

CONSTITUTIONS, MINORITIES AND SUPERDIVERSITY

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Abstract: Superdiversity is an interesting concept that needs to be incorporated into the field of legal sciences. A comparative analysis of the European Constitutions shows that constitutional references to culturally based minorities reflect the particular political context of each country, although there is a correspondence between the categories generally employed in comparative constitutional law and those in common use in international institutions. In addition to the cultural elements that characterise minorities (language, ethnicity, religion, nationality), other identity factors such as sex (gender), physical appearance (phenotype), opinions or convictions and social or economic status are generally included in anti-discrimination provisions. However, other elements that are relevant to the idea of superdiversity, such as place of residence within an urban environment and employment status, hardly appear in the European constitutional texts. If superdiversity is implemented without calibrating it to each context it may pose a threat to the fair and appropriate treatment of traditional minorities.

Keywords: Superdiversity, cultural diversity, minorities, constitutions, comparative law, discrimination.

SUMMARY: 1. INTRODUCTION. 2. SUPERDIVERSITY AND THE CONSTITUTIONAL COMPARISON. 3. DIVERSITY ELEMENTS IN THE EUROPEAN CONSTITUTIONS: MINORITY GROUPS AND DISCRIMINATION GROUNDS. 3.1. Constitutional references to minority groups. 3.2. Cultural and identity elements as discrimination grounds. 4. MINORITIES, DISCRIMINATION GROUNDS AND SUPERDIVERSITY: ANALYSIS AND CHALLENGES. 5. CONCLUSION.

1. INTRODUCTION

This paper discusses the constitutional treatment of diversity, with special emphasis on minorities. It specifically aims to analyse how the constitutions of European countries deal with the minority groups within their societies, and whether they in any way reflect superdiversity as a category. The analysis is limited to the fundamental texts and not extended to the full scope of constitutional law. The starting hypothesis is that constitutions cover cumulative grounds of discrimination and specific minority situations, depending on the particular context and tradition of each country. At the same time, however, common patterns can be found in identifying the elements of diversity that are currently incorporated into constitutional texts. This exercise is intended to increase awareness of the challenges of today's superdiverse societies and to assess the position of traditional minorities under European constitutions.

A fundamentally comparative method will be used to do this. I will first define the object of study by approaching Superdiversity and its meanings from a constitutional comparative lens. I will then outline how diversity markers are present at European constitutions analysing how and how often minority references and specific grounds of dis-

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crimination are mentioned by the constitutions, identifying those that are most frequently found, and reflect the complex diversities that are usually included in the generic notion of minority. Finally, from the previous analyses I will draw some conclusions and warn about the challenges that constitutional law should meet concerning diversity management today.

2. SUPERDIVERSITY AND THE CONSTITUTIONAL COMPARISON

The term of ‘Superdiversity’ was coined by sociologist Steven Vertovec (2007) to reflect the complex dynamics and relationships caused by population movements in urban settings, while also taking into account both cultural and social/legal factors. This concept has found wide resonance in the social sciences, particularly in Europe (Deumert 2014, 116; Meissner and Vertovec 2015, 541; Arnaut, Blommaert, Rampton and Spotti 2015; Creese and Blackledge 2018; Pavlenko 2018; Foner, Willem and Kasinitz 2019).

There is not a unique idea about what Superdiversity means. Indeed, Vertovec classifies 7 ways in which Superdiversity has been used in different social sciences (Vertovec 2019). As a minimum, it can be stated that Superdiversity has been understood as a concept, as an approach and as a methodology tool. As a concept, superdiversity is sometimes read as synonymous with ‘very much diversity’ or ‘more ethnicity’ to reflect an increasing complexity of migration dynamics and cultural relations derived from it, particularly in urban settings, going beyond simple differences understood in terms of binary oppositions. Used as a methodology, superdiversity looks for deepening or complementing traditional multiculturalist approaches and incorporating analysis that captures and goes beyond ethnicity or national belonging as their main element. In addition, the superdiversity approach aims to improve the analysis of current social phenomena that derive from population movements different from those that occurred after the Second World War. At the same time, it seeks to account for the complex differentiating factors involved, rather than to carry out a segmented or static analysis of social groups. In this sense, the superdiversity approach poses a challenge for so-called traditional minorities, insofar as their sometimes already weak or vulnerable position can be diluted into a diffuse amalgamation of differentiating elements that blur the outlook of a minority as a recognisable subject in need of protection.

It is true that superdiversity entails a multitude of factors, among which differences in socio-economic and legal status are equally important. However, the term is primarily designed to address diversities resulting from recent population movements in the context of urban settings, which does not necessarily match the needs of many of Europe's traditional minorities. How superdiversity can be a tool applicable to the field of national minority protection has yet to be studied and reflected upon.

Philimore, Sigona and Tonkiss have pointed out that the interest sparked in migration studies by the superdiversity proposition has not been transferred to research from the point of view of governance and policymaking (Philimore, Sigona and Tonkiss 2020). Similarly, this approach has yet to be imported into legal studies. The emphasis on the variety of differentiating elements and interaction between them leads to relating super-

diversity not only to the protection of minorities, but above all to the intersectionality studied for the field of anti-discrimination law. I will analyse here which factors European constitutions incorporate as possible grounds of discrimination, as well as their frequency of occurrence and their relation to the idea of minority traditionally used in the main legal and political documents on the subject today. If superdiversity is to be a useful concept for the legal sciences, it will first be necessary to analyse the extent to which the law addresses diversity factors and their possible cross-relationships.

Comparison of constitutional texts is needed for such an analysis. Comparative law emerged during the 19th century, with the first International Congress of Comparative Law being held in 1900 on the occasion of the World Exhibition in Paris in the same year. However, the early days of comparative law were marked by an interest in private law, and the comparison of constitutions did not gain momentum until the latter part of the 20th century (Ginsburg and Dixon 2011: 2). Regarding the constitutional comparison of minority rights and mentions, the most relevant existing international studies are either partial, or limited in its material scope (Hannum 1993; De Varennes 1996; Thornberry 1991; Capotorti 1991; Dinstein and Tabory 1991; Yacoub 1995; Fenet 1995; Pentassuglia 2002)², as it is the case with the comparison of anti-discrimination provisions (Osin and Porat 2005; Chopin and Germaine-Sahl 2017).

² In Spain, several scholars have published relevant research about minorities in the last 30 years, but not following a systematic comparative approach. Among others, we can mention (in alphabetical order): ARP, B. (2008), *Las minorías nacionales y su protección en Europa. Centro de Estudios Políticos y Constitucionales*, Madrid; BAUTISTA JIMENEZ, J.M. (1995), “El Convenio Marco para la protección de las Minorías Nacionales: construyendo un sistema europeo de protección de las minorías“, en *Revista de instituciones europeas*, vol. 22, no. 3, 939-960; CARBONELL SANCHEZ, M., “Minorías y constitución”, in CARBONELL SÁNCHEZ, M and VALDES, D. (2000), *Constitucionalismo iberoamericano en el siglo XXI*, 15- 32; CARBONELL SÁNCHEZ, M. (2000), “Constitucionalismo, minorías y derechos”, *Isonomía: Revista de teoría y filosofía del derecho*, no 12, 95-118; CARNERERO CASTILLA, R. (1999), “El Convenio Marco del Consejo de Europa para la protección de las Minorías Nacionales”, en *Boletín jurídico de la Universidad Europea de Madrid*, no. 2, 1999; CASTELLA SUBIRATS, S. (2002), *La protección internacional de las minorías. El estatuto jurídico internacional de las minorías: una aproximación histórica al desarrollo normativo y la acción institucional*, Tarragona, Silva editorial; CONDE PEREZ, E. (2001), *La protección de las minorías nacionales en la organización para la seguridad y la cooperación en Europa (OSCE)*, Universidad Complutense, Madrid. CONTRERAS MAZARIO, J.M. (2004), *Las Naciones Unidas y la protección de las minorías religiosas*, Tirant lo Blanch, Valencia. DE LUCAS, J. (1993), “Algunos problemas del estatuto jurídico de las minorías. Especial atención a la situación en Europa”, in *Revista del Centro de Estudios Constitucionales*, no. 15, 97-128; DEOP MADINABEITIA, X. (2000), *La protección de las minorías nacionales en el Consejo de Europa*, Oñate, Instituto Vasco de Administración Pública; DIAZ BARRADO, C.M. (1999), *La protección de las minorías nacionales por el Consejo de Europa*, Madrid, Edisofer; DIAZ PEREZ DE MADRID, A. (2004), *La protección de las minorías en Derecho internacional*, Granada, Universidad de Granada; FERNANDEZ LIESA, C.R. (2001), “La protección de las minorías en el Derecho internacional general. Análisis de la evolución y del estatuto jurídico internacional”, in MARIÑO MENENDEZ, F., FERNÁNDEZ LIESA, C.R. and DIAZ BARRADO, C.M., *La protección internacional de las minorías*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 51-217; GARCIA RODRIGUEZ, I. (ed.) (2001), *Las minorías en una sociedad democrática y multicultural*, Alcalá de Henares, Universidad de Alcalá; GONZALEZ HIDALGO, E. y RUIZ VIEYTEZ, E. (2013), “El derecho a la autonomía como contenido emergente del derecho a la participación política de las minorías nacionales en Europa”, *Revista*

The comparative method, considered a fifth method of constitutional interpretation (Häberle 2010: 387), requires accurately defining the object of study from the outset, as well as recognising some limits. This comparison focuses on the European continent, including all the states that are members of the Council of Europe, as well as those that only have borders with members of the Council. Consequently, there are 50 constitutions corresponding to the sovereign states in this geographical space to be analysed. State-aspiring entities that have obtained fewer than 10 international recognitions have

Electrónica de Estudios Internacionales, no. 24; GONZALEZ HIDALGO, E. and RUIZ VIEYTEZ, E. (2012), “La definición implícita del concepto de minoría nacional en el Derecho Internacional”, *Derechos y Libertades*, no. 27, 17-56; GUTIERREZ VEGA, P. (2006), “Minority Report. La ‘vis atractiva’ del concepto de ‘minoría’ sobre el de ‘pueblo indígena’ en la Convención Marco para la Protección de las Minorías Nacionales”, in PEREZ ROYO, J., URIAS MARTINEZ, J.P. and CARRASCO DURAN, M. (eds.), *Derecho Constitucional para el siglo XXI*, vol. II, Thomson-Aranzadi, Cizur menor, 5045-5065; JIMENEZ PIERNAS, C.B. (1999), “El Convenio Marco para la Protección de las Minorías Nacionales, de 1 de febrero de 1995, y su aplicación en España”, in GARCIA RODRIGUEZ, I. (ed.), *Las ciudades de soberanía española: respuestas para una sociedad multicultural*, Universidad de Alcalá, Alcalá de Henares, 105-130; LÓPEZ BASAGUREN, A. (2013), “La Carta Europea de lenguas regionales o minoritarias: ¿un modelo para las sociedades multilingües más allá de la protección minoritaria?”, in LOPEZ CASTILLO, A. (dir.), *Lenguas y Constitución Española*, 129-149; MARIÑO, F., DIAZ BARRADO, C.M. and FERNANDEZ LIESA, C. (2001), *La protección internacional de las minorías*, Madrid, Ministerio de Trabajo y Asuntos Sociales; PAREJO ALFONSO, L. (2000), “Minorías y constitución”, in RODRÍGUEZ PALOP, M.E. and TORNOS, A., *Derechos culturales y derechos humanos de los inmigrantes*, Universidad Pontificia de Comillas, Madrid, 141-170; PETSCHEN VERDAGUER, S. (1990), *Las minorías lingüísticas de Europa Occidental: documentos (1492-1989)*, Parlamento Vasco, Vitoria-Gasteiz, 37-87; PRIETO SANCHIS, L. (1996), *Tolerancia y minorías: problemas jurídicos y políticos*, Universidad de Castilla-La Mancha, Cuenca; RELAÑO PASTOR, E. (2003), *La protección internacional de las minorías religiosas*, Centro de Estudios políticos y Constitucionales, Madrid; RUIZ VIEYTEZ, E. (1999), *The History of Legal Protection of Minorities in Europe (XVIIIth - XXth Centuries)*, University of Derby, Derby; RUIZ VIEYTEZ, E. (2006), *Minorías, inmigración y democracia en Europa. Una lectura multicultural de los derechos humanos*, Tirant lo blanch-Universidad de Valencia, Valencia; RUIZ VIEYTEZ, E. (2008), “Minorías, nacionalidades y minorías nacionales. La problemática aplicación en España del Convenio Marco para la protección de las Minorías Nacionales”, in *Revista Vasca de Administración Pública*, no. 82, 187-225. RUIZ VIEYTEZ, E. (2011), “Nuevas minorías y diversidad cultural”, in AÑÓN ROIG, M.J. and SOLANES CORELLA, A. (eds.), *Construyendo sociedades multiculturales. Espacio público y derechos*. Universidad de Valencia-Tirant lo Blanch, Valencia, 45-82; RUIZ VIEYTEZ, E. (2013), “Immigration and Cultural Justice: A Reflection on Human Rights of “New” Minorities”, in MERLE, Jean-Christophe (dir.), *Spheres of Global Justice. Global Challenges to Liberal Democracy. Political Participation, Minorities and Migrations*, Springer Science, London, 365-377; RUIZ VIEYTEZ, E. (2013), “Minority marriage and discrimination: redrafting Muñoz Díaz v. Spain”, in BREMS, E. (ed.), *Diversity and European Human Rights*, Cambridge University Press, Cambridge, 401-425; RUIZ VIEYTEZ, E. (2014), “Derechos y Minorías nacionales”, in PECES-BARBA MARTINEZ, G.; FERNANDEZ GARCIA, E.; DE ASIS ROIG, R.; ANSUATEGUI ROIG, J. and FERNANDEZ LIESA, C. (dirs.), *Historia de los Derechos fundamentales. Siglo XX. Vol. V*, Dykinson, Madrid, 1083-1151; RUIZ VIEYTEZ, E. (2014), “Minorías nacionales o étnicas, lingüísticas y religiosas”, in BARRANCO AVILES, M.C. y CHURRUCA MUGURUZA, C. (eds.), *Vulnerabilidad y protección de los derechos humanos*, Tirant lo blanch, Valencia, 139-166. RUIZ VIEYTEZ, E. (2014), “España y el Convenio Marco para la Protección de las Minorías Nacionales: una reflexión crítica”, *Revista Española de Derecho Internacional*, vol. 66-1, 55-80; SORIANO DIAZ, R., (2004), “Las minorías y la Constitución española”, in BETEGÓN CARRILLO, J., LAPORTA SAN MIGUEL, F.J., PRIETO SANCHÍS, L. and DE PÁRAMO ARGÜELLES, J.R., *Constitución y derechos fundamentales*, Presidencia del Gobierno. Madrid, 543-568.

been excluded, but Kosovo and the Vatican/Holy See are included, as they maintain diplomatic relations with more than 100 UN Member States. Among these 50 States there are certainly very different political forms and sizes, but at the same time more similarities than differences can be found from a constitutional point of view.

One of the most significant limitations of comparison in constitutional law is the linguistic diversity it implies. The European constitutions to be analysed are written in different languages and very few of them can be compared in their original version. This comparative exercise is only possible by using unofficial translations of constitutional texts into a single language. This poses problems in identifying concepts in languages and that do not always have a clear correspondence in English or vary in meaning depending on the socio-cultural contexts (Pegoraro and Rinella 2007, 102). In addition, there is no internationally standardised legal terminology for any area of comparative law, nor for the one being dealt with here, which entails accepting that identity of terms does not necessarily mean identity of meanings.

Similarly, the differences between European constitutions are not only limited to linguistic aspects, but also to other features. Most of them are inscribed within very similar legal-political cultures and a many have been adopted over the last decades. But these are different texts. From the point of view of structure, the most notable differences are those cases where we do not have a formal written constitution in the strict sense (United Kingdom), and where a text is not specifically called a constitution. For the Czech Republic the Charter of Fundamental Rights and Freedoms will be taken as a reference, whereas for Sweden the Instrument of Government will be used. In the rest of the countries, a constitutional text can be clearly recognised. Although this comparison of constitutional provisions is not exhaustive in nature, such a large and relatively homogeneous set of constitutional texts can provide innovative and relevant evidence in a methodologically valid comparison.

3. DIVERSITY ELEMENTS IN THE EUROPEAN CONSTITUTIONS: MINORITY GROUPS AND DISCRIMINATION GROUNDS

3.1. Constitutional references to minority groups

Constitutional references to minorities or similar groups are very uneven in European constitutions. This analysis includes general or group-specific references that do not correspond to the population majority in the country in question, or to its official elements. Of the total of 50 constitutions, 16 can be found in which there is no explicit reference to minorities³, which means that a total of 34 incorporate in some way one or more of the categories of minorities or a concept directly related to minorities. These include the case

³ These are the constitutions of a) very small countries such as Andorra, Monaco, San Marino, Malta, the Vatican, Luxembourg, Liechtenstein and Iceland; b) countries that are significantly reluctant to recognising minorities: France, Turkey, and Azerbaijan; c) countries that recognise minorities but whose constitutional texts do not contain references to the issue, basically because they are old texts: Denmark, Germany, Ireland, and the Netherlands; and d) the United Kingdom, which has no formal written constitution.

of the Georgian constitution, which does not include categories of minorities, but does contain one allusion to ‘minority rights’ in Article 38.2.

The remaining 33 constitutions incorporate concepts that refer to minorities or groups that are not part of the majority in each country. The term most frequently used is that of ‘National Minority’, which appears in the constitutions of Ukraine, the Czech Republic, Poland, Albania, Bosnia, Armenia, Estonia, Romania, Croatia, and Serbia. Similar terms are employed in other constitutions. According to the translations, the term ‘National Group’ is used in the constitutions of Slovakia and Kosovo; ‘National Community’ in those of Hungary, Slovenia, and Montenegro. The latter also refers to the ‘Minority Nations’. In addition, there are three constitutions (Spain, Hungary, and Serbia), which include the term ‘Nationalities’. There is a total of 16 constitutions that contain terms similar to the ‘National Minorities’ category together in this first group of countries.

The second group of concepts is related to religious minorities. The terminology is also diverse here. The term ‘Religious Community’ predominates, which can be found in the constitutions of Hungary, Slovenia, Croatia, Serbia, Montenegro, Albania, Portugal, Switzerland, North Macedonia, Finland, Norway, and Belgium. The concept of ‘Religious Minority’ as such is only mentioned in the Swedish constitutional text. Kosovo and Belarus incorporate the term ‘Religious Group’, and Norway the term ‘Belief Community’. Finally, The Greek constitution uses the term ‘Holy Community’ to refer to the special case of the monastic communities of Mount Athos. Thus, there is a total of 16 constitutions that contain references to religious minorities. An admittedly separate case, albeit related to this kind of minorities, is the very original reference to ‘Ideological and Philosophical Minorities’ (Art. 11) in the Belgian Constitution.

The adjective ‘ethnic’ has also characterised minorities, both in UN documents and in some legal systems. In European constitutional terms, the expression ‘Ethnic Minorities’ appears in the texts of Latvia, Sweden, Poland, and the Czech Republic. Other constitutions incorporate very similar terms. This is the case of ‘Ethnic Communities’ in the constitutions of Lithuania, Belarus, and Hungary, and ‘Ethnic Groups’ in Austria (‘Autochthonous Ethnic Groups’), Slovakia, and Kosovo. Finally, it is worth mentioning here that the Hungarian Constitution is the only one that maintains the category of ‘Racial Community’, retaining an adjectival form to refer to the concept of minority found in the documents from the 1920s and 1930s. Consequently, the total number of constitutions which incorporate some reference to minorities on the basis of ethnic differences is 10.

In the context of ethnic minorities, there are four other constitutions that include categories relating to indigenous peoples or minorities, which have traditionally benefited from being considered ethnic minorities in the interpretation of Article 27 ICCPR. Thus, the category of ‘Indigenous Minority People’ appears in the Russian constitution, and that of ‘Indigenous People’ in those of Finland and Ukraine. Additionally, the constitutions of Sweden, Norway and Finland refer to the Sámi as a ‘People’.

Linguistic minorities are less often found in European constitutions. This concept is only included in the constitutions of Sweden, Italy, Switzerland, and Austria. The

Kosovo Constitution refers to ‘Linguistic Groups’ and the Swiss Constitution alludes to ‘Linguistic Communities’. Thus, the language issue is the least frequently found in constitutional texts that have traditionally used an adjectival form for the term minority. This is consistent with increased explicit references to minority language rights in some constitutions and to specific references to certain non-majority languages or their speaker communities.

Finally, there are other related concepts that can be identified in a comprehensive review of the 50 European constitutions. The Albanian Constitution refers to ‘Minorities’ (Art. 3) and the Swedish Constitution to ‘Minority groups’ (IG, chapter 2) - both examples of non-adjectival uses. The most commonly used term, however, is ‘Communities’, which appears in the constitutions of Kosovo, North Macedonia, and Belarus. The first two of these refer on several occasions to ‘Communities not in the majority’ or ‘Underrepresented Communities’. The latter also adds the term ‘Social Communities’ (Art. 14). The Constitutions of Cyprus, North Macedonia, Kosovo, and Slovenia also use the concept of ‘Community’ when referring to specific groups within their territory⁴. The Finnish Constitution also alludes to ‘Other Groups’ (Art. 17).

All in all, 16 European constitutions contain references to national minorities or very similar concepts; another 16 include allusions to religious minorities; 15 constitutions refer to ethnic minorities or indigenous peoples, and 5 to linguistic minorities. Two other constitutions refer to philosophical or ideological minorities and minority groups, respectively. A comparative analysis of the constitutions (see Table 1) seems to confirm that the adjectives that continue to define minorities today are the same as those cited in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. This indicates that the most outstanding diversity factors for this purpose continue to be religious, ethnic, linguistic, and national.

3.2. Cultural and identity elements as discrimination grounds

Nearly all European constitutions incorporate an anti-discrimination provision; there are certainly few that do not. Apart from the specific case of the United Kingdom⁵, there are no articles prohibiting discrimination in the Constitutional Act of Denmark, the Fundamental Law of the Vatican City State, and in the Constitutions of Luxembourg and Monaco. Three other constitutions incorporate references to non-discrimination in other singular provisions, such as the one on freedom of conscience and religion (Art. 44 of the

⁴These references are the following: for Slovenia, the Hungarian and Italian national communities (Art. 11); and the Roma community (Art. 65); for Kosovo, the Serb community (Arts. 59, 64, 78), the Roma community, the Ashkali community, the Egyptian community, the Bosnian community, the Turkish community, and the Gorani community (Art. 64); for Northern Macedonia, Turks, Vlachs, Roma, Serbs, and Bosniaks (Art. 78); for Cyprus, the Greek and the Turkish communities (Arts. 1, 2, 108).

⁵As for England and Wales, the non-discrimination principle was incorporated in the *Race Relations Act* (1965), the *Equal Pay Act* (1970), the *Sexual Discrimination Act* (1975), the *Disability Discrimination Act* (1995), the *Gender Recognition Act* (2004) and the *Equality Act* (2010).

Table 1: Constitutional categories relating to minority or non-majority groups

International categories	Other related constitutional categories	Constitutions which include them	No. of Const.
National Minority		Ukraine, Czech Republic, Poland, Albania, Bosnia, Armenia, Estonia, Romania, Croatia, Serbia	16
	National Group	Slovakia, Kosovo	
	National Community	Hungary, Slovenia, Montenegro	
	Minority Nations	Montenegro	
	Nationalities	Spain, Hungary, Serbia	
Religious Minority		Sweden	16
	Religious Community	Hungary, Slovenia, Croatia, Serbia, Montenegro, Albania, Portugal, Switzerland, North Macedonia, Finland, Norway, Belgium	
	Religious Group	Kosovo and Belarus	
	Belief Community	Norway	
	Holy Community	Greece	
Linguistic Minority		Sweden, Italy, Austria	5
	Indigenous linguistic minorities	Switzerland	
	Linguistic Groups	Kosovo	
	Linguistic communities	Switzerland	
Ethnic Minority		Latvia, Sweden, Poland, Czech Republic	10
	Ethnic Communities	Lithuania, Belarus, Hungary	
	Ethnic Groups	Slovakia, Kosovo	
	Autochthonous Ethnic Groups	Austria	
	Racial Community	Hungary	
Indigenous people		Finland, Ukraine	5
	Indigenous Minority People	Russia	
	(Sami) People	Sweden, Norway, Finland	
(Ideological and Philosophical Minorities)		Belgium	1
Generic concepts	Minorities	Albania	8
	Minority groups	Sweden	
	Communities	Kosovo, North Macedonia, Belarus, Cyprus, Slovenia	
	Communities not in the majority	Kosovo, North Macedonia	
	Underrepresented Communities	Kosovo	
	Other groups	Finland	

Irish Constitution), the one recognising the right to life, honour, and liberty (Art. 5.2 of the Greek Constitution), and the one that limits the restrictions on rights derived from the application of States of Emergency (Art. 25 of the Constitution of Montenegro).

Of the 42 European constitutions that include a specific anti-discrimination clause, the texts from Belgium, Latvia, Poland, Belarus, Liechtenstein, and Norway do not incorporate a list of grounds of discrimination. Therefore, considering the three mentioned in the previous paragraph, there is a total of 39 lists of grounds of discrimination in European constitutions. These 39 listings can be presented as an exhaustive and closed list of grounds, (model followed by 16 constitutions: Austria, Bulgaria, France, Germany, Greece, Ireland, Italy, Lithuania, Malta, Portugal, Romania, Azerbaijan, Georgia, Macedonia, Moldova and San Marino) or as a non-exhaustive or open-ended list of factors (like in the following 23 countries: Czech Republic, Cyprus, Croatia, Slovakia, Slovenia, Spain, Estonia, Finland, Hungary, Netherlands, Sweden, Andorra, Armenia, Bosnia, Iceland, Kosovo, Montenegro, Russia, Ukraine, Turkey, Albania, Serbia, Switzerland, Slovakia, Slovenia, Andorra, Turkey, Serbia, and Switzerland). The latter can be technically specified through the incorporation of a general residual ground ('any other possible social or personal status' or similar formulations) or through initial expressions that present them as illustrative within the list ('in particular...', 'including such as...', or similar). The main difference between the above models, is the scope for intervention by the courts in the application of anti-discrimination rules. In the case of closed lists, their action is basically limited to considering only the grounds included, whereas in an open-ended model they have a wider scope for intervention in the identification of possible additional grounds (Solanke 2017, 43).

The analysis of the frequency and importance given in Europe to the possible grounds of discrimination at the constitutions, will provide us some guidelines to understand the factors of cultural diversity recognised by comparative constitutional law. Considering the linguistic differences in their wording, the first grouping of the same or very similar terms results in 50 different factors being identified. As for their frequency range within the European constitutions, the grounds 'sex/gender' and 'race' appear in more than 30 constitutions. 'Language/linguistic affiliation' and 'political opinion/condition/conviction/belief/views' appear in more than 20 constitutional texts. And other grounds mentioned by more than 10 constitutions are 'colour (of skin)', 'property (status)', '(other) opinion', 'birth', 'national origin', '(social) origin', 'ethnicity' and 'nationality', being the rest of grounds cited by less than 10 constitutions, including 'belonging/association with/affiliation to a national minority'.

However, many of these elements show clear commonalities among them. This initial analysis is still too open and many of the factors or elements emerging can be considered close to each other. Therefore, a second grouping has to be made, based on the semantic proximity of several of the categories listed. These different groupings can help to simplify and improve the analysis. A first group is based on the different ways of referring to religion, religious belief, religious conviction, religious affiliation, faith, worship or other similar terms. The second macro-group includes references to visible phenotypic aspects of people such as 'race', 'skin colour', 'colour' or 'genetic traits'. The third

one results from interrelating elements such as convictions, opinions or beliefs that are not expressly religious, ideologies, opinions or philosophical ascriptions. Other groups include the various references to social status (social condition/social circumstance/social affiliation/social belonging/social origin/social status/social position/class); economic status (economic situation/economic condition/financial position/material standing/property/property status); national origin (origin/place of origin/homeland/national origin/nationality/national affiliation); ethnicity (ethnicity/ethnic identity/ethnic origin/ethnic affiliation); occupation (occupation/way of life); and personal status (personal condition/personal circumstance/personal status/official status/estate). There may also be a macro-group for health-related items (health/disability/functional disability/physical, mental, or psychological disability), another for membership of political or trade union organisations (membership of public associations/organisations/trade union/political parties/political affiliation), and another for membership of minorities (belonging to/association with/affiliation to a national minority/minority group/community).

This second grouping exercise reduces the final number of discrimination grounds to 25, of which 8 are present in 20 or more constitutions in Europe (see Table 2).

Other less frequent elements that are in principle highly relevant for Superdiversity include ‘birth’, with 14 mentions; ‘ethnicity’ (ethnic identity/ethnic origin/ethnic affiliation) with 10 mentions, ‘minority belonging’ (belonging to/association with/affiliation to a national minority/minority group/community) with 7, and ‘place of residence’, with 3.

Table 2: Groups that contain the grounds of discrimination included in at least 20 European constitutions

Groups of terms	Terms included in constitutions	No of constitutions
Religion	religion/religious affiliation/religious condition/ religious condition/creed/faith/sect/religious opinion/ religious conviction/religious belief	39
Sex	sex / gender/gender/gender identity	36
Physical appearance	race/skin colour/colour/genetic features	35
Ideology or opinion	opinion/other opinion/worldview/ political views/other views/conviction/other conviction/ideological belief/ philosophical belief/belief/other belief/ideological convictions/political opinion/political condition/ political conviction/political belief	35
National Origin	origin/place of origin/homeland/national origin/ nationality/national affiliation	32
Language	language/linguistic affiliation	29
Social status	social condition/social circumstance/ social affiliation/social belonging/social origin/ social status/social position/class	26
Economic status	economic situation/economic condition/ financial position/material standing/property/property status	23

‘Culture’ and ‘ancestry’ appear only once. Other grounds mentioned by few constitutions include health/disabilities, personal status or circumstances, membership of political or social entities, education, age, sexual orientation, parentage and occupation.

This implies that more than three quarters of the grounds of discrimination in European constitutions relate to religion, sex (gender), physical appearance (phenotype), opinions or beliefs, national or ethnic origin, language, and social or economic status. This leaves a much lower frequency for other possible diversity factors such as sexual orientation, disability, age, and personal or family status. If national or ethnic origin is understood as expressing the differences in legal status that being foreign or a refugee entails, these are the factors that are commonly mentioned when describing superdiversity.

If, in addition to analysing constitutional texts, we have a look at the main international legal instruments relating to human rights, a conclusion could be drawn that the elements of diversity most frequently cited adhere to a very similar pattern, which shows that the legal-political culture that inspires them is very close to that which inspires European constitutions. Thus, the most frequently cited grounds of discrimination in international treaties are physical appearance (race, colour, genetic characteristics), origin (national, ethnic or social origin, descent, birth), religion, sex, social status, opinion (conviction), language and economic status (economic position/wealth, wealth, affluence). Lower frequencies can be again found for factors such as disability, age, or sexual orientation⁶.

In short, although the legal concept of minority is associated with certain culturally-based aspects of identity, such as religion, language and ethnicity, it is in the analysis of the elements that may cause discrimination that comparative constitutional law better reflects the idea of superdiversity, considering a broader set of relevant factors or elements.

Nevertheless, the reduction of the legal concept of ‘minority’ to the cultural-identity sphere has a substantive explanation and a *raison d'être*. This justification entails differentiating between two categories: ‘national identity’ and ‘dominant (social) reality’ (Ruiz Vieytez 2016, 9). ‘Cultural’ elements shape (majority) national identities and by virtue of this define minorities. Conversely, other important factors such as gender, age, sexual orientation, or functional ability also require policies of inclusion, affirmation, or accommodation; but these demands are not defined in opposition to a majority national identity but in opposition to a dominant social reality. These factors do not identify a majority society *vis-à-vis* other neighbouring societies, and therefore do not affect the design of the State, or of public space, in the same way as the strictly cultural factors that define a national

⁶ The listings found in the following nine texts have been compared and analysed: Universal Declaration of Human Rights (Art. 2), International Covenant on Civil and Political Rights (Art. 26, which repeats the grounds listed in Art. 2), International Covenant on Economic, Social and Cultural Rights (Art. 2), International Convention on the Elimination of All Forms of Racial Discrimination (Art. 1), Convention on the Rights of the Child (Art. 2), International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (Art. 7, which repeats the list in Art. 1), European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 14), Treaty on the Functioning of the European Union (Art. 10), Charter of Fundamental Rights of the European Union (Art. 21).

identity. National identity (based on a majority linguistic, national, ethnic, or religious tradition) defines and separates Danish society from German society, or French society from Italian society. On the contrary, none of these societies identifies as such with a generation, a gender, or a given disability. Groups who have a minority sexual orientation are not confronted with a 'national identity' but with a 'dominant social reality' at a given historical moment. European countries do not distinguish themselves from each other by sexual orientation, but by language, religious-cultural traditions or ethnic and symbolic elements associated with them. Thus, the technical concept of minority is confined to these realities in which difference is proclaimed in the face of the majority 'national identity' and not in the face of the 'majority social reality'. The dynamics of the two factors are very different (and contradictory: exclusion versus assimilation), as are the type of collective identities they form, and the legal solutions that both categories deserve or need. This distinction does not exclude the possibility of talking about intersectionality or interactions, but it is crucial in order to understand the impact of the two types of factors, something that may be overlooked in the superdiversity approaches.

4. MINORITIES, DISCRIMINATION GROUNDS AND SUPERDIVERSITY: ANALYSIS AND CHALLENGES

From the previous analysis, it can be concluded that the set of diversity factors contained in most European constitutions correspond, in general terms, to those mentioned in the literature on superdiversity. However, some further clarification of this general principle is in order. In constitutional law there are hardly any references to the level of integration into the labour market and to residential geographical segregation, two aspects that frequently appear in analyses of superdiversity. Similarly, the importance of the legal status of an individual, especially in terms of their foreign status, is partly diluted at the constitutional and international level. Differences in the legal status of nationals and foreigners are taken for granted in legal systems, precisely because they are defined by those very legal systems. Although, in theory, discrimination factors should refer to all persons without reference to their citizenship status, the right to equality is mediated by this element. The same applies to legal nationality when defining national minorities on the European continent. The predominant definition excludes those who do not have the status of nationals from this category, in an attempt to separate the realities of the new and old minorities, which are increasingly socially and legally intertwined.

Some elements mentioned by the constitutions are also worth mentioning that are the result of a recent process of incorporation. Factors such as differences in gender or physical appearance (race) are today embedded in the political cultures of European societies, yet they are the product of a long historical struggle that has crystallised at different times. References to sex or gender have been incorporated into constitutions generally in the last 25 years. However, today it is the second most cited ground in all European constitutions. This shows that there is not always a direct relationship between the age of a ground of discrimination and its frequency of occurrence in European constitutions. What can be seen is that the total number of grounds of discrimination contained in European constitutions is increasing, which would be more in line with a more dynamic and complex approach to diversity.

It is true that to speak of superdiversity is to emphasise the dynamics and processes generated within diverse interactions and less the impact of each identity factor statically or in isolation. Meissner and Vertovec proposed that the research focus on diversity be changed, shifting ‘from analysing diversity to analysing diversifications’ (Meissner and Vertovec 2015, 550). Constitutions, insofar as they are texts, are limited instruments and can only incorporate concepts on which public policies can be based, or those that are recognised as relevant to Law. But legal texts are also subject to change and mutation.

The determination of one factor or another by legal texts is the product of a creative tension between different forces, cultural and political contexts and a reciprocal influence between constitutions of other countries, international human rights norms, or judicial interpretations. Constitutions are not static and are subject to policies that help consolidate or transform them, incorporating ideas and demands that emerge from their historical and social context. In any case, research in comparative constitutional law demands taking into consideration the ‘cultural diversity’ of constitutional experience (Häberle 2010, 393).

The fact that the law is formulated through texts does not imply that diversification rather than mere diversity cannot be incorporated in the application of the law. This, however, requires more advanced legal interpretation techniques than the ones currently used. In this context, the role played by legal pluralism must be considered when analysing the utility of the superdiversity approaches for legal studies. However, pluralism and superdiversity are not concepts at the same level of functionality. Of course, legal pluralism can be an adequate response to manage certain types of diversity. But it is not easy to see a total correspondence or implementation of legal pluralism in relation to the diversities and diversification processes that superdiversity points out. Nevertheless, further research and reflection is needed to explore how superdiversity approaches may foster legal pluralism or lead to new ways of expansion or intensification of it.

Another key concept in this regard is that of intersectionality, on the basis of which several forms of discrimination or restrictions of rights can be identified when the two or more diversity factors are combined. Unfortunately, European constitutions do not include explicit references to multiple, cumulative, or intersectional discrimination. Superdiversity, applied to the legal field, aims to enhance the detection of multiple forms of discrimination and, in particular, of intersectional discrimination. To this end, it should take advantage of the existence in many anti-discrimination lists of residual or open-ended provisions. This allows for the inclusion of intersectional discrimination that may otherwise be left out of judicial analysis.

However, it also appears that society is diversifying and becoming increasingly complex faster than the law is able to keep up with. In this sense, it is clear that there is a great need to incorporate the superdiversity perspective into legal studies as well. In other words, it is necessary to incorporate legal parameters into the analysis of superdiversity, not only as a factor that generates it, but also as a management instrument. The constitutional comparison suggests that the process of including diversity factors as possible grounds of discrimination reflects an ongoing contextualisation of constitutional texts. The grounds of discrimination provide some guidance to understand which groups are

regarded as being potentially vulnerable in each society, or which groups are stigmatised or stereotyped (Solanke 2017, 62). Superdiversity should be a useful approach to increase current awareness of how these stigmas are generated and prevented through legal norms, and thus prevent them from having social impact to the extent possible.

At the same time, it is necessary to enquire whether superdiversity itself can be a valid approach for a long time to come, also in legal terms. This will depend on whether the categorisation of people into groups, however dynamic, will continue to prevail over other possible differences or forms of discrimination. Information and Communications Technologies point to new forms of social relations and a lower impact of traditional collective categories. In particular, future forms of discrimination may be based not so much on the existence of one or more elements of collective identity but on an algorithm that processed a vast cross-section of different individualised data. Future superdiversity will not result from the combination of multiple, dynamically interacting groups, but from there being as many categories as there are individuals, whose personal data are potential grounds for social or institutional discrimination. In the 21st century we may face a growing problem of ‘individual(ised) discrimination’ (Harari 2018, 73) rather than differences based on the existence of diversity factors as they are currently considered, albeit in a dynamic and changing way. It might be a kind of exponential intersectionality on exclusively individual data that expose the population to very different social treatments beyond their ethnic, legal, cultural or gender memberships. These kinds of potentially excluding social dynamics are much more difficult to combat from traditional legal and political perspectives. The same risk affects persons belonging to traditional minorities. This makes it advisable to incorporate superdiversity as an approach within legal studies, but ensuring that it is linked to the implications of the technological potential that is rapidly becoming a reality.

5. CONCLUSION

A comparison of existing European constitutions shows that the references to culturally-based minorities are not systematic, and that they reflect the particular cultural context of each country, since constitutions are also a cultural piece (Häberle 2010, 384). However, there is a correspondence between the categories generally employed in comparative constitutional law and those in common use in international institutions. The European constitutions analysed provide a more consistent and generalised picture as regards identity factors that may be grounds of discrimination. In addition to the cultural elements that characterise minorities (language, ethnicity, religion, nationality), other identity factors such as sex (gender), physical appearance (phenotype), opinions or convictions and social or economic status are generally included in anti-discrimination provisions.

Nevertheless, there are other elements that are affected by superdiversity, such as place of residence within an urban environment and employment status, which hardly ever appear in the basic legal texts. At the same time, the various legal conditions that determine a person’s foreign status are only defined in general terms. As far as the recognition of minorities is concerned, many countries do not incorporate in their constitutions references to the minorities that exist within them, not even historical or traditional

minorities. Ultimately, the decision-making power of each State in drafting its constitution still largely prevails over a more honest and comparable approach to diversity. This shows the immense power that States (and their majorities) continue to have in defining not only their policies, but also the very description of the existing reality. Diversity exists based on what social scientists analyse and demonstrate but is only taken into account politically and legally in some States and in different ways. In this respect, it is not possible to find in the European constitutions a common philosophy of identity, but a plurality of fragments that is culturally grounded and remains linked to the concrete country context (Häberle 2006, 98). This translates into the concept widely used by the European Court of Human Rights of the ‘national margin of appreciation’, which reinforces this hard sovereignty of each State in the enforcement of fundamental rights, which especially affects minorities or non-majority groups in the broadest sense.

Superdiversity is an interesting concept coined in the framework of social sciences that needs to be incorporated into the field of legal sciences. This can be implemented by using it as an approach to the analysis of the effectiveness of the law; and to ensure that the relationship between the different legal conditions of people and other factors of diversity are studied in a more integrated way, both by Law and by other social sciences. However, if superdiversity is implemented without calibrating it to each context, it may pose a threat to the fair and appropriate treatment of traditional minorities. These can be diluted in an amalgamation of dynamic relationships of diversity factors that obscure some needs and confuse the policies to be adopted in each situation. It is not surprising that the concept of superdiversity has been fundamentally perceived and constructed from majority perspectives, as has traditionally been the case with other approaches that claim to be pluralist. It is necessary to integrate the difficult debate on the relationship between old and new minorities, and the policies to be applied to each of them, but without allowing superdiversity to hide realities and needs that are also present. To this end, the different nature of identity factors needs to be appropriately addressed, rather than simply be incorporated into a mix of concepts and relationships in the name of a superdiversity approach. I have proposed here a fundamental distinction between the factors that construct diversities *vis-à-vis* a national identity or *vis-à-vis* a dominant social reality (section 3, *in fine*). This and other possible distinctions will be necessary tools to ensure that the superdiversity approach will truly incorporate a positive development for pluralist policy justice.

Finally, it is worth noting that there is a need to be attentive to how emerging technologies will evolve and the impact they will have on society. The identity factors at play may be less and less important on their own, but this could also be the case for the current dynamics of diversification. The elements that give rise to discrimination or segregation may not only be one or several cross-memberships of certain groups or categories, but an individualised aggregate of personal data that can be much more difficult to analyse and combat politically. Law, by its very nature, is ill-prepared to address these threats, as are the other social sciences. They are failing to pay due attention to the processes that will end up transforming and de-territorialising our social relations and our memberships. Not just the minority approach, but also the very concept of majority might be seriously challenged in such a future scenario.

REFERENCES

- Arnaut, K.; Blommaert, J. Rampton, B.; Spotti, M. (eds)(2015), *Language and Superdiversity*, Routledge. DOI 10.4324/9781315730240
- Capotorti, F. (1991), *Study on the Rights of Persons belonging to ethnic, religious and linguistic minorities*, New York: United Nations/Centre for Human Rights.
- Chopin, I. and Germaine, C. (2017), *A comparative analysis of non-discrimination law in Europe. The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey compared*, Brussels: European Commission (Directorate-General for Justice and Consumers).
- Creese, A. and Blackledge, A. (eds.)(2018), *The Routledge Handbook of Language and Superdiversity*, Oxon: Routledge. DOI 10.4324/9781315696010
- De Varennes, F. (1996), *Language, Minorities and Human Rights*, The Hague: Martinus Nijhoff.
- Deumert, A. (2014), 'Digital superdiversity: A commentary'. *Discourse, Context, and Media*, 4-5, 116-120. DOI 10.1016/j.dcm.2014.08.003
- Dinstein, Y. and Tabory, M. (eds.)(1991), *The Protection of Minorities and Human Rights*, Dordrecht: Martinus Nijhoff.
- Fenet, A. (dir.)(1995), *Le Droit et les minorités*, Brussels: Bruylant.
- Foner, N, Willem Duyvendak, J and Kasinitz, P (2019), 'Introduction: super-diversity in everyday life', *Ethnic and Racial Studies*, vol 42-1, Special Issue: Super-diversity in Everyday Life. DOI 10.1080/01419870.2017.1406969
- Ginsburg, T. and Dixon, R. (eds.)(2011), *Comparative Constitutional Law*, Cheltenham: Edward Elgar. <https://doi.org/10.4337/9780857931214>
- Häberle, P (2006), 'Aspectos culturales de la identidad cultural', *Derechos y Libertades*, no 14, pp. 89-102.
- Häberle, P (2010), 'Métodos y principios de interpretación constitucional. Un catálogo de problemas', *Revista de Derecho Constitucional Europeo*, no. 13, pp. 379-414 (translation to Spanish by professor Francisco Balaguer Callejon from Häberle, P. (2000), 'Methoden und Prinzipien der Verfassungsinterpretation - ein Problemerkatalog', *Revue européenne de droit public = European review of public law*, vol. 12, no 3, pp. 867-895).
- Hannum, H. (1993), *Documents on Autonomy and Minority Rights*, The Hague: Martinus Nijhoff.
- Harari, Y.N. (2018), *21 Lessons for the 21st Century*, London: Jonathan Cape-Penguin Random House.
- Meissner, F. and Vertovec, S. (2015) 'Comparing super-diversity,' *Ethnic and Racial Studies* 38(4): 541-555. <https://doi.org/10.1080/01419870.2015.980295>

- Osin, N. and Porat, D. (eds.)(2005), *Legislating against Discrimination. An international Survey of Anti-Discrimination Norms*, Leiden-Boston: Martinus Nijhoff Publishers.
- Pavlenko, A (2018) 'Superdiversity and why it isn't: Reflections on terminological innovations and academic branding', in Barbara Schmenk, Stephan Breidbach, and Lutz Küster (eds.) *Slogonization in Language Education Discourse. Conceptual Thinking in the Age of Academic Marketization*, Bristol: Multilingual Matters. DOI 10.21832/9781788921879-009
- Pegoraro, L. and Rinella, A. (2007), *Diritto Pubblico Comparato. Profili metodologici*, Padova: CEDAM.
- Pentassuglia, G. (2002), *Minorities in International Law*, Strasbourg: Council of Europe/ European Center for Minority Issues.
- Phillimore, J.; Sigona, N. and Tonkiss, K. (eds.)(2020), *Superdiversity, Policy and Governance in Europe, Multi-scalar Perspectives*, Bristol: Bristol University Press. <https://doi.org/10.1332/policypress/9781447352051.001.0001>
- Ruiz Vieytez, E. (2016), 'Cultural traits as defining elements of minority groups', *The Age of Human Rights Journal, special issue on Identity, Belonging and Human Rights*, no 7; DOI 10.17561/tahrj.n7.2
- Solanke, I. (2017), *Discrimination as Stigma. A Theory on Anti-discrimination Law*, Oxford-Portland: Hart Publishing.
- Thornberry, P. (1991), *International Law and the Rights of Minorities*, Oxford: Clarendon Press.
- Vertovec, S. (2007) 'Super-diversity and its implications', *Ethnic and Racial Studies* 29(6): 1024-54. <https://doi.org/10.1080/01419870701599465>
- Vertovec, S. (2019) 'Talking around super-diversity', *Ethnic and Racial Studies*, 42:1, 125-139, DOI: 10.1080/01419870.2017.1406128
- Yacoub, J. (1995), *Les minorités, quelle protection?*, Paris: Desclée de Brouwer.

Received: November 28th 2021

Accepted: January 24th 2022

