

Minority identity in the making? Conceptualization and operationalization of national and ethnic minorities in the case law of the European Court of Human Rights

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ABSTRACT

It is well known that the European Convention on Human Rights aims to remedy violations of individual human rights, i.e., it is not an instrument for the protection of minorities. However, the European Court of Human Rights has the potential to protect minority communities indirectly by interpreting Convention rights in the context of non-discrimination. This judicial role cannot be overestimated since ethnic and national tensions are crucial social problems of our time that can be resolved peacefully by legal means based on a desirable European consensus. However, for this to happen, it is first necessary to identify what a minority is (conceptualization) and who belongs to a minority group (operationalization). Through the analysis of selected cases, this article shows how far the Court has gone on this path and what major elements of conceptualization and operationalization can be identified in its jurisprudence. Shortcomings and missed opportunities in the Court's reasoning will also be pointed out. With respect to conceptualization, we claim that the theoretical concept of a minority can implicitly be identified in the Strasbourg case law, with minority identity as its central element. In accordance with this, the main method of operationalization for the Court is self-identification, along with the (often explicit) acceptance of the objective criteria of minority membership.

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KEYWORDS

conceptualization, operationalization, national and ethnic minorities, European Court of Human Rights, identity, self-identification

1. INTRODUCTION

As part of the research programme ‘Identity, Race, Ethnicity in Constitutional Law’, our study aims to explore how the European Court of Human Rights (hereinafter ECtHR or Court) has contributed to the legal conceptualization and operationalization of national and ethnic minorities¹ in the context of the European regional fundamental rights regime.

With regard to terminology, our study stays in line with the broader understanding of the research project. Thus conceptualization means here the process by which a court defines what a national or ethnic minority is. In contrast, operationalization is when a court identifies and specifies *who* belongs to a particular minority in order to decide a human rights dispute. (Of course, these steps and elements are not always easily separated in judicial practice.) On a related note, the term ‘minority’ is used to refer to national, ethnic, and linguistic minorities, but we are aware that minority identity is a broader concept. Therefore, in relation to the theme of this special issue, we are not specifically concerned with new minorities but with how the ECtHR can provide protection for traditional minorities within the framework of the European Convention on Human Rights (hereinafter ECHR or Convention). Furthermore, it is beyond the scope of our striving to reflect on the potentially cross-fertilizing jurisprudence of universal human rights monitoring bodies and other regional courts or the overlaps and gaps in the protection of minorities guaranteed by the Council of Europe and the European Union.²

The role of the ECtHR in the protection of minorities has been addressed by several authors³ and the Venice Commission⁴ from different perspectives. However, the focus of these analyses was not the conceptualization and/or operationalization of minorities, and reflection on recent jurisprudence is scarce. The disasters of the 2020s – including the tragic Russo-Ukrainian war and the Ukrainian people’s struggle for freedom, the renewed Armenian-Azerbaijani conflict, and the most recent Israeli-Palestinian hostilities – confirm that identity struggles play an important role in serious, actual, and factual crises. The law is generally slow to respond to these crises, and even more so in the case of the judiciary. However, the legal protection of national and ethnic identities and the judicialization of identity disputes can help to mitigate such crises. Furthermore, as Pentassuglia warns us, ‘[t]he various attempts at (re-)conceptualising ethno-cultural identity ultimately account for the role of law, not only in addressing a

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²As for the developments in universal international law and the Council of Europe (apart from the ECtHR), see Nagy and Vizi (2024).

³See e.g. Fokas and Richardson (eds) (2020); Gilbert (2002); Henrard (2016); Pentassuglia (2009a), (2009b), (2012), (2013); Peroni (2015).

⁴Venice Commission (2007).



variable range of collective and individual interests [...], but also in calibrating responses at a more systemic level'.⁵

Our hypothesis is that the Court is able to carry out the conceptualization and operationalization of minorities *indirectly* by interpreting the rights set out in the ECHR. In particular, the right to privacy and the prohibition of discrimination seem relevant, but potentially other rights as well, such as the freedom of expression, freedom of religion, linguistic rights related to due process, right to education, participation in social, cultural, economic and public life, etc. This indirect approach follows from the general nature of the Convention, i.e., the fact that it does not contain specific minority rights but only a general anti-discrimination clause. To justify our hypothesis, we first need to examine the limits of judicial law-making in the field in the case of the ECtHR (Section 2). We will then use the method of case analysis to identify what has been achieved so far, and what has been missed (Sections 3 and 4). It is important to note that we do not intend to undertake a fully-fledged analysis of the Strasbourg case-law but to draw on a sample of cases that are or could potentially have been relevant for the conceptualization and operationalization of minorities. Finally, we will take stock of the contribution of the ECtHR to the protection of minorities in this context, given its limited possibilities (Section 5).

2. THE LIMITS OF CONCEPTUALIZATION AND OPERATIONALIZATION IN ECTHR PRACTICE IN THE CASE OF MINORITY RIGHTS

In order to explore the limits of the ECtHR's protection of minority rights, it is useful to refer to the basic difficulties. It is commonplace in minority studies that a fundamental problem is the lack of a common definition of minorities, even at the European level. Suffice it to recall that some countries, because of their egalitarian conception of democracy, do not recognize national or ethnic minorities at all (France),⁶ while others make a distinction between Indigenous ethnic groups and other national and ethnic minorities (e.g., Finland⁷ and recently Ukraine⁸). In some European states, these groups are identified as linguistic or religious minorities, whereas in others, the notion of national and ethnic minority is defined by law, and different (identity, linguistic, political, cultural) rights are guaranteed to those groups and their members who meet the definition of minority under domestic law. The coexistence of the majority nation and linguistic and cultural communities with different identities is also due to different historical facts (succession of states, changes in state borders, colonial past, etc.).

⁵Pentassuglia (2018) 20–21.

⁶See e.g. Gilbert and Keane (2016) 883.

⁷According to the Constitution of Finland (Section 17, Subsection 3), the Sámi, as an indigenous people, have the right to maintain and develop their own language and culture. See also the website of the Sami Parliament ([link1](#)).

⁸The Ukrainian Constitution in its Article 11 provides that '[t]he State promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine.' According to Article 92(3) of the Constitution, the rights of indigenous peoples and national minorities of Ukraine are determined exclusively by the laws of Ukraine.



Nevertheless, Europe has sought to develop a legal framework for the international protection of minorities. The main pillars of this framework are well known. The most comprehensive instrument is the Framework Convention for the Protection of National Minorities (hereinafter FCNM), the first legally binding multilateral instrument for the protection of national minorities worldwide. It was adopted by the Committee of Ministers on 10 November 1994 and entered into force on 1 February 1998. To date, the FCNM has 39 member states. The other relevant Council of Europe treaty in this field is the European Charter for Regional or Minority Languages. It is important to note, however, that while these legal instruments provide a framework for the protection of national and ethnic minorities, their effectiveness depends on their implementation by member states, as the ECtHR has no jurisdiction over the rights enshrined in them.

Of course, the ECtHR may refer to these conventions when interpreting the ECHR, and it may also rely on the reports of the Council of Europe's European Commission against Racism and Intolerance. However, the ECtHR can only deal with a violation of ECHR rights if the individual or organization concerned has exhausted all domestic remedies or has no effective remedy. In other words, the Court's jurisdiction is limited to cases falling within the scope of the ECHR and brought before it by individuals or groups claiming to be victims of human rights violations.⁹ The ECHR embraces the universalistic approach to human rights protection and does not provide specific rights for minority groups defined by ethnicity, language, and/or religion.¹⁰ The only explicit reference to (national) minorities can be found in Article 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.¹¹

Although the term 'national minority' is not defined, it is contrary to the ECHR to treat any person, non-governmental organization, or group of persons in a discriminatory manner on any of the listed grounds without reasonable and objective justification. Therefore, there is no direct way for individuals belonging to minority groups to claim minority rights before the ECtHR. However, in the context of other human rights violations, the Court can protect minority identity if it is willing to do so.

⁹Gilbert (2002) 737.

¹⁰In 1993, the Parliamentary Assembly of the Council of Europe, in Recommendation 1201, did propose a new protocol to the ECHR providing for minority rights, but this was rejected by the Heads of State and Government meeting of the Council of Europe at its Vienna Summit in October 1993. Gilbert (2002) 738.

¹¹Protocol 12 to the ECHR (adopted on 4 November 2000, and entered into force on April 1, 2005, after the tenth ratification) in its Art. 1(1) confirms the general prohibition of discrimination and gives a detailed regulation, however, not all Council of Europe (CoE) Member States ratified or signed this protocol. To date, Protocol 12 has been ratified by Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia (with one reservation: Abkhazia), Luxembourg, Malta, Montenegro, the Netherlands, Northern Macedonia, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, and Ukraine. A further 17 states have signed but not ratified (including Russia, which is no longer a member of the CoE). Bulgaria, Denmark, France, Lithuania, Monaco, Poland, Sweden, Switzerland, the United Kingdom have not signed the Protocol.



3. CONCEPTUALIZATION IN STRASBOURG CASE LAW – WHAT IS A MINORITY?

One would search in vain for a full-blown definition of minorities in Strasbourg case law. Even though the Court has referred to the FCNM many times, relying on an ‘emerging international consensus recognizing the special needs of minorities’,¹² this consensus, in its view, does not seem to extend to the very notion of minorities. As expected from a post-World War II judicial body with a mandate to supervise the implementation of individual human rights, the ECtHR only deals with collectivities in relation to individual rights violations. Nevertheless, there are several cases that contribute to the conceptualization of minorities by having put forward certain elements that together could add up to a minority definition – indeed, similarly to what UN Special Rapporteur Capotorti proposed in 1977.¹³ These cases invariably centre around the issue of minority identity,¹⁴ whereby group identity can be unfolded from personal identity. In our view, minority identity is a central element of the concept of minorities, even if this has never been explicitly proclaimed by the ECtHR.

3.1. Group identity in the context of freedom of assembly and association

Beginning in the late 1990s, the ECtHR started to receive applications, initially from Greece and Turkey and subsequently from countries from the former Soviet bloc, that affected the assertion of minority groups’ identity in the public sphere.¹⁵ These involved the refusal by state authorities to register the applicants as associations or bans on their public meetings.

One of the most famous cases in which the ECtHR explicitly addressed the issue of the conceptualization of minorities was *Gorzelik and Others v. Poland*.¹⁶ Here, the applicants alleged a breach of their right to freedom of association under Article 11 of the Convention because they had been refused permission to register their association called ‘Union of People of Silesian Nationality’ on the grounds that such a nation did not exist in Poland. The domestic courts noted that there might exist an ethnic identity of Silesians in Poland but denied that this group constituted a nation or a national minority (paras. 22, 26, 48, and 50). Beyond the conceptual problem of whether Silesians can be recognized as a national minority or are merely an ethnic group, the issue had practical significance. Namely, recognizing the Silesians as a national minority might have resulted in further claims on their part for the special rights and privileges granted to national minorities by domestic law, particularly in the context of elections, including exemptions from the electoral thresholds (paras. 32, 35–36). The Katowice Court of Appeal admitted as much that...

[T]he Silesians belong to a regional group with a very deep sense of identity, including their cultural identity; no one can deny that they are distinct. This does not, however, suffice for them to be

¹²See, for example, *Chapman v. the United Kingdom*, App. No. 27238/95, judgment of 18 January 2001, para. 93.

¹³See Nagy and Vizi (2024).

¹⁴As Pentassuglia (2012: 2) aptly points out, identity – along with pluralism and non-discrimination – is one of the main themes that underpin the recent decades of Strasbourg case law on minorities.

¹⁵Pentassuglia (2013) 74.

¹⁶*Gorzelik and Others v. Poland*, App. No. 44158/98, judgment of 17 February 2004.



considered a distinct nation. They have never commonly been perceived as a distinct nation, and they have never tried to determine their identity in terms of [the criteria for a 'nation'] (para. 32).

Further, 'a nation is formed in a historical process which may last for centuries', a crucial element of which is self-identification or national awareness. Importantly, it is not sufficient that a group of individuals considers itself a nation, but they must be accepted and perceived by others as such (para. 32). The ECtHR quoted at length from the conceptualization of the Katowice Court of Appeal – which the Supreme Court of Poland itself regarded as arbitrary and controversial (para. 33) –, but did not venture to comment on its pertinence. Accordingly, the Court did not contest the Polish authorities' argument, pursuant to which, in order to constitute a national minority, a group must be linked to a majority from outside Poland, such as the Germans, Ukrainians, or Lithuanians. As Judges Costa, Zupančič, and Kovler pointed out, '[t]hat is a political choice and a matter on which an international court could not dictate to a Contracting State without infringing upon the subsidiarity principle'.¹⁷ Instead, the Court focused on the applicants' argument that Polish law did not provide any definition of a 'national minority' as part of its standard analysis regarding the justification of the interference with freedom of association.

Examining whether the impugned restriction was prescribed by law, the Court allowed that 'such a definition would be very difficult to formulate' (para. 67); perhaps this is why no definition is found in any international treaty, including the FCNM. Furthermore, State practice regarding the official recognition of national, ethnic, or other minorities varies from country to country and even within countries. The Court declared as a statement of principle that the choice as to what form such recognition should take – be it an international treaty, a constitutional provision, or a special statute – must be left to the respective State (para. 67). Although the Court detected 'a commonly shared European view' concerning the importance of the protection of national minorities, in its opinion this did not imply a particular concept of a national minority or the obligatory introduction of a procedure for the official recognition of minority groups (para. 68). That said, it seems strange that the Court saw no problem in that the Polish legislation did not define national minorities at all, and left the interpretation of the notion to practice (para. 69). The European judges found comfort in the fact that 'in the area under consideration it may be difficult to frame laws with a high degree of precision. It may well even be undesirable to formulate rigid rules'. Yet, in our view, having rigid rules and the lack of an express definition are quite different things.

In any event, the Court proceeded to look at the legitimate aim of the restriction. In line with its established practice, the only necessity capable of justifying an interference with freedom of association is one that springs from 'democratic society' (para. 89). In this context, the Court admitted that associations seeking an ethnic identity or asserting minority consciousness are important to the proper functioning of democracy, as they contribute to diversity (para. 92), and that 'forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights' (para. 93). Yet, the Court accepted the interpretation of the domestic authorities, namely that registration of the association as an organization of a national minority could potentially lead to the latter's acquisition of electoral privileges (paras. 101–102). Under these circumstances, the national authorities had not

¹⁷Joint concurring opinion of Judges Costa and Zupančič joined by Judge Kovler, para. 8.



overstepped their margin of appreciation in considering that there was a pressing social need, at the moment of registration, to regulate the free choice of associations to call themselves 'organisation[s] of a national minority', in order to avoid a future abuse of electoral privileges and thereby prevent disorder and protect the rights of others (paras. 103, 105). Moving on to issues of proportionality, the Court found that the refusal of registration did not amount 'to a denial of the distinctive ethnic and cultural identity of Silesians'. Indeed, the disputed restriction was essentially concerned with the label which the association could use in law – whether it could call itself a national minority – rather than with its ability 'to act collectively in a field of mutual interest'. As such, it could not be considered disproportionate to the aims pursued (para. 105).

In Weller's opinion, a superficial reading of the judgment might suggest that the Court endorsed the view that a state should have the right to determine only according to its own interests whether a group constitutes a minority, whereas, in fact, the Court merely focused on the automaticity between registration of the organization and the possibility of claiming exemption from the five per cent threshold for parliamentary representation.¹⁸ While this may well have been the case, *Gorzelik* remains a controversial judgment, especially given that in other, factually similar cases related to minority associations, the ECtHR found violations of Article 11 of the ECHR.¹⁹

In *Sidiropoulos and Others v. Greece*,²⁰ the national authorities refused to recognise the association called 'Home of Macedonian Civilization' on the grounds that the latter posed a threat to the territorial unity and national security of Greece. The applicants claimed that the association represented the Macedonian minority in Greece with the aim of promoting 'Macedonian national consciousness' and preserving the traditions and culture of the Florina region (para. 8). In turn, the domestic courts denied the existence of a Macedonian minority in Greece. They were convinced that the applicants intended to dispute the Greek identity of Macedonia and its inhabitants (paras. 11, 39). The ECtHR established that the interference was prescribed by law (para. 36) and had a legitimate aim. In light of the situation prevailing in the Balkans at the time and the political friction between Greece and the Former Yugoslav Republic of Macedonia, the Court accepted that the interference was intended to protect national security and prevent disorder (para. 39). However, '[m]ention of the consciousness of belonging to a minority and the preservation and development of a minority's culture could not be said to constitute a threat to "democratic society" [...] Nor had Mr Sidiropoulos in any way challenged the Greek identity of the Greek province of Macedonia; he had merely claimed that the Macedonian minority there was oppressed' (para. 41). Unsurprisingly, the Court did not take an explicit position on the question of whether Macedonians can really be considered a minority in Greece. It did proclaim that the existence of minorities in a country is a 'historical fact' that a

¹⁸Weller (2012) 502.

¹⁹Three European judges did try to reconcile the *Gorzelik* decision with the Court's decisions in other similar cases to prove that they had not treated the Silesians more severely than the Macedonian minority. However, their argumentation is not entirely convincing: 'the decisive factor in the *Gorzelik* case was the fact that the association could have been registered if it had changed its name and amended the disputed paragraphs of its memorandum. While this would have deprived it of the electoral 'advantage' afforded national minorities, it would have acquired full legal capacity as an association'. *Gorzelik v. Poland*, Joint concurring opinion of Judges Costa and Zupančič joined by Judge Kovler, para. 13.

²⁰*Sidiropoulos and Others v. Greece*, App. No. 26695/95, judgment of 10 July 1998.



democratic society has to tolerate and protect (para. 41), but it focused on the cultural aims of the association (para. 44).

*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*²¹ concerned an association based in south-western Bulgaria (the Pirin region) having the aim to 'unite all Macedonians in Bulgaria on a regional and cultural basis' and to achieve 'the recognition of the Macedonian minority in Bulgaria'. Its main activity consisted of holding commemorative meetings (paras. 1, 10). The national authorities refused to register Ilinden as they found it dangerous to the territorial integrity of Bulgaria and the unity of the nation (para. 12). For the same reason, Ilinden's meetings were banned (paras. 19–31). The applicants claimed that the aim of the authorities had been to suppress the dissemination of the idea that a Macedonian minority existed in Bulgaria (para. 64). In the government's view, Ilinden had infringed the rights and freedoms of others because it aspired to create a Macedonian nation among people belonging to the Bulgarian nation and demanded the imposition of a Macedonian identity in the region of Pirin. Most importantly, the applicant association was a separatist group that sought the secession of Pirin from Bulgaria (para. 71). The ECtHR did not take a stance with regard to the existence of a Macedonian minority in Bulgaria; instead, it repeated its argumentation expressed in *Sidiropoulos*:

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 [...] interference with its rights under Article 11 of the Convention' (para. 89).

Later refusals to register Ilinden were also discussed by the Court.²² The applicants asserted that it was an official policy to systematically ignore the existence of the Macedonian minority in Bulgaria (UMO Ilinden, para. 37), despite the results of the latest census, according to which 5,071 persons defined themselves as Macedonians (UMO Ilinden, para. 45). They pointed out that the Macedonian minority was the only one not recognized by Bulgaria, and had as a result suffered diverse instances of discrimination, as had been noted by various Council of Europe bodies. In their view, the national courts systematically refused to register any organization which endeavoured to defend the rights of the Macedonian minority because they feared that such registration would amount to a recognition of that minority (UMO Ilinden No. 2, para. 45). This made it particularly important for the Court to examine the complaint under Article 14, because '[o]nly a ruling under that provision would spur a real solution to the problem and show that the situation under consideration consisted in the denial of the existence of a whole ethnos' (UMO Ilinden No. 2, para. 47). Yet, similarly to other cases concerning interferences with the rights of persons asserting minority ethnic consciousness (namely, the Kurdish in Turkey and

²¹*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, App. nos. 29221/95 and 29225/95, judgment of 2 October 2001.

²²See for example *United Macedonian Organisation Ilinden and Others v. Bulgaria*, App. No. 59491/00, judgment of 19 January 2006; *United Macedonian Organisation Ilinden and Others v. Bulgaria No. 2*, Application no. 34960/04, judgment of 18 October 2011.



the Turkish in Greece),²³ the Court was satisfied with finding a breach of Article 11, and perceived no need to address separately the complaint under Article 14 (UMO Ilinden No. 2, para. 49). Therefore, the Court's case law on freedom of assembly and association provided no further guidance on the issues of the conceptualization (or operationalization) of minorities.

3.2. The right to minority identity in the context of private and family life

Minority identity considerations have also been widely discussed by the Court under Article 8, which concerns 'rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community'.²⁴

From the many pertinent cases, for our analysis, we chose *Chapman v. the United Kingdom*, as this seems to cover all relevant aspects mentioned by the Court. The applicant was a Gypsy woman who lived in a caravan with her family and stopped on temporary or unofficial sites when her husband found work as a landscape gardener. They were constantly moved from place to place by the authorities, and thus, the children's education was interrupted. When the applicant decided to buy a piece of land with the intention of living on it in a mobile home, the authorities refused to give her planning permission, referring to environmental reasons. The Court famously declared that *a minority-specific lifestyle belongs to the broader concept of ethnic identity*:

[T]he applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though [...] many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods... Measures affecting the applicant's stationing of her caravans therefore [...] affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition (para. 73).

That said, the Court warned that 'belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment' (para. 96). The Court also emphasized that 'the *vulnerable position of Gypsies as a minority* means that some special consideration should be given to their needs and their different lifestyle' both in legislation and decision-making and entails a positive obligation imposed on the States 'to facilitate the Gypsy way of life' (para. 96, emphasis added). Vulnerability may be seen as an important

²³See, among others, *Sidiropoulos and Others*, para. 52; *United Macedonian Organisation Ilinden and Others*, para. 84; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, App. no. 23885/94, judgment of 8 December 1999, para. 49; *Emek Partisi and Şenol v. Turkey*, App. no. 39434/98, judgment of 31 May 2005, para. 31; *Bekir-Ousta and Others v. Greece*, App. no. 35151/05, judgment of 11 October 2007, para. 51; *Emin and Others v. Greece*, no. 34144/05, judgment of 26 March 2008, para. 37; and *Tourkiki Enosi Xanthis and Others v. Greece*, no. 26698/05, judgment of 27 March 2008, para. 63.

²⁴*Connors v. the United Kingdom*, App. no. 66746/01, judgment of 27 May 2004, para. 82.



element of the minority concept, with a loosely analogous meaning to the *non-dominant position* of minority groups in society.²⁵

Notwithstanding the above-principled statements, similar to other cases on the right to respect for family life and home concerning Gypsy/Roma families,²⁶ the Court applied Article 8 in a 'minority-insensitive way'.²⁷ It did refer to the applicant's ethnic identity, but when examining the justification of the restriction imposed upon her right to family life, it did not give due consideration to this aspect. It focused on the applicant's (individual) right to a home rather than a particular way of life as a conceptual element of minority identity. It has never even mentioned group identity – although perhaps this is something we cannot expect it to do, considering its limited mandate. In any case, eight judges, in their dissenting opinion, realized the collective aspect of the case, even if from another perspective, i.e., the associated public interest in preserving cultural diversity.²⁸ Other commentators also point out this flaw in the Court's argumentation in the Roma and Sámi cases and advocate for the use of 'cultural characteristics' instead of 'lifestyle'. The latter term, in their view and ours, suggests that individuals choose a way of life and does not adequately address those who were born into the traditions of (minority) communities. Instead, the fact of being a member of a minority is a result of choice only in a very limited sense – perhaps to stay or leave.²⁹

The *Aksu v. Turkey*³⁰ case concerned the use of derogatory stereotypical images of Roma in government-sponsored publications. In a book approved and funded by the Ministry of Culture, a professor wrote about the Roma minority living in Turkey, describing their customs and way of life. The applicant, a Turkish citizen of Roma origin, was offended by the text, especially the passages which stated that Gypsies were engaged in illegal activities, lived as 'thieves, pick-pockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers' and were 'polygamist and aggressive' which he considered to be a generalization and offensive to his ethnic group. Moreover, he filed another complaint against definitions included in 'the Turkish Dictionary for Pupils' that he found to be highly offensive to his community and asked the Ministry of Culture to remove them. The applicant claimed the violation of Art. 14 on non-discrimination in conjunction with Art. 8 on the protection of private life. The Court firmly balanced the applicant's right to private life with the competing right to free expression (even academic freedom) and the positive obligations of the state and held that the Turkish authorities

²⁵To that, only indirect reference can be found in Strasbourg case law: 'A balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'. *Gorzelik*, para. 90. See also, *Artyomov v. Russia*, App. no. 17582/05, decision of 7 December 2006.

²⁶E.g. *G. and E. v. Norway*, App. no. 9278/81 and 9415/81, decision of 3 October 1983; *Buckley v. United Kingdom*, App. no. 20348/92, judgment of 25 September 1996, *Connors v. the United Kingdom*. See their analysis in *Holt (2012)* 244–51. and *Salomon (2012)* 441–45.

²⁷*Hannikainen (2012)* 39.

²⁸'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 but also in order to preserve a cultural diversity of value to the whole community.' *Chapman v. UK*, Joint Dissenting Opinion of Judges Pastor, Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 3.

²⁹*Thornberry and Estébanez (2004)* 70 quoted by *Salomon (2012)* 445.

³⁰*Aksu v. Turkey*, App. nos. 4149/04 and 41029/04, judgment of 15 March 2012.



had not overstepped their margin of appreciation or disregarded their positive obligation to secure to the applicant effective respect for his private life.³¹ Thus, there had been no violation of Art. 8 ECHR considering the context of the publications as a whole and the details of the case in their complexity.

Nevertheless, the case is a step forward in two respects. First, the Court considered the complaint to be admissible, even though the applicant was a member of an ethnic group:

[T]he applicant, who is of Roma origin, complained about remarks and expressions that allegedly debased the Roma community. It is true that the applicant was not personally targeted; he could, however, have felt offended by the remarks concerning the ethnic group to which he belonged. Furthermore, there was no dispute in the domestic proceedings regarding the applicant's standing before the court. Hence, the merits of his case were examined at two levels of jurisdiction. In view of the foregoing and given the need to apply the criteria governing victim status in a flexible manner, the Court accepts that the applicant, although not directly targeted by the contested passages, can be considered a victim of the facts complained of within the meaning of Article 34 of the Convention. (paras 53–54).

Second, the ECtHR reaffirmed that 'any negative stereotyping of a group, if it reaches a certain level, is likely to affect the group's sense of identity and the self-esteem and self-confidence of its members. In that sense, the private life of the members of the group may also be affected' (para. 58). However, the judgment did not clarify the factors influencing a 'certain degree' of stereotyping. For the purposes of the conceptualization of a minority, the case law of the Court could filter out certain aspects that might influence the assessment, according to which the negative impact of a statement or act on privacy should exceed a 'threshold of seriousness' – but it was not clear what the criteria for this threshold were.

These criteria were formulated only nine years later when the ECtHR issued two landmark decisions in the cases of *Budinova and Chaprazov v. Bulgaria*³² and *Behar and Gutman v. Bulgaria*,³³ concerning minority diversity: It ruled that in cases of incitement to hatred, violence, and discrimination, the protection of freedom of expression cannot be invoked as a defence when the expressions used clearly violate the individual rights of the victims of hate speech in the specific cases of Roma and Jews. Member States have an obligation under Article 8 ECHR, which protects privacy, in conjunction with Article 14 ECHR, which prohibits discrimination, to take action against persons who publicly incite hatred, violence, or discrimination.³⁴ For the first time in its many decades of practice, the Court thus found a violation of the Convention for general anti-minority speech and also set out criteria for assessing when the speech in question is sufficiently harmful to the sense of identity of a community or to the self-esteem of its members. According to commentators, this represents a qualitative change in the recognition of the link between community identity and human dignity.³⁵ The judicial practice embodied in these decisions also represents a notable advance in the legal conceptualization of minority, as will be shown below.

³¹Bourloyannis-Vrailas (2012) 685.

³²*Budinova and Chaprazov v. Bulgaria*, App. no. 12567/13, judgment of 16 February 2021.

³³*Behar and Gutman v. Bulgaria*, App. no. 29335/13, judgment of 16 February 2021.

³⁴Voorhoof (2021).

³⁵Ilieva (2021), Várnagy (2021).



The two cases were based on statements made by the Bulgarian politician Volen Siderov, the leader of Ataka, a political party that has been represented in Bulgaria's Parliament since 2005 and has been part of the ruling coalition since 2017. Ataka runs its own television channel, which regularly broadcasts programmes attacking ethnic minorities and foreigners. Siderov has also been an MP in Bulgaria since 2005, having previously worked as a journalist. The complainants described Ataka as a xenophobic party and alleged that throughout his journalistic and political career, Siderov had systematically engaged in extremist anti-minority propaganda through his books, newspaper articles, and later his television show, which he had effectively turned into his political platform. In his television programmes, interviews, and articles, the politician constantly spoke of the 'Gypsy terror' threatening Bulgaria and the 'Gypsyisation' of the country (Budinova, para. 11), and in two books, he made statements denigrating the Jewish religion and denying the Holocaust (Behar, paras. 11–14). As the Supreme Court of Cassation in Bulgaria dismissed the appeals without considering the merits, the claimants turned to the ECtHR in 2013.

In these judgments, the Court identified the criteria of stereotyping and hate speech against minorities. The first two elements of the test clearly help to conceptualize minorities under ECHR law. The relevant factors for determining the applicability of Article 8 include, but are not necessarily limited to, (1) the characteristics of the group (for example, its size, degree of homogeneity, particular vulnerability or history of stigmatization, and its position in relation to society as a whole); (2) the precise content of negative remarks about the group (in particular, the extent to which they are likely to convey a negative stereotype about the group as a whole and the specific content of that stereotype); (3) the form and context of the statements, their extent (which may depend on where and how they were made), the position and status of their author, and the extent to which the statements could be considered to have affected a fundamental aspect of the group's identity and dignity; (4) the general social and political climate at the time the statements were made.

Using these criteria, the Court in *Behar* found that the offending articles targeted Jews as a group, as a weak and vulnerable minority. The Court found these articles 'virulently anti-Semitic', 'invoked outdated anti-Semitic narratives', 'denied the Holocaust and portrayed it as a story invented as a tool of financial blackmail', displaying 'extremely negative stereotypes aimed at denigrating Jews and inciting prejudice and hatred against them' (paras. 69–71). In *Budinova*, 'the target group was the Roma, who have long been considered disadvantaged and vulnerable and in need of special protection'. All statements were 'deliberately couched in inflammatory terms, in an apparent attempt to portray Roma [...] as highly susceptible to crime and depravity'; 'systematic and [...] extremely virulent', the 'message conveyed in a blunt and repeated manner [...] that Roma are immoral social parasites who abuse their rights, live on the backs of the Bulgarian majority, subject the majority to systematic violence and crime without hindrance, and seek to take over the country'. All of this is 'capable of stigmatizing the Roma [...] as a group and inciting hatred and prejudice against them'; 'undoubtedly an extremely negative stereotyping aimed at denigrating the Roma [...] and inciting prejudice and hatred [...]' (paras. 64–65). In view of all this, and the fact that the speaker, Siderov, was a rising parliamentary party leader with significant media exposure, his statements were capable of having a sufficient impact on the Jewish/Roma identity and self-esteem of Jewish/Roma individuals to meet the 'gravity' threshold for the applicability of Articles 8 and 14 (Behar, para. 72; Budinova, paras. 67–68).



3.3. Electoral rights and minorities

The right to freedom of elections, combined with a general prohibition of discrimination, seems to be an appropriate way of conceptualizing what a minority is. Below, we present four cases – one from early case law and three more recent – in which the Court, however, made little or no use at all of this opportunity.

The first example is *Mathieu-Mohin and Clerfayt v. Belgium*³⁶ from 1987, which can be located at the intersection of the right to representation and the right to use one's language. The applicants, Mrs. Mathieu-Mohin and Mr. Clerfayt, were French-speaking Belgian citizens residing in the administrative district of Halle-Vilvoorde in the Flemish Region and in the electoral district of Brussels-Capital. They were members of the national parliament (the former of the Senate, the latter the House of Representatives³⁷) and took their parliamentary oath in French. Therefore, they were excluded from being members of the Flemish Council. They both claimed that the relevant Belgian law was discriminatory as regards the right to vote freely since, on the one hand, French-speaking voters in the district of Halle-Vilvoorde could not appoint French-speaking representatives to the Flemish Council, whereas Dutch-speaking voters could appoint Dutch-speaking representatives to the same, and on the other hand, the law prevented any parliamentarian elected in Halle-Vilvoorde from sitting on the Flemish Council if they belonged to the French-speaking group in the House of Representatives or the Senate.

The Court found that in this particular case, there was no violation of Protocol 1, Art. 3 (free elections) alone or in conjunction with Art. 14 (prohibition of discrimination). It has been consistently argued that the right to free elections does not in itself guarantee a right to 'equal weight in the outcome of the election or that all candidates must have equal chances of winning' (para. 54). In light of the general context of the Belgian electoral system, it provisionally attempted to achieve a balanced representation of both culture/language and territorial districts, and in this endeavour, the Belgian government was granted a wide margin of appreciation. Voters cannot be defined solely in terms of language and culture; political, economic, social, religious, and philosophical considerations also influence their votes. At the same time, the Court admitted that in a country like Belgium, linguistic preferences are an important factor in the way citizens vote, especially in the case of residents of a 'sensitive' area, such as the municipalities on the outskirts of Brussels (para. 56). However, according to the ECtHR, the particular system had built-in safeguards for the protection of minorities and the at-that-time electoral system did not constitute a disproportionate restriction on 'the free expression of the opinion of the people in the choice of the legislature' (para. 57). The Belgian electoral law

³⁶*Mathieu-Mohin and Clerfayt v. Belgium*, App. no. 9267/81, judgment of 2 March 1987.

³⁷The national parliament of Belgium consists of two chambers: the House of Representatives and the Senate. The House of Representatives has 150 members who are directly elected by proportional representation for a five-year term. The districts are divided along linguistic lines: five Flemish (French), five Walloon (Dutch), and one bilingual (Brussels). Each district has a given number of seats proportional to its population, ranging from 4 to 24. All districts have an electoral threshold of 5%, except for Brussels and Leuven. The Senate has 60 members who are either co-opted by the community and regional parliaments or elected by them. There are two categories of senators: co-opted senators and senators of community and regional parliaments. Co-opted senators are appointed by the King on the advice of the Prime Minister and represent the interests of their respective communities or regions. Senators of community and regional parliaments are elected by and from their respective parliaments for a five-year term. See, ACE – Electoral Knowledge Network Website, [link2](#).



sought to achieve a balance between territorial and cultural representation and did not necessarily threaten the interests of minorities.

The Court did not go into an explanation of what constitutes a minority, but fully accepted the context of the case and the Belgian situation. It should be noted that this was a relatively early judgment prior to the adoption of the FCNM. At the same time, the Court could have given a more detailed explanation of the built-in guarantees of Belgian law that it considered to ensure the protection of minorities. Thus, the ECtHR could have come closer to conceptualizing the criteria for qualification as a minority group. This would have been particularly useful given the number of new member states that acceded to the ECHR in the 1990s, including multi-ethnic and nationally complex political communities.

In *Aziz v Cyprus*,³⁸ the applicant, Mr Ibrahim Aziz, was a Cypriot national. In January 2001, he applied to the Ministry of the Interior for registration on the electoral roll so that he could exercise his right to vote in the parliamentary elections on 27 May 2001. His application was rejected on the grounds that, under the Constitution, members of the Turkish Cypriot community could not be registered on the Greek Cypriot electoral roll.³⁹ The applicant then appealed to the Supreme Court on the basis of Article 3 of Protocol 1 to the ECHR. He argued that, following the dissolution of the communal councils, the Cypriot Government had failed to establish two electoral rolls in order to protect the electoral rights of members of both communities. His appeal was rejected. The ECtHR found a violation of Article 14 of the Convention, read in conjunction with Article 3 of Protocol No. 1, on the grounds that the difference in treatment complained of by the applicant resulted from the fact that he belonged to a Turkish Cypriot minority community, on account of which he was deprived of his right to participate in elections. The ECtHR – without entering into the definitional issues of the communities concerned – referred to...

[T]he irregular situation in Cyprus [which has] deteriorated following the occupation of northern Cyprus by Turkish troops and has continued for the last thirty years [...] [however] despite the fact that the relevant constitutional provisions have been rendered ineffective, there is a manifest lack of legislation resolving the ensuing problems. (para. 29).

What is the lesson of the *Aziz* case? In its judgment, the ECtHR granted individual legal protection but did not consider what the characteristics of a minority/community were or on what basis the applicant was a member of the minority (i.e., it did not consider the criteria for determining which community he belonged to). In this respect, the judgment is a typically missed opportunity for political reasons, as the Court even reflected on the historical situation, which it obviously did not want to be involved in.

*Sejdić and Finci v. Bosnia and Herzegovina*⁴⁰ concerned the constitutional arrangements in Bosnia and Herzegovina regarding the House of Peoples and the Presidency, which reserved posts for ethnic Bosniaks, Bosnian Serbs, and Bosnian Croats ('constituent peoples') only, whereas 'others' (members of ethnic minorities and persons who do not declare affiliation with

³⁸ *Aziz v Cyprus*, App. no. 69949/01, judgment of 22 December 2004.

³⁹ The 80 members of the House of Representatives are elected by proportional representation in multi-member constituencies through open lists to serve a five-year term. 56 are elected by the Greek Cypriots and 24 by the Turkish Cypriots, which, however, have remained vacant since 1964. See ACE – Electoral Knowledge Network Website, [link3](#).

⁴⁰ *Sejdić and Finci v. Bosnia and Herzegovina*, App. No. 27996/06 and 34836/06, judgment of 22 December 2009.



any particular group because of intermarriage, mixed parenthood or other reasons) were excluded. The applicants, Dervo Sejdić and Jakob Finci, who were of Roma and Jewish ethnicity, respectively, contested these provisions. The Court found that the applicants' ineligibility to stand for election to the House of Peoples violated Article 14 ECHR (ban on discrimination in the field of Convention rights) taken in conjunction with Article 3 of Protocol 1 (free elections) and that their ineligibility to stand for election to the Presidency violated Article 1 of Protocol 12 (general ban on discrimination).

Crucially, this case was the first one in which the Court applied the far-reaching general prohibition of discrimination in Protocol 12 to the ECHR, regarding 'a politically volatile situation of electoral discrimination based on ethnicity in a post-conflict society – discrimination that was institutionalized in order to end a war'.⁴¹ In addition, the judgment can also be considered a landmark one⁴² for the purposes of conceptualization: on the one hand, the notion of *ethnicity* was explained as having its *origin in the idea of societal groups characterized in particular by a common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds*; and on the other hand, *race and ethnicity were distinguished*:

Ethnicity and race are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person's ethnic origin is a form of racial discrimination [which] is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from 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. (para. 43).

The most recent judgment related to free elections in the context of minority protection was handed down in November 2022. *Bakirdzi and E.C. v. Hungary*⁴³ concerned the voting rights of the applicants, who were registered as national minority voters for the 2014 parliamentary elections in Hungary. The Court found that the system put in place to ensure the political representation of national minorities in Hungary had ended up limiting their political effectiveness and threatened to reduce, rather than increase, diversity and minority participation in political decision-making. It also questioned whether a system in which a vote could only be cast for a specific closed list of candidates (without the possibility of expressing a preference⁴⁴ for particular candidates), and which required voters to renounce their party affiliation in order to be represented as a member of a minority, ensured 'the free expression of the will of the people

⁴¹Milanovic (2010) 1.

⁴²Cf. *Zornić v. Bosnia and Herzegovina*, App. no. 3681/06, judgment of 15 July 2014; and *Pilav v. Bosnia and Herzegovina*, App. no. 41939/07, judgment of 9 June 2016.

⁴³*Bakirdzi and E.C. v. Hungary*, App. no. 49636/14 and 65678/14, judgment of 10 November 2022, final 3 April 2023.

⁴⁴Unger (2022).



in the choice of the legislature'. The Court unanimously held that the combination of restrictions on the applicants' right to vote constituted a violation of Article 3 of Protocol No. 1 to the Convention (right to free elections),⁴⁵ read in conjunction with Article 14 (prohibition of discrimination) of the ECHR. For its analysis, the Court took the definition of nationality under Hungarian law as a given and did not take the opportunity to conceptualize what nationality/minority is for the purposes of free elections and in light of the ECHR. This could have been done by looking more closely at whether the Hungarian nationality registration and nomination system were aligned with the articles of the Convention referred to.

4. OPERATIONALIZATION IN STRASBOURG CASE LAW – WHO BELONGS TO A MINORITY?

Most of the cases are relevant for the purposes of the operationalization of minorities and deal with the right to self-identification, i.e., the subjective element of belonging to a minority, which the Court considers as 'of cardinal importance in the field of protection of minorities'.⁴⁶ Nevertheless, as will be shown below, self-identification is not regarded by the Court as an exclusive criterion of minority membership.⁴⁷ Furthermore, from the point of view of participation in political life, the Court takes minority self-determination and self-identification more or less as a given (based on subjective rather than objective criteria) but examines the merits of the applicants' individual human rights violations and provides broad protection in relation to the electoral process.

4.1. Private life and self-identification

A significant proportion of the relevant cases relate to Article 8 ECHR. As the Court put it, the concept of 'private life' is a broad term that is not susceptible to an exhaustive definition. It covers the physical and psychological integrity of a person, as well as personal autonomy and identity. The Court has held that just like name, gender, religion, sexual orientation and sexual life, an individual's ethnic identity constitutes an essential aspect of his or her identity and as such falls within the ambit of 'private life'.⁴⁸

In *Ciubotaru v. Moldova*, the applicant alleged a breach of his right to respect for private life because the authorities refused to register his ethnicity as declared by him and forced on him an ethnic identity with which he did not identify (paras. 3, 26, 37). The applicant's parents were born in the 1920s in Bessarabia, Romania. Their Romanian civil status documents did not

⁴⁵See the several analyses of the judgment on this perspective, Kállai (2022), Unger (2022), Majtényi (2023), Sándor-Szalay and Kiss (2022), Kurunczi (2023).

⁴⁶*Molla Sali v. Greece*, App. no. 20452/14, judgment of 19 December 2018, para. 157.

⁴⁷Cf. *Pentassuglia* (2013) 104–106.

⁴⁸*S. and Marper v. the United Kingdom*, App. nos. 30562/04 and 30566/04, judgment of 4 December 2008, para. 66; *Ciubotaru v. Moldova*, App. no. 27138/04, judgment of 27 April 2010, paras. 49 and 53; *Aksu v. Turkey*, para. 58; *R.B. v. Hungary*, App. no. 64602/12, judgment of 12 April 2016, para. 78.



contain any information concerning their ethnic identity, but the applicant's birth certificate and identity card issued by the Soviet authorities recorded his parents as ethnic Moldovans (para. 6). When in 2002 the applicant wanted to have his old Soviet identity card replaced by a Moldovan one, the authorities refused to register his Romanian ethnicity on the grounds that he had failed to prove that his parents were ethnic Romanians as no such identity had been recorded in their identity papers (paras. 7–13). In Moldavia, as formerly in the Soviet Union, an individual's ethnic identity is recorded on the basis of the ethnic identities of their parents or the identity of one parent if they differ (para. 21). However, Section 68 of the Law on Documents pertaining to Civil Status is clear about the fact that it is impossible to rectify the ethnic identity of one's parents on the basis of the identity papers of grandparents or other ascendants if the parents' civil status documents do not contain information concerning the requested ethnic identity (para. 16). The applicant thus found himself in a trap, with no legal means of claiming his Romanian identity.

Furthermore, Mr Ciubotaru disagreed with the Moldovan authorities regarding whether there was a Moldovan ethnicity – 'an artificial creation of the Stalinist regime' – distinct from the Romanian ethnicity (paras. 10, 40). As expected, the Court did not deal with definitional issues. Distancing itself from the debate within Moldovan society concerning the ethnic identity of the main ethnic group, it accepted the official position of the State when referring to Moldovans and Romanians (para. 52).

The government's main argument was that 'recording an individual's ethnic identity, solely on the basis of his or her declaration and in the absence of any objective grounds linking the individual to the ethnicity claimed, could lead to serious administrative consequences and to possible tensions with other countries' (para. 56). For its part, the Court did not dispute the right of a state 'to require the *existence of objective evidence of a claimed ethnicity*'. Indeed, it accepted that 'it should be open to the authorities to refuse a claim to be officially recorded as belonging to a particular ethnicity where such a claim is based on purely subjective and unsubstantiated grounds'. In the instant case, however, the applicant had been confronted with a legal requirement which made it impossible for him to present any evidence in support of his claim. He could change his ethnic identity only if he could show that one of his parents had been recorded as being of Romanian ethnicity in the official records, which represented 'a disproportionate burden in view of the historical realities of the Republic of Moldova' (para. 57, emphasis added). The Court further observed that 'Mr Ciubotaru's claim was based on more than his subjective perception of his own ethnicity', as he was able to provide '*objectively verifiable links with the Romanian ethnic group such as language, name, empathy and others*'. However, no such objective evidence can be relied on under Moldovan law (para. 58, emphasis added).

Importantly, the Court established a breach of Article 8 because the State had failed to provide the applicant with the opportunity to adduce evidence in support of his identity claim (para. 59). Judge Mijović concurred with the majority's finding of a violation of Article 8, but rather on the basis that the applicant's self-identification choice should have been respected *regardless* of any objective criteria for establishing affiliation with a particular group. In particular, he referred to Article 3 of the FCNM, which provides that anyone has the right to freely choose whether or not to belong to an ethnic minority. In the light of that provision, he found that the practice of the Moldovan authorities of imposing a particular ethnicity (Moldovan) on an individual is *per se* contrary to the principle of self-identification – a principle which was not only accepted by the Court but further developed in *Sejdić and Finci v. Bosnia and Herzegovina*



(see below). In essence, Judge Mijović considered self-identification as primarily ‘a matter of personal perception rather than a matter based on objective grounds’.⁴⁹ Such an interpretation, however, hardly fits with established international law and human rights practice; rather, it offers a critique of such practice.⁵⁰

Further elaboration of the right to free self-identification can be found in *Molla Sali v. Greece*. The case concerned the applicant’s right to inherit under a will made in her favour by a member of the Thrace Muslim community. Whereas the applicant’s husband had decided, in a will drawn up in accordance with Greek civil law before a notary, to bequeath his whole estate to her, the deceased’s two sisters had challenged the validity of the will relying on Sharia law (paras. 9–11). The Court of Cassation considered that, in fact, the Islamic law of succession should be applied, with the consequence of depriving the applicant of her inheritance rights under the will made by her husband, which was rendered without any legal effect (para. 122). Although the applicant also alleged a violation of her right to a fair trial under Article 6(1) ECHR, the Court decided to consider the case solely from the angle of Article 14, read in conjunction with Article 1 of Protocol No. 1. on the right to property (para. 86).

The ECtHR accepted that the domestic court had pursued a legitimate aim in the public interest, namely the protection of the Thrace Muslim minority in Greece; nevertheless, in the particular circumstances of the case, it expressed doubt as to whether the impugned measure was suitable for achieving that aim. In any event, it found the measure disproportionate to the aim pursued (para. 143). The case offers important insights into the operationalization of minorities. For a start, the Court proclaimed that a State cannot ‘take on the role of guarantor of the minority identity of a specific population group to the detriment of the right of that group’s members to choose not to belong to it or not to follow its practices and rules’ (para. 156). In that context, refusing members of a minority ‘the right to voluntarily opt for and benefit from ordinary law would amount not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of the protection of minorities – that is to say, the right to free self-identification. The negative aspect of this right, namely the right to choose not to be treated as a member of a minority, is not limited in the same way as the positive aspect of that right. [...] The choice in question is completely free, provided it is informed. It must be respected both by the other members of the minority and by the State itself’ (para. 157).

In this context, the Court referred to the explanatory report of the FCNM, whereby the negative aspect of the right to self-identification is that every person shall decide whether they wish to come under the protection of the Framework Convention. The positive aspect of the right, however, is limited: an individual cannot choose arbitrarily to belong to any national minority; their subjective choice is inseparably linked to objective criteria relevant to the person’s identity (para. 68). As Judge Mits pointed out,⁵¹ it is here that Greece, by denying the choice of not being subjected to the specific legal regime for Muslims, failed to achieve the legitimate aim of protecting the Thrace Muslim minority (para. 11). However, he blamed the Court for not examining the broader context of the case, namely that Sharia law was introduced in Thrace in order to enable the Muslim minority to maintain its identity, in

⁴⁹*Ciubotaru v. Moldova*, Concurring opinion of Judge Mijović.

⁵⁰*Pentassuglia* (2018) 14–15; (2012) 72–74.

⁵¹*Molla Sali v. Greece*, Concurring opinion of Judge Mits.



particular by following a separate legal regime (para. 10). This can be interpreted as an implicit reference to a collective minority identity, part of the concept of minorities. In fact, Judge Mits referred to the ‘commonly accepted’ elements characterizing a minority under international law: objective characteristics, self-identification, the number of members of the minority, and its long-term presence on the territory concerned (para. 11). In our view, however, self-identification is not an element of the minority concept. Instead, it is an element of the operationalization of minorities. What Judge Mits could have meant here is a common identity, or put differently, a sense of solidarity, directed towards preserving the minority’s culture, traditions, religion, or language (as formulated in the Capotorti definition).

In the more recent case of *Tasev v. North Macedonia*, the applicant alleged a breach of his right to respect for a private life as a result of the authorities’ refusal to register his declared ethnicity. Specifically, Mr Tasev wanted his ethnicity as stated in the electoral roll for judges to be changed from that of Bulgarian to Macedonian (paras. 3, 7). The national authorities denied his request on the grounds that it was submitted after the announcement for the election of members of the State Judicial Council (SJC) and that it sought an unfair advantage (paras. 9, 12, 15). Since the SJC is composed of fifteen members, of whom only three members belong to ethnic-minority communities (para. 19), the government claimed that the applicant had abused his right to determine his own ethnic identity in order to increase his chance in the election. The abuse of minority rights – that is, the issue of ethno-business⁵² – was also raised in the *Gorzelik* case. There, the Katowice Court of Appeal pointed out that the acceptance of the applicants’ opinion that ‘the mere choice of the individual concerned is decisive for his nationality’ would ‘lead to a situation in which the aims pursued by the association could be accomplished by groups of members who did not have any connection or links with Silesia and who had become members of the Union solely to gain an advantage for themselves.’⁵³ It further stated that a national minority, established on the basis of objective criteria, must exist with which the person wishes to identify. It does not work the other way around: ‘such a poorly established self-identity of a small (and decreasing) group of Silesians’ cannot provide a basis for recognizing that all Silesians constitute a separate nation.⁵⁴ In our opinion, this means that self-identification is not enough to constitute a minority; conceptualization must precede operationalization.

In *Tasev v. North-Macedonia*, the applicant refused the allegation of ethnobusiness, and maintained that his self-identification as ethnic Macedonian had been genuine (paras. 30–31). He eventually submitted his intention to run for election along with a written statement affirming his Macedonian affiliation. In turn, the SJC struck his name out of the general list of candidates because his declared ethnicity did not correspond with the official records in which he had been registered as Bulgarian (paras. 16–17).

⁵²Ethno-business or ethno-corruption means practices that intend to take unfair advantage of the existing legal framework for the protection of national minorities to obtain material, financial or political benefit. In other words, it is the abuse or misuse of minority rights for private gain in a manner contrary to the legislator’s intentions. Carstocea (2011) 16.

⁵³*Gorzelik and Others v. Poland*, para. 32.

⁵⁴*Gorzelik and Others v. Poland*, para. 32.



The Court confirmed previous case law, according to which ‘ethnic identity is a detail’⁵⁵ pertaining to an individual’s identity that falls within the personal sphere protected by Article 8 of the Convention’ (para. 32). After that, it repeated verbatim the argumentation on the right to self-identification as expressed in *Molla Sali v. Greece*,⁵⁶ once again applying the Convention in the context of the FCNM (para. 33). In essence, Article 3 of the Framework Convention includes the right to opt out of the special regime protecting ethnic minorities. Consequently, the applicant was free to opt out of running on a national minority list and run on a general list of candidates.⁵⁷

Tasev v. North Macedonia offers further evidence for the ECtHR’s permissive approach towards the objective criteria of minority membership. Reflecting on the government’s observations that the applicant had failed to prove his claimed (Macedonian) ethnic identity, the Court observed that at no stage in the impugned proceedings was the applicant requested to provide any (objective) evidence that his claim was genuine. Indeed, it seems that the applicant’s request was not dismissed for being purely subjective and based on unsubstantiated grounds. On the contrary, the government explicitly argued that the applicant’s request would have been granted had it not been submitted after the publication of the announcement of the election to the SJC (para. 37). Since the domestic authorities did not refer to any legal provision when explaining the basis of their findings, the Court came to the conclusion that the interference with the applicant’s rights under Article 8 was not in accordance with the law (paras. 39–41). Regrettably, it did not take a position regarding how far the right to free self-identification extends or when someone can be considered a member of a minority.

The partly dissenting opinion of Judge Wojtyczek offers quite a few insightful observations regarding the operationalization of minorities (some of which we have already mentioned in the footnotes above). For one, he emphasized that the FCNM does not guarantee the right to choose arbitrarily one’s own ethnic identity. It only guarantees the right of persons belonging to national minorities to opt out of the special protection of the Framework Convention in certain chosen spheres of life or in all fields. At the same time, *affiliation with a national minority (or the national majority, for that matter) for the purpose of the exercise of certain rights is not identical to ethnic identity*. For Wojtyczek, the question of respect for a person’s ethnic identity requires a broader assessment of the person’s legal situation, not only in the context of elections of the State Judicial Council. The majority made a mistake in applying an area-specific approach while ignoring the issue of the recognition of ethnic identity in other contexts (para. 7). Wojtyczek also proposes a nuanced definition of ethnic identity. In his view, ethnic identity is equivalent to membership in an ethnic community, and as such, it is a ‘social reality’, reflecting ‘objective criteria accepted in the society in question’, not merely a ‘subjective feeling’

⁵⁵We agree with Judge Wojtyczek that this wording is not very fortunate. The term ‘detail’ in English may mean either ‘an individual feature, fact or item’ or ‘a minor or less significant item or feature’, whereas for most people, ethnic identity is neither of the above. ‘Ethnic identity is an essential part of personal identity, one of its most important aspects’. Partly dissenting opinion of Judge Wojtyczek, para. 6. Fortunately, this has been expressly declared by the ECtHR elsewhere; see, for example, *Ciubotaru v. Moldova*, para. 53.

⁵⁶*Molla Sali v. Greece*, para. 157, cited above.

⁵⁷Although Judge Wojtyczek points out that the right to opt-out is limited to the regime under the Framework Convention, which does not cover elections to national councils of the judiciary. *Tasev v. North Macedonia*, Partly dissenting opinion of Judge Wojtyczek, para. 10.



(paras. 4–5). Here, he seems to misread the reasoning of the majority as suggesting that for the purpose of the recognition of ethnic identity by the State authorities, the subjective feelings of the person concerned are decisive. Such an interpretation would indeed depart from both the text of the FCNM and the intent of the Contracting Parties as expressed in the Explanatory Report (para. 4). However, as we have seen above, the Court did not exclude objective membership criteria: it established a violation because the authorities did not refer to any legislation when rejecting the applicant's request.

4.2. Participation in political life, political opinion, and voting rights

Returning to two cases already mentioned in the section on the conceptualization of minorities, we will now analyze whether the ECtHR, when dealing with complaints relating to the right to vote or the special electoral and representation rights of minorities, has operationalized who belongs to a minority in the spectrum of participation in political life.

In *Sejdić and Finci v. Bosnia and Herzegovina*, Bosnia's power-sharing agreement signed at Dayton in 1995 was found incompatible with Article 14 ECHR because it excluded members of communities other than the Bosniak, Croat, and Serbian ones (who had freely thus self-identified) from certain political offices. The Grand Chamber established that the applicants, who described themselves as being of Roma and Jewish origin and who did not wish to declare affiliation with the 'constituent peoples', were discriminated against (para. 45). The Grand Chamber's reasoning was built on the assertion that one's choice to declare affiliation with an ethnic group (or not) needs to be respected. As Pentassuglia points out, '[t]he blend of human rights protections and security arrangements in complex group accommodation models adds to the dilemmatic aspects' of debates around ethno-cultural claims.⁵⁸

The Court did not consider it necessary to decide whether the maintenance of the contested constitutional provisions after the ratification of the ECHR served a legitimate aim since the maintenance of the system did not satisfy the requirement of proportionality. The ECtHR took into account the developments in the field of political stability after Dayton and agreed with the Venice Commission that there are power-sharing mechanisms that do not automatically lead to the total exclusion of representatives of the other communities. By becoming a member of the Council of Europe in 2002 and by ratifying the Convention and its Protocols without reservations, the respondent State voluntarily agreed to comply with the relevant standards. The Court, therefore, concluded that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina was not objectively and reasonably justified and, therefore, violated Article 14 read in conjunction with Article 3 of Protocol No. 1 (paras 46, 48–50).

More to the point concerning operationalization, Judge Mijović and Judge Hagiyevev added the following explanation:

Power-sharing arrangements at the State level, particularly those concerning the structure of the House of Peoples and the State Presidency, provide that only those who declare affiliation with one of the three main ethnic groups are entitled to hold a position in these two State organs. It must be added that, in the context of Bosnia and Herzegovina, ethnic affiliation is not to be taken as a legal category since it depends exclusively on one's self-classification, which represents *stricto sensu*, a

⁵⁸Pentassuglia (2018) 21.



subjective criterion. It actually means that everyone has a right to declare (or not) his or her affiliation with one ethnic group. It is not obligatory to do so. There is neither a legal obligation to declare one's ethnic affiliation nor objective parameters for establishing such affiliation. Affiliation becomes an important issue only if an individual wishes to become involved in politics. A declaration of ethnic affiliation is thus not an objective and legal category but a subjective and political one.⁵⁹

In *Bakirdzi and E.C.*, the Court clearly approached the question from the perspective of the Hungarian minority voting system, with special regard to the free choice of expressing the political opinion of voters enrolled in the minority register. Without a doubt, *Bakirdzi* is a landmark case as it concerns the voting rights of national minorities and has significant implications for the political representation of minorities in Europe. The Court's decision highlights the importance of ensuring that national minorities are able to participate fully in political decision-making processes and that their voices are heard. In other words, 'the ECtHR has not yet carried out such an abstract examination of the legislation of the Member States ensuring the effective participation of national minorities in public life, and thus – in its own assessment as well – has deviated significantly from its previous case-law.'⁶⁰ That said, only those statements of the ECtHR that are – or could have been – of relevance regarding the legal operationalization of minorities are addressed below.

The Court recalled the FCNM Advisory Committee's view that due consideration should be given to the potentially negative impact of minimum thresholds on the participation of national minorities in the electoral process. Exemptions from threshold requirements have proved useful in increasing the participation of national minorities in elected bodies. The Court emphasized, however, that the member states of the FCNM enjoyed a wide margin of appreciation as to how to approach the objective of promoting the effective participation of persons belonging to national minorities in public affairs and that the ECHR, even interpreted in the light of the FCNM, did not require different treatment in favour of minority parties in this context.⁶¹ In the case of the Hungarian minority voting system in the parliamentary elections, the statutory scheme excluded minorities from associating for political purposes since their candidate could only be supported by members of the same national minority. Thus, the legislature restricted who could vote on the national minority list, and this was not based on the choice of national minority candidates or voters themselves (paras. 55–57). The Court pointed out the contradiction that the number of minority voters belonging to the same national minority in most of the cases would not be high enough to reach the preferential threshold even if all voters belonging to that national minority were to vote for the relevant minority list (para. 58). It was concluded that the system would weigh unequally against the applicants because of their status as national minority voters (para. 72).

As was already mentioned above, the problem of the registration itself, i.e., who belongs to the minority electorate, was not addressed in the judgment. Instead, the minority voting rights were analyzed as the chances of a minority list despite the preferential quota, the secrecy

⁵⁹Partly concurring and partly dissenting opinion of Judge Mijović, joined by Judge Hajiyeu to *Sejdić and Finci v. Bosnia and Herzegovina*, Part III.

⁶⁰Sándor-Szalay and Kiss (2022) 77.

⁶¹See earlier in *Party Die Friesen v. Germany*, App. No. 65480/10, § 43, judgment of 28 January 2016.



challenges of a minority ballot, and the loss of the expression of the political preferences of persons registering as minority voters. These are truly important deficiencies in the Hungarian minority voting system; the constitution in force is not committed to the parliamentary representation of minorities; it merely stipulates that the participation of nationalities in the work of parliament must be guaranteed. While the Court in *Sejdić and Finci* carefully considered the fragile constitutional environment (a constitution-making process that ended an ethnic conflict after a civil war and was internationally assisted) in the context of operationalization, this was not the case in *Bakirdzi and E.C.* In the case of Hungary, the constitutional tension goes much deeper: it is an illiberal or hybrid regime masquerading as a democracy. What the Court was unable or unwilling to recognize is that in such an environment, even the choice and affirmation of minority identity becomes captive to the authoritarian political power of the majority. In this way, human rights debates in relation to political participation in public life cannot be dissociated from the informalities of authoritarianism.

5. CONCLUSIONS

This article aimed to identify elements of the conceptualization and operationalization of minorities in the case law of the Strasbourg court. Whereas the ECHR does not provide for specific minority rights, in theory, all individual human rights could be interpreted in a minority-sensitive way and thus prove to be relevant for our purposes. Without undertaking a thorough screening of the Court's seven-decade judicial practice, we ultimately selected two dozen cases related to the following human rights: freedom of assembly and association (where the association represents a minority), right to private and family life (minority/ethnic identity falling under the notion of private life); right to vote (minority parties, minority voters, special rules of minority elections); and standing alone or in conjunction with the prohibition of discrimination (even though in most of the cases that were examined, where discrimination was found to have occurred, the ECtHR was satisfied with finding a violation of the substantive right).

Our analysis showed that the central theme of the relevant case law is identity in the context of cultural pluralism, which the Court has endorsed as a value protected by the ECHR. The relevant cases are 'located within a human rights-driven pluralistic agenda rather than a narrowly defined security context',⁶² where seeking an ethnic identity or asserting a minority consciousness is fundamentally connected to the quality of the democratic process.⁶³ That said, the political instability or the inherent fragility of the constitutional system often requires the ECtHR to be particularly cautious (see cases from Cyprus or Bosnia and Herzegovina).

As for conceptualization, the Court has never openly addressed the question of whether the groups concerned were minorities under international law, and it has avoided offering a definition of its own. In contrast, it clearly defined ethnicity as involving common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds (*Sejdić and Finci v. Bosnia and Herzegovina*, para. 43; *Behar*, paras. 69–71; *Budinova*, paras. 64–65). Nevertheless, certain characteristics of a minority group can be identified in the Strasbourg case

⁶²Pentassuglia (2013) 75. See e.g., *Gorzelić v Poland*, para. 92: 'pluralism is [...] built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities'.

⁶³Pentassuglia (2013) 75.



law that were usually mentioned individually by the Court, but put together could add up to a minority concept that strongly resembles the Capotorti definition: (1) identity, which may manifest itself in objective features such as cultural traditions and group-specific lifestyles; (2) non-dominant position, particular vulnerability, history of stigmatization; (3) numerical size; (4) degree of homogeneity; (5) long-term presence on the respective territory.⁶⁴ It must be added that although the Court seems to have a different notion of (national) minorities and ethnic groups, it routinely uses these terms as synonyms, which alludes to the uncrystallized nature of its jurisprudence in this context.

Regarding operationalization, in the Strasbourg case law, the main element of minority membership is the right to self-identification, which the Court regards as the ‘cornerstone of international law on the protection of minorities’ (*Molla Sali v. Greece*, para. 157). Nevertheless, the Court has had regard to objective criteria, such as language, name, and empathy (explicitly mentioned in *Ciubotaru v. Moldova*, para. 58).

To conclude, although the ECtHR’s jurisprudence in many ways seems to be sporadic and mosaic-like in the context of the conceptualization and operationalization of minorities, it points towards accepting an approach that is protective of minority identities within culturally diverse societies, and will perhaps eventually catch up with the standards offered by the FCNM and its Advisory Committee, articulating a long-desired European consensus in the field.

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⁶⁴This latter element was mentioned in the concurring opinion of Judge Mits in *Molla Sali v. Greece*.



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