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Improving Human Rights Protection through EU Accession to the ECHR;
a Minority Perspective

Will EU accession to the ECHR have a substantive positive impact on the protection of minority rights in the EU?

Author: Ana Sophie Bisgaard Üşüdür
Supervisor: Eva Albers

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Abstract

This thesis addresses the question of whether the EU accession to the ECHR will have a substantive positive impact on the protection of minority rights in the EU. This assessment is based on an analysis of case law from the ECtHR and the CJEU. The chosen cases relate to the following communities: Roma, Muslim, Jewish, and Rainbow community. This thesis uses the term 'rainbow community' as an umbrella term for the LGBTQIA+ community in an attempt to recognize that this community is continuously expanding and accepting people whose characteristics make them uniformly vulnerable. The cases analyzed include D.H. and Others v. the Czech Republic, Dudgeon v. the United Kingdom, M'Bala M'Bala v. France, Pavel Ivanov v. Russia, S.A.S. v. France, V.C. v. Slovakia, and Vejdeland and Others v. Sweden of the ECtHR, and C-71/11 and C 99/11 (Bundesrepublik Deutschland v Y and Z), C-83/14 (CHEZ Razpredelenie Bulgaria AD (...)), C-157/15 (Achbita), C-673/16 (Relu Adrian Coman), C-451/16 (MB v Secretary of State for Work and Pensions), C-336/19 (Centraal Israëlitisch Consistorie van België), C-804/18 and C-341/19, WABE and MH Müller Handel of the CJEU, including short references to other cases.

The cases demonstrate the approaches of the two courts in assessing issues relating to minority rights, such as religious and cultural rights, and the rights of sexual orientation and gender identity. The analysis reveals that the two courts approach the cases similarly, however, the CJEU is more restricted in its ability to express explicit support, whereas the ECtHR is freer to do so. In some cases, the CJEU is able to show implicit support toward a certain cause by the effort it makes in its assessment. In other cases, the CJEU is reluctant to overstep its competence and declines to comment on issues that are deemed irrelevant for the case. The ECtHR continues to trailblaze in the fight for human rights protection in Europe by making bold statements and groundbreaking judgments.

Through the analysis of the abovementioned, this thesis concludes that while the EU accession to the ECHR will have a substantive positive impact on the protection of human rights in general, it is doubtful that the accession will lead to a vastly different assessment of minority rights, though the strength of the competences of the ECtHR will be a significant improvement on the protection of the rights of persons belonging to minorities in the European Union.

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List of abbreviations

CEDAW: The Committee on the Elimination of Discrimination against Women

CM: Committee of Ministers

CoE: Council of Europe

ECHR: European Convention on Human Rights and Fundamental Freedoms

ECRI: The European Commission against Racism and Intolerance

ECtHR: European Court of Human Rights

EU: European Union

HCP: High Contracting Party

LGBTQIA+: Lesbian, Gay, Bisexual, Trans, Queer, Intersex, Asexual, +.

UDHR: Universal Declaration of Human Rights

UN: United Nations Organization

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

Introduction

The European Union has long expressed a wish to accede to the European Convention of Human Rights. This thesis explores why this accession has not been completed yet, and studies if it will have a substantive positive impact on the protection of persons belonging to minorities when the accession is completed in the future.

The accession has been studied by many scholars who agree that the accession will fill a void in the protection of human rights in Europe and the European Union.[1] The purpose of this thesis is to refocus the debate on the accession and consider the hypothetical benefits of its completion from the perspective of minority rights. Minority communities remain vulnerable globally, in Europe, and within the Member States of the European Union. It is therefore important to consider their perspective when implementing human rights protection, which is the intention of this thesis. This thesis will discuss the topic of the accession in a new light, hoping to bring attention to the importance of including vulnerable groups in the considerations when the accession moves forward.

Methods and delimitation

The purpose of this thesis is to assess the impact of the impending accession of the European Union to the European Convention on Human Rights on the protection of minority rights. The thesis applies jurisprudence and comparative case law analysis as the primary methods of study. The aim of this methodology is to analyze if (and how) the EU system and the Council of Europe system, including their two courts, differ in the protection of minority rights. The purpose is to explore if the accession of the EU to the ECHR will have a substantive positive impact on the protection of the rights of persons belonging to minorities in the European Union. Prior research on the EU accession to the ECHR focuses primarily on the legal and practical difficulties of implementing the ECHR at the EU level without interfering with EU autonomy. This thesis will briefly discuss these issues as well; however, the aim of this thesis it to refocus the topic of the accession to be considered from the perspective of providing better protection for persons belonging to minorities in the EU.

[1] Kosta, V., Skoutaris, N., & Tzevelekos, V. (2016). *The EU Accession to the ECHR (Modern Studies in European Law)* (Reprint ed.). Hart Publishing.

The thesis is limited to analyzing case law related to the interference with and recognition of the rights of persons belonging to minorities from the European Court of Human Rights and the Court of Justice of the European Union. The purpose of using comparative case law analysis is to uncover the similarities and differences in the approaches of the two courts to help answer the chosen research question: will EU accession to the ECHR have a substantive positive impact on the protection of the rights of persons belonging to minorities in the European Union?

This thesis aims to analyze if the two systems and their respective courts differ in the quality of protection they offer to persons belonging to minorities, hoping to discover if the accession will result in better protection for these vulnerable groups and communities.

I. Explanation

I.I. The minority perspective

The respect for rights of persons belonging to minorities is famously one of the core values of the European Union presented in Article 2 of the Treaty on European Union. The first sentence of the article reads:

"*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.(...)*"

While the inclusion of persons belonging to minorities in the TEU is positive, it is also complicated as it does not offer a definition of the term. However, this is not the only time the EU refers to minorities without offering a definition of the term. The EU Charter of Fundamental Rights[2], which came into direct effect at the same time as the TEU, also emphasizes minority protection. Article 21 of the Charter prohibits any discrimination based on the *membership of a national minority*. This wording is different from what we see in Article 2 TEU which mentions *persons belonging to minorities*. This ponders the question if the two articles are in fact offering protection to the same persons. Article 21 of the Charter does not offer a definition of 'national minority' and, as of yet, the EU has still to offer an official, Union-wide interpretation of the term.

[2] Heretofore also known as the Charter

The EU is not the only entity that has struggled to provide a definition of minorities. The *recognition* of minorities and their vulnerability dates far back, however, the *definition* of 'minorities', which can be drawn from history, is not inherently inclusive. Historically, the recognition of people or communities as minorities was restricted to those who could be categorized as 'national' or "ethnic, linguistic and religious minorities"[3]. The 19th and 20th centuries were both heavily influenced by the emergence of nationalist thought and ideology which led to the establishment of the nation-state as the political norm[4]. The nation-state model was based on the idea that people united by language, history, and traditions had the legitimate right to claim and form an independent state[5]. Therefore, the term 'minority' was understood to include those communities who shared a language, history, traditions, *et cetera*. Furthermore, a minority group had to be "(…)*numerically inferior to the dominant majority*"[6], to be considered a minority. Hence, the term 'minority' was considered in relation to a person's ethnicity or national identity in connection to the size of the community. Many attempts at defining the term 'minority' have resulted in definitions which include references to the size of the community and the wish of the community to preserve their language, religion, and ethnic characteristics. One such attempt was made in 1979 by UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti. He offered the following definition on who should be considered a minority:

"*A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members–being nationals of the State–possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*"[7]

[3] Ringelheim, J. (2010). Minority Rights in a Time of Multiculturalism, The Evolving Scope of the Framework Convention on the Protection of National Minorities. *Oxford University Press*. https://doi.org/10.1093/hrlr/ngp038

[4] Ibid

[5] Ibid

[6] Eide, A. (2002). The Rights of "Old" versus "New" Minorities. *European Yearbook of Minority Issues Vol 2, 365–379.*

[7] Capotorti, F. & United Nations. (1979). *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. para, 568, https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/903/66/PDF/NL790366.pdf?OpenElement

This definition is similar to what other experts refer to as 'old minorities'[8], which generally refers to a group that lived, or whose ancestors lived, in the country before the state was established, and therefore have a historical claim to the land and territory. Capotorti's definition includes the characteristic of nationality, which relates strongly to the definition on 'national minority' offered by Kymlicka in 2010.[9] While the term 'national minority' does not have a universal definition either, Kymlicka argues that the term has been used in Europe to describe those minorities who are "historically settled" and living in or near territories which they consider their own or feel a particular belonging to, which coincides with one of the aspects included in Capotorti's definition. The opposite group of minorities referred to by both Kymlicka and Eide are the so-called 'new-minorities', which many states have argued are not national minorities. Some states have gone so far as to exclude the Roma community from the term 'national minorities', alleging that the Roma are a "non-territorial" group[10]. According to Kymlicka, the "spiraling ethnic conflicts" of the Balkans and Caucasus in the 1990's[11] prompted the Council of Europe to establish targeted norms to deal with the immediate risks and dangers as it were believed that these ethnic conflicts were endangering European values. Unfortunately, it was not possible for the CoE to reach consensus on a definition of 'national minority'. This is apparent in the Framework Convention for the Protection of National Minorities 1995, which offers a wide range of protection for national minorities, however, the explanatory report found in the back of the Convention also explains that it was not possible to gather support for a definition of the concept of 'national minority' from the CoE Member States, and therefore the Convention lacks an official definition.[12] 'New minorities', who are not recognized as national minorities, refer to the people who have entered the country after the state was established, according to Eide, or more specifically: immigrants, guestworkers, and refugees, according to Kymlicka.

In recent history, the EU has relied on standards provided by the international community, like the UN or the CoE, to define the term 'minority', and any other terms that may be derived from it, however, as the international community does not agree on an interpretation

[8] Eide, A. (2002). The Rights of "Old" versus "New" Minorities. *European Yearbook of Minority Issues Vol 2, 365–379.*
[9] Kymlicka, W. (2010). Minority Rights in Political Philosophy and International Law. In S. Besson & J. Tasioulas (Eds.), *The Philosophy of International Law* (1st ed., pp. 377–396). Oxford University Press.
[10] Ibid, p. 382
[11] Ibid.
[12] Framework Convention for the Protection of National Minorities and Explanatory Report, 1995, Council of Europe, https://rm.coe.int/16800c10cf, §12, explanatory report.

of the term, it may be worthwhile to explore the definitions offered by other fields of study than international law. If we look beyond the literature on international law to the field of sociology and feminism, we find authors like Wirth[13] and Hacker[14] who argue that minority groups are defined by their characteristics, such as physical or cultural, which result in them being excluded from general society and subsequently discriminated against collectively. This perspective offers a much wider definition and gives recognition to groups that have been excluded from the historical narrative for centuries. Suddenly, by applying this definition, we are able to include all the minorities already mentioned, like ethnic, religious, and linguistic groups, but we may also include groups like the LGBTQIA+ community, women, and disabled people. These are groups who have suffered greatly under patriarchal rule and are often forgotten or purposefully excluded from the historical narrative. A principal example of such is the Holocaust where, in present day, we recognize the genocide led against lesbians, gay men, "gypsies", and disabled people under the Nazi regime, but historically these groups were not recognized or acknowledged as victims on equal terms with others during the Holocaust[15].

'Minority rights' has somehow managed to remain a kind of mythical creature in both European and international law. Everyone struggles to define it exactly, although, according to the treaties, everyone wants to protect it. For the purpose of this thesis, a person or persons belonging to a minority group is anyone who may be, or is at risk of becoming, the victim of discrimination based on characteristics that are not accepted by the normative majority, much akin the definition offered by Hacker. Furthermore, it is important to clarify that this thesis recognizes communities or groups which are discriminated against without being of numerical inferiority to the opposing group. Examples of this include gender discrimination, which can occur even when the gender that is being discriminated against is larger in number than the other. Another example is Apartheid, which infamously allowed for the discrimination of the numerical majority by the numerical minority, which had managed to maintain social and political power despite being inferior in number.

Furthermore, the minority groups covered by this thesis are limited to the Muslim, Jewish, and Roma communities, as well as the LGBTQIA+ community (henceforth be known as

[13] Wirth, L., (1945) "The Problem of Minority Groups," The Science of Man in the World Crisis, ed. by Ralph Linton

[14] Hacker, H. (1951). Women as minority group. Social Forces, 30(1), 60-69.

[15] Jensen, E., (2002), The pink triangle and political consciousness: Gays, Lesbians, and the memory of Nazi persecution, Journal of the History of Sexuality

the *Rainbow community*). I have chosen to use the term 'Rainbow community' to symbolize and recognize that the LGBTQIA+ community is continuously growing, accepting, acknowledging, and including new people into the community. Their battle with discrimination is ongoing and seemingly never-ending, and by limiting the thesis to focus on the term 'LGBTQIA+', there is a risk that the thesis will become outdated due to a poor choice of terminology. I have therefore chosen to use 'Rainbow community' as an umbrella term for all people who have already been included in the community, and those who will be included in the future. Individuals in the Rainbow community have in common a set of characteristics that go against the heteronormative, cis-gendered narrative, and the acknowledgment and inclusion of more people into the community will only emphasize this issue.

This thesis follows a definition of minority which is more similar to that of Hacker, as opposed to the definitions provided by Eide, Kymlicka, Capotorti, *et cetera.* Some of the communities of this thesis can be divided into the categories provided by Eide, Kymlicka, Capotorti, however, these categories are more limited than what is ideal for the purpose of this thesis. Jews and Roma are typically regarded as 'old' or 'national minorities' in Europe, with the exception of the few countries that have attempted to deny Roma this recognition, as mentioned previously. The Muslim community is both 'old/national' and 'new' depending on the country. Muslims have resided historically in countries such as Greece and Turkey, making them an 'old' or 'national minority' of those states, however, in other European/EU states they are a recent addition to the population, making them a 'new minority'. This is mostly due to the influx of Muslim immigrants to Europe in recent history.[16] Lastly, the Rainbow community is more difficult to place within these categories as the community does not relate to national identity, ethnicity, or culture in the sense that is theorized by Eide, Kymlicka, Capotorti. It may be argued that this community is 'new', because they have received more recognition in recent history, or 'old' because the struggles of sexual orientation, gender identity, *et cetera*, have existed forever. This exposes one of the weaknesses of this older approach at defining minorities, because it excludes communities that do not relate to the nation state, and therefore may be excluded from the protection offered to the communities that do.

Furthermore, my choices of the abovementioned communities come down to a wish to analyze those communities who have been historically discriminated against in Europe, i.e.,

[16] Profanter, A., & Maestri, E. (2021). *Migration and Integration Challenges of Muslim Immigrants in Europe: Debating Policies and Cultural Approaches (Politics of Citizenship and Migration)* (1st ed. 2021 ed.). Palgrave Macmillan. https://link-springer-com.kuleuven.e-bronnen.be/content/pdf/10.1007/978-3-030-75626-0.pdf

Jews, Roma, Muslims, the Rainbow community. Furthermore, the inclusion of the Rainbow community is to acknowledge the importance of intersectionality[17] when discussing any form of discrimination. As this thesis will continue, we come to discover the importance of the overlap in characteristics and how this plays an essential role in the discrimination faced by minorities in Europe today. The reality is that a lot of people belong to more than one minority group, because their ethnicity, religion, gender identity, sexual orientation, *et cetera*, make them more vulnerable to certain discrimination compared to another person or another community. For example, a Muslim woman and a Muslim man will face both similar and diverse forms of discrimination, and a trans person will face different forms of discrimination as opposed to a cis-gendered person, and so on. Ignoring the topic of intersectionality when discussing discrimination and minority rights would be a grave oversight, as it has conclusive impact on the life of victims of discrimination.

I.II. Intersectionality

Intersectionality is a term coined by Kimberlé Crenshaw[18] long ago to describe the amplified struggles faced by individuals who have more than one characteristic which leads to their discrimination. In the late 1980's, Crenshaw began using intersectionality to describe the particular duality of discrimination faced by Black[19] women in the USA. She frequently uses the example of Emma DeGraffenreid who sued General Motors in 1976 and claimed that they would not hire her because she was a Black woman[20]. General Motors hired Black men to work in the factories and white women for administrative positions, such as secretaries. This meant that Black women were never offered employment, as they could not be hired for the "women's jobs" because of their race and could not be hired for the "men's jobs" because of their gender. The court dismissed the claim because General Motors employed both Black men and white women, and therefore the court found that there was no evidence that Ms. DeGraffenreid's had been discriminated against based on race or gender. The court failed to

[17] See chapter I.II.
[18] Crenshaw, K. (2021). Demarginalizing the Intersection of Race and Sex: Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *Droit et Societe, 108,* 465-490.
[19] Crenshaw capitalizes "Black(s)" and other minorities to demonstrate the collectiveness of that particular cultural group. She does not capitalize "white(s)". Crenshaw, K. (1991). Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color. Stanford Law Review, 43(6), 1241-1300.
[20] Crenshaw, K. (2015, September 24). Why intersectionality can't wait. *Washington Post*. https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/

recognize that the combination of race and gender was what led to the discrimination against Ms. DeGraffenreid[21].

Crenshaw's theory of intersectionality relates strongly to the topic of this thesis as it recognizes the multiplicity of discrimination endured by minority groups. The minority communities which have been selected for this thesis can all overlap with each other for different individuals and therefore cause multilayered discrimination. Gender *and* gender identity has definitive impact on all the communities mentioned in this thesis; as does sexual orientation, and many other characteristics. Furthermore, it is important to mention intersectionality in the cases where an individual belongs to more than one minority group. As theorized by Hacker in 1951, women can be considered a separate minority group based on the discrimination they endure due solely to their gender and sex[22]. This same theory can be applied in combination with intersectionality, and we suddenly see how an individual can belong to all the communities mentioned in this thesis simultaneously. Theoretically, an individual can have a mixed background that includes the Muslim-, Jewish-, and Roma heritage simultaneously, whilst also belonging to the Rainbow community and having a gender or gender identity which meets particular discrimination. This combination may be specifically what leads to discrimination against the individual, when belonging to only one of these communities separately may not lead to discrimination. It is therefore essential to recognize the undeniable importance of intersectionality when working with minorities; both in theory and in practice.

I.III. EU Accession to the European Convention on Human Rights

It has long been the intention of the European Union to accede to the ECHR to achieve better protection of human rights. The accession has met many difficulties on its way to becoming a reality, and as of now it remains an intention of the Union that has yet to happen. It has been argued by many legal scholars that acceding to the ECHR would help the EU fill certain gaps in its own attempts at human rights protection.[23] This thesis intends to refocus this notion and apply it from the perspective of minority rights protection. While some experts argue that the accession will result in an overall increase in the quality of human rights protection in the EU[24],

[21] Ibid.
[22] Hacker, H. (1951). Women as minority group. Social Forces, 30(1), 60-69.
[23] Kosta, V., Skoutaris, N., & Tzevelekos, V. (2016). *The EU Accession to the ECHR (Modern Studies in European Law)* (Reprint ed.). Hart Publishing.
[24] Ibid.

can the same be argued from the perspective of minority communities in the EU? This chapter briefly explains the recent history of the accession and brings it into the context of the minority perspective.

I.III.I. The Accession and its history

The Treaty on European Union Article 6 proclaims the intention for the EU to accede to the European Convention on Human Rights. Article 6 gives ample praise to the ECHR and the values of human rights protection that it inspires in the Union. The provision ends with Art. 6(3) which states that the fundamental rights protected by the ECHR "*(...) shall constitute general principles of the Union's law*". Unfortunately, the provision offers no timeframe for the accession, and specifies that accession shall only happen to the extent that it will not interfere with the competencies of the Union as defined in the Treaties. This creates two questions: why does the EU want to accede to the ECHR, and when will the accession happen?

The EU has a long and established history of cooperation spanning decades, including the establishment of the Coal and Steel Community. However, in more present history, the Union expanded its purposes and values, and became adamant about the protection of human rights and fundamental freedoms, as is evident in the EU Charter of Fundamental Rights. All Member States of the Union are bound to comply with Union law, which includes treaties, regulations, and directives, all of which may have an impact on the protection of human rights and fundamental freedoms. The Court of Justice of The European Union has been granted the competence to ensure that the Member States are interpreting and applying Union law accurately, and TEU Article 19 gives opportunity for individuals, and others, to bring a case to the court if they suspect that Union law is not complied with. As such, the CJEU is an institution of the Union, but it is not an institution *above* the Union. This emphasis is important as it means that there is no institution where an individual can bring a case against the Union as a whole, where the Union can stand as an accused party, i.e., the Union cannot currently act as a legal person in a case. Individuals are currently limited to bringing their cases to the CJEU with the Member States, or possibly another EU institution, as the accused parties. The CJEU may rule on cases against EU institutions, bodies, agencies, or offices, however, the EU cannot currently stand as an accountable party in a dispute. Furthermore, while an individual may bring a case before the CJEU, the scope of the CJEU is limited as it may only assess human rights issues in relation to the Charter when EU institutions or Member States implement and apply EU law.

This means that other acts of the EU institutions or Member States which may result in a human rights violation cannot be brought before the CJEU.

The European Union is not yet signatory to the European Convention on Human Rights, nor is it subject to the jurisdiction of the European Court of Human Rights. While all EU member states are signatories to the ECHR and subjects to the jurisdiction of the ECtHR on individual bases, the Union remains independent from the Convention and the Court as of now. This means that while an individual may bring a case against a Member State of the EU to the ECtHR, there is no opportunity to bring a case against the Union to the ECtHR. The Union cannot be held accountable in the ECtHR against an individual claim, yet.

In conclusion, as to *why* the EU wants to accede to the ECHR and become subject to the jurisdiction of the ECtHR, it is reflected in the desire to offer the protection of human rights and fundamental freedoms as is the purpose of the ECHR. Furthermore, as will be explored in more detail later, the limitations of the scope and competencies of the CJEU, leaves a gap in the protection of the individual which may be filled by the broader wingspan of the ECtHR.

I.III.II. The delay

Article 6, as part of the TEU and the Treaty of Lisbon, entered into force on 1 December 2009. The ECHR also allowed for a small change in 2010 with the amendment of Article 59(2) which states that the EU *may* accede to the Convention.[25] Subsequently, on June 4th 2010 the negotiations for an accession agreement were authorized to begin.[26] Negotiations went on for approximately three years, and finally on 5 April 2013, the negotiators from the 47[27] Member States of the CoE and the negotiators from the EU came to an agreement on the draft accession instruments.[28] The CJEU was asked by the Commission to give its opinion on the draft agreement, regarding compliance with Article 218 of TFEU, which is the provision that provides the framework with which all agreements between the Union and international organizations shall comply. After assessing the draft agreement, the CJEU delivered its opinion on 18 December 2014, known as Opinion 2/13, which concluded that the agreement was not compatible with

[25] Amended by Protocol 14, 1 June 2010

[26] Court of Justice of the European Union. (2014, December 18). *The Court of Justice delivers its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law* [Press release]. https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf

[27] The number of Member States at the time of the negotiations.

[28] Opinion 2/13

Union law. In this conclusion, the Court had emphasized that the special structure of the EU, namely that it is not a state and cannot be regarded as such, has a definitive impact on the ability to accede to the ECHR. The Court observed that accession to the ECHR would impact and be binding not only on all Member States, but also on all institutions of the EU, which would make the Union the subject of external control. This external control would emanate from the decisions and judgments of the ECtHR.

The Court presented the following concerns as to why it was not possible to accept the draft agreement:

- The ECHR should be coordinated with the Charter to ensure that unity and effectiveness of EU law is not compromised.
- Accession could result in mistrust between Member States as they would be required to monitor each other's observation with fundamental rights, which goes against the obligation of *mutual trust* established by the Union. The Court felt that there was a risk of upsetting the underlying balance of the Union.
- Protocol No 16 to the ECHR, which permits Member States to request advisory opinions from the ECtHR presents a risk to the autonomy and effectiveness of the preliminary ruling procedure established by the TFEU.
- The requirements of the TFEU are at risk of being undermined by the ECHR as it allows for Member States to submit applications to the ECtHR alleging violations of another Member state.
- The co-respondent mechanism presents a risk to the autonomy of the EU and the division of powers between the Union and its Member States.
- The competences of the EU and the powers of the Court were considered to be severely limited by the lack of a proper "prior involvement procedure".
- Lastly, the Court pointed out that the ECtHR would be empowered to rule on questions regarding the common foreign and security policy (CFSP) of the Union, which the Court itself, "for want of jurisdiction"[29], cannot "(…)*review in the in the light of fundamental rights*"[30].

In conclusion, the Court of Justice of the European Union declared in Opinion 2/13 that the accession could not yet proceed, as the suggested draft agreement endangered the jurisdiction

[29] Opinion 2/13
[30] Opinion 2/13

of the Court, the autonomy of the EU, and would empower the ECtHR beyond the capabilities of the CJEU, and such, create an imbalance, *inter alia*.

Interim conclusion

This chapter has attempted to explain the complexities of human rights protection from the perspective of minority rights. In this chapter we have explored the history of the recognition of minorities and the numerous attempts at defining the terms that relate to these communities. We have discovered that not all definitions are equal in the recognition they lead to, and that flexibility in terminology is essential to avoid limitation. We have discussed the importance of recognizing intersectionality and the multiplicity of discrimination endured by different individuals in relation to the minority community they belong to. Lastly, the accession has been contextualized for the purposes of this thesis. With this, it has become clear that the accession has endured some of the same problems as the recognition of minority communities in the sense that terminology and interpretation is a conclusive factor in how the matter can proceed. The debate surrounding minority recognition and protection has remained exactly that; a debate. The accession is no exception; it also remains a debate without an end in near sight. The CJEU, and by extension the EU, is apprehensive in fulfilling the intention laid out in Article 6 of the TEU as had been made clear by Opinion 2/13. While many of the concerns expressed in this opinion are reasonable, especially those related to compatibility with Union values, others are less so. It may not be surprising that the opinion expresses hostility toward surrendering authority to the ECtHR, however, it is difficult to argue that the accession can proceed without an agreement to surrender *some* authority, because without the recognition of the autonomy of the ECtHR over the EU as signatory to the ECHR, the accession is inherently futile.

II. Legal theory

This chapter will explore the establishments of the two courts and their respective systems. The chapter includes explanations of the competences of the two courts, as well as accessibility and impact. The purpose of the chapter is to bring into context the structural similarities and differences between the two systems in order to provide a strong background and preface for the case law analysis which will follow in Chapter III.

II.I. Establishment and competencies of the European Court of Human Rights

The European Court of Human Rights is considered by many to be the most effective tool in human rights protection in the world[31]. The competences of the Court can be found in the European Convention on Human Rights, also known as the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention was drafted after the events of World War II and signed by the founding 14 States of the Council of Europe in 1950. Membership in the CoE has grown quite a bit since those days, and subsequently, the amount of signatory states to the Convention has grown as well. In 2022 the CoE has 46[32] Member States, all of which are signatory to the ECHR and subject to the Court as per the membership requirements of the CoE. The rights and freedoms protected in the Convention were heavily inspired by the Universal Declaration of Human Rights which had been drafted, signed, and ratified just 2 years prior in 1948.

One of the core differences between the UDHR and the ECHR was the establishment of a permanent human rights court; namely, the European Court of Human Rights. The establishment of the Court is to be found in Article 19 of the Convention; the first article of Section II of the Convention, which is entirely dedicated to the establishment, structure, and jurisdiction of the Court, including the access to individual application and admissibility criteria, *inter alia*.

II.I.I. Implementation and effectivity of judgments

The judgments of the Court are binding upon the High Contracting Parties according to Article 46 (1) of the Convention. Each judgment is transmitted to the Committee of Ministers to ensure compliance with the execution and implementation of the judgment.[33] If the CM suspects non-compliance from an HCP it shall refer the matter back to the Court which will assess the claim and make another binding judgment, that is then referred back to the CM. This back-and-forth case referral between the Court and the Committee of Ministers may seem excessive, however,

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[31] Bates, E., The Evolution of the European Convention on Human Rights, (2010), Oxford University Press, p. 7

[32] Russia has been expelled from the Council of Europe by the Committee of Ministers(CM) on the 16th of March 2022 as a result of the invasion of Ukraine. On the 15th of March 2022 Russia expressed a desire to denounce the European Convention on Human Rights and wanted to withdraw from the CoE before expulsion, however the CM voted on the matter the very next day, and Russia was expelled with immediate effect. Russia is infamous for not complying with judgments from the ECtHR and the CM has attempted to sanction the state in the past, although these sanctions were dropped when Russia threatened to leave the CoE. Initially it was considered ideal to keep Russia as a member in order to maintain the ability to observe the human rights situation in the state, however, the invasion of another member state was the last drop as it shows a clear disregard for the values of the CoE which Russia has time and time again rejected. https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe

[33] Article 46 (2)

it is important to remember that this procedure, while excruciatingly long and complicated, is put in place to ensure the protection of the rights and freedoms of the convention as well as to uphold and respect the rule of law and the independence of the judiciary. It falls within the competence of the Court, and *only* the Court, to *judge* whether an HCP is in violation of the Convention; this includes judging whether an HCP is in violation of complying with such a judgment. At first glance the process may seem unnecessary, however, the importance of upholding the independent judiciary cannot be ignored; especially when regulation of states is the matter at hand. It falls within the competences of the CM to consider and issue the necessary measures to help ensure the compliance of the HCP with the judgment.

II.I.II. Access to the European Court of Human Rights

According to Article 34 of the Convention, the Court may receive applications from any individual, NGO, or group of individuals who claim to be victims of a violation by an HCP. There are no requirements for the applicants to be citizens of an HCP or of the state that they claim has violated their rights. The ECHR protects all individuals from violations that may occur in any of the HCPs.

From the perspective of minority rights, it may seem obvious that group access to the Court directly grants access for minorities to apply to the Court collectively, however, this is not necessarily the case. While the wording of "groups of individuals" in Article 34 may read as broad and vague, it must be interpreted in the context of the whole article and the Convention itself. The purpose of the Convention is to protect human rights and provide justice for those who become victims of human rights violations, and it is exactly this notion of 'victim' that results in a narrower interpretation of the article than one may expect upon first reviewing the wording. The Court stated in *Romanov Zakharov v. Russia* that it:

"(…)*does not provide for the institution of an actio popularis and that its task is not normally to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention*"[34].

Actio popularis is a case brought by a member or members of the public in the interest of the public and does not require the applicant to be a victim of a violation themselves. The ECtHR is limited to reviewing and assessing cases with actual victims of human rights and

[34] Roman Zakharov v. Russia §164

therefore, the Court does not consider for review the practices and laws *in abstracto* of an HCP. In layman's terms, the Court only reviews cases where there is a suspicion that an actual human rights violation has already occurred.[35]

In practice, the Court recognizes three types of victims: direct victims, indirect victims, and potential victims. The notion of direct victims is explored in *Tănase v. Moldova* where the Court reiterated its previous case law by stating that "*In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure(...)"*[36]. This is to avoid people bringing cases before the Court simply because they consider that something may be in violation of the Convention. However, the Court also states in *Tănase v. Moldova* that "(…)*a member of a class of people who risk being directly affected by the legislation*"[37] may bring a case before the Court for assessment.

Recognition to indirect victims was explored in *Varnava and Others v. Turkey*, *inter alia*. This case concerned the disappearance of multiple men, and the Court stated that "(…)*close relatives of the missing men may introduce applications raising complaints concerning their disappearance, to the extent that such complaints fall within the Court's competence*[38]", which granted the close relatives the status of indirect victims in relation to the human rights violations felt by their family members, or the *direct victims*.

Concerning potential victims, it is only possible for the Court to consider such a case under very limited circumstances. Such circumstances include where the alleged violation has not yet occurred but is considered immediate and imminent. This is more common in cases of expulsion of aliens where the individual may apply to the Court *before* the expulsion has taken place and the Court may conclude that the expulsion *would be a violation* of the Convention. and subsequently require the HCP to refrain from expelling the applicant, as determined by *Soering v. the United Kingdom*. The Court also held in *Klass and Others v. Germany* that a person may bring a case to the Court when they were not able to establish if the legislation they complained about had been applied to them due to the secret nature of the measures it authorised. In such cases, the Court recognizes that an applicant may be a potential victim and that it is necessary for the Court to examine the case before victim status can be determined.

[35] The Court also accepts interim measure applications where it may decide that the risk that a human rights violation may occur is imminent, and subsequently order an HCP to act or refrain from acting in a certain matter to avoid violating the Convention, (Rule 39 of the Rules of Court).
[36] Tănase v. Moldova, §104
[37] Tănase v. Moldova, §104
[38] Varnava and Others v. Turkey, § 112

When applying these concepts and interpretations of victim status to minority rights we can conclude that it is certainly possible for a minority, i.e., a group of people belonging to a certain race, ethnicity, gender, sexual identity, religion, political belief, *et cetera*, to apply to the Court as a group under Article 34. However, for the application to be considered admissible, the members of the group must be *victims* of a violation of the Convention. This means that the mere self-identification as a minority and a member of a certain group does not make an individual a victim under the Court's interpretation of Article 34.

II.II. Establishment and competencies of the Court of Justice of the European Union

Understanding the establishment and the history of the Court of Justice of the European Union requires much patience and attention as this is a court which has gone through as many changes as the European Union itself; possibly more. The Court was established after World War II, as most of the human rights treaties and institutions we know today, although the Court was not initially intended to be a human rights court. It has evolved over time into a supranational court of European supremacy with the competence to rule on cases related to the Charter of Fundamental Rights. However, human rights and fundamental rights are not the only matters that the Court has the competence to assess, which is one of the primary differences between the CJEU and the ECtHR, as the latter exclusively considers cases of alleged human rights violations.

The establishment of the CJEU came as an extension of the establishment of the European Coal and Steel Community, which was initially established after World War II as a solution for the political and economic struggles of Europe[39]. These struggles were considered a high risk of causing lasting conflicts which could turn into war; something the European community desperately wanted to avoid after experiencing two world wars in less than half a century. The Court of Justice of the European Coal and Steel Communities came to life for the first time in Chapter 4[40] of the Treaty of Paris, signed in 1951 by France, Belgium, Italy, the Netherlands, Germany, and Luxembourg. After that, the Court went through several structural and name changes before becoming what we know today as the Court of Justice of the European Union.

[39] Tamm, D. (2013). The History of the Court of Justice of the European Union Since its Origin. In: The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence. T.M.C. Asser Press, The Hague, The Netherlands. https://doi-org.kuleuven.e-bronnen.be/10.1007/978-90-6704-897-2_2

[40] Treaty of Paris, 1951, https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT&from=EN (French)

The CJEU, as we know it today, was born from the Treaty of Lisbon, signed by the EU Member States in 2007, which includes the amended forms of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). According to Article 19(1) of the TEU, it is the role of the Court to ensure that Union law is accurately observed by the Member States when interpreting and applying the treaties of the EU. This wording may appear, on first glance, as rather broad, however, a deeper analysis of the entirety of Article 19 concludes that the scope and competences of the CJEU are rather limited. Article 19(3) reads as such:

"3. The Court of Justice of the European Union shall, in accordance with the Treaties:

> *(a) rule on actions brought by a Member State, an institution or a natural or legal person;*
>
> *(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the*
>
> *institutions;*
>
> *(c) rule in other cases provided for in the Treaties."*

Article 19 (1) taken in conjunction with (3) demonstrates the limitations of the Court to *only* rule on cases regarding *interpretation* and *application* of EU law. In practice, this means that an individual, or other entity covered by (3), may only bring a case to the Court if it is concerning the interpretation or application of Union law. If a case does not concern compliance with Union law, it is not included in the competences of the Court, and therefore, the individual, or other, is left without the option to have their case reviewed by a court of the European Union. Thus, if a case concerns state law that is not covered by the scope of the CJEU, one will have to bring forth the case elsewhere, like the ECtHR, if one suspects human rights violations have occurred.

II.II.I. Sovereignty, and effectivity of the rulings of the Court

As can be expected when establishing a supranational court, the authority, and subsequently whether the judgments of the CJEU are legally binding on the Member States, was questioned early on. In 1964 the Court ruled on what soon became a landmark decision; namely *Costa v. ENEL*. The case was a request for a preliminary ruling brought by Italy. An individual, Mr.

Costa, had brought a case against the newly established nationalized electricity company, ENEL. Mr. Costa claimed that the nationalization of the electricity company was against the Italian Constitution and the Treaty of Rome (1957). The Italian Constitutional Court had ruled that it was in compliance with the Italian constitution to allow for the limitation of sovereignty for the benefit of an international organization, like the European Community, as it was called at that time. However, according to the Constitutional Court, this did not equal that the laws of the latter would prevail over those of the former. The Italian Constitutional Court argued that while the Treaty of Rome had been incorporated into Italian law in 1958, it did not prevail over the electricity nationalization law of 1962[41]. The CJEU ruled against this interpretation stating that:

"*By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves*."[42].

The CJEU was hence able to conclude with Costa v. ENEL the principle of *direct effect*, which confirmed that Member States had indeed limited their sovereignty and were bound by the rulings of the Court[43].

II.II.II. Access to the Court of Justice of the European Union

Individual access to the CJEU is granted by Article 19(3) of the TEU which states that the Court shall, in accordance with the Treaties, rule on actions brought by Member States, legal persons, institutions, or individuals. Individual access is therefore unequivocally ensured in the treaty, however, as opposed to Article 34 of the ECHR which establishes the right for groups of individuals to access the Court, Article 19(3) of the TEU does not include the same wording. The wording is limited to the abovementioned four types. It is possible that group access could

[41] de Witte, Bruno (2011). Craig, Paul; de Búrca, Gráinne (eds.). Direct Effect, Primacy, and the Nature of the Legal Order. The Evolution of EU Law. Oxford: Oxford University Press. p. 328. ISBN 978-0-19-959296-8

[42] Flaminio Costa v E.N.E.L

[43] Tamm, D. (2013). The History of the Court of Justice of the European Union Since its Origin. In: The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence. T.M.C. Asser Press, The Hague, The Netherlands. https://doi-org.kuleuven.e-bronnen.be/10.1007/978-90-6704-897-2_2, p. 25

fall under the interpretation of *legal person*, such as an NGO, or a registered religious community, *et cetera*. However, as the CJEU does not rule directly on whether an individual has been a victim of a human rights violation, but rather rules on whether the Member State has accurately interpreted and applied Union law, it is unlikely that a "group" of individuals could join together as a legal person, in accordance with Article 19(3), for the purpose of complaining of a violation to their rights, as is possible with the ECtHR. It is also questionable if "group access" to the Court is even necessary, as it does not rule on remedies or compensation to victims, but rather clarifies the obligations imposed on the Member States by Union law. It is, therefore, to a large degree, irrelevant who or what entity brings a case to the Court, as the decision will have binding effect on everyone affected by Union law regardless of which entity brought the case to the Court.

Furthermore, it is worth noting that a high number of the cases brought to the Court are requests for preliminary rulings[44], which are brought by the Member States themselves, as opposed to individuals or legal persons. When an action for a preliminary ruling is requested by the Member State, the parties of the case remain the same as they are in the case before the domestic court, meaning that if a group has brought the case before the domestic court, it remains a party in the case during the review of the CJEU, as the request falls under the scope of Article 19, para. 3(b), as opposed to para. 3(a).

II.III. Interim conclusion

While it is true that both courts have the abilities and competences to assess human rights-related cases, it has become clear that most of the similarities between the two courts are superficial, and in fact, the two courts are very different, both in scope and applicability. Both courts are supranational and are based on a community of states which give up their sovereignty, to a limited degree. The ECtHR is limited strictly by the scope of the ECHR, however, it is not limited to only assessing the interpretation and application of the Convention, as it has the competence to assess any action(s) taken by the state which may constitute a violation of the Convention. In comparison, the CJEU is limited in its competences to only assess cases

[44] In 2021, the CJEU received a total of 567 requests for preliminary rulings, according to the annual statistics. https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-03/cp220040en.pdf

regarding the interpretation and application of Union law, which means it cannot assess claims of violations of human-, and fundamental rights that are not related to the implementation of Union law.

III. Analysis

III.I. Legal analysis

It was the initial intention for this chapter to focus primarily on comparative case law analysis, however, after thorough research of the case law of the two courts, it became apparent that the CJEU does not have nearly as much case law on minority rights as the ECtHR. This is mostly explained by its scope and applicability which limits the amount of case law severely when compared to the ECtHR. Additionally, the ECtHR has been active longer than the CJEU, and the CJEU is not exclusively a human rights body, whereas the ECtHR is. It became evident that the thesis needed to expand the research portion to include analysis of the *de jure* protection offered by each system, as opposed to only analyzing the *de facto* protection, which is established by legal precedent.

The European Convention on Human Rights

The European Court of Human Rights is limited in its competence to the scope of the European Convention on Human Rights which only mentions 'minority' twice. The first mention is in Article 14 which prohibits discrimination against *national minorities,* and the second mention is in Protocol 12, Article 1, which reiterates the prohibition of discrimination against national minorities. However, while the concept of 'minority' is not broadly developed in the wording of the Convention, the prohibition of discrimination offers a wider definition of who benefits from the protection of Article 14.

Article 14 reads:

"*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*."

This wording is very interesting because it is both detailed and vague. It provides exact mentions of characteristics such as sex, race, color, and religion, all of which are very specific,

however, it also includes the words '*other opinion*' and '*other status*'. The minority communities included in this thesis all fall under the scope of Article 14. While the article does not explicitly mention the issues of gender identity or sexual orientation, which are some of the struggles suffered in the Rainbow community, the Court has held through its case law that Article 14 does, in fact, provide protection for such characteristics on equal ground with the other characteristics protected by the principle of non-discrimination[45].

As established earlier, the ECHR does not offer explicit protection to minority rights other than the mention of national minorities in Article 14. However, many of the cases that involve people from minority communities or with minority characteristics, still manage to find their legal arguments for issues relating to minority protection within the Convention.

Article 14 is a prime example of this as it cements the principle of non-discrimination as a basic principle no matter the characteristic of the person. Therefore, while *national minority* is mentioned explicitly in the provision, it is not limited to this minority group. As explained earlier, it is also not possible to limit the protection of minorities in Article 14 to *national minorities*, as there is not currently a definition provided for this term. This is clearly reflected in the Article's wording.

Article 8, with the respect for private and family life, is another example of this, as especially the right to respect for private life acts as an umbrella term for many issues that may be faced by the minority communities, as well as *family life*, which equally can relate to issues of culture or sexual orientation.

Article 9 gives us the freedom of thought, conscience, and religion, which additionally relates to the minority communities emphasized in this thesis, particularly the Jewish and Muslim communities.

Article 10, which provides for the protection of and right to freedom of expression is especially interesting as it can represent a double-edged sword for minority rights in the sense that while minorities often claim it in protection of themselves, it is also claimed by the non-minority when accused of violating minority rights. This is a specific trend for freedom of speech where cases like *Pavel Ivanov v. Russia* and *M'bala M'Bala v. France* come to mind. Both will be analyzed at length below. These cases are recognized by the applicant's attempt of claiming their own right of freedom of speech as a means of justifying hate speech and speech that incentivizes hatred and even violent behavior in others. While, on the opposite end

[45] Salgueiro da Silva Mouta v. Portugal, § 28

of the sword, we have minorities who apply the Article to their right to freely express their religious or political beliefs.

The Charter on Human Rights and Fundamental Freedoms

The Charter can be recognized by its more meticulous and wide range of *de jure* protection in comparison with the ECHR. More rights are mentioned and explicitly granted protection, which gives a longer treaty with more Articles, however, the Articles are significantly smaller than those of the ECHR and they offer less detail.

Article 7, which protects the right to private and family life is just one sentence long compared to its ECHR counterpart, Article 8, which has two sub paragraphs.

Article 9 specifically grants the right to marry and found a family, however, within the restrictions of the national laws of each Member State, which is where the recognition of same-sex marriage has met issues.

Article 10 provides the right to freedom of thought, conscience, and religion almost verbatim to its ECHR counterpart, Article 9, however, Article 10 of the Charter also explicitly recognizes the right to conscientious objection.

Article 11 articulates the right to freedom of expression and information, similarly to its ECHR counterpart, Article 10.

After Article 11 is where the Charter starts to go off on its own independent path and mentions many rights and freedoms that are not expressly mentioned in the ECHR. One example is Article 13, which provides freedom of the arts and sciences. It reads:

”*The arts and scientific research shall be free of constraint. Academic freedom shall be respected*.”

The explicit inclusion of artistic and academic freedom is interesting from the minority perspective, because it is important to emphasize the impact these two fields have on society as a whole and on the individual, particularly in combination with other rights and freedoms, like the freedom of expression. One example of protection of academic freedom and its impact on minority rights is this thesis and other academic works like it. Without the respect for academic freedom, it would not be possible to produce works like this where minority protection can be enlightened.

The Charter has an entire Chapter dedicated to equality; namely Chapter 3 which holds Articles 20-26. These provisions are recognizable again by their short wording, however, they

explicitly mention communities that are not mentioned in the ECHR, such as respect for cultural and linguistic diversity in Article 22, the rights of the elderly in Article 25, and the rights of people with disabilities in Article 26.

Additional EU law

The EU system clearly distances itself from the ECHR system with the use of treaties, directives, and regulations which broadens the legislative scope of the Court, considering the EU approves upwards of 80 directives and 1200 regulations annually[46]. It is therefore possible for an individual, or a Member State, to bring a case regarding the interpretation and implementation of any of these types of legislation to the Court. Through these varying types of legislation, the EU can provide detailed protection of human rights and fundamental freedoms, including minority rights, and impose them on the Member States within the limitations that the type of legislation allows for. Regulations are a legislative act that is binding on the Member States in its entirety, whereas a directive sets a collective goal, where the respective Member States can devise their own laws to achieve this goal.[47] Some directives and regulations will be further explored below in the CJEU case law.

III.II. Case law analysis

The following chapter includes case law relating to the Jewish, Roma, Muslim, and Rainbow communities in Europe and the EU. The cases have been chosen from the case law of the Court of Justice of the European Union and the European Court of Human Rights. The purpose of analyzing the case law of the two courts separately is to expose the strengths and weaknesses of the two courts independently from each other. This will lead to an evaluation of the differences between the two courts, and how these differences will impact the protection of minority rights in the EU when the accession is completed.

The specific cases have been chosen based on their relation to the minority groups included in this thesis. Certain cases, such as *Case C-336/19, (Centraal Israëlitisch Consistorie van België and Others), Joined Cases C-804/18 and C-341/19, (WABE and MH Müller Handel)* of the CJEU, and *S.A.S. v France* of the ECtHR have been chosen due to the attention,

[46] Toshkov, D. (n.d.) *'55 years of EU Legislation'*, Online presentation, Available at: http://www.dimiter.eu/Eurlex.html

[47] European Union. (2022). *Types of legislation*. European-Union.Europa.Eu. https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en

both in media and academics, that they attracted. The remaining cases have been chosen because they highlight particular struggles experienced by the community they represent, namely struggles of discrimination. Lastly, *Dudgeon v UK* was chosen for its landmark status and because it provides a historical perspective of the ECtHR's approach to the Rainbow community, and minority communities by extension.

III.II.I. The Court of Justice of the European Union

Joined Cases C 71/11 and C 99/11, Bundesrepublik Deutschland v Y and Z, 5 September 2012

Germany asked for a preliminary ruling regarding the interpretation of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees, *inter alia*. Y and Z entered Germany separately in 2004 and 2003 and applied for asylum and refugee protection. Both had their applications rejected on the grounds that they did not qualify for refugee status, which led to appeal procedures and eventually Germany brought the cases to the CJEU. The State asked the Court about the interpretation of Article 9(1)a of the Directive, in regard to whether every interference with religious freedom constitutes an act of persecution, *inter alia*. Furthermore, the State asked about the understanding of "the core area" of religious freedom and how this concept shall be understood within the meaning of Article 9(1)a of the Directive. Lastly, the State asked about the well-founded fear of persecution, and if it can be expected of a person to abstain from practicing certain aspects of their religion upon returning to their country of origin to avoid persecution.

Y and Z were both members of the Muslim Ahmadiyya community in Pakistan, and both claimed that their memberships of this community had forced them to flee the country under the fear of persecution. Y stated that he had been beaten in his home on several occasions, and that he had stones thrown at him at the community's place for prayer. He also claimed that those same attackers had threatened to kill him and report him to the authorities for insulting the Prophet Mohammed, which was criminalized under Article 295 C of the Pakistani Criminal Code, punishable by death or life imprisonment.[48] Z claimed that he had been mistreated and imprisoned due to his religion.[49] Y and Z submitted that Article 298 C of the Pakistani Criminal Code also prohibited the Ahmadiyya community from referring to themselves as Muslims, describing their faith as Islam, and that they were prohibited from preaching or inviting others

[48] Joined Cases C 71/11 and C 99/11, Bundesrepublik Deutschland v Y and Z, 5 September 2012, § 30
[49] Ibid.

to join the faith, *inter alia*.[50] The case presents the intersectionality of religious beliefs and migration status, i.e., recognition as a refugee based on one's religion.

In its assessment, the Court stated that Directive 2004/83 should be interpreted in the light of the Geneva Convention and the other treaties referred to in Article 78(1) TFEU. Thereafter, the Court referred to the definitions provided in the Directive for the term 'refugee' in Article 2(c), which stated that a third country national who owing to a well-founded fear of being persecuted for reasons of religion, *inter alia*, is outside the country of nationality and is unable or unwilling to return, *inter alia*, because of this fear.

Firstly, the Court stated that a person seeking refugee status must have a well-founded fear that he will personally be persecuted for his religion, *inter alia*. Secondly, persecution is understood as relevant acts that are "sufficiently serious" and constitute a "severe violation of basic human rights", according to Article 9(1) of the Directive. Thirdly, the Court reiterates the acts of persecution which are presented in Article 9(2) of the Directive, which include violence and discriminatory prosecution or punishment, amongst other acts. The list is not conclusive, and it is therefore possible for States to consider other acts as qualifying as persecution, based on proper assessment.[51]

Furthermore, the Court considers the importance of religious freedom as a basic human right and one of the foundations of a democratic society. Interference with this right may be so serious that it equals persecution within the meaning of Article 9 of the Directive.[52] The interference must constitute a serious violation to be considered an act of persecution, within the meaning of Article 9. The Court also declined to distinguish acts that interfere with the so-called "core areas" of the right to freedom of religion, stating that "(…)*such a distinction is incompatible with the broad definition of 'religion' given by Article 10(1)(b) of the Directive*(…)"[53]. The Court affirmed that an act interfering with a person's right to practice his faith in public, which is not included in the concept of "core areas", can also amount to persecution, as Article 9 is not limited to a person's private life, but also includes a person public life. In conclusion to the first two questions of the State, the Court essentially offered the above-mentioned guidelines, however, the Court reiterated the importance of considering each case individually and conducting a specific evaluation of the facts and circumstances of each case to determine whether an interference with religious freedom constituted persecution.

[50] Ibid, § 31
[51] Ibid, § 50-55
[52] Ibid, § 57
[53] Ibid, §63

Regarding the State's third and last question, the Court is quick to dismiss the idea that a State may be justified in returning an asylum seeker to their country of origin by requiring him to abstain from practicing his religion in a way that would lead to persecution. It goes against the principle of the Directive which is to grant protection to those who have the right to it, and the Court declared that it is irrelevant that a person could, in theory, abstain from certain religious practices[54], when it is their right to practice their religion without persecution. It was therefore not reasonable for States to expect an asylum seeker to abstain from their religious practices to avoid persecution.

The case is important seen in the light of the Muslim community because it includes the Ahmadiyya community which is essentially 'a minority within a minority', and it reiterates the importance of recognizing intersectionality when assessing discrimination, as the Applicants may endure discrimination based on their refugee status, or lack thereof, and their religion on dual level. With the general rise in islamophobia in Europe[55], it is important to remember to acknowledge that xenophobia and discrimination can also occur within the community. Whilst Europe may look at Muslims as belonging to one community, the reality is much more nuanced, and this will have an impact on the rights of the individual, such as with Y and Z who faced persecution in Pakistan for belonging to a Muslim minority.

Case C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, 16 July 2015

Ms. Nikolava, ran a grocer's shop in a district in Bulgaria known for its Roma population. She claimed that the electricity supply company had installed their electricity metres much higher in the Roma neighborhood compared to other neighborhoods, and she claimed that this interfered with her ability to monitor and check if her electricity bill was accurate as she could not access the metre. A request for preliminary ruling was issued by the Bulgarian court and was composed of ten questions, including questions as to the applicability of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

The Court held that the supply of electricity did fall within the interpretation of Directive 2000/43, however, the Court emphasized that it fell outside the competences of the

[54] Ibid, § 79

[55] The European Union Agency for Fundamental Rights. (n.d.). *European Islamophobia Report 2018*. https://www.islamophobiaeurope.com/wp-content/uploads/2019/09/EIR_2018.pdf

Court to apply rules of EU law, such as rules of non-discrimination. According to the competences described in Article 267 of TFEU, the Court can only rule on the *interpretation* of EU legislation, which meant that the Court had to refer the assessment of whether the installation of the electricity metres was the result of discrimination back to the referring court. However, while the Court was not able to assess if discrimination had occurred, it gave a detailed description of how the principle of non-discrimination was to be understood, with references to international law, such as the UDHR, the UN 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 UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the ECHR.

Therefore, while the Court held that it would be up to the referring court to assess whether the claims of discrimination were accurate, the attention to detail on the topic implies strongly that the Court, at the very least, suspected that discrimination of the Roma community had occurred. Furthermore, the Court also noted that if the referring court found instances of disproportionate disadvantages which led to direct or indirect discrimination against Ms. Nikolava and the Roma community of her town district, it would be for the referring court to determine if less restrictive means would be more appropriate[56], which again implied that the Court suspected that discrimination had occurred, without the competence to make such a statement.

Case C-673/16, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others, 5 June 2018

Romania requested a preliminary ruling concerning the interpretation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Mr. Coman, a Romanian national, was denied a prolonged residence permit for his husband, Mr. Hamilton, by the Romanian authorities who claimed that because same-sex marriage was not legal or recognized in Romania, Mr. Hamilton, could not derive the rights of a spouse, and thereby could not prolong his residence permit. The Applicants claimed that not attaining prolonged residence for Mr. Hamilton due to their same-sex marriage resulted in discrimination based on sexual orientation, which is prohibited by Article 21 of the Charter, *inter alia*.

[56] Case C-83/14, 16 July 2015, § 128

The Court's assessment takes an interesting turn when it points out that Directive 2004/38 only determines whether an EU citizen can enter and reside in Member States other than that of which he is a national, meaning that because Mr. Coman is a citizen of Romania, he and his husband cannot claim the rights of Directive 2004/38 regarding their residence in Romania. After stating that Directive 2004/38 is not relevant for the circumstances of the case, the Court goes on to answer the question of the interpretation of the term 'spouse' in the Directive anyway by stating that "*The term 'spouse' used in that provision refers to a person joined to another person by the bonds of marriage.*[57]" and concludes that the term 'spouse' is gender-neutral[58]. It is fascinating that the Court makes the effort to determine the understanding of the term 'spouse' in the Directive even after establishing that the Directive is not relevant for the case of Mr. Hamilton and Mr. Coman. It reveals an interest from the Court to demonstrate the same-sex marriage rights which are being granted in many Member States.[59]

The Court goes on to contribute to the contents of the case. The Court reiterates that while the referring court may have limited its questions to a particular directive, "(…)*this does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has specifically referred to them in the wording of its questions.*[60]"

This means that it falls within the competences of the Court to elaborate on the matter of the present case by including reference to and analysis of other EU legislation to further aid the case. With this statement the Court explains that while Mr. Hamilton may not derive a right of residence from Directive 2004/38, it is possible for the spouse of an EU citizen to derive a right of residence through Article 21(1) of TFEU.

In conclusion, the Court held that while the Member States, including the referring State of Romania, have the freedom to authorize same-sex marriage or not, they cannot deprive the same-sex spouse of an EU citizen the right of residence in their territory[61].

The case clearly expresses that while the Court cannot demand a Member State to authorize same-sex marriage, it is a strong value of the Union to recognize same-sex relationships and protect such relationships from discrimination.

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[57] Case C-673/16, 5 June 2018, § 34
[58] Ibid, § 35
[59] *Same-sex marriages and partnerships should be recognised across the EU | News | European Parliament*. (2021, September 14). [Press release]. https://www.europarl.europa.eu/news/en/press-room/20210910IPR11913/same-sex-marriages-and-partnerships-should-be-recognised-across-the-eu
[60] Case C-673/16, 5 June 2018, § 22
[61] Ibid.

Case C-451/16, MB v Secretary of State for Work and Pensions, 26 June 2018

The United Kingdom requested a preliminary ruling concerning the interpretation of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The case concerned MB, a transgender woman who had undergone male-to-female reassignment surgery in 1995 and had been living as a woman since 1991. She turned 60 in 2008 and applied for State retirement pension. The application was denied based on the fact that she had not completed the legal procedure for the recognition of her gender, and therefore was still considered male under national law. She had refrained from changing her legal gender as it would require her to annul her marriage to her wife, as same-sex marriage was not permitted at the time. The Supreme Court of the United Kingdom therefore asked the Court: "*Does Council Directive 79/7/EEC preclude the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a State retirement pension?*"[62]. As the main proceedings concerned the matter of MB's entitlement to pension, the Court declared that it had not been asked to consider in general if the legal recognition of gender could be conditioned on the annulment of an existing marriage.

In its assessment, the Court reiterated its previous case law on the scope of Directive 79/7 where it has been established that the Directive also applies to discrimination arising from gender reassignment.[63] The Court declared that a person who has lived for a significant period as a gender other than their birth gender and who has undergone gender reassignment surgery must be considered to have changed gender, for the purpose of the application of Directive 79/7.[64] The Court considered that the national legislation which required a person to annul a marriage into which they had entered before changing gender, constituted direct discrimination within the meaning of Article 4(1) of Directive 79/7 because the State did not have the same requirement for persons who had married and retained their birth gender.[65] The State argued that the situation of a person who has changed gender after marrying, and a person who has not changed gender after marrying are not comparable, and therefore the difference in treatment

[62] Case C-451/16, MB v Secretary of State for Work and Pensions, § 25
[63] Case C-451/16, § 35
[64] Ibid.
[65] Ibid, § 36-38

did not amount to discrimination. The Court considered this claim and stated that comparability was not dependent on situations being *identical*, but only that they were *similar*.[66] The court held that marriages of cis-gender persons and marriages of persons where one or both have changed gender after marrying are comparable.[67] The Court therefore ruled that the national legislation which required a transgender person to annul their existing marriage to attain legal recognition of their gender in order to qualify for State retirement pension was not compatible with Directive 79/7 and constituted discrimination.

The case and the previous case law which the Court refers to throughout the assessment demonstrate the recognition of trans rights within the EU and the recognition of discrimination against trans persons as amounting to discrimination based on sex. The case does not include hostile language from the Court toward the Applicant or trans rights in general, and the narrative is overall neutral and respectful.

Case C-336/19, Centraal Israëlitisch Consistorie van België and Others (…), v Vlaamse Regering[68], 17 December 2020

'The ban on ritual slaughter', as it became known in European Media[69], concerned a special case before the Court which combines two of the minority communities covered by this thesis; the Muslim and Jewish community.

The case concerned the interpretation of Regulation No 1099/2009 on the protection of animals at the time of killing, which requires that animals be stunned prior to slaughter, according to Article 4(1). Both the Muslim and Jewish communities in Belgium, where the case originated, claimed that this practice violated their abilities to perform ritual slaughter in accordance with their respective religions, and thus violated Article 4(4) of the Regulation which states that in cases of "(…)*slaughter prescribed by religious rites, the requirements of paragraph 1 shall not apply (...).*" Subsequently, the applicants claimed that discrimination occurred in violation of Article 20, 21 & 22 of the Charter, as the requirements for slaughter were not imposed on hunting, *inter alia*.

[66] Ibid, § 41
[67] Ibid, § 44
[68] Full case name: "*Case C-336/19, Centraal Israëlitisch Consistorie van België and Others, Unie Moskeeën Antwerpen VZW, Islamitisch Offerfeest Antwerpen VZW, JG, KH, Executief van de Moslims van België and Others, Coördinatie Comité van Joodse Organisaties van België – Section belge du Congrès juif mondial et Congrès juif européen VZW and Others, v Vlaamse Regering*", 17 December 2020
[69] The Economist. (2021, October 21). *Europe is in a muddle over ritual slaughter*. https://www.economist.com/europe/2021/10/21/europe-is-in-a-muddle-over-ritual-slaughter

The Court held that the main objective of Regulation No 1099/2009 is the protection of animal welfare and allowing Member States to require stunning before slaughter is proportionately pursuant to that objective. While Article 4(4) of the Regulation allowed for exceptions to be made for religious slaughter, as quoted above, Article 26 expressly allows for Member States to adopt legislation aimed at offering more extensive protection of animal welfare than is provided by the Regulation, and deviating from Article 4(4) is allowed for this purpose[70].

The Applicants submitted, *inter alia*, that the requirement to stun animals disproportionately discriminated against the Muslim and Jewish communities as the amount of meat slaughtered in Belgium in accordance with religious rites only amounted to 0.1% of the total amount of meat produced in Belgium.[71]

When examining the discrimination claim, the Court took into consideration the principle of non-discrimination and emphasized that "(…)*the prohibition on discrimination is merely a specific expression of the general principle of equality which is one of the fundamental principles of EU law, and that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.*[72]" In the light of this statement, the Court held that hunting, or other activities which includes the killing of animals, cannot be considered equal to the activity of slaughter which centers around food production, both in terms of purpose and scale. The Court's primary argument was that the principle of non-discrimination meant that similar situations shall be treated equally, and as the ritual slaughter of animals and hunting and fishing are not similar and cannot be compared, it is not required for the Member States to regulate them equally.

Furthermore, the Court did agree that the requirement to stun animals prior to slaughter imposes a limitation on "(…)*the exercise of the right of Jewish and Muslim believers to the freedom to manifest their religion, as guaranteed in Article 10(1) of the Charter.*"[73] In regards to this limitation of the rights described in Article 10 of the Charter, the Court reiterates the principle in Article 52(3) of the Charter which states that any provision of the Charter which corresponds to rights guaranteed by the ECHR must be interpreted in correlation with the Convention, and by extension the case law of the ECtHR. In connection with this, the Court held, *inter alia*, that the limitation of the Article 10 rights of the Jewish and Muslim communities

[70] According to Article 26(2), Point C, of Regulation No 1099/2009
[71] Case C-336/19, Centraal Israëlitisch Consistorie van België and Others, 17 December 2020, § 20
[72] Case C-336/19, § 85
[73] Ibid, § 55

was justified because it pursued the general interest of animal welfare, which is recognized by the Union, and was not disproportionate in pursuing this objective. Therefore, the Court concluded that it fell within the interpretation of Regulation No 1099/2009 for Belgium to require stunning of animals prior to religious slaughter.

When one compares some of the statements made by the parties; especially the claims that hunting and fishing cannot be compared to slaughter because they do not produce large amounts of meat and are therefore a small bracket of the issue of slaughtering, it becomes apparent that the parties use some of the same arguments to support their claims. The Applicants make the same argument toward *ritual slaughter* where they present a statistic stating that meat produced through ritual slaughter only amounts to 0.1% (see above) of the total amount of meat produced for consumption in Belgium. It is curious that the Court uses the argument of the small amount that is produced by hunting and fishing as an example of how it cannot be compared to ritual slaughter, when seemingly both instances produce very small amounts of meat, and therefore impact a very small number of animals. With this comparison of the amount of meat produced in mind, it becomes difficult to understand why the Court accepts that hunting should not have the same requirements on stunning as ritual slaughter. While it is true that ritual slaughter is more related to slaughter for consumption, and hunting and fishing are more related to cultural practices, there is an argument to be made that ritual slaughter is equal to that of hunting as a religious practice considering the importance it has for its communities and the small amount of meat which is produced by it. Nevertheless, the Court declares that a Member State cannot prohibit the import of meat produced by ritual slaughter in another Member State and therefore the Court finds that the Jewish and Muslim communities are not prohibited in consuming meat in accordance with their religious beliefs.

Joined Cases C-804/18 and C-341/19, WABE and MH Müller Handel, 15 July 2021

In the summer of 2021, the CJEU ruled on the joined cases of IX and MJ, who were employed by separate companies in Germany. IX and MJ were both Muslim women who had been required by their employers to remove their hijabs[74] while working. The case is similar to Case C-157/15 (Achbita v G4S Secure Solutions NV) from 2017, which also concerned a Muslim woman who wore the hijab in the workplace. Achbita had been terminated from her job with G4S for wearing a hijab against company policy which prohibited the wearing of any religious,

[74] Islamic headscarves.

political or philosophical signs. The policy was an unwritten rule in 2003 when Achbita was hired by G4S as a receptionist, though it later was approved by the G4S works council as an amendment to the workplace regulations, entering into force on 13 June 2006. This amendment came after Achbita had informed her employer that she intended to wear the hijab in the workplace. [75] The Court was asked to determine if a blanket ban on all religious signs, *inter alia*, in the workplace constituted direct discrimination, against Muslim women, which is prohibited in Directive 2000/78. The Court held in Achbita that a blanket ban on all religious, philosophical, and political signs did not constitute direct discrimination within the meaning of Article 2(2)(a) of the Directive, however, it may constitute indirect discrimination after Article 2(2)(b), which would be for the referring court to ascertain.

The Joined cases of IX and MJ expanded on the understanding of Article 1 and 2 of Directive 2000/78. The joined cases included numerous questions on the interpretation of the Directive, one of which was whether it would amount to unlawful indirect discrimination to implement a prohibition limited to "conspicuous, large-sized signs", such as hijabs, or if the prohibition had to cover all religious, philosophical, and political signs. The referring court argued that the case law of the Court, including Achbita, did not provide an answer to this question.

In its examination of IX and MJ, the Court stated that it examined *direct* and *indirect discrimination* separately. The Court stated that wearing signs or clothing depicting or manifesting one's religion or belief is protected by Article 10, freedom of thought, conscience, and religion, of the Charter. Subsequently, the Court recalled its previous case law which has established that internal rules imposed by employers on their employees, requiring them to dress "neutrally" does not constitute direct discrimination even if such a rule should inconvenience some individuals more than others[76]. The Court related its case law to the present joined cases and emphasized that the employers had required other employees to remove religious signs as well, such as Christian crosses, and therefore the treatment between employees was undifferentiated. The Court also referred to the rights of the employers to conduct businesses according to Article 16 of the Charter and agreed that imposing a rule on employees demanding them to

[75] Case C-157/15, Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, 14 March 2017, § 11-15
[76] Joined Cases C-804/18 and C-341/19, WABE and MH Müller Handel, 15 July 2021, § 52

refrain from displaying religious affiliation could be considered necessary to avoid undermining the business. There should be a *genuine need* and *legitimate wish* to distance the business from religious or political belief. The Court held that "(…)*a restriction of the freedom of thought, conscience and religion,* (as) *guaranteed in Article 10(1) of the Charter* (must appear) *strictly necessary in view of the adverse consequences that the employer is seeking to avoid by adopting that prohibition*."[77]

The Court makes a clear distinction between *direct* and *indirect discrimination* in its examination; however, it offers the same justification and explanation as to why neither may be present in the cases of IX and MJ. The Court held that a prohibition of the wearing of religious, political, or philosophical signs could not constitute *direct* or *indirect discrimination,* if it met a genuine need and required the removal of all signs equally with regard to the scale and severity of the consequences that the employer seeks to avoid.

Lastly, regarding the issue of intersectionality and gender, the Court made the following statement:

"*As a preliminary point, as regards the existence of indirect discrimination on the grounds of gender, referred to in this question, it should be noted that, as the Advocate General observed in point 59 of his Opinion, that ground of discrimination does not fall within the scope of Directive 2000/78, which is the only EU law measure to which this question relates. It is not therefore necessary to examine whether there is such discrimination.*[78]"

The Court hereby calls attention the fact that gender falls outside the scope of Directive 2000/78. While Directive 2000/78 establishes the general framework for equal treatment in employment and occupation, Article 1 specifically expresses the purpose of the Directive which is to combat discrimination on the grounds of *religion or belief, disability, age or sexual orientation*. Gender or sex does not fall within the scope of Directive 2000/78.

While it is understandable that the Court cannot examine a matter that does not fall within its scope, this case highlights the issues with the limitations of the Courts scope and competences. By not being competent to assess the issue of *direct* or *indirect discrimination* as a result of the combination of two factors, in this case gender and religion, the Court is unable to aid in the battle against intersectional discrimination. In fact, the Court had to refer the issue of whether Muslim women were discriminated against disproportionately back to the referring court. Marie-Claire Foblets argues in a 2021 article that the Court, through this judgment, is

[77] Ibid, § 69
[78] Ibid, § 58

indirectly allowing for the private sector to place people who openly manifest their religious beliefs in so-called "back-office jobs"[79], where they are not in contact with the costumers; the purpose of which is to decrease the likelihood of customer dissatisfaction and monetary losses for the company.

If we use the present case of two Muslim wearing who wear hijabs to work as an example, they will now be "forced" to apply for back-office jobs, which significantly limits their chances of employment. This example sounds eerily similar to the 1976 case of Emma DeGraffenreid which Kimberlé Crenshaw uses to demonstrate the significance of recognizing intersectional discrimination. Just as the Black men whom General Motors only hired to work in the "back", and the white women who were hired to work in the "front", the CJEU has, with this judgment, allowed for the private sector to purposefully place Muslim women in the "back", away from the sight of the costumer; the purpose of which is to find a "compromise"[80] which meets the company's monetary needs and the individuals religious rights.

If a comparison is made between this case and Case C-673/16 (Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others) regarding residence permit for a same-sex spouse, there is a clear difference in the effort made by the Court. In Case C-673/16 the Court makes the effort to explore beyond what is asked for in the original request, whereas the present case includes a complicated narrative which tries to justify why the Court cannot comment on intersectional discrimination. In comparison to Case C-83/14 (CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia), regarding the instillation of electricity metres in a Roma neighborhood, the Court was quick to allude to the fact that the behavior of the company may be discriminatory, whereas in the present case the Court offers an extensive explanation on the rights of the employers in the light of monetary losses, *et cetera*. If nothing more, it demonstrates that the Court is apprehensive in demonstrating particular support toward IX and MJ, and the Muslim community by extension. Greater, albeit *implicit*, support is shown by the Court toward the Rainbow community in Case C-673/16 and Case C-451/16 (MB v Secretary of State for Work and Pensions).

[79] Foblets, M.C. (2021). Islam under the Rule of Law in Europe: How Consistent Is the Human Rights Test?. *Religions* 12: 857. https://doi.org/10.3390/rel12100857
[80] Ibid.

III.II.II. The European Court of Human Rights

Dudgeon v. the United Kingdom, 22 October 1981

The Applicant, Mr. Dudgeon claimed that the criminalization in Northern Ireland of homosexual activity was a violation of his Article 8 rights. The Applicant claimed that he suffered from fear of persecution and harassment, noting an incident in 1976 where the police searched his home and questioned him about "homosexual activities", and seized and withheld personal documents from the Applicant for longer than one year.[81] He argued, primarily, that the criminalization of homosexual activities in Northern Ireland were "(…)*an unjustified interference with his right to respect for his private life*"[82], and secondarily, that he was discriminated against in violation of Article 14 as only male homosexual activity was criminalized, but female, i.e., lesbian activity, was not criminalized.

While *Dudgeon v. the UK* is considered a landmark case for the Rainbow community as it is the first successful complaint relating to homosexuality, it is worth noting that the Court did not exactly express a "pro-LGBTQIA+" approach during the assessment. The Court pointed out that, at the time, all CoE Member States had some form of regulation of male homosexual behavior and that some regulation could be "(…)*justified as necessary in a democratic society*[83]". The Court found that while *some* regulation could be justified, the case of Northern Ireland was different as it prohibited all forms of male homosexual activity, in private or public, without consent or other circumstances making a difference.

The Court considered the importance of the margin of appreciation, referring to *Handyside v. the United Kingdom*, stating that while "(…)*the margin of appreciation will be more extensive where the protection of morals is in issue*", the matter at hand is "(…)*a most intimate aspect of private life*", and can therefore only be regulated when there exists particular serious reasons for interference.[84] Furthermore, the Court took into consideration the increase in tolerance amongst the other Member States, the fact that the authorities in Northern Ireland had refrained from enforcing the prohibition in recent years, and that no evidence that this lack of enforcement had been "(…)*injurious to moral standards in Northern Ireland or that there* (had) *been any public demand for stricter enforcement of the law*.[85]" Hence, the Court concluded that Mr. Dudgeon had, and continued to be, a victim of a violation to his Article 8 rights in regard

[81] Dudgeon v. the United Kingdom, 22 October 1981
[82] Ibid, § 37
[83] Ibid, § 49
[84] Ibid, § 52
[85] Ibid, § 60

to the criminalization of homosexual activity over the age of 21. While the Applicant argued that the age of consent for male homosexual activity should be lowered to the age of 17, which was the age for hetero-, and lesbian sexual activity, the Court disagreed. The Court made the following statement:

"*The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth.*"[86]

The statement reads as a reminder that while the Court was progressing toward adopting a more tolerant approach towards the Rainbow community, it was still prevalent in the Court, as well as society, that homosexuality, particularly male homosexuality, was a matter that corrupted the young mind. The statement ultimately reads as accusing homosexual men of being predatory and guilty of perverting young men who would otherwise be considered of consensual age *if* the sexual activity was heterosexual.

Lastly, while the Court ultimately favored Mr. Dudgeon's claim that criminalizing homosexual activity over the age of 21 was in violation of Article 8, the Court did not agree that "(…)*a clear inequality of treatment* (remained) *a fundamental aspect*"[87] of the case, and therefore did not find it necessary to further investigate his claims of discrimination in regard to gender, *inter alia*.

It is also worth noting that while the Court sided with the Applicant, to a certain extent, it was not unanimous. The dissenting opinions included references to religious beliefs, moral conceptions and standards, societal values, *et cetera*. The case is considered a landmark case for homosexual rights as it resulted in the requirement of all CoE member states to decriminalize gay and lesbian sexual activity over the age of 21, however, the obvious homophobia and disdain that read throughout the case text cannot be ignored.

Pavel Ivanov v. Russia, 20 February 2007

While the case of Mr. Ivanov was found inadmissible, the facts of the case and the Court's reasoning for inadmissibility show the Court's commitment to combat antisemitism in Europe. The applicant, Mr. Ivanov, was the sole founder, owner and editor of the "Russkoye Veche"

[86] Ibid, § 62
[87] Ibid, § 69

newspaper in which he published numerous articles calling for "(…)*the exclusion of Jews from social life(...)*[88]". Additionally, the publications alleged that Jews were responsible for the "social, economic, and political discomfort" in Russia, as well as containing general hatred towards the Jewish ethnic group. In 2004 the Novgorod Town Court found the Applicant guilty of inciting racial, national, and religious hatred, and prohibited the Applicant from journalism and publishing in the mass media for three years.

In his application, Mr. Ivanov complained that his conviction was a violation of Article 13 and 14 of the Convention, as well as complaining in general that his conviction for "racial hatred" was invalid as he argued that "(…)*the jews did not exist as a race or a nation*.[89]" As a result of this statement the Court considered that the Applicant was also complaining about a violation to his Article 10 rights regarding freedom of expression, which was assessed first. In it's Article 10 assessment the Court reiterated previous case law which declares that "(…)*speech which is incompatible with the values proclaimed and guaranteed by the Convention would be removed from the protection of Article 10 by virtue of Article 17*(…)[90]". In practice, the Court has determined in its previous case law that statements denying the Holocaust, justifying pro-Nazi policies, or speech linking all Muslims with acts of terrorism, *inter alia*, are considered incompatible with Article 17[91]. The Court took into consideration that Mr. Ivanov, during the trial with the domestic court, had consistently denied the Jews the right to national dignity, as well as, in his publications, accusing the entire Jewish ethnic group of plotting a conspiracy against the Russian people, and proclaimed that the Jews were the source of all evil in Russia. With this, the Court concluded that the Applicant could not benefit from the protection of Article 10, as the abovementioned speech was incompatible with Article 10 and 17 of the Convention.

As regards the Applicants complaint under Article 13, the Court took into consideration that his main complaint was that the domestic court has refused to order an "expert report" which would prove, in the Applicant's opinion, that the Jews did not form a nation and for that reason were not entitled to national dignity. He claimed that this was a violation of his Article 13 rights and that the trial in general was based on contradictory evidence, which lacked due to the refusal of the "expert report"[92]. Firstly, the Court pointed out that this complaint should

[88] Pavel Ivanov v. Russia, 20 February 2007
[89] Ibid, § 1
[90] Ibid.
[91] Ibid.
[92] Ibid, § 2

also be addressed in the light of Article 6, the right to a fair trial. However, the Court quickly concluded that Article 6 does not lay down specific rules on the admissibility of evidence in domestic courts, and it is therefore up to the Member States to regulate by national law. Beyond this, the Court saw no infringement on Article 6. Furthermore, the Court stated that Article 13 on applies to individuals that have an "arguable claim"[93] to be a victim of a violation of the Convention, which Mr. Ivanov did not, as the Applicant's complaint under Article 10 was found inadmissible.

Finally, the Applicant complained that he was discriminated against on account of his religious beliefs in violation of Article 14. This claim was swiftly rejected by the Court, as the Court reiterated previous case law which has established that Article 14 has no independent existence and can only be applied in relation to the rights protected by the Convention. In Mr. Ivanov's case this meant that because his other claims were found inadmissible, his rights under Article 14 could not be evoked as they had no independent effect. As a result, the entire application was found inadmissible in accordance with Article 35.

In its assessment, the Court assessed the statements made by the applicant during the domestic trial in detail, and the Court stated that it had "(…)*no doubt as to the markedly anti-Semitic tenor of the applicant's views and it* (agreed) *with the assessment made by the domestic courts that he sought through his publications to incite hatred towards the Jewish people*.[94]"

This case became a clear example of the importance of legal precedent as established by previous case law as the Court relied completely on its previous assessments in order to justify inadmissibility of all the claims made by the Applicant. The Court made numerous statements against antisemitic speech and pro-Nazi policy, which demonstrates the historical commitment of the Court in protecting, in particular, a minority group that has been severely violated before the establishment of the Court.

This commitment of the Court towards protecting against antisemitism continues as was made clear in 2015 with the decision on *M'Bala M'Bala v. France.* In that case the comedian Dieudonné M'Bala M'Bala had invited known antisemite, Robert Faurisson, on stage to engage in a "comedic scene" which the Court described as antisemitic. Faurisson was known for denying the existence of gas champers during WWII, amongst other antisemitic opinions. The performance was considered by the Court to have lost its status of entertainment and had entered into the territory of a political meaning which demonstrated hatred, anti-Semitism, and

[93] Ibid.
[94] Ibid, § 1

support for Holocaust denial under the guise of artistic expression. The Court believed that the performance was "(…)*as dangerous as a head-on and sudden attack*(…)"[95], and that the entire production projected ideologies which countered the values of the Convention. The application was found inadmissible on the grounds that it was not compatible with the real purpose of Article 10.[96]

D.H. and Others v. the Czech Republic, 13 November 2007

An application was lodged with the Court in 2000 regarding 18 Roma children with Czech nationality who were placed in schools for children with mental or social handicaps, also called special needs schools. The Applicants claimed that the procedure which placed Roma children in these schools were the result of a systematic attempt at segregation. The Applicants also argued that the special needs schools had an adapted curriculum, which was too simplified for those without special needs, resulting in Roma children of average or above average intelligence being taught a curriculum below their aptitude. The Court took into consideration that the majority of children in special needs schools in the Czech Republic were of Roma origin.

In its assessment the Court reiterated continuously its previous case law which had established both the severity of ethnic discrimination and the special consideration that should be given to the Roma community based on their vulnerability.[97]

The case is an excellent example of a case where the burden of proof is shifted onto the State based on statistical evidence submitted by the Applicant, which is out of the ordinary for the Court.[98] The Court referred to its previous case law where it had accepted "undisputed official statistics" submitted by an Applicant which prove the existence of unequal effect.[99] In the present case, the Court held that the Applicants had submitted reliable and significant statistical evidence to support their claims, and considering that the State had not disputed the statistics or produced alternative statistical evidence, the burden of proof would shift to the State.[100]

[95] Registrar of the Court. (2015, November 10). *European Convention on Human Rights does not protect negationist and anti-Semitic performances* [Press release]. https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-5219244-6470067%22]}
[96] Ibid
[97] D.H. and Others v. Czech Republic, 13 November 2007, § 181
[98] Ibid, § 195
[99] Ibid, § 180
[100] Ibid, § 191 + 195

In assessing the claim of a violation of Article 14 taken in conjunction with Article 2 (right to education) of Protocol No. 1., the Court reiterated that a difference in treatment is only considered discriminatory if it cannot be justified reasonably and objectively and if it does not pursue a legitimate aim.[101] Furthermore, the principle of proportionality must apply between the means employed and the aim pursued. The State claimed that the Applicants had been placed in special needs school based on their performance on psychological tests conducted in educational psychology centres. According to the State, the centres made their recommendations of which school the child should be placed in, and the ultimate decision was then made by the parents. The State therefore claimed that ethnic origin was not a factor in the placement of Roma children in special needs schools. The Court considered the criticism of the tests that the Applicants had submitted, as well as the criticism of the third party interveners all of which criticized the State, and expressed particular concern at the segregation that resulted from the system.[102] Furthermore, the Court considered that the Czech authorities had acknowledged in 1999 that the tests were not produced to take Roma specifics into consideration which often resulted in Roma children of average or above-average intelligence to be placed in the special needs schools because they had performed badly on these tests which were not tailored to them.[103] The State claimed that they had revised the tests in order to ensure that they were not misused against Roma children, however the statistics submitted by the Applicants disprove that this was achieved. The Court also scrutinized the claim of the State that parental consent had been given prior to placing the Roma children in special needs schools. The State itself admitted that consent by the parents were given by signature on a pre-completed form, which did not contain information on the differences between the special needs curriculum and the regular curriculum, as well as not offering any information on alternative options. Furthermore, the parents were left with a choice between an ordinary school which they had been told could not cater to their child's special needs, where the child risked isolation and ostracism, or a special needs school where the majority of the children were Roma.[104]

As mentioned by the Court continuously throughout the present case, it recognizes the particular vulnerabilities and disadvantages of the Roma community all over Europe, giving the community recognition as a group which experiences disadvantages as a result of its cir-

[101] Ibid, § 196
[102] Ibid, 198-199
[103] Ibid, 200
[104] Ibid, § 203

cumstances. In the present case, the Court considered that the evidence submitted by the Applicants, as well as the submissions of the third party interveners and the State, all amounted to proof that the Roma community of the Czech Republic had been victims of discrimination based on their ethnic origin, and that the Applicants as members of the community "(…)*necessarily suffered the same discriminatory treatment.*"[105] Therefore, the Court established that it was not necessary to examine the Applicants individual cases, and a conclusion could be delivered for them all as a result of their belonging to the community.[106]The Court concluded that the law which allowed for a system where Roma children were disproportionately placed in special needs schools was in violation of Article 14 of the Convention taken in conjunction with Article 2 (right to education) of Protocol No. 1.

The case illustrates the Court's commitment to protecting the Roma community and demonstrates a willingness to offer recognition to minority groups and grant recognition to members of such communities with acknowledgement of the particular vulnerabilities that are distinct to that group.

V.C. v. Slovakia, 8 November 2011

The Applicant, a Roma woman was sterilized in a public hospital in Slovakia after giving birth to her second child by Caesarean section. She claimed that the procedure had happened without her informed consent, without medical necessity, and that she had been discriminated against as a result of her ethnic Roma origin, and such her Article 3, 8, 12, 13, and 14- rights had been violated.

During active labor, prior to the Caesarean section, she was told by the hospital staff that if she were to get pregnant again there was a high chance that both her and her future child would die during the pregnancy or during childbirth, and therefore the hospital staff recommended that she undergo sterilization. According to the Applicant's own submissions, she had first been asked by the hospital staff if she wanted more children, and after answering in the affirmative, was told that such a pregnancy could result in the death of herself and/or her future child. Furthermore, the Applicant submitted that during this conversation took place after several hours of active labor had passed, that she was in a lot of pain, and finally, that the hospital staff had insisted so severely that she was at a high risk of endangering herself or her future child's life, and therefore she finally agreed and said: "*Do what you want to do*.[107]"

[105] Ibid, § 209
[106] Ibid.
[107] V.C. v. Slovakia, 8 November 2011, § 15

The Court assessed the claim of an Article 3 violation first and took into consideration whether informed consent had been obtained, and whether the procedure had been necessary to the point where consent could be omitted. Regarding consent, the Court paid particular attention to the fact that the Applicant had been in active labor for several hours, and therefore in immense amounts of pain, when she was asked to make a decision regarding sterilization. The Court also noted that the Applicant's signature on the consent form was "shaky" and "unsteady", and that she had failed to write her maiden name in one word[108], which clearly gave the impression that she was not in any condition to be writing her signature in the first place. The Court also considered a psychologist assessment of the Applicant which concluded that "(…)*her intellectual capacity was very low, on the verge of mental retardation, but that her thinking was well developed in relation to practical issues*.[109]" The Court ultimately concluded that the hospital staff failed to obtain proper consent form the Applicant, who, under proper circumstances, would have been able to consent to such a procedure, as the psychologist had determined. The Court noted that the actions of the hospital staff were paternalistic, especially considering that the Applicant had not been given a proper choice to decline the procedure[110]. Finally, regarding the matter of medical necessity, the Court noted the contradictory statements made by the hospital staff, and subsequently the State, in regard to whether sterilization in that particular moment had been necessary. The doctors claimed that there were clear signs that a third pregnancy could lead to rupture of the uterus[111], however, when discussing internally whether to proceed with a hysterectomy or tubal litigation, the doctors opted for tubal litigation[112]. Tubal litigation is the procedure known as sterilization which consists of severing the Fallopian tubes, thus preventing the eggs from reaching the uterus for fertilization. This procedure does not prevent a person from becoming pregnant through other means, such as in vitro fertilization, which the State itself used as an argument in relation to the Applicant's Article 8 claims, which is just one example of the contradictory statements made by the State in this case. The State's primary argument in regard to the alleged Article 3 violation was, namely, that the Applicant was in risk of rupture of the uterus, however, when deciding how to proceed, the doctors opted for the option that (a) did not remove the uterus, and (b) did not prevent pregnancy. The Court also made a note of the fact that the procedure had caused physical and

[108] Ibid, § 14
[109] Ibid, § 34
[110] Ibid, § 114
[111] Ibid, § 22
[112] Ibid, § 10

psychological problems for the Applicant later in life, including a false pregnancy, which caused both physical and mental strain on her[113]. The Court unanimously found a violation of Article 3 based on the fact that the Applicant did not give informed consent, sterilization is not a life-saving procedure, and the hospital staff had treated the Applicant with an overall disregard of her own autonomy and choice.

The Applicant claimed under Article 8 that her rights had been violated because the procedure was not life-saving, she did not give informed consent, she was not provided with information about her reproductive health or alternative ways of contraception to avoid pregnancy, she considered her infertility to be irreversible because in vitro fertilization was not an option for her for both financial and religious reasons, and lastly, her infertility had led to ostracism from the Roma community and the deterioration of her marriage.[114] When assessing the Article 8 complaint the Court started by stating that it was not disputed between the parties that the procedure had, in fact, affected her reproductive health and had negative repercussions on her private and family life, and as such had interfered with her rights under Article 8[115]. Furthermore, the Court considered the ethnic origin of the Applicant, as it had also been mentioned in the medical records of the Applicant when she was a patient at the hospital. The Court noted that an "(…)*entry in the "Medical history" part of the record of the applicant's pregnancy and delivery, under the sub-section entitled "Social and working conditions, especially during the pregnancy", simply stated: "Patient is of Roma origin."*[116], without further reference as to why this information was relevant. The Court considered the opinions of ECRI[117], which expressed severe concerns about the public opinion towards Roma in Slovakia, and CEDAW[118], which expressed particular concerns regarding the sterilization of Roma women without informed consent, indicating a widespread tendency. In conclusion, the Court, unanimously, held that the particular "mindset" of the hospital staff toward the Applicant due to her Roma origin, in conjunction with the abovementioned interference with the Applicant's Article 8 rights, resulted in a violation of Article 8. This conclusion also meant that it was unnecessary for the Court to consider if a violation of Article 12 had occurred. The Court also did not find

[113] Ibid, § 118
[114] Ibid, § 133-134
[115] Ibid, § 143
[116] Ibid, § 150
[117] Ibid, § 147
[118] Ibid, § 148

a violation of Article 13 of the Convention, however, the Court did reiterate its previous statement that the dismissal of the Applicant's case with the Constitutional Court was "excessively formalistic"[119], though this, in itself, did not constitute a violation of Article 13.

Regarding the Article 14 claims made by the Applicant, the Court noted that while the actions of the hospital staff were questionable, there was not sufficient evidence to convince the Court that these actions were part of an organised policy or that the actions were intentionally racially motivated.[120] Nonetheless, the Court held that the State had failed to comply with its positive obligation under Article 8 to secure that the Applicant had "(…)*a sufficient measure of protection enabling her, as a member of the vulnerable Roma community, to effectively enjoy her right to respect for her private and family life in the context of her sterilisation.*"[121], and therefore, while the Court found it unnecessary to further consider discrimination in relation to Article 14, it was established that the Applicant's Roma origin had entitled her to particular attention, which the State of Slovakia had failed to give her.

Although the Court declined to consider some of the Applicant's claims in conjunction with other Articles, the case was mostly concluded unanimously, including the assessment of damages which granted the Applicant a total of 43.000€ for non-pecuniary damages, and costs and expenses.

In conclusion, the case is a positive example of the attention and consideration the ECtHR gives the Roma community taking into consideration that the case was concluded mostly in favor with the claims of the Applicant, primarily by unanimous agreement, and with particular attention given to external reports on the situation of Roma people in Slovakia. The Court also briefly considered the relevance of the sex of the Applicant, giving implicit attention to the importance of intersectionality of the discrimination endured by the Applicant. The case overall demonstrates an intention form the ECtHR to protect the particularly vulnerable group that is the Roma community.

[119] § 166
[120] § 177
[121] § 179

Vejdeland and Others v. Sweden, 9 February 2012

In December 2004 four men entered a secondary school in Sweden and distributed leaflets which contained homophobic statements.[122] The leaflets characterized homosexuality as deviant behavior and morally destructive. It encouraged the students to challenge their teachers and tell them that "(…)*homosexual lobby organisations are* (…) *trying to play down pedophilia(...)*"[123]. The references to deviancy and pedophilia are particularly interesting as they demonstrate a similarity to the Dudgeon case in the perception of homosexuality in society, even considering the difference in time. The Applicants were convicted of agitation against a national or ethnic group.[124] Interestingly, both the Applicants and the prosecutor appealed against the first judgment of the domestic court. The former wanted the charges dropped, or the punishments reduced, and the latter wanted the punishments increased and asked the court to consider the acts to be aggravated.[125] The case ultimately made its way to the ECtHR where the Applicants claimed, *inter alia*, that their Article 10, freedom of expression, rights had been violated.

When assessing if a violation of Article 10 has occurred the Court first has to consider if the act of the State constitutes an interference with the rights of Article 10. In the present case the Court found that the Applicants' convictions did amount to an interference with their freedom of expression, which the State did not deny. This interference can therefore only be justified if it is in pursuance of a legitimate aim as prescribed by the Article. The assessment made by the Court on this matter is noticeably short and quickly concludes that the interference served a legitimate aim in protecting the reputation and rights of others, within the meaning of Article 10 § 2.

Furthermore, the Court had to consider the necessity of the interference. During this assessment the Court focused on the contents of the leaflets distributed by the Applicants, stating that the leaflets contained homophobic statements and could be considered as inciting to hatred.[126] Additionally, the Court stated that discrimination based on sexual orientation is as serious as discrimination based on race, origin, or color.[127] The Court held unanimously that there had been no violation of Article 10 of the Convention, *inter alia*.

[122] Vejdeland and Others v. Sweden, 9 February 2012, § 8
[123] Ibid, § 8
[124] Ibid, § 11
[125] Ibid, § 12
[126] Ibid, § 54-55
[127] Ibid, § 55

When one compares the present case, and the rhetoric of the Court, to that of *Dudgeon v. UK* there is a significant improvement in the respect for and attitude toward homosexuality, and by extension, the rainbow community. The Court appears in strong support of gay rights and the language of the case is far more encouraging than that of Dudgeon. The development is a true testament to the Court's claim that the Convention, and the Court by extension, is a living instrument and shall be interpreted in light of the progression of society.[128]

S.A.S v. France, 1 July 2014

A French Muslim woman complained to the Court and argued that the law no. 2010-1192 of 11 October 2010, which bans the wearing of face-coverings and face-veils in public, constituted a violation of her rights as protected by Articles 3, 8, 9, 10, and 11, taken separately and in conjunction with Article 14 of the Convention[129]. The Applicant argued that apprehending her from wearing what she wanted in the public sphere was a violation of her rights.

The Applicant submitted to the Court that she rightfully belonged to the category of potential victim as was determined by *Dudgeon v. UK* where "(…)*the Court had recognised homosexuals as victims on account of the very existence of laws imposing criminal sanctions for consensual homosexual activity, on the ground that the choice they faced was between refraining from prohibited behaviour or risking prosecution, even though such laws were hardly ever enforced.[130]"*It was the opinion of the Applicant that the present case was identical.

The State argued that the Applicant was not a victim, and that the notion of potential victims[131], "(…)*undermine*(s) *the obligation to exhaust domestic remedies and that an extensive application of this notion could have highly destabilising effects for the Convention system*."[132] It was ultimately the opinion of the State that the victim's claim constituted an *actio popularis[133]*, and was therefore inadmissible, *inter alia*. Furthermore, the State made a somewhat controversial statement when it argued that the Applicant had not adduced evidence that she was in fact Muslim and chose to wear the Niqab or Burqa for religious reasons, or that she had worn them before the ban entered into force. The Court dismissed the State's arguments

[128] Tyrer v. the United Kingdom, 25 April 1978, § 31
[129] S.A.S v France, 1 July 2014, § 3
[130] Ibid, § 54
[131] See Chapter II.I.II. on the victim status with the ECtHR
[132] S.A.S. v. France, § 53
[133] Ibid § 53

of inadmissibility on these grounds and declared that the case did not constitute an *action popularis.*[134]

The Court did go on to declare that the Applicant's claims of violations of Article 3 and 11 were inadmissible based on the Courts assessment that "(…)*the minimum level of severity required if ill-treatment is to fall within the scope of Article 3*(…)"[135] had not been reached in the present case, and that the Applicant's claim that the ban would "(…)*breach her right to freedom of association and would generate discrimination*(…)"[136] was unsubstantiated and therefore manifestly ill-founded. The Court found the remaining claims admissible in accordance with Article 35 § 3 (a) of the Convention.

The case is a fascinating example of countering parties that utilize the same arguments to prove their countering claims. In the present case the emancipation of women and gender equality were arguments used by both parties to substantiate their claims. The State argued that prohibiting the covering of the face in the public sphere was in the interest of gender equality, stating that the covering of women's faces "(…)*denoted the woman's emancipation, self-assertion and participation in society*(…)"[137]. The Applicant countered this statement by claiming that wearing a face cover was a "(…)*profoundly personal choice*(…)" and that the principle of gender equality as presented by the State was *simplistic*, and denied women the right to exist as individuals in public.[138] The Applicant also relied on the intervention of third parties, such as Amnesty International, which brought up the notion of *intersectionality*, calling it "*intersecting discrimination*"[139]. Amnesty observed that women were at risk of experiencing "(…)*a distinct form of discrimination due to the intersection of sex with other factors such as religion*(…)", and that the State contributed to a form of gender-, and religion-based discrimination when it assumed that women who dress in a certain way for religious reasons only do so under coercion.[140] It was the opinion of Amnesty International that a more nuanced approach than Law no. 2010-1192 was necessary to ending discrimination.

In its assessment of the alleged violations of Article 8 and 9 the Court stated that it would examine the Law under both Articles, but with an emphasis on Article 9, as the Court found that the issue mainly regarded the freedom to manifest one's religion.[141] The Court

[134] Ibid, § 68
[135] Ibid, § 70
[136] Ibid, § 73
[137] Ibid, § 82
[138] Ibid, § 77
[139] Ibid, § 90
[140] Ibid, § 90
[141] Ibid, § 108

swiftly concluded that the ban constituted an interference with or limitation of the rights protected by both Articles, and that the ban was prescribed by law. The importance was therefore whether the Court agreed that the ban was pursuant of a legitimate aim. Both Articles include lists of legitimate aims, and the State argued that the Law pursued the aim of "public safety" and "respect for the minimum set of values of an open and democratic society".[142]

Firstly, the Court accepted that the ban had been adopted in pursuance of public safety, although the Court did point out that it was questionable if the Law's drafters had initially attached much weight to this concern. The Court therefore also relied on a study report of 25 March 2010 where "(…)*the Conseil d'État indicated that public safety might constitute a basis for prohibiting concealment of the face*(…)"[143].

Secondly, the Court examined the claim of the State that the ban on face-coverings was necessary to ensure "respect for the minimum set of values of an open and democratic society". The State referred to three principal values which it considered could be linked to the "protection of the rights and freedoms of others", within the meaning of Article 8 and 9. The three values were as follows: (1) respect for equality between men and women, (2) respect for human dignity, and (3) respect for the minimum requirements of life in society.[144]

Firstly, the Court stated that gender equality and its advancement is a particular interest of the Council of Europe and that it is possible that a Member State may prohibit anyone from enforcing women to conceal their faces in pursuance of this advancement. However, a blanket ban on a practice which is defended by women, such as the Applicant, cannot be justified under the guise of gender equality.[145]

Secondly, the Court held that the wearing of the full-face veil is an expression of cultural identity and "(…)*contributes to the pluralism that is inherent in democracy*.", as well as recognizing that it is a practice that relates to the variability of the notions of virtuousness and decency. [146] Therefore, the Court held that the State could not legitimately justify the blanket ban as an attempt of protecting the respect for human dignity.

[142] Ibid, §114
[143] Ibid, § 115
[144] Ibid, § 116
[145] Ibid, § 119
[146] Ibid, § 120

Thirdly, and most importantly for the present case, the Court agreed that the "respect for the minimum requirements of life in society" could be linked to the legitimate aim of protecting the rights and freedoms of others.[147] In this assessment the Court considered the submissions of the State that the face is an important part of social interaction, that covering the face may present difficulties in developing open interpersonal relationships, both of which form indispensable elements of community life. To this assessment the Court made the following interim conclusion:

"*The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier."*[148]

The Court did declare that the high risk of abuse of such a ban requires careful examination of the necessity of the Law.

The Court then commences a longer explanation from § 123-129 on the importance of minority rights, tolerance, equal treatment, pluralism, neutrality and impartiality of the State, public order, religious harmony, *et cetera*, in a democratic society. The Court makes many statements in favor of all these principles and values including declaring that "(…)*democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids abuse of a dominant position*."[149] With this statement and many others alike in mind, the Court goes on to conclude whether the ban is proportionate in the pursuance of (a) public safety, and (b) to ensure the observance of the minimum requirements of life in society as part of "the protection of the rights and freedoms of others". The Court is quick to determine that a blanket ban on the wearing of face-coverings of any kind in public spaces is not proportionate with the legitimate aim of public safety, however, the obligation for people to show their face and to identify themselves when there is a particular need for it, would be proportionate as established by the Court's earlier case law.[150] The present case did not meet this proportionality requirement. Thereafter, the Court considers the matter of "the minimum requirements of life in society", also known as the principle of "living together" or *vivre ensemble* in French. It is during this assessment that the amount of statements by the Court in favor of the respect for minority rights

[147] Ibid, § 121
[148] Ibid, § 122
[149] Ibid, § 128
[150] Ibid, § 139

and culture, and the freedom to manifest one's religion, *et cetera*, begin to decline and it becomes more clear that the Court believes that the State can justify a blanket ban on face coverings in the public sphere, which will result in the complete criminalization of a specific religious observance practice. The Court declares that it falls within the margin of appreciation for the State to legislate in a way to secure the conditions under which "(…)*individuals can live together in their diversity*." It is here where the argumentation of the Court begins to enter a gray area of self-contradiction in the sense that while the Court does not directly contradict itself, it does make statements that are less in favor of minority rights and diversity as it has done previously in the case (as mentioned earlier in this chapter). During this *vivre ensemble* assessment, the Court begins to slowly move away from the previous statements of the importance of protecting minority rights in a democratic society, and that democracy does not simply mean that the majority opinion shall prevail over the minority, towards a narrative that in fact does support the democratically elected state government in issuing a blanket ban which has a devastating effect on a very small minority group of women in France. According to the State's own submission, approximately 1900 women wore the Islamic full-face veil in France in 2009.

It is now worth mentioning that this assessment and conclusion is not unanimous; the Court voted by fifteen votes to two that there had been no violation of Article 8 and 9. Judges Nussberger and Jäderblom disagreed and issued a joint partly dissenting opinion. In this opinion the judges are particularly critical of the concept of *vivre ensemble* and they declare that the concept does not fall directly under the rights or freedoms protected by the Convention, and that the concept is "far-fetched and vague".[151] The dissenting judges criticize the arguments made by the State and particularly a report by a French parliamentary commission which claimed that the face veil was "a symbol of a form of subservience"[152]. The judges are particularly critical of the majority vote for not acknowledging previous observations made by the Court that the Convention protects not only those opinions "(…)*that are favourably received or regarded as inoffensive or as a matter of indifference, but also ... those that offend, shock or disturb", pointing out that "[s]uch are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'*".[153]

[151] S.A.S. v. France, Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, § 5
[152] Ibid, § 6
[153] Ibid, § 7

Moreover, the dissenting judges criticize the notion that the ban is justified in preventing individuals from not engaging with others in the public sphere. The judges argue that, in fact, an individual does not have a right to engage with other people, in public, against their will,[154] and therefore the principle of *vivre ensemble* cannot prevail over the individual's right to refrain from engaging with people in public. Furthermore, judges Nussberger and Jäderblom argue that there are plenty examples in European culture where the covering of the face does not disrupt interpersonal exchange or social relationships. The judges make examples of the exceptions to the Law, where it is tolerated, that people cover their face, such as skiing and wearing costumes. The dissenting judges argue that in these situations "*nobody would claim that* (…) *the minimum requirements of life in society are not respected*."[155]

In conclusion, *S.A.S. v. France* is a fascinating case for multiple reasons, one of which is that it perfectly displays one of the many characteristics of the Court that make it a strong human rights protection institution: the attention to detail. The Court's assessment is long and exhaustive and includes not only the submissions of the two parties, but also the intervention of third parties, and references to international law and culture. Attention is given to the values of democracy and the importance of protecting minority rights. That being said, the judgment did surprise many scholars, and the reception was overwhelmingly negative.[156] The decision was called a "legal and political mess" and was criticized for perpetuating an irrational fear towards Islam, ultimately viewing the religion and its observers as threats.[157] These criticisms are understandable considering what has been discussed above. The Court starts out by expressing the importance of protecting minority rights, encouraging tolerance, and nourishing diversity, however, through a carefully executed narrative of the concept of *vivre ensemble*, the Court favors the State and fails to offer protection to Muslims, women, and Muslim women. It is ironic, to say the least, that the State is allowed to justify a ban, which has a devastating effect on women's freedom to dress as they choose, when one of the arguments made by the State in support of its own law is that it wishes to liberate women from oppression and subservience. The Court fails to acknowledge this irony and subsequently proceeds to allow a state to indirectly regulate the behavior of women, not unlike the alleged oppression the State claimed to be fighting against.

[154] Ibid, § 8
[155] Ibid, § 9
[156] Pearson, M. (2021). What Happened to 'Vivre Ensemble?': Developments after *SAS v France*. *Oxford Journal of Law and Religion*, *10*(2), 185–205. https://doi.org/10.1093/ojlr/rwab017
[157] Ibid, p.188

III.III. Interim conclusions on case law analysis

The primary differences between the two courts are the scope, applicability, and general competences. The CJEU is severely limited compared to the ECtHR considering that the latter is competent in assessing any act committed by a Member State, as opposed to the former which is limited to assessing the compliance of the implementation of EU law. Applicants are granted different statuses in each court; before the CJEU an applicant is merely a party in the case, whereas the ECtHR can recognize their applicants as victims, and grant compensation accordingly. Furthermore, the evolution of society is very prominent in the case law of the ECtHR as it is an older institution, whereas the CJEU as we know it today is very new. It is clear from the case law of the ECtHR that the protection of the rights of the Convention is the first priority of the Court, whereas the CJEU has a broader scope in protecting the implementation of all EU law. This is evident in *Joined Cases C-804/18 and C-341/19 (WABE and MH Müller Handel),* where the Court also considers the rights of the companies concerned.

The two courts appear to have equal interest in promoting the rights of the Rainbow community, as well as both courts appearing apprehensive toward the Muslim community. The case law on the Jewish community before the CJEU was limited and it was only possible to find the case concerning ritual slaughter (Case C-336/19), which is not enough to conclude if the CJEU assesses cases regarding the Jewish community differently than the ECtHR. Accordingly, the ECtHR flourished with case law condemning antisemitism and continuously declared the importance of supporting the Jewish community. Furthermore, the two courts seem equally dedicated to protecting the Roma community. These statements are made whilst keeping in mind that the structure and competences of the CJEU restricts it in making bold statements of support, as those made more frequently by the ECtHR, and therefore this conclusion on the CJEU is based on the interpretation of the case law, wherein the support towards specific communities often presents itself implicitly, in comparison to the ECtHR which is more direct.

IIII. Evaluation of The Two Systems: Differences and Similarities

The EU system overall, and the CJEU by extension, offers a wide range of *de jure* protection of human rights, and subsequently minority rights. With the impressive number of regulations, directives and decisions produced every year, there can be no doubt that the protection of fundamental rights and freedoms is constantly pursued by the Union. The fact that individuals

have access to a court where they can directly challenge if the laws of their state are compliant with EU obligations, is truly remarkable and is a true testament to the development of democratic values in Europe. Furthermore, the CJEU is able to issue judgments on the interpretation of Union law which will have effect on all Member States, such demanding equal treatment for all equal matters within the Union. However, the EU system is not without its faults. Compared to the scope of the ECHR, the EU system only has legislative and judicial power over 27 states, and additionally, the CJEU can only assess cases that are specific to Member States' implementation and interpretation of EU law. Nevertheless, it may be argued that the EU system is more advanced because it includes consistent development of directives and regulations, which offer more extensive detail than the ECHR. The EU system reflects an attempt at achieving European consensus on specific matters, such as matters relating to minority rights protection. Member States are obligated to comply with EU law, within its scope. It is therefore possible for the EU system to offer more detailed *de jure* protection.

The wide *de jure* protection, including a continuous legislative production of regulations and directives, makes the EU system strong. However, when the CJEU is viewed separately from the collective powers of the EU system, the Court is significantly weaker than the ECtHR. The limitations of the types of cases that can be assessed by the CJEU leave a want of redress for individuals whose case cannot be pushed through the narrow pinhole of the requirements set out in TEU Article 19. These individuals are left to seek remedy elsewhere, and it is highly likely that their case could fit the broader scope of the ECHR.

The ECHR is considered a *living instrument* by the Court itself and legal scholars. It is accepted that the ECHR is to be interpreted according to the developments of society, and therefore the interpretation of the ECHR may change over time depending on social progression. It is meant to evolve alongside society which in practice means that the interpretation of the Convention must always remain authentic to the intention of the Convention, i.e., to protect human rights, as well as remain true to how society evolves. Therefore, acts that were not considered violations in the past, may be considered violations today as seen in the light of progressive society. This is not to say that the case law of the ECtHR does not hold its value as legal precedent; however, it does mean that the Court may be enlightened by social evolution in such a way that allows it to interpret the ECHR in a manner that is more compatible with present day. Furthermore, the ECHR has a wide range of applicability with 46 HCP's, which allows for the Court to protect human rights on a broader scale compared with the EU system.

Therefore, while the EU is constantly producing new legislation in the forms of directives and regulations to further the *de jure* protection of human rights, and subsequently minority rights, the ECtHR has the competence to interpret the Convention in the light of present day, and it may therefore be argued that their powers are equal. The ECHR does not include much literal reference to the protection of minority rights, in comparison to the EU Charter of Fundamental Rights, or other EU legislation. However, this has not prevented the ECtHR from protecting minorities overall, as can be seen in the analysis above. The ECtHR's competence to assess the intentions of the ECHR and the needs for protection in present day, gives it the ability to offer similar if not equal protection for minorities compared to the EU system. Furthermore, any case where it is suspected that a human rights violation has occurred, can be brought before the ECtHR for assessment. The ECtHR is not limited in its competence to only assess certain types of actions taken by the HCP's; the ECtHR can assess *all* actions taken by the HCP's, in contrast to the CJEU. Therefore, while the EU system may offer greater literal *de jure* protection of human rights, and the rights of persons belonging to minorities, the ECHR allows for a system of human rights protection that offers more *de facto* protection, as well as giving equal *de jure* protection; albeit through a more abstract system of interpretation of the ECHR.

Furthermore, the two courts appear to assess cases relating to the rights of persons belonging to minorities similarly. In general, the CJEU is much less detailed, which is mostly due to the fact that this court does not consider their cases from the perspective of violations of human rights, and does not acknowledge victim status of the applicants or parties involved. Rather, this court, as mentioned often, assesses interpretation of and compliance with EU law, therefore the facts and circumstances of the applicants are only referred to and used by the Court indirectly without the Court acknowledging victim status. Although, as is apparent in some of the cases analyzed above, the Court may indirectly express support toward the applicants or individuals involved in the case through the way the case is conducted. This is apparent in *Case C-673/16 (Relu Adrian Coman)* where the Court makes exceptional effort to provide aid relating to same sex marriage, or *Case C-83/14 (CHEZ Razpredelenie Bulgaria AD)* where the Court softly implies that the referring court may find that there has been discrimination toward the Roma community. This is another of the main differences between the two courts. While the CJEU makes very indirect suggestions as to how the referring court *may* consider the case, or conducts its assessment in such a comprehensive manner to express implied support towards the applicants, the ECtHR can make such statements openly and bluntly. This is evident in the ECtHR's continuous fight against antisemitism.

In *M'Bala M'Bala v. France* and *Pavel Ivanov v. Russia*, this is evident when the ECtHR makes bold statements against antisemitism and holocaust-denial. The Court continuously reiterates its established case law on the importance of combatting antisemitism, which confirms that the Court is dedicated to this cause. This also makes sense historically, because the Holocaust was one of the driving factors behind the drafting of the Convention after World War II. It is therefore unsurprising that the ECtHR remains dedicated to this cause. Furthermore, the Jewish community may be considered an 'old' or 'national' minority in many of the HCP's, which, according to Kymlicka and Eide, may explain why the Court expresses strong loyalty and willingness in protecting this community.

The same theory can be applied to the Roma community, where the ECtHR in both *D.H. and Others v. the Czech Republic* and *V.C. v. Slovakia*, continuously express the importance of recognizing the characteristics that cause this community to be more vulnerable than others. The CJEU upholds a similar sentiment in *Case C-83/14, (CHEZ Razpredelenie Bulgaria AD)* where it offered an extensive explanation on how the principle of non-discrimination was to be understood in the context of the obstacles experienced by the Roma community.

As the Roma and Jewish communities have experienced similar atrocities throughout European history, and have received increasingly better recognition in recent history, it makes sense, in theory, that the two courts would assess cases relating to discrimination against these two communities similarly. However, in practice, it was only possible to uncover one case from the CJEU which specifically included the Jewish community, namely *Case C-336/19, (Centraal Israëlitisch Consistorie van België and Others)*, on ritual slaughter, which is joined by the Muslim community. It is difficult to make a conclusive statement as to *why* there are no other cases from the CJEU that relate to the Jewish community. Based on the research conducted for this thesis, including Chapters I-III, it may be explained by the limitations of the competences of the CJEU. As this court is limited to reviewing cases regarding the interpretation of EU law it is plausible that the Jewish community has not been able to bring a case to the CJEU earlier because the cases have not fallen under the scope of Article 19 of TEU.

In comparison, the Muslim community is present in more case law from the CJEU, including *Case C-336/19* on ritual slaughter, but also in cases like *C-71/11 and C-99/11, Bundesrepublik Deutschland v Y and Z*. Cases on asylum, as those of Y and Z, often include issues relating to religion, which therefore typically triggers the topic of minority rights. Y and

Z is particularly interesting because it presents the importance of intersectionality within a controversial topic, which is that of migration and asylum. Asylum seekers and refugees are a vulnerable group as a whole, and within that group we can identify individuals who are more vulnerable due to additional characteristics, such as religion or gender. In the cases of Y and Z we are presented with examples of people who, (1) have fled their country of origin, (2) have arrived in a country where they are a religious, and presumably ethnic and linguistic minority, (3) are a religious minority in their country of origin, (4) have been, or will likely be, persecuted in their country of origin for their religious beliefs, *et cetera*. It is in cases such as these that it is important for the Court(s) to recognize intersectionality in general when considering discrimination, and especially when considering discrimination against minorities. In Y and Z the CJEU approached the case with more direct recognition of the importance of protecting the rights of refugees who have a well-founded fear that they will be persecuted in their country of origin, in comparison to the approach toward ritual slaughter where the CJEU was more open to accepting that the rights of Jews and Muslims to perform ritual slaughter in accordance with their religious beliefs be restricted to comply with the legitimate aim of promoting animal welfare. As mentioned previously, the case was criticized for not viewing ritual slaughter on equal terms with hunting, while both arguably produce small amounts of meat for consumption. Here the CJEU differentiated between the two practices, although the arguments to justify this distinction appear weak and leave the impression that one practice is simply more acceptable than the other.

In this thesis the Muslim community is solely represented by the case of *S.A.S. v. France*. It may be argued that it is not possible to make a conclusion on the ECtHR's approach to the Muslim community by only analyzing one case; however, this case is very special. As mentioned previously, the case is very long, and very detailed. The ECtHR's assessment is extensive and exhaustive, including references to its own established case law, as well as considering third-party interveners, international law, cultural and democratic values, *et cetera*. An entirely new thesis could be dedicated to this case and the concept of *vivre ensemble* and its victory over the rights of a religious minority community. The ECtHR's assessment is overall very encouraging from the perspective of minority rights in general, and religious rights specifically, however, the approach gradually advances toward the abstract notion of *vivre ensemble* to justify interfering with the rights of Muslim women in France. Despite that, the assessment overall dedicates a significant amount of effort to the importance of protecting religious rights and the rights of minorities, before it concludes in favor of the ban of the face veil, which

furthermore confirms how special the case is, and perhaps also explains why the judgment was shocking to many scholars, and even to two dissenting judges. The ECtHR is normally strictly dedicated to protecting minority rights, as can be seen in Chapter III, and therefore *S.A.S. v. France* does present itself as a "black sheep" of the case law of the ECtHR that relates to the rights of persons belonging to minorities. However, when considered together with the cases of *C-804/18 and C-341/19 (WABE and MH Müller Handel)*, and *Case C-336/19* on ritual slaughter, it is unsurprising that both courts seem apprehensive in their recognition of minority rights towards practices that distinguish themselves from the European norms, such as ritual slaughter and the wearing of hijabs and burqas.

Lastly, both courts appear very dedicated to promoting the rights of the Rainbow community. Gender identity, same-sex marriage, and sexual orientation all receive an overall show of support, both directly and indirectly. As stated in Chapter III.II.II., *Dudgeon v UK* includes hostile and seemingly homophobic language, however, the case is still a landmark decision in the protection of the rights of sexual orientation, and the language of the Court may mostly be explained by the timing of the judgment. Furthermore, the ECtHR's recent case law on the Rainbow community include more expressive support toward the community. The same conclusion can be made with the CJEU which makes exceptional effort in *Case C-673/16(Relu Adrian Coman)* on the rights of same-sex spouses in the EU, as well as the recognition of gender identity and trans rights in *Case C-451/16, (MB v Secretary of State for Work and Pensions)*.

In conclusion, the impact of the differences and similarities of the two systems of the CJEU and the ECtHR on the protection of the rights of persons belonging to minorities can be viewed as twofold. Firstly, the ECtHR is the stronger court when a comparison of the competences and scopes of the two courts is made. The ability of the ECtHR to assess any act of a state that is suspected of violating the ECHR is far superior to the CJEU's ability to only assess cases in relation to interpretation and implementation of EU law. Furthermore, there is a need for individuals to be able to bring cases against the EU as an accountable party to a court of human rights. The current structure of the Union where the CJEU is the highest court to which a person can bring their case is problematic because the limitations of the CJEU leaves a narrow margin for acceptable cases, and subsequently leaves a vacancy in the need for human rights protection in the EU. Acceding to the ECHR will help to fill this void and provide individuals, and subsequently minorities, with better protection.

Secondly, in regard to the differences in approach of the two courts, there is not a noticeable difference in how the two courts approach cases relating to the communities represented in this thesis. The two courts seemingly approach 'old' minorities, such as the Jewish and Roma communities, with more forthright support, and are more apprehensive against 'new' minorities, namely the Muslim community. Both courts display support for the Rainbow community, and the ECtHR is continuously expressing the importance of combatting antisemitism. It is therefore unlikely that the accession will make a substantive difference in the protection of a specific community, as the analysis of the case law in this thesis presents an overall consensus between the two courts on how they approach the Jewish, Muslim, Roma, and Rainbow community.

V. Conclusion

The EU needs to accede as a union to the ECHR to achieve more effective human rights protection, and subsequent offer better protection of the rights of persons belonging to minorities. The ECHR offers more comprehensive protection to the individual as it bestows a more complete set of competences on its court. The ECtHR has the ability to consider any act by the HCP's and is able to recognize the victim status of parties and consider compensation accordingly. While the communities explored in this thesis may not be able to hope for a substantive difference in the assessment of their cases, acceding to the ECHR will give them the right to hold the Union accountable, which is nonetheless a strong addition to the protection of human rights in practice. The CJEU cannot fully satisfy the need for human rights protection, and subsequently the need for the protection of the rights of persons belonging to minorities, as it is limited too severely in its competences to do so. While the ECtHR appears as the stronger court of the two, it is not without its faults, and the analysis above has demonstrated that there is a need for the Court to consider intersectionality when assessing the severity of interference with the rights of individuals; both from the perspective of minority rights, and human rights overall.

In conclusion, the accession of the EU to the ECHR will fill a current vacancy in the protection of human rights in the Union, and will subsequently increase the quality of the protection of the rights of persons belonging to minorities. While it currently appears that the ECtHR will asses cases relating to the rights of persons belonging to minorities similarly to the CJEU, the

principle of the ECHR as a living instrument leaves a glimmer of hope that this will change over time to the benefit of European minorities.

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