

A comparative study of jurisprudence, between the Inter-American Court of Human Rights and European Court of Human Rights, regarding political representation in multicultural contexts

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Resumo

Este artigo fará uma análise comparativa entre a jurisprudência da Corte Interamericana de Direitos Humanos e a Corte Europeia de Direitos Humanos com o fim de verificar como questões de representação política são tratadas em contextos multiculturais. Para tanto, discutirei acerca do debate teórico sobre representação política em sociedades multiculturais e, em seguida, analisarei a jurisprudência das duas cortes sobre o tema, com o foco em casos que envolvam partidos políticos. Depois, responderei às seguintes perguntas: As jurisprudências da Corte Interamericana de Direitos Humanos e da Corte Europeia de Direitos Humanos são permeadas por uma visão multicultural do Direito? Há diferença entre a forma como as duas cortes lidam com a representação política em sociedades multiculturais? É possível classificar os julgamentos relevantes dessas duas cortes de acordo com alguma vertente da filosofia política contemporânea? Após responder a essas perguntas, discutirei comparativamente questões teóricas e jurisprudenciais.

Palavras-chave: Multiculturalismo, Corte Interamericana de Direitos Humanos, Corte Europeia de Direitos Humanos

Abstract

This article makes a comparative analysis of the caselaw between the Inter-American Court of Human Rights and the European Court of Human Rights to verify how questions of political representation are dealt with in multicultural contexts. For this purpose, I discuss the theoretical debate on political representation in multicultural societies, followed by analysis of the caselaw from the two Courts regarding the theme, focusing on cases involving political parties. Then I answer the following questions: Is the caselaw from the Inter-American Court of Human Rights and the European Court of Human Rights permeated by a multicultural vision of the law? Are there differences between the ways the two Courts deal with political representation in multicultural societies? Is it possible to classify the relevant judgments of the Courts according to some contemporary political philosophy? After responding to these questions, I present a comparative theoretical and jurisprudential discussion.

Keywords: Multiculturalism, Inter-American Court of Human Rights, European Court of Human Rights

1. Introduction

These days multiculturalism is considered to be a phenomenon, namely a historical fact which is present in most modern democracies¹. As a result, multiculturalism must be understood as pluralism of cultures in a political society, that is, symbolic universes that give meaning to the choices and life plans of those who live within it.² Therefore, since the phenomenon of multiculturalism has important practical and political implications, legal theorists and legal practitioners can choose one of the following options: 1) to ignore or deny the fact that multiculturalism exists, and therefore develop theories and the practice of law without taking it into consideration; 2) to recognize the existence of this phenomenon, but argue that its consequences can be explained and managed without the need to introduce a multicultural perspective or a new paradigm in legal theory; 3) to acknowledge that the phenomenon of multiculturalism and how it relates to rights requires a new foundation and new theories, and therefore that legal institutions need to be adequate to this phenomenon. The latter is the position taken in this paper.

In relation to theoretical and political issues, discussion in multicultural societies has developed around human rights and political representation. The outcome may vary accordingly to the general point of view taken and depends on how open the relevant theory of the law is to multicultural claims. According to theorists who support classical liberalism, human rights and political representation should take into account the same considerations that already exist and therefore the demands of different cultural groups should be dealt with according to the classical concepts of equality and non-discrimination.³ On the other hand, communitarian theorists put forward a view of political representation that is closely linked to the idea of self-government.⁴ In addition, an intermediate position is taken by those authors who align themselves with liberalism (cultural or national) and consider the multicultural variable, seeking to establish a special right to political representation in multicultural contexts and adapt the framework of democratic societies.⁵

At a judicial level, although with some differences, the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR), over the last two decades, have both decided many cases about understanding and how to balance political representation in multicultural societies, by determining its content, limits and scope. In relation to this case law, many questions have been raised, including the following: Has multicultural view been permeated by the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights? Are there significant differences between the

1. See W Kymlicka, *Multicultural Citizenship*, Oxford, Oxford University Press (1995), pp 16-19. See also A Gutmann, *Identity in Democracy*, Princeton, Princeton University Press (2003), pp 60-71. See also IM Young, *Inclusion and Democracy*, New York, Oxford (2000), pp 148-153.

2. See F Viola, «Constitución y Multiculturalismo», 11 *Raion practica* (2003), pp 33-71.

3. See B Barry, *Culture and Equality: an Egalitarian Critique of Multiculturalism*, Cambridge, Polity (2005), pp 63-103.

4. See Ch Taylor, «The Politics of Recognition», in *Multiculturalism*, Princeton, Princeton University Press (1994), pp 25-73.

5. See W Kymlicka, *op cit*, pp 131-151; Also in IM Young, *op cit*, pp 136-137.

Inter-American Court of Human Rights and the European Court of Human Rights in the ways they approach political representation in multicultural societies? Is it possible to ascribe the relevant judgments to any of the current political philosophies, such as classical liberalism, communitarianism and liberal egalitarianism? Should the interpretation of the rights set out in human rights conventions, in so far as they are applicable to the relevant cases, and their weighting, including from a multicultural perspective, be given special consideration? Answering these questions, and others which could arise in relation to this topic, is the aim of this research paper.

In order to address the questions raised, I will begin by providing an overview of the theoretical debate surrounding political representation in multicultural contexts. I will then analyse the case law of the IACtHR and the ECtHR relating to political representation in multicultural contexts, while focussing on the case law that relates to political parties.⁶ Subsequently, the research questions posed will be addressed and a theoretical and jurisprudential discussion will be undertaken in a comparative way. Finally, I will then discuss the conclusions reached.

2. Main elements of political representation in multicultural contexts

2.1. Proposals in relation to political representation in multicultural contexts

In a democratic society⁷, it is essential that decision-making processes be equitable. In other words, these processes must involve listening to and considering the interests and perspectives⁸ of minorities and disadvantaged ethno-cultural groups.⁹ According to Kymlicka, in order to achieve this goal the classical political rights have been provided by the common rights of citizenship, although they are important, but not enough.¹⁰ Based on a series of data on the exclusion of disadvantaged political (cultural or ethnic) groups in social processes, he argues that in all Western democracies many people consider that the electoral and legislative processes are unrepresentative because they fail to reflect the diversity of the population.¹¹

In order to remedy this, a number of different methods have been experimented with and the most common is for the legislature to reserve a certain number of seats for members

6. I will not consider other aspects of political representation in multicultural contexts, such as: 1) The right of a member of a linguistic minority to stand for election (e.g. *Podkolzina v Latvia* [2002] ECtHR); 2) The right to vote for a member of an ethnic group (e.g. *Aziz v Cyprus* [2004] ECtHR).

7. I am referring here to a representative democracy, which may have participatory elements, but representation itself is a necessary requirement of this type of society. See IM Young, *op cit*, p 124.

8. Here, I am using Young's concept of "perspective" as set out in *ibid*, p 137.

9. See A Gutmann, *op cit*, pp 20-21.

10. See W Kymlicka, *op cit*, pp 131-133.

11. *Ibid*, p 132.

of marginalized or disadvantaged groups.¹² Other options include changing the boundaries of electoral districts where ethnic and cultural minorities are concentrated¹³ and introducing proportional parliamentary election systems.¹⁴ In this regard, it is important to note that not all ethnic and cultural groups are concentrated in a particular area and, secondly, even if there is a system of proportional representation, they may not be able to attend to parliament, mainly due to the lack of recognition (in the sense that Taylor attributes to this idea)¹⁵ that they have in society.

As a consequence, Kymlicka analyses the political representation of different ethno-cultural groups in an integrated way. He argues that the representation of these groups does not require a break with current conceptions of representative democracy, which undermines the most cherished principles of liberal democracy, being individual rights and responsible citizenship. This type of group representation could be a logical extension of existing principles and mechanisms relating to representation and it is also consistent with the broader characteristics of liberal-democratic culture.¹⁶ Kymlicka is mindful that group representation, as a general theory of representation, seems to end the possibility of representation. These difficulties, among others, suggest that we should dispense with the idea of group representation as a general theory of representation and limit it to cases where: 1) it is necessary to include ethno-cultural groups that are systemically excluded from the political process; 2) the social perspective of ethno-cultural groups represents an important social viewpoint and is therefore crucial to political deliberation.¹⁷

Group representation can thus play an important role in the inclusion of marginalized groups in society and also improves the quality of deliberative democracy. Therefore, Kymlicka considered that group representation was justified, at least in some circumstances, and his question became: What groups should qualify for representation as a group?¹⁸

According to Kymlicka, which groups are entitled to group representation could be determined by applying two alternative rules, although their use will depend on the context of the particular group. Firstly, the representation of an ethno-cultural group would be acceptable when its members are subject to systemic disadvantage within the political process. Secondly, this type of representation is possible when group members have the right to self-government.¹⁹ Young agrees with the two alternative rules proposed by Kymlicka and further develops ideas relating to systemically disadvantaged groups and problematizing the politi-

12. *Ibid*, pp 131-132.

13. *Ibid*, pp 132-134.

14. See IM Young, *op cit*, pp 148-153.

15. See Ch Taylor, *op cit*, pp 25-50.

16. See W Kymlicka, *op cit*, p 34.

17. *Ibid*, pp 138-141.

18. I consider that the general approach proposed by Gutmann in order to assess the relevance of an ethno-cultural group is very useful in this respect. See A Gutmann, *op cit*, pp 31-33.

19. See W Kymlicka, *op cit* (1995), pp 144-145.

cal representation of groups entitled to self-government.²⁰ She notes social and economic structural inequalities, and political inequality generally, result in the relative exclusion of the ethno-cultural groups that have historically experienced a lack of recognition from influential political debate. For this reason, an important strategy to promote greater inclusion of the members of such groups in the political process is through political and civic institutions designed specifically to increase their participation in the political process.²¹

The inclusion of ethno-cultural groups in the political process can then help improve the quality of the decisions made by parliament. If the social perspective of these groups is not included in the policy-making processes, as a manner of deference due to a different view, unlikely to be present at the time of decision making, it could be understood as a whole and not just as to legislative bodies.²²

2.2. Interpretation of human rights in multicultural contexts

Based on the discussion above, it can be seen that accommodating a multicultural view of political representation within classical models of representative democracy can prove difficult. In addition, the vast majority of constitutions do not recognize any fundamental rights which can incorporate rights of group identity or specifically rights for some cultural minorities²³. As a result, multicultural views have been developed through judicial review.²⁴

However, the proposals outlined above, when understood in context, can help overcome these drawbacks.²⁵ Thus, new concepts which have been incorporated into representative democracies have allowed for the inclusion of the social perspectives of disadvantaged ethno-cultural groups in the political process. In addition, the incorporation of multicultural perspectives in the interpretation of hardship cases involving human rights may also play an important role.²⁶

20. See IM Young, *op cit*, pp 145-148.

21. *Ibid*, pp 141-143.

22. *Ibid*, pp 152-153.

23. In Latin America, for example, group identity and protection have been afforded to certain groups through the constitutionalization of the rights of indigenous peoples and the inclusion of special fundamental rights in the constitution (e.g. Constitution of the Plurinational State of Bolivia, 2009).

24. See D Grimm, «Multiculturalidad y Derechos Fundamentales» [Multikulturalität und Grundrechte], in *Derecho Constitucional para la Sociedad Multicultural*, Madrid, Trotta (2007), p 57.

25. In this respect, Añón has stated that traditional interpretative boundaries result in many difficulties in adequately addressing the social structures that perpetuate discrimination. To this end, she proposes to extend the spectrum of reasoning in terms of indirect discrimination and material equality, using additional interpretative criteria derived from areas such as structural discrimination and intersectionality discrimination. See M Añón, «Principio antidiscriminatorio y determinación de la desventaja», 39 *Isonomía* (2013), pp 127-157.

26. See S Álvarez, «Los Derechos Humanos como Valores Plurales. Multiculturalismo, Cosmopolitismo y Conflictos», in *Entre Estado y Cosmópolis. Derecho y Justicia en un Mundo Global*, Madrid, Trotta (2014), pp 179-201. Also see E Denninger, «Derecho y Procedimiento Jurídico como Engranaje en una Sociedad Multicultural» [Recht und Rechtliche Verfahren als Klammer in Einer Multikulturellen Gesellschaft], in *Derecho Constitucional para la Sociedad Multicultural*, Madrid, Trotta (2007), pp 39-41.

In relation to the way the law is interpreted, constitutional and international human rights courts have differed widely in their judgments and fluctuated from the pursuit of cultural assimilation to cultural relativism. In endeavouring to overcome these logics of understanding about the phenomenon multiculturalism, Grimm proposes a contextual solution to this problem by suggesting cultural integration, which is quite similar to the ideas of cultural liberalism, as an intermediate solution.²⁷

Therefore, a multicultural perspective needs to integrate balancing criteria²⁸, which leads to a case-oriented approach and allows for procedural problems to be dealt with individually in order to reduce any controversial subject-matter and increase the possibility of reaching solutions that can be accepted by different spheres of society.²⁹

Finally, I also agree with Letsas in saying that “what matters is the substantive reasoning that goes into various stages of the judicial test, rather than its formalistic, rule-like application”.³⁰ I think that this is especially correct in multicultural contexts where substantive reasoning could help us to include disadvantaged ethno-cultural groups or cultural minorities in the political process.³¹

3. Jurisprudence of the Inter-American Court of Human Rights

In Latin America, the main source of multiculturalism relates to indigenous people. As a result, there is much Inter-American jurisprudence relating to the human rights of indigenous people and indigenous peoples as cultural groups, most of which has been produced by the IACtHR.³² In relation to the political representation of indigenous peoples, one importance case decided by the IACtHR is *Yatama v. Nicaragua* (2005) (*Yatama*).

The *Yatama* case began when the Inter-American Commission of Human Rights (IACCommHR) filed a lawsuit on behalf of the Political Party Yapti Tasba Masraka Nanih Asla Takanka (*Yatama*) against the State of Nicaragua (2003). In the complaint, the IACCommHR alleged that the State of Nicaragua violated Articles 8.1 (Right to a Fair Trial), 23 (Right to Participate in Government) and 25 (Right to Judicial Protection) of the American Convention on Human Rights (ACHR), in conjunction with Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of candidates for positions as mayors, deputy mayors and councillors presented by *Yatama*. The IACCommHR alleged

27. *Ibid*, pp 60-61.

28. *Ibid*, pp 60-68.

29. See *supra* 22.

30. See G Letsas, «The scope and balancing of rights», in *Shaping Rights in the ECHR*, Cambridge, Cambridge University Press (2013), p 64.

31. See P Consorti, *Conflitti, mediazione e diritto interculturale*, Pisa, Pisa University Press (2013), pp 206-215.

32. I explored this in J Gajardo, «Derechos de los Grupos en el Sistema Interamericano de Protección de los Derechos Humanos», in *Un Conflicto de Derechos: Autonomía Individual v. Autonomía Colectiva*. Madrid, Marcial Pons (2014), pp 139-165.

that these candidates were excluded from participating in the municipal elections held on 5 November 2000 in the North Atlantic and South Atlantic Autonomous Regions as a result of a decision issued on 15 August 2000, by the Supreme Electoral Council.³³

In spite of the fact that those affected filed several documents in protest against the decision by the Supreme Electoral Council, the IACommHR noted that the Supreme Court of Justice of Nicaragua declared that the application for *amparo* that they had filed was inadmissible. The IACommHR therefore alleged that the State of Nicaragua had not provided a recourse that could have protected the rights of these candidates to participate, and to be elected in, the municipal elections and it had not adopted the legislative or other actions necessary to make those rights effective. Above all, the IACommHR claimed that the State:

“(...) had not provided norms in the electoral law that would facilitate the political participation of the indigenous organizations in the electoral processes of the Atlantic Coast Autonomous Region of Nicaragua, in accordance with the customary law, values, practices and customs of the indigenous people who reside there”.³⁴

The decisions of the Supreme Electoral Council and the Supreme Court of Justice of Nicaragua were based on the electoral legislation in force at the time. In this regard, Article 82 of the Electoral Act 2000 stipulates that in order to enter candidates in the municipal elections political parties must register their candidates in at least eighty per cent of municipalities and must also have at least eighty per cent of the total number of candidates. In addition, the Electoral Act 2000 (Articles 83 and 84) established that political parties or alliances of parties may substitute their candidates in one, several or all of the municipal districts, through their respective legal representatives, during a set period or during any extension they are granted by the Supreme Electoral Council. If the Council decides to “deny a request or reject a candidate because they do not comply with the legal requirements, it will notify the political party, or alliance of parties, within the three days that follow the decision, so that it may proceed to correct the defects or to substitute the candidates”.³⁵

The IACommHR also submitted evidence which proved that the exclusion of Yatama resulted in an 80% abstention rate in the municipal elections in the area, which meant that the elected representatives were lawfully elected, but lacked legitimacy, because they did not represent the people and particularly the local indigenous people.³⁶ The crucial questions in this case were therefore whether the implementation of the current Electoral Act and its requirements reduced Yatama's opportunities to participate in these elections, thus discriminating against a historically disadvantaged group, and whether this warranted an analysis by the IACtHR that would take into account ideas outside the classical concepts of the right to equality in political participation.

Based on the claims and evidence outlined above, the IACtHR could have followed the formal reasoning of Judge Montiel Argüello in this case in the sense that the right of politi-

33. *Yatama v Nicaragua* [2005] IACtHR 1 at 2.

34. *Ibid*, p 2.

35. *Ibid*, pp 45-46.

36. *Ibid*, pp 24-35.

cal participation, in line with the principle of equality, should have required the indigenous candidates to comply with the same requirements as the non-indigenous candidates. For instance, Judge Argüello said:

“With the exception of very special cases, a State cannot have different laws for each of the races that compose it, for the election of authorities who exercise their functions in territories inhabited by different races, such as the municipalities of the Autonomous Regions.”³⁷

However, the IACtHR chose to acknowledge that the right of political participation in multicultural realities should take into account the effective political participation of the ethnic groups that comprise it.³⁸ Thus, for the IACtHR, the State of Nicaragua did not adopt the necessary actions to guarantee the enjoyment of the right to be elected of the candidates put forward by Yatama, who are members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua, because they were affected by both legal and real discrimination which prevented them from participating in the municipal elections of November 2000 under equal conditions.³⁹

The Yatama case is interesting because the IACtHR overcomes the formal reasoning of representative democracy and considers the multicultural reality of the country and its potential impact on the real participation of the population in the political process. The Yatama case therefore includes an understanding of political participation in multicultural contexts as a key element of its reasoning. For the IACommHR, thanks to the Yatama case, it can now be considered that Article 23 of the ACHR:

“(...) refers to political rights not simply as rights, but rather opportunities, meaning that every person formally vested with such rights has a real opportunity to exercise them. In this regard, the Inter-American Court recognizes as essential that the State should generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively, respecting the principle of equality and non-discrimination.”⁴⁰

In the judgment itself, a special right to political representation in multicultural contexts can also be identified, thus emphasising the importance of disadvantaged cultural groups, like the Yatama party, in the political process.⁴¹ Therefore, since this decision involved a more intensive review of the duty to provide equality in political participation, (according to which, political participation can include broad and diverse activities, performed individually or

37. *Yatama v Nicaragua* [2005] IACtHR 1, dissenting opinion of Judge Ad-Hoc Alejandro Montiel Argüello.

38. See *Yatama v Nicaragua* [2005] IACtHR 1 at 3, concurring opinion of Judge Diego García-Sayán.

39. *Yatama v Nicaragua* [2005] IACtHR 90.

40. Inter-American Commission on Human Rights, «The Road to Substantive Democracy: Women's Political Participation in the Americas», OEA/Ser. L/V/II, Doc. 79, (2011), p 9.

41. See A Ubeda de Torres, *Democracia y Derechos Humanos en Europa y en América*, Madrid, Reus (2007), p 498.

collectively) which was designed to intervene in the appointment of elected representatives and in the formation of state policy directly, giving effect to political rights can thus require positive action by the State which exceeds the mere regulation of the party system and the substance of these rights includes the effective participation of the people in the operation of the State.⁴²

Similarly, the concurring opinion of Judge Jackman strengthens the idea of special rights for disadvantaged cultural groups in terms of group representation because he asserts that the right of political participation established in Article 23.1.b of the ACHR is clearly referring to political representation on an individual basis. Nevertheless, this judge was concerned:

“(…) that by including questions of culture, customs and traditional forms of organization in its ruling on this issue, the actions developed by the Court have the risk of reducing the protection that should be available to every “citizen” under the jurisdiction of every State, irrespective of his culture, customs or traditional forms of association.”⁴³

However, although this decision may have alluded to a special right to political representation for cultural groups, its content was unknown. The IACtHR then shed some light on this matter when it stated that the State of Nicaragua should take all necessary actions to ensure that the members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua can participate, under equal conditions, in decision-making on matters and policies that affect or could affect their rights and the development of these communities, so that they can be part of State institutions and bodies and participate directly and proportionately to their population in the conduct of public affairs, and also do this from within their own institutions and according to their values, practices, customs and forms of organization, provided that these are compatible with the human rights embodied in the ACHR.⁴⁴

4. Jurisprudence of the European Court of Human Rights

In contrast to the Latin American case outlined above, the ECtHR has considered a wide range of cases on political representation in multicultural contexts. The normative source of these cases has been Article 11, as well as Articles 10, 14 and 17, of the European Convention of Human Rights (ECHR) and Article 3 of Protocol N° 1.

The case law of the ECtHR will be discussed in relation to the following areas: 1) Case law on banning political parties in Turkey and Bulgaria; 2) Positive dimensions of the right to freedom of association.

42. See L Clerico and M Aldao, «La Igualdad como Redistribución y Reconocimiento: Derechos de los Pueblos Indígenas y Corte Interamericana de Derechos Humanos», 9 *Estudios Constitucionales* (2011), p 188. Also see A Dalla Vía, «Derechos Políticos, Normativa Electoral y Equidad en los Procesos Electorales», 57 *Cuadernos de Capel* (2012), pp 25-61.

43. *Yatama v Nicaragua* [2005] IACtHR 2, concurring opinion of Judge Jackman.

44. *Yatama v Nicaragua* [2005] IACtHR 90.

4.1. Case law on banning political parties in Turkey and Bulgaria

The ECtHR case law on banning political parties is vast. In relation to multicultural considerations, the cases regarding Turkey and Bulgaria allow us to review the criteria used by ECtHR in determining the limits on political parties when they try to claim cultural-religious rights or to represent national minorities. Such jurisprudence includes decisions on banning political parties when claiming rights for national minorities and decisions on banning religious political parties when they claim special rights based on their ethnic group or culture.

The first group of judgments is composed of the following cases, in chronological order: 1) *United Communist Party of Turkey and others v Turkey* (1998); 2) *Socialist Party and others v Turkey* (1998); 3) *Parti de la Démocratie et de L'Évolution et autres v. Turkey* (1999); 4) *Yazar and others v Turkey* (2002); 5) *Parti de la Démocratie et de L'Évolution et autres v Turkey* (2005); 6) *Emek Partisi and Şenol v Turkey* (2005); 7) *Ivanov and others v Bulgaria* (2006); 8) *The United Macedonian Organization Ilinde-Pirin and others (No. 1) v Bulgaria* (2006/2012).

To begin with, the judgment in the *United Communist Party of Turkey (TBKP)* case provides us with the main guidelines used in this area of jurisprudence. Therefore, the analysis of this case, which considered the dissolution of the political parties of national minorities, will be central to this discussion, which will then be complemented with an analysis of other important cases and further consideration of relevant points.

The TBKP case began in 1991 when the Constitutional Court of Turkey received a request made by the State Prosecutor for the dissolution of the United Communist Party of Turkey, only ten days after it was founded, on the basis that its statutes and political program were based on the distinction between Kurds and Turks. The State Prosecutor, however, could not allow the claim that two nations existed within the Republic of Turkey. Consequently, the Constitutional Court of Turkey stated that the TBKP political program was trying to divide the Turkish nation, which was not a permissible aim for a political party and confirmed its dissolution.

When analysing this case, the ECtHR begins by pointing out that the Contracting States of the ECHR only have a limited margin of appreciation⁴⁵, which goes hand in hand with rigorous European supervision of both these laws and the decisions applying them, including those decided by independent courts. At the same time, the exceptions to this rule are set out in Article 11, which concerns political parties and states that only convincing and compelling reasons can justify restrictions on such parties' freedom of association.⁴⁶ Moreover, for the ECtHR, the TBKP's program could hardly have been belied by any practical action it took, since it was dissolved immediately after being formed and accordingly did not even have time to take any action. The TBKP was thus penalized for conduct relating solely to the exercise of freedom of expression.⁴⁷ After considering these points, the ECtHR stated that:

45. The margin of appreciation is a judicial doctrine which ECtHR allow states to have a measure of diversity in their interpretation of human rights treaty obligations. For a defence of the margin of appreciation doctrine see A Legg, *The Margin of Appreciation in International Human Rights Law*, Oxford, Oxford University Press (2012). For a discussion of the margin of appreciation doctrine see G Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press (2007).

46. See *United Communist Party of Turkey and others v Turkey* [1998] ECtHR 19 at 21.

47. *Ibid*, pp 24-26.

“(..) action as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, is disproportionate to the aim pursued and consequently unnecessary in a democratic society. It follows that the measure infringed Article 11 of the Convention.”⁴⁸

The ECtHR then used the same criteria to review the case of the dissolution of the Socialist Party of Turkey. In this case, the ECtHR reiterates that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The ECtHR stated that the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. “That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy”.⁴⁹ Furthermore, the ECtHR also emphasized there can be no democracy without pluralism. In this regard, the ECtHR stated:

“It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention.”⁵⁰

Similarly, in the case of the *Parti de la Démocratie et de L'Évolution*, the ECtHR again emphasizes the importance of political parties in democratic contexts and the fact that States must allow them to carry out their activities when there is no relevant evidence that their intention is to do so through the use of violence.⁵¹

Moreover, in the judgment of the *Yazar* case, the ECtHR deepens its consideration of the role of political parties claiming rights for national minorities. In this case, the ECtHR accepts that the principles supported by the relevant political party, such as the right to self-determination and recognition of language rights, are not in themselves contrary to the fundamental principles of democracy. Likewise, the court also reasoned that if a political group were held to be supporting acts of terrorism merely by advocating those principles, this would then reduce the possibility of being able to deal with related issues in the context of a democratic debate and would allow armed movements to monopolize support for the principles in question. That, in turn, would be strongly at variance with the spirit of Article 11 and the democratic principles on which it is based.⁵²

Subsequently, these revised criteria have been applied by the ECtHR in order to decide cases about the dissolution of political parties in Bulgaria claiming rights to self-determination for the Macedonian people. Thus, the ECtHR considers that even if it can be assumed

48. *Ibid*, p 26.

49. See *Socialist Party and others v Turkey* [1998] ECtHR 23 at 24.

50. *Ibid*, p 24.

51. See *Parti de la Démocratie et de L'Évolution et autres v Turkey* [1999] ECtHR 6 at 7.

52. See *Yazar and others v Turkey* [2002] ECtHR 15 at 16.

that the political project advanced by the relevant political parties was indeed the autonomy or even secession of Pirin Macedonia, this does not automatically mean that it was at variance with the principles of democracy.⁵³

In the second group of judgments, those that deal with the dissolution of religious political parties when they claim special rights based on their group or culture, there are two ECtHR judgments in relation to *Refah Partisi v Turkey*. The first was decided in 2001 in a split decision (four votes to three) in which the decision by the Turkish Constitutional Court to dissolve Refah Partisi was validated. The second was decided by the ECtHR in 2003 in its Grand Chamber formation as a result of an appeal against the 2001 judgment. Again the ECtHR upheld the dissolution of Refah Partisi, but this time by unanimous vote.

In contrast to the previous cases, Refah Partisi was an Islamic political organization, which had been running for several years, with over four million members and it had also obtained 22% of the votes in 1995 legislative elections. As a result, it was part of the Government coalition led by Mrs. Ciller, leader of the True Path, and was also the largest party within this coalition.

In 1997, the Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to dissolve the Refah Partisi on the grounds that it was a “centre” of activities contrary to the principles of secularism and consequently of the Constitution. In support of his application, he referred to a number of acts and remarks made by leaders and members of Refah Partisi.⁵⁴ The key question in this case was whether or not Refah Partisi was a real threat to the rights established by the ECHR.⁵⁵

In this regard, the ECtHR considered that the arguments in favor of the dissolution of Refah Partisi could be organised into three main groups: 1) arguments that Refah Partisi intended to set up a plurality of legal systems, therefore leading to discrimination based on religious beliefs, in relation to which the ECtHR concluded that a plurality of legal systems, as proposed by Refah Partisi, cannot be considered to be compatible with the ECHR;⁵⁶ 2) arguments that Refah Partisi intended to apply Sharia law to the internal or external relations of the Muslim community within the context of this plurality of legal systems, which the ECtHR held was true and concurred in the view that Sharia law is incompatible with the fundamental principles of democracy and the ECHR;⁵⁷ 3) arguments based on references made by Refah Partisi members to the possibility of recourse to force as a political method. In this regard, the ECtHR held that the fact that the responsibility for Refah Partisi originated with its leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it.⁵⁸

53. See *The United Macedonian Organization Ilinde-Pirin and others v Bulgaria* [2006] 1 ECtHR 17 at 18.

54. See *Refah Partisi v Turkey* [2003] ECtHR 3 at 5.

55. See JM Bilbao, «Las Libertades de Reunión y Asociación: Algunas Vacilaciones en una Trayectoria de Firme Protección», in *La Europa de los Derechos. El Convenio Europeo de Derechos Humanos*, Madrid, Centro de Estudios Políticos y Constitucionales (2009), p 683. Also see P Van Dijk et al, *Theory and Practice of the European Convention on Human Rights*, 4th ed., Antwerpen, Intersentia (2006), p 431.

56. See *Refah Partisi v Turkey* [2003] ECtHR 36 at 37.

57. *Ibid*, pp 37-39.

58. *Ibid*, pp 39-40.

The ECtHR decisions on the dissolution of Refah Partisi have had important doctrinal consequences, since it has become the paradigmatic case on the limits that apply to the exercise of the right to political association in the case of cultural-religious groups seeking to establish differentiated group rights and threaten the core of democracy.⁵⁹ In addition, the ECtHR judgment has been the subject of interesting reviews. In this regard, the dissenting judgment made by Mr. Fuhrmann, Mr. Loucaides and Sir Nicolas Bratza in 2001 did not consider that there was sufficient evidence to justify dissolving Refah Partisi. For these judges, the ECtHR departed from its previous case law and how political pluralism was previously understood.⁶⁰

4.2. Positive dimensions of the right to freedom of association

The political party Ouranio Toxo (Rainbow), which was founded in 1994, has regularly taken part in the Greek elections since that date and its declared aims include the defence of the Macedonian minority living in Greece. This party applied to the ECtHR because after it opened an office in the town of Florina in 1995, the people at this office were the victims of violence committed by some locals but the local authorities did not intervene to protect them. The party argued that even local religious and political authorities showed signs of working against the installation of the party and started a campaign against them. The applicants also claimed that the State violated Articles 11 and 6 of the ECHR.⁶¹

In this case, the ECtHR, while recognizing the importance of political parties within the structure of democratic political systems, notes that States not only have a duty of non-interference, but they must also ensure that rights are enjoyed in a positive sense. Accordingly, the ECtHR stated that:

“(...) it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote. Their members must be able to hold meetings without having to fear that they will be subjected to physical violence by their opponents. Such a fear would be liable to deter other associations or political parties from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right of association.”⁶²

59. See JM Bilbao, *op cit*, pp 680-688. Also see L Martín-Retortillo, *La Afirmación de la Libertad Religiosa en Europa: de Guerras de Religión a Meras Cuestiones Administrativas*, Navarra, Thomson (2007), pp 97-100.

60. See *Refah Partisi v Turkey* [2001] ECtHR 35 at 47.

61. See *Ouranio Toxo and others v Greece* [2006] ECtHR 2 at 4.

62. *Ibid*, pp 6-7.

5. Comparative study and perspectives

5.1. Commonalities

The case law analysed in relation to political representation in multicultural contexts demonstrates that there are significant commonalities relating to practical effects on the inclusion of ethnic, cultural and national diversity in the processes of democratic political deliberation.

The first point that should be highlighted is the importance that both international courts have given to political parties in democratic political processes and their connection with political pluralism. Both international courts concur that the freedom of association and the freedom of expression have particular protection under human rights law mainly due to the role played by political organizations in a democracy. This implies that a State which restricts the right of political participation, such as in relation to the freedom of association, has a reduced margin of appreciation. Moreover, in terms of the content of the right to freedom of association, which can be broader in national contexts, the State must guarantee the effective political participation of all ethnic and national groups.

Therefore, for both international courts, the right of political participation must be guaranteed by the State both in a negative sense (no interference) and, in certain special situations, must also be protected in a positive sense. In other words, the State should act and exert their regulatory and protective powers in order to ensure that individuals and groups are able to properly exercise the right of political participation.

A second important point, which is related to the first, relates to the content of the concept of democracy protected by the international courts in their case law. For both courts, democracy cannot be understood exclusively from formal points of view that only allow the participation of actors who meet the legal requirements and have political views consistent with the majority culture. Also, within the reasoning of the courts in relation to the concept of democracy, it is possible to identify a commitment to an inclusive concept of democracy, which allows those who do not even meet the formal requirements, like in the *Yatama* case, to participate in it. In addition, in principle, this allows democracy to include actors who want to implement significant reforms of the state, as long as such reforms respect the human rights guaranteed by international conventions on the subject (the ACHR and the ECHR) and any modifications are made through institutional channels.

The above points also have important implications in multicultural contexts as the jurisprudence of both international courts is closely related to an inclusive idea of democracy and political participation. For these courts, the right of association should be guaranteed by the State, not only by not putting any obstacles in the way of its exercise, but also by taking positive actions to enable its realization. Thus, in multicultural contexts the door is opened for members of disadvantaged, cultural and national groups to participate in public deliberation and enjoy international protection in voicing their political demands within the political system.

Finally, although the philosophical-political approach of both international Courts it is different -as I will discuss in the next section-, the practical consequences of their decisions allow to ethnic and national minorities be able to express their views within the political process and thus they have not been marginalized in the process of public deliberation.

5.2. Main differences and possible explanations

The main difference concerns the theoretical approach taken by each court, which is a consequence of three important considerations, being the following: 1) whether individual and group rights are protected, or just individual rights; 2) whether or not political-cultural groups, in relation to their approaches, may be limited (legitimately) in their rights to political representation; 3) whether or not the context of the relevant cultural diversity plays a role when interpreting the human rights linked to political representation.

Based on the IACtHR case law analysed above, it is quite clear that this court's approach falls within the theoretical parameters of cultural liberalism, by accepting the theoretical formulation of group rights, which may even include some aspects of communitarian political philosophy. However, the analysed case law of the ECtHR shows that the approach used by this court in analysing cases of political representation in multicultural contexts, falls within the ambit of classical liberalism, together with some elements of cultural liberalism.

As a result, these different approaches have played a key role when both courts have interpreted human rights that relate to operational political representation in multicultural contexts.

For example, the IACtHR in the *Yatama* case considers that the political scene in which actors perform is marked by the phenomenon of multiculturalism. It is stated that *Yatama* is a political party that represents the interests of a disadvantaged ethno-cultural (indigenous) group that has been historically and systemically excluded from political participation. Furthermore, the court notes that political groups like *Yatama* have a right of political participation as a group. Finally, it establishes that the State has a positive duty to act to ensure that the participation of these groups is possible. In this way, for the IACtHR, political representation in multicultural contexts in light of the ACHR can be conceptualized as a group right, which in principle would benefit ethno-cultural groups, including indigenous groups, that are disadvantaged or excluded from the political process and would also require positive actions to be taken by the State in terms of implementing appropriate legislative and practical mechanisms to ensure this law is effective.

In relation to the limitation of the right of association for certain ethnic groups with cultural practices or proposals made against the rights set out in the ACHR, the analysis presented in the *Yatama* case may raise theoretical issues because the IACtHR does not undertake a factual analysis of the beliefs or customs of the group it is protecting. As a result, the IACtHR leaves the door open for any historically and politically disadvantaged call for a similar level of protection to that provided by the IACHR in the *Yatama* case. This may be problematic in cases where the practices or beliefs of ethno-cultural groups are inconsistent with the rights protected by the ACHR. For example, this could be an issue for some indigenous peoples in relation to the rights of their members (e.g., the rights of women who live in indigenous communities)⁶³. Therefore, the following questions may arise: Could these protections be extended to an ethno-cultural political party when they want to extend their system of family relations to the rest of the political community? Would the IACtHR grant the same protection to an ethno-cultural political party if that party does not respect the rights of the ACHR within its community? Does the IACtHR endorse restrictions on the rights of political participation imposed by States based on the ideas above?

63. See C Deere and M Leon, *op cit*, pp 36-55.

Based on the case analysed above, it can be seen that the IACtHR currently takes a strong approach, largely in line with liberal culturalism and communitarian theory, in order to protect and formulate political representation in multicultural contexts as a group right. In doing so, it has emphasized the State's obligation to take the necessary steps to ensure that the political process adequately represents the multicultural perspective of indigenous people.

Meanwhile, the approaches taken by the ECtHR have directly influenced their interpretation of the human rights that are involved in political representation in multicultural contexts. The ECtHR takes a more "neutral" approach and does not consider whether the political party is disadvantaged or not, but rather focuses on an overarching issue: the importance of political parties in democratic systems and for political pluralism. By using this consideration as the basis for its reasoning, the court can avoid making value judgments about the proposals of the political parties when evaluating a possible limitation on the right of political association. Similarly, the analysis and interpretation of the human rights in question will always be undertaken in the same way, not allowing for any group rights. This perspective stems from the illusion of "neutrality" and may result in the problem, which Taylor warns about,⁶⁴ of consolidating positions of cultural supremacy within the countries that are contracting parties to the ECHR.

However, the protection given by the ECtHR to the right of political representation in multicultural contexts has been quite effective and the only case in which the right of association was limited was *Refah Partisi v. Turkey*. Furthermore, the reasoning in that case was based on a factual analysis of the political party (as a cultural group) in terms of their approaches and actions⁶⁵, and the understanding that *Refah Partisi* constituted a real danger to the future enforcement of the human rights set out in the ECHR in Turkey.

Finally, a possible explanation for the difference in approaches between these two international courts (although this may be more appropriately addressed in the context of an analysis of legal sociology) is the source of the relevant multiculturalism in the cases reviewed. These different approaches may be a result of the fact that the main source of multiculturalism considered by the IACtHR related to indigenous peoples, while the ECtHR has had to analyse multicultural cases from a variety of sources (immigration, national minorities, ethnic groups and religious-cultural groups). For this reason, the ECtHR requires greater theoretical coherence in the rules set out in its decisions, for which, in principle, the supposed cultural neutrality of classical liberalism allows for more homogeneous judgments.⁶⁶

5.3. Perspectives

In relation to the IACHR, challenges may possibly arise due to growing tensions within the countries that are parties to the ACHR if more political groups like *Yatama* applying to the IACtHR for the same kind of protection as that given in the *Yatama* case. In addition, in the

64. See Ch Taylor, *op cit*, p 43.

65. In the ECtHR's factual analysis, some of the elements proposed by Amy Gutmann in order to establish that minority cultural groups should be granted protection can be identified. Also see M Añón, «Principio antidiscriminatorio y determinación de la desventaja», 39 *Isonomía* (2013), pp 146-154.

66. Even though the accuracy and consistency of the application of law are unquestioned virtues, It should be noted the implications of this in personal autonomy. See S Álvarez, *op cit*, pp 186-190.

Yatama case the IACtHR left the door open for States to formulate a special right to political representation in multicultural contexts, which may give rise to the following possibilities: 1) When considering a future case, the IACtHR may decide that a special national right relating to political representation in multicultural contexts is inappropriate or inadequate in light of the Yatama case and thus determine the relevant State's international responsibility for its violation of the ACHR; 2) When considering a future case, the IACtHR may consider that a national law providing for special political representation in multicultural contexts is appropriate in light of the Yatama case and determine the relevant criteria to be respected by States in this regard.

As a result, for a political party with a vision of political representation anchored in classical liberalism, creating a special system of political representation for disadvantaged groups in light of case Yatama could be considered discriminatory and result in theoretical issues. As can be appreciated, these types of perspectives are possible and may currently be developing in some countries.

For the ECtHR, the phenomenon of multiculturalism will continue to result in cases which put pressure on the approach taken by the ECtHR in this regard. In relation to other multicultural issues, it is possible that the ECtHR may be open to a more multicultural perspective. Considering that the current ECtHR approach can help protect the human rights of minorities who have been historically disadvantaged or discriminated against, it will be interesting to see if the ECtHR will be open to the possibility of considering group rights or the multicultural context when deciding future cases.

Furthermore, the main tension which currently exists is the ECtHR's factual conceptualization of cultural-religious groups such as Refah Partisi. In this regard, the ECtHR has not had to resolve any similar cases, so it is not possible to know whether the ECtHR will keep using strict parameters (threat to approve the dissolution of a political party) when deciding cases or whether it will become more flexible in order to endeavour to ensure the existence of increased cultural dialogue within the process of political deliberation.

6. Conclusion

In order to address the objectives of this paper, the conceptual and normative aspects of political representation in multicultural contexts were first discussed, while noting that there has been very little consideration about the impact of multiculturalism on political representation, since it is more embryonic in its relationship with legal theory and its implications for the interpretation of the rights that are in conflict.

Furthermore, during the literature review, it was concluded that despite the fact that research in this area is only just beginning to emerge, a multicultural perspective provides adequate space for enabling political deliberation to include the different socio-cultural perspectives present in society. While this may not be easy, there is already a foundation which can be built upon, including: 1) The work of Kymlicka, Gutmann and Young, which helps overcome certain theoretical barriers of classical liberalism and in understanding the usefulness of the political representation of disadvantaged groups in strengthening democracy and respecting the cultural identities of the individuals who compose it; 2) Likewise, the work of Álvarez, Denninger and Grimm on the role of multicultural perspectives in the interpretation of hu-

man rights, which creates a framework for making decisions and whose reasoning takes into account the specific cultural and factual circumstances of those seeking judicial protection. This may also require overcoming the principle of formal equality, with the State assuming a role of promotion and protection in relation to historically disadvantaged groups so that they are included in political deliberation.

Subsequently, the jurisprudential analysis outlined above, while showing a large disparity in the number of cases decided by the IACtHR and the ECtHR, being very few for the former and many for the latter, demonstrated the existence of a difference in the approaches taken by each of these international courts. On one hand, the IACtHR mainly uses approaches consistent with cultural liberalism together with some aspects of communitarianism, while on the other, the approach of the ECtHR is principally aligned with classical liberalism, although it does also incorporate some aspects of cultural liberalism. However, both international courts have been effective in protecting the human rights of cultural, national and ethnic minorities, as well as establishing strict criteria regarding the limitation of the rights associated with political representation in multicultural contexts (ECtHR) and positive duties to act in order to ensure the inclusion of disadvantaged groups in political deliberation (IACtHR).

Finally, multicultural perspectives on political representation face huge challenges, both theoretical and practical, within the legal system. Moreover, societies are becoming more diverse and porous every day. Therefore, legal and judicial systems should be considered multicultural phenomenon and the cultural and ethnic specificities of individuals and groups who submit their claims within them should be incorporated as an element of analysis, as well as discussion of multicultural perspectives when hearing and deciding cases which involve ethno-cultural groups or individuals who are members of ethno-cultural minorities. Multicultural perspectives must also be taken into account when a tribunal considers the factual aspects of a case, since, in principle, any individual or ethno-cultural group that claims differential or non-discriminatory treatment is justified in doing so.

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