

CULTURAL DIVERSITIES AND HUMAN RIGHTS: HISTORY, MINORITIES, PLURALIZATION

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Abstract: Cultural diversity plays today a prominent role in the updating and developing of human rights. Past developments in the protection of rights have essentially forgotten the democratic management of cultural and identity-based diversity. States have stifled the main developments of the rights and constrained them to partial views in favour of the majority or dominant groups in each country. The current context of regional progressive integration and social diversification within each state agrees on the need to address the adequacy of systems for the protection of rights from different strategies to the context of multiculturalism. Against the process of "nationalization of rights" it is necessary to adopt a strategy for pluralization. On the one hand, the concept of minority has to be given its corresponding importance in both international and domestic law. On the other hand, different kind of policies and legal instruments for the accommodation of diversity can be identified and used to foster this necessary process of pluralization.

Keywords: Cultural Diversity, Human Rights, Pluralization, Minorities, Accommodation, Multiculturalism, Discrimination.

Summary: I. INTRODUCTION; II. LEGAL PROTECTION OF DIVERSITY WITHIN AN HISTORICAL PERSPECTIVE; II.1.Diversity in the historical origins of human rights; II.2.Europe one hundred years ago and the decline of diversity; II.3.The non-European momentum and the Fall of the Berlin Wall; III. CULTURAL DIVERSITY AND HUMAN RIGHTS: EVOLUTION AND CURRENT STATUS; III.1.Nationalization of rights and the need for democratic pluralization; III.2.Institutional and doctrinal approaches to accommodate minorities; IV. PROPOSALS AND INSTRUMENTS FOR PLURALIZATION; IV.1.Techniques for constitutional accommodation of diversity; IV.2.Instruments for pluralization in the implementation of rights; IV.2.1.Re-examination of the concept of citizenship; IV.2.2.The Rights of minorities; IV.2.3.Multicultural clauses; IV.4.2.4.Indirect discrimination; IV.4.2.5.Reasonable accommodation; V. CONCLUSION; VI. REFERENCES.

I. INTRODUCTION

This article analyzes the crucial position that cultural diversity holds at the present time in respect of updating and developing human rights. The article supports the idea that European developments in the protection of rights has essentially forgotten the democratic management of cultural and identity-based diversity in what we refer to as the nationalization of rights. In spite of this, it is the experience of diversity which is, to a large extent, found in the origin of human rights. However, the political form of the state has stifled the main developments of the rights and has constrained them to partial views in favour of the majority or dominant groups in each country. The current context of regional progressive integration and social diversification within each state agrees on

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the need to address the adequacy of systems for the protection of rights from different strategies to the context of multiculturalism.

In order to address this issue, I will divide the argument into three consecutive steps. In the first, I will try to explain how the historical and political development of our continent has conditioned the interpretation of human rights and how the latter have been able to address the cultural differences of people. In a subsequent step, I will call this process "nationalization of rights" and defend the need, in view of the foregoing, to adopt a strategy for pluralization. From a legal perspective, we should point out the difficulty in implementing the concept of minority in international or domestic law, and the state of play thereof, including references to the most prominent European doctrine in this area. Finally, in the last section, I will endeavour to systematize different legal instruments and techniques that can be applied to advance the process of pluralization alluded to previously. The article is complemented with a final section containing conclusions and appropriate references.

II. LEGAL PROTECTION OF DIVERSITY WITHIN AN HISTORICAL PERSPECTIVE

II.1. Diversity in the historical origins of human rights

If we take a look at European history from the perspective of the formation and evolution of collective identities, we conclude that language and religion were the two major factors in those processes. Indeed, in all traditional European groups that have demanded some public recognition one of the two elements that help to distinguish it is present. Both concepts are complex in their definition and the role they play in identifying collective groups. There are many difficulties in terms of law and policy when regulating or planning elements related to collective identity, such as languages (with their own variations, spellings, alphabets, etc.) or religions (with its syncretism, ritual or organizational differences, new spiritual movements, etc.). But the fact is that language and religion are also the most commonly cited elements in the legal definitions of the concept of minority, both in international and domestic courts (Ruiz Vieyetz 2006, 284-288).

The truth is that neither in terms of religion or language is diversity a novel characteristic for Europe. Both facets of identity have been intertwined in their role in the political and policy debates throughout the modern history of our continent, but European societies have always been pluralistic from both perspectives. More than a hundred languages have been and are spoken in Europe, and historically many pre-Christian, pagan, animist, Christian, Jewish, Muslim and Buddhist religions and cults were practised. All this supported the configuration of collective identities based on culture, which have been labelled according to options such as ethnic groups, nations, peoples, or more generically, minorities.

If we go back to the beginnings of the modern era, religion was by far the largest and most problematic factor in respect of identity in Europe at that time. And it is precisely in that context when ideas of tolerance and coexistence emerge that form the

ideological basis of human rights. It was the Protestant Reformation that triggered the mechanisms necessary for us to develop ideas that point to the current human rights. Suffice it to mention events such as the enactment of the Edicts of Nantes in 1589 (Wanegffelen 1998). And if we consider the Reformation Wall that stands in the Park des Bastions in Geneva, we would see the close connection between the spread of Protestantism and the emergence of the great liberal, constitutional traditions of the West (Rey Martínez 2003; Ruiz Vieyetz 2003).

But the Reformation, on the other hand, would at the same time serve to gradually strengthen the State and to proclaim its future nationalization. This has to do with the impetus it gave to the vernacular languages and the gradual consolidation of dominant national or state languages, whose symbolic starting point is the Ordinances of Villers-Coterets (1539) and its culmination in the speech by the Committee on Public Safety to the Convention on regional languages (1794). Over time, national identities based primarily on linguistic criteria were shifting the importance of religious differences in the public debate. The nineteenth century extolled national and linguistic differences and a commitment was made to combat diversity within each State, much more the in linguistic field than in the religious field. The growth of nationalism led to a way of organizing cultural diversity in Europe that has profoundly marked our recent evolution. But this has not prevented the recent population movements and the transformations in the world of communications from regaining the role of identity from the religious differences at the present time. Religion has not disappeared with the end of modernity, but on the contrary, it has made a strong comeback into the public debate (López Camps 2007, 181), albeit via the intertwined phenomena of believing without belonging (Davie 2000) and belonging without believing (Hervieu-Léger 2005).

In any case, we can say that diversity is at the source of human rights. The transformation that led to the Reformation was decisive in this regard, generating a novel experience of otherness. While any form of religious dissent was simply suppressed by force in some kingdoms, in other countries, such as England or France, the existence of religiously different sectors of the majority of the population would entail significant political and social conflicts that would condition its political development. Actually, neither the Catholic nor the Protestant Reformation advanced ideas that would support a specific political position for protecting minorities or that would legitimize resistance to temporal authority by dissident groups or communities. However, the expansion of Calvinism to countries where it held a minority position or was subjected to a Catholic secular power (Scotland, Holland, Hungary or France) led to theories being developed that justified resistance. Additionally, although religious dissent was usually combated with repression and assimilation, the impossibility that occurred in certain groups of submitting to or eliminating such minorities led to the idea of religious tolerance being adopted, and consequently the protection of religious minorities, as a positive value.

Within this framework, the States would start to accept the imposition of the mandate to respect beliefs and the freedom to worship for certain minority communities. This resulted in legal standards by which one or more powers internationally assumed

the commitment to protect or tolerate the religious practices of certain communities. Sometimes this was motivated by a balance of various forces that were difficult to overcome, as occurred with the 1648 Peace of Westphalia, which legally enshrined the recognition of religious plurality in most parts of the Empire. In other cases, the victorious powers wanted to ensure stability with the annexation of a territory that included religious minorities, linking an alleged halo of humanity to a strategic interest of gaining the loyalty of these new populations, bordering populations on most occasions. The first example in this regard is provided by the 1660 Treaty of Oliva, by which Sweden was obliged to respect Catholic inhabitants in Livonia, which was included to the detriment of Poland. Similar clauses can be found in the Treaties of Nijmegen (1678), Ryswick (1697), Carlowitz (1699), Breslau (1742) and Kütschük-Kainardschi (1774). A breakthrough was made in 1815 when the Congress of Vienna was passed, which first established an international system of protection for national minorities and extending protection outside the exclusively religious area. Along with the continued protection towards religious minorities, the nineteenth century would see an increase in the references to minority peoples or nations in international treaties. These include the Peace of Adrianople (1829), the Treaties of London (1830 and 1864), the Peace of Paris (1856) and the Treaty of Berlin (1878).

In any case, it is the protection of the different minority groups, those that cannot access the power established by procedure or by number, which gives rise to the initial progress in the international framework for the protection of all persons. Add to this the emergence at international level of the so-called "minimum international standard", derived ultimately from unequal international relations, but also aimed at the protection of the different individuals in jurisdictions in which they are unfamiliar. We can thereby establish when the idea of rights outside the boundaries of a given policy framework is agreed on, it is the otherness or identity-based difference that serves as the basis for its progressive emergence².

II.2. Europe one hundred years ago and the decline of diversity

It is worth taking a look at the cultural and identity-based composition of Europe one hundred years ago when the tragic event that was the First World War was just breaking out³. At that time, Europe revealed a complex patchwork of diversity in many

² On the historical evolution of legal protection of minorities, vid.: FERNANDEZ LIESA, C.R. (2001), "La protección de las minorías en el Derecho internacional general. Análisis de la evolución y del estatuto jurídico internacional", in MARIÑO MENENDEZ, F., FERNÁNDEZ LIESA, C.R. and DIAZ BARRADO, C.M., *La protección internacional de las minorías*, Ministerio de Trabajo y Asuntos Sociales, Madrid, pp. 51-217; JACKSON-PREECE J. (1997), "Minority rights in Europe: from Westphalia to Helsinki", *Review of International Studies*, no. 23-1, pp. 75-92; PETSCHEN VERDAGUER, S. (1990), *Las minorías lingüísticas de Europa Occidental: documentos (1492-1989)*, Parlamento Vasco, Vitoria-Gasteiz, pp. 37-87; RUIZ VIEYTEZ, E. (1998), *La protección jurídica de las minorías en la Historia Europea*, Universidad de Deusto, Bilbao; RUIZ VIEYTEZ, E. (1999), *The History of Legal Protection of Minorities in Europe (XVIIth - XXth Centuries)*, University of Derby, Derby.

³ To contextualize this period from an identity and political perspective: CORNWALL, M. (ed.) (2002), *The Last years of Austria-Hungary, A Multinational Experiment in Early Twentieth-Century Europe*, University of Exeter Press, Exeter; GAILLARD, J.M. and ROWLEY, A. (2000), *Historia de un*

parts of the continent. In the western half of Europe, the nation states had generally been established for longer (except Germany and Italy), but were home to a number of linguistic and culturally distinct communities. For example, the percentages of state population that did not have the official language as their first language were relatively significant in several of these countries, including Spain, France or the UK. By contrast, in Central and Eastern Europe, most of the region was still under the Russian, Austro-Hungarian and Ottoman empires, real multinational, pluri-linguistic and pluri-religious (and therefore pluri-ethnic) groups. Hence, just 100 years ago, and unlike what happens today, most Europeans lived within a context of cultural diversity. Religions, cultures and languages coexisted, with varying degrees of harmony, in the major historical regions of Central and Eastern Europe such as Banat, Baranya, Bosnia, Bucovina, Crimea, Istria, Macedonia, Thrace and Transylvania, as well as in many cities which had different names depending on the language of the group that named it such as Sarajevo, Lemberg (Lviv), Klagenfurt (Celovec), Bratislava (Posozny/Pressburg), Temesvar (Timisoara), Krainburg (Kranj), Adrianople (Edirne), Zadar (Zara), Bitola (Monastir), Spalato (Split), Thessaloniki (Salonika) or Istanbul (Constantinople), including others. This diversity also shifted to the cultural landscape of then Europe. There were many theatres, colleges, lyceums, universities and academies of various minority communities in cities where they were not in the majority or in regions far from their historical settlement areas.

However, and since then, the nation state has emerged as a powerful agent of national homogenization of its inhabitants. Western European countries have, in general terms, been very effective in achieving the progressive linguistic and cultural assimilation of their non-native populations. Sometimes they have used for this repressive policies, but this has not been the dominant trend. Express support was enough for a specific "national" language to achieve, either directly or indirectly, a loss of social status and the resulting decline of other languages, which are regarded as "regional" or "local" languages. The generalization of the military service, the call to arms in the two world wars, the universalization of the education system and the spread of mass media have been extremely important factors in this process. The data in this respect is compelling and there is virtually no single country in Europe that is not much more homogeneous in terms of culture and identity than it was a hundred years ago (Magosci 1995, 130-148), which proves the commitment and effectiveness towards standardization of the European nation states.

The two world wars provided an opportunity to address the diversity on the continent from different parameters. And indeed, subsequent treaties to each conflict reflected opposing strategies for managing European diversity, but with a very similar

continente. Europa desde 1850, Alianza editorial, Madrid; MICHEL, B. (1995), *Nations et nationalisme en Europe Centrale, XIXe-XXe siècle*, Aubier, Paris; SANTAMARIA, Y. and WACHE, B. (1996), *Du Printemps des Peuples à la Société des Nations. Nations, nationalités et nationalismes en Europe 1850-1920*, La Découverte, Paris; SEGARD, J.F. and VIAL, E. (1996), *Nations, nationalismes, nationalités en Europe de 1850 à 1920*, Ellipses, Paris; SELIER, A. and SELIER, J. (1995), *Atlas des Peuples d'Europe Occidentale*, La Découverte, Paris; SELIER, A. and SELIER, J. (1995), *Atlas de los Pueblos de Europa Central*, Acento editorial, Madrid; WINKS, R. and NEUBERGER, J. (2005), *Europe and the making of modernity. 1815-1914*, Oxford University Press, Oxford-Nueva York.

underlying objective. The end of the First World War brought about the collapse of multi-ethnic empires in Central Europe, and the creation or enlargement of national states, in a Western style. The principle that gave rise to the 1919-1920 Paris peace treaties was that which redrew the boundaries of most of Europe in a bid to adapt them to the ethnic divisions, while attaching certain adjustments for the victorious countries. This resulted in the virtual elimination of all political entities inspired by pluralism, being replaced by nation-oriented States with clear identity-based majorities.

In addition to this, an innovative and interesting system of minority protection emerged in a good part of Europe under the League of Nations⁴, which could be regarded as the predecessor of the current universal system for the protection of human rights. This system worked reasonably well until the tensions arising from frustrated social or agrarian reforms in some countries, the 1929 economic crisis and the access of the Nazis to power in Germany thwarted its potential. Nonetheless, the contempt it deserved in the later legal doctrine is unjust and the system showed some vitality during the twenties, especially considering the political and experimental context in which it was implemented.

After World War II, the principle that would pave the way for the peace treaties would be radically different. The victorious countries did not seek to shift the borders to make them closer to the ethnic reality. With the exception of the "transfer" of Poland about 400 kilometers to the west at the expense of Germany, the borders of the 1930s remained intact. What the victorious powers sought or allowed within that context was not the movement of boundaries on maps but the movement of people. Nearly twenty million people were displaced from their homes, most of them in Central and Eastern Europe, with Germans, Poles, Slovaks and Ukrainians being those primarily involved. This mass movement of population, together with the holocaust caused by the Nazis, the Soviets and the war itself, in the end, led to the same result, the homogenization of the resulting nation States. Ultimately, the aim of the peace treaties in the 1920s and 1940s was the same, seeking to reduce the presence of minorities, or in other words, considering diversity as a problem to be avoided for better management the resulting national societies. It was therefore clear that diversity was neither nor is understood in Europe as a positive event but rather as an obstacle to be avoided.

Consistent with this, the process of progressive national standardization has been successful in almost all European countries in the past hundred years. This statement only wanes in some countries whose independence is recent (mainly Estonia, Latvia, Moldova and Bosnia-Herzegovina) and who have been subjected to processes of

⁴ On the League of Nations and minorities, vid.: RUIZ VIEYTEZ, E. (2010), "Derechos humanos y minorías nacionales en el siglo XX", *Derechos y Libertades*, no. 23, pp. 35-72; AZCARATE, P. (1998), *Minorías Nacionales y Derechos Humanos*, Universidad Carlos III, Congreso de los Diputados, Madrid; BAUTISTA JIMENEZ, J.M. (2008), "La vinculación entre la protección de algunos derechos fundamentales y la seguridad y paz internacionales: el antecedente de la Sociedad de Naciones", en *Revista Electrónica de Estudios Internacionales*, no. 16, pp. 1-35; NUÑEZ SEIXAS, X.M. (1998), *Movimientos nacionalistas en Europa. Siglo XX*, Editorial Síntesis, Madrid; NUÑEZ SEIXAS, X.M. (2001), *Entre Ginebra y Berlín. La cuestión de las minorías nacionales y la política internacional en Europa: 1914-1939*, Akal, Madrid.

homogenization in another area (notably, the Soviet Union or Yugoslavia). However, following their independence they revert the process in favour of the new dominant identity, such is the strength of the independent state as a factor for legitimacy in said process. Therefore, at present it is very difficult to find national, linguistic or religious minorities that are completely consistent on the European map, or to detect regions or cities that have maintained this plurality of cultures that once characterized them. In short, state national identities exist and tend to permanently expand over the other identities, thanks to the significant support given by the state system.

II.3. The non-European momentum and the Fall of the Berlin Wall

While diversity in Europe was perceived in terms of being a problem, the experience of some former British colonies would take a turn in direction from the sixties, mainly for reasons of geopolitical necessity. Indeed, from that time some countries reviewed old assimilationist systems, thereby opening the way to the reflexion that was the basis of the multiculturalist options. This step forward is made from the progressive thrust from the so-called Third World and, essentially, the experience of Canada and Australia.

From the second post-war period, Canada would be forced to adopt the mindset that immigration should be diversified both for ethical and strategic reasons. From the 1960s, immigration was predominantly non-European and the old policies of the white Canada faded into oblivion. The origins of the multicultural option in Canada date back to the work of the Commission on Bilingualism and Biculturalism, a body created to review the balance between the two dominant cultural choices in Canadian society. Social reality was transformed in the seventies as a result of the progressive diversification of immigration and more active demands in the attitude of indigenous peoples led to the restructuring of the name of the Commission. Significantly, the reference to bilingualism was maintained, while the expression multiculturalism was adopted. Namely, a growing, multicultural diversity was recognized, but a reference to linguistic duality was maintained, and thereby showing signs that a certain balance was being sought between the protection of the dominant identities and those that were not. In any case, the government first proclaimed multiculturalism as an official policy in 1971, being Canada the first country to formally adopt this option.

Multiculturalism in Canada has gone through different periods since 1971 (Elliot and Fleras 1992, 465-479). During its first decade in existence, initiatives were primarily developed in the area of cultural promotion, encouraging participation, cultural exchange, and teaching of the official languages. This official policy would become more firmly established in the eighties, when it would be further developed in the fight against discrimination in employment and economic areas, and major policy developments materialized. Indeed, the Canadian Charter of Rights and Freedoms⁵

⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.).

would be adopted in 1982, including Section 27, which we shall refer to hereinbelow. Similarly, the Law on Multiculturalism was adopted in 1988⁶.

Meanwhile, in Australia, support for the “White Policy” in the 1940s was still transversal (Jupp 2004, 373). But World War II generated a serious vulnerability which led to the belief that it was necessary to promote the country's population. During the immediate post-war period the motto was “populate or perish” and Chifley's Labour government launched an immigration programme in order to achieve substantial population growth, which led to Commonwealth Department of Immigration being set up. As a result, the Australian population would increase by about five million between 1947 and 1970. The boundaries of whiteness and assimilation would gradually blur and expand simultaneously (Carter 2006, 321), although the dominant policy on reception remained deeply assimilationist (Elder 2005, 110).

The Australian Citizenship Act was passed in 1948, the first rule of law relating to nationality, surpassing the traditional scheme of British subjects, and included aboriginal Australians as citizens, despite some discriminatory constitutional references to these would not be phased out until the 1967 constitutional referendum. On the other hand, the slow but progressive cultural pluralization of society led to the creation of ethnic and social networks in the sixties. This was prior to the multicultural policy being passed by the government, because in all cases it was the cause, but not the effect of the former (Jupp 2002, 27-29). The progressive dismantling of the White Australia Policy was materialized during the 1960s and 1970s (Tavan, 2005, 235-239). If until 1960, all immigration policy was accompanied by the idea of assimilation (Carter 2006, 335), it was in 1973 that the Whitlam Labour government announced that Australia's immigration policy would no longer discriminate against people because of their race, colour or national origin. Consequently, the Racial Discrimination Act was passed in 1975. The idea of multiculturalism was supported enthusiastically during the liberal Fraser government (1975-1983) and the successive Hawke and Keating Labour governments (1983-96), the consensus generated in this regard raised being remarkable during its first 10 or 15 years (Carter 2006, 343).

In Australia, multiculturalism was understood as being a policy for welcoming and settling immigrants. The idea was established that while everyone was expected to be loyal citizens, this did not amount to everyone having to speak the same language, practice the same religion, eat the same food or have the same type of family (Elder 2005 111). Australian multiculturalism was based more on economic criteria rather than legal criteria as it was in Canada, and took some time to become officially defined until by government until the emergence of so-called Galbally Report in 1978, under the Fraser government. The basic principles thereof, reiterated in subsequent agendas include the right to enjoy one's own culture; equal access to public resources and the need to develop different skills for the overall economic benefit (Jupp 2004, 382), namely, cultural identity, social justice and economic efficiency (Smith 2001, 235). But unlike the Canadian experience, Australian multiculturalism has not been extended to

⁶ Canadian Multiculturalism Act, R.S. 1985, c. 24 (4th Supp.), passed on 21 July 1988.

the legal level and has not resulted in any specific regulation. Nonetheless, this policy culminated in a series of social or institutional initiatives, including the establishment of a comprehensive system of interpreting for any official public services since 1973 and the creation of the Special Broadcasting Service in 1980, a public media entity broadcasting in other languages and focusing on minorities. On the other hand, a large private network of publicly funded education in Australia also helps these communities to pass on their own languages, religions and cultures.

In any case, the multiculturalism that emerged strongly in the seventies does not correspond to a single discourse or set of policies, but rather the term is used to refer to a diverse set of proposals or actions. Nonetheless, we can consider proposed legislation and policy that pursues an inclusive purpose by recognising and protecting the cultural differences in society, as well as the relationships generated between them. Ultimately, understanding multiculturalism in its broadest political sense implies a set of programmes and measures aimed at managing cultural diversity in terms of integration and equality.

Multicultural policies were met in Europe with varying degrees of acceptance. Countries such as the United Kingdom and the Netherlands applied tighter policies, but this was not the case in Germany or France. However, the seventies in Europe also coincided with a certain revival of regional or local identities and a reappraisal of internal diversity.

However, a real political turning point was to be the fall of the Berlin Wall in 1989, which would generate a sense of alarm in the main European governments due to the sudden reappearance of conflicts and ethnic tensions in various parts of Central and Eastern Europe. This would lead to the first half of the nineties addressing a real boom in European Law for minorities, with the approval of a number of bilateral treaties, the 1992 European Charter for Regional or Minority Languages, the 1995 Framework Convention for the Protection of National Minorities, the establishment of the OSCE High Commissioner on National Minorities in 1992, the adoption by the General Assembly of the United Nations of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992, or the General Comment adopted by the Human Rights Committee on Article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to minorities in 1993.

The increase of population movements in recent decades has fuelled the debate on the diversity management, in particular in those countries with the highest immigration, in which the second and third generations raise questions in terms of identity that were not raised by their predecessors. This seems to be particularly true in the case of religious identities, as religious differences did not surface strongly in the early years of extra-European immigration, yet the debates on religious accommodation

are now part of the political agenda, most notably in relation to the presence of Islam in European societies that have a Christian tradition⁷.

Today the debate on diversity management is taking place within the framework of a Europe divided into state societies with a clearly dominant national, linguistic or religious identity (except in the rare cases in Switzerland, Belgium and Bosnia-Herzegovina), which in turn have created supranational structures on the protection of rights which see European diversity primarily in terms of the state. Using this framework, which is much more homogeneous than the framework from a hundred years ago, the debates on the protection of minorities or traditional groups converge with very unequal demands and strengths, accommodating new identities without a historical tradition on the continent, but comprising a large number of its citizens. In addition, the process of secularization and certain technological advances that are affecting cultural identities built on languages, religions or other cultural elements. The debate on the interpretation of rights in increasingly pluralistic societies, but little historical experience of internal diversity, is what characterizes the regulatory, institutional and doctrinal developments that have taken place in the area in question. The consequence of all this has been a nationalization of rights which need to be redirected towards a process of pluralization.

III. CULTURAL DIVERSITY AND HUMAN RIGHTS: EVOLUTION AND CURRENT STATUS

III.1. Nationalization of rights and the need for democratic pluralization

From the study of European developments in the last hundred years, we can conclude that the main enemy of cultural diversity has been the nation-state, which still clearly makes up the majority of states in Europe today. There is no doubt that the state has been a powerful factor in identity homogenization, or that we live still anchored in state-based identity systems. Any European state which has enjoyed a relatively long period of independence for many decades is now much more linguistically, religiously and nationally homogenous than a century ago, such that the map of collective identities in Europe is now adapted to the political boundaries of states which never happened before (Magosci 1995, 130-148).

This is relevant because the cultural elements that make the collective identities at the present time affect or determine the ownership and enjoyment of human rights. This means diversity becomes an extremely important factor in the theory and practice of human rights, particularly to the extent that we follow political and legal systems on personally and spatially defined states. We are assuming that we cannot build a framework that respects human rights (in other words, a democratic framework) without considering the cultural identity of the individuals and groups, especially if they are a minority in their respective policy areas⁸.

⁷ On this topic, see Resolution 1743 (2010) and Recommendation 1927 (2010), adopted by unanimity by the Parliamentary Assembly of the Council of Europe on 23 June 2010, under the title "Islam, Islamism and Islamophobia in Europe".

⁸ Article 4 of the UNESCO Declaration on Cultural Diversity, of 3 March 2001.

Indeed, the way to understand what human rights are or how they should be exercised on many occasions has to do with different cultural visions whose presence is necessary to first recognize and then include in an open and engaged dialogue. In turn, some elements that make up cultural identities (for example, religions, languages and lifestyles) can, in turn, be contained in the exercise of rights. Diversity thus generates current and relevant public debates such as the debate on the possibility of wearing symbols or religiously inspired clothes in public and private spaces, the use of certain languages when providing public services, the appropriateness of certain materials in education and training curricula, the structure of the compulsory educational system, the interactions between genders in certain areas, the occupancy of public space for cultural, ethnic or religious expressions, the desirability of providing autonomy or public funding to culture-based entities, the scheduling of public holidays, the display of collective symbols, the arrangement of spaces for culturally based practices, etc. All this confirms that relegating cultural events to the purely private sphere is neither advisable or feasible from the point of view of public administration, as languages, religions or ethnic or national belongings are relevant in both the public and private domain, which leads to the need to make decisions about the way in which the public system must act in order to address the demands put forward or the potential conflicts of interest.

In the historical evolution we have outlined in the previous paragraph, the paradigm of managing cultural diversity has changed considerably. Nonetheless, the change in the discourse does not necessarily mean a real change in the policies or beliefs that Western societies have when faced with this phenomenon and the challenge posed by what such a change means for human rights.

Hence, it is worth pointing out that nowadays there is (unlike what happened up until the 1970s) a politically correct discourse that values diversity as a good thing in itself. According to this language, cultural diversity (and therefore linguistic, religious, ethnic or national diversity) equates to wealth, and constitutes a heritage that should be adhered to, preserved and promoted. It would not be difficult to find many political documents such as governmental plans, parliamentary declarations, decisions made by international bodies and the like, who insist on this maxim. This principle is, however, accompanied by another well-established idea. Under different terms depending to the cases in question, the policy documents for use also stress the need to ensure social cohesion and social integration. According to this view, a non-cohesive society is synonymous with imbalance, conflict, and a problematic and costly situation. The state filter that accompanies us almost permanently in political analysis leads to such social cohesion being identified with the personal and territorial sphere of a given state space.

This discourse, which is politically correct and institutionally dominant at the present time, includes those two principles that are not necessarily complementary and that can even become contradictory. In practice, the blessing projected on diversity is largely neutralized in the name of social cohesion. If this involves sharing elements of cultural identity, as it seems to support the majority of citizens and public institutions, the promotion of diversity is relegated to a secondary role. The political and socially dominant discourses highlight the fact that a good deal of harmony is required which

consists of sharing certain aspects (such as language, symbols, senses of belonging) and that they are varied. Underlying this is the old idea that in any society (in the sense of a state) it is desirable and possible for all citizens to share elements of identity, so that diversity is relegated into the background, or the lesser of two evils, contrary to what the first of the aforementioned principles advocates.

From this reductionist perspective, and as happened in European history over the last hundred years, it is still advocated that it is more practical to have a less pluralistic, more homogeneous society, and efforts and resources required for the management of diversity should be allocated to other needs. In this view, social cohesion would be much more difficult to attain, the greater the cultural diversity of a society were. This is somehow tested in immigration policies that are adhered to by most of the States in our environment. Countries do not seek immigration that increases the cultural diversity of their own society, but clearly prioritize migration flows have less diversity in relation to its domestic society, a clear reflection of the negative perception that ultimately has to do with an excessive rise in cultural differences.

In terms of human rights, all the above means that we have experienced a process of "nationalization" since the recognition and consolidation thereof. The inevitability of this process can be explained by the need for the rights to be recognized and guaranteed within comprehensive legal systems, with potential methods of enforcement and institutional mechanisms that can, at a minimum, ensure its implementation. This does not happen at present at international level, and the responsibility for their assurance corresponds to the domestic sphere. Therefore, the states have been entrusted to guarantee the protection of rights, and this guarantee has served as one of the defining elements of a first rule of law, and, more recently, a social and democratic rule of law. However, we are now facing another challenge in the process of guaranteeing compliance of supposedly universal rights. The internal diversity inherent in any (post) modern, developed society leading to the need for stepping this process up a gear, which exceeds the nationalization of rights. This historical process of the "nationalization" of human rights means, therefore, that they have been incorporated and protected through every nation-state legal system and this means that they have been "filtered" through the identities or dominant or majority cultural elements within each political community. In view of the foregoing, the biggest challenge for politics nowadays in democratic societies is precisely the management of diversity, given its close relationship with the proper respect for the rights that underpin legitimation of any democratic system. The states and systems must be pluralized so that human rights can be enjoyed by all citizens through their own identities and not in spite of them, even if they are in a minority position. The recognition and enjoyment of human rights cannot be unquestioning of the differences that people bring with them. The law, like the state, must undergo a process of de-identification and open itself to the service of increasingly pluralistic and changing societies in respect of belonging. We have sometimes called this process "democratic pluralization" and there are several legal means that lend themselves to this gradual opening, and which we will discuss schematically in the next section (Ruiz Vieitez 2009, 128-130).

In short, we are assuming that legal frameworks should be relaxed to allow for a greater number of identities to be adopted; that the state must review its legislation (especially the interpretation thereof) to facilitate it being successfully applied to a larger number of groups and individuals; that the identity debates and distribution of political power should be de-territorialized; all in all, that the need for citizens to feel they belong to another country from the rationality of collective effectiveness than from collective affectivity; all in the belief that a harmonious, pluralistic society is more just and peaceful community than a homogenizing community. On the path towards that distant goal, it will be necessary to take smaller, more conservative steps, gradually "pluralizing" the legislation.

III.2. Institutional and doctrinal approaches to accommodate minorities

To a large extent, the political search for the democratic management of cultural diversity in legal terms is reflected in what has traditionally been known as the protection of minorities. Indeed, cultural diversity equates in practice to the coexistence of majorities and minorities on one particular society and approaching the issue from the legal perspective should be done through the concept of minority. If we define the legal meaning of this concept, we might first of all say that from the literal point of view, the term "minority" would be better used for designating any group of people identified around a specific characteristic that would account for less than half of individuals within a given field of reference among its members. In this regard, we can discuss many different types of social minorities, but this way the legal scope of protection would be endlessly broad.

However, in terms of the international law on human rights, the term "Protection of Minorities" refers to a defined subject area. When international legal texts refer to minorities, this noun is preceded primarily by four adjectives: religious, linguistic, ethnic and national. The four categories are by no means mutually exclusive, but they provide an important basis for understanding what we are referring to when we speak of cultural diversity in legal terms. In short, the concept of "minority" has traditionally referred to groups of people who differ from the majority of the population in the State in some linguistic, religious or cultural characteristic and who, at the time, share a certain sense of cohesion or bonding in respect of said specific characteristic. In this regard, a distinction has traditionally been made between linguistic minorities, religious minorities and ethnic minorities. The latter concept replaces the concept of racial minority, widely used until the mid-twentieth century. Finally, in Europe, the term "national minority" is used to refer to ethnic, linguistic or religious minorities whose members are nationals of the State where they live, in order to thereby distinguish these groups of new minorities driven by recent migration flows.

If we analyze the developments produced in the institutional framework of the United Nations, the meaning of the term national minority is less precise. Firstly, because Article 27 in the International Covenant on Civil and Political Rights adopted in 1966 only refers to ethnic, linguistic and religious minorities, which has led to the Human Rights Committee to accept members of any distinct group that may be differentiated by

any of these characteristics as persons protected by that provision, regardless of their national status. The term national minority appears in the title of the Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and may not give rise thereto if it is equivalent to ethnic minority or whether, on the contrary, it is equated in the text to any of the other three categories above. What can be noted is a difference of approaches between the European regional institutions and those of the United Nations. Faced with a more restrictive and cautious European approach to the idea of minority and the need to establish policies recognizing rights for its members, there is a more idealistic vision in the context of the United Nations, with a broader concept of minority and which seeks to establish universally valid standards above the importance attached to the national state context.

Figure 1: Approaches to the ideas of minority and diversity in European universal and regional institutional settings

| | Universal Scope United Nations Human Rights Committee | European Scope Council of Europe ECHR |
|--|--|--|
| Minority Concept | Broad (old and new) | Strict (old) |
| Nature of the rights recognized | Individual + collective | Individual |
| Operational perspective | Pursues universally valid standards over domestic institutions | Strongly considers domestic conditions through national discretionary powers |
| Ideological perspective | idealist | Realist/pragmatic |

In any case, both in theory and in practice, we still come up against considerable problems requiring further research and more solid consensus. The problems begin with defining the various categories of minorities we have referred to, but also extend to the relevant elements of identity. Indeed, it is not easy to legally define what is meant by religion, ethnicity or language. These difficulties are compounded in part when diversities with other traditional minorities converge in practice with other formed as a result of recent population movements. In addition to all this, there is considerable confusion about the rights that may correspond to its members as such, there being significant tensions between the reinterpretation of generic rights or the recognition of specific rights, on the one hand, and between individual and collective rights on the other hand.

A part of the European Academy has dedicated itself to trying to resolve some or all of these issues over the past three decades. The list of European scholars who have worked on the aforementioned issues is extensive, but it is very unbalanced between one country and another. Hence, we firstly find those who are regarded as classics or pioneers of minority rights, such as Lerner, Thornberry, Capotorti, Fenet or Yacoub, to

whom we can add Sigler, Whitaker, Stavenhagen, Dinstein, Tabori or Bokatola⁹. From the mid-nineties, the political and regulatory momentum which we previously alluded to is also dealt with at doctrinal level wherein far more publications on the subject was published by authors such as Philips, Rosas, Packer, Mintty, Benoît-Rohmer, Brölmann, Lefeber, Zieck, Miall, Rääkkä, Rouland, Poumarede, Pierre-Caps, Rousso-Lenoir, Geremek, Lalumiere, Fottrell, Bowring, Musgrave, Modeen, Zagar, Novak, Bloed and van Dijk¹⁰. During the same period, or in the early twenty-first century, other names were added that are very relevant today in the European debates on protection and management of minorities. By way of example, the following should be mentioned: Skutnabb-Kangas, Henrard, Dunbar, Kovacs, Mejknecht, Moucheboeuf, Palermo, Woelk, Pentassuglia, Scheinin, Toivanen, Skrentny, Skurbaty, Trifunovska, Vitale, Lantschner, Medda-Windischer, Heintze, Amed, Martín Estébanez, Spilipoulou, Tsitselikis, Grin, Foblets, Basta, Fleiner, Woerhling (Jean-Marie), Gilbert, Weller, Eide, Malloy, Marko, Ringelheim, Oran, Aurescu and Kurbozka¹¹.

⁹ THORNBERRY, P. (1991), *International Law and the Rights of Minorities*, Clarendon Press, Oxford; CAPOTORTI, F. (1991), *Study on the Rights of Persons belonging to ethnic, religious and linguistic minorities*, United Nations/Centre for Human Rights, Nueva York; DINSTEIN, Y. and TABORY, M. (eds.)(1991), *The Protection of Minorities and Human Rights*, Martinus Nijhoff, Dordrecht; LERNER, N. (1991), *Group Rights and Discrimination in International Law*, Martinus Nijhoff, Dordrecht; FENET, A. (dir.)(1995), *Le Droit et les minorités*, Bruylant, Bruxelles, 1995; YACOUB, J. (1995), *Les minorités, quelle protection?*, Desclée de Brouwer, Paris, 1995; SIGLER, J.A. (1983), *Minority rights: a comparative analysis*, Greenwood Press, Connecticut; WHITAKER, B. (dir.)(1984), *Minorities. A question of Human Rights?*, Pergamon Press, Oxford; STAVENHAGEN, R. (1990), *The Ethnic Question: Conflicts, Development and Human Rights*, United Nations University Press, Tokyo; BOKATOLA, I.O. (1992), *L'Organisation des Nations Unies et la protection des minorités*, Bruylant, Bruselas.

¹⁰ PHILIPS, A. and ROSAS, A. (1995), *Universal Minority Rights*, University of Abo – Minority Rights Group International, Abo; PACKER, J. y MINTTY, K. (1997), *The Protection of Ethnic and Linguistic Minorities in Europe*, Institute for Human Rights, Abo Akademi, Abo-Turku; BENOÎT-ROHMER, F. and HARDEMAN, H. (1994), *The Minority Question in Europe: Towards the Creation of a Coherent European Regime*, Centre for European Policy Studies, Brussels; BRÖLMANN, C.; LEFEBER, R. and ZIECK, M. (eds.)(1993), *Peoples and Minorities in International Law*, Martinus Nijhoff, Dordrecht; MIALL, H. (ed.)(1994), *Minority Rights in Europe. The Scope for a Transnational Regime*, Pinter Publishers, London; RÄIKKÄ, J. (ed.)(1996), *Do We Need Minority Rights?*, Martinus Nijhoff, La Haya; ROULAND, N., POUMAREDE, J. and PIERRE-CAPS, S. (1996), *Droit des minorités et des peuples autochtones*, PUF, Paris; ROUSSO-LENOIR, F., GEREMEK, B. and LALUMIERE, C. (1994), *Minorités et droits de l'homme: l'Europe et son double*, Bruylant, Bruselas; FOTTRELL, D. and BOWRING, B. (eds.)(1999), *Minority and Group Rights in the New Millenium*, Nijhoff, The Hague; MUSGRAVE, T.D. (1997), *Self-determination and National Minorities*, Clarendon, Oxford; MODEEN, T. (1999), *The International Protection of National Minorities in Europe*, Abo Akademi, Abo-Turku; ZAGAR, M. and NOVAK, A. (1999), “La protección de las minorías nacionales en la Europa central y del Este a través del Derecho constitucional e internacional”, en *Humana Iura-Persona y Derecho*, no. 8/9, pp. 18-68; BLOED, A. and VAN DIJK, P. (eds.)(1999), *Protection of Minority Rights through Bilateral Treaties: The Case of Central and Eastern Europe*, The Hague/Boston/London.

¹¹ HENRARD, K. (2000), *Devising an Adequate System of Minority Protection*, Martinus Nijhoff Publishers, The Hague; HENRARD, K. and DUNBAR, R. (eds.)(2008), *Synergies in Minority Protection. European and International Law Perspectives*, Cambridge University Press, Cambridge; THORNBERRY, P. and MARTIN ESTEBANEZ, M.A. (2004), *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe*, Strasbourg, Council of Europe; KOVACS, P. (2000), *International Law and Minority Protection. Rights of Minorities or Law of Minorities?*, Akademia Kiadó, Budapest; MEJKNECHT, A. (2001), *Towards International Legal Personality: The Position of Minorities and Indigenous Peoples in International Law*, Intersentia, Amberes-Groningen-Oxford;

At this point, it should be noted the contribution which from outside Europe has become a part of the Canadian or American doctrine, either laying the philosophical and political foundations of the protection of minorities or exploring techniques and political and legal instruments for the same purpose. In particular, important contributions include those by Kymlicka, Parekh, Taylor, Tully, Hannum, Skutsch, De Varennes, Woerhling (Jose), Gagnon, Jezequel and Bosset, among others¹².

MOUCHEBOEUF, A. (2006), *Minority Rights Jurisprudence*, Council of Europe / European Centre for Minority Issues, Strasbourg; PALERMO F. and WOELK, J. (2008), *Diritto costituzionale comparato dei gruppi e delle minoranze*, Cedam, Padova; PENTASSUGLIA, G. (2002), *Minorities in International Law*, Council of Europe/ European Center for Minority issues, Strasbourg; SCHEININ, M. and TOIVANEN, R. (eds.)(2004), *Rethinking non-discrimination and Minority Rights*, Abo Institute for Human Rights, Abo-Turku; SKRENTNY, J.D. (2002), *The Minority Rights Revolution*, The Belknap Press of Harvard University Press, Cambridge; SKURBATY, Z. (2000), *As if Peoples Mattered. A Critical Appraisal of Peoples and Minorities from the International Human Rights Perspective and Beyond*, Martinus Nijhoff, The Hague; TRIFUNOVSKA, S. (ed.)(2001), *Minority Rights in Europe. European Minorities and Languages*, Asser press, The Hague; VITALE, E. (dir.)(2000), *Diritti umani e diritti delle minoranze*, Rosenberg and Sellier, Turin; LANTSCHNER, E. and MEDDA-WINDISCHER, R. (2003), "Protection of National Minorities through Bilateral Agreement in South-Eastern Europe", in *European Yearbook of Minority Issues*, vol. 1, 2003, pp. 535-564; HEINTZE, H.J. (2002), "Implementation of Minority Rights through the Devolution of Powers. The Concept of Autonomy reconsidered", in *International Journal on Minority and Group Rights*, vol. 9, no. 4, pp. 325-343; AHMED, T. (2013), "The Treaty of Lisbon and beyond: the evolution of EU minority protection?", *European Law Review*, no. 1, pp. 30-51; SKUTNABB-KANGAS, T. and PHILIPSON, R. (eds.)(1995), *Linguistic Human Rights. Overcoming Linguistic Discrimination*, Mouton de Gruyter, Berlin/New York; GILBERT, G. (2002), "The Bourgeoning Minority Rights Jurisprudence of the European Court of Human Rights", in *Human Rights Quarterly*, no. 24, pp. 736-780; MALLOY, T. H. (2007), "Deconstructing the Nation for the 21st Century through a Critical Reading of the Parliamentary Assembly's Recommendation 1735 (2006)", in *European Yearbook of Minority Issues*, vol. 5, ECMI-Eurac Research, Martinus Nijhoff publishers, Leiden-Boston, pp. 161-177; SPILIOPOULOU, S. (2007), "Multiculturalism in Crisis?", in RUIZ VIEYTEZ, E. and DUNBAR, R. (eds.), *Human Rights and Diversity: New Challenges for Plural Societies*, Humanitarian Net, Bilbao; MARKO, J. (2009), "Effective participation of National Minorities in Public Affairs in Light on National Case Law", *International Journal on Minority and Group Rights*, no. 16, pp. 621-642; RINGELHEIM, J. (2006), *Diversité culturelle et droits de l'homme. La protection des minorités para la Convention européenne des droits de l'homme*, Brusells, Bruylant; WELLER, Marc (ed.)(2005), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford University Press, Oxford; AURESCU, B. (2007), "Cultural Nation versus Civic Nation: Which Concept for the Future Europe? A Critical Analysis of the Parliamentary Assembly's Recommendation 1735 (2006) on The Concept of Nation", *European Yearbook of Minority Issues*, vol. 5, 2005/6, ECMI-Eurac Research, Martinus Nijhoff publishers, Leiden-Boston, pp. 147-159; BOSSET, P. and FOLETS, M.-C. (2010), "Accommodating diversity in Quebec and Europe: different legal concepts, similar results?", in *Institutional accommodation and the citizen: legal and political interaction in a pluralistic society*, Council of Europe, Strasbourg, pp. 37-65; KUZBORSKA, E. (2013), *Legal Situation of National Minorities in Lithuania in the Context of International and Supranational Protection Standards*, Artprint, Vilnius.

¹² KYMLICKA, W. (1995), *The Rights of Minority Cultures*, Oxford University Press, Nueva York, 1995; PAREKH, B.C. (2000), *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, Macmillan Palgrave, Basingstoke; TULLY, J. and GAGNON, A.G. (eds.)(2001), *Multinational democracies*, Cambridge University Press, Cambridge; SKUTSCH, C. (ed.)(2005), *Encyclopedia of the World's Minorities*, Routledge, New York-London; HANNUM, H. (1993), *Documents on Autonomy and Minority Rights*, Martinus Nijhoff, The Hague; JÉZÉQUEL, M. (dir.)(2007): *Les accommodements raisonnables: quoi, comment, jusqu'ou? Des outils pour tous*, Éditions Yvon Blais, Cowansville;

From the point of view of research, in Europe, the EURAC (European Academy) in Bolzano and the ECMI (European Centre for Minority Issues) in Flensburg are leading centres in the field. We could add other centres along with the above to address these issues from different perspectives, such as the Aland Islands Peace Institute, the Institute of Federalism in Fribourg and the Institute for Ethnic Studies in Ljubljana, among others. At institutional level, the published work developed by the Council of Europe, including systematic feedback to the European Charter for Regional or Minority Languages¹³ and the Framework Convention for the Protection of National Minorities¹⁴ is also important. Reports published by the Venice Commission are on occasion of great importance on the subject. It has also promoted the gathering of many of the academics cited by the OSCE High Commissioner on National Minorities, especially for drawing up their various recommendations. Similarly, the UN Working Group on Minorities, today Forum on Minorities, has held regular meetings and discussions on issues related to this sector of the European and international academia.

Meanwhile, some NGOs have also played a very active role in this area, encouraging debate, training or even research in the field of accommodation of minorities and protection of diversity. In this regard, the following should be cited: MRG (Minority Rights Group International), UNPO (Unrepresented Nations and Peoples Organization) and FUEN (Federal Union of European Nationalities).

In respect of periodicals that serve as reference on the subject, we should note the online Journal on Ethnopolitics and Minority Issues in Europe, for its connection to the ECMI, and the rigorous European Yearbook on Minority Issues, co-edited by ECMI and EURAC, and from which there have been more than ten editions. To both the above publications, we can also include others such as International Journal on Minority and Group Rights, Diversities (formerly the International Journal on Multicultural Societies) or Nations and Nationalities. Finally, we should mention the encyclopaedias and compilations by Skutsch, Yacoub, De Varennes and Hannum¹⁵.

WOEHLING, J. (1998), "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse", *Revue de Droit de McGill*, no. 43, pp. 325-401.

¹³ NOGUEIRA, A., RUIZ VIEYTEZ, E. and URRUTIA LIBARONA, I. (eds.)(2012), *Shaping language rights. Commentary on the European Charter for Regional or Minority Languages in light of the Committee of Experts' evaluation*, Council of Europe Publishing, Strasbourg; WOEHLING, J.M. (2005), *The European Charter for Regional or Minority Languages*, Council of Europe, Strasbourg; Council of Europe (1998), *International Conference on the European Charter for Regional or Minority Languages*, Strasbourg; Council of Europe (1999), *Implementation of the European Charter for Regional or Minority Languages*, Strasbourg; Council of Europe (2002), *From Theory to Practice: The European Charter for Regional or Minority Languages* Strasbourg; DUNBAR, R and MORIN, T. (2008), *The European Charter for Regional or Minority Languages and the media*, Council of Europe, Strasbourg.

¹⁴ VERSTICHEL, A., ALEN, A., DE WITTE, B and LEMMENS, P. (eds.)(2008), *The Framework Convention for the Protection of National Minorities, A Useful Pan-European Instrument?*, Intersentia, Mortsel, 2008; WELLER, M. (ed.)(2005), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford University Press, Oxford; Council of Europe (2004), *Filling the Frame. Five years of monitoring the Framework Convention for the Protection of National Minorities*, Strasbourg.

¹⁵ SKUTSCH, C. (ed.)(2005), *Encyclopedia of the World's Minorities*, Routledge, New York-London; YACOB, J. (1998), *Les minorités dans le monde: faits et analyses*, Desclée de Brouwer, Paris; HANNUM,

In respect of the Spanish academy, the almost zero use (and understanding) of the minority concept has caused very few authors to refer to it in their work and there are really quite few works that address the issue in a comparative manner or from a European perspective. Nonetheless, there are some authors who, while they do not normally refer to the situation in Spain in their writings, have worked partially on the legal protection of minorities or the political management of diversity. These include De Lucas, Díaz Pérez de Madrid, Deop, Relañó, Contreras, Arp, Prieto Sanchis, Mariño, Fernández Liesa, García Rodríguez, Díaz Barrado, Conde Pérez, Castella or Petschen¹⁶. In turn, the management of diversity and its connection to human rights, fuels the lines of work and research in the Human Rights Institutes at the Universities of Valencia and Deusto (Bilbao)¹⁷. On another level, the whole area of linguistic law has attracted

H. (1993), *Documents on Autonomy and Minority Rights*, Martinus Nijhoff, The Hague; DE VARENNES, F. (1996), *Language, Minorities and Human Rights*, Martinus Nijhoff, The Hague.

¹⁶ DE LUCAS, J. (1993), "Algunos problemas del estatuto jurídico de las minorías. Especial atención a la situación en Europa", in *Revista del Centro de Estudios Constitucionales*, no. 15, pp. 97-128; ARP, B. (2008), *Las minorías nacionales y su protección en Europa*. Centro de Estudios Políticos y Constitucionales, Madrid; ARP, B. (2008), *International Norms and Standards for the Protection of National Minorities. Bilateral and Multilateral Texts with Commentary*, Boston-Leiden, Martinus Nijhoff Publishers; CASTELLA SUBIRATS, S. (2002), *La protección internacional de las minorías. El estatuto jurídico internacional de las minorías: una aproximación histórica al desarrollo normativo y la acción institucional*, Tarragona, Silva editorial; DEOP MADINABEITIA, X. (2000), *La protección de las minorías nacionales en el Consejo de Europa*, Oñate, Instituto Vasco de Administración Pública; DIAZ BARRADO, C.M. (1999), *La protección de las minorías nacionales por el Consejo de Europa*, Madrid, Edisofer; DIAZ PEREZ DE MADRID, A. (2004), *La protección de las minorías en Derecho internacional*, Granada, Universidad de Granada; GARCIA RODRIGUEZ, I. (ed.) (2001), *Las minorías en una sociedad democrática y multicultural*, Alcalá de Henares, Universidad de Alcalá; MARIÑO, F., DIAZ BARRADO, C.M. and FERNANDEZ LIESA, C. (2001), *La protección internacional de las minorías*, Madrid, Ministerio de Trabajo y Asuntos Sociales; RELAÑO PASTOR, E. (2003), *La protección internacional de las minorías religiosas*, Centro de Estudios políticos y Constitucionales, Madrid; PRIETO SANCHIS, L. (1996), *Tolerancia y minorías: problemas jurídicos y políticos*, Universidad de Castilla-La Mancha, Cuenca; CONTRERAS MAZARIO, J.M. (2004), *Las Naciones Unidas y la protección de las minorías religiosas*, Tirant lo Blanch, Valencia; PETSCHEN VERDAGUER, Santiago (1990), *Las minorías lingüísticas de Europa Occidental: documentos (1492-1989)*, Parlamento Vasco, Vitoria-Gasteiz; CONDE PEREZ, E. (2001), *La protección de las minorías nacionales en la organización para la seguridad y la cooperación en Europa (OSCE)*, Universidad Complutense, Madrid.

¹⁷ Apart from those mentioned along the paper, other recent works in this field are the following: RUIZ VIEYTEZ, E. (2014), "Derechos y Minorías nacionales", in PECES-BARBA MARTINEZ, G.: FERNANDEZ GARCIA, E.; DE ASIS ROIG, R.; ANSUATEGUI ROIG, J. and FERNANDEZ LIESA, C. (dirs.), *Historia de los Derechos fundamentales. Siglo XX. Vol. V*, Dykinson, Madrid, pp. 1083-1151; RUIZ VIEYTEZ, E. (2014), "Minorías nacionales o étnicas, lingüísticas y religiosas", in BARRANCO AVILES, M.C. y CHURRUCA MUGURUZA, C. (eds.), *Vulnerabilidad y protección de los derechos humanos*, Tirant lo blanch, Valencia, pp. 139-166. GONZALEZ HIDALGO, E. y RUIZ VIEYTEZ, E. (2013), "El derecho a la autonomía como contenido emergente del derecho a la participación política de las minorías nacionales en Europa", *Revista Electrónica de Estudios Internacionales*, no. 24; RUIZ VIEYTEZ, E. (2013), "Immigration and Cultural Justice: A Reflection on Human Rights of "New" Minorities", in MERLE, Jean-Christophe (dir.), *Spheres of Global Justice. Global Challenges to Liberal Democracy. Political Participation, Minorities and Migrations*, Springer Science, London, pp. 365-377; RUIZ VIEYTEZ, E. (2013), "Minority marriage and discrimination: redrafting Muñoz Díaz v. Spain", in BREMS, E. (ed.), *Diversity and European Human Rights*, Cambridge University Press, Cambridge, pp. 401-425; GONZALEZ HIDALGO, E. and RUIZ VIEYTEZ, E. (2012), "La definición implícita del concepto de minoría nacional en el Derecho Internacional", *Derechos y Libertades*, no. 27, pp. 17-56;

widespread attention in Spain, including standardization policies and their relationship to the language rights of citizens. In this specific area, a large number of experts from different branches of law can be found in Spain (Milian i Massana, Vernet, Pons, Arzoz, Urrutia, Nogueira, Cobrerros, Agirreazkuenaga, Fernández Liesa, De Carreras, López Castillo, López Basaguren, Fernández Pérez, among many others), and even schools with different positions that address current debates generated by the linguistic diversity that characterizes Spain as one of the most pluralistic countries in Europe. Notwithstanding the foregoing, the attention given to the European debates on minorities or on the main instruments of protection by the Spanish Academy is limited¹⁸.

RUIZ VIEYTEZ, E. (2011), “Nuevas minorías y diversidad cultural”, in AÑON ROIG, M.J. and SOLANES CORELLA, A. (eds.), *Construyendo sociedades multiculturales. Espacio público y derechos*. Universidad de Valencia-Tirant lo Blanch, Valencia, pp. 45-82.

¹⁸ On the Framework Convention for the Protection of National Minorities and its implementation in Spain, or on the European Charter for Regional or Minority Languages, vid.: ARP, B. (2004), “Un balance sobre el primer ciclo de informes estatales del Comité consultivo del Convenio-Marco para la protección de las Minorías Nacionales de 1995”, in *Revista Española de Derecho Internacional*, vol. 56, no. 1, pp. 525-530; ARP, B. (2004), “La protección de las minorías nacionales en España vista desde el Consejo de Europa: la Opinión del Comité Consultivo del Consejo de Europa para las Minorías Nacionales”, in *Revista Española de Derecho Internacional*, vol. 56, no. 2, pp. 1023-1028; BAUTISTA JIMENEZ, J.M. (1995), “El Convenio Marco para la protección de las Minorías Nacionales: construyendo un sistema europeo de protección de las minorías”, en *Revista de instituciones europeas*, vol. 22, no. 3, pp. 939-960; CARNERERO CASTILLA, R. (1999), “El Convenio Marco del Consejo de Europa para la protección de las Minorías Nacionales”, en *Boletín jurídico de la Universidad Europea de Madrid*, no. 2, 1999; DIAZ BARRADO, C.M. (1999), “La protección de las minorías en el seno del Consejo de Europa: Convenio Marco para la protección de las Minorías Nacionales”, in *Anuario de la Facultad de Derecho*, Universidad de Extremadura, no. 17, pp.125-170; GUTIERREZ VEGA, P. (2006), “Minority Report. La ‘vis atractiva’ del concepto de ‘minoría’ sobre el de ‘pueblo indígena’ en la Convención Marco para la Protección de las Minorías Nacionales”, in PEREZ ROYO, J., URIAS MARTINEZ, J.P. and CARRASCO DURAN, M. (eds.), *Derecho Constitucional para el siglo XXI, vol. II*, Thomson-Aranzadi, Cizur menor, pp. 5045-5065; JIMENEZ PIERNAS, C.B. (1999), “El Convenio Marco para la Protección de las Minorías Nacionales, de 1 de febrero de 1995, y su aplicación en España”, in GARCIA RODRIGUEZ, I. (ed.), *Las ciudades de soberanía española: respuestas para una sociedad multicultural*, Universidad de Alcalá, Alcalá de Henares, pp. 105-130; LÓPEZ BASAGUREN, A. (2013), “La Carta Europea de lenguas regionales o minoritarias: ¿un modelo para las sociedades multilingües más allá de la protección minoritaria?”, in LOPEZ CASTILLO, A. (dir.), *Lenguas y Constitución Española*, pp. 129-149; RUIZ VIEYTEZ, E. (2003), “La Carta Europea de las Lenguas Regionales o Minoritarias, ¿un instrumento más para la protección de las minorías lingüísticas?: contenido, límites y oportunidades”, in *Carta Europea de las Lenguas Regionales o Minoritarias. Una perspectiva sobre su aplicación*, EKE, Pamplona; RUIZ VIEYTEZ, E. (2003), “El Convenio Marco para la protección de las Minorías Nacionales. La Carta Europea para las Lenguas Regionales o Minoritarias”, in GOMEZ ISA, F. (dir), *La protección internacional de los derechos humanos en los albores del siglo XXI*, Universidad de Deusto, Bilbao, pp. 513-546; RUIZ VIEYTEZ, E. (2004), *Working Together. NGOs and regional or minority languages*, Council of Europe, Strasbourg; RUIZ VIEYTEZ, E. (2009), “Constitutions, Languages, Definitions and the European Charter for Regional or Minority Languages”, *Llengua i Dret*, no. 51, pp. 227-253; RUIZ VIEYTEZ, E. (2008), “Minorías, nacionalidades y minorías nacionales. La problemática aplicación en España del Convenio Marco para la protección de las Minorías Nacionales”, in *Revista Vasca de Administración Pública*, no. 82, pp. 187-225. RUIZ VIEYTEZ, E. (2014), “España y el Convenio Marco para la Protección de las Minorías Nacionales: una reflexión crítica”, *Revista Española de Derecho Internacional*, vol. 66-1, pp. 55-80.

IV. PROPOSALS AND INSTRUMENTS FOR PLURALIZATION

As argued in the preceding paragraph, democracy cannot be reduced to a mere numbers game in favour of the majorities. The very idea of respecting and guaranteeing basic human rights, the foundation of any democratic system nowadays, consists precisely of setting limits for that numerical rule. A democracy understood exclusively as a rule of majorities does not resolve issues related to respecting the identity of minorities. In the nineteenth century, Tocqueville warned of the risk of formal democracy becoming a "tyranny of the majority" (Tocqueville 2007, 303-336). The 2009 Swiss referendum banning new minarets being built in the country, and its possible effect on freedom of religion or expression constitutes a clear example of formally democratic decision, which nonetheless goes against a fundamental right (freedom of religion) and against the prohibition of discrimination against members of a minority (in this case a religious minority). In fact, it represents a serious contradiction between the constitutional and international legal orders that are governing simultaneously in Switzerland (Ruiz Vieyetz 2013, 253-288).

In any modern society characterized by cultural diversity, the role of law today cannot be the mere conduit for the decisions of the political majority. In respect of human rights, the aim should be that they can be exercised through the identity of each person, and not in spite of it. There is a right to equality against discrimination, but there is also a right to differentiation (differential treatment) versus standardization (De Lucas 2003a, 107). The role of law in this area involves balancing the democratic criteria, which are understood as being the majority rule by implementing corrective measures, accommodations or adaptations that underscore the pluralist dimension. Again, we need society and law to be more open and flexible, and make the latter more malleable, such that it can be adapted and applied not only to a way of understanding life, but to as many as possible.

This involves shifting the diversity of society to the legal setting, interpreting human rights multiculturally, while multiculturalizing public institutions that carry out such an interpretation. For this process of democratic pluralization of rights and institutions, we have to break with the logic that sees differentiated treatments as privileges. If the unity or cohesion of the political community does not provide for different treatment of different situations, discrimination is guaranteed. The difference in the manner of exercising rights does not imply a difference in the rights themselves. In the current state of development of the law, it is much more feasible to work from the plurality of application rather than from the plurality of the definition of rights. From this perspective, democratic pluralization does not involve creating new rights, or special rights, or collective rights, but a new more open, plural and inclusive method for interpreting the rights we afford to all people.

It would certainly be contradictory that democratic and liberal societies that are based on pluralism of opinions of all kinds would nonetheless seek to create a neutral public space from the cultural viewpoint. On the contrary, cultural and identity-based

pluralism should be understood as something substantial on the theme of democracy¹⁹, and this implies the recognition of a certain division in society that should be respected²⁰.

The political developments of the twentieth century have served to extend a broader and more inclusive concept of democracy. It is without doubt an unfinished and insufficient process, but by merely implementing the numerical majority rule or assimilationist policies, we have shifted towards to a paradigm in which diversity is a positive development that we must protect and support. The progress is essentially seen from the perspective of discourse rather than from a practical viewpoint, as seen above. However, international and domestic developments for the accommodation of diversity have increased sharply in recent decades.

To analyze the instruments or techniques which, within the existing legal system and respecting the state policy framework, we will distinguish two areas or different approaches. The first of these will serve to systematize the ways in which the states try to constitutionally accommodate diversity. Secondly, we will examine legal instruments, the adoption of which could mean a breakthrough in pluralization when applying or interpreting individual rights of persons belonging to minorities.

IV.1. Techniques for the constitutional accommodation of diversity

In comparative practice, we can see a set of instruments used by European political communities to accommodate cultural or identity-based diversity in a democratic manner. Systematizing these techniques is a complex task. On the one hand, because the mechanisms that are used in practice by several states are varied and are applied to very different social realities (Leurat 1998, 40-60), and on the other hand, because on occasion these mechanisms overlap substantially within the same policy framework.

Nevertheless, various formulas have been tested by the states to meet the linguistic, ethnic and religious plurality of their populations. From positions that have rejected said plurality with policies aimed at the elimination of minorities or progressive assimilation, to institutional and legal responses designed to effectively protect these groups. In the case of national minorities with a roughly defined regional base, several States have chosen models of regional self-government, either in the form of a federal state (Russia, Yugoslavia, India, Belgium and Switzerland), or through the decentralization of political power to subnational entities (United Kingdom, Spain, Italy, Finland, Ukraine, Moldova and Denmark). On certain occasions, the regional self-government is combined with some other kind of crosscommunity arrangements (Northern Ireland, South Tyrol, Cyprus, India or Ethiopia). In other cases, the self-government guaranteed to national minorities of the state is done primarily by means of personal autonomy (Slovenia, Hungary, India, Fiji

¹⁹ European Court of Human Rights, case *Metropolitan Church of Bessarabia against Moldova*, judgment of 13 December 2001, para. 119; case *Refah Partisi against Turkey*, judgment of 31 July 2001, para. 69.

²⁰ European Court of Human Rights, case *Agga against Greece*, judgment of 17 October 2002, para. 58-60.

Islands or Russia). As well as or as an alternative to these protective measures, there may be others that fall within the scope of the direct participation of the minorities concerned in the relevant state and constitutional bodies, and even in some cases, there may be election or decision-making mechanisms specifically provided for to ensure consent from certain groups in the decision-making. In any case, within the European framework itself, at the present time we can observe fundamental differences in the policies adopted by the various states in terms of attaining the mere recognition of their own linguistic, religious and cultural diversity.

Despite this complex landscape, we can present a typology which can be useful in the theoretical conceptualization of democratic pluralization. The classification in question is presented in table form where two perspectives or different approaches can overlap. On the one hand, we distinguish between a collective approach to diversity and a more individualistic approach to managing such diversity. In the first case, we would place measures and techniques that take into account the connection between majority and minority groups, while the second approach tends to consider the policy framework as a state of citizens who are diverse in their identity. Each of these two approaches corresponds to a column in our diagram. The second axis of the diagram reflects the total or partial provision diversity is to be addressed with. This would differentiate approaches that understand diversity (or at least a certain degree of it) as an overall defining element in the state, in approaches that understand diversity as a more limited factor in the organization of the state.

By combining both approaches we obtain a total of four categories that bring together different mechanisms for accommodating diversity. Hence, self-government or territorial autonomy usually occurs as the result of a collective assumption of diversity and a global approach thereof as a substantial element in the definition of the state. Logically, this does not refer to the whole reality of territorial self-government, but at that whose purpose is full or partial satisfaction of the demands for accommodation of a particular minority group. Secondly, when the focus is collective, but the assumption of plurality is undertaken to a more partial degree, measures are set out providing for participation in the power of minority groups or some sort of personal or culturally based autonomy. This usually addresses situations in which the minority group is very small demographically and clearly identifiable (such as the situation of certain indigenous peoples or small national minorities) or it is not associated with a clearly definable territory (as is the case for some religious or ethnic minorities). The concept of participation in this case does not equate to that used more widely as a right in international human rights treaties for members of minorities²¹, but rather refers to measures for compartmentalization of power or specific access to it (power-sharing arrangements), and even some consociational arrangements, which are not very common in Europe

²¹ Cfr. Advisory Committee of the Framework Convention for the Protection of National Minorities, *Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs*, adopted on 27 February 2009 (Doc. ACFC/31DOC(2008)001); United Nations Committee on Economic Social and Cultural Rights, *Right of everyone to take part in cultural life* (General Comment no. 21), adopted on 20 November 2009 (Doc. E/C.12/GC/21).

Figure 2: Systematization of legal and constitutional techniques for accommodating diversity within a State

| | | |
|---|--|---|
| | Collective approach (Relations between majority and minorities) | Individual approach (Relations between state and citizens) |
| Global approach (Diversity as a defining element of the state) | Territorially based Self-government | Official recognition of the minority elements |
| Partial approach (Diversity as a secondary element in the state) | Participation Power-sharing Cultural autonomy | Specific rights for members of minorities |

Possibly nowadays we should emphasize the lower left quadrant of our diagram and highlight the potential of cultural autonomy as a future instrument in accommodating diversity. The dynamics of the future must be based on an ongoing process of deterritorialization and on the premise of the multiethnic character of existing states. In the balance between cohesion and diversity, cultural or personal autonomy has potential advantages that have not yet been sufficiently explored (Nimni 2005)²². These advantages extend to the fact that it is one of the instruments that can best combine the treatment traditional and new diversities. In short, we would advocate reopening those discussions from the Danubian area that took place more than one hundred years ago. This would require that, in particular in Western European societies, certain taboos on people belonging to religious, national, ethnic or linguistic communities were dissipated and the value of cultural ascriptions would be recognized as natural and inherent to the human and social condition.

IV.2. Instruments for pluralization in the implementation of rights

If we move from a political-constitutional perspective towards an approach that is more focused on the legal protection of human rights, we can find other channels for the pluralization of law in order to deal more effectively with diversity. We can therefore identify some legal instruments that can help us to pluralize rights also within each of democratic political communities. Existing legal instruments that may be useful in this regard would be, among other possibilities, a reinterpretation of the concept of citizenship, the international law on minorities, multicultural clauses, indirect discrimination and reasonable accommodation. This list does not mean that the aforementioned channels are equal in respect of depth or potential. They are not mutually

²² Vid. A recent debate on cultural and personal autonomy in an special issue 1/2013 of the *Journal on Ethnopolitics and Minority Issues*, available at <http://www.ecmi.de/publications/detail/issue-12013-273/>

exclusive, but they may be compatible and, in fact, there are obvious connection factors between some of them.

IV.2.1. *Re-examination of the concept of citizenship*

To manage cultural diversity in a democratic manner, a restructuring of the traditional readings of the legal and policy framework and opening the way to a more plural and inclusive understanding of citizenship has been proposed. This new way of understanding citizenship is essentially derived applying multiculturalism to the traditional doctrine of human rights and involves understanding the political community as a democracy based on an open, inclusive and differentiated citizenship (De Lucas 2003b, 93).

Only full citizenship guarantees entitlement to rights and the political inclusion of persons belonging to minorities, particularly immigrants, in the receiving political community. Inclusive citizenship involves creating an open system of legal membership in the political community. Citizenship, as legal relationship with the State, would no longer be conditional on the assumption of a certain identity parameters to depend on purely factual elements such as mere residence in the state. Hence, nationality has to give way to the factual residence as a link for political inclusion (Rubio Marin 2002, 182), which is expressed in the concept of inclusive citizenship. This filter would be the only condition for access to civil and social rights on an equal basis, but also to develop fair cultural policies in the presence of minorities of all kinds and particularly those minority communities formed in the main from recent immigration processes.

This proposal is based on the idea that the democratic legitimacy of the State requires the participation of all residents in the political decision-making processes in fair consideration of their contribution to the country's prosperity²³. The documents that call for an extended and flexible review of the link of citizenship for foreign residents are becoming increasingly more numerous²⁴.

At the same time, this citizenship should be plural, and also establish an open system of identity. In fact, multicultural democracy requires the State to be restructured using parameters that reject the uniformity and monopoly of power by a specific group, regardless of their majority status. This requires constantly negotiating the design of public space between all cultural sensitivities or collective identities that actually make

²³ Council of Europe, Parliamentary Assembly, Recommendation 1500 (2001), "Participation of immigrants and foreign residents in political life in the Council of Europe member states", of 26 January 2001, para. 4.

²⁴ Council of Europe, Parliamentary Assembly, Recommendation 1206 (1993), "Integration of migrants and community relations", of 4 February 1993, para. 7; Council of Europe, Parliamentary Assembly, Recommendation 1500 (2001), "Participation of immigrants and foreign residents in political life in the Council of Europe member states", of 26 January 2001, para. 11.4.b; Council of Europe, Parliamentary Assembly, Recommendation 1625 (2003) "Policies for the integration of immigrants in Council of Europe member states", of 30 September 2003, para. 5; United Nations, Committee for the Elimination of Racial Discrimination, Recommendation no. 30, "Discrimination against non-citizens", of 1 October 2004, para. 13.

up society. Plural citizenship is thus constructed from the acceptance of difference, diversity and plurality as positive values. This should be reflected in the position of the public system to ensure the participation of all citizens and groups who are part of the social and cultural life, with a real and effective equality. This obliges the state to intervene on behalf of minority communities in a bid to achieve real participation in the social life and to prevent their difference from becoming a substantive barrier for them to access public resources.

IV.2.2. *The Minority Law*

In Europe nowadays there is a robust legal framework for the protection of minorities, meaning those that fit into the categories used by the United Nations in its official documents or by internal constitutions that refer to this concept. There are specific treaties in Europe on the subject already ratified by a large number of states, in addition to a set of policy documents that are not strictly binding (soft-law) that make up an increasingly consolidated regulatory block to the point that there was talk of the emergence of a common European *acquis* on the subject (Arzoz 2007, 378). This means that all European states are obliged to ensure such protection, including the adoption of positive measures necessary in this regard.

Nonetheless, there are a number of important legal issues that remain outstanding in defining the scope of this legal block. On the one hand, the absence of an internationally agreed definition for the various categories of minorities and cultural elements that characterize them makes it difficult to uniformly apply this policy area and leaves considerable leeway to the authorities of each state. For example, this leads to the position of several European countries who deny the existence of national minorities in their midst despite evidence of the sociological and political events they include. The potentiality of this sector of the law cannot, of course, be deployed if there is no initial recognition of plurality.

In addition to these problems regarding definitions, we have some usual discussions that concur when the rights of minorities are studied. The most common ones in this regard are the confusion between their nature as generic or specific rights and the confusion about their categorization as individual or collective rights. In general, it is more legally correct and politically practical to understand the rights in question as generic and individual. In any case, based on this legislation which acquired notable development in recent years, the need for public authorities to take positive steps to ensure the equality of minorities and the participation of its members in the social, political and cultural life of the country in which they live can be justified.

Such positive measures can and should benefit not only the minorities formed by nationals in the country in which they reside, but also by foreign nationals. The debate on the protection of old and new minorities, and the point at which they overlap, is one of the most controversial and most successful debates of the current discussions in democratic systems. The doctrinal and institutional progress, albeit slow progress, is heading in the direction of a progressive alignment and consideration of contextual factors as markers

of state obligations to serve the citizens²⁵. This would involve the state's duty to enable all linguistic, religious or ethnic minority communities to exercise their rights, or generic rights through its minority identity, by taking, where necessary, positive measures to ensure their effective equality in the society.

IV.2.3. *Multicultural clauses*

Comparative constitutional law offers us a unique example of a multicultural clause for the interpretation of rights. This relates to article 27 of the Canadian Charter of Rights and Freedoms, adopted as an annex to the Constitution in 1982, which reads as follows:

“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”

It is, therefore, a clause requiring public institutions in Canada to perform a plural interpretation when implementing the rights recognized in the Charter itself; an interpretation inspired by the multiculturalism that traditionally exists in that society. The clause is certainly unique in comparative law, and could be potentially exported to other legal systems.

Nonetheless, it should be noted that the aforementioned article 27 of the Canadian Charter of Rights and Freedoms has not been used extensively to date in the jurisprudence of the Supreme Court in that country (Seglers 2004; Ruiz Vieytez 2007). The cases that used this article as basis are scarce and do not cover all cases of course where cultural differences have arisen. At the same time, the Canadian system has not solved the relationship of the multicultural clause with other constitutional provisions that recognize specific rights for certain minorities based on historical or foundational grounds. In this legal context, these provisions take precedence over this clause. Hence, Canada has addressed the problem of accommodating religious or linguistic minorities who aspired to achieving equal treatment of other traditional minorities, without the clause from Article 27 being particularly useful for this purpose²⁶.

There is no doubt that a clause of this nature involves the legal obligation to consider the existing culture or identity plurality in society when it comes to deciding on conflicting rights. However, it is also possible to argue that the presence of the clause, to be

²⁵ EIDE, A. (2004), “The Rights of ‘Old’ versus ‘New’ Minorities”, in *European Yearbook of Minority Issues*, vol. 2, Martinus Nijhoff, pp. 365-379; MEDDA-WINDISCHER, R. (2009), *Old and New Minorities: Reconciling diversity and cohesion. A human rights model for minority integration*, Nomos-Eurac Research, Bolzano/Bozen; PALERMO, F. (2008), “Soluciones jurídicas a sociedades complejas: El Derecho de la diversidad”, in RUIZ VIEYTEZ, E. (dir.), *Derechos humanos y diversidad. Nuevos desafíos para las sociedades plurales*, Alberdania, San Sebastián, pp. 75-97; PALERMO, F. and WOELK, J. (2005), “From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights”, in *European Yearbook of Minority Issues*, vol. 3, pp. 5-13.

²⁶ See, in this respect, cases Adler and Waldman: Supreme Court of Canada, Adler v Ontario case, [1996] 3 S.C.R. 609; judgment of 21 November 1996. Human Rights Committee, Waldman v Canada case, decision of 3 November 1999, (Documento de Naciones Unidas CCPR/C/67/D/694/1996).

symbolically very important, adds nothing substantially new to the role of law in a plural society. In any event, it is the diversity that actually exists that should serve as a guide for any operator, since the law must be interpreted according to the social context in which it should be applied. In any case, their presence serves as a hermeneutical pattern and indicates a guiding principle that helps the pluralization of the law along the lines that are argued in this paper.

IV.2.4. *Indirect discrimination*

The concept of indirect discrimination has a broad legal scope in any system. There is practically no human rights treaty or constitution that does not incorporate the prohibition of discrimination on the grounds of various cultural elements such as language, religion, membership of an ethnic group or national minority. However, discrimination is a term that may appear as numerous adjectives²⁷. The prohibition affects all discrimination and not only what we understand as direct discrimination, and it is within the area of managing cultural diversity where the concept of indirect discrimination can display significant potential²⁸. The interpretation we get from indirect discrimination is that in certain cases it is precisely the lack of differentiation (either in the regulation itself or how it is implemented) which leads to discrimination. It also includes situations in which a supposedly neutral regulation eventually causes a negative impact on a particular group because of their identity.

In addition, the idea of indirect discrimination also includes "discrimination by indifferenciation" or "discrimination by equalization" (Rey Martinez 2008), which the European Court of Human Rights contained in its judgment of the case of *Thlimmenos against Greece*²⁹. Nonetheless, although the Court itself alluded to *Thlimmenos* doctrine on later occasions, there has been no further evidence of a discrimination by equalization based on cultural or religious differences. Therefore, this concept has not yet helped to make significant progress in the pluralization of the rights we called for above. On the contrary, indirect discrimination has become part of the various European systems and can facilitate future developments in this regard.

IV.2.5. *Reasonable accommodation*

Reasonable accommodation is also a result of the prohibition of discrimination alluded to in the previous section, and is specified in an obligation, whose mechanism for justification is very similar to that of indirect discrimination. Reasonable accommodation does not come so much from a legislative formulation but from a concept of the right to

²⁷ An extensive taxonomy can be found at United Nations Committee on Economic Social and Cultural Rights, *Non-discrimination in ESC Rights* (General Comment no. 20), adopted on 10 June 2009 (Doc. E/C.12/GC/20).

²⁸ This concept is included in European law through Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

²⁹ European Court of Human Rights, case *Thlimmenos against Greece*, judgment of 6 April 2000, para. 44.

equality which is taking shape through case-law (Bosset 2007, 10). Hence, we could define reasonable accommodation as a legal obligation derived from the right to non-discrimination, which involves taking reasonable steps to align an action or inaction with a particular claim to exercise a right, unless it would cause undue hardship. Reasonable accommodation, therefore, can be used on any of the fundamental rights in a system, including those that are projected on or from cultural elements, such as the specific case of religious freedom or expression contained in all bills of rights.

Reasonable accommodation takes the form of an obligation and is based on the repeal or exemption of a particular standard, or adaptation or special agreement in time, in space or in a particular activity. The concept appears originally in the area of labour relations in American law, from where it would move on to Canada. Canadian originality in this matter consists of implementing the technique of reasonable accommodation to religious freedom and its ensuing use as a measure of social harmonization of cultural diversity³⁰. Since 1986³¹, the Supreme Court of Canada has recognised that when a law can be found to have a valid secular purpose, but in addition involves negative effects on the freedom of religion for some persons, the latter have the right to be accommodated, usually in the form of an exemption from enforcement of the law, provided that such a solution is compatible with public interest and does not cause an undue hardship (Woehrling 2006, 380)³². Issues related to dressing codes, food, work calendar, places of worship or the display of cultural or religious symbols feed the possibilities for reasonable accommodation in the Canadian experience.

As such, reasonable accommodation based on elements of cultural diversity has not yet made the leap to other legal systems³³. Conversely, if they have been using this or other similar concepts in European legislation, such as those related to "reasonable adjustments", almost invariably geared towards persons with functional diversity. In any case, one of the possibilities is that this legal technique can adapt human rights in terms of pluralism, particularly in an environment of cultural diversity (Ruiz Vieytez 2009).

V. CONCLUSION

If the transition to modernity meant fleeing from religious and irrational dogmas in order to seek rational principles of social, moral or political organization, postmodernism means giving up any static and comprehensive system to the resistance to change in terms of reference, axiology and identity, in pursuit of a permanent unstable and questionable balance of reciprocal accommodations between different individuals. Liberal and democratic societies can only be characterized by pluralism that is derived from its freedom, and which extends not only to the latest values, but also to

³⁰ Vid. The famous Report Bouchard-Taylor at <http://www.accommodements.qc.ca/commission/mandat-en.html>

³¹ Supreme Court of Canada, Ontario Human Rights Commission versus Simpsons-Sears, [1985] 2 S.C.R. 536. Judgment of 17 December 1985.

³² R. v. Edwards Books and Art Ltd., [1986] 2 Supreme Court Review 713, p. 32; judgment of 18 December 1986.

³³ United Nations Human Rights Committee, Bhinder v Canada case, decision of 28 November 1989 (Doc. CCPR/C/37/D/208/1986 (1989)).

the most common cultural and symbolic elements that serve to build strong collective identities.

This has a crucial impact on the theory and practice of human rights. In some way, it may be noted that the context of diversity is the ultimate test of human rights as universal rights. Multiculturalism is the framework that will allow us to gauge the depth of the concept of democracy that sustains our political and legal systems. It forces us to reconsider the demos, belonging thereto in terms of citizenship, but also the core content of the rights, to pluralization. At the present time, the legislation we require is not that which precisely defines in a general manner what can and cannot do in a given society, but rather a framework of protection that is less identity-based, more open, cross-cutting and flexible, wherein procedural provisions becomes substantive. What will make the law valuable in pluralistic and changing societies will not be so much its comprehensiveness but its versatility and resilience.

Democratic pluralization obliges us to re-read the rights from more open and inclusive underpinnings. In this sense, the final regulatory outcome and the procedures taken for arriving at that point therefore become important. In a pluralistic society, procedures and interests are shared, but not necessarily elements of identity. Democracy may be measured by the extent to which the collective minority references are accepted or accommodated by the majority group. Or, in other words, extending the scope of acceptance of different lifestyles, symbols, references and values within the same legal and political framework.

We already have political mechanisms and legal instruments in place for this process that can facilitate an open, plural and inclusive reinterpretation of the different rights. But this needs to be done without forgetting the historical process we come from, which is not exactly a promising example for managing diversity, and assuming the limitations of a liberal legal system, which is based on fundamentally individual allegations and powers, and divided into in nation-state political communities that work on the basis of the rule of the majority. Diversities are without doubt a challenge for plural societies, but they are also an opportunity for overcoming outworn identity-based political framework, to reconsider rights and democracy, to repose law as an instrument of social cohesion and to take a giant step forward in the deepening of democracy.

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