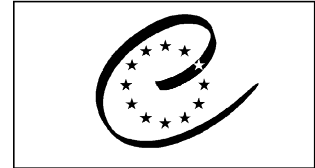

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2. Political Questions

2.4 Freedom of association

Thematic monitoring report presented by the Secretary General and decisions on follow-up action taken by the Committee of Ministers

PART I - Overview of Council of Europe's work on freedom of association

Explanatory note

The present report is the first one to be presented under the new thematic monitoring procedure adopted by the Committee of Ministers in July 2004. It thus provides "*an analysis of major issues within the scope of the theme […] based on the work undertaken by existing Council of Europe monitoring mechanisms*" to "*serve as a basis for debate*" and includes "*decisions on follow-up action by the Committee of Ministers*".

The starting point for defining the scope of the report has been the explanatory note presented by the Delegation of the United Kingdom which proposed the theme: *"Freedom of association is a basic fundamental human right, as stated in Article 11 of the European Convention on Human Rights and should form the basis of any pluralist democracy. All groups in society should therefore have the freedom to participate in associative life as this contributes towards the development of a strong democratic civil society" (see doc.* CM/Monitor(2004)8).

The report follows a thematic approach and is divided into three parts, published in three separate volumes:

The **first part** (**Volume I**) provides an overview of the work carried out by the Council of Europe (CoE) on the major issues within the scope of the theme. The core legal instruments of relevance to the subject are presented in the first section, namely the European Convention on Human Rights and the case-law of the Strasbourg Court (under A), as well as the European Social Charter and the conclusions of the European Committee of Social Rights (under B). The second section provides a brief overview of work carried out in specific fields with references allowing the reader to look further into certain issues if he/she wishes.

The second part (Volume II) provides examples of legislation and practice in member states with reference to CoE principles and standards, putting emphasis on good practices. The first section deals with freedom of association in the political and work spheres, namely political parties (under A) and trade unions (under B), while the second one is devoted to the civil society, namely non-governmental organisations (NGOs) and foundations (under A), as well as more generally the role of civil society in the democratic process in the member states (under B). Issues linked to religious associations have been deliberately left outside since they have been dealt with in a previous thematic monitoring report on the freedom of religion (CM/Monitor(2003)10).

The third part (Volume III) presents conclusions by the Secretary General and decisions on follow-up action taken by the Committee of Ministers with respect to the Organisation's Programme of Activities. These decisions, always in accordance with the new procedure, include instructions or invitations *"to competent Council of Europe mechanisms - in particular Steering Committees - to work"* on the areas in which "*gaps*" were revealed.

[1] This document has been classified confidential at the date of issue. It was declassified at the 943rd meeting of the Ministers' Deputies (19 October 2005) (see CM/Del/Dec(2005)943/2.4).

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I. LEGAL *ACQUIS*: CORE INSTRUMENTS

A. The European Convention on Human Rights and relevant case-law

1. Freedom of association is chiefly protected by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention" or the ECHR), which states that:

> *"1. Everyone has the right to [freedom of peaceful assembly and to] freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
>
> *2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."*

2. Since the case-law of the European Court of Human Rights (hereinafter referred to as "the Court" or the ECtHR) is contingent on the cases that come before it, many issues related to freedom of association have, by their very nature, never been addressed by the Court. The Court's case-law on Article 11 ECHR is in itself fairly limited. However, current trends show that the number of cases relating to Article 11 ECHR has increased in recent years, enabling the Court to clarify its views on how the Convention should be construed.

1. The notion of freedom of association

a. An autonomous notion

3. The Court has made it clear that the term "association" possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point. The Court merely determines whether bodies can be regarded as "associations" within the meaning of Article 11 of the Convention.[2]

b. Definition and criteria of "associations"

4. The former European Commission of Human Rights (hereinafter referred to as "the Commission") defined freedom of association as follows:

> "*Freedom of association is a general capacity for the citizens to join without undue interference by the State in associations in order to attain various ends. However, a right to the successful attainment of such ends is not guaranteed by Article 11."*[3]

5. The Court has made it clear in its case-law that Article 11 does not seek to protect a mere gathering of people desirous of "*sharing each other's company*"; it follows that in order for it to be an association, some kind of *institutional structure* is required, even if it is only an informal one.[4]

6. More specifically, the Court examines entities in relation to certain criteria in order to determine whether they constitute associations. It observes their *nature* (with regard to their origins), their *aim/objectives* and also their *means*.[5]

7. The Court does, however, leave itself a *margin of appreciation* so that if an entity falls just short of these criteria, it could still be defined as an association. Although freedom of association, as enshrined in Article 11 ECHR, cannot be held to apply to public law corporations, the Court has stated that the fact that

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[2] *Chassagnou v. France*, nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999-III.
[3] *X v. Sweden* (preliminary objections), no. 6094/73, § 52, DR 9 (1978).
[4] *Mc Feeley v. the United Kingdom* (dec.), no. 8317/78, § 114, 20 DR 44; *Le Cour Grandmaison and Fritz v. France* (dec.), nos. 11567/85 and 11568/85, 53DR150; see also Jeremy Mac Bride, NGO Rights and their Protection under International Human Rights Law, 2004.
[5] *Le Compte, Van Leuven and De Meyere v. Belgium*, nos. 6878/75 and 7238/75, § 64, Series A no. 43.

an association performs functions provided for by law is not enough to exclude it from the scope of Article 11.[6]

[6] *Sigurdur A. Sigurjónsson v. Iceland*, no. 16130/90, § 31, Series A no. 264.

c. The scope of Article 11 ECHR

8. While Article 11 ECHR specifically mentions *trade union freedom*, it is clear that this is not an exhaustive reference intended to limit the list of possible forms of association, but rather an expression of emphasis that has to do with the historical context of the period in which the Convention was drafted. In the case of the *National Union of Belgian Police v. Belgium*, the Court reiterates this principle:

> *"The Court notes that […] Article 11 § 1 presents trade union freedom as one form or a special aspect of freedom of association […]."*[7]

9. At first sight, freedom of association would seem to refer to the *positive right* to form or to join an association. The Court, however, has made it clear in its case-law that Article 11 of the Convention also safeguards the right *not* to form or not to join an association: "*[…] a large number of domestic systems contain safeguards which, in one way or another, guarantee the negative aspect of the freedom of association, that is the freedom not to join or to withdraw from an association. A growing measure of common ground has emerged in this area also at the international level. […] It should be recalled that the Convention is a living instrument which must be interpreted in the light of present-day conditions […]. Accordingly, Article 11 (Article 11) must be viewed as encompassing a negative right of association."*[8]

10. The Court makes a distinction between *compulsory membership* of a body which is an association within the meaning of Article 11 of the Convention and a body which does not fall within the scope of Article 11. In this latter instance, a requirement to join a particular body does not amount to a breach of the Convention, provided that the freedom to create parallel associations remains guaranteed.[9]

11. In an effort to ensure its effectiveness, the Court has not confined the protection afforded by Article 11 to the mere founding of an association:

> *"The Court reiterates that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective […]. The right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention. It follows that the protection afforded by Article 11 lasts for an association's entire life and that dissolution of an association by a country's authorities must accordingly satisfy the requirements of paragraph 2 of that provision […]. "*[10]

12. As regards more specifically trade union freedom, the Court elaborated on the nature of this freedom in the case of the *National Union of Belgian Police v. Belgium*:

> *"[…] the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible*".**[11]***

13. As concerns the *negative righ*t of association in relation to *trade unions*, the Court has found that *'closed shop'* agreements, concluded after having employed the workers concerned and in a situation where the persons affected by the agreements risk to lose their livelihood if they refuse to join the relevant trade union, may result in a violation of Article 11.**[12]** The Court has not, however, concluded that *'closed shop'* agreements as such are in contravention of Article 11 ECHR. The Court (the Grand Chamber) is currently dealing with two applications concerning the issue of negative freedom of association in Article 11 in relation to the Danish *'closed shop'* agreements, which are not imposed by law, but concluded between private organisations as parts of the labour market and of which applicants for a job are made aware before being hired.**[13]**

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[7] *National Union of Belgian Police v. Belgium*, n° 4464/70, Series A no.19 § 38; see also, among other authorities, *Schmidt and Dahlström v. Sweden*, no. 5589/72, § 34, Series A no. 21 and *Wilson, National Union of Journalists and others v. the United Kingdom, nos.* 30668/96;30671/96;30678/96, § 42, ECHR 2002-V.
[8] *Idem*, § 35.
[9] *Le Compte, Van Leuven and De Meyere v. Belgium, supra,* § 65.
[10] *United Communist Party of Turkey and others v. Turkey*, no. 19392/92, § 33, ECHR 1998-I.
[11] *Idem, § 39.*
[12] *Young, James and Webster v. the United Kingdom*, Nos 7601/76 and 7806/77, Series A no. 44, § 55.
[13] *Rasmussen v. Danemark*, No 52620/99 and *Sorensen v. Danemark*, No 52562/99.

14. Although the Court regards the *right to strike* as one of the most important means of permitting and making possible the conduct and development of the freedom to protect the occupational interests of union members by trade union action, it does nevertheless point out that the right to strike *"which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances"*.[14]

15. The Court has often referred to the fundamental role played by *political parties* in a democratic society. It has ruled that political parties come under the protection of Article 11 ECHR as "*there was nothing in the wording of Article 11 to limit its scope to a particular form of association or group or suggest that it did not apply to political parties. On the contrary, if Article 11 was considered to be a legal safeguard that ensured the proper functioning of democracy, political parties were one of the most important forms of association it protected."*[15]

16. The Court has further observed that, notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. 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.[16] 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. In the Court's view, there can be no democracy without pluralism. The fact that their activities are 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.[17]

17. The Court has also underlined the importance, for the proper functioning of democracy, of associations formed for purposes other than political parties *"including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness"*.[18] Referring to the Preamble to the CoE Framework Convention for the Protection of National Minorities, the Court went on to recognise "*that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities*".[19]

2. Restrictions on freedom of association

a. General restrictions

i. Refusal of registration or prohibition

18. Generally speaking, the exceptions set out in Article 11 § 2 are to be *constructed strictly:* only *convincing and compelling reasons* can justify restrictions on freedom of association.[20] The Court has on numerous occasions affirmed "*the direct relationship between democracy, pluralism and the freedom of association*", thus justifying the limited margin of appreciation enjoyed by states and its rigorous supervision of all restrictions placed on this freedom.[21]

19. In the Court's view, the refusal to register an association solely on the ground that once founded, its activities might prove incompatible with the aims mentioned in its memorandum of association, constitutes a violation.[22]

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[14] *Schmidt and Dahlström v. Sweden*, *supra,* § 36.
[15] *United Communist Party, supra,* § 23.
[16] See, among other authorities, the *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* judgment, no. 44626/99, § 44, 3 February 2005, unpublished; *Young, James and Webster v. the United Kingdom*, *supra,* § 57 and *Vogt v. Germany,* no. 17851/91, § 64, Series A, No. 323.
[17] *United Communist Party of Turkey and others v. Turkey*, *supra*, § 42-43.
[18] *Gorzelik and others v. Poland*, no. 44158/98, § 92, 17 February 2004, unpublished.
[19] *Idem*, § 93.
[20] *Sidiropoulos v. Greece*, no. 57/1997/841/1047, § 40, ECHR 1998-IV.
[21] *Gorzelik and others v. Poland*, no. 44158/98, § 88, 17 February 2004, unpublished; see also *United Communist Party of Turkey and others v. Turkey, supra, § 46.*
[22] *Sidiropoulos v. Greece*, no. 57/1997/841/1047, § 44-47, ECHR 1998-IV.

20. The Commission has however ruled that refusal to register an association, some of whose aims involve an incitement to commit an offence, may be considered necessary in a democratic society, especially when the aims, which are not connected with any offence, may be pursued without registering, so that the individuals' freedom of association is not affected.[23] An association may also be refused permission to register if its name is liable to create confusion by giving the impression that its activities are linked to those of another legal entity, particularly when the proposed name is defamatory for the legal entity concerned.[24]

ii. Restrictions with regard to political parties

21. The Court has noted that an association, even if it is a political party, is not beyond the reach of the Convention merely because its activities are seen by the national authorities as undermining the constitutional basis of the State.

22. Altogether with the Article 11 § 2, the Article 17 ECHR permits the state to create burdens on and to restrain political parties whose programme or activities aim "*at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*". The Court has already indicated that the general purpose of Article 17 was to prevent totalitarian groups from exploiting in their own interest the principles enunciated by the Convention.[25] It applies only to rights or freedoms which entitle a person to engage in activities, including freedom of association, and prevents from reliance on those with the purpose of subversive activities. So far, the Court has not considered necessary to examine separately the violation of Article 17 in cases related to political parties.

23. Several cases deal with instances where parties have been *dissolved even before they have been able to start their activities.* Dissolution having been ordered solely on the basis of their constitution and programme, the Court takes these documents as a basis for assessing whether the interference was necessary.[26] A measure as drastic as the immediate and permanent dissolution of a political party, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, is seen as disproportionate to the aim pursued and consequently unnecessary in a democratic society.[27]

24. The Court makes it clear, however, that even though the margin of appreciation left to states must be a narrow one where the dissolution of political parties is concerned, since the pluralism of ideas and parties is itself an inherent part of democracy, a State may reasonably forestall the execution of a policy which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime.[28]

25. In other cases, political parties have been *dissolved on account of the declarations and policy statements made by their chairman and their members,* without their constitution and programme playing any part in the decision.[29] According to the Court's case-law, it cannot be ruled out that a party's political programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not do so, the content of the programme must be compared with the party's actions and the positions it defends.[30]

26. The Court has also held that there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.[31] A political party may also campaign for a change in the law or the legal and constitutional basis of the State provided that the means used to that end are in every respect legal and democratic and that the change proposed is itself compatible with fundamental democratic principles.[32]

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[23] *Lavisse v. France* (dec), no. 14223/88, 70 D.R. 218. In this particular instance, the aims of the association included defence of the moral and material interests of surrogate mothers and promotion and moral endorsement of surrogate motherhood. The Commission, however, held that this amounted to an incitement to child abandonment, which is a criminal offence in French law.
[24] *Apeh Üldözötteinek Szövetsége and others v. Hungary* (dec.), no. 32367/96, 31 August 1999, unpublished.
[25] *Lawless v. Ireland*, judgement of 01.07.1961, Series A, Nos.1-3 (1979-1980)1 ECHR 1, § 6 and 7.
[26] *United Communist Party of Turkey and others v. Turkey*, *supra,* § 51.
[27] *Idem,* § 61.
[28] *Refah partisi and others v. Turkey*, nos. 41340/98; 41342/98; 41343/98, § 81, 31 July 2001, unpublished.
[29] *Idem*, § 67.
[30] *United Communist Party of Turkey and others v. Turkey, supra,* § 58.
[31] *United Communist Party of Turkey and others v. Turkey*, *supra*, § 57.
[32] *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, no. 44626/99, § 46, 3 February 2005, unpublished.

b. Specific restrictions with respect to the armed forces, the police and the administration

27. The second sentence of Article 11§ 2 of the ECHR may be regarded as special in the context of the Convention in that it expressly allows member states to restrict the freedom of association of three categories of persons: *members of the armed forces*, of the *police* and of the *administration*. No such restriction is mentioned in Articles 8, 9 and 10, even though they allow a restriction of the exercise of the relevant rights in the same terms as the first sentence of Article 11 § 2.

28. In its Recommendation 1572 (2002) *on the right to association of the professional staff of the armed forces*, the Parliamentary Assembly (hereinafter PACE) recommended that members of the *armed forces* should be allowed to join legal political parties.[33] In its Reply (doc. CM/AS(2003)1572 final) the Committee of Ministers (hereinafter CM) noted that there could be legitimate grounds for certain restrictions on the right to join political parties in respect of members of the armed forces. Such restrictions did exist in a number of member states and, in the CM view, it was for the Strasbourg Court to ultimately review whether they complied with the various requirements of Article 11§ 2.

29. The CoE Commissioner for Human Rights, for his part, has organised two Seminars on "Human Rights and the Armed Forces", one on 5-6 December 2002 in Moscow and one on 15-16 September 2003 in Madrid (see CommDH(2002)21 and CommDH(2003)9).

30. As regards the *police,* the Court has held that, in view of the "*historical background*", a constitutional ban barring *police officers* from membership of a political party may constitute "legitimate" interference within the meaning of Article 11 § 2.[34] This judgment seems rather isolated.

31. Broadly speaking, the notion of *"administration of the State"* is to be construed narrowly, in the light of the post held by the official concerned.[35] The Court has recognised the legitimacy of restrictions on the political activities of *police officers*, *civil servants*, *judges* and other persons employed by the State and participating in the exercise of *public authority*. It concedes that it is particularly important to safeguard their political neutrality in order to ensure that all citizens are treated in a manner that is equal, fair and untainted by political considerations, hence its finding that the restrictions placed on members of the *executive* or the *judiciary* are legitimate.

32. The Court has made it clear that, because of their duty of impartiality, *civil servants* have an obligation to be politically neutral not only towards elected members of the local authority that employs them but also towards members of the local electorate. This may call for the introduction of legal rules restricting the participation of local government officials to certain types of political activity.[36]

33. Further reference may be made to two cases concerning more specifically *membership of the Freemasons.* In the first case, the Court found that there had been a violation of Article 11 because domestic law did not lay down with sufficient precision the conditions in which a judge should refrain from joining the Freemasons, at the risk of incurring sanctions.[37] In the second, it held that freedom of association is of such importance that it cannot be restricted in any way, even in respect of a candidate for public office, so long as the person concerned does not himself commit any reprehensible act by reason of his membership of the association.[38]

34. Reference can also be made in this context to CM Rec(94)12 *on independence, efficiency and role of judges*, Principle IV of which guarantees them the right to form associations, and CM Rec(2000)21 *on the freedom of exercise of the profession of lawyer* which, in Principle V, calls for lawyers to be encouraged to form and join associations and lays down general criteria governing associations.

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[33] See also Resolution 903 (1988) on the same issue. Work on "the human rights of conscript soldiers", including their freedom of association, is currently being carried out in PACE.
[34] *Rekvenyi v. Hungary*, no. 25390/94, § 46-48 and § 59-60, ECHR 1999-III.
[35] *Vogt v. Germany*, *supra,* § 67.
[36] *Ahmed v. the United Kingdom*, no.22954/93, § 70, ECHR 1998-VI.
[37] *N. F. v. Italy*, no. 37119/97, § 31, ECHR 2001-IX.
[38] *Grande Oriente d'Italia di Palazzo v. Italy*, no. 35972/97, 25-26, ECHR 2001-VIII; in this particular instance, an article in a regional law, which set out the terms and conditions for submitting applications for nominations and appointments in the region, stipulated *inter alia* that candidates must not be Freemasons. In its Interim Resolution ResDH(2004)71, the CM noted that three years after the Court's judgment, the legal provisions at the origin of the violation were still in force and that no appropriate measure had been taken to prevent similar violations in the future.

c. Political activity of foreigners: Article 16 ECHR

35. Article 16 ECHR states that

> *"Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."*

36. In this sense, Article 16 ECHR limits the rights conferred in Article 11 in the specific case of foreigners. In 1995, the Court restricted the scope of Article 16 by ruling that *"(the applicant's) possession of the nationality of a member state of the European Union […] does not allow Article 16 of the Convention to be raised against her*."[39] Apart from this single judgement on the merits given by the Court in this matter, a very small number of decisions on admissibility made reference to Article 16 ECHR. In no single case the Court used Article 16 to justify a restriction on the provisions of the Convention.

37. The rights recognised by the Convention are, generally speaking, guaranteed for nationals and aliens alike, as the very first article makes clear that "[t]*he High Contracting Parties shall secure to* ***everyone*** *within their jurisdiction the rights and freedoms […]*' listed in the Convention. Article 14 ECHR further reinforces this view by stating that the rights and freedoms set forth in the Convention are to be secured without discrimination "*on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*". Hence the proposal from PACE, as far back as 1977, calling for the repeal of Article 16.[40]

38. It should be borne in mind that Article 16 dates from a time when it was considered legitimate to restrict the political activity of aliens generally. Subsequent human rights treaties, such as the United Nations Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter of Human and Peoples' Rights all do without such a clause.

39. The repeal of Article 16 ECHR, as PACE had suggested 28 years ago, would in no way affect existing possibilities to restrict legitimately the rights of foreigners, protected by the Articles 10 and 11, by virtue of the 2nd paragraph of these provisions. It would furthermore be perfectly in line with the aim of the CoE to achieve "*further progress in building a Europe without dividing lines […] to be based on the common values embodied in the Statute of the Council of Europe: democracy, human rights, the rule of law*", in the terms of the Warsaw Declaration.

3. Access of associations to the Court

40. Freedom of association takes on a further dimension where the Court is concerned. Not only does this international judicial authority define and protect freedom of association in its case-law, but the institution itself assigns a special place to associative bodies as an active party in the decision-making process. An organisation may make an informal contribution by backing an individual application by a natural person but it may also apply to the Court if it can claim to be the victim of a violation of the rights enshrined in the Convention (see Article 34 ECHR). It is worth noting here that the fact that a State does not recognise the legal personality of a particular association does not prevent the Court from finding that the group exists in practice. Provided the group is sufficiently autonomous and real, its legal personality is deemed to have been sufficiently established.[41]

41. What is more important, Article 36 ECHR allows for the possibility of associations to intervene as third parties before the Court. Under this procedure, the associations may submit their written comments at the invitation of the President of the Chamber (see Rule 44 § 2(a) of the Rules of Court). The opportunities for NGOs to intervene before the Court in a third party capacity have tended to expand in recent years. Such contributions have proven highly material and have been taken into account by the Court.[42]

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[39] *Piermont v. France*, nos. 15773/89 and 15774/89, § 64, Series A No. 314.

[40] See Recommendation 799(1977) *on the political rights and position of aliens*, on which no further action was taken; see also below under II, C, 2.

[41] *Catholic Church v. Greece*, Judgment of 16.12.1995, Series A, No.83-A; *Radio France and others v. France* (Dec.), N° 53984/00, §§ 24-26, ECHR 2003-X. See also *L'accès des personnes morales à la Cour européenne des droits de l'homme*, Olivier de Schutter *in* Avancées et confins actuels des droits de l'homme aux niveaux international, européen et national, Mélanges offerts à S. Marcus Helmons, Bruxelles, Bruylant, 2003, pp. 83-108.

[42] See for example Amnesty International's contribution in the case *Soering v. the United Kingdom*, no. 14038/88, Series A 161 or the attached letter from Article 19 and Interights in the cases of *Otto-Preminger-Institut v. Austria* and *Goodwin v. the United Kingdom.*

B. The European Social Charter (ESC)

42. The European Social Charter (hereinafter referred to as "the Charter" or ESC), adopted in 1961[43] and revised in 1996[44], sets out social rights and freedoms, including one which has a fundamental significance for freedom of association.[45] Indeed, Article 5 of the Charter guarantees "*the freedom to organise*", that is to say the freedom of workers and employers "*to form local, national or international organisations for the protection of their economic and social interests and to join those organisations".* Article 5 is one of the nine "hard-core" provisions of the Revised ESC – of which six must be accepted by a State wishing to ratify it - and one of the seven "hard core" provisions of the 1961 Charter - of which five must be accepted by a State wishing to ratify it.

43. Not only active workers, but all persons enjoying labour-based rights (i.e. retired, unemployed persons)[46] have benefit of the union freedom guaranteed by Article 5 ESC, an interpretation which is, however, not supported by some governments of member states. When accepting article 5 ESC, "*the Contracting Parties undertake that national law should not be such as to impair, nor shall it be so applied as to impair this freedom. They are also obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise, and in particular to protect, workers' organisations from any interference on the part of employers*".[47] More specifically, the freedom to organise is translated into the following more specific freedoms: the freedom to form trade unions and the freedom to join or not to join trade unions.

1. Establishment and membership of trade unions

a. Freedom to form trade unions

44. According to the provisions of Article 5, the creation of trade unions must be free. In other words, such organisations should be established without any prior authorisation, and the creation formalities (*inter alia* declaration, registration) have to be simple and easy to implement. Furthermore, any fee requirement for the registration or establishment must be reasonable and only destined to cover necessary minimal administrative costs.[48] A minimum membership requirement is in conformity with Article 5 if fixed at a reasonable number which does not obstruct the creation of organisations.

45. As well as their members, trade unions have to be free to group together as well as to join similar international organisations. Therefore, a State Party cannot limit the level at which they may organise.

46. States Parties are also subjected to a positive obligation to provide adequate institutional guarantees, notably access to court, in order to ensure the respect of these rights.

b. Freedom to join or not to join trade unions

47. Like Article 11 ECHR, Article 5 ESC has a positive and a negative aspect. Workers must not only be free to join, but also not to join a trade union.

48. According to the European Committee of Social Rights (ECSR), Article 5 requires that employees are protected against all forms of reprisals and discrimination in areas of recruitment, dismissal, promotion, etc. because of trade union membership activities. States Parties are required to take concrete protection measures.[49]

49. Since Article 5 ESC expressly mentions the word "freedom" and not "right", the ECSR made clear since the first cycle that it interprets Article 5 as including both the freedom to form or join trade unions and the freedom not to do so: "*any form of compulsory unionism imposed by law must be considered incompatible with the obligation arising under this Article of the Charter.*"[50] According to the ECSR, the freedom guaranteed by Article 5 implies that the exercise of a worker's right is the result of a choice, and

[43] 26 states have signed and 18 states have ratified the ESC.
[44] 38 states have signed and 19 states have ratified the Revised ESC.
[45] For details as regards the procedure see website of the ESC and Monitor/Inf(2004)2.
[46] See European Committee of Social Rights (hereinafter ECSR) Conclusions XVII-1, vol.2, 2002, Poland, p. 375.
[47] ECSR Conclusions XIII-3, United Kingdom, p. 107-111.
[48] ECSR Conclusions XV-1, vol. 2, United Kingdom, p. 628-633.
[49] ECSR Conclusions XIV-1, vol.1, Denmark, p. 177-178.
[50] ECSR Conclusions I, p. 32.

that it is not to be decided under the influence of constraints that rule out the exercise of this freedom.[51] In order to ensure this freedom, the ECSR finds that national law must clearly prohibit any trade union monopoly

[51] See *The Confederation of Swedish Enterprise v. Sweden*, No. 12/2002, decision on the merits, of 15th May 2003, § 29.

clause. Therefore, the ECSR considered that the clauses set out in collective agreements or authorised by law, which reserve in practice employment for members of a certain trade union, are clearly contrary to the freedom guaranteed by Article 5.[52] When the Governmental Committee presented a recommendation referring to the Danish system of *'closed shop'* agreements to the Committee of Ministers' deputies, however, only 11 out of 28 member states supported the recommendation. Hence, the ECSR's interpretation of Article 5 was not supported by the Committee of Ministers' deputies in this respect and the Danish authorities hence consider that to this day there is no common political understanding concerning *'closed shop'* agreements.

2. Organisational autonomy

50. Trade unions and employers' organisations have to enjoy a substantial autonomy concerning their internal organisation and functioning. Consequently, any excessive interference from a State Party is not in conformity with Article 5.

51. This autonomy has various aspects: *inter alia* trade unions' leaders must have access to their places of work and it must be possible for trade union members to hold meetings at these places. In addition, trade unions have the right to choose their own members and representatives. Furthermore, the ECSR considered that the severe restrictions contained in British law, on the grounds on which a trade union might lawfully discipline members, constituted an unjustified incursion into the autonomy of trade unions inherent in Article 5.[53]

3. Restrictions

52. Article 5 is a general provision applicable to public and private sectors. Nevertheless, it contains restrictions concerning the *police* and *armed forces*. Article G of the Revised ESC states that these restrictions must be "*prescribed by law and necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*". Moreover, only the *nationals* of other States Parties lawfully resident or working regularly within the territory of the Contracting Party concerned can enjoy the rights guaranteed by the Charter. Article 19 § 4*b* ESC compels States Parties to afford nationals of other States Parties treatment not less favourable than that of their own nationals as regards membership of trade unions and enjoyment of the benefits of collective bargaining.

53. As regards the *police*, the ECSR held that "*it is clear in fact from the second sentence of Article 5 and from the "travaux préparatoires" on this clause, that while a state may be permitted to limit the freedom of organisation of the members of the police, it is not justified in depriving them of all the guarantees provided for in the Article*".[54] In other words, members of the police must benefit from the fundamental union privileges, namely the right to negotiate their payment and working conditions, as well as to enjoy freedom of assembly.[55] Besides, compulsory membership of organisations is not in conformity with Article 5.

54. As regards the armed forces, according to Article 5 ESC, "the principle governing the application to the members of the armed forces of [the guarantees of this article] and the extent to which they shall apply to persons in this category shall equally be determined by national laws and regulations". The States Parties are authorised to limit or to deprive members of the armed forces of the right to organise. Therefore, the ECSR recalled "that Article 5 allows for the right to organise of the military to be limited and even denied".[56] However the ECSR verifies that the bodies defined as armed forces by the national law of a State Party indeed hold military duties.

55. A number of CoE member states have converted their armies from a conscription system to a purely professional system. As a consequence, military personnel are becoming increasingly "regular" employees. In this context, PACE came up with an appeal to the member states to reconsider restrictions on the freedom of association imposed on the professional military personnel.

[52] ECSR Conclusions XVII-1, vol.1, Denmark, p. 127.
[53] ECSR Conclusions XVII, vol. 2, United Kingdom, p. 510.
[54] ECSR Conclusions I, p. 32; see also Conclusions II, *Italy*, 1968-1969, p. 23 and Conclusions III, *Italy*, p. 31.
[55] *European Council of Police Trade Unions v. Portugal*, No. 11/2001, decision on the merits of 22.05.2002.
[56] See ECSR Conclusions XIII-2, Belgium, p. 268. See also Collective Complaints from the *European Federation of Employees in Public Services v. France, Italy and Portugal*, Nos. 2/1999, 4/1999 and 5/1999, Decisions on the merits of 4 December 2000.

56. PACE Recommendation 1572 (2002) *on the right to association of the members of the professional staff of the armed forces* included a proposal to amend Article 5 ESC by deleting its third sentence. It recommended that the CM call on governments of the member states to allow members of the armed forces and military personnel to organise themselves in representative associations with the right to negotiate on matters concerning salaries and conditions of employment. PACE argued that, although "*it [was] still the exception in our member states for armed personnel to be granted all fundamental human rights […] this [was] becoming increasingly hard to accept in view of [their] professionalisation*" (Doc. 9532, 02.09.2002). In its Reply - following the Opinion of the Governmental Committee of the ESC on that question, which did not favour the idea of an amendment of Article 5 ESC - the CM underlined that it was not in the position to approve the proposal to amend Article 5 ESC, while observing that in many member states members of the armed forces and military personnel had the right to organise and to bargain collectively. The CM invited all the member states to study the various examples that exist (doc. CM/AS(2003)1572 final).

4. The specific question of "representativity"

57. A representativity requirement may be imposed by member states in order to render efficient the participation of trade unions in various procedures of consultation and collective bargaining. However, the ECSR stated that "*with respect to Article 5, any requirement of representativity must not amount, directly or indirectly, to a hindrance to the formation of trade unions*". The representativity criteria must be objective, reasonable, prescribed by law and subject to judicial review.[57]

5. Collective complaints

58. The 1995 Additional Protocol to the ESC introduced a system of collective complaints, thus contributing to the reinforcement of freedom of association.[58] According to Article 1, the following groups are able to submit complaints: the international trade unions and organisations of employers participating to the work of the Governmental Committee, the international non-governmental organisations which have participative status with the CoE and have been put on a list established for this purpose by the Governmental Committee and representatives of national trade unions and organisations of employers of the Party concerned. Furthermore, each State may entitle national non-governmental organisations to lodge complaints against it through a declaration deposited with the Secretary General (hereinafter SG) of the CoE (Article 2). To date, only Finland has made such a declaration.

59. A "representativity" requirement is set out in Article 1 of the 1995 Protocol. This provision specifies that only "*representative national organisations of employers and trade unions*" have the right to submit complaints alleging unsatisfactory application of the Charter. In interpreting Article 1 of the 1995 Additional Protocol to the ESC, the ECSR considered that "*for the purpose of the collective complaints procedure, representativity is an autonomous concept, not necessarily identical to the national notion of representativity*".[59]

II. OVERVIEW OF WORK UNDERTAKEN IN SPECIFIC FIELDS

60. An important work has been undertaken by CoE organs and institutions in several specific fields related to numerous aspects of freedom of association. This work has led to the elaboration of more detailed principles and standards.

A. Work related to the fight against discrimination and the protection of national minorities

1. The European Commission against Racism and Intolerance

61. The CoE's specialised body in charge to combat racism, racial discrimination, xenophobia, antisemitism and intolerance, the European Commission against Racism and Intolerance **(ECRI)**, contributed to the standard-setting in the area of freedom of association by addressing two main concerns:

[57] *Syndicat occitan de l'éducation v. France*, No. 23/2003, decision on the merits of 7 September 2004, § 26.
[58] 13 states have so far accepted the collective complaints procedure.
[59] See *inter alia Confédération française de l'Encadrement CFE-CGC v. France*, No. 9/2000, decision on the admissibility of 06.11.2000, § 6.

i the need to ensure that freedom of association is enjoyed by everyone, without discrimination on grounds such as race, colour, language, religion, nationality and national or ethnic origin and
ii the need to ensure that racist groups cannot avail themselves of the right to freedom of association to establish their organisations.

62. As to the first aspect, in a number of its country monitoring reports, the ECRI has reiterated the obligation of member states to thoroughly respect Article 11 ECHR and Article 14 ECHR in combination with Article 11, in particular when considering issues related to the establishment of political parties with an ethnic affiliation, religious organisations and cultural associations.

63. Moreover, in the context of growing worries about the negative effect that the fight against terrorism might have on fundamental rights and freedoms of individuals, the ECRI, in its General Policy Recommendation N° 8 *on combating racism while fighting terrorism*, recommends "*to pay particular attention to guaranteeing in a non-discriminatory way the freedoms of association, expression, religion and movement […]*" (CRI(2004)26, 17.03.2004).

64. As concerns the second aspect highlighted above, ECRI has developed more detailed standards. In its General Policy Recommendation N° 7 *on national legislation to combat racism and racial discrimination* (CRI(2003)8, 13.12.2002), ECRI recommends that:

i national Constitutions "*provide that the exercise of freedom of […] association may be restricted with a view to combating racism. Any such restrictions should be in conformity with the European Convention on Human Rights*" (§ 3);
ii national criminal legislation penalise "*the creation or the leadership of a group which promotes racism; support for such a group; and participation in its activities with the intention of contributing to the [commission of racist] offences*" (§ 18g and Explanatory Memorandum § 43);
iii national civil and administrative legislation "*provide for the possibility of dissolution of organisations that promote racism*" (§ 17). However, in the Explanatory Memorandum, ECRI specifies that "*in all cases, the dissolution of such organisations may result only from a court decision*" (§ 37);
iv national legislation "*provide for an obligation to suppress public financing of organisations which promote racism*" and that *"[w]here a system of public financing of political parties is in place, such an obligation should include the suppression of public financing of political parties which promote racism*" (§ 16 and Explanatory Memorandum, § 36). In this context, it is worth noting that in its Resolution 1344(2003) *on threat posed by extremist parties and movements in Europe* (29.09.2003), PACE invites the member states to "*provide in their legislation that the exercise of freedom of expression, assembly and association can be limited for the purpose of fighting extremism" and to apply or introduce in their legislations a series of dissuasive measures to contribute to the fighting of extremism*."

65. At a different level, ECRI's programme mentions its own relations with the civil society. ECRI co-operates with the civil society in order to spread its anti-racist message as widely as possible since "*racism and intolerance can only be successfully countered if civil society is actively engaged in this fight*" (CRI (99)53 rev.5, 09.2004). ECRI is thus implementing a programme of action to develop its relations with the civil society, including various co-operation activities with NGOs. This programme is complementary to other CoE activities undertaken to reinforce the role of civil society in fields such as education and culture, as well as awareness-raising on human rights issues.

2. The Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages

66. The Framework Convention for the Protection of National Minorities (hereinafter FCNM), an open Convention signed and ratified by 36 CoE member states, sets out principles to be respected and goals to be achieved by Contracting Parties in order to ensure the protection of persons belonging to national minorities.[60] Notably, Article 7 of the FCNM guarantees for every person belonging to a national minority the

[60] See Overview of activities of the CoE in the field of protection of national minorities (20.01.2005).

right to freedom of association, whereas Article 15 requires states to *"create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.*" In order to create the necessary conditions for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, Parties to the FNCM are called on to promote *inter alia:*

i consultation with these persons, in particular through their representative institutions, when contemplating legislative or administrative measures likely to affect them directly;
ii their involvement in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly, and
iii their effective participation in the decision-making process and elected bodies both at national and local level.[61]

67. The **Advisory Committee** - which assists the **CM** in monitoring the implementation of the FCNM by the Parties, examines States' reports and prepares Opinions on the measures taken by the Parties – has repeatedly noted that consultation with national minorities' representative consultative bodies is essential to the preparation and implementation of policies for the protection of national minorities and has recommended the Governments of several member states to make more frequent use of co-operation with these bodies, while ensuring conditions conducive to their increased effectiveness.[62]

68. Some states, as a follow-up to Resolutions adopted by the CM when monitoring the implementation of the FCNM, have organised seminars to tackle the question of the freedom of association of minorities and
of their participation in society.[63]

69. The European Charter for Regional or Minority Languages,[64] for its part, foresees, in Article 16, the involvement of NGOs in its monitoring mechanism. The NGOs which are legally established in one of the Parties can report to the Committee of Experts regarding the implementation of the Charter and the related policies pursued by their respective states. The NGOs are not only present during the monitoring process but may also assist in persuading and supporting their government at the stage prior to ratification. NGOs must indeed be regarded by states as privileged partners in promoting language diversity. This is all the more so since the Charter does not guarantee individual or collective rights for the speakers of regional or minority languages, but sets out obligations for states and their respective legal systems with regard to the use of these languages.[65]

B. Work related to political parties

70. Substantial work has been undertaken on the main questions concerning political parties by the **Venice Commission**, the Council of Europe's advisory body on constitutional matters. The main documents elaborated on this respect are the *Guidelines on prohibition and dissolution of political parties and analogous measures* (CDL-INF(2000)1), the *Guidelines and report on the financing of political parties (*CDL-INF(2001)8) and the recent *Guidelines and explanatory report on legislation of political parties* (CDL-AD(2004)7rev.). These Guidelines lay a solid basis for regulating the main issues related to the functioning and financing of political parties.[66] Moreover, the Venice Commission has drawn up a number of Opinions on the relevant legislation of several member states (in particular Ukraine, Albania, Armenia and Moldova). Experts of the Venise Commission are currently working on a report on *political parties and elections.*

[61] Explanatory Report of the FCNM, § 80.
[62] ACFC/I/Secr(2003)001 rev. 5 Vol. 2, 03.05.2005.
[63] See for instance Follow-up Seminar Ukraine, Kiev, 16-17.09.2003 and Follow-up Seminar Estonia, « National Minorities in Estonian Society: Non-Discrimination and Integration», Part III *National Minorities in Estonian Society: The role of Cultural Associations of National Minorities in Estonian Society*, Tallinn, 26.09.2002.
[64] Signed by 31 member states and ratified by 17.
[65] See the Charter's Explanatory Report; for more details see "*Working together, NGOs and regional or minority languages*", Legal affairs, 05.2004.
[66] See CM Reply to PACE Rec 1680(2004), 11 April 2005; see also Part II, I, A.

71. In its Recommendation 1516(2001) on financing of political parties, PACE, taking note, in particular, of the Venice Commission's work on the matter, has formulated a number of general principles, which should inspire the CoE member states in setting up their relevant legislation, such as: the need to ensure a reasonable balance between public and private funding; fair criteria for the distribution of state contributions to the parties; strict rules concerning private donations; limits on parties' expenditure on electoral campaigns; complete transparency of accounts; establishment of independent audit mechanisms and meaningful sanctions for violations. More recently, in its Resolution 1407(2004) *on new concepts to evaluate the state of democratic development*, PACE elaborated a list of parameters for the evaluation of the democratic development in a country – in addition to the traditional CoE democratic standards – including "*the development of political pluralism and the way in which parties are financed and function*". In its Recommendation 1680(2004) on the same subject PACE recommended the CM to instruct its competent steering committee to develop, in co-operation with the Assembly, *inter alia* "*a code of good practice for political parties and their members*".

72. For its part, the **CM,** further to PACE Recommendation 1516(2001), adopted in April 2003 Recommendation (2003)4 *on common rules against corruption in the funding of political parties and electoral campaigns.*[67] The CM recommended the CoE member states to adopt national regulations, which are inspired by the said common rules in so far as they have not already put in place particular regulations allowing for effective alternatives. It, furthermore, instructed the Group of States against Corruption **(GRECO)** to monitor the implementation of this recommendation. During the first and second evaluation rounds undertaken by GRECO, the matters included in Rec(2003)4 have not been addressed specifically. GRECO is currently considering various options for its forthcoming Third Evaluation Round. One of the options is the monitoring of Rec(2003)4. It is expected that GRECO will take a decision on this matter in due course.

73. An implementation guide on "*Financing political parties and election campaigns*", was prepared in 2004 as a supplement to CM Rec(2003)4 within the Integrated Project **"*Making Democratic Institutions Work*" (IP1) (2002-2004).** It encloses a compendium of CoE instruments on the financing of political parties and public control of political finance and includes the work of the Venice Commission and GRECO as of December 2003. A clear overview is made of the basic concepts in the field, such as the need for appropriate funding of political parties, through a healthy combination of different sources of income including both private and public funding, existence of unambiguous, understandable and transparent legal regulation, as well as of mechanisms of control and sanctioning of possible violations.

C. Promotion of participation in political and public life

1. Citizens at the local level

74. The development of local democracy requires increased participation of citizens in the local public life. Setting the basic principles of a local democratic participation policy, the **CM** Rec(2001)19 *on the participation of citizens in local public life*, stipulates that the member states should, *inter alia*, "*recognise and enhance the role played by associations and groups of citizens as key partners in developing and sustaining a culture of participation and as a driving force in the practical application of democratic participation*".[68]

75. A mention should be made of the Handbook of good practice in public ethics at local level, prepared by the Steering Committee on Local and Regional Democracy (**CDLR**) and adopted at a high level international conference in Noordwijkerhout in March 2004. It has been included in the curricula for training local public servants in several countries. It inspired legal reforms leading to the creation or revision of codes of conduct in Ireland, Romania and Malta and was used in the preparation of the draft law on local self-government in Slovenia. The Handbook contains a section on the funding of political parties and electoral campaigns at local level which inspired a legal reform in Finland. It also includes a section dealing with the relations of local authorities with the private sector, including the questions of subsidising NGOs and delegating public service functions to them.

[67] See also CM Replies to the PACE Rec 1516(2001): Doc. 9551 of 20.09.2002; Doc. 9774 of 16.04.2003 and CM/AS(2003)Rec1516final of 14.04.2003.
[68] For the participation of young people at the local level see below under 4.

76. The Congress of Local and Regional Authorities (hereinafter **CLRAE**) also produced a number of recommendations and resolutions aimed at enhancing and promoting participation of citizens at local level: Rec. 113(2002) *on relations between the public, the local assembly and the executive in local democracy* (the institutional framework of local democracy); Res. 91(2000) *on responsible citizenship and participation in public life*; Res. 165(2003) *on NGOs and local and regional democracy*.

77. The particular relevance of the European Charter of Local Self-government[69] as regards freedom of association resides in the explicit reference that the Charter makes to the right of the local authorities to associate. Article 10 § 2 of the Charter reads: *"The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State."* The explanatory report states that the right to belong to associations at the national level is accompanied by a parallel right to belong to international associations because a number of them are active in the promotion of European unity along lines which accord with the aims laid down in the statute of the CoE. However it clarifies the fact that *"Article 10 § 2 leaves to individual member states the choice of means, legislative or otherwise, whereby the principle is given effect".*

2. Foreigners in the countries of residence

78. The Convention on the Participation of Foreigners in Public Life at Local Level aims at a better integration of foreign residents into the life of the local community. It applies to all persons who are not nationals of the Party to the Convention but lawful residents on its territory. The Convention provides *inter alia* that the Parties undertake to guarantee to foreign residents, on the same terms as to their own nationals, the "classical rights" of freedom of expression, peaceful assembly and association, including the right to form trade unions. In the terms of Article 3 of the Convention, "*the right to freedom of association shall imply the right of foreign residents to form local associations of their own for purposes of mutual assistance, maintenance and expression of their cultural identity or defence of their interests in relation to matters falling within the province of the local authority, as well as the right to join any organisation*."

79. Article 3 is of particular interest bearing in mind that Article 16 ECHR allows particular restrictions to the freedom of association of foreigners. Noteworthy, the Convention on the Participation of Foreigners in Public Life at Local Level allows no such restrictions to the freedom of association of foreigners and the general restrictions foreseen by Article 9 of the said Convention are similar to those stipulated in Article 11 § 2 ECHR. As stated in § 28 of the Explanatory Report "*in any case, what matters for the purpose of the present convention is that within each state foreign residents should not be subject to different treatment from citizens with respect to [the right] in question*". Moreover, one of the purposes of the Convention is to ensure better involvement of foreign residents in the process of consultation on local matters. The Convention opens the possibility of creating consultative bodies at local level elected by the foreign residents in the local authority area or appointed by individual associations of foreign residents.

80. The Parties are to inform foreign residents about their rights and obligations in relation to local public life. Parties to the Convention must keep the SG of the CoE informed about developments in the participation of foreign nationals in local public life.

81. Opened for signature on 05.02.1992, the Convention has to date been signed by no more than 11 member states and ratified by only 7 (*Denmark*, *Finland*, *Iceland*, *Italy*, *the Netherlands*, *Norway* and *Sweden*), although some European states are already implementing the measures it proposes without having signed or ratified it.[70] Both the PACE and the CM urged the member states to ratify the said Convention.[71] It would appear that the Convention needs further publicity.[72]

[69] Signed by 42 and ratified by 41 member states.
[70] See **CLRAE** Rec. 115(2002) *on the participation of foreign residents in local public life*: *consultative bodies*, § 17.
[71] PACE Recommendation 1500 (2001) and CM Reply Doc. 9549 of 20.09.2002.
[72] In the "*Agenda for delivering good local and regional governance*", adopted at the 14th Session of the Conference of European Ministers Responsible for Local and Regional Government (Budapest, 24-25 February 2005) and endorsed in the Action Plan adopted at the Warsaw Summit, it was agreed "*to seek to overcome any obstacles to acceding to the Convention on the Participation of Foreigners in Public Life at Local Level (ETS NO. 144) and to seek to ratify it as soon as possible".*

82. The same tendency to extend the aliens' participation in the political life of the country of residence characterises the **PACE**'s approach to the issue. In its Recommendation 1500 (2001) *on the participation of immigrants and foreign residents in the political life in the CoE member states*, the Assembly stresses that "*democratic legitimacy requires equal participation by all groups of society in the political process, and that the contribution of legally residing non-citizens to a country's prosperity further justifies their right to influence political decisions in the country concerned*". It also urges the governments of member states, *inter alia*, "*to promote the actions of migrants' organisations and associations and encourage the networking of their activities*". Finally, PACE calls on the CLRAE "*to continue its action to promote the participation of immigrants in public life*".[73] In this respect, **CLRAE** has adopted a number of pertinent texts: Res. 181(2004) *on a pact for the integration and participation of people of immigrant origin in Europe's towns, cities and regions*; Rec. 115(2002), Res. 141(2002), Rec. 76(2000) and Res. 92(2000) *on the participation of foreign residents in local public life: consultative bodies*.

3. Women and men on equal terms

83. While acknowledging that women are under-represented in political and public decision-making in a large number of CoE member states despite the existence of *de jure* equality, the **CM**, in its Recommendation (2003)3 *on balanced participation of women and men in political and public decision making*, recommends the governments, *inter alia*, to protect and promote the equal civil and political rights of women and men, making an express reference to the freedom of association. The gender aspect of the freedom of association has been furthermore addressed by the **CLRAE** in its Recommendation 68(1999) *on women's participation in political life in the regions of Europe*, as well as in Res. 134(2002) and Rec. 111(2002) *on women's individual voting rights*.

4. Youth

84. Acknowledging the crucial role the youth plays in the development and renewal of the civil society, the CoE continuously promotes the participation of young people in the associative life, in particular in youth organisations. Notably, in its Rec(97)3 *on youth participation and the future of civil society*, the **CM** calls for the promotion of the partnership between youth organisations and authorities at national, regional and local levels and encourages youth participation in the voluntary sector. In its Rec(2004)13 *on the participation of young people in local and regional life*, the **CM** considers that *"the participation of young people is a determining factor in ensuring social cohesion and in making democracy work"* and especially encourages the participation of young people in associative life, particularly in youth organisations. Rec(2004)13 also recommends the governments of the member states to promote and support the implementation of the revised European Charter on the Participation of Young People in Local and Regional Life, as well as of two relevant texts of the **CLRAE,** namely Res. 78(1999) and Rec. 59(1999) *on Europe 2000 Youth Participation: The Role of Young People as Citizens.*[74]

85. More specifically, the Revised European Charter on the Participation of Young People in Local and Regional Life, which does not have the status of a convention, enhances the importance of promoting organisations of young people and youth participation in NGOs and political parties because "*a vibrant, independent and active non-governmental sector is an essential element of any truly democratic society*".[75]

86. A wide range of activities and actions to support the development of education for democratic citizenship and human rights education have been initiated by the CoE since 1997.[76] One of the aims of the project on Education for Democratic Citizenship is to help people learn how to participate in associative life and democratic processes. CM Rec(2002)12 *on education for democratic citizenship* encourages the member states to promote education for democratic citizenship as a separate subject at school and as a fundamental approach to any educational reform. This should take into account teaching practices for and developed by NGOs.

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[73] See also PACE Doc. 8916 of 22.12.2000 and Doc. 8947 of 23.01.2001; CM Reply Doc. 9549 of 20.09.2002.
[74] See also CLRAE Rec. 128 (2003) *on the Revised European Charter on the participation of young people in local and regional life.*
[75] The content of the ECHR relative to freedom of association is also taken into account by the CM Rec. R(92) 13 rev. *on the revised European Sports Charter.* The Resolution adopted during the 10th Conference of European Ministers responsible for Sport on Good Governance in Sport, doc. MSL-IM10 (2004)7, 14-15.10.2004, calls on all institutions, non-governmental organisations and other groups concerned with the sports issues to devise, implement, strengthen and support initiatives based on the principles of good governance in sport; for more details see CoE and Sports 2004.
[76] For more details see *European Year of Citizenship through Education 2005*, doc. DGIV/EDU/CAHCIT (2004) 13rev4, 29.11.2004.

87. A *Youth Summit*, organised in co-operation with the European Youth Forum and the Advisory Council of Youth NGOs of the CoE, was held in Warsaw on 15-16.05.2005 with the purpose of creating a communication line with the Third Summit of the CoE and affirming the recognition of the youth participation as a crucial element in making democracy work. In their Final Declaration, the participants called upon "*European Heads of State and Government to launch a large scale action of the Council of Europe, in cooperation with the European Union, according to the principle of participation, with the aim of strengthening participatory democracy by constructing improved relations between young citizens and public authorities*."[77] The Heads of State and Government of CoE member states, for their part, in the Action Plan they adopted at the Warsaw Summit decided to "*intensify [their] efforts to empower young people to actively participate in democratic processes so that they can contribute to the promotion of [CoE] core values".*

5. Patients and people in vulnerable situation

88. The CoE considers that citizens' and patients' participation in the decision-making process on health care matters is a feature of a "*health democracy*". The Convention on Human Rights and Biomedicine (Oviedo Convention) covers a number of important patients' rights and includes provisions on public debate of a paramount importance on questions related to biology and medicine. The **CM** Recommendation (2000)5 *on the development of structures for citizen and patient participation in the decision-making process affecting health care* proposes a comprehensive policy framework for the citizens participation in health matters. It recognises that citizens' involvement leads to improvement of health systems through citizen empowerment and proposes methods to involve citizens and patients in all aspects and at all levels of health care systems.

89. Moreover, a series of policy guidelines on health care for persons in vulnerable situations include recommendations on active participation, according to the principle of democratic partnership: "*talking with them, not to them*": **CM** Recommendation(1997)4 *on single-parent families*, **CM** Recommendation (1998)7 *on health care in prison*, **CM** Recommendation (1998)11 *on the chronically ill* and **CM** Recommendation (2001)12 *on the adaptation of health care services to the demand for health care and health care services of people in marginal situations*.

6. People with disabilities

90. With the constant effort deployed by the CoE to encourage the integration of people with disabilities into all areas of society, special attention has been paid to their participation in community life. The **CM** Recommendation R (92) 6 *on a coherent policy for people with disabilities* reads: "*A coherent and global policy in favour of people with disabilities or who are in danger of acquiring them should aim at: […] guaranteeing full and active participation in community life; […]*" Moreover, in 1996, the European Social Charter (ESC) was extended to cover the right of people with disabilities to independence, social integration and participation in community life.

7. Freedom of association in the Information Society

91. The **CM** adopted on 13.05.2005 a Declaration *on human rights and the rule of law in the Information Society* (CM(2005)56 final), the first ever international declaration to boost human rights and the rule of law in the Information Society. The Declaration, which was distributed at the Warsaw Summit, covers, *inter alia*, the issue of freedom of association. It notes that information and communication technologies (ICTs) bring an additional dimension to the exercise of freedom of association, thus extending and enriching ways of enjoying this right in a digital environment: "*this has crucial implications for the strengthening of civil society, for participation in the associative life at work (trade unions and professional bodies) and in the political sphere, and for the democratic process in general*". Referring to Article 11 ECHR, it states that all groups in society should have the freedom to participate in ICT-assisted associative life and that this freedom should be respected in a digital environment.

[77] For more details see http://www.coe.int/t/dcr/summit/Youth_summit_en.asp.

D. Special importance given to NGOs

1. Core instruments

a. The European Convention on the Recognition of the Legal Personality of International NGOs

92. Increase of the 'transnational' activities of NGOs and of the number of international NGOs (INGOs) revealed the need to promote the international recognition of their legal status. Thus, in 1981, the **CM** asked a group of experts to explore the possibilities of an intergovernmental action in this field. This led to the elaboration of the Convention ETS No. 124, which entered into force on 01.01.1991. At present, the Convention remains the only international standard-setting instrument related to INGOs.

93. The purpose of this Convention is to lay down conditions for recognition of the legal personality of the INGOs in order to facilitate their activities at European level. In order to benefit from the provisions of the Convention, an INGO has to satisfy several criteria. Once an NGO meets these criteria, its legal personality and capacity, acquired in the Contracting State where the NGO has its statutory offices, is automatically recognised in all Contracting States and there is no need for a special procedure for this. However, restrictions, limitations or special procedures laid down by domestic law for national entities analogous to foreign NGOs may be applicable to the latter when they are required by essential public interest.

94. Only 10 member states have ratified the Convention so far*: Austria, Belgium, Cyprus, France, Greece, Portugal, Slovenia, Switzerland, "the former Yugoslav Republic of Macedonia"* and *the United Kingdom*. In its Opinion 246 (2003) *on the relations between the Council of Europe and non-governmental Organisations*, PACE asked the CM to invite a group of experts to examine why the Convention had not aroused more accessions since its opening for signature in 1986 and, if need be, to adapt this Convention through an amending protocol. In the Decision taken at their 861st meeting on 19.11.2003, the Ministers' Deputies instructed the Secretariat "*to look into the matter and report back to them in due course*".

95. At its 80th Plenary meeting on 20-22 April 2005, national delegations to the European Committee on Legal Co-operation (CDCJ) were invited to give information on their preparation of signature and ratification of a number of treaties, including treaty ETS No. 124. No delegation reacted to this invitation and no comments were communicated to the Secretariat. On the same occasion the delegations were invited to examine whether or not this instrument, among others, is still up to date and corresponding to the real need of today's society. The delegations did not provide any comments in this respect.

b. Fundamental Principles on the Status of NGOs in Europe

96. As a result of a reflection process initiated in 1996, the 'Fundamental principles on the Status of NGOs in Europe' (hereinafter "Fundamental Principles") were elaborated with a view to supplementing the Convention ETS 124. The text was adopted at a multilateral meeting in July 2002 and remains a non-binding instrument.

97. The Fundamental Principles seek to promote legislation which favours the creation of NGOs and which, *inter alia*, regulates the acquisition of legal personality by NGOs, regardless of whether the NGO's work is to be purely national or international as well. The Fundamental Principles furthermore address a broad range of issues like NGOs' status, management, fund raising, transparency, accountability, etc.[78]

98. In a Decision taken at their 837th on 16.04.2003, the Ministers' Deputies 'noted with appreciation' the Fundamental Principles and instructed the Secretariat to give them the widest possible circulation. PACE for its part, in its Opinion 246 (2003) *on the relations between the Council of Europe and non-governmental Organisations*, asked the CM *"to promote harmonisation of the principles for granting NGO status at national level by calling on member states to apply the fundamental principles on the status of non-governmental organisations in Europe […] and to consider transforming this text into a Council of Europe legal instrument."*

[78] For more details see below Part II, II, A.

99. As a follow-up, in 2004, the Secretariat has undertaken a study of the member states' legislation and practice regarding NGOs on the basis of a questionnaire elaborated in the light of the Fundamental Principles. Information from the expert analysis of the replies, which were provided by 16 member states (doc. ONG (2005) 1, published in February 2005), was used in the preparation of this report. Having in mind the divergent law and practice in Member States" and "taking into account the important role NGOs play in a democratic society and the importance the CoE and its member States attribute to civil society", one delegation to the CDCJ underlined the need to develop common guidelines for national legislation and proposed to the CDCJ to prepare a legal instrument on NGOs. Such an instrument, possibly in the form of a recommendation, "would help to exchange good practice and provide for common standards" (see doc. CDCJ (2005) 6). Further discussion on this proposal was postponed by the CDCJ pending consideration by the CM of the present thematic monitoring and adoption of decisions on follow-up action.

c. PACE proposal for a European Agreement on tax-treatment of foreign donations for philanthropic, educational or cultural purposes

100. In its Recommendation 656 (1972) *on tax treatment of non-profit organisations*, **PACE** recommended to remove the legal and fiscal obstacles in international activities of non-profit organisations. It furthermore mentioned the possibility of concluding a European Agreement in this field. At the time, for its part, the CM did not support these proposals (see Reply of the CM in Doc. 3707 of 8.01.1976 and Addendum) and no further consideration was given to this issue. Nevertheless, in the present-day context, the issue appears to receive a new topicality, given the fact that international financial support became the main source of non-governmental sector's funding in a number of CoE member states and in some of them heavy tax-treatments impede fund-raising by NGOs.[79]

2. Enhancement of NGOs' role in the CoE work

a. From consultative to participatory status for INGOs

i. The consultative status

101. The CoE has for a long time recognised the crucial role played by the national and international NGOs in the development of a democratic society and always acknowledged the importance of NGOs for the work of the Organisation.[80] It thus created, as far back as in 1952, a consultative status for INGOs which has since been further developed.[81]

102. International NGOs wishing to obtain such status are required to be particularly representative in the field(s) of their competence and at the European level, to share the Council of Europe's aims, and contribute actively to its work. Over the years, approximately 370 international NGOs acquired such status.

ii. The participatory status

103. In 2003, the CoE replaced the consultative status of INGOs by a participatory one so as to enhance the working relations with them.

104. The **CM** Res. (2003) 8 *on participatory status for international NGOs at the CoE*, adopted in November 2003, introduces new regulations which aim at intensifying the co-operation between the other CoE's bodies and the INGOs, clarify the conditions for obtaining that status and recognise the collective structures created by the INGOs at the CoE.

105. Thus, the Resolution encourages the steering committees, committees of governmental experts and other bodies of the CM to involve the INGO's enjoying participatory status in the definition of CoE's policies, programmes and actions in particular by granting observer status to their Liaison Committee and to the INGOs thematic groupings (see below). Also, the PACE and CLRAE committees are invited to explore ways to intensify cooperation and facilitate participation of NGOs in their work. The CoE Commissioner for Human

[79] See below Part II, II, A.
[80] See CM Resolution(51)30 on *Relations with International Organisations, both Intergovernmental and Non-governmental.*
[81] See the conclusions of the 18th meeting of the Ministers' Deputies in 1954 and the conclusions of the 90th meeting of the Ministers' Deputies in 1960; see also Rec. (72) 35 and Res. (93) 38.

Rights is encouraged to maintain close co-operation with the INGOs enjoying participatory status. The SG may also consult the INGOs, the Liaison Committee or the INGO thematic groupings, in writing or by means of a hearing, on questions of mutual interest. In addition to the rights the INGOs enjoyed under the consultative status, the participatory status allows them to be invited to provide, through their specific activity or experience, expert advice on CoE policies, programmes and actions. They are also invited to public sittings of the CLRAE.

106. To be granted participatory status, INGOs have to meet some additional criteria. Notably, they have to be represented at the European level, which means that they must have members in a significant number of countries throughout Europe (Appendix, Res(2003)8).

107. The INGOs which enjoyed consultative status up to November 2003, enjoy now the participatory status. As of 17.05.2005, their number amounts to 373.

iii. Institutional mechanisms of dialogue

108. The INGOs created structures to facilitate their co-operation with the CoE: the Plenary Conference of INGOs, whose name has changed in January 2005 into *Conference of the INGOs of the CoE*, the *Liaison Committee* and ten *thematic groupings*.

109. The *Conference of the INGOs* of the CoE is the organ representing INGOs enjoying participative status with the CoE. Its role is to enable the expression of INGOs' ideas, wishes and proposals. It approves the annual progress report of the Liaison Committee and of the INGO groupings. At its January 2005 session, the Conference adopted new Rules of Procedure in application of the new participatory status of INGOs. As part of the "Quadrilogue" (see below), the Conference has been consulted in 2003 by the CM on the draft Resolutions on participatory and partnership status[82] and prepared a contribution to the third Summit of the CoE Heads of States and Governments, namely Recommendation INGO(2005)1.

110. The *Liaison Committee*, elected by the Conference, is the permanent structural link between the INGOs and the CoE. Its duties are the preparation of the Conference, the organisation of consultations with INGOs, the development of relations with the CoE Secretariat and the establishment of relations with all the organs of the Organisation. Its objectives are determined by the Conference. Its Rules of Procedure have also been revised in January 2005.

111. Furthermore, INGOs are organised in *thematic groupings*, namely civil society, countryside and environment, education and culture, extreme poverty and social cohesion, gender equality, health, human rights, NGO towns, North-South dialogue and solidarity, European Social Charter and social policies. Thematic Groupings enable expert representations and provide experts' advice to the various CoE bodies. Several thematic groupings send observers to the corresponding Steering Committees (e.g. European Committee for Social Cohesion (CDCS) and Steering Committee for Equality between Women and Men (CDEG)).[83]

112. Moreover, individual human rights NGOs such as Amnesty International (AI), the International Commission of Jurists, the International Federation of Human Rights (FIDH) and the European Co-coordinating Group of National Institution for the Promotion and Protection of Human Rights have been given a special observer status with the Steering Committee on Human Rights (CDDH). On an *ad hoc* basis, some NGOs have an observer status with expert committees in the fields of their specific competencies. Thus, for example, four NGOs enjoy this status with the European Committee on Migration(CDMG) and 12 with the European Committee on Crime Problems (CDPC).

[82] 837th meeting, 16 April 2003, item 2.3.
[83] See H(2001)3 NGOs and the Human Rights Work of the Council of Europe – Opportunities for Co-operation, 05.2001.

iv. Ministers' Deputies

113. In 1992, an *ad hoc* Working Party on modalities of the relations between the CoE and NGOs was created within the **CM**.[84] It was later on replaced by the Rapporteur Group on the Relations between the CoE and NGOs, and finally by a Rapporteur on Relations between the CoE and NGOs in 2002. The Rapporteur is appointed among the Ministers' Deputies for a three-year term. He/she may consult the delegations as necessary and convene informal meetings. The most recent contribution of the Rapporteur to the optimisation of relations between the CM and NGOs was related to the elaboration of the participatory status for INGOs.

114. The President of the Conference of INGOs of the CoE is regularly invited for an exchange of views with the Ministers' Deputies. Recently, Heads of INGO thematic groupings have been invited to attend meetings of the Ministers' Deputies' subsidiary groups, such as the Rapporteur Group on Education, Culture, Sport Youth and Environment (GR-C).

b. The "Quadrilogue"

115. Years of intense and fruitful co-operation between the CoE and INGOs made of the latter an essential partner for the Organisation. The INGOs are active contributors to the CoE decision-making process, the implementation of its programmes and the achievement of its goals. This form of 'institutional governance' has been called '*Quadrilogue'*. As the CM notes in its Res. (2003) 8, "*the development and reinforcement of […] co-operation between INGOs and the Committee of Ministers and its subsidiary bodies, as well as with the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe has led to the "Quadrilogue" which is, within the Council of Europe, an expression of democratic pluralism and an essential element for the further development of a citizens' Europe*".

116. The idea of a 'Quadrilogue' tends to include the Conference of INGOs of the CoE in the institutional interplay alongside the CM, the PACE and the CLRAE.

117. To date, the European Centre for Global Interdependence and Solidarity remains the only real expression of the 'Quadrilogue' at the institutional level. Indeed, its Executive Council includes, alongside with PACE, CM and CLRAE's representatives, INGOs members.[85]

118. However, the essence of the 'Quadrilogue' does not yet appear in the statutory rules of the CoE. The INGOs stress, in their contribution to the Third Summit of CoE Heads of State and Government, that *"the CoE is the only international institution worldwide that formally recognises INGOs as one of its pillars and one of the principal organs of the Council, alongside the CM, PACE and the CLRAE […]".*[86] In the Action Plan adopted at the Warsaw Summit, the Heads of State and Government of the CoE member states decided, for their part, "*to enhance the participation of NGOs in the Council of Europe activities as an essential element of civil society's contribution to the transparency and accountability of democratic government*".[87] The NGOs could play an important role in the work of the *Forum of the Future of Democracy*, to be established as part of the Action Plan.

c. Partnership status for national NGOs

119. Supplementing the Resolution (2003) 8 *on participatory status for international NGOs at the CoE*, the **CM** adopted in November 2003 Resolution (2003) 9, which creates the *partnership status* for national NGOs. The Resolution allows the CoE to conclude partnership agreements with those national NGOs which are particularly representative in fields of action shared by the CoE and are able to contribute to the achievement of the CoE's statutory aim to ensure closer unity between its members for the purpose of safeguarding and achieving the democratic ideals and principles. Thus, the national NGOs enjoying partnership status have become privileged partners in the implementation of the CoE's programmes of activities and may provide expert advice on issues related to their specific field of competence. Furthermore, they have the possibility, according to the applicable CoE rules, to attend the PACE and CLRAE public sittings, seminars, conferences and hearings of interest to their work and regularly disseminate information to their members on the standards, activities and achievements of the CoE in their own field(s) of competence.

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[84] See Grah-NGO(92)1 rev., 04.09.1992.
[85] For more details see Res. (89) 14 and Res. (93)51.
[86] See Rec. INGO(2005)1.
[87] Action Plan, CM(2005)80 final, 17.05.2005.