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Fit for Purpose or Faulty Design? Analysis of the Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Legal Protection of Minorities

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Abstract

This paper examines whether the European Court of Justice (ECJ), even in the absence of explicit competences, could play a role in the creation of a European Union policy promoting the protection of minorities and thus preventing their social exclusion. Comparison is made with the jurisprudence of the European Court of Human Rights (ECtHR) because of the cross-fertilisation between the two Courts.

The author argues that there is a conspicuous absence in ECJ jurisprudence on the rights of minorities to their culture and identity, whereas the jurisprudence of the ECtHR in this regard is progressive. In contrast, the ECJ takes the fore when it comes to the protection of the linguistic rights of minorities.

In conclusion, the author argues that the ECJ is not fit for purpose, but that to speak of a faulty design is taking a step too far.

I. Introduction

"Europe is the Europe *of* minorities".[2] The EU can indeed be thought of as a patchwork of minorities.

The Rome Treaty paid no attention to minority protection. However, it is my assertion that the EU should develop an efficient policy for minority protection, not only to fulfil its role as defender of human rights on the international scene but also to maintain stability within the EU itself. Neglecting the minority problem could be a destabilizing factor. In spite of this, the member states did not assign any explicit competence to the EU to take action on this sensitive issue in the Nice Treaty.

This paper will examine to what extent the EU has, even in the absence of explicit competences, developed a policy for minority protection. This will be effected through an analysis of the jurisprudence of the European Court of Justice (ECJ). The choice to analyze the case law of the ECJ is not arbitrary. The ECJ has played a pioneering role in the sphere of protection of human rights by qualifying them as "general principles of Community law

[1] The author would like to thank Stanislas Adam, Kirstyn Inglis and Peter Van Elsuwege for their comments on an earlier version of this article. The usual disclaimer applies.

[2] Romano Prodi quoted in *Hungarian News Agency*, 15 April 2001 (emphasis added).

common to the Member States".[3] The question is whether it could do the same for the protection of minority rights.

Account must also be taken of the jurisprudence of the European Court of Human Rights (ECtHR), because of the cross-fertilization between the ECtHR and the ECJ.[4] Moreover, the Council of Europe was the first international organization to develop treaty protection for minorities by creating the Framework Convention for the Protection of National Minorities (FCNM) in 1994 and embraces a larger territory than the European Union with substantial minority populations, for example, in the Balkans. It is interesting to scrutinize whether the ECtHR was able, on the basis of a general human rights instrument (the European Convention on Human Rights and Fundamental Freedoms (ECHR)), to develop a consistent minority protection jurisprudence that could serve as an example for the ECJ.

The length of this study does not permit an examination of all of the judgments of the ECJ and the ECtHR that are linked to minority protection or could have an impact thereon.[5] Therefore, the paper will concentrate on certain milestone judgments of the two courts where minority issues have arisen, in order to gain insight into their respective attitudes towards minority protection. Ultimately, the aim is to determine whether this overall approach to minority protection at EU level is fit for purpose, namely by leaving it to the ECJ to fill the legal gaps in the European treaties.

[3] ECJ, case 29/69, *Erich Stauder*, judgment of 12 November 1969, [1969] *ECR* 419, para. 7; ECJ, case 11/70, *Internationale Handelsgesellschaft*, judgment of 17 December 1970, [1970] *ECR* 1124, para. 4. In this "jurisprudential chart" of fundamental rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has "special significance". ECJ, case C-299/95, *Kremzow*, judgment of 29 May 1997, [1997] *ECR* I-2629, para. 14.

[4] For an extensive analysis, see, for example, Sionaidh Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis", 43(3) *Common Market Law Review* (2006), 629–665. Our study examines only the jurisprudence of the ECtHR, since that Court has only a general human rights treaty (ECHR) as a basis. The question is if the ECJ can do the same on the basis of its own human rights doctrine. That explains why acts of non-specific minority instruments, like the opinions of the Advisory Committee of the Framework Convention for the Protection of National Minorities (FCNM), are not taken into consideration.

[5] For an extensive overview of the jurisprudence of the ECtHR on minorities, see the contributions of Roberta Medda-Windischer, "The Jurisprudence of the European Court of Human Rights", 1 *European Yearbook of Minority Issues* (2001/2002), 487–534; 2 *European Yearbook of Minority Issues* (2002/2003), 445–469; 3 *European Yearbook of Minority Issues* (2003/2004), 389–422; and 4 *European Yearbook of Minority Issues* (2004/2005), 557–597.

II. The Rights of Minorities to their Culture and Identity: Conspicuous Absence versus Progressive Presence

One of the core interests for a minority is the preservation of its culture and identity. To sum up the view of the European Parliament, unwanted assimilation is to be denounced.[6] Non-discrimination in itself is regarded as insufficient for the effective integration of minorities. That is why the jurisprudence of the ECJ and the ECtHR in this regard will be discussed briefly, before analysing their jurisprudence on the substantial rights of minorities to their culture and identity.

A. Non-discrimination

The Treaty of Amsterdam (1997) introduced a general non-discrimination article in the legal framework of the European Union (Article 13 EC). It aims to combat discrimination and not to eliminate differences *de facto*. This implies that it cannot be a useful basis for measures aimed at the positive discrimination of minorities. Moreover, the ECJ has been very reluctant in accepting positive discrimination.[7] However, Article 13 EC has served as a basis for the adoption of the so-called 'Race Equality Directive', designed to "combat discrimination based on racial or ethnic origin implementing the principle of equal treatment between persons irrespective of racial or ethnic origin".[8]

In the framework of the Council of Europe, Article 14 ECHR is the general non-discrimination clause, explicitly referring to "association with a national minority" when enumerating the grounds on which discrimination is forbidden. This is not the place to analyze in detail the reach and scope of the prohibition of discrimination under Article 14 ECHR.[9] The article has been of little practical relevance as concerns the protection of the rights of persons belonging to minorities.

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[6] European Parliament Resolution on the Protection of Minorities and Anti-Discrimination Policies in an Enlarged Europe (2006), para. 43.

[7] See, for example, ECJ, case C-450/93, *Kalanke*, judgment of 17 October 1995, [1995] ECR I-3051.

[8] Council Directive 2000/43/EC of 29 June 2000 on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, OJ L 180/122 of 19 July 2000. Certain member states, however, did not fulfil their obligations under this Directive. See, for example, ECJ, case C-320/04, *Commission v. Luxemburg*, judgment of 24 February 2005, OJ C 93/2 of 16 April 2005; and ECJ, case C-327/04, *Commission v. Finland*, judgment of 24 February 2005, OJ C 93/3 of 16 April 2005.

[9] For an excellent analysis of the reach and scope of the prohibition of discrimination under Article 14 ECHR, see Kristin Henrard, "The Impact of International Non-Discrimination Norms in Combination with General Human Rights for the Protection of National Minorities: the European Convention on Human Rights", Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), DH-MIN (2006)020.

It was only in July 2005 that the ECtHR found for the first time a violation of the principle against racial discrimination contained in Article 14 ECHR. The Court considered in *Nachova v. Bulgaria* that any evidence of racial verbal abuse used by law enforcement agents when using force against persons from an ethnic or other minority is highly relevant to the question of whether or not hatred-induced violence has taken place.[10]

With the *Nachova* judgment, the Court confirmed its increasing attention to the specific problems of Roma (see below). Moreover, it also confirmed that certain forms of racial discrimination can even amount to "degrading treatment".[11] Since this is prohibited by Article 3 ECHR, the Court examined the actions of states in this regard with heightened scrutiny.[12]

However, the ECtHR remains demanding when it comes to the evidence required to prove discrimination and in scrutinizing the margin of appreciation of states. The Court always examines the case from the perspective of the individual application and not the overall social context. Statistics, for example, are not considered as sufficient in their own right to disclose a practice that might be classified as discriminatory.[13] More substantive evidence is necessary. This became clear in *D.H. and others v. the Czech Republic*, where the Court had to judge on the frequent practice in Eastern Europe of the placement of Roma children in special schools intended for children with learning disabilities who are unable to attend 'ordinary' or specialized primary schools. This case shows the potential tension between the "subjective experience and perception of the applicant as concerns the alleged violations and the (perceived) objective and quantifiable proof requested by the Court".[14]

B. Substantial Rights

To date, the ECJ has not had occasion to use the instruments at its disposal to explicitly help minorities to preserve their identity, except as concerns their linguistic rights. However, they are treated in the next paragraph for the sake of comparison with the jurisprudence of the ECtHR.

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[10] ECtHR, Appl. Nos. 43577/98 and 43579/98, *Nachova and others v. Bulgaria*, judgment of 6 July 2005, para. 164

[11] *Ibid.*, para. 145.

[12] Henrard, "The Impact of International …", 12.

[13] ECtHR, Appl. No. 57325/00, *D.H. and others v. the Czech Republic*, judgment of 7 February 2006, para. 46.

[14] Sia Spiliopoulou Åkermark, "The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?", *JEMIE* (2002) No. 3, 21.

The lack of judgments of the ECJ can be explained by the fact that the ECJ has never been confronted with a case concerning minorities' culture and identity because there is no legally binding document in the European Union preserving these rights. In contrast, the ECtHR has a written human rights treaty to interpret (the ECHR). This might change should the Charter of Fundamental Rights of the European Union (hereinafter "Charter") be furnished with legally binding powers,[15] as the ECJ would thus be confronted with the matter of interpretation of its provisions. For example, if confronted with a question on the freedom of expression, as provided by Article 11 of the Charter, the ECJ could refer to the jurisprudence of the ECtHR to interpret this Article in favour of minority protection (see below). However, it should be underlined that, acording to Article 50 of the Charter, the Charter is addressed to the member states "only when they are implementing Union law".

By comparison, the jurisprudence of the ECtHR is carefully progressive. Especially since 2000, the ECtHR has made use of the substantive provisions of the ECHR in support of minority protection. The ECtHR generally deals with minority protection when scrutinizing the margin of appreciation of states.

1. The ECtHR on the Right to Respect for Private and Family Life

One of the first set of judgments of the ECtHR on the right of minorities to preserve their identity was the judgments on the traditional lifestyle of Roma under Article 8 ECHR on the right to respect for private and family life. The first case was *Buckley v. the United Kingdom* but the Court did not develop the minority problem as such in this case.[16] In subsequent judgments on the traditional lifestyle of Roma, the ECtHR reviewed its approach and the minority problem is explicitly dealt with. The case of *Chapman v. the United Kingdom* serves as an example.

[15] Today, the Charter can be qualified as a 'soft law' instrument because the European Commission and the European Parliament decided to scrutinize their proposals for compatibility with the Charter. See Article 34 of the Rules of Procedure of the European Parliament, at http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC; Communication from the Commission, "Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals", COM(2005) 172 final of 27 April 2005. The Court of First Instance (CFI) referred to it for the first time in 2002. CFI, case T-54/99, *max. mobil*, judgment of 30 January 2002, [2002] ECR II-313, para. 48. In the line of its reasoning on human rights, the ECJ concluded for the first time in 2006 that the Charter reflects "the constitutional traditions and international obligations common to the Member States". ECJ, case C-540/03, *Parliament v. Council*, judgment of 26 June 2006, [2006] ECR I-5769, para. 38.

[16] By contrast, the partly dissenting opinions of Judge Repik and Judge Lohmus do make central the fact that it concerns minorities when scrutinizing the "necessary in a democratic society" condition. ECtHR, Appl. No. 20348/92, *Buckley v. the United Kingdom*, judgment of 26 August 1996, partly dissenting opinion of Judge Repik and partly dissenting opinion of Judge Lohmus.

The Court explicitly referred to the importance for a minority to maintain its identity, including the possibility to maintain a travelling lifestyle.[17] To that end, state parties have a "positive obligation to facilitate the Gypsy way of life".[18] However, this obligation only implies that special consideration should be given to their needs and different lifestyles. It does not imply that states are obliged to make an adequate number of suitably equipped sites available to the Roma. This would be too "far-reaching [a] positive obligation of general social policy".[19] The Court left a wide margin of appreciation to states to fill in this positive obligation.

The Court derived the obligation of state parties to take into account the special way of life of the Roma from the "emerging international consensus amongst Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle".[20] The moderation of the obligation, on the other hand, derives from the fact that "the consensus is not sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation".[21] Nevertheless, the ECtHR made a clear statement in favour of measures to preserve the identity of minorities and thus attributed a cultural diversity of value to the whole community.

The case law of the ECtHR on the basis of Article 8 ECHR is not limited to the protection of the traditional lifestyle of Roma. In *Slivenko v. Latvia*, the Court dealt with the family life of Russian-speaking minorities living in Latvia. According to the Court, to carry out removal orders without providing any possibility for taking individual circumstances into account is incompatible with the requirements of Article 8 ECHR.[22]

2. The ECtHR on Freedom of Religion

The ECtHR considers that state parties that do not recognize minority churches or refuse them legal personality, when the church is often central to the minority's culture, are in breach of

[17] ECtHR, Appl. No. 27238/95, *Chapman v. the United Kingdom*, judgment of 18 January 2001, para. 73.
[18] *Ibid.*, para. 96.
[19] *Ibid.*, paras. 96–98.
[20] The Court refers to the FCNM in ECtHR, *Chapman v. the United Kingdom*, para. 93. It is interesting to note that reference is also made to the Resolution of the European Parliament on the situation of Gypsies in the Community and the fact that protection of minorities has become one of the preconditions for accession to the European Union (paras. 60–61).
[21] *Ibid.*, para. 94.
[22] ECtHR, Appl. No. 48321/99, *Slivenko v. Latvia*, judgment of 9 October 2003, para. 122.

the freedom of religion (Article 9 ECHR). From the cases *Canea Catholic Church v. Greece*[23] and *Metropolitan Church of Bessarabia and others v. Moldova*,[24] we can learn that the ECtHR recognizes the plurality of religions in a democratic society but also the possible necessity to place restrictions on that freedom in order to reconcile the interests of the various groups and to ensure that everyone's beliefs are respected. However, when the state exercises its regulatory power, it must remain neutral and impartial because the maintenance of true religious pluralism is at stake. It is in this regard that the Court assesses the margin of appreciation of the state and the proportionality of the measures taken by the state.[25]

In *Serif v. Greece*, the ECtHR also emphasized that a government, when confronted with tensions created by a divided religious or any other community, should not remove the cause of the tension by eliminating pluralism but rather should ensure that the competing groups tolerate each other.[26]

These judgments make clear that it is not enough that people may believe what they want. States must allow the establishment of the necessary institutions and give them the necessary recognition in order that they may have effective freedom of religion. The Court supports the existence of different religions alongside each other and thus it fosters the preservation of the (religious) identity of minorities. It places the conservation of pluralism at the heart of a democratic society but avoids explicitly treating the minority problem as such. At the same time, the Court has given clear indications of the necessity to protect minorities or at least not to hinder them from preserving their identity.

3. The ECtHR on Freedom of Expression

The emphasis of the ECtHR on pluralism can also be seen in its reasoning on the right of freedom of expression, as laid down in Article 10 ECHR. This right concerns, for example, the right to publish books that reflect a minority's ideas.

In *Association Ekin v. France*, the ECtHR condemned the ban of the circulation, distribution and sale of a book as a breach of Article 10 ECHR because pluralism demands that freedom of expression is not only applicable to information or ideas that are favourably received or

[23] ECtHR, Appl. No. 143/1996/762/963, *Case of the Canea Catholic Church v. Greece*, judgment of 16 December 1997.
[24] ECtHR, Appl. No. 45701/99, *Metropolitan Church of Bessarabia and others v. Moldova*, judgment of 13 December 2001.
[25] *Ibid.*, paras. 115–119.
[26] ECtHR, Appl. No. 38178/97, *Serif v. Greece*, judgment of 14 December 1999, para. 53.

regarded as inoffensive but also to those that offend, shock or disturb. Also here, exceptions to this right must be "proportionate to the legitimate aim pursued" and "relevant and sufficient".[27] That is why a complete ban on the publication of a book, the screening of books before their distribution[28] or a conviction for having published a book[29] are regarded by the Court as disproportionate to the aim pursued and thus in breach of the right of freedom of expression.

In *Özgür Gündem*, the Court found that freedom of expression even implies a positive obligation on parties to allow minority views and opinions to be expressed, albeit without imposing an impossible or disproportionate burden on the authorities.[30]

In general, according to the Court, it can be concluded that minority groups enjoy a broad degree of freedom of expression that might challenge state structures.[31] It should be noted, however, that the emphasis that the Court has placed on the obligation of parties to regulate in a pluralistic way is not necessarily interpreted by the parties as a general obligation to take positive measures.

III. The Linguistic Rights of Minorities: the ECJ to the Fore

Language is one of the core elements of a minority's identity and goes to the very heart of the notion of 'United in Diversity' of the European Union. Despite the lack of explicit competences, the European Union has committed itself to the preservation of linguistic diversity.[32]

The situation is clearly different within the Council of Europe, the international organization that created the ECHR, regarding which the ECtHR ensures enforcement. The Council of Europe not only created the FCNM, the first ever legally binding multilateral instrument devoted to the protection of minorities, as noted earlier; in 1992, it also created an instrument specifically aimed at protecting minority languages, namely the European Charter for Regional or Minority Languages (EChRML). The ECtHR has no power to ensure the

[27] ECtHR, Appl. No. 39288/98, *Association Ekin v. France*, judgment of 17 July 2001, para. 56.
[28] ECtHR, Appl. No. 25781/94, *Cyprus v. Turkey*, judgment of 10 May 2001, para. 44.
[29] ECtHR, Appl. No. 27528/95, *Kizilyaprak v. Turkey*, judgment of 2 October 2003, para. 40.
[30] ECtHR, Appl. No. 23144/93, *Özgür Gündem v. Turkey*, judgment of 16 March 2000, para. 43.
[31] Geoff Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights", 24(3) *Human Rights Quarterly* (2002), 736–780, at 761.
[32] See, for example, Article 22 of the Charter; European Commission Communication, "A New Framework Strategy for Multilingualism", COM(2005) 596 final, 3; and European Parliament Resolution on Regional and Lesser-Used European Languages (2001), para. B. The importance of the preservation of minority languages is always highlighted.

enforcement of these last two instruments, for reasons we will not elaborate on further.[33] However, it uses the articles of the ECHR to preserve the linguistic rights of minorities.

In contrast to the aforementioned rights of minorities to their culture and identity, the ECJ has left its marks on the language rights of minorities within the European Union. It should, however, be noted that these judgments have been pronounced in the framework of the free movement of persons and the freedom to provide services. Concerning the former, this implies that these judgments cannot serve as an example for third-country nationals (since free movement of persons is linked to citizenship of the European Union) or nationals of the member states that entered in 2004 and 2007, since transitional provisions apply to them, restricting their free movement. On the other hand, these judgments could serve for so-called 'new minorities' that have the nationality of one of the 'old' member states while exercising their rights of free movement.

In *Mutsch*, the ECJ had to rule for the first time on the use of languages before national courts. A Belgian court referred to the ECJ for preliminary ruling in order to ascertain whether the national legislation stipulating that nationals residing in a certain region of the country may ask to have proceedings before a court in that region conducted in a specific language had to be extended without discrimination based on nationality to nationals of other member states.

The ECJ did not address the issue of minority protection but focused instead on the importance of the protection of linguistic rights in the context of the free movement of workers. For the Court, the right of a worker to use his/her own language in proceedings before the courts of the host member state (under the same conditions as national workers) plays an important role in the integration of the worker. The Court qualified this possibility as a "social advantage" and concluded that national provisions adopted for the benefit of a minority may not only concern persons who are members of that minority and reside in the area where that minority is established.[34]

The ECJ was confronted with a similar judicial problem in *Bickel & Franz*. However, in contrast to *Mutsch*, *Bickel & Franz* did not reside in the country where they were being

[33] For comments on the FCNM, see Marc Weller (ed.), *The Rights of Minorities. A Commentary on the European Framework Convention on the Protection of National Minorities* (Oxford University Press, Oxford, 2005); for comments on the EChRML, see Francois Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages* (Palgrave Macmillan, London, 2003).
[34] ECJ, case 137/84, *Mutsch*, judgment of 11 July 1985, [1985] *ECR* 2681, paras. 11–17.

prosecuted. The ECJ perceived a form of indirect discrimination because nationals of the host member state are favoured indirectly by comparison with nationals of other member states exercising their right to freedom to provide services. In line with the general case law of the Court, such a rule can only be justified if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim pursued.[35] Although the Court explicitly recognized that "the protection of such a minority [ethno-cultural minority] may constitute a legitimate aim",[36] it found ultimately that the rule was disproportionate.[37] Regional language arrangements were thus overridden by the ECJ in the interests of Community law.

The main implication of these two judgments is that special language rights (the right to use a minority language in criminal proceedings) provided by national provisions to residents of certain regions have to be extended to all EU citizens who find themselves in the same circumstances, i.e., whose language is the particular language of that region. However, both cases concerned communication with and before judicial authorities, being "non-scarce goods".[38] The question is whether this line of reasoning would also be followed in a case concerning language requirements regulating the access to resources such as workplaces.

No possible solution can be found in the judgments of the ECJ on the requirement to have proficient knowledge of a (minority) language as a condition for access to employment.[39] After all, these cases concern the *requirement* of proficient language knowledge, whereas the *Mutsch* and *Bickel & Franz* cases concern the *right* to use a language. However, the *Groener*, *Angonese* and *Haim* judgements are interesting because they indicate how far member states

[35] ECJ, case C-274/96, *Bickel & Franz*, judgment of 24 November 1998, [1998] *ECR* I-7637, para. 27.
[36] *Ibid.*, para. 29.
[37] *Ibid.*, para. 31.
[38] Briefly put, being goods that are readily available. See also Gabriel von Toggenburg, "The EU's 'Linguistic Diversity': Fuel of Brake to the Mobility of Workers", in Andrew P. Morris and Samuel Estreicher (eds.), *Cross-Border Human Resources, Labor and Employment Issues: Proceedings of the New York University 54th Annual Conference on Labor* (Kluwer Law International, The Hague, 2004), 677–723.
[39] The European Union, as an employer, is also confronted with these problems. One of the conditions of becoming part of the reserve pool from which administrators are recruited is having a thorough knowledge of the language of the country of which you have citizenship. This can cause problems for minorities having the nationality of a certain member state but speaking another language as mother tongue. This was the case in, for example, *Dálnoky v. Commission*. Dálnoky, a Romanian national belonging to the Hungarian-speaking minority in Romania, submitted her application in the competition organized to constitute a reserve pool from which to recruit administrators with Romanian citizenship. One of the requirements was to have a thorough knowledge of Romanian. She contended that that notice was discriminatory against Romanian nationals of the Hungarian mother tongue and requested that, instead, "a thorough knowledge of one Community language" should be required. However, the president of the European Union Civil Service Tribunal dismissed the case, among others, for lack of urgency. See Order of the President of the European Union Civil Service Tribunal, 14 December 2006, F-120/06 R, not yet published. The case is now pending before the Civil Service Tribunal.

may go when requiring proficient knowledge of a (minority) language as a condition for access to employment.

In *Groener*, the Court again found a way to avoid issuing a Community viewpoint on minority languages. Emphasizing that the Irish language is recognized in the Irish Constitution as the national language, the minority aspect does not arise and the case concerns a national language that is the first official language.[40] The Court examined whether the linguistic requirements (knowledge of the Irish language) were justified "by reason of the nature of the post to be filled".[41] In principle, member states can adopt a policy for the protection and promotion of a language that is both the national language and the first official language. However, the implementation of this policy may not lead to an encroachment upon fundamental freedoms. This implies that the linguistic requirement must be applied in a proportionate and non-discriminatory manner.[42]

Two questions remained unanswered after *Groener*: would the Court exclude support of non-national minority languages? Second, when is a linguistic requirement proportionate and non-discriminatory? The *Angonese* case provided the answers. The Court does not preclude a policy promoting and protecting a language, even if this language is not recognized as a national language.[43] However, the principles of proportionality and non-discrimination preclude the imposition of any requirement that the linguistic knowledge in question must have been acquired within the national territory.[44]

The *Haim* case, which bears no relation to minorities at first sight, contains a line of reasoning of the Court that could have importance for them. The Court argued that even persons whose mother tongue is not the national language must be able to speak in their own language with dental practitioners.[45] This could be understood as a recognition by the Court of the fact that linguistic diversity is a means of an advanced level of social integration of a minority and especially—in light of the case—so-called 'new minorities'.[46] Implicitly, this could even be

[40] Advocate General Darmon recognizes that Irish is a minority language. See ECJ, case C-379/87, *Groener*, judgment of 16 May 1989, [1989] *ECR* 3967, Opinion of Advocate General Darmon, para. 18.
[41] *Ibid.*, para. 16.
[42] *Ibid.*, para. 19.
[43] ECJ, case C-281/98, *Angonese*, judgment of 6 June 2000, [2000] *ECR* I-4139, para. 44.
[44] ECJ, *Groener*, para. 23.
[45] ECJ, case C-424/97, *Haim*, judgment of 4 July 2000, [2000] *ECR* I-5123, para. 60.
[46] Von Toggenburg, "The EU's 'Linguistic Diversity' …", 712. It can be supposed that the Court referred to the large amount of Turkish immigrants living in Germany (Haim himself studied dentistry in Istanbul). The Turkish immigrants can be seen as 'new minorities'.

understood as an encouragement to member states to create an effective minority language policy.

The above examined judgments indicate clearly the position of the ECJ towards the language policies of member states fostering minority languages.[47] However, they also reveal the lack of any coherent Union policy on minority languages.

The ECHR contains few language rights. The few that exist concern procedural and police related matters and are interpreted in a "minimalistic" way.[48]

The most interesting developments with regard to the language rights of minorities are made on the bases of Articles 2 (right to education) and 3 (right to free elections) of Protocol 1 to the ECHR. With respect to the former—and, more specifically, the protection of mother tongue education or education in the minority language—the first case to address the matter dates from 1968. In the *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*,[49] the ECtHR made clear that this provision implies no right to education in a particular language. What is important is that no unjustified distinctions exist; that is to say, discriminations that affect the exercise of the right enshrined in Article 2 of Protocol 1, read in conjunction with Article 14 ECHR.[50]

In *Cyprus v. Turkey*, the Court seemed to move away from its rigid stance, although the context in this case is particularly relevant. Even if the Court did not recognize a right to mother tongue education, it argued that if authorities assume responsibility for mother tongue education in primary schooling, they have the same obligation for the secondary school level.[51] This is already a step forward in the protection of mother tongue education for minorities and might even be transposed to other situations in which minority groups are denied education in their mother tongue in circumstances where they had formerly enjoyed it.[52]

In regard to the protection of the rights of (linguistic) minorities on the basis of Article 3 of Protocol 1, the ECtHR ruled in *Mathieu-Mohin and Clerafayt v. Belgium* that this provision

[47] Even though the 'minority problem' is only explicitly treated as such by the Court in *Bickel & Franz.*
[48] Henrard, "The Impact of International …", 24.
[49] ECtHR, Appl. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Case Relating to Certain Aspects of theLaws on the Use of Languages in Education in Belgium*, judgment of 23 July 1968.
[50] *Ibid.*, para. I.12.
[51] ECtHR, Appl. No. 25781/94, *Cyprus v. Turkey*, judgment of 10 May 2001, para. 278.
[52] Medda-Windischer, "The Jurisprudence of the European Court …" (2002/2003), 469.

does not create any obligation to introduce a specific system such as proportional representation or majority voting with one or two ballots.[53] The conservative attitude of the Court can be ascribed to the falling back on the wide margin of appreciation it attributes to parties. The Court does not take into account the effect of this reasoning on the effective respect for the right to free elections.

Like the ECJ, the ECtHR has also had to consider the legitimacy of linguistic requirements, not in the context of access to work this time but rather in terms of the right to stand for national elections. It is interesting to see how the reasoning of the ECtHR and the ECJ follows the same line. After having referred to the wide margin of appreciation of parties, the ECtHR concluded in *Podkolzina v. Latvia* that a party may require a candidate for election to the national parliament to have sufficient knowledge of the official language. However, the requirement must pursue a legitimate aim and be proportionate to the aim pursued,[54] whereas for the ECJ, the measures must be non-discriminatory and proportionate.

This overview shows that the jurisprudence of the ECtHR on the linguistic rights of minorities is less substantive than the jurisprudence of the ECJ. The ECJ has come to the fore in the matter of the linguistic rights of minorities and plays an active role in the promotion of the protection of minority languages within the European Union. This should, however, be nuanced against the background of the cases brought before the ECJ. Since this Court has only been confronted with language problems, it is only logical that its jurisprudence is more substantive in this regard.

IV. The Participatory Rights of Minorities: Opening to Explicit Recognition

The right to participate in all aspects of the life of the larger national society is essential for minorities, both to promote their interests and values as well as to create an integrated but pluralist society based on tolerance and dialogue.[55]

Since there exist no provisions in EC/EU law providing for the participation of minorities in public, social and economic life in the member states,[56] there exist no judgments of the ECJ

[53] ECtHR, Appl. No. 9267/81, *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, para. 54. It is remarkable that the Court, when applying the principles in the case, explicitly treats the problem as one of linguistic minorities (para. 57).
[54] ECtHR, Appl. No. 46726/99, *Podkolzina v. Latvia*, judgment of 9 April 2002, para. 37.
[55] Working Group on Minorities to the United Nations, "Commentary to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", E/CN.4/Sub.2/AC.5/2005/2.35.

on the participatory rights of minorities. However, a recent judgment could be the first step in the recognition of participatory rights for minorities. The ECJ had to ascertain in *Spain v. United Kingdom* whether there is a clear link between citizenship of the Union and the right to vote and stand for elections, requiring that that right always be limited to citizens of the Union.[57] The Court held that Community law does not preclude member states from granting the right to vote and to stand as a candidate to persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.[58] It is up to the member states to decide whether they make use of this possibility.

Even if this judgment does not explicitly refer to minorities, it is important for minorities. After all, so-called 'new minorities' rarely hold the citizenship of their state of residence and, as a consequence, are excluded from participating in elections.[59]

The ECHR contains two provisions that could favour the participation of minorities. On the basis of Article 11 ECHR, which provides for freedom of assembly and association, since 1998, the ECtHR has consistently confirmed its protective stance towards (political) associations with a minority focus by sanctioning refusals of parties to recognize or register such considerations. It did so for the first time in *Sidiropoulos and others v. Greece*. The Court refers to the limited margin of appreciation of states[60] and makes clear that parties may not forbid the application of registration of an association because it aims to promote the culture of a minority.[61] After all, pluralism is built on the genuine recognition of and respect for diversity and the dynamics of traditions and of ethnic and cultural identities.[62] The Court held the same line of reasoning in subsequent judgments.[63] However, it clarified in *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* that if there had been a call for

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[56] Olivier De Schutter, "European Union Legislation and the Norms of the Framework Convention for the Protection of National Minorities", Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), DH-MIN (2006)019, 20.
[57] ECJ, case C-145/04, *Spain v. United Kingdom*, judgment of 12 September 2006, [2006] *ECR* I-7917.
[58] *Ibid.*, para. 78.
[59] An example in this regard are the so-called 'non-citizens', often members of the Russian-speaking community, living in Latvia.
[60] ECtHR, Appl. No. 26695/95, *Sidiropoulos v. Greece*, judgment of 10 July 1998, para. 40.
[61] *Ibid.*, para. 44.
[62] ECtHR, Appl. No. 74989/01, *Ourano Toxo and others v. Greece*, judgment of 20 October 2005, para. 35.
[63] See, for example, ECtHR, Appl. Nos. 29221/95 and 29225/95, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, judgment of 2 October 2001, para. 89; and ECtHR, Appl. No. 74989/01, *Ourano Toxo and others v. Greece*, judgment of 20 October 2005, para. 40.

the use of violence or an uprising or any other form of rejection of democratic principles by the association, parties enjoy a wider margin of appreciation.[64]

The ECtHR used the margin of appreciation, which it exceptionally interpreted in a broad sense in *Gorzelik v. Poland*, to deny a violation of Article 11 ECHR, although the party in question forbade the registration of an association that aimed, among other things, to promote a minority.[65] Two conclusions can be gleaned from this judgment.

First, the Court is more inclined to interpret the margin of appreciation in a broad sense when it comes to electoral matters because of their relevance to the institutional order of the parties.[66] This goes especially for judgments on Article 3 of Protocol 1 on the right to free elections.[67] After all, the Court argued in *Ždanoka v. Latvia* that this Article is seen as *lex specialis*.[68] The Court recognizes that the standards to be applied for establishing compliance with this Article must be considered to be less stringent than those applied under Article 11 ECHR[69] in order to respect the internal institutional order of parties and because it has been cast in very different terms compared to that Article.[70] That is why the Court, for example, judged that a residence requirement as a condition to vote does not violate Article 3 of Protocol 1.[71]

Second, it was essentially the factual assessment that led the Court to its decision in *Gorzelik v. Poland*. That the particular circumstances of the country play an important role in the decision of the Court had been proved earlier in *Refah Partisi and others v. Turkey.*[72] The long line of cases against Turkey in relation to the dissolution of political parties shows that the Court does not allow parties to take disproportionate measures such as dissolving political parties because of their anxiety about minorities and their quest to participate in public life in

[64] ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, para. 90.
[65] ECtHR, Appl. No. 44158/98, *Gorzelik and others v. Poland*, judgment of 17 February 2004, para. 106.
[66] Henrard, "The Impact of International …", 23.
[67] Also, the ECJ refers to the wide margin of appreciation of states in imposing conditions on the right to vote on the basis of Article 3 of Protocol 1. See ECJ, *Spain v. United Kingdom*, para. 94.
[68] ECtHR, Appl. No. 58278/00, *Ždanoka v. Latvia*, judgment of 16 March 2006, para. 141.
[69] The two criteria to examine compliance with Article (8-)11 ECHR are "necessity" or "pressing social need". The criteria for compliance with Article 3 of Protocol 1 are "arbitrariness or a lack of proportionality" or "interference with the free expression of the opinion of the people". See ECtHR, *Ždanoka v. Latvia*, para. 115(c).
[70] *Ibid.*, para. 115.
[71] ECtHR, Appl. No. 66289/01, *Py v. France*, judgment of 11 January 2005, para. 56.
[72] ECtHR, Appl. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and others v. Turkey*, judgment of 13 February 2003.

order to protect their own identity.[73] However, in *Refah Partisi*, the ECtHR did not find that Turkey violated Article 11 ECHR by dissolving the Islamic-oriented Refah, which called for the elimination of secularism and for its replacement with Sharia law. Because secularism constitutes a key constitutional and democratic principle in Turkey, the Court considered that the dissolution of Refah could be regarded as necessary in a democratic society.[74]

V. Conclusion

The examination of the jurisprudence of the ECJ on minority rights compared with that of the ECtHR shows that the ECJ's hands are tied when it comes to augmenting minority protection in the EU and is therefore not fit for effective minority protection. Because of this limited room for manoeuvre, speaking of a faulty design goes a bridge too far.

The ECJ is not fit for the purpose because it has refrained from taking clear stances on minority protection—for example, by defining a minority language as the 'national language' in *Groener*. Accordingly, the Court has avoided articulating the viewpoint of the Union on minorities.

The restraint of the ECJ can be explained by diverse factors, such as the impact of its judgments, the diverse minority concepts and minority protection in the member states and the sensitivity of the issue. However, it is foremost explained by the lack of competences of the ECJ and, more generally, the different framework in which the ECJ and the ECtHR find themselves. First, the basic aim of European integration is economic cooperation and the development of the internal market, whereas the 'core business' of the Council of Europe is the protection of human rights. Second, the European Union has only attributed competences and a partly supranational character, implying that it can take decisions without the assent of all member states, for example, in areas where it has exclusive competences or where decisions can be taken with a (qualified) majority. That explains why the member states are reluctant to relinquish their powers in the field of human rights, especially minority rights, to the European Union. Moreover, some member states are not eager to give up the regulation of minority matters to a supranational government because they see this as a threat to state

[73] See, for example, ECtHR, Appl. No. 19392/92, *United Communist Party of Turkey and others v. Turkey*, judgment of 30 January 1998; and ECtHR, Appl. No. 21237/93, *Socialist Party and others v. Turkey*, judgment of 25 May 1998.
[74] ECtHR, *Refah Partisi (the Welfare Party) and others v. Turkey*, paras. 135 and 136.

cohesion. In other words, they fear the possible implications of decisions adopted by the European Union over their heads.

The ECJ has to act within the framework of these limited competences of the European Union and even in the absence of competences in the field of human rights and as a consequence of instruments. The ECJ elaborated its human rights doctrine before any provision in this regard existed in the treaties, which was already seen as an extension of its competences. Providing minority protection would be viewed by the member states as going a step too far and could, in light of the limited competences, even be seen as 'illegal'. The situation is different for the Strasbourg Court. That Court does not have its hands tied to the same extent as the ECJ, as it operates in a 'classical' international, intergovernmental organization, where no decisions can be made without the assent of the parties. Moreover, it has a written human rights treaty, which thus provides a different starting point. This mainly explains why the ECtHR, in contrast to the ECJ, gradually took some clear stances towards minority protection, such as placing positive obligations upon states to protect the rights of minorities to their culture and identity.

The recognition of positive state obligations by the ECtHR is a first step in relation to an effective protection of minorities. Yet it is not all roses in the ECtHR. When a complaint is upheld, it is up to the party to provide adequate remedies—for example, a change in legislation. The ECHR does not, however, provide sanctions in the case of non-execution of its judgments. Moreover, the judgments of the Strasbourg Court in the field of minority protection are sometimes ambiguous and inconsistent.

However, to speak of a faulty design after examining the jurisprudence of the ECJ on minority rights is to go a bridge too far. After all, in spite of it having its hands tied, the ECJ leaves the possibility open to member states to construct their own minority language policies and to attribute voting rights to minorities. Moreover, should the Charter obtain a legally binding character, the ECJ's role in protecting minority rights in matters relating to culture and identity issues would be even stronger.

The above argumentation shows that there are some major legal obstacles to overcome to create efficient legal protection for minorities in the European Union. However, apart from the legal aspect, assuming that the preservation of an 'own' identity is of vital importance for minorities and that they should be able to participate at different levels of society, an effective

minority policy should comprise two elements. First, the right to identity of minorities, be it their ethnic, cultural, linguistic or religious identity. Second, making their integration possible while respecting diversity. The desired standard of protection should at least be that defined by the instruments of the Council of Europe. In that way, there would be no possibility that the Union standard could be regarded as an alternative standard.

Let us hope that putting these elements into practice will make policy makers in the future able to say that “Europe is the Europe *for* minorities”.

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