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Since the mid-1990s, the European Court of Human Rights has had before it a number of cases concerning the situation of minorities under Article 14 of the European Convention for the Protection of Human Right – which aims to secure the enjoyment of rights and freedoms without discrimination inter alia *on grounds of association with a national minority. At present, the number of similar cases pending before the Court is growing. Through an examination of cases concerning mainly the nexus between Article 11 and Article 14 as well as Article 8 and Article 14, this article seeks to identify a number of problematic aspects of the jurisprudence of the Court. This, the author argues, includes uncertainty as to when and why the Court chooses to examine Article 14; issues of cumulative violations; issues of evidence; the questionable principle of prevention; issues of indirect discrimination and last, but not least, the potential benefits of the entry into force of Protocol No. 12. To address these problems, the author concludes that there is a need for greater coherency in the positions adopted by the Court with respect to minority issues as well as a need for more legal research.*

I. A Brief History

It is well known that the only explicit reference to minorities in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, adopted in 1950) and its protocols is found in Article 14:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, *association with a national minority*, property, birth or other status (emphasis added).

What is not as well known is that in the period preceding the adoption of the ECHR, i.e. between 1949 and early 1950, efforts had indeed been made to include minority-specific provisions in the Convention. It was then argued that "[n]ational minorities should be assured a free life with a free enjoyment of their own cultural development".[1] When the Chairman of the Legal Committee, Maxwell-Fyfe, commented on the draft convention which was presented to the Committee of Ministers, he highlighted this omission. In his letter addressed to the Chairman of the

[1] Proposal of draft article by Hermod Lannung, 30 August 1949, Collected Edition of the Travaux Préparatoires, 1975, Vol. I: 180-182.

Committee of Ministers, he noted "the need for an examination of the problem of the wider protection of the rights of national minorities, with a view to a more precise definition of the rights of these minorities".[2] In November 1950, the ECHR was then adopted with a discreet reference to minorities in Article 14, on the prohibition of discrimination in the enjoyment of the rights guaranteed in the Convention.

Without going at this stage into too much detail on the scope of Article 14, we can simply recall that the European Court of Human Rights (henceforth the Court) initially established its thesis on the accessory nature of Article 14 in the ***Belgian Linguistic Case***. This was so while still allowing, the Court argued, for situations where a substantive provision (e.g. Article 8 on the right to respect for private and family life or Article 11 on freedom of assembly and association) may be found to be violated ***in conjunction with*** Article 14, even though no violation of the provision in question could be established. The Court also set down the requirements for a 'permitted distinction' i.e. legitimate aim, objective justification, and proportionality.[3]

The Legal Committee pursued its efforts for substantive minority protection in the period from 1950 to1968, but met with the opposition of the Committee of Ministers. This era was followed by a limited discussion of minority issues by the European Commission and Court of Human Rights, in the period from 1968 to 1992 (see below). Towards the end of this period, the efforts of the Legal Committee were reinforced through input from the so-called 'Venice Commission' (formally the European Commission for Democracy through Law), the Parliamentary Assembly and the Standing Conference of Local and Regional Authorities of the Council of Europe.

It may therefore be argued that we can look upon the whole period from 1949 to 1992 as a period of transition leading to the adoption in 1992 of the European Charter for Regional or Minority Languages,[4] and in 1994 of the Framework Convention for the Protection of National Minorities.[5] It could equally be argued that the early case law of the European Commission and Court of Human Rights with regard to

[2] Collected Edition of the Travaux Préparatoires, 1975, Vol. V: 40.
[3] Interestingly enough the criteria are most clearly identified by the dissenting judges. See ***Belgian Linguistic Case***, ECHR, Ser. A, No. 6, 1968: 89-90. This adds to the argument put forward implicitly in the present article concerning the value of dissenting opinions as vital elements in the interpretation of the relevant provisions of the Convention.
[4] ETS 148, hereinafter 'Language Charter'.
[5] ETS 157, hereinafter 'Framework Convention'.

minorities, notably the above-mentioned *Belgian Linguistic Case*,[6] was an argument that could be employed at the time to postpone the work of standard-setting for minorities. The hope was that the Court would be able to address the needs of minorities sufficiently through the medium of the prohibition of discrimination as found in the ECHR (Spiliopoulou Åkermark 1997: 197-246). We will return to the case law of the Court in more detail below.

Since the mid-1990s, the activity of the European Court of Human Rights has steadily increased. There are a number of reasons which have prompted this, two of which are paramount and interlinked:

1) The ratification of the ECHR and its protocols by a large number of states in Central and Eastern Europe, where there are a large number of minorities and minority concerns, but also a tradition of affirming the distinctiveness of 'nationalities'; and

2) The adoption of the Framework Convention and Language Charter, as mentioned above.

One should, however, emphasize at this point that the recent case law of the European Court of Human Rights does not deal exclusively with the situation of minorities in the states of Central and Eastern Europe. Several cases concerning Jehovah's Witnesses and Muslims in Greece, and Jews in France, for example, may also be mentioned.[7] Indeed, as we shall see later, much discussion in the Court has recently centred on the rights and living conditions of Gypsies in the United Kingdom.[8]

II. Protocol No. 12 in the Light of Recent Case Law

On 26 June 2000, the Committee of Ministers of the Council of Europe adopted Protocol No. 12 to the European Convention introducing a general prohibition of discrimination:

[6] ECHR, Ser. A, No. 6, 1968.

[7] Without providing an exhaustive list of all related cases, here I mention only those cases that I have found of particular interest in the recent evolution of the case law of the Court. With regard to Greece see *Serif v. Greece*, Reports of Judgments and Decisions 1999-IX and *Thlimmenos v. Greece*, Reports of Judgments and Decisions 2000-IV. On France, see the case *Cha'are Shalom Ve Tsedek v. Franc*e (Application no. 27417/95), Judgment of 27 June 2000. The two last-mentioned cases will be discussed in the present text.

[8] In the present text I use the term 'Gypsy' rather than the widely accepted and preferred term 'Roma' simply because that is the term used in the case law itself.

Article 1 – General prohibition of discrimination

1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, *association with a national minority*, property, birth or other status (emphasis added).

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

As of 28 August 2002, that is, more than two years after adoption, Protocol No. 12 has been ratified by only two states (Cyprus and Georgia), while 27 other states have signed the document.[9] However, in order to enter into force, the Protocol requires at least ten ratifications.

Protocol No. 12 was designed to deal mainly with the problem of the non-autonomous nature of Article 14, i.e. the necessity of a link to a substantive provision in the Convention. However, in *Thlimmenos v. Greece*, following the thrust in its earlier case law, the Court explained that the application of Article 14 does not presuppose a breach of one or more of any such provisions and *to this extent it is autonomous*. Instead, for Article 14 to become applicable *it suffices that the facts of a case fall within the ambit* of one or more substantive provisions of the Convention or its Protocols.[10] The applicant, a Jehovah's Witness, had been convicted for refusing to wear a military uniform. With this particular case, the Court found, in its Grand Chamber Judgment, that the refusal to register the applicant as a chartered accountant as a result of his conviction came within the 'ambit' of Article 9 (freedom of religion). This was argued to be the case even though the Convention does not guarantee the right to work or access to a particular profession. As a consequence, it here seems that the Court held a liberal stand as to the scope of applicability of Article 14 (see, for example, a similar argument on the autonomous but complementary nature of Article 14 in van Dijk and van Hoof 1998: 716). With regard to the obligations of states on the basis of Article 14, the Court went even further and found the following:

[9] Information available at http://conventions.coe.int/.

[10] *Thlimmenos v. Greece*, Application No. 34369/97, Judgment 6 April 2000, para. 40 (emphasis added).

> The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification …. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is *also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*.[11]

The Court did not find it necessary to examine whether the impositions of heavy sanctions on conscientious objectors to military service may, in itself, infringe Article 9, nor whether it amounted in itself to indirect discrimination prohibited by Article 14.

In other words, the Court seems here to be doing two things: firstly, it is shifting the burden of proof from the applicant to the respondent state. The applicant needs to argue only that the complaint concerns significantly different situations, which are treated similarly. It is then up to the state to prove that the undifferentiated treatment has a legitimate aim, which can be justified as objective and proportionate. Secondly, and perhaps more importantly, the Court is arguing that the Convention imposes positive obligations on the basis of the prohibition of Article 14, which is otherwise usually perceived as a primarily negative obligation. The assumption is that different situations should be treated differently.

In this particular case, a differentiated treatment would entail the introduction of exception clauses in national legislation. The Court said: "The State did so [i.e. violated the provisions of the Convention] by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants" (para. 48 of the Judgment). This is indeed a major step taken by the Grand Chamber of the Court in the interpretation of Article 14. In part, it addresses also the issue of indirect discrimination, which has been largely left outside the scope of the concept of discrimination in the jurisprudence of the European Court of Human Rights. Using the *Thlimmenos* case as a starting point, one may therefore be tempted to argue that Protocol No. 12 is unnecessary for addressing the concerns of minorities in the scope of the work of the European Court of Human Rights.

[11] *Thlimmenos v. Greece*, Application No. 34369/97, Judgment 6 April 2000, para. 44 (emphasis added).

The picture is, however, modified if we take a look at one of the very recent judgments of the Court, namely *Podkolzina v. Latvia*.[12] In its Chamber Judgment, the Court found that the procedure followed in the applicant's case, in the determination of language proficiency for the purpose of eligibility for election, was incompatible with the requirements of fairness and legal certainty. As a consequence, the Court held – unanimously – that there had been a violation of Article 3 of Protocol No. 1. The Court did not proceed in an examination of the possible discriminatory indirect effects of the harsh language requirements in Latvian electoral legislation, nor did it examine whether the legislation had been used in a discriminatory way in this particular case. The Court noted instead that it had serious doubts as to the distinction made between Ms Podkolzina and other candidates, but did not find it necessary to examine a possible violation of Article 14.

As it has often done before, the Court concluded that the issues are the same as those raised under Article 3 of Protocol No. 1 and that it did not deem it necessary to examine Article 14 separately. Neither did it address the argument made by the applicant that the requirement of excellence (so-called 'third-level knowledge') in the Latvian language was disproportionate to the aim it pursued, namely the well-functioning of the parliament. While this argument is at the very heart of the whole issue of language requirements with regard to minorities, the Court nevertheless chose not to address it.[13] In line with previous jurisprudence, the Court accepts the theory of a 'wide' margin of appreciation in electoral matters (in the Podkolzina Judgment, in French, the Court repeatedly uses the adjectives 'grande' and 'large' (See further Yourow 1996 and Spiliopoulou Åkermark 1997: 218)). In this case, there was no discussion as to a possible obligation of treating different situations in a differentiated manner. In other words, and as a first conclusion, there seems to be an uncertainty with regard to the reasons for the decision of the Court to examine, or not, a possible violation of Article 14. As we will see, this uncertainty persists in recent cases of the Court concerning the nexus of Article 11/Article 14 and Article 8/Article 14.

[12] Affaire Podkolzina c. Lettonie, Requête no. 46726/99, Arrêt 9 April 2002. (At the moment, the Judgment is found only in French. All translations in the present text are the responsibility of the author.)
[13] Ibid., para. 30, 36 and 42.

III. The Legal Questions Raised

The above account provides a background to the legal questions that will be examined in the present article: since article 14 is not an independent provision, or is only a complementary provision, it may be asked to what extent it has been used by the Court with regard to questions affecting minorities? Has the Court referred to the ground of "affiliation to a national minority" in its case law? In conjunction to which substantive articles has Article 14 been used in minority related cases? Which are the "legitimate aims" put forward by states and accepted or discarded by the Court as a basis for permissible distinctions in situations concerning minorities? How has the Court addressed issues of proportionality in this context? What is the relationship between the ECHR and the Framework Convention and Language Charter of the Council of Europe according to the Court? Finally, can we expect that the protection of minorities in Europe will be enhanced through the application of this new protocol?

IV. Methodological Questions

At this point, there seems to be a need to make a methodological choice. There are two ways in which the above questions can be addressed. One option is that of briefly summarizing, more or less exhaustively, all cases concerning minorities. It would, however, be impossible to do an in-depth analysis, especially in the space available, of the issues raised above if one were to follow this method, and particularly given that the number of cases concerning minorities has accelerated rapidly since the mid-1990s. In addition, other authors have already provided excellent overviews of this kind in recent years (e.g. Gilbert 2000, 2001 and 2002).

The other possible avenue to take is that of limiting the examination to a few areas of concern to minorities, and trying to look in detail at the reasoning of the Court, in order to draw some conclusions of a more general character, at least with regard to the examined fields. Since we have already touched upon the rather incoherent approach of the Court in the examination of Article 14, this more restricted method is here considered wiser, in order to minimize the potential impact of incoherence. We will therefore choose two areas where the Court in recent years (i.e. since the mid-1990s)

has had before it a number of (more or less) similar cases related to the rights of minorities. The two areas chosen are:

1. *Registration and recognition* of minorities and minority institutions. The issues raised here fall mainly within the scope of Article 11 (freedom of assembly and association) but often relate to Article 6 (right to fair trial), Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of expression) taken alone and together with Article 14 (prohibition of discrimination).

2. *Right to respect for a traditional way of life* as an aspect falling within the right to private and family life guaranteed in Article 8 of the Convention as such, and in conjunction with Article 14.

Examining several similar cases in a narrowly defined subject area permits us to draw some more generalized conclusions with regard to the scope of the protection offered for minorities by the European Convention of Human Rights. Another reason for choosing the above two aspects is that, notwithstanding the critique of the public/private distinction by, for example, feminist critical scholars, the first aspect falls mainly in the 'public sphere' while the second touches rather upon issues in the realm of the 'private sphere'. We will therefore examine whether there is any difference in the position of the Court depending on the public/private variable. The case law will first be presented briefly in chronological order, after which there follows a discussion of the legal questions raised above.

However, before that, another limitation in the present examination must be pointed out. That is to say, the limitation inherent in the choice of cases examined is that of dealing with so-called 'old' or 'traditional' minorities, i.e. rather than addressing the issues of 'recent' minorities, or immigrants. Nevertheless, it is important to underline that cases concerning, for example, discrimination of immigrants have a bearing in our field of enquiry, as well as that the line between 'old' and 'new' minorities is not a rigid one.[14]

[14] See for instance the admissibility decision (15 February 2000) of the Court in a case concerning the use of the Finnish language in criminal proceedings in Sweden (*Lagerblom v. Sweden*, application no.

V. Registration and Recognition of Minorities and Minority Institutions

Under the present heading we will examine case law in two subgroups. First cases are presented concerning minority organizations, including political parties. It may be noted that two of the cases analyzed below *Refah Partisi and others v. Turkey* (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) and *Gorzelik and others v. Poland* (Application no. 44158/98) were both decided in 2001 by Chambers of the Court and are now pending for examination by the Grand Chamber (after referral according to Article 43 ECHR). It is here argued that this is a positive development since the two cases raise principal issues, are complex, and, especially with regard to the *Refah Partisi* case, created a schism in the Court Chamber with a four against three vote decision and a lengthy joint dissenting opinion. The other cases discussed within this first subgroup are: *United Communist Party of Turkey and others v. Turkey* (Reports of Judgments and Decisions 1998-III), *Freedom and Democracy Party (ÖZDEP) v. Turkey* (Reports of Judgments and Decisions 1999-VIII) and *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (Applications No. 29221/95 and 29225/95 decided on 2 October 2001.

This first subgroup is followed by a somewhat briefer discussion of cases concerning religious institutions, namely the case of the *Canea Catholic Church v. Greece* (Reports of Judgments and Decisions 1997-VIII), *Cha'are Shalom ve Tsedek v. France* (Application No. 27417/95 decided on 27 June 2000) and *Metropolitan Church of Bessarabia and others v. Moldova* (Application No. 45701/99, decided on 13 December 2001).

In the cases of the United Communist Party of Turkey (TBKP) and ÖZDEP the Court had to deal with the dissolution by the Constitutional Court of Turkey of parties shortly after their formation in 1990 and 1992 respectively. Both parties had references in their programmes to the Kurdish problem and Kurdish nation even though the programmes only referred to peaceful and democratic solutions to the issues at stake. The respondent argued that the interference pursued the legitimate aims of ensuring national security, public safety and territorial integrity as well as

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26891/95). The applicant had settled in Sweden in the 1980s but argues, *inter alia*, on the basis of the numerous Finnish minority living in Sweden.

protecting the rights and freedoms of others. The Court's reasoning is based on the importance of political pluralism (see para. 57-61 in the TBKP Judgment, emphasis added):

> Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public *the situation of part of the State's population* and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. … Admittedly, it cannot be ruled out that a party's political programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the party's actions and the positions it defends. In the present case, the TBKP's programme could hardly have been belied by any practical action it took, since it was dissolved immediately after being formed and accordingly did not even have time to take any action. ... Regard being had to all the above, a measure as drastic as the immediate and permanent dissolution of the TBKP, … is disproportionate to the aim pursued and consequently unnecessary in a democratic society (emphasis added).

With regard to the argument on terrorism, the Court underlined in the ÖZDEP case that the burden of proof is with the respondent state. The government had failed to establish in a convincing manner how the passages in issue in ÖZDEP's programme could be regarded as having exacerbated terrorism in Turkey (para. 46-47 in the ÖZDEP Judgment). For those reasons, the Court found a violation of Article 11 of the Convention and, following its usual practice, found it therefore "unnecessary" to examine claims under other provisions of the Convention (including Article 14). It is unclear whether the wording used in paragraph 62 of the TBKP Judgment implies that the Court might have examined other claims (including on the basis of Article 14), had the applicants insisted on them.

One can see a continuation of the reasoning in TBKP and ÖZDEP in the Court's Judgment in the *Stankov case* (*loc. cit.*) two years later. The Court qualifies here the limits of democratic pluralism (para. 90, 97 and 98 of the Judgment):

> An essential factor to be taken into consideration is the question whether there has been a call for the use of violence, an uprising or any other form of rejection of democratic principles …. Where there has been incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression …. The Court reiterates, however, 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 ….

Therefore, an automatic reliance on the very fact that an organization has been considered anti-constitutional – and refused registration – cannot suffice to justify a practice of systematic bans on the holding of peaceful assemblies, the Court said. In the present case, the Court emphasized the necessity to examine the possibly varying perceptions and ideas existing within one and the same organization or political party. Isolated extremist members or sporadic incidents are not sufficient as proof of incitement to violence, armed resistance or other public order threats justifying sweeping measures. Also in this case, the Court found a violation of Article 11 and did not discuss issues under Article 14. This is so, even though the facts before it included elements of potential discriminatory practice, since the holding of other commemorative events had been permitted at the same place and date as the applicants had wished. The Court noted in paragraph 109 of the Judgment that the facts disclose a difference in treatment: "Despite the margin of appreciation enjoyed by the Government in such matters the Court is not convinced that it was not possible to ensure that both celebrations proceeded peacefully either at the same time or one shortly after the other". However, this did not urge the Court to proceed to a separate examination of Article 14.

Up to this point, we have merely outlined some arguments as to whether Article 14 should have a more prominent position in the application of the European Convention by the Court, but we have not put forward any major critique of the reasoning and actual outcome in the Judgments presented here. This is, however, the case with regard to the position of the Court in ***Refah Partisi v. Turkey***, decided in 2001 (***loc. cit.***). The case concerns the dissolution of the Islamic Welfare Party (Refah partisi) by the Turkish Constitutional Court in January 1998 at a time when it had nearly a third of the seats in the Turkish Grand National Assembly and almost 15 years after its foundation. The decision of the Turkish Constitutional Court was based on the importance of secularism as a fundamental principle of the Turkish State and as a guarantee of democracy. The main issue, said the majority of the Court, was "the question whether the Refah party had become a 'center of anti-secular activities' and a political group aiming at the installation of a theocratic regime" (para. 66 of the Judgment). The Court took further the stand that "Refah's proposal that there should

be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement" (para. 70). This would entail, implied the Court, a violation of Article 14, since such a model cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and, on the other, the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs. As a result of this reasoning, the Court accepted the argument of the state as to the "legitimate aims" pursued by the interference as well as the proportionality of that interference. It did not find a violation of Article 11 and it did not examine the alleged violation of Article 9, 10, 14, 17 and 18 of the Convention "as their complaints concern the same facts as those examined under Article 11" (para. 85 of the Judgment). The decision on Article 11 was not unanimous (four votes to three), while the decision on the examination of the other provisions was unanimous. As already mentioned, the case is now pending before the Grand Chamber.

Starting from this last issue of the relevance of other provisions in the ECHR, but focusing at present only on Article 14, it remains unclear why the Court found that the issues under Article 14 had been dealt with sufficiently through the examination of facts under Article 11. In not finding a violation of Article 11, one would expect at least a discussion of the acceptability of different answers to essentially the same questions as those encountered earlier by the Court in the cases of the Turkish Communist Party and ÖZDEP, which have been discussed above. It does, however, become very much a question of evaluation of evidence. Why does the Court in the ***Refah*** case seem to accept a lower degree of evidence? If the Court, through its earlier jurisprudence, 'imposes' on states a certain position – in this particular case condemning the dissolution of political parties in the name of ***prevention*** of harm to the democratic system – one would at least expect some reasoning as to why prevention is accepted, presumably as an exception, in the case at hand. For, surely, the Court itself must be guided by the prohibition of discrimination if it is to continue enjoying a high degree of legitimacy. This is, indeed, the main argument of the dissenting judges in the final paragraphs of their joint opinion. They repeat, for this reason, the earlier phraseology of the Court that "one of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through

dialogue, without recourse to violence, *even when they are irksome*" (emphasis added).

One can agree in principle with the reasoning of the Court with regard to what can been termed 'inter-culturalism', i.e. the co-existence and mutual respect necessary in a democratic society, as opposed to 'multi-culturalism', i.e. the parallel, but separate, existence of several cultures, religions, traditions, and groups in one state.[15] Interestingly, the dissenting judges did not find it necessary to examine the "precise nature or effect of the multi-juridical society" since their argument was precisely that evidence was insufficient as to the actual content and structures of such a model. This then leaves open the question whether a "multi-juridical society" as such violates Article 14 or not, and it will be of interest to see whether the Grand Chamber judgment will pronounce anything on this issue. One argument certainly is that the conclusion of the Court on the *Thlimmenos* case, saying that different situations should be treated differently, is based on *a case-by-case examination of different individual situations*. Creating, therefore, religiously or culturally or otherwise collectively oriented solutions does not satisfy the requirement of individual examination. This of course begs the question of the adequacy of liberal individualism in Europe and the world of today, where different individuals, different groups and different views meet. Finally, the bottom line in this case is the rather philosophical and political question: should democracy be allowed to abolish itself if it is done in a non-violent manner? My conclusion is that the international legal system, both in terms of human rights documents, the jurisprudence of the European Court of Human Rights and in terms of the United Nations Charter does not permit anticipatory or preventive sanctions and actions against individuals, groups or states. After all, the applicants in this particular case had not been convicted of any crime, as rightly argued by the dissenting judges.

The same type of issues are very much at stake in the case *Gorzelik v. Poland* (*loc. cit*.) which has recently been brought before the Grand Chamber, after having been decided unanimously by a Chamber (Fourth Section) of the Court. The applicants complained that the Polish authorities had arbitrarily refused to register their association under the name of 'Union of People of Silesian Nationality'. The Court

[15] The terms 'inter-culturalism' and 'multi-culturalism' are inspired by the notions as used by Asbjörn Eide as reflected in many of his reports for the Working Group on Minorities of the UN Sub-Commission on the Promotion and Protection of Human Rights.

did not find that the refusal was a disproportional interference amounting to a violation of Article 11 of the Convention. The reasoning is built on the following four-step logic:

1. "Democracy does not simply mean that the views of a majority must always prevail" (for instance on the issue of what is to be defined as a 'minority', author's note. See para. 57 of the Judgment);
2. While the Court found a "lacuna in the law" in that persons belonging to a minority could be recognized as such only through bilateral treaties, or through the procedure for the registration of associations, a procedure not designed for that purpose, the Court did not find that that fact "in itself had consequences for the applicants' rights under Article 11" (para. 62-63).
3. The name of the association proposed by the applicants, and their refusal to compromise on this issue, "*gives the impression* that *in the future* the members of the association *might*, in addition to the pursuit of their objectives expressly set out in their programme, aspire to stand in elections" (para. 64, emphasis added).
4. Referring to the theory of the 'wide margin of appreciation' of states in electoral matters, and somewhat contradicting itself when saying that the Court examines this margin "rigorously", the Court concludes that "it was reasonable on the part of the authorities to act as they did in order to protect the electoral system of the State" (para. 58 and 66).

The logic summarized above shows the inherent contradiction between, on the one hand, steps 1 and 2 and, on the other, the conclusions reached by the Court in steps 3 and 4. The Court accepts (again) the preventive measures of the Polish state on rather loose grounds and does not require any substantive evidence as to how an eventual 'abuse' of election legislation would jeopardize the entire electoral system of the state. It is precisely on this point that discrimination issues come into the picture, something addressed by the government and the applicants, but not discussed by the Court. The government argued that the registration of the applicants' association would have an "adverse" effect on the rights of "other ethnic groups in Poland". The argument of the government in this section (para. 41) is as follows:

> Had the Silesian ethnic group acquired the status of a national minority through the procedure for the registration of their association, the principle of equality before the law would have been infringed. Other ethnic groups of Polish citizens, for instance Highlanders, Kashubians or Mazurians, would evidently have been discriminated against.

The applicants asked the Court to reject the government's argument that the interference in question had pursued the aims of upholding the principle of equality before the law and of preventing discrimination against other ethnic or regional groups. In their view, "anticipating a situation where members of other ethnic minority groups would be discriminated against depended on additional prerequisites. First, those minorities would have had to declare aspirations similar to those of the Union of People of Silesian Nationality. Second, their aspirations would have had to be denied".

In its evaluation of the arguments of the parties, the Court does not discuss the point on non-discrimination. The question links to the issue of the structures and methods of recognition of minorities in Poland. When discussing discrimination what is the relevant comparison? Should we compare the already recognized groups (through for instance bilateral agreements, registration of associations or in the report recently submitted by Poland to the Advisory Committee monitoring the Framework Convention on National Minorities[16]) with those not recognized? Or with the majority population? In this sense, the argument of the government does not seem valid. Or should we compare non-recognized minorities only with other non-recognized minorities (see reference to Highlanders, Kashubians and Mazurians in the argument of the government in paragraph 41)? In addition, for what purpose are we comparing? With regard to the recognition of certain privileges in election legislation? Or with regard to the possibility to be recognized as a minority group? If the questions are seen as linked, as they indeed seem to be in the setting of Polish legislation, the refusal to be recognized as a minority may entail discrimination directed against this concerned group in comparison to other recognized groups with respect to election privileges. The Court has long ago asserted that the granting of privileges to certain individuals, groups or institutions is not a violation of the Convention if it is done in a non-discriminatory way. This was asserted already in the ***Belgian Linguistic case***

[16] The report of Poland was submitted in July 2002 and can be found at the website of the Advisory Committee on the Framework Convention on National Minorities of the Council of Europe: http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/StateReports/Toc.htm

mentioned above and has been repeated several times later on (Spiliopoulou Åkermark 1997: 23-28 and 207-208). It is also at the heart of the conclusion of the Court in the case of ***Thlimmenos v. Greece*** which has also been discussed above.

In recent years, the Court has had to tackle issues of great relevance to minorities in a number of cases concerning religious institutions. In ***Canea Catholic Church v. Greece*** (***loc. cit.***) the Court found a violation of both Article 6 and Article 14 taken together with Article 6. The wording of the argument of the Court implies that the applicants succeeded in providing evidence about the discriminatory practice (through comparisons with the Greek Orthodox Church and the Jewish community) while the government failed to provide the Court with an "objective and reasonable justification for such a difference of treatment" (para. 47 of the Judgment).

In ***Cha'are Shalom ve Tsedek v. France*** (***loc. cit.***) the Court did not find a violation of Articles 9 or 14 and the two provisions were examined together. The case concerns in effect a situation of a minority within a minority. The applicant association, whose arguments were endorsed by the Commission, is an Orthodox Jewish liturgical association wishing to secure ritual slaughter according to the standards of this particular conviction, standards not satisfied – in their view – by the ritual slaughter performed by 'mainstream' Jewish organizations in France under the umbrella of the Jewish Consistorial Association of Paris (ACIP). The applicant association argued that the fact that the French state did not grant them authorization for ritual slaughter violated Article 9 of the Convention as well as Article 14 since such authorization had been granted to the ACIP. As already discussed earlier with regard to the ***Refah Partisi*** and the ***Gorzelik*** cases, the Convention does not guarantee as such the right of minorities to be recognized. However, if recognition and privileges have been granted to one religious group, church, conviction or other minority institution, this should be done on a non-discriminatory basis. The Court confirmed that ritual slaughter comes within the ambit of the right to religion and it pronounced that "by establishing an ***exception*** to the principle that animals must be stunned before slaughter, French law gave practical effect to a ***positive undertaking*** in the State's part intended to ensure ***effective*** respect for freedom of religion" (para. 76, emphasis added). The Court found that the only difference between ritual slaughter as performed by Cha'are Shalom ve Tsedek and ACIP lies in the thoroughness of the examination of the slaughtered animal's lungs after death (para. 79) and that so called 'glatt' meat could be and was imported from Belgium. Mainly for those reasons the Court did not find an

interference with Article 9 (with twelve votes to five). With regard to Article 14 the majority of Judges (ten votes to seven) found that the difference of treatment (between the applicant association and ACIP) was "limited in scope", pursued a legitimate aim (protection of public health and order) and was proportional to the aims sought (para. 84 and 87). The dissenting judges put the emphasis on issues of discrimination rather than the possible interference with the freedom of religion (see section 2 in the joint dissenting opinion). They pronounced some very critical and important principles, which I find justified to reproduce as such:

> The fact that this movement [i.e. Cha'are Shalom ve Tsedek. Author's note] is a minority within the Jewish community as a whole is not in itself sufficient to deprive it of the character of a religious body. …
>
> We certainly do not disregard the interest the authorities may have in dealing with the most representative organisations of a specific community. The fact that the State wishes to avoid dealing with an excessive number of negotiating partners so as not to dissipate its efforts and in order to reach concrete results more easily, whether in its relations with trade unions, political parties or religious denominations, is not illegitimate in itself, or disproportionate. … We … do not see how granting the approval in question could have threatened to undermine public order. …
>
> While we accept that States enjoy a margin of appreciation in this area, we observe that in the same judgment [author's note: this refers to Manoussakis and Others v. Greece, Reports of Judgments and Decisions 1996-IV] the Court went on to emphasise that in delimiting the extent of the margin of appreciation concerned it had to have regard to what was at stake, namely the need to secure true religious pluralism, which is an inherent feature of the notion of a democratic society ….
>
> We consider that similar reasoning is applicable in the present case. In our view, withholding approval from the applicant association, while granting such approval to the *ACIP* and thereby conferring on the latter the exclusive right to authorise ritual slaughterers, amounted to a failure to secure religious pluralism or to ensure a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Here again we have the core issue of pluralism, this time of a religious character. The dissenting judges reflect a justified concern about the neutrality and objectivity of the state in its relation towards various religious organizations and convictions. This theme comes again in the case of the *Metropolitan Church of Bessarabia and others v. Moldova* (*loc. cit.*). The Court found that the refusal to recognize the applicant church was disproportionate to the legitimate aims pursued and therefore amounted to

a violation of Article 9. With regard to the alleged violation of Article 14, the Court said that the allegations amounted to a "repetition of those submitted under Article 9" and did not examine them separately. In addition, the Court found a violation of Article 13 of the Convention (right to an effective remedy). It is clear in this case that, as with the hesitant position of the Court avoiding to discuss who is a minority and who is not, the Court avoids taking a stand on the question of whether the applicant church is a new denomination or a schismatic group (para. 132-133). Even though one may understand the doubts of the Court as to whether it is possible and appropriate for the Court to take such a stand, one may also ask how it is possible to evaluate an alleged discrimination without at least discussing whether the Court is dealing with comparable and similar, or, completely different situations. The whole logic of the prohibition of discrimination is based on such comparisons.

VI. Respect for a Traditional Way of Life

Article 8 ECHR protects the right to private and family life. One of the questions raised originally many years ago before the Commission was whether the scope of this right also covers a right to respect for a traditional way of life.[17] It was, however, first in the mid-1990s that the Court started receiving several applications relating to this issue. In 1996, the Court decided on the application of *Buckley v. the United Kingdom* (Judgment of 25 September 1996, Reports of Judgments and Decisions, 1996-IV). Ms June Buckley, a gypsy woman, wished to live in a caravan on land which she herself owned. She had applied for planning permission, but her application was rejected on the grounds that adequate provision had been made for gypsy caravans elsewhere and that road safety and "the open quality of the landscape" required the restriction of planning permissions. The applicant claimed that the designation system under the 1968 Caravan Sites Act and the criminalization of "unauthorized camping" under the 1994 Criminal Justice and Public Order Act discriminated against gypsies by preventing them from pursuing their traditional lifestyle. The Commission found a violation of Article 8 and did not examine the claims under Article 14. The Court did not find a violation of Article 8 even though

[17] *G. and E v. Norway*, Applications 9278/81 and 9415/81, DR 35, 1983, p. 30; *P. v. the United Kingdom*, Application No. 14751/89, DR 67, 1990, p. 264.

the case was found to be admissible on this point. The Court accepted again a wide margin of appreciation of the state in planning matters. The fact that there was here a collision of private and public interests does not seem to have posed problems in the argument of the Court. In any case, it was a considerable step that the Commission and Court asserted the position that the protection of a traditional lifestyle falls within the ambit of Article 8. With regard to Article 14, the Court found that it did not appear that the applicant was "at any time penalised or subjected to any detrimental treatment for attempting to follow a traditional gypsy lifestyle" (para. 59-60 and 88). The Court failed to look at the whole picture of provisions and practices of the relevant authorities, repeated imposition of fines on the applicant and a notorious inadequacy of available and acceptable caravan sites in many parts of the United Kingdom. For this reason, the Court was unable to establish any detrimental and discriminatory treatment of the applicant. However, one of the three dissenting judges, Judge Pettiti, concluded that "in the general context of Article 14 and Article 8 all of the applicant's complaints relate to the effect of the *de jure* and *de facto* measures, which in being discriminatory prevented respect for family life" (see also Sebok 2002). The case raises important gender issues, since almost all judges of the Court and members of the Commission failed to take into consideration the fact that Ms Buckley was a single mother of three children and that the sites she had been offered were unsuitable for her situation (Spiliopoulou Åkermark 2000: 69-73).

In January 2001, the Court decided upon five cases all relating to the same issues as in *Buckley*: *Chapman v. the United Kingdom* (Application no. 27238/95), *Beard v. UK* (no. 24882/94), *Coster v. UK* (no. 24876/94), *Lee v. UK* (no. 25289/94) and *Jane Smith v. UK* (no. 25154/94). I will here use the *Chapman* case as my point of reference, since it was in fact used by the Court as its pilot case. I will mainly concentrate on highlighting the points in the Judgment which develop the views of the Court as compared to the *Buckley* case. First of all, we note that the Court discusses the factual situation of the Roma in the United Kingdom in much more detail, drawing on a number of reports from other organizations such as the Organization for Security and Cooperation in Europe (OSCE) and the Advisory Council for the Education of Romany and Other Travellers (ACERT). The Court goes one step further, also as regards the obligations of the state to take positive action, even though it emphasized that "the fact of being a member of a minority with a traditional lifestyle different from that of the majority of a society does not confer an immunity

from general laws". The Court concludes that such a traditional lifestyle may have an incidence on the manner in which such laws are to be implemented (para. 96) and it concludes (in the same section, emphasis added):

> As intimated in the Buckley judgment, the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases …. To this extent there is thus a *positive obligation* imposed on the Contracting States by virtue of Article 8 to *facilitate* the gypsy way of life.

The Court was not prepared, however, to conclude that the statistically well-supported fact that there is a general lack of adequate and acceptable housing and camping facilities for Roma in the United Kingdom amounted to a violation of Article 8. The Court was not convinced, "despite the undoubted evolution that has taken place in both international law, as evidenced by the Framework Convention, and domestic legislations in regard to protection of minorities", that Article 8 can be interpreted to involve such "a far-reaching positive obligation of general social policy" being imposed on states (para. 98). It is clear that we are here in the middle of the "battlefield of the socialisation" of the European Convention of Human Rights (van Dijk and van Hoof 1998: 729-730, discussing "the socialising effect" of Article 14). There were seven dissenting Judges who found a violation of Article 8 since there was not an acceptable balance between, on the one hand, environmental and planning considerations and, on the other, the need to protect traditional lifestyles (section 4 of the joint dissenting opinion). They further refer to the reasoning of the Court in the *Thlimmenos* case as regards the obligation of states to treat differently persons whose situations are significantly different (section 8 of the opinion). For those reasons they concluded that their "view that Article 8 of the Convention imposes a positive obligation on the authorities to ensure that gypsies have a practical and effective opportunity to enjoy their rights to home, private and family life, in accordance with their traditional lifestyle, is not a startling innovation".

VII. Problems that Need to be Addressed

It has been argued that a number of problems arise in the application of Article 14 in cases concerning minorities, as well as in the application of the other substantive provisions of the Convention in such cases. In the following final reflections we focus mainly on problems related to discrimination assessments. First of all, there seems to be a degree of uncertainty as to when and why the Court actually proceeds to an examination of Article 14 violations. In general, the Court does not examine Article 14 violations if it has established a violation of another substantive provision. This is most likely explained through theories of procedural economy and expediency, aspects all the more urgent in times when the Court is overwhelmed by the burden of applications. However, it has been shown above that in some cases the Court chooses to proceed to an examination of Article 14, even though it has first found a violation of another substantive provision.

A related matter is that of the theoretical and practical consequences (for instance concerning procedural or compensation matters) as well as the advantages or disadvantages of the identification of multiple, cumulative violations by the Court. This would be particularly relevant to study in situations of so called 'multiple discrimination' (for a discussion of the concept, although predominantly from an American perspective, see Makkonen 2002).

In terms of issues of evidence, the Court, in order to proceed to an examination of discriminatory practices, requires apparently a thick set of statistical and narrative evidence. In addition to being a challenging task in itself for the applicants – especially in countries where statistical information is not collected regularly and with respect to various thematic areas of concern – there is here a potential tension between, on the one hand, the subjective experience and perception of the applicant as concerns the alleged violations and, on the other hand, the (perceived) objective and quantifiable proof requested by the Court. At this point, I agree with the views of the Commission in the ***Buckley*** case, discussed above. The Commission emphasized that the special circumstances of every individual applicant – and presumably also of every concerned group – and ***the importance of the right for him or her*** have to be taken into consideration when assessing the balance between the interests of the individual and the general interest. This position was later endorsed by the Court in its Judgment in the same case (para 76).

There is clearly a problem in the logic of the Court with regard to the whole issue of indirect discrimination (Gilbert 2002: 7). Indirect discrimination is not adequately dealt with by the Court, even though there is nothing in the text of the relevant provision which prohibits the expansion of the scope of the notion of discrimination to cover also indirect discrimination. This is clearly an approach accepted in Europe today as shown by the recently adopted European Union Directive 2000/43/EC (the so-called 'Race Equality Directive'). In this respect, the adoption of the 12th Protocol to the European Convention on Human Rights does not seem to offer a sufficient solution. The explanatory report to Protocol No. 12 confirms this impression.

Finally, there is the important and systemic question of the coherency of minority protection in the Council of Europe as a whole and the links between various documents. One aspect of this issue concerns the relationship between the regime of the European Convention on Human Rights and the Framework Convention on National Minorities touched upon by the Court in several recent cases, including the *Gorzelik* case and the *Chapman* case.

All those issues are raised before the Court more and more often. There are several cases concerning minorities currently pending (sitting as a Chamber and a Grand Chamber). For these reasons, coherency in the positions adopted will be crucial and the potential contribution of legal research is evident.

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