

Conference of European Churches – Thematic Reference Group on Human Rights



5th Summer School on Human Rights

Legal training on the European Human Rights regime

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Structure (Wednesday and Thursday legal trainings)

A. General Introduction (overview and definitions)

I. Human Rights – What do we understand by the term?

1. Different ‚generations‘ of Human Rights
2. Where does religion fit in here?

II. Freedom of Religion or Belief (FORB) – What does it entail?

1. Focus: FORB as a freedom right
2. FORB as an equality right

III. Protection of Human Rights – how are they guaranteed?

1. Law
2. Promotion and enforcement
3. Human Rights systems complementing each other – the European Human rights ‚regime‘

B. The European framework and instruments

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1. What is the OSCE
2. The 'Human Dimension'
3. Intergovernmental complaint mechanisms
4. Individual complaint mechanisms

II. The Council of Europe (COE)

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2. The Convention for the Protection of Human Rights and Fundamental Freedoms (short: European Convention of Human Rights – ECHR)
3. The European Court of Human Rights (ECtHR)

III. The European Union

1. The EU, fundamental freedoms and fundamental rights
2. The European Charter on Fundamental Rights (ECFR)
3. The [European] Court of Justice (ECJ)

IV. The European Human rights 'regime' - Conclusions

1. Synergies and competition/conflict
2. Subsidiarity

A. General Introduction (overview and definitions)

I. Human Rights – What do we understand by the term?

1. Different ‚generations‘ of Human Rights

a. First generation: civil-political rights

- ♦ ‘classic’ fundamental rights: freedom and equality
- ♦ subjective ‘claim’ rights; defense against state interference
- ♦ direct obligation of the state to refrain from action, indirect obligation to act (protect)

b. Second generations: socio-economic

- ♦ rights of participation: economic, social and cultural
- ♦ direct obligation of the state to act (deliver)

[c. Third generation: collective rights, e.g. self-determination; natural resources; environment ...]

2. Where does religion fit in here?

a. Religion is an all encompassing concept, relating to human personality and identity – it therefore has many dimensions that claim relevance in different social spheres.

b. Therefore, it is relevant in all two/three generations

- ♦ originally/historically, it is a classic freedom right: personal belief should be chosen personally, not by the state/society (e.g. art. 18 UDHR)
- ♦ soon also equality rights became attached: your personal choice should not lead to discriminatory treatment (primarily) by the state (e.g. art. 2 UDHR)
- ♦ as belief is not only a personal matter, but also a cultural phenomenon, it also affects areas such as education (e.g. art 13 ICESCR)
- ♦ as belief is not only a personal matter, but also a social phenomenon, it also affects peoples (minority rights)

II. Freedom of Religion or Belief (FORB) – What does it entail?

1. Focus: FORB as a freedom right

a. Range of protection

- ♦ religious (transcendental reference) and belief (immanent) *systems*
- ♦ positive and negative side (freedom to and freedom from)
- ♦ right to have (or change) a religion (forum internum)
- ♦ right to manifest (exercise: ‘teaching, practice, worship and observance’) a religion (forum externum)
- ♦ individual, collective and corporative aspects

b. Limitations

- ♦ general: balancing conflicting fundamental rights (by law or jurisprudence)
- ♦ particular: laws pursuing legitimate social aims (public safety, public order, health or morals)

c. Limitations to limitations

- ♦ principle of proportionality (legitimate aim, adequate means, necessity, appropriateness, prohibition of excessiveness)
- ♦ principle of non-discrimination

2. FORB as an equality right

a. in relation to the state

- ♦ (almost) absolute with regard to the individual believer
- ♦ with certain reservations binding towards religious communities/organisations

b. between private parties

- ♦ no direct effect of the fundamental right
- ♦ indirect effects (general principles)
- ♦ Anti-discrimination legislation (as collision law)

III. Protection of Human Rights – how are they guaranteed?

1. Law

a. National constitutions

b. EU primary law

- ♦ treaties
- ♦ European Charter of Fundamental Rights

c. International instruments (treaties and agreements)

- ♦ (Universal Declaration of Human Rights [non-binding political reference document])
- ♦ International Covenant on Civil and Political Rights (ICCPR)
- ♦ International Covenant on Economic, Social and Cultural Rights (ICESCR)
- ♦ Convention on the Rights of the Child (CRC)
- ♦ ...

2. Promotion and enforcement

a. National institutions

- ♦ Human Rights institutions (commissions, institutes, ombudspersons...)
- ♦ Constitutional (or Supreme) Courts

b. European Union Institutions

- ♦ **European Union (EU)** – institutional: Fundamental Rights Agency (FRA) and EU Special Representative for Human Rights (EUSR); **judicial: European Court of Justice (ECJ)**

c. International Organisations and their specialised and/or juridical bodies

- ♦ United Nations (UN) – Office of the High Commissioner for Human Rights (OHCHR)
- ♦ **Organisation for Security and Cooperation in Europe (OSCE)** – **political: Office for Democratic Institutions and Human Rights (ODIHR)**

- ♦ **Council of Europe (CoE)** – intergovernmental: Steering Committee for Human Rights (CDDH); institutional: Commissioner for Human Rights; **judicial: European Court of Human Rights (ECHR)**
- ♦ ...

3. Human Rights systems complementing each other – the European Human rights ‘regime’

a. Human Rights as a global governance issue

- ♦ problem of enforcement on the international level: no vertical structures
- ♦ alternatively, horizontal structures need to be established to coordinate the nation states’ Human Rights endeavours: ‘global governance’
- ♦ by ‘global governance’ I refer to all procedures and institutions that aim at
 - steering the processes of communication and cooperation between states and between states and other relevant international actors (such as international civil society organisations and transnational companies) and
 - transforming such processes, by way of binding rules and regulations, into sectoral and thematic-transsectoral regimes, so as to juridify the outcomes and enhance their enforceability.
- ♦ by ‘regime’ I refer to all institutions and instruments of international law that relate to the same subject and which, in their sum, contribute to its being regulated on the international level.

b. Overlapping systems in the European context

- ♦ national Human Rights guarantees (constitutional and others)
- ♦ EU Human Rights guarantees (primary law)
- ♦ Council of Europe Human Rights guarantees (European Convention of Human Rights)
- ♦ OSCE Human Dimension Commitments (Helsinki Final Act and Concluding Documents of OSCE meetings)

B. The European framework and instruments

I. The Organisation for Security and Cooperation in Europe (OSCE)

1. What is the OSCE

a. history

- ◆ Conference on Security and Co-operation in Europe (CSCE) and 'Helsinki process'
- ◆ 1975: Helsinki Final Act – 'Helsinki Decalogue'
- ◆ 1990: Charter of Paris for a New Europe
- ◆ 1994: Institutionalising of the Conference, re-named: 'Organisation' replaces 'Conference'

b. structure

b. work

} see graphic depiction

How we work

Inclusiveness underpins everything the OSCE does.
OSCE participating States enjoy equal status and take decisions by consensus.

Decision-making bodies

Summit

Meetings of Heads of State or Government of OSCE participating States set priorities, take decisions and provide orientation at the highest political level.

Ministerial Council

The meeting of foreign ministers from OSCE States, the Ministerial Council is the central decision-making and governing body of the OSCE.

Permanent Council

The PC is the regular body for political dialogue and decision-making among representatives of all OSCE States, meeting weekly in Vienna.

Forum for Security Co-operation

The FSC is an autonomous decision-making body where representatives of participating States meet weekly to consult on military stability and security.

OSCE Parliamentary Assembly

The OSCE PA is made up of more than 300 parliamentarians from the OSCE's 57 States, offering parliamentary input and taking action on OSCE-related work and facilitating co-operation between lawmakers.

Personal Representatives of the Chairperson-in-Office

The Personal Representatives are tasked by the Chair to work on preventing and managing conflicts in the OSCE region, and to ensure co-ordination in specific areas like gender and youth issues, and to promote tolerance and non-discrimination.

Chairmanship

A different participating State holds the OSCE Chairmanship each year with that country's foreign minister acting as Chairperson-in-Office. The Chairmanship co-ordinates decision-making and sets the OSCE's priorities during its year in office.

Troika

The Troika consists of representatives of the current, preceding and future Chairmanships.

Executive structures

Secretary General

Elected to a three-year term by the Ministerial Council, the Secretary General heads the OSCE Secretariat in Vienna, acting under the guidance of the Chairperson-in-Office.

Secretariat, Vienna

The Secretariat assists the Chairmanship in its activities, and provides operational and administrative support to field operations and, as appropriate, to other Institutions.

Office for Democratic Institutions and Human Rights, Warsaw

ODIHR promotes democratic elections, respect for human rights, the rule of law, tolerance and non-discrimination, and the rights of Roma and Sinti communities.

Representative on Freedom of the Media, Vienna

The Representative observes media developments in all 57 OSCE participating States and provides early warning on violations of free expression and media freedom.

High Commissioner on National Minorities, The Hague

The High Commissioner's role is to provide early warning and take appropriate early action to prevent ethnic tensions from developing into conflict.

OSCE in the field

The OSCE's field operations assist host countries in putting their OSCE commitments into practice and fostering local capacities through concrete projects that respond to their needs. The field operations enable the OSCE to tackle crises as they arise, and in many places play a critical post-conflict role, helping to restore trust among affected communities.

South-Eastern Europe

- Presence in Albania
- Mission to Bosnia and Herzegovina
- Mission in Kosovo
- Mission to Montenegro
- Mission to Serbia
- Mission to Skopje

Eastern Europe

- Mission to Moldova
- Project Co-ordinator in Ukraine
- Special Monitoring Mission to Ukraine
- Observer Mission at the Russian Checkpoints Gukovo and Donetsk

South Caucasus

- Personal Representative of the OSCE Chairperson-in-Office on the conflict dealt with by the OSCE Minsk Conference

Central Asia

- Centre in Ashgabat
- Programme Office in Astana
- Programme Office in Bishkek
- Programme Office in Dushanbe
- Project Co-ordinator in Uzbekistan

OSCE-related bodies

Joint Consultative Group

This Vienna-based body deals with questions relating to compliance with the provisions of the Treaty on Conventional Armed Forces in Europe.

Open Skies Consultative Commission

This body meets regularly in Vienna and consists of representatives from each of the 34 States that have signed the Open Skies Treaty.

Court of Conciliation and Arbitration

This Geneva-based Court serves as a mechanism for the peaceful settlement of disputes in accordance with international law and OSCE commitments.

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2. The 'Human Dimension'

a. definition

- ♦ acknowledging that 'lasting security cannot be achieved without respect for human rights and functioning democratic institutions'
- ♦ acknowledging that 'pluralistic democracy based on the rule of law is the only system of government suitable to guarantee human rights effectively'
- ♦ creating 'a common pan-European public order (ordre public)', transcending the principle of sovereignty and non-interference:
 - » Commitments undertaken in the field of the human dimension of the OSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned. « (Moscow Document, 1991)
- ♦ however, there is no comprehensive 'human dimension' or even 'human rights' codex, but the OSCE acquis, formed of all relevant documents produced through the OSCE process

b. religion (FORB)

- ♦ Helsinki Decalogue, no. VII:
 - » Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. «
 - » ***Respect for the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.*** «
- ♦ Madrid 1983, par. 13 and 14
 - » ***In this context, they will consult, whenever necessary, the religious faiths, institutions and organizations, which act within the constitutional framework of their respective countries.*** «
 - » ***They will favorably consider applications by religious communities of believers practicing or prepared to practice their faith within the constitutional framework of their States, to be granted the status provided for in their respective countries for religious faiths, institutions and organizations.*** «

- ♦ Vienna 1989, par. 16 and 17
 - Many concrete commitments, such as
 - » foster a climate of mutual tolerance and respect «
 - » respect the right of these religious communities to establish and maintain freely accessible places of worship or assembly; organize themselves according to their own hierarchical and institutional structure; ***select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State***; solicit and receive voluntary financial and other contributions «
 - » ***engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom*** «
 - » respect the right of everyone to give and receive religious education in the language of his choice, whether individually or in association with others «
 - » ***favourably consider the interest of religious communities to participate in public dialogue, including through the mass media*** «
 - adding the standard statement on limitations and limitations to limitations
- ♦ Copenhagen 1990, par. 18
 - adding the right to conscientious objection

3. Intergovernmental complaint mechanisms

a. the Vienna Mechanism

‘allows a participating State, through a set of procedures, to raise questions relating to the human dimension in another OSCE participating State’

b. the Moscow Mechanism

‘builds on this and provides for the additional possibility to establish ad hoc missions of independent experts to assist in the resolution of a specific human dimension problem’

4. Individual complaint mechanisms

- ♦ No official mechanism, but guidelines and good practice
- ♦ Methods include: factfinding, investigations, interventions with governments, appeals for the release of prisoners, trial monitoring, assistance to refugees and displaced persons, mediation

II. The Council of Europe (COE)

1. [What is the Council of Europe] – covered by Ambassador Dragana Filipovic

2. The Convention for the Protection of Human Rights and Fundamental Freedoms (short: ECHR)

a. history and relevance

- ♦ signed 1950, entered into force 1953
- ♦ open for the member states of the Council of Europe and the EU
- ♦ also open for the EU (art. 52 II ECHR i.c.w. art. 6 II TEU), but still pending (see below B.IV)
- ♦ 'safety net': sets minimum standards that signatory states must not undermatch, but can go beyond
- ♦ The ECtHR (established by section II of the Convention) further develops the ECHR through its jurisprudence

b. norms on religion

- ♦ art. 9 (Freedom of thought, conscience and religion); art. 14 (Prohibition of discrimination); art. 2 ProtECHR, 1952, (Right to education); art. 1 ProtECHR No. 12, 2000, (General prohibition of discrimination)
- ♦ **art. 9 - Freedom of thought, conscience and religion**
 - » (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
 - (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. «

3. The European Court of Human Rights (ECtHR)

a. competence

- ♦ » to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto « (art. 19)
- ♦ » The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto [...] « (art. 32)
- ♦ » Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party. « (art. 33)
- ♦ » The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. « (art. 34)
- ♦ » If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party. « (art. 41)
- ♦ » The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. « (art. 46)

b. case law on religion

General principles:

- ♦ religion features very prominently in the ECtHR's jurisprudence. The Court basis its jurisprudence on the fundamental realisation that 'freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.' (Kokkinakis and others)
- ♦ a tendency can be seen that there are more cases against such states as have an officially preferred religion, but the ECHR does not exclude the possibility of either a state church or a national religion as long as other religions or beliefs are not discriminated against otherwise
- ♦ states are been given a wide margin of appreciation concerning state-religion relations

- ♦ areas covered by case law are, *inter alia*, negative religious freedom (oaths; passports; wage-tax-cards); religious autonomy (state intervention in internal conflicts; labour law); religion in the public sphere (crosses; headscarves)
- ♦ Concerning complaints by churches and religious communities, the court took some time and deliberation to accept their right to sue. It first started from a notion of representation (of believers), but finally developed a concept of corporate religious freedom following from art. 9 and art. 11 (freedom of association) being read/interpreted in conjunction.

Exemplary decisions:

- ♦ **Rommelfanger; Obst/Schüth**
church labour law: religious organisations can – generally – freely select, appoint and replace their personnel in accordance with their respective requirements and standards, including moral/doctrinal requirements, but they have to make case-specific weighing of the conflicting interests, being open for exemptions to that general rule should the interests of the worker outweigh those of the organisation
- ♦ **Hasan and Chaush/ Metropolitan Church of Bessarabia**
In case of an leadership/schismatic conflict, the state must not take side for political reasons
» Indeed, **the autonomous existence of religious communities is indispensable for pluralism** in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. «
- ♦ **Jehovah's Witnesses of Moscow**
Religious organisations must be granted legal personality
- ♦ **Kurtulmuş/Dahlab/Leyla Şahin/Dogru/Savanci et.al.**
In deliberating if the wearing of headscarves in public institutions can be limited/forbidden, states have a wide margin of appreciation, taking into account if they rather lean towards a more secularist or a more religious character and which aims they want to achieve

- ♦ **Lautsi**
States have a wide margin of appreciation in displaying religious symbols in the public sphere (schools). The case was highly disputed and had to be decided by the Grand Chamber. It rejected the notion of the Chamber that the 'negative' aspect of FORB required states to refrain from taking into account the formative effect religions have on culture and society.
- ♦ **Osmanoğlu and Kocabaş**
Mixed swimming lessons are an aim that justify a limitation to FORB
- ♦ **[Minarets/Switzerland: So far no admissible complaint decided upon]**

III. The European Union

1. The EU, fundamental freedoms and fundamental rights

a. development

- ♦ European Communities were a **political project**, but build **by economic means**. Therefore, its focus was on **Fundamental Freedoms** (free movement of goods, capital, services, and labour), not on **Fundamental Rights**.
- ♦ ECJ found early that, despite the lack of a Human Rights codex in EC law, Human Rights have to be applied as general principles of Community Law (Stauer: Rs C-29/69), but only in its own context (Internationale Handelsgesellschaft: C-11/70)

b. sources

- ♦ constitutional traditions common to the Member States
- ♦ ECHR

c. religion

- ♦ at first only sporadic references (e.g. Mt Athos)
- ♦ Amsterdam Treaty brought more: non-discrimination, welfare of animals, status of churches
- ♦ Lisbon Treaty consolidated this, adding preamble, Art. 17 (status and dialogue), ECFR

2. The European Charter on Fundamental Rights (ECFR)

a. development

- ♦ 1999: 'European Convention' drafted the Charter; 2000: solemn proclamation
- ♦ 2009 : Treaty of Lisbon
 - » The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. «
- ♦ (opt-out protocol for UK and Poland)

b. norms on religion

♦ **Article 10 – Freedom of thought, conscience and religion**

» 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right. «

♦ **Article 14 – Right to education**

» 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right. «

♦ **Article 21 – Non-discrimination**

» 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. «

♦ **Article 22 – Cultural, religious and linguistic diversity**

» The Union shall respect cultural, religious and linguistic diversity. «

3. The [European] Court of Justice (ECJ)

a. competence

» It shall ensure that in the interpretation and application of the Treaties the law is observed. «
(art. 19 I TEU)

» rule on actions brought by a Member State, an institution or a natural or legal person; « (art. 19 III TEU)

independence and primacy of EU law (Van-Gend-&-Loos, C-26/62; Costa/ENEL, C-6/64;

Internationale Handelsgesellschaft, C-11/70; Simmenthal II, C-10/77)

b. case law on religion

- ♦ **Viviane Prais (1976)**
EC Institutions must try to accommodate religious holidays as far as possible
- ♦ **Egenberger (2017)**
Churches can be forced to employ personell of other or no religious affiliation
- ♦ **Achbita (2017)**
Private employers may impose dress codes that prohibit religious symbols from being worn
- ♦ **Bougnaoui (2017)**
In imposing dress codes that prohibit religious symbols from being worn private employers may not discriminate

IV. The European Human rights 'regime' - Conclusions

1. Synergies and competition/conflict

- ♦ different levels of protection come with different levels of enforceability: national and supranational laws/judicature are enforceable, while international laws/judicature depend on the good-will of the State Parties and there is no competence to change laws (only to grant compensation)
- ♦ there is a competition between national Constitutional/Supreme Courts, the ECJ and the ECtHR. This competition could be solved if the EU would fulfil its obligation to sign the ECHR and submit to the ECtHR's judicature. The ECJ's attitude is defensive and does not help the consolidation of the European Human Rights regime

2. Subsidiarity

- ♦ the primary level for the guarantee and protection of fundamental/human rights is the nation state. We should all advocate firstly on this level that a high level of protection is secured

- ♦ the more power the supranational level attains, the more important does it become to develop its own fundamental rights guarantees because of the primacy of EU law
- ♦ when developing the supranational human rights regime, a wide margin of appreciation must be left on the national level as FORB is also closely related to historic state-religion-relations