

Novel Legal Challenges to Danish Ghetto Laws: A Tripartite Approach

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Abstract:

This paper considers the so-called “ghetto laws” recently introduced in Denmark. The laws prescribe harsher treatment and lesser social benefits for residents of ethnic ghettos in an effort to promote integration of migrants into Danish culture. The laws have been the subject of numerous protests, but no legal challenge has yet been mounted to repeal them. In this paper, the laws are evaluated under three courts: the Danish Supreme Court, the European Court of Justice, and the European Court of Human Rights. In regard to the latter two, Denmark, although not a member of the Eurozone, is not exempt from European Union law. The paper concludes that there is a basis for challenging the laws under the Danish Constitution, as well as under EU law. They fail to satisfy the Danish constitutional requirement of non-discrimination in the granting of civic benefits, as well as a number of European non-discrimination laws. However, a lack of precedent and a historical reluctance to conduct judicial review through either the Danish or the European courts mean that such a challenge is not guaranteed to succeed.

The Danish Ghettos:

Denmark, like many of its neighboring countries, has experienced a significant influx of migrants from the middle east over the course of the past three decades. In 2015 immigrants numbered a little over 500,000, making up about a tenth of the Danish population.²²¹ This number is on the lower end of European nations: Germany, Belgium, and The Netherlands, for example, all had a higher share of immigrants in their population.²²² As a member of the European Union, Denmark is bound by the Schengen agreement of 1995 to allow free movement

²²¹ United Nations Population Division, Net Migration in Denmark, World bank , <https://data.worldbank.org/indicator/SM.POP.NETM?locations=DK> (last visited Dec 25, 2019).

²²² United Nations Population Division, *Net Migration*, World bank , <https://data.worldbank.org/indicator/SM.POP.NETM> (last visited Dec 25, 2019).

into Denmark from other European countries.²²³ Like in many of its peer nations, this has led to a sizable migrant population from Eastern European countries (specifically Poland), who hope to find better economic opportunities in an affluent state such as Denmark. In 2019, Polish immigrants were the largest ethnic group present in Denmark. Syrian and Turkish immigrants formed the second and third largest groups, respectively.²²⁴

Although the demographics of immigrants in Denmark are quite varied, anti-immigrant sentiment has focused specifically on those from majority Muslim countries. This is not a new phenomenon: Danish political parties have used themes of migration and “Islamification” to drum up votes since 1995.²²⁵ Evidence for Danish nationalism can also be found in the rising share of seats in the Folketing²²⁶ held by the Danish People’s Party.²²⁷ Although the Social Democrats²²⁸ remain Denmark’s most popular party by far, Islamophobia has become relatively blatant in Danish legislation. Political analysts have pointed out that the Social Democrats have increasingly adopted the Danish People’s Party’s immigration platform, thereby shifting Denmark’s entire political spectrum towards a more nationalist slant.²²⁹ This paper focuses specifically on the so-called Ghetto Laws, which were first approved in May 2018.²³⁰ The laws

²²³ European Union, *The Schengen area and cooperation*, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133020> (last visited Dec 25, 2019).

²²⁴ Agnete Lundetræ Jürgensen, *Denmark: number of immigrants by country of origin 2019*, Statista, <http://www.statista.com/statistics/571909/number-of-immigrants-in-denmark-by-country-of-origin/> (last visited Dec 12, 2019).

²²⁵ Ellen Brun & Jacques Hersh, *Monthly Review | The Danish Disease: A Political Culture of Islamophobia*, *Monthly Review* (2008), <https://monthlyreview.org/2008/06/01/the-danish-disease-a-political-culture-of-islamophobia/> (last visited Dec 12, 2019).

²²⁶ Danish Parliament

²²⁷ Danish far-right populist party, known for their anti-immigrant and Islamophobic platform. *See, e.g.*, Karina Piser, ‘The European Left’s Dangerous Anti-Immigrant Turn,’ *The Nation*, June 7 2019, <https://www.thenation.com/article/archive/denmark-social-democrats-welfare-chauvinism/> (last visited April 4, 2020).

²²⁸ Denmark’s center-left party

²²⁹ Farhiya Khalid & Nikolaj Houmann Mortensen, *How anti-immigrant sentiment infected Denmark’s politics*, <https://www.newstatesman.com/world/europe/2019/06/how-anti-immigrant-sentiment-infected-denmark-s-politics> (last visited Dec 12, 2019).

²³⁰ Ghattoudspil: Regeringens strategi mod parallelsamfund, Regeringen.dk, <https://www.regeringen.dk/nyheder/ghattoudspil/> (last visited Dec 22, 2019).

were supported by almost all major parties, including the far-left Socialist People's Party.²³¹

Practically, they form a package of policies that apply only in "ghetto areas," a list of which is compiled and published by the Danish Ministry of Transport, Building and Housing annually. As of 2018, there were 29 areas characterized as "ghettos," with 15 of those being "hard ghettos."²³²

The ghettos are defined as:

A general residential area with at least 1,000 residents, *where the proportion of immigrants and descendants from non-western countries exceeds 50 per cent*²³³ and where at least two of the following four criteria are met:

- I. The proportion of residents aged 18-64 who are unemployed or not enrolled in some form of education exceeds 40 percent on average over the past 2 years.
- II. The proportion of residents convicted of violating the Criminal Code, the Arms Act or the Drugs Law is at least 3 times the national average over the past 2 years.
- III. The proportion of residents aged 30-59 who only have a basic education exceeds 60 percent.
- IV. The average gross income for taxpayers aged 15-64 in the area (excluding current students) is less than 55 percent of the average gross income for the same group in the country as a whole.

For the purpose of European Union law, it's important to note that ghettos are not classified based on the nationality of the inhabitants. Rather, the ghettos are designated based on *ethnicity*, which is a protected class in the EU. An area that meets two or more of the four aforementioned

²³¹ John Graversgaard & Liz Fekete, *Denmark's 'ghetto package' – discrimination enshrined in law* | Institute of Race Relations, <http://www.irr.org.uk/news/denmarks-ghetto-package-discrimination-enshrined-in-law/> (last visited Dec 23, 2019).

²³² If a country has been on the ghetto list for more than five years, it is classified as a "hard ghetto" (Danish Transport Ministry).

²³³ My emphasis added

criteria but does *not* have a majority non-Danish population is classified as a “vulnerable housing area,” and is *not* included in the 2018 ghetto laws.

The laws prescribe harsher punishments for crimes committed by residents of ghettos, as well as require specific actions to be taken by residents in order to facilitate their “assimilation” into Danish culture. Some of the more salient policies include:²³⁴

- I. Lower unemployment payments and educational benefits²³⁵ for residents of ghettos
- II. Significantly increased police presence in ghetto areas, as well as more traffic checks and other police actions
- III. Creation of a “sharpened penalty zone”: penalties for low-level crime (e.g. vandalism or petty theft) would increase significantly, and penalties for high-level crime (e.g. robbery or murder) would increase by one third. Certain offences that were so far punishable by fine only will now be punishable by imprisonment.²³⁶
- IV. Compulsory daycare or language stimulation programs for all children who are either bilingual or do not speak Danish at home, starting at age 1 for a minimum of 30 hours per week. Children that do not reside in ghettos may not be assigned places in daycares adjacent to ghettos.
- V. Withholding of children’s benefit²³⁷ if a child raised in a ghetto area either fails their final exams or is absent for more than 15% of classes in a given quarter. This section also leaves open the possibility of establishing curfews or mandatory after-school program

²³⁴ Ghattoudspil: Regeringens strategi mod parallelsamfund, Regeringen.dk, <https://www.regeringen.dk/nyheder/ghettoudspil/> (last visited Dec 22, 2019).

²³⁵ Danish students are paid roughly \$900 per month for attending university. Under the ghetto laws, residents of ghettos would not be eligible for this benefit.

²³⁶ This specifically applies to repeat offenders

²³⁷ Denmark, like many Western European countries, provides parents a stipend of roughly \$700 per quarter per child. This varies slightly as children age.

attendance for students who are in danger of failing either of the two aforementioned criteria.

- VI. Criminalization of ghetto parents who send their children on “re-education”²³⁸ journeys, punishable by up to four years of imprisonment or deportation, regardless of citizenship or residency status. This section also allows for the withdrawal of ghetto children’s passports if there is reason to believe parents are attempting to send their child on such a journey.

The response to these proposed laws has been mixed. Some see them as a way to prevent immigrants from abusing Denmark’s generous welfare system, whereas others claim they unfairly discriminate against minorities.²³⁹ In response to those who protest that the laws are unjust and inequitable, Denmark’s Minister of Justice claimed that “[the allegations are] nonsense and rubbish. To me this is about, no matter who lives in these areas and who they believe in, they have to profess to the values required to have a good life in Denmark.”²⁴⁰ The government has further argued that the laws only affect those who break the law, and that minorities who follow the rules thus have little to fear. A recent report on Islamophobia commissioned by the European Union cited the ghetto laws as an example of the increasingly hostile climate Muslims face in Europe, and thereby explicitly linked the laws to Islamophobia and discrimination. The report claimed that “ethnocracy [in Denmark] grows in the form of

²³⁸ This refers to trips to an immigrant’s “home country.” The reasoning behind the law is that retaining roots in your country of origin will hamper assimilation into Danish society

²³⁹ Ellen Barry & Martin Selsoe Sorensen, In Denmark, Harsh New Laws for Immigrant ‘Ghettos,’ *The N.Y. Times*, July 1, 2018, <https://www.nytimes.com/2018/07/01/world/europe/denmark-immigrant-ghettos.html> (last visited Dec 25, 2019).

²⁴⁰ *The Local*, Outrage in Denmark after EU-funded report brands it “Islamophobic” (2019), <https://www.thelocal.dk/20191106/outrage-in-denmark-after-eu-funded-report-calls-it-islamophobic> (last visited Dec 17, 2019).

discriminatory legislation,”²⁴¹²⁴² and that the laws “in practice restrict the freedom of Danish Muslims.”²⁴³ In response, Denmark’s foreign minister Jeppe Kofod said that he was “really angry” about the report, as well as that “EU funds should not be used to finance a Turkish NGO’s report on Islamophobia in Europe, including Denmark.”²⁴⁴

Whether or not these laws were motivated by Islamophobia is outside the scope of this paper. That being said, the laws clearly treat certain groups differently, and in that way seem to violate the principles of equality so frequently espoused in Danish, and more broadly European, society.²⁴⁵ This allows for a number of possible legal challenges to the proposed laws, three of which will be detailed in the following sections.

A Constitutional Challenge Through the Danish Supreme Court:

Constitutionality

Denmark is a constitutional monarchy, and has been since 1849, when its first constitution was adopted. The document was revised a number of times, with the most recent revision dating from 1953.²⁴⁶ Amongst other things, the Danish constitution lays out a form of government governed by parliament, where powers are separated into a legislative, executive, and judicial branch. The constitution further spells out a number of fundamental rights that apply to all Danish citizens. Some of these rights include:²⁴⁷

²⁴¹ In reference to the “ghetto laws”

²⁴² Sibel Özcan & Zeynep Bangert, *European Islamophobia Report 2018 (Denmark)*, 258, (2018), https://www.islamophobiaeurope.com/wp-content/uploads/2019/09/EIR_2018.pdf.

²⁴³ Sibel *supra* note 22, 278

²⁴⁴ The Local, *supra* note 20

²⁴⁵ See, e.g., Income and gender equality, DENMARK.DK, <https://denmark.dk/society-and-business/equality> (last visited Apr 4, 2020).

²⁴⁶ The Constitutional Act of Denmark, The Danish Parliament, <https://www.thedanishparliament.dk/en/democracy/the-constitutional-act-of-denmark> (last visited Dec 25, 2019).

²⁴⁷ The Constitutional Act of Denmark, Statsministeriet, http://www.stm.dk/_p_10992.html (last visited Dec 25, 2019).

1. “[...] No Danish subject shall, in any manner whatsoever, be deprived of his liberty because of his political or religious convictions or because of his descent”
2. “[...] Parents or guardians making their own arrangements for their children or wards to receive instruction equivalent to the general primary school standard shall not be obliged to have their children or wards taught in a publicly provided school.”
3. “No person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights [...]”

Denmark’s constitution is relatively sparse in comparison to some of its peer nations,²⁴⁸ but it nonetheless goes some way towards granting inalienable rights to its citizens. Of the aforementioned three, the latter two are most relevant to this case.

Neither descent nor creed are sufficient to deprive any person of their “civic and political rights” according to the Danish constitution. However, the ghetto laws seem to do exactly that. Migrants who choose to send their children on vacations to their country of origin are criminalized, whereas ethnic Danes and their children enjoy absolute freedom of movement. Daycare is made compulsory for those who do not speak Danish at home, while ethnic Danes are free to keep their children at home until they reach primary school age.²⁴⁹ Educational benefits and unemployment insurance, both very much seen as civic rights in Denmark, are lowered for residents of ghetto areas. The ghetto laws apparently display some incompatibilities with the Constitution.

Judicial review in Denmark

²⁴⁸ See, e.g., Jens Faerkel, SOME ASPECTS OF THE CONSTITUTION OF DENMARK, 17 *Irish Jurist* (1966-) 1–31 (1982).

²⁴⁹ Even then they are able to keep their children at home, as long as the children “receive instruction equivalent to the general primary school standard”

Judicial review is a tool that is available to the Danish Supreme Court, but the Court has historically been reluctant to use it. Part of this reluctance stems from a propensity toward parliamentary precedence in Denmark, a doctrine that is common throughout Scandinavia. The concept of parliamentary precedence implies that the legislative branch “has a qualified or preferred, position vis-a-vis the executive and the judiciary” (Schaumburg-Muller 170). This belief is facilitated by the Danish constitution, which outlines preciously little inherent powers for the judiciary or executive branch. Alf Ross, a prominent Danish legal scholar, argued that only the legislature has direct constitutional competence. The legislature can fulfil its function relying on the Constitution alone, whereas the executive and the judiciary in addition must have legal authority from legislated acts. The powers as institutions are all mentioned in the Constitution, but as functions, the legislature is superior.²⁵⁰

Scholars have noticed that the Danish court frequently practices “soft” judicial review: they occasionally interpret the law in a broad sense so as to protect the rights of citizens, but rarely get involved in politically sensitive issues where they would have to practice “hard”²⁵¹ judicial review.²⁵² Denmark’s parliament has been fairly respectful of individual rights and freedoms over the years, allowing for a more hands-off judicial system.²⁵³ That being said, judicial review in the Danish Supreme Court remains an option for challenging the ghetto laws.

There is limited legal precedent for Judicial review in Denmark. In a report to to the Conference of European Constitutional Courts, the Danish Supreme Court wrote that

²⁵⁰ Sten Schaumburg-Muller, *Parliamentary Precedence in Denmark - A Jurisprudential Assessment*, 27 for Menneskerettigheter 171 (2009)

²⁵¹ Explicitly declaring a law unconstitutional

²⁵² Sten Schaumburg-Muller, *supra* note 32, 176

²⁵³ See, e.g., Human rights in Denmark, , The Danish Institute for Human Rights , <https://www.humanrights.dk/research/human-rights-in-denmark> (last visited Dec 30, 2019).

The Danish Courts have [...] since long clearly stated that they consider it to fall within their competence to examine the constitutionality of Parliamentary Acts, and the Supreme Court has in a judgment from 1999 set a Parliamentary Act aside on grounds that the act was unconstitutional.²⁵⁴

The 1999 judgement in question revolved around the Tvind network of schools.²⁵⁵ In this case, the Danish government cut off funding for a number of Tvind schools based on a suspicion that they had been forging and artificially inflating enrollment numbers. Fearing an overwhelming number of lawsuits, the legislature enacted a bill prohibiting the Tvind schools from suing the government over lost funding. The Supreme Court ruled that this violated the separation of powers, and as such declared the law unconstitutional. In their ruling, they wrote that “The Supreme Court [...] finds, that § 7 in law nr. 506 of the 12 of June 1996 is invalid with regards to The Free School in Veddinge Bakker as contradicting the Basic Law §3, 3. pkt.”²⁵⁶ Although this is the only case in Danish history where the courts struck down a law, the legality of judicial review has never really been disputed in the country.

Unlike in the United States, judicial review in Denmark does not have the power to “strike down” a law. Rather, it can declare the *enforcement* of certain laws to be unconstitutional, which would de facto render a law useless.

Challenges

²⁵⁴ The Supreme Court of Denmark, *Danish National Report For the XIVth Congress of the Conference of European Constitutional Courts*, 1 (2007).

²⁵⁵ The Tvind school network is an organization of private alternative schools in Denmark, founded in 1970. It has been at the center of a number of controversies.

²⁵⁶ MH Jensen & JP Christensen, *Højesterets afgørelse i Tvind-sagen*, in *Ugeskrift for Retsvæsen* 223–237 (1999).

A case against the ghetto laws would almost certainly run into a number of difficulties, many of them stemming from the nebulous nature of the Danish constitution.²⁵⁷ A case would likely need to claim that the ghetto laws violate civic rights on the basis of creed or national descent. Unfortunately, “civic rights” are never explicitly defined in the Constitution. One could make the argument that many of the actions prohibited by the ghetto laws, such as sending children back to their country of origin, are privileges, rather than rights. Furthermore, ghetto areas are defined both by their ethnic composition *and* by their meeting two out of four criteria. Since these four criteria are not related to ethnicity, but rather to poverty or crime, it may be difficult to argue that ghetto areas are solely ethnic or religious enclaves. This is an essential part of arguing that citizens are being discriminated against on the basis of ethnicity or creed. No similar case has yet been tried by the Danish Supreme Court, so it is difficult to anticipate the way the Court would approach such arguments.

Courts in the European Union:

European courts promise another way of challenging the Danish ghetto laws. Denmark has been a full member state of the European Union, and the European Communities prior to that, since 1973.²⁵⁸ While it is not a member of the Eurozone, it is not exempt from European Union law nor from supervision by the Court of Justice of the European Union and the European Court of Human Rights²⁵⁹ The former is seen as the Supreme Court of Europe, and deals with all matters of EU law. The latter is specifically tasked with hearing cases regarding violations of human rights provisions in the European Convention on Human Rights. The relationship

²⁵⁷ Faerkel, *supra* note 27

²⁵⁸ See Ian Bache et al., *Politics in the European Union*, 119-133 (4 ed. 2014).

²⁵⁹ See EU law, European Union (2016), https://europa.eu/european-union/law_en (last visited Dec 30, 2019).

between these two courts is somewhat muddled, but both have the power to issue binding judgements over EU member states.²⁶⁰

Court of Justice of the European Union (ECJ):

Judicial Review and European Union Law

Article 263 of the Treaty on the Functioning of the European Union states that The Court of Justice of the European Union shall review [...] the legality of acts of bodies, [...] of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. [...] Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them [...].²⁶¹

As such, any individual is able to bring suit to a nation with the ECJ as long as the suit addresses an “act which is of direct and individual concern to them.” There is some precedent of the ECJ engaging in judicial review of member states’ laws. In *Sean Ambrose McCarthy et al. v Secretary of State for the Home Department* (2014), the ECJ struck down a UK law requiring non-citizen EU residents²⁶² to acquire a visa before entering the United Kingdom.²⁶³ The Court

²⁶⁰ See e.g., Snezana Bardarova, *Comparison Between the European Court of Justice and European Court of Human Rights* (2013), <https://papers.ssrn.com/abstract=2281215> (last visited Dec 30, 2019).

²⁶¹ Treaty on the Functioning of the European Union, EU, art. 263, May 9, 2009, EUR-Lex 12008E263.

²⁶² The case dealt specifically with those who obtained this status by virtue of marriage or family relations with an EU citizen

²⁶³ Case C-202/13, *Sean Ambrose McCarthy et al. v Secretary of State for the Home Department*, [1973] E.C.R. C-2450

held that this law infringed on the “right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.”²⁶⁴ In general, the ECJ has maintained that “an infringement of the Treaties or of any rule of law relating to [the application of a law]” is grounds for judicial review.²⁶⁵

The European Union has enacted fairly extensive anti-discrimination legislation. For example, it expressly prohibits discrimination on the basis of racial or ethnic origin in relation to “social protection, including social security and healthcare; social advantages; education, and access to and supply of goods and services which are available to the public, including housing.”²⁶⁶ Furthermore, discrimination based on religious beliefs is prohibited in relation to these same areas.²⁶⁷ This directive further states that “[t]he right to equality before the law and protection against discrimination for all persons constitutes a universal right.”²⁶⁸ The European Union does allow for member states to “discriminate” in the case of “positive action.” This refers to situations in which “[member states maintain or adopt] specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”²⁶⁹ Furthermore, neither directive covers “difference of treatment based on nationality [...] and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.”²⁷⁰ European non-discrimination law is marked by a sort of hierarchy, with EU law providing stronger protection

²⁶⁴ Case C-202/13, *Sean Ambrose McCarthy et al. v Secretary of State for the Home Department*, [1973] E.C.R. C-2450 § 6

²⁶⁵ Gabriël Moens & John Trone, *Judicial Review and the European Court of Justice*, in *Commercial Law of the European Union* 337–366, 361 (Gabriël Moens & John Trone eds., 2010), https://doi.org/10.1007/978-90-481-8774-4_11.

²⁶⁶ Directive 2000/43/EC of the Council of the European Union of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 3

²⁶⁷ Directive COM(2008) 426 of the Council of the European Union of 2 July 2008 Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, 2008 O.J. (C 303) 3 § 1

²⁶⁸ Directive COM(2008) 426 of the Council of the European Union of 2 July 2008 Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, 2008 O.J. (C 303) § 2

²⁶⁹ Directive 2000/43/EC of the Council of the European Union of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 5

²⁷⁰ Directive 2000/43/EC of the Council of the European Union of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 3 § 2

against discrimination based on racial or ethnic origin than it does for most other classes.²⁷¹ As such, EU law presents a promising pathway for challenging the Danish ghetto laws.

Relevant Case Law of the ECJ

The European Court of Justice has ruled in favor of applicants in some cases that are pertinent to the Danish ghetto laws. In *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, a non-Roma Bulgarian alleged that the district she worked in had electricity meters installed at a difficult-to-reach height because of the high density of ethnic Romanis in the area. As such, she claimed discrimination on the basis of nationality and ethnicity, even though she was not a member of the group that was being discriminated against.²⁷² The Court held that, regardless of the applicant's ethnicity, the placement of electricity meters did constitute unfavorable treatment of a specific ethnic group, and as such was in violation of the non-discrimination directive. The Court further held that a measure does not need to be introduced with discrimination as its main purpose in order to amount to discrimination, but merely needs to "[have] the effect of placing particularly persons possessing that characteristic at a disadvantage."²⁷³ This holds important implications for the ghetto laws—as long as an applicant is able to prove that ethnic minorities are placed at a disadvantage because of the laws, the Court could find them discriminatory. In *European Commission v. Republic of Austria*, an Austrian law granting reduced public transport fare only to students whose parents received Austrian government benefits was deemed discriminatory. The ECJ found that this law was likely to unfairly disadvantage non-Austrians without sufficient reason, and felt that it constituted clear

²⁷¹ See, e.g., Erica Howard, *EU anti-discrimination law: Has the CJEU stopped moving forward?*, 18 International Journal of Discrimination and the Law 60–81 (2018).

²⁷² Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, [2015] E.C.R. C 311

²⁷³ Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, [2015] E.C.R. C 311 96

discrimination on the basis of nationality and citizenship.²⁷⁴ Since the ghetto laws would similarly reduce benefits for a protected class (albeit based on ethnicity rather than nationality), this case could prove predictive of their viability. *Heinz Huber v. Bundesrepublik DE* saw an Austrian residing in Germany file suit against the German state for its refusal to remove his personal data from their files. This data was collected only for non-German residents, which Germany argued was required for statistical purposes.²⁷⁵ Pursuant to Article 9 of Regulation 2016/679,²⁷⁶ the ECJ ruled that discrimination in data collection would only be allowed if *necessity* could be demonstrated; that is, if the State could demonstrate a compelling government interest that could not be fulfilled in any other way.²⁷⁷ In *Heinz Huber*, the Court did not see the necessity of having personalized data for statistical purposes, and as such ruled in favor of the applicant. The concept of necessity is a recurring one in EU law, and one that the ghetto laws would likely have to conform to. Whether or not the laws serve a government interest that could not be fulfilled in a less discriminatory way would be up to the Court to decide.

Implications for the Ghetto Laws

European Union law seems irreconcilable with the Danish ghetto laws. Under these laws, access to social advantages and education can reasonably be seen as being dependent on ethnicity. Furthermore, access to housing is prohibited to those residents of ghettos who are convicted of a crime, whereas non-ghetto residents in social housing are not moved after a conviction. Both EU directives mentioned above also champion the importance of equality

²⁷⁴ Case C-75/11, *European Commission v Republic of Austria*, [2012] E.C.R. C 605

²⁷⁵ Case C-524/06, *Heinz Huber v Bundesrepublik Deutschland*, [2008] E.C.R. C 724

²⁷⁶ This regulation supplanted Directive 95/46/EC in 2016. At the time of *Heinz Huber*, the latter was still in effect, but Regulation 2016/679 is not substantially different in content or meaning for our purposes.

²⁷⁷ Case C-524/06, *Heinz Huber v Bundesrepublik Deutschland*, [2008] E.C.R. C 724 66

before the law, regardless of ethnicity or nationality. Instituting stricter penalties for residents of ethnic ghettos is at odds with this fact. However, a challenge to these laws before the ECJ would run into similar problems as a challenge under Danish constitutional law. For one, it would be difficult to prove that the ghettos are purely ethnic or religious enclaves, which is something that the anti-discrimination clauses are entirely dependent on. That being said, *CHEZ* established that any law placing a protected class at a *de facto* disadvantage could be seen as discriminatory. A defense of the laws could also claim that these ghetto laws constitute “positive action”—they attempt to prevent disadvantages linked to ethnicity by forcing children to learn Danish from an early age and by instituting a “tough on crime” attitude, amongst other things. However, it is questionable whether this defense would satisfy the necessity requirement established in *Heinz Huber*.

European Court of Human Rights (ECHR):

Judicial Review in the European Court of Human Rights

The European Union has adopted a number of fundamental human rights established by the European Convention of Human Rights and outlined in the Charter of Fundamental Rights, and the ECHR is the institution tasked with enforcing them. These rights include, amongst others, “[...] the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.” (Article 14), equality before the law (Article 20), and non-discrimination based on gender, nationality, race, ethnicity, et cetera (Article 21).²⁷⁸ Typically the ECHR will rule on whether a law was

²⁷⁸ See European Court of Human Rights & Council of Europe, *European Convention on Human Rights* (1953), www.echr.coe.int.

misinterpreted or wrongfully applied in a certain case, and either uphold or reject the ruling of a lower national court. Although rare, “in cases of systemic shortcomings, typically of a legislative kind, the Court can identify legislation which a State should pass, modify, or repeal.”²⁷⁹ Similar to the ECJ, the ECHR thus has the ability to conduct judicial review of member nations’ legislation. In *M. v Germany*, for example, the plaintiff had been detained beyond his original sentence as “preventive detention.”²⁸⁰ The Court held that this was an unjust deprivation of liberty under Article 5 Section 1 of the Human Rights Charter, and therefore recommended that Germany reconsider the domestic legislation that had enabled this violation. As a result, Germany ordered a judicial review of all prior cases that occurred under the same statute and declared unconstitutional the mandate that allowed for preventive detention.²⁸¹ The Court offers these judgements in an effort toward non-repetition. “Measures of non-repetition are mandates that require states to change their policies and their practices to avoid the repetition of violations.”²⁸² This means that they do not repeal laws outright, but only order a review of them so as to prevent a similar case from appearing before the court again—a form of “weak” judicial review. This is a key difference between the ECHR and the ECJ.

Relevant Case Law of the ECHR

Of the three articles mentioned above, the ECHR most frequently hears cases regarding Article 21 (non-discrimination). This is also the most promising avenue to challenge the ghetto laws under, as they constitute what could be seen as “discrimination based on any ground such as

²⁷⁹ Council of Bars & Law Societies of Europe (CCBE), *The European Court of Human Rights: Questions & Answers for Lawyers* (2018), www.ccbe.eu § 33.

²⁸⁰ *M v. Germany*, [2009] E.C.H.R. 970

²⁸¹ See Marianna Klaudia Lévai, *Indefinite Sentencing in Criminal Law: A Human Rights Perspective* (2013) 43.

²⁸² Courtney Hillebrecht, *The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change*, 20 *European Journal of International Relations* 1100–1123 (2014) 1103.

[...] race, colour, ethnic or social origin, [...], religion or belief, [...], membership of a national minority, [...] shall be prohibited.” The Court has held that direct discrimination occurs when “an individual is treated less favourably; by comparison to how others, who are in a similar situation, have been or would be treated; and the reason for this is a particular characteristic they hold, which falls under a ‘protected ground.’”²⁸³ Under ECHR rules, an applicant must be able to prove they were directly affected by discrimination, similar to the requirement of “standing” in U.S. law.

The ECHR has heard a number of cases that could have implications for the Danish ghetto laws. In *Savez crkava “Riječ života” and Others v. Croatia*, for example, the Croatian government refused to grant certain privileges to three Reformist churches, even though other religious communities were granted them.²⁸⁴ The Court found that a violation of Article 21 had occurred, given that there was a clear difference in treatment between two different religious groups. It held that “the State had a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs.”²⁸⁵ Were the Court to extend this ruling to the duty of impartial provision of benefits and neutral administration of justice, it could have pivotal implications for the Danish ghetto laws. In *Biao v. Denmark*, a Danish national born in Tonga sought a residence permit for his Ghanian wife.²⁸⁶ At the time Denmark had a law requiring Danish citizens not born in Denmark to prove the strength of their ties to Denmark in order to receive a family residency permit, and the applicant failed to demonstrate sufficiently strong ties. The ECHR

²⁸³ Handbook on European non-discrimination law, (Europäische Union, Europarat, & Europäischer Gerichtshof für Menschenrechte eds., 2018 edition) 43.

²⁸⁴ *Savez crkava “Riječ života” and Others v. Croatia*, [2010] E.C.H.R. 1983

²⁸⁵ *Savez crkava “Riječ života” and Others v. Croatia*, [2010] E.C.H.R. 1983 § 88

²⁸⁶ *Biao v. Denmark*, [2016] E.C.H.R. 455

ruled in favor of the applicant, arguing that Danish citizens born elsewhere are likely to disproportionately be of a different ethnic origin, and therefore the law was discriminatory on the basis of ethnicity.²⁸⁷ This ruling, in particular, is relevant to the proposed laws in Denmark. The Court was willing to *infer* that a law discriminated on the basis of ethnicity, even though it did not explicitly say so in the legislature. The fact that ethnic discrimination was likely to result *de facto* was sufficient for the Court to establish a violation of Article 21. Finally, in *Ponomaryovi v. Bulgaria*, the applicant was required to pay school fees in Bulgaria due to his lack of a residence permit, whereas those who held residency were allowed to attend secondary education for free.²⁸⁸ The Court held that this constituted discrimination on the basis of nationality, and ordered Bulgaria to reimburse the applicant for all fees.²⁸⁹ Here, the Court was unwilling to accept the government's argument that this discrimination was required to achieve a necessary aim—namely, to reduce government spending on benefits for non-Bulgarians. A similar argument has been made by politicians in defense of the ghetto laws.

Implications for the Ghetto Laws

The above cases show that the ECHR has previously been willing to hear non-discrimination cases, and the Danish ghetto laws seem at least as discriminatory as the laws in *Savez crkava "Riječ života"*, *Biao*, or *Ponomaryovi*. However, the Court has been reluctant to extend these rulings beyond the specific cases they arose from. In *Ponomaryovi*, the Court wrote that "It is not the Court's role to consider in the abstract whether national law conforms to the Convention,"²⁹⁰ and that "a State may have legitimate reasons for curtailing the use of resource-

²⁸⁷ *Biao v. Denmark*, [2016] E.C.H.R. 455 § 102

²⁸⁸ *Ponomaryovi v. Bulgaria*, E.C.H.R. 972

²⁸⁹ *Ponomaryovi v. Bulgaria*, E.C.H.R. 972 § 63 & § 75

²⁹⁰ *Ponomaryovi v. Bulgaria*, E.C.H.R. 972 § 59

hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants [...].”²⁹¹ The ECHR thus explicitly limits itself to specific cases, and is careful not to impede on member nations’ sovereignty. As such, there isn’t strong established precedent for challenging the ghetto laws—rather, the Court would likely view the case on its own merits and consider the unique context that led to the creation of these laws. The ECHR has further established that differential treatment can be justified, but only if it can be shown “that the rule or practice in question pursues a legitimate aim; that the means chosen to achieve that aim [...] is proportionate to and necessary to achieve that aim, [...] that there is no other means of achieving that aim that imposes less of an interference with the right to equal treatment [...], and that the disadvantage suffered is the minimum possible level of harm needed to achieve the aim sought [...].”²⁹² A possible defense of the ghetto laws could thus argue that they are meant to achieve a legitimate aim (integration of non-ethnic Danes) and that they are both proportionate and necessary. That being said, the aforementioned non-discrimination cases saw the defense make similar arguments, and the ECHR maintained a stringent standard of proof in regards to a law having a “legitimate aim” and being “proportionate to” that aim.

The European Court of Human Rights is slightly more constrained than the European Court of Justice. It requires that applicants have standing, lacks explicit power of judicial review, and focuses on specific cases rather than on establishing broad precedent. That being said, the Court has repeatedly ruled in favor of applicants when it comes to non-discrimination cases, and the ghetto laws certainly seem incompatible with the EU’s Charter of Fundamental Rights. *Biao* established that laws need not be discriminatory *de jure* to be found in violation of the right to

²⁹¹ *Ponomaryovi v. Bulgaria*, E.C.H.R. 972 § 54

²⁹² Justification for less favourable treatment under European non- discrimination law *in* Handbook on european non-discrimination law 91-103, (Europäische Union, Europarat, & Europäischer Gerichtshof für Menschenrechte eds., 2018 edition).

non-discrimination, which is likely to be a key point in any case involving the ghetto laws. A legal challenge to the ghetto laws by way of the ECHR may thus not be as promising as one by way of the ECJ, but it is by no means dead in the water.

Legal Challenges to the Ghetto Laws: A Promising Path?

A number of directives set forth in the Danish ghetto laws have been enacted into law, and today residents of Danish ghettos face increased criminal punishment, a mandatory pre-school programme, a burqa ban, and more.²⁹³ The remaining directives are set to be implemented in the coming months. So far, challenges to the laws have yet to veer into the legal realm. Civil discontent has primarily been voiced through peaceful protests and newspaper opinion columns.²⁹⁴ This paper has attempted to show the promise of a legal challenge to the ghetto laws, and has set out a tripartite framework to do so. The laws could be challenged under the Danish constitution, European Union law, or under the European Union's Charter of Fundamental Rights. Of these three options, the latter two seem most promising—the Danish Supreme Court has been reluctant to engage in judicial review, and has generally demonstrated an acceptance of parliamentary precedence. The European courts, in contrast, have heard a number of cases regarding discriminatory legislation, and have repeatedly ruled in favor of applicants. The drawback of both courts is that member nations cannot be pressured into implementing their judgements into domestic legislation. In 2018, nearly 10,000 judgements made by the European

²⁹³ See John Graversgaard & Liz Fekete, *Denmark's 'ghetto package' – discrimination enshrined in law*, Institute of Race Relations (2019), <http://www.irr.org.uk/news/denmarks-ghetto-package-discrimination-enshrined-in-law/> (last visited Dec 23, 2019).

²⁹⁴ See, e.g., Danish activists protest “ghetto” law that targets minorities, Peoples Dispatch (2019), <https://peoplesdispatch.org/2019/10/01/danish-activists-protest-ghetto-law-that-targets-minorities/> (last visited Dec 31, 2019).

Court of Human Rights were yet to be implemented, some of them dating from 1992.²⁹⁵ The European Court of Justice has enacted a system of financial penalties to punish non-implementation, but similarly fails to wield real authority over member states' domestic legislation (European Commission Infringement Procedure).²⁹⁶

In summary, the ghetto laws can be seen as violating the Danish constitution, EU law, and the Charter of Fundamental Rights to varying degrees. That being said, it is unclear whether a legal challenge under either of these three frameworks would result in a repeal of the laws. The larger issue surrounding these laws is that they enjoy widespread political support across the ideological spectrum. Until Danish citizens stop supporting nationalist rhetoric and stop empowering xenophobic politicians, the ghetto laws are likely to survive in one form or another. The surest way to challenge them can be found at the ballot box, not the courthouse.

²⁹⁵ Ginger Hervey, *Europe's human rights court struggles to lay down the law*, POLITICO (2017), <https://www.politico.eu/article/human-rights-court-ilgar-mammadov-azerbaijan-struggles-to-lay-down-the-law/> (last visited Dec 23, 2019).

²⁹⁶ See Infringement procedure, European Commission, https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en (last visited Dec 23, 2019).

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