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CENTRE OF RESEARCH ON
INTERNATIONAL ORGANIZATIONS

ISSN: 2037-6006

CRIO PAPERS

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2009

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CRIO PAPERS NO. 5/2009

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ISSN 2037-6006

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(http://www.lex.unict.it/crio/criopapers.asp)

CULTURAL IDENTITY PROTECTION AND HUMAN RIGHTS

THE STRASBOURG CASE LAW

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Contents

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I. Introduction. The Protection of Cultural Identity, Cultural Diversity and Cultural Relativism in International Law

Since Margaret Mead wrote about cultural identity, a genuine, overwhelming flow of theories and ideas has taken the stage of cultural debate in occidental countries, trying to cope with the problem of culture diversity stemming from different cultural identities.

The fact that cultural identities should be protected and that cultural diversity is a source of richness rather than of chaos has become a well known and almost undisputable tenet. And that is why signs of protection of cultural diversity are being found in almost every legal order.

Still, in human rights treaties, the topic seems to be quite unknown, or rather neglected. Nevertheless, as we aim to show in this essay, examining international courts' case law one may well find the building blocks to construct the edifice of cultural identity protection even at international level[1].

The concept of cultural identity has not been exhaustively defined in international law[2]. Here we deal with the topic at the European level.

The Council of Europe has increasingly turned its attention to the protection of cultural identities, though the two main regional human rights instruments, i.e. the European Convention on Human Rights and Fundamental Freedoms[3] (hereinafter ECHR) and the European Social Charter[4] (ESC), do not contain provisions expressly devoted to cultural diversity issues.

Nevertheless, debates and negotiations have been conducted in this context to define some fundamental guarantees of minority rights, including questions on cultural identity protection.

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[1] See M. Iovane, *The Universality of Human Rights and the International Protection of Cultural Identity: Some Theoretical and Practical Considerations*, *International Journal on Minority and Groups Rights*, 2007, p. 231 ff.

[2] See Y. M. Donders, *Towards a Right to Cultural Identity*, Antwerp, Oxford, New York, 2002.

[3] The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on 4 November 1950 and entered into force on 3 September 1953. Its text has been amended according to the provisions of substantive and procedural Protocols. See at <http://www.coe.int>.

[4] The European Social Charter was signed on 18 October 1961 and entered into force on 26 February 1965. See at <http://www.coe.int>.

In recommendation no. 285 (1961) the Parliamentary Assembly recommended that the Committee of Ministers should consider including an article relating to the protection of national minorities in the Second Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms[5].

Following the Strasbourg conclusions on the Belgian Linguistic case (1968), the Committee of Government experts charged with the task of studying the question eventually held that there was no need to adopt specific provisions designed to guarantee minorities rights already covered by the Convention and its first Protocol.

As a consequence of the accession of Central and Eastern European States to the Organisation, further interesting proposals on cultural diversity issues were advanced to guarantee the protection of fundamental rights of those belonging to national minorities.

In 1990 a Parliamentary Assembly Recommendation (no. 1134) again recommended that the Committee of Ministers draw up a Protocol to the European Convention on Human Rights or a special Council of Europe legal instrument to protect the rights of minorities in the light of international principles requiring certain minimum standards of protection. A Committee of experts extensively examined the different proposals for an ad hoc convention on the protection of national minorities (including that of the Commission for Democracy through Law) and for an additional protocol to the ECHR, without reaching any agreed solutions.

The language question is another starting point for a regional approach concerning the protection of cultural identity standards. On 22 November 1992 the European Charter for Regional or Minority Languages was finally adopted as the first legal instrument in the field of minorities' cultural identity – related rights[6]. This convention, in force since 1 March 1992, contains a set of provisions concerning the use of regional and minority languages in social and cultural life, judicial procedures, relations with public authorities, as well as a monitoring procedure. It significantly

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[5] A draft of the Article was attached to the text of the recommendation: "Persons belonging to a national minority shall not be denied the right, in community with the other members of their group, and as far as compatible with public order, to enjoy their own culture, to use their own language, to establish their own schools and receive teaching in the language of their choice or to profess and practise their own religion".

The texts of Parliamentary Assembly's Recommendations are available at <http://www.assembly.coe.int>.

[6] See European Charter for Regional and Minority Rights, at: <http://conventions.coe.int>

contributes, with specific reference to language rights, to the development of a cultural identity standard of protection at regional level.

Later on, the 1993 Parliamentary Assembly's proposal (Recommendation no. 1201) for a new additional protocol to the ECHR on the rights of national minorities was eventually rejected[7].

Following the Vienna Declaration (Vienna Summit of 8-9 October 1993), the Committee of Ministers set up the ad hoc Committee for the Protection of National Minorities (CAHMIN) with the mandate of drafting a framework convention on the protection on national minorities and a protocol "…which complements the European Convention on Human Rights in the cultural field by provisions which guarantee individual rights, in particular for persons belonging to national minorities"[8].

Though the protocol was abandoned as a viable solution, because the idea prevailed that the ECHR contained sufficient elements for the protection of cultural diversity, the framework convention eventually reached the adoption stage.

The Framework Convention for the Protection of National Minorities[9], adopted on 1 February 1995 and entered into force on 1 February 1998, constitutes the first international instrument containing legally binding provisions on the protection of national minorities. It does not include a definition of "national minority". Rather, in Article 3 it incorporates the right for individuals belonging to a national minority to choose whether or not to be treated as a member of such minority.

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[7] For the text of Parliamentary Assembly's Recommendation no. 1201 see *Revue Universelle des Droits de l'Homme*, 1993, p. 189 ff. See also H. Klebes, *Projet de Protocole Additionnel à la CEDH sur le Droits des Minorités*, *ibidem*, p. 184 ff.

[8] See Vienna Summit Declaration, 9 October 1993, App. II, at <http://www.cm.coe.int>.

[9] The Framework Convention for the Protection of National Minorities, I.L.M. 351, 1995; available also at: <http://conventions.coe.int/treaty/en/Treaties/Html/157.htm>.

See H. Klebes, *The Council of Europe's Framework Convention for the Protection of National Minorities*, *Human Rights Law Journal*, vol. 16, No. 1-3, 1995, p. 92 ff.; F. Capotorti, *The First European Legislation on the Protection of National Minorities, Council of Europe. The Challenges of a Greater Europe*, Strasbourg, 1996, p. 147 ff.; S. Poulter, *The Rights of Ethnic, Religious and Linguistic Minorities*, *European Human Rights Law Review*, 1997, p. 254 ff.; G. Alfredsson, *A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures*, *International Journal on Minority and Groups Rights*, 2000, p. 291 ff.; K. Henrad, *Devising an Adequate System of Minority Protection*, The Hague, Boston London, 2000; G. Pentassuglia, *Minorities in International Law: an Introductory Study*, Strasbourg, 2002.

As the Explanatory Report to the Framework Convention confirms[10], the treaty's "programme-type provisions" mainly contain principles and objectives not directly applicable and leave the Member States a wide discretion as to their implementation.

Protection of cultural identity is not expressly mentioned by the Framework Convention. Rather, it seems to be considered a fundamental principle underlying the treaty's general rules on cultural rights, mainly in the field of language, education, religion[11].

As to the monitoring mechanism of the Framework Convention, the Secretary General and the Committee of Ministers of the Council of Europe play a central role in the supervision of the implementation of the Convention, the latter (being) assisted by an Advisory Committee of experts in the field of minorities and human rights[12].

What we've been stating till now with regard to cultural diversity protection in the Council of Europe system seems in line with legal developments in ECHR jurisprudence dealing with the cultural identity issues analysed below, though no prescription in the Convention and its Protocols seems, at first sight, to target the protection of cultural identity.

II. "Cultural Identity" Issues in the European Court of Human Rights' Jurisprudence

As shown above, cultural identity is not expressly mentioned in the European Convention of Human Rights, though racial, linguistic, religious, ethnic and national diversity are covered in principle by the non-discrimination clause under Article 14.

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[10] CoE Doc. Explanatory Report on the Framework Convention for the Protection of National Minorities, at <http://conventions.coe.int/Treaty/EN/Reports/Html/157.htm>.

[11] Several provisions contain guarantees directly referring to cultural identity, including non-discrimination rules, freedoms of peaceful assembly, association, expression, thought, conscience and religion, linguistic and educational rights. See Y. Donders, *Towards a Rights* cit., pp. 252-261.

[12] See Articles 24-25 of the Framework Convention. On the Convention monitoring system see G. Pentassuglia, *Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities – With Special Reference to the Role of the Advisory Committee*, *International Journal on Minority and Groups Rights*, 1999, p. 417 ff.

Nevertheless, it might be held that a general notion of "cultural identity" has been used by the Strasbourg institutions in an increasing number of cases dealing with various aspects of diversity and autonomy of individuals, such as religion, language, private life, education.

In this sense, "cultural identity" could be considered a comprehensive and rather disputed "judicial concept" which covers and summarises different spheres of individual life concerning mainly the collective dimension of the exercise of certain fundamental rights.

Arguably, in the ECHR framework, "cultural identity" is essentially a jurisprudential tool aiming to give substance to evolutive applications of conventional rights and to guide judges in the enforcement of the Convention as a living instrument to be applied in multicultural democratic societies.

The central question is to clarify whether and to what extent a comprehensive principle of respect for cultural identity can be considered "inherent" in the European Convention system.

A certain degree of "diversity" recognition seems in fact to be implied by the judicial application of several human rights provisions, while a right to difference is also directly implied in equality and non-discrimination principles. Moreover, it should be recalled that certain conventional guarantees, such as Articles 9 and 10, Article 2 of Protocol no. I, expressly allow some grounds of diversity by referring to specific aspects of the rights enshrined.

In this context, respect for cultural identity is likely to have a remarkable legal impact if taken as a guideline for the proper implementation of conventional guarantees relevant to the protection of cultural diversity.

Pluralism and respect for cultural identity are also closely related to the idea of a "democratic society" informing the European Convention. Cultural identity must be protected by States Party as an expression of that tolerance and pluralism which are the hallmarks of democratic societies[13].

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[13] On the interpretation of ECHR provisions see, *ex plurimis*, F. Matscher, *Methods of Interpretation of the Convention*, in R. St. J. Macdonald, F. Matscher, H. Petzold (eds.), *The European System for the Protection of Human Rights*, 1993, Dordrecht, p. 63 ff.; E. Kastanas, *Unité et diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, 1996 ; P. Pustorino, *L'interpretazione della Convenzione Europea dei diritti dell'uomo nella prassi della Commissione e della Corte di Strasburgo*, Napoli, 1998; P. Van Dooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droit de l'homme. Prendre l'idée simple au sérieux*, Bruxelles, 2001.

To see this in practice, we analyse now selected cases taken from Strasbourg case law.

A suitable starting point is the European Court's case law on the first-generation human rights of liberty, such as respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of association and freedom of education, but useful hints may also be drawn from the case law concerning non-discrimination.

European case law well illustrates the institutions' fairly positive attitude towards cultural expressions of diversity when hearing alleged breaches of individual human rights. Such expressions may be religious practices, minority traditions and ways of life, and language.

Thus, in their decisions, the Strasbourg institutions have outlined States' obligation of non-interference with, for instance, the autonomy of religious groups, minority rights, language rights and, more generally, the right to exercise cultural practices[14].

III.a. Selected Case Law on Respect for Private and Family Life

As stated above, the ECHR does not explicitly refer to cultural identity in its provisions.

Article 8 of the ECHR expressly guarantees "the right to respect for private life, family life…" and "home…", protecting individuals from arbitrary interference by public authorities[15].

Thus, in Strasbourg case law, respect for 'private life' implies non-interference with individuals' freedom to make particular choices on personal ways of life[16].

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[14] See M. Larralde, *La Convention européenne des droits de l'homme et la protection de groupes particuliers, Revue Trimestrielle des droits de l'homme*, 2003, p. 1246 ff.

[15] See G. Cohen-Jonathan, *Respect for Private and Family Life*, R. St. J. Macdonald, F. Matscher, H. Petzold (eds.), *The European System* cit., p. 207 ff.; J. A. Frowein, W. Peukert, *Artikel 8, Privat- und Familienleben, Europäische MenschenRechtsKonvetion EMRK-Kommentar*, Kehl, Straßourg, Arlington, 1996, p. 337 ff.; C. Russo, *Article 8 § 1* and V. Coussirat-Coustère, *Article 8 § 2*, L.-E. Petitti, E. Decaux e P.-H. Imbert (éd.), *La Convention européenne des droits de l'homme. Commentaire article par article*, Paris, 1999, p. 305 ff., p. 323 ff.; V. Z. Zencovich, *Art. 8, Diritto al rispetto della vita privata e familiare*, S. Bartole, B. Conforti, G. Raimondi (a cura di), *Commentario alla Convenzione europea per la tutela dei diritti dell' uomo e delle libertà fondamentali*, Padova, 2001, p. 307 ff.; C. Ovey, R. C. A. White, *Jacobs and White, The European Convention on Human Rights*, 3rd ed., Oxford, 2002, p. 217 ff.

Moreover, claims under Article 8 show that Contracting States must not only limit any interference in the private life of individuals, but they may also be required to take, in some circumstances, special measures in order to secure the enjoyment of those rights relating to the private sphere, striking a fair balance between the interests of the individual and those of the community. In this respect, they enjoy a wide margin of appreciation in pursuing the aims referred to in the second paragraph of the provision.

Moreover, the Strasbourg organs have provided a broad definition of 'home' under Article 8 of the Convention.

The issue of the protection of individuals' life choices has been brought before the European Court with regard to planning and enforcement measures imposed on Gypsy families in connection with the occupation of lands in caravans[17].

In Buckley v. United Kingdom[18], the applicant, a British citizen who lived in caravans following the Gypsy traditional lifestyle, was ordered by

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[16] In *G. and E. v. Norway* (joined applications no. 9278/81 and 9415/81), Decision of 3 October 1983, the European Commission, while holding that the building of a dam could constitute an interference with the private life (and the particular lifestyle) of the two Lapps claimants, declared the applications manifestly ill-founded and inadmissible for the State's measures were, *inter alia*, justified under Article 8, para. 2, as being in accordance with law, and necessary in a democratic society in the interest of the economic well-being of the country. According to the applicants, in the national context concerned "…they have met little understanding, but much discrimination…" and "they …will not only lose the land, but also their identity". Thus alleging that "…the Lapps, as a minority, are discriminated against, and that their rights have not been sufficiently protected". The Commission firstly considered that "…the Convention does not guarantee specific rights to minorities. The rights and freedoms set forth in the Convention are, according to Article 1 of the Convention, guaranteed to "everyone" within the jurisdiction of a High Contracting Party. The enjoyment of the rights and freedoms in the Convention shall, according to Article 14, be secured without discrimination on any ground such as, *inter alia*, association with a national minority". According to the Commission, while " the Convention does not guarantee any specific rights to minorities, … disrespect of the particular life style of minorities may raise an issue under Article 8…" as being "private life", family life" and "home".

See also the most recent case of *Noack v. Germany*, 46346/99, ECHR (Fourth Section) Decision of 25 May 2000. In the Court's conclusions on the inadmissibility of the application, the minority group identity was given some relevance.

The cases cited above and all cases before the European Commission and Court of Human Rights commented or mentioned following *infra* are available at <http://www.echr.coe.int/echr/> website.

[17] See K. Reid, *A Practitioner's Guide to the European Convention of Human Rights*, London, 2nd ed., 2004, pp. 248 ff., 323 ff.

[18] *Buckley v. United Kingdom*, ECHR Judgement of 25 September 1996.

local authorities to leave her own land because establishing residence in that area was contrary to planning regulations. She submitted there had been a violation of the right to respect for her private and family life and home, relying on Article 8 of the Convention.

According to the European Court, as to the rights contemplated under Article 8 of the Convention, the public authority's interference did not give rise to a violation since it was necessary in a democratic society to consider public safety, the economic well-being of the country, the protection of health and the protection of the rights of others. As Ms. Buckley had been offered an alternative site for her caravan in the same area, the Court found that "…Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest"[19].

With regard to the broad margin of appreciation accorded to the State authorities, the majority argued that it was due to the fact that town and country planning schemes involve a considerable amount of discretion[20].

In the light of the above, the Court concluded (by six votes to three) that there had been no violation of Article 8, since in the case at issue the national authorities had not exceeded their margin of appreciation[21].

Similar complaints under Article 8 ECHR concerning problems experienced by Gypsies, such as those about the planning and enforcement measures imposed on caravans' occupiers of lands without permissions, have arisen mainly in the United Kingdom[22].

See O. De Schutter, *Le droit au mode de vie tsigane devant la Cour européenne des droits de l'homme: droits culturels, droits des minorités, discrimination positive*, *Revue Trimestrielles des Droits de l'Homme*, 1997, p. 47 ff.

[19] *Buckley v. United Kingdom,* para. 81.

[20] *Buckley v. United Kingdom*, paras. 74-76.

[21] But see the partially dissenting opinion of Judge Lohmus and the dissenting opinion of Judge Pettiti. In the *Buckley* case (Application no. 20348/92), the European Commission had found that the lack of reasonable alternatives for the Gypsy family for the siting of their caravan, the refusal of planning permission on their own land and the consequent enforcement measures, constituted a violation of applicant's itinerant lifestyle as protected by Article 8 ECHR. See E. Comm. H. R., Decision of 3 March 1994, *Report* (31) of 11 January 1995.

[22] See *Chapman v. the United Kingdom* (Application no. 27238/94); *Beard v. the United Kingdom* (Application no. 24882/94); *Coster v. the United Kingdom* (Application no. 24876/94); *Lee v. the United Kingdom* (Application no. 25289/94); *Jane Smith v. the United Kingdom* (Application no. 25154/94).

In Chapman v. the United Kingdom[23], the European Court observed that, although an emerging international consensus amongst the Contracting States on the special need of minorities could be registered, this consensus was not "…sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation"[24].

The Court did not, however, go so far as to accept that "…Article 8 could be interpreted as implying for States … a far-reaching positive obligation of general social policy" (i.e. any "…obligation to make available to the Gypsy community an adequate number of suitably equipped sites…"[25].

Thus, it held there had been no violation, inter alia, of Articles 8 (by ten votes to seven) and 14 (unanimously) of the Convention.

However, the joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Stràžnická, Lorenzen, Fischbach and Casadevall, who voted for a finding of a violation of Article 8, deserves to be emphasized:

"3. Our principal disagreement with the majority lies in their assessment that the interference was "necessary in a democratic society". […]. In Buckley (…) it was stated that in principle national authorities … enjoyed a wide margin of appreciation in the choice and implementation of planning policies. However, in our view, this statement cannot apply automatically to any case which involves the planning sphere. The Convention has always to be interpreted and applied in the light of current circumstances (…). There is an emerging consensus amongst the member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (…), not only for the purpose of safeguarding the interests of the minorities themselves

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[23] *Chapman v. the United Kingdom,* ECHR (G. Ch.) Judgment of 18 January 2001. See F. Sudre, *A propos de l'autorité d'un « précédent » en matière de protection des droits des minorités. Observations sous l'arrêt Chapman*, *Revue Trimestrielles des Droits de l'Homme*, 2001, p. 905 ff.; F. Benoît-Rohmer, *En marge de l'arrêt Chapman c. Le Royame Uni (18 janvier 2001): la Cour de Strasbourg et la protection de l'intérêt minoritaire: une avancée décisive sur le plan des principes?*, *ibidem*, p. 999 ff.; D. Rosemberg, *En marge de l'arrêt Chapman c. Le Royame Uni (18 janvier 2001): l'indifférence du judge européen aux discriminations subies par le Roms*, *ibidem*, 2001, p. 1017 ff.

[24] Ibid., para. 94.

[25] Ibid., para. 98.

but also in order to preserve a cultural diversity of value to the whole community. This consensus includes a recognition that the protection of the rights of minorities, such as Gypsies, requires not only that Contracting States refrain from policies or practices which discriminate against them but also that, where necessary, they should take positive steps to improve their situation through, for example, legislation or specific programmes. We cannot therefore agree with the majority's assertion that the consensus is not sufficiently concrete or with their conclusion that the complexity of the competing interests renders the Court's role a strictly supervisory one (…). In our view, this does not reflect the clearly recognised need of Gypsies for protection of the effective enjoyment of their rights and perpetuates their vulnerability as a minority whose needs and values differ from those of the general community. The impact of planning and enforcement measures on the enjoyment by a Gypsy of the right to respect for his or her home, private and family life therefore has a dimension beyond environmental concerns. […].

In these circumstances, we find that the planning and enforcement measures exceeded the margin of appreciation accorded to the domestic authorities and were disproportionate to the legitimate aim of environmental protection. They cannot therefore be regarded as "necessary in a democratic society. […]".

Several cases have been brought by Gypsies before Strasbourg's organs claiming difference in treatment of conventional rights on the ground of their ethnic origin under Article 14 of the Convention.

Indeed a significant number of decisions relating to the protection of the rights of individuals belonging to particular groups or minorities have been adopted in relation to Central and Eastern Contracting States, which have large Roma populations[26].

In the case of Moldovan and Others v. Romania[27] the Strasbourg Court unanimously found a violation of Articles 8 and 3, and a violation of Article 6, § 1 on account of the length of the proceedings and of Article 14 taken in conjunction with Articles 6 and 8 of the ECHR.

[26] See, amongst others, *Assenov and Others v. Bulgaria*, ECHR Judgment of 28 October 1998; *Anguelova v. Bulgaria*, ECHR Judgment of 6 June 2000; *Nachova and Others v. Bulgaria*, ECHR Judgment of 6 July 2005.

[27] *Moldovan and Others v. Romania (no. 2)*, ECHR Judgment of 12 July 2005.

The applicants were Romanian nationals of Roma origins who alleged that they were victims of several breaches by the respondent State of its obligations under Articles 3, 6, 8 and 14 of the Convention, as a result of the destruction of their property during a riot on September 1993 and ensuing events.

As to issues relating to Article 8, in particular, the Court assessed the positive obligations inherent in an effective protection of private or family life and home, involving the adoption of measures designed to secure respect for these rights even in the sphere of relations between individuals.

It then stressed that

> "94. …the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention (…). A State may also be held responsible even where its agents are acting ultra vires or contrary to instructions (…).

It further considered that the applicants' living conditions (and particularly unsanitary environment in which they had to live) might have caused them a state of mental suffering, contrary to their human dignity within the meaning of Article 3 of the Convention.

Finally, with regard to the non-discrimination clause under Article 14 of the Convention, the Court concluded that the applicants were victims of discrimination by judicial bodies and officials due to their ethnic origins[28].

III.b. Freedom of Thought, Conscience and Religion

Respect for cultural identity has significant implications in the sphere of freedom of religion[29].

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[28] See paras. 136-140.

[29] See R. O' Dair, A. Lewis (ed.) *Law and Religion, Current Legal Issues*, 2001, vol. 4, p. 185 ff. And, generally speaking, on Article 9 see *Artikel 9, Glaubensfreheit*, J. A, Frowein, W. Peukert, *Europäische MenschenRechtsKonvetion* cit., p. 367 ff.; J. A. Frowein, *Article 9 § 1*, L.-E. Petitti, E. Decaux e P.-H. Imbert (éd.), *La Convention européenne des droits de*

In this context, Article 9 of the ECHR provides an extremely useful framework for the analysis of different expressions of cultural identity-related values through the protection of the forum internum and the right to the external manifestation of freedom of religion. In particular, the right to manifest one's religious belief offers the Strasbourg institutions an opportunity to identify and appreciate States' obligations relating to individual or collective forms of religious manifestations.

If the European Court has recognised, in general terms, that freedom of religion is a fundamental element of the "…identity of believers and their conception of life...",[30] it is mostly with regard to the collective enjoyment of religious rights that questions concerning the protection of cultural identity could emerge from the judicial interpretation.

The collective dimension of "religious cultural identity", according to Article 9 ECHR, cannot be challenged if related to the fundamental value of pluralism in the context of Contracting States' democratic societies.

a) Autonomy of Religious Communities

The autonomy of distinct religious groups implies, inter alia, the right to choose religious leaders and to determine the requirements for their appointment.

In several cases, the European Court has decided on Governments restrictions to the internal affairs of religious communities with regard to the appointment of Muslim leaders in Bulgaria and Greece.

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l'homme cit., p. 353 ff.; V. Coussirat-Coustière, *Article 9 § 2*, *ibidem*, p. 361 ff.; C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford, 2001; S. Lariccia, *Articolo 9, Libertà di pensiero, di coscienza e di religione*, S. Bartole, B. Conforti, G. Raimondi (eds.), *Commentario alla Convenzione europea* cit., p. 319 ff.; B. Conforti, *La tutela internazionale della libertà religiosa*, in *Rivista internazionale dei diritti dell'uomo*, 2002, p. 269 ff.; J.-F. Flauss (éd.), *La protection internationale de la liberté religieuse. International Protection of Religious Freedom*, Bruxelles, 2002; P. M. Taylor, *Freedom of Religion. UN and European Human Rights Law and Practice*, Cambridge, 2005.

[30] *Kokkinakis* v. *Greece*, ECHR, Judgment on Merits and Just Satisfaction of 25 May 1993, para. 31. On Strasbourg case law concerning the treatment of Jehovah's Witnesses in Greece (*Manoussakis et al.* v. *Greece*, ECHR, Judgment on Merits and Just Satisfaction of 26 September 1996; *Thlimmenos* v. *Greece*, ECHR, Grand Chamber, Judgment on Merits and Just Satisfaction of 6 April 2000.

In Serif v. Greece[31], the autonomy of the Muslim community in Greece, as expressed through the direct appointment of its religious leaders, was disputed by the Government. The Court found a violation of Article 9 of the Convention since, for the protection of public order, the conviction of a religious leader for assuming the functions of a minister of a "known religion" could not be deemed "necessary in a democratic society". It relied heavily on the close relation between the 'autonomy of organisation' and the principles of religious pluralism in European democratic societies[32].

More recently, the Strasbourg Court upheld its conclusions on Serif in the Hasan and Chaoush v. Bulgaria judgment[33], concerning the forced removal of the legitimate leadership of the Muslim community in that State.

In this judgment the Court showed consideration not only for religious freedom as an individual right, but also for the organisational life of the Muslim community and the internal affairs of a religious group as fundamental guarantees of cultural identity of its members in the context of a pluralist democratic society[34].

Accordingly, the Court upheld the claimants' conclusions that State authorities had interfered with the believers' freedom to manifest their religion under Article 9 by replacing the leaders of the religious community[35].

In short, the Court's case law, according to which "…State measures favouring a particular leader or group in a divided religious community

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[31] *Serif v. Greece* ECHR, Judgment of 14 December 1999. *Serif* conclusions have been closely followed by the European Court, *inter alia*, in the cases *Agga v. Greece (no. 2)*, ECHR Judgment of 17 October 2002, *Agga v. Greece (no. 3)*, ECHR Judgment of 13 July 2006, *Agga v. Greece (no. 4)*, ECHR Judgment of 13 July 2006, all concerning similar claims.

[32] "53. Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that is one of the unavoidable consequences of pluralism. The 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".

[33] *Hasan and Chaoush* v. *Bulgaria*, EHCR, Grand Chamber, Judgment on Merits and Just Satisfaction of 26 October 2000.

[34] See *ibid.*, paras. 60-62.

[35] According to the Court, interference with the internal organisation of the Muslim community had not been "prescribed by law" as it had been arbitrary and based on legal provisions which granted unfettered discretion to the executive and did not meet the required standards of clarity and foresee ability of the law.

or seeking to compel the community, or part of it, to place itself under a single leadership against its will…[36]"
constitute an infringement of the freedom of religion in its collective dimension, significantly contributes to the development of the protection of cultural pluralism through conventional rights.

The final result is likely to be the recognition of the duty to respect the cultural identity of a religious community and of its members, as emerges from the following passage:

> "93. The Court reiterates that the autonomous existence of religious communities is indispensable for pluralism in a democratic society. While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and beliefs. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome (…). […]."[37].

b) Religious Practices

It may also happen that in the ECHR system, individual and group cultural identity can be indirectly limited by States' legitimate restrictions of conventional human rights.

In cases relating to Article 9, the Strasbourg organs have found certain restrictions of the right to manifest a religious belief compatible with the Convention, in terms of the theory of States' margin of appreciation.

In Cha'are Shalom ve Tsedek v. France,[38] the Convention's scrutiny concerned State interference in the cultural traditions of a Jewish minority in France. The Court rejected the applicant association's claims that the State's refusal to authorize a particular form of ritual slaughter amounted

[36] *Supreme Holy Council of the Muslim Community v. Bulgaria*, ECHR Judgment of 16 December 2004, at para. 76.

[37] *Ibid.*

[38] *Cha'are Shalom Ve Tsedek* v. *France*, ECHR, Grand Chamber Judgment on Merits of 27 June 2000.

to an unjustified restriction of religious rights of ultra-orthodox Jews (the Cha'are Shalom ve Tsedek Association) and unlawful discrimination under Article 14 ECHR. In the case at issue, Strasbourg found that there was no interference in the right to freedom of religion, as the claimants could have obtained the ritual slaughtered meat in Belgium or by contacting butchers working under control of the most representative Jewish organisation[39].

Nor was there any violation of Article 9 of the Convention taken in conjunction with Article 14[40].

When deciding whether there has been a violation of religious rights, the European Court has sometimes considered certain prescribed practices as expressions of a fundamentalist view, threatening the State's constitutional guarantees[41]. In such cases, States' restrictive measures have been held compatible with international standards of human rights protection.

Thus, according to Strasbourg case law, a State's interference limiting the expression of cultural diversity, such as wearing religious distinctive symbols, may be considered lawful under the Convention if intended to safeguard the pluralist values of tolerance and the peaceful enjoyment of rights among different groups.

A significant recent paradigm can be offered by European case law relating, in particular, to the wearing of Islamic headgear[42]. Actually, of the religious practices recognised in Article 9 ECHR, the right to wear headgear prescribed to women in the Muslim tradition has not been given a high level of protection by the Strasbourg institutions.

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[39] See *Cha'are Shalom Ve Tsedek*, para. 84.

[40] See *Cha'are Shalom Ve Tsedek*, para. 87.

[41] Many of the cases involving Turkey belong to the above mentioned category, due to the special context and historical development of the country. See in general *Refah Partisi (the Welfare Party) and Others v. Turkey*, ECHR Judgment of 13 February 2003.

[42] See, *inter alia*, ECHR *Lamiye Bulut v. Turkey* (Application no. 18783/91); *Senay Karaduman v. Turkey* (Application no. 6278/90); *Dahlab v. Switzelrland* (Application no. 42393/98), Decision of 15 February 2001; *Zeynep Tekin v. Turkey* (Application no. 41556/98), Judgment of 29 June 2004; *Leyla Şahin v. Turkey*, (Application no. 44774/98), G.Ch. Judgment of 10 November 2005; *Fazilet Partisi et Kutan v. Turkey* (Application no. 1444/02), Judgment of 27 April 2006; *Şefika Köse and Others v. Turkey* (Application no. 26625/02), Decision of 24 January 2006; *Sevgi Kurtulmuş v. Turkey* (Application no.65500/01), Decision of 24 January 2006.

The Leyla Şahin v. Turkey[43] Grand Chamber judgment well illustrates the Court's approach ~~on~~ to the questions arising in connection with this high expressive sign of cultural identity.

The Court rejected the applicant's (a Turkish medical student at the University of Istanbul) submissions that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified interference with the right to manifest her religion, her private life, the right to freedom of expression, the right to education and non-discrimination guarantees.

The majority found, in particular, that the ban on wearing the Islamic headscarf on university premises constituted interference with the applicant's right under Article 9 but that the ban was prescribed by law and pursued the legitimate aims of the protection of the rights and freedom of others and of public order. The main question was that of determining whether such interference was "necessary in a democratic society". In this regard, the Court recalled, firstly, the importance of religious pluralism in democratic societies[44].

So, as an inherent element of the notion of a "democratic society", pluralism constitutes a central issue in the Court's reasoning when determining the necessity of State interference on conventional rights. The need to secure religious pluralism, therefore, plays a role in delimiting the extent of State's margin of appreciation[45].

Judge Tulkens did not agree with the majority conclusions on the question of Article 9 of ECHR and Article 2 of Protocol No. 1. In her dissenting opinion she strongly contested the majority approach on margin of

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[43] *Leyla Şahin* cit., ECHR GC, judgment of 10 November 2005.

See D. Ch. Decker, M. Lloydd, *Leyla Şahin v. Turkey*, *European Human Rights Law Review*, 2004, p. 672 ff.; B. D. Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, *Cornell Law Review*, vol. 91, 2005, p. 129 ff.; K. Pabel, *Islamisches Kopftuch und Prinzip des Laizismus*, in *Europäische Grundrechts*, 2005, p. 12 ff.; Ch. D. Belelieu, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Şahin Judgment*, *Columbia Journal of European Law*, 2006, p. 573 ff.; L. Burgorgue-Larsen, E. Dubout, *Le port du voile à l'université. Libres propos sur l'arrêt de la Grande Chambre Leyla Şahin c. Turquie du 10 novembre 2005*, *Rev. Trim. Dr. H.*, 2006, p. 183 ff.; C. Skach, *Şahin v. Turkey, "Teacher Headscarf" Case*, *American Journal of International Law*, 2006, p. 186 ff.; C. Evans, *The 'Islamic Scarf' in the European Court of Human Rights*, *Melbourne Journal of International Law*, 2006, p. 52 ff.

[44] See *Leyla Şahin*, para. 108.

[45] *Leyla Şahin,* paras.109-110.

appreciation doctrine, stressing that in her view, the Court had not exercised at all her powers of supervision[46].

As regards the principle of secularism, she argued that, tough agreeing on the need to prevent radical Islamism, merely wearing the headgear could not be deemed to be evidence of a fundamentalist belief[47].

Finally, on the alleged violation of Article 2 of Protocol no. 1, the dissenting Judge argued that the applicant's exclusion from lectures and examinations at the Faculty of Medicine amounted to a de facto deprivation of the right of access to the University and, consequently, of her right to education.

III.c. Freedom of Expression and Freedoms of Association and Assembly

(a) Freedom of Expression

Freedom of expression, as enshrined in Article 10, para. 1, of the ECHR includes a broad and extensive protection of expressions of any kind, regardless of their form, content or way of distribution. This guarantee has been interpreted by the European institutions to include the freedom to seek and receive information. Such freedoms can be subject to the limitations allowed under the subsequent paragraph 2, which must be lawful, pursue legitimate aims[48] and satisfy the necessity test.

In Strasbourg case law, freedom of expression is conceived as a fundamental value and a necessary requirement for the functioning of democratic societies[49].

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[46] *Leyla Şahin,* para. 3 of the dissenting opinion.

[47] *Leyla Şahin,* paras. 5-10 of the dissenting opinion.

[48] Limitations under paragraph 2 must be narrowly interpreted. This involves examining whether they are provided by law and "necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary".

[49] See *Artikel 10, Meinungsfreiheit*, J. A, Frowein, W. Peukert, *Europäische MenschenRechtsKonvetion* cit., p. 383 ff.; G. Cohen-Jonhatan, *Article 10*, L--E. Pettiti, E. Decaux, P.-H. Imbert (éd.), *La Convention européenne des droits de l'homme* cit., p. 365 ff.; V. Coussirat-Coustère, Article 10-2, *ibidem*, p. 409 ff.; P. Caretti, *Art. 10, Libertà di espressione*, S. Bartole, B. Conforti, G. Raimondi (eds.), *Commentario alla Convenzione europea* cit., p. 337 ff.

It could be useful to recall the Court's judgements relating to Kurdish nationalists in the specific context of South East Turkey as they are illustrative of the Strasbourg approach to State interference affecting freedom of expression. These cases well clarify the preconditions allowing restrictions on expression "necessary in a democratic society" in the interests of national security, public safety and for the prevention of disorder or crime under Article 10.2 of the Convention.

In the Court's opinion, in the Turkish national context, speeches or statements threatening, for example, national security can justify severe restrictions on free expression, given the State's wide margin of appreciation in assessing the necessity and proportionality of the restrictive measures.

In many similar cases concerning the political activities of ethnic minorities, the result has been the legitimation of discriminatory limitations of the expression of cultural diversity of groups or communities claiming forms of political autonomy[50].

As regards the Kurdish question in Turkey, the European institutions have clearly underlined States' obligations to respect and guarantee minorities' rights of expression and autonomist instances. In particular, they have called States to respect and guarantee the democratic legitimate recognition of the national and cultural diversity of particular groups, while safeguarding the political integrity of the State.

The Strasbourg decisions on the dissolution of Turkish socialist and communist parties[51] well illustrate the approach followed by the Court's in finding a balance between these conflicting exigencies. In cases concerning the applicability of Article 10 and 11 ECHR, European judges expressly emphasised that freedoms of expression and association in political parties are essential to the effective functioning of pluralist democracies. They declared the dissolution of the Socialist and Communist Parties to be contrary to the Convention standards since the Kurdish political aims were to be considered legitimate and did not imply any incitement to violence or denial of democratic values[52].

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[50] See G. Gilbert, *The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights*, *Human Rights Quarterly*, 2002, p. 736 ff.

[51] See *United Communist Party of Turkey and Others* v. *Turkey*, ECHR, Grand Chamber, Judgment on Merits and Just Satisfaction of 30 January 1998; *Socialist Party and Others* v. *Turkey*, ECHR, Grand Chamber, Judgment on Merits and Just Satisfaction of 25 May 1998; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, ECHR, Grand Chamber, Judgment of 8 December 1999; *Aksoy v. Turkey*, ECHR Judgment of 10 October 2000.

[52] See paras. 51-61.

Finally, the recognition and protection of a minority's cultural identity is also manifest in Strasbourg jurisprudence in a series of similar decisions, known as 'propaganda cases', all concerning convictions and prosecutions of authors for articles, books and other published materials supporting, directly or indirectly autonomist groups activities[53].

The Court's reasoning in these cases, focusing on the importance of freedom of expression in a functioning democracy, finds the violation of Article 10 ECHR, except when publications could be regarded as an incitement to violence, threatening territorial integrity of the State.

(b) Freedom of Peaceful Assembly and Association

As well as freedom of expression, the freedoms of association and peaceful assembly constitute fundamental elements of a democratic society.

Strasbourg case law on Article 11 of the Convention expressly recognises the right of minority groups and communities to associate freely in order to promote their own traditions and cultural identity[54].

In Sidiropoulos et al. v. Greece,[55] the Greek authorities' refusal to register a Macedonian cultural organisation amounted, in the opinion of the European Court, to a disproportionate interference with the applicants' exercise of their right to freedom of association, guaranteed under Article 11. The Court argued that, in the case at issue, no separatist or violent intentions of the claimant association were established, and promoting the idea of a 'Macedonian' minority would not have justified this restrictive measure.

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[53] See, in particular, *Arslan* v. *Turkey*, ECHR, Grand Chamber, Judgment on Merits and Just Satisfaction of 8 July 1999. See also *Baskaya & Okçuoglu v. Turkey* (Applications no.23536, 24408/94); *Ceylan v. Turkey* (Application no. 23556/94); *Erdogidu & Ince v. Turkey* (Applications no. 25067, 25068/94); *Gerger v. Turkey* (Application no. 24919/94); *Karatas v. Turkey* (Application no. 23168/94); *Sürek & Özdemir v. Turkey* (Applications no. 23927, 24277/94); *Zana v. Turkey* (Application no. 26982/95), ECHR (First Section), 15 February 2000.

[54] See *Artikel 11, Versammlungs – und Vereinigungsfreiheit*, J. A., Frowein, W. Peukert, *Europäische MenschenRechtsKonvetion* cit., p.409 ff.; N. Valticos, *Article 11*, L.-E. Petitti, E. Decaux, P.-H. Imbert (éd.), *La Convention européenne des droits de l'homme* cit., p. 419 ff.; P. Ridola, *Art. 11, Libertà di riunione e di associazione*, Bartole, B. Conforti, G. Raimondi (eds.), *Commentario alla Convenzione europea* cit., p. 351 ff.

[55] *Sidiropoulos et al.* v. *Greece*, ECHR, Judgment on Merits and Just Satisfaction of 10 July 1998, *Reports*, 1998-IV, p. 1594 ff.

The more recent case of Stankov and the United Macedonian Organisation Ilinden v. Bulgaria[56], concerned alleged interferences in the activities of a minority association (The United Macedony Organisation Ilinden) whose aims were to "unite all Macedonians in Bulgaria on a regional and cultural basis" and to achieve "the recognition of the Macedonian minority in Bulgaria". The Court found the authorities' restrictions of the applicants' right to hold commemorative meetings contrary to Article 11 of the Convention. It underlined that

> "89. The inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. The fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 of the Convention (…). […]".

In line with its case law, it then recalled:

> "97. …. 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. […]".

In Gorzelik and Others v. Poland[57], the applicants had been refused permission to register an association called "Union of People of Silesian Nationality", on the ground that, inter alia, according to Polish courts Silesians did not constitute a national minority, but only a local ethnic group. The qualification of Silesian identity represented a relevant element of judicial scrutiny because the recognition of national minority status conferred special treatment under Polish electoral law.

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[56] *Stankov and The United Macedonian Organisation Ilinden* v. *Bulgaria*, ECHR, Judgment on Merits and Just Satisfaction of 2 October 2001. Among similar cases, see also *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, 20 October 2005; *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, 20 October 2005; *Ivanov and Others v. Bulgaria*, 24 November 2005 and *The United Macedonian Organisation Ilinden et al. v. Bulgaria*, 19 January 2006.

[57] *Gorzelik et al. v. Poland, ECHR*, Judgments on Merits of 20 December 2001 and 17 February 2004 (G. Ch.).

The ECHR Grand Chamber first of all recalled that the notion of national minority is not defined in Polish Law nor is it defined in any international treaty, including the Council of Europe Framework Convention[58].

Then, referring to the rule of democracy and pluralism, it asserted that

"92. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, 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. For pluralism is also built 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. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.

93. The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, "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" . 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".

Therefore, the Court found no violation.

[58] See paras. 67-68.

III.d. Freedom of Education

Strasbourg jurisprudence relating to education may also raise interesting questions about the recognition and respect of cultural identity in the Convention system. As regards minority groups claims for special protection, several cases have been brought before the Convention institutions concerning, in particular, discriminatory treatment with regard to access to education for members of linguistic minorities[59].

If, on one hand, it appears clear that the European Convention does not in principle recognise a right to mother-tongue education, on the other the interpretative approach followed in this field by the European institutions since the well known case of Belgian linguistic legislation, and grounded on the non-discrimination clause of Article 14, cannot be ignored.

In the 1968 case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium[60], the Commission and the Court decided on the compatibility with Convention standards of the Belgian linguistic legislation relating to the use of the French and Dutch languages in the schools of the two monolingual regions of the country. The applicants, French-speakers who resided in the Dutch speaking region, complained that their children could not attend local schools in their native tongue. They therefore alleged a violation of Article 2 of the First Protocol recognizing the right to education as well as Article 14 of the European Convention embodying the principle of non-discrimination.

As to the scope of the right to education, the Court stated that, though the Convention guarantees a right of access to education, in the sense of affective education, Article 2 of Protocol I does not "…require of States that they should, in the sphere of education or teaching, respect parents' linguistic preferences, but only their religious and philosophical convictions"[61].

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[59] See P. M. Dupuy, L. Boisson de Chazournes, *Article 2*, L.-E. Petitti, E. Decaux, P.-H. Imbert (éd.), *La Convention européenne* cit., p. 999 ff.; G. Mor, G. E. Vigevani, *Articolo 2. Diritto all'istruzione*, S. Bartole, B. Conforti, G. Raimondi (eds.), *Commentario alla Convenzione europea* cit. p. 829 ff.; C. Zanghì, K. Vasak (eds.), *Le droit fondamental à l'éducation: les droits et les obligations qui découlent des instruments internationaux*, Torino, 2003.

[60] Case *"Relating to Certain Aspects of The Laws on The Use of Languages In Education In Belgium"* v. *Belgium*, ECHR, Judgment on Merits of 23 July 1968.

[61] See para.6.

Nevertheless, the Court concluded that Belgian law was contrary to the requirements of Article 14 ECHR read in conjunction with the first sentence of Article 2 of Protocol no. I, since it prevented children living in the monolingual Dutch-speaking region from having access to the French-language schools existing in six municipalities in the outskirts of Brussels solely on the ground of the residence of their parents.

In fact, according to the Court, the discriminatory treatment of the French-speakers resulted in a serious threat to the applicants' language diversity, that was incompatible with conventional human rights standards.

In this regard, the Commission's and Court's holding in Cyprus v. Turkey[62] concerning alleged violations arising out of the living conditions of the Greek Cypriot Community in the Turkish Republic of North Cyprus should also be mentioned.

The Grand Chamber summarised the opinion of the Commission about denying the right to education to the Greek Cypriot community living in Northern Cyprus as follows:

> "275. The Commission, with reference to the principles set out by the Court in the Case relating to certain aspects of the laws on the use of languages in education in Belgium (merits) (judgement of 23 July 1968, Series A no. 6), observed that the secondary educational facilities which were formerly available to children of Greek Cypriots had been abolished by the Turkish-Cypriot authorities. Accordingly, the legitimate wish of Greek Cypriots living in northern Cyprus to have their children educated in accordance with their cultural and ethnic tradition, and in particular through the medium of the Greek language, could not be met. The Commission further considered that the total absence of secondary-school facilities for the persons concerned could not be compensated for by the authorities' allowing pupils to attend schools in the south, having regard to the fact that restrictions attached to their return to the north (…). In the Commission's conclusion, the practice of the Turkish-Cypriot authorities amounted to a denial of the substance of the right to education and a violation of Article 2 of Protocol No. 1".

[62] *Cyprus v. Turkey* (Application no. 25781/94), Eur. Comm. H. R., *Report* of 4 June 1999; Eur. Court H. R., G. Ch. Judgment of 10 May 2001.

In light of the above considerations, the Court found a violation of Article 2 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus, since no appropriate secondary-school facilities were available to them in conformity with their legitimate wish to preserve their own linguistic tradition and cultural identity.

More recently, the same scheme was followed by the Grand Chamber in D.H. ad Others v. the Czech Republic (13 November 2007), concerning (indirect) discrimination on account of ethnic origin faced by members of the Roma/Gypsi community in the field of education[63]. As established in its previous case law "discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires form the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment…"[64].

In the Court's conclusions the alleged practice of referring large number of Roma children to special schools amounted, in the circumstances of that case, to a violation of Article 14 of the Convention, read in conjunction with Article 2 of Protocol no. 1.

IV. Respect for Cultural Identity as a General Value Underlying the Notion of "Democratic Society"

As seen above, respect for cultural identity appears to be part and parcel of the notion of democratic pluralism which is a constitutive element of what Strasbourg organs call "democratic society"[65].

Indeed, in its case law, the European Court has progressively extended the meaning of democratic pluralism to include a right to cultural

[63] *D.H. and Others v. the Czech Republic*, GC Judgment of 13 November 2007 (application no. 57325/00), see in particular, paras. 182-210.

[64] See paras. 175-176.

[65] See P.T. Vegleris, *Valeur et Signification de la Clause «dans une Societé Démocratique» dans la Convention Européenne des Droits de l'Homme*, *Human Rights Journal*, 1968, p. 219 ff. ; V. Fabre-Alibert, *La notion de «société démocratique» dans la jurisprudence de la Cour européenne des droits de l'homme*, *Revue Trimestrielle des Droits de l'Homme*, 1988, p 465 ff.

diversity. Thus, it has been constructed a wider dimension of pluralism, that some scholars have called "pluralisme culturel"[66].

The cultural horizon determines, in many ways, the constitution of individuals' personal identity and plays a fundamental role in giving meaning to life choices and freedoms. From this perspective, only through safeguarding the close link between culture and identity could States effectively respect human dignity in terms of the liberty of every person to belong to and to be fully integrated in a cultural group[67]. This is why the cultural context plays a central role when verifying State practices' compatibility with Convention standards concerning culture-related rights. It is always in a specific 'cultural context' that the guarantees of international human rights must be effectively and fully implemented by States authorities. Therefore, human rights must be scrutinised by the courts, at national and international level, in a way that is meaningful and relevant in each cultural context.

As constantly held in the Commission's and Court's jurisprudence[68], the Convention mechanism is subsidiary to the national systems of protection of human rights[69].

The European Convention, as underlined by the Strasbourg jurisprudence, provides certain minimum international standards on the diversity of national legal systems and does not require uniformity of attitudes by national authorities in the domestic enforcement of human rights.

Therefore, the primary responsibility for the protection and promotion of human rights rests with State authorities, which are "better placed"

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[66] See J. Ringhelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme*, Bruylant, Bruxelles, 2006, p. 398 ff.

[67] See B. Maurer, *Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme*, La Documentation Française, Paris, 1999.

[68] See, *ex plurimis*, ECHR, *Handyside v. United Kingdom*, judgment of 7 December 1976: "48. The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (article 26)". See also *Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (23 July 1968) cit., § 10; *Akdivar and others v. Turkey* (16 September 1996) § 35, §§ 65-69, Judge's Golkuklu dissenting opinion § 3.

[69] See H. Petzold, *The Convention and the Principle of Subsidiarity,* in S. T. Macdonald, F. Matscher, H. Petzold (eds.), *The European System* cit., p. 41 ff.; E. Kastanas, *Unité et diversité* cit., p. 95 ff.

to appreciate the specific character of the domestic 'cultural context'. This seems to be confirmed in the light of the so-called "margin of appreciation" theory, applied and developed by the Strasbourg jurisprudence[70]. It allows Contracting States some space within which to find a balance between the conventional rights protection and the defence of general public interest in accordance with the necessity and proportionality criteria. This interpretive method plays a fundamental role in the Court's reasoning on matters of cultural identity, since it marks the line between a context-related appreciation of local authorities and European scrutiny in the application of international human rights.

Thus, the protection of cultural diversity seems to fall under the margin of appreciation of the State and therefore the Court elaborates her own findings on this issue only when it appears that the State has exceeded its margin of appreciation.

As seen above, this happens frequently when the behaviour of the State amounts to sheer violations of the non-discrimination principle[71].

V. Concluding Remarks

[70] See R. Sapienza, *Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo*, *Rivista di Diritto internazionale*, 1991, p. 571 ff.; H. Ch. Yourov, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Dordrecht, 1996; AA. VV., *The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice*, *Human Rights Law Journal*, 1998, p. 1 ff.; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp, Oxford, New York, 2002.

See also J. A. Sweney, *Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, *International and Comparative law Quarterly*, 2005, vol. 54, p. 459 ff.

[71] The non-discrimination principle is a fundamental rule of international human rights law. In the European Convention system, it is recognised in Article 14 with regard to the enforcement of conventional rights. Moreover, additional Protocol no. 12 to the Convention, adopted on 4 November 2000, has introduced a general prohibition of discrimination stating in Article 1: "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. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1".

In conclusion, it may be said that the ECHR guarantees several aspects of cultural diversity by ensuring the protection of cultural identities in its provisions relating to private and family life, religion, freedoms of expression and association, language, education and non-discrimination.

These issues mainly focuse on the individual dimension of cultural identity (the European Convention provisions recognise essentially the rights of the individual), though related to the collective enjoyment of conventional rights.

The Strasbourg Judges indirectly recognise the principle of respect for cultural identity monitoring the domestic legal systems' protection of some "cultural human rights" expressly mentioned by the Convention, such as linguistic rights, religious rights, land rights, family rights.

Moreover, European case law seems to show the legal relevance of respect for cultural identity as a general value underlying the interpretation of the ECHR provisions.

Many ECHR judgments make explicit reference to this fundamental value underlying the notion of "democratic society" to develop, through the non-discrimination approach and the margin of appreciation doctrine, the rights and freedoms enshrined by the Convention in the light of current questions arising from multicultural social contexts.

Finally, it should be emphasized that the current developments in Strasbourg jurisprudence do not yet justify the existence of any European standard of cultural identity protection in the context of the Council of Europe.

The conventional institutions have elaborated a wide and undefined notion of "cultural identity" when exercising their international scrutiny on the "…necessary in a democratic society" clause as well as on the non-discrimination guarantees. These two comprehensive approaches have been managed by the Court through a systematic reference to the doctrine of margin of appreciation.

Rather, it is true that the recognition of specific contexts within the margin of appreciation theory would constitute the best approach to enhancing cultural identity protection. Nevertheless, the sensitivity of the matters involved and the consequent plurality of national approaches to cultural diversity issues do constitute significant factors preventing an effective consolidation of European common standards for the recognition of cultural identity.