely proportional thoughts the Court found unanimously no violation of Art. 11 of the Convention in the *Batasuna* case regarding the dissolution of the two nationalist Basque parties, Herri Batasuna and Batasuna, accused of being instruments of ETA's violent strategy, by upholding *inter alia* the conclusion of the Spanish Constitutional Court that there was a link between the applicant parties and ETA and by opining that this link could objectively be considered to constitute a threat to democracy, *see Batasuna*, supra n. 59, paras. 85-95.

99 *The United Communist Party*, *supra* n. 9, para. 43; *The Socialist Party*, *supra* n. 14, para. 41; *Freedom and Democracy Party (ÖZDEP)*, *supra* n. 83, para. 37; *Yazar*, *supra* n. 83, para. 46; *HADEP and Demir*, *supra* n. 83, para. 57. See General Assembly, Report to Freedom of Peaceful Assembly and Association: Note by the Secretary General, UN Doc. A/68/299, 7 August 2013, at 14, para. 37; Also, *Batasuna*, *supra* n. 59, para. 76.

100 See *Kokkinakis v. Greece*, ECHR (1993) Series A, No. 260-A, para. 31; *Hasan and Chaush v. Bulgaria*, ECHR (2000) Applic. No. 30985/96, para. 60; *Ibragim Ibragimov and Others v. Russia*, ECHR (2018) Applic. Nos. 1413/08 and 28621/11, para. 88. See also Z. R. Calo, 'Pluralism, Secularism and the European Court of Human Rights', 26 *Journal of Law and Religion* (2010-2011) 261-280, at 261-262 [doi: https://doi.org/10.1017/S0748081400000977].

101 A. Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of 'Democratic Society", 5 *Global Constitutionalism* (2016) 16-47, at 25 [doi: https://doi.org/10.1017/S2045381716000022].

102 S. E. Berry, 'Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework', 24 *International Journal on Minority and Group Rights* (2017), 205-228, at 216 [doi: https://doi.org/10.1163/15718115-02403005].

of the will of a minority or a distinct community to maintain its identity and seek recognition and protection cannot, in the Court's view, be prevented.[103]

(E) MINORITY UNIONS' FREEDOM OF ASSOCIATION IN A DEMOCRATIC SOCIETY THE "NEW ERA"

In the same year (1998) that the first judgments of the ECtHR on the violation of the freedom of association of Turkish parties with a 'pro-Kurdish' agenda were issued, the Court also delivered its judgment in the case of *Sidiropoulos and Others v. Greece*, which is considered by many commentators to have introduced a "new era" in the Court's approach to minority rights.[104] In this case the applicants, who claimed "to be of "Macedonian" ethnic origin and to have "Macedonian national consciousness"", invoked, *inter alia*, a violation of Article 11 of the Convention due to the refusal by the Greek courts to register their association under the name of "Home of Macedonian Civilization", which they decided on 18/04/1990 to set up having as its explicit statutory objectives: a) the cultural, intellectual and artistic development of its members and of the inhabitants of Florina, b) the cultural decentralization and preservation of intellectual and artistic endeavours and traditions, as well as cultural monuments and, in general, the preservation and dissemination of folk culture, and c) the protection of the region's natural and cultural environment.[105]

The national courts, on the other hand, proceeding to a preventive review of desirability and not simply lawfulness, as provided by the relevant provisions of the legislation (Articles 12 of the Constitution and 78-81 of the Civil Code)[106] and pointed out by the ECtHR itself,[107] refused to register the association on the ground that its real aim was different from those proclaimed in its statute. Thus, according to the reasoning of the Florina Court of First Instance (Decision 73/926/26/1990), the real aims of the association were not those stated in its statute, "but the promotion of the idea that there is a Macedonian minority in Greece, which is contrary to the country's national

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[103] M. Iovane, 'The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations', 14 *International Journal on Minority and Group Rights* (2007), 231-262, at 259-260 [doi: https://doi.org/10.1163/138548707X208827].

[104] A. Petričušić, 'The Rights of Minorities in International Law', 11 *Croatian International Relations Review* (2005) 47-57, at 51; R. Medda Windischer, 'The European Court of Human Rights and Minority Rights', 25 *European Integration* (2003) 249-271, at 250 [doi:10.1080/0703633032000133583]. As Henrard points out, since the *Sidiropoulos* case the Court has produced a long-established and coherent with the exception of the *Gorzelik* case as far as associations are concerned jurisprudence which emphasises that states are not allowed to restrict the freedom of association of members of minorities just because they want to promote their culture through their unions, *supra* n. 51, at 334.

[105] *Sidiropoulos*, *supra* n. 14, para. 8. See A. Budziszewska, 'The Concept of Right to Culture in International Relations', 4 *Polish Journal of Political Science* (2018) 7-36, at 27 (note 78).

[106] See S. Stavros, 'The Legal Status of Minorities in Greece Today: The Adequacy of Their Protection in the Light of Current Human Rights Perceptions', 13 *Journal of Modern Greek Studies* (1995) 1-32, at 15 [doi: 10.1353/mgs.2010.0393].

[107] "The Court also takes into account in this context the fact that Greek law does not lay down a system of preventive review for setting up non-profit-making associations. Article 12 of the Constitution provides that the forming of associations cannot be made subject to prior authorization…; Article 81 of the Civil Code allows the courts merely to review lawfulness and not to review desirability...", *Sidiropoulos*, *supra* n. 14, para. 45.

interest and consequently contrary to law."[108] Next, the Thessaloniki Court of Appeal (Decision 1558/1991) questioned the stated aims of the association and stressed that its statute posed a risk of trapping young people "in an ethnologically non-existent and historically evacuated Slav-Macedonian minority", while its name could also create confusion, because at first sight it gave the impression that it referred to Macedonia's Greek civilisation, while in reality it envisaged a specifically Slavic civilisation which did not exist in the region in question, ultimately discerning "an intention on the part of the founders to undermine Greece's territorial integrity…".[109] Finally, the Supreme Court (Decision 795/1994) upheld the decision of the Court of Appeal, holding that the grounds of the appeal were vague and unfounded and the decision of the court of appeal was sufficiently reasoned.

The ECtHR first pointed out, by analogy with its reasoning in the case of the *United Communist Party of Turkey*, that the right to form associations is an inherent element of the freedom of association of Article 11, even if the provision makes explicit reference only to the right to form trade unions.[110] In fact, for the ECtHR, the ability of citizens to form legal entities in order to be able to act collectively in areas of mutual interest is one of the most important dimensions of the right to freedom of association,[111] as without it the right would be devoid of any meaning.[112] This is, moreover, why

> [t]he way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned.[113]

The Greek Government argued that it was legitimate for the national courts to proceed to a prior examination of the evidence and assessment of the circumstances, on the basis of which they came to the reasonable conclusion that the real purpose of the association was different from that stated in its memorandum, and agreed with their findings that acceptance of the unclear principles of its statute could lead to a risk of "entrapment" of new members, while the deceptive name of the association could also cause confusion, as the applicants sought to disguise the culture to which they referred in a more general propaganda effort to create a climate of doubting the Greek identity

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[108] *Sidiropoulos*, *supra* n. 14, para. 10. See L. S. Lehnhof, 'Freedom of Religious Association: The Rights of Religious Organizations to Obtain Legal Entity Status under the European Convention', 2 *Brigham Young University Law Review* (2002) 561-610, at 573 [https://digitalcommons.law.byu.edu/lawreview/vol2002/iss2/16].

[109] *Sidiropoulos*, *supra* n. 14, para. 11. See N. Kyriakou, 'Minority Participation in Public Life: The Case of Greece', 8 *Journal of Ethnopolitics and Minority Issues in Europe* (2009) 1-22, at 6.

[110] *Sidiropoulos*, *supra* n. 14, para. 40. See K. O' Halloran, M. McGregor and L. K. W. Simon, *Charity Law and Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, Dordrecht, 2008), at 90.

[111] *Sidiropoulos*, *supra* n. 14, para. 40. See T. Isiksel, 'Corporate Human Rights Claims under the ECHR', 17 *The Georgetown Journal of Law and Public Policy* (2019) 979-1005, at 992-993.

[112] *Sidiropoulos*, *supra* n. 14, para. 40. See F. Francioni, 'The International Legal Framework for Enforcement of Cultural Rights', in A. Jakubowski (ed.), *Cultural Rights as Collective Rights* (Martinus Nijhoff Publishers, Leiden/Boston, 2016) 255, at 264.

[113] *Sidiropoulos*, *supra* n. 14, para. 40. See W. A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, Oxford, 2015), at 499.

of (Greek) Macedonia, maintaining irredentist aspirations.[114] In this context it invoked reasons of a) maintaining national security, b) preventing disorder, and c) upholding Greece's cultural traditions and historical and cultural Greek symbols, in order to justify the interference in the enjoyment of the right.[115]

The ECtHR first noted that the refusal of the national courts to register the association amounted to interference in the right of association because it deprived the applicants of the possibility to pursue individually or jointly the objectives set out in the association's statute.[116] It then accepted, in principle, the first two reasons put forward by the Greek Government as legitimate aims of the intervention,[117] rejecting the third, namely the preservation of cultural traditions and of historical and cultural Greek symbols, as not being a legitimate aim, since it is not foreseen in Article 11 (2) of ECHR.[118] On this point the Strasbourg Court stressed once again that the accepted limitations to the freedom of association must be interpreted strictly, as the enumeration of them (in Article 11(2)) is exhaustive and their definition necessarily restrictive.[119] In this light, it reiterated, on the one hand, that only convincing and compelling reasons can justify restrictions on freedom of association and, on the other hand, that in determining the existence of a necessary interference within the meaning of Article 11 (2), the states have only a limited margin of appreciation, accompanied by a rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.[120] Furthermore, it stressed once again, in accordance with its now well established case law,[121] that in its scrutiny it not does not confine itself to ascertaining whether the respondent State has exercised its margin of appreciation reasonably, carefully or in good faith, but looks at the interference complained of in the light of the case as a whole and determines whether it was "proportionate to the legitimate aim pursued" and

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114 *Sidiropoulos*, *supra* n. 14, para. 42. See J. D. van der Vyver, 'The Relationship of Freedom of Religion or Belief Norms to Other Human Rights', in T. Lindholm *et al.* (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer Science, Dordrecht, 2004) 85, at 110-111.

115 *Sidiropoulos*, *supra* n. 14, para. 37. See P. Kempees, *A Systematic Guide to the Case-Law of the European Court of Human Rights 1997-1998*, VOL IV (Martinus Nijhoof Publishers, The Hague/London/Boston, 2000), at 539.

116 *Sidiropoulos*, *supra* n. 14, para. 31. See also *Koretskyy and Others v. Ukraine*, ECHR (2008) Applic. No. 40269/02, para. 39; *Kimlya and Others v. Russia*, ECHR (2009) Applic. Nos. 76836/01 and 32782/03, para. 84; *Gorzelik* (GC), *supra* n. 7, para. 52.

117 *Sidiropoulos*, *supra* n. 14, para. 39. See I. Bantekas, 'The Authority of States to Use Names in International Law and the Macedonian Affair: Unilateral Entitlements, Historic Title, and Trademark Analogies', 22 *Leiden Journal of International Law* (2009) 563-582, at 570 (note 24) [doi: https://doi.org/10.1017/S0922156509990094].

118 *Sidiropoulos*, *supra* n. 14, para. 38. See J. A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge, London and New York, 2013), at 213.

119 *Sidiropoulos*, *supra* n. 14, para. 38. See P. M. Taylor, *Freedom of Religion — UN and European Human Rights Law and Practice* (Cambridge University Press, Cambridge, 2005), at 229. Also, *Batasuna*, *supra* n. 59, para. 77.

120 *Sidiropoulos*, *supra* n. 14, para. 40. See D. Golubovic, 'Freedom of Association in the Case Law of the European Court of Human Rights', 17 *The International Journal of Human Rights* (2013) 758-771, at 764 [https://doi.org/10.1080/13642987.2013.835307]. See also *Batasuna*, *supra* n. 59, para. 77.

121 See *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, ECHR (2014) Applic. Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12,41463/12, 41553/12, 54977/12 and 56581/12, para. 80; *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, ECHR (2005) Applic. No. 46626/99, para. 49; *Batasuna*, *supra* n. 59, para. 75.

whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".[122]

Proceeding to the examination of the merits of the case, the Court observed that the aims of the association, as reflected in its statute, namely the preservation and development of the traditions and folk culture of the region of Florina, seemed absolutely clear and legitimate.[123] In addition, it pointed out that the inhabitants of a region have the right to form associations in order to promote the particular characteristics of the region, for historical as well as economic reasons.[124] At this point, the ECtHR, in response to the Greek government's objections regarding the alleged real purpose of the association, took its reasoning one step further by applying the interpretative method of the dynamic, evolutionary reading of the Convention which it initiated in the case of *Tyrer v. The United Kingdom* (1978), holding that "the Convention is a living instrument which… must be interpreted in the light of present-day conditions",[125] and in "accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights."[126]This implies that the Court cannot but be influenced by developments and commonly accepted standards in the policy of the member states of the CoE,[127] adapting the text of the Convention to social, ethical, scientific and legal changes,[128] such as, for example, those that have taken place in post-Cold War Europe with the adoption of texts on the protection of minority rights within the framework of the CSCE/OSCE and the CoE. Thus, the ECtHR invoked for the first time other than ECHR's provisions and indeed non-legally binding norms, stressing that:

> [e]ven supposing that the founders of an association like the one in the instant case assert a minority consciousness, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November 1990 which Greece has signed allow them to form associations to protect their cultural and spiritual heritage.[129]

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122 *Sidiropoulos*, *supra* n. 14, para. 40. See also O. M. Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance', 15 *International Journal of Constitutional Law* (2015) 9-35, at 20 [https://doi.org/10.1093/icon/mox008].

123 *Sidiropoulos*, *supra* n. 14, para. 44. See L. M. Danforth, 'Ancient Macedonia, Alexander the Great and the Star or Sun of Vergina: National Symbols and the Conflict between Greece and the Republic of Macedonia', in J. Roisman and I. Worthington (eds), *A Companion to Ancient Macedonia*, (Wiley-Blackwell, 2010) 572, at 596.

124 *Sidiropoulos*, *supra* n. 14, para. 44. See J. Marko, 'Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation. The Interplay Between Equality and Participation', in T. Malloy and U. Caruso (eds), *Minorities, Their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities — Essays in Honour of Rainer Hofmann* (Martinus Nijhoff Publishers, Leiden/Boston, 2013) 97, at 113.

125 *Tyrer v. The United Kingdom*, ECHR (1978) Series A, No. 26, para. 31; *Matthews v. The United Kingdom*, ECHR (1999) Applic. No. 24833/94, para. 39. See also G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *European Journal of International Law* (2004) 279-305, at 298-302 [https://doi.org/10.1093/ejil/15.2.279].

126 *Demir and Baykara v. Turkey*, ECHR (2008) Applic. No. 34503/97, para. 146.

127 *Soering v. The United Kingdom*, ECHR (1989) Series A, No. 161, para. 102.

128 *Magyar Helsinki Bizottság v. Hungary*, ECHR (2016) Applic. No. 18030/11, Concurring Opinion of Judge Sicilianos, joined by Judge Raimondi, at 67-68.

129 *Sidiropoulos*, *supra* n. 14, para. 44. The Court repeated this thesis in the essentially alike case of *Home of Macedonian Civilization*, *supra* n. 11, para. 39. See also M. Elósegui Itxaso, 'The Case-Law Concept of

The reference to that provision, together with the Court's acceptance of the applicants' position that "[t]erritorial integrity, national security and public order were not threatened by the activities of an association whose aim was to promote a region's culture, even supposing that it also aimed partly to promote the culture of a minority",[130] made it clear for the first time that the ECtHR recognises a wide veil of protection to associations with a minority profile, provided that they do not aim to incite violence and to circumvent democratic principles.[131]

The Court went on to find, from a careful study of the press articles at issue, which had a weighty impact as evidence before the national courts, that they referred to issues some of which had no connection with the applicants and to conclusions based on the subjective assessment of their authors. On the basis of these articles, the courts concluded that the applicants and the association they wished to establish were dangerous to the territorial integrity of Greece. The national courts' judgment, therefore, was based, according to the ECtHR, on mere suspicions as to the real intentions of the founders of the association and the actions it would take when it was in operation. On this point, the Court referred to the case of the *United Communist Party of Turkey*, recalling that it could not rule out the possibility that a party's political programme might conceal purposes other than those it proclaims, but that in order to establish that this was not the case its programme needed to be compared with the actions and positions it advocated. Similarly, as regards the case at hand, the ECtHR did not rule out the possibility that the association might, after its establishment, have engaged in activities incompatible with those purposes under the pretext of the purposes stated in its statute. However, such a possibility, which the national courts took as a certainty, could hardly be refuted (or verified) by concrete actions, since the association, not having been set up, had not had time to carry out any activities.[132] If this possibility were to become a reality, the authorities would not be powerless, since, under Article 105 of the Civil Code, the Court of First Instance would be able to order the dissolution of the association if it pursued an objective other than that stated in its memorandum or if its operation proved to be contrary to law, morality and public order.[133] Indeed, for the Court this element, as demonstrated by its subsequent approach in the similar cases of minority associations in Greek Thrace[134] and also explicitly stressed in the second examination of the *Home of Macedonian Civilization* case in 2015, is "particularly crucial",

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Reasonable Accommodation: The European Court of Human Rights Facing the Governance of Cultural and Religious Diversity in the Public Space', in J. A. del Real Alcala (ed.), *The Rights of Minorities: Cultural Groups, Migrants, Displaced Persons and Sexual Identity — Current and Future Developments in Law*, VOL 2 (Bentham Science Publishers, 2017) 34, at 44; S. Montgomery, 'Assembly and Association (Freedom of)', in A. J. Wiesand *et al.* (eds), *Culture and Human Rights: The Wroclaw Commentaries* (De Gruyter, Berlin, 2016) 90, at 91.

130 *Sidiropoulos*, *supra* n. 14, para. 41. See F. Lenzerini, *The Culturalization of Human Rights* (Oxford University Press, Oxford, 2014), at 196.

131 See Z. Machnyikova and L. Hollo, 'The Principles of Non-Discrimination and Full and Effective Equality and Political Participation', in M. Weller and K. Nobbs (eds), *Political Participation of Minorities — A Commentary of International Standards and Practice* (Oxford University Press, New York, 2010) 95, at 125-126.

132 *Sidiropoulos*, *supra* n. 14, para. 46.

133 *Sidiropoulos*, *supra* n. 14, para. 46. See also ECHR, *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association*, last update 31.12.2021, para. 202.

134 See *Bekir Ousta and Others v. Greece* (in Greek), ECHR (2007) Applic. No. 35151/05, para. 45; *Emin and Others v. Greece* (in Greek), ECHR (2008) Applic. No. 34144/05, para. 31.

as its case-law "favours the registration of an association and not the preventive review of its legality, when national law includes provisions that allow the *a posteriori* monitoring of its activity."[135] Even in this case, however, of repressive control, it is at least very doubtful if reasons of protection of national security and public order could justify the dissolution of a minority association, which does not encourage violence or the circumvention of democratic principles, as the case of the *Turkish Association of Xanthi* (2008) has also shown.[136]

Returning to the *Sidiropoulos* case, the Court unanimously concluded, on the basis of the above considerations, that the refusal to register the association was disproportionate to the objectives pursued (of national security and public order) and therefore constituted a violation of Article 11 of the Convention.[137] Indeed, due to the refusal of the national courts to comply both with the substance of the decision's reasoning despite the Greek Government's assurance since 2000 that it "is of the opinion that... the Greek courts will not fail to prevent the kind of judicial error that was at the origin of the violation found in this case"[138] and with the general jurisprudential precedent that the ECtHR subsequently produced, starting from this case, and consequently to accept the new application submitted for the registration of the association, a second appeal to the ECtHR followed which resulted in a new unanimous conviction for violation of Article 11.[139] This development was to be expected, since the Strasbourg Court accepted in the *Sidiropoulos* case the applicants' positions that the existence of minorities and different cultures constitutes a historical fact which a democratic society must tolerate and protect, and that associations which aim, even partially, at promoting a minority culture (without inciting violence or rejecting democratic principles) do not constitute a threat to democratic society, territorial integrity, national security and public order.[140] In addition, they play an important role in the proper functioning of democracy.

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135 *Home of Macedonian Civilization*, *supra* n. 11, paras. 41-42.

136 See *Turkish Association of Xanthi and Others v. Greece* (in Greek), ECHR (2008) Applic. No. 26698/05, paras. 51, 53, 56.

137 *Sidiropoulos*, *supra* n. 14, para. 47. See European Commission Against Racism and Intolerance (ECRI), Second Report on Greece, adopted on 10 December 1999, CRI (2000) 32, Strasbourg, 27 June 2000, at 12.

138 Appendix to Resolution DH (2000)99, concerning the Judgment of the European Court of Human Rights of 10 July 1998 in the case of Sidiropoulos and Others against Greece, adopted by the Committee of Ministers on 24 July 2000 at the 716th meeting of the Ministers' Deputies. See also *Home of Macedonian Civilization*, *supra* n. 11, para. 19.

139 See *Home of Macedonian Civilization*, *supra* n. 11, para. 44. The Commissioner for Human Rights of the CoE has noticed in the past the "over-restrictive practice" of the Greek courts, "which by proceeding to a preventive, in effect, control of certain applicant minority associations have refused to register them", Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Greece on 8-10 December 2008 Issue Reviewed: Human Rights of Minorities, CommDH(2009)9, Strasbourg, 19 February 2009, at 2. See also V. Aarbakke, 'The Identity Question Regarding the Macedonian Nation and Minorities: The Conflicting Views of its Neighbours and the Implications for North Macedonia's Path Towards the EU', in Bruno Ferreira Costa (ed.), *Challenges and Barriers to the European Union Expansion to the Balkan Region* (IGI Global, 2021) 209, at 220.

140 See B. Cilevičs (Rapporteur), *Minority Protection in Europe: Best Practices and Deficiencies in Implementation of Common Standards*, PACE Committee on Legal Affairs and Human Rights, Doc. 12109, 20 January 2010, at 17, para. 87.

(1) The establishment of minority associations as an indicator of the proper functioning of democratic society

The *Sidiropoulos* case highlighted for the first time, as far as its legal dimension is concerned, the possibilities offered by the inclusion of associations, especially those with a minority profile, within the sphere of protection of Article 11 of the ECHR as regards the normative safeguarding of a minimum public sphere of free collective expression and action of their members. As subsequently recognised by the GC in its review of the *Gorzelik* case (2004), freedom of association is particularly important for persons belonging to minorities, as the expression and promotion of their identity through it can play a vital role in assisting a minority (as such) in maintaining and upholding its rights.[141]

Another radical development in the *Sidiropoulos* case was the fact that the arguments put forward by the applicants and accepted by the Court became fundamental thinking in all similar cases, establishing a solid jurisprudential precedent for the defence of minority diversity. Thus, the position that

> [m]ention of the consciousness of belonging to a minority and the preservation and development of a minority's culture could not be said to constitute a threat to "democratic society"[142]

has since been a constant reference in the relevant case law of the ECtHR, as, for example, in the similar cases of refusal of registration of the minority associations of Greek Thrace.[143] In fact, starting from the case of *Rainbow and Others v. Greece* (2005), the Court added to the wording of this position that it applies even if the invocation of a minority conscience or the preservation of a minority cultural identity may cause tensions.[144]

Further, as regards the first part of the position on belonging to a minority, the Court noted in the case of *Turkish Association of Xanthi* that the right to express opinions through freedom of association and the concept of personal autonomy imply the right of each individual to express, within the framework of legality, his/her beliefs as to his/

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141 *Gorzelik* (GC), *supra* n. 7, para. 93. See Y. Al Tamimi, 'Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law', XX *Social and Legal Studies* (2017) 1-16, at 9-10 [https://doi.org/10.1177/0964663917722598].

142 *Sidiropoulos*, *supra* n. 14, para. 41. See I. Tourkochoriti, 'Challenging Historical Facts and National Truths: An Analysis of Cases from France and Greece', in U. Belavusau and A. Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge University Press, New York, 2017) 151, at 160.

143 See *Bekir Ousta*, *supra* n. 134, para. 44, where, with regard to the refusal of the national courts to register the association under the name "Youth Association of the Minority of Evros", the Court ruled "that, even assuming that the association's real purpose was to spread the idea that there is a national minority [in this case Turkish] in Greece, this does not amount to a threat to democratic society. This is all the more so since nothing in the statute of the association implied that its members would defend the use of violence or undemocratic or unconstitutional means." See on the case L. Cariolou, 'Recent Case Law of the European Court of Human Rights Concerning the Protection of Minorities (August 2006-December 2007)', 6 *European Yearbook of Minority Issues* (2006-2007) 409-427, at 425-426 [doi: https://doi.org/10.1163/22116117-90001617]. See also *Emin*, *supra* n. 134, para. 30.

144 *Ouranio Toxo v. Greece*, ECHR (2005) Applic. No. 74989/01, para. 40. See A. Fontaine, 'Commentary on Article 7 of the Framework Convention for the Protection of National Minorities', in R. Hofmann, T. H. Malloy and D. Rein (eds), *The Framework Convention for the Protection of National Minorities* (Brill/Nijhoff, Leiden/Boston, 2008) 167, at 172.

her national identity.[145] On this issue, the Court has in the recent past been criticized by some scholars, because in the case of *Ciubotaru v. Moldova* (2010)[146] it departed from the emerging consensus among international bodies, such as the Committee on the Elimination of Racial Discrimination (CERD) and the Advisory Committee (AC) of the FCNM, which give primacy to self-identification of individuals as a method of ethnic categorization of the population,[147] and opined that "it should be open to the authorities to refuse a claim to be officially recorded as belonging to a particular ethnicity where such a claim is based on purely subjective and unsubstantiated grounds."[148] In this light, the ECHR pointed out that the proof of an ethnicity membership presupposes the existence of both the subjective criterion, i.e. the relative will of the person concerned, and objective criteria, such as, for example, language and name.[149] However, in its most recent case-law (*Tasev v. North Macedonia* (2019) and *Molla Sali v. Greece* (2018))), a shift in its approach to the issue towards convergence with that of the aforementioned Committees can be observed, as it allegedly now attaches particular importance to the criterion of self-identification, stressing that "[t]he right to self-identification [both in its positive, and even more so in its negative dimension, which is absolute]… is the "cornerstone" of international law on the protection of minorities in general."[150]

With regard to the second part of its thinking, on the cultivation of the culture of a minority, the ECtHR pointed out for the first time during the review by its GC of the *Gorzelik* case (2004) and has since then consistently reiterated in its jurisprudence that:

> associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy.[151]

For this very reason, as it was pointed out earlier, the way in which the national legislation guarantees this freedom, as well as its application by the authorities in practice, is revealing of the state of democracy of each country,[152] while on a more general

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145 *Turkish Association of Xanthi*, *supra* n. 136, para. 56. See also ECHR Research Division, *Cultural Rights in the Case-Law of the European Court of Human Rights*, updated 17 January 2017, at 22, para. 55.

146 See *Ciubotaru v. Moldova*, ECHR (2010) Applic. No. 27138/04. The case concerned the rejection by the competent Moldovan authorities of the academic Mihai Ciubotaru's request to change his ethnicity on his birth and marriage certificates from Moldovan to Romanian on the ground that his parents had not been registered as ethnic Romanians on their respective certificates.

147 J. Ringelheim, 'Ethnic Categories and European Human Rights Law', 34 *Ethnic and Racial Studies* (2011) 1682-1696, at 1688 [https://doi.org/10.1080/01419870.2010.542249].

148 *Ciubotaru*, *supra* note 146, para. 57. See J. Ringelheim, 'Ethnic Categories and European Human Rights Law', in M. Möschel, C. Hermanin and M. Grigolo (eds), *Fighting Discrimination in Europe: The Case for a Race-Conscious Approach* (Routledge, New York, 2013) 47, at 53.

149 *Ciubotaru*, *supra* n. 146, para. 58. See A. Pap, "Is There a Legal Right to Free Choice of Ethno-Racial Identity? Legal and Political Difficulties in Defining Minority Communities and Membership Boundaries", 46 *Columbia Human Rights Law Review* (2014-2015) 153-232, at 201.

150 *Tasev v. North Macedonia*, ECHR (2019) Applic. No 9285/13, para. 33; *Molla Sali v. Greece*, ECHR (2018) Applic. No. 20452/14, para. 157.

151 *Gorzelik* (GC), *supra* n. 7, para. 92; *Bekir-Ousta*, *supra* n. 134, para. 36; *Emin*, *supra* n. 134, para. 22; *Turkish Association of Xanthi*, *supra* n. 136, para. 43; See also J. Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press, New York, 2019), at 66.

152 *Association Rhino and Others v. Switzerland*, ECHR (2011) Applic. No. 48848/07, para. 61; *Turkish Association of Xanthi*, *supra* n. 136, para. 44; *Bekir-Ousta*, *supra* n. 134, para. 37; *Emin*, *supra* n. 134, para. 23; *Gorzelik* (GC), *supra* n. 7, para. 88; *Sidiropoulos*, *supra* n. 14, para. 40.

level, respect for the rights of minorities is considered, in the European area at least, a *conditio sine qua non* for a democratic society.[153] In this spirit and in the more specific context of the freedom of assembly provided for in Article 11 (1) of the Convention, the Court has repeatedly emphasised, starting with the case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (2001), which concerned the prohibition of public celebrations of historical events by members of the unregistered association *Ilinden*, whose express statutory objectives were "the unification of all Macedonians in Bulgaria on a regional and cultural basis" and "the recognition of the Macedonian minority in Bulgaria", without "violating the territorial integrity" of the country and "without the use of violent ... or unlawful means",[154] that:

> [a]ny measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles however shocking and unacceptable certain views or words used may appear to the authorities do a disservice to democracy and often even endanger it.[155]

(2) Territorial integrity, national security, public order and minority cultural associations in the light of multi- and inter- cultural pluralism

Apart from asserting the full compatibility of the establishment of minority associations with the fundamental constitutional axis of the Convention democratic society and indeed recognising their positive contribution to the proper functioning of the latter, the Court also shed light on the question of the relationship between cultural minority diversity and territorial integrity, national security and public order by originally accepting in the *Sidiropoulos* case and then reiterating in the case of the *Turkish Association of Xanthi*, the thesis that:

> [t]erritorial integrity, national security and public order were not threatened by the activities of an association whose aim was to promote a region's culture, even supposing that it also aimed partly to promote the culture of a minority.[156]

Thus, for example, the Court held in the case of *Eğitim ve Bilim Emekçileri Sendikası v. Turkey* (2012) that the establishment of an association whose objective is to cultivate the cultural identity of citizens whose first tongue is different (in this case Kurdish) from the

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153 *Gorzelik* (GC), *supra* n. 7, para. 68. See F. Palermo, 'Domestic Enforcement and Direct Effect of the Framework Convention for the Protection of National Minorities: On the Judicial Implementation of the (Soft?) Law of Integration', in A. Verstichel *et al.* (eds), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Antwerp/Oxford/Portland, 2008) 187, at 200.

154 *Stankov*, *supra* n. 14, para. 10. See on the case R. Medda Windischer, 'The Jurisprudence of the European Court of Human Rights', 1 *European Yearbook of Minority Issues* (2001/2002) 487-534, at 489-493 [doi: https://doi.org/10.1163/22116102X00220].

155 *Stankov*, *supra* n. 14, para. 97. Also, *Kudrevičius and Others v. Lithuania*, ECHR (2015) Applic. No. 37553/05, para. 145; *Taramenko v. Russia*, ECHR (2014) Applic. No. 19554/05, para. 67; *Fáber v. Hungary*, ECHR (2012) Applic. No. 40721/08, para. 37; *Sergey Kuznetsov v. Russia*, ECHR (2008) Applic. No. 10877/04, para. 45. See also P. Černý, 'The Current Trends in the Rights of Assembly under the European Convention on Human Rights', 6 *Athens Journal of Law* (2020) 231-242, at 233 [https://doi.org/10.30958/ajl.6-3-2].

156 *Sidiropoulos*, *supra* n. 14, para. 41; *Turkish Association of Xanthi*, *supra* n. 136, para. 51. See also T. Papademetriou, *Greece: Status of Minorities*, The Law Library of Congress, Global Legal Research Directorate, LL File No. 2012-008036, 2012, at 21.

official state one (in this case Turkish) by providing education in their mother tongue is not incompatible with national security and does not represent a threat to public order, even if this educational activity favours the culture of a minority.[157]

Besides the minor proposition, which consists in accepting that associations can promote the cultural identity of a minority or the culture of a region in general without this activity being considered a threat to national security,[158] the Court proceeded, from the starting-point of the aforementioned *Stankov and the United Macedonian Organisation Ilinden* case, to formulate the major one[159] concerning the limits of the political aspirations[160] of minority associations, noting that:

> the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory thus demanding fundamental constitutional and territorial changes cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country's territorial integrity and national security.[161]

This position does not imply that the ECtHR recognises a right to autonomy or even to secession to minorities, but that discussion on these matters cannot be excluded from the public debate.[162] For the Court, demands for such changes in constitutional structures must simply, as it was reiterated once again in the case of *The United Macedonian Organisation Ilinden — Pirin and Others v. Bulgaria* (2005), meet two basic conditions, firstly that the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles.[163]

In particular, with regard to the classic objection of states (and national courts) concerning the disruption of public order and social peace by the possible division of the population and the consequent tensions that may arise from the raising of various

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157 *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, ECHR (2012) Applic. No. 20641/05, para. 59.

158 R. Hofmann, T. H. Malloy and D. Rein, 'Introduction', in R. Hofmann, T. H. Malloy and D. Rein (eds), *The Framework Convention for the Protection of National Minorities* (Brill/Nijhoff, Leiden/Boston, 2018) 3, at 18.

159 G. Gilbert, 'Law and Human Rights rather than International Human Rights Law', in G. Gilbert, F. Hampson and C. Sandoval (eds), *Strategic Visions for Human Rights — Essays in Honour of Professor Kevin Boyle* (Routledge, London and New York, 2011) 19, at 27.

160 The ECtHR has repeatedly accepted that associations formed of members with a minority consciousness may also pursue political aims, thus rejecting the relevant objections of national courts which argue that such an activity is allowed exclusively for political parties, see *Vasilev and Society of the Repressed Macedonians in Bulgaria Victims of the Communist Terror v. Bulgaria*, ECHR (2020) Applic. No. 23702/15, paras. 26-27; *Yordan Ivanov and Others v. Bulgaria*, ECHR (2018) Applic. No. 70502/13, paras. 41-42.

161 *Stankov*, *supra* n. 14, para. 97. See also D. Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Publishing, Oxford, 2010), at 107.

162 G. Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', 24 *Human Rights Quarterly* (2002) 736-780, at 778 [doi:10.1353/hrq.2002.0034].

163 *The United Macedonian Organisation Ilinden — PIRIN and Others v. Bulgaria*, ECHR (2005) Applic. No. 59489/00, para. 59. Consequently, as the Court *inter alia* noted in the *Batasuna* case, "a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds", *supra* n. 59, para. 79. See Ana Salinas de Frias, *Counter-Terrorism and Human Rights in the Case Law of the European Court of Human Rights* (Council of Europe Publishing, 2012), at 147.

forms of minority issues generated by the setting up of the associations in question and not these only, the ECtHR has developed in a number of cases a well-established jurisprudence which recognises the possibility of tensions arising when a community, religious or any other, is divided, but considers that such a development is an unavoidable consequence of pluralism.[164] Accordingly,

> [t]he role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[165]

For the ECtHR, therefore, the guarantees of Article 11 of the Convention considered in the light of Article 10, in the context of their close connection and, as the Court has repeatedly stressed, complementary relationship,[166] apply not only to persons or *associations* whose views are favourably received or considered inoffensive or indifferent, but also to those which may offend, shock or disturb.[167] This is required by the principle of pluralism, which, according to the ECtHR, cannot be achieved without the existence of associations that can freely express their ideas and opinions.[168]

Particularly in the case of minority associations, pluralism is perceived as "cultural pluralism"[169] and is built, according to the now established case law of the ECtHR, starting from the *Gorzelik* (GC) case

> on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts.[170]

The "ultimate guarantor" of pluralism is, according to the ECtHR, the state.[171] In this context, and in line with its consistent dictum that the purpose of the Convention is to protect not rights that are theoretical or illusory but rights that are practical and

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164 G. Gilbert, 'The Cultural and Political Autonomy of Minorities', 23 *L' Observateur des Nations Unies* (2007) 225-250, at 235.

165 *Serif v. Greece*, ECHR (1999) Applic. No. 38187/97, para. 53; *Metropolitan Church of Bessarabia and Others v. Moldova*, ECHR (2001) Applic. No. 45701/99, para. 116; *Ouranio Toxo*, *supra* n. 144, para. 40. See Y. Donders 'Cultural Diversity and Cultural Identity in Human Rights', in A. J. Wiesand *et al.* (eds), *Culture and Human Rights: The Wroclaw Commentaries* (De Gruyter, Berlin, 2016) 23, at 24.

166 See *Primov v. Russia and Others*, ECHR (2014) Applic. No. 17391/06, para. 92; *Vona v. Hungary*, ECHR (2013) Applic. No. 35943/10, para. 53.

167 *Redfearn v. The United Kingdom*, ECHR (2012) Application No. 47335/06, para. 56. See also N. Hatzis, *Offensive Speech, Religion, and the Limits of the Law* (Oxford University Press, Oxford, 2021), at 96.

168 "Given that the implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions…", *Zhechev v. Bulgaria*, ECHR (2007) Applic. No. 57045/00, para. 36; *Gorzelik* (GC), *supra* n. 7, para. 91; *The United Macedonian Organisation Ilinden and Others*, *supra* n. 10, para. 59.

169 G. Pentassuglia, 'Protecting Minority Groups through Human Rights Courts: The Interpretive Role of European and Inter-American Jurisprudence', in A. Vrdoljak (ed.), *The Cultural Dimension of Human Rights* (Oxford University Press, Oxford, 2013), 73, at 75.

170 *Gorzelik* (GC), *supra* n. 7, para. 92. Also, *İzzettin Doğan and Others v. Turkey*, ECHR (2016) Applic. No. 62649/10, para. 109; *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, ECHR (2009) Applic. No. 37083/03, para. 53; *Ouranio Toxo*, *supra* n. 144, para. 35; *United Macedonian Organization Ilinden and Others*, *supra* n. 10, para. 58. See also J. Sand, 'The Concept of Democracy and the European Convention on Human Rights', 5 *University of Baltimore Journal of International Law* (2017) 195-227, at 200-201 [https://scholarworks.law.ubalt.edu/ubjil/vol5/iss2/3].

171 *Informationsverein Lentia and Others v. Austria*, ECHR (1993) Series A, No. 276, para. 38.

effective,[172] the Court has consistently emphasised that real and effective respect for the freedom of association cannot be reduced to a mere duty of non-intervention by the state, as such an absolutely negative approach would not be compatible with the purposes of Article 11 and the Convention more generally. Consequently, there may be positive obligations for the effective enjoyment of the right to freedom of association even in the sphere of relations between individuals.[173] Indeed, this positive obligation on States to ensure the effective enjoyment of the freedoms of association and assembly is, according to the Court, particularly important for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.[174]

> Accordingly, it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote. Their members must be able to hold meetings without having to fear that they will be subjected to physical violence by their opponents. Such a fear would be liable to deter other associations or political parties from openly expressing their opinions on highly controversial issues affecting the community.[175]

With this in mind and with regard to the more specific context of assemblies / gatherings of associations of citizens claiming minority status, the Court, starting with the aforementioned *Stankov and the United Macedonian Organisation Ilinden* case, stressed that if every possibility of tensions and passionate disputes between opposing groups during an event justified its prohibition, then society would be deprived of the opportunity to hear different views on any issue that offended the sensitivity of the majority opinion.[176]

In essence, the ECtHR, recognising both the cultural dimension of the principle of pluralism in matters relating to freedom of association and assembly and the value of diversity in general, as clearly indicated by its constant position that in a democracy "diversity is not perceived as a threat but as a source of enrichment",[177] also seems to incorporate, to some extent, elements from the theory of multiculturalism, which, despite its polysemy[178]and lack of coherence, advocates in a general context objectives similar to

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172 *Artico v. Italy*, ECHR (1980) Series A, No. 37, para. 33; *Kutić v. Croatia*, ECHR (2002) Applic. No. 48788/99, para. 25; *Cocchiarella v. Italy*, ECHR (2006) Applic. No. 64886/01, para. 83.

173 *Zhdanov and Others v. Russia*, ECHR (2019) Applic. Nos. 12200/08, 35949/11 and 58282/12, para. 162; *Wilson, National Union of Journalists and Others v. the United Kingdom*, ECHR (2002) Applic. Nos. 30668/96, 30671/96 and 30678/96, para. 41; *Ouranio Toxo*, *supra* n. 144, para. 37. See P. Wiater, *Intercultural Dialogue in the Framework of European Human Rights Protection*, (White Papers Series VOL 1, Council of Europe Publishing, 2010), at 98.

174 *Bączkowski and Others v. Poland*, ECHR (2007) Applic. No. 1543/06, para. 64; *Zhdanov*, *supra* n. 173, para. 163.

175 *Ouranio Toxo*, *supra* n. 144, para. 37; *Zhdanov*, *supra* n. 173, para. 162. See also European Commission for Democracy Through Law (Venice Commission), Guidelines on Political Party Regulation (2nd edition), Study No. 881/2017, CDL-AD(2020)032, Strasbourg, 14 December 2020, at 15, para. 40.

176 *Stankov*, *supra* n. 14, para. 107. See also Venice Commission and OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly (3rd edition), Study No. 581/2010, CDL-AD(2019)07, Strasbourg/Warsaw, 8 July 2019, at 51 (note 256).

177 *Nachova and Others v. Bulgaria*, ECHR (2005) Applic. Nos. 43577/98 and 43579/98, para. 145; *Bekos and Koutropoulos v. Greece*, ECHR (2005) Applic. No. 15250/02, para. 63; *Timishev v. Russia*, ECHR (2005) Applic. Nos. 55762/00 and 55974/00 2005, para. 56.

178 See A. Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards', 32 *Human Rights Quarterly* (2010) 21-48, at 23 [http://www.jstor.org/stable/40390001].

those of international law's minority rights regime, namely the safeguarding of the right of non-dominant cultural groups to maintain their identity and preserve, practice and protect their culture.[179] At the same time, possibly in the context of the broader recognition by certain international human rights treaty bodies of the dominant perception in the field of contemporary social sciences that culture "is a living process, historical, dynamic and evolving",[180] the Court does not only stand by the need to protect diversity solely as a monolithic distinctiveness, which, according to critics of multiculturalism, exacerbates the segregation of both 'old' and 'new' minorities (e.g. immigrants) and impedes their integration into mainstream society,[181] but also embraces elements of interculturalism. The latter, in at least one of its major theoretical versions, that of *cohesion*, focuses on the role of positive interactions between citizens in weakening prejudices, stereotypes and misconceptions about *Others*, as well as in fostering a climate of mutual understanding and respect for the right of self-identification of the whole population and building social trust and solidarity.[182] In such a spirit, the ECtHR guarantees to the associations in question, insofar as they do not support violence and disrespect for democratic principles, an important podium to freely express their views, however divisive they may be, to make them known in public life and to present them freely at the table of public debate and to the criticism of civil society, so that, through fruitful debate, dialectical confrontation and gradual fermentation and possibly synthesis, a harmonious interaction between individuals and groups with different identities may be achieved, which in turn and under certain conditions can lead to the desired social cohesion.[183]

(3) The existence of minorities as a historical fact and the need for their protection in a democratic society

The picture of the ECtHR's normative approach to the minority phenomenon by way of freedom of association is completed by another thesis that the Court accepted in the *Sidiropoulos* case and has since repeated in its jurisprudence, namely that

> the existence of minorities and different cultures in a country was a historical fact that a "democratic society" had to tolerate and even protect and support according to the principles of international law.[184]

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179 S. E. Berry, 'Aligning Interculturalism with International Human Rights Law: 'Living Together' without Assimilation', 18 *Human Rights Law Review* (2018) 441-471, at 444 [https://doi.org/10.1093/hrlr/ngy022].

180 ECSR, General Comment No. 21 Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, 21 December 2009, para. 11.

181 See for example C. Joppke, 'The Retreat of Multiculturalism and the Liberal State: Theory and Policy', 55 *The British Journal of Sociology* (2004) 237-257, at 248, 250-251 [https://doi.org/10.1111/j.1468-4446.2004.00017.x].

182 P. Loobuyck, 'Towards an Intercultural Sense of Belonging Together: Reflections on the Theoretical and Political Level', in N. Meer, T. Modood, and R. Zapata-Barrero (eds), *Multiculturalism and Interculturalism: Debating the Dividing Lines* (Edinburgh University Press, 2016) 225, at 230.

183 See *Moscow Branch of the Salvation Army v. Russia*, ECHR (2006) Applic. No. 72881/01, para. 61; *Gorzelik* (GC), *supra* n. 7, para. 92; *Ouranio Toxo*, *supra* n. 144, para. 35; *The United Macedonian Organization Ilinden and Others*, *supra* n. 10, para. 58. See also K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012), at 93.

184 *Sidiropoulos*, *supra* n. 14, para. 41; *Turkish Association of Xanthi*, *supra* n. 136, para. 51; *Eğitim ve Bilim Emekçileri Sendikası*, *supra* n. 157, para. 59. See Y. Donders, 'Do Cultural Diversity and Human Rights Make a

This thought contains two interrelated elements, which are both of vital interest for minority diversity. The first concerns the major issue of the existence of a minority and the different views relating to it, while the second concerns the proper treatment that minority diversity should receive in a democratic society. Starting with the first, it is a fact that in several states the existence of a minority and consequently its subjection to the relevant protection regime provided by the norms of international law conventions depends on prior state recognition of the group concerned as such.[185] In this light, official recognition by the state becomes both *de jure* and *de facto* a necessary precondition for the preservation and promotion of minority identities.[186] As a result, a group that claims minority status but is not recognised as such by the national authorities is in practice hampered in its enjoyment of the relevant international law provisions (e.g. as to the state affirmative action necessary to achieve real and effective equality and to preserve its characteristics) and lacks the necessary institutional legitimacy to negotiate political settlements with the state of residence.[187] On the other hand, some states accept that the existence of a minority is a fact that does not depend on their own recognition.[188] The latter stance is consistent with the contemporary approach of a number of international and regional bodies, including, *inter alia*, the Human Rights Committee (HRC) of the International Covenant on Civil and Political Rights (ICCPR), the AC of the FCNM, the High Commissioner on National Minorities (HCNM) of the OSCE, and according to one interpretation the ECtHR itself, and at least in theory facilitates access to minority rights.

In the European region in particular, nine states (Albania, North Macedonia, Germany, Denmark, Norway, the Netherlands, Slovakia, Slovenia and Sweden) out of the thirty-nine that have acceded to the FCNM have submitted, at the time of signature or ratification, a declaration or reservation according to which they explicitly enumerate by name the minorities subject to the Convention's protection regime.[189] In the same way, six other countries (Austria, Switzerland, Estonia, Latvia, Luxembourg and Poland) have established their own definitions with a combination of objective and subjective criteria that must be met for the concept to be fulfilled and consequently for a group to be included in the scope of the Convention.[190] Finally, Liechtenstein, Luxembourg,

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Good Match?', 61 (199) *International Social Science Journal* (2010) 15-35, at 27 [https://doi.org/10.1111/j.1468-2451.2010.01746.x].

185 F. Palermo and J. Woelk, 'No Representation Without Recognition: The Right to Political Participation of (National) Minorities', 25 *European Integration* (2003) 225-248, at 227 [https://doi.org/10.1080/0703633032000133574].

186 J. Marko, 'Minority Protection through Jurisprudence in Comparative Perspective: An Introduction', 25 *European Integration* (2003) 175-188, at 176 [https://doi.org/10.1080/0703633032000133600].

187 A. Anghie, 'Human Rights and Cultural Identity: New Hope for Ethnic Peace?', 33 *Harvard International Law Journal* (1992) 341-352, at 346.

188 "Finland has continued its inclusive and pragmatic approach concerning the personal scope of application of the Framework Convention which remains based on the idea that "the existence of minorities does not depend on a declaration by the Government but on the factual situation in the country"", ACFC, Third Opinion on Finland, adopted on 14 October 2010, ACFC/OP/III(2010)007, Strasbourg, 13 April 2011, para. 23.

189 *See* ACFC, The Framework Convention: A Key Tool to Managing Diversity Through Minority Rights Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities, ACFC/56DOC(2016)001, Strasbourg, 27 May, 2016, at 10-11, paras. 19, 23.

190 M. Telalian, 'European Framework Convention for the Protection of National Minorities and its Personal Scope of Application', in G. Alfredsson and M. Stavropoulou (eds), *Justice Pending: Indigenous Peoples and*

Malta, San Marino, Portugal and Spain declared that no national minorities exist on their territory. Reflecting this situation, the ECtHR observed that the practice of states regarding the recognition of minorities varies from country to country and even within the same country. For the Court, the choice of the form of recognition, as well as the way in which it is to be implemented, e.g. by means of an international treaty or bilateral agreement or constitutional provision or a special law, is in by the nature of things left to the discretion of the State, as it depends on the particular circumstances of each country.[191]

On the other hand, the stance of these states to make the existence and therefore the protection of minorities dependent on their prior recognition does not seem to be in line with the position of the PCIJ in the case of the *Greco-Bulgarian communities* (1930), where it has been opined that: "[t]he existence of communities is a question of fact; it is not a question of law".[192] In a similar vein, more recently, the HRC stressed in its General Comment No. 23 (1994) on the rights of minorities under Article 27 of the Covenant that "[t]he existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria."[193] Analogous in its essence is the contemporary approach of the AC in its supervision of the compatibility of state policies with the provisions of the FCNM. Thus, the Committee has repeatedly emphasized that the application of the Convention with respect to a group of persons does not necessarily require prior formal recognition of the group as a minority or the existence of a definition of the concept of national minority.[194] Consequently, what matters to the AC is the enjoyment of minority rights in practice, regardless of whether or not the persons concerned are recognised in the domestic legal order.[195] On this basis, the Committee has consistently criticised those states that link the granting of minority rights to their prior formal recognition of a minority and stresses that such an attitude constitutes by definition a policy of exclusion that is inconsistent with the principles of the Convention.[196] The act of recognition can, according to the AC, have only a declaratory and not a constitutive character and therefore access to minority rights cannot depend on the formal recognition of minorities.[197]

The view on the factual existence of minorities is shared by the overwhelming majority of international law scholars.[198] Characteristic in this direction was the stance of the first

Other Good Causes — Essays in Honour of Erica-Irene A. Daes (Martinus Nijhoff Publishers, The Hague/London/New York, 2002) 117, at 126.

191 *Gorzelik* (GC), *supra* n. 7, at para. 67. *See* Olivier de Schutter, *International Human Rights Law. Cases, Materials, Commentary* (3rd ed., Cambridge University Press, Cambridge, 2019), at 358.

192 *The Greco-Bulgarian "Communities"*, 1930 PCIJ Series B, No. 17, at 22.

193 HRC, General Comment No. 23, Article 27 (Rights of Minorities), UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, para. 5.2.

194 ACFC, Fourth Opinion on Denmark, ACFC/OP/IV(2014)001, 20 January 2015, para. 18; ACFC, Fourth Opinion on Germany, ACFC/OP/IV(2015)003, 19 March 2015, para. 18; ACFC, Fourth Opinion on Hungary, ACFC/OP/IV(2016)003, 12 September 2016, para. 21; ACFC, Fourth Opinion on Italy, ACFC/OP/IV(2015)006, 12 July 2016, para. 20; ACFC/56DOC(2016)001, *supra* n. 189, para. 28.

195 ACFC, Fourth Opinion on Spain, ACFC/OP/IV(2014)003, 3 December 2014, para. 13.

196 ACFC/56DOC(2016)001, *supra* n. 189, para. 27.

197 *Ibid*, para. 28.

198 Indicatively, M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (2nd revised ed., N. P. Engel Publisher, Kehl, 2005), at 648; P. Thornberry, 'International and European Standards on Minority

HCNM of the OSCE, *Max van der Stoel*, stressing that a minority does not need to enjoy official state recognition in order to be able to invoke the minority provisions of the OSCE texts;[199] otherwise, minority guarantees become a legal vacuum, as demonstrated by the case of several states that explicitly refuse to recognise as minorities even groups that allegedly fulfil the elements of the term from every point of view (e.g. part of the Bretons in France), thus evading their obligations and depriving the members of minorities of the necessary and due protection.[200]

For its part, by adopting in its relevant jurisprudence the opinion on the historical presence of minorities, the ECtHR appears, on one reading to endorse the aforementioned view that the existence of a minority is a matter of fact and not of law and consequently does not depend on its recognition by the state[201] or, according to another approach, to accept that it is not exclusively at the discretion of the state.[202] As regards the question, however, of the Court's own recognition of the applicant group of persons as a minority, where this is raised in one way or another, the interpretations of its thoughts are divergent. According to an earlier reading by the present UN Special Rapporteur *Fernand de Varennes*, the Court seems reluctant to take a position only with regard to the cases of specific categories of minorities, namely those whose recognition would automatically confer special privileges under the domestic legal order (e.g. favourable electoral treatment for Silesians if they acquired national minority status in the *Gorzelik* case). On the other hand:

> [i]n the increasingly numerous cases involving, Kurds, Roma/Gypsies, Sorbs, Russians, Macedonians, Basques, Saami, Jehovah's Witnesses, Atheists, Catholics, Jews, Muslims and other minorities…there has never been a difficulty for the Court to acknowledge their objective, factual presence within a state, often referring to them specifically as minorities, regardless of their status or of a country's recognition, and regardless of the ECHR itself being quasi-silent on the existence or rights of minorities.[203]

Rights', in H. Miall (ed.), *Minority Rights in Europe — The Scope for a Transnational Regime* (Pinter Publishers, London, 1994) 14, at 15; C. Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights', in R. Bernhardt *et al.* (eds), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte. Festschrift für Hermann Mosler* (Springer, Berlin/Heidelberg/New York, 1983) 949, at 965 (note 70); L. B. Sohn, 'The Rights of Minorities', in L. Henkin (ed.), *The International Bill of Rights* (Columbia University Press, New York, 1981) 270, at 272; F. Capotorti, 'The Protection of Minorities under Multilateral Agreements on Human Rights', 2 *Italian Yearbook of International Law* (1976) 3-32, at 18 [doi: https://doi.org/10.1163/221161376X00010].

199 M. van der Stoel, 'Statement of HCNM on Discussion in Greece Regarding the Question of National Minorities, 23 August 1999', 4 *Helsinki Monitor* (1999) 78-79, at 79.

200 J. Rehman, 'E. Gayim, The Concept of Minority in International Law: A Critical Study of the Vital Elements, Rovaniemi, 2001, University of Lapland Press' (Book Review), 10 *International Journal on Minority and Group Rights* (2004) 261-262 [doi: https://doi.org/10.1163/15718110313106675].

201 Z. Machnyikova, 'Article 7', in M. Weller (ed.), *The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, Oxford/New York, 2005) 193, at 208.

202 P. Thornberry, *Indigenous Peoples and Human Rights* (Juris Publishing and Manchester University Press, New York/Manchester, 2002), at 292.

203 F. de Varennes, 'Using the European Court of Human Rights to Protect the Rights of Minorities', in M. Weller and A. Morawa (eds), *Minority Issues Handbook. Mechanisms for the Implementation of Minority Rights* (Council of Europe Publishing, 2004) 83, at 88-89.

Another approach, based on the example of the Silesians in the *Gorzelik* case, points out that in cases where the applicants explicitly raise the relevant question the ECtHR avoids deciding whether the applicant group of persons constitutes a "national minority" let alone making a definition of the concept.[204] In any case, however, the non-recognition of a group as a minority does not constitute for the Court an obstacle to the exercise of the right to freedom of association, as it originally pointed out in the first examination of the *Gorzelik* case (2001). Along these lines, the ECtHR recently ruled in the case of *Macedonian Club for Ethnic Tolerance in Bulgaria and Radonov v. Bulgaria* (2020), which concerned the Bulgarian courts' refusal to register the association in question because, *inter alia*, it "advocated the idea that there existed a Macedonian ethnic minority in Bulgaria, which meant that it sought to cultivate such a minority since one did not in reality exist and was thus directed against the unity of the nation", that this reason was not sufficient to justify the interference and, consequently, that it constituted a violation of Article 11.[205]

In fact, the Court has built on the basis of freedom of association[206] a coherent jurisprudence that systematically recognises the right of members of both recognised and unrecognised minorities[207] to affirm their understanding of their national or ethnic identity, history and culture.[208] The specific approach has led part of academia to the formulation of the view that the Strasbourg Court essentially by-passes the issue of the definition and official recognition of a group as a national minority and focuses, in line *inter alia* with the above-mentioned approach of the AC of the FCNM and of certain delegated bodies of the UN, on the need for the *de facto* protection of minority diversity.[209]

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[204] *Gorzelik*, *supra* n. 14, para. 62. See G. Gilbert, 'Soft Solutions to Hard Problem: Justiciable Minority Rights?', 10 *European Yearbook of Minority Issues* (2011) 179-199, at 185-186 (note 21) [doi: https://doi.org/10.1163/22116117-01001008].

[205] *Macedonian Club for Ethnic Tolerance in Bulgaria and Radonov v. Bulgaria*, ECHR (2020) Applic. No. 67197/2013, paras. 24-25.

[206] E. Horváth, 'Cultural Identity and Legal Status: Or, the Return of the Right to Have (Particular) Rights', in F. Francioni and M. Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers, Leiden/Boston, 2008) 169, at 178-179.

[207] A. Eide, 'Introduction: Mechanisms for Supervision and Remedial Action', in M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, Oxford, 2007) 1, at 23.

[208] S. Cacciaguidi-Fahy, 'Julie Ringelheim, Diversité Culturelle et Droit de l'Homme La Protection des Minorités par la Convention Européenne des Droits de l'Homme, Bruylant, Brussels, 2006' (Book Review), 15 *International Journal on Minority and Group Rights* (2008) 427-432, at 429 [doi: https://doi.org/10.1163/157181108X332703].

[209] Françoise Tulkens and Stefano Piedimonte, *The Protection of National Minorities in the Case — Law of the European Court of Human Rights*, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), 7th Meeting, Strasbourg, 12-13 March 2008, at 3-9, paras. 5, 9-14, 19-23. On the UN level this approach is reflected for example in the recommendation of the Independent Expert on Minority Issues, *Gay McDougall*, to the Greek government to "retreat from the dispute over whether there is a Macedonian minority or a Turkish minority and place its full focus on protecting the rights to self-identification, freedom of expression and freedom of association of those communities", Human Rights Council, Report of the Independent Expert on Minority Issues, *Gay McDougall*, Addendum: Mission to Greece (8-16 September 2008), UN Doc. A/HRC/10/11/Add.3, 18 February 2009, at 2, 24, para. 90. *See also* European Democracy for Democracy Through Law (Venice Commission), Report on Non-Citizens and Minority Rights, Study No 294/2004 (18 January 2007) CDL-AD(2007)001, para. 144, where "the Venice Commission

The importance, however, of official recognition cannot be overlooked, since, as the former UN Independent Expert on Minority Issues, *Gay McDougall*, among others, has pointed out, state recognition based on self-identification is the first step in a process of securing minority rights and guaranteeing the position of members of minorities as equal social partners.[210] It is for this reason that the competent UN human rights bodies, as well as the AC of the FCNM, often ask states to consult with the groups concerned with a view to recognising them as minorities in accordance with the right to self-identification.[211] Naturally, states enjoy, as the ECtHR has recognised, a wide margin of discretion as to the ways in which they may recognise minorities living on their territory. However, states have an obligation under international law to behave in "good faith", which means that they cannot act arbitrarily when there is objective evidence of the existence of a minority within their territory.[212] In a similar context, it is argued that the obligation of states to protect minorities also implies the obligation to recognise them,[213] as otherwise the group is condemned to institutional non-existence and the persons belonging to it cannot enjoy their culture since their group and its identity do not exist for the legal order.

Next, as regards the second part of the ECtHR's thinking on the tolerance and protection of minorities, it is abundantly clear that on the level of principle the Court is strongly aligned, even if it has accepted that the relevant emerging consensus among the contracting states of the CoE has not become sufficiently coherent,[214] with the wording of the FCNM's Preamble which states that: "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity."[215]

This obligation is not exhausted, according to the existing international law, in the guarantee of formal equality before the law, which is emphasized by the so-called "denial

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is of the opinion that attention should be shifted from the definition issue to the need for an unimpeded exercise of minority rights in practice."

210 Human Rights Council, Report of the Independent Expert on Minority Issues, *Gay McDougall*, UN Doc. A/HRC/13/23, 7 January 2010, at 16, para. 63.

211 For example, "[t]he Committee notes with concern that the status of a community of Ukrainian citizens, who consider themselves to be Ruthenians, is not clear and that there is a reported absence of dialogue between them and the State party. The Committee recommends that the State party respect the right of persons and peoples to self-identification and consider the issue of their status in consultation with representatives of Ruthenians in order to recognize all minorities which claim to exist in the State party." CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ukraine, UN Doc. CERD/C/UKR/CO/19-21, 14 September 2011, para. 19.

212 F. Ermacora, 'The Protection of Minorities before the UN', 182 *Recueil des Cours* (1983) 247-370, at 299.

213 R. Medda Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion, A Human Rights Model for Minority Integration* (Nomos, Baden Baden, 2009), at 108; G. Gilbert, 'Individuals, Collectivities and Rights', in N. Ghanea and A. Xanthaki (eds), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Martinus Nijhoff Publishers, Leiden/Boston, 2005) 139, at 159-160.

214 *Chapman v. The United Kingdom*, ECHR (2001) Applic. No. 27238/95, paras. 93-94. It should be noted, however, that almost a decade later the Court was content to observe that there is an emerging consensus in the field of minority protection, while refraining from adding that this is not coherent, *Muñoz Díaz*, *supra* n. 36, para. 60.

215 *Gorzelik* (GC), *supra* n. 7, para. 93. See A. Zysset, *The ECHR and Human Rights Theory — Reconciling the Moral and Political Conceptions* (Routledge, London/New York, 2017), at 238. Also, *Muñoz Díaz*, *supra* n. 36, paras. 60, 64.

states" of minority diversity, since equality does not mean equality of dissimilarities but equal treatment of the substantially similar and unequal treatment of the dissimilar.[216] Otherwise, by rigidly treating the dissimilar equally, real inequalities are not mitigated but prolonged.

(F) THE STATES' ARGUMENT FOR THE PROTECTION OF THE RIGHTS AND FREEDOMS OF OTHERS THE STRASBOURG COURT'S RESPONSE

Concluding this survey of the freedom of association of minority associations, another legitimate under Article 11 (2) of the ECHR aim invoked by states to justify interference with the enjoyment of that right is the protection of the rights and fundamental freedoms of others. The invocation of this reason in some of the relevant cases refers to the safeguarding of majority members from the alleged attempt by the members of the associations in question to challenge or undermine the former's historical and cultural identity and to confuse or mislead them, through the distortive use, in the prevailing view, of ethnic names and designations or the choice of deliberately ambiguous and unclear terminology in the name and statute of their associations.[217] The ECtHR, following all the above mentioned considerations on the permitted limitations to the freedom of expression, the rights of minority persons and the importance of the principle of pluralism in a democratic society, adopted, starting with *Stankov and the United Macedonian Organisation Ilinden*, a different view, holding that, since no illegal means were used, it was not necessary to restrict the right of assembly of the members of the unregistered association *Ilinden* in order to protect the Bulgarian population of the Pirin region from what the Bulgarian Government considered to be its "conversion" to another identity.[218] In particular, the Court held that the applicants' desire to commemorate certain historical events as "Macedonian", while the State and the majority of society regarded them as moments in Bulgarian history,[219] did not constitute sufficient grounds for prohibiting the events in question, since, as was pointed out, there were no indications that their gatherings were likely to become centres of propaganda of violence and rejection of democratic principles.[220] In that light, the Court held that the fact that the substance of the dispute in the present case concerned national symbols

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216 P. Thornberry, 'Education', in M. Weller (ed.), *Universal Minority Rights — A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, Oxford, 2007) 325, at 362.

217 See *Stankov*, *supra* n. 14, paras 71-72, 104; *The United Macedonian Organisation Ilinden and Others*, *supra* n. 10, para. 45; *Home of Macedonian Civilization*, *supra* n. 11, para. 28.

218 *Stankov*, *supra* n. 14, para. 105.

219 *Stankov*, *supra* n. 14, para. 106. See also V.J. de Graaf, 'Het Grote Gelijk van de Demostrant Europees Hof voor de Rechten van de Mens, 2 Oktober 2001: Stankov en de Verenigde Macedonische Organisatie Ilinden t. Bulgarije', 27 *NJCM-Bulletin* (2002) 414-428, at 420.

220 *Stankov*, *supra* n. 14, paras. 90, 103. See also A. Van Bossuyt, 'Fit for Purpose or Faulty Design? Analysis of the Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Legal Protection of Minorities', 6 *Journal on Ethnopolitics and Minority Issues in Europe* (2007) 1-20, at 14-15 [https://nbn-resolving.org/urn:nbn:de:0168-ssoar-61858]. As the Court once again stated in the *Guzman* case, "Article 11 therefore apply to all gatherings except those where the organizers and participants have such [violent] intentions, incite violence or otherwise reject the foundations of a democratic society", *Laguna Guzman v. Spain*, ECHR (2020) Applic. No. 41462/17, para. 33.

and national identity could not in itself be regarded as allowing the authorities a wider margin of appreciation.[221] Instead, the Court held that:

> [t]he national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views no matter how unpopular they may be.[222]

Beyond the freedom of assembly and in particular with regard to the freedom of association, the ECtHR has more recently (2018) held, in the case of *The United Macedonian Organisation Ilinden and Others v. Bulgaria* (No.3), which revisited the issue of the Bulgarian courts' long-standing refusal to register the *Ilinden* association, citing *inter alia* grounds for protecting the majority of Bulgarian citizens from exposure to views considered offensive, that that reasoning is not sufficient to justify the refusal to register it, as there are no new developments since the Court's judgment in the *Stankov and the United Macedonian Organisation Ilinden* case which could call into question the correctness of its abovementioned findings.[223] Earlier, the Court had already ruled in the case of *Association of Citizens Radko & Paunkovski v. The former Yugoslav Republic of Macedonia* (2009) that the dissolution, for reasons of protection of the rights of others, of the said association, which did not, as pointed out by the ECtHR itself, pursue minority claims, but was, through its objectives, allegedly undermining the sense of national identity of the majority of the country's citizens[224] by promoting the view of their Bulgarian ethnic origins, could not be considered necessary in a democratic society, since it was not shown that it would use illegal or undemocratic means to achieve its aims or that it would advocate hostility and consequently constituted a violation of Article 11.[225]

These cases confirmed in the clearest way that even the functioning of associations that directly challenge the dominant perception of the ethnic identity of the majority by rejecting the official narrative of history on which the latter is based cannot be prohibited or prevented on this ground alone.[226] In this context, and provided always that there is no incitement to violence or circumvention of democratic principles, the ECtHR does not accept that interference with the freedom of assembly and association is necessary to protect the rights of the members of the majority.[227]

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221 *Stankov*, *supra* n. 14, para. 107. See E. Horváth, *Mandating Identity: Citizenship, Kinship Laws and Plural Nationality in the European Union* (Kluwer Law International, 2008), at 61.

222 *Stankov*, *supra* n. 14, para. 107. See also *"Orthodox Ohrid Archdiocese (Greek-Orthodox Archdiocese of the Peć Patriarch)" v. the former Yugoslav Republic of Macedonia*, ECHR (2017) Applic. No. 3532/07, para. 117; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, ECHR (2009) Applic. Nos. 412/03 and 35677/04, para. 148.

223 *The United Macedonian Organisation Ilinden and Others v. Bulgaria* (No.3), ECHR (2018) Applic. No. 29496/16, para 34.

224 *Association of Citizens Radko and Paunkovksi*, *supra* n. 21, para. 70. "In Association of Citizens Radko and Paunkovksi v. the former Yugoslav Republic of Macedonia…the statements had affected the national and ethnic identity of all Macedonians", *Perinçek v. Switzerland*, ECHR (2015) Applic. No. 27510/08, para. 217.

225 *Association of Citizens Radko and Paunkovksi*, *supra* n. 21, paras. 72-78.

226 B. Baade, 'Historical Truth before the European Court of Human Rights', in H. P. Aust and E. Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical Perspective* (Elgar Publishing, Cheltenham/Northampton, 2021) 221, at 226.

227 L. Cariolou, 'Recent Case Law of the European Court of Human Rights Concerning the Protection of Minorities', 7 *European Yearbook of Minority Issues* (2007/2008) 512-544, at 533 [doi: https://doi.org/10.1163/22116117-90001647]. *See Stankov*, *supra* n. 14, para. 105; *The United Macedonian Organisation Ilin-*

Moreover, according to the now established case-law of the ECtHR:

> it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression, assembly and association would become merely theoretical rather than practical and effective as required by the Convention.[228]

(G) CONCLUDING OBSERVATIONS

Europe changed radically after the collapse of the Eastern Coalition compared to the time when the post-war European system of human rights protection was established, resulting in challenges that had not been foreseen by the drafters of the ECHR.[229] One of these was the need for a new perspective on the issue of minorities neglected for historical and ideological-political reasons, as it has become common after post-Cold War developments in the European,[230] and not only,[231] region that their protection is an essential element of stability, peace and democratic security.[232] At the same time, it was accepted at the universal level, as the then UN Secretary General *Boutros Boutros-Ghali* noted, that "democracy... requires a deeper understanding and respect for the rights of minorities."[233] With regard to the normative content of these rights, the forensic thinking adopted in the interwar period by the PCIJ returned to the fore, i.e. that minorities' protection should include, in addition to the universal guarantee of formal equality, measures aimed both at achieving real, full and effective equality and at preserving and promoting their identity. In this context, it must not be forgotten that the ECtHR also aligns in principle with the FCNM's Preamble, which states that a pluralistic and genuinely democratic society must not only respect the ethnic, cultural, linguistic and religious identity of every person belonging to a minority but also create the appropriate conditions that enable the expression, preservation and development of this identity.[234]

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den and Others, *supra* n. 10, para. 78; *The United Macedonian Organisation Ilinden and Others (No.3)*, *supra* note 223, para. 34.

228 *Zhdanov*, *supra* n. 173, para. 158. See also *Sekmadienis LTD. v. Lithuania*, ECHR (2018) Applic. No. 69317/14, para. 82; *Bayev and Others v. Russia*, ECHR (2017) Applic. Nos. 67667/09, 44092/12 and 56717/12, para. 70; *Alekseyev v. Russia*, ECHR (2010) Applic. Nos. 4916/07, 25924/08 and 14599/09, para. 81.

229 E. Brems, 'Key Challenges for the ECHR System: Protecting and Empowering Institutions, Human Rights Defenders and Minorities', 1 *European Convention on Human Rights Law* (2020) 7-10, at 7 [doi: https://doi.org/10.1163/26663236-00101004].

230 See 'Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe on the Reform of the Control Mechanism of the ECHR, on National Minorities, and on a Plan of Action against Racism', 14 *Human Rights Law Journal* (1993) 373-376, at 373.

231 See 'United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action', 32 *International Legal Materials* (1993) 1661-1687, at 1668, Chap. I, para. 19.

232 See 'Framework Convention for the Protection of National Minorities', 16 *Human Rights Law Journal* (1995) 98-101, at 98. Also, 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE', 11 *Human Rights Law Journal* (1990) 232-245, at 242, Chap. IV, para. 30.

233 B. B. Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, Report of the Secretary-General pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992*, United Nations, New York, 1992, at 46, para. 81.

234 *Gorzelik* (GC), *supra* n. 7, para. 93. See J. Marko, 'Constitutional Recognition of Ethnic Difference Towards an Emerging European Minimum Standard?, in A. Verstichel *et al.* (eds), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Antwerp/Oxford/

The ECtHR, for its part, did not remain indifferent to the world-changing developments that took place in the field of minority rights and began to become gradually more "sympathetic", to the extent permitted by the inherent limitations of the ECHR, to cases with a minority interest, adopting a more "sensitive" perspective in the interpretation of provisions that are of particular interest to members of minorities.[235] Central among these is Article 11 of the Convention on the right to freedom of association, which has become one of the main vehicles through which certain groups of individuals seek to affirm and manifest a minority consciousness, the recognition of minority status or, more generally, the preservation of their ethnic, cultural, linguistic, etc., identity. The ECtHR recognised the particular importance of freedom of association for persons belonging to minorities and for minorities as such[236] and proceeded to produce a coherent jurisprudence which greatly limits the scope for discretionary assessment by states in invoking legitimate purposes of interference with the enjoyment of freedom of association, such as the protection of national security, public order and the rights and freedoms of others, consistently stressing that unless there is an incitement to violence or circumvention of democratic principles and with the exception of special cases such as those which have to do with electoral issues, the above-mentioned lawful reasons cannot justify an "imperative social need" and consequently establish proportionately necessary restrictions in a democratic society. In other words, the ECtHR recognised, on the basis of the freedom of association, the possibility of building collective identities under conditions of political and cultural pluralism, strongly rejecting approaches that seek to limit this field of freedom on the grounds of security or other reasons of public interest.[237] This does not imply that in the relevant cases, which are almost always marked by a strong ideological charge, the Court embraces the applicants' discourse regarding their national, ethnic, linguistic or other identity or, conversely, that of the national authorities, in the only case (that of *Gorzelik*) where it did not find a breach of the provision in question. On the contrary, as it has stressed, neither arbitration on historical issues nor their interpretation falls within the scope of its competence and therefore it cannot, by its nature and role, and does not seek to supplant the historian and, more broadly, the social scientist.[238] Limited by and within the limits of its jurisdiction, the Strasbourg Court therefore focuses exclusively on monitoring the compliance of States with their obligations under the Convention with regard to respect for the individual human rights contained therein. In this context,

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Portland, 2008) 19, at 30. It should be noticed that according to the Court this state obligation serves not only the purpose "of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community", *Muñoz Díaz*, *supra* n. 36, para. 60.

235 J. Mačkić, 'The European Court of Human Rights and Discriminatory Violence Complaints', in J. Schweppe and M. A. Walters (eds), *The Globalization of Hate — Internationalizing Hate Crime?* (Oxford University Press, Oxford, 2016) 233, at 239.

236 *Gorzelik* (GC), *supra* n. 7, para. 93. See also J. Almqvist, *Human Rights, Culture, and the Rule of Law* (Hart Publishing, Oxford and Portland, Oregon, 2005), at 19.

237 G. Pentassuglia, 'Do Human Rights Have Anything to Say About Group Autonomy?', in G. Pentassuglia (ed.), *Ethno-Cultural Diversity and Human Rights: Challenges and Critiques* (Martinus Nijhoff Publishers, Leiden/Boston, 2018) 125, at 131.

238 "The Court considers that it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation", *Chauvy and Others v. France*, ECHR (2004) Applic. No. 64915/01, para. 69.

the fundamental constitutional and juridical axis of reference in the interpretative and reasoning basis of its decisions remains firmly and primarily the truly democratic state and its distinctive elements, such as broad-mindedness, pluralism and tolerance, in the light of which the proportionality of measures interfering with the enjoyment of rights is assessed. Of course, the Court now also refers to minority texts and provisions outside the ECHR in the context of a dynamic reading of the Convention as a "living text", thus accepting the inevitable "intrusion" of some of these standards into the structure of its reasoning.[239] However, these references to the protection of the rights of persons belonging to minorities constitute, so far, a secondary legal reasoning that does not constitute the axis of its jurisprudential judgment, and in any case they only play a subsidiary role, although their special weight in demonstrating the Court's criteria concerning the treatment that minority diversity needs to enjoy in a democratic society should not be overlooked. The assessment, therefore, of the Court's case-law must be made first of all in the light of the constitutional paradigm it emphatically sets, that of a genuinely democratic society, where respect for the right to freedom of association in conjunction with the right to freedom of expression implies that all views and ideas on national and ethnic identities must at least have an "adequate opportunity to be expressed",[240] in order to achieve interaction, dialectical confrontation, fruitful conflict, dignified contestation and possibly synthesis. Through, therefore, a continuous dynamic process of negotiation between citizens for the formation of a community of ideals and values and the building of an open and inclusive democratic culture, and not as a consequence of an assimilationist national policy, whose involuntary imposition is not allowed in international law (Article 5(2) of the FCNM), or as a superficial coexistence of parallel rigid and static ethnic collectivities, which reproduces the separation and enclosure of groups and power relations between and within them, the desired social cohesion can be achieved. In, of course, a truly democratic state...

[239] G. Pentassuglia, 'Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence', 11 *International Community Law Review* (2009) 185-218, at 210 [doi: https://doi.org/10.1163/187197309X430918].

[240] See *Turkish Association of Xanthi*, *supra* n. 136, para. 56.