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**RELIGIOUS MINORITIES AND DIVERSITY GOVERNANCE :
THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

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Definition of Minorities : a still unresolved issue

*“Even though I may not have a definition of what constitutes a minority,
I would dare to say that I know a minority when I see one.”*

Max van der Stoel
OSCE High Commissioner on National Minorities
(1993)

Definition of Minorities : Attempts to find a legally binding definition

United Nations : Francesco Capotorti (1977)

A group **numerically inferior** to the rest of the population of a state, in a **non-dominant position**, whose members - being **nationals of the state** - possess **ethnic, religious or linguistic characteristics** differing from those of the rest of the population and show, **if only implicitly**, a **sense of solidarity**, directing towards **preserving** their culture, traditions, religion or language.

United Nations : Jules Deschênes (1985)

A group of **citizens of a state**, constituting a **numerical minority**, (...) motivated, if only implicitly, by a **collective will to survive** and whose aim is to **achieve equality** with the majority in fact and in law.

Council of Europe (PACE Rec. 1201(1993))

A group of persons in a State who:

- a) **reside** in the territory of that state and are **citizens** thereof,
- b) maintain **long-standing, firm and lasting ties** with that state,
- c) display distinctive **ethnic, cultural, religious or linguistic characteristics**,
- d) **are sufficiently representative**, although **smaller in number** than the rest of the population of the **State** or of a **region of that State**, and
- e) are motivated by a concern to **preserve together** that which constitutes their common identity, including their culture, their traditions, their religion or their language.

Definition of Minorities : constitutive factors

➤ Objective factors

Religious, cultural, (ethnic) or linguistic characteristics (*religion/ECHR: level of cogency, seriousness, cohesion and importance*)

Citizenship/Residence

Numerical minority

Non-dominant position

➤ Subjective factors

Sense of solidarity / Will to survive/preserve identity

Minority protection and diversity governance

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

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

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

Positive actions/Special measures

It is generally acknowledged that :

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

Minority protection and the majority-minority relation

“(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”

Religious minorities and diversity governance: The European Convention on Human Rights

Main ECHR articles involved :

- Article 8 (right to respect for **private and family life**)
- Article 2 of Protocol No. 1 (right to **education**)
- Article 14 (Prohibition of **discrimination**)
- Article 17 (Prohibition of **abuse of rights and freedoms**)
- Article 9 (right to freedom of **thought, conscience and religion**)



Right to freedom of thought, conscience and religion

Art.9 (1). Everyone has the right to freedom of thought, conscience and religion (...)

Art. 9 (2). Freedom to **manifest** one's religion or beliefs shall be subject only to such **limitations** as are prescribed by law and are **necessary in a democratic society** in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Interpretative rules of the ECtHR in religiously-motivated cases

The right to freedom of religion: an absolute or relative right?

The right **to hold** beliefs and convictions (internal dimension) is **absolute and unconditional** but the right **to manifest** religion (external dimension) is **relative and thus not unconditional**; this makes regulation of and restrictions on this right possible.

The state`s margin of appreciation

- It is based on the fact that it is not possible to discern a **uniform European conception** of the significance of religion or morals in society
- Relevance is given to the **national decision-making bodies** and the **local context**
- The use of the margin of appreciation, however, **does not give the state unlimited discretion**

The general consensus principle

It functions as a **corollary** of the margin of appreciation principle : the Court can always narrow this margin, should a **more general consensus** among European countries on the relationship between the state and the manifestation of religion or belief **emerge**.

Religiously motivated claims : Public spaces and public institutions

Exemption from specific **school activities** (ECtHR, *Osmanoğlu and Kocabaş v. Switzerland*, 2017)

Refusal by Muslim parents to send their daughters, who had not reached the age of puberty, to **compulsory mixed swimming lessons**

For the Court :

- **School plays a special role** in the process of social integration
- The children's interest in attending swimming lessons was not just to learn to swim, but above all to take part in **that activity with all the other pupils**
- The authorities offered the applicants some **flexible arrangements** to reduce the impact of the children's attendance at mixed swimming classes on their parents' religious convictions, such as allowing their daughters to wear a burkini, which were **refused by the applicants**
- Facilitating successful **social integration according to local customs and mores**, took precedence over the parents' wish to have their daughters exempted from mixed swimming lessons

Searching for a compromise and forms of accommodation

Religiously motivated claims : Workplace and public employment

Person's inability to manifest religion in the workplace : attributable to a **free choice**

'Freedom to resign', 'freedom to take up a different profession', 'voluntary acceptance of certain requirements and restrictions'

Pharmacists who **refused on religious grounds to sell contraceptives** (ECtHR, Pichon and Sajous v. France, 2001)

For the Court :

- The sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants could **not give precedence to their religious beliefs and impose them on others** as justification for their refusal to sell such products.
- The applicants were **free to take up a different profession**, therefore there was no interference with their freedom to manifest their religion
- The Court assumed that the applicants could **manifest those beliefs in many ways outside** the professional sphere
- By **voluntarily accepting** to pursue a chosen career, the applicants were held to have accepted the consequent necessary limitations on the right to manifest their religious belief

Protection of rights and freedoms of others

Religiously motivated claims : Workplace and public employment

Desire to **manifest religious belief** and protection of **employer's corporate image** (ECtHR, *Eweida and Others v. the UK*, 2013).

Ms Eweida, complained that her employer, British Airways, refused to allow her to continue in her job unless she removed a **visible small cross** hanging on a chain around her neck, as this was a **breach of the company's uniform policy**.

For the Court :

- The applicant's cross was **discreet** and could **not have detracted from her professional appearance**
- The employer had **previously accommodated** the claims of employees belonging to other faiths, primarily Sikhs and Muslims, and there was **no evidence** that the wearing of other religious clothing, such as turbans and hijabs, had any **negative impact** on British Airways' brand or image.

Crucial role of (previous) accommodating measures

Culturally-philosophical motivated claim : Home education

Refusal by parents, on principle, to have their children educated outside the family in contrast with the **prohibition of home-schooling** in Germany.

Enforcement of **compulsory school attendance** (+ withdrawal of parents' authority and removal from family home for 3 weeks) (ECtHR, Wunderlich v. Germany, 2019)

For the Court :

- Acknowledged the views of the local authorities/courts that home-schooling prevented children from becoming part of the community and learning social skills such as tolerance and **ability to assert their own convictions against majority-held views;**
- Compulsory school attendance was justified to ensure the children's **integration into society;**
- **Risk** of keeping children in a **"symbiotic" family system**, isolated, with no contact with anyone outside of the family.

**Protection of rights and freedoms of others
(Best interest of the child)**

Interpretative rules of the ECtHR in religiously-motivated cases

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Accommodating measures

In adjudicating religiously-motivated cases, the Court favour the position of public authorities, employers or alleged victims (individuals or groups), that have offered and/or accepted **accommodating measures and flexible arrangements** to **reduce the impact** of certain restrictions and in which **all interests at stake are balanced**.

Is an accommodation regime towards diversity emerging in Europe?

EU Directive on Equal Treatment in Employment (2000/78/EC) for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation.

Disability : „reasonable accommodation shall be provided (...) unless disproportionate burden “

Europe

Adjustement on the
basis of group
belonging

Canada

Accommodation on
the basis of
individual, factual
discrimination

Jakóbski v. Poland (ECHR, 2010)

(vegetarian diet for a Buddhist detainee)

Neagu v. Romania (ECHR, 2020)

(pork-free meals for a converted Muslim detainee)

(**RA reasoning** : no problems in running the prison and
no negative impact on the diet offered to other prisoners)

Conclusions

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

In some cases, however, the Court has applied a **more progressive orientation towards accommodating diversity**: the positive (or, a contrario, the negative) approaches to mediation and accommodation expressed by actors involved in a controversy has been particularly relevant for the Strasbourg Court in adjudicating the case.

All actors involved in religiously motivated cases, e.g. public authorities, employers, school authorities, individuals, should perform a **proactive role as mediators and promoters of dialogue through concerted solutions** in which all interests at stake are balanced.

In this regard there is a **need for cross-fertilisation and synergies** among different disciplines and studies, esp. on human rights, interculturalism, diversity, 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, (concerted) solution**.

THANK YOU !

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