



Substantive equality in community law

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Strategic thinking
on equality and mobility

HR treaties and RED

RED (3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the **International Convention on the Elimination of all forms of Racial Discrimination** and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the **European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.**



Substantive equality in RED

- RED Article 5
- With a view to ensuring **full equality in practice**, the principle of equal treatment **shall not prevent** any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.



Substantive equality in ICERD I.

- Article 2.2.
- States Parties **shall**, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of **guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms**. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.



ICERD's impact on RED's application I.

- How to apply Article 5 RED in light of (3) RED?
- European Parliament v Council of the European Union (Case C-540/03), judgment of the Court of 27 June 2006, paras. 35-39.



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ICERD's impact on RED's application II.

- „Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from ...the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.”
- ECHR has special significance, while the ICCPR and the CRC are instruments the ECJ „takes account in applying the general principles of Community law”.



ECHR's impact on RED's application

I.

- *Thlimmenos*: “The right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.” BUT no positive obligation
- *Connors*: vulnerable position of Gypsies warrants special consideration of their needs arising from Gypsy way of life, and imposes positive obligation on States under Article 8
- *Cyprus v. Turkey*: Once special measures are in place for minority, they shall be maintained.



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ECHR's impact on RED's application II.

As UK, French and Irish Travellers are primarily nomadic, the key issues relate to the **extent to which** positive provision **should be made** for the special needs of Traveller families.



ECHR's impact on RED's application III.

- D.H. and others v the Czech Republic 2007 (Ostrava II): unless special measures are taken, no justification for discrimination against Roma
- the schooling arrangements for Roma children were not attended by **safeguards** that would ensure that ... the **State took into account their special needs as members of a disadvantaged class** (para. 207.)



ECHR's impact on RED's application IV.

These special needs cannot be taken into account by simply refraining from discrimination, ie amending legislation. Unless making special financial investments into developing new tests and training professionals, the Czech Republic cannot facilitate the special interests of Roma children. Under the RED this sort of special provision amounts to positive action, which has been rather narrowly defined in sex discrimination cases.

Segregation – a special case

- ICERD Article 3: States Parties particularly condemn racial segregation and apartheid and undertake to **prevent**, prohibit and **eradicate** all practices of this nature in territories under their jurisdiction
- RED does not define segregation

Minority rights

- Permanent International Court of Justice advisory opinion on Minority Schools in Albania – no positive **obligation** on States
- “Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.” **Deprivation** of the minority community from institutions that ensure the preservation of minority ‘peculiarities’ would render minority rights protection ‘illusory’ as it could compel the minority “to renounce that which constitutes the very essence of its being a minority”.
- FCNM Article 4(2): full and effective equality – measures shall be proportionate. ECHR case law only elevates Roma as a specific group with special needs that warrant positive obligations.

Information at EU level

- http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm#stud
- Beyond Formal Equality
- Segregation of Roma Children in Education