

Introduction to non-discrimination and equality:
standards of minority protection

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Structure

- General introduction : Concepts and main legal instruments
- Overview of the Strasbourg Legal System : Focus on ECHR and ECtHR
- Non-discrimination and the ECtHR : Different aspects of non-discrimination
- Interpretative Rules and Guiding Principles
- Concluding Remarks



Minority protection and non-discrimination

“(D)emocracy does not simply mean that the views of a majority must always prevail: a **balance** must be achieved which ensures the **fair and proper treatment of minorities and avoids any abuse of a dominant position.**”

(ECtHR, Valsamis v. Greece, 1996)

- Majority-Minority relation : a David vs Goliath story based on power-relation
- State and Majority : the “Myth of Neutrality” ?



Minority protection and non-discrimination

Protection of Minorities : Differential treatment (*politics of difference*)

Prevention of Discrimination : Equality of treatment (*politics of sameness*)

Equal situations : treated equally

Unequal situations : treated differently

Fair balance between **formal** and **substantial** equality

Positive actions/Special measures

➤ They are not discriminatory or considered ‘privileges’ towards those who do not benefit of them if **justified and necessary in a ‘democratic society’**

➤ Necessity to find a reasonable relationship of **proportionality** between **means employed** and **aim sought** to be realised



Minority protection and non-discrimination

Direct - Indirect
Discrimination

Multiple - Intersectional
Discrimination



Legal Instruments

UNITED NATIONS

Art. 27 of the International Covenant on Civil and Political Rights (ICCPR 1966)

Declaration on the Rights of Persons belonging to National Minorities or Ethnic, Religious and Linguistic Minorities (1992)

COUNCIL OF EUROPE

European Convention on Human Rights (1950)

Framework Convention for the Protection of National Minorities (1998)

EUROPEAN UNION

Treaty on European Union (Treaties from 1951→ Lisbon Treaty)

Charter of Fundamental Rights of the European Union (2000)

ORGANISATION ON SECURITY AND COOPERATION IN EUROPE

Recommendations on thematic issues



Legal Instruments

COE - Framework Convention for the Protection of National Minorities (1998)

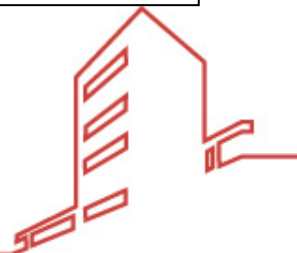
Article 1

The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.

COE - European Convention on Human Rights (1950)

Article 14

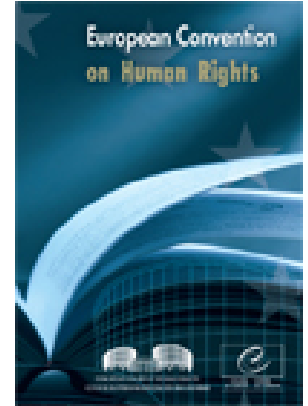
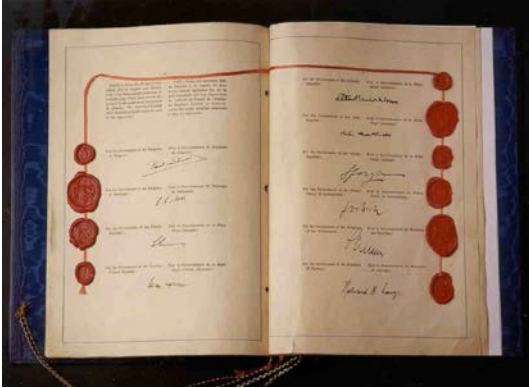
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.



EUROPEAN COURT OF HUMAN RIGHTS STRASBOURG (46 MSs)



EUROPEAN CONVENTION ON HUMAN RIGHTS



- No right **specific** to minorities
- Rights and freedoms afforded to “**everyone**”
- Article 14 : **anti-discrimination** clause (“such as” : sex, language, religion, association with a national minority, national origin, colour,) in the enjoyment of **other** Convention’s rights
- Protocol 12: **general** anti-discrimination provision



EUROPEAN COURT OF HUMAN RIGHTS

Enforcement mechanism

States undertake to
“abide by the final judgment of
the Court in any cases to which
they are parties” (art.46)



wide **margin of appreciation**
on the means

Judgment execution
presumed **voluntary** and
supervised by the Committee of Ministers



No sanction under ECHR
in case of non-compliance

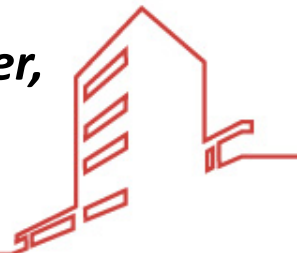
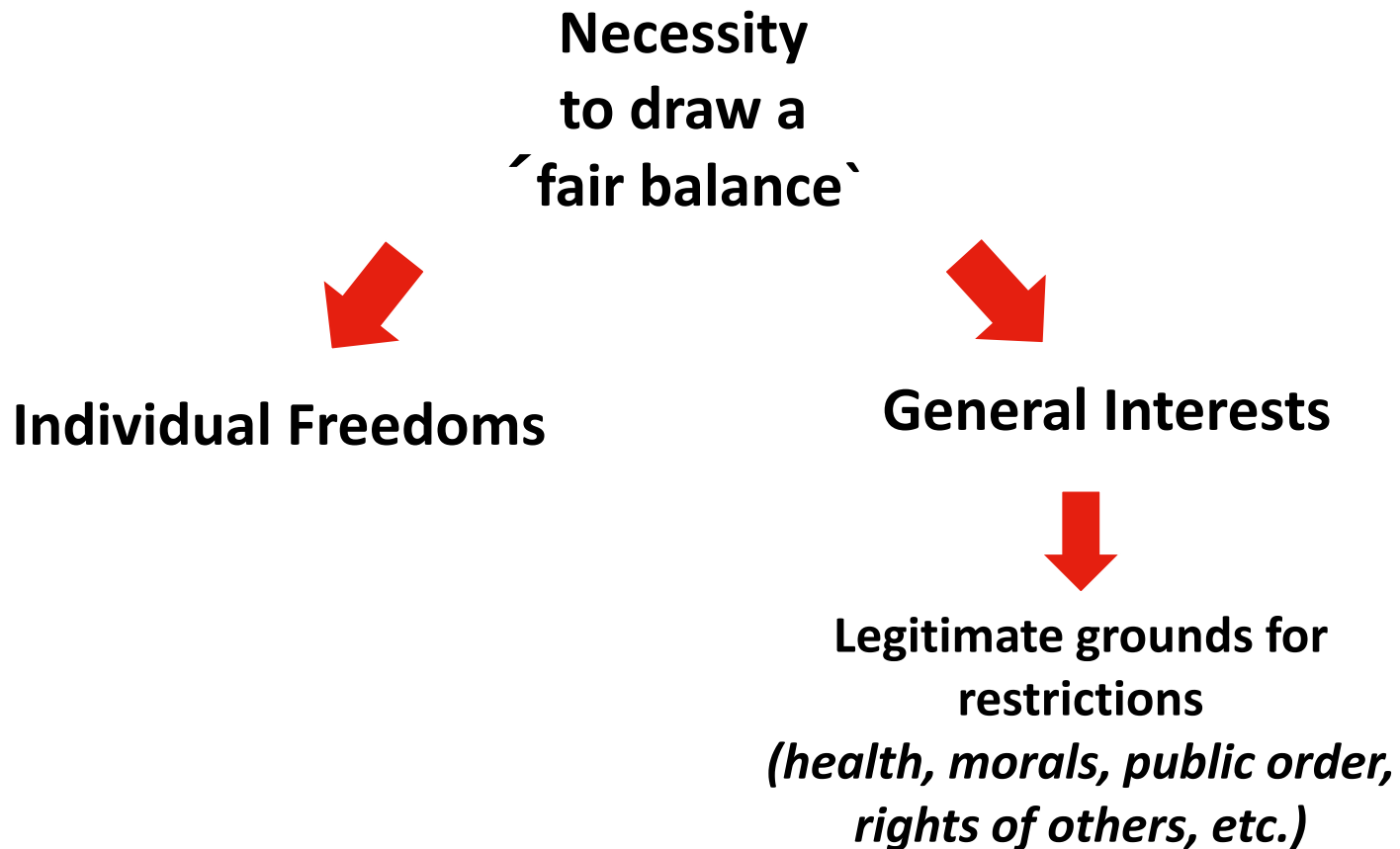
Statute CoE



withdrawal or suspension
for grave violation rule of law or human rights



ECtHR principles and interpretative rules on equality and non-discrimination



Restrictions of the individual freedoms

must ensure



fair and proper
treatment of
minorities



avoid any abuse of a
dominant position



Non-discrimination grounds and the ECtHR

Different Aspects

Non-discrimination / Equality

Language

Culture

Religion

Sexual Orientation



Non-Discrimination / Equality (1)

Thlimmenos vs. Greece (2000)

Discrimination

Differential treatment
in analogous situations
but also

Same treatment
in different situations

De jure/Formal
De facto/Substantial
Equality

Roma case-law on Education

Direct / Indirect Discrimination

D.H. vs Czech Republic (2007)



Non-Discrimination / Equality (2)

D.H. vs Czech Republic (2007)

(special segregating Roma-only school system)

(DH: Chamber - no violation; Grand Chamber - violation)

(right to education + non-discrim.)

Indirect discrimination



effect (statistics) and not *intention*



Non-Discrimination / Equality (3)

D.H. vs Czech Republic (2007)

(`special` segregating Roma-only school system)

Segregated education is banned

Separated classes may be admitted
only if

- clear/non-discriminatory criteria
 - regular assessment
- provisional to enter ordinary classes



Language (1)

Belgian Linguistic case
(1968)

No right to
mother-tongue education

unless previously provided

Cyprus vs Turkey
(2001)

K. vs France
(1983)

Use of language in
judicial proceedings

Fryske Nasjonale Partij vs
the Netherlands
(1985)

Use of language with PA

Clerfayt, Legros vs Belgium
(1985)

Use of language by elected
representatives (local level)

Podkolzina vs Latvia
(2002)

Linguistic knowledge of national
parliaments' candidates



- No right for linguistic minorities as such :
only **right not to be discriminated** against in the enjoyment of the Convention's rights on the grounds of belonging to a minority
- No obligation to respect parents' linguistic preferences
- Obligation to provide education in minority language only when **formerly available** and then withdrawn
- Use of language in **judicial proceedings** (right to be informed; free assistance interpreter : unless sufficient knowledge official language)
- No right for **elected representative** to use minority language in statements/votes as members of public bodies (e.g. municipal councils/assemblies)
- No right to use minority language in **administrative matters**
- Obligation for candidates to the national parliament to possess **sufficient knowledge** of the official language as verified by a fair language examination is legitimate



Culture (1)

Right to Traditional Way of Life

Part of private life - family life - home
(Art.8)

Linkage with
territory/resources

G. and E. vs Norway
(1983 - ECommHR)
Sami / hydroelectric plant

Proportionate test

Roma case-law
Romani mobility



Right to Traditional Lifestyle



Culture

Right to Traditional Way of Life (2)

Champan vs. UK (2001)
(caravan stationing)
(no violation -10/7 votes)

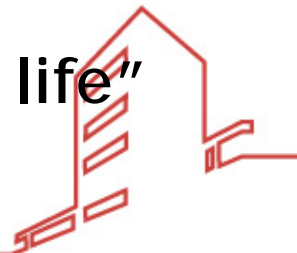
Recognition of Roma
as specific type of disadvantaged/vulnerable minority



Special consideration
to their needs and different lifestyle



Positive obligation to “ facilitate the gypsy way of life”



Culture

Right to Traditional Way of Life (3)

Chapman vs. UK (2001)
(caravan stationing)

Competing interests

Relevant factor (own land but no permission)
home (un)lawfully established



Individual right for home

Caravan station: integral
part Roma ethnic identity



Right community to
environmental protection



Right to Traditional Way of Life (4)

Champman vs. UK (2001)
(caravan stationing)

Emerging international consensus



special needs of minorities



obligation to protect
security, identity and lifestyle

purpose



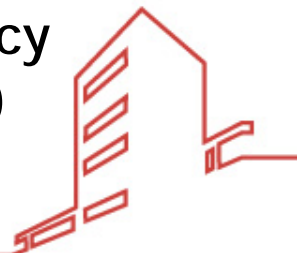
interests minorities



cultural diversity
whole community

but

consensus **not sufficiently concrete** for
far-reaching positive obligation of general social policy
(i.e. providing adequate number of equipped sites)



Right to Traditional Way of Life (5)

Champman vs. UK (2001)
(caravan stationing)

Protection of cultural diversity/minorities
no immunity from general laws
but
vulnerable position
some special consideration
needs and different lifestyle

Positive obligation to “ facilitate the gypsy way of life”
but

no individuals’ preferences place of residence
above general interest
(no right to be provided with a home)

This is clearly desirable but it is a matter for political and not judicial
decision



Religion (1)

Personal Use of Religious Symbols

Leyla Sahin v. Turkey

(ECHR, 2005)

Use veil - University
(students)

Lucia Dahlab v. Switzerland

(ECHR, 2001)

Use veil - Primary school
(teachers)

Dogru v. France

(ECHR, 2008)

Use `visible` religious symbols
French public schools
(students/teachers)



Religion (2)

Use of Religious Symbols

Eweida and Others v the UK

(ECHR, 15 January 2013)

(use of cross by hostess of British Airways)

Violation

Reasoning of the Court:

- Cross : discreet object
- Not detracted from professional appearance
- No negative impact on BA's image by use turban/hijabs prev. allowed



*Public Spaces
vs
Public
buildings*

Use of Religious Symbols (niqab, burqa)

*Ordinary
citizens
vs
Public
officials*

S.A.S v France
ECHR, 1 July 2014

„Living together“
standard

Importance of *face* for
social interaction
by virtue of „established
consensus“

Barrier raised against others may be perceived
as breaching the **rights of others**

Special weight to be given to
domestic policy-maker



Legal framework affording same-sex couples recognition and protection

Fedotova and Others v Russia
ECHR, 17 January 2023

„Clear ongoing trend“

in legislation of a majority of MSs
+
converging positions of various
international bodies

Public-interest grounds, ie
traditional family, feelings of the
majority, minors, **not prevailing**
over applicants' interests

Margin of appreciation:
reduced for providing a
legal framework

+
more extensive for
determining exact nature
of the **form** of recognition
and **content** of protection

Form of **marriage**
not required



Legal framework affording same-sex couples recognition and protection

Fedotova and Others v Russia
ECHR, 17 January 2023

Many **3rd party comments**
were attached in support
of the applicants

On 16 Sept 2022
Russia ceased to be a
State Party of the ECHR

Overview MS CoE :

- In **30** states some forms of recognition exist
- In Russia + other **16** MSs no recognition

By 14 votes to 3: **violation art. 8**
Finding a violation has been
considered in itself a sufficient
just satisfaction



ECtHR Interpretative Rules

Proportionality test

Fair Balance

‘Undue Burden’

but also

State Margin of Appreciation

+

“European Consensus”



General Guiding Principles

(that can be inferred from the judgments of the European Court of Human Rights)

1. The principle of **gender equality** is an overriding factor in balancing (individual and collective) conflicting interests.
2. The protection of the **interests expressed by vulnerable individuals** are taken in high consideration.
3. The implementation of minority/diversity claims must be **reasonable, proportionate and feasible**.
4. Diversity/Minority claims must not be used to achieve **undemocratic objectives**.
5. The right to **manifest one's diversity** can be limited and subjected to restrictions.
6. There is no general right to **positive actions/special measures**, but if adopted, they must respect objective and reasonable criteria.



Concluding Remarks

In diversity-related cases-law the approach of the ECtHR seems to **fluctuate** between strict restrictions and more tolerant forms of accommodation (main criticism : it is an arbitrary, erratic and unpredictable approach).

In many cases, the Court has applied a **more progressive orientation towards accommodating diversity** especially when **mediation and accommodation** was expressed by actors involved in the controversy - public authorities, employers or alleged victims (individuals or groups), who have offered and/or accepted accommodating measures and flexible arrangements.

All actors involved in diversity-related cases, e.g. judges, public prosecutors, public authorities, employers, school authorities, should then perform a **proactive role as mediators and promoters of dialogue through reasonable concerted solutions** in which all interests at stake are balanced.

In this regard there is a **need for cross-fertilisation and synergies** among different branches of law and disciplines, eg criminal law, administrative law, family law, human rights, minority rights, etc. to assist all actors involved to **give content and context to each individual case** in order to find the **most appropriate, meaningful, but also creative and innovative (reasonable and concerted) solution** in each specific case.



Thanks !

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