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**Call for consistent incorporation of super-
diversity considerations in the European
Court of Human Rights' (non-discrimination)
jurisprudence**

Kristin Henrard

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Call for consistent incorporation of super-diversity considerations in the European Court of Human Rights' (non-discrimination) jurisprudence

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Abstract

Super-diversity may not yet be a term of art in the field of fundamental rights, courts are undoubtedly confronted with cases that de facto concern super-diversity, understood here as referring to various layers of ethnic population diversity and the related differential rights of the distinctive groups. Selected cases of the ECtHR are analysed in light of a theoretical frame of analysis concerning rights, interpretation of and legitimate limitations to rights. The comparison of the reasoning in these cases reveals marked differences in approach. The working paper proceeds with a call for a consistent incorporation by the ECtHR of 'super-diversity' considerations in the reasoning of judgments on fundamental rights of the respective groups. This would not only entail a refinement of the Court's non-discrimination jurisprudence, but also to a rise in coherence and consistency of the Court's overall jurisprudence, in line with the rule of law. The conclusion consists of some recommendations for the ECtHR on how it could proceed when developing its jurisprudence in this respect.

Keywords

Super-diversity, layers of ethnic diversity and differential rights, European Court of Human Rights, consistent jurisprudence, rule of law

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Introduction

In the current era of liberal democracies, state policies need to respect fundamental rights at all times, in particular when making, developing and implementing legislation and policies. In other words: fundamental rights constitute the outer framework within which states need to 'work' and develop their policies, legislation and related practices. This is also the case for the ever-increasing 'super-diversity' they are confronted with. This article is not concerned with empirical processes and policy implications thereof. It rather studies the extent to which 'super-diversity' is reflected upon in the interpretation of legal norms, more particularly, fundamental rights norms. The ensuing call to take super-diversity –more consistently- into account within the human rights paradigm, stimulates and develops that paradigm, which in turn determines the framework for policy development. In other words, the analysis in this working paper contributes at least indirectly to the emerging field of super-diversity.

It is first of all important to specify in what way the concept 'super-diversity' is used in this working paper, which allows to establish a link between super-diversity on the one hand and minorities and their fundamental rights on the other. Subsequently, the focus on the jurisprudence of one particular international court is justified, as well as the selection of the case-law which will be analysed,

Since the concept of super-diversity was coined by Steve Vertovec in his 2007 article 'Super-diversity and its implications', it has been the subject of several publications, and major conferences mainly in the field of social sciences (Meissner 2012). While Vertovec intended to capture with 'super-diversity' the multiple axes of differentiation that have to be taken into account when researching migration-related diversity, going beyond ethnicity (Vertovec 2007), several authors use the term to refer to an increased diversity of ethnic backgrounds, without adding other dimensions (Meissner 2012). In this article a related, yet different use of 'super-diversity' is adopted, namely one that is not so much concerned with migration as such but rather with the interaction of different kinds of ethnic (including religious) groups. 'Super-diversity' in this article thus remains within the confines of 'ethnicity' (in the broad sense) while focusing on the relation between the different layers of ethnic diversity, and more particularly on the relation between the actual rights and rights claims of (persons belonging to) the respective groups. These different layers of ethnic diversity mostly concern traditional (indigenous) diversity versus 'new' layers of ethnic diversity. Still, as is visible in relation to religious diversity, 'new' layers do not necessarily need to have a migrant origin. The different layers can also refer to ethnic groups with different degrees of *anciennité* in the country concerned. In addition, regard is had to the relation of rights and rights claims of ethnic groups on the one hand and rights of (purely) religious groups on the other.

Super-diversity may not (yet) be a term of art in the field of fundamental rights, (international) courts are undoubtedly confronted with human rights cases that de facto concern 'super-diversity' (as used here). Hence, it is surely relevant to analyse the case law of these courts so as to distill their approach towards 'super-diversity', more particularly to identify to what extent super-diversity related factors are taken into account within the human rights analysis.

Since super-diversity -as used here- refers to ethnic population diversity and the analysis focuses on the rights (claims) of the distinctive groups, regard must and will be given to the burgeoning literature on minorities and their fundamental rights, particularly the general, not-minority-specific rights (Gilbert 2002, Henrard 2008, Ringelheim 2006).

This article focuses on the case law of the European Court of Human Rights (ECtHR) since it is undoubtedly the most renowned international court specialized in adjudicating human rights cases (Grear 2007). It may be a regional court, related to the Council of Europe's European Convention on Human rights (ECHR), its jurisprudence is a source of inspiration in other regional systems and also in several highest national courts in countries outside Europe (including Canada, the US and South Africa: *inter alia* Henrard 2002; Mak 2013). The EU's intended ratification of the ECHR further buttresses the standing of the European Court of Human Rights as the latter will then be the highest court in the EU legal order for human rights related matters (Eeckhout 2013).

In view of feasibility concerns, the analysis in this article will be confined to a selection of cases of the ECtHR. All are prominent cases that concern different layers of 'ethnic' diversity and differences between the fundamental rights of the respective groups, while reflecting cross-cutting differences and similarities. Two cases concern political participation rights of different categories/kinds of ethnic population diversity. Four cases evaluate differential rights for relatively new religious and philosophical traditions as compared to more traditional religions: two on registration of religions and two on religion in education. The final case addresses a differential regime regarding the official recognition of minority marriages for religious minorities as compared to ethnic minorities.

The working paper starts with a theoretical frame of analysis regarding human rights, interpretation principles and requirements for limitations to rights. Subsequently the selected cases of the ECtHR are analysed. The comparison of the reasoning in these cases and their outcomes arguably expose that the Court has not yet developed a particular strategy (and related criteria) in relation to cases on super-diversity, and thus concerning differentiation in terms of rights for (the members of) different types of ethnic population groups. The paper proceeds with an argument why it is imperative for the ECtHR (and international courts more generally) to develop such a strategy and incorporate super-diversity considerations consistently in the reasoning of judgments on fundamental rights of the respective groups concerned. The article concludes with some recommendations for the Court, on how it should proceed when developing its jurisprudence to incorporate super-diversity considerations.

Theoretical frame of analysis: human rights, interpretation, limitation analysis

When one wants to establish the current state of the art regarding human rights, research cannot be limited to the text of the relevant conventions only. The interpretation of the respective norms by the courtsⁱ throughout their review of state compliance is equally important (Christoffersen 2009; Smith 2013). Another important general consideration is that most fundamental rights are not absolute. Consequently, under certain conditions states can legitimately limit the enjoyment of these rights. In human rights law considerable attention goes to the interpretation principles adopted by the courts to assess whether particular limitations on the effective enjoyment of rights amount to legitimate limitations or to violations of the right concerned. The analysis tends to proceed in (at least) two stages (Van der Schyff 2005). First it needs to be considered whether the facts of the case come within the scope of application of one or more fundamental rights. For example does the wearing of a religious garment concern the manifestation of a religion, and thus comes within the scope of application of the freedom of religion? Once that is established, and an interference is made

out with the enjoyment of the right, the analysis turns to the justification for that interference put forward by the (respondent) state.

Important interpretation principles have been developed for human rights, that go beyond the 'normal meaning of the words' (Arato 2012) and reflect the specific characteristics of human rights treaties. A teleological interpretation implies that the interpretation of a provision is guided by its aim, objective, and/or underlying rationale, at times by the underlying principles of the human rights treaty as a whole, such as human dignity and pluralism (de Schutter & Tulkens 2008). Following the evolutive interpretation principle the Court underscores the importance to interpret the rights enshrined in the Convention in a way which is in line with the changed conditions and circumstances in society, so that these rights remain practical and effective (Dzehtsariou and O'Mahony 2012-2013). This interpretation principle leads to developments in the jurisprudence, most of the time in favour of a more extensive interpretation of the scope of application, and a more demanding review of limitations of rights.

The reference to the need for rights to be practical and effective is actually an overriding concern of the European Court of Human Rights, closely related to the principle of effective protection of fundamental rights (Dzehtsariou and C. O' Mahony 2013). This is also visible in the second stage or the limitations analysis and more particularly in relation to the central requirement that limitations need to be proportionate to the legitimate aim pursued by the state (Waldock 1980). In a system where the effective protection of fundamental rights is the goal, the scope of legitimate limitations is restricted. This translates in principle in a rather demanding review or level of scrutiny by the court of the justification put forward by the state. The level of scrutiny is inversely related to the discretion the court leaves to states. In other words, a more demanding scrutiny implies little discretion for the states, while an extensive discretion for the state implies a lenient, easy-going scrutiny. Arguably, the more demanding the review by the court, the stronger the protection of the right concerned (Christoffersen 2009). Inversely, when a broad discretion is left to states, the scrutiny is so lenient, that one could argue that the Court more or less leaves the matter to the state concerned, thus sharply reducing the protection of the right concerned.

However, from early on the ECtHR has developed a margin of appreciation doctrine in relation to the proportionality principle as an emanation of the fact that its protection is merely subsidiary to the primary responsibility of the contracting states to protect the rights enshrined in the convention (Arai-Takahashi 2002, Christoffersen 2009). Following the preceding argumentation, 'in principle' this margin of appreciation left to states would be narrow. Unfortunately, this is not the line that the Court has adopted. The margin the Court is willing to grant to the contracting states may not always be equally extensive, in several matters it is rather broad indeed, as the subsequent case analysis will confirm. In so far as granting a broad margin of appreciation implies that the Court is actually not evaluating the proportionality (and thus the legitimacy) of the interference concerned, one could argue the Court is abdicating its supervisory role (Legg 2012). Consequently, no guidance is given to the contracting states about the relevant criteria for the proportionality test, and jurisprudential refinements do not occur.

Throughout its case law, the Court has identified several factors that influence the width of the margin of appreciation in a particular case. Factors that feature prominently in this respect include the nature of the fundamental right concerned and the degree to which there would be a European

consensus on the matter (Arai-Takahashi 2002, Shelton 2006). When a right is considered to be essential to a democratic society, such as the freedom of expression, or the right concerns 'a particularly important facet of an individual's existence or identity' (Evans v UK, par.30) and is thus crucial for the individual's well-being, the margin of appreciation will be restricted (Schokkenbroek 1998).

According to the Court's steady jurisprudence, and particularly important for the following case analysis, the absence of European consensus should entail a broad margin of appreciation and thus a very lenient scrutiny. This position is not self-evident. One could also argue that exactly in situations where there is not yet a particular European consensus, that would be the moment for the international supervisor to set the boundaries. Importantly, an argument against leaving states a (broad) margin of appreciation does not advocate for a uniform standard, but rather for guidance about minimum protection levels (Henrard 2012). At the same time, the limits of international law need to be acknowledged, and especially the lack of enforcement possibilities of legally binding judgments against recalcitrant states. Put differently, the Court's judgments may be legally binding, in the end, the Court is dependent on the willingness of the states to actually abide by these judgments. This in turn implies that the Court needs to respect – at least to some extent- national traditions and sensitivities of the contracting states.

A lack of consensus is particularly visible regarding highly controversial themes: ethical issues, moral choices and choices about the place of religion in society, minorities and their rights. These themes tend to be so closely bound up with perceptions of national constitutional identity that the ECtHR is careful not to impose particular views, and steer towards European consensus. Put differently, in cases on controversial themes, the Court tends to be concerned about maintaining its political legitimacy. This concern entails a careful approach, leaving considerable room for national choices and related national differentiation, so as to avoid delivering judgments that are utterly unacceptable for the member states.

It goes beyond the confines of this paper to develop a sustained critique of the margin of appreciation doctrine of the Court (see in this respect Henrard 2012). However, in addition to the principled concern expressed above, the Court's margin of appreciation doctrine has also been said to actually undermine the legitimacy the Court is trying so anxiously to maintain (inter alia Dembour 2006). The argumentation developed (infra) in this paper, towards the inclusion of super-diversity considerations in the Court's reasoning (in relevant cases) ties to rule of law arguments, that also feature prominently in critiques of the margin of appreciation doctrine.

Case law analysis

Since super-diversity tends to be bound up with controversial questions that are closely related to the national constitutional identity of contracting states, one would expect the Court to almost categorically grant states a wide margin of appreciation in cases pertaining to super-diversity. However, the following case analysis demonstrates that no such 'principled' approach is forthcoming. At times the Court acknowledges the differential treatment between distinctive layers of ethnic diversity and will be ready to pressure states in a particular direction. Often, though, the Court seems to prefer to ignore the underlying differential treatment and to leave states a wide margin, not steering towards European convergence. Moreover, the Court does not acknowledge

these different approaches, let alone explain them in terms of relevant variables (and differences in this respect). Consequently, it is not (yet) possible to identify clear overarching principles in the Court's jurisprudence for cases concerning 'super-diversity'.

Super-diversity (more traditional v new ethnic groups) and political participation

Two cases regarding political participation in relation to different categories of minorities are particularly noteworthy, both in themselves and in relation to one another. In both cases access to electoral rights was restricted for some ethnic groups. However in one case the Court scrutinized mildly, concluding to a non-violation, while in the other the Court acknowledges both factors that point towards strict scrutiny and factors that would call for lenient scrutiny, fully reasoning its ultimate conclusion of a violation of the Convention.

In *Gorzelik v Poland* (17 February 2004) the European Court of Human Rights had to evaluate the refusal to register an association that explicitly invoked the qualification 'national minority'. This refusal is related to the Polish legal system's distinction between national minorities on the one hand and ethnic minorities on the other (par. 69). While the former are allowed to associate as such to pursue their common goals, they are not granted particular privileges, notably regarding passive electoral rights. These privileges are reserved for 'national minorities' (par. 105). Strikingly, the national legal system does not provide definitions of these two categories of minorities, let alone stipulates particular criteria that need to be fulfilled, and procedures that can be followed to obtain one or the other status. In practice national minorities are exclusively identified through bilateral treaties between Poland and another state (par. 61-63, 69-71).

A group of persons claiming to represent the Silesian minority attempted to register an association, under the name of Association of the Silesian National Minority. The registration was refused because the Silesian minority is not a national minority under Polish law and one suspected a ruse by the group concerned to claim electoral privileges the group would not be entitled to (par. 82-84).

The Court does repeat its steady line of jurisprudence on article 11's freedom of association that the freedom of association can only be legitimately limited in very narrow circumstances. In other words, states have a narrow margin of appreciation in the matter (par. 88, see also par. 95). The Court also underscores that in democratic societies the views of the majority should not always prevail but that a balance must be achieved which ensures the fair and proper treatment of minorities (par. 90). The Court furthermore recognizes that the freedom of association is particularly important for persons belonging to minorities, national and ethnic minorities alike (par. 93). Notwithstanding these promising lines of argumentation, all of which seem to point to a rather serious scrutiny, the Court chooses not to scrutinize strictly this refusal to register the association concerned. The Court does not explicitly argue the width of the margin of appreciation it grants Poland, but it appears to leave a particularly broad margin, seemingly because of the combination of three factors, each of which are characterized by a lack of European consensus.

Firstly, the Court had earlier in the same judgment highlighted that there is no consensus among contracting states, neither regarding the definition of minority, nor the practice of officially recognizing them (par. 67-68). Secondly, since the refusal to register is related to particular electoral privileges, the Court relies on its steady line of jurisprudence that the contracting states have a wide margin of appreciation in the design of their electoral system.ⁱⁱ Finally, the Court hints at its steady

line of jurisprudence that states have a broad margin of appreciation when balancing conflicting individual interests and rights. The Court refers indeed to the potential clash between the 'rights of other persons or entities participating in parliamentary elections' against infringement in case the association would indeed seek to prevail itself of the electoral privileges of a national minority (par. 103).

In view of the numerous hints at the appropriateness of a broad margin of appreciation for states, it was not that surprising that the Court concluded to the non-violation of art. 11. Nevertheless, it remains striking that the underlying and glaring differential treatment between ethnic minorities on the one hand and national minorities on the other is entirely glossed over, and that no argumentation is put forward about the (reasonable and objective) justification for this differential treatment. The Court does not even acknowledge that the differential treatment concerned is at least indirectly based on ethnic grounds. Consequently, there is also no reference to the starting position of strict scrutiny for differentiations on the basis of ethnicity. Actually, in *Gorzelik* the Court simply accepts the choice made in Poland to grant particular ethnic minorities an electoral advantage, and not to others, and does not even scrutinize whether this differentiation is in line with the prohibition of discrimination.

In *Sejdic and Finci v. Bosnia-Herzegovina* (22 December 2009) the ECtHR is confronted with a differentiation between ethnic groups that is arguably even more intertwined with the national constitutional identity of the country concerned. In line with the power sharing agreement that was concluded in Bosnia-Herzegovina following a bloody civil war, only persons belonging to the three Constituent Peoples (the Bosniacs, the Croats and the Serbs) are allowed to 1) stand for election to one of the two houses of parliament, and 2) are eligible to become president of the country. The power sharing agreement is widely considered to be an essential pillar of the fragile balance the country has currently found (see also the dissent by Judge Bonello).

Two Bosnian nationals that belonged to 'other groups', more particularly the Roma and Jews respectively, challenged this arrangement as violating the prohibition of discrimination. Arguably, the difference between the constituent peoples and 'the others' refers to a distinction between groups that are considered more 'indigenous', more 'traditional' than others. The case concerns in any event a glaring differentiation on ethnic grounds.

The Court acknowledges this and starts its analysis by pointing out that such differentiations on ethnic grounds tend to trigger heightened (strict) scrutiny: 'where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible' (par. 44). However, the Court immediately goes on to highlight that 'Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct 'factual inequalities' between them' (ibid.) This expression can be understood as indicating that measures of 'positive action' are not presumed to be illegitimate, which would imply that it is actually not necessary to adopt heightened scrutiny (Henrard 2011b).

In other words, the Court seems to show a willingness to accept in principle differentiations on the basis of ethnicity in this type of power sharing setting,

aimed at restoring the peace, ending a period of conflict and ethnic cleansing (par. 45), and in the end at ensuring 'effective equality between the constituent peoples'. The actual level of scrutiny

adopted by the Court indeed does not appear to be particularly demanding as the Court even exhibits sympathy for the adoption of power sharing arrangements in this particular context.

Nevertheless, the Court is ultimately swayed by the particularly radical nature of the total exclusion of representatives of the other groups, and concludes to a violation of the prohibition of discrimination on the basis of ethnicity. In this respect reference is made to a study of the Venice commission, which clearly demonstrated that power-sharing arrangements do not necessarily have to go hand in hand with the total exclusion of representatives of the other communities (par. 48, referring to par. 22). Arguably, the radical nature of the arrangement is such that it would have been difficult not to conclude to a disproportionate differentiation, and thus a prohibited discrimination, even under regular scrutiny (Henrard 2011b).

In *Sejdic-Finci*ⁱⁱⁱ the Court explicitly acknowledges the unusual context, and the related intricate political considerations pertaining to peace and stability, demonstrating a keen understanding of the related sensitivities (Tran 2011; Wakely 2010). Notwithstanding the various hints at the appropriateness of a level of scrutiny which is below 'strict scrutiny', the Court still actually scrutinizes the differential treatment between 'constituent peoples' and other ethnic population groups. The total nature of the exclusion of particular groups is considered disproportionate, and entails a violation of the prohibition of discrimination. In the process, the Court chose to take a clear stance against a particular national regulation notwithstanding it being closely bound up with national constitutional identity.

When comparing the two cases, the Court's reasoning in *Sejdic-Finci* is in several respects different from that in *Gorzelik*. The argumentation in *Sejdic-Finci* is both more explicit and more nuanced. What is particularly important for the analysis here is that the Court in *Sejdic-Finci* clearly did not completely refrain from scrutinizing the differential treatment concerned, as it did in *Gorzelik*. In other words, in the former case the Court does engage with the super-diverse context, in a context-sensitive manner, while it chooses to ignore the super-diversity dimension in the latter case. The two cases are set in a very different context, indeed, but differences of degree and of sensitivity can be taken on board in the proportionality analysis, as is nicely visible in *Sejdic-Finci*. However, in *Gorzelik* the Court does not even get into the proportionality analysis, its reasoning stops with the grant of a broad margin of appreciation to Poland. This extreme hands-off approach would seem to indicate that the *Gorzelik* matter is actually more sensitive than the *Sejdic-Finci* one? The marked differences in the Court's reasoning and approach in both cases arguably reveal that the Court has simply not yet developed a particular strategy for cases on super-diversity.

Super-diversity in the religious field (traditional and dominant religious groups versus newer religious minorities)

The lack of a principled approach by the ECtHR to 'super-diversity' is similarly visible in its case law on the freedom of religion, more particularly in cases involving the (differential) treatment of traditional and dominant religious groups, compared to new(er) religious minorities. The following analysis will reveal that not only does the Court use different 'benchmarks' for different 'religious freedom' themes, but also within one particular theme a consistent approach is lacking. Two 'religious freedom' themes that reveal a different base-line approach by the Court are the registration (recognition) of religions on the one hand and religion in education on the other hand. While the

former is 'governed' by article 9, the *lex generalis* of the freedom of religion; article 2 of the first additional protocol is considered to be the *lex specialis* thereof in educational matters.

According to the Court, the freedom of religion's central value is religious pluralism and this translates into a steady line of jurisprudence underscoring state duties of neutrality and impartiality (Nieuwenhuis 2007). States are indeed supposed to be neutral and impartial organizers of the exercise of various religions, faiths and beliefs, while its overall role is meant to be conducive to religious harmony and tolerance (Tulkens 2009). The freedom of religion is also often highlighted to be a cornerstone or one of the foundations of a democratic society, arguably pointing towards a narrow margin of appreciation (Henrard 2012).

However, in a broad variety of religious freedom cases the Court chooses to focus on the absence of a European consensus regarding 'religion-state relations' to grant states a wide margin of appreciation (Henrard 2012). The wide margin of appreciation for states tends to imply an extensive deference by the Court to the diverse national constitutional traditions in this regard. This deference to diverse national constitutional traditions is maintained also when these traditions reflect majoritarian assertions of national cultures permeated by Christian values – implying negative attitudes towards minority religions (Augenstein 2011; Martinez Torron 2012; Ungureanu 2011). This deference even goes as far as maintaining that a state church is not – as such- incompatible with the Convention, notwithstanding the obvious tensions between a state church on the one hand and state duties of neutrality and impartiality on the other (Henrard 2011a).

Nevertheless, regarding registration and cooperation systems used by states in relation to religions and religious communities the Court is de facto increasingly becoming demanding. It may still hold on to the wide margin of appreciation concerning religion-state relations, the Court now scrutinizes rather closely whether the criteria used in these systems are non-discriminatory and the related procedures are transparent. In the end all religions should have a fair chance of obtaining that 'special' status. Particularly relevant for the analysis here, and its focus on (differential rights and treatment of) traditional and 'new' religions, is the Court's critical scrutiny of requirements of enduring existence.

In a case pertaining to the Church of Scientology in Russia (*Kimlya et al v Russia*, 1 October 2009), the Court criticized a 15 year waiting period before religious movements could become eligible for registration as unreasonable. According to the Court, this arrangement violates article 9's freedom of religion because it would disproportionately thwart the manifestation of religion by relatively new religious minorities (par. 99-102). A similar finding was made in a case pertaining to Jehovah's witnesses a year earlier (*Religionsgemeinschaft der Zeugen Jehovas and others v Austria*, 31 July 2008), where a waiting period of 20 years -until a religious movement could obtain recognition as a legal entity- was considered a violation of article 9. The Court held that this prolonged lack of legal status disproportionately inhibited the exercise of several of the movement's religious activities (par. 78-80).

Apparently the Court gives increasingly pride of place to state duties of neutrality and impartiality, also in the field of registration and recognition systems, which are arguably at the core of 'religion-state relations'. This was more recently confirmed in a case brought by various religious communities against Hungary (*Magyar Kereszteny Mennonita Egyhaz et al v Hungary*, 8 April 2014,). The case was triggered by a change in the legislation on the requirements to obtain the status of incorporated

church (necessary to perform all religious activities). The new law introduced an extensive length of existence requirement of 100 years internationally or 20 years in Hungary. In its analysis the Court underscores the central importance of neutrality and impartiality, also when the state exercises its regulatory power in the sphere of religious freedom in its relations with different religions and beliefs (par. 76). According to the Court, state duties of neutrality and impartiality are at odds with placing novel communities in a disadvantageous situation, by inhibiting them in the exercise of their religious activities: 'the Court accepts that the prescription of a reasonable period might be necessary in the case of newly established and unknown religious groups. But the same is hardly justified for religious groups established ... after the end of the communist regime in Hungary and which must be familiar to the competent authorities by now' (par. 111). The Court goes on to opine that 'such differentiation does not satisfy the requirements of State neutrality and is devoid of objective grounds for the differential treatment. Such discrimination imposes a burden on believers of smaller religious communities without an objective and justifiable reason' (par. 112).

The latter case makes abundantly clear that the Court is critical about a state which operates a distinction between religious communities, also in terms of required amount of years in existence, when this would disadvantage new religious groups/minorities, without reasonable and objective justification. The Court furthermore links this discrimination reasoning explicitly to a failure to respect state duties of neutrality and impartiality.

Obviously both in *Magyar Kereszteny* and in *Kimlya* the differential treatment between religious communities is central to the case. Nevertheless, in both cases the Court refuses to make an explicit assessment in terms of article 14's prohibition of discrimination, because the inequality of treatment was sufficiently taken into account in the assessment of article 9 (*Kimlya*, par 104; *Magyar Kereszteny*, par 114). It is indeed standing practice of the Court not to investigate the discrimination complaint (under article 14 in combination with another article), when it has already concluded to a violation of the latter article in itself.^{iv} Nevertheless, the Court used to underscore that this would be different if the differential treatment is a fundamental aspect of the case (*Airey v Ireland*, 9 October 1979; Melchior 1991). This line is obviously not adopted in the cases discussed here, which is especially striking in *Magyar Kerezsteny* where the analysis under article 9 is actually replete with discrimination lingo (both regarding terminology and criteria).

Interestingly, in *Magyar Kerezsteny* the Court does seem to hint at an impending re-assessment about the compatibility of state churches with the Convention. More particularly the Court argues that historical-constitutional traditions of countries can imply that a state church is acceptable under article 9, *especially* when this predates accession to the Convention (par. 100). The Court is careful not to limit the acceptability of state churches to those predating accession. Nevertheless, in its balancing exercise under article 9 it does explicitly take into account that the change in legislation, and the introduction of a two tier system (and related differentiation), was a new (recent) development. The Court furthermore acknowledges that a state church implies 'providing state benefits only to some religious entities and not to others in furtherance of legally prescribed public interests' (par. 113), and underscores that this should be based 'on reasonable criteria related to the pursuance of public interests' (par. 113).

Overall, the Court is clearly sending multiple signals that state churches are potentially problematic in view of state duties of neutrality and impartiality under article 9. Notwithstanding its refusal to

assess the case in terms of article 14, it's reasoning under article 9 highlights the discrimination problem. A more explicit analysis in terms of the prohibition of discrimination and a substantive consolidation of this line of reasoning would certainly increase the protection of newer religious movements, particularly against disadvantageous treatment in comparison with dominant religions which have obtained the status of state church.

The other religious theme analysed here, namely the place of religion in education, is equally closely intertwined with national (constitutional) identity while fundamentally concerning the relation between the traditionally dominant religion and newer religious movements. Also here interesting developments can be identified regarding the way in which the Court deals with differentiations between religious movements, and the margin of appreciation it leaves states. However, no consistent pattern can be discerned in this respect: the two judgments discussed here demonstrate very different approaches to the matter indeed. On the one hand, *Folgero* is widely considered to be the judgment which sets clear limits to the extent to which a traditional religion may dominate teaching in the public curriculum (Tulkens 2009). The more recent judgment in *Lautsi* on the other hand allows states to have a symbol of the traditional religion, to the exclusion of symbols of other religions, in all classrooms of public schools.

Folgerø et al v Norway (29 June 2007) concerns religious education in a country where the overwhelming majority adheres to the state religion, Lutheran. The complaint pertains to a new compulsory subject which was introduced, namely 'Christianity, Religion and Philosophy'. According to the claimants this subject would not provide objective, critical and pluralistic information, but would be strongly geared towards Christianity. In its preceding jurisprudence the Court had interpreted parents' right to respect for their religious and philosophical convictions in the education of their children (under article 2, protocol 1) as requiring states to ensure that the information included in the public curriculum is conveyed in an objective, critical and pluralistic manner. This requirement is arguably closely related to state duties of neutrality and impartiality under article 9 (the *lex generalis* concerning the freedom of religion).

However, the Court had reduced parents' right to a protection against indoctrination, because it would be impossible to construct a curriculum that pleases all parents in all respects (Martinez-Torron 2012; Plesner 2005). The parents' rights were further reduced by the Court's acceptance that the prohibition of indoctrination only covers actual instances of coercion and blatant indoctrination, thus disregarding more subtle forms of indoctrination (Henrard 2011c). Indeed, traditionally the Court accepted that education about (not of) religions, focuses on a particular religion (to the virtual exclusion of all others) because of its traditional importance in the country (Evans 2008). This line of reasoning was criticized because it is difficult to understand how a course, which is pervaded by the doctrine of one religion, can provide objective, critical and pluralistic information.

In *Folgerø* the Court purports to conform to this line of jurisprudence, explicitly confirming that states have a wide margin of appreciation regarding curriculum choices, and repeating that in itself disproportionate attention to one particular religion in a class 'about' religions in public education would not amount to indoctrination (par. 89). The Court even states that the important place of one particular faith in the national history may legitimately influence the choices of the national authorities in terms of curriculum (par. 89). Nevertheless, on closer scrutiny the Court actually scrutinizes all aspects of the course closely, thus leaving a narrow margin to the state (par. 90-93).

Apparently, the Court no longer accepts that the traditional religion ‘dominates’ a class about religions in the public curriculum. Indeed, it concludes in *Folgerø* to a violation of the Convention because the quantitative and qualitative differences in the course between Christianity and the other religions imply a failure to provide the requisite objective, critical and pluralistic information in public education (par. 95 and 101; Henrard 2011c).

However, in other cases the Court has (ultimately) allowed states to perpetuate the traditional dominance of one particular religion, de facto excluding the other (newer) religions and philosophical convictions. A case which needs to be discussed in this respect is the *Lautsi* case, which turns around the question whether having a crucifix in classrooms of state schools violates state duties to respect parents’ religious and philosophical convictions in relation to education and to teaching (article 2, protocol no 1). The *Lautsi* case actually gave rise to two judgments of the ECtHR, one by a regular section of 7 judges, and one by the Grand Chamber, consisting of 17 judges. The Grand Chamber only considers a case when it concerns important interpretation questions of the Convention, and/or decisive shifts in existing lines of jurisprudence. In *Lautsi*, the Grand Chamber reconsidered the case, and formulated a second judgment with virtual opposite reasoning and conclusions in comparison to the first judgment. The Chamber judgment had actually focused on state duties of neutrality and impartiality in religious matters, and had concluded to a violation because the government aligned itself with one particular religion in the public education arena. The Grand Chamber’s judgment is focused upon here, because that is the judgment that carries most weight, and ultimately reflects the jurisprudence of the ECHR. Furthermore, the Grand Chamber judgment shows again a Court which prefers to gloss over super-diversity features.

The Grand Chamber does acknowledge that the state duty to impart information and knowledge in an objective, critical and pluralistic manner applies to the organization of the school environment (Henrard 2011c), and thus to the question of the crucifix in the classroom (para 63,65). It also admits that the crucifix is above all a religious symbol (par 66) and a mandatory crucifix in every classroom of a public school ‘confers on the country’s majority religion preponderant visibility in the school environment’ (par. 71). Nevertheless, throughout its reasoning the Grand Chamber focuses on the wide margin of appreciation of states regarding the organization of the school environment (Henrard 2011c). Unsurprisingly, it follows the government’s arguments about the lack of evidence that the display of a religious symbol on classroom walls may have an influence on pupils (par. 66), and about the crucifix being a merely passive symbol (par. 72), while there is no obligatory teaching of Christianity, and religious practices of minority religions are allowed at public schools (par. 74). In other words, in the end, the Grand Chamber hides behind the broad margin of appreciation it grants states in the matter and accepts the preponderant visibility of the dominant, traditional religion in the public school environment.

The preceding analysis revealed marked differences in the ECtHR’s approach to ‘religious super-diversity’, more particularly regarding the extent to which it de facto steers states in a particular direction, while narrowing their margin of appreciation. It is striking that the Court becomes ever more critical about differentiations between the various religions present in a state, not only regarding registration and recognition schemes but also concerning the place of religion in the public curriculum. The Court’s criticism regarding the demand of an extensive time period of presence before a religious movement would be eligible for registration, clearly benefits new religious minorities, and fights disadvantageous treatment of the latter as compared to traditional religions.

Similarly, the Court does not accept that a course on religion in the public curriculum disproportionately reflects the traditional, dominant religion. However, in other cases the Court still allows states (a broad margin of appreciation) to perpetuate the traditional dominance of one particular religion, de facto excluding the other (newer) religions and philosophical convictions. Put differently, the analysis of the cases on religious themes confirms the lack of consistent approach and of related lines of jurisprudence by the ECtHR pertaining to (religious) 'super-diversity'.

Official recognition of minority marriages: religious marriages versus Roma marriage

This lack of a considered and consistent approach towards cases concerning 'super-diversity' and the emergence of relevant criteria to evaluate these is further compounded by the *Munos Diaz* judgment. This case concerns the double discrimination complaint by a Roma widow, who was only married in accordance with Roma rites. Throughout its reasoning the Court exhibits an ambivalent attitude towards the recognition of Roma marriages in comparison to religious marriages.

According to Spanish legislation, a widow only receives a survivor's pension when she is officially married, that is following a civil wedding or one of the religious weddings which are recognized as official marriage. Nevertheless, other marriages that are 'in good faith' are also accepted as a basis for a survivor's pension. The Court follows the widow's reasoning that the state duty to give special consideration to the needs of minorities also implies that they need to consider marriages according to Roma rites that are accepted as such by that community as 'marriages in good faith'. According to the Court the facts clearly disclose that the widow was married in good faith (par. 58), which the government had actually officially recognized several times (par. 62-63). Consequently, the Court opined that Spain's failure to grant the widow a survivor's pension because her marriage would not be in good faith, amounts to a differential treatment which does not have a reasonable and objective justification and thus to a prohibited discrimination (par. 71).

However, the Court does not consider that the Spanish state's refusal to recognize Roma marriages as valid, official marriages amounts to (a second instance of) a prohibited discrimination (par. 81). While there may be good reasons to distinguish Roma marriages from those marriages that were officially recognized so far, the Court does not really argue that in any way. It simply states that this complaint is manifestly ill founded because Roma marriages are not religious marriages (par. 80-81). The latter statement seems to refer to a lack of comparability between Roma and religious marriages. The claimant's argument that Roma marriage is deeply rooted in Roma culture and that this marriage is the only one accepted by the community (par. 76) arguably implies that Roma marriages are comparable to religious marriages. However, the Court in no way specifies in what way Roma marriages would need to be comparable to religious marriages -in order to become eligible for official recognition- and actually are not. Furthermore, it is difficult to see how the Court's point about Spain not having denied the essence of the right to marry because everyone can obtain a civil marriage (par. 78-79), addresses the complaint that Roma marriage are not officially recognized in comparison to several other (religious) non-civil marriages (Ruiz Vieytez 2013).

Regarding this second discrimination complaint the Court does not hide behind a broad margin of appreciation it leaves to the state, it clearly does not want to actually evaluate and pronounce itself on the underlying differential treatment and rights of different 'ethnic' groups. In other words, in

regard to the second discrimination claim, the Court fails to engage with the substance of the complaint and thus also fails to acknowledge and address the super-diverse dimension at hand.

A (consistent) strategy on super-diversity: the rule of law and an explicit development of the Court's non-discrimination jurisprudence

When critically comparing the ECtHR's approach in the various cases analysed here, the Court has clearly not developed a thought-out approach towards super-diversity, which clarifies the different criteria, that are relevant, as well as the way in which these interact in concrete cases. Each of the selected cases deals with 'superdiversity', defined in this working paper, as an encounter of different layers of ethnic diversity, more particularly the differential treatment and different rights meted out to the distinctive ethnic groups: traditional versus less traditional ethnic groups; traditional, dominant versus newer minority religions; and religious versus ethnic minorities.

Indeed, the Court's practice reveals different approaches rather than a recurring pattern. At times the Court chooses to critically assess differential treatment of different layers of diversity, while at other times it ignores this dimension and/or prefers to hide behind a broad margin of appreciation of the state parties. Strikingly, the Court does not acknowledge these different approaches, let alone attempts to explain these differences in light of an overarching rationale and relevant variables (for example the degree to which national constitutional identity questions are in order).

The resulting uneven track-record of the Court in relation to cases regarding super-diversity, entails a lack of predictability, which sits uneasily with the rule of law. The latter is not only one of the foundational values of the European Convention on Human Rights (ECHR) (Lautenbach 2013), the ECtHR furthermore uses the rule of law as a fundamental guiding principle to the application and interpretation of the Convention (Greer 2013:195).

Furthermore, in most cases the explicit non-discrimination analysis (in terms of article 14) is avoided, notwithstanding the centrality of the differential treatment and rights of the respective ethnic groups. If the Court would develop its more explicit reasoning in cases concerning super-diversity in terms of the prohibition of discrimination, this would not only improve predictability (and thus the rule of law), but would also imply an important boost for the Courts' non-discrimination jurisprudence. Admittedly, cases reflecting super-diversity would tend to be complex cases, in which an extensive range of relevant interests are at play, and often several layers of disadvantage co-exist and exacerbate one another. Consequently, it may be impossible for the Court to quantify exactly the respective weight of all the interests in play. Nevertheless, the Court would greatly enhance the transparency (and predictability) of its reasoning if it would acknowledge the differential rights concerned, identify the related interests, and reflect on their relative weight, while having regard to a possible multitude of layers of disadvantage. Over time, the Court could then refine the relevant parameters and build its jurisprudence, gradually but surely.

Recommendations by way of conclusion

As contemporary societies are increasingly becoming super-diverse, and as the rule of law, a hallmark of the ECHR system and of liberal democracies, requires a decent level of predictability, the

ECtHR is recommended to develop a more explicit, consistent and coherent approach to deal with cases concerning super-diversity. It is in any event important that the Court does not totally abdicate European supervision, even when it grants states a certain margin of appreciation.

The Court correctly acknowledges that arguments relating to ‘tradition’ (we always did it this way – this reflects the traditional dominance of a particular religion) should not be decisive. In addition, it remains important to clarify, in terms of the prohibition of discrimination, what factors are relevant to evaluate the acceptability of differentiated rights for different population groups. Arguably, the differentiation in rights of the different groups should take into account the extent to which they are comparable in particular respects. Furthermore, the mere fact of being traditional or rather new should not be decisive. Instead, other more substantive factors, that matter for the particular subject matter at hand, should be identified. The selected case law has already clarified that for example in the field of electoral rights concerns about representativity matter, while for religion in education, state neutrality is an important consideration. Similar guiding principles can be identified for other subject matters on the basis of the existing jurisprudence, and can then be related to the relevant super-diversity marker. A lot will still depend of the interpretation adopted by the Court, as well as by the weighing of all respective interests. Nevertheless, incorporating these super-diversity considerations in a consistent manner in the Court’s reasoning will contribute to a coherent jurisprudence, in line with the rule of law. Furthermore the concomitant gradual refinement of the ECtHR’s non-discrimination jurisprudence could also contribute to tackling other types of complex cases.

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Endnotes

ⁱ The term court and international court is used here in the broad sense of the word, encompassing quasi-judicial or court-like bodies. These bodies do not produce legally binding jurisprudence but their pronouncements have nevertheless considerable de facto authority.

ⁱⁱ According to the Court 'there are numerous ways of organizing and running electoral systems and a wealth of differences, inter alia in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into their own democratic vision' (*Hirst v UK* (no 2), EHRM (GC) 6 October 2005, par. 61).

ⁱⁱⁱ At the same time the case and its aftermath demonstrate the limit of international law and the binding legal judgments of the ECtHR. While international law is clear that domestic law, even if constitutional in character, cannot justify non compliance with international law and judgments, 'compliance is always more difficult and presents more complex political challenges when constitutional instruments have been considered to be in violation of the Convention' (Milanovic 2010). An ongoing political deadlock in the country blocks the constitutional amendment which is required to comply with the Court's judgment: by May 2014 the country has still not implemented the judgment (which should have been complied with by October 2010 for the Council of Europe, and again by 31 august 2012 for the EU's accession negotiations: see also Brljavac 2012).

^{iv} Article 14 ECHR only prohibits discrimination in relation to the other rights of the ECHR and thus needs to be invoked with another article, enshrining a particular substantive right.