The Concept of Pluralism in the Case-Law of the European Court of Human Rights

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Meanings of pluralism in different disciplines – Meaning in jurisprudence, esp. European Court of Human Rights – Feature of society and idea of society – Individual freedom v. group existence – Politics, religion, education – Pluralism as expression of rights and as guarantee of rights – Rejection of legal pluralism – Contradiction of elitist theory – State protection of pluralism and its limits

Introduction

The concept of pluralism is widely used. A brief outline shows that the meaning may vary in different disciplines. In philosophical ethics, value pluralism, or moral pluralism implies that there is a diversity of conflicting values.[1] Therefore, individuals normally have more than one rational moral choice. Social pluralism is used to characterise a society in which different religious, cultural, ethnic or other groups live together. Individuals may to a certain extent be considered as members of these groups.[2] In political science, more specifically, the concept of pluralism points to the existence of all kinds of associations and groupings that aim for political influence, without one particular group being predominant.[3] If we describe political decisions as choices between different and partly conflicting values (liberty – equality; privacy – public safety) we may have come back to value pluralism.

These different concepts may all affect the meaning of pluralism when used in jurisprudence.[4] Value pluralism is an argument for individual expressive liber-

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[1] I. Berlin, 'Two Concepts of Liberty', in *Four Essays on Liberty*, Oxford 1969. Cf. W. Galston, *Liberal Pluralism*, Cambridge 2002, p. 5.

[2] E.g., *Dictionary of the Social Sciences*, Oxford 2002, p. 363-364.

[3] R. Dahl, *A Preface to Democratic Theory*, Chicago 1956; R. Dahl, *Who Governs*, Yale 1961; A. Eisenberg, *Reconstructing Political Pluralism*, New York 1995.

[4] For an extensive overview of the meaning of pluralism in jurisprudence, *see* A. Soeteman (ed.), *Pluralism and Law*, Amsterdam 2001.

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ties[5] and state neutrality.[6] After all, every citizen must choose his own idea of a good life. The importance of the existence of various groups may be translated into an argument for associational liberties in general and freedom for religious associations in particular.[7] When social pluralism and the role of groups is stressed, there may be a more general tendency to recognise group interests in law. The existence of group libel laws may serve as an example.[8] A more drastic step would be the creation of different legal orders for different groups, a system known as legal pluralism. Political pluralism, to conclude, may call for legal safeguards against predominance of one particular group in the political process.

The concept of pluralism plays a prominent part in the case-law of the European Court of Human Rights (ECtHR). The Court considers 'pluralism' as one of the main characteristics of a democratic society. That is to say that pluralism is an important factor determining the scope and impact of a number of fundamental rights such as the right to freedom of speech and the right to freedom of association.

The question rises of what the meaning of pluralism is in the case-law of the ECtHR. This question is all the more important because the concept is ambivalent in several respects. As we have seen, the concept may be smoothly linked with individual fundamental rights, but actually refers to groups, associations and institutions such as the media. Moreover, pluralism is often aimed at a characterisation of society as a whole but it may also serve a useful purpose in the political process. To conclude, the concept both aims at an existing feature of certain societies and at an idea that is to be fostered. In this respect, not surprisingly, the ECtHR sees pluralism as something that is to be protected and guaranteed by the state. One of the consequences thereof is that restrictions may be imposed on groupings which threaten pluralism.

This paper aims to clarify the concept of pluralism in the case-law of the ECtHR.[9] The paper will start with a section on the scope of the concept of pluralism; in what field and for what fundamental rights is this concept relevant? The next section will analyse the complex and ambivalent character: do we speak about

[5] W. Galston 2002, *supra* n. 1, p. 15 et seq.

[6] W. Sadurski, *Moral Pluralism and Legal Neutrality*, Dordrecht 1990.

[7] W. Galston 2002, *supra* n. 1, p. 110 et seq.

[8] R. Post, 'The Social Foundations of Defamation Law', *Cal. Law Review 1969*, p. 691-742.

[9] Some references to European community law and to the constitutional law of some European states will be made as well. The concept of pluralism, after all, is also to be found in European Community law, for example in the considerations of the 'Television without Frontiers Directive'. The Constitutional Treaty of the European Union even made pluralism a constitutional value or, more precisely, a characteristic of a society that includes values as human dignity, liberty and equality (Art. I-2). The concept of pluralism is also present in certain national constitutions and in the case-law of national constitutional courts. The concept is often aimed at diversity in the forming of public opinion in particular, but it may imply as well a characterisation of society as a whole.

individual liberties or about group rights, and what is the relationship between a pluralistic political process and a pluralistic social structure? Special attention will be devoted to the limits to pluralism and to the role of the state as the ultimate guarantor of pluralism. The conclusion will give a survey of the findings.

The scope of the concept

In 1976 the ECtHR rendered two judgments in which for the first time the concept of pluralism was used to interpret the fundamental rights laid down in the European Convention on Human Rights (ECHR) and its protocols.[10] The first judgment is the well-known *Handyside* case.[11] In its general considerations about the importance of freedom of speech, the ECtHR links its manner of judging to its characterisation of a democratic society:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (Art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.

The other judgment rendered on the same day is the equally well-known *Kjeldsen, Busk, Madsen & Pedersen* case that deals with the right to and the freedom of education.[12] In this case the Court points out the importance of pluralism as well:

> The second sentence of Article 2 [First Protocol, ed.] aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the 'democratic society' as conceived by the Convention.

It follows that the state when organising education has to make sure that:

> information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.

These two judgments in and of themselves make clear that the concept of pluralism has a rather wide scope. Pluralism is described as a characteristic of and a condition for a democratic society, and 'democratic society' is not narrowly inter-

[10] The concept is already implicitly present in the Belgian language cases, ECtHR 23 July 1968.
[11] ECtHR 7 Dec. 1976, *Handyside* v. *UK*.
[12] ECtHR 7 Dec. 1976, *Kjeldsen, Busk, Madsen & Pedersen* v. *Denmark*.

preted. That means that several fundamental rights can be directly linked to the concept of pluralism. An overview is given below.

Freedom of speech and media structure

The aforementioned reflections about 'pluralism, tolerance and broadmindedness' and about information and ideas that 'offend, shock or disturb' have become regular considerations in judgments of the ECtHR about free speech restrictions. This case-law makes clear that it cannot be taken for granted that freedom of speech can be restricted when an utterance or opinion is offensive for a certain group. Individuals with different ideas and members of groups with different values may all publish their views. This starting point is particularly relevant for contributions to the public debate. As far as political discussion is concerned, there has to be room for severe criticism. The question of whether in a pluralistic society, the State has a positive obligation to protect groups against offensive utterances as well will be treated later on in this paper.

The judgments about content-based restrictions of freedom of speech regard pluralism as a feature of a democratic society. Other judgments under the terms of Article 10 of the Convention deal especially with pluralism of the press and the other media. In the *Lentia* case, for example, the ECtHR has stated that the press cannot successfully perform its task to impart information and ideas of general interest unless that undertaking 'is grounded in the principle of pluralism'. Therefore, as many voices as possible should be heard. Not allowing broadcasting by others than the public broadcasting organisation, when ether frequencies are still available, is a violation of Article 10 ECHR. While public broadcasting may be important for the realisation of pluralism, there are less restrictive means to protect public broadcasting and its pluralism, according to the Court.[13] In granting broadcasting licences, the state may still be guided by the importance of pluralism. In this respect one may think of pluralism as cultural, linguistic and regional diversity. The possible contribution to pluralism of programs devoted to facts and news about motor cars seems to be smaller.[14] In any case, national authorities do have a rather wide margin of appreciation in this field.[15]

The exercise of power by mighty financial groupings may form a threat to media pluralism.[16] The same holds true for a far-reaching monopolisation in the press and media sector.[17] In this particular respect, the concept of pluralism has a

[13] ECtHR 24 Nov. 1993, *Lentia* v. *Austria*.
[14] ECtHR 5 Nov. 2002, *Demuth* v. *Switzerland*.
[15] ECtHR 7 Nov. 2000, *United Christian Broadcasters* v. *UK* (admissibility decision).
[16] ECtHR 28 June 2001, *VGT Vereiniging gegen Tierfabriken* v. *Switzerland*.
[17] EComHR 6 July 1976, R. 5178/71 (*Geïllustreerde Pers* v. *The Netherlands*).

long tradition in European Community law as well. The 'Television without frontiers directive (1989)' includes the consideration:

> Whereas it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and the information sector as a whole.[18]

Political parties and other associations

The ECtHR has expressly pointed out the importance of pluralism in its case-law concerning political parties. They play an 'essential role in ensuring pluralism'.[19] That is not surprising because in a democracy, the only system compatible with the Convention,[20] the will and opinion of the people must be expressed in the free elections the state is obliged to organise in accordance with Article 3 First Protocol to the Convention. Such elections are inconceivable 'without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population.'[21]

The strong emphasis on the importance of political parties should not conceal the fact that according to the Court, associations of a different kind play an essential role in a democratic society too:

> 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.[22]

[18] Cf. consideration 44, Television without frontiers directive 1997. In the Constitutional Treaty there was also a special provision dedicated to respect for pluriformity in the media (Art. II-71 para. 2).

[19] ECtHR 30 Jan. 1998, *United Communist Party of Turkey and others* v. *Turkey*.

[20] Idem par. 45.

[21] Idem par. 44.

[22] EtCHR 17 Feb. 2004, *Gorzelik* v. *Poland*, par. 92; cf. more recently ECtHR 20 Oct. 2005, *Ouranio Toxo* v. *Greece*, par. 35; ECtHR 19 Jan. 2006, *United Macedonian Organization Ilinden and others* v. *Bulgaria*, par. 58, cf. ECtHR 5 Oct. 2006, *Moscow Branch of the Salvation Army* v. *Russia*, par. 61.

Religion and belief

The previous paragraph already implicates that the ECtHR considers a democratic society much more than just a political system. Therefore it is not surprising that the right to freedom of religion and belief is also inextricably related to democracy and pluralism:

> Freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[23]

Consequently, the Court looks upon the freedom to associate with others with the same religion or philosophy of life as an essential feature of a democratic society:

> The autonomous existence of religious groups is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[24]

The importance of this religious and philosophy of life pluralism entails a certain obligation for the state to act neutrally and impartially. A registration system for religious groupings, for example, must take that into account.[25]

Education

The relationship between education and pluralism has already been mentioned. Pluralism in this field may be seen as the result of the responsibility of the state for the effectuation of the right to education as recognised in Article 2 First Protocol of the Convention on the one hand and the parents' right to respect for their religion or philosophy of life on the other hand. Once again, according to the Court there is a direct connection with democracy:

> safeguarding pluralism in education (…) is essential for the preservation of the 'democratic society' as conceived by the Convention. In view of the power of the

[23] ECtHR 15 May 1993, *Kokkinakis* v. *Greece*, par. 31; ECtHR 13 Feb. 2003, *Refah Partisi and others* v. *Turkey*, par. 90; ECtHR 10 Nov. 2005, *Leyla Sahin* v. *Turkey*, par. 104.

[24] ECtHR 5 Oct. 2006, *Moscow Branch of the Salvation Army* v. *Russia*, par. 58

[25] ECtHR 13 Dec. 2001, *Metropolitan Church of Bessarabia* v. *Moldova*.

> modern State, it is above all through State teaching that this aim must be realised.[26]

In this respect it has to be taken into account that the parents' right should not infringe the children's right to education which is also laid down in Article 2 First Protocol. Respecting parents' religious and philosophical convictions does not prevent the State from 'imparting through teaching or education information of a directly or indirectly religious or philosophical kind.'[27] It is forbidden, however, for the State to impose an established religion on the pupils or to pursue another aim of indoctrination.[28]

A further analysis

It turns out that the ECtHR uses the concept of pluralism when judging interferences with a number of individual fundamental rights. The Court strongly links individual liberties with a characteristic of society. Moreover, the Court stresses the importance of a pluralist political process within a pluralist society. In this section these two connections will be further analysed.

Pluralism and individual liberty

The right to freedom of religion or belief, the right to freedom of expression and even the right to freedom of association first and foremost belong to individuals. How is that to be reconciled with the importance of pluralism, a concept aiming at groups or institutions?

On the one hand pluralism can be considered to be the outcome of the exercise of several individual fundamental rights. Individual freedoms make it possible to get organised by reason of conviction, preference or interest. The existence of associations, churches and other religious groups, political parties and media can be seen as just the result of individual choices. On the other hand pluralism can be considered to be the very condition for the exercise of certain individual rights. The average person does not found an association or a political party. On the contrary, he chooses from among the existing possibilities. The average person does not publish a newspaper, he chooses one.[29] Without any given diversity he would not have a real choice.

[26] ECtHR 11 Sept. 2006, *Konrad and others* v. *Germany* (admissibility decision), referring to *Kjeldsen, Busk, Madsen & Pedersen*, par. 50. More generally, pupils may be educated to become responsible citizens participating in the democratic process in a pluralistic society, cf. Bundesverfassungsgericht (German Constitutional Court) 31 May 2006, 2 BvR 1693/04.

[27] ECtHR 29 June 2007, *Folgerø* v. *Norway*.

[28] Idem.

[29] The phenomenon of 'weblog journalism' will be left aside.

One may even argue that fundamental freedoms in general and religious freedom in particular did not in the first place originate for the sake of individual choice. Religious freedom had to make room for the existence of different religious groups by withdrawing from the state the authority to assess religious truth. The individual right to choose is in a way, then, an additional result. In Western societies, however, the right to freedom of religion and belief nowadays is expressly seen as a right to change your mind. Article 9 ECtHR not only lays down everyone's right to manifest his religion or belief, but also the right to change his religion or belief. Consequently, existing groups and associations may change if their followers change and they will not remain if all their followers pull out. From that point of view there is no real antithesis between the concept of pluralism and the concept of individual liberty, even though the stress is laid differently.

The notion that pluralism is both a result of and a condition for the exercise of several rights in particular holds true for minorities. In other words, pluralism is both an expression of their existence and at the same time a guarantee for their existence. Pluralism, after all, is opposed to predominance by one group. Therefore it is obvious that in several judgments the ECtHR has linked pluralism with the rights of minorities. According to the Court, the fact that 'pluralism, tolerance and broadmindedness are hallmarks of a "democratic society"' implies that

> democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[30]

In another judgment, the Court refers to the Council of Europe Framework Convention to argue that 'a pluralist and genuine democracy is particularly important for persons belonging to minorities.' [31] That also goes for ethnic and national minorities. The Court points out the importance of the possibility for minorities to express their own identity. Discrimination on account of ethnic origin conflicts with the pluralistic starting point of a democratic society:

> In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.[32]

[30] ECtHR 13 Aug. 1981, *Young, James & Webster* v. *UK*, par. 23, 49 and 63, Cf. ECtHR 17 Feb. 2004, *Gorzelik* v. *Poland*, par. 90; ECtHR 10 Nov. 2005, *Leyla Sahin* v. *Turkey*, par. 108. *See* Schokkenbroek, *Toetsing aan de vrijheidsrechten van het Europees verdrag tot bescherming van de rechten van de mens*, Zwolle 1996, p. 191.

[31] ECtHR 17 Feb. 2004, *Gorzelik* v. *Poland*.

[32] ECtHR 13 Dec. 2005, *Timishev* v. *Russia*, par. 58.

Obviously, the concept of pluralism recognises the importance of groups and institutions. Therefore the concept of pluralism is sometimes regarded as supplementary to an all too individualistic liberalism. After all, most values are group values and groups play an important part in the development of the individual.[33] That may be true, but the case-law of the ECtHR normally focuses on individual liberty. The viewpoints of individuals do not lose their weight because the majority of the group has another viewpoint.[34]

In this line of argument, the Court rejects the notion of legal pluralism conceived as a system in which different laws apply to the members of different religious groupings. One of the issues in the *Refah Partisi* case was that party's proposal that there should be a plurality of legal systems. According to the Court, this proposal would introduce into all legal relationships a distinction between individuals grounded on religion. It would categorise everyone according to his religious beliefs and it would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement.[35] The Court judged such a system to be contrary to the basic principles of the Convention.

More generally, individual freedoms are not just derivates of the existing pluralism. Pluralism may be considered as a 'technicité' of freedom[36] or even as a social objectification of freedom, to be studied more easily by the social sciences than the individual freedoms, which to a certain extent remain as yet to be exercised. That does not mean that individual liberties are swallowed up by pluralism. It is the other way round: pluralism enhances individual liberties.

Pluralism and political participation

Pluralism is especially important as far as political participation and political opinion building is concerned. The constitutions of a number of European states explicitly lay down this principle. The constitutions of Spain and Romania mention 'political pluralism', the constitution of Portugal refers to 'pluralistic democratic expression and organisation'. Other constitutions state the importance of a multiparty system or the free competition between political parties.

Apparently, between the individual citizens and the state there is no vacuum where the general will spontaneously arises. One of the most important means for an individual to have some influence on the decision-making process is voting for and being a member of one of the political parties which for their part bid for the

[33] A. Eisenberg, *Reconstructing Political Pluralism*, New York 1995.

[34] Cf. ECtHR 13 Aug. 1981, *Young, James & Webster* v. *UK*: 'Accordingly, the mere fact that the applicants' standpoint was adopted by very few of their colleagues is again not conclusive of the issue now before the Court'.

[35] ECtHR 13 Feb. 2003, *Refah Partisi* v. *Turkey,* par. 119.

[36] J. Mertens de Wilmars, 'Libertés, pluralisme et droit, Pluralisme et intégration Européenne', in L. van Goethem & L. Waelkens (eds.), *Liberté, pluralisme et droit*, Bruxelles 1995, p. 14.

public's favour. In this process the media play an important part as well. They offer the public

> information and ideas on political issues just as on those in other areas of public interest. (……) Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion on the ideas and attitudes of political leaders.[37]

In a democratic society all kinds of personal opinions, group interests and associational aspirations may nourish the political process. Religion may play its part as well.

Opinions may be based on religious values[38] and the exercise of the right of freedom of association may have a religious background.[39] In its judgment in the *Refah Partisi* case, the Court is somewhat more cautious with regard to religiously based political parties, but it does not exclude in advance their significance for pluralism and democracy. Provided that the means used are legal and democratic and the aims of the party are compatible with fundamental democratic principles, 'a political party animated by the moral values imposed by a religion cannot as such be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention.'[40] This paper will return to this subject later on.

By recognising the essential role of political parties, the Court does not discount the importance of other associations. There are all kinds of associations in which an individual may express his identity or his opinions.[41] Participating in these associations may give an individual all kinds of different valuable experiences, spiritual or rather worldly, intellectually challenging or rather entertaining. Moreover, the function of a lot of associations goes further:

> 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.[42]

[37] ECtHR 8 July 1986, *Lingens* v. *Austria.*
[38] ECtHR 4 Dec. 2003, *Ozgür Gündüz* v. *Turkey.*
[39] ECtHR 17 Feb. 2004, *Gorzelik* v. *Poland.*
[40] ECtHR 13 Feb. 2003, *Refah Partisi* v. *Turkey*, par. 100.
[41] Cf. the two foundations of freedom of expression: self development and democracy.
[42] ECtHR 5 Oct. 2006, *Moscow Branch of the Salvation Army* v. *Russia*, ECtHR 21 June 2007, *Zhechev* v. *Bulgaria,* both referring to Gorzelik.

At this place the Court's concept of pluralism demonstrates a certain affinity with pluralism theory in political science. The concept coined by Dahl assumes that all kinds of groupings and associations (trade unions, organisations of entrepreneurs, organisations of elderly people, churches, environment protection associations, organisations of farmers, human rights organisations and so on) try to influence government policies. They lobby directly at government agencies and inside political parties as well. Normally, a citizen belongs to several groupings and as such he has some influence in determining the policy of the government.[43] Political pluralism may therefore be described as: 'a plurality of groups to which individuals belong and by which individuals seek to advance and, more importantly, to develop, their interests.'[44]

This theory, in spite of being criticised at several points, still has some important aspects. Firstly, the theory contradicts elitist theory which assumes that every democracy has a definite elite with which the real power rests.[45] Secondly, the theory considers the influence of all kinds of groups to be a guarantee that not one grouping can actually seize power. Thirdly, the theory assumes that membership of groups and associations, more particularly the membership of all kinds of different groups and associations, furthers social integration and stability. An individual learns to compromise and to adapt himself within these groupings and associations. Moreover, being a member of different associations which may have different and sometimes contradicting aims improves the individual's willingness to accept compromise.

This paper does not claim that the ECtHR has really adopted this theory, but some judgments seem to have a similar background. The above quotation about participation and integration is actually preceded by this consideration: 'The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.'[46] The emphasis in pluralism theory on the phenomenon of the individual organising himself in *different* associations in *different* fields can also be found in the case-law of the Court. In a decision on a petition about the possibilities of special private and denominational education in Germany the Court considered:

> The Federal Constitutional Court stressed the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society. The Court regards this as

[43] R. Dahl, *Who governs*? Yale 1961; R. Dahl, *Pluralist democracy in the United States. Conflict and Consent*, Chicago 1967.

[44] A. Eisenberg, *Reconstructing Political Pluralism*, New York 1995

[45] Vgl. A. Hicks & F. Lechner in T. Janovski (ed.), *The Handbook of Political Sociology*, CUP 2005.

[46] ECtHR 5 Oct. 2006, *Moscow Branch of the Salvation Army* v. *Russia*, par. 61.

being in accordance with its own case-law on the importance of pluralism for democracy.[47, 48]

To sum up, the case-law of the Court shows the important role of pluralism in the political process. Citizens do not only try to influence political decisions as individuals, but also as members of all kinds of associations. Participating in these associations may contribute to a pluralist democracy and to social cohesion as well. The comments of the Court about religiously based political parties and the possible emergence of parallel societies do suggest that these effects are not to be taken for granted. In certain circumstances pluralism may even need some protection. That is our next section's subject.

Protection of pluralism

Pluralism is not only a concept that aims at a description of the actual situation of a democratic society and its consequences for individual liberty, but pluralism is a value to be protected as well.[49] After all, pluralism offers the individual a real choice and possibilities for developing himself, it provides for a many-voiced political process and may contribute to social stability.

Yet, pluralism to a large extent is the outcome of government abstention. The notion of pluralism as a hallmark of a democratic society, however, may also imply that the state has a part to play in the protection and safeguarding of pluralism. For years this idea is to be found in the case-law of the ECtHR. The Court labels the state as the 'ultimate guarantor of pluralism' (…).[50] It has also linked the idea that pluralism is especially important for minorities with the notion that the state not only has to respect their freedoms, but under circumstances has a duty to look after the conditions for minorities to express their identity.[51] The potential task in the field of the media recognised by the Court was already mentioned above. In France the Conseil Constitutionnel judged a press merger law to be in conformity

[47] ECtHR 11 Sept. 2006, *Konrad and others* v. *Germany* (admissibility decision).

[48] The ECtHR apparently lacks confidence in the integrative power of a 'pillarised' society. For 40 years such a structure of society existed in the Netherlands. The individual had an interest in all kinds of different associations and organisations (trade union, sporting club, school, church, newspaper and so on) but all these institutions were often part of one and the same Catholic, Protestant or Socialist pillar. In other words, there were not many associational connections between individuals living in different pillars. One of the most famous Dutch political scientists has studied the reasons why this very society was stable after all: A. Lijphart, *The politics of accommodation, pluralism and democracy in the Netherlands*, Berkeley 1975. Stability was achieved by co-operation and willingness to compromise at the top.

[49] Cf. J. Mertens de Wilmars, 'Libertés, pluralisme et droit, Pluralisme et intégration Européenne', in L. van Goethem & L. Waelkens (eds.), *Liberté, pluralisme et droit*, Bruxelles 1995, p. 14.

[50] E.g., ECtHR 24 Nov. 1993, *Lentia* v. *Austria*.

[51] Gorzelik, para. 93.

with the constitution, because this law's restrictions served pluralism, an 'objectif de valeur constitutionnelle'.[52]

This paper will treat two special aspects of the more active role of the state in protecting pluralism: the possible positive obligations of the state as far as the relationship *between* different groups is concerned and the obligation of the state to prevent an anti-pluralistic seize of power.

Relationship between different groups

The ECtHR realises that pluralism may carry tensions just because people of all kinds of convictions live in one and the same society. Actually, pluralism, tolerance and broadmindedness must go together, according to the Court. So there must be room to express controversial opinions. The state, for example, has an obligation to prevent opponents of a controversial demonstration from rendering the freedom to assembly illusory.[53]

Tolerance and broadmindedness imply that groups and their members have to bear criticism. That principle has been made clear by the Court as well as far as religious groups are concerned:

> Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.[54]

A ban on serious criticism of a religion therefore will be contrary to Article 10 ECHR.[55]

Even if differences of opinion between different religious groupings create a tension, the State's duty is not to remove the tension by eliminating pluralism. For example, when a religious community splits up, the mutual tension thereafter is to be considered as one of the inevitable effects of pluralism. In such a situation the State has to take care that the 'competing groups' tolerate each other.[56] In any case the State's duty of neutrality and impartiality, as defined in the Court's case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs.[57]

[52] 84-181 DC, 10/11 Oct. 1984; 82-141 DC, 27 July 1982.
[53] ECtHR 21 June 1988, *Plattform Ärzte für das Leben* v. *Austria*.
[54] ECtHR 20 Sept. 1994, *Otto Preminger Institut* v. *Austria*, par. 47.
[55] ECtHR 31 Jan. 2006, *Giniewski* c. *France*; ECtHR 2 May 2006, *Tatlav* c. *Turquie*.
[56] ECtHR 13 Dec. 2001, *Metropolitan Church of Bessarabia* v. *Moldova*.
[57] ECtHR 5 Oct. 2006, *Moscow Branch of the Salvation Army* v. *Russia*, par. 58, referring to ECtHR 13 Dec. 2001, *Metropolitan Church of Bessarabia* v. *Moldova*, and to ECtHR 26 Oct. 2000, *Hasan & Chaush* v. *Bulgaria*.

However, another starting point of the Court is the idea that groupings are to be protected against too vehement attacks. The state has a positive obligation to protect religious groupings against treatment that would make it impossible for them to profess their conviction without being threatened.[58] In other cases the Court has given national authorities a rather wide margin of appreciation to judge if the offensiveness of certain anti-religious utterances was a sufficient reason for a ban. A 'gratuitously' offensive and biting satire for example could be prohibited.[59]

The importance of pluralism seems to be a double-edged sword here. On the one hand pluralism involves room for all kinds of different opinions. On the other hand pluralism, tolerance and respect for the 'equal dignity' of others are foundations of a democratic society and may prompt state action against 'hate speech'.[60] The case-law of the Court shows that the question whether an utterance is to be considered as a contribution to public debate is often decisive. If this is the case, freedom of speech gives a substantial protection and offensiveness as such will not easily be a good reason for a ban. On the other hand it may be stated that in several cases, the Court has pointed to an obligation of every citizen

> to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement to their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.[61]

Anti-pluralistic political groupings

In a pluralistic and democratic society all kinds of different and conflicting values may exist.[62] In that respect pluralism and democracy involve a certain value-relativism.[63] Individuals themselves decide what values they prefer; they may choose for example between an active or a contemplative life. In politics there exist all kinds of values as well. Political parties decide for themselves whether in a given situation they prefer equality above liberty or the other way around. These parties must leave room for each other. The actual outcome of the political process will therefore always be 'provisional'.

The existence of groupings with ideas contrary to the very values of democracy and pluralism raises a problem, however. It may be useful to distinguish between

[58] ECtHR 20 Sept. 1994, *Otto Preminger Institut* v. *Austria*; ECtHR 25 Nov. 1996, *Wingrove* v. *UK*; ECtHR 9 Sept. 2005, *I.A.* c. *Turquie*.

[59] ECtHR 20 Sept. 1994, *Otto Preminger Institut* v. *Austria*.

[60] ECtHR 4 Dec. 2003, *Gündüz* v. *Turkey*, par. 40.

[61] ECtHR 20 Sept. 1994, *Otto Preminger Institut* v. *Austria.*

[62] J. Rawls, 'The Domain of the Political and Overlapping Consensus', in *Collected Papers*, Boston 1999.

[63] R.C. van Ooyen, *Der Staat der Moderne, Hans Kelsens Pluralismustheorie*, Berlin 2003. For that matter pluralism is not the same as relativism, Galston 2002, *supra* n. 1, p. 30.

such groupings that strive for political power and such groupings that do not. After all, in Europe nowadays, the democratic and pluralistic freedoms do not automatically extend to anti-democratic or anti-pluralistic political movements.[64] Experiences with fascism and communism have been decisive at this point. The preamble of the ECHR shows that human rights and democracy are to be considered to be inextricably bound up with each other and that democracy is a part of the 'European public order'.[65] The abuse of law provision (Article 17 ECHR) shows even more clearly that some political groupings are to be treated differently:

> One of the main objectives of Article 17 is to prevent totalitarian or extremist groups from justifying their activities by referring to the Convention.[66]

Subsequently, the Court has under certain circumstances allowed a ban on a political party. Because of the fact that such a ban is one of the most drastic interferences with the freedom of association, only 'serious breaches such as those which endanger political pluralism or fundamental democratic principles could justify a ban on a political party.'[67] One of the essential considerations of the Court in the *Refah Partisi* case was the fact that the aforesaid party was regarded as aiming at a replacement of the system of free and pluralistic political decision-making by a theocratic system. An earlier Commission judgment shows that a party that wants to set up a communistic and thus anti-pluralistic regime may be banned as well.[68]

This special approach normally does not hold true for groupings not striving for political power or using violence. Inside religious and other groups exist all kinds of convictions that are incompatible with the basic principles of a modern democratic society. Most religions, for example, do not strongly support equality between men and women. Many groupings may be organised in an authoritarian way as well. As long as they do not want to impose their views on others and as long as it is guaranteed that members of such groups are free to leave, these groups may actually be considered as contributing to social pluralism. These groups themselves may even endorse pluralism and the corresponding freedom.[69] In any case

[64] Cf. A. Logemann, *Grenzen der Menschenrechte in demokratischen Gesellschaften*, Baden Baden 2004, p. 292.

[65] ECtHR 30 Jan. 1998, *United Communist Party of Turkey and others* v. *Turkey.*

[66] Among others ECtHR 17 June 2004, *Zdanoka* v. *Latvia*, par. 109; cf. ECtHR 16 Nov. 2004, *Norwood* v. *UK* (admissibility decision). The Court has also referred to totalitarian examples in modern European history, ECtHR 13 Feb. 2003, *Refah Partisi* v. *Turkey*, par. 99.

[67] ECtHR 14 Feb. 2006, *Christian Democratic Peoples Party* v. *Moldava*, par. 76.

[68] EComHR 20 July 1957, 250/57.

[69] J. Rawls, 'The Domain of the Political and Overlapping Consensus', in *Collected Papers*, Boston 1999, p. 474.

they do not by definition threaten the 'overlapping consensus' in politics necessary for the maintenance of democracy.[70]

Nevertheless, we have seen that there is no strict separation between political and other opinions. Therefore, the range of thought of some groupings may form a breeding ground for farther-reaching and anti-pluralistic *political* opinions. Government interference to eliminate such thoughts could easily infringe the freedom of religion or the freedom of association, because a ban on the dissemination of these thoughts will not as such be necessary in a democratic society. In fact, the ECtHR judged a criminal conviction because of a religiously inspired argument in favour of *sharia* in the setting of a television debate to be a violation of Article 10 ECHR.[71] This catches the eye because in the *Refah Partisi* case, the aim of introducing *sharia* was one of the reasons for the party ban that the Court acknowledged:

> the Court considers that *sharia*, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.[72]

Yet, the government is not powerless in defending the basic principles of a modern democratic society. Even if a grouping presents itself as having a religious character, the state is permitted to review its real character:

> the Court recognizes that the States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population.[73]

Moreover, the government is allowed to restrict the reach of religious convictions that contradict those starting points. The Court accepted the banning of the headscarf from public education institutions. One of the reasons for that ban was the assessment of the headscarf as an expression of gender inequality. In this area the national authorities do have a rather wide margin of appreciation. So the Court's none-too-clear concept of 'true religious pluralism'[74] is to be elaborated by every member state of the Convention.

[70] Cf. Art. 7 of the Convention on the Elimination of all Forms of Discrimination against Women. This provision is more strict for organisations with a political nature.

[71] ECtHR 4 Dec. 2003, *Gündüz* v. *Turkey.*

[72] ECtHR 13 Feb. 2003, *Refah Partisi* v. *Turkey*, par. 123.

[73] In ECtHR 26 Sept. 1996, *Manoussakis* v. *Greece*, the Court talks about the need to secure true religious pluralism.

[74] ECtHR 10 Nov. 2005, *Leyla Sahin* v. *Turkey*, par. 110.

Conclusion

The ECtHR often uses the concept of pluralism. The concept is used in free speech cases, in freedom of education cases, in freedom of association cases and in freedom of religion cases. Generally speaking, the concept of pluralism reinforces individual and associational freedoms. Individuals and members of associations may for example express their different opinions. There are no predominant groups whose values may not be criticised. Government may not thwart new religious groups or cultural minorities' organisations. There is even a reciprocity between pluralism and individual and associational freedoms. Pluralism may be considered to be the outcome of the exercise of certain rights such as the right to freedom of association or freedom of religion, but at the same time it may be considered to be a condition for the exercise of those rights.

Pluralism in politics is especially important, and political freedoms are also reinforced by the concept. Political pluralism, however, is not to be separated from pluralism in society. It is not too far-fetched a conclusion that the ECtHR considers pluralism in society to be a *conditio sine qua non* for pluralism in politics. In this respect the special importance of media pluralism is to be understood. Media do not only express all kinds of values and identities, but they play their indispensable role in the political process as well. Therefore, predominance in the media sector must be prevented in order to safeguard political pluralism.

According to the Court, pluralism may contribute to the proper functioning of the social and political system, especially when individuals participate in all kinds of different groups and associations. The Court is less confident about a situation in which society is really split up and members of the same group do not have much contact with members of other groups. In other words, pluralism is different from the existence of separate societies. In this respect the Court's rejection of legal pluralism, of different legal orders for different groups fits in easily.

Individual liberty and pluralism do not always coincide. When the state is protecting pluralism the relationship between pluralism and individual freedoms becomes more ambiguous. Some of the free speech cases may serve as an example. On the one hand pluralism of speech may be at its peak when offensive speech is not banned at all. On the other hand, the Court leaves room for protecting the feelings of the members of religious groups against offensive utterances. In this ambiguous situation, a margin of appreciation is left to the national authorities. To a certain extent they may decide what 'true religious pluralism' means. The same holds true for government measures to discourage thoughts contradicting the basic principles of democracy.

When a political party promotes such thoughts, even a ban could be justified. A ban is allowed for by the Court if a party strives for one of the opposites of pluralism. These opposites may be described as totalitarianism, theocracy and absolutism. In this respect pluralism forms an essential part of the concept of democracy.

The question whether the concept of pluralism in the case-law of the ECtHR has a clear and distinct meaning can be answered by now. Pluralism can be defined as diversity of values, opinions, and social groups and the absence of predominance of particular values, opinions or groups. By using the concept of pluralism, the Court adds to the importance of individual and associational fundamental rights. As long as groups and associations leave individuals free to go, there's no discrepancy between individual and associational liberties either.

The Court's concept of pluralism gets rather vague in cases concerning the protection or the promotion of pluralism. Then, individual liberties as freedom of speech may conflict with group interests. In that kind of cases, the Court still seems to use its own single and distinct notion of pluralism, but at the same time allows for a plurality of national pluralisms. Some might find that a little bit disappointing. Nevertheless, the Court's case-law on the meaning of pluralism and the limits to pluralism will continue to be fascinating, simply because it is with that concept that the Court tries to reconcile individual liberties with the existence of groups.